TAB 2

Case Name:

Bloom Lake g.p.l. (Arrangement relatif à)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED: BLOOM LAKE GENERAL PARTNER LIMITED, QUINTO MINING CORPORATION, 8568391 CANADA LIMITED, CLIFFS QUÉBEC IRON MINING ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC., Petitioners, and THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, BLOOM LAKE RAILWAY COMPANY LIMITED, WABUS MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED, Mises-en-cause, and FTI CONSULTING CANADA INC., Monitor, and HER MAJESTY IN RIGHT OF NEWFOUNLAND AND LABRADOR, AS REPRESENTED BY THE SUPERINTENDENT OF PENSIONS, THE ATTORNEY GENERAL OF CANADA, SYNDICAT DES MÉTALLOS, SECTION LOCALE 6254, SYNDICAT DES MÉTALLOS, SECTION LOCALE 6285, MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON, AS REPRESENTATIVES OF THE SALARIED/NON-UNION EMPLOYEES AND RETIREES, Objecting parties

[2015] Q.J. No. 6111

2015 QCCS 3064

2015EXP-2208

J.E. 2015-1232

No.: 500-11-048114-157

Quebec Superior Court

District of Montreal

The Honourable Stephen W. Hamilton J.S.C.

Heard: June 22, 2015.
Judgment: June 26, 2015.

(148 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Priority -- The Interim Financing should be approved and the Interim Lender Charge should be granted with priority over the deemed trust under the Pension Benefits Standards Act and the Newfoundland and Labrador Pension Benefits Act -- The Court ordered the suspension of the special payments to the pension funds -- Motion granted.

The Court had to determine whether it could order that the charge in favour of the interim lender rank ahead of the statutory deemed trusts for payments due by the debtors to the pension plan, whether it should suspend the debtors' obligation to pay the special amortization payments to the pension plan and whether it should suspend the debtors' obligation to pay the other post-employment benefits for the retirees. Wabush filed a motion for the issuance of an initial order under the Companies' Creditors Arrangement Act. Wabush had two defined benefit pension plans for its employees. The Interim Financing Term Sheet provided that the Interim Lender would advance a maximum principal amount of US$10,000,000 to provide for short-term liquidity needs of Wabush while they were under CCAA protection. The Newfoundland & Labrador Superintendent objected to Wabush's request for a suspension of the special payments. He argued that the suspension of the special payments sought contravened Sections 32 and 61(2) of the Newfoundland and Labrador Pension Benefits Act. The Office of the Superintendent of Financial Institutions (OFSI) objected solely to the granting of the priority of the Interim Lender Charge. It invoked the statutory deemed trust in connection with outstanding special payments. The Union and retirees submitted that Wabush should be forced to make such payments notwithstanding the terms of the Interim Financing Term Sheet. Wabush argued that it did not have any funds or any source of funds and that the Court should exercise its discretion to give the Interim Lender Charge priority over the deemed trusts and to suspend the obligation to pay the special payments.

HELD: Motion granted. The deemed trust under Section 8(2) Pension Benefits Standards Act did not prevent the Court from granting priority to the Interim Lender Charge, if the conditions of Section 11.2 CCAA were met. Giving effect to the deemed trust under the Newfoundland and Labrador Pension Benefits Act carried a serious risk of frustrating the CCAA process. The Court therefore concluded that the doctrine of federal paramountcy was engaged, and that the Newfoundland and Labrador Pension Benefits Act was not effective to that extent. The Court ordered the suspension of the special payments to the pension funds. The beneficiaries of the pension plans would not be prejudiced by this suspension. Wabush acted in good faith in a way

consistent with its fiduciary duties to the beneficiaries of the pension plans.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 67(2)

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 6(6), s. 11.2, s. 11.2(4), s. 32, s. 36(7), s. 37(1)

Newfoundland and Labrador Pension Benefits Act, 1997, SNL 1996, c. P-4.01, s. 32, s. 32(2), s. 61(2)

Pension Benefits Standards Act, 1985, R.S.C. 1985, c. 32 (2nd Supp.), s. 8, s. 8(1), s. 8(2), s. 36(2)

Counsel:

Bernard Boucher, Steven Weisz, BLAKE CASSELS & GRAYDON S.R.L., For the Petitioners Bloom Lake General Partner Limited et al.

Matthew Gottlieb, LAX O'SULLIVAN SCOTT LISUS LLP, Independent Counsel for the Board of Directors of Petitioners.

Sylvain Rigaud, Chrystal Ashby, NORTON ROSE FULLBRIGHT LLP, For the Monitor FTI Consulting Canada Inc.

Doug Mitchell, Leslie-Anne Wood, IRVING MITCHELL KALICHMAN, For Her Majesty in right of Newfoundland and Labrador, as represented by the Superintendent of Pensions.

Pierre Lecavalier, DEPARTMENT OF JUSTICE - CANADA, For the Attorney General of Canada.

Jean-François Beaudry, PHILION, LEBLANC, BEAUDRY, AVOCATS, For the Syndicat des Métallos, Section Locale 6254 and the Syndicat des Métallos, Section Locale 6285.

Nicholas Scheib, SCHEIB LEGAL and Andrew J. Hatnay, Ari Kaplan, KOSKIE MINSKY LLP, For Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson, as representatives for the salaried/non-union employees and retirees.

Gerry Apostolatos, LANGLOIS KRONSTROM DESJARDINS, For the Creditors Quebec North Shore and Labrador Railway Company Inc., Air Inuit Ltd, Metso Shared Services Ltd, Iron Ore Company of Canada, and WSP Canada Inc.

Louis Dumont, DENTON, For the Interim Lender Cliffs Quebec Iron Mining ULC.

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

INTRODUCTION

1 These proceedings raise essentially three issues:

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

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

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

BACKGROUND

The parties

2 On May 20, 2015, the Petitioners Wabush Iron Co. Limited and Wabush Resources Inc. and the Mises-en-cause Wabush Mines (a joint venture of Wabush Iron and Wabush Resources), Arnaud Railway Company and Wabush Lake Railway Company Limited (the "Wabush CCAA Parties") filed a motion for the issuance of an initial order under the *Companies' Creditors Arrangement Act*[1] (CCAA), which was granted on that date by the Court (the "Wabush Initial Order").

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

The pension plans and other post-employment benefits

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

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

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

5 Wabush Mines is the administrator of both plans.

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

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

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

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

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

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

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

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

The Interim Financing

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

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

16 The Interim Financing Term Sheet provided that the Interim Lender would advance a maximum principal amount of US$10,000,000 to provide for short-term liquidity needs of the Wabush CCAA Parties while they are under CCAA protection. The Interim Lender's obligation to advance funds is subject to a number of conditions and covenants, including the following:

* The Interim Lender will have a charge in the principal amount of CDN$15,000,000 which will have priority over all charges against the Wabush CCAA Parties' property except for certain specified charges;[2] and

* The Wabush CCAA Parties will not make any special payments in relation to the pension plans or any payments in respect of OPEBs.[3]

CCAA proceedings

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

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

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

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

21 On May 29, 2015, the Wabush CCAA Parties filed their "Motion for the issuance of an order in respect of the Wabush CCAA parties (1) granting priority to certain CCAA charges, (2) approving a Sale and Investor Solicitation Process *nunc pro tunc*, (3) authorizing the engagement of a Sale Advisor *nunc pro tunc*, (4) granting a Sale Advisor Charge, (5) amending the Sale and Investor Solicitation Process, (6) suspending the payment of certain pension amortization payments and post-retirement employee benefits, (7) extending the stay of proceedings, (8) amending the Wabush Initial Order accordingly", in which they sought various conclusions including (1) an order granting priority to the Interim Lender Charge over all charges against the Wabush CCAA Parties' property, subject to certain exceptions not relevant here, and (2) an order suspending the payment of the special payments and the OPEBs.

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

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

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

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

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

> [10] **DECLARES** that this Order approving the SISP as it relates to the Wabush CCAA Parties *nunc pro tunc* is without prejudice to the rights, if 'any, of the Administration Portuaire de Sept-Îles/Sept-Iles Port Authority (hereinafter the "SIPA"), vis à vis the Wabush CCAA Parties, including: (i) the rights of the SIPA, acting as successor in the rights of the National Harbours Board, pursuant to the agreement referred to and communicated as Exhibit O-1 in support of SIPA's Notice of objection dated April 13, 2015; and (ii) the rights of SIPA, acting as successor in the rights of the Canada Ports Corporation, pursuant to the agreement referred to and communicated as Exhibit O-7 in support of SIPA's Notice of objection already filed in the Court record and dated April 13, 2015;
>
> [11] **DECLARES** that this Order approving the SISP as it relates to the Wabush CCAA Parties *nunc pro tunc* is without prejudice to the rights, if any of the Iron Ore Company of Canada or its related companies (hereinafter the "IOC"), vis-à-vis the Wabush CCAA Parties, including, but not limited to, the rights pursuant to the Subscription Agreement dates August 3, 1959 referred to in IOC's Notice of objection already filed in the Court record and dated April 13, 2015;
>
> [12] **DECLARES** that this Order approving the SISP as it relates to the Wabush CCAA Parties *nunc pro tunc* is without prejudice to the rights, if any, of MFC Industrial Ltd. ("MFC") if any, vis-à-vis the Wabush CCAA Parties, including pursuant to an Amendment and Consolidation of Mining Leases dated September 2, 1959 and related sub-leases (as amended from time to time) as it relates to the property of Wabush CCAA Parties.
>
> [13] **RESERVES** the right of IOC, SIPA and of MFC to raise any such rights at a later stage if need be;

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

> [6] **RESERVES** the rights of Her Majesty in right of Newfoundland and Labrador, as represented by the Superintendent of Pensions, the Syndicat des Métallos, Section Locale 6254, the Syndicat des Métallos, Section 6285 and the Attorney General of Canada to contest the priority of the Interim Lender Charge over the deemed trust(s) as set out in the Notices of Objection filed by each of

those parties in response to the Motion, which shall be heard and determined at the hearing schedules on June 22, 2015;

[...]

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

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

[23] **ORDERS** the Wabush CCAA Parties' request for an order for the suspension of payment by the Wabush CCAA Parties of other post-retirement benefits to former hourly and salaried employees of their Canadian subsidiaries hired before January 1, 2013, including without limitation payments for life insurance, health care and a supplemental retirement arrangement plan, *nunc pro tunc* to the Wabush Filing Date is adjourned to June 22, 2015;

THE POSITION OF THE OBJECTING PARTIES

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

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

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

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

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

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

N&L Superintendent

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

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

31 In his notice of objection, the N&L Superintendent also reserved his right to raise additional objections. In his written argument, he adds an argument with respect to the priority of the Interim Lender Charge, which he also claims would contravene Sections 32 and 61(2) of the N&L Act.

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

33 Finally, the N&L Superintendent further claims that additional information with regards to

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

OSFI

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

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

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

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

The Union

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

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

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

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

Non-union retirees

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

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

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

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

POSITION OF THE WABUSH CCAA PARTIES

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

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

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

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

POSITION OF THE MONITOR

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

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

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

ISSUES IN DISPUTE

53 The issues in dispute can be outlined as follows;

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

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

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

ANALYSIS

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

1. Super-priority of the Interim Lender Charge

General

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

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

> 11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge -- in an amount that the court considers appropriate -- in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the

consent of the person in whose favour the previous order was made.

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(*c*) whether the company's management has the confidence of its major creditors;

(*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(*e*) the nature and value of the company's property;

(*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and

(*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

(Emphasis added)

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

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

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

* The CCAA prevails over the PBSA as a matter of statutory interpretation of two pieces of federal legislation, and

* The CCAA prevails over the N&L Act because of the constitutional doctrine of federal paramountcy.

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

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

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

Effectiveness of the PBSA deemed trust in CCAA proceedings

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

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

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

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

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

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

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

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

(*b*) any money withdrawn from a pension fund pursuant to section 26 is void or, in Quebec, null.

(Emphasis added)

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

65 Section 8(1) PBSA requires the employer to keep the required amounts separate and apart from its own moneys, and deems the employer to hold them in trust. In the present matter, the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Given that the pension provisions of the *BIA* and *CCAA* came into force much later than s. 8 of the *PBSA*, normal interpretation would require that the later legislation be deemed to be remedial in nature. Likewise, since those provisions of the *BIA* and *CCAA* are the more specific provisions, normal interpretation would take them to have precedence over the general. Finally, the limited scope of the protection given to pension claims in the *BIA* and the *CCAA* would, by application of the doctrine of implied exclusion, suggest that Parliament did not intend there to be any additional protection. In enacting *BIA* subs. 60(1.5) and

> 65.13(8) and ss. 81.5 and 81.6 and *CCAA* subs. 6(6) and 37(6), while not amending subs. 8(2) of the *PBSA* (by adding explicit priority language or by removing the insolvency trigger), Parliament demonstrated the intent that pension claims would have protection in insolvency and restructurings only to the limited extent set out in the *BIA* and the *CCAA*.[19]
>
> (Emphasis added)

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

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

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

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

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

> **32.** (1) An employer or a participating employer in a multi-employer plan shall ensure, with respect to a pension plan, that
>
> (a) the money in the pension fund;
>
> (b) an amount equal to the aggregate of
>
> (i) the normal actuarial cost, and
>
> (ii) any special payments prescribed by the regulations, that have accrued to date; and
>
> (c) all

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

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

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

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

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

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

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

(a) an amount equal to the aggregate of

(i) the normal actuarial cost, and

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

(b) all

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

(ii) other amounts due to the pension fund from the employer that have not been remitted to the pension fund at the date of termination.

(2) Where, on the termination, after April 1, 2008, of a pension plan, other than a multi-employer pension plan, the assets in the pension fund are less than the value of the benefits provided under the plan, the employer shall, as prescribed by the regulations, make the payments into the pension fund, in addition to the payments required under subsection (1), that are necessary to fund the benefits provided under the plan.

(Emphasis added)

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

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

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

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

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

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

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

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

Factors under Section 11.2(4) CCAA

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

> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (*c*) whether the company's management has the confidence of its major creditors;
>
> (*d*) whether the loan would enhance the prospects of a viable compromise or

arrangement being made in respect of the company;

(*e*) the nature and value of the company's property;

(*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and

(*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

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

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

The period during which the company is expected to be subject to proceedings under the CCAA

(a) While the deadline for the submission of binding offers pursuant to the SISP has yet to be set, based the Wabush May 18 Forecast and preliminary discussions regarding the potential timeline for the completion of the SISP, it is believed that the Interim Financing Term Sheet provides sufficient liquidity to enable the Wabush CCAA Parties to complete the SISP;

How the company's business and affairs are to be managed during the proceedings

(b) The Wabush CCAA Parties' senior personnel and Boards of Directors remain in place to manage the business and affairs of the Wabush CCAA Parties. The Wabush CCAA Parties and their management will also have the benefit of the expertise and experience of their legal counsel and the Monitor;

Whether the company's management has the confidence of its major creditors

(c) The largest creditors of the Wabush CCAA Parties are affiliated companies who the Monitor understands to have confidence in the Wabush CCAA Parties' management. Other major creditors include the pension plans described in the

May 19 Motion, employee groups in respect of other post-retirement benefits and various contract counterparties. None of the major creditors has to date expressed any concern to the Monitor in respect of the Wabush CCAA Parties' management;

Whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company

(d) Based on the Wabush May 18 Forecast, without the Interim Facility the Wabush CCAA Parties would be unable to pay their obligations, maintain their assets or complete the SISP. The Wabush CCAA Parties and the Monitor are of the view that approval of the Interim Facility would likely enhance the prospects of generating recoveries for stakeholders, whether through a sale or a restructuring plan;

The nature and value of the company's property

(e) The Wabush CCAA Parties' assets are described in the May 19 Motion, and consist primarily of real estate, equipment, inventory and income tax receivables. The value of the Wabush CCAA Parties' property will be determined through the SISP. Nothing has come to the attention of the Monitor in respect of the nature of the Wabush CCAA Parties' property that, in the Monitor's view, ought to be given particular consideration in connection with the Interim Lender Charge;

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

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

Other potential considerations

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

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

94 The Court makes the following findings:

* The Sale and Investor Solicitation Process (SISP) is in the interests of the Wabush CCAA Parties and their stakeholders because it should lead to greater recovery;

* Without new financing, the Wabush CCAA Parties do not have enough cash to complete the SISP. The cash flow projection attached to the Fifth Report shows the Wabush CCAA Parties running out of cash in the week ending May 22, 2015;

* Without new financing, it is therefore likely that the Wabush CCAA Parties will go bankrupt;

* The Wabush CCAA Parties and the Monitor have not identified any other sources of new financing;

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

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

96 With respect to the deemed trust under the N&L Act, there is the added issue of whether

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

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

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

(Emphasis added)

98 Similarly, Justice Morawetz stated in *Timminco*:

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

(Emphasis added)

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

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

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

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

2. Suspension of special payments

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

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

105 Several reasons underlie the existence of this jurisdiction.

106 First, the normal pension payments that the employer is required to make relate to the current services rendered by the current employees and the Court's jurisdiction to affect those payments is limited by the principle that the debtor must pay for current services. However, the special payments relate to a deficit that has accumulated in the pension plan. Pension benefits are deferred compensation for services that were provided by the retiree while he or she was an employee.[24] As a result, the special payments relate to services provided to the employer before the filing, and as such, they can be qualified as pre-filing obligations.[25]

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

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

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

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

111 The special payments for the two plans are made up of monthly amortization payments in the amount of $666,555.58 per month and a lump sum "catch-up" amortization payment of

approximately $5.5 million due in July 2015.

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

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

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

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

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

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

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

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

3. Suspension of the OPEBs

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

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

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

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

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

124 The retirees plead that there are two important differences.

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

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

127 The retirees argue that this is equivalent to a disclaimer or resiliation of the insurance contract by the Wabush CCAA Parties, which is invalid because the formalities under Section 32(1) CCAA were not followed, and the test under Section 32(4) CCAA for the Court to authorize the

disclaimer or resiliation was not met. Section 32(4)(c) provides that one of the factors to be considered is "whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement."

128 This argument does not withstand scrutiny.

129 There is a tri-partite relationship. The employer has obligations to the beneficiaries, and has entered into an insurance policy with the insurer so that the insurer provides those benefits to the beneficiaries. If the employer stops paying the premiums, the insurer will terminate the insurance policy. This does not affect the employer's obligations to the beneficiaries,[30] but the beneficiaries will be left with an insolvent debtor instead of the insurer.

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

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

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

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

4. Breach of fiduciary duties

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

135 The PBSA and the N&L Act allow the employer to act as administrator, and the insolvency

of the employer inevitably leads to the type of potential conflict in which Wabush Mines finds itself.

136 Consistent with the views expressed by the Supreme Court in *Indalex*, the Court concludes that the giving of notice to the regulators, the Union and the retirees, the postponement of the hearing from June 9, 2015 to June 22, 2015 to allow the objecting parties to present their arguments, and the consent to the motion presented by the four retirees for a representation order allowing them to represent all salaried/non-union employees and retirees and related beneficiaries at the expense of the Wabush CCAA Parties, all show that the employer acted in good faith in a way consistent with its fiduciary duties to the beneficiaries of the pension plans.[32]

5. Representation order sought by the Union

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

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

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

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

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

142 For these reasons, the Union's motion will be dismissed.

FOR THESE REASONS, THE COURT:

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

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

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

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

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

148 **WITHOUT COSTS**.

THE HONOURABLE STEPHEN W. HAMILTON J.S.C.

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

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

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

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

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

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

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

8 *Ibid*, par. 38.

9 R.S.C. 1985, c. C-44, as amended.

10 In *Aveos Fleet Performance Inc./Aveos Performance aéronautique inc. (Arrangement relatif à)*, 2013 QCCS 5762, par. 66, Justice Schrager (then of this Court) leaves open the possibility that the liquidation of Aveos under the CCAA may have triggered Section 8(2) PBSA.

11 *Century Services Inc.* v. *Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379.

12 R.S.C. 1985, c. B-3, as amended.

13 *Aveos*, s*upra* note 10, par. 74-75.

14 *White Birch Paper Holding Company (Arrangement relatif à)*, 2012 QCCS 1679, par. 141-142.

15 *Century Services*, *supra* note 11, par. 44.

16 R.S.C. 1985, c. E-15, as amended.

17 *Century Services*, *supra* note 11, par. 46.

18 *Sun Indalex Finance, LLC* v. *United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, par. 81-82. See also *Aveos*, *supra* note 10, par. 77.

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

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

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

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

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

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

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

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

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

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

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

30 *Ibid*, par. 58.

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

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

TAB 3

Case Name:

Bloom Lake g.p.l. (Arrangement relatif à)

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

Between

MICHAEL KEEFER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON, as representatives of the salaried / non-union employees and retirees, Applicants -- objecting parties, and

BLOOM LAKE GENERAL PARTNER LIMITED, QUINTO MINING CORPORATION, 8568391 CANADA LIMITED, CLIFFS QUEBEC IRON MINING ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC, Respondents -- petitioners, and

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, BLOOM LAKE RAILWAY COMPANY LIMITED, WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED, Impleaded Parties -- impleaded parties, and

FTI CONSULTING CANADA INC., Impleaded Party -- monitor, and

HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR, as represented by THE SUPERINTENDENT OF PENSIONS, THE ATTORNEY GENERAL OF CANADA, SYNDICAT DES MÉTALLOS, SECTION LOCALE 6254, SYNDICAT DES MÉTALLOS, SECTION LOCALE 6285, Impleaded Parties -- objecting parties

And between

SYNDICAT DES MÉTALLOS, SECTION LOCALE 6254, SYNDICAT DES MÉTALLOS, SECTION LOCALE 6285, Applicants -- objecting parties, and

BLOOM LAKE GENERAL PARTNER LIMITED, QUINTO MINING CORPORATION, 8568391 CANADA LIMITED, CLIFFS QUEBEC IRON MINING ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC, Respondents -- petitioners, and

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, BLOOM LAKE RAILWAY COMPANY LIMITED, WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED, Impleaded Parties -- impleaded parties, and FTI CONSULTING CANADA INC., Impleaded Party -- monitor, and HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR, as represented by THE SUPERINTENDENT OF PENSIONS, THE ATTORNEY GENERAL OF CANADA, MICHAEL KEEFER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON, as representatives of the salaried / non-union employees and retirees, Impleaded Parties -- objecting parties, and QUEBEC NORTHSHORE AND LABRADOR RAILWAY COMPANY INC., IRON ORE COMPANY OF CANADA, Impleaded Party -- impleaded parties

[2015] Q.J. No. 7736

2015 QCCA 1351

2015EXP-2491

J.E. 2015-1381

EYB 2015-255623

Nos.: 500-09-025441-155, 500-09-025469-156 (500-11-048114-157)

Quebec Court of Appeal
Registry of Montreal

The Honourable Nicholas Kasirer J.A.

Heard: August 5, 2015.
Judgment: August 18, 2015.

(63 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application of Act -- Debtor company -- Compromises and arrangements -- Claims -- Priority --

Effect of related legislation -- In the matter of Bloom Lake's arrangement, representatives of non-union and retired employees and the union sought leave of appeal from a judgment which dismissed their contestations -- Given the findings of fact concerning the fragility of the Wabush C.C.A.A. parties as observed by the judge, the positions of both petitioners were unconvincing -- It was not enough to say, without more, that the amount was a small one in the grand scheme of things, as did the non-union and retired employees, or that another interim lender could be found without difficulty as the action proceeded -- Motions for leave to appeal dismissed.

Bankruptcy and insolvency law -- Proceedings -- Appeals and judicial review -- Leave to appeal -- In the matter of Bloom Lake's arrangement, representatives of non-union and retired employees and the union sought leave of appeal from a judgment which dismissed their contestations -- Given the findings of fact concerning the fragility of the Wabush C.C.A.A. parties as observed by the judge, the positions of both petitioners were unconvincing -- The risk of default on the interim financing and of bankruptcy to the Wabush C.C.A.A. parties was serious -- If leave were granted, the petitioners would likely obtain, at best, a Pyrrhic victory if they succeeded on appeal -- Motions for leave to appeal dismissed.

In the matter of the Companies' Creditors Arrangement surrounding Bloom Lake, g.p.l., representatives of non-union employees and retired employees and the Syndicat des Métallos, sections locales 6254 and 6285 (Union) sought leave of appeal from a judgment which dismissed their contestations. In so doing, the Superior Court confirmed Bloom Lake's request to grant priority to an interim lender charge over claims made by the petitioners based on deemed trusts in pension legislation. The Court also suspended certain payments due under pension plans as well as for post-retirement benefits. The Companies' Creditors Arrangement Act (C.C.A.A.) judge gave reasons for his decision to grant the Wabush parties' request to suspend their obligation to make special and other post-employment benefits (OPEB) payments. He held that forcing them to make special payments would lead to a default under the interim financing arrangement and a likely bankruptcy. He came to the same conclusion in respect of the OPEBs. In so doing, he rejected the argument that the suspension of the OPEBs amounted to a resiliation of the insurance contract under which the benefits were provided, resiliation which would have required notice under s. 32 C.C.A.A. The C.C.A.A. judge rejected all other grounds for contestation. He confirmed the priority of the interim lending charge over the deemed trusts as set out in the initial order and ordered the suspension of payment by the Wabush parties of monthly amortization payments, of the annual lump sum catch-up payments, and of other post-retirement benefits.

HELD: Motions dismissed. Given the findings of fact concerning the fragility of the Wabush parties as observed by the C.C.A.A. judge, the positions of both petitioners were unconvincing. Even the "strategic" decision of the non-union and retired employees to contest the judgment on a narrower basis did not satisfy this criterion. Both proposed appeals would unduly hinder the action. The findings of fact, while not immune from review, were deserving of deference on appeal. It was not enough to say, without more, that the amount was a small one in the grand scheme of things, as did

the non-union and retired employees, or that another interim lender could be found without difficulty as the action proceeded. The C.C.A.A. judge decided specifically otherwise. A reviewable error would have to be shown on this point to overcome the strong impression that came from reading the judgment that granting leave and suspending provisional execution would hinder the action. The risk of default on the interim financing and of bankruptcy to the Wabush parties was serious. Granting leave would, in this setting, risk hindering the action. If leave were granted, the petitioners would likely obtain, at best, a Pyrrhic victory if they succeeded on appeal.

Statutes, Regulations and Rules Cited:

Code of Civil Procedure, art. 29, art. 511, art. 550

Companies' Creditors Arrangement Act, R.S.C. (1985), c. C-36, s. 6(6), s. 11.2, s. 13, s. 14, s. 14(2), s. 32, s. 36(7)

Pension Benefits Standards Act, 1985, s. 8(2)

Counsel:

Andrew J. Hatnay, Ari Nathan Kaplan, KOSKIE MINSKY LLP, Geeta Narang, NARANG & ASSOCIÉS, Nicholas Scheib (absent), SCHEIB LEGAL, For Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson.

Bernard Boucher, BLAKE CASSELS & GRAYDON S.R.L. (MONTREAL), For Bloom Lake General Partner.

Steven Weisz, BLAKE CASSELS & GRAYDON S.R.L. (TORONTO), For Bloom Lake General Partner.

Louis Dumont, DENTONS CANADA LLP, For Cliffs Quebec Iron Mining ULC.

Sylvain Rigaud, NORTON ROSE FULBRIGHT CANADA LLP, For FTI Consulting Canada Inc.

Douglas Mitchell (absent), Leslie-Anne Wood (absent), IRVING MITCHELL KALICHMAN, For Her Majesty in right of Newfoundland and Labrador, as represented by the Superintendent of Pensions.

Pierre Lecavalier, DEPARTMENT OF JUSTICE -- CANADA, For the Attorney General of Canada.

Jean-François Beaudry, PHILION, LEBLAND, BEAUDRY, AVOCATS, S.A., For the Syndicat des Métallos, Section Locale 6254 and Section Locale 6285.

Gerald N. Apostolatos, LANGLOIS KRONSTRÖM DESJARDINS, For the Creditors Quebec

North Shore and Labrador Railway Company Inc. and Iron Ore Company of Canada.

JUDGMENT

1 Sitting as judge in chambers pursuant to sections 13 and 14 of the *Companies' Creditors Arrangement Act*[1] ("CCAA") and articles 29, 511 and 550 C.C.P., I am seized of two motions for leave to appeal from a judgment of the Superior Court, District of Montreal (the Honourable Stephen Hamilton), rendered on June 26, 2015. The Superior Court dismissed contestations made on behalf of the petitioners, who are, respectively, representatives of non-union employees and retired employees (petitioners in court file C.A.M. 500-09-025441-155 and hereinafter designated the "Salaried Members") and the Syndicat des Métallos, sections locales 6254 and 6285 (in court file C.A.M. 500-09-025469-156, hereinafter referred to together as the "Union"). In so doing, the Superior Court confirmed the respondent's request to grant priority to an interim lender charge over claims made by the petitioners based on deemed trusts in pension legislation. The Court also suspended certain payments due under pension plans as well as for post-retirement benefits.

2 The Union filed an amended motion prior to the hearing. Both motions for leave also ask for orders to suspend provisional execution of the judgment notwithstanding appeal.

I Background

3 The facts are usefully and completely recounted in the judgment *a quo*.[2]

4 On May 20, 2015, the CCAA Judge Hamilton, J. granted a motion for the issuance of an initial order to commence proceedings under the CCAA to respondents Wabush Iron Ore Co. Ltd., Wabush Resources Inc., Wabush Mines, Arnaud Railway Company and Wabush Railway Co. Ltd. (the "Wabush CCAA Parties"). The CCAA proceedings as they concern the Wabush CCAA Parties were joined to CCAA proceedings started some four months earlier involving the "Bloom Lake CCAA Parties".[3]

5 Prior to the filing of the motion, Wabush Mines operated an iron ore mine located near the Town of Wabush and Labrador City, in the province of Newfoundland and Labrador, with facilities at Pointe-Noire, Quebec.

6 The Wabush CCAA Parties are currently involved in a court-ordered sales process, originally commenced in the Bloom Lake CCAA proceedings, whereby they seek to sell assets with a view either to concluding a plan of compromise with their creditors (including the petitioners) or disposing of assets and distributing the proceeds to creditors (including the petitioners).

7 The Wabush CCAA Parties have two defined pension plans for their employees, one for

salaried employees and the other for unionized employees paid an hourly wage. Because some employees work in a provincially-regulated setting in Newfoundland and Labrador and others work in federally-regulated industries, the plans are subject to oversight by both the federal Office of Superintendent of Financial Institutions and the Newfoundland and Labrador Superintendent of Pensions.

8 Both plans are underfunded. The CCAA Judge set forth estimated amounts to be paid as winding-up deficiencies, monthly amortization payments and lump-sum "catch-up" amortization payments. He noted as well that the Wabush CCAA Parties provide other post-employment benefits ("OPEB"), including health care and life insurance, to certain retired employees. Accumulated benefits' obligations for the OPEBs, as well as monthly premiums required to fund those benefits, are to be paid by the Wabush CCAA Parties. In addition, amounts are due pursuant to a supplemental retirement arrangement plan for certain salaried employees (see paras [4] to [13] of the judgment).

9 The Wabush CCAA Parties arranged for interim financing (a debtor-in-possession or "DIP" loan) from Cliffs Mining Company, a related company. The CCAA Judge was of the view that the Wabush CCAA Parties' cash-flow was compromised and that the interim financing was necessary to continue operations during restructuring. The Wabush initial order approved an interim financing term sheet pursuant to which the interim lender would provide US$10M of interim financing, on conditions, for the Wabush CCAA Parties short-term liquidity needs during the CCAA proceedings. These conditions included, as the CCAA Judge recorded in paragraph [16] of his reasons, a requirement that the interim lender have a charge in the principal amount of CDN $15M, with priority over all charges, against Wabush CCAA Parties' property, subject to some exceptions. There is a further condition that Wabush CCAA Parties may not make any special payments in relation to the pension plans or any payments in respect of the OPEBs. The initial order granted the interim lender charge of $15M but did not give priority to that charge over existing secured creditors in order to allow the parties to make representations at a comeback hearing.

10 At that comeback hearing, the Wabush CCAA Parties sought, *inter alia*, priority for the interim lender charge ahead of deemed trusts created by pension legislation and a suspension of obligations to pay amortization payments in relation to the pension plans and payments for OPEBs. The Salaried Members and the Union contested these matters. The CCAA Judge issued an order on June 9, 2015 granting priority to the interim lender charge, subject to the rights of, *inter alia*, the Salaried Members, the Union and the federal and provincial pension authorities to be determined at a later hearing.

11 That hearing on June 22, 2015 gave rise to the judgment a *quo* in which the CCAA Judge granted the Wabush CCAA Parties' comeback motion and dismissed the contestations brought by the Salaried Members and the Union.

II The judgment of the Superior Court

12 The CCAA Judge made numerous findings and rendered different orders, not all of which concern the motions before me. I will limit my comments to those aspects of the judgment relevant here.

13 After setting forth the context and the arguments of the parties, the CCAA Judge considered the conflict between the super-priority of the interim lender charge and the deemed trusts created by federal and provincial legislation. (His findings in respect of the provincial rules do not concern us directly at this stage).

14 As to the impact of CCAA proceedings on the deemed trust created by subsection 8(2) of the *Pension Benefits Standards Act, 1985*,[4] the judge wrote "there is no general rule that deemed trusts in favour of anyone other than the Crown are ineffective in insolvency" (para. [72]). He then considered the effect of subsection 8(2) PBSA on the provisions of the CCAA that deal with pension obligations, including subsections 6(6) and 36(7) CCAA that were added to the Act in 2009. Based on his interpretation of the general rule in subsection 8(2) PBSA and the particular rules in the CCAA, the judge concluded, as an exercise of statutory interpretation, that "Parliament's intent is that federal pension claims are protected in [...] restructurings only to the limited extent set out in the [...] CCAA, notwithstanding the potentially broader language in the PBSA" (para. [78]). In the alternative, he wrote, "the Court could conclude that a liquidation under the CCAA does not fall within the term "liquidation" in Subsection 8(2) PBSA such that there has been no triggering event" (para. [79]). Either way, he observed, the deemed trust in subsection 8(2) PBSA did not prevent him from granting a priority to the interim lending charge if the conditions of section 11.2 CCAA were met.

15 After considering the relevant factors under the CCAA to the facts of the case, the CCAA Judge decided that the proposed sale was in the interests of the Wabush CCAA Parties and their stakeholders as it should lead to a greater recovery. The sale required new financing and, without that financing, it is likely that the Wabush CCAA Parties would go bankrupt. The judge also expressed his view that the terms and conditions of the interim financing were reasonable, and that the security is limited to the amount of the new financing. He then wrote that "[t]his is sufficient for the Court to conclude that the Interim Financing should be approved and the interim lender charge should be granted with priority over the deemed trust under the PBSA, if it is effective in the CCAA context" (para. [95]). He also found that the terms of the interim lending sheet, including the requirement that the interim lender be granted super priority, were not unusual and that he was not satisfied that the Superior Court had jurisdiction to order the lender to advance the funds on other terms (para. [100]).

16 The CCAA Judge then gave reasons for his decision to grant the Wabush CCAA Parties' request that their obligation to make special and OPEB payments be suspended. He held that forcing the Wabush CCAA Parties to make special payments would lead to a default under the interim financing arrangement and a likely bankruptcy (para. [112]). He came to the same conclusion in respect of the OPEBs (para. [122]). In so doing, he rejected the argument that the

suspension of the OPEBs amounted to a resiliation of the insurance contract under which the benefits are provided, resiliation which would have required notice under section 32 CCAA (paras [127] to [131]).

17 The CCAA Judge rejected all other grounds for contestation. He confirmed the priority of the interim lending charge over the deemed trusts as set out in the initial order; he ordered the suspension of payment by the Wabush CCAA Parties of monthly amortization payments, of the annual lump sum catch-up payments, and of other post-retirement benefits.

III The motions for leave

18 The two motions raise some similar issues but are different in scope.

19 The Salaried Members ask for leave to appeal in respect of conclusions relating to two aspects of the judgment.

20 First, the Salaried Members seek to reverse the CCAA Judge's approval of what they characterize as the termination of OPEBs and of payment of supplemental pension benefits imposed by the Wabush CCAA Parties without proper notice as required by section 32 CCAA. In this regard, the Salaried Members object to the following paragraph in the judgment *a quo*:

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

21 In argument, the Salaried Members also contended that the CCAA Judge's finding that the Wabush CCAA Parties did not have the funds to meet the $182,000 monthly payments for the premiums to fund the OPEBs and the supplemental pension benefits was mistaken.

22 Second, the Salaried Members seek to reverse that portion of the CCAA Judge's reasons bearing on the ineffectiveness of the federal statutory deemed trust in CCAA proceedings. They say that to hold the deemed trust priority under the PBSA to be "of no force and effect in CCAA Proceedings on a wholesale basis" is wrong in law. Specifically they state that the deemed trust priority should continue to apply for the benefit of Salaried Members over the assets of the company in future priority distributions (after the DIP and CCAA-ordered priorities). For this second argument, the Salaried Members target the following paragraphs of the CCAA Judge's reasons as they pertain to the effectiveness of the PBSA deemed trust in CCAA proceedings:

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

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

23 It may be noted that the Salaried Members had initially contemplated objecting to the non-payment of other amounts owing by the Wabush CCAA Parties in respect of the pension plans. But given limits to the Wabush CCAA Parties' cash-flow and the significant amounts of these payments, the Salaried Members chose not to pursue the objections in these proceedings.

24 As noted, the Salaried Members also ask to suspend provisional execution notwithstanding appeal of this order.

25 The Union's proposed appeal is somewhat broader.

26 In respect of the portion of the judgment regarding the deemed trust provided in the PBSA, the Union is of the view, like the Salaried Members, that the CCAA Judge erred in holding that the subsection 8(2) PBSA deemed trust is ineffective in CCAA proceedings. Moreover, the Union disagrees with the CCAA Judge that the pension amortization payments constitute ordinary, unsecured claims under the CCAA rather than trust claims (paras [103] to [118] of the judgment). The Union also says the CCAA Judge was mistaken in deciding that the financing conditions in respect of the interim financial loan were reasonable insofar as those conditions precluded the payment of OPEBs (paras [119] to [133]). The judge should have set aside the unreasonable conditions in the interim lending sheet. Had he done so, the judge would have found that the Wabush CCAA Parties had the necessary funds to make the payments owed under the plans.

27 The Union also seeks a stay of provisional execution of the judgment.

28 It bears mentioning that the Union's motion was filed late. In keeping with section 14(2) CCAA, the Union obtained permission from the CCAA Judge to bring the late appeal, subject to the determination by a judge in chambers of this Court as to whether the appeal is a serious one.[5] None of the parties objected to this way of proceeding and I find the Union's amended motion to be correctly before me.

IV Criteria for granting leave

29 The test for leave under the CCAA is well known. Writing for the Court of Appeal for Saskatchewan in *Re Stomp Pork Farm Ltd.*,[6] Jackson, J.A. wrote:

> [15] In a series of cases emanating first from British Columbia and then from Quebec, Alberta and Ontario, there has developed a consensus among the Courts

of Appeal that leave to appeal an order or decision made under the *CCAA* should be granted only where there are serious and arguable grounds that are of real significance and interest to the parties and to the practice in general. The test is often expressed as a four-part one:

1. whether the issue on appeal is of significance to the practice;

2. whether the issue raised is of significance to the action itself;

3. whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and,

4. whether the appeal will unduly hinder the progress of the action.

30 Judges sitting in chambers of this Court have consistently applied this four-part test to measure the seriousness of a proposed appeal. As my colleague Hilton, J.A. observed in *Statoil Canada Ltd. (Arrangement relative à)*, 2012 QCCA 665,[7] the above-mentioned four criteria are understood to be cumulative, with the result that if a petitioner fails to establish any one of them, the motion for leave will be dismissed. Hilton, J.A. alluded to the oft-repeated injunction that a petitioner seeking leave to appeal faces a heavy burden given the role of a CCAA judge, the discretionary character of the decisions he or she must make and the nature of the proceedings. He recalled the longstanding cautionary note that motions for leave should only be granted "sparingly".[8]

31 The grounds upon which a stay of provisional execution notwithstanding appeal may be granted by a judge in chambers are also well known.[9] Applying the principles developed pursuant to article 550 C.C.P. to this case, I note that the petitioners must show that the judgment suffers from a plain weakness; that failing to grant the stay would result in serious harm (sometimes characterized as irreparable harm) to them; and that the balance of inconvenience favours granting a stay.

IV Analysis

32 Despite the importance of certain of the questions raised in the motions for leave to the practice and to this action, and notwithstanding the *prima facie* meritorious character of some arguments made by the petitioners, I am of the respectful view that both the Salaried Members and the Union have failed to meet the test for leave. In particular, they have not convinced me that an appeal would not unduly hinder the progress of the action.

33 I shall make brief comments on each of the four criteria in turn.

IV.1 Importance of the questions to the practice

34 Some questions raised in both motions, to varying degrees, have importance to the practice as that notion is understood in connection with applications for leave brought under sections 13 and 14 CCAA.

35 The issue of the effectiveness of the PBSA deemed trust in CCAA proceedings raised in both motions meets this first criterion. This issue is not, as the respondent argued, a settled matter. In pointing to the CCAA Judge's comment in paragraph [61] to the effect that "[t hese are not new issues", respondent has, it seems to me, quoted the judge out of context. It is of course true, as the CCAA Judge observed, that courts, including the Supreme Court, have been called upon to consider the effect of statutory deemed trusts in insolvency on numerous occasions. But as the CCAA Judge's own reasons make plain, the interpretation of the deemed trust protection in subsection 8(2) PBSA in light of amendments made to the CCAA in 2009, in particular subsections 6(6) and 36(7), involve a different exercise of statutory interpretation. In undertaking that work, the judge did have the benefit of principles set out in *Century Services*[10] relating to the conflict between the deemed trust for the GST and the CCRA, in *Sparrow Electric*[11] dealing with a deemed trust in favour of the Crown in respect of payroll deductions for taxation, as well as *Indalex*[12] in which a conflict between provincial deemed trust and federal insolvency law was in part at issue. But these settings were different from that of the case at bar. Others have observed that difficulties arising out of the interaction between deemed trust rules for pensions and the CCAA persist, notwithstanding the jurisprudence of the Supreme Court on point.[13] Moreover, the narrow issue would be new to this Court and the practice would have a precise consideration of the interaction between the federal deemed trust in subsection 8(2) and the CCAA by an appellate court.

36 This is not to say that the CCAA Judge was the first to consider the problem. He had the benefit of *Aveos*[14], decided by Schrager, J., as he then was, as well as a scholarly paper on the topic which he cited with approval in paragraph [77]. And while the CCAA Judge and Schrager, J. agree on central aspects of that interpretation exercise, they are not at ones on all points, including the importance of a Crown exception in this context (as the CCAA Judge himself noted at para. [72]). While I recognize the care with which the CCAA Judge examined the question of statutory interpretation, as well as the alternative argument as to whether "any liquidation" within the meaning of subs. 8(2) PBSA includes CCAA proceedings -- a point not given full analysis in *Aveos* -- the matter of the effectiveness of the federal deemed trust in CCAA proceedings is not settled law and remains important to CCAA practice.

37 Is the issue raised by the Salaried Members of the proper scope of section 32 CCAA, and the prior notice rule, also of sufficient importance to the practice?

38 As I will note below, I am of the respectful view that the merits of this argument are less strong. Nonetheless, the matter of the proper scope of section 32 in light of the kind of insurance contract that provided benefits here, and in particular of competing notions of suspension and

termination of OPEBs, is one of importance to the practice.

39 What about the Union's argument that the judge erred in holding that the terms of the interim financing were reasonable?

40 This decision was one that called upon the CCAA Judge to make a determination of fact and exercise discretion afforded him under the Act, matters generally viewed as less consequential to the practice. Moreover, it would seem to me that the ability of a lender to determine the basis of risk he or she is willing to tolerate in a restructuring is not a matter widely disputed. I have not been convinced that this point, viewed on its own, is important to the practice.

IV.2 Importance of the questions to the present action

41 The decision not to apply the PBSA deemed trust in CCAA proceedings has meaningful negative consequences for both the Salaried Members and the Union. The importance to the action in this regard seems beyond serious dispute.

42 I agree with the petitioners that the question relating to the suspension or termination of the OPEBs is also significant to the action. The CCAA Judge recognized at para. [126] and again at para. [133] of his reasons that if the Wabush CCAA Parties fail to pay the premiums on the insurance policy, the policy will be cancelled thereby causing hardship to the Petitioners. I agree too with the position of counsel to the Union who argued that aspects of the pension claims may usefully be compared to alimentary claims, and that the hardship in suspending them gives the question sufficient importance to the action.

IV.3 The proposed appeals are *prima facie* meritorious and not frivolous

43 The arguments brought in service of the petitioners' view that the deemed trust under the PBSA remains effective in CCAA proceedings are not frivolous. While the exercise of statutory interpretation undertaken by the CCAA Judge -- which, it should be noted, is not a discretionary exercise in and of itself -- shows no *prima facie* weakness, that is not to say that it precludes an arguable case for the other side.[15] There are, in my view, grounds for framing a statutory interpretation argument for the petitioners' position that have *prima facie* merit when one considers, for example, that the CCAA amendments are the product of a complicated evolution; that the CCAA and the PBSA have different policy objectives which may shape interpretation; that the relevance of principles developed by the Supreme Court in other settings to the deemed trusts problem faced in this case is the matter of fair debate; that comparisons might be made with deemed trust regimes from the provinces or other statutes, and more. All of these factors suggest to me that, notwithstanding the strength of the judgment *a quo*, there are *prima facie* meritorious lines of argument that might be pressed on appeal. The parties debated vigorously the scope of "any liquidation" in subs. 8(2) PBSA before me, for example, as they did the proper scope of amendments to the CCAA and the policy they reflect. On the question of the effectiveness of the PBSA deemed trust as raised by the Salaried Members and in the first three grounds of appeal in the

Union's amended motion, I am of the view that this criterion is satisfied.

44 The issue of the proper scope of section 32 CCAA, and the prior notice rule, strikes me, from my disadvantaged position, to be less compelling, but I would not say it is wholly lacking in merit.

45 Counsel for the monitor argued, in support of the respondents' position that leave should be refused, that this ground of appeal was frivolous. He contended that the CCAA Judge rightly held that section 32 plainly did not apply to the resiliation of the Wabush CCA Parties' insurance contract. Like the respondents, the monitor said the CCAA Judge rightly relied on *Mine Jeffrey*[16] decided by this Court in 2003, and that his analysis of the "tri-partite relationship" between the employer, the insurer and the beneficiary in paragraphs [129] *et seq*. is free from error.

46 The question as to the applicability of section 32 here is not frivolous, even if *Mine Jeffrey* presents a formidable obstacle to a successful appeal. While not equal in strength, arguments raised by counsel for the Salaried Members as to type of contract to which the rule applies and, in particular, to the distinction between the termination of a contract and the suspension of a contract, are not without some merit. While I recognize that the test of the relative merit of the arguments proposed can be construed in some circumstances as requiring more than "a limited prospect of success"[17] given the nature of CCAA proceedings, I would not dismiss the motions on this narrow issue on this basis alone.

47 The Union says the interim lender's conditions should be set aside as unreasonable. I am not convinced that this argument is *prima facie* meritorious.

48 Counsel for the Union argues strongly that the interim lender should not be allowed to dictate terms to the CCAA Judge or to the stakeholders as a whole by imposing conditions on financing that have the effect of exploiting the vulnerability of the employees and former employees. He says that if the interim lender's conditions were struck as unreasonable, the Wabush CCAA Parties would have access to those funds and that there would be no need to suspend the various payments due to the petitioners.

49 With respect, this argument strikes me as flawed in two respects. First, it requires an overturning of the CCAA Judge's view -- with all the advantages of perspective he has in so deciding -- that as a matter of fact the conditions of the interim financing are reasonable. Secondly, the Union has left unanswered the questions raised by the judge concerning the "harsh commercial realities of interim financing" at paragraph [115]. Why indeed should the interim lender advance funds be used to pay someone else's debt, particularly one that is pre-filing and unsecured? Why should a condition of the financing be ignored, effectively forcing the lender to advance funds on disadvantageous terms to which it did not agree? It is not a matter of the CCAA Judge being callous or insensitive to hardship faced by vulnerable parties. In my view, the comment of Deschamps, J. for the majority in *Indalex*, as adapted to the setting of federal deemed trusts, is apposite here: "The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to

legislate in favour of pension fund beneficiaries".[18]

IV.4 The appeal will not hinder the progress of the action

50 The petitioners argue that the Wabush CCAA Parties are undergoing a court-supervised sales process in accordance with timelines and procedures that are supervised by the CCAA Judge with the oversight of the monitor. In the circumstances, they say, the proposed appeal, especially if it were placed on an accelerated roll, would not hinder the progress of the action. They contend, to differing degrees, that the CCAA Judge erred in his measure of the financial vulnerability of the Wabush CCAA Parties. Mindful no doubt of the difficulty that this aspect of the analysis presents to their leave application, the Salaried Members "part company" (to use the expression of counsel) with the Union in framing their appeal more narrowly, in particular in respect of the recognition that the DIP loan enjoys a wider priority than does the Union, and in limiting their claim in respect of the payments that should escape suspension.

51 Given the findings of fact concerning the fragility of the Wabush CCAA Parties as observed by the CCAA Judge, I find the positions of both petitioners on this point unconvincing. Even the "strategic" decision of the Salaried Members to contest the judgment on a narrower basis does not satisfy this criterion. In my view, both proposed appeals would unduly hinder the action.

52 My conclusion is based largely on the findings of fact arrived at by the CCAA Judge regarding the vulnerability of the Wabush CCAA Parties at this stage of the restructuring.

53 In canvassing the circumstances in which the interim financing was put in place, the CCAA Judge observed that the cash-flow position of the Wabush CCAA Parties was compromised with the result that they needed the interim financing to continue even their limited operations during the CCAA process (para. [16]). The CCAA Judge made the following specific findings, which I consider to be findings of fact: (1) that the sale and investor solicitation process in progress are in the interests of the Wabush CCAA Parties and their stakeholders because they will likely lead to a greater recovery; (2) that without new financing, the Wabush CCAA Parties could not complete the sale; (3) that without new financing allowing them to complete the sale, it is likely that the Wabush CCAA Parties will go bankrupt; (4) that the Wabush CCAA Parties and the monitor have not identified any other source of new financing; and (5) that the terms of the interim financing are reasonable (para. [94]).

54 When discussing the suspension of special payments, the CCAA Judge observed, at para. [112]:

> [112] The Wabush CCAA Parties do not have the funds available to make these payments. The cash flow statements filed with the Court show that the Wabush CCAA Parties need the funds from the Interim Financing to meet their current obligations other than the special payments. The Interim Lender Term Sheet expressly requires the Wabush CCAA Parties not to make any special payments.

> As a result, forcing the Wabush CCAA Parties to make the special payments would lead to a default under the Interim Financing and a likely bankruptcy.
>
> [Footnote omitted.]

55 In respect of the suspension of the OPEBs -- including what the Salaried Members characterize as the modest premiums of $182,000 per month and the supplemental retirement arrangement plan amount -- the CCAA Judge recalled at para. [122] that "[t]he Wabush CCAA Parties do not have any funding valuable to continue to pay any of the foregoing OPEBs, as the Interim Financing Sheet prohibits such payments". In para. [125], the CCAA Judge explained that it was not enough to say, as did the Salaried Members, that $182,000 and the supplemental amount could be found elsewhere if the interim lending sheet prevents them from making the payments: "Given the cash flow statement filed with the Court and the language of the Interim Lender Sheet, the Court accepts that the Wabush CCAA Parties do not have the funds".

56 These findings of fact, while not immune from review, are deserving of deference on appeal. It is not enough to say, without more, that the amount is a small one in the grand scheme of things, as do the Salaried Members, or that another interim lender could be found without difficulty as the action proceeds. The CCAA Judge decided specifically otherwise. A reviewable error would have to be shown on this point to overcome the strong impression that comes from reading the judgment that granting leave and suspending provisional execution would hinder the action.

57 In like circumstances, leave has been denied. Recently in *Bock inc. (arrangement relative à)*,[19] my colleague Bich, J.A. declined to grant leave, notwithstanding the presence of a question she characterized as "interesting" for the purposes of an eventual appeal and one in respect of which, like ours, there was a paucity of appellate court consideration. "Granting leave to appeal", she wrote at para. [12] of her reasons, "would most likely jeopardize the course of the action and cause irreparable harm to the debtor company and, consequently, all other stakeholders (creditors, employees, etc.)". Similarly, in *Re: Consumer Packaging Inc.*,[20] a bench of the Court of Appeal for Ontario declined to grant leave in circumstances where conditions set by the interim lender meant that the time and financial constraints that would have come with an appeal were prohibitive: "Leave to appeal should not be granted", wrote the Court at para. [5], "where, as in the present case, granting leave would be prejudicial to restructuring the business for the benefit of stakeholders as a whole [...]".[21]

58 All told, the risk of default on the interim financing and of bankruptcy to the Wabush CCAA Parties is serious. Granting leave would, in this setting, risk hindering the action. If leave were granted, the petitioners would likely obtain, at best, a Pyrrhic victory if they succeeded on appeal.

***

59 Given my conclusion that leave should be denied, the motions seeking a stay of the judgment

pursuant to article 550 C.C.P. are without further object and should be dismissed as well. In any event, the conditions necessary for a stay were not present. While the petitioners have, to be sure, shown that they have an arguable case, they have not pointed to something I would characterize as a weakness in the judgment *a quo*. They did satisfy the burden of showing that the failure to grant a stay would cause them harm. However, the balance of inconvenience -- considering the impact that lifting the stay would have on the Wabush CCAA Parties -- would not have favoured granting a stay.

60 Counsel should be commended for their helpful presentation of the matter in dispute.

61 **FOR THE AFOREMENTIONED REASONS**: the undersigned:

62 **DISMISSES** the Salaried Members motion for leave to appeal and for a stay, with costs;

63 **DISMISSES** the Union's amended motion for leave to appeal and for a stay, with costs.

THE HONOURABLE NICHOLAS KASIRER J.A.

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

2 2015 QCCS 3064.

3 The pre-existing CCAA proceedings were commenced on January 27, 2015, by an initial order issued by Castonguay, J. of the Superior Court, in respect of Bloom Lake General Partner Ltd., Quinto Mining Corp., 8568391 Canada Ltd., Cliffs Quebec Iron Mining ULC, The Bloom Lake Iron Ore Partnership and Bloom Lake Railway Co. Ltd. (the "Bloom Lake CCAA Parties").

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

5 2015 QCCS 3584, paras [32] to [34] (*per* Hamilton, J.).

6 [2008] S.J. No. 349, 2008 SKCA 73 (footnotes omitted).

7 2013 QCCA 851, para. [4] (in chambers).

8 *Ibid.*, para. [4].

9 Recently summarized by the Court in *Imperial Tobacco Canada Ltd.* v. *Conseil québécois sur le tabac et la santé*, 2015 QCCA 1224, para. [14].

10 *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379.

11 *Royal Bank of Canada v. Sparow Electric Corp.*, [1997] 1 S.C.R. 411.

12 *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, 272.

13 Scholars have alluded to the different permutations of the deemed trust problem in CCAA matters as important to the practice: see, *e.g*., Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Carswell, 2013) at 370 *et seq*. and a useful comment by Jassmine Girgis entitled "*Indalex*: Priority of Provincial Deemed Trusts in CCAA Restructuring" posted by the University of Calgary Faculty of Law on the website http://ablawg.ca in which the author comments on the on-going importance of the issue after *Indalex*.

14 *Aveos Fleet Performance Inc. (arrangement relatif à)*, 2013 QCCS 5762.

15 The gradation between "*prima facie* meritorious" and "frivolous" is not always clear, and the better view may well be that "meritorious" and "frivolous" do not constitute a *summa division* for proposed appeals: see *Statoil, supra*, note 7, para. [11]. It is certainly true that the petitioners may have an arguable case -- one with *prima facie* merit -- but that the judgment *a quo* may still be said to suffer from no apparent weakness: see the helpful comments, albeit in another context, in *Droit de la famille -- 081957*, 2008 QCCA 1541, para. [4] (Morissette, J.A., in chambers).

16 *Syndicat national de l'amiante d'Asbestos inc. c. Mine Jeffrey Inc*., [2003] R.J.Q. 420 (C.A.).

17 *Doman Industries Ltd.* v. *Communications, Energy and Paperworkers' Union, Local 514*, 2004 BCCA 253, para. [15] (per Prowse, J.A., in chambers).

18 *Indalex, supra* note 12, para. [59].

19 2013 QCCA 851 (in chambers).

20 2001 CanLII 6708 (Ont. C.A.).

21 As a final observation on this point, it may be recalled that, prudently, the CCAA Judge offered a further observation that gives weight, I think, to the conclusion that granting leave would be inopportune here. He suggested that even if the PBSA deemed trusts were effective in CCAA proceedings, he would have exercised his discretion under the CCAA to grant priority to the interim lender: see para. [95].

TAB 4

Case Name:

Arrangement relatif à Bloom Lake

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:
BLOOM LAKE GENERAL PARTNER LIMITED,
QUINTO MINING CORPORATION, 8568391
CANADA LIMITED, CLIFFS QUÉBEC IRON MINING
ULC, WABUSH IRON CO. LIMITED,
WABUSH RESOURCES INC., Petitioners, and
THE BLOOM LAKE IRON ORE MINE, LIMITED
PARTNERSHIP, BLOOM LAKE RAILWAY
COMPANY LIMITED, WABUSH MINES, ARNAUD
RAILWAY COMPANY LIMITED, WABUSH LAKE
RAILWAY COMPANY LIMITED, Mises en cause, and
MICHAEL KEEPER, TERENCE WATT, DAMIEN
LEBEL AND NEIL JOHNSON, SYNDICAT DES
MÉTALLOS, SECTIONS LOCALES 6254 ET
6285, MORNEAU SHEPELL LTD, IN ITS
CAPACITY ASREPLACEMENT PENSION PLAN ADMINISTRATOR,
HER MAJESTY IN RIGHT OF
NEWFOUNLAND, AND LABRADOR, AS REPRESENTED
BY THE SUPERINTENDENT OF PENSIONS,
THE ATTORNEY GENERAL OF CANADA, ACTING
ON BEHALF OF THE OFFICE OF THE
SUPERINTENDENT OF FINANCIAL INSTITUTIONS,
RÉGIE DES RENTES DU QUÉBEC, VILLE
DE SEPT-ÎLES, Mises en cause, and
FTI CONSULTING CANADA INC., Monitor

[2017] Q.J. No. 449

2017 QCCS 284

2017EXP-1248

31 C.C.P.B. (2d) 216

2017 CarswellQue 329

275 A.C.W.S. (3d) 251

45 C.B.R. (6th) 110

EYB 2017-275611

No.: 500-11-048114-157

Quebec Superior Court
District of Montréal

The Honourable Stephen W. Hamilton J.S.C.

Heard: December 20, 2016.
Judgment: January 30, 2017.

(92 paras.)

Private international law -- Conflict of jurisdictions -- Determination of competent authority -- Forum non conveniens -- Interest of justice -- Interest of the parties -- Law applicable to the dispute -- Institution of proceedings outside Québec impossible -- Evidence and procedure -- Motion for declinatory exception -- Burden of proof -- Because of the similarities between the N.L.P.B.A. and the federal and other provincial pension laws, the judge interpreting the N.L.P.B.A. will likely refer to decisions of the courts of other provinces interpreting their legislation or the federal P.B.S.A. -- The Québec Court should be in as good a position as the NL Court in that exercise -- Although the representatives of the salaried employees and retirees want the NL Court to interpret the N.L.P.B.A., more than half of the persons that they represent live in Québec -- Motion to refer issues to the Supreme Court of Newfoundland and Labrador dismissed.

In the matter of the plan of compromise or arrangement of Wabush Iron Co. Limited et al. (Wabush) the Court must decide on whether it should request the aid of the Supreme Court of Newfoundland and Labrador (NL Court) with respect to the scope and priority of the deemed trust and the lien created by the Newfoundland and Labrador Pension Benefit Act (N.L.P.B.A.), and whether the deemed trust and the lien extend to assets located outside of Newfoundland and Labrador. Wabush Mines operated an iron ore mine and processing facility located in Newfoundland and Labrador and a port facility and a pellet production facility in Québec. The operations had been discontinued and the employees terminated or laid off prior to the filing of the Companies' Creditors Arrangement Act (C.C.A.A.) motion. The Wabush C.C.A.A. Parties had two pension plans for their employees which include defined benefits. Wabush Mines was the administrator of both plans. The majority of the employees covered by the plans reported for work in Newfoundland and Labrador while some reported for work in Québec. According to the Monitor,

the total amounts owing were approximately $28.7 million to the Salaried Plan and $34.4 million to the Union Plan. The arguments put forward in support of the referral of the issues to the NL Court is that the courts in Newfoundland and Labrador possess far greater expertise in interpreting the N.L.P.B.A. than does the courts in Québec, the province of Newfoundland and Labrador is closely connected to the dispute, and there will be increased costs and delays if the Québec Court interprets the N.L.P.B.A.

HELD: Motion dismissed. Because of the similarities between the N.L.P.B.A. and the federal and other provincial pension laws, the judge interpreting the N.L.P.B.A. will likely refer to decisions of the courts of other provinces interpreting their legislation or the federal Pension Benefits Standards Act (P.B.S.A.). The Québec Court should be in as good a position as the NL Court in that exercise. There is a close interplay between the N.L.P.B.A. and the C.C.A.A. In that sense, there may not even be a need to deal with the interpretation of the N.L.P.B.A. The Court will not refer issues of Québec law or federal law to the NL Court, and if those issues are too closely interrelated to the N.L.P.B.A. issues, or if in the interests of simplicity and expediency they should all be decided by the same court, then the solution is not to refer any issues to the NL Court. The bulk of the assets on which the deemed trust or the lien created by the N.L.P.B.A. may apply are the proceeds of the sale of assets in Québec. On balance, the legal considerations do not favour referring the issues to the NL Court. This is not a matter of purely local concern in Newfoundland and Labrador. Although the representatives of the salaried employees and retirees want the NL Court to interpret the N.L.P.B.A., more than half of the persons that they represent live in Québec. The Court can take judicial notice of the law of another province.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 187(7)

Civil Code of Quebec, art. 2809, arts. 3083-3133, art. 3135

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 17

Employment Pension Plans Act, S.A. 2012, c. E-8.1, s. 58, s. 60

Judicature Act, R.S.N.L. 1990, c. J-4, s. 13

Miners Lien Act, R.S.Y. 2002, c. 151

Pension Benefit Act, S.N.L. 1996, c. P-40.1, s. 32

Pension Benefits Act, 1992, S.S. 1992, c P-6.001, s. 43

Pension Benefits Act, C.C.S.M., c. P32, s. 28

Pension Benefits Act, S.N.B. 1987, c P-5.1, s. 51

Pension Benefits Act, S.N.S. 2011, c. 41, s. 80

Pension Benefits Act, R.S.O. 1990, c. P.8, s. 57

Pension Benefits Standards Act, R.S.C. 1985 (2nd Supp.), c. 32, s. 8(1), s. 8(2)

Pension Benefits Standards Act, S.B.C. 2012, c. 30, s. 58

Supplemental Pension Plans Act, CQLR, c R-15.1, s. 49

Counsel:

Bernard Boucher, BLAKE, CASSELS & GRAYDON, For the Petitioners.

Sylvain Rigaud, Chrystal Ashby, NORTON ROSE FULBRIGHT CANADA, For the Monitor.

Nicholas Scheib, SCHEIB LEGAL, Andrew Hatnay, KOSKIE MINSKY LLP, For the mises en cause Michael Keeper, Terence Watt, Damien Lebel, and Neil Johnson.

Daniel Boudreault, PHILION, LEBLANC, BEAUDRY, For the mise en cause Syndicat des métallos, sections locales 6254 et 6285.

Ronald A. Pink, PINK LARKIN, For the mise en cause Morneau Shepell Ltd, in its capacity as replacement pension plan administrator.

Doug Mitchell, Edward Béchard-Torres, IRVING MITCHELL KALICHMAN, For the mise en cause Her Majesty in Right of Newfoundland and Labrador, as represented by the Superintendent of Pensions.

Pierre Lecavalier, MINISTÈRE DE LA JUSTICE CANADA, For the mise en cause the Attorney General of Canada, acting on behalf of the office of the Superintendent of financial institutions.

Sophie Vaillancourt, Roberto Clocchiatti, RETRAITE QUÉBEC, For the mise en cause Régie des rentes du Québec.

Martin Roy, STEIN MONAST, For the mise en cause Ville de Sept-Îles.

JUDGMENT

INTRODUCTION

1 The debtors have filed proceedings under the *Companies' Creditors Arrangement Act* ("CCAA").[1] They owe substantial liabilities under two pension plans, including special payments, catch-up special payments and wind-up deficiencies. The Monitor has filed a motion for directions with respect to the priority of the various components of the pension claims.

2 A preliminary issue has arisen as to whether the Court should request the aid of the Supreme Court of Newfoundland and Labrador (the "NL Court") with respect to the scope and priority of the deemed trust and other security created by the Newfoundland and Labrador *Pension Benefit Act* ("NLPBA"),[2] which regulates in part the pension plans.

CONTEXT

3 On May 19, 2015, the Petitioners Wabush Iron Co. Limited and Wabush Resources Inc. and the Mises-en-cause Wabush Mines (a joint venture of Wabush Iron and Wabush Resources), Arnaud Railway Company and Wabush Lake Railway Company Limited (together the "Wabush CCAA Parties") filed a motion for the issuance of an initial order under the CCAA, which was granted the following day by the Court.

4 Prior to the filing of the motion, Wabush Mines operated (1) the iron ore mine and processing facility located near the Town of Wabush and Labrador City, Newfoundland and Labrador, and (2) the port facilities and a pellet production facility at Pointe-Noire, Québec. Arnaud Railway and Wabush Lake Railway are both federally regulated railways that transported iron ore concentrate from the Wabush mine to the Pointe-Noire port. The operations had been discontinued and the employees terminated or laid off prior to the filing of the CCAA motion.

5 The Wabush CCAA Parties have two pension plans for their employees which include defined benefits:

* A hybrid pension plan for salaried employees at the Wabush mine and the Pointe-Noire port hired before January 1, 2013, known as the Contributory Pension Plan for Salaried Employees of Wabush Mines, Cliffs Mining Company, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company (the "Salaried Plan"); and

* A pension plan for unionized hourly employees at the Wabush mine and Pointe-Noire port, known as the Pension Plan for Bargaining Unit Employees of Wabush Mines, Cliffs Mining Company, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company (the "Union Plan").

6 Wabush Mines was the administrator of both plans.

7 The majority of the employees covered by the plans reported for work in Newfoundland and Labrador while some reported for work in Québec. Moreover, some of the employees covered by the Union Plan worked for Arnaud Railway, which is a federally regulated railway. The result is that the Salaried Plan is governed by the NLPBA, while the Union Plan is governed by both the NLPBA and the federal *Pension Benefits Standards Act* ("PBSA").[3] Further, the Union suggests that the Québec *Supplemental Pension Plans Act* ("SPPA")[4] might be applicable to employees or retirees who reported for work in Québec. Both plans are subject to regulatory oversight by the provincial regulator in Newfoundland and Labrador, the Superintendent of Pensions (the "NL Superintendent"), while the Union Plan is also subject to regulatory oversight by the federal pension regulator, the Office of the Superintendent of Financial Institutions ("OSFI"). The Québec regulator, Retraite Québec, might also have a role to play.

8 On June 26, 2015, in the context of approving the interim financing of the debtors, the Court ordered the suspension of payment by the Wabush CCAA Parties of the monthly amortization payments and the annual lump sum "catch-up" payments coming due under the plans, and confirmed the priority of the Interim Lender Charge over the deemed trusts with respect to the pension liabilities. The Court also ordered the suspension of payment of other post-retirement benefits, including life insurance, health care and a supplemental retirement arrangement plan.[5]

9 On December 16, 2015, the NL Superintendent terminated both plans effective immediately on the basis that the plans failed to meet the solvency requirements under the regulations, the employer has discontinued all of its business operations and it was highly unlikely that any potential buyer of the assets would agree to assume the assets and liabilities of the plans.[6] On the same date, OSFI terminated the Union Plan effective immediately for the same reasons.[7]

10 Both the NL Superintendent and OSFI reminded the Wabush CCAA Parties of the employer's obligation upon termination of the plan to pay into the pension fund all amounts that would be required to meet the solvency requirements and the amount necessary to fund the benefits under the plan. They also referred to the rules with respect to deemed trusts.[8]

11 On January 26, 2016, the salaried retirees received a letter from Wabush Mines notifying them that the NL Superintendent had directed Wabush Mines to reduce the amount of monthly pension benefits of the members by 25%.[9] Retirees under the Union Plan had their benefits reduced by 21% on March 1, 2016.[10]

12 On March 30, 2016, the NL Superintendent and OSFI appointed Morneau Shepell Ltd as administrator for the plans.[11]

13 The Wabush CCAA Parties paid the monthly normal cost payments for both plans up to the termination of the plans on December 16, 2015. As a result, the monthly normal cost payments for the Union Plan were fully paid as of December 16, 2015.[12] The monthly normal cost payments for the Salaried Plan had been overpaid in the amount of $169,961 as of December 16, 2015.[13]

14 However, the Wabush CCAA Parties ceased making the special payments in June 2015 pursuant to the order issued by the Court, with the result that unpaid special payments as of December 16, 2015 total $2,185,752 for the Salaried Plan[14] and $3,146,696 for the Union Plan.[15]

15 Further, the Wabush CCAA Parties did not make the lump sum "catch-up" special payments that came due after June 2015. The amount payable is now calculated to be $3,525,125.[16] These amounts became known with certainty only when the actuarial report was completed and filed in July 2015, but some of these amounts may relate to the pre-filing period.

16 Finally, the plans are underfunded. The Plan Administrator estimates the wind-up deficits as at December 16, 2015 to be approximately $26.7 million for the Salaried Plan and approximately $27.7 million for the Union Plan.

17 As a result, according to the Monitor, the total amounts owing are approximately $28.7 million to the Salaried Plan and $34.4 million to the Union Plan.

18 The Plan Administrator filed a proof of claim in respect of the Salaried Plan that includes a secured claim in the amount of $24 million and a restructuring claim in the amount of $1,932,940,[17] and a proof of claim with respect to the Union Plan that includes a secured claim in the amount of $29 million and a restructuring claim in the amount of $6,059,238.[18]

19 The differences in the numbers are not important at this stage. It is sufficient to note that there are very large claims and that the Plan Administrator claims the status of a secured creditor with respect to a substantial part of its claims.

20 It is also important to note that the Wabush CCAA Parties held assets both in Newfoundland and Labrador and in Québec. Many of the Québec assets have been sold and have generated substantial proceeds currently held by the Monitor.

21 The Monitor is now working through the claims procedure. In that context, the Monitor applies to the Court for an order declaring that:

a) normal costs and special payments outstanding as at the date of the Wabush Initial Order are subject to a limited deemed trust;

b) normal costs and special payments payable after the date of the Wabush Initial Order, including additional special payments and catch up payments established on the basis of actuarial reports issued after the Wabush Initial Order, constitute unsecured claims;

c) the wind-up deficiencies constitute unsecured claims; and

d) any deemed trust created pursuant to the NLPBA may only charge property in Newfoundland and Labrador.

22 Those issues are not yet before the Court. A preliminary issue has arisen as to whether the Court should request the aid of the NL Court with respect to the scope and priority of the deemed trust and the lien created by the NLPBA and whether the deemed trust and the lien extend to assets located outside of Newfoundland and Labrador.

POSITION OF THE PARTIES

23 All parties agree that (1) the Court has jurisdiction to deal with all of the issues, and (2) the Court has the discretion to request the aid of the NL Court.

24 Three parties suggest that the Court should exercise that discretion and request the aid of the NL Court:

* The Plan Administrator;

* The representatives of the salaried employees and retirees; and

* The NL Superintendent.

25 The representatives of the salaried employees and retirees have proposed that the following questions should be resolved by the NL Court:

1. The Supreme Court of Canada has confirmed in *Indalex*, [2013] 1 S.C.R. 271, that provincial laws apply in CCAA proceedings, subject only to the doctrine of paramountcy. Assuming there is no issue of paramountcy, what is the scope of section 32 in the NPBA [NLPBA] deemed trusts in respect of:

a) unpaid current service costs;

b) unpaid special payments; and,

c) unpaid wind-up liability.

2. The Salaried Plan is registered in Newfoundland and regulated by the NPBA.

a) (i) Does the PBSA deemed trust also apply to those members of the Salaried Plan who worked on the railway (i.e., a federal undertaking)?

(ii) If yes, is there a conflict with the NPBA and PBSA if so, how is the conflict resolved?

b) (i) Does the SPPA also apply to those members of the Salaried Plan who reported for work in Québec?

(ii) If yes, is there a conflict with the NPBA and SPPA and if so, how is the conflict resolved?

(iii) Do the Quebec SPPA deemed trusts also apply to Québec Salaried Plan members?

3. Is the NPBA lien and charge in favour of the pension plan administrator in section 32(4) of the NPBA a valid secured claim in favour of the plan administrator? If yes, what amounts does this secured claim encompass?

26 Three other parties suggest that the Court should not transfer any issues to the NL Court and should decide all of the issues:

* The Monitor;

* The Syndicat des métallos, sections locales 6254 et 6285; and

* The Ville de Sept-Îles.

27 The Ville de Sept-Îles argues that the request to transfer should be dismissed because it is too late.

28 Finally, two parties do not take a position on the request to transfer:

* The Attorney--General of Canada, acting on behalf of OSFI; and

* Retraite Québec.

ANALYSIS

1. The jurisdiction of the CCAA Court

29 In principle, all issues relating to a debtor's insolvency are decided before a single court.[19] This rule is based on the "public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse."[20] This public interest favours a "single control" of insolvency proceedings by one court as opposed to their fragmentation among several courts.[21]

30 The Supreme Court in *Sam Lévy* concluded as follows with respect to the relevant test:

> 76 In the present case, we are confronted with a federal statute that *prima facie* establishes one command centre or "single control" (*Stewart, 53 S.C.R. 337, supra*, at p. 349) for all proceedings related to the bankruptcy (s. 183(1)). Single control is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and who cannot claim to be a "stranger to the bankruptcy", has the burden of demonstrating "sufficient cause" to send the trustee scurrying to multiple jurisdictions. Parliament was of the view that a substantial connection sufficient to ground bankruptcy proceedings in a particular district or division is provided by proof of facts within the statutory definition of "locality of a debtor" in s. 2(1). The trustee in that locality is mandated to "recuperate" the assets, and related proceedings are to be controlled by the bankruptcy court of that jurisdiction. The Act is concerned with the economy of winding up the bankrupt estate, even at the price of inflicting additional cost on its creditors and debtors.[22]

(Emphasis added)

31 Although the *Sam Lévy* case was decided in the context of the *Bankruptcy and Insolvency Act* ("BIA"),[23] the same principles apply in the context of the other insolvency legislation, including the CCAA.[24] The CCAA court has jurisdiction to deal with all of the issues that arise in the context of the CCAA proceedings.[25] The stay of proceedings under the CCAA gives effect to this principle by preventing creditors from bringing proceedings outside the CCAA proceedings without the authorization of the CCAA court.

32 There are clear efficiencies to having a single court deal with all of the issues in a single judgment.

33 The general rule is therefore that the Court should rule on all issues that arise in the context of these insolvency proceedings.

2. The discretion to ask for the assistance of another court

34 There are however situations where another court can deal more efficiently with specific issues. The CCAA Court has jurisdiction to ask for the assistance of another court under Section 17 CCAA:

> **17** All courts that have jurisdiction under this Act and the officers of those courts shall act in aid of and be auxiliary to each other in all matters provided for in this Act, and an order of a court seeking aid with a request to another court shall be deemed sufficient to enable the latter court to exercise in regard to the matters directed by the order such jurisdiction as either the court that made the request or the court to which the request is made could exercise in regard to similar matters within their respective jurisdictions.

35 The representative of the salaried employees and retirees also pleaded the notion of *forum non conveniens* under the Civil Code:

> **3135.** Even though a Québec authority has jurisdiction to hear a dispute, it may, exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another State are in a better position to decide the dispute.

36 The Supreme Court held in *Sam Lévy*[26] that Article 3135 C.C.Q. does not apply in bankruptcy matters because of Section 187(7) BIA, which provides:

> **187 (7)** The court, on satisfactory proof that the affairs of the bankrupt can be more economically administered within another bankruptcy district or division, or for other sufficient cause, may by order transfer any proceedings under this Act that are pending before it to another bankruptcy district or division.

37 While Section 17 CCAA is not as explicit, the Court is satisfied that it is not necessary or appropriate to refer to Article 3135 C.C.Q. in the present context. The CCAA court is not being asked to decline jurisdiction, but rather it is being asked to seek the assistance of another court.

38 The Court is therefore satisfied that, notwithstanding the general rule that it should rule on all issues that arise in the context of these insolvency proceedings, it can seek the assistance of another court. It is a discretionary decision of this Court, based on factors such as cost, expense, risk of contradictory judgments, expertise, etc.

3. Specific grounds

39 The arguments put forward in support of the referral of the issues to the NL Court can be

summarized as follows:

a) Legal considerations:

* These are complex and important issues of provincial law;

* The courts in Newfoundland and Labrador possess far greater expertise in interpreting the NLPBA than does the courts in Québec, although these specific questions have not yet been considered by any court in Newfoundland and Labrador;

* The interpretation of the NLPBA is a question of the intention of the legislator in Newfoundland and Labrador, and the NL Court is better situated to determine this intention;

b) Factual considerations:

* It is a question of purely local concern and it may significantly impact a large number of residents of Newfoundland and Labrador;

* The province of Newfoundland and Labrador is closely connected to the dispute: a majority of the employees reported for work in the province and the Wabush CCAA Parties maintained significant business operations in the province;

* If justice is to be done and be seen to be done it is important that consequential decisions on provincial legislation be made by the courts of that province;

* The representatives of the salaried employees and retirees want the NL Court to interpret the NLPBA;

c) Practical considerations:

* The law of another province is treated as a question of fact in Québec, with the result that the conclusion on a matter of foreign law is not binding on subsequent courts and can only be overturned in the presence of a palpable and overriding error;

* It might be difficult to prove the law of Newfoundland and Labrador in a Québec court given the lack of jurisprudence on the specific issues;

* There will be increased costs if the Québec Court interprets the NLPBA because of the need to retain experts to provide legal opinions;

* There is no reason to believe that fragmenting the proceedings will result in additional delay;

* The judgment to be rendered will be a precedent and only a decision of the courts of Newfoundland and Labrador would be an authoritative precedent;

* Other persons or parties may wish to intervene on the issue of the scope of the Section 32 NLPBA deemed trusts, which would be more practical in the NL Court.

40 These arguments do not convince the Court that this is an appropriate case to refer the issues to the NL Court.

a) Legal considerations

41 This is the key argument put forward by the parties suggesting that the NLPBA issues be referred to the NL Court: the issues relate to the NLPBA, and the NL Court is best qualified to interpret the NLPBA.

42 The Court accepts as a starting point that the NLPBA applies in the present matter: the pension plans are regulated by the NL Superintendent in accordance with the NLPBA (although OSFI also regulates the Union Plan in accordance with the PBSA) and the plans expressly provide that they are interpreted in accordance with the NLPBA.

43 The Court also accepts the obvious proposition that the NL Court is more qualified to deal with an issue of Newfoundland and Labrador law than the courts of Québec, particularly since Newfoundland and Labrador is a common law jurisdiction and Québec is a civil law jurisdiction.

44 However, that does not mean that the Court will automatically refer every issue governed by the law of another jurisdiction to the courts of that other jurisdiction.

45 First, there are rules in the Civil Code with respect to how Québec courts deal with issues governed by foreign law. Articles 3083 to 3133 C.C.Q. set out the rules to determine which law is applicable to a dispute before the Québec courts, and Article 2809 C.C.Q. sets out how the foreign law is proven before the Québec courts.

46 Further, pursuant to these rules, Québec courts regularly hear matters governed by foreign law. The Court of Appeal recently held that the fact that a dispute is governed by foreign law does not have much weight in a *forum non conveniens* analysis:

> [98] Si on revoie les considérations du Juge, portant sur dix points, pour conclure que le for géorgien est préférable, deux aspects principaux en ressortent, soit les coûts et la loi applicable.
>
> [99] Quant à cette dernière considération, elle n'est pas d'un grand poids, à mon avis. Parce que le débat porte sur les faits plutôt que sur le droit. Parce que la *common law* est tout de même familière aux tribunaux québécois. Parce que faire la preuve de la loi d'un État américain n'est pas un grand défi, c'est même chose courante.
>
> [100] Et surtout, parce que le critère de la loi applicable ne constitue pas en soi un facteur important. Dans tout litige international, les conflits de lois sont l'ordinaire et non l'exception.[27]

47 In other words, the mere fact that a dispute is governed by foreign law is not a good reason to send the case to the foreign jurisdiction. This principle was applied in a CCAA context in the *MMA* case.[28]

48 There are examples in the insolvency context of the court with jurisdiction over the insolvency declining to send an issue governed by foreign law to the foreign court. In *Sam Lévy*, the Supreme Court declined to send an insolvency matter to British Columbia simply because there was a choice of B.C. law, stating, "The Quebec courts are perfectly able to apply the law of British Columbia."[29]

49 In *Lawrence Home Fashions Inc./Linge de maison Lawrence inc. (Syndic de)*, Justice Schrager, then of this Court, stated :

> [18] In any event, should equitable set-off under Ontario law become relevant to the case, Québec judges sitting in such matters, on the presentation of the appropriate evidence, are readily capable of dealing with foreign law issues. Indeed, this is a frequent occurrence particularly in insolvency matters.[30]

50 The Ontario courts rejected similar arguments in *Essar Algoma*:

> [80] Ontario courts can and do often apply foreign law. In this case I do not consider the fact that the law to be applied is Ohio law much of a factor, if any.[31]

51 The Monitor submitted cases in which Québec courts have interpreted different provisions of the pension laws of other provinces.[32] The Court also notes that it dealt to a more limited extent with the deemed trust under the NLPBA in its decision dated June 26, 2015.

52 There are nevertheless circumstances where the CCAA court has referred legal issues to the courts of another province. The *Curragh*[33] and *Yukon Zinc*[34] judgments were cited as examples of such cases. However, in both cases, the legal issues related to the Yukon *Miners Lien Act*.[35] Justice Farley in *Curragh* wrote :

> This legislation and its concept of the lien affecting the output of the mine or mining claim is apparently unique to the Yukon Territory.[36]

53 Moreover, both cases involved real rights on property in Yukon.

54 The parties also pointed to *Timminco* as precedent authority directly on point supporting the transfer of a pension issue by the CCAA court to the jurisdiction where the pension plan is registered and has been administered.[37] However, *Timminco* is not a precedent in that the parties in that case consented to the referral of the issue and Justice Morawetz simply gave effect to their consent.

55 Without concluding that the Court would only refer a legal issue if the foreign law at issue is unique, the Court concludes that the arguments favouring the referral of a legal issue are stronger when the foreign law is unique.

56 It is therefore important to examine the issues that might be referred to the NL Court and the uniqueness of the NLPBA provisions that are at issue in the present matter.

57 The representatives of the salaried employees and retirees identify the relevant questions as being the scope of the deemed trust and of the lien and charge under Section 32 NLPBA, as well as the interaction between the NLPBA and the federal and Québec statutes.

58 Section 32 NLPBA provides:

> **32.** (1) An employer or a participating employer in a multi-employer plan shall

ensure, with respect to a pension plan, that

(a) the money in the pension fund;

(b) an amount equal to the aggregate of

(i) the normal actuarial cost, and

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

(c) all

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

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

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

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

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

amount of money equal to employer contributions due under the plan to the date of termination.

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

59 The first point is that there is nothing particularly unique about Section 32 NLPBA.

60 There is a very similar deemed trust provision in Section 8(1) and (2) PBSA:

> **8 (1)** An employer shall ensure, with respect to its pension plan, that the following amounts are kept separate and apart from the employer's own moneys, and the employer is deemed to hold the amounts referred to in paragraphs (a) to (c) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits under the plan:
>
> **(a)** the moneys in the pension fund,
>
> **(b)** an amount equal to the aggregate of the following payments that have accrued to date:
>
> **(i)** the prescribed payments, and
>
> **(ii)** the payments that are required to be made under a workout agreement; and
>
> **(c)** all of the following amounts that have not been remitted to the pension fund:
>
> **(i)** amounts deducted by the employer from members' remuneration, and
>
> **(ii)** other amounts due to the pension fund from the employer, including any amounts that are required to be paid under subsection 9.14(2) or 29(6).

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

61 In Québec, the SPPA provides :

> **49.** Until contributions and accrued interest are paid into the pension fund or to the insurer, they are deemed to be held in trust by the employer, whether or not the latter has kept them separate from his property.

62 There are similar deemed trusts and/or liens in every Canadian province outside Québec except Prince Edward Island: Ontario,[38] British Columbia,[39] Alberta,[40] Saskatchewan,[41] Manitoba,[42] Nova Scotia[43] and New Brunswick.[44]

63 The second point is that there is no Newfoundland and Labrador jurisprudence interpreting the relevant provisions of the NLPBA. The NL Superintendent pleaded that "the courts of Newfoundland & Labrador possess far greater expertise in interpreting the *PBA* [NLPBA] than does the Superior Court of Québec." While this is undoubtedly true with respect to the NLPBA as a whole, it is not true with respect to Section 32 NLPBA. In an earlier ruling also issued in the *Yukon Zinc* matter, Justice Fitzpatrick of the B.C. Supreme Court refused to decline jurisdiction and refer a matter involving the Yukon *Miners Lien Act* to the courts of Yukon and one of the factors that went against referring the matter to the Yukon court was the lack of jurisprudence in the Yukon court.[45]

64 Moreover, in this case, because of the similarities between the NLPBA and the federal and other provincial pension laws, the judge interpreting the NLPBA will likely refer to decisions of the courts of other provinces interpreting their legislation or the federal PBSA.

65 The Québec Court should be in as good a position as the NL Court in that exercise.

66 Finally, as is typical in these cases, there is a close interplay between the NLPBA and the CCAA. The first question proposed by the representatives of the salaried employees and retirees is: "<u>Assuming there is no issue of paramountcy</u>, what is the scope of section 32 in the NPBA [NLPBA] deemed trusts". The scope of the NLPBA is not relevant if the NLPBA does not apply because of a conflict with the CCAA and federal paramountcy. In that sense, there may not even be a need to deal with the interpretation of the NLPBA.

67 Moreover, there are issues in this case with the federal PBSA and the Québec SPPA. The representatives of the salaried employees and retirees suggest that the following questions are

relevant:

2. The Salaried Plan is registered in Newfoundland and regulated by the NPBA.

a) (i) Does the PBSA deemed trust also apply to those members of the Salaried Plan who worked on the railway (i.e., a federal undertaking)?

(ii) If yes, is there a conflict with the NPBA and PBSA if so, how is the conflict resolved?

b) (i) Does the SPPA also apply to those members of the Salaried Plan who reported for work in Québec?

(ii) If yes, is there a conflict with the NPBA and SPPA and if so, how is the conflict resolved?

(iii) Do the Quebec SPPA deemed trusts also apply to Québec Salaried Plan members?

68 The representatives of the salaried employees and retirees and the NL Superintendent suggest that, in the interests of simplicity and expediency, all of these questions should be referred to the NL Court.

69 The Court has great difficulty with this suggestion. On what basis should the Court conclude that the NL Court is in a better position to decide whether the Québec SPPA and deemed trust apply to employees who reported for work in Québec (question 2(b)(i) and (iii)) and how the conflict between the NLPBA and the SPPA should be resolved (question 2(b)(ii))? The first are pure questions of Québec law, and the last is a question where the laws of Québec and of Newfoundland and Labrador have equal application. There are similar questions with respect to the federal PBSA (question 2(c)), which the Court is in as good a position to decide as the NL Court.

70 The Court will not refer issues of Québec law or federal law to the NL Court, and if those issues are too closely interrelated to the NLPBA issues, or if in the interests of simplicity and expediency they should all be decided by the same court, then the solution is not to refer any issues to the NL Court.

71 In the earlier *Yukon Zinc* ruling where Justice Fitzpatrick refused to refer the matter to the

courts of Yukon, she found that the issues related to the interrelationship between the Yukon *Miners Lien Act* and the rights asserted by others under B.C. law, in relation to assets the majority of which were located in British Columbia:

> [89] As for the law to be applied to the various issues, it is clear that whatever forum is used to resolve these issues, there will be a blend of both British Columbian contract law and Yukon miner's lien law. The majority of the concentrate is located in British Columbia and was in this Province well before the 2015 Procon Lien was registered. Further, the contract rights are to be decided in accordance with British Columbian law, particularly as to if, and if so, when, title to the concentrate passed from Yukon Zinc to Transamine.
>
> [90] This is not akin to the situation discussed in *Ecco Heating Products Ltd. v. J.K. Campbell & Associates Ltd.*, 1990 CanLII 1631 (BC CA), (1990) 48 B.C.L.R. (2d) 36 (C.A.), where the major issue arose under builder's lien legislation in British Columbia and where the court referred to the "extensive existing relevant jurisprudence" in British Columbia: at 43-44. It is common ground here that there is no case law on the issues of scope and priority under the *MLA* that arise here, let alone relevant Yukon jurisprudence.
>
> [91] It is quite apparent that some issues arise under the *MLA* and, in particular, issues relating to Procon's rights in relation to the concentrate remaining in Yukon which is claimed by Transamine under British Columbian law. Transamine argues that this Court can take judicial notice of the *MLA*: see *Evidence Act*, R.S.B.C. 1996, c. 124, s. 24(2)(e). In any event, Procon has fully researched the issues as they arise under the *MLA* and made submissions on them. To turn the tables on Procon, if I were to decline jurisdiction in favour of the Yukon courts, there equally would be issues as to the Yukon court interpreting and applying British Columbian law on the contract issues.
>
> [92] It would be impossible in the circumstances to bifurcate the issues based on the applicable law. Even if bifurcation was available, it would be neither a practical nor an efficient strategy in resolving the issues between Yukon Zinc, Procon and Transamine.
>
> (Emphasis added)

72 In the present matter, the bulk of the assets on which the deemed trust or the lien created by the NLPBA may apply are the proceeds of the sale of assets in Québec.

73 On balance, the legal considerations do not favour referring the issues to the NL Court.

b) Factual considerations

74 The parties suggesting that the NLPBA issues be referred to the NL Court also argue that these are essentially local issues that should be decided by the localcourt.

75 It is clear that there are significant factual links between these issues and the province of Newfoundland and Labrador.

76 In particular, the Wabush mine is located in Newfoundland and Labrador and most of the employees reported to that mine. As a result, many of the retirees are currently resident in Newfoundland and Labrador. The representatives of the salaried employees and retirees want the NL Court to interpret the NLPBA.

77 However, there are equally strong factual links to the province of Québec: the Pointe-Noire facility is in Québec and most of the railway joining the Wabush mine and the Pointe-Noire facility is in Québec. There are almost as many employees and retirees in Québec:

	Salaried Plan	Union Plan
Newfoundland and Labrador	313	1,005
Québec	329	661
Other	14	66[46]

[Editor's Note: Note[46] is included in the image above]

78 As a result, this is not a matter of purely local concern in Newfoundland and Labrador.

79 Although the representatives of the salaried employees and retirees want the NL Court to interpret the NLPBA, more than half of the persons that they represent live in Québec.

80 It is also worth noting that the Union, which represents more employees and retirees, asks that

the case remain in Québec, even though most of their members reside in Newfoundland and Labrador.

c) Practical considerations

81 The parties suggesting that the NLPBA issues be referred to the NL Court argue that the law of Newfoundland and Labrador is in principle a question of fact in a Québec court which is proven with expert witnesses. They argue that this has a series of somewhat inconsistent consequences:

* The parties will have to hire experts, which is costly and time consuming;
* It will be difficult to find experts because these questions have never been litigated before;
* If there is an appeal, the interpretation of the NLPBA will be treated as a question of fact and therefore only subject to be overturned if there is a palpable and overriding error.

82 This seems to exaggerate the difficulty. The Court can take judicial notice of the law of another province.[47] This is particularly true when it is an issue of interpreting a statute.[48] In this case, where the parties plead that it will be difficult to find an expert, it seems unlikely that the Court would require expert evidence. This is particularly so when the provisions of the NLPBA which are at issue are similar to the provisions of the federal PBSA with respect to which expert evidence is not admissible. If there is no expert evidence to be offered, then there is no expense. A finding of fact with respect to expert evidence may attract the higher standard for appellate review of a palpable and overriding error.[49] This does not mean that every ruling on an issue of foreign law attracts the same standard. If the judge decides the interpretation of the NLPBA without considering the credibility of expert witnesses, then there is no reason for the Court of Appeal to apply the higher standard for appellate review.

83 In terms of cost, it is difficult to see how the cost of continuing the proceedings in Québec will be higher than the cost of hiring attorneys in Newfoundland and Labrador and debating part of the issues there. The Union and Sept-Îles argued that it would be more expensive for them to argue the issues in Newfoundland and Labrador, and they added that they pay their own costs, unlike the representatives of the salaried employees and retirees and the Plan Administrator.

84 Another issue is the delays that the referral might create.

85 Sept-Îles bases its argument that it is too late now to raise the issue of a transfer on the fact that the Court already dealt with some of these issues 18 months ago. The representatives of the salaried employees and retirees plead that they raised the issue of a possible transfer of issues to the

NL Court at the hearing of the motion for approval of the Claims Procedure Order on November 16, 2015.

86 The Court will not dismiss the issue for lateness. However, it is relevant that the issue is being debated now as opposed to 18 months ago. If the issue had been debated at that time, the Court might have been less concerned about the possible delays that would result from referring the issues to the NL Court.

87 The parties suggesting that the NLPBA issues be referred to the NL Court plead that there is no reason to believe that fragmenting the proceedings will result in additional delay. They do not however offer the Court any concrete indication of how quickly the case could proceed through the NL Court and any appeal.

88 The Court is concerned by the possible delay. The parties pointed to *Timminco*, where the CCAA Court transferred a pension issue to the Québec Superior Court, as an example of how these referrals should work. In that case, the parties consented to refer the Québec pension aspects of the CCAA file that was being litigated in Ontario to a Québec court. Even in those circumstances, the delay between the referral (October 18, 2012)[50] and the final judgment of the Québec court (January 24, 2014)[51] was over 15 months.

89 Finally, the Court does not consider the question of whether its decision will or will not be treated as a precedent to be a relevant consideration. Similarly, the Court does not consider the possibility of intervenants to be relevant. The Court's focus is on resolving the difficulties of the parties appearing before it. If the government of Newfoundland and Labrador wishes to obtain a judgment from the courts of the province on the interpretation of the NLPBA, it can refer a matter to the Court of Appeal of Newfoundland and Labrador.[52]

CONCLUSION

90 For all of the foregoing reasons, the Court concludes that it is not appropriate in the present circumstances to refer the proposed questions to the NL Court.

FOR THESE REASONS, THE COURT:

91 **DECIDES** that it has jurisdiction to deal with the issues related to the interpretation of the Newfoundland and Labrador *Pension Benefits Act* in the context of the present proceedings under the *Companies' Creditors Arrangement Act* and that it will not refer those issues to the Supreme Court of Newfoundland and Labrador;

92 **THE WHOLE WITHOUT JUDICIAL COSTS**.

THE HONOURABLE STEPHEN W. HAMILTON J.S.C.

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

2 S.N.L. 1996, c. P-40.1.

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

4 CQLR, c R-15.1, s. 49.

5 2015 QCCS 3064; motion for leave to appeal dismissed, 2015 QCCA 1351.

6 Exhibit R-13.

7 Exhibit R-14.

8 Exhibits R-13 and R-14.

9 Exhibit RESP-7.

10 Affidavit of Terence Watt, sworn December 14, 2016, par. 19.

11 Exhibit R-15.

12 There is a debate as to whether the Wabush CCAA Parties were required to pay the full monthly payment for December or only a pro-rated portion. The amount at issue for the period from December 17 to 31, 2015 is $21,462.

13 Exhibit R-16.

14 Exhibit R-16.

15 Exhibit R-17.

16 Exhibit R-17.

17 Exhibit R-18.

18 Exhibit R-19.

19 *Sam Lévy & Associés Inc.* v. *Azco Mining Inc.*, 2001 SCC 92, par. 25-28.

20 *Ibid*, par. 27.

21 *Ibid*, par. 64.

22 *Ibid*, par. 76.

23 R.S.C. 1985, c. B-3.

24 *Century Services Inc.* v. *Canada (Attorney General)*, 2010 SCC 60, par. 22; *Newfoundland and Labrador* v. *AbitibiBowater Inc.*, 2012 SCC 67, par. 21; *Montreal, Maine & Atlantic Canada Co./Montréal, Maine & Atlantique Canada Cie (Arrangement relatif à)*, 2013 QCCS 5194, par. 24-25; *Re Nortel Networks Corporation et al*, 2015 ONSC 1354, par. 24; *Re Essar Steel Algoma Inc.*, 2016 ONSC 595, par. 29-30, judgment of Court of Appeal ordering (i) Cliffs to seek leave to appeal the Order, (ii) the hearing of the leave to appeal motion be expedited, and (iii) the issuance of a stay pending the disposition of the leave to appeal motion, 2016 ONCA 138.

25 Section 16 CCAA provides that the orders of the CCAA court are enforced across Canada.

26 *Supra* note 19, par. 62.

27 *Stormbreaker Marketing and Productions Inc.* c. *Weinstock*, 2013 QCCA 269, par. 98-100.

28 *MMA, supra* note 24, par. 20.

29 *Sam Lévy, supra* note 19, par. 61.

30 2013 QCCS 3015, par. 18.

31 *Supra* note 24, par. 80. See also *Nortel Networks, supra* note 24, par. 29.

32 *Emerson Électrique du Canada ltée* c. *Chatigny*, 2013 QCCA 163; *Bourdon* c. *Stelco inc.*, 2004 CanLII 13895 (QC CA).

33 *Canada (Minister of Indian Affairs and Northern Development)* v. *Curragh Inc.*, [1994] O.J. No. 953 (Gen. Div.)

34 *Yukon Zinc Corp. (Re)*, 2015 BCSC 1961.

35 R.S.Y. 2002, c. 151.

36 *Supra* note 33, par. 11. See also *Yukon Zinc, supra* note 34, par. 47 and 57.

37 *Timminco Limited (Re)*, 2012 ONSC 5959.

38 Ontario *Pension Benefits Act*, R.S.O. 1990, c. P.8, s. 57.

39 British Columbia *Pension Benefits Standards Act*, S.B.C. 2012, c. 30, s. 58

40 Alberta *Employment Pension Plans Act*, S.A. 2012, c. E-8.1, s. 58 and 60.

41 Saskatchewan *Pension Benefits Act, 1992*, S.S. 1992, c P-6.001, s. 43

42 Manitoba *Pension Benefits Act*, C.C.S.M., c. P32, s. 28.

43 Nova Scotia *Pension Benefits Act*, S.N.S. 2011, c. 41, s. 80.

44 New Brunswick *Pension Benefits Act*, S.N.B. 1987, c P-5.1, s. 51.

45 *Yukon Zinc Corporation (Re)*, 2015 BCSC 836, par. 90.

46 Watt Affidavit, par. 16.

47 Article 2809 C.C.Q.

48 *Constructions Beauce-Atlas inc.* c. *Pomerleau inc.*, 2013 QCCS 4077, par. 14.

49 *Canada (Minister of Citizenship and Immigration)* v. *Asini*, 2001 FCA 311, par. 26.

50 *Supra* note 37.

51 2014 QCCS 174.

52 *Judicature Act*, R.S.N.L. 1990, c. J-4, Section 13.

TAB 5

** Preliminary Version **

Case Name:

IBM Canada Limited v. Waterman

IBM Canada Limited, Appellant;
v.
Richard Waterman, Respondent.

[2013] S.C.J. No. 70

[2013] A.C.S. no 70

2013 SCC 70

[2013] 3 S.C.R. 985

[2013] 3 R.C.S. 985

347 B.C.A.C. 43

452 N.R. 207

2013EXP-4007

2013EXPT-2316

J.E. 2013-2186

D.T.E. 2013T-851

235 A.C.W.S. (3d) 411

52 B.C.L.R. (5th) 1

9 C.C.L.T. (4th) 173

11 C.C.E.L. (4th) 169

8 C.C.P.B. (2d) 1

[2014] CLLC para. 210-008

[2014] 2 W.W.R. 452

2013 CarswellBC 3726

366 D.L.R. (4th) 287

File No.: 34472.

Supreme Court of Canada

Heard: December 14, 2012;
Judgment: December 13, 2013.
Amended Judgment: January 10, 2014.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

(155 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Employment law -- Wrongful dismissal damages -- Deductions -- Appeal by IBM from British Columbia Court of Appeal judgment affirming decision granting Waterman damages equivalent to 20 months' salary dismissed -- After being dismissed, Waterman started drawing on pension and sued for wrongful dismissal --Trial judge found that appropriate period of notice was 20 months -- IBM argued that pension benefits should be deducted from salary and benefits otherwise payable during this period -- Employee pension payment swere a type of benefit that should generally not reduce damages otherwise payable for wrongful dismissal -- Pension benefits were a form of deferred compensation for employee's service and constituted a type of retirement savings -- They were not intended to be an indemnity for wage loss due to unemployment.

Appeal by IBM from a judgment of the British Columbia Court of Appeal affirming a decision granting Waterman damages equivalent to 20 months' salary. When IBM wrongfully dismissed its long-time employee, Waterman, he had to start drawing his pension. Waterman sued for wrongful dismissal and the matter proceeded to summary trial in the Supreme Court of British Columbia. The

trial judge found that the appropriate period of notice was 20 months. The question before the court was whether his receipt of the pension benefits reduced the damages otherwise payable by IBM for wrongful dismissal. IBM's position was that Waterman's pension benefits should be deducted from the salary and benefits otherwise payable during this period. The trial judge rejected this position. IBM's appeal from this decision was dismissed by the British Columbia Court of Appeal.

HELD: Appeal dismissed. The principle that the defendant should compensate the plaintiff only for his or her actual loss was not, on its own, an answer to the collateral benefit problem. There were exceptions to the strict application of this principle, the most important of which was the exception for private insurance. That exception applied not only to insurance benefits in the strict sense, but also to other benefits such as pension payments to which an employee contributed and which were not intended to be an indemnity for the type of loss suffered as a result of the defendant's breach. Given that there was double recovery and that the benefit would not have arisen but for IBM's breach, the court had to decide whether the benefit should or should not be deducted from damages otherwise payable by IBM. While considering the connection between the breach and the benefit helped to identify that there was an issue about whether the benefit should be deducted, principles of causation did not provide reliable markers of whether a benefit should be deducted or not. The nature and purpose of the benefit, on the other hand, was often a better explanation of why private insurance benefits should or should not be deducted. There was no single marker to sort which benefits fall within the private insurance exception. One widely accepted factor related to the nature and purpose of the benefit. The more closely the benefit was, in nature and purpose, an indemnity against the type of loss caused by the defendant's breach, the stronger the case for deduction. Whether the plaintiff contributed to the benefit remained a relevant consideration, although the basis for this was debatable. In general, a benefit would not be deducted if it was not an indemnity for the loss caused by the breach and the plaintiff had contributed in order to obtain entitlement to it. There was also room in the analysis of the deduction issue for broader policy considerations. The compensation principle should not be applied strictly in this case because the pension benefits fell within the private insurance exception and should not be deducted from the wrongful dismissal damages. The court's decision in Sylvester v. British Columbia was distinguishable. The reasoning in Sylvester in fact supported the conclusion that Waterman's pension benefits should not be deducted from the wrongful dismissal damages otherwise payable by IBM.

Statutes, Regulations and Rules Cited:

Canadian Forces Superannuation Act, R.S.C. 1985, c. C-17,

Employment Insurance Act, S.C. 1996, c. 23, s. 45

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Employment law -- Wrongful dismissal -- Damages -- Compensating advantage -- Dismissed employee drawing pension benefits upon dismissal -- Trial judge establishing appropriate notice period at 20 months without deduction for pension benefits -- Whether pension benefits constitute compensating advantage -- Whether pension benefits should be deducted from damages for wrongful dismissal.

Court Summary:

IBM dismissed W without cause on two months' notice. W was 65 years old, had 42 years of service, and had a vested interest in IBM's defined benefit pension plan. Under the plan, IBM contributed a percentage of W's salary to the plan on his behalf. Upon termination, W was entitled to a full pension, and his termination had no impact on the amount of his pension benefits.

W sued to enforce his contractual right to reasonable notice. The trial judge set the appropriate period of notice at 20 month and declined to deduct the pension benefits paid to W during the notice period in calculating his damages. The Court of Appeal dismissed the appeal.

Held (McLachlin C.J. and Rothstein J. dissenting): The appeal should be dismissed.

Per LeBel, Fish, Abella, **Cromwell**, Moldaver, Karakatsanis and Wagner JJ.: The rule that damages are measured by the plaintiff's actual loss does not cover all cases. The law has long recognized that applying the general rule of damages -- the compensation principle -- strictly and inflexibly sometimes leads to unsatisfactory results. Employee pension payments, including payments from a defined benefits plan, should generally not reduce the damages otherwise payable for wrongful dismissal. Pension benefits are a form of deferred compensation for the employee's service and constitute a type of retirement savings. They are not intended to be an indemnity for wage loss due to unemployment.

A compensating advantage arises if a source other than the damages payable by the defendant ameliorates the loss suffered by the plaintiff as a result of the defendant's breach of a legal duty. However, not all benefits received by a plaintiff raise a compensating advantages problem. A problem only arises with a compensating advantage when the advantage is one that (a) would not have accrued to the plaintiff but for the breach, or (b) was intended to indemnify the plaintiff for the sort of loss resulting from the breach.

The question is whether the compensation principle should be strictly applied and the compensating advantage should be deducted. Considerations other than the extent of the plaintiff's actual loss shape the way the compensation principle is applied. The deductibility of compensating advantages also depends on justice, reasonableness and public policy.

Benefits received by a plaintiff through private insurance are generally not deductible from damages

awards. While there is no single marker to sort which benefits fall within the private insurance exception, the more closely the benefit is, in nature and purpose, an indemnity against the type of loss caused by the defendant's breach, the stronger the case for deduction. Whether the plaintiff has contributed to the benefit also remains a relevant consideration, although the basis for this is debatable. In general, a benefit will not be deducted if it is not an indemnity for the loss caused by the breach and the plaintiff has contributed in order to obtain entitlement to it. Finally, there is room in the analysis of the deduction issue for broader policy considerations such as the desirability of equal treatment of those in similar situations, the possibility of providing incentives for socially desirable conduct, and the need for clear rules that are easy to apply. While this exception is called the private insurance exception, it has been applied by analogy to a variety of payments that do not originate in a contract of insurance.

Although the courts have not relied on any broad "single contract" rule, where a cause of action and a benefit arise under the contract of employment, the terms of a contract and the dealings between the parties will inform the analysis.

A compensating advantage issue arises in this case: W received his full pension benefits and the salary he would have earned had he worked during the period of reasonable notice; had IBM given him working notice, he would have received only his salary during that period. However, the private insurance exception applies to benefits such as pension payments to which an employee has contributed and which were not intended to be an indemnity for the type of loss suffered as a result of the defendant's breach. As such, the compensation principle should not be applied strictly in this case.

In this case, the factors clearly support not deducting the retirement pension benefits from wrongful dismissal damages. W's contract of employment is silent on this issue, but it does not have any general bar against receiving full pension entitlement and employment income. W's retirement pension is not an indemnity for wage loss, but rather a form of retirement savings. While IBM made all of the contributions to fund the plan, W earned his entitlement to benefits through his years of service, as the plan's primary purpose is to provide periodic pension payments to eligible employees after retirement in respect of their service as employees. Thus, this case falls into the category of cases in which the insurance exception has always been applied -- the benefit is not an indemnity and W contributed to the benefit.

Although *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315, is distinguishable on the facts, the factors it sets out support the conclusion that W's benefits should not be deducted from his wrongful dismissal damages. The pension benefits were clearly not an indemnity benefit for loss of salary due to inability to work, and W's interest in the pension bears many of the hallmarks of a property right. Looking at the contract as a whole, it is not a fair implication that the parties agreed that pension entitlements should be deducted from wrongful dismissal damages.

Finally, the broader policy concerns in this case support not deducting the pension benefits. The law

should not provide an economic incentive to dismiss pensionable employees rather than other employees. The other policy concerns raised by Justice Rothstein or present in *Sylvester* either do not arise here or are highly speculative.

Per McLachlin C.J. and **Rothstein** J. (dissenting): This case requires an assessment of W's loss under the terms of a single contract which gave rise to both a right to reasonable notice and a right to pension benefits. The private insurance exception has no application to such a case. Where a court is called upon to assess loss under a single contract, the plaintiff's entitlement turns on the ordinary governing principle that he should be put in the position he would have been in had the contract been performed. In this case, that means that the pension benefits W received must be deducted in calculating his damages for wrongful dismissal; not deducting would give W more than he bargained for and would charge IBM more than it agreed to pay.

The governing principle for damages upon breach of contract is that the non-breaching party should be provided with the financial equivalent of performance. Employer-provided benefits are integral components of the employment contract, so deductibility turns on the terms of the employment contract and the intention of the parties. Under the terms of W's employment contract, he would have been eligible to receive pension benefits only upon being terminated or retiring. Therefore, as in *Sylvester*, W's contractual right to wrongful dismissal damages and his contractual right to his pension are based on opposite assumptions about his availability to work. Damages cannot be paid on the assumption that he could have earned both.

This conclusion is necessitated by the fact that the pension plan at issue here is a defined benefit plan. Unlike a defined contribution plan, a defined benefit plan guarantees the employee fixed predetermined payments upon retirement for life. Deducting the benefits would provide the wrongfully terminated employee with exactly what he would have received had the employment contract been performed: an amount equal to his salary during the reasonable notice period and thereafter defined benefits for the rest of his life.

This is materially different from a defined contribution plan, which provides an employee with a finite total amount or lump sum of retirement benefits. Deducting benefits that a wrongfully terminated employee receives from a defined contribution plan would leave the employee in a worse position that he would have been in had his employment contract not been breached.

In this case, W's wrongful dismissal had no impact on his pension entitlement, and he could not have received both his salary and his pension benefits had he continued to work for IBM through the reasonable notice period. Whether the benefit is non-indemnity or contributory does not answer the question of whether the plaintiff will be provided with the financial equivalent of performance or will receive excess recovery under the governing principle of contract damages.

Furthermore, the private insurance exception is not applicable to cases that involve a single contract that is the source of both the plaintiff's cause of action and his right to a particular benefit. In such circumstances, there is no justification for resorting to the private insurance exception because the

plaintiff's entitlement to the benefits is established based on the terms of his contract. If the plaintiff is entitled to the benefits under his contract, he will receive the benefits based on the ordinary governing principle that he should be placed in the position he would have been in had the contract been performed. There will be no need to reach the collateral benefit exception. A straightforward reading of *Sylvester* demonstrates that it is a fully applicable authority supporting the proposition that, under a single contract of employment, barring contractual provisions to the contrary, an individual cannot receive salary as if he is working and pension benefits as if he is retired. These are opposite, incompatible assumptions. Thus, applying *Sylvester* to this case, salary and pension income are not payable at the same time.

Cases Cited

By Cromwell J.

Distinguished: *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315; *Ratych v. Bloomer*, [1990] 1 S.C.R. 940; **discussed:** *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359; **referred to:** *Phillips v. Western Company of North America*, 953 F.2d 923 (1992); *United States v. Price*, 288 F.2d 448 (1961); *Sloas v. CSX Transportation, Inc.*, 616 F.3d 380 (2010); *Parry v. Cleaver*, [1970] A.C. 1; *Attorney General v. Blake*, [2001] 1 A.C. 268; *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601; *Redpath v. Belfast and County Down Railway* (1947), N.I. 167; *Jack Cewe Ltd. v. Jorgenson*, [1980] 1 S.C.R. 812; *Canadian Pacific Ltd. v. Gill*, [1973] S.C.R. 654; *Grand Trunk Railway v. Beckett* (1887), 16 S.C.R. 713; *Quebec Workmen's Compensation Commission v. Lachance*, [1973] S.C.R. 428; *Guy v. Trizec Equities Ltd.*, [1979] 2 S.C.R. 756; *Chandler v. Ball Packaging Products Canada Ltd.* (1992), 2 C.C.P.B. 101, aff'd (1993), 2 C.C.P.B. 99; *Emery v. Royal Oak Mines Inc.* (1995), 24 O.R. (3d) 302; *Canadian Human Rights Commission v. Canada (Attorney General)*, 2003 FCA 86, 301 N.R. 321; *Bradburn v. Great Western Railway Co.* (1874), L.R. 10 Ex. 1; *National Insurance Co. of New Zealand Ltd. v. Espagne* (1961), 105 C.L.R. 569; *Graham v. Baker* (1961), 106 C.L.R. 340; *Smoker v. London Fire and Civil Defence Authority*, [1991] 2 A.C. 502; *Hopkins v. Norcross plc*, [1993] 1 All E.R. 565; *Knapton v. ECC Card Clothing Ltd.*, [2006] I.C.R. 1084; *Gilbert v. Attorney-General*, [2010] NZCA 421, 8 N.Z.E.L.R. 72.

By Rothstein J. (dissenting)

Girling v. Crown Cork & Seal Canada Inc. (1995), 9 B.C.L.R. (3d) 1; *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315; *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359; *Chandler v. Ball Packaging Products Canada Ltd.*, [1992] O.J. No. 3114 (QL); *Parry v. Cleaver*, [1970] A.C. 1; *Guy v. Trizec Equities Ltd.*, [1979] 2 S.C.R. 756; *Canadian Pacific Ltd. v. Gill*, [1973] S.C.R. 654; *Jack Cewe Ltd. v. Jorgenson*, [1980] 1 S.C.R. 812; *United States v. Price*, 288 F.2d 448 (1961); *Phillips v. Western Company of North America*, 953 F.2d 923 (1992); *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601.

Statutes and Regulations Cited

Canadian Forces Superannuation Act, R.S.C. 1985, c. C-17.

Employment Insurance Act, S.C. 1996, c. 23, s. 45.

Authors Cited

Burrows, Andrew. *Remedies for Torts and Breach of Contract*, 3 ed. Oxford: Oxford University Press, 2004.

Cassels, Jamie, and Elizabeth Adjin-Tettey. *Remedies: The Law of Damages*, 2 ed. Toronto: Irwin Law, 2008.

Fleming, John G. "The Collateral Source Rule and Contract Damages" (1983), 71 Cal. L. Rev. 56.

Kaplan, Ari, and Mitch Frazer. *Pension Law*, 2 ed. Toronto: Irwin Law, 2013.

Marks, John. "Symmetrical Use of Universal Damages Principles -- Such as the Principles Underlying the Doctrine of Proximate Cause -- to Distinguish Breach-Induced Benefits That Offset Liability From Those That Do Not" (2009), 55 Wayne L. Rev. 1387.

McCamus, John D. *The Law of Contracts*, 2 ed. Toronto: Irwin Law, 2012.

Ogus, A. I. *The Law of Damages*. London: Butterworths, 1973.

Perillo, Joseph M. "The Collateral Source Rule in Contract Cases" (2009), 46 San Diego L. Rev. 705.

Sproat, John R. *Wrongful Dismissal Handbook*, 6 ed. Toronto: Carswell, 2012.

Swan, Angela, and Jakub Adamski. *Canadian Contract Law*, 3 ed. Markham, Ont.: LexisNexis, 2012.

Waddams, S. M. *The Law of Damages*, 5 ed. Toronto: Canada Law Book, 2012.

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J. and Prowse and Levine JJ.A.), 2011 BCCA 337, 20 B.C.L.R. (5) 241, 308 B.C.A.C. 304, 521 W.A.C. 304, 336 D.L.R. (4) 481, [2011] 10 W.W.R. 425, 91 C.C.P.B. 60, 92 C.C.E.L. (3d) 289, [2011] B.C.J. No. 1453 (QL), 2011 CarswellBC 2023, affirming a decision of Goepel J., 2010 BCSC 376, 2010 CLLC para210-021, [2010] B.C.J. No. 510 (QL), 2010 CarswellBC 679. Appeal dismissed, McLachlin C.J. and Rothstein J. dissenting.

Counsel:

D. Geoffrey Cowper, *Q.C.*, and *Lorene A. Novakowski*, for the appellant.

Christopher J. Watson and *Matthew G. Siren*, for the respondent.

[Editor's note: A corrigendum was published by the Court January 10, 2014. The corrections have been incorporated in this document and the text of the corrigendum is appended to the end of the judgment.]

The judgment of LeBel, Fish, Abella, Cromwell, Moldaver, Karakatsanis and Wagner JJ. was delivered by

CROMWELL J.:--

I. Introduction

1 When IBM Canada Ltd. wrongfully dismissed its long-time employee, Richard Waterman, he had to start drawing his pension. The question before the Court is whether his receipt of those pension benefits reduces the damages otherwise payable by IBM for wrongful dismissal. The British Columbia courts decided not to deduct the pension benefits and IBM appeals.

2 The question looks straightforward enough at first glance. The general rule is that contract damages should place the plaintiff in the economic position that he or she would have been in had the defendant performed the contract. IBM's obligation was to give Mr. Waterman reasonable notice of dismissal or pay in lieu of it. Had it given him reasonable working notice, he would have received only his regular salary and benefits during the period of notice. As it is, he in effect has received both his regular salary and his pension for that period. It therefore seems clear, under the general rule of contract damages, that the pension benefits should be deducted. Otherwise, Mr. Waterman is in a better economic position than he would have been in had there been no breach of contract.

3 On closer study, however, the question raised on appeal is not as simple as that. The case in fact raises one of the most difficult topics in the law of damages, namely when a "collateral benefit" or a "compensating advantage" received by a plaintiff should reduce the damages otherwise payable by a defendant. The law has long recognized that applying the general rule of damages strictly and inflexibly sometimes leads to unsatisfactory results. The question is how to identify the situations in which that is the case.

4 In my view, employee pension payments, including payments from a defined benefits plan as in this case, are a type of benefit that should generally not reduce the damages otherwise payable for wrongful dismissal. Both the nature of the benefit and the intention of the parties support this conclusion. Pension benefits are a form of deferred compensation for the employee's service and

constitute a type of retirement savings. They are not intended to be an indemnity for wage loss due to unemployment. The parties could not have intended that the employee's retirement savings would be used to subsidize his or her wrongful dismissal. There is no decision of this Court in which a non-indemnity benefit to which the plaintiff has contributed, such as the pension benefits in issue here, has ever been deducted from a damages award.

5 I would dismiss IBM's appeal and affirm the result arrived at by the British Columbia courts.

II. Overview of Facts and Proceedings

6 When IBM dismissed Mr. Waterman without cause on March 23, 2009, he was 65 years old and had 42 years of service. He was a long-standing member of IBM's defined benefit pension plan, which I will refer to simply as "the plan". IBM contributed a percentage of his salary to the plan on his behalf and the plan guaranteed specific benefits, which became vested over time, upon retirement.

7 At the time of the termination, there was no longer a mandatory retirement policy in place for IBM employees. However, Mr Waterman was entitled to a full pension under the plan and his termination had no impact on the amount of his pension benefits. IBM told Mr. Waterman that on termination, he *would* be treated as a retiree and that he *must* begin receiving monthly pension payments as of that date.

8 An employee like Mr. Waterman, who is entitled to retire with his full pension but has not reached the age of 71, cannot receive both pension and employment income from IBM at the same time. That changes at age 71, when he or she must start drawing benefits and may continue working and earning employment income from IBM. We have not been referred to any provision in the plan that would prevent a retiree, regardless of age, from receiving benefits under the plan and employment income from a different employer.

9 Mr. Waterman sued for wrongful dismissal and the matter proceeded to summary trial in the Supreme Court of British Columbia. The trial judge, Goepel J., found that the appropriate period of notice was 20 months. IBM's position was (and is) that Mr. Waterman's pension benefits (approximately $2,124 per month starting June 1, 2009) should be deducted from the salary and benefits otherwise payable during this period. The trial judge rejected this position: 2010 BCSC 376, 2010 CLLC para210-021.

10 IBM's appeal from this decision was dismissed by the British Columbia Court of Appeal. Writing for the court, Prowse J.A. relied on this Court's judgment in *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315. However, she concluded that the distinctions between the benefits and the intentions of the parties in the two cases led to a different conclusion in this case: 2011 BCCA 337, 20 B.C.L.R. (5th) 241.

III. Positions of the Parties

11 On its appeal to this Court, IBM makes two main points. It submits, first, that the result reached by the British Columbia courts is at odds with the compensatory goal of damages for wrongful dismissal. IBM points out that even if it had given Mr. Waterman adequate working notice of his termination, he would not have received both his employment income and his pension benefits during the notice period. By awarding him damages for the full notice period without deduction of the pension benefits received during that period, the British Columbia courts have placed him in a better economic position than he would have been in had IBM performed the contract. Second, IBM maintains that the Court in *Sylvester* held that these sorts of benefits are part of an integrated employment relationship and unless deducted, the employee collecting them would receive greater compensation than would an employee lawfully dismissed with working notice.

12 Mr. Waterman urges us to reject IBM's position. He submits that the pension is the property of the employee that is earned through work and consists of a benefit that is part of the employee's remuneration package. The pension is like a "nest egg", RRSP or savings account, which IBM could not take advantage of to offset the damages awarded. Mr. Waterman could have transferred the value of his pension to another vehicle if he had left employment with IBM before reaching the age of 65 and his retirement savings would consequently have been out of reach. As for the intention of the parties, there is no provision in the pension plan expressly prohibiting concurrent reception of salary and pension benefits. It was therefore up to the courts to determine the parties' intention, which the Court of Appeal correctly did in its decision.

IV. Analysis

13 In my respectful view, both of IBM's main arguments must be rejected. The general principle of compensation is not a full answer to the issue. The question is whether this case falls within an exception to it and in my view it does. The Court's decision in *Sylvester* is distinguishable and, in fact, its reasoning supports the conclusion that the pension benefits should not be deducted.

14 There are three key matters that need to be considered in order to answer the question posed by the appeal. I will set them out here with a summary of my conclusions.

A. Why is there a "collateral benefit" problem in this case?

15 A collateral benefit is a gain or advantage that flows to the plaintiff and is connected to the defendant's breach. This connection may exist either because there is a "but for" causal link between the breach and the receipt of the benefit or the benefit was intended to provide the plaintiff with an indemnity for the type of loss caused by the breach. The problem raised by collateral benefits is the question of whether they should be deducted from the damages otherwise payable by the defendant on account of the breach. This case raises a collateral benefit problem because there is a "but for" causal link between the IBM's breach of contract and Mr. Waterman's receipt of the benefit. He would not have received the pension benefits and full salary in lieu of working notice "but for" the dismissal.

B. Is the compensation principle the answer to the problem?

16 The principle that the defendant should compensate the plaintiff only for his or her actual loss is not, on its own, an answer to the problem. There are exceptions to the strict application of this principle, the most important of which is the exception for private insurance and other benefits which, for this purpose, are considered analogous to private insurance. That exception applies not only to insurance benefits in the strict sense, but also to other benefits such as pension payments to which an employee has contributed and which were not intended to be an indemnity for the type of loss suffered as a result of the defendant's breach.

C. Does the Court's decision in *Sylvester* support IBM's position that the pension benefits must be deducted?

17 In my view, it does not. *Sylvester* is distinguishable. The reasoning in *Sylvester* in fact supports the conclusion that Mr. Waterman's pension benefits should *not* be deducted from the wrongful dismissal damages otherwise payable by IBM.

18 My more detailed analysis follows.

A. *Why Is There a Collateral Benefit Problem in This Case?*

19 It will be helpful to start by explaining what a collateral benefit problem is and why we have one here.

(1) What Is a Collateral Benefit Problem?

20 In general terms, there is a collateral benefit when a source other than the damages payable by the defendant ameliorates the loss suffered by the plaintiffs as a result of the defendant's breach of legal duty: J. Cassels and E. Adjin-Tettey, *Remedies: The Law of Damages* (2nd ed. 2008), at p. 416. For example, if an employee is wrongfully dismissed, but receives employment insurance benefits, those benefits are a collateral benefit. The problem is whether they should be deducted from the damages the defendant will pay for wrongful dismissal.

21 If we simply apply the compensation principle -- that the plaintiff should recover his or her actual economic loss but not more -- the answer is straightforward. If we do not deduct the collateral benefit, the plaintiff will be in a better position than he or she would have been in had the employment contract been performed. To apply the compensation principle, we should consider not only the plaintiff's losses but also any gains that flow from the defendant's breach. The collateral benefit problem asks whether we should apply the compensation principle and deduct or depart from it and not deduct.

22 There is considerable overlap between the collateral benefit problem and the questions of mitigation. The main distinction is this: mitigation is concerned with whether the plaintiff acted

reasonably after the defendant's breach in order to reduce losses. The collateral benefit question, in contrast, is concerned with whether some compensating advantage that was in fact received by the plaintiff, most often as a result of arrangements made before the breach, should be taken into account in assessing the plaintiff's damages: see A. I. Ogus, *The Law of Damages* (1973), at pp. 87-88.

(2) When Does a Collateral Benefit Problem Arise?

23 Not all benefits received by a plaintiff raise a collateral benefit problem. Before there is any question of deduction, the receipt of the benefit must constitute some form of excess recovery for the plaintiff's loss and it must be sufficiently connected to the defendant's breach of legal duty.

24 For example, there is no excess recovery if the party supplying the benefit is subrogated to -- that is, steps into the place of -- the plaintiff and recovers the value of the benefit. In those circumstances, the defendant pays the damages he or she has caused, the party who supplied the benefit is reimbursed out of the damages and the plaintiff retains compensation only to the extent that he or she has actually suffered a loss: see, e.g., *Cunningham v. Wheeler*, [1994] 1 S.C.R 359, at pp. 386-88, per McLachlin J., as she then was, dissenting in part. (The employment insurance example that I mentioned earlier is now resolved in this way by statute: see below, at para. 44).

25 Even if there is some form of excess recovery, however, there is only a collateral benefit problem if the benefit is sufficiently connected to the defendant's breach. This requirement of sufficient connection serves a purpose with respect to collateral benefits that is analogous to that served by rules of causation and remoteness with respect to damages. Just as plaintiffs cannot recover all losses, no matter how loosely related to the defendant's breach or how far beyond the parties' reasonable contemplation, so too the defendant does not get credit for all benefits accruing to the plaintiff, no matter how loosely connected to the defendant's wrongful conduct.

26 Before turning to the nature of the required link, I note that scholars have objected to the term "collateral benefit" because it assumes the answer to the question. The word "collateral" suggests that the benefit should not be taken into account. But of course the legal problem is whether or not the benefit should be deducted. Scholars have suggested that the term "compensating advantages" is a better one and that is the term I will use in my reasons: see, e.g., Ogus, at pp. 93-94; A. Burrows, *Remedies for Torts and Breach of Contract* (3rd ed. 2004), at p. 156; S. M. Waddams, *The Law of Damages* (5th ed. 2012), at s. 15.700.

27 Another problem with the terms "collateral benefit" or "collateral source" is that they suggest that the test for whether a benefit is deductible is whether it is "collateral", that is, independent of the relation between the plaintiff and the defendant. Some of the American jurisprudence, for example, has recognized that this "independence" test is an oversimplification which does not explain the treatment of benefit in the cases: see, e.g., *Phillips v. Western Company of North America*, 953 F.2d 923 (5th Cir. 1992), at pp. 931-33. Moreover, it can lead to fruitless semantic debates about whether a benefit is or is not "collateral" or "independent" rather than furthering

principled analysis. As one court put it, that a benefit "comes from the defendant tortfeasor does not itself preclude the possibility that it is from a collateral source. The plaintiff may receive benefits from the defendant himself which, because of their nature, are not considered double compensation": *United States v. Price*, 288 F.2d 448 (4th Cir. 1961), at pp. 449-50; *Sloas v. CSX Transportation, Inc.*, 616 F.3d 380 (4th Cir. 2010), at p. 389. As we shall see, several factors other than the source of the benefit may be considered in order to determine whether it should be deducted.

28 Returning to the issue of connection between the benefit and the breach, the question is what sort of link is required before the issue about deduction arises. The cases suggest two answers. The advantage must either be one that (a) would not have accrued to the plaintiff "but for" the defendant's breach *or* (b) was intended to indemnify the plaintiff for the sort of loss resulting from it. If neither of these conditions is present, there is no issue about deduction. If either of these conditions is present, there is.

29 In relation to the "but for" connection between the breach and the advantage, consider this example. A plaintiff who has been injured by a defendant's negligence buys a lottery ticket, as is his usual practice, and wins a large sum of money. No one would argue that the amount of the winnings should be deducted from the damages payable by the defendant. There is no "but for" causal connection between the defendant's negligence and the plaintiff's purchase of the winning ticket: see Burrows, at p. 156.

30 Even if there is no "but for" causal link between a benefit and the breach, there may still be a problem about whether a benefit should be deducted. This will occur where the benefit and the breach are connected in the sense that the benefit is intended to indemnify the type of loss caused by the breach -- *Sylvester* is an example. Mr. Sylvester was unable to work and receiving disability payments under his employment contract when he was wrongfully dismissed. There was clearly no causal link between the employer's failure to give reasonable notice of termination (or payment in lieu of notice) and the receipt of the disability benefits. Nonetheless, the Court found that there was a compensating advantages problem. As Major J. pointed out, the disability benefits were intended to be a substitute for Mr. Sylvester's regular salary: para. 14. In other words, the benefit was intended to be an indemnity for the loss of the regular salary, precisely the sort of loss that resulted from the defendant's breach of the employment contract.

31 The existence of these sorts of links between the breach and the benefit identifies whether there is a compensating advantage problem. But the existence of such a link is not a reliable marker of whether a particular benefit should be deducted. Relying on strict principles of causation, for example, often conceals unarticulated policy concerns: see, e.g., *Parry v. Cleaver*, [1970] A.C. 1 (H.L.), at pp. 34-35, per Lord Pearce; Ogus, at pp. 225-26; *Ratych v. Bloomer*, [1990] 1 S.C.R. 940, at pp. 965-66. Similarly, the indemnity factor is not a reliable marker of which benefits are or are not deductible. This is clear, for example from the Court's decision in *Cunningham*. In issue were disability benefits provided for under collective agreements. They were clearly intended to provide

an indemnity for wage loss arising from an inability to work. Nonetheless, the Court held that the benefits should *not* be deducted.

32 To sum up, a potential compensating advantage problem exists if the plaintiff receives a benefit that would result in compensation of the plaintiff beyond his or her actual loss and *either* (a) the plaintiff would not have received the benefit but for the defendant's breach, *or* (b) the benefit is intended to be an indemnity for the sort of loss resulting from the defendant's breach. These factors identify a potential problem with a compensating advantage, but do not decide how it should be resolved.

(3) Why Is There a Problem About Deduction in This Case?

33 A compensating advantage issue arises in this case. First, there is an element of excess compensation. Mr. Waterman has received his full pension benefits and, in addition, the salary he would have earned had he worked during the period of reasonable notice (less an allowance for his earnings from other employment). Had IBM not breached the contract of employment and instead given him working notice, he would have received only his salary during that period and not his pension. Second, there is a "but for" causal relationship between IBM's breach of contract and Mr. Waterman's receipt of the pension benefits. One could say that it was the pension plan rather than IBM's breach of contract that gave rise to the benefit, but it is artificial to suggest that there is no "but for" causal link between IBM's breach of contract and Mr. Waterman's receipt of his pension benefits: "but for" the breach, there would have been no termination and, "but for" the termination, Mr. Waterman would not have started to collect his pension. Given that there was double recovery and that the benefit would not have arisen but for IBM's breach, we must decide whether the benefit should or should not be deducted from damages otherwise payable by IBM.

B. *Is the Compensation Principle the Answer to the Problem?*

34 IBM's first main point is that the compensation principle requires the pension benefits to be deducted. Mr. Waterman is better off as a result of the damage award than he would have been if IBM had given reasonable working notice. It follows, in IBM's submission, that the pension benefits must be deducted so that the damage award places Mr. Waterman in the economic position he would have been in had IBM given him reasonable working notice. This is essentially the position adopted by my colleague Rothstein J.

35 While I agree that the damage award is a departure from the compensation principle, this in itself is not an answer to the problem posed by the appeal. As I will explain, the compensation principle cannot be, and is not, applied strictly or inflexibly in a manner that is divorced from other considerations. The question is whether the compensation principle should be strictly applied in this case. In my view, it should not. To explain why, it is helpful to look first at why the compensation principle is not applied strictly, or at all, in various situations.

(1) When Does the Compensation Principle Not Apply Strictly?

36 Considerations other than the extent of the plaintiff's actual loss shape the way the compensation principle is applied and there are well-established exceptions to it. For example, the rule that contract damages compensate only the plaintiff's actual loss is not the only rule that applies to assessing contract damages. As a leading English case put it, "Damages are measured by the plaintiff's loss, not the defendant's gain. But the common law, pragmatic as ever, has long recognised that there are many commonplace situations where a strict application of this principle would not do justice between the parties. Then compensation for the wrong done to the plaintiff is measured by a different yardstick": *Attorney General v. Blake*, [2001] 1 A.C. 268 (H.L.), at p. 278. In some cases, for example, an award of damages in contract may be based on the advantage gained by the defendant as a result of the breach rather than the loss suffered by the plaintiff: see, e.g., *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601, at para. 25. The rule that damages are measured by the plaintiff's actual loss, while the general rule, does not cover all cases. In addition, through the doctrines of remoteness and mitigation, the compensation principle gives way to considerations of reasonableness in relation to whether the plaintiff's expectations of the contract and his or her conduct in response to the breach of it were reasonable.

37 Finally, there are well-recognized exceptions in which benefits flowing to plaintiffs are not taken into account even though the result is that they are better off, economically speaking, after the breach than they would have been had there been no breach. These exceptions are ultimately based on factors other than strict compensatory considerations. As Lord Reid put it in *Parry*, "[t]he common law has treated [the deductibility of compensating advantages] as one depending on justice, reasonableness and public policy": p. 13. Or, as McLachlin J. wrote, this issue raises a question of "basic policy": *Ratych*, at p. 959.

(2) What Factors Help to Identify When Compensating Advantages are Not Deducted?

38 What are some of these considerations of justice, reasonableness and policy? An answer may be found by looking at the two well-established situations in which compensating advantages are not deducted: charitable gifts and private insurance.

(a) *Charitable Gifts*

39 The first is the less controversial. The rule is that charitable gifts made to the plaintiff are generally not deductible from the plaintiff's damages even though they were made as a result of and in response to the injury or loss caused by the defendant's wrong: see, e.g., Waddams, at ss. 3.1550-3.1560; Cassels and Adjin-Tettey, at pp. 420-21. Two concerns explain the exception: first, that if these charitable gifts were deducted, "the springs of private charity would be found to be largely, if not entirely, dried up" and, second, that it rarely makes practical sense to spend the time and effort required to take these sorts of gifts into account (*Redpath v. Belfast and County Down Railway* (1947), N.I. 167 (K.B), at p. 170). See also Ogus, at p. 223; Waddams, at s. 3.1550; Cassels and Adjin-Tettey, at pp. 420-21; *Cunningham*, at p. 370.

40 These explanations of the exception suggest we may take into account the broader incentives created by deducting or not deducting a benefit as well as pragmatic considerations relating to whether the applicable rule is clear, coherent and easy to apply: *Cunningham*, at p. 388, per McLachlin J.

(b) *Private Insurance*

41 A second and more controversial exception relates to payments from the plaintiff's private insurance. The core of the exception is well established: benefits received by a plaintiff through private insurance are not deductible from damage awards. However, both the precise scope and the rationale of the exception have been the subject of judicial and scholarly debate. Its practical importance is limited given the widespread use of subrogation, which avoids the compensating advantage issue altogether. While the exception more typically arises in tort cases, it has also been applied in contract actions, including actions for wrongful dismissal: *Jack Cewe Ltd. v. Jorgenson*, [1980] 1 S.C.R. 812. The approach in both areas of law is the same in principle, although the terms of the contract and the dealings between the parties will inform the analysis in contract cases.

42 One area of controversy relates to the sorts of benefits which fall within the private insurance exception. Does it apply to both indemnity and non-indemnity insurance? Does it extend to disability benefits, employment insurance or pensions payable on retirement? The Court has held that the answer to all of these questions is yes, but not, as we shall see, without well-reasoned dissent. In short, the so-called private insurance exception has been applied by analogy to a variety of payments that do not originate in a contract of insurance.

43 In *Canadian Pacific Ltd. v. Gill*, [1973] S.C.R. 654, the Court applied the insurance exception to prevent deduction of the present value of Canada Pension Plan benefits available to surviving dependents from the damages awarded in a fatal injuries claim. Spence J., for the Court, held that the payments were "so much of the same nature as contracts of insurance that they also should be excluded from consideration when assessing damages under the provisions of that statute": p. 670; see also *Grand Trunk Railway v. Beckett* (1887), 16 S.C.R. 713, at p. 714, and *Quebec Workmen's Compensation Commission v. Lachance*, [1973] S.C.R. 428, at pp. 433-34.

44 In *Guy v. Trizec Equities Ltd.*, [1979] 2 S.C.R. 756, Mr. Guy's injury led to his retirement and receipt of pension benefits. They were not deducted from damages for loss of earnings. Ritchie J., for the Court, viewed pensions, whether contributory or non-contributory, as flowing from the employee's work and part of what the employer was prepared to pay for the employee's services. He agreed with Lord Reid's conclusion, in *Parry*, as quoted by Spence J., in *Gill*, that "[t]he fact that they flow from past work equates them to rights which flow from an insurance privately effected by [the employee]": *Guy*, at p. 763. Similarly, in *Jack Cewe*, the Court did not deduct a dismissed employee's unemployment insurance benefits from his wrongful dismissal damages. The benefits, wrote Pigeon J., for the Court, were a consequence of the contract of employment making them similar to contributory pension benefits: p. 818. (The collateral benefit issue that arose in *Jack Cewe*

is now addressed by s. 45 of the *Employment Insurance Act*, S.C. 1996, c. 23, which states that a claimant who receives benefits and is subsequently awarded damages for the same period, "shall pay to the Receiver General as repayment of an overpayment of benefits an amount equal to the benefits that would not have been paid if the earnings had been paid or payable at the time the benefits were paid".)

45 In *Ratych*, the Court found that sick leave benefits should be deducted from damages otherwise payable for loss of earning by the party whose negligence was responsible for the injuries. For the majority, McLachlin J. wrote that it may well be appropriate not to deduct benefits where the employee can show a contribution equivalent to payment of an insurance premium. In other words, benefits may not be deductible when they come about because the plaintiff has prudently obtained and paid for insurance. However, that was not the case in *Ratych*, making it a different situation than one in which the benefits flow from the employer/employee relationship: pp. 973-74. In *Cunningham*, disability insurance benefits payable under the terms of collective agreements were held not to be deductible because there was evidence that the plaintiffs had paid for these disability plans through reduced wages. The Court's earlier decision in *Ratych* was distinguished on this basis.

46 Finally, in *Sylvester*, non-contributory disability benefits received during the notice period were deducted from wrongful dismissal damages otherwise payable. The benefits were intended to be an indemnity for lost wages while the plaintiff was unable to work, the plaintiff had not contributed to acquire the benefit, and policy considerations favoured deduction.

47 The two cases in which the private insurance exception was *not* applied (*Ratych* and *Sylvester*) involved benefits that were intended to be an indemnity for the type of loss that resulted from the defendant's breach and to which the plaintiff had not contributed. Retirement pension benefits, which are not an indemnity for loss of wages resulting from inability to work and to which the employee contributes directly or indirectly, have been held by this Court and others to fall within the private insurance exception: *Guy*; *Gill*; *Chandler v. Ball Packaging Products Canada Ltd.* (1992), 2 C.C.P.B. 101 (Ont. Ct. J. (Gen. Div.)), aff'd (1993), 2 C.C.P.B. 99 (Ont. Ct. J. (Div. Ct.)); *Emery v. Royal Oak Mines Inc.* (1995), 24 O.R. (3d) 302 (Gen. Div.); *Parry*.

48 IBM relies on *Canadian Human Rights Commission v. Canada (Attorney General)*, 2003 FCA 86, 301 N.R. 321, but, in my view, this reliance is misplaced. The human rights complainant in that case, Master Corporal (retired) Carter, complained that his release from the Canadian Forces by virtue of his age constituted discrimination; in other words, his claim was not that his employer had failed to give him reasonable notice of termination, but that it could not lawfully terminate him. Following his release from service, a proper legislative basis for compulsory retirement was put in place, thus ending the discrimination. The question was whether the compensation awarded by the Human Rights Tribunal for lost wages during the period of discrimination should be reduced by the amount of pension benefits received during that period. The Federal Court of Appeal held that they should. However, it specifically declined to decide the case on the basis of the private insurance

exception: para. 20. Instead, it reasoned that Master Corporal Carter should be treated as a member of the regular force during the period of discrimination. But, by virtue of the applicable provisions of the *Canadian Forces Superannuation Act*, R.S.C. 1985, c. C-17, a person may *either* be a member of the regular armed forces contributing to the superannuation account *or* a person who has ceased to be a member and entitled to benefits, but not both at the same time. On that basis, his claim for both pension benefits and his full salary was inconsistent with the nature of his claim and the governing legislation. This reasoning cannot apply to this case, however. The private insurance exception applies to wrongful dismissal actions: *Jack Cewe*. In addition, the contractual provisions here, unlike the statute that governed Master Corporal Carter's case, do not have any general bar against receiving full pension entitlement and employment income.

49 A second area of controversy concerns the basis of the private insurance exception. It has been explained on various grounds, which may be grouped under three main headings. One is concerned with the strength of the causal connection between receipt of the benefit and the defendant's breach, a second relates to the nature of the benefit, and a third concerns a variety of policy considerations that may be served by either deducting or not deducting the benefit.

50 Before turning to those issues, however, I must address a contention advanced by my colleague Rothstein J. He maintains that application of the collateral benefit or private insurance exception is not appropriate where the plaintiff's cause of action and his right to a particular benefit arise from the same contract. I respectfully do not accept that there is or should be any such categorical "single contract" rule in relation to compensating advantages. This proposition is not consistent with this Court's jurisprudence.

51 In *Jack Cewe*, unemployment insurance benefits were not deducted from wrongful dismissal damages. The Court held that the benefits were the "consequence of the contract of employment", making them similar to contributory pension benefits: p. 818. Thus, although the Court considered that the benefits and the claim for damages arose as a consequence of the same contract, the benefits were *not* deducted from the wrongful dismissal damages. Thus, my colleague's proposition is contradicted by a leading authority from this Court on the deduction of benefits from wrongful dismissal damages.

52 The *Sylvester* case, from this Court, does not lay down any such broad "single contract" rule. If that had been the Court's view, it would have provided a much simpler solution to the issue in *Sylvester* than the one it unanimously adopted. Of course, in *Sylvester*, the sick leave benefits and the claim for wrongful dismissal damages both arose from the contract of employment, but the Court did not rely on, or even mention, the broad "single contract" rule advanced by my colleague. On the contrary, Major J., writing for the Court, was careful *not* to articulate any broad "single contract" rule in relation to compensating advantages. He stated that

> [t]here may be cases where an employee will seek benefits in addition to damages for wrongful dismissal on the basis that the disability benefits are akin

> to benefits from a private insurance plan for which the employee has provided consideration. This is not the case here... . The issue whether disability benefits should be deducted from damages for wrongful dismissal where the employee has contributed to the disability benefits plan was not before the Court. [Emphasis added; para. 22.]

Of course, whether the employee contributes to the benefits or not, they equally arise under the employment contract. The fact that the Court explicitly left this point open is inconsistent with the Court intending to adopt the broad "single contract" rule espoused by Rothstein J. *Sylvester* teaches that, where a cause of action and a benefit arise under the contract of employment, we must look first to that contract to determine the issue of whether an employment benefit should be deducted from wrongful dismissal damages. As in *Sylvester*, Mr. Waterman's contract of employment is silent on this issue, so we must attempt to discern the parties' intentions in light of the express terms of the contract of employment.

53 I return to the three areas of controversy in relation to the basis of the private insurance exception.

(i) Strength of Connection to the Defendant's Breach

54 The strength-of-connection factor has often been referred to in the cases. The argument is that private insurance benefits (and benefits considered analogous to them) should not be deducted because they result from the plaintiff's contract of insurance, not from the defendant's wrongful act. This was part of the reasoning in *Bradburn v. Great Western Railway Co.* (1874), L.R. 10 Ex. 1, but at the distance of 140 years, this analysis seems artificial. Moreover, scholars have pointed out that decisions about legal as opposed to factual causation often simply disguise the true policy reasons underlying the decisions: see, e.g., Ogus, at p. 94; Burrows, at p. 162. In the leading English case on the private insurance exception, *Parry*, Lord Pearce commented that strict principles of causation do not provide a "satisfactory line of demarcation" between benefits that are and are not deductible: p. 34. While, as discussed, considering the connection between the breach and the benefit helps to identify that there is an issue about whether the benefit should be deducted, principles of causation do not provide reliable markers of whether a benefit should be deducted or not.

(ii) The Nature and Purpose of the Benefit

55 The nature and purpose of the benefit, on the other hand, is often a better explanation of why private insurance benefits should or should not be deducted. Two factors relating to the nature of the benefit have been particularly important: whether the benefit is an indemnity for the loss caused by the defendant's breach and whether the plaintiff has directly or indirectly paid for the benefit.

56 I will not attempt to lay down general principles that will cover all possible types of benefits. However, as we shall see, a review of this Court's jurisprudence supports the following general propositions (subject, of course, to statutory or contractual provisions to the contrary).

* Benefits have *not* been deducted if (a) they *are not* intended to be an indemnity for the sort of loss caused by the breach *and* (b) the plaintiff has contributed to the entitlement to the benefit: *Gill*; *Guy*.
* Benefits have *not* been deducted where the plaintiff has contributed to an indemnity benefit: *Jack Cewe*; *Cunningham*.
* Benefits *have* been deducted when they *are* intended to be an indemnity for the sort of loss caused by the breach but the plaintiff has not contributed in order to obtain entitlement to the benefit: *Sylvester*; *Ratych*.

57 The pension benefit in this case was not intended to be an indemnity for lost wages and Mr. Waterman contributed to the acquisition of his pension through his years of service. This, no doubt, is why it has never been argued that the benefits should be deducted under the principle of mitigation. The pension benefit, therefore, is the type of benefit which should not be deducted. The reasoning leading me to this conclusion follows.

58 I begin my review with the decision of the House of Lords in *Parry*, which is the foundation of much of the Canadian jurisprudence. Lord Reid ultimately based his conclusion that the benefit (a pension) should not be deducted based on its "intrinsic nature": "A pension is intrinsically of a different kind from wages... . [W]ages are a reward for contemporaneous work, but ... a pension is the fruit, through insurance, of all the money which was set aside in the past in respect of his past work. They are different in kind": p. 16. Lord Pearce also considered the nature and purpose of the benefit when he asked: "Is there anything else in the nature of these pension rights derived from work which puts them into a different class from pension rights derived from private insurance? Their 'character' is the same": p. 37. Lord Wilberforce also focused on the nature of the pension benefit, noting that it did not prevent the injured officer from taking other paid employment, whether it be for a wage that was less, equal to or more than his police officer's salary: p. 42.

59 The nature and purpose of the benefit was central to the minority's reasoning in *Cunningham*. While the majority was concerned with authority, fairness and deterrence, the minority refocused the analysis on the nature of the benefit, distinguishing between "indemnity" and "non-indemnity" insurance. The former should be deductible, while the latter should not:

> This distinction is critical to a discussion of collateral benefits. If the insurance money is not paid to indemnify the plaintiff for a pecuniary loss, but simply as a matter of contract on a contingency, then the plaintiff has not been compensated for any loss. He may claim his entire loss from the negligent defendant without violating the rule against double recovery. [pp. 371-72]

60 Importantly, the minority judges accepted that the dominant tide of the jurisprudence in the common law world is that non-indemnity pension benefits should not be deducted: *Cunningham*, at p. 376. Although they mostly do not rely on the private insurance exception, Commonwealth decisions conclude that pension benefits should not be deducted from a damages award because

pension benefits are not meant to compensate the plaintiff for the injury or breach of contract or to act as wage replacement. See for example: *National Insurance Co. of New Zealand Ltd. v. Espagne* (1961), 105 C.L.R. 569; *Graham v. Baker* (1961), 106 C.L.R. 340; *Parry*; *Smoker v. London Fire and Civil Defence Authority*, [1991] 2 A.C. 502. In *Hopkins v. Norcross plc*, [1993] 1 All E.R. 565 (Q.B.), the High Court applied this reasoning to the deductibility of pension benefits in a wrongful dismissal suit. The reasoning is also consistent with the decision of the Employment Appeal Tribunal in *Knapton v. ECC Card Clothing Ltd.*, [2006] I.C.R. 1084. The non-deductibility of pension benefits was affirmed by the New Zealand Court of Appeal in *Gilbert v. Attorney-General*, [2010] NZCA 421, 8 N.Z.E.L.R. 72. This is consistent with the approach in *Guy*, discussed earlier, which concerned pension benefits that were clearly not intended to be an indemnity for loss of earnings due to an inability to work. They were held not to be deductible from damages for loss of earnings payable by those responsible for the plaintiff's inability to work.

61 The nature of the benefit was also an important factor in the Court's decision to deduct employer-funded disability payments from wrongful dismissal damages in *Sylvester*. The Court's analysis looked first to the nature and purpose of the benefit and, in particular, to the question of whether the benefit is in the nature of an indemnity for the sort of loss caused by the defendant's breach of contract. The fact that the benefit was intended to be an indemnity for wage loss was one of the reasons for the Court's conclusion that the benefit should be deducted.

62 Reliance on the distinction between indemnity and non-indemnity benefits is sound in principle. As McLachlin J. pointed out in her dissenting reasons in *Cunningham*, if the benefit "is not paid to indemnify the plaintiff for a pecuniary loss, but simply as a matter of contract on a contingency", the benefit cannot be seen as having compensated the plaintiff for that pecuniary loss: pp. 371-72. If that is the case, the arguments in favour of deducting the benefit are weaker in the sense that IBM is asking to deduct apples from oranges.

63 The fact that Mr. Waterman's pension comes from a defined benefit plan does not change its nature as a non-indemnity benefit.

64 The Court in *Sylvester* also considered another factor -- that the plaintiff had not contributed to obtain the benefit by paying for it directly or indirectly -- in support of its conclusion that the benefit should be deducted from the damages. This factor has often been mentioned and relied on in the cases.

65 For example, the Court first applied *Parry* in the 1973 case of *Gill*, and reaffirmed it in *Guy*. In both cases, the Court emphasized that the plaintiff had directly or indirectly paid for the benefit in question. As Ritchie J., writing for the Court, put it in *Guy*:

> ... this contributory pension is derived from the appellant's contract with his employer and that the payments made pursuant to it are akin to payments under an insurance policy. This view is in accord with the judgment of the House of Lords in *Parry v. Cleaver*, which was expressly approved in this Court in the

> reasons for judgment of Mr. Justice Spence in *Canadian Pacific Ltd. v. Gill ...* . [p. 762]

66 This line of reasoning was repeated in *Jack Cewe*, which held that contributory unemployment insurance benefits were not deductible from wrongful dismissal damages. This factor was also an important one in *Cunningham*. As Cory J. put it, on behalf of the majority: "The application of the insurance exception to benefits received under a contract of employment should not be limited to cases where the plaintiff is a member of a union and bargains collectively. Benefits received under the employment contracts of non-unionized employees will also be non-deductible if proof is provided of payment in some manner by the employee for the benefits": p. 408 (emphasis added). The majority found that there was evidence of such payment and held that the benefit should not be deducted.

67 While the cases from this Court have referred to whether the plaintiff has directly or indirectly contributed to the benefit, there are strong arguments against giving this consideration much weight as an explanation of why particular benefits should or should not be deducted. As McLachlin J. pointed out in her dissent in *Cunningham*, reliance on this factor may be seen as inconsistent with legal principle and logic. With respect to legal principle, the defendant takes the plaintiff as he or she is and the plaintiff is compensated for his or her actual loss and no more. As a matter of logic, it does not seem right to say that deducting the benefits deprives the plaintiff of the contributions made to gain entitlement to those benefits -- whether deducted from damages or not, the plaintiff receives the benefits: *Cunningham*, at pp. 381-83; for a critique of reliance on this factor, see also Ogus, at pp. 226-27.

68 The pension benefits in issue in this case are not an indemnity for loss of wages and, as we shall see, pension benefits earned through years of service are invariably found to be contributory. The fact that the pension plan here is a defined benefits plan does not detract from that conclusion. As a result, the problem highlighted in the difference between the majority and the dissent in *Cunningham*, i.e. how to treat indemnity benefits to which the plaintiff contributed, does not arise in this case.

69 I conclude from this review that whether the benefit is in the nature of an indemnity for the loss caused by the defendant's breach and whether the plaintiff has directly or indirectly paid for the benefit have been important explanations of why particular benefits fall, or do not fall within the private insurance exception. The Court has been sharply and closely divided on the issue of the deduction for an indemnity benefit to which the plaintiff has contributed. However, there is no decision of the Court of which I am aware that has required deduction of a non-indemnity benefit to which the plaintiff has contributed, like the pension benefits in this case.

(iii) Broader Policy Considerations

70 Three main policy considerations have often been advanced to explain why a benefit should or should not be deducted: punishment, deterrence, and the provision of incentives for socially

responsible behaviour.

71 The private insurance exception has often been justified on the basis that deducting the benefit from the damages reduces their punitive and deterrent value. However, the notion that the exception was intended to have a punitive and deterrent value has been widely, and, in my view, soundly, criticized. Authors agree that punitive and deterrent value ought not to be relied on to explain why a benefit is or is not deducted: see J. G. Fleming, "The Collateral Source Rule and Contract Damages" (1983), 71 Cal. L. Rev. 56, at pp. 58-59; J. Marks, "Symmetrical Use of Universal Damages Principles -- Such as the Principles Underlying the Doctrine of Proximate Cause -- to Distinguish Breach-Induced Benefits That Offset Liability From Those That Do Not" (2009), 55 Wayne L. Rev 1387, at p. 1420; J. M. Perillo, "The Collateral Source Rule in Contract Cases" (2009), 46 San Diego L. Rev. 705, at p. 716; Ogus, at p. 225; Burrows, at pp. 162-63. This view is supported by both the High Court of Australia and the House of Lords: see *National Insurance Co.*, per Dixon C.J, at p. 571, and *Parry*, at p. 33. In *Parry*, Lord Pearce put it this way at p. 33: "The word 'punitive' gives no help. It is simply a word used when a court thinks it unfair that a defendant should be saddled with liability for a particular item." I would add that it is hard to defend punishment and deterrence as rationales against the incisive critique advanced by McLachlin J. in her dissenting reasons in *Cunningham*, at pp. 383-84. I conclude that it is unsound to rely on a punitive or deterrent justification for the private insurance exception, particularly in breach of contract cases where fault is not an operating concept.

72 This is not to say, however, that the approach to damages does or should ignore the underlying purposes of the substantive obligations the breach of which they seek to remedy. If, for example, an important purpose of the law of contracts is to protect the reasonable expectations of the parties to a contract, it is appropriate to consider how well the award of damages furthers that purpose in a particular case: see, e.g., A. Swan and J. Adamski, *Canadian Contract Law* (3rd ed. 2012) at s. 1.27. This consideration may be taken into account along with the other principles of damages law in order to ensure that there is a good "remedial fit" between the breach of obligation and the remedy.

73 The private insurance exception has also been justified by the incentives it may provide. For example, deducting benefits that plaintiffs have provided for themselves might discourage plaintiffs from acting prudently in obtaining that sort of proctection. This, however, has been a controversial explanation. The majority relied on it in *Cunningham*, but it was trenchantly criticized by the dissent and a similar critique has been made by scholars: see, e.g., Ogus, at pp. 226-27.

74 In my view, we should be cautious about relying too heavily on the incentives that may result from deducting or not deducting. There will sometimes be little basis in fact for supposing that either deducting or not deducting certain benefits will have any impact on people's behaviour. For example, do we think it likely that deducting insurance benefits will discourage people from buying insurance? The coverage is not limited to situations in which there will be legal recourse against a defendant. Even when legal recourse is available, it will likely require a longer and more expensive

process, as compared to making an insurance claim. Nor is it likely that people will be less ready to buy insurance if they are not doubly compensated in cases in which fault can be established. It seems to me that we should generally rely on these broader policy concerns only when they are directly related to the particular benefit in issue and when there is some reasonable basis in fact or experience to suppose that deducting or not deducting will actually serve the policy objective.

75 *Sylvester* provides an example of grounding policy considerations in the facts of the case. The result in that case was supported by the fact that deducting the disability benefits from wrongful dismissal damages ensured that all affected employees would receive equal damages: if the benefits were not deducted, a dismissed employee collecting disability benefits would receive more compensation than would the employee who is dismissed while working (para. 21). In the same paragraph, the Court considered the incentives created by the deduction or non-deduction of the disability benefits: failing to deduct the disability benefits could be an undesirable deterrent to employers establishing disability benefit plans. These concerns are directly related to the benefits in question and have a reasonable basis in fact.

76 From this review of the authorities, I reach these conclusions:

(a) There is no single marker to sort which benefits fall within the private insurance exception.

(b) One widely accepted factor relates to the nature and purpose of the benefit. The more closely the benefit is, in nature and purpose, an indemnity against the type of loss caused by the defendant's breach, the stronger the case for deduction. The converse is also true.

(c) Whether the plaintiff has contributed to the benefit remains a relevant consideration, although the basis for this is debatable.

(d) In general, a benefit will not be deducted if it is *not an indemnity* for the loss caused by the breach and the plaintiff *has contributed* in order to obtain entitlement to it.

(e) There is room in the analysis of the deduction issue for broader policy considerations such as the desirability of equal treatment of those in similar situations, the possibility of providing incentives for socially desirable conduct, and the need for clear rules that are easy to apply.

(3) Application to This Case

77 Where would these factors lead us in this case? In my view, they clearly support not deducting the retirement pension benefits from wrongful dismissal damages. The retirement pension is not an indemnity for wage loss, but rather a form of retirement savings. While the employer made all of the contributions to fund the plan, Mr. Waterman earned his entitlement to benefits through his years of service. As the plan states, its primary purpose is "to provide periodic pension payments to

eligible employees ... after retirement ... in respect of their service as employees": art. 1.01, A.R., at p. 117. Thus, it seems to me that this case falls into the category of cases in which the insurance exception has always been applied: the benefit is not an indemnity and the employee contributed to the benefit. This result is consistent with the dominant view in the case law and among legal scholars: *Guy*; *Gill*; *Chandler*; *Emery*; *Parry*; *Ogus*, at p. 223.

78 To conclude, the compensation principle should not be applied strictly in this case because the pension benefits fall within the private insurance exception and should not be deducted from the wrongful dismissal damages.

C. *Does the Court's Decision in Sylvester Support IBM's Position That the Pension Benefits Must Be Deducted?*

79 I turn to IBM's second main argument, that the Court's decision in *Sylvester* supports its position that the pension benefits must be deducted here. In my view *Sylvester* does not support that result.

80 The issue in *Sylvester* was whether damages for wrongful dismissal should be reduced by the amount of disability benefits paid during the notice period from an employer-funded plan. The Court's analysis addressed three factors: the nature of the benefit, the intentions of the parties as reflected in the employment contract, and some broader policy considerations. When these factors are considered in light of the facts of this case, they lead to the opposite conclusion than they did in *Sylvester*.

81 The Court in *Sylvester* began by looking at the nature of the benefit. Was it intended to be a substitute (i.e. an indemnity) for wages payable during the period of reasonable notice? For two reasons, the Court determined that they were. First, the disability benefits were a wage replacement benefit. It was clear from the terms of the plans that the benefits were intended to continue the employee's earnings in the event the employee was unable to work due to illness or injury. Second, the disability benefits would be reduced by other income received by the employee, including other disability income, wage continuation plan benefits, pension benefits, workers' compensation benefits and salary from other employment: para. 14. They were therefore not freestanding entitlements -- they were linked to and defined by the extent of actual income loss. (As I have already noted, the Court was also careful not to opine on whether the result would be the same if the employee had contributed money or money's worth in order to obtain the benefit. The Court specifically left open the question of whether "disability benefits should be deducted from damages for wrongful dismissal where the employee has contributed to the disability benefits plan": para. 22.)

82 The benefit in issue in this case is of an entirely different nature. Unlike the disability benefits in *Sylvester*, the pension benefit is clearly not an indemnity benefit for loss of salary due to inability to work. The purpose of the pension benefits, as expressed in the plan documents, "is to provide periodic pension payments to eligible employees ... after retirement and until death in respect of

their service as employees": art. 1.01, A.R., at p. 117. The pension plan is, in essence, a retirement savings vehicle to which an employee earns an absolute entitlement over time. Benefits are determined by years of service and salary level. An employee who leaves employment after 10 or more years of service receives either a deferred pension or a transfer of the lump sum commuted value of the pension entitlement to a locked-in retirement vehicle. Pensionable earnings are credited at 100 percent of salary while on approved unpaid leave or short-term disability. Moreover, unlike the disability payments in *Sylvester*, pension payments or entitlements are not in general reduced by other income or benefits received by the recipient. Mr. Waterman could have retired, drawn his full pension, and drawn a full salary from another employer. Pension benefits are clearly not intended to provide an indemnity for loss of income.

83 There is an even more fundamental difference. As Prowse J.A. points out in her reasons in the Court of Appeal, pension benefits like those in issue here bear many of the hallmarks of a property right. They, as she put it, are regarded as belonging to the employee:

> ... although the payments under the [Defined Benefit Pension] Plan are made wholly by IBM, they are made "on behalf of" the employee. This is also reflected in IBM's [Defined Contribution] Plan, where employer contributions are attributed to a fund in the name of the employee. In both instances, <u>the pension benefits are regarded as belonging to the employee</u>. They have the right to designate beneficiaries of the benefit; they can elect to transfer their pension account to another locked-in RRSP or to another employer after 10 years of service upon leaving IBM; there is a provision for a lump-sum pay-out on retirement in the case of "small pensions" (of lesser magnitude than that enjoyed by Mr. Waterman (Article 10.08)); and, in many jurisdictions, their pension rights are divisible between spouses on marriage breakdown. [Emphasis added; para. 60.]

84 This view is supported by basic principles of pension law. Mr. Waterman's pension was vested. As A. Kaplan and M. Frazer explain in *Pension Law* (2nd ed. 2013), at p. 203:

> Vesting is the "foundation stone" of employee protections upon which pension regulation is based ... . An employee who is vested has an enforceable statutory right to the accrued value of his or her pension benefit earned to date, even if the employee terminates employment and plan membership prior to retirement age. It is the vesting of pension benefits that shift our perception of pensions from purely contractual entitlements to quasi-proprietary interests.

85 Pension benefits have consistently been viewed as an entitlement earned by the employee. As Lord Reid put it in *Parry*, at p. 16: "The products of the sums paid into the pension fund are in fact delayed remuneration for [the employee's] current work. That is why pensions are regarded as earned income." The pension is therefore a form of retirement savings earned over the years of

employment to which the employee acquires specific and enforceable rights. This is no less the case because the pension benefits were not reduced by the wrongful dismissal; had they been, there would be no collateral benefit problem and no question of deduction. It is useful to ask this question: In light of the contract of employment, would the parties have intended to use an employee's vested pension entitlements to subsidize his or her wrongful dismissal? In my view, the answer must be no. As Joseph M. Perillo writes:

> Suppose an employer fires an employee without justification, breaching a contract of employment, and the employee turns to his or her savings account for living expenses. No one would argue that the employee's recovery against the employer should be diminished by the employee's withdrawals from savings. The savings account is a collateral source. To the extent that another collateral source resembles a savings account, the plaintiff should be able to recover damages without a deduction for the amount received from the collateral source. [Emphasis added; p. 706.]

86 My colleague Rothstein J. does not accept that the different nature of the benefits in issue here and in *Sylvester* is a relevant distinction between the two cases. However, Major J., writing for a unanimous Court in *Sylvester*, clearly thought it was. His first reason for deciding that the benefits ought to be deducted was that "the disability benefits were intended to be a substitute for the respondent's regular salary": para. 14. In other words, it was a key aspect of the Court's reasoning in *Sylvester* that the benefit in issue was intended to be an indemnity for wage loss. I find it impossible to dismiss the first reason the Court in *Sylvester* gave for its decision as irrelevant.

87 The Court in *Sylvester* then turned to the contract of employment. The goal was to see if it shed any light on the parties' intentions with respect to the receipt of both damages for wrongful dismissal and disability benefits. Contrary to the view of my colleague Rothstein J., the relevant question was *not* what Mr. Sylvester was entitled to under his contract in the event that his employer had not breached it. The question was whether the contract expressly or impliedly provided for him to receive both disability benefits and damages for wrongful dismissal: para. 13. Although the employment contract in *Sylvester* (as in this case) did not expressly address that question, it did so by implication. The receipt of both disability benefits and wages was not possible in any circumstances under the contract of employment. Moreover, other income of any nature had to be deducted from the amount of the disability payments. This suggested that the parties did not intend Mr. Sylvester to receive both disability benefits and damages representing lost wages during the notice period. As Major J. put it:

> The respondent's contractual right to damages for wrongful dismissal and his contractual right to disability benefits are based on opposite assumptions about his ability to work and it is incompatible with the employment contract for the respondent to receive both amounts. The damages are based on the premise that he would have worked during the notice period. The disability payments are

> only payable because he could not work. It makes no sense to pay damages based on the assumption that he would have worked in addition to disability benefits which arose solely because he could not work. This suggests that the parties did not intend the respondent to receive both damages and disability benefits. [Emphasis added; para. 17.]

88 As I read *Sylvester*, this analysis does not suggest that we should focus narrowly on the precise provisions of the employment contract, unless of course they deal expressly with the issue of whether pension benefits should be deducted from wrongful dismissal damages. In the absence of such an explicit provision -- and, as in *Sylvester*, there is no explicit provision in this case -- we must look at the contract in an attempt to determine what the parties intended with respect to the receipt of both wrongful dismissal damages and pension benefits.

89 When we examine the employment contract in this case, the picture is much less clear than it was in *Sylvester*. It is true that because Mr. Waterman was between the ages of 65 and 71 at the time of his dismissal and qualified for his full pension, he could not in fact receive both employment income from IBM and pension benefits. However, looking at the contract as a whole, it is not a fair implication that the parties agreed that pension entitlements should be deducted from wrongful dismissal damages.

90 First, an employee who is dismissed before his date of retirement would receive, without deduction, wrongful dismissal damages and all of his or her entitlements under the plan (for example, a deferred pension or its commuted value transferred to a locked-in savings vehicle). No one has suggested that these amounts would in any way affect wrongful dismissal damages. In fact, the value of any pension entitlements lost during the notice period would be a compensable loss in an unjust dismissal action: see, e.g., J. R. Sproat, *Wrongful Dismissal Handbook* (6th ed. 2012), at pp. 6-51 to 6-52.6. Second, a retired employee would receive, in full, both his pension benefits and any employment income earned from another employer. There is nothing before us to suggest that a retired IBM employee could not obtain employment with another employer and keep both his or her pension income and the new employment income. Third, once an employee reaches age 71, he or she could receive in full both employment income *from IBM* and pension benefits: plan description, at p. 2 (A.R., at p. 103); plan art. 9.02 (A.R., at p. 132). In *Sylvester*, not only was it impossible *in all circumstances* to receive salary and disability benefits, it was clear that the amount of disability benefits would be reduced by any other income, whatever its source, received by the employee: para. 14. Unlike *Sylvester*, it cannot be said here that the rights to damages for unjust dismissal and to pension benefits are based on opposite or incompatible assumptions. This conclusion is also consistent with the understanding of vested pension entitlements as being akin to property rights which accrue over time for the employee's benefit.

91 I conclude that, unlike the situation in *Sylvester*, Mr. Waterman's receipt of pension benefits and wrongful dismissal damages is not based on opposite assumptions about his ability to work and it is not incompatible with the employment contract that he could receive both pension benefits and

employment income.

92 Finally, the Court in *Sylvester* turned to the broader policy concerns, notably that dismissed employees should be treated alike and that the incentives should encourage rather than discourage employers from setting up disability plans. As Major J. put it, at para. 21:

> If disability benefits are paid in addition to damages for wrongful dismissal, the employee collecting disability benefits receives more compensation than the employee who is dismissed while working. Deducting disability benefits ensures that all affected employees receive equal damages ... If disability benefits are not deductible, employers who set up disability benefits plans will be required to pay more to employees upon termination than employers who do not set up plans. This deterrent to establishing disability benefits plans is not desirable. [Emphasis added.]

93 These factors are also relevant here, although, in this case, they support not deducting rather than deducting the benefits. Unlike in *Sylvester*, non-deduction in this case promotes equal treatment of employees. If deduction is permitted, an employee who is eligible to receive his or her pension but has not reached 71 years of age can, by means of wrongful dismissal, be forced to retire and draw on his or her pension benefits. By contrast, an employee who is not entitled to his or her pension receives either a deferred pension or the commuted value of it plus full damages for wrongful dismissal and an employee over the age of 71 receives both pension and employment income. Deducting the benefits only in the case of employees in Mr. Waterman's situation would constitute unequal treatment of pensionable employees. Moreover, deductibility seems to me to provide an incentive for employers to dismiss pensionable employees rather than other employees because it will be cheaper to do so. This is not an incentive the law should provide. While this is a broader policy consideration, it is directly related to the benefit in question and has a reasonable basis in fact.

94 My colleague Rothstein J. is of the view that there is no such incentive because "with respect to the cost of dismissing pensionable and non-pensionable employees, there is a difference only in form, not substance": para. 134. Respectfully, I cannot agree. The suggestion implicit in this is that there is a dollar for dollar correlation between the amount of the pension benefits that IBM claims should be deducted and the amount IBM contributed over time in order to fund those benefits such that it is not cheaper to dismiss a pensionable employee than one who is not eligible to collect a full pension. This proposition, however, is based on a considerable oversimplification of how pension benefits are funded and, in my respectful view, is not accurate.

95 My colleague Rothstein J. suggests that failure to deduct earned pension benefits from wrongful dismissal damages may disadvantage other employees in the future because it may "incentivize" employers to require an employee to work through the duration of the reasonable notice period to the potential disadvantage of employees. However, the risk of such an incentive

seems to me to be highly speculative. There are pluses and minuses for both the employer and employee of giving (and receiving) working notice. From the employer's perspective, it may not be advantageous to have the employee remain on the employer's premises during the period of working notice. In addition, the employer loses the benefit of the employee's efforts to mitigate damages by finding alternate employment, a benefit that is often unpredictable at the time of termination. The employer is always able to negotiate before firing an employee rather than firing without first negotiating. In light of these considerations, among others, it seems to me to be highly speculative to say that refusal to deduct pension benefits will encourage employers to give working notice rather than offer severance.

96 Finally, there is no parallel, from a policy analysis perspective, between this case and *Sylvester.* The Court in *Sylvester* was concerned that failure to deduct the non-contributory wage replacement benefits in issue there might make employers reluctant to fund wage replacement benefits. This concern does not arise here, given that the pension benefit is not intended to be an indemnity for wage loss and that the employees contribute to the cost of the pension benefits. Moreover, any employer who has this concern (and it must be said that the scarcity of reported cases on the point suggest that it arises very uncommonly) can address it by adding appropriate language to the pension plan text.

97 To conclude: in this case, the pension benefits are markedly different in nature than the disability benefits in issue in *Sylvester,* the intention of the parties in relation to the issue of deduction is much more uncertain in this case than in *Sylvester* and the broader policy considerations point in the opposite direction. Unlike the disability benefits in *Sylvester*, the pension benefits are not an indemnity for loss of earnings, they are not reduced by other benefits or income received and the employee over time receives a legal entitlement to the commuted value of the benefits. Unlike the situation respecting disability benefits in *Sylvester*, there is no general bar against an employee receiving both pension income and employment income and receipt of the benefits and income is not based on opposite or incompatible assumptions. Pension benefits are not reduced by other income. Not deducting the pension benefits serves the goal of equal treatment of employees and provides better incentives for just treatment of all employees.

98 I conclude, therefore, that *Sylvester* does not support IBM's position in this case, and that it, in fact, supports the conclusion that the pension benefits should not be deducted from the wrongful dismissal damages.

V. Disposition

99 I would dismiss the appeal with costs throughout.

The reasons of McLachlin C.J. and Rothstein J. were delivered by

ROTHSTEIN J. (dissenting):--

<u>Introduction</u>

100 Richard Waterman brought this suit alleging that his employer, IBM Canada Ltd., breached his employment contract by failing to provide him with reasonable notice of his termination. The trial judge found, and it is now undisputed that, Mr. Waterman was entitled to 18 months more notice than he was given, and that he is accordingly entitled to the salary he would have earned if he continued to work during that period. During the 18-month period, IBM paid Mr. Waterman monthly pension benefits under the assumption that he was retired. The sole issue in this case is whether the pension benefits that IBM paid to Mr. Waterman during the 18-month notice period must be deducted in calculating the appropriate damages award.

101 I agree with the majority that a straightforward application of the governing principle of contract damages -- that the non-breaching party be placed in the position he would have been in had the contract been performed -- leads to the conclusion that deduction is required (see para. 2). The parties agree that, had Mr. Waterman been given reasonable notice and worked through the reasonable notice period, he would have received his salary, but not his pension, until the notice period elapsed. Deducting the pension benefits IBM paid him during the reasonable notice period thus puts him in the position he would have been in had the contract been performed and failure to deduct gives him a windfall.

102 However, the majority accepts Mr. Waterman's argument that he should be allowed a windfall because his pension benefits are subject to the "private insurance" exception. I would reject that argument. This case requires the Court to assess Mr. Waterman's loss under the terms of a single contract which gave rise to both Mr. Waterman's right to reasonable notice and his right to pension benefits. The private insurance exception has no application to such a case. Where the Court is called upon to assess loss under a single contract, the plaintiff's entitlement turns on the ordinary governing principle that he should be put in the position he would have been in had the contract been performed.

103 It is important to note that not all pension plans are alike. Mr. Waterman's pension plan is a defined benefit plan, under which IBM undertook to provide Mr. Waterman with pension benefits from the time of his retirement until the time of his death, based on a predetermined formula. That is to say that, from Mr. Waterman's perspective, upon retirement, he would receive his defined benefits from an unlimited fund for the rest of his life. For this reason, Mr. Waterman's receipt of pension benefits during the reasonable notice period did not affect his future entitlement to pension benefits and deducting the benefits does not have the effect of taking anything away from Mr. Waterman. Rather, not deducting has the effect of giving Mr. Waterman more than he bargained for and charging IBM more than it agreed to pay.

<u>Factual Background</u>

104 Mr. Waterman was an employee of IBM for approximately 42 years. At the time he was terminated, he was 65 years old.

105 As an employee of IBM, Mr. Waterman became a member of the company's defined benefit pension plan. Under the terms of the plan, IBM was required to make contributions to the pension plan on behalf of its employees and, upon an employee's eligibility to receive benefits, IBM would provide the employee with monthly benefits according to a predetermined formula until the employee's death. An employee became eligible to receive his monthly benefits upon retiring after reaching the age of 65. An employee whose employment was terminated prior to the age of 65 could receive his pension benefits upon turning 65 or could elect to transfer the actuarial equivalent of his accrued pension to a new employer. An employee also became eligible to receive his benefits upon reaching the age of 71, independent of whether he had been terminated or retired, which, according to the parties, was necessary for the plan to comply with income tax regulations. At the time Mr. Waterman was terminated by IBM, the monthly payment he would receive upon becoming eligible had already been determined for several years.

106 IBM terminated Mr. Waterman in March 2009. It provided him with two months' working notice, after which it would consider him retired and begin paying him his pension benefits. The trial judge found, and it is now undisputed that, IBM was required to give Mr. Waterman an additional 18 months of notice.

107 The termination letter also offered Mr. Waterman a separation payment in exchange for a general release from liability. As explained later, the separation offer would have provided Mr. Waterman with more than he would have earned had he been given the full 20-month notice period and worked through the notice period. Mr. Waterman declined IBM's separation offer. He continued to work for IBM during the two-month notice period that he was given, and thereafter began collecting monthly pension benefits from IBM. On June 11, 2009, Mr. Waterman initiated this action to enforce his contractual right to be provided with reasonable notice of his termination.

108 In September 2009, Mr. Waterman obtained alternative employment as a part-time insurance salesman.

Procedural History

Supreme Court of British Columbia, 2010 BCSC 376, 2010 CLLC para210-021

109 After a summary trial, Goepel J. found that IBM breached Mr. Waterman's employment contract by failing to provide him with reasonable notice. Goepel J. held that IBM was required to provide Mr. Waterman with an additional 18 months of notice beyond the two months that had been provided. As a result, Mr. Waterman was entitled to the salary he would have earned and benefits he would have accrued if he had continued to work for IBM during that time.

110 Goepel J. did not deduct the pension benefits that IBM paid to Mr. Waterman during the notice period in calculating his damages. Goepel J. expressed the view that he was bound by the Court of Appeal for British Columbia's decision in *Girling v. Crown Cork & Seal Canada Inc.* (1995), 9 B.C.L.R. (3d) 1, in which it was held that pension benefits should not be deducted from

wrongful dismissal damages. He acknowledged the possibility that *Girling* was no longer an accurate statement of the law in light of this Court's decision in *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315, but found it incumbent upon him to follow *Girling* for reasons of judicial comity.

111 Based on this reasoning, Goepel J. awarded Mr. Waterman $93,305 in damages, which reflected the salary and benefits he would have earned if he had worked through the additional 18 months of notice, less the income earned from his new employment during that period.

Court of Appeal for British Columbia, 2011 BCCA 337, 20 B.C.L.R. (5th) 241

112 Writing for a unanimous panel, Prowse J.A. dismissed IBM's appeal.

113 Prowse J.A. observed that the approach the Court of Appeal had previously taken in *Girling* was rejected by this Court's decision in *Sylvester*. In particular, *Sylvester* rejected the Court of Appeal for British Columbia's approach of treating agreements for employee benefits as contracts distinct from the employment contract. According to Prowse J.A., under *Sylvester*, Mr. Waterman's entitlement to both salary and payment of his pension benefits during the notice period turned on the construction of the contractual arrangement between the parties.

114 After reviewing the terms of Mr. Waterman's employment contract and IBM's defined benefit plan, Prowse J.A. found that there was no express provision addressing Mr. Waterman's rights in the event of wrongful dismissal. Prowse J.A. turned to consider what the parties would have intended had they put their minds to that circumstance. She concluded that, although there was no evidence regarding the parties' intention, had they considered the issue, they would not have intended for Mr. Waterman's pension benefits to be deducted from wrongful dismissal damages.

115 Prowse J.A. also concluded, at para. 62, that "the pension benefits in issue are also properly characterized as a form of non-deductible, non-indemnity insurance", as described by McLachlin J., as she then was, in *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359.

Issue

116 The only issue before this Court is whether the pension benefits IBM paid to Mr. Waterman during the reasonable notice period should have been deducted in calculating his damages.

Analysis

117 My analysis proceeds in two stages. First, I consider whether it is necessary to deduct the pension benefits Mr. Waterman received during the reasonable notice period in order to put him in the position he would have been in had the contract been performed -- i.e. had he been given reasonable notice and worked through the end of the reasonable notice period. Second, I consider whether there is a basis for applying the private insurance exception, which allows a plaintiff to

receive excess compensation in certain circumstances. I conclude that, to put Mr. Waterman in the position he would have been in had the contract been performed, the pension benefits he received must be deducted. The private insurance exception is not applicable to this case.

Contract Damages for Wrongful Dismissal

118 The governing principle for damages upon breach of contract is that the non-breaching party should be provided with the financial equivalent of performance (J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at p. 871). With respect to wrongful dismissal, damages should "represent the salary the employee would have earned had the employee worked during the notice period, less any amounts credited to mitigation" (*Sylvester*, at para. 1). I agree with the majority that applying this rule leads to the deduction of the pension benefits in this case.

119 In *Sylvester*, this Court considered whether disability benefits received by a wrongfully terminated employee during his reasonable notice period should be deducted from damages for wrongful dismissal. Major J., writing for a unanimous Court, held that deduction was required. He explained that employer-provided benefits should not be considered as "distinct from the employment contract, but rather as integral components of it" (para. 13). As such, "[t]he question of deductibility ... turn[ed] on the terms of the employment contract and the intention of the parties" (para. 12).

120 Major J. went on to explain that damages for wrongful dismissal were "based on the premise that the employee would have worked during the notice period" (para. 15). The employee's "contractual right to damages for wrongful dismissal and his contractual right to disability benefits [were] based on opposite assumptions about his ability to work and it [was] incompatible with the employment contract for the respondent to receive both amounts" (para. 17). Based on this analysis, Major J. concluded: "It makes no sense to pay damages based on the assumption that [the plaintiff] would have worked in addition to disability benefits which arose solely because he could not work" (para. 17).

121 It follows from a straightforward application of *Sylvester* that deduction is required in this case. In particular, Mr. Waterman's wrongful dismissal damages must be "based on the premise that the employee would have worked during the notice period" (*Sylvester*, at para. 15). Under the terms of Mr. Waterman's employment contract, he would have been eligible to receive pension benefits *only* upon being terminated or retiring. Therefore, as in *Sylvester*, Mr. Waterman's contractual right to wrongful dismissal damages and his contractual right to his pension are based on "opposite assumptions" about his availability to work (para. 17). It thus "makes no sense" to pay damages on the assumption that he could have earned both (*ibid.*).

122 This conclusion is necessitated by the nature of the pension plan at issue in this case -- a defined benefit plan. This plan is materially different from a defined *contribution* plan, and the distinction between these two types of pension plans is at the heart of my disagreement with the majority.

123 A defined contribution plan "operates in much the same way as group registered retirement savings plans", in that it provides an employee with a finite total amount or lump sum of retirement benefits (A. Kaplan and M. Frazer, *Pension Law* (2nd ed. 2013), at p. 89). It would be inappropriate to deduct pension benefits that a wrongfully terminated employee receives from a defined contribution plan because deduction would leave the employee in a worse position that he would have been in had his employment contract not been breached.

124 In particular, in the case of a defined contribution plan, if the employee's employment contract is performed (i.e. he is given reasonable working notice of his termination and he continues to work through the notice period), he would expect to receive his salary through the notice period and the full lump sum he would have accrued in his savings account or defined contribution plan by the end of the reasonable notice period, including whatever additions should have been made to the plan during that notice period. If, instead, the employee is wrongfully dismissed and draws benefits from his finite lump sum during the reasonable notice period, deducting the pension benefits would leave the employee with an amount equal to his salary through the notice period and the lump sum, less the amount he had withdrawn during the notice period. He would thus be awarded *less* than he was entitled to under his employment contract.

125 Throughout Mr. Waterman's argument before this Court, he has made submissions that his pension operates like a savings account. He is not alone in this respect. The Court of Appeal, at para. 48, quoted with approval language from Kent J. in *Chandler v. Ball Packaging Products Canada Ltd.,* [1992] O.J. No. 3114 (QL) (Gen. Div.), that pension payments should be viewed "as akin to a registered Retirement Savings Plan" (para. 4).

126 The majority too accepts the analogy. It holds that "[p]ension benefits ... constitute a type of retirement savings" (para. 4; see also para. 85). It quotes, with emphasis, the following language from J. M. Perillo, "The Collateral Source Rule in Contract Cases" (2009), 46 San Diego L. Rev. 705, at p. 706:

> Suppose an employer fires an employee without justification, breaching a contract of employment, and the employee turns to his or her savings account for living expenses. No one would argue that the employee's recovery against the employer should be diminished by the employee's withdrawals from savings. The savings account is a collateral source. <u>To the extent that another collateral source resembles a savings account, the plaintiff should be able to recover damages without a deduction for the amount received from the collateral source.</u> [Emphasis added by Cromwell J., at para. 85.]

These references may wrongly suggest that Mr. Waterman's pension benefits came from a finite account and thus came at a cost to him. If Mr. Waterman had needed to draw from his own savings due to his wrongful dismissal, the amount he withdrew would have to be reflected in the damages award in order to put him in the position he would have been in had the contract been performed.

However, analogizing Mr. Waterman's pension to a savings account misconceives the nature of the defined benefit pension plan at issue in this case.

127 Unlike a defined contribution plan, the defined benefit plan at issue in this case is fundamentally different from a savings account. The defined benefit plan did not provide Mr. Waterman with a finite lump sum that was partially depleted by the pension funds he received during his reasonable notice period. Rather, the plan guaranteed him fixed predetermined payments upon retirement for as long as he would live. For that reason, deducting Mr. Waterman's pension benefits in this case does not have the effect of "taking away" benefits that he would have been entitled to had IBM not breached the contract. On the contrary, deducting provides him with exactly what he would have received had the employment contract been performed: an amount equal to his salary during the reasonable notice period and thereafter defined benefits for the rest of his life.

128 The different outcome in the cases of defined benefit and defined contribution plans turns on a straightforward application of the governing principle of contract damages -- that the non-breaching party should be placed in the same position he would have been in had the contract been performed. It has nothing to do with the collateral benefit, compensating advantages or private insurance exception. As my colleague correctly observes, those exceptions are relevant only where the plaintiff experiences "excess recovery" (para. 23). However, as the analysis above demonstrates, there is no excess recovery when pension benefits received from a *defined contribution plan are not* deducted or where benefits received from a *defined benefit plan are* deducted. In each case, the result is to put the employee in the position he would have been in had the contract been performed.

129 At the time Mr. Waterman was wrongfully dismissed, the amount of pension benefits he was to receive upon retirement had already been determined for some time and could not have gone up if he had continued to work for IBM. If Mr. Waterman's pension benefits could have increased during the notice period, his wrongful dismissal damages would have compensated for this loss. However, in this case, Mr. Waterman's wrongful dismissal had no impact on his pension entitlement and, as the parties agree, there is no need to make adjustments to his damage awards based on pension entitlements that would have accrued had he worked through the reasonable notice period.

130 The majority states that the fact that Mr. Waterman's pension comes from a defined benefit plan does not change its nature as a contributory, non-indemnity benefit (paras. 63 and 68). However, the nature of the benefit as non-indemnity or contributory does not answer the question of whether the plaintiff will be provided with the financial equivalence of performance or will receive excess recovery. With respect, the majority reasons conflate the analysis of contract damages for wrongful dismissal with what considerations should apply with respect to the private insurance exception to contract damages. Under the governing principle of contract damages, the fact that the pension plan at issue is a defined benefit plan leads to the conclusion that the benefits must be deducted from Mr. Waterman's wrongful dismissal damages.

131 As an aside, not distinguishing between defined benefit and defined contribution plans may

also be why the majority's policy concern about making pensionable employees cheaper to dismiss is incorrect. The majority suggests that deducting the benefits IBM paid to Mr. Waterman during the reasonable notice period would "provide an incentive for employers to dismiss pensionable employees rather than other employees because it will be cheaper to do so". The majority states that "[t]his is not an incentive which the law should provide" (para. 93).

132 This incentive argument is based on a false premise: that deducting pension benefits from reasonable notice damages would make it cheaper to dismiss a pensionable employee than a non-pensionable employee. That is not the case. The pension benefits that Mr. Waterman received during the notice period did not come out of thin air. With a defined benefit pension plan, the employer is solely responsible for providing the employee with the guaranteed defined benefits. In the event the payment of the defined benefits results in an actuarial deficit in the pension fund, the employer will be required to top up the fund to meet its statutory obligation to keep it fully funded. Alternatively, if the fund is operating at an actuarial surplus despite payment of the benefits, the contribution holiday that the employer may otherwise be able to take -- i.e. the break from its regular contributions to the pension fund -- would be reduced. In this way, withdrawal of the benefits from the pension fund, like any other payment, affects the employer's bottom line.

133 The majority alleges that this analysis is an oversimplification and is inaccurate (para 94). This assertion seems to misunderstand the impact of IBM having paid pension benefits to Mr. Waterman. The analysis has nothing to do with funding the benefits over time. Rather, the analysis is simply how the pension benefits paid by IBM impacted IBM's obligation to ensure the actuarial solvency of the pension fund, such that it would be necessary to either top up the pension fund or to refrain from taking a contribution holiday to the extent of those pension benefit payments.

134 It follows that, with respect to the cost of dismissing pensionable and non-pensionable employees, there is a difference only in form, not substance. That is to say, in the case of an employee who is not eligible to receive his defined pension benefits, the employer compensates a dismissed employee by paying him damages equal to the salary he would have earned during the reasonable notice period. In the case of an employee who is eligible to receive his defined pension benefits, the employer pays: (1) pension benefits from the employer's pension fund, which it is responsible for maintaining, and (2) damages equal to the salary the employee would have earned during the notice period less what it has already paid from the pension fund. In both cases, the cost to the employer is the same: an amount equal to the salary the employee would have earned had he worked through the reasonable notice period. There is thus no incentive to terminate pensionable employees.

135 The majority emphasizes Mr. Waterman's "specific and enforceable rights" in relation to his pension (para. 85). It is not disputed that Mr. Waterman's pension benefits are vested and that this gives him specific and enforceable rights. However, his specific and enforceable rights remain subject to the provisions of the plan text which govern the conditions under which benefits will be paid. As a result, even though Mr. Waterman's pension plan had vested, he could not have

demanded to receive both his salary and his pension benefits had he continued to work for IBM through the reasonable notice period.

Applicability of the Private Insurance Exception

136 The majority agrees that putting Mr. Waterman in the position he would have been in had the contract been performed would lead to the conclusion that the pension benefits must be deducted (para. 2). According to the majority, however, the pension benefits that IBM paid to Mr. Waterman under his employment contract on the assumption that he was retired may be treated as a "private insurance" and, thus, need not be deducted under the private insurance exception. I disagree with that conclusion. In my view, the private insurance exception has no applicability to this case.

137 This case involves the interpretation of a single employment contract that gives rise to Mr. Waterman's right to wrongful dismissal damages and his right to pension benefits. This Court has determined that employer-provided benefits "should not be considered contracts which are distinct from the employment contract, but rather as integral components of it" (*Sylvester*, at para. 13). The majority is correct that the words "'single contract' rule" do not literally appear in *Sylvester*, but the reasoning in Sylvester can lead to no other conclusion (para. 52).

138 As I will explain, in the context of a single contract, the collateral benefit or private insurance exception has no application. The reason is straightforward: where the plaintiff's cause of action and his right to a particular benefit arise from the same contract and the plaintiff is indeed entitled to the benefits -- i.e. he has "insured" himself in a manner that requires the defendant to pay the benefits -- then the plaintiff will receive the benefits based on the ordinary governing principle that he should be placed in the position he would have been in had the contract been performed. There will be no need to reach the collateral benefit exception.

139 Said another way, given that Mr. Waterman's pension flows from the same contract under which the court must assess his loss, the need to reach the private insurance exception is itself a concession that Mr. Waterman's pension was not "private insurance" that covered the breach in the first place. If he had "insured" the breach, he would get the benefits under the governing principle that he should be provided with what he would have expected to receive under the terms of the contract.

140 For this reason, the majority's approach to this case contains an inherent inconsistency: the majority concludes that Mr. Waterman had "private insurance" that allows him to keep his pension benefits in addition to his salary. To the extent Mr. Waterman had such "private insurance", it must have come from his employment contract. However, if Mr. Waterman's employment contract indeed allowed him to have pension benefits in addition to his salary, there would be no need to reach any exception: he would get the benefits by simply giving him what he would have expected under the terms of the contract.

141 In addition to this troubling inconsistency, applying the private insurance exception to this

case would not be consistent with the justification for the exception. The rationale for the private insurance exception is that it would be "be unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should enure to the benefit of the tortfeasor" (*Parry v. Cleaver*, [1970] A.C. 1 (H.L.), per Lord Reid, at p. 14). Accepting the assumption that Mr. Waterman's work for IBM over the years is analogous to paying premiums to obtain his pension plan, it remains that the contractual terms of the pension or "insurance" he paid for allowed him to receive salary or pension benefits, but not both at the same time. In other words, this is not a case where deduction would lead to some benefit that the plaintiff paid for enuring to the benefit of the defendant. Quite to the contrary, as explained above, deducting is necessary to provide the plaintiff with the pension or "insurance" he paid for. Not deducting has the effect of the plaintiff receiving more than he expected to receive under the terms of his contract and requiring the defendant to pay more than it agreed to pay.

142 This distinguishes the case before the court from all other cases in which the private insurance exception has been applied. Each of *Guy v. Trizec Equities Ltd.*, [1979] 2 S.C.R. 756, *Canadian Pacific Ltd. v. Gill*, [1973] S.C.R. 654, and *Cunningham* involved a plaintiff who was personally injured by the defendant and, upon being sued, the defendant sought to pay *less* than what it owed under ordinary principles of compensatory damages based on a distinct contractual or statutory benefit that the plaintiff received from a third party.

143 Similarly, *Jack Cewe Ltd. v. Jorgenson*, [1980] 1 S.C.R. 812, involved a wrongful dismissal suit, in which the employer sought to have its damages reduced based on the employee's distinct statutory entitlement to unemployment benefits. Contrary to the majority's assertion that the benefits were derived from the employment contract, the source of the benefits was a *third party* -- the government. As with *Guy*, *Gill*, and *Cunningham*, *Jack Cewe* was not a case in which the plaintiff's cause of action and the benefit he received came from a single contract whose terms did not allow the plaintiff to receive both salary and benefits at the same time.

144 Considered in terms of the justification for the private insurance exception, in each of *Guy*, *Gill*, *Cunningham* and *Jack Cewe*, the Court was faced with two choices: (1) not deduct the benefits and thus require the defendant to pay the amount equal to the plaintiff's loss determined by ordinary principles of tort or (in the case of *Jack Cewe*) contract damages, even though the plaintiff would receive more than his actual loss as a result of the benefits he received; or (2) allow the defendant to pay nothing or some amount less than the plaintiff's loss, such that the plaintiff does not get the benefit resulting from the premiums he paid to the third party. The Court decided, consistent with the rationale for the private insurance exception, that the plaintiff -- not the defendant -- should receive the benefits associated with the premiums he paid.

145 The choice in this case is very different. The options are to (1) not deduct, requiring the defendant to pay more than it agreed to pay the plaintiff under the terms of the employment contract and awarding the plaintiff more than he bargained for; or (2) deduct, requiring the defendant to pay an amount equal to the plaintiff's loss (i.e. the amount required to put the plaintiff in the position he

would have been in had the contract been performed) and awarding the plaintiff an amount equal to his loss. In neither case do benefits that the plaintiff actually paid for enure to the defendant. The issue is whether the defendant should be required to pay twice, such that the plaintiff receives more than he bargained for under his contract, or pay once, such that the plaintiff receives exactly what he bargained for under his contract. In my view, the latter is appropriate.

146 The fact that this case involves a single contract also distinguishes the cases the majority cites, such as *United States v. Price*, 288 F.2d 448 (4th Cir. 1961), and *Phillips v. Western Company of North America*, 953 F.2d 923 (5th Cir. 1992), in which employees sued their employers in tort for personal injuries caused by the employer. In each of those cases, the employer sought to pay less than the plaintiff's loss from the injury, according to ordinary tort principles, based on benefits that flowed to the plaintiff from his employment contract. In neither case did the facts before the court establish that it would be inconsistent with the terms of the employment contract for the plaintiff to receive both tort damages and his employment benefits. That is in contrast to this case, where, as described above, Mr. Waterman's contract provided that he could receive salary or pension benefits, but not both.

147 Further, the choice before the courts in *Price* and *Phillips* was whether to (1) require the defendant to honour both of its legal duties (the legal duty to take reasonable care under tort and the legal duty to pay the plaintiff the amount promised under his employment contract) such that the plaintiff would receive compensation for his loss and the benefits he was entitled to under his employment contract; or (2) allow the defendant to offset the damages for breaching its duty of care using the benefits that it had separately promised the plaintiff in his employment contract, such that those benefits would enure to the defendant. Again, there is no parallel here. This case involves a single legal duty to honour the terms of an employment contract. The terms of that contract provided that Mr. Waterman would receive only his salary during his reasonable notice period.

148 In sum, I would reject the idea that the private insurance exception is applicable to cases that involve a single contract that is the source of both the plaintiff's cause of action and other benefits. In such circumstances, there is no justification for resorting to the private insurance exception because the plaintiff's entitlement to the benefits is established based on the terms of his contract.

The Majority's Treatment of Sylvester

149 The majority has devoted an extensive portion of its reasons in attempting to distinguish this case from *Sylvester* and at the same time attempting to rely on *Sylvester* (paras. 80-98). As I read the majority's reasons with respect to *Sylvester*, they say that, under the ordinary principles of contract damages, *Sylvester* would support the proposition that Mr. Waterman is entitled to both his salary and his pension benefits at the same time (paras. 88-91). Indeed, if *Sylvester* was authority for such a result, it is difficult to understand the majority's resort to the private insurance exception. With respect, the majority's analysis of *Sylvester* is strained. In my respectful opinion, a straightforward reading of *Sylvester* demonstrates that it is a fully applicable authority supporting

the proposition that under a single contract of employment, barring contract terminology to the contrary, an individual cannot receive salary as if he is working and pension benefits as if he is retired. These are opposite, incompatible assumptions. Thus, salary and pension income are not payable at the same time.

Efficient Breach

150 My colleague appropriately cautions against speculation about "policy" and the future impact of deduction rules. I would not resolve this case based on policy or speculation. In my view, the case should be resolved based on the terms of the parties' contract.

151 Only in response to the majority's concerns about policy, I point out that while the majority's conclusion would operate to Mr. Waterman's benefit in this case, it would do so at the cost of other employees in the future. It is often advantageous for both employers *and* employees to agree to an amount for reasonable notice, rather than having the employee work through the notice period. For instance, in the case of an employer who must terminate an employee, it may be advantageous for the employer to offer the employee at least the amount he would have earned throughout the notice period in order to end the employment relationship immediately. In those circumstances, it will generally also be economically favourable for the employee to accept the offer because he will receive the full salary he would have earned if he worked through the notice period without having to work through the period. He would then be free to earn additional income from alternate employment.

152 In fact, the record reveals that this was precisely the case here: IBM offered Mr. Waterman a separation agreement that would have provided him with even more than he would have earned if he had worked through the reasonable notice period. If IBM had provided Mr. Waterman with the additional 18 months of notice to which he was entitled and Mr. Waterman had worked through the entire notice period, he would have earned approximately $112,000 in salary and accrued benefits. Under the separation offer Mr. Waterman turned down, he would have received an $80,000 separation payment, plus an additional $38,000 in pension payments during the 18-month period. He thus would have received approximately $118,000. In addition, he would have been free to obtain income from alternative employment.

153 This is an example of efficient breach. This Court has previously described efficient breach and cautioned courts from discouraging such a breach:

> Efficient breach is what economists describe as a Pareto optimal outcome where one party may be better off but no one is worse off, or expressed differently, nobody loses. Efficient breach should not be discouraged by the courts. This lack of disapproval emphasizes that a court will usually award money damages for breach of contract equal to the value of the bargain to the plaintiff.

> (*Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601, at para. 31)

154 The majority's approach discourages efficient breach in the context of an employer with a defined benefit pension plan who wishes to terminate an employee. This is because, all things equal, the majority approach incentivizes the employer to require the employee to work through the notice period (and avoid paying out the pension benefits) instead of offering the employee a separation package that would be economically superior for the employee. While there are always a number of competing factors that govern whether an employer makes a separation offer and what that offer contains, the majority's approach encourages, at least to some extent, giving working notice rather than severance.

Conclusion

155 The pension benefits IBM paid to Mr. Waterman during the reasonable notice period should be deducted in assessing Mr. Waterman's damages for wrongful dismissal. I would allow the appeal with costs throughout.

Appeal dismissed with costs throughout, MCLACHLIN C.J. *and* ROTHSTEIN J. *dissenting.*

Solicitors:

Solicitors for the appellant: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the respondent: MacKenzie Fujisawa, Vancouver.

* * * * *

Corrigendum, released January 10, 2014

Please note the following changes in the English version of *IBM Canada Limited v. Waterman*, 2013 SCC 70, released December 13, 2013:

> Paragraph 144, first sentence should read: "Considered in terms of the justification for the private insurance exception, in each of *Guy, Gill, Cunningham* and *Jack Cewe*, the Court was faced with two choices: (1) not deduct the benefits and thus require the defendant to pay the amount equal to the plaintiff's loss determined by ordinary principles of tort or (in the case of *Jack Cewe*) contract damages, even though the plaintiff would receive more than his actual loss as a result of the benefits he received; or (2) allow the defendant to pay nothing or some amount less than the plaintiff's loss, such that the plaintiff does not get the benefit resulting from the premiums he paid to the third party."

Paragraph 145, second sentence should read: "The options are to (1) not deduct, requiring the defendant to pay more than it agreed to pay the plaintiff under the terms of the employment contract and awarding the plaintiff more than he bargained for; or (2) deduct, requiring the defendant to pay an amount equal to the plaintiff's loss (i.e. the amount required to put the plaintiff in the position he would have been in had the contract been performed) and awarding the plaintiff an amount equal to his loss."

TAB 6

Indexed as:

Schmidt v. Air Products Canada Ltd.

Air Products Canada Ltd., William M. Mercer Limited, Confederation Life Insurance Company and T. J. Westley, appellants;
v.
Gunter Schmidt in his personal capacity and on behalf of the Beneficiaries of the Stearns Catalytic Ltd. Pension Plans, respondents.
And between
Gunter Schmidt in his personal capacity and on behalf of the Beneficiaries of the Stearns Catalytic Ltd. Pension Plans, appellants;
v.
Air Products Canada Ltd., William M. Mercer Limited, Confederation Life Insurance Company and T. J. Westley, respondents.

[1994] 2 S.C.R. 611

[1994] 2 R.C.S. 611

[1994] S.C.J. No. 48

[1994] A.C.S. no 48

File Nos.: 23047, 23057.

Supreme Court of Canada

1993: December 1; 1994: June 9.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Pensions -- Trusts -- Contracts -- Pension fund -- Surplus -- Entitlement to surplus in defined benefit pension plans -- One plan incorporating a trust fund and not contemplating the reversion of surplus assets to the company -- Second plan originally defined contribution plan but converted to defined benefit plan -- Second plan making no reference to the existence of a trust and specifically contemplating the reversion of surplus assets to the company -- Whether employer entitled to surplus -- Whether employer entitled to contribution holiday in situation where pension fund in surplus -- Employment Pension Plans Act, S.A. 1986, c. E-10.05, ss. 42(2), 58(a), (b), (c) -- Regulations to the Employment Pension Plans Act, Alta. Reg. 364/86, s. 34(9)(b)(i), (ii), (iii), (iv).

Stearns-Roger Canada Ltd. (Stearns) and Catalytic Enterprises Ltd. (Catalytic) merged and eventually became Air Products Canada Ltd. Both companies had defined benefit pension plans for their employees, and both plans were in surplus. Their pension plans and funds were amalgamated and evolved into two virtually identical Air Products Plans, one of which forms the subject of the appeal and cross-appeal; the senior management plan will be affected by the result.

In 1959, Catalytic instituted a contributory money-purchase plan incorporating a trust fund administered by a trustee. By 1966, the plan had been amended to become a contributory defined benefits plan. No provision existed as to the treatment of surplus funds until the plan was further amended in 1978 to give the employer a purported discretion as to the distribution of any surplus which might remain upon the termination of the pension plan.

The first Stearns plan, created in 1970, was a contributory defined benefits plan until 1977, when it was amended to provide that employee contributions were to be of a voluntary nature only. All relevant versions of the Stearns plan gave the employer a discretion as to the distribution of any surplus which might remain upon the termination of the pension plan.

The amalgamated plan was a contributory defined benefits plan. The plan gave the company a discretion as to the distribution of surplus upon termination and provided for the automatic reversion to the company of any surplus remaining once benefits paid to a member had reached the maximum level specified in the plan. For several years the company transferred no assets to the fund but rather met its contributions from the actuarially determined surplus existing in the pension fund.

The Air Products pension plan was terminated following the sale of most of the company's assets. Actuarial calculations established that a substantial surplus would remain in the plan after all benefits had been paid. Both Air Products, and Gunter Schmidt, on behalf of the Air Products employees, applied to the Alberta Court of Queen's Bench for a declaration of entitlement to the surplus funds. Schmidt also sought a declaration that Air Products be required to repay the amount of fund surplus it had used to take a contribution holiday. The Court of Queen's Bench found that the portion of the surplus derived from the Catalytic fund was to be paid out to the employees, and that Air Products was not entitled to take a contribution holiday utilising any part of the Catalytic surplus. The surplus traceable to the Stearns fund was found to belong to Air Products. An appeal

by the company to the Alberta Court of Appeal in respect of the Catalytic surplus and the contribution holiday and a cross-appeal by the former Stearns employees in respect of the Stearns surplus were both dismissed.

At issue here is the question of entitlement to surplus monies remaining in an employee pension fund once the fund has been wound up and all benefits either paid or provision made for their payment. There is a further related issue as to whether or when employers may refrain from contributing to ongoing pension plans which are in "surplus". Both the appeal and cross-appeal are the same as before the Court of Appeal. The former Catalytic employees are the respondents on the appeal and the former Stearns employees are the appellants on the cross-appeal.

Held (Sopinka and McLachlin JJ. dissenting in part): The appeal by Air Products Canada Ltd. (File No. 23047) with respect to entitlement to any surplus traceable to the Catalytic fund should be dismissed and its appeal with respect to its entitlement to take a contribution holiday is allowed.

Held: The cross-appeal by Gunter Schmidt in his personal capacity and on behalf of the beneficiaries of the Stearns pension plans (File No. 23057) should be dismissed with respect to the entitlement of Air Products Canada Ltd. to all surplus remaining in the pension fund derived from the Stearns plan and to its entitlement to take a contribution holiday.

Per La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ.: Absent legislation to the contrary, a court must determine competing claims to pension surplus by a careful analysis of the pension plan and the funding structures created under it. First it must determine, using ordinary principles of trust law, if the pension fund is impressed with a trust. A trust will exist whenever there has been an express or implied declaration of trust and an alienation of trust property to a trustee to be held for specified beneficiaries. If the pension fund, or any part of it, is not subject to a trust, then any issues relating to outstanding pension benefits or to surplus entitlement must be resolved by applying principles which pertain to the interpretation of contracts.

Different considerations apply if the fund is impressed with a trust. The trust is not a trust for a purpose, but a classic trust governed by equity, and, to the extent that applicable equitable principles conflict with plan provisions, equity must prevail. The trust will in most cases extend to an ongoing or actual surplus as well as to that part of the pension fund needed to provide employee benefits. An employer may explicitly limit the operation of the trust so that it does not apply to surplus and, as a settlor of the trust, may reserve a power to revoke the trust. In order to be effective, the latter power must be clearly reserved at the time the trust is created. A power to revoke the trust or any part of it cannot be implied from a general, unlimited power of amendment.

Funds remaining in a pension trust following termination and payment of all defined benefits may be subject to a resulting trust. Before a resulting trust can arise, all of the trust's objectives must have been fully satisfied. Even when this is the case, the employer cannot claim the benefit of a resulting trust when the terms of the plan demonstrate an intention to part outright with all money contributed to the pension fund. In contributory plans, it is not only the employer's, but also the

employees', intentions which must be considered. Both are settlors of the trust.

An employer's right to take a contribution holiday must also be determined on a case-by-case basis. It can be excluded either explicitly or implicitly in circumstances where a plan mandates a formula for calculating employer contributions which removes actuarial discretion. Contribution holidays may also be permitted by the terms of the plan. When the plan is silent on the issue, the right to take a contribution holiday is not objectionable so long as actuaries continue to accept the application of existing surplus to current service costs as standard practice. These principles apply whether or not the pension fund is subject to a trust. Because no money is withdrawn from the fund by the employer, the taking of a contribution holiday represents neither an encroachment upon the trust nor a reduction of accrued benefits. These general considerations are, of course, subject to applicable legislation.

The Catalytic plan and the trust agreement constituted a clear declaration of an intention to create a trust. The subject matter of the trust was defined and the beneficiaries were identified in the trust agreement by reference back to the plan. This classic trust established for the benefit of a defined group of persons was never terminated and so continues to exist. The parties contemplated that the trust would continue if a different trustee were named. The trust therefore was not terminated when, in 1974, the company transferred control of its pension fund to Confederation Life Insurance Company. Further, the fact that the 1978 version of the Catalytic plan removed all reference to a trust could not have the effect of terminating the trust. Nor could any of the provisions of the 1984 investment contract entered into by Stearns Catalytic and Confederation Life have that effect.

The trust fund was comprised of all contributions made by both the company and the employees, together with any earnings of those monies. The fact that the 1959 plan was a defined contribution plan under which no surplus could arise does not affect this definition of the trust fund. The company could only claim the surplus remaining on termination by virtue of a resulting trust, or by validly revoking the trust. The purposes of the trust were not fully satisfied by the payment of all defined benefits. One of the objects of the trust was to use any money contained in the fund for the benefit of the employees. The benefits to which employees were entitled under the 1959 plan were not restricted to only those contributions made by the company on their behalf. Therefore, the trust objects could never be exhausted so long as some money remained in the fund and some eligible employees could be found. A resulting trust could not arise here. Air Products was only entitled to the surplus if it could have revoked the trust upon termination of the pension plan in 1988.

Both the trust agreement and all versions of the plan make some provision for what was to occur on termination of the plan. Although the company reserved a general amending power subject to the provisos that no amendments could reduce accrued benefits or allow the trust fund to be used in any way other than for the employees' exclusive benefit, the company did not clearly reserve a power to revoke the trust. Such a power could not be implied under the broad general amendment power. Therefore, the 1978 amendment purporting to give the company the power to distribute surplus to itself, as well as the reversion clause of the 1983 plan, were invalid. Both represented attempts to

revoke partially the 1959 trust in favour of the employees. Neither was within the scope of the control which the company reserved to itself at that time.

The relevant plan provisions which governed the taking of a contribution holiday were those contained in the 1983 Air Products plan. The wording of the plan implicitly authorized an actuary to consider the surplus when calculating the company's annual funding obligation. Since the plan allowed the company to take contribution holidays, it did not need to repay the actuarial surplus taken into account in the years when it made no contributions into the plan.

The first Stearns plan differed in two significant ways from the original Catalytic plan: it made no reference to the existence of a trust and it specifically contemplated the reversion of surplus assets to the company. A trust was never created notwithstanding the facts that the alleged subject matter of the trust, the pension fund, was defined under the two Stearns plans, that the employees were identified as those entitled to receive the fund monies and that the exclusive benefit and non-diversion clauses relied upon by the employees were consistent with the existence of a trust. Several other clauses were equally consistent with the non-existence of trust and clearly identified the plan as a contract to receive defined benefits. No intention to create a trust was apparent on the face of the documents.

A brochure distributed by the company to its employees in 1972 did not form a binding part of the pension plan documents and its influence on entitlement of plan surplus in 1988 was doubtful since it specifically stated that the plan would be subject to amendment from time to time. The statement contained in the brochure to the effect that the company intended to pay any remaining surplus to the employees could not in the circumstances of this case form the basis for an estoppel preventing the company from now claiming the surplus for itself. Documents not normally considered to have legal effect may nonetheless form part of the legal matrix within which the rights of employers and employees participating in a pension plan must be determined. Whether they do so depends on the wording of the documents, the circumstances in which they were produced, and the effect which they had on the parties, particularly the employees.

Since no trust was ever created under the Stearns plan and since the 1972 brochure was without legal effect, the issue of entitlement to the plan surplus had to be decided on the basis of an interpretation of the plan's provisions. The 1983 amendment of the pension plan was within the limits of the power of amendment because it did not reduce any "then existing" interest of the employees as the employees had no interest in the surplus remaining upon termination until the company exercised its discretion to give them an interest. The amendment did not violate the restriction that no amendments were to have the effect of diverting any part of the fund to purposes other than for the exclusive benefit of the participants, former participants, joint annuitants, beneficiaries, or estates. Although the 1970 plan did not deal with the issue, the reversion of surplus to the company was not inconsistent with the non-diversion and exclusive benefit clauses. The prohibition on diversion of funds and the exclusive benefit clause applied from the outset only in respect of the defined benefits to which the employees were contractually entitled. They did not

apply to the distribution of a plan surplus.

The company is entitled according to the plan's terms to any surplus remaining in the pension fund which can be traced to the former Stearns plans. It was also entitled to take a contribution holiday. The application of an actuarial surplus to current service funding obligations was permitted under the terms of the Air Products plan, and did not have the effect of reducing any benefits which had accrued to the employees.

The results in these appeals demonstrate the need for legislation. It is unfair that there should be a different result for these two groups of employees based only on a finding that a trust exists in one case but not the other. A legislative scheme should be set up to provide for the equitable distribution of surplus between employees and employers when pension plans are terminated.

Per Sopinka J. (dissenting in part on the appeal (File No. 23047)): The surplus in the Catalytic plan reverts to the employer. The imposition of a trust on all the monies in that plan, did not prevent the trust's being amended. The nature of the rights of amendment depends upon the terms of the plan and of the trust agreement, if any. Nothing in the Catalytic plan precluded the company's exercising the express power of amendment in the plan so as to provide for the return of surplus funds on termination of the plan.

The company from the outset reserved the power to amend the Catalytic plan so as to permit any surplus to be distributed to itself. The trust agreement's amending clause was subject to the plan and both the 1959 and the 1966 versions of the plan reserved broader powers of amendment to the company than did the trust agreement. Both plans provided that the company's power to amend the plan was limited only by the condition that accrued benefits could not be reduced. The right to receive surplus monies in the pension fund was not a benefit which had accrued to the members of the plan when the company amended the plan to permit the surplus to be distributed to itself. Moreover, even if such a right could be said to have accrued at the time of amendment, it is not a benefit contemplated by that provision.

A power of amendment, limited in that it cannot reduce accrued benefits, is not inconsistent with the fundamental purpose of a defined benefits pension trust. It should be given effect if sufficiently explicit to permit a change amounting to a partial revocation in law.

No magic exists in the use of the specific word "revocation". Both the creation of a trust and a limitation on the nature of a trust can be determined from the clear intention of the settlor. The power of amendment can be sufficiently explicit to include a power of revocation and the absence of the word "revocation" does not mean that a settlor's changes clearly having the effect of revocation would be fatally flawed. A formulaic approach should not be allowed to dislodge the clear intention of the parties.

Neither the company nor the employees foresaw the existence of a surplus when the plan was created and the employees had no reason to expect to receive more than their defined benefits.

There was nothing inequitable in allowing the employer to take advantage of the broad amending power to distribute the surplus to itself, so long as it did nothing to reduce the level of benefits provided to the employees.

The tax motivations of the parties to pension plans, while generally of limited relevance in interpreting those plans, here supported a broad interpretation of the amending power. It was reasonable to infer that the Catalytic plan's broad amending power, in 1959 and subsequent versions, was retained in part to deal with changes in income tax legislation, given the plan's express direction that the company's contributions be tax deductible.

Per McLachlin J. (dissenting in part on the appeal (File No. 23047)): The surplus in defined benefit plans (as distinguished from defined contribution plans) should revert to the employer. Apart from the reference in the 1978 restatement which provided that surplus should go to the employer, the documents were silent on the question of surplus. The 1978 stipulation was a valid "amendment" to the original trust documents and ought to stand. Even if the 1978 stipulation were disregarded, however, the surplus would devolve on the employer under the doctrine of resulting trust.

Where a new situation arises and falls within an existing term of the contractual document, the courts must look at the factual context in which the term was drafted and consider whether the new situation can reasonably be said to fall within this clause. If it does not, the court may nevertheless consider if a term covering the new situation can be implied, whether as a matter of fact, law or custom. The courts will not make a new contract or trust to which the parties have not agreed.

Article V in the 1959 trust agreement, which dealt with modification and termination, provided that no part of the fund be diverted to purposes other than for the exclusive benefits of those intended to benefit from it. This article was drafted in the context of a defined contribution plan under which no surplus could arise and should therefore not be read as applying to the surplus which arose under the later defined benefit plan. The 1978 provision stipulating that the surplus should go to the employer is valid and determines the issue.

Payment of the surplus to the employer does not constitute revocation of a trust. A trust cannot be revoked without express wording so permitting. The surplus was an unanticipated development never contemplated by the original trust and not addressed by any changes to the trust until 1978. The 1959 trust provisions do not apply to a surplus.

The trust did not require that the surplus in question be paid to the employees. In 1966, when the possibility of a surplus first arose because of the plan's conversion to a defined benefit plan, the trust provided no guidance as to where a surplus would go in the event of termination. The 1978 amendment made it clear that it was payable to the employer. Therefore, under the terms of the trust, the employer is entitled to the surplus.

Alternatively, if the 1978 amendment as to surplus is invalid, the doctrine of resulting trust requires that the surplus be available to the employer. The employer was responsible for ensuring a fund

sufficient to meet all defined benefits owing to employees. Since the employer paid more than required for the purpose of the trust, the residual sum should return to the employer.

Even where employees contribute to a defined benefit plan, that contribution is taken to be fully satisfied by receipt of the defined benefits. The employee accepts this fixed amount in lieu of the greater or lesser amounts he or she might obtain on a defined contribution plan and in doing so exhausts his or her rights under the plan.

Cases Cited

By Cory J.

Considered: Re Reevie and Montreal Trust Co. of Canada (1986), 53 O.R. (2d) 595; Hockin v. Bank of British Columbia (1990), 71 D.L.R. (4th) 11; Re Campbell-Renton & Cayley, [1960] O.R. 550; Re Canada Trust Co. and Cantol Ltd. (1979), 103 D.L.R. (3d) 109; distinguished: Re Collins and Pension Commission of Ontario (1986), 56 O.R. (2d) 274; disapproved: Davis v. Richards & Wallington Industries Ltd., [1991] 2 All E.R. 563; referred to: C.A.W., Local 458 v. White Farm Manufacturing Canada Ltd. (1989), 66 O.R. (2d) 535, aff'd (1990), 39 E.T.R. 1; King Seagrave Ltd. v. Canada Permanent Trust (1986), 13 O.A.C. 305 (C.A.), aff'g (1985), 51 O.R. (2d) 667 (H.C.); Arrowhead Metals Ltd. v. Royal Trust Co., Pension Commission of Ontario, March 26, 1992, unreported; Bathgate v. National Hockey League Pension Society (1992), 11 O.R. (3d) 449; Martin & Robertson Administration Ltd. v. Pension Commission of Manitoba (1980), 2 A.C.W.S. (2d) 249; C.U.P.E.-C.L.C., Local 1000 v. Ontario Hydro (1989), 68 O.R. (2d) 620; Askin v. Ontario Hospital Association (1991), 2 O.R. (3d) 641; Maurer v. McMaster University (1991), 4 O.R. (3d) 139; Trent University Faculty Assn. v. Trent University (1992), 99 D.L.R. (4th) 451; Harris v. Robert Simpson Co., [1985] 1 W.W.R. 319.

By Sopinka J. (dissenting in part on the appeal (File No. 23047))

Re Reevie and Montreal Trust Co. of Canada (1986), 53 O.R. (2d) 595; Re Campbell-Renton & Cayley, [1960] O.R. 550; Hockin v. Bank of British Columbia (1990), 71 D.L.R. (4th) 11.

By McLachlin J. (dissenting in part on the appeal (File No. 23047))

Davis v. Richards & Wallington Industries Ltd., [1991] 2 All E.R. 563; In re Courage Group's Pension Schemes, [1987] 1 W.L.R. 495; Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co., 555 F.Supp. 257 (1983); In re C. D. Moyer Co. Trust Fund, 441 F.Supp. 1128 (1977); Pollock v. Castrovinci, 476 F.Supp. 606 (1979); Wilson v. Bluefield Supply Co., 819 F.2d 457 (1987); Bryant v. International Fruit Products Co., 793 F.2d 118 (1986); Audio Fidelity Corp. v. Pension Benefit Guaranty Corp., 624 F.2d 513 (1980); Maurer v. McMaster University (1991), 4 O.R. (3d) 139; Askin v. Ontario Hospital Association (1991), 2 O.R. (3d) 641; Re Reevie and Montreal Trust Co. of Canada (1986), 53 O.R. (2d) 595; Murphy v. McSorley, [1929] S.C.R. 542; Re Canada Trust Co. and Cantol Ltd. (1979), 103 D.L.R. (3d) 109.

Statutes and Regulations Cited

Employment Pension Plans Act, S.A. 1986, c. E-10.05, ss. 42(2), 58(a), (b), (c).
Income Tax Act, S.C. 1970-71-72, c. 63.
Income Tax Regulations, ss. 8502(c), 8503(4)(c).
Pension Benefits Act, R.S.A. 1980, c. P-3.
Pension Benefits Act, R.S.M. 1987, c. P32, s. 26(2).
Pension Benefits Act, R.S.O. 1990, c. P.8.
Pension Benefits Standards Act, S.B.C. 1991, c. 15.
Power Corporation Act, R.S.O. 1980, c. 384, s. 20(4).
Regulations to the Employment Pension Plans Act, Alta. Reg. 364/86, s. 34(9)(b)(i), (ii), (iii), (iv).

Authors Cited

Adell, Bernard. "Pension Plan Surpluses and the Law: Finding a Path for Reform", in Task Force on Inflation Protection for Employment Pension Plans, Research Studies, vol. 2. Toronto: The Task Force, 1988.
Canada. Revenue Canada. Information Circular No. 72-13R7 (December 31, 1981).
Canada. Revenue Canada. Information Circular No. 72-13R8 (December 16, 1988).
Ezra, D. Don. The Struggle for Pension Fund Wealth. Toronto: Pagurian Press, 1983.
Hanscom, Deborah K. "A Surplus of Uncertainty: The Question of Entitlement After Hockin" (1991), 10 Est. & Tr. J. 258.
Nachshen, Gary. "Access to Pension Fund Surpluses: The Great Debate", in New Developments in Employment Law. (Meredith Memorial Lectures, 1988.) Cowansville, Qué.: Yvon Blais, 1989.
Ontario. Task Force on Inflation Protection for Employment Pension Plans. Task Force on Inflation Protection for Employment Pension Plans, Research Studies, vol. 2. Toronto: The Task Force, 1988.
Scott, Austin Wakeman. The Law of Trusts, 4th ed., vol. 4. Boston: Little, Brown, 1989.
Treitel, G. H. The Law of Contract, 4th ed. London: Stevens & Sons, 1975.
Waters, D. W. M. Law of Trusts in Canada, 2nd ed. Toronto: Carswell, 1984.

APPEALS from a judgment of the Alberta Court of Appeal (1992), 125 A.R. 224, 14 W.A.C. 224, 89 D.L.R. (4th) 762, 46 E.T.R. 21, dismissing an appeal and cross-appeal from an order of Moore C.J.Q.B. in Chambers (1990), 104 A.R. 190, 66 D.L.R. (4th) 230, 37 E.T.R. 64. The appeal by Air Products Canada Ltd. (File No. 23047) with respect to entitlement to any surplus traceable to the Catalytic fund should be dismissed and its appeal with respect to its entitlement to take a contribution holiday is allowed, Sopinka and McLachlin JJ. dissenting in part. The cross-appeal by Gunter Schmidt in his personal capacity and on behalf of the beneficiaries of the Stearns plans (File No. 23057) should be dismissed with respect to the entitlement of Air Products Canada Ltd. to all surplus remaining in the pension fund derived from the Stearns plan and to its entitlement to take a contribution holiday.

Dennis R. O'Connor, Q.C., Anne Corbett and Barry L. Glaspell, for the appellants Air Products Canada Ltd., William M. Mercer Limited, Confederation Life Insurance Company and T. J. Westley. Neil C. Wittman, Q.C., and Kenneth J. Warren, for the respondents Gunter Schmidt in his personal capacity and on behalf of the Beneficiaries of the Stearns Catalytic Ltd. Pension Plans. Aleck H. Trawick and Leslie O'Donoghue, for the appellants on the cross-appeal Gunter Schmidt in his personal capacity and on behalf of the Beneficiaries of the Stearns Catalytic Ltd. Pension Plans. Dennis R. O'Connor, Q.C., for the respondents on the cross-appeal Air Products Canada Ltd., William M. Mercer Limited, Confederation Life Insurance Company and T. J. Westley.

Solicitors for Air Products Canada Ltd., William M. Mercer Limited, Confederation Life Insurance Company and T. J. Westley: Borden & Elliott, Toronto. Solicitors for the Beneficiaries of the Stearns Catalytic Ltd. Pension Plans: Code, Hunter, Calgary. Solicitors for Gunter Schmidt in his personal capacity and on behalf of the Beneficiaries of the Stearns Catalytic Ltd. Pension Plans: Blake, Cassels & Graydon, Calgary.

The judgment of La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ. was delivered by

1 **CORY J.**:-- These two cases raise the issue of entitlement to surplus monies remaining in an employee pension fund once the fund has been wound up and all benefits either paid or provision made for their payment. There is a further related issue as to whether or when employers may refrain from contributing to ongoing pension plans which are in "surplus".

Some Definitions

2 At the outset it may be helpful to review briefly some of the technical terms which often appear in pension surplus cases. For a detailed explanation reference may be made to: G. Nachshen, "Access to Pension Fund Surpluses: The Great Debate", in New Developments in Employment Law (Meredith Memorial Lectures, 1988), 1989; Deborah K. Hanscom, "A Surplus of Uncertainty: The Question of Entitlement After Hockin" (1991), 10 Est. & Tr. J. 258, and the articles contained in vol. 2 of the Task Force on Inflation Protection for Employment Pension Plans, Research Studies (1988).

3 Pension surpluses can only arise in "defined benefit" pension plans. In those plans, each employee belonging to the plan is guaranteed specific benefits upon retirement.

4 An ongoing pension fund is said to have an "existing" or "actuarial" surplus when the estimated value of the assets in the fund exceeds the estimated value of all of the liabilities (i.e., pension benefits owed employees) of the fund. When the calculated fund liabilities exceed the calculated

fund assets, the plan is said to be in a state of "unfunded liability". Once the plan is wound up, assets and liabilities can be precisely determined. The fund will then be in a state of "actual" or "real" surplus or liability.

5 Contribution to a defined benefit plan is made each year on the basis of an actuary's estimate of the amount which must be presently invested in order to provide the stipulated benefits at the time the pension is paid out. The actuary's estimate of the present value of future benefits to members of the plan is known as the "current service cost". The obvious difficulties involved in predicting factors such as inflation rates, investment returns and the future employee levels of the company mean that the actuary's task is difficult and to a certain extent speculative. The assumptions made by actuaries in respect of these and other factors will have a significant impact upon the determination of current service costs and the calculation of present levels of fund surplus or liability.

6 Defined benefit plans are to be distinguished from defined contribution (or "money purchase") plans, where set amounts are paid into the pension fund, and the benefits eventually paid equal the amount of the initial contributions plus any return which was obtained on the investment of those funds.

7 Either type of pension plan may be "contributory" (contributions by both employer and employee are mandatory) or "non-contributory" (only the employer's contributions are mandatory). In a non-contributory defined benefit plan, only the employer is obligated to contribute to the pension fund, although employees may have the option of making voluntary contributions in order to increase the benefits they will receive. In a contributory defined benefit plan, the employees must contribute a set amount, which may vary according to factors such as each employee's length of service and earnings, but is usually a defined percentage of salary. The employer's contribution to the fund is the amount over and above the employee contributions which the actuary determines is needed to cover the current service costs of the plan.

8 In the 1980s, a unique combination of conservative actuarial estimates and various economic factors caused many pension funds to accumulate large actuarial surpluses. Many employers sought to recapture this surplus by withdrawing excess monies from pension funds as an alternate source of capital, by applying surplus funds to any required contribution to the pension plan (i.e., taking a "contribution holiday"), or by claiming a proprietary right in any excess remaining upon the termination of the plan once all the employee benefits had been provided for. Employee groups have resisted such actions, claiming that the pension plans were established for their benefit, that the employers never intended or expected to recover any contributions made to the fund, and that any surplus accruing because of fortuitous economic circumstances should be paid to them when the plans are terminated.

Factual Background

9 In 1983, two companies, Stearns-Roger Canada Ltd. ("Stearns") and Catalytic Enterprises Ltd. ("Catalytic") merged to form Stearns Catalytic, which subsequently became Air Products Canada

Ltd. At the time of the merger, both Stearns and Catalytic had defined benefit pension plans for their employees, and both plans were in surplus. The pension plans and funds of Stearns and of Catalytic were amalgamated and evolved into two virtually identical Air Products Plans, one for employees of the Construction Division, and one for members of senior management. It is the employees' pension plan (the "Air Products plan") which forms the subject of the appeal and cross-appeal, although the results of the appeals will also affect the senior management plan.

10 Catalytic first instituted a pension plan for its employees in 1959. This plan was a contributory money-purchase plan which incorporated a trust fund administered by a trustee. By 1966, the plan had been amended to become a contributory defined benefits plan. The Catalytic plan was further amended in 1978.

11 The first Stearns pension plan relevant to these appeals was created in 1970. It repealed and replaced an earlier defined contribution plan. The 1970 plan was a contributory defined benefits plan until 1977, when it was amended to provide that employee contributions were to be of a voluntary nature only. Pursuant to the plan, Stearns entered into a Group Annuity Policy with the Mutual Life Assurance Company. All relevant versions of the Stearns plan gave the employer a discretion as to the distribution of any surplus which might remain upon the termination of the pension plan. By contrast, no provision was made for the treatment of surplus in the Catalytic plans until the 1978 amendment to the plan purported to give the company a similar discretion.

12 The amalgamated Stearns Catalytic (later Air Products) plan was a contributory defined benefits plan. It was funded by means of an Investment Contract with the Confederation Life Insurance Company. The terms of the plan gave the company a discretion as to the distribution of surplus upon termination and also provided for the automatic reversion to the company of any surplus remaining once benefits paid to a member had reached a maximum level specified in the plan. For the years ending September 30, 1985, September 30, 1986, September 30, 1987 and January 31, 1988, the company transferred no assets to the Confederation Life fund. Rather, the company's contributions to the pension fund were paid from the actuarially determined surplus existing in the pension fund.

13 On January 31, 1988, following the sale of most of the company assets, the Air Products pension plan was terminated. Actuarial calculations established that once provision had been made for payment to the employees of Air Products Canada Ltd. of all benefits to which they were entitled under the terms of their plans, a surplus of $9,179,130 would remain in the employee pension plan.

14 In February, 1988, first Air Products, and then Gunter Schmidt on behalf of the employees of Air Products, applied to the Alberta Court of Queen's Bench for a declaration of entitlement to the surplus funds. Schmidt, on behalf of himself and the employees, also sought a declaration that Air Products be required to pay $1,465,400 into the pension fund. This sum represented the amount of fund surplus applied by Air Products to its contribution requirements from 1985 to 1988.

15 The Chief Justice of the Alberta Court of Queen's Bench (Stearns Catalytic Pension Plans (Re) (1990), 104 A.R. 190) found that the portion of the surplus which had been derived from the Catalytic fund was to be paid out to the employees, and that Air Products was not entitled to take a contribution holiday utilising any part of the Catalytic surplus. He therefore ordered the company to return $1,465,400 to the pension fund. In respect of the surplus which was traceable to the Stearns fund, the chambers judge held that it belonged to Air Products.

16 An appeal by the company to the Alberta Court of Appeal in respect of the Catalytic surplus and the contribution holiday and a cross-appeal by the former Stearns employees in respect of the Stearns surplus were both dismissed.

17 The appeal and the cross-appeal before this Court are the same as before the Court of Appeal. The facts and the plans at issue in the appeal and the cross-appeal are sufficiently different that they must be dealt with separately. In order to avoid confusion, I will not refer to the parties as appellants or respondents but to either "Air Products" or "the company" (appellants on the appeal and respondents on the cross-appeal); and to "the employees" or "the plan members". The former Catalytic employees are the respondents on the appeal and the former Stearns employees are the appellants on the cross-appeal.

I. Judgments Below

Alberta Court of Queen's Bench (1990), 104 A.R. 190

18 The chambers judge noted that two provisions in the 1983 amalgamated pension plan were of particular importance. Under Section 18.05, any surplus remaining in the amalgamated fund following termination of the plan and distribution of all defined benefits was to revert to the company. Section 1 of the plan provided that the benefits provided by the plan were in lieu of any benefits to which employees may have been entitled under any of the previous plans and also that the benefits paid under the 1983 plan "in no event shall be less than the benefits to which they were entitled under these Prior Plans" (at p. 201). It was this phrase which required the court to review the Stearns and the Catalytic plans which had existed prior to 1983.

19 Following a careful examination of the history and terms of all the relevant pension plans, Moore C.J. decided that Air Products was entitled to the surplus funds under the Stearns Plan and that the employees were entitled to the surplus funds under the Catalytic plan. He further held that the company was not entitled to apply any actuarial surplus from the Catalytic fund towards its contributions to the pension fund in the period 1985-88, but that the relevant plan provisions did permit the company to use the existing surplus in the Stearns fund to pay its contribution to the pension fund.

20 The Chief Justice first considered the Stearns plans. He noted, at pp. 206-207, that Article 14.1 of the 1970 Stearns pension plan, incorporated as Article 14.3 in the 1977 plan, provided:

> Notwithstanding any surplus remaining after all benefits referred to in this Sub-section 14.1(c) have been provided, such surplus may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions at the time, be returned to the Company or may be used for the benefit of Participants, former Participants, beneficiaries or estates in such equitable manner as the Company may in its discretion determine. [Emphasis of the Chief Justice.]

21 In his view the concluding words of this section gave the company a discretion as to the distribution of the surplus. He rejected the employees' suggestion that the 1977 plan was amended to remove this discretion, holding instead that the alleged "1982 amendments" to the plan were never more than a draft version which was not adopted and never registered. The Chief Justice considered that Article 14.3, when read together with Article 13.4 of the 1977 Plan, which permitted funds to be returned to the company with the consent of the Minister of National Revenue and the Superintendent of Pensions, modified a more general clause which prohibited any amendment, termination, or diversion of the fund other than for the exclusive benefit of the employees.

22 Therefore, on a construction of the plan provisions as a whole, Moore C.J. concluded at p. 208:

> From the moment the prior Stearns Plan was terminated in 1969, the company had the right to any surplus as it had from the outset reserved out to itself any surplus. The plan had ended and the company could reserve out the surplus. The company at this point did not enter into a trust agreement but purchased an annuity contract. Insofar as the Stearns Plan is concerned, we are dealing with a defined benefits plan and once all the defined benefits have been satisfied or provided for (as is the case), the balance or any surplus is to be disposed of at the discretion of the company. The plan was not established to create a fund to be divided up among the employees, but rather to provide them with specific pensions on retirement.

He concluded that the Stearns fund was never impressed with a trust, nor could one be implied to any part of the Air Products fund which evolved from the prior Stearns plans. The company's right to control the allocation of surplus was determined in 1970, and the amalgamation of the Stearns and the Catalytic plans did not create any employee entitlement to such surplus.

23 The Chief Justice next considered the Catalytic plans. The first began in 1959 as a defined contribution plan. Unlike the original Stearns plan, this plan was never terminated. Rather it was amended several times over the following twenty-five years. The 1959 plan included a Trust Agreement entered into between Catalytic and the Canada Trust Company for the administration of the pension fund. It contained a provision prohibiting the company from recovering any sums paid into the fund, and an amendment provision which prohibited any amendment which had the effect

of reducing members' benefits. These three features were also present in the 1966 restatement of the Catalytic Plan, although by then the plan had been changed from a money purchase plan to a defined benefits plan.

24 Moore C.J. noted that although in 1974 the agreement between Canada Trust and Catalytic was terminated and replaced by an investment contract with Confederation Life, there was no evidence that the trust itself had terminated. He was therefore of the opinion that the trust was still in place in 1978 when Catalytic purported to amend the plan in order to give itself the right to any surplus remaining upon termination.

25 Moore C.J., at p. 210, felt that in 1959 Catalytic had created a trust,

> [t]he sole object of . . . which . . . was to provide retirement benefits for the employees, not the company. . . . The fund became a trust fund for the benefit of the Catalytic employees.

He was particularly struck, at p. 210, by the wording of the 1959 Trust Agreement:

> It states in clear terms that no amendment shall authorize or permit any part of the Fund to be used for or diverted to purposes other than for the exclusive benefit of such persons or their estates. This wording cannot be ignored and in my view it overrides any attempt to amend the trust to give the surplus to the company.

26 Moore C.J. therefore held that the 1978 amendment was invalid. He further relied upon Re Reevie and Montreal Trust Co. of Canada (1986), 53 O.R. (2d) 595, and C.A.W., Local 458 v. White Farm Manufacturing Canada Ltd. (1989), 66 O.R. (2d) 535, aff'd (1990), 39 E.T.R. 1, in support of his conclusion that, by virtue of the trust in their favour, the former employees of Catalytic were entitled to their portion of the surplus remaining in the Air Products Fund.

27 Moore C.J. dealt lastly with the issue of the contribution holidays taken by the company. He observed that, under the provisions of the amalgamated plan, Air Products reserved the right to pay its annual contribution to the fund out of existing surplus. He therefore held that the company could validly use this surplus for its contribution obligations in the years 1985-88, but that, as a result of the existence of the trust in favour of the Catalytic employees, the contribution could not have been taken from the Catalytic share of the actuarial surplus.

Alberta Court of Appeal (1992), 125 A.R. 224 (McClung, Foisy and Major JJ.A.)

28 The Court of Appeal affirmed the judgment of Moore C.J., adding only two brief comments. The former Stearns employees argued again that the Stearns plan had been amended in 1982 so as to give them title to the surplus. The court noted that the chambers judge held that the draft provision the employees relied upon never became part of the plan and found no evidence to

suggest that he was wrong in this conclusion.

29 Secondly, the Court of Appeal dealt with the employees' argument that the company was bound by the terms of an employee benefits brochure issued in 1982 to give the surplus to the employees. Under the heading "Future of the Plan" that brochure provided (p. 227):

> In the event there is a surplus in the fund after all benefits have been paid, it is the Company's intention the surplus will be distributed in an equitable manner to the employees active in the Plan at the date of termination.

The chambers judge had noted the existence of this brochure, but did not comment on its legal effect in his judgment.

30 The Court of Appeal held that the evidence surrounding the brochure was insufficient to alter the plan provisions giving Stearns a discretion as to use of the surplus. The facts were distinguishable from the case of Re Collins and Pension Commission of Ontario (1986), 56 O.R. (2d) 274. In Re Collins the company had given "repeated assurances" to the employees concerning the surplus in the course of collective bargaining, and it knew that the employees were aware of the surplus and expected to receive it. In this case there was no evidence that any employees knew of or relied upon the Stearns brochure. Finally, the court held that the Stearns employees had failed to demonstrate that the brochure estopped the company from appropriating the surplus, or that the company acted unfairly in the exercise of its discretion to distribute the excess funds.

II. Issues on Appeal

A. The Appeal (The Catalytic Plan)

31

1. Whether the Court of Appeal erred in finding that Air Products was not entitled to the monies deriving from the Catalytic Plan which remained in its employee pension fund following termination of the pension plan and provision of all benefits.
2. Whether the Court of Appeal erred in finding that Air Products was not entitled to take existing actuarial surplus deriving from the Catalytic Plan into account in determining the amount of its annual funding obligation.

B. The Cross-Appeal (The Stearns Plan)

32

1. Whether the Court of Appeal erred in holding that Air Products was entitled to take the surplus remaining in its employee pension fund which was derived from the Stearns plan following termination of the plan and provision of all benefits.

2. Whether the Court of Appeal erred in finding that Air Products was entitled to use existing actuarial surplus not derived from the Catalytic plan in order to fund its required annual contribution to the Air Products plan during the years 1985-88.

III. The Legislative Framework

33 Two separate regimes affect Canadian employer pension plans in surplus. Each province now has in place some form of pension benefits legislation designed to protect member benefits by ensuring that employers meet their funding obligations and that pension funds remain solvent. The federal income tax authorities have also attempted to regulate employer pension plans in order to limit the tax relief which employers and employees can obtain for their contributions to pension funds. Some of the provincial statutes have recently begun to deal with the issue of surplus upon plan termination or of contribution holidays. The tax regulation pertaining to surplus has to date taken the form of non-binding Information Circulars rather than legislation.

A. The Income Tax Act

34 Under the Income Tax Act, S.C. 1970-71-72, c. 63, certain tax benefits are granted to those contributing to registered pension plans. Contributions by employers and employees to a registered pension plan are tax deductible; plan earnings are exempt from taxation, and the taxation of employee benefits is deferred until they are received by the employee. The Act also contains two ceilings, one on the amount which an employer can deduct from income in respect of current service contributions to an employee pension plan, and the other on the maximum benefit which each employee can derive from the employer's deductible contributions.

35 In addition, on December 31, 1981, Revenue Canada issued Information Circular No. 72-13R7. This circular contains two significant requirements for the registration of pension plans. First, s. 39 of the circular requires that all plans provide that any existing actuarial plan surplus in excess of the employer's normal current service costs over a two-year period must either be refunded to the employer or used to take a contribution holiday. The circular also sets a maximum limit on the benefits which an employee can recover under a plan, and in s. 13.1 stipulates that all pension plans must contain a provision permitting actual surplus to be refunded to employers upon termination of the plan. However, these requirements were never incorporated into the Income Tax Act or its Regulations during the lifetime of the Air Products plan or its predecessors.

36 One of the results of the Information Circular has been that many pension plans which originally were silent on the issue of surplus or which stated that employer contributions to a plan were "irrevocable" have been amended to provide that any surplus should be refunded to employers upon termination of the plan. Air Products cites the Information Circular in support of its position, presumably as evidence that Revenue Canada supports employer ownership of a surplus. The employees in turn emphasize the non-binding effect of the circular and contend that the employer's motivation for amending the plan is not a relevant consideration in determining its legal effect.

37 Several years ago I agreed with Zuber J.A. of the Ontario Court of Appeal that the Information Circular is of limited legal significance: King Seagrave Ltd. v. Canada Permanent Trust (1986), 13 O.A.C. 305 (C.A.), aff'g (1985), 51 O.R. (2d) 667 (H.C.). I am still of that opinion. At the time the pension plans which are the subject of these appeals were wound up, the requirements contained in the circular did not have binding legal force. The circular did not purport to clarify any provisions of the Income Tax Act, and the fact that some pension plans may have been amended to comply with its provisions does not alter my approach to the surplus entitlement issue.

B. Provincial Legislation

38 No Canadian province has yet dealt directly with the issue of ownership of or entitlement to pension surplus by legislation. The preferred approach in most jurisdictions has been to provide that the withdrawal or transfer of actuarial surplus can only be accomplished when certain specified conditions have been met. See, for example, the Ontario Pension Benefits Act, R.S.O. 1990, c. P.8. The British Columbia Pension Benefits Standards Act, S.B.C. 1991, c. 15, requires that all pension plans must contain clauses providing for the arbitration of disputes concerning entitlement to surplus or contribution holidays. Manitoba has also enacted an interesting variation on the treatment of surplus funds. Section 26(2) of its Pension Benefits Act, R.S.M. 1987, c. P32, provides that no existing surplus may be withdrawn from a pension fund unless the Pension Commission "believes it equitable to do so".

39 The B.C. and Manitoba provisions represent welcome legislative steps. Regrettably, a comprehensive approach to the issues arising from pension surplus has yet to be enacted in any part of this country. The courts have on a number of occasions been required to determine the allocation of pension surplus. Yet the courts are limited in their approach by the necessity of applying the sometimes inflexible principles of contract and trust law. The question of entitlement to surplus raises issues involving both social policy and taxation policy. The broad policy issues which are raised by surplus disputes would be better resolved by legislation than by a case-by-case consideration of individual plans. Yet that is what now must be undertaken.

40 The pension plans under consideration are governed by the Alberta Employment Pension Plans Act, S.A. 1986, c. E-10.05 (proclaimed into force January 1, 1987). Section 42(2) of the Act requires that all plans provide for the allocation of surplus on termination to either the employer, the employees, or both. Section 58 prohibits employer withdrawal of surplus from an ongoing fund unless such withdrawal is specifically permitted in the plan and the permission of the Superintendent of Pensions is obtained.

41 Withdrawal, together with the issue of contribution holidays, is also referred to in s. 34(9) of the Regulations to the Act (Alta. Reg. 364/86) which provides:

34 . . .

(9) Where the actuarial valuation report . . . reveals that the plan has surplus assets,

. . .

(b) when the unfunded liabilities have been amortized or where no unfunded liability exists, the surplus assets may be

(i) used to increase benefits,
(ii) left in the plan,
(iii) if the plan does not so prohibit, applied to reduce the employer contributions referred to in subsection (3)(a), or
(iv) where no solvency deficiency exists and subject to section 58 of the Act and section 39 of this Regulation, paid or transferred to the employer.

42 The Employment Pension Plans Act and its regulations do no more than establish that surplus entitlement must be determined by the wording of the plan. Contribution holidays are permitted provided they are not prohibited by the plan. The previous legislation governing pensions in Alberta, the Pension Benefits Act, R.S.A. 1980, c. P-3, did not deal with either surplus remaining on termination or with contribution holidays. As a result, the primacy of the wording of individual pension plans has never been displaced by legislation, and it is therefore those specific provisions which must be considered.

IV. Relevant Pension Plan Provisions

43 The parties most helpfully compiled a summary of the history and relevant provisions of all the pension plans and related documents pertinent to these appeals. An abbreviated version of this summary, taken from the Agreed Statement of Facts, is attached as an appendix to these reasons.

V. Analysis

A. Surplus Entitlement

44 An employer who creates an employee pension plan agrees to provide pension benefits to retiring employees. At first, employers undertaking this obligation paid retired employees directly from company income. Gradually, the practice of creating separate pension funds emerged following the passage of regulations designed to protect employees from the bankruptcy or termination of the company, coupled with the realization of employers that the cost of providing pensions is reduced if money is put aside on behalf of present employees for their future benefit.

45 Pension funds thus began to be structured in several different ways. Investment contracts and trust funds eventually proved to be the most popular forms of pension plan funding for employers

since they provided the requisite degree of "irrevocability" of contribution to entitle an employer to obtain tax relief on its pension contributions. The relatively recent phenomenon of pension plan surplus has created an inevitable tension between employers who claim that they never lose their entitlement to monies which they contribute to the fund but which are not needed to provide agreed benefits, and employees who assert that all pension fund monies belong to them. It is suggested that if employers are not able to retrieve surpluses, they will be tempted to fund existing plans less generously. I cannot agree. First, unless the terms of the plan specifically preclude it, an employer is entitled to take a contribution holiday. Second, most pension plans require the level of employer contribution to be determined by an actuary. The employer will not be able to reduce the level of contribution unilaterally below that required according to standard actuarial practice. Third, employers are required by legislation to make up any unfunded liability. Finally, the fact that some employers cannot recoup surplus on termination is unlikely to influence the conduct of employers as a whole. In order to obtain registration, plans created since 1981 must make provision for distribution of surplus on termination. It is generally only in pre-existing plans that the problem of ownership of surplus arises and, as the results of these appeals demonstrate, even then employee entitlement to the surplus is not automatic.

46 Entitlement to the surplus will often turn upon a determination as to whether the pension fund is impressed with a trust. Accordingly, the first question to be decided in a pension surplus case is whether or not a trust exists.

1. Trust or Contract?

47 Employer-funded defined benefit plans usually consist of an agreement whereby an employer promises to pay each employee upon retirement a pension which is defined by a formula contained in the plan. A pension fund is created pursuant to the plan, either by way of contract or by way of trust. Whether or not any given fund is subject to a trust is determined by the principles of trust law. If there has been some express or implied declaration of trust, and an alienation of trust property to a trustee for the benefit of the employees, then the pension fund will be a trust fund.

48 If no trust is created, then the administration and distribution of the pension fund and any surplus will be governed solely by the terms of the plan. However, when a trust is created, the funds which form the corpus are subjected to the requirements of trust law. The terms of the pension plan are relevant to distribution issues only to the extent that those terms are incorporated by reference in the instrument which creates the trust. The contract or pension plan may influence the payment of trust funds but its terms cannot compel a result which is at odds with the existence of the trust.

49 Typically, when a pension fund is subject to a trust, several issues arise: Are such trusts for a purpose or are they "classic" trusts? What part of the pension fund is subject to the trust? To what extent can a settlor-employer alter the terms of a trust in order to appropriate the fund surplus for itself? Is the surplus subject to a resulting trust? Let us consider the nature of the trust in this case.

2. Purpose or 'True' Trust?

50 Air Products has suggested that the Catalytic pension fund was not subject to an express trust but instead to a trust for a purpose. Relying on dicta of the British Columbia Court of Appeal in Hockin v. Bank of British Columbia (1990), 71 D.L.R. (4th) 11, the company argues that a trust set up as part of a pension plan constitutes a trust whose sole purpose is to provide defined benefits to members. Once those benefits have been provided the purpose is fulfilled, the trust expires and the terms of the pension plan alone determine entitlement to any remaining fund surplus. I cannot accept this proposition.

51 Trusts for a purpose are a rare species. They constitute an exception to the general rule that trusts for a purpose are void. (See D. W. M. Waters, Law of Trusts in Canada (2nd ed. 1984), at pp. 127-28.) The pension trust is much more akin to the classic trust than to the trust for a purpose. I agree with the following comments of the Pension Commission of Ontario in Arrowhead Metals Ltd. v. Royal Trust Co. (March 26, 1992), unreported, at pp. 13-15, cited by Adams J. in Bathgate v. National Hockey League Pension Society (1992), 11 O.R. (3d) 449, at p. 510:

> Purpose trusts are trusts for which there is no beneficiary; that is, they are trusts where no person has an equitable entitlement to the trust funds. Funds are deposited in trust in order to see that a particular purpose is filled; people may benefit, but only indirectly. . . .
>
> People are clearly direct beneficiaries of pension trusts. Pension trusts are established not to effect some purpose, such building [sic] a recreation centre, but to provide money on a regular basis to retired employees. It misconceives both the nature of a purpose trust and of a pension trust to suggest that pensions are for purposes, not persons. It is important to recognize that the characterization of pension trusts as purpose trusts results in the pension text, a contract, taking precedence over the trust agreement. That is, in making common law principles of contract paramount to the equitable principles of trust law. It is trade [sic] law that where common law and equity conflict, equity is to prevail. In light of that rule, it seems inappropriate to do indirectly that which could not be done directly.

52 To repeat, the first step is to determine whether or not the pension fund is in fact a pension trust. This will most often be revealed by the wording of the pension plan itself, but may also be implied from the plan and from the way in which the pension fund is set up. A pension trust is a "classic" or "true" trust and not a mere trust for a purpose. If there is no trust created under the pension plan, the wording of the pension plan alone will govern the allocation of any surplus remaining on termination. However, if the fund is subject to a trust, different considerations may govern.

3. The Definition of the Trust Fund

53 Before proceeding to an examination of the actual effect of the trust, one more brief

investigation must be undertaken. That is the determination of whether all of the monies contained in a given pension fund are subject to the trust, or whether the surplus remaining after termination is separate from the remainder of the fund and thus not subject to the trust. In creating a pension plan and accompanying trust, an employer may be able to define the subject matter of the trust so as to include only the amount necessary to cover the employee benefits owed. However, very specific wording will be necessary before an ongoing surplus will be excluded from the operation of the pension trust.

54 The definition of the trust fund in the pension plan and in the trust agreement will usually establish that any surplus monies form part of the trust. In Re Reevie and Montreal Trust Co. of Canada, supra, for example, part of Canada Dry's pension plan, cited at p. 596 of the judgement of Zuber J.A., provided:

10.1

> A Trustee shall be appointed by the Board of Directors from time to time and a Trust Agreement executed between the Board of Directors and such trustee, under the terms of which a Trust Fund shall be established to receive and hold all Contributions payable by the Members and the Company, interest and other income, and to pay the benefits provided by the Plan and any of its expenses not paid directly by the Company. [Emphasis added.]

55 In the absence of any more specific definition of the content of the trust fund in either the plan or the trust agreement such a phrase establishes that all money in the care of the trustee is subject to the trust in favour of the employees. The wording of the plan in Hockin, supra, at p. 13, was even more explicit:

> (h) "Fund" means the trust consisting of all sums of money and other property as shall from time to time be paid or delivered to the Trustee in accordance with the provisions hereof, all investments and proceeds thereof and all earnings, profits and other accretions thereto, less all payments and deductions that are made therefrom as herein provided.

56 I would have thought that the wording of this clause would make it clear that any existing surplus formed a part of the trust and was subject to the provisions of the trust.

57 The definition of the trust fund should not be confused with the issue of the definition of the benefits to which the employee/beneficiaries are entitled according to the terms of the pension plan. As the examples demonstrate, the trust fund will normally include all monies contributed to the pension fund, including both any ongoing actuarial surplus and any surplus on termination.

4. Amendment of the Trust

58 When a pension fund is impressed with a trust, that trust is subject to all applicable trust law principles. The significance of this for the present appeals is twofold. Firstly, the employer will not

be able to claim entitlement to funds subject to a trust unless the terms of the trust make the employer a beneficiary, or unless the employer reserved a power of revocation of the trust at the time the trust was originally created. Secondly, if the objects of the trust have been satisfied but assets remain in the trust, those funds may be subject to a resulting trust.

59 The settlor of a trust can reserve any power to itself that it wishes provided the reservation is made at the time the trust is created. A settlor may choose to maintain the right to appoint trustees, to change the beneficiaries of the trust, or to withdraw the trust property. Generally, however, the transfer of the trust property to the trustee is absolute. Any power of control of that property will be lost unless the transfer is expressly made subject to it.

60 Employers seeking to obtain a pension surplus have frequently made the argument that they reserved a power to revoke, or to revoke partially the pension trust fund they set up for the benefit of their employees. This approach has had mixed results. The inconsistency of the decisions on the revocation of pension trusts exists on two levels. At one level, the different decisions can be explained on the basis of the wording of the particular amending clause and the limitations put upon it in each case. However, the decisions also reveal a more fundamental difference of opinion as to whether the revocation of trusts is possible when a settlor has reserved a broad power of amendment. This difference must be resolved in this case.

61 The differing approaches to revocation of the trust are perhaps most starkly illustrated by the cases of Reevie, supra, and Hockin, supra. In both of these cases, a trust fund was established pursuant to a pension plan which contained a broad power of amendment. Each amending power was subject only to the proviso that no amendment could reduce members' entitlement to accrued benefits.

62 The court in Reevie relied upon a passage from Waters to the effect that it is a cardinal rule of trust law that a settlor can only revoke his or her trust when the settlor has expressly reserved the power to do so and found that the broad amendment power reserved by Canada Dry did not amount to an express reservation. The Court in Hockin, on the other hand, preferred the approach of McLennan J. in Re Campbell-Renton & Cayley, [1960] O.R. 550 (H.C.).

63 In Re Campbell-Renton & Cayley, the settlors of a private trust sought to revoke the trust in order to set up a more tax-beneficial trust in England. After considering the unlimited power of amendment contained in the trust agreement, McLennan J. stated at pp. 552-53:

> I am advised that there is no decision either in England or in this country as to whether or not a power to alter and amend includes the power to revoke or perhaps it would be better to say includes a power to amend in such a way as to permit the revocation of the trust instrument but there is American law on the subject and statements in 3 Scott's Law of Trust, 2nd ed., pp. 2393, 2402-3, 2413, 2395 and 2416 and at the latter citation it is stated that an unrestricted power to amend is equivalent to a power to revoke.

McLennan J. elected to follow the American jurisprudence on this point, as did the court in Hockin at p. 19 which relied upon the following more recent excerpt from Scott (The Law of Trusts (4th ed. 1989), vol. 4, at pp. 346-48):

> 330.1. Where the creation of a trust is evidenced by a written instrument that purports to include the terms of the trust, and there is no provision in the instrument expressly or impliedly reserving to the settlor power to revoke the trust, the trust is irrevocable. The intention to reserve a power of revocation need not be manifested by an express provision to that effect; it can be indicated by the use of language from which it may be inferred.

64 Based upon this authority, the B.C. Court of Appeal concluded at p. 19 that "[a] power to amend includes the power to revoke unless revocation is precluded by specific wording of the power to amend". With respect, I cannot agree with this position.

65 In my view the nature and purpose of the trust as it has evolved in Canada is consistent with a more restrictive interpretation as to when the trust instrument will permit a unilateral revocation of the trust. One of the most fundamental characteristics of a trust is that it involves a transfer of property. In the words of D. W. M. Waters, Law of Trusts in Canada, supra, at p. 291:

> . . . the trust is a mode of disposition, and once the instrument of creation of the trust has taken effect or a verbal declaration has been made of immediate disposition on trust, the settlor has alienated the property as much as if he had given it to the beneficiaries by an out-and-out gift. This almost self-evident proposition has to be reiterated because it is sometimes said that the trust is a mode of "restricted transfer." So indeed it is, but the restriction does not mean that by employing the trust the settlor inherently retains a right or power to intervene once the trust has taken effect, whether to set the trust aside, change the beneficiaries, name other beneficiaries, take back part of the trust property, or do anything else to amend or change the trust. By restriction is meant that he has transferred the property but subject to restrictions upon who is to enjoy and to what degree. The mode of future enjoyment is regulated in the act of transferring, but the transfer remains a true transfer.

66 The judgment of the B.C. Court of Appeal in Hockin, if followed to its logical conclusion, would mean that the presence of an unlimited power of amendment in a trust agreement entitles a settlor to maintain complete control over the administration of the trust and the trust property. That result is inconsistent with the fundamental concept of a trust, and cannot, in my opinion, be sustained without extremely clear and explicit language. A general amending power should not endow a settlor with the ability to revoke the trust. This is especially so when it is remembered that consideration was given by the employee beneficiaries in exchange for the creation of the trust. In the case of pension plans, employees not only contribute to the fund, in addition they almost

invariably agree to accept lower wages and fewer employment benefits in exchange for the employer's agreeing to set up the pension trust in their favour. The wording of the pension plan and trust instrument are usually drawn up by the employer. The employees as a rule must rely upon the good faith of the employer to ensure that the terms of the specific trust arrangement will be fair. It would, I think, be inequitable to accept the proposition that a broad amending power inserted unilaterally by the employer carries with it the right to revoke the trust. The employer who wishes to undertake a restricted transfer of assets must make those restrictions explicit. Moreover, amendment means change not cancellation which the word revocation connotes.

67 Furthermore, prior to the 1981 circular, the amendment power in most trust arrangements was specifically made broad and ambiguous at the behest of the employer, who was entitled to tax relief on funds designated for employee pensions only if those funds were committed irrevocably to a trust or some other funding arrangement. The tax motivations of the respective parties to pension plans are not particularly relevant to a judicial interpretation of the trust. However a court should not be eager to sanction a result which would allow an employer to represent to the Minister of National Revenue that it has irrevocably committed funds to an employee pension plan, only to later purport to revoke the pension trust in order to recoup surplus funds.

68 As a result I find that, at least in the context of pension trusts, the reservation by the settlor of an unlimited power of amendment does not include a power to revoke the trust. A revocation power must be explicitly reserved in order to be valid.

5. The Resulting Trust

69 A resulting trust may arise if the objects of the trust have been fully satisfied and money still remains in the trust fund. In such situations, the remaining trust funds will ordinarily revert by operation of law to the settlor of the fund. However, a resulting trust will not arise if, at the time of settlement, the settlor demonstrates an intention to part with his or her money outright. This is to say the settlor indicates that he or she will not retain any interest in any remaining funds.

70 Several Canadian cases have dealt with the resulting trust in relation to pension surplus cases. In Re Canada Trust Co. and Cantol Ltd. (1979), 103 D.L.R. (3d) 109 (B.C.S.C.), the pension plan had been terminated. The plan provided that upon termination, assets were to be applied to four listed categories of beneficiaries. All the beneficiaries were paid in accordance with this provision, and a surplus remained in the fund. The trustee of the fund, Canada Trust, sought directions from the court as to how to deal with the surplus.

71 Gould J. held, at p. 111, that the "purposes of this trust simply did not exhaust the fund and the outcome here, i.e., a surplus balance of $31, 163.38, was not foreseen by the respondent. . . . The situation appears to be one where a resulting trust arises by operation of the law." This conclusion could well be questioned in light of another provision in the plan (at p. 110) which provided that "no alteration, amendment or termination of the Plan or any part thereof shall permit any part of the trust fund to revert to or to be recoverable by the Company or to be used for or diverted to purposes

other than the exclusive benefits of members . . .". Perhaps the decision can be explained on the basis that the employees were not parties before the court and did not contribute to the plan which was funded solely by the employer.

72 In most cases, the existence of a non-reversion clause will be evidence of a permanent intention to part with the trust property and it will preclude the operation of the resulting trust. The trust agreement in C.A.W., Local 458 v. White Farm Manufacturing Canada Ltd., supra, contained the following clause, at p. 538:

> No part of the capital or income of the fund shall ever revert to the Company or be used for or diverted to purposes other than for the exclusive benefit of the employees and former employees under the plan except as therein and herein provided.

I agree with Montgomery J.'s conclusion, at p. 540, that these provisions "effectively dispose of the respondents' arguments that the surplus is subject to the doctrine of resulting trust". The employer had absolutely and irrevocably waived its interest in any surplus that might arise upon the termination of the pension fund despite the contributions it had made to that fund.

73 The exigencies of tax law are such that preferential tax treatment will only be afforded to registered pension plans. Registration, originally contingent upon clear evidence that the employer's contribution would be irrevocable, now requires a plan to provide that, following termination of the plan, any remaining surplus in excess of the statutory maximum level of employee benefits must revert to the employer. Therefore, the provisions of most registered pension plans will normally themselves exclude the possibility of a resulting trust's arising. That is not to say that the resulting trust will never have a place in the context of pension funds. Yet the practical reality is that the factual circumstances which could trigger the operation of a resulting trust will rarely occur in pension surplus cases.

74 The relevant documents in this case are such that it is not necessary to examine all of the difficult issues which can arise in relation to resulting trusts. Nonetheless, when a resulting trust arises in respect of a contributory plan, I would be inclined to prefer the view of Nitikman J. in Martin & Robertson Administration Ltd. v. Pension Commission of Manitoba (1980), 2 A.C.W.S. (2d) 249, to that of Scott J. in Davis v. Richards & Wallington Industries Ltd., [1991] 2 All E.R. 563 (Ch.Div.). Nitikman J. held that where employers and employees are (by virtue of their contributions) settlors of the trust, surplus funds remaining on termination can revert on a resulting trust to both employers and employees in proportion to their respective contributions. Scott J., on the other hand, held that employees cannot benefit from a resulting trust since, by the mere act of contributing to the fund, they manifest an intention to part irrevocably with their money.

75 I do not think that any general rule can be laid down as to the intentions of employees contributing to a pension trust. Where the circumstances of a particular case do not indicate any particular intention to part outright with money contributed to a pension fund, equity and fairness

would seem to require that all parties who contributed to the fund should be entitled to recoup a proportionate share of any surplus subject to a resulting trust. However, this issue should be left to be resolved when it arises.

76 In most pension trust cases the resulting trust will never arise. This may be because the objects of the trust can never be said to be fully satisfied so long as funds which could benefit the employees remain in the pension trust, or because the settlor has manifested a clear intention to part outright with its contributions. The operation of the resulting trust may also be precluded by the presence of specific provisions dealing with the disposition of surplus on plan termination.

B. Contribution Holiday

77 Two issues arise in respect of the contribution holiday. The first is whether or not, in the calculation of an employer's required annual contribution to a pension plan, consideration of actuarial surplus in an ongoing pension fund is permitted by law. The second is whether a consideration of that surplus is permitted or prohibited under the terms of a specific plan.

78 Both parties to the appeals accept that, subject to the plan provisions, the application of an existing surplus to contribution obligations was at all relevant times permitted by Alberta law. This proposition seems incontrovertible in light of the provisions of the Employment Pension Plans Act and Pension Benefits Act referred to earlier. It also accords with the provisions of Information Circular No. 72-13R7, supra. Therefore the provisions of the plan must determine the issue.

79 Before turning to the Air Products plan, it may be helpful to review the cases which have dealt with contribution holidays. The Ontario Court of Appeal held in C.U.P.E.-C.L.C., Local 1000 v. Ontario Hydro (1989), 68 O.R. (2d) 620, that Ontario Hydro could not take a contribution holiday when its employee pension plan was in surplus. The pension plan for Hydro employees was unusual in that it was established pursuant to a statute which enacted the employer's obligation to contribute. Section 20(4) of the Power Corporation Act, R.S.O. 1980, c. 384 (as cited by Robins J.A. at p. 623), provided:

> 20. . . .
>
> (4) The Corporation shall contribute towards the cost of the benefits mentioned in subsection (1) the amount of the difference between the amount of the contributions of the employees and the amount of the cost of the benefits as determined by actuarial valuations. [Emphasis of Robins J.A.]

Robins J.A. held that this clause was unequivocal and required Hydro to contribute each year the difference between the cost of the benefits for that year as determined by an actuary and the contributions of the employees. The existence of an ongoing fund surplus was irrelevant to this obligation. Robins J.A. explicitly added at p. 630 that s. 20(4) should not be treated:

> . . . as tantamount to stating that "the corporation shall make contributions to the plan on such basis as may be determined by the actuary from time to time" or "the corporation shall contribute to the plan an amount determined by an actuary in accordance with generally accepted actuarial principles". While clauses of that kind may not be uncommon, particularly in private pension plans, the statutory provisions regulating this plan and under which it operates are not to that effect. Under the formula mandated by the Act, an actuarial valuation is required only for the purpose of ascertaining the cost of the benefits. The actuary is not empowered to set the over-all level of corporation contributions on such basis as he may determine, notwithstanding that his determination may be by reference to generally accepted actuarial principles.

80 Subsequent cases have limited the application of Ontario Hydro. In Askin v. Ontario Hospital Association (1991), 2 O.R. (3d) 641, the Ontario Court of Appeal considered a plan (at p. 644) which required that "[e]ach Contributing Member Hospital shall make contributions to the Plan on a basis determined by the Actuary from time to time". Carthy J.A. held that this provision allowed the employers to take a contribution holiday. He distinguished Ontario Hydro in this way, at p. 651:

> To repeat for clarity, the ratio I take from the Ontario Hydro case is that, if a specific calculated contribution is mandated by statute or by the plan itself, it is an indirect use of trust funds to apply surplus to meet that obligation. The intended ratio of the present case is that, where the specific method of calculation is not mandated, it is inoffensive and in accordance with statutory authorization and normal actuarial practice to consider a surplus as one factor in the calculation of the contribution.

81 A contribution holiday was also permitted in Maurer v. McMaster University (1991), 4 O.R. (3d) 139 (Gen. Div.). The relevant plan provision there (at p. 144) provided that "[t]he University shall pay into the Fund each year the amount required to fund fully the current service cost of the Plan, as determined by the Actuary, after allowing for the Members' required contributions". Haley J. considered that the words "as determined by the Actuary" modified the phrase "the amount required to fund fully the current service cost of the Plan", and therefore held that the provision enabled the University to use the actuarial surplus to offset current contributions.

82 Most recently, the Ontario Divisional Court applied Ontario Hydro and held that the specific contribution requirements contained in its pension plan prohibited Trent University from taking a holiday from its contributions to its employee pension plan (Trent University Faculty Assn. v. Trent University (1992), 99 D.L.R. (4th) 451).

83 Finally, I note that the taking of a contribution holiday was contemplated by the court in Reevie, supra, even though in that case employees were held to be entitled to the fund surplus upon termination. The thought was expressed in this manner at pp. 600-601:

> While the plan continues to operate, a surplus will simply afford a cushion against years during which the fund performs poorly, or, it may lead to the reduction of future contributions. If the plan is discontinued, other considerations will arise.

84 All of these cases are perfectly consistent with one another. Together they demonstrate only that whether or not a contribution holiday is permissible must be decided on the basis of the applicable plan provisions. I can see no objection in principle to employers' taking contribution holidays when they are permitted to do so by the terms of the pension plan. When permission is not explicitly given in the plan, it may be implied from the wording of the employer's contribution obligation. Any provision which places the responsibility for the calculation of the amount needed to fund promised benefits in the hands of an actuary should be taken to incorporate accepted actuarial practice as to how that calculation will be made. That practice currently includes the application of calculated surplus funds to the determination of overall current service cost. It is a practice that is in keeping with the nature of a defined benefits plan, and one which is encouraged by the tax authorities.

85 An employer's right to take a contribution holiday can also be excluded by the terms of the pension plan or the trust created under it. An explicit prohibition against applying an existing fund surplus to the calculation of the current service cost, or other provisions which in effect convert the nature of the plan from a defined benefit to a defined contribution plan, will preclude the contribution holiday. For example, the presence of a specific formula for calculating the contribution obligation, such as those considered in the Ontario Hydro and Trent University cases, prevents employers from taking a contribution holiday. However, whenever the contribution requirement simply refers to actuarial calculations, the presumption will normally be that it also authorizes the use of standard actuarial practices.

86 The former Catalytic employees successfully argued before the chambers judge that to permit a contribution holiday is to permit an encroachment upon the trust fund of which they are the beneficiaries. I do not agree. As noted earlier, the trust property usually consists of all the monies contributed to the pension fund. To permit a contribution holiday does not reduce the corpus of the fund nor does it amount to applying the monies contained in it to something other than the exclusive benefit of the employees. The entitlement of the trust beneficiaries is not affected by a contribution holiday. That entitlement is to receive the defined benefits provided in the pension plan from the trust and, depending upon the terms of the trust to receive a share of any surplus remaining upon termination of the plan.

87 Once funds are contributed to the pension plan they are "accrued benefits" of the employees. However, the benefits are of two distinct types. Employees are first entitled to the defined benefits provided under the plan. This is an amount fixed according to a formula. The other benefit to which the employees may be entitled is the surplus remaining upon termination. This amount is never certain during the continuation of the plan. Rather, the surplus exists only on paper. It results from

actuarial calculations and is a function of the assumptions used by the actuary. Employees can claim no entitlement to surplus in an ongoing plan because it is not definite. The right to any surplus is crystallized only when the surplus becomes ascertainable upon termination of the plan. Therefore, the taking of a contribution holiday represents neither an encroachment upon the trust nor a reduction of accrued benefits.

88 Similar reasoning explains why I cannot accept the proposition that an employer entitled to take a contribution holiday must also be entitled to recover surplus on termination.

89 While a plan which takes the form of a trust is in operation, the surplus is an actuarial surplus. Neither the employer nor the employees have a specific interest in this amount, since it only exists on paper, although the employee beneficiaries have an equitable interest in the total assets of the fund while it is in existence. When the plan is terminated, the actuarial surplus becomes an actual surplus and vests in the employee beneficiaries. The distinction between actual and actuarial surplus means that there is no inconsistency between the entitlement of the employer to contribution holidays and the disentitlement of the employer to recovery of the surplus on termination. The former relies on actuarial surplus, the latter on actual surplus.

C. Summary

90 In the absence of provincial legislation providing otherwise, the courts must determine competing claims to pension surplus by a careful analysis of the pension plan and the funding structures created under it. The first step is to determine whether the pension fund is impressed with a trust. This is a determination which must be made according to ordinary principles of trust law. A trust will exist whenever there has been an express or implied declaration of trust and an alienation of trust property to a trustee to be held for specified beneficiaries.

91 If the pension fund, or any part of it, is not subject to a trust, then any issues relating to outstanding pension benefits or to surplus entitlement must be resolved by applying the principles which pertain to the interpretation of contracts to the pension plan.

92 If, however, the fund is impressed with a trust, different considerations apply. The trust is not a trust for a purpose, but a classic trust. It is governed by equity, and, to the extent that applicable equitable principles conflict with plan provisions, equity must prevail. The trust will in most cases extend to an ongoing or actual surplus as well as to that part of the pension fund needed to provide employee benefits. However, an employer may explicitly limit the operation of the trust so that it does not apply to surplus.

93 The employer, as a settlor of the trust, may reserve a power to revoke the trust. In order to be effective, that power must be clearly reserved at the time the trust is created. A power to revoke the trust or any part of it cannot be implied from a general unlimited power of amendment.

94 Funds remaining in a pension trust following termination and payment of all defined benefits

may be subject to a resulting trust. Before a resulting trust can arise, it must be clear that all of the objectives of the trust have been fully satisfied. Even when this is the case, the employer cannot claim the benefit of a resulting trust when the terms of the plan demonstrate an intention to part outright with all money contributed to the pension fund. In contributory plans, it is not only the employer's but also the employees' intentions which must be considered. Both are settlors of the trust. Both are entitled to benefit from a reversion of trust property.

95 An employer's right to take a contribution holiday must also be determined on a case-by-case basis. The right to take a contribution holiday can be excluded either explicitly or implicitly in circumstances where a plan mandates a formula for calculating employer contributions which removes actuarial discretion. Contribution holidays may also be permitted by the terms of the plan. When the plan is silent on the issue, the right to take a contribution holiday is not objectionable so long as actuaries continue to accept the application of existing surplus to current service costs as standard practice. These principles apply whether or not the pension fund is subject to a trust. Because no money is withdrawn from the fund by the employer, the taking of a contribution holiday represents neither an encroachment upon the trust nor a reduction of accrued benefits. These general considerations are, of course, subject to applicable legislation.

96 Let us see how these principles should be applied to the agreements presented in this case.

VI. Application to the Facts

A. Surplus Entitlement

1. The Catalytic Plan

97 The plan provided under Article V that all contributions would be paid to a trustee to be held and administered in accordance with a trust agreement which formed part of the plan. The plan also contained the following definitions in Section II:

> 12. "Trust Agreement" means the agreement entered into between the Company and the Trustee establishing the Trust Fund;
> 13. "Trustee" means the Canada Trust Company, or such other successor trust company, if any, as the Board may appoint;
> 14. "Trust Fund" means the pension fund established pursuant to the Trust Agreement and to which contributions are made after January 1, 1959, by the Company and by contributing members and from which pensions and other benefits under this Plan are to be paid.

98 A trust agreement was executed between the company and Canada Trust, which contained the following:

> AND WHEREAS under the PLAN contributions will be made to the Trustee which when received by the Trustee shall constitute a Pension Trust

> Fund (hereinafter called the "FUND") to be held and administered for the benefit of such persons or their estates as may from time to time be designated in or pursuant to the PLAN;
>
> . . .
>
> ARTICLE I
>
> ESTABLISHMENT OF TRUST
>
> 1. This Agreement is hereby made a part of the PLAN.
> 2. The Company may pay or cause to be paid from time to time to the Trustee upon the trusts of this Agreement money or property acceptable to the Trustee for the purpose of the PLAN, all of which together with the earnings, profit and increments thereon and property from time to time substituted therefore shall constitute the FUND hereby created and established. [Emphasis added.]

99 These provisions establish that a trust was created in 1959. The plan and the agreement constitute a clear declaration of an intention to create a trust. The subject matter of the trust is defined as all contributions made by the company and by employees together with all the earnings of those contributions; the beneficiaries are defined in the Trust Agreement by reference back to the Plan. This is a classic trust established for the benefit of a defined group of persons.

100 As Moore C.J. noted, there is no evidence that this trust was ever terminated. I agree with that finding. It must then be assumed that the trust continues to exist. This conclusion is strengthened by the definition of "Trustee" in the original plan, which accepts that Canada Trust might not always be in charge of the fund. Thus it can be seen that the parties contemplated that the trust would continue if a different trustee was named. It follows that the trust was not terminated when, in 1974, the company transferred control of its pension fund to Confederation Life Insurance Company pursuant to the terms of an investment contract which is not included in the evidence. Further, the fact that the 1978 version of the Catalytic plan removed all reference to a trust could not have the effect of terminating the trust. Nor could any of the provisions of the 1984 investment contract entered into by Stearns Catalytic and Confederation Life have that effect.

101 What then is the effect of this trust? The preamble to the Trust Agreement, the underlined portion of Article I.2 of that agreement, and the definition of "Trust Fund" contained in the 1959 Plan, taken together, make it clear that the trust fund was comprised of all contributions made by both the company and the employees, together with any earnings of those monies. The fact that the 1959 plan was a defined contribution plan under which no surplus could arise does not affect this definition of the trust fund. These provisions in themselves refute the company's argument that only that portion of the fund necessary to cover the benefits defined in the plan was subject to the trust.

102 All monies in the Catalytic pension fund were impressed with a trust. It follows that the

company could only claim the surplus remaining on termination by virtue of a resulting trust, or according to the terms of the trust itself. No resulting trust arises in this case. In my opinion, the purposes of the trust were not fully satisfied by the payment of all defined benefits. One of the objects of the trust was to use any money contained in the fund for the benefit of the employees.

103 This objective can be implied from the "exclusive benefit" and "non-diversion" clauses contained in the original trust agreement. Furthermore, Section XI of the plan provided that all contributions on behalf of employees who left the company prior to the vesting of their rights as members should be forfeited to the fund and "allocated among the Company Accounts of the remaining Members at that date".

104 Section XV of the plan governed an employee's pension entitlement. It reads:

SECTION XV AMOUNT OF PENSION

> When a Member retires, the proceeds of his Member's Account, if any, and of his Company Account . . . shall be used in their entirety to purchase for the Member an Annuity from an insurance company . . . . [Emphasis added.]

These clauses demonstrate that all money in the fund was to be used for the benefit of employees. Even though originally the plan was one of "defined contribution", the entitlement of each employee was never limited to the contributions made on his behalf. Collectively, the entitlement of all eligible employees was to all monies contained in the fund, whether the money resulted from contributions made on their behalf or "windfall" funds resulting from the withdrawal of employees from the plan prior to the vesting of their rights.

105 These provisions, specifically incorporated by reference into the 1959 Trust Agreement, clearly indicate that one of the objectives of the trust was to divide all monies in the fund among eligible members. The corollary to this is that the trust objects are not exhausted so long as some money remains in the fund and some eligible employees can be found. Therefore, a resulting trust cannot arise in this case.

106 Air Products is only entitled to the surplus, if at all, under the terms of the trust. In this case both the trust agreement and all versions of the plan make some provision for what was to occur on termination of the plan. The question is which of the different provisions dealing with termination governed in 1988? The answer depends upon the validity of the amendments purportedly made by the employer since 1959.

> Section XXII of the 1959 plan provided:

> 3. In the event of termination of the Plan, the Company cannot recover any sums paid to the date thereof and each Member of the Plan shall receive the proceeds of his Member's Account and his Company Account as of the date of such termination. . . .

107 This section was reproduced in nearly identical form in the 1966 plan. The issue of entitlement to surplus was not specifically addressed until the plan was amended again in 1978. Section 17.05 of the 1978 plan provided that any surplus remaining on termination was to be distributed according to the directions of the company. The 1983 Air Products Plan contained the same stipulation (renumbered to become Section 18.05), and added an additional clause imposing a maximum level of benefits recoverable by an employee and stating that any surplus remaining once that maximum level had been reached was to revert to the company.

108 The validity of these amended provisions depends upon the original 1959 documents. Section XXII.2 of the pension plan prohibited any amendment which would operate to reduce the benefits which had accrued to the employees prior to the date of the amendment. The Trust Agreement contained the following provision:

ARTICLE V

MODIFICATION AND TERMINATION

> 1. Subject as herein and in the PLAN provided, the Company reserves the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the PLAN (including this Agreement) provided . . . that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the FUND to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the PLAN as amended from time to time. . . .

109 The company therefore reserved a general amending power subject to the provisos that no amendments could reduce accrued benefits or allow the trust fund to be used in any way other than for the employees' exclusive benefit. The company did not expressly reserve for itself the power to revoke the trust. Such a power cannot be implied under the broad general amendment power.

110 I cannot accept that when the Catalytic Plan became a defined benefit plan in 1966, the parties did not intend Article V of the Trust Agreement to apply to any surplus which might arise. Although the Trust Agreement was not altered, several provisions contained in the 1959 plan were modified in the 1966 version of the plan. The nature of the modifications indicates that the parties considered the effect of changing to a defined benefit plan and made the necessary amendments to the 1966 plan. In these circumstances, the parties must be taken to have intended that the unaltered provisions of the plan and the Trust Agreement should continue to apply to the new arrangement. Article V therefore continued to apply to all monies in the pension fund after 1966.

111 In the result, the 1978 amendment purporting to give the company the power to distribute surplus to itself, as well as the reversion clause of the 1983 plan, are invalid. Both represent attempts to revoke partially a trust in favour of the employees which was established in 1959. Neither is within the scope of the control which the company reserved to itself at that time.

112 I agree with the Chambers Judge and the Court of Appeal that, by virtue of a continuing trust in their favour, the employees are entitled to those surplus funds which are derived from the Catalytic plans.

B. Contribution Holiday

113 The relevant plan provisions which govern the taking of a contribution holiday are those contained in the 1983 Air Products Plan. As the employees point out, the Chambers Judge, when considering this issue, mistakenly quoted the contribution provisions from the 1977 Stearns plan. The Stearns plan expressly reserved to the company the right to pay its contributions from surplus. It is therefore necessary to consider whether the actual provisions of the 1983 plan would affect the result he reached.

114 Section 4.03 of the Air Products plan (which is identical to s. 4.03 of the 1978 Catalytic plan) provides that:

> 4.03 Company Contributions
>
> The Company shall contribute from time to time, but not less frequently than annually, such amounts as are not less than those certified by the Actuary as necessary to provide the retirement benefits accruing to Members during the current year pursuant to the Plan and to make provision for the proper amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued, in accordance with the requirements of the Pension Benefits Act, after taking into account the assets of the Pension Fund and all other relevant factors.

115 The employees submit that this section, like the contribution clause in the Ontario Hydro case, provides a fixed formula according to which the annual contribution obligation must be calculated. On this approach, the standard actuarial practice of applying surplus to current service funding obligations is excluded. Instead, Section 4.03 requires the company to contribute an amount equal to not less than the sum of:

> (i) the amount necessary to provide the retirement benefits accruing to members during the current year, and
> (ii) the amount required to make provision for the proper amortization of any

> initial unfunded liability or experience deficiency with respect to benefits previously accrued, in accordance with the requirements of the Pension Benefits Act, after taking into account the assets of the Pension Fund and all other relevant factors.

Where no amount is required under (ii), the employees submit that the Company's minimum annual contribution is the amount determined under (i).

116 In my view, the words "after taking into account the assets of the Pension Fund and all other relevant factors" must qualify all of the preceding phrase beginning with "as necessary. . .". Such an interpretation is consistent with the natural grammatical construction of Section 4.03. The absence of a comma between the phrases "to provide the retirement benefits accruing to Members during the current year pursuant to the Plan" and "to make provision for the proper amortization of any initial unfunded liability or experience deficiency" supports this position. Further, to agree to the interpretation suggested by the employees would be to accept that the company either overlooked or decided not to take advantage of the chance to take into account a surplus in the ongoing plan in determining its contributions. This seems to me unlikely since elsewhere in the amended provisions specific reference is made to a potential surplus on termination. There is as well the Revenue Canada circular which requires employers to take contribution holidays when the actuarial surplus exceeds certain levels. It is more likely that in 1983 the company simply assumed that the wording of Section 4.03 permitted the consideration of an actuarial surplus in the calculation of the current service cost.

117 The Air Products Plan, like those considered in Askin and Maurer, supra, is not one which specifically mandates regular contribution on a specified basis which would leave an actuary no discretion to employ the standard actuarial practice of considering existing surplus. The wording of the plan itself implicitly authorizes an actuary to consider an actuarial surplus when calculating the company's annual funding obligation.

118 As a result, I am of the opinion that the plan did allow the company to take contribution holidays. The appeal should be allowed in respect of the order made by the courts below requiring Air Products to pay $1,465,400 (which represents the actuarial surplus applied to the current service costs in the years when the company made no contributions) into the plan.

2. The Stearns Plan

119 The Stearns employees also claim entitlement to the surplus remaining in the pension fund. They argue that the original Stearns fund was subject to a trust in their favour. Even if no trust existed, the employees say that the company is obligated by the provisions of a 1972 employee pension brochure and by the existence of a fiduciary duty to exercise its discretion to distribute the surplus in favour of the employees.

120 The 1970 Stearns plan differs in two significant ways from the original Catalytic plan. Firstly

the Stearns plan makes no reference to the existence of a trust; secondly, it specifically contemplates the reversion of surplus assets to the company in these words:

ARTICLE XIV

Amendment or Termination of the Plan

14.1 . . .

c) . . .

> Notwithstanding any surplus remaining after all benefits referred to in this Sub-section 14.1 (c) have been provided, such surplus may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions at the time, be returned to the Company or may be used for the benefit of Participants, former Participants, beneficiaries or estates in such equitable manner as the Company may in its discretion determine.

121 This provision remained in the 1977 version of the Stearns plan and was then replaced in 1983 by Section 18.05 of the Air Products plan which, as observed earlier, provided for the automatic reversion of surplus to the company. The employees seek to establish the existence of a trust in order to make the further argument that the 1983 amendment to the plan was invalid as an unauthorized partial revocation of the trust.

(a) Was the Stearns Fund Impressed with a Trust?

122 Neither the 1970 nor the 1977 Stearns plans make any reference to a trust nor provide for the creation of a trust agreement. The plan was funded by means of a Group Annuity Policy entered into between the company and the Mutual Life Assurance Group. The employees contend that the terms of the pension plan clearly implied a trust onto this fund. In particular, the employees rely upon the following provisions of the plan:

13.2

> No part of the Fund shall be used for or diverted to purposes other than for the exclusive benefit of Participants and their beneficiaries. . . .

14.1 . . .

> b) No amendment shall have the effect of diverting any part of the Fund to purposes other than for the exclusive benefit of the Participants . . .

123 This plan, together with the 1972 Brochure and the 1977 Stearns plan, are said to constitute the trust documents.

124 It is true that the alleged subject matter of the trust, the pension fund, was defined under the two Stearns plans, and that the employees were identified as those entitled to receive the fund monies. Furthermore, the exclusive benefit and non-diversion clauses relied upon by the employees above are consistent with the existence of a trust. Nonetheless, I am not convinced that a trust was ever created. Certain phrases, such as the exclusive benefit and non-diversion clauses identified above, are commonly found in plans which do create pension trusts. They may point to the existence of a trust but of themselves they cannot be taken as demonstrating an intention by the employer to create a trust.

125 The company identifies several other clauses which it claims are equally consistent with the non-existence of trust, and clearly identify the plan as a contract to receive defined benefits. These individual clauses are of little assistance in determining whether a trust came into existence. Rather, all of the documents relied upon by the employees must be construed in their entirety in order to see whether an intention to create a trust can be imputed to the company. I do not see any such intention apparent on the face of these documents.

126 Unlike the Catalytic plan, the Stearns plan makes no mention of any trust, trust fund or trustee. The Stearns fund was not created pursuant to a trust agreement but pursuant to a contract. This is so even though by 1970 the use of the trust in the creation of private employer pension plans had become a well-established practice. The absence of any reference to a trust in these circumstances indicates that there was a deliberate decision to avoid the use of a trust. Any argument that the employer merely "omitted" to state explicitly its intention to create a trust is difficult to accept.

127 At the time of the 1970 plan, the employer tax benefits to be gained from the creation of a "trusted" pension fund were equally available to employers who preferred to purchase a group insurance policy.

128 Finally, the employees contend that three documents -- the 1970 and the 1977 plans and the 1972 employee brochure -- made up the trust deed. On this approach, it would seem that the employer's intention to create a trust was not perfected until seven years after the creation of the fund. There was no significant change in circumstances between 1970 and 1977 which warrants a finding that a trust which did not exist at the inception of the plan suddenly came into existence in 1977.

129 I do not think that the Stearns pension fund was ever subject to a trust.

(b) The Pension Brochure

130 The Stearns employees relied upon the effect of a pension brochure which was distributed to employees in 1972. They urged us to accept that clauses contained in that document must be taken to have fixed the employer with an equitable obligation to distribute any surplus remaining on termination to the employees.

131 The brochure is entitled "Stearns-Roger Canada Ltd. -- Employee Benefits". In his supplementary affidavit, Gunter Schmidt stated that he received the brochure, which is dated June 1, 1972, when he joined the company in 1973. It consists of eight pages of text in which the operation of the pension plan is explained in some detail. The brochure contains the following relevant provisions:

> Future of the Plan
>
> It is the intention of the Company that the plan will continue indefinitely but of necessity they reserve the right to amend, modify or terminate the plan at any time. . . . In the event that there is a surplus in the fund after all benefits have been paid it is the Company's intention that the surplus will be distributed in an equitable manner to the employees active in the plan at the date of termination.
>
> General
>
> This outline has been prepared to acquaint you with the provisions of your plan. Please read it carefully.
>
> The precise terms of the plan are contained in the official plan text and Insurance company contract which may be read by any employee on request at the Calgary Office of the Company.
>
> . . .
>
> The company reserves the right to revise or discontinue any of the benefit plans at any time.
>
> The above are transcripts from the various insurance policies and contracts. If more detailed information is desired our insurance group will be pleased to

answer questions.

132 The employees assert that this brochure formed a binding part of the pension plan documents and that the statement contained in it to the effect that the company intends to pay any remaining surplus to the employees estops the company from now claiming the surplus for itself.

133 Documents not normally considered to have legal effect may nonetheless form part of the legal matrix within which the rights of employers and employees participating in a pension plan must be determined. Whether they do so will depend upon the wording of the documents, the circumstances in which they were produced, and the effect which they had on the parties, particularly the employees.

134 Foisy J. explained why courts will in specified circumstances bind an employer to the terms of a pension brochure in Harris v. Robert Simpson Co., [1985] 1 W.W.R. 319, at p. 327:

> If it were otherwise then an employer could provide the employee with a brochure claiming to represent the significant and material terms in the company's pension plan. Yet the "true" plan could vary significantly from this representation without the employee's knowledge. In such a case it cannot be said that the "true" agreement prevails, as to do so would leave the door open to mischief.

135 In other words it would be unfair or unacceptable if an employer were to attract and retain employees by making representations as to the pension benefits available upon which the employees could be expected to rely and then resile from those representations as being contrary to the actual pension terms.

136 The 1972 brochure does not purport to have any contractual effect. It does, however, contain a detailed outline of an employee's entitlements under the plan, although it states that it is merely a "transcript" of the various policies and that the benefits can be amended by the company. The brochure is worded in a way that is declarative of the rights of individual employees under the plan. For example, the plan states "The Life Insurance is payable in the event of your death from any cause. . . . If you should become totally and permanently disabled while insured and prior to age sixty your life insurance will remain in force as long as you remain so disabled but you must furnish proof of disability . . . ."

137 The only notable exception to this didactic style is contained in the clause concerning the future of the plan. The brochure there sets out the "intention" of the company. This is a declaration of intention as to a future act, but it does not in any way indicate that the company is undertaking an obligation to allocate surplus to the employees.

138 The brochure is potentially misleading. Yet there is no evidence as to the effect that this brochure had on the employees of the company. All that is known is that the brochure was

distributed to the employees of the company in June, 1972, and that Mr. Schmidt received a copy in 1973 when he joined the company. There is no indication that Mr. Schmidt was induced to join the company on the basis of the terms of the brochure, or that he even read it. There is no evidence that either the employees or their union relied upon the brochure in such a way as to affect their position during collective bargaining sessions. This may be contrasted to the situation in Re Collins and Pension Commission of Ontario, supra, where the Ontario Divisional Court found, at p. 277, that a booklet describing the terms of the pension plan, together with the plan itself, led to a belief amongst plan members that the company had no right to claim any part of the fund.

139 Finally, I have some doubts as to the extent to which a brochure issued in 1972 can influence entitlement to plan surplus in 1988 particularly since it specifically states that the plan will be subject to amendment from time to time. As a brochure describing pension benefits becomes outdated, it becomes increasingly difficult for employees to rely upon it as the source of a supplementary obligation undertaken by the employer.

140 I agree with the Court of Appeal that the brochure provisions concerning the treatment of surplus did not, on the evidence adduced in this case, amount to a promise intended to affect the legal relationship between the parties. It cannot form the basis for an estoppel as there is no evidence of inducement or reliance upon it by the employees.

(c) Interpretation of the Plan Provisions

141 Since no trust was ever created under the Stearns plan and the 1972 brochure did not have any legal effect, the issue of entitlement to the plan surplus must be decided on the basis of an interpretation of the plan's provisions.

142 The position of the employees is that Section 18.05 of the Air Products Plan was an invalid amendment. Therefore, they argue that Article 14.1(c) of the 1970 plan (Article 14.3 of the 1977 plan) still applies, that that section gives the company a discretion as to whether distribute surplus to employees or to itself, and that the employer owes a fiduciary duty to the employees which compels it to exercise that distribution discretion in favour of the employees.

143 Moore C.J. did not explicitly deal with the validity of the 1983 amendment. He decided that, even under the 1977 version of the plan, the employer was entitled to take the surplus. The issue of fiduciary duty was not raised before him.

144 It may be helpful to begin by examining the 1983 amendment. Whether or not the surplus reversion clause contained in Section 18.05 of the Air Products plan is valid must be determined by reference to the amendment clause contained in both the 1970 and the 1977 plans:

14.1

> The Company retains the right to amend or modify or terminate the Plan in whole or in part, at any time and from time to time, and in such manner and to such extent as it may

deem advisable, subject to the following provisions:

a) No amendment shall have the effect of reducing any Participant's, former Participant's, joint annuitant's, beneficiary's, or estate's then existing interest in the Fund;
b) No amendment shall have the effect of diverting any part of the Fund to purposes other than for the exclusive benefit of the Participants, former Participants, joint annuitants, beneficiaries, or estates;

145 In my opinion, the 1983 amendment of the pension plan was within the limits of this power of amendment. The amendment does not violate Article 14.1(a) because at the time it was enacted it did not reduce any "then existing" interest of the employees. Under the prior plans, the employees had no interest in the surplus remaining upon termination until such time as the company exercised its discretion to give them an interest. The removal of a mere potential interest in the funds was within the company's amending power.

146 Nor do I think that the amendment violated the limitation on the amending power contained in Article 14.1(b). I agree with Moore C.J. that this restriction on amendment was in the nature of a general protection of the benefits and rights of the plan participants and that it must be read in the light of other provisions dealing with specific rights including the treatment of surplus. He considered that two particular provisions in the 1977 plan overrode any conflict with the more general terms of the amendment power. I agree. This was also true of the corresponding provisions in the 1970 plan. The relevant 1970 clauses are that part of s. 14.1(c) which gives the employer a discretion as to the allocation of surplus, and:

13.2

No part of the Fund shall be used for or diverted to purposes other than for the exclusive benefit of Participants and their beneficiaries. No Participant, retired Participant, survivor or beneficiary under the Plan, or any other person, shall have any interest in or right to any part of the earnings of the Fund, or any rights in or to or under such Fund or any part of the assets thereof, except and to the extent expressly provided in this Plan.

147 The amending power contained in Article 14.1(b) must therefore be read in light of the fact that the employee rights under the plan are limited by s. 13.2 (and indeed throughout the plan) to the benefits defined in the plan, as well as by the stipulation that the company has the right to distribute surplus as it chooses. The 1970 plan does not deal with the issue of whether the reversion of surplus to the company is inconsistent with the non-diversion and exclusive benefit clauses contained in Article 13.2. I do not think it is. The prohibition on diversion of funds and the exclusive benefit clause applied from the outset only in respect of the defined benefits to which the employees were contractually entitled. They did not apply to the distribution of a plan surplus. The revamped version of Article 13.2, which appeared as Article 13.4 in the 1977 plan, and upon which Moore

C.J. based his conclusion, clarified this point but did not change the substance of the original provisions.

13.4

> No part of the Fund shall be used for, or diverted to, purposes other than for the exclusive benefit of Participants, their designated Beneficiaries, or estates, except to the extent that surpluses, as certified by the Actuary, may be returned to the Company with the approval of the Minister of National Revenue and the Superintendent of Pensions. . . . No Participant, retired Participant, survivor, or designated Beneficiary under this Plan, or any other person, shall have any interest in or right to any part of the Fund except and to the extent expressly provided in this Plan. [Emphasis added.]

148 Whether measured against the 1970 or the 1977 plan provisions, Section 18.05 of the Air Products Plan was a valid amendment. The company is entitled according to its terms to any surplus remaining in the pension fund which can be traced to the former Stearns plans. This is the conclusion which must be reached on an interpretation of the contract. The issue of a fiduciary duty does not arise.

(d) The Contribution Holiday

149 For the reasons given on the appeal, Air Products was entitled to take a contribution holiday. The application of an actuarial surplus to current service funding obligations was permitted under the terms of the Air Products Plan, and did not have the effect of reducing any benefits which had accrued to the employees.

(e) The Need for Legislation

150 The results in these appeals demonstrate the need for legislation. In both appeals the pension fund was created to benefit the employees. During the contribution holiday enjoyed by the employer they continued to pay into the pension fund. They had a real stake in the fund which was created for their benefit and funded in part by their contributions. It seems unfair that there should be a different result for these two groups of employees based only upon a finding that a trust was created in one case but not in the other. In my opinion there should be a legislative scheme set up for determining the proportion of the surplus which should be awarded to the employer and the employees. It could be based at least in part upon their contributions to the creation of the surplus. Principles of equity and fairness should encourage legislators to draft a scheme to provide for the equitable distribution of any surplus in pension plans that are terminated.

VII. Disposition

151 In the result, I would dispose of these appeals as follows:

The Appeal

152

1. The former Catalytic Employees are entitled to any surplus remaining in the pension fund which derives from former Catalytic plans. The appeal is dismissed on this ground and the order of the Court of Appeal varied accordingly.
2. Air Products was entitled under the terms of its pension plan to take a contribution holiday. The appeal is allowed on this ground.

The Cross-Appeal

153

1. Air Products is entitled to all surplus remaining in the pension fund which derives from the former Stearns plan.
2. Air Products was entitled to take a contribution holiday.

154 The cross-appeal is dismissed on both grounds. In light of the potentially misleading provisions contained in the brochure prepared and circulated by the employer, there should be no costs against the employees.

155 The costs of all parties on the appeal should be paid out of the Catalytic pension fund on a solicitor and client basis.

156 Similarly the costs of all parties on the cross-appeal should be paid out of the Stearns pension fund on a solicitor and client basis.

APPENDIX A

The following is an edited version of the Agreed Statement of Facts provided by the parties. The full text of the document is incorporated in the reasons of the Chief Justice of the Alberta Court of Queen's Bench.

I. HISTORY OF CATALYTIC PLANS
A. THE 1959 CATALYTIC PLAN

The 1959 Catalytic Plan was a money purchase plan which contained the following provisions:

SECTION V TRUST FUND

All contributions made by the members and the Company will be paid to the Trustee to be administered subject to the provisions of the Act governing the

investment of Pension funds, and in accordance with the terms of the Trust Agreement which forms part of this plan and of which this plan is Exhibit "A".

All benefits on the death or break of service of a Member shall be payable from the Trust Fund. All benefits on the retirement of a Member shall be payable as set forth in Section XV.

Expenses of the Trust Fund shall be paid out of the Fund unless paid by the Company.

SECTION VIII MEMBERS' ACCOUNTS

The Pension Committee shall keep for each Member of the Plan two accounts as follows:

1. Member's Account

   Here will be kept a cumulative record of any contributions made by the Member and the interest income and capital gains and losses realized and unrealized allocated thereon in accordance with Section X.

2. The Company Account

   Here will be kept a cumulative record of the amounts allocated to the Member as follows:

   (a) the Company's contribution allocated in accordance with Section IX.
   (b) The interest income and capital gains and losses realized and unrealized allocated in accordance with Section X.
   (c) The forfeitures allocated in accordance with Section XI.

SECTION XXII FUTURE OF THE PLAN

1. The Company hopes and expects to continue the Plan and the payment of contributions hereunder indefinitely but such continuance is not assumed as a contractual obligation. The Company expressly reserves the right, by action of its Board, to amend or terminate the Plan in whole or in part, if in the opinion of the Company future conditions warrant such action.
2. No amendment to the Plan shall operate to reduce the benefits which have occrued (sic) to the Members of the Plan prior to the date of amendment.
3. In the event of termination of the Plan, the Company cannot recover any sums paid to the date thereof and each Member of the Plan shall receive the proceeds of his Member's Account and his Company Account as of the date of such termination. No other employees will become eligible to become Members and no further contributions will be made by the Company.

. . .

B. TRUST AGREEMENT

As contemplated by the 1959 Catalytic Plan, Catalytic entered into an agreement dated September 8, 1959 (the "Trust Agreement") with Canada Trust Company whereby Canada Trust, as trustee, was to hold, invest and administer the fund. The Trust Agreement provided:

ARTICLE I

ESTABLISHMENT OF TRUST

1. This Agreement is hereby made a part of the PLAN.
2. The Company may pay or cause to be paid from time to time to the Trustee upon the trusts of this Agreement money or property acceptable to the Trustee for the purpose of the PLAN, all of which together with the earnings, profit and increments thereon and property from time to time substituted therefore shall constitute the FUND hereby created and established.
3. The Trustee hereby accepts the trusts herein set out and agrees to hold, invest, distribute and administer the FUND in accordance with the provisions of this Agreement.

ARTICLE V

MODIFICATION AND TERMINATION

1. Subject as herein and in the PLAN provided, the Company reserves the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the PLAN (including this Agreement) provided that no such amendment which affects the rights, duties, compensation, or responsibilities of the Trustee shall be made without its consent, and provided further that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the FUND to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the PLAN as amended from time to time, and for the payment of taxes or other assessments as provided in paragraph 2 of Article II hereof, and the expenses and compensation of the Trustee as provided in paragraph 4 of Article IV hereof.
2. This Agreement may be terminated at any time by the Company upon at least sixty (60) days' prior written notice to the Trustee, and with its termination, or upon the dissolution or liquidation of the Company, the FUND shall be paid out by the Trustee as directed by the Company.

C. THE 1966 CATALYTIC PLAN

The 1966 Catalytic Plan changed the benefit formula from a money purchase formula to a defined benefit formula. . . . [E]ffective October 1, 1966 the plan provided that:

> . . . the Company shall not less frequently than annually make such contributions as are necessary to provide the benefits accruing to Members during the current year and to amortize any initial unfunded liability or experience deficiency in accordance with the provisions of The Pension Benefits Act of Ontario. (Section VI)

The provisions regarding the future of the plan remained unchanged from Section XXII of the 1959 Catalytic Plan.

The money purchase portion of the Catalytic 1959 and 1966 Plans was segregated and is administered separately from the funds generated in the defined benefit plans. No surplus was or could be generated from the money purchase portion of the 1959 and 1966 Catalytic Plans.

D. THE 1978 CATALYTIC PLAN

This plan was a defined benefit plan. . . . [It] provided . . .:

. . .

> SECTION 2 -- DEFINITIONS

2.12 "Funding Agency" means the trustees, trust company or insurance company that the Company may appoint to hold and invest the Pension Fund or the Pooled Pension Trust Fund or such successor trustees, trust company or insurance company as the Company may appoint from time to time to hold and invest the Pension Fund or the Pooled Pension Trust Fund.

2.13 "Funding Agreement" means the agreement entered into between the Company and the Funding Agency establishing and maintaining the Pension Fund.

2.18 "Pension Fund" means the fund established pursuant to the Funding Agreement to which contributions are made by the Members and Company and from which retirement and other benefits under the Plan are to be provided.

SECTION 4 -- CONTRIBUTIONS

4.03 The Company shall contribute from time to time, but not less frequently than annually, such amounts as are not less than those certified by the Actuary as necessary to provide the retirement benefits accruing to Members during the current year pursuant to the Plan and to make provision for the proper amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued, in accordance with the requirements of the Pension Benefits Act, after taking into account the assets of the Pension Fund and all other relevant factors.

. . .

SECTION 17 -- AMENDMENT TO OR TERMINATION OF THE PLAN

17.01 Continuation of Plan

The Company expects and intends to maintain this Plan in force indefinitely but necessarily reserves the right to amend or discontinue the Plan either in whole or in part, if, in the opinion of the Company, future conditions warrant such action, subject always to the requirements of the Department of National Revenue and the provisions of the Pension Benefits Act.

17.02 Amendment of Plan

No amendment to the Plan shall operate to reduce the pension benefits which have accrued to Members thereunder prior to the date of such amendment.

17.03

Discontinuance of Plan

Should the Plan be wholly terminated, the Company shall not be obligated to make any further contributions to the Plan and the assets held under the Pension Fund shall be allocated for the provisions of the accrued benefits to which the Members, their Beneficiaries and their joint annuitants are entitled in such equitable manner as may be determined by the Company in consultation with the Actuary until all liabilities under the Plan have been met. Such benefits may be provided through the purchase of annuity contracts from insurance companies licensed to transact business in Canada, in the form elected by the Members, or through the continuation of the Funding Agreement for this purpose. If the assets of the Pension Fund are not sufficient to provide the aforementioned accrued benefits, the Pension Fund shall be allocated in a manner approved under the Pension Benefits Act.

. . .

17.05

Distribution of Benefits

If, after full provision has been made for the accrued benefits payable to the Members, their Beneficiaries and their joint annuitants, there should remain any excess assets in the Pension Fund, such excess shall be used as the Company or liquidator or trustee in bankruptcy, if appropriate, may direct. Any distribution of the Pension Fund resulting from termination of the Plan shall be in accordance with the applicable provisions of the Pension Benefits Act and the Income Tax Act, and with the rules and regulations of the

Department of National Revenue with respect to registered pension plans.

. . .

II. A HISTORY OF THE STERNS PLANS

A. THE 1962 STEARNS PLAN

On January 1, 1962, Stearns obtained a Group Annuity Policy (GA577) from the Mutual Life Assurance Company for the purpose of providing retirement benefits to its employees. No surplus was or could have been derived pursuant to this plan.

B. THE 1970 STEARNS PLAN

Stearns established a pension plan effective January 1, 1970 for the retirement of and payment of pensions to its employees.

. . .

As required by Article 13.1 of this plan, the Company entered into a Group Annuity Policy (GA1328) with the Mutual Life Assurance Company and a fund was established by transfer of the assets from the 1962 Stearns Plan and by contributions from the employees and the Company.

The 1970 Stearns Plan provided that:

ARTICLE I

DEFINITIONS

Fund shall mean the Fund to be established under the Deposit Administration Policy issued by the Insurer by transfer of assets from the Prior Plan and by contributions by the Participants and the Company from which the benefits of the Plan are to be provided.

ARTICLE II

ESTABLISHMENT OF THE PLAN

. . .

2.2

Prior to the Effective Date, certain Employees of the Company had accumulated retirement benefits under the Prior Plan. The Prior Plan shall be terminated 31 December 1969 and all benefits earned thereunder shall be transferred to the Plan. All benefits accrued under the

Prior Plan transferred to the Plan shall become a liability of the Plan and shall be paid in accordance with the provisions of the Plan. Future contributions by such Employees and Employees who become eligible on and after the Effective Date shall be made under the Plan.

ARTICLE IV

CONTRIBUTIONS

4.3

(a) The Company will contribute each year to the Fund such amounts as determined by the Actuary, which, when added to the Participant's contributions made under Section 4.1 will provide the regular benefits described in the Plan and will provide for funding in accordance with the tests for solvency prescribed by the regulations under the Pension Benefits Act.

(b) It is expressly stipulated that the Company will not make any additional contributions corresponding to or in respect of the additional voluntary contributions made by a Participant as provided for in Section 4.2 or 4.4.

ARTICLE XIII

RETIREMENT FUND

13.2

No part of the Fund shall be used for or diverted to purposes other than for the exclusive benefit of Participants and their beneficiaries. No Participant, retired Participant, survivor or beneficiary under the Plan, or any other person, shall have any interest in or right to any part of the earnings of the Fund, or any rights in or to or under such Fund or any part of the assets thereof, except and to the extent expressly provided in this Plan.

ARTICLE XIV

Amendment or Termination of the Plan

14.1

The Company retains the right to amend or modify or terminate the Plan in whole or in part, at any time and from time to time, and in such manner and to such extent as it may deem advisable, subject to the following provisions:

a) No amendment shall have the effect of reducing any Participant's, former Participant's, joint annuitant's,

beneficiary's, or estate's then existing interest in the Fund;

b) No amendment shall have the effect of diverting any part of the Fund to purposes other than for the exclusive benefit of the Participants, former Participants, joint annuitants, beneficiaries, or estates;

Article 14.1(c) set out the following scheme of distribution to be instituted upon termination of the plan:

c) If it should become necessary to discontinue the Plan, the assets of the Fund shall be used, to the extent adequate, for the following purposes:

. . .

Notwithstanding any surplus remaining after all benefits referred to in this Sub-section 14.1 (c) have been provided, such surplus may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions at the time, be returned to the Company or may be used for the benefit of Participants, former Participants, beneficiaries or estates in such equitable manner as the Company may in its discretion determine.

C. BROCHURE . . .

On June 1, 1972, Stearns issued to its employees a brochure entitled 'Employee Benefits' which provided that:

Future of the Plan

It is the intention of the Company that the plan will continue indefinitely but of necessity they reserve the right to amend, modify or terminate the plan at any time. If it becomes necessary to terminate the plan at some future date, all employees would be granted 100% vesting, regardless of their service. No part of the assets of the fund will be available to the Company until all benefits earned under the plan to the date of termination have been paid. In the event there is a surplus in the fund after all benefits have been paid it is the Company's intention the surplus will be distributed in an equitable manner to the employees active in the plan at the date of termination.

D. THE 1977 STEARNS PLAN . . .

By an amendment dated January 1, 1977, Stearns amended the 1970 plan. . . .

The 1977 Stearns Plan contained . . . the following provisions:

ARTICLE I

DEFINITIONS

1.14 Fund means the corpus and all earnings, appreciations, or additions thereon and thereto held by the Funding Agency under the Funding Agreement.

1.15 Funding Agency means the Trust Company, Trustees, Insurance Company or successors thereof as the Company may appoint to hold the Fund pursuant to the Funding Agreement.

1.16 Funding Agreement means the agreement or contract entered into between the Company and the Funding Agency establishing the Fund.

ARTICLE IV

CONTRIBUTIONS

4.1 The Company will contribute to the Fund, not less frequently than annually, such amounts which are not less than those certified by the Actuary as being necessary to provide benefits accruing during each Plan Year and to make provision in accordance with the Pension Benefits Act for the amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued after taking into account the assets of the Fund and such other factors as may be deemed relevant. The Company reserves the right, however, subject to the provisions of Article XIII, to pay its contributions from such surpluses as may accumulate and shall be determined in a valuation of the Funds' assets and liabilities certified by an Actuary.

4.2 Participants shall not be required to contribute to the Plan.

ARTICLE XIII

ESTABLISHMENT OF THE FUND

13.4

No part of the Fund shall be used for, or diverted to, purposes other than for the exclusive benefit of Participants, their designated Beneficiaries, or estates, except to the extent that surpluses, as certified by the Actuary, may be returned to the Company with the approval of the Minister of National Revenue and the Superintendent of Pensions and except as provided in Sub-section 14.2 (d) of Article XIV. No Participant, retired Participant, survivor, or designated Beneficiary under this Plan, or any other person, shall have any interest in or right to any part of the Fund except and to the extent expressly provided in this Plan.

ARTICLE XIV

AMENDMENT OR TERMINATION OF THE PLAN

14.1

The Company retains the right to amend or modify or terminate the Plan in whole or in part, at any time and from time to time, and in such manner and to such extent as it may deem advisable, subject to the following provisions:

(a) no amendment, modification or termination shall have the effect of reducing any Participant's, former Participant's, joint annuitant's, Beneficiary's or estate's then existing interest in the Fund.

(b) no amendment, modification or termination shall have the effect of diverting any part of the Fund to purposes other than for the exclusive benefit of the Participants, former Participants, joint annuitants, Beneficiaries or estates.

The scheme of distribution upon termination was . . . contained in Article 14.2 . . .:

14.2

Should the Plan be terminated, whether by the Company or as a result of wind-up or bankruptcy of the Company, the assets of the Fund shall be used, to the extent adequate, and subject to the provisions of the Pension Benefits Act, for the following purposes:

. . .

14.3

Any balance remaining in the Fund after distributions have been made in accordance with the foregoing Section 14.2 after satisfying all other liabilities of the Plan may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions, be returned to the Company or may be used for the benefit of Participants, former Participants, designated Beneficiaries, or estates, in such equitable manner as the Company may at its discretion determine.

E. THE 1982 STEARNS PLAN CONSOLIDATION . . .

The 1982 Stearns Plan Consolidation is virtually identical to the 1977 Stearns Plan with one important exception. Article 14.3 of the 1982 Sterns Plan Consolidation provides that:

14.3

> Any balance remaining in the Fund after distributions have been made in accordance with the foregoing Section 14.2 after satisfying all other liabilities of the Plan may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions, be returned to the former Participants, designated Beneficiaries, or estates, in such equitable manner as the Company may at its discretion determine, so long as the surplus is distributed in such manner as to observe the maximum benefit allowed by the Department of National Revenue.

This consolidation was not registered with the Employment Pension Plans Branch and there is no Directors' Resolution authorizing it.

III. THE STEARNS CATALYTIC PENSION PLANS

[I]n 1983 with the amalgamation of Stearns and Catalytic, the Company instituted the two Stearns Catalytic Pension Plans. . . .

These plans contained, . . . the following terms:

> SECTION 1 -- ESTABLISHMENT OF THE PLAN
>
> The benefits provided by this Plan, in respect of service prior to October 1, 1983, are in lieu of all and any benefits to which any person, active or retired, may have been entitled under either of these Prior Plans, and in no event shall be less than the benefits to which they were entitled under these Prior Plans.
>
> Effective October 1, 1983, the respective pension funds of the Catalytic Enterprises Plan and the Stearns-Roger Plan shall be merged and held as one fund to the benefit of members of this Pension Plan for Employees (Senior Members of Management) of Stearns Catalytic Ltd. - Construction Division.
>
> SECTION 2 -- DEFINITIONS

2.19

"Pension Fund" means the fund established pursuant to the Trust Agreement to which contributions are made by the Members and the Company and from which retirement and other benefits under the Plan are to be provided.

2.24 "Trustee" means the trustees, trust company or insurance company that the Company may appoint from time to time, to hold and invest the Pension Fund.

2.25 "Trust Agreement" means the agreement entered into between the Company and the Trustee establishing and maintaining the Pension Fund.

. . .

SECTION 4 -- CONTRIBUTIONS

4.03

The Company shall contribute from time to time, but not less frequently than annually, such amounts as are not less than those certified by the Actuary as necessary to provide the retirement benefits accruing to Members during the current year pursuant to the Plan and to make provision for the proper amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued, in accordance with the requirements of the Pension Benefits Act, after taking into account the assets of the Pension Fund and all other relevant factors.

. . .

6.05 Statutory Maximum Retirement Benefit

In no event shall the annual retirement benefit payable under the Plan in respect of the retirement or termination of service of a Member or termination of the Plan exceed the lesser of:

a) $1,715 for each year of the Member's Credited Service to a maximum of 35 years; and

b) 2% of the Member's average best three (3) consecutive years' Earnings multiplied by his years of Credited Service, to a maximum of 35 years.

. . .

SECTION 18 -- AMENDMENT TO OR TERMINATION OF THE PLAN

18.01

Continuation of Plan

The Company expects and intends to maintain this Plan in force indefinitely but necessarily reserves the right to amend or discontinue the Plan either in whole or in part, if, in the opinion of the Company, future conditions warrant such action, subject always to the requirements of the Department of National Revenue and the provisions of the Pension Benefits Act.

18.02

Amendment of Plan

No amendment to the Plan shall operate to reduce the pension benefits which have accrued to Members thereunder prior to the date of such amendment.

18.03

Discontinuance of Plan

Should the Plan be wholly terminated, the Company shall not be obligated to make any further contributions to the Plan and the assets held under the Pension Fund shall be allocated for the provisions of the accrued benefits to which the Members, their Beneficiaries and their joint annuitants are entitled in such equitable manner as may be determined by the Company in consultation with the Actuary until all liabilities under the Plan have been met. Such benefits may be provided through the purchase of annuity contracts from insurance companies licensed to transact annuities business in Canada, in the form elected by the Members, or through the continuation of the Trust Agreement for this purpose. If the assets of the Pension Fund are not sufficient to provide the aforementioned accrued benefits, the Pension Fund shall be allocated in a manner approved under the Pension Benefits Act.

. . .

18.05

Distribution of Benefits

If, after full provision has been made for the accrued benefits payable to the Members, their Beneficiaries and their joint annuitants, there should remain any excess assets in the Pension Fund, such excess shall be used as the Company or liquidator or trustee in bankruptcy, if appropriate, may direct.

Any distribution of the Pension Fund resulting from termination of the Plan shall be in accordance with the applicable provisions of the Pension Benefits Act and the Income Tax Act, and with the rules and regulations of the Department of National Revenue with respect to registered pension plans.

The distribution of the assets of the fund must not result in a Member's retirement benefits exceeding the maximum indicated in Section 6.05 hereof. If any surplus remains in the Fund after all allocations have been made, such surplus shall be refunded to the Company.

The contributions made to the Stearns Catalytic Pension Plans [were] provided to Confederation Life Insurance Company under the terms of an Investment Contract dated October 29, 1984. . . .

[This contract] provided . . . that:

PROVISION 6 -- WITHDRAWALS

6.1

Confederation Life shall make withdrawals from the Accounts in order to make payments as designated in writing by the Contractholder provided that any such withdrawal shall be for the sole purpose of making payments in accordance with one of the following conditions:

(c) Payments to the Contractholder of any certified actuarial surplus as may be approved by any provincial or federal government body having jurisdiction in the matter.

The following are the reasons delivered by

157 SOPINKA J. (dissenting in part on the appeal (File No. 23047)):-- I have read the reasons of Justices Cory and McLachlin. Like McLachlin J. I agree with most of Cory J.'s conclusions but disagree with him on the question of entitlement to the surplus in the Catalytic plan. In my view, the surplus in the Catalytic plan reverts to the employer. However, I have arrived at this conclusion by a somewhat different route from McLachlin J.

158 While I agree with Cory J. that all monies in the Catalytic pension fund, including the surplus, were impressed with a trust, this does not foreclose amendment of that trust. In the case of a pension plan, the nature of the rights of amendment will continue to depend upon the terms of the plan and the trust agreement, if any. In my view, nothing in the Catalytic plan precluded the company from exercising the express power of amendment in the plan so as to provide that any surplus funds would revert to it upon termination of the plan.

159 I should state at the outset that I agree with Cory J.'s conclusion that the parties intended Article V of the Trust Agreement to apply to all monies in the pension fund after 1966, including the surplus funds. Article V purports to restrict the company's right to make amendments which divert parts of the "FUND" and reads as follows:

ARTICLE V
MODIFICATION AND TERMINATION

1. Subject as herein and in the PLAN provided, the Company reserves the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the PLAN (including this Agreement) provided that no such amendment which affects the rights, duties, compensation, or responsibilities of the Trustee shall be made without its consent, and provided further that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the FUND to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the PLAN as amended from time to time, and for the payment of taxes or other assessments as provided in paragraph 2 of Article II hereof, and the expenses and compensation of the Trustee as provided in paragraph 4 of Article IV hereof. [Emphasis added.]

160 Under the 1959 Catalytic Plan, the Trust Agreement was made part of the plan. It was clear that the terms upon which the monies contributed to that plan were to be held and administered were contained in both the plan and the Trust Agreement. The 1966 Catalytic Plan amended the 1959 Plan but retained a provision stating that all contributions to the plan were to be administered in accordance with the terms of the Trust Agreement. Thus it is clear that when the Catalytic Plan

became a defined benefit plan in 1966, the parties intended the provisions of the Trust Agreement to continue to apply to monies contributed to the plan. Furthermore, at all relevant times the Trust Agreement provided that the "FUND" referred to in that Agreement included all the monies paid to the Trustee by the Company for the purpose of the plan, as well as the earnings, profit and increments therefrom. The Catalytic surplus is derived from monies contributed to the plan after 1966 and thus is obviously part of the Fund. Therefore, it follows that Article V applies to amendments concerning the use of the surplus.

161 This, however, does not end the matter. By its terms Article V is subject to the terms of the plan. Both the 1959 and the 1966 versions of the plan reserved broader powers of amendment to the company than those contained in Article V of the Trust Agreement. The relevant provisions of the 1959 Catalytic Plan are as follows:

SECTION XXII FUTURE OF THE PLAN

1. The Company hopes and expects to continue the Plan and the payment of contributions hereunder indefinitely but such continuance is not assumed as a contractual obligation. The Company expressly reserves the right, by action of its Board, to amend or terminate the Plan in whole or in part, if in the opinion of the Company future conditions warrant such action.
2. No amendment to the Plan shall operate to reduce the benefits which have occrued [sic] to the Members of the Plan prior to the date of amendment.
3. In the event of termination of the Plan, the Company cannot recover any sums paid to the date thereof and each Member of the Plan shall receive the proceeds of his Member's Account and his Company Account as of the date of such termination. No other employees will become eligible to become Members and no further contributions will be made by the Company.

162 These provisions were carried over into the 1966 version of the Catalytic plan, renumbered as Section XXI. By virtue of those provisions, the only limitation upon the company's power to amend the plan was that no amendment could reduce accrued benefits. The right to receive surplus monies in the pension fund was not a benefit which had accrued to the members of the plan at the time that the company amended the plan to permit the surplus to be distributed to itself. Under the terms of the 1959 and 1966 plan the employees may have obtained a right to the surplus upon termination of the plan, but no such right had accrued to them prior to termination. Even if such a right could be said to have accrued at the time of amendment, it is not a benefit contemplated by that provision. The benefits contemplated by the plan are those to which the members were entitled pursuant to other Articles of the plan. The right to the surplus is not one of those benefits. Indeed,

when Article XXII.2 was drafted, it could not have referred to a surplus because no surplus was possible under a defined contribution plan. For both these reasons I conclude that from the outset the company reserved the power to amend the Catalytic plan so as to permit any surplus to be distributed to itself.

163 Assuming that a provision disposing of the surplus in favour of the employer is a partial revocation, I see no magic in the use of those specific words. If the powers of amendment are sufficiently explicit to permit a change which is in law a partial revocation, they should be given effect. After all, a trust can be created by the use of apt words without express reference to a trust. Words are apt to create a trust if the intention of the settlor is clear. Conversely, limitations on the nature of the trust must surely be determined on the same basis.

164 It is the contention of the respondents that the right to the surplus is an accrued benefit and a reduction of accrued benefits is a revocation or partial revocation of the trust. The fact that reduction in accrued benefits was made an express exception from the power of amendment shows that when the trust was created the parties considered that in the absence of this exception the power of amendment would extend to reduce accrued benefits. It follows that the power of amendment included the power to make changes having the effect of revocation or partial revocation. The real issue, therefore, is whether the right to the surplus comes within the exception. For the reason I have given above, it does not.

165 As Cory J. points out, there is a fundamental disagreement in the authorities as to whether a power of amendment can be sufficiently explicit to include a power of revocation. This disagreement is said to derive from the conflicting views expressed in Waters, Law of Trusts in Canada (2nd ed. 1984) and Scott, The Law of Trusts (4th ed. 1989), vol. 4. As I understand my colleague's reasons, he would apply a statement in Waters as requiring nothing short of the use of the actual words "power of revocation" in order to permit the settlor to effect a change which would amount to a revocation or partial revocation. With respect, I am of the opinion that Waters does not go that far. In the passage to which my colleague refers and which was quoted by Zuber J.A. in Re Reevie and Montreal Trust Co. of Canada (1986), 53 O.R. (2d) 595, at p. 600, the learned author states: "A settlor cannot revoke his trust unless he has expressly reserved the power to do so." I do not read this to mean that if the settlor uses language that, when interpreted by reference to the usual canons of construction, clearly establishes an intention to include changes having the effect of revocation, the absence of the magic words is fatal. Nor do I believe that Zuber J.A. was of the opinion that no power of amendment could authorize a change having the effect of revocation. It is clear that he was of the opinion that, in applying the statement in Waters, the appropriate inquiry was whether the wording of the relevant documents could be interpreted to authorize a change having the effect of revocation. At page 600, he stated:

> The appellant does not take issue with these general principles [stated in Waters] but asserts that it has reserved a power of amendment which is wide enough to entitle him to recover surplus funds. In my opinion, this proposition is

> simply untenable. The language of the trust agreement and the pension plan do not support such an argument. The section in the pension plan (prior to the 1981 amendment) dealing with the powers of amendment specifically affirms the irrevocability of the contributions and the fact that the members of the plan are the sole beneficiaries.

166 The terms of the trust agreement and plan in Reevie, supra, were not identical to the wording of the agreements in this case.

167 But even if Waters stands for the proposition advanced by Cory J., the logic of the contrary position, which is stated in Scott, The Law of Trusts, supra, and adopted by McLennan J. in Re Campbell-Renton & Cayley, [1960] O.R. 550 (H.C.), and the British Columbia Court of Appeal in Hockin v. Bank of British Columbia (1990), 71 D.L.R. (4th) 11, appeals to me in preference to a formulaic approach that would disregard the clear intention of the parties. Nor am I persuaded that we should adopt a rule of interpretation that ignores the clear intention of the parties in order to maintain the fundamental character of a trust. Trusts can be revocable or irrevocable. Neither is more fundamental than the other. All we are debating is the means by which we distinguish one from the other. Moreover, the true nature of a trust established as part of a pension plan is to provide funds needed to pay the benefits which accrue to employees under the plan. A power of amendment which is qualified by the requirement that it cannot be used to reduce accrued benefits is not inconsistent with the fundamental purpose of a defined benefits pension trust.

168 Cory J. also reasons that the circumstances which prevailed when the plans in question were created support his interpretation of the breadth of the power of amendment. In my view, however, the most relevant of those circumstances is the fact that neither the company nor the employees appear to have foreseen the existence of a surplus when the plan was created. In fact, there was no reason for the employees to expect to receive anything more than the defined benefits set out in the plan. Therefore, I see nothing inequitable in allowing the employer to take advantage of the broad amending power to distribute the surplus to itself, so long as it did nothing to reduce the level of benefits provided to the employees.

169 As far as the tax legislation in force when the plans were created is concerned, I agree with Cory J.'s observation that the tax motivations of the parties to pension plans are of limited relevance in interpreting those plans. I note however that the Catalytic plan expressly stated that the plan was structured so as to ensure that the company's contributions were deductible under the Income Tax Act, S.C. 1970-71-72, c. 63, and any amendments thereto. It is not unreasonable to infer that the broad amending power retained in the 1959 Catalytic plan and subsequent versions of the plan was retained in part to deal with changes in income tax legislation. The amendment of the 1983 Air Products Plan to include Section 18.05 was required by Revenue Canada in order to comply with the pension plan registration requirements under the Income Tax Act. Therefore, if anything, consideration of the parties' tax motivations supports a broad interpretation of the power of amendment.

170 Moreover, the approach which Cory J. adopts may make it difficult for the numerous pension plans that had an existence prior to 1981, which do not have an express power of revocation, to conform with the new registration requirements. Both Information Circulars Nos. 72-13R7 (1981) and No. 72-13R8 (1988) provide that the plan must contain a provision permitting an actuarial surplus to be refunded to the employer on termination of the plan. This requirement has apparently been incorporated in ss. 8502(c) and 8503(4)(c) of the Income Tax Regulations. The Minister has indicated that these regulations may be amended; for the time being, however, they have the force of law.

171 For the above reasons I conclude that Section 17.05 of the 1978 plan was a valid amendment to the Catalytic plan, as was Section 18.05 of the 1983 Air Products plan. Pursuant to those provisions the surplus in the Catalytic plan should revert to the company. In light of the result which I have reached by interpreting the terms of the plan it is not necessary for me to consider whether the funds could revert to the employer by the operation of a resulting trust.

172 In the result I would dispose of the appeals as proposed by Cory J., except with regards to the distribution of the surplus in the Catalytic plan. In this respect, I would allow the appeals with costs.

The following are the reasons delivered by

173 McLACHLIN J. (dissenting in part on the appeal (File No. 23047)):-- I have read the reasons of Justice Cory. I agree with his conclusions except on the question of the right to surplus on the Catalytic plan. In my view, the surplus on the Catalytic Plan reverts to the employer, either on the terms of the plan or on the basis of the doctrine of resulting trust.

Background:

Situating the Problem

174 Modern private pension plans date to the late 19th century. Fundamental and pervasive societal changes -- large scale industrialization coupled with the breakdown of family, village and church assistance networks -- produced a need to devise methods of caring for those past working age. Employer-sponsored private pension plans, supplemented later by government plans, were the response. Today, together with personal savings, private and public pension plans provide the primary source of income for retired Canadians.

175 There are two main types of pension plans. In the first type, the "defined contribution" plan, the amount paid in by the contributors to the fund is set. The eventual size of the employee's annuity is determined by the rate of return on the invested contributions. It follows that a low rate of return on investment will result in a smaller pension than if the rate of return is high. While the employer contributes to the plan, the employer does not guarantee the amount of the annuity. The employee is not assured of any particular benefit. The 1959 Catalytic plan was this sort of plan.

176 In the other type of pension plan, the "defined benefit" or "money purchase" plan, the employee, who may or may not contribute to the fund, is assured of a certain monetary benefit upon retirement. An actuary is employed to determine the amount of contribution which the employer must make in order to ensure that the plan can meet its present and future obligations. The market risk, assumed by the employee in a defined contribution plan, falls on the employer in a defined benefit plan. If, at any time, the plan is unable to meet its obligations, the employer is liable to make up any shortfall. For these two reasons -- the guarantee of a certain benefit and the assumption by the employer of the market risk -- a defined benefit plan is regarded as more advantageous to employees than a defined contribution plan.

177 The defined benefit plan possesses a feature which the defined contribution plan does not -- a feature which is at the heart of this appeal, the actuarial surplus. A defined contribution plan can never have a surplus; everything, after deduction of taxes and expenses, must be paid out to the pensioners. However a surplus may accumulate in a defined benefit plan when the amount in the fund exceeds the amount required to meet the defined benefits as calculated by the actuary.

178 In valuing the assets of a pension plan, the actuary must take into account a number of factors and make assumptions about each of them. These factors include the rate of investment return, the rate of price inflation, salary increases, rates of mortality for active and retired members, rates of employee turnover, incidence of disability and utilization of early retirement options. As might be expected, actuaries advising employers tend to err on the side of caution to produce what is called an "experience gain" rather than an "experience deficiency", since the latter would deprive pensioners of the benefits guaranteed to them.

179 In the early 1980s this actuarial conservatism combined with a particular set of economic factors to produce massive surpluses in many pension funds. These factors included the level of interest rates -- as high as 20 percent at one point -- which gave returns on investments in fixed value securities far in excess of those predicted. The stock market boom from 1982 to 1987 also resulted in much higher capital gains than were anticipated. Furthermore, the recession of 1981-82 caused widespread layoffs of employees who had no vested right to pension benefits. Money contributed on their account remained in the plan and either reduced unfunded liability for other employees or fell into surplus. At the same time, employers, uncertain as to whether they could use surplus for ongoing funding, often continued to contribute to over-funded plans in years when investment returns were at their highest, increasing existing surpluses: Gary Nachshen, "Access to Pension Fund Surpluses: The Great Debate", in New Developments in Employment Law (Meredith Memorial Lectures, 1988), 1989. The result of these events was to increase pension surpluses in Canada which, by 1982, had already been estimated to be between $4 billion and $8 billion: D. Don Ezra, The Struggle for Pension Fund Wealth (1983).

180 So long as a pension plan remains operational, hefty surpluses pose no problem except perhaps to employers wondering whether they can use the surplus for current funding needs, taking a "contribution holiday". When a plan terminates, however, the question arises of who is entitled to

the surplus. That is the problem that faces us on this appeal. It is not, we are told, an isolated one. Many plans such as this were set up in the 1960s and the decades that followed. Few contained express provisions as to distribution of surplus.

181 The Catalytic plan in this appeal was set up in 1959 as a defined contribution plan. As one would expect in that type of plan, all funds would ultimately be paid out to the pensioners or beneficiaries. There could be no surplus.

182 In 1966, however, the plan was changed to a defined benefit plan and the possibility of a surplus arose. In 1978, the Plan Agreement was redrafted. This restatement raised for the first time the issue of what should be done with any surplus. It empowered the company to use the surplus as it saw fit after making full provision for the accrued benefits payable to members and beneficiaries. When the plan was terminated in 1988, a large surplus was revealed. The issue was who should have it -- the employees and their beneficiaries or the employer?

Implications Flowing from the Nature of the Defined Benefit Plan

183 As noted, the employer is legally obliged under a defined benefits plan to ensure that all pension benefits owing are paid when they fall due. The employer thus bears the risk that contributions may be insufficient or that investments may not perform as well as predicted. The converse of this proposition is that the employer should be permitted to take advantage of the excess when investments do better than predicted.

184 From an economic policy perspective, if employers cannot retrieve surpluses, they may be inclined to request that their actuaries take a more optimistic view of the future of their investments and fund existing pensions less generously. Alternatively, they may refuse to enter into new pension regimes or, in some cases, terminate those which already exist. Inability to retrieve surpluses may also lead employers, unwilling to assume the risk of providing guaranteed benefits without the possibility of recovering surplus funding, to choose defined contribution plans rather than defined benefit plans. Employees, no longer assured of a specific pension and required to assume the risk of insufficient funding themselves, would be the losers.

185 On the other side of the coin, permitting employers to recover surplus in a defined benefit plan is not unfair to employees. It is argued that employees should have the surplus because they have paid for it through direct contributions or by accepting lower wages and fewer fringe benefits. This argument overlooks the nature of the employees' legitimate expectations under a defined benefit plan. The employees, having bargained for specific benefits, will receive precisely what they bargained for. The benefits, as defined by the plan, are the quid pro quo for their services and contributions. Indeed, the intention of the parties -- and the very purpose of the plan -- is that they receive these benefits. To give the employees the surplus, however, is to give them more than they bargained for. It is a windfall to the employees and a denial of the equitable interest which the employer holds in the surplus.

186 This practical view of things is supported by the policy of the Minister of National Revenue. Information Circular No. 72-13R7, December 31, 1981, is based on the assumption that surplus is normally returnable to the employer. In order to comply with registration requirements, surplus in excess of the employer's current service funding obligations in the following 24-month period must be either refunded to the employer or applied against the employer's obligations for contributions on account of current or past service in the current and subsequent years. Furthermore, all pension plans are to contain a provision permitting an actuarial surplus to be refunded to contributing employers of the plan. This requirement, it may be noted, may prevent problems such as the one presented on this appeal from arising in plans set up after the Circular.

The Position in Other Jurisdictions

187 The problem of surplus in defined benefit pension plans is a recent one. The matter has, however, been considered by courts in England and the United States. It is fair to say that they have generally come down on the side of returning the surplus to the employers.

188 Courts in Great Britain have relied primarily upon principles of trust law when attempting to resolve the question of pension surplus. In Davis v. Richards & Wallington Industries Ltd., [1991] 2 All E.R. 563 (Ch. D.), for example, Scott J. applied the doctrine of resulting trust and concluded that a surplus in a contributory defined benefits pension fund should be paid to the employer. He held that the result could be otherwise only if the plan contained a provision expressly excluding return of the funds to the employer. He rejected the argument that a resulting trust operated in favour of the employees in view of their contributions mainly on the ground that what the employees had paid for was the specific benefit received from the fund. See also, In re Courage Group's Pension Schemes, [1987] 1 W.L.R. 495 (Ch.D.).

189 In the United States, the courts look to the terms of the plan documents and the intent of the parties. They also tend to the view that the surplus would represent an unintended windfall profit if it were retained by the employees: Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co., 555 F.Supp. 257 (D.C. 1983). Provisions to the effect that amendments to the plan or trust documents may not enable an employer to divert or recover any portion of the trust funds are treated as prohibiting diversion prior to satisfaction of the plan's liabilities, but not thereafter. Once the pensioners are assured of their benefits, the surplus is recoverable by the employer: In re C. D. Moyer Co. Trust Fund, 441 F.Supp. 1128 (E.D. Pa. 1977); Pollock v. Castrovinci, 476 F.Supp. 606 (S.D.N.Y. 1979); Washington-Baltimore Newspaper Guild; Wilson v. Bluefield Supply Co., 819 F.2d 457 (4th Cir. 1987). Where courts in the United States have found that a surplus could not be recovered by the employer, they have done so on the basis that the wording of the plan documents unequivocally precluded such recovery: Bryant v. International Fruit Products Co., 793 F.2d 118 (6th Cir. 1986); Audio Fidelity Corp. v. Pension Benefit Guaranty Corp., 624 F.2d 513 (4th Cir. 1980).

Consistency with the Right to Use Surplus for a "Contribution Holiday"

190 It has repeatedly been held that employers are entitled to use the surplus in defined benefit plans for purposes of funding their actuarially determined contributions: Maurer v. McMaster University (1991), 4 O.R. (3d) 139; Askin v. Ontario Hospital Association (1991), 2 O.R. (3d) 641; Re Reevie and Montreal Trust Co. of Canada (1986), 53 O.R. (2d) 595. Cory J. arrives at the same conclusion in this case.

191 The obvious question immediately presents itself. If the employer is entitled to use the surplus to fund future contributions, why should the employer be denied the ability to recoup the surplus from previous funding? If, on the other hand, the fund in equity belongs to the employees in some notional sense, how can the employer usurp that interest by using the surplus to discharge its ongoing funding responsibility? Consistency suggests that both past and present funding and entitlement should be treated in the same way.

192 Some commentators, while recognizing the anomaly of allowing the employer to use the surplus for a contribution holiday but not to recoup past over-contributions from the surplus, argue that, from a "practical and symbolic" point of view, the two questions may be different since "all funds paid into the pension stay there, at least notionally": Bernard Adell, "Pension Plan Surpluses and the Law: Finding a Path for Reform", Task Force on Inflation Protection for Employment Pension Plans, Research Studies, vol. 2 (1988), at p. 242. Cory J. makes a similar point. So, it is suggested, an employer's entitlement to a contribution holiday may "not automatically entitle him to ownership of the actuarial surplus, as well": Nachshen, supra, at p. 77.

193 Nevertheless, it remains true that as a matter of principle, there appears to be no reason why an employer permitted to use surplus for ongoing contributions should not be allowed to reclaim the result of past over-contributions from the same surplus.

Summary

194 Consideration of the nature of defined benefit plans leads to the conclusion that the normal and just result is that surplus in such plans (as distinguished from defined contribution plans) should revert to the employer. Against this background, I turn to the documents which govern this case and the principles of law applicable to them.

Analysis

The Private Regime

195 Pension plans such as those at issue here are private arrangements bestowed by an employer on employees as a benefit of employment or set up pursuant to agreement between employer and employees. The employees may contribute (contributory plans), or the employer may bear the entire cost (non-contributory plans). The plan may be funded through insurance purchased by the employer for payment of the benefits (an insured plan), or the monies may be placed in a trust (a "trusteed" plan). Whatever form they take, as private contractual or as trust arrangements, the law of

contract or trust determines how the funds are distributed. This may be varied by legislation, but in this case that did not occur. We must look to the principles of private law for a solution to the problem of distribution of surpluses. In so far as we are concerned with an agreement, we look to the law of contract; in so far as a trust arises, we look to the law of trusts. We are not concerned with making some new law peculiar to pension surpluses.

196 The primary rule in construing an agreement or defining the terms of a trust is respect for the intention of the parties or, in the case of a trust, the intention of the settlor. The task of the court is to examine the language of the documents to ascertain what, on a fair reading, the parties intended. Unless there is a legal reason preventing it, the courts will seek to give effect to that intention. The search for an answer to the problem before us must therefore focus primarily on the documents relating to the plans and the intention of the parties, if any, with respect to a surplus arising under a defined benefits plan.

The Documents

197 It is my conclusion, after studying the documents and applying them to the plan as it stood at all relevant times, that apart from the reference in the 1978 restatement which provided that surplus should go to the employer, the documents are silent on the question of surplus. There is a dispute about whether the 1978 stipulation was a valid "amendment" to the original trust documents. As I see it, and for the reasons discussed below, it was a valid amendment and, as such, ought to stand. Alternatively, even if the 1978 stipulation were disregarded, the surplus would devolve on the employer under the doctrine of resulting trust.

198 The crux of the debate is Article V of the 1959 Trust Agreement:

ARTICLE V

MODIFICATION AND TERMINATION

1. Subject as herein and in the PLAN provided, the Company reserves the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the PLAN (including this Agreement) provided that no such amendment which affects the rights, duties, compensation, or responsibilities of the Trustee shall be made without its consent, and provided further that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the FUND to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the PLAN as amended from time to time, and for the payment of taxes or other assessments as provided in paragraph 2 of Article II hereof, and the expenses and compensation of the Trustee as provided in paragraph 4 of Article IV hereof. [Emphasis added.]

199 Moore C.J. upheld in the Court of Appeal, interpreted the underlined portion of Article V as precluding any amendment of the plan which would have the effect of conferring money in the plan to anyone other than the beneficiaries. Reasoning that the surplus here in issue constituted funds under the plan, he concluded that the 1978 amendment was ineffective and that, consequently, the surplus must go to the employees. Cory J., as I understand his reasons, adopts the same approach.

200 The problematic step in this logical process is the assumption that the surplus arising after conversion to a defined benefit plan in 1966 forms part of the fund to which Article V is addressed. For the reasons outlined earlier, at the time Article V was drafted, there could never be a surplus. It was simply impossible to have a surplus under the defined contribution plan then in place. The surplus was a new entity, created years later as a consequence of converting the plan to a defined benefits plan. The "FUND" referred to in Article V cannot therefore refer to the surplus with which we are concerned. Rather, it refers to the fund in place under the defined contributions scheme. This is apparent from the latter part of Article V, which permits deductions for only those things which would be deductible under a defined contribution policy: "taxes or other assessments as provided in paragraph 2 of Article II hereof, and the expenses and compensation of the Trustee as provided in paragraph 4 of Article IV hereof".

201 With respect, I think Moore C.J. gave a broader scope to Article V of the 1959 Trust Agreement than it can reasonably be made to bear. In effect, he read "FUND", which at the time of drafting could not by definition have included any surplus, as extending to the surplus which later arises under quite a different arrangement.

202 The problem is a common one. A contract or trust deed is drafted. Later, a new, unanticipated situation arises. The first question is whether the new situation falls within an existing term of the document. Courts facing this question look at the factual context in which it was drafted. They consider the wording against this background to determine whether the new situation can reasonably be said to fall within this clause. If the answer to this question is negative, the court may go on to ask itself whether a term covering the new situation can be implied, whether as a matter of fact, law or custom: see Treitel, The Law of Contract (4th ed. 1975), at p. 128. The limiting principle is that the courts will not make a new contract or trust to which the parties have not agreed: Murphy v. McSorley, [1929] S.C.R. 542.

203 In the case at bar, there is nothing in the evidence that suggests that the parties who signed Article V intended it to apply to a surplus which might arise under a conversion of the plan to a defined benefit plan. There is no suggestion that conversion of the plan was foreseen, much less that a surplus might arise under such a scheme. Article V by its terms clearly applies to the specific defined contribution plan which the parties were putting in place in 1959. It refers to a specific "PLAN", the 1959 plan, and, consistent with a defined contribution plan, it treats all funds as falling into one of two categories -- benefits payable to the employees and expenses. Finally, to apply Article V to a surplus under the unforeseen defined benefit plan would, for the reasons enunciated earlier, produce a result which, if not anomalous, is out of step with the characteristics of a defined

benefits plan and the approach which has been taken to this problem in other jurisdictions. It is not reasonable, in my opinion, to conclude that Article V applies to the surplus that could only develop after conversion of the plan years later to a defined benefit plan.

204 The same considerations negate the possibility of implying a term that the provisions of Article V apply to the unforeseen surplus. An attempt to imply a term to cover an unforeseen factual situation will generally fail if it is not clear that the parties would have agreed to the term, or where one or both of the parties is shown not to have known of the new situation at the time of contracting: Treitel, supra, at pp. 129-130. There is no suggestion that the parties who signed Article V in 1959 knew about the possibility of a surplus; nor can it be said that they would have agreed that it should go to the employees had they foreseen it. Indeed, the inference from the 1978 provision that surplus go to the employer suggests the contrary.

205 I am thus led to conclude that Article V, drafted in the context of a defined contribution plan, should not be read as applying to the surplus which arose under the later defined benefit plan. It follows that the 1978 provision stipulating that the surplus should go to the employer is valid and determines the issue.

Express Trust

206 It is argued that the surplus here in question is impressed with an express trust in favour of the employees which prevents the employer from claiming it.

207 I note initially that this argument must be distinguished from the argument based on the doctrine of resulting trust. The doctrine of resulting trust does not deal with the classic express trust, but is rather an equitable doctrine permitting those who have an interest in funds held in the name of another to recover them. In the first case we are concerned with the interpretation of terms of an express trust document; in the latter about the application of a legal (equitable) doctrine to a given situation.

208 The 1959 plan created a trust. All contributions were made subject to the trust. This did not mean, however, that all contributions were payable to the employees. Under the 1959 plan, expenses and administrative fees were payable to those who earned them, and the balance was payable to the beneficiaries. Consistent with a defined contribution plan, these were the only two classes of disbursements.

209 When the plan was changed in 1966 to a defined benefits plan, the nature of the trust necessarily changed. For one thing, the two accounts which the trustee was obliged to hold under the 1959 plan, the Employee's Account and the Company Account, no longer made sense and were necessarily collapsed. For another, the benefits payable to the employees were redefined. The trustee's former obligation to pay out the balance in the member's share of the two accounts after expenses, was replaced with a new and different obligation to pay out the defined benefits. And finally, as the fund continued to operate in its new form, there appeared a new element; the surplus

which accumulated from year to year.

210 It appears that when the change was first made from a defined contribution to a defined benefit plan, no thought was given to the question of surplus. Certainly the 1966 plan made no reference to surplus. In theory, the actuarial projections should be so perfect that a surplus does not arise. But in reality, as the years passed, it became evident that a surplus was being generated. This new situation needed to be addressed. The response was the 1978 stipulation that any surplus which existed after all defined benefits and expenses had been met, was payable to the employer.

211 Against this background, we return to the obligations on the trustee. The situation, as I see it, was this. Under the 1966 plan the trustee was obliged to pay defined benefits to each entitled employee. The trustee was further required to pay all administrative expenses of the trust. In addition to these two obligations, however, the trustee, as the years passed, found itself holding a third fund which was attached neither by the obligation to pay out benefits nor the obligation to pay expenses -- the accumulating surplus. The original trust documents did not contemplate this fund and gave no guidance as to what to do with it.

212 The trustee was left with the following options with respect to the surplus. Prior to the 1978 stipulation, the trustee's only option, had the question of distribution of surplus arisen, would have been to apply to the court for a ruling. Had this occurred, the appropriate ruling would have been that it go to the employer on the principles of resulting trust, for the reasons discussed below. As it happened, however, a stipulation that the surplus go to the employer was made before the question of surplus distribution arose. For the reasons discussed earlier, that stipulation was valid. It follows that the surplus goes to the employer pursuant to the 1978 amendment.

213 It is contended that payment of the surplus to the employer constitutes revocation of a trust and that a trust cannot be revoked without express wording so permitting. This argument, however, fails because the surplus was an unanticipated development which was never contemplated by the original trust and was not addressed by any changes to the trust until 1978. The error in the respondents' submissions, as I see it, lies in assuming that the 1959 trust provisions apply to a surplus. In fact, they do not. All contributions fell into the trust, but to stop the analysis there is to beg the critical question: what was the trustee to do with the portion of the fund which became surplus after conversion of the plan to a defined benefit plan? The answer to that question does not amount to revocation of a trust, as the respondents suggest. Rather, it amounts to fulfilling the trust.

214 I conclude that the terms of the trust did not require that the surplus in question be paid to the employees. In 1966, when the possibility of a surplus first arose, the trust provided no guidance as to where a surplus would go in the event of termination. The 1978 amendment made it clear that it was payable to the employer. Therefore, under the terms of the trust, the employer is entitled to the surplus.

Resulting Trust

215 I have argued that under the terms of the governing documentation, and in particular the 1978 amendment which I consider valid, surplus contributions are returnable to the employer. If I were wrong in concluding that the documentation requires this result, the same conclusion would nevertheless flow from application of the doctrine of resulting trust.

216 Waters, Law of Trusts in Canada (2nd ed. 1984), at p. 299, describes the concept of resulting trust as follows:

> . . . a resulting trust arises whenever legal or equitable title to property is in one party's name, but that party, because he is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner, or to the person who did give value for it. [Emphasis in original.]

217 The concept of resulting trust does not depend on there being an express trust in existence. However, one of its applications is in the case where residual monies not designated to a particular person or purposes arise in an express trust. Where this happens in a charitable trust, the courts will order the residual sum cy-près, among all the creditors. Where the trust is non-charitable, the sum generally reverts to the settlor: see Waters, supra, at p. 322.

218 If the 1978 amendment as to surplus is invalid, these principles suggest that the doctrine of resulting trust requires that the surplus be available to the employer. The employer was responsible for ensuring a fund sufficient to meet all defined benefits owing to employees. As it turns out, the employer paid more than required for the purpose of the trust, the provision of benefits to all eligible employees. The residual sum should therefore return to the employer.

219 As noted earlier, the doctrine of resulting trust has been applied to this situation in Great Britain, with the result that surplus funds in defined benefit pension plans have been ordered paid to the employer. It has also been applied in Canada. The case of Re Canada Trust Co. and Cantol Ltd. (1979), 103 D.L.R. (3d) 109 (B.C.S.C.), raised similar issues as those before us. The first question was the validity of an amendment directing that surplus should revert to the employer. Gould J. found that the attempted amendment in that case was invalid. However, he went on to hold that the surplus reverted to the employer under the doctrine of resulting trust. He stated, at p. 111:

> The method which the board has employed [directors' resolution to allow reversion] does not accomplish the purpose for which it was intended. If this method is ineffectual, how then must the money remaining in the fund be distributed?
>
> . . .
>
> The purposes of this trust simply did not exhaust the fund and the outcome here, i.e., a surplus balance of $31,163.38, was not foreseen by the respondent Dependable. The situation appears to be one where a resulting trust arises by

operation of the law. [Emphasis added.]

220 My colleague seeks to distinguish this case on two grounds. He questions Gould J.'s conclusion that there could be a resulting trust in favour of the employer because of a clause in the plan providing that no amendment "shall permit any part of the trust fund to revert to or to be recoverable by the Company" (p. 110). But Gould J. was not talking about reversion under an amendment (having found the attempt to amend had failed), but rather about reversion by operation of law. My colleague also points to the fact that unlike the plan at bar, the plan in Cantol was non-contributory. But as we have seen, even where employees contribute to a defined benefit plan, that contribution is taken to be fully satisfied by receipt of the defined benefits: Davis v. Richards & Wallington Industries Ltd., supra. Once the defined obligations to the employees have been paid, it is difficult to argue that the employees have an interest in the surplus on the basis of a resulting trust in their favour. It is in the nature of a defined benefit that it represents a fixed amount to which the employee is entitled from the plan. The employee accepts this fixed amount in lieu of the greater or lesser amounts he or she might obtain on a defined contribution plan. Generally, this is thought to be in the employee's interest.

221 To put it another way, once the stipulated benefit is paid, the employee is no longer a beneficiary -- he or she has exhausted his or her rights under the plan. As Gould J. put it in Cantol, at p. 111, "[a]ll of the beneficiaries have been paid off in accordance with [the trust] provisions, and no beneficiaries remain in any of the categories". Moreover, the complications of holding otherwise appear significant. As Scott J. points out in Davis, supra, at p. 595, different employees contribute different amounts, and often receive benefits disproportionate to their contributions, depending on when they started working, how long they have been working, and other factors. The task of restoring to each employee his or her fair share of any surplus would be impossible. I can do no better than echo the query of Scott J.: "How can a resulting trust work as between the various employees inter se? I do not think it can and I do not see why equity should impute to them an intention that would lead to an unworkable result."

Conclusion

222 I conclude that the surplus in the Catalytic plan should revert to the employer. It is not touched by Article V of the 1959 agreement, with the result that the 1978 provision for its disposition is determinative. There is nothing in the Trust Agreement which requires its return to the beneficiaries, once their stipulated entitlement under the agreement has been fully met. If, in the alternative, the 1978 provision does not settle the matter, the doctrine of resulting trust would require that the surplus revert to the employer.

223 I would dispose of the appeals as proposed by Cory J., except on the question of the distribution of surplus in the Catalytic fund, where I would allow the appeal with costs.

TAB 7

Case Name:

Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)

Monsanto Canada Inc., appellant;
v.
Superintendent of Financial Services, respondent.
And between
Association of Canadian Pension Management, appellant;
v.
Superintendent of Financial Services, respondent, and Attorney General of Canada, National Trust Company, Nicole Lacroix, R. M. Smallhorn, D. G. Halsall, S. J. Galbraith, S. W. (Bud) Wesley, Canadian Labour Congress and Ontario Federation of Labour, interveners.

[2004] S.C.J. No. 51

[2004] A.C.S. no 51

2004 SCC 54

2004 CSC 54

[2004] 3 S.C.R. 152

[2004] 3 R.C.S. 152

242 D.L.R. (4th) 193

324 N.R. 259

J.E. 2004-1546

189 O.A.C. 201

17 Admin. L.R. (4th) 1

45 B.L.R. (3d) 161

41 C.C.P.B. 106

2004 CarswellOnt 3172

132 A.C.W.S. (3d) 579

File No.: 29586.

Supreme Court of Canada

Heard: February 16, 2004;
Judgment: July 29, 2004.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Deschamps and Fish JJ.

(51 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Catchwords:

Pensions -- Pension plans -- Partial wind-up -- Rights and benefits on partial wind-up -- Surplus -- Whether pension benefits legislation requiring distribution of proportional share of actuarial surplus when defined benefit pension plan partially wound up -- Pension Benefits Act, R.S.O. 1990, c. P.8, s. 70(6).

Administrative law -- Judicial review -- Standard of review -- Financial Services Tribunal -- Standard of review applicable to Tribunal's interpretation of s. 70(6) of Pension Benefits Act, R.S.O. 1990, c. P.8.

Summary:

As a result of a reorganization of Monsanto Canada Inc. ("Monsanto"), 146 active members of the pension plan ("Affected Members") received notice that their employment with Monsanto would terminate. The Superintendent of Financial Services refused to approve Monsanto's partial wind-up report, for failing to provide for the distribution of surplus assets related to the part of the pension plan being wound up. A majority of the Financial Services Tribunal disagreed with the Superintendent and ordered her to approve the report, holding that s. 70(6) of the Ontario *Pension Benefits Act* provides no more than a right to participate in surplus distribution when, if ever, the plan fully winds up. The Divisional Court set aside the Tribunal's order and upheld the

Superintendent's decision. The Court of Appeal dismissed the appeal.

Held: The appeal should be dismissed.

When the relevant factors of the pragmatic and functional approach are properly considered, the appropriate standard of review applicable to the Financial Services Tribunal's interpretation of s. 70(6) of the *Pension Benefits Act* is that of correctness.

Section 70(6) requires the distribution of a proportional share of actuarial surplus when a defined benefit pension plan is partially wound up. The ordinary and grammatical meaning of s. 70(6) indicates that the assessment of rights and benefits is to be conducted as if the pension plan was winding up in full on the effective date of partial wind-up. The realization of rights and benefits, including the distribution of surplus assets, then occurs for the part of the plan actually being wound up. Therefore, the Affected Members, if entitled, may receive their pro rata share of the surplus existing in the fund on a partial wind-up, as if the plan was being fully wound up on that day. The members affected by a partial wind-up are thus accorded the rights and benefits that are not less than the group would have if there were a full wind-up on the date of partial wind-up.

The scheme of the *Pension Benefits Act* and of the regulations also supports the ordinary and grammatical meaning of s. 70(6). Delaying the distribution would not be consonant with the provisions that make distribution of surplus assets an intended part of the wind-up process, whether the wind-up is in whole or in part. In addition, the statutory scheme makes an important distinction between continuing plans and winding-up plans. The interpretation of s. 70(6) herein proposed is consistent with the logic of this aspect of the statutory scheme and the legislature's choice to treat partial wind-ups in the same manner as full wind-ups.

A purposive interpretation of s. 70(6) should be mindful of the legislative objective in the context of the statutory scheme surrounding surplus and partial wind-up. The *Pension Benefits Act* is public policy legislation that recognizes the vital importance of long-term income security. Its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans. The Act seeks, in some measure, to ensure a balance between employee and employer interests that will be beneficial for both groups. Distribution of surplus on partial wind-up is unlikely to disrupt that balance or to compromise the continuing integrity of the pension fund. Policy and practical reasons also favour an interpretation requiring distribution upon partial wind-up. Since pension plans are theoretically intended to be indeterminate in nature, it is reasonable for Affected Members to be subject to the risks of the plan while they are a part of it, but not after they have been terminated from it. The most equitable solution is thus to distribute the fortunes of favourable markets at the time Affected Members are terminated. In this way, the windfall is related to their actual time and participation in the plan. Moreover, the increasingly mobile nature of labour should be recognized. The Affected Members should be able to know their status at the time of their termination so as to arrange their affairs accordingly and not be

indefinitely tied to an employer that laid them off.

Cases Cited

Discussed: Schmidt v. Air Products Canada Ltd., [1994] 2 S.C.R. 611; referred to: Barrie Public Utilities v. Canadian Cable Television Assn., [2003] 1 S.C.R. 476, 2003 SCC 28; Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc., [2001] 2 S.C.R. 100, 2001 SCC 36; Voice Construction Ltd. v. Construction & General Workers' Union, Local 92, [2004] 1 S.C.R. 609, 2004 SCC 23; Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982 ; Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247, 2003 SCC 20; Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825; National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324; GenCorp Canada Inc. v. Ontario (Superintendent, Pensions) (1998), 158 D.L.R. (4th) 497; Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817; Dr. Q v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226, 2003 SCC 19; Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748; Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, 2002 SCC 42; R. v. Campbell, [1999] 1 S.C.R. 565; Firestone Canada Inc. v. Ontario (Pension Commission) (1990), 1 O.R. (3d) 122.

Statutes and Regulations Cited

Financial Services Commission of Ontario Act, 1997, S.O. 1997, c. 28, ss. 1 "regulated sector", 6, 7, 20, 21(4), 22.

Pension Benefits Act, R.S.O. 1990, c. P.8 [am. 1997, c. 28], ss. 1 "partial wind up", "surplus", "wind up", 68, 69 [am. 2002, c. 18, Sch. H, s. 5(1)], 70, 73, 74(1), 77, 78, 79, 84(1) [am. 1999, c. 6, s. 53(20)], 91(1).

Pension Benefits Act, 1987, S.O. 1987, c. 35.

O. Reg. 103/66, s. 11 [am. O. Reg. 91/69, s. 3].

O. Reg. 708/87, ss. 7a [ad. O. Reg. 100/88, s. 1], 7c [ad. O. Reg. 412/90, s. 1].

R.R.O. 1980, Reg. 746, s. 21(2) [rep. & sub. O. Reg. 31/87, s. 1].

R.R.O. 1990, Reg. 909, ss. 1(2) "going concern valuation" [rep. & sub. O. Reg. 144/00, s. 1(2)], 4(1), 8 [am. O. Reg. 743/91, s. 1; am. O. Reg. 307/98, s. 4; am. O. Reg. 444/03, s. 1], 9 [rep. & sub. O. Reg. 665/94, s. 1], 10 [am. idem, s. 2; am. O. Reg. 307/98, s. 5], 10.1 [ad. O. Reg. 286/97, s. 1; am. O. Reg. 307/98, s. 6], 13(1) [am. O. Reg. 712/92, s. 9], (1.1) [ad. idem; am. O. Reg. 144/00, s. 8(1)], 16 [am. O. Reg. 712/92, s. 11; am. O. Reg. 144/00, s. 11], 25 [am. O. Reg. 629/92, s. 3; am. O. Reg. 712/92, s. 15; am. O. Reg. 307/98, s. 10], 26, 28(5) [am. O. Reg. 712/92, s. 16; am. O. Reg. 307/98, s. 12], (6) [am. O. Reg. 307/98, s. 12], 28.1 [ad. O. Reg. 144/00, s. 22].

Authors Cited

Deaton, Richard Lee. The Political Economy of Pensions: Power, Politics and Social Change in Canada, Britain and the United States. Vancouver: University of British Columbia Press, 1989.

Dewetering, June. Occupational Pension Plans: Selected Policy Issues. Background paper (BP-250E) prepared for the Library of Parliament, Research Branch, February 1991.

Driedger, Elmer A. Construction of Statutes, 2nd ed. Toronto: Butterworths, 1983.

Gillese, Eileen E. "Pension Plans and the Law of Trusts" (1996), 75 Can. Bar Rev. 221.

Mercer Pension Manual, loose-leaf ed., by William M. Mercer Limited. Agincourt, Ont.: Carswell, 1988 (updated 2003, release 6).

Ontario. Legislative Assembly of Ontario. Hansard -- Official Report of Debates, Nos. 85 and 108. First Session, 33rd Parliament, January 13, 1986 and February 4, 1986.

Ontario. Legislative Assembly of Ontario. Hansard -- Official Report of Debates, Nos. 12, 19, 27, 55, 86 and 98. Second Session, 33rd Parliament, May 12, 1986 to February 4, 1987.

Ontario. Legislative Assembly of Ontario. Hansard -- Official Report of Debates, No. 34. Third Session, 33rd Parliament, June 25, 1987.

Ontario. Royal Commission on the Status of Pensions in Ontario. Report of the Royal Commission on the Status of Pensions in Ontario, vol. I, Design for Retirement. Toronto: Government of Ontario, 1980.

Sullivan, Ruth. Sullivan and Driedger on the Construction of Statutes, 4th ed. Markham, Ont.: Butterworths, 2002.

History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (2002), 62 O.R. (3d) 305, 220 D.L.R. (4th) 385, 166 O.A.C. 131, 29 B.L.R. (3d) 18, 21 C.C.E.L. (3d) 11, 32 C.C.P.B. 248, [2002] O.J. No. 4407 (QL), affirming a decision of the Superior Court of Justice (Divisional Court) (2001), 198 D.L.R. (4th) 109, 144 O.A.C. 204, 10 C.C.E.L. (3d) 257, 27 C.C.P.B. 82, [2001] O.J. No. 963 (QL), setting aside the order of the Financial Services Tribunal (2000), 3 B.L.R. (3d) 99, 50 C.C.E.L. (2d) 303, 23 C.C.P.B. 148. Appeal dismissed.

Counsel:

Freya Kristjanson and Markus Kremer, for the appellant Monsanto Canada Inc.

Jeffrey W. Galway and Randy Bauslaugh, for the appellant the Association of Canadian Pension Management.

Deborah McPhail and Leslie McIntosh, for the respondent.

Donald J. Rennie and Kirk Lambrecht, Q.C., for the intervener the Attorney General of Canada.

J. Brett Ledger and Lindsay P. Hill, for the intervener the National Trust Company.

William J. Sammon, for the intervener Nicole Lacroix.

Howard Goldblatt, Dona Campbell and Ethan Poskanzer, for the interveners the Canadian Labour Congress and the Ontario Federation of Labour.

Mark Zigler and Ari N. Kaplan, for the interveners R. M. Smallhorn, D. G. Halsall, S. J. Galbraith and S. W. (Bud) Wesley.

The judgment of the Court was delivered by

1 **DESCHAMPS J.**:-- Pension law is a field which is gaining in importance as more and more people retire and look to their pensions to sustain them during their "golden years". The complex exercise of actuarial accounting that determines how pensions should be funded is rivalled only by the complexity of the law determining the pension rights and obligations of employees and employers, which lies at the intersection of contracts, trust law, and statute law. This appeal is an attempt to bring some clarity to a relatively confined area of pension law, which has been the subject of much debate: when there is a partial wind-up of an Ontario-defined benefit pension plan, must the actuarial surplus be distributed at that time?

2 In particular, does s. 70(6) of the Ontario *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("Act"), require the distribution of a proportional share of actuarial surplus when a defined benefit pension plan is partially wound up? The Superintendent of Financial Services answered this question in the affirmative. She refused to approve the partial wind-up report of the appellant, Monsanto Canada Inc. ("Monsanto"), for failing to provide for the distribution of surplus assets related to the part of the Pension Plan being wound up. A majority of the Financial Services Tribunal ("Tribunal") disagreed with the Superintendent and ordered her to approve the report: (2000), 3 B.L.R (3d) 99. The majority held that s. 70(6) provides no more than a right to participate in surplus distribution when, if ever, the Plan fully winds up. The Ontario Divisional Court overturned the Tribunal on appeal ((2001), 198 D.L.R. (4th) 109) and the Court of Appeal agreed ((2002), 62 O.R. (3d) 305). Monsanto and the Association of Canadian Pension Management now appeal to this Court. The

appeal, for the reasons that follow, should be dismissed.

I. Facts

3 The factual foundation of the legal question raised in the present appeal can be briefly stated. Monsanto originally maintained three separate pension plans in respect of various operations. Effective January 1, 1996, these plans were consolidated to form the Pension Plan for Employees of Monsanto Canada Inc. ("Plan"). As a result of a subsequent reorganization of Monsanto, involving a staff reduction program and a plant closure, 146 active members of the Plan ("Affected Members") received notice that their employment with Monsanto would terminate between December 31, 1996 and December 31, 1998. Monsanto's report to the Superintendent provided that the partial wind-up was to be effective May 31, 1997. As of that date, the information supplied to the regulator by the actuaries for the Plan showed that there was an actuarial surplus of some $19.1 million, representing the amount by which the estimated asset value exceeded the estimated liabilities. According to the evidence, the pro rata share of the surplus related to the part of the Plan being wound up is approximately $3.1 million.

4 One of the bases for the Superintendent's refusal to approve Monsanto's report was the failure to provide for the distribution of this surplus on partial wind-up, in accordance with s. 70(6) of the Act. This is the only ground still in issue before this Court as the other bases for refusal were not pursued on this appeal. Also noteworthy is the fact that this matter is preliminary to the question of surplus entitlement, which is not affected by this decision and will need to be determined at a later date.

II. Issue

5 The only issue in this appeal is whether the Tribunal properly interpreted s. 70(6) of the Act as not requiring distribution of the actuarial surplus on a partial plan wind-up. Thus, the analysis must proceed in two stages. First, the appropriate standard of review of the Tribunal's decision must be determined. Second, the Tribunal's interpretation of s. 70(6) must be measured against this standard. All of the relevant legislative provisions are annexed at the end of these reasons.

III. Standard of Review

6 The courts below found, and the appellants and respondent agreed, that the appropriate standard of review of the Tribunal's decision was reasonableness. However, the standard of review is a question of law, and agreement between the parties cannot be determinative of the matter. An evaluation of the four factors comprising the pragmatic and functional approach is required to decide the appropriate level of deference this Court should grant in reviewing the decision.

A. *Privative Clause*

7 The legislature did not enact a privative clause to insulate the Tribunal's jurisdiction. To the

contrary, s. 91(1) of the Act provides for a statutory right of appeal to the Divisional Court. While not determinative, this factor suggests that the legislature intended less deference to be afforded to the Tribunal on judicial review (*Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28, at para. 11; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, 2001 SCC 36, at para. 27).

B. *Nature of the Problem*

8 The issue on appeal is a pure question of law, related to the interpretation of a section that has no specialized technical meaning. Statutory interpretation is an exercise in which the courts are well equipped to engage. The question here concerns the establishment of statutory rights by construing the legislature's intention from the text of s. 70(6), the legislative purpose, and the statutory context in which it is situated. Generally speaking, such legal questions will attract a more searching standard of review as being clearly within the expertise of the judiciary, unless the legal question is "at the core" of the Tribunal's expertise (*Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23, at para. 29; see also *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 34).

C. *Relative Expertise*

9 The expertise of the Tribunal relative to that of the courts must be evaluated in reference to the particular provision being invoked and interpreted and the nature of the Tribunal's expertise (*Barrie, supra*, at paras. 12-13; *Pushpanathan, supra*, at para. 28). In other words, relative expertise must be evaluated in context and in relation to the specific question under review (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, at para. 30).

10 On the one hand, we have to look at courts' expertise and the subject matter which is, as discussed in the previous sections, the statutory interpretation of s. 70(6). On its face, the provision sets out the rule of parity between situations of partial wind-up and full wind-up. Except perhaps in demonstrating the practical implications of proposed interpretations, the issue is neither factually laden nor highly technical. In this case, as it is generally, statutory interpretation is "a purely legal question ... 'ultimately within the province of judiciary'" (*Barrie, supra*, at para. 16; see also *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 28).

11 On the other hand, the Tribunal does not have specific expertise in this area. The Tribunal is a general body that was created under the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28 ("*FSCOA*"), s. 20, to replace the specialized Pension Services Commission. It is responsible for adjudication in a variety of "regulated sector[s]" (*FSCOA*, s. 1), including co-operatives, credit unions, insurance, mortgage brokers, loans and trusts, and pensions (*FSCOA*, s. 1). In addition, the nature of the Tribunal's expertise is primarily adjudicative. Unlike the former Pension Services Commission or the current Financial Services Commission, the Tribunal has no policy functions as part of its pensions mandate (see *FSCOA*, s. 22). As noted in *Mattel Canada, supra*, and in *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324,

involvement in policy development will be an important consideration in evaluating a tribunal's expertise. Lastly, in appointing members to the Tribunal and assigning panels for hearings, the statute advises that, to the extent practicable, expertise and experience in the regulated sectors should be taken into account (*FSCOA*, ss. 6(4) and 7(2)). However, there is no requirement that members necessarily have special expertise in the subject matter of pensions. The Tribunal is a small entity of 6 to 12 members which further reduces the likelihood that any particular panel would have expertise in the matter being adjudicated (*FSCOA*, s. 6(3)).

12 Overall, there is little to indicate that the legislature intended to create a body with particular expertise over the statutory interpretation of the Act. The Tribunal would not have any greater expertise than the courts in construing s. 70(6). Thus, this factor also suggests a lower amount of deference is required to be given to the Tribunal's decisions on the issue of statutory interpretation.

D. *Purposes of the Legislation and the Provision*

13 The purpose of the Act was well stated in *GenCorp Canada Inc. v. Ontario (Superintendent, Pensions)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.), at p. 503:

> [T]he *Pension Benefits Act* is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans, and "evinces a special solicitude for employees affected by plant closures" ... .

14 On the one hand, the protection of the rights of vulnerable groups is a central and long-standing function of the courts. The protectionist aim of the legislation is especially evident in s. 70(6), which seeks to preserve the equal treatment and benefits between situations of partial wind-up and full wind-up. On the other hand, pension standards legislation is a complex administrative scheme, which seeks to strike a delicate balance between the interests of employers and employees, while advancing the public interest in a thriving private pension system. In this task, the regulatory body usually has a certain advantage in being closer to the dispute and the industry. In part, this factor led the Ontario Court of Appeal in *GenCorp* to conclude that the decisions of the Pension Services Commission should be reviewed on a standard of reasonableness.

15 Here, however, the Tribunal assumes a different role and function in relation to the statutory purpose of the particular provision at issue. The determination of the meaning of s. 70(6) is not "polycentric" in nature. In other words, s. 70(6) does not grant the Tribunal broad discretionary powers nor a range of policy-laden remedial choices that involve the balancing of multiple sets of interests of competing constituencies (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 56; *Pushpanathan, supra*, at para. 36; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at paras. 30-31). Moreover, the issues raised in s. 70(6) are legal in nature, rather than economic, broad, specialized, technical or scientific in such a way as to substantially deviate from the normal role of

the courts (*Dr. Q, supra*, at para. 31; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at paras. 48-49). Therefore, this factor also seems to indicate less deference be accorded to the Tribunal's interpretation.

E. *Conclusion on the Standard of Review*

16 As all four factors point to a lower degree of deference, a standard of review of correctness should be adopted in this case. There are no persuasive grounds for the Court to grant the Tribunal any deference on the pure question of law before us in this case (see also *Barrie, supra*, at para. 18, citing *Pushpanathan, supra*, at para. 37).

IV. Statutory Interpretation of Section 70(6)

17 I now turn to the essence of this appeal: the question of the interpretation of s. 70(6). The provision reads:

> **70.**.. .
>
> (6) On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.

18 The appellants argue that the effect of the provision is to afford Affected Members a vested right, as of the effective date of partial wind-up, to participate in surplus distribution when, if ever, the Plan fully winds up, assuming they are so entitled under the Plan agreement. In contrast, the respondent contends that s. 70(6) requires that the distribution of the surplus actually occurs on the effective date of the partial wind-up. The main area of contention between the parties is the import of the last phrase: "on the effective date of the partial wind up".

19 The established approach to statutory interpretation was recently reiterated by Iacobucci J. in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

I will examine each of these factors in turn, beginning first with the background context.

A. *Historical Context*

20 Pension plans have a long history in Canada, first appearing in the late 19th century. However, it was not until after the Second World War that the development of pension plans flourished in tandem with the economic growth and prosperity of the era (see *Report of the Royal Commission on the Status of Pensions in Ontario* (1980), vol. I, at p. 35; R. L. Deaton, *The Political Economy of Pensions: Power, Politics and Social Change in Canada, Britain and the United States* (1989), at p. 79). In the early days, pensions were commonly regarded as gratuitous rewards for long and faithful service, subject to the discretion and financial health of the employer (see *Report of the Royal Commission on the Status of Pensions in Ontario, supra*, at p. 2; *Mercer Pension Manual* (loose-leaf ed.), at p. 1-9). However, particularly as pensions became a more familiar sight at the collective bargaining table, a competing conception as an enforceable employee right developed (see E. E. Gillese, "Pension Plans and the Law of Trusts" (1996), 75 *Can. Bar Rev.* 221, at pp. 226-27; Deaton, *supra*, at pp. 122-23). The enactment of minimum standards legislation in Ontario, first in 1963 and again in 1987, "considerably expanded the rights of plan members. It altered, again, the power balance between employers and employees in the matter of pensions" (Gillese, *supra*, at p. 228).

21 The notion of a pension fund actuarial surplus, by contrast, has had a much shorter history. Surpluses, in any noticeable form, generally did not appear before the early 80s when millions of dollars in actuarial surplus were developing in some funds (see, e.g., J. Dewetering, *Occupational Pension Plans: Selected Policy Issues* (1991), at p. 17; Deaton, *supra*, at p. 134). Surplus can only arise in defined benefit plans, like the one provided by Monsanto, because, in contrast to defined contribution plans, benefits or plan liabilities are not contingent on the level of nor the return on contributions. Members are guaranteed specific benefits at retirement in an amount fixed by a determined formula. Contributions are made each year on the basis of an actuary's estimate of the amount which must be presently invested in order to provide the stipulated benefits at the time the pension is paid out ("current service cost"). These estimates are generally conservative in nature and based on a narrow range of assumptions consistent with actuarial standards and practices. This exercise is inherently somewhat speculative, and in the event of changes in market conditions or other unforeseeable future experience, the present value of the assets of the fund may actually be lower or greater than originally estimated.

22 If, in a given year, the assets of the fund, evaluated as a going concern, are found to be insufficient to cover the current service cost, there is said to be an "unfunded liability" and the employer will be called upon to make up the deficit through contributions (see, generally, s. 4(1) of the *Pension Benefits Act* General Regulations, R.R.O. 1990, Reg. 909). If the plan is underfunded on wind-up, then benefits will be reduced, subject to the application in Ontario of the Pension Benefits Guarantee Fund (ss. 77 and 84(1) of the Act). In contrast, if the value of the assets are greater than originally estimated, the fund is said to have a surplus, being "the excess of the value of the assets of a pension fund related to a pension plan over the value of the liabilities under the pension plan" (s. 1 of the Act). The surplus is considered "actuarial" because it has not yet been concretely realized through the liquidation of assets and the payment of liabilities.

23 Consequently, in the 80s, the surplus issue became a hotly contested one. Employers claimed the surplus as the result of their assumption of risk, while employees maintained that the fund, including the surplus, represented deferred wages belonging to them. It was in this context that the legislature re-enacted s. 70(6) as part of the *Pension Benefits Act, 1987*, S.O. 1987, c. 35, virtually unchanged from the previous version introduced in 1969 (O. Reg. 103/66, s. 11, as am. by O. Reg. 91/69, s. 3; see Legislative Assembly of Ontario, *Hansard -- Official Report of Debates*, 33rd Parl., January 13, 1986 to June 25, 1987). Also at this time, definitions of "partial wind up" and "surplus" were included in the scheme. Concurrently, a moratorium was placed on surplus withdrawals from ongoing plans in 1986 (R.R.O. 1980, Reg. 746, s. 21(2), as am. by O. Reg. 31/87), which was extended to plans on wind-up in 1988 (O. Reg. 708/87, s. 7a (added by O. Reg. 100/88)). The surplus sharing regulation was enacted to replace the moratorium (O. Reg. 708/87, s. 7c (added by O. Reg. 412/90)), requiring that no payments be made from the surplus of a pension plan that is being wound up in whole or in part unless it is (a) made to or for the benefit of members, former members or persons other than the employer who are entitled to payments; or (b) made to the employer with the written agreement of a prescribed number of members (R.R.O. 1990, Reg. 909, s. 8(1)). This regulation, designed to encourage agreement and sharing between employers and employees, ceases to have effect after December 31, 2004 (Reg. 909, s. 8(3)).

24 This historical context, though not determinative, may provide some insight into the legislature's intention regarding the effect of s. 70(6). Through its statutory interventions, the legislature has sought to clarify some aspects of the relationship between employers and employees in pension matters. Steps have been taken to improve many employee rights but the importance of maintaining a fair and delicate balance between employer and employee interests, in a way which promotes private pensions, has also been a consistent theme. It is in light of this background that the legal meaning of the provision must be interpreted in accordance with the accepted approach to statutory interpretation.

B. *Grammatical and Ordinary Sense*

25 As noted by the Court of Appeal, s. 70(6) specifies the timing, group and rights to which the section applies. First, the timing is the partial wind-up of a pension plan. Second, the specified group of "members, former members and other persons entitled to benefits under the pension plan" is generally meant to refer to the members affected by a partial wind-up (para. 41). Lastly, the rights accorded are those rights and benefits that are not less than the group would have if there were a full wind-up on the date of partial wind-up (para. 42). The parties agree with these propositions.

26 Where the disagreement lies is with regard to the timing of distribution following a partial wind-up of a plan in which there is an actuarial surplus. The respondent reasons that, since (i) s. 70(6) requires the rights and benefits on a partial wind-up to not be less than those available on full wind-up, and (ii) all parties agree that surplus distribution would occur on a full wind-up (Court of Appeal judgment, at para. 43; see also s. 79(4)), then (iii) s. 70(6) must require surplus distribution on a partial wind-up. In contrast, the appellants argue that, at most, s. 70(6) requires the vesting of

the right to participate in surplus distribution in a potential future full wind-up because it is only on final wind-up that an actual, rather than actuarial, surplus can exist. In my opinion, the former interpretation accords better with the ordinary and grammatical meaning of the section.

27 First, the section mandates that the Affected Members "shall have", on the effective date of the partial wind-up, the rights and benefits they "would have" on a full wind-up. This wording transposes the timing of the rights and benefits exigible on full wind-up up to the effective date of partial wind-up. It does not connote any delay until the future date of full wind-up before the exercise of acquired rights.

28 Second, the phrase "on the effective date" (emphasis added) suggests more immediacy than other possible alternatives, such as "as of". If the provision was worded "shall have rights and benefits ... as of the effective date", this would be more indicative of a situation where rights were being vested presently but paid out in the future. The actual wording of "shall have rights and benefits ... on the effective date" (emphasis added) indicates a more immediate realization of rights and benefits.

29 Third, the appellants' proposed interpretation, as adopted by the majority of the Tribunal, in effect reads out this last phrase of the provision. In my opinion, without the phrase "on the effective date of the partial wind up", it may have been open to read s. 70(6) as only vesting rights to be exercised on full wind-up. However, the presence of this phrase confirms that rights and benefits are not only measured but also realized on the effective date of partial wind-up.

30 Lastly, s. 70(6) acts as a residual deeming provision rather than being an independent delineation of substantive rights. As a matter of logic, if it equalizes the position of the full and partial wind-up groups, and it is clear that there is surplus distribution on full wind-up, then there should also be surplus distribution on partial wind-up.

31 In sum, the provision indicates that the assessment of rights and benefits is to be conducted as if the Plan was winding up in full on the effective date of partial wind-up. The realization of rights and benefits, including the distribution of surplus assets, then occurs for the part of the Plan actually being wound up. Therefore, the Affected Members, if entitled, may receive their pro rata share of the surplus existing in the fund on a partial wind-up, as if the Plan was being fully wound up on that day.

C. *Scheme of the Act*

32 The statutory scheme further supports this conclusion. First, the definitions of "wind up" and "partial wind up" in s. 1 of the Act closely parallel one another, both requiring a distribution of assets:

> "partial wind up" means the termination of part of a pension plan and the distribution of the assets of the pension fund related to that part of

the pension plan;

"wind up" means the termination of a pension plan and the distribution of the assets of the pension fund;

It then follows that s. 70(1)(c) requires the administrator to file as part of its full or partial wind-up report, "the methods of allocating and distributing the assets of the pension plan". Similarly, s. 28.1(2) of Reg. 909 requires that the administrator of the Plan give to each person entitled to a pension a statement setting out, among other things: "[t]he method of distributing the surplus assets", "[t]he formula for allocating the surplus among the plan beneficiaries" and "[a]n estimate of the amount allocated to the person." Thus, delaying the distribution would not be consonant with these provisions that make distribution of surplus assets an intended part of the wind-up process, whether the wind-up is in whole or in part.

33 Second, the statutory scheme makes an important distinction between continuing plans and winding-up plans. The partial wind-up falls, for all purposes, in the latter group, even though there is a remaining part of the Plan that continues to exist. Under the scheme, in evaluating rights and procedural requirements, partial wind-up is treated the same as a full wind-up, which coincides with the purpose and effect of s. 70(6). For instance, in s. 78(1) the general rule is established that "[n]o money may be paid out of a pension fund to the employer without the prior consent of the Superintendent." Sections 79(1) and 79(3) then provide for exceptions to this rule depending on whether the application for payment is being made with regard to a plan that is continuing or one that is winding up. As with the additional conditions set out in the regulations (Reg. 909, ss. 8 to 10 and 25 to 28.1), it is much more difficult to justify surplus withdrawal from a continuing plan than from a plan winding up in whole or in part. The interpretation of s. 70(6) herein proposed is consistent with the logic of this aspect of the statutory scheme and the legislature's choice to treat partial wind-ups in the same manner as full wind-ups. As a result, a partial wind-up requires a full wind-up to notionally occur for the purposes of evaluating the pro rata share of the assets and liabilities related to the partial wind-up, followed by the continuation of the remainder of the Plan.

34 Lastly, in this statutory scheme, the role of s. 70(6) appears to be as a residual deeming provision reflecting the legislature's intent of assuring that rights on partial wind-up are not less than those available on full wind-up, whether granted under the Act or under the terms of the Pension Plan. In almost every section where wind-up is mentioned, the legislature has already clarified that it is referring to wind-up "in whole or in part". This is the case when referring to grow-in rights (s. 74(1)) and immediate vesting rights (s. 73(1)(b)). These are special rights that members affected by a wind-up acquire but that ordinary retirees or individuals leaving employment do not. Provisions regarding the procedural requirements on wind-up similarly specify application on wind-up both "in whole or in part" (see, e.g., ss. 68 to 70). One of the rare instances in the Act where both are not expressly included is with regard to transfer rights on wind-up, which only mentions "wind up" (s. 73(2)). The appellants seem to agree, correctly in my opinion, that those rights would still have

effect on partial wind-up even though it is not explicitly mentioned. Presumably, this must result from the application of s. 70(6), and controverts any sort of *expressio unius est exclusio alterius* logic for s. 73(2).

35 As a last point, it is worth commenting on the approach of the majority judgment of the Tribunal in disregarding the regulations in construing the meaning of s. 70(6). While it is true that a statute sits higher in the hierarchy of statutory instruments, it is well recognized that regulations can assist in ascertaining the legislature's intention with regard to a particular matter, especially where the statute and regulations are "closely meshed" (see *R. v. Campbell*, [1999] 1 S.C.R. 565, at para. 26; *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 282). In this case, the statute and the regulations form an integrated scheme on the subject of surplus treatment and the thrust of s. 70(6) can be gleaned in light of this broader context.

36 In summary, the scheme of the Act and of the regulations supports the ordinary and grammatical meaning of s. 70(6) as requiring distribution of surplus at the time of partial wind-up.

D. *Object of the Act*

37 A purposive interpretation of s. 70(6) should be mindful of the legislative objective in the context of the statutory scheme surrounding surplus and partial wind-up.

38 The Act is public policy legislation that recognizes the vital importance of long-term income security. As a legislative intervention in the administration of voluntary pension plans, its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans (see *GenCorp, supra*; *Firestone Canada Inc. v. Ontario (Pension Commission)* (1990), 1 O.R. (3d) 122 (C.A.), at p. 127). This is especially important when, as recognized by this Court in *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, at p. 646, it is remembered that pensions are now generally given for consideration rather than being merely gratuitous rewards. At the same time, the voluntary nature of the private pension system requires the interventions in this area to be carefully calibrated. This is necessary to avoid discouraging employers from making plan decisions advantageous to their employees. The Act thus seeks, in some measure, to ensure a balance between employee and employer interests that will be beneficial for both groups and for the greater public interest in established pension standards.

39 Employers often argue that the risk and responsibility of a defined benefit plan are borne by the employer and, thus, it should be allowed the control and flexibility to manage the plan as it sees fit. It is contended that requiring distribution of surplus weighs the balance too heavily in favour of the employees and will result in funds being contributed to according to less cautious actuarial estimates, fewer defined benefit plans, and fewer private pension plans overall. While important considerations, these arguments are unpersuasive. First, the requirement of distribution is value-neutral to the question of entitlement, which must be determined separately under the provisions of the Plan and the Act. Second, the statutory scheme protects against underfunding by

requiring employers and administrators to follow accepted actuarial practice in their valuations (Reg. 909, s. 16). Lastly, the provision of pensions serves a number of labour market functions which benefit the corporate sector, including attracting a labour supply, reducing turnover, improving morale, increasing productivity and efficiency, promoting loyalty to the corporation, and so on (Deaton, *supra*, at p. 119). In short, there are many reasons for employers to maintain pension plans and a construction of s. 70(6) that is in accordance with the terms of the statute is unlikely to disrupt the balance between employer and employee interests.

40 As between employees, it is difficult to see how this interpretation of s. 70(6) results in any unfairness to the ongoing members, as was argued before us in this appeal. Requiring that the pro rata share of the actuarial surplus be distributed at the time of partial wind-up is unlikely to compromise the continuing integrity of the pension fund. By definition, the fund will still be in surplus after the distribution, except that the amount of surplus will be reduced in proportion to the size and level of entitlement, if any, of the partial wind-up group and subject to the statutory restrictions on withdrawal of surplus by the employer. In this case, approximately $16 million in actuarial surplus would have remained in the fund even if the entire surplus related to the partial wind-up was distributed.

41 By contrast, if Affected Members are required to await a full wind-up at some indeterminate future date to share in the distribution of surplus, it would place them in a worse position than continuing employees. Affected Members are placed in a significantly different position from continuing employees because they have just lost their jobs, their level of pensionable earnings are reduced, and they will rarely be able to replicate the same level of benefits elsewhere. Since pension plans are theoretically intended to be indeterminate in nature, Affected Members may no longer be reachable if a full wind-up occurs. It makes sense for the Affected Members to be subject to the risks of the Plan while they are a part of it, but not after they have been terminated from it. This same rationale would equally apply to future Affected Members if another partial wind-up occurs and to all members at the time of a full wind-up, so that each group would bear the consequences of market forces at the time of their termination from the Plan. This seems to be the fairest distribution of risk and in accordance with the object of the Act.

42 There are also policy and practical reasons supporting an interpretation requiring distribution upon partial wind-up. A surplus is, in effect, a windfall because it was not within the expectations of either the employer or the employees when the regime was implemented. The employer contributes to the fund as much as is necessary to match the funding target of the Plan on a going concern basis, taking into consideration actuarial estimates and assumptions. The basic expectation of the employees when joining the Plan is to receive periodic pension benefits on retirement. The fluctuation in the value of the assets is essentially the result of unforeseen market performance or plan experience. As discussed earlier, the most equitable solution is to distribute the fortunes of favourable markets at the time Affected Members are terminated. In this way, the windfall is related to their actual time and participation in the plan rather than being subject to the experience of a plan of which they are no longer a part.

43 Moreover, the increasingly mobile nature of labour should be recognized. When a group of employees is terminated and that part of the Plan is wound up, those accounts should generally be settled concurrently. The Affected Members should be able to know their status at the time of their termination so as to arrange their affairs accordingly and not be indefinitely tied to an employer that laid them off. On the flip side, if Affected Members only have a right to surplus distribution on full wind-up, assuming they are so entitled to receive it, they may no longer be alive to realize their right when, if ever, a full wind-up occurs. Even if they are, they may be difficult to locate or contact. As a practical matter, it is at the time of termination that their right to surplus, if any, is most needed, considering they have just lost their jobs and their source of regular income.

44 Furthermore, the argument that actuarial surplus is notional and thus too unreliable to justify the liquidation of any Plan assets is unconvincing. Although the assessment of an actuarial surplus is of necessity an estimate, it does not follow that the distribution of surplus would be unsound. Actuarial estimates of pension values are used for many purposes, including the sale of corporations or divisions of corporations, the division of matrimonial property, and the taking of contribution holidays by employers. Further, while the actuarial assumptions at play can vary, some uniformity can be found by requiring particular methods of valuation for certain purposes. For instance, the regulations prescribe that a "going concern valuation" (defined in Reg. 909, s. 1(2)) be used for valuing <u>continuing</u> pension plans (see, e.g., Reg. 909, s. 13(1) or 26). In contrast, a "solvency valuation" or "wind-up valuation" can be used when plans are actually or notionally wound up. This is in line with the different purposes underlying the regulation of continuing as opposed to winding up plans. In the former, the main concern is capital regulation to ensure adequate contribution levels based on estimates of current service costs to maintain fund integrity. In the latter, for wind-ups in whole or in part, the main concern is severing the terminated part of the Plan and ensuring Affected Members receive their legal entitlements, if any, as beneficiaries through the distribution of assets related to the part of the Plan being wound up.

45 Lastly, distribution upon partial wind up is consistent with the trust principles outlined in *Schmidt, supra*, regarding surplus entitlement and contribution holidays. Although that case dealt with a situation of entitlement to surplus on a full wind-up, which is not in issue here, the appellants placed much weight on the distinction made by Cory J. between actual and actuarial surplus. Cory J. held at pp. 654-55 that:

> Employees can claim no entitlement to surplus in an ongoing plan because it is not definite. The right to any surplus is crystallized only when the surplus becomes ascertainable upon termination of the plan. Therefore, the taking of a contribution holiday represents neither an encroachment upon the trust nor a reduction of accrued benefits.
>
> ...
>
> <u>When the plan is terminated</u>, the actuarial surplus becomes an actual surplus and

vests in the employee beneficiaries. [Emphasis added.]

46 Section 70(6) provides for distribution of surplus only at the time of plan termination, be it partial or full. The definition of "partial wind up" in s. 1 of the Act explicitly refers to the "termination" of "that part of the pension plan". Also, surplus is ascertainable at that time according to current valuation methods. Neither s. 70(6) nor this appeal affects the ability of an employer to take contribution holidays while the Plan is ongoing and the Plan allows for it. Therefore, requiring distribution on partial wind-up is fully compatible with this Court's decision in *Schmidt* and the principles discussed therein. Upon partial wind-up, the pro rata share of the surplus ceases to be notional. It is then actual.

47 Section 70(6) was enacted to ensure that Affected Members on partial wind-up are not in a worse position than a future full wind-up group. This requirement of equity provided by s. 70(6) is in relation to other rights provided for under the Act. As far as the distribution of surplus is concerned, the object of the Act and s. 70(6) strongly promote an interpretation that requires this distribution to occur at the time of the partial wind-up rather than later.

V. Conclusion

48 In light of all of the above, I conclude that s. 70(6) requires the distribution of actuarial surplus related to the part of the Plan being wound up, on the effective date of the partial wind-up. As a consequence, I agree with the Court of Appeal's interpretation and find that the Tribunal incorrectly interpreted the provision at first instance.

49 This result is also consistent with the historical context of pension law. Statutory interventions in pension law have sought to clarify and regulate the relationship between employers and employees in order to promote the pension system while adjusting imbalances of power. With regard to surplus and its distribution on wind-up, the legislature has implemented some measures in this regard, be it to improve the position of employees if the Plan fails to provide for distribution (s. 79(4) of the Act) or to require consent of members for the withdrawal of surplus by employers (Reg. 909, s. 8). However, these steps have also been tailored in such a way as to avoid placing too heavy a burden on employers in exercising their rights under the Plan or discouraging them from maintaining pension funds for their workforce. Distribution of surplus on partial wind-up reflects this balance because it does not reduce or remove any entitlements of the employers. In contrast, failure to require distribution could negatively impact the potential entitlements of affected employees of the partial wind-up group. Considering the text, scheme and purpose of the Act against this background discloses an intent of the legislature to require surplus distribution on partial wind-up of a plan.

50 The vital importance of pension schemes in the modern labour market is evident. Pension funds are a significant asset for employers and an invaluable nest egg for an aging workforce. Legislative schemes that establish minimum standards and ensure the protection of employee benefits are an element of sound financial and social policy. The facilitation and encouragement of

pension plan participation advance the interests of employees, employers, and the public. As part of the legislature's statutory structure that aims to accommodate the interests of ongoing and terminated employees, it enacted s. 70(6) to require actual distribution of the pro rata share of actuarial surplus on plan wind-up, be it full or partial.

51 The appeal is dismissed with costs.

APPENDIX

Statutory Provisions

(1) *Pension Benefits Act*, R.S.O. 1990, c. P.8

1. In this Act,

...

"partial wind up" means the termination of part of a pension plan and the distribution of the assets of the pension fund related to that part of the pension plan;

...

"surplus" means the excess of the value of the assets of a pension fund related to a pension plan over the value of the liabilities under the pension plan, both calculated in the prescribed manner;

...

"wind up" means the termination of a pension plan and the distribution of the assets of the pension fund;

...

68. (1) The employer or, in the case of a multi-employer pension plan, the administrator may wind up the pension plan in whole or in part.

(2) The administrator shall give written notice of proposal to wind up the pension plan to,

(a) the Superintendent;

(b) each member of the pension plan;
(c) each former member of the pension plan;
(d) each trade union that represents members of the pension plan;
(e) the advisory committee of the pension plan; and
(f) any other person entitled to a payment from the pension fund.

(3) In the case of a proposal to wind up only part of a pension plan, the administrator is not required to give written notice of the proposal to members, former members or other persons entitled to payment from the pension fund if they will not be affected by the proposed partial wind up.

(4) The notice of proposal to wind up shall contain the information prescribed by the regulations.

(5) The effective date of the wind up shall not be earlier than the date member contributions, if any, cease to be deducted, in the case of contributory pension benefits, or, in any other case, on the date notice is given to members.

(6) The Superintendent by order may change the effective date of the wind up if the Superintendent is of the opinion that there are reasonable grounds for the change.

69. (1) The Superintendent by order may require the wind up of a pension plan in whole or in part if,

(a) there is a cessation or suspension of employer contributions to the pension fund;
(b) the employer fails to make contributions to the pension fund as required by this Act or the regulations;
(c) the employer is bankrupt within the meaning of the *Bankruptcy and Insolvency Act* (Canada);
(d) a significant number of members of the pension plan cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer or as a result of the reorganization of the business of the employer;
(e) all or a significant portion of the business carried on by the employer at a specific location is discontinued;

(f) all or part of the employer's business or all or part of the assets of the employer's business are sold, assigned or otherwise disposed of and the person who acquires the business or assets does not provide a pension plan for the members of the employer's pension plan who become employees of the person;

(g) the liability of the Guarantee Fund is likely to be substantially increased unless the pension plan is wound up in whole or in part;
(h) in the case of a multi-employer pension plan,

(i) there is a significant reduction in the number of members, or
(ii) there is a cessation of contributions under the pension plan or a significant reduction in such contributions; or

(i) any other prescribed event or prescribed circumstance occurs.

(2) In an order under subsection (1), the Superintendent shall specify the effective date of the wind up, the persons or class or classes of persons to whom the administrator shall give notice of the order and the information that shall be given in the notice.

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

(a) the assets and liabilities of the pension plan;
(b) the benefits to be provided under the pension plan to members, former members and other persons;
(c) the methods of allocating and distributing the assets of the pension plan and determining the priorities for payment of benefits; and
(d) such other information as is prescribed.

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

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

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

(5) The Superintendent may refuse to approve a wind up report that does not meet the requirements of this Act and the regulations or that does not protect the interests of the members and former members of the pension plan.

(6) On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.

73. (1) For the purpose of determining the amounts of pension benefits and any other benefits and entitlements on the winding up of a pension plan, in whole or in part,

(a) the employment of each member of the pension plan affected by the winding up shall be deemed to have been terminated on the effective date of the wind up;

(b) each member's pension benefits as of the effective date of the wind up shall be determined as if the member had satisfied all eligibility conditions for a deferred pension; and

(c) provision shall be made for the rights under section 74.

(2) A person entitled to a pension benefit on the wind up of a pension plan, other than a person who is receiving a pension, is entitled to the rights under subsection 42(1) (transfer) of a member who terminates employment and, for the purpose, subsection 42(3) does not apply.

74. (1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

77. Subject to the application of the Guarantee Fund, where the money in a pension fund is not sufficient to pay all the pension benefits and other benefits on the wind up of the pension plan in whole or in part, the pension benefits and other benefits shall be reduced in the prescribed manner.

78. (1) No money may be paid out of a pension fund to the employer without the prior consent of the Superintendent.

79. (1) Subject to section 89 (hearing and appeal), the Superintendent shall not consent to payment of money that is surplus to the employer out of a continuing pension plan unless,

(a) the Superintendent is satisfied, based on reports provided with the

application, that the pension plan has a surplus;

(b) the pension plan provides for the withdrawal of surplus by the employer while the pension plan continues in existence, or the applicant satisfies the Superintendent that the applicant is otherwise entitled to withdraw the surplus;

(c) where all pension benefits under the pension plan are guaranteed by an insurance company, an amount equal to at least two years of the employer's current service costs is retained in the pension fund as surplus;

(d) where the members are not required to make contributions under the pension plan, the greater of,

(i) an amount equal to two years of the employer's current service costs, or

(ii) an amount equal to 25 per cent of the liabilities of the pension plan calculated as prescribed,

is retained in the pension fund as surplus;

(e) where members are required to make contributions under the pension plan, all surplus attributable to contributions paid by members and the greater of,

(i) an amount equal to two years of the employer's current service costs, or

(ii) an amount equal to 25 per cent of the liabilities of the pension plan calculated as prescribed,

are retained in the pension fund as surplus; and

(f) the applicant and the pension plan comply with all other requirements prescribed under other sections of this Act in respect of the payment of surplus money out of a pension fund.

...

(3) Subject to section 89 (hearing and appeal), the Superintendent shall not

consent to an application by an employer in respect of surplus in a pension plan that is being wound up in whole or in part unless,

(a) the Superintendent is satisfied, based on reports provided with the application, that the pension plan has a surplus;

(b) the pension plan provides for payment of surplus to the employer on the wind up of the pension plan;

(c) provision has been made for the payment of all liabilities of the pension plan as calculated for purposes of termination of the pension plan; and

(d) the applicant and the pension plan comply with all other requirements prescribed under other sections of this Act in respect of the payment of surplus money out of a pension fund.

(4) A pension plan that does not provide for payment of surplus money on the wind up of the pension plan shall be construed to require that surplus money accrued after the 31st day of December, 1986 shall be distributed proportionately on the wind up of the pension plan among members, former members and any other persons entitled to payments under the pension plan on the date of the wind up.

84. (1) If the Superintendent by order declares that the Guarantee Fund applies to a pension plan, the following are guaranteed by the Guarantee Fund, subject to the limitations and qualifications as are set out in this Act or are prescribed:

1. Any pension in respect of employment in Ontario.
2. Any deferred pension in respect of employment in Ontario to which a former member is entitled, if the former member's employment or membership was terminated before the 1st day of January, 1988 and the former member was at least forty-five years of age and had at least ten years of continuous employment with the employer, or was a member of the pension plan for a continuous period of at least ten years, at the date of termination of employment.
3. A percentage of any defined pension benefits in respect of employment in Ontario to which a member or former member is entitled under section 36 or 37 (deferred pension), or both, if the member's or former member's employment or membership was terminated on or after the 1st day of January, 1988, equal to 20 per

cent if the combination of the member's or former member's age plus years of employment or membership in the pension plan equals fifty, plus an additional 2/3 of 1 per cent for each additional one-twelfth credit of age and employment or membership to a maximum of 100 per cent.

4. All additional voluntary contributions, and the interest thereon, made by members or former members while employed in Ontario.
5. The minimum value of all required contributions made to the pension plan by a member or former member in respect of employment in Ontario plus interest.
6. That part of a deferred pension guaranteed under this subsection to which a former spouse or same-sex partner of a member or of a former member is entitled under a domestic contract or an order under the *Family Law Act*.
7. Any pension to which a survivor of a former member is entitled under subsection 48(1) (death before commencement of payment).

91. (1) A party to a proceeding before the Tribunal under section 89 may appeal to the Divisional Court from the decision or order of the Tribunal.

(2) *Pension Benefits Act* General Regulations, R.R.O. 1990, Reg. 909

1... .

(2) In this Part,

...

"going concern valuation" means a valuation of the assets and liabilities of a pension plan using methods and actuarial assumptions that are consistent with accepted actuarial practice for the valuation of a continuing pension plan;

4. (1) Every pension plan shall set out the obligation of the employer or any person required to make contributions on behalf of an employer, to contribute both in respect of the normal cost and any going concern unfunded actuarial liabilities and solvency deficiencies under the plan.

8. (1) No payment may be made from surplus out of a pension plan that is being wound up in whole or in part unless,

(a) the payment is to be made to or for the benefit of members, former members and other persons, other than an employer, who are entitled to payments under the pension plan on the date of wind up; or
(b) the payment is to be made to an employer with the written agreement of,

(i) the employer,
(ii) the collective bargaining agent of the members of the plan or, if there is no collective bargaining agent, at least two-thirds of the members of the plan, and
(iii) such number of former members and other persons who are entitled to payments under the pension plan on the date of the wind up as the Superintendent considers appropriate in the circumstances.

(2) Despite subsection (1), a payment may be made from surplus out of a pension plan that is being wound up in whole or in part if,

(a) the payment would have been permitted by this section as it read immediately before the 18th day of December, 1991; and
(b) notice of proposal to wind up the pension plan was given to the Superintendent of Pensions before December 18, 1991.

(3) Subsections (1) and (2) do not apply after December 31, 2004.

9. If an amendment to a pension plan with defined benefits converts the defined benefits to defined contribution benefits, the employer may offset the employer's contributions for normal costs against the amount of surplus, if any, in the pension fund after the conversion.

10. (1) The criteria described in this section must be met before the Superintendent may consent to the payment of money that is surplus out of a continuing pension plan to the employer.

(2) All persons who are entitled to receive benefits under the pension plan and all members must consent to the terms upon which the surplus is to be paid out of the plan.

(3) All persons in respect of whom the administrator has purchased a pension, deferred pension or ancillary benefit, other than those persons who requested that the administrator do so, must consent to the terms upon which the surplus is to be paid out of the pension plan.

(4) The pension plan must provide that a former member's contributions to the plan and the interest on the contributions shall not be used to provide more than 50 per cent of the commuted value of a pension or deferred pension in respect of contributory benefits to which the member is entitled under the plan on termination of membership or employment.

(5) The pension plan must provide that a former member who is entitled to a pension or deferred pension on termination of employment or membership is entitled to payment from the pension fund of a lump sum payment equal to the amount by which the former member's contributions under the plan and the interest on the contributions exceed one-half of the commuted value of the former member's pension or deferred pension in respect of the contributory benefits.

...

(8) If surplus is allocated to a person to increase the person's benefits, the person must be offered the choice of receiving the surplus in the form of inflation adjustments to the existing benefits.

(9) The inflation adjustments that are provided must be made,

(a) by indexing the benefits in accordance with a formula based upon increases in the annual Consumer Price Index;
(b) by providing an annual percentage increase in the amount of the benefits or an annual increase of a specified dollar amount; or
(c) by a combination of the methods described in clauses (a) and (b).

(10) For the purpose of subsection (9), the employer may select the method for providing the inflation adjustments.

(11) The pension plan must state who is entitled, or must provide a mechanism for determining who is entitled, to any surplus in the plan after the payment of surplus to which the Superintendent is being asked to consent.

(12) Subsection (11) applies with respect to applications under section 78 of the Act made after the 31st day of October, 1990.

10.1 (1) This section applies with respect to a payment from surplus out of a pension plan to the employer,

(a) if a court has appointed an individual to represent persons described in subclause 8(1)(b)(iii), persons described in subsection 10(2) (but not members) or persons described in subsection 10(3); and

(b) if the Superintendent is satisfied, on the basis of such information and evidence as he or she may require from the employer or administrator, that,

(i) in the case of a proposed payment to the employer from surplus out of a pension plan that is being wound up in whole or in part, the employer has obtained the written agreement referred to in clause 8(1)(b) of 90 per cent of the former members who are in receipt of a pension payable from the pension fund on the date of the wind up, or

(ii) in the case of a proposed payment of money that is surplus out of a continuing pension plan to the employer, the employer has obtained the consent of 90 per cent of the former members who are in receipt of a pension payable from the pension fund, whose consent is required by subsection 10(2).

(2) The court-appointed representative is authorized to give the written agreement referred to in clause 8(1)(b) on behalf of the former members in receipt of a pension payable from the pension fund, who he or she represents.

However, the representative is not authorized to give written agreement on behalf of former members who have agreed or have objected to the payment from surplus.

(3) The court-appointed representative is authorized to give the consent required by subsection 10(2) on behalf of the former members in receipt of a pension payable from the pension fund, who he or she represents. However, the representative is not authorized to consent on behalf of former members who have consented or have objected to the terms upon which the surplus is to be paid out of the plan.

13. (1) Within sixty days after the date of establishment of a plan, the administrator shall submit a report on the basis of a going concern valuation that sets out,

(a) the normal cost, in the first year during which the plan is registered and the rule for computing the normal cost in subsequent years up to the date of the next report;
(b) an estimate of the normal cost, in the subsequent years up to the date of the next report;
(c) where applicable, the estimated aggregate employee contributions to the pension plan during each year up to the date of the succeeding report;
(d) the past service unfunded actuarial liability, if any, under the pension plan as at the date on which the plan qualified for registration;
(e) the special payments required to liquidate the past service unfunded actuarial liability in accordance with section 5;
(f) any other going concern unfunded liability;
(g) the special payments required to liquidate any going concern unfunded liability referred to in clause (f);
(j) where the plan provides for an escalated adjustment, whether and to what extent,

(i) liability for the future cost of the adjustment has been included in the determination of any going concern unfunded actuarial liability, or
(ii) the cost for the escalated adjustment is included in the

normal cost.

(1.1) The report shall also set out, on the basis of a solvency valuation,

(a) whether there is a solvency deficiency;

(b) if there is a solvency deficiency, the amount of the solvency deficiency and the special payments required to liquidate it in accordance with section 5;

(c) whether the transfer ratio is less than one; and

(d) if the transfer ratio is less than one, the transfer ratio.

16. (1) An actuary preparing a report under section 70 of the Act or under section 3, 5.3, 13 or 14 shall use methods and actuarial assumptions that are consistent with accepted actuarial practice and with the requirements of the Act and this Regulation.

(2) An actuary preparing a report under section 4 shall use his or her best effort to meet the standards set out in subsection (1).

(3) The person preparing a report referred to in subsection (1) or (2) shall certify that it meets the requirements of subsection (1) or (2), as the case may be.

(4) The person preparing a report referred to in subsection (2) shall disclose in the report any respect in which the report does not meet the standards set out in subsection (1).

25. (1) The following information is prescribed for the purposes of a notice respecting an application under subsection 78(2) of the Act:

1. The name of the pension plan and its provincial registration number.
2. The valuation date of the report provided with the application and the amount of surplus in the pension plan.
3. The surplus attributable to employee and employer contributions.
4. The amount of surplus withdrawal requested.

5. A statement that submissions in respect of the application may be made in writing to the Superintendent within thirty days after receipt of the notice.
6. The contractual authority for surplus withdrawals.
7. Notice that copies of the report and certificates filed with the Superintendent in support of the surplus request are available for review at the offices of the employer and information on how copies of the report may be obtained.

(2) The employer shall file a copy of the notice required by subsection 78(2) of the Act before transmitting it to the persons required by that subsection.

...

(4) An application by an employer for the consent of the Superintendent to a payment from a continuing pension plan under subsection 78(1) of the Act shall be accompanied by a certified copy of the notice referred to in subsection (1), a statement that subsection 78(2) of the Act has been complied with, details as to the classes of persons who received notice and the date the last notice was distributed.

(5) An application referred to in subsection (1) shall be accompanied by a current report prepared on the basis of a going concern valuation demonstrating that a surplus as determined in accordance with section 26 exists and that there are no special payments required to be made to the pension fund.

26. (1) For purposes of determining surplus in a continuing pension plan,

(a) the value of the assets of the pension plan shall be calculated on the basis of the market value of the investments held by the pension fund plus any cash balances and accrued or receivable items; and

(b) the value of the liabilities of the pension plan shall be the greater of the calculation of,

(i) the going concern liabilities, or

(ii) the solvency liabilities.

(2) For purposes of subclauses 79(1)(d)(ii) and 79(1)(e)(ii) of the Act, the liabilities of the pension plan shall be calculated as the solvency liabilities.

28... .

(5) A notice required under subsection 78(2) of the Act for a plan that is being wound up shall contain,

(a) the name of the pension plan and its provincial registration number;
(b) the valuation date of the report provided with the application and amount of surplus in the pension plan;
(c) the surplus attributable to employee and employer contributions;
(d) the amount of surplus withdrawal requested;
(e) a statement that submissions may be made in writing to the Superintendent within thirty days of receipt of the notice;
(f) the contractual authority for surplus reversion; and
(g) notice that copies of the wind up report filed with the Superintendent in support of the surplus request are available for review at the offices of the employer and information on how copies of the report may be obtained.

(6) An application by an employer for the consent of the Superintendent to a payment from a pension plan that is being wound up shall be accompanied by a certified copy of the notice referred to in subsection (5), a statement that subsection 78(2) of the Act has been complied with, the date the last notice was distributed and details as to the classes of persons who received notice.

28.1 (1) This section applies if there is a surplus on the wind up of a pension plan in whole or in part.

(2) The administrator of the pension plan shall give to each person entitled to a pension, deferred pension or other benefit or to a refund in respect of the pension plan a statement setting out the following information:

1. The name of the pension plan and its provincial registration number.
2. The member's name and date of birth.

3. The method of distributing the surplus assets.
4. The formula for allocating the surplus among the plan beneficiaries.
5. An estimate of the amount allocated to the person.
6. The options available to the person concerning the method for distributing the amount allocated to the person and the period within which any election respecting the options must be made.
7. The method of distribution that will be used, if an election is not made within the specified period.
8. The name and details of the person to be contacted with respect to any questions arising out of the statement.
9. Notice that the allocation of surplus and the options available for distributing it are subject to the approval of the Superintendent and of the Canada Customs and Revenue Agency, and may be adjusted accordingly.

(3) *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28

1. In this Act,

...

"regulated sector" means a sector that consists of,

(a) all co-operative corporations to which the *Co-operative Corporations Act* applies;
(b) all credit unions, caisses populaires and leagues to which the *Credit Unions and Caisses Populaires Act, 1994* applies;
(c) all persons engaged in the business of insurance and governed by the *Insurance Act*;
(d) all corporations registered or incorporated under the *Loan and Trust Corporations Act*;
(e) all mortgage brokers registered under the *Mortgage Brokers Act*; or
(f) all persons who establish or administer a pension plan within the meaning of the *Pension Benefits Act* and all employers or other persons on their behalf who are required to contribute to any such pension plan;

6. (1) There is hereby established a tribunal to be known in English as the Financial Services Tribunal and in French as Tribunal des services financiers.

...

(3) In addition to the chair and the two vice-chairs, the Lieutenant Governor in Council shall appoint at least six persons, and not more than 12, as members of the Tribunal for the length of time not exceeding three years that the Lieutenant Governor in Council specifies and may reappoint any member to the Tribunal.

(4) In appointing members to the Tribunal, the Lieutenant Governor in Council shall, to the extent practicable, appoint members who have experience and expertise in the regulated sectors.

7. (1) A matter referred to the Tribunal may be heard and determined by a panel consisting of one or more members of the Tribunal, as assigned by the chair of the Tribunal.

(2) In assigning members of the Tribunal to a panel, the chair shall take into consideration the requirements, if any, for experience and expertise to enable the panel to decide the issues raised in any matter before the Tribunal.

20. The Tribunal has exclusive jurisdiction to,

(a) exercise the powers conferred on it under this Act and every other Act that confers powers on or assigns duties to it; and
(b) determine all questions of fact or law that arise in any proceeding before it under any Act mentioned in clause (a).

21... .

(4) An order of the Tribunal is final and conclusive for all purposes unless the Act under which the Tribunal made it provides for an appeal.

22. For a proceeding before the Tribunal, the Tribunal may,

(a) make rules for the practice and procedure to be observed;
(b) determine what constitutes adequate public notice;
(c) before or during the proceeding, conduct any inquiry or inspection that the Tribunal considers necessary; or
(d) in determining any matter, consider any relevant information obtained by the Tribunal in addition to evidence given at the proceeding, if the Tribunal first informs the parties to the proceeding of the additional information and gives them an opportunity to explain or refute it.

Solicitors:

Solicitors for the appellant Monsanto Canada Inc.: Borden Ladner Gervais, Toronto.

Solicitors for the appellant the Association of Canadian Pension Management: Blake, Cassels & Graydon, Toronto.

Solicitor for the respondent: Ministry of the Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitors for the intervener the National Trust Company: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the intervener Nicole Lacroix: Barnes, Sammon, Ottawa.

Solicitors for the interveners the Canadian Labour Congress and the Ontario Federation of Labour: Sack Goldblatt Mitchell, Toronto.

Solicitors for the interveners R. M. Smallhorn, D. G. Halsall, S. J. Galbraith and S. W. (Bud) Wesley: Koskie Minsky, Toronto.

TAB 8

Indexed as:

British Columbia v. Henfrey Samson Belair Ltd.

Her Majesty The Queen in right of the Province of British Columbia, appellant;
v.
Henfrey Samson Belair Ltd., respondent;
and
The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of Nova Scotia, the Attorney General for New Brunswick, the Attorney General of Manitoba, the Attorney General for Alberta and the Attorney General of Newfoundland, interveners.

[1989] 2 S.C.R. 24

[1989] 2 R.C.S. 24

[1989] S.C.J. No. 78

[1989] A.C.S. no 78

File No.: 20515.

Supreme Court of Canada

1989: April 21 / 1989: July 13.

Present: Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy -- Priority -- Statutorily created trust for tax collected -- Tax collected commingled with bankrupt's assets -- All assets applied to reduce bank's indebtedness -- Whether or not province should be given priority over other creditors because of statutorily created trust -- Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 47(a), 107(1)(j) -- Social Service Tax Act, R.S.B.C. 1979, c. 388, s. 18.

Tops Pontiac Buick Ltd. collected provincial sales tax in the course of its business operations, as required by the Social Service Tax Act, and mingled the tax collected with its other assets. A creditor placed Tops in receivership and Tops then made an assignment in bankruptcy. The receiver sold the assets and applied the full proceeds to reduce the bank's indebtedness.

The province contended that the Social Service Tax Act created a statutory trust over the assets of Tops equal to the amount of the sales tax collected but not remitted, and that it had priority over the bank and all other creditors for this amount. The chambers judge [page25] held that the Social Service Tax Act did not create a trust and that the province had no priority under the Bankruptcy Act. The Court of Appeal held that the legislation created a statutory trust but the Bankruptcy Act did not confer priority on such a trust. At issue here is whether the statutory trust created by s. 18 of the British Columbia Social Service Tax Act gives the province priority over other creditors under the Bankruptcy Act.

Held (Cory J. dissenting): The appeal should be dismissed.

Per Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: The statutory trust created by the provincial legislation is not a trust within s. 47(a) of the Bankruptcy Act but merely a Crown claim under s. 107(1)(j). Section 47(a), which concerns "property held by the bankrupt in trust for any other person", permits removal of property which can be specifically identified as not belonging to the bankrupt under general principles of trust law from the distribution scheme established by the Bankruptcy Act. Section 107(1)(j), on the other hand, does not deal with rights conferred by general law, but with the statutorily created claims of federal and provincial tax collectors. If sections 47(a) and 107(1)(j) are read in this way, no conflict arises between them. This construction of ss. 47(a) and 107(1)(j) of the Bankruptcy Act conforms with the principle that provinces cannot create priorities under the Bankruptcy Act by their own legislation.

Section 18 of Social Service Tax Act deems a statutory trust at the moment the tax is collected. The trust property is identifiable at that time and the requirements for a trust under the principles of trust law are met. The money when collected would therefore be exempt from distribution to creditors by reason of s. 47(a). The trust at common law ceases to exist, however, when the tax money collected is mingled with other money so that it cannot be traced and is no longer identifiable. The province has a claim secured only by a charge or lien created by s. 18(2) of the Social Service Tax Act, and s. 107(1)(j) of the Bankruptcy Act would accordingly apply. Here, no specific property impressed with a trust could be identified and s. 47(a) of the Bankruptcy Act did not extend to the province's claim.

Per Cory J. (dissenting): The moneys collected as sales tax by a vendor belong to the province and the vendor is in every sense of the word a trustee for them. The province did not need to rely on the vendor's [page26] keeping separate bank accounts to protect its trust property but rather could and did implement a registration system that allowed it to specify precisely the amount owing through a system of bookkeeping. If the tax were not paid to the province then a vendor must have stolen the

funds, converted them to its own use or most charitably lost the funds for which it would be responsible and for which it would be accountable to the province.

The Bankruptcy Act prevents the provinces from creating priorities but it does not prevent them from creating a deemed trust or lien. It protects funds which, at the moment they were paid, were truly trust funds and the validity of the trust need not be determined exclusively on the basis of common law. Since section 18 of the Social Service Tax Act and ss. 47(a) and 107 of the Bankruptcy Act do not conflict, the doctrine of federal paramountcy cannot apply and s. 18 should prevail. The property at issue which was subject to s. 18 of the Social Service Tax Act never at any time became the property of the bankrupt and was therefore not subject to distribution as the property of the bankrupt pursuant to s. 107 of the Bankruptcy Act.

The trust, created by s. 18, contained the three essential characteristics required of a trust by equity: certainty of intention, subject matter and of objects. The statute established certainty of intention and of object and through the use of a clear formula established the trust property. A statutorily constituted trust has an advantage over a privately constituted trust in that it is recognized without the beneficiary's having to undertake the often inordinately expensive action of tracing commingled funds. This advantage should not deprive the statutory trust property of its trust character or take it outside the policies determined by this Court.

Cases Cited

By McLachlin J.

Applied: Deputy Minister of Revenue v. Rainville, [1980] 1 S.C.R. 35; Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board, [1985] 1 S.C.R. 785; referred to: Re Phoenix Paper Products Ltd. (1983), 48 C.B.R. (N.S.) 113.

[page27]

By Cory J. (dissenting)

Royal Trust Co. v. Tucker, [1982] 1 S.C.R. 250; John M. M. Troup Ltd. v. Royal Bank of Canada, [1962] S.C.R. 487; Re Deslauriers Construction Products Ltd. (1970), 3 O.R. 599; Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd., [1980] 1 S.C.R. 1182; Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161; Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board, [1985] 1 S.C.R. 785; Re Diplock's Estate, [1948] Ch. 465, [1948] 2 All E.R. 318, aff'd sub nom. Min. of Health v. Simpson, [1951] A.C. 251, [1950] 2 All E.R. 1137 (H.L.); Deputy Minister of Revenue v. Rainville, [1980] 1 S.C.R. 35; Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail), [1988] 1 S.C.R. 1061.

Statutes and Regulations Cited

Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 47(a), 107(1)(j).
Builders' Lien Act, R.S.A. 1980, c. B-12, s. 16.1.
Business Corporations Act, S.A. 1981, c. B-15, s. 191(1).
Canada Pension Plan, R.S.C. 1985, c. C-8, s. 23(4).
Construction Lien Act, S.O. 1983, c. 6, s. 7.
Employment Standards Act, R.S.A. 1980, c. E-10.1, s. 113.
Health Insurance Act, R.S.O. 1980, c. 197, s. 18.
Health Insurance Premiums Regulation, Alta. Reg. 217/81.
Insurance Act, R.S.A. 1980, c. I-5, s. 123(1).
Insurance Act, R.S.O. 1980, c. 218, s. 359.
Mechanics' Lien Act, R.S.O. 1950, c. 227.
Pension Benefits Act, S.O. 1987, c. 35, s. 58.
Real Estate Agents' Licensing Act, R.S.A. 1980, c. R-5, s. 14.
Revenue Act, R.S.B.C. 1979, c. 367.
Social Service Tax Act, R.S.B.C. 1979, c. 388, ss. 5, 6, 8, 9, 10, 18(1), (2), 27.
Social Services Tax Act Regulations, B.C. Reg. 84/58, Division 5.

Authors Cited

Driedger, Elmer A. Construction of Statutes, 2nd ed. Toronto: Butterworths, 1983.
Hardy, Anne E. Crown Priority in Insolvency. Toronto: Carswells, 1986.
Waters, D.W.M. Law of Trusts in Canada, 2nd ed. Toronto: Carswells, 1984.

APPEAL from a judgment of the British Columbia Court of Appeal (1987), 13 B.C.L.R. [page28] (2d) 346; 40 D.L.R. (4th) 728; [1987] 4 W.W.R. 673; 65 C.B.R. (N.S.) 24; 5 A.C.W.S. (3d) 47, dismissing an appeal from a judgment of Meredith J. in chambers (1986), 5 B.C.L.R. (2d) 212, 61 B.C.R. (N.S.) 59. Appeal dismissed, Cory J. dissenting.

William A. Pearce and J.G. Pottinger, for the appellant. Wendy G. Baker, Q.C., and Gillian E. Parson, for the respondent. James M. Mabbutt, Q.C., for the intervener the Attorney General of Canada. Janet E. Minor and Timothy Macklem, for the intervener the Attorney General for Ontario. Yves de Montigny and Madeleine Aubé, for the intervener the Attorney General of Quebec. Reinhold M. Endres, for the intervener the Attorney General of Nova Scotia. Richard Burns, for the intervener the Attorney General for New Brunswick. W. Glenn McFetridge and Dirk D. Blevins, for the intervener the Attorney General of Manitoba. Robert C. Maybank, for the intervener the Attorney General for Alberta. W.G. Burke-Robertson, Q.C., for the intervener the Attorney General of Newfoundland.

Solicitor for the appellant: The Ministry of the Attorney General of British Columbia, Victoria. Solicitors for the respondent: Davis & Company, Vancouver. Solicitor for the intervener the Attorney General of Canada: The Deputy Attorney General of Canada, Ottawa. Solicitor for the

intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto. Solicitor for the intervener the Attorney General of Quebec: The Attorney General of Quebec, Ste-Foy. Solicitor for the intervener the Attorney General of Nova Scotia: The Department of the Attorney General of Nova Scotia, Halifax. Solicitor for the intervener the Attorney General for New Brunswick: The Attorney General for New Brunswick, Fredericton. Solicitor for the intervener the Attorney General of Manitoba: Gordon E. Pilkey, Winnipeg. Solicitor for the intervener the Attorney General for Alberta: The Attorney General for Alberta, Edmonton. Solicitor for the intervener the Attorney General of Newfoundland: The Attorney General of Newfoundland. St. John's.

The judgment of Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. was delivered by

1 **McLACHLIN J.**:-- The issue on this appeal is whether the statutory trust created by s. 18 of the British Columbia Social Service Tax Act, R.S.B.C. 1979, c. 388, gives the province priority over other creditors under the Bankruptcy Act, R.S.C. 1970, c. B-3.

2 Tops Pontiac Buick Ltd. collected sales tax for the provincial government in the course of its business operations, as it was required to do by the Social Service Tax Act. Tops mingled the tax collected with its other assets. When the Canadian Imperial Bank of Commerce placed Tops in receivership pursuant to its debenture and Tops [page29] made an assignment in bankruptcy, the receiver sold the assets of Tops and applied the full proceeds in reduction of the indebtedness of the bank.

3 The province contends that the Social Service Tax Act creates a statutory trust over the assets of Tops equal to the amount of the sales tax collected but not remitted ($58,763.23), and that it has priority over the bank and all other creditors for this amount.

4 The Chambers judge held that the Social Service Tax Act did not create a trust and that the province did not have priority. On appeal the receiver conceded that the legislation created a statutory trust, but contended that the chambers judge was correct in ruling that the Province did not have priority because the Bankruptcy Act did not confer priority on such a trust. The British Columbia Court of Appeal accepted this submission. The Province now appeals to this Court.

5 The section of the Social Service Tax Act which the Province contends gives it priority provides:

> 18. (1) Where a person collects an amount of tax under this Act

(a) he shall be deemed to hold it in trust for Her Majesty in right of the Province for the payment over of that amount to Her Majesty in the manner and at the time required under this Act and regulations, and
(b) the tax collected shall be deemed to be held separate from and form no part of the person's money, assets or estate, whether or not the amount of the tax has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who collected the amount of the tax under this Act.

(2) The amount of taxes that, under this Act,

(a) is collected and held in trust in accordance with subsection (1); or
(b) is required to be collected and remitted by a vendor or lessor

forms a lien and charge on the entire assets of

(c) the estate of the trustee under paragraph (a); [page30]
(d) the person required to collect or remit the tax under paragraph (b); or
(e) the estate of the person required to collect or remit the tax under paragraph (d).

6 The Province argues that s. 18(1) creates a trust within s. 47(a) of the Bankruptcy Act, which provides:

47. The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

7 The respondent, on the other hand, submits that the deemed statutory trust created by s. 18 of the Social Service Tax Act is not a trust within s. 47 of the Bankruptcy Act, in that it does not possess the attributes of a true trust. It submits that the Province's claim to the tax money is in fact a debt falling under s. 107(1)(j) of the Bankruptcy Act, the priority to which falls to be determined according to the priorities established by s. 107.

107. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as

follows:

. . .

(j) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, pari passu notwithstanding any statutory preference to the contrary.

Discussion

8 The issue may be characterized as follows. Section 47(a) of the Bankruptcy Act exempts trust property in the hands of the bankrupt from distribution to creditors, giving trust claimants absolute priority. Section 107(1) establishes priorities between creditors on distribution; s. 107(1)(j) ranks Crown claims last. Section 18 of the Social Service Tax Act creates a statutory trust which lacks the essential characteristics of a trust, namely, that the property impressed with the trust be identifiable or traceable. The question is whether the statutory trust created by the provincial legislation is a trust within s. 47(a) of the Bankruptcy Act or a mere Crown claim under s. 107(1)(j).

[page31]

9 In my opinion, the answer to this question lies in the construction of the relevant provisions of the Bankruptcy Act and the Social Service Tax Act.

10 In approaching this task, I take as my guide the following passage from Driedger, Construction of Statutes (2nd ed. 1983), at p. 105:

> The decisions ... indicate that the provisions of an enactment relevant to a particular case are to be read in the following way:
>
> 1. The Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament (the law as expressly or impliedly enacted by the words), the object of the Act (the ends sought to be achieved), and the scheme of the Act (the relation between the individual provisions of the Act).
> 2. The words of the individual provisions to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in the light of the intention of Parliament embodied in the Act as a whole, the object of the Act and the scheme of the Act, and if they are clear and unambiguous and in harmony with that intention, object and scheme and with the general body of the law, that is the end.

11 With these principles in mind, I turn to the construction of ss. 47(a) and 107(1)(j) of the Bankruptcy Act. The question which arises under s. 47(a) of the Act concerns the meaning of the phrase "property held by the bankrupt in trust for any other person". Taking the words in their ordinary sense, they connote a situation where there is property which can be identified as being held in trust. That property is to be removed from other assets in the hands of the bankrupt before distribution under the Bankruptcy Act because, in equity, it belongs to another person. The intention of Parliament in enacting s. 47(a), then, was to permit removal of property which can be specifically identified as not belonging to the bankrupt under general principles of trust law from the distribution scheme established by the Bankruptcy Act.

12 Section 107(1)(j), on the other hand, has been held to deal not with rights conferred by general law, but with the statutorily created claims of federal and provincial tax collectors. The purpose of s. 107(1)(j) was discussed by this Court in Deputy Minister of Revenue v. Rainville, [1980] 1 [page32] S.C.R. 35. Pigeon J., speaking for the majority, stated at p. 45:

> There is no need to consider the scope of the expression "claims of the Crown". It is quite clear that this applies to claims of provincial governments for taxes and I think it is obvious that it does not include claims not secured by Her Majesty's personal preference, but by a privilege which may be obtained by anyone under general rules of law, such as a vendor's or a builder's privilege.

13 If sections 47(a) and 107(1)(j) are read in this way, no conflict arises between them. If a trust claim is established under general principles of law, then the property subject to the trust is removed from the general distribution by reason of s. 47(a). Following the reasoning of Pigeon J. in Deputy Minister of Revenue v. Rainville, such a claim would not fall under s. 107(1)(j) because it is valid under general principles of law and is not a claim secured by the Crown's personal preference.

14 This construction of ss. 47(a) and 107(1)(j) of the Bankruptcy Act conforms with the principle that provinces cannot create priorities under the Bankruptcy Act by their own legislation, a principle affirmed by this Court in Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board, [1985] 1 S.C.R. 785. As Wilson J. stated at p. 806:

> ... the issue in Re Bourgault [Deputy Minister of Revenue v. Rainville] and Re Black Forest Restaurant Ltd. was not whether a proprietary interest has been created under the relevant provincial legislation. It was whether provincial legislation, even if it did create a proprietary interest, could defeat the scheme of distribution under s. 107(1) of the Bankruptcy Act. These cases held that it could not, that while the provincial legislation could validly secure debts on the property of the debtor in a non-bankruptcy situation, once bankruptcy occurred s. 107(1) determined the status and priority of the claims specifically dealt with in the section. It was not open to the claimant in bankruptcy to say: By virtue of the applicable provincial legislation I am a secured creditor within the meaning of

> the opening words of s. 107(1) of the Bankruptcy Act and therefore the priority accorded my claim under the relevant paragraph of s. 107(1) does not apply to me. In effect, this is the position adopted by the Court of Appeal and advanced [page33] before us by the respondent. It cannot be supported as a matter of statutory interpretation of s. 107(1) since, if the section were to be read in this way, it would have the effect of permitting the provinces to determine priorities on a bankruptcy, a matter within exclusive federal jurisdiction.

While Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board was concerned with provincial legislation purporting to give the Province the status of a secured creditor for purposes of the Bankruptcy Act, the same reasoning applies in the case at bar.

15 To interpret s. 47(a) as applying not only to trusts as defined by the general law, but to statutory trusts created by the provinces lacking the common law attributes of trusts, would be to permit the provinces to create their own priorities under the Bankruptcy Act and to invite a differential scheme of distribution on bankruptcy from province to province.

16 Practical policy considerations also recommend this interpretation of the Bankruptcy Act. The difficulties of extending s. 47(a) to cases where no specific property impressed with a trust can be identified are formidable and defy fairness and common sense. For example, if the claim for taxes equalled or exceeded the funds in the hands of the trustee in bankruptcy, the trustee would not recover the costs incurred to realize the funds. Indeed, the trustee might be in breach of the Act by expending funds to realize the bankrupt's assets. Other difficulties would arise in the case of more than one claimant to the trust property. The spectre is raised of a person who has a valid trust claim under the general principles of trust law to a specific piece of property, finding himself in competition with the Crown claiming a statutory trust in that and all the other property. Could the Crown's general claim pre-empt the property interest of the claimant under trust law? Or would the claimant under trust law prevail? To admit of such a possibility would be to run counter to the clear intention of Parliament in enacting the Bankruptcy Act of setting up a clear and orderly [page34] scheme for the distribution of the bankrupt's assets.

17 In summary, I am of the view that s. 47(a) should be confined to trusts arising under general principles of law, while s. 107(1)(j) should be confined to claims such as tax claims not established by general law but secured "by her Majesty's personal preference" through legislation. This conclusion, in my opinion, is supported by the wording of the sections in question, by the jurisprudence of this Court, and by the policy considerations to which I have alluded.

18 I turn next to s. 18 of the Social Service Tax Act and the nature of the legal interests created by it. At the moment of collection of the tax, there is a deemed statutory trust. At that moment the trust property is identifiable and the trust meets the requirements for a trust under the principles of trust law. The difficulty in this, as in most cases, is that the trust property soon ceases to be identifiable. The tax money is mingled with other money in the hands of the merchant and

converted to other property so that it cannot be traced. At this point it is no longer a trust under general principles of law. In an attempt to meet this problem, s. 18(1)(b) states that tax collected shall be deemed to be held separate from and form no part of the collector's money, assets or estate. But, as the presence of the deeming provision tacitly acknowledges, the reality is that after conversion the statutory trust bears little resemblance to a true trust. There is no property which can be regarded as being impressed with a trust. Because of this, s. 18(2) goes on to provide that the unpaid tax forms a lien and charge on the entire assets of the collector, an interest in the nature of a secured debt.

19 Applying these observations on s. 18 of the Social Service Tax Act to the construction of ss. 47(a) and 107(1)(j) of the Bankruptcy Act which [page35] I have earlier adopted, the answer to the question of whether the Province's interest under s. 18 is a "trust" under s. 47(a) or a "claim of the Crown" under s. 107(1)(j) depends on the facts of the particular case. If the money collected for tax is identifiable or traceable, then the true state of affairs conforms with the ordinary meaning of "trust" and the money is exempt from distribution to creditors by reason of s. 47(a). If, on the other hand, the money has been converted to other property and cannot be traced, there is no "property held ... in trust" under s. 47(a). The Province has a claim secured only by a charge or lien, and s. 107(1)(j) applies.

20 In the case at bar, no specific property impressed with a trust can be identified. It follows that s. 47(a) of the Bankruptcy Act should not be construed as extending to the Province's claim in this case.

21 The province, however, argues that it is open to it to define "trust" however it pleases, property and civil rights being matters within provincial competence. The short answer to this submission is that the definition of "trust" which is operative for purposes of exemption under the Bankruptcy Act must be that of the federal Parliament, not the provincial legislatures. The provinces may define "trust" as they choose for matters within their own legislative competence, but they cannot dictate to Parliament how it should be defined for purposes of the Bankruptcy Act: Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board.

22 Nor does the argument that the tax money remains the property of the Crown throughout withstand scrutiny. If that were the case, there would be no need for the lien and charge in the Crown's favour created by s. 18(2) of the Social Service Tax Act. The Province has a trust interest and hence property in the tax funds so long as they can be identified or traced. But once they lose that character, any common law or equitable property interest disappears. The Province is left with a statutory deemed trust which does not give it the same property interest a common law trust would, [page36] supplemented by a lien and charge over all the bankrupt's property under s. 18(2).

23 The province relies on Re Phoenix Paper Products Ltd. (1983), 48 C.B.R. (N.S.) 113 (Ont. C.A.), where the Ontario Court of Appeal held that accrued vacation pay mixed with other assets of a bankrupt constituted a trust under s. 47(a) of the Bankruptcy Act. As the Court of Appeal in this

case pointed out, the Ontario Court of Appeal in Re Phoenix Paper Products Ltd., in considering the two divergent lines of authority presented to it, did not have the advantage of considering what was said in Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board, and the affirmation in that case of the line of authority which the Ontario Court of Appeal rejected.

24 The appellant raised a second question in the alternative, namely:

> If the Province is divested of its trust property by reason of S. 18(1) being in conflict with S. 107(1)(j) of the Bankruptcy Act, does [that] property devolve to the secured creditor [the Bank] or is it distributed to unsecured creditors pursuant to S. 107 of the Bankruptcy Act?

This question was not raised in the courts below, nor on the application for leave to appeal. It concerns parties who were not present on the appeal. For these reasons, I would decline to consider it.

Conclusion

25 For the reasons stated, I conclude that s. 47(a) of the Bankruptcy Act does not apply in this case and the priority of the Province's claim is governed by s. 107(1)(j) of the Act. I would decline to answer the alternative question posed by the appellants.

26 I would dismiss the appeal, with costs.

The following are the reasons delivered by

27 CORY J. (dissenting):-- I have read with great interest the compelling reasons of my colleague Justice McLachlin. Unfortunately I cannot agree [page37] that s. 47(a) of the Bankruptcy Act, R.S.C. 1970, c. B-3, does not apply in this case. If section 18 of the British Columbia Social Service Tax Act, R.S.B.C. 1979, c. 388, creates a valid trust, then s. 47(a) of the Bankruptcy Act must apply. In order to determine the effect of s. 18 it may be helpful to consider the Social Service Tax Act as a whole.

Scheme of the B.C. Social Service Tax Act

28 Registration under this Act is a condition precedent to carrying on a retail sales business in the province of British Columbia. Subject to certain irrelevant and minor exceptions, the Act provides that no one may sell "tangible personal property" in the province at a retail sale without being registered with the "commissioner", the provincial official appointed to administer the Act. It is sufficient to note that the term "tangible personal property" is given a very broad definition. With the approval of the Minister, the Commissioner may cancel or suspend the certificate of anyone found guilty of an offence under the Act thus terminating the retail business. This is the ultimate form of control that the province exercises over those who collect the taxes assessed under the Act.

In addition, the regulations passed pursuant to the Act provide for close scrutiny of the use of the registration certificates issued to vendors.

29 Pursuant to s. 5 of the Act, retail vendors are deemed to be agents of the Minister for the purposes of levying and collecting sales tax. Section 6 provides that these agents are deemed to be tax collectors for the purposes of the Revenue Act, R.S.B.C. 1979, c. 367, and are made subject to the provisions of ss. 22 to 28 of that Act. Sections 22 to 28 prescribe the penalties for tax collectors who fail to render their accounts as required by the statute. Pursuant to s. 27, where a collector has received money belonging to the Crown in right of the Province and has failed to pay it to the province, the defaulting collector's property may be seized. As a quid pro quo, s. 8 of the Social Service Tax Act provides that vendors are to [page38] receive remuneration for the service they provide to the government by collecting the tax.

30 Under ss. 9 and 10 of the Act every vendor is required to make returns and keep tax records in the form prescribed by the regulations and must keep a record of all purchases and sales. Division 5 of the Social Services Tax Act Regulations, B.C. Reg. 84/58, makes detailed provision for these returns and records. The regulations make clear that there is to be continuous supervision of sales tax collection. Separate monthly returns must be made for each place of business and the returns must be made no later than fifteen days after the last day of each monthly period. The regulations provide in detail for the means of calculating upon each return the commission for each vendor on the collection of sales tax.

31 The requirements concerning the keeping of records and accounts emphasize the trust nature of the arrangement. They provide that books of account must contain distinct records of all (1) sales, (2) purchases, (3) non-taxable sales, (4) taxable sales, (5) amounts of tax collected and (6) disposal of tax including commission taken. The records further stress that "all entries concerning the tax and such books of account, records and documents shall be kept separate and distinguishable from other entries made therein." (Emphasis added.) As well the tax must be shown as a separate item on all receipts given to purchasers. Section 27 of the Act provides wide powers for the inspection of these records.

32 It is against this background that s. 18 of the Social Service Tax Act must be considered. That section provides:

> 18. (1) Where a person collects an amount of tax under this Act
>
> (a) he shall be deemed to hold it in trust for Her Majesty in right of the Province for payment over of that amount to Her Majesty in the manner and at the time required under this Act and regulations, and [page39]
>
> (b) the tax collected shall be deemed to be held separate from and form no part of the person's money, assets or estate, whether or not the

amount of the tax has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who collected the amount of the tax under this Act.

(2) The amount of taxes that, under this Act,

(a) is collected and held in trust in accordance with subsection (1); or
(b) is required to be collected and remitted by a vendor or lessor

forms a lien and charge on the entire assets of

(c) the estate of the trustee under paragraph (a);
(d) the person required to collect or remit the tax under paragraph (b); or
(e) the estate of the person required to collect or remit the tax under paragraph (d).

33 It can be seen that the moneys collected by a vendor such as Tops as the tax collector of the sales tax never belongs to the vendor. The sales tax is payable by the purchaser who owes that sum to the province. The vendor never has any interest in those funds and is in every sense of the word a trustee of the funds collected for the sales tax. The vendor is simply the conduit for payment of the sales tax to the province. The province has not relied upon a requirement that separate bank accounts be kept by a vendor to protect its trust property. Rather, it has put into place a system of registration of all retail sales businesses and provided for a regulated means of record keeping and inspection. This system permits the government to specify precisely what money is due to it and to ascertain what is happening to its money on a monthly basis.

34 If the tax is not paid to the province then a vendor such as Tops must have stolen the funds, converted them to its own use or most charitably lost the funds for which it was responsible and for which it was accountable to the province.

35 From the point of view of fairness, there would seem to be no objection to the provincial government creating a lien or charge on the assets of [page40] the vendor for the amount of the sales tax (the trust funds) which the vendor was responsible for collecting and remitting to the province.

Does Section 18 Create a Valid Trust?

36 The question may be phrased more precisely by asking: If, as the chambers judge found, sales tax money "was misappropriated by Tops and mingled with its assets", does that put an end to the

trust? It is said that the trust, although validly existing at the moment the funds were paid by the purchaser, ceases to exist or have any validity once the funds were mingled so that they could not be traced readily. To begin with, and somewhat simplistically, there is no prohibition in the Bankruptcy Act against the province creating a deemed trust or lien against the retail vendor's property for the extent of the sales tax nor is there a conflict between s. 18 of the Social Service Tax Act and s. 47(a) and s. 107 of the Bankruptcy Act. This is not a statutory ruse to evade the provisions of the Bankruptcy Act. It is simply an attempt to protect trust funds which are earmarked to be used for the public benefit and public use. Rather than insist that on each sale there be a separate payment to the province, the Act created a system which was in the best interest of retail purchasers, retail vendors, the business community and the province as a whole. The Act does no more than protect funds which at the moment they were paid were truly trust funds. Nor am I sure that the validity of a trust must be determined exclusively on the basis of common law. It has been held by this Court that the civil law of trust is not the same as that of common law. See Royal Trust Co. v. Tucker, [1982] 1 S.C.R. 250, at p. 261.

37 There are a number of provincial statutory provisions which create trusts. This type of legislation is common to a wide range of statutes that may benefit employees, purchasers of insurance, payers of health and insurance and many others who lack the organization or bargaining power to establish a trust for themselves. See for example, [page41] Pension Benefits Act, S.O. 1987, c. 35, s. 58; Insurance Act, R.S.O. 1980, c. 218, s. 359; Health Insurance Act, R.S.O. 1980, c. 197, s. 18; Builders' Lien Act, R.S.A. 1980, c. B-12, s. 16.1; Construction Lien Act, S.O. 1983, c. 6, s. 7; Business Corporations Act, S.A. 1981, c. B-15, s. 191(1); Employment Standards Act, R.S.A. 1980, c. E-10.1, s. 113; Insurance Act, R.S.A. 1980, c. I-5, s. 123(1); Real Estate Agents' Licensing Act, R.S.A. 1980, c. R-5, s. 14, and Health Insurance Premiums Regulation, Alta. Reg. 217/81.

38 This Court has held that a province may, to further and protect a principle of social policy, create a statutory trust. In John M. M. Troup Ltd. v. Royal Bank of Canada, [1962] S.C.R. 487, at p. 494, the trust provisions of The Mechanics' Lien Act, R.S.O. 1950, c. 227, (now the Construction Lien Act) were found to be validly enacted. The statutory trusts referred to above provide needed protection for their beneficiaries and forward salutary social objectives which the provinces have jurisdiction to pursue.

39 Subsection 23(4) of the Canada Pension Plan, R.S.C. 1985, c. C-8, creates a statutory trust using language almost identical to s. 18 of the Social Service Tax Act. In Re Deslauriers Construction Products Ltd. (1970), 3 O.R. 599 (C.A.), Gale C.J.O., for a unanimous Court, noted that the Act deemed Pension Plan moneys to be kept separate and apart from the estate of the employer "whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate", and commented at p. 601:

> [These words] were inserted in the Act specifically for the purpose of taking the moneys equivalent to the deductions out of the estate of the bankrupt by the [page42] creation of a trust and making those moneys the property of the

> Minister.

From this he drew the following conclusion at pp. 602-3:

> In the Canada Pension Plan the fund is deemed to be property which does not comprise part of the bankruptcy at all, so that the Crown under that act is not a creditor, but is deemed to hold property which is not the property of the bankrupt.

Gale C.J.O's judgment was cited with approval by Pigeon J. writing for the majority in this Court in Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd., [1980] 1 S.C.R. 1182, at p. 1198, who stated: "I find the reasoning in Deslauriers wholly persuasive ...."

40 The provisions of s. 18 then should prevail unless they are in conflict with the provisions of the Bankruptcy Act. Sections 47 and 107 of the Act provide:

> 47. The property of a bankrupt divisible among his creditors shall not comprise
>
> (a) property held by the bankrupt in trust for any other person;
>
> . . .
>
> 107. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:
>
> . . .
>
> (j) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, pari passu notwithstanding any statutory preference to the contrary.

41 The doctrine of federal paramountcy of legislation can only apply if there is actual conflict in the operation of the provincial and federal statutes. The principle was set forth in Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161, at p. 191, by Dickson J., as he then was, in these words:

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens [page43] are being told to do inconsistent things"; compliance with one is defiance of the other.

42 In this case there is no conflict as the property which was subject to s. 18 of the Social Service Tax Act never at any time became the property of the bankrupt and is therefore not subject to distribution as the property of the bankrupt pursuant to s. 107 of the Bankruptcy Act. On a plain reading of s. 47 of the Bankruptcy Act there is no conflict created by the two statutes.

43 It is true that this Court has in Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board, [1985] 1 S.C.R. 785, recognized and emphasized that provinces cannot, by means of their own legislation, create priorities under the Bankruptcy Act. However, s. 18 has not created a priority. It did no more than give statutory recognition to a valid trust. It then eliminated the necessity of setting up a separate bank account for sales tax moneys and substituted a system of registration and record-keeping to control these funds which never at any time belonged to the vendor trustee. That latter step did not alter the existence of the valid trust of the funds collected from the purchasers for payment to the province. I do not think that the decision in Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board, supra, can be taken to have altered the meaning of the words "property of the bankrupt" contained in s. 47 of the Bankruptcy Act.

44 This appears to be the opinion expressed by Anne E. Hardy, the author of Crown Priority in Insolvency (1986). She concedes that in the interest of consistency with Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board, supra, the lien portion of the deemed trust section should probably be held to be ineffective on the bankruptcy of the trustee. Nonetheless at p. 107 she sets out her position in this way:

> Thus, as a matter of interpretation, it is questionable to limit the scope of section 47(a) of the Bankruptcy Act to trusts which either exist in fact or do not benefit the Crown or a creditor whose claim is referred to in subsection 107(1) of the Act. Until the Act is amended to permit the courts to construe section 47 in this manner, they are probably not justified in taking this [page44] approach. The Coopers & Lybrand case therefore appears to be incorrectly decided. The judgments in most cases which have upheld statutory deemed trusts in bankruptcy and refused to rank the claims covered by them under subjection 107(1) of the Act are preferable.
>
> As argued above, trusts should generally be upheld on the bankruptcy of the trustee regardless of the manner in which they arise. It is possible, however, that certain types be deemed trust provisions should be held to be ineffective and that a valid trust would therefore not come into existence. Most of the trust cases decided since Re Bourgault have distinguished that case because it did not discuss trust provisions or the relationship between the trusts covered by section 47(a) and subsection 107(1) of the Bankruptcy Act. Some of these decisions dealt with trust provisions under which an amount deemed to be held in trust had been made a lien and charge on the assets of the trustee.

That view should I think prevail.

45 Furthermore, it seems that the trust although imposed by statute contains all the essential characteristics required of a trust. In order for a trust to be recognized in equity, there had to be three fundamental aspects complied with, that is to say there had to be certainty of intention, certainty of subject matter and certainty of objects. It is conceded that the statute establishes certainty of intention and of object. The respondent argues that there cannot be certainty of subject matter because the trust property cannot be identified and that thus trust in the traditional sense has not come into existence. However, here the subject matter was clearly identified at the moment of the sales by the vendor (Tops). The only issue that remained was whether or not the trust property could be identified so that such a trust could succeed in a tracing action. This subject matter was addressed by Professor Waters in the Law of Trusts in Canada (2nd ed. 1984), at pp. 119-22:

> When the courts say that there must be certainty of subject-matter, they mean that the property must either [page45] be described in the trust instrument, or there must be "a formula or method given for identifying it."
>
> . . .
>
> In determining certainty, what the courts are looking for is the certainty of concept rather than whether it is too difficult to ascertain the subject-matter.

He distinguishes this question from the tracing issue:

> Initial ascertainability does not exist, so far as case law is concerned, unless specific property is earmarked as the trust property. Once this has occurred, and the trust has come into effect, the trust beneficiary can trace that property, whether it is converted into other forms, or, if money, it is mixed with other funds. [Emphasis in original.]

46 There can be no doubt that the statute provides a clear formula for establishing the trust property, that is to say the sales tax, and therefore certainty of subject matter does indeed exist. The three certainties of intention, object and subject matter are thus established by statute. It could not be said that funds which were collected by Tops for sales tax became the property of Tops on the ground that the certainties required of a trust by equity do not exist as the statute has validly created them.

47 Neither could it be said that the statutory trust funds (the sales tax collected) became the property of the bankrupt Tops by reason of the fact that Tops improperly mingled those funds with its own property. In equity, funds mingled in this way remained impressed with their trust obligations. This left the beneficiary with two possible recourses against the trustee for its wrongful conduct. The beneficiary might either seek to recover the trust property by itself through the remedy of tracing or might choose instead to seek compensation for the loss by means of an action against

the trustee.

48 Although there is some dispute as to whether at common law funds can be "followed" once they have been mixed with the defendant's own funds, in equity those monies can be traced "either as a [page46] separate fund or as part of a mixed fund or as latent in property acquired by means of such a fund": Re Diplock's Estate, [1948] Ch. 465, at p. 521, [1948] 2 All E.R. 318, at p. 347 (C.A.), per Lord Green M.R.; aff'd sub nom. Min. of Health v. Simpson, [1951] A.C. 251, [1950] 2 All E.R. 1137 (H.L.). The limits to a tracing action are largely fixed by the difficulties and ultimately the prohibitive excuse of providing the necessary accounts. See D. W. M. Waters, supra, at pp. 1037 ff. There is no reason why a statutorily constituted trust cannot provide an advantage over a privately constituted trust by recognizing the existence of the trust in property held by the trustee without requiring the beneficiary to undertake the often inordinately expensive action of tracing commingled funds. This advantage should not deprive the statutory trust property of its trust character or take it outside the policies articulated in Deputy Minister of Revenue v. Rainville, [1980] 1 S.C.R. 35; Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board, supra, and Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail), [1988] 1 S.C.R. 1061. It would thus seem that the statutory trust complies with the requirements of a valid trust that would be recognized in equity.

49 If as stated in Deputy Minister of Revenue v. Rainville mechanics' liens or construction liens may be recognized, although it would be impossible to trace the funds of the sub-contractors in the commingled accounts of the general contractor, so too should the statutory trust pertaining to sales tax be recognized.

50 Nor will such a conclusion create practical problems. If the proposed trustee in bankruptcy is faced with the question as to whether or not the assets are subject to a trust, an application may be made to the court to determine that issue at the outset of the proceedings. Further, if there is a dispute between those claiming a trust interest it can be determined on the basis of priority predicated upon the date on which the trust arose.

[page47]

Disposition

51 I conclude therefore that the trust described in s. 18 of the British Columbia Social Service Tax Act is not in any sense a claim against the property of the bankrupt so as to conflict with the policy underlying s. 107(1) of the Bankruptcy Act as that policy has been expounded in Deputy Minister of Revenue v. Rainville; Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board and Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail) for the following reasons:

(a) The sums constituting the trust were never the property of the bankrupt, but were transferred from purchasers of vehicles to the provincial Crown, for whom Tops acted as trustee, in satisfaction of an obligation incurred by those purchasers;
(b) the trust was validly constituted in that it complied with the three certainties required of trusts by the law of equity: s. 18 of the Social Service Tax Act does not dispense with those certainties, but conforms to them, in the same way that a contractual trust instrument must;
(c) the only relevant distinction between this statutory trust and a contractual express trust lies in the deemed tracing remedy provided by the statute. The existence of this remedy

(i) does not negate the trusts;
(ii) is largely facilitative and thus does not take the trust out of the policy enunciated in Deputy Minister of Revenue v. Rainville; Deloitte Haskins & Sells Ltd. v. Workers' Compensation Board and Federal Business Development Bank v. Québec (Commission de la santé et de la sécurité de travail);

(d) The trust therefore properly falls within s. 47(a) of the Bankruptcy Act and outside the property of the bankrupt, as that term is to be understood in light of the policy underlying s. 107(1) of the Act.

52 I would therefore answer the constitutional question as follows:

[page48]

Are the provisions of s. 18(1) of the Social Service Tax Act, R.S.B.C. 1979, c. 388, as amended, inoperative by reason of being in conflict with s. 107(1)(j) of the Bankruptcy Act, R.S.C. 1970, c. B-3?

Answer: No.

53 I would allow the appeal, set aside the decision of the Court of Appeal and that of the chambers judge and direct that the special case be answered "the defendant was not correct in granting the Canadian Imperial Bank of Commerce priority over the statutory trust of the plaintiff."

TAB 9

** Preliminary Version **

Case Name:

Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny

Deputy Minister of Revenue of Quebec and Her Majesty The Queen, Appellants;
v.
Caisse populaire Desjardins de Montmagny and Raymond Chabot Inc., in its capacity as Trustee in bankruptcy of 9083-4185 Québec Inc., Respondents, and
Canadian Association of Insolvency and Restructuring Professionals, Intervener.
And between
Deputy Minister of Revenue of Quebec and Her Majesty The Queen, Appellants;
v.
Raymond Chabot Inc., in its capacity as Trustee for the estate of the debtor, Consortium Promecan Inc., Respondent.
And between
Deputy Minister of Revenue of Quebec and Her Majesty The Queen, Appellants;
v.
National Bank of Canada, Respondent, and
Canadian Association of Insolvency and Restructuring Professionals, Intervener.

[2009] S.C.J. No. 49

[2009] A.C.S. no 49

2009 SCC 49

[2009] 3 S.C.R. 286

[2009] 3 R.C.S. 286

312 D.L.R. (4th) 577

2009 G.T.C. 2036

EYB 2009-165544

J.E. 2009-1958

394 N.R. 368

60 C.B.R. (5th) 1

182 A.C.W.S. (3d) 261

2009 CarswellQue 10706

File Nos.: 32486, 32489, 32492.

Supreme Court of Canada

Heard: March 17, 2009;
Judgment: October 30, 2009.

Present: McLachlin C.J., Binnie, LeBel, Fish, Abella, Rothstein and Cromwell JJ.

(30 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Insolvency -- Claims -- Priorities -- Claims by Crown -- In amending the Bankruptcy and Insolvency Act (BIA), the federal government intended to reduce the Crown to the rank of an ordinary creditor in bankruptcy situations -- The Quebec legislation respecting the QST did not contain a provision similar to the one of the Excise Tax Act that rendered the deemed trust in favour of the tax authorities ineffective in bankruptcy situations -- However, the provincial legislatures could not modify the order of priority established in the BIA -- The deemed trusts in favour of the Crown were terminated at the time of the bankruptcy -- Appeal dismissed.

Taxation -- Goods and Services Tax (GST) -- Collection and enforcement -- In amending the Bankruptcy and Insolvency Act (BIA), the federal government intended to reduce the Crown to the rank of an ordinary creditor in bankruptcy situations -- The Quebec legislation respecting the QST

did not contain a provision similar to the one of the Excise Tax Act that rendered the deemed trust in favour of the tax authorities ineffective in bankruptcy situations -- However, the provincial legislatures could not modify the order of priority established in the BIA -- The deemed trusts in favour of the Crown were terminated at the time of the bankruptcy -- Appeal dismissed.

Taxation -- Sales and service taxes -- Enforcement -- Collection -- Quebec Sales Tax -- In amending the Bankruptcy and Insolvency Act (BIA), the federal government intended to reduce the Crown to the rank of an ordinary creditor in bankruptcy situations -- The Quebec legislation respecting the QST did not contain a provision similar to the one of the Excise Tax Act that rendered the deemed trust in favour of the tax authorities ineffective in bankruptcy situations -- However, the provincial legislatures could not modify the order of priority established in the BIA -- The deemed trusts in favour of the Crown were terminated at the time of the bankruptcy -- Appeal dismissed.

Appeal by the Canadian and Quebec tax authorities of a decision of the Quebec Court of Appeal allowing the appeal of the trustees in bankruptcy of certain businesses and financial institutions holding various security interests in the property of the bankrupts. The parties disagreed about what should be done with taxes on consumption that had been collected but not remitted, or were collectible, as of the date of the bankruptcy. The tax authorities submitted that they were entitled to the amounts in issue as the owners thereof, as opposed to creditors. In their opinion, the trustee collected the taxes on their behalf, as their mandatary, and these amounts were not part of the bankrupt's patrimony. The respondents contended that, under the law applicable in bankruptcy matters, the federal or provincial Crown was only an ordinary creditor and had to be ranked as such with the debtors' other creditors. The financial institutions submitted that their security interests could be set up against the Crown as against any ordinary creditor. The Quebec Superior Court found for the Crown. The Quebec Court of Appeal set aside the judgments and accepted the arguments of the trustees and financial institutions.

HELD: Appeal dismissed. In amending the Bankruptcy and Insolvency Act (BIA), the federal government intended to reduce the Crown to the rank of an ordinary creditor in bankruptcy situations. The Quebec legislation respecting the QST did not contain a provision similar to s. 222(1.1) of the Excise Tax Act that rendered the deemed trust in favour of the tax authorities ineffective in bankruptcy situations. However, according to a settled principle of constitutional law regarding the Parliament of Canada's legislative authority over bankruptcy and insolvency, the provincial legislatures could not modify the order of priority established in the BIA. The tax authorities' position amounted to maintaining that the deemed trusts established by tax legislation continued to exist after a bankruptcy. This argument was inconsistent with the nature of their rights under the system for the collection and remittance of the GST and QST. It also conflicted with Parliament's clear intent and with the very explicit wording of the relevant statutory provisions regarding what was to happen if a supplier went bankrupt. The deemed trusts in favour of the Crown were terminated at the time of the bankruptcy.

Statutes, Regulations and Rules Cited:

Act respecting the Ministre du Revenu, R.S.Q., c. M-31, s. 20, s. 23

Act respecting the QuÚbec sales tax, R.S.Q., c. T-0.1, s. 16, s. 82, s. 302.1, s. 422, s. 425, s. 427, s. 437

Act respecting the QuÚbec sales tax and amending various fiscal legislation, S.Q. 1991, c. 67,

Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof, S.C. 1992, c. 27,

Bank Act, S.C. 1991, c. 46, s. 427

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 67, s. 67(2), s. 67(3), s. 86(1)

Constitution Act, 1867, R.S.C. 1985, App. II, No. 5, s. 92(2)

Excise Tax Act, R.S.C. 1985, c. E-15, s. 141.01, s. 165, s. 169(1), s. 221(1), s. 222, s. 222(1), s. 222(1.1), s. 222(3), s. 223, s. 224, s. 228, s. 265, s. 296(1)(b)

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Bankruptcy and insolvency -- Crown claims -- Goods and services tax -- Provincial sales tax -- Tax amounts that have been collected but not remitted, or are collectible, at time of bankruptcy of supplier -- Legal characterization of Crown's rights in amounts of such taxes -- Whether federal or provincial Crown is ordinary creditor or owner of tax amounts -- Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(1), (1.1) -- Act respecting the Ministère du Revenu, R.S.Q., c. M-31, s. 20 -- Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 67(2).

Court Summary:

The GST imposed under the *Excise Tax Act* ("*ETA*") and the QST payable under the *Act respecting the Québec Sales Tax* are taxes that are collected, and in respect of which credits are available, at each step of the manufacturing and marketing of taxable goods and services. They are payable by the recipient, who is regarded as the debtor in respect of the tax liability to the Crown. In principle, the supplier acts only as a mandatary of the Crown in collecting and remitting these taxes and is deemed to hold the amounts so collected in trust for Her Majesty.

A number of businesses went bankrupt. The Canadian and Quebec tax authorities (the "tax authorities") claimed from the trustees the GST and QST amounts that had been collected but not remitted, or were collectible, by those businesses as of the dates of their bankruptcies. The tax authorities submitted that they were entitled to the amounts in issue as the owners thereof. Financial institutions that held various security interests in the property of the bankrupts contended that, under the law applicable in bankruptcy matters, the federal or provincial Crown is only an ordinary creditor and must be ranked as such with the debtors' other creditors, and that their security interests could therefore be set up against the Crown. The Quebec Superior Court found for the tax authorities on the basis that the GST and QST amounts were not part of the bankrupts' patrimonies. The Quebec Court of Appeal set aside the judgments.

Held: The appeals should be dismissed.

When a supplier goes bankrupt, the tax authorities do not own GST and QST amounts that have been collected but not remitted or are collectible at the time of the bankruptcy. Instead, they have an unsecured claim against the supplier. The legal characterization of the relationships between the tax authorities and the suppliers and recipients of goods and services cannot be considered in isolation from the overall context of the system for the collection and remittance of these taxes and from the provisions of the *Bankruptcy and Insolvency Act* ("*BIA*"). The tax authorities' position amounts to maintaining that the deemed trusts established by s. 222 *ETA* and s. 20 of the *Act respecting the Ministère du Revenu* ("*AMR*") continue to exist after a bankruptcy, which conflicts with both the words and the intent of the statutory provisions in question, and is inconsistent with the nature of the tax authorities' rights under the system for the collection and remittance of the GST and QST. [para. 7] [para. 21] [paras. 28-29]

In light of the 1992 amendments to s. 67 *BIA*, the deemed trusts established by ss. 222 *ETA* and 20 *AMR* are terminated at the time of the bankruptcy. Parliament also enacted concordance amendments to the *ETA* by adding subsection (1.1) to s. 222. As a result of this provision, deemed trusts intended to secure GST claims are ineffective in bankruptcy situations. Although the Quebec legislation does not contain a provision similar to s. 222(1.1) *ETA*, Parliament's legislative authority over bankruptcy prevents the provincial legislatures from modifying the order of priority established in the *BIA*. Thus, the trustee is responsible for liquidating patrimonies that include the GST and QST amounts in issue. The mandate the supplier or the trustee is deemed to have been given with respect to the two taxes involves the performance of obligations to collect and then to remit, not the amounts collected, but a balance resulting from offsetting claims of the Crown and the supplier. [paras. 7-8] [paras. 16-17] [para. 23] [paras. 27-28]

Cases Cited

Referred to: *Reference re Quebec Sales Tax*, [1994] 2 S.C.R. 715; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *D.I.M.S. Construction inc. (Trustee of) v. Quebec* (*Attorney General)*, 2005 SCC 52, [2005] 2 S.C.R. 564; *Victuni AG v. Minister of Revenue of Quebec*, [1980]

1 S.C.R. 580; *Lefebvre (Trustee of)*, 2004 SCC 63, [2004] 3 S.C.R. 326; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94.

Statutes and Regulations Cited

Act respecting the Ministère du Revenu, R.S.Q., c. M-31, ss. 20, 23, 24.

Act respecting the Québec sales tax, R.S.Q., c. T-0.1, ss. 16, 82, 302.1, 422, 425, 427, 437.

Act respecting the Québec sales tax and amending various fiscal legislation, S.Q. 1991, c. 67.

Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof, S.C. 1992, c. 27.

Bank Act, S.C. 1991, c. 46, s. 427.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 67, 86(1), 87(1).

Constitution Act, 1867, s. 92(2).

Excise Tax Act, R.S.C. 1985, c. E-15, ss. 141.01, 165, 169(1), 221(1), 222, 223, 224, 228, 265, 296(1)(*b*).

Authors Cited

Canada. House of Commons. *House of Commons Debates*, vol. II, 3 Sess., 34 Parl., June 19, 1991, p. 2106.

Canada. House of Commons. *House of Commons Debates*, vol. IV, 3 Sess., 34 Parl., November 1, 1991, p. 4354.

Canada. House of Commons. *Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 9, September 5, 1991, p. 9:5.

Canada. House of Commons. *Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 10, September 5, 1991, p. 10:18.

Robert Brakel & Associates Ltd. *Value-Added Taxation in Canada: GST , HST and QST*, 2 ed. Toronto: CCH Canadian, 2003.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5 ed. Markham, Ont.: Lexis-Nexis, 2008.

History and Disposition:

APPEAL from a judgment of the Quebec Court of Appeal (Forget, Doyon and Duval Hesler JJ.A.), 2007 QCCA 1837, [2008] R.J.Q. 39, 40 C.B.R. (5) 18, [2008] G.S.T.C. 3, SOQUIJ AZ-50464769, [2007] J.Q. no 14712 (QL), 2007 CarswellQue 12231, setting aside a decision of Boisvert J., 2006 QCCS 2108, 34 C.B.R. (5) 245, [2007] G.S.T.C. 185, SOQUIJ AZ-50368833, [2006] J.Q. no 3613 (QL), 2006 CarswellQue 3427. Appeal dismissed.

APPEAL from a judgment of the Quebec Court of Appeal (Forget, Doyon and Duval Hesler JJ.A.), 2007 QCCA 1835, 40 C.B.R. (5) 18, [2008] G.S.T.C. 3, SOQUIJ AZ-50464328, [2007] J.Q. no 14713 (QL), 2007 CarswellQue 12231, setting aside a decision of St-Julien J., 2006 QCCS 6370, SOQUIJ AZ-50412620, [2006] J.Q. no 15239 (QL), 2006 CarswellQue 11998. Appeal dismissed.

APPEAL from a judgment of the Quebec Court of Appeal (Forget, Doyon and Duval Hesler JJ.A.), 2007 QCCA 1813, 40 C.B.R. (5) 18, [2008] G.S.T.C. 3, SOQUIJ AZ-50464770, [2007] J.Q. no 14564 (QL), 2007 CarswellQue 12231, setting aside a decision of Bouchard J., 2006 QCCS 2656, 21 C.B.R. (5) 289, [2006] G.S.T.C. 123, SOQUIJ AZ-50373960, [2006] J.Q. no 11028 (QL), 2006 CarswellQue 4759. Appeal dismissed.

Counsel:

Christian Boutin, *Michel Beauchamp* and *Jean-Yves Bernard*, for the appellant the Deputy Minister of Revenue of Quebec.

Pierre Cossette and *Guy Laperrière*, for the appellant Her Majesty The Queen.

Reynald Auger and *Jean-Patrick Dallaire*, for the respondents Caisse populaire Desjardins de Montmagny and Raymond Chabot Inc., in its capacity as Trustee in bankruptcy of 9083-4185 Québec Inc. (32486)

Mason Poplaw and *Miguel Bourbonnais*, for the respondent Raymond Chabot Inc., in its capacity as Trustee for the estate of the debtor Consortium Promecan Inc. (32489)

Marc Germain, for the respondent National Bank of Canada (32492).

Éric Vallières and *Sidney Elbaz*, for the intervener.

English version of the judgment of the Court delivered by

LeBEL J.:--

I. Introduction

1 In these three cases, the Canadian and Quebec tax authorities, on the one hand, and the trustees in bankruptcy of certain businesses and financial institutions holding various security interests in the property of the bankrupts, on the other, disagree about what should be done with taxes on consumption that had been collected but not remitted, or were collectible, as of the date of the bankruptcy. The tax authorities submit that they are entitled to the amounts in issue as the owners thereof. The respondents contend that, under the law applicable in bankruptcy matters, the federal or provincial Crown is only an ordinary creditor and must be ranked as such with the debtors' other creditors. The financial institutions submit that their security interests can be set up against the Crown as against any ordinary creditor. The Quebec Superior Court found for the Crown. The Quebec Court of Appeal set aside the judgments and accepted the arguments of the trustees and financial institutions. In my view, that decision is well founded, and I would uphold it.

II. Origins of the Cases

2 These three cases result from the bankruptcies of a number of businesses and from problems that arose as a result of their insolvency in respect of the administration of the federal goods and services tax ("GST") imposed under the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), and the Quebec sales tax ("QST") payable under the *Act respecting the Québec sales tax*, R.S.Q., c. T-0.1 ("*AQST*"). To begin, I will summarize the facts that must be considered to understand these cases. The relevant statutory provisions are reproduced in the Appendix.

A. *Deputy Minister of Revenue of Quebec and Her Majesty the Queen in Right of Canada v. Caisse populaire Desjardins de Montmagny and Raymond Chabot Inc., in its Capacity as Trustee for the Bankruptcy of 9083-4185 Québec inc.*

3 In this case, a manufacturing company required, as a supplier, to collect the GST and the QST went bankrupt on September 7, 2005. Raymond Chabot Inc. was appointed trustee in bankruptcy. The debtor had hypothecated its claims and accounts receivable in favour of the respondent Caisse populaire Desjardins de Montmagny. Quebec's Deputy Minister of Revenue gave the trustee notice that he considered it to be his mandatary for the recovery of GST and QST amounts that had been collected but not remitted or were collectible. The tax authorities claimed that they owned the amounts in question. Furthermore, the record shows that some of the taxes that had been collected or were collectible at the time of the bankruptcy had been payable for more than 60 days. The Caisse populaire Desjardins de Montmagny claimed to hold valid security interests, which could be set up against the tax authorities, in the tax amounts related to the claims hypothecated in its favour. In view of these conflicting claims, the trustee asked the Superior Court to determine to whom the tax amounts belonged.

B. *Deputy Minister of Revenue of Quebec and Her Majesty the Queen in Right of Canada v. Raymond Chabot Inc. in its Capacity as Trustee for the Estate of the Debtor Consortium Promecan inc.*

4 In this case, Consortium Promecan inc. went bankrupt on March 20, 2004, and Raymond Chabot Inc. was appointed trustee. The debtor had not filed returns with respect to the GST and the QST since February 1, 2004. Quebec's Deputy Minister of Revenue asked the trustee to remit to him all GST and QST amounts in respect of the period between February 1 and March 20, 2004 that had been collected or were collectible. The trustee replied that, in its view, the Deputy Minister was only an ordinary creditor in the bankruptcy, and it denied his request. The Crown appealed that decision to the Superior Court.

C. *Deputy Minister of Revenue of Quebec and Her Majesty the Queen in Right of Canada v. National Bank of Canada*

5 The tax claims in this case result from the bankruptcies of two companies, Alternative Granite et Marbre inc. and Stone Vogue Resources inc., on November 5, 2004. The Crown claimed GST and QST amounts related to the accounts receivable of the bankrupt debtors. The National Bank of Canada had obtained, on those accounts, security under s. 427 of the *Bank Act*, S.C. 1991, c. 46, and movable hypothecs. It tried to exercise its rights under these various security interests and claimed the proceeds of the accounts receivable as well as the GST and QST amounts related to these claims. It then applied to the Superior Court to resolve the resulting dispute between itself and the tax authorities. In the meantime, the Bank's mandatary, the trustee and the Crown all collected portions of the disputed taxes and even of the accounts receivable.

III. Judicial History

A. *Quebec Superior Court*

6 The Superior Court heard the three cases separately. The result was the same in all of them. All three judges concluded that the Crown owned the disputed GST and QST amounts. If the trustee in bankruptcy collected them, it was as a mandatary of the tax authorities. Quebec's Deputy Minister of Revenue and the Minister of National Revenue could not be considered to be mere ordinary creditors. In essence, the Superior Court judges held that the GST and QST amounts were not part of the bankrupt's patrimony: 2006 QCCS 2108, 34 C.B.R. (5th) 245 (*per* Boisvert J.), 2006 QCCS 6370, [2006] Q.J. No. 15239 (QL) (*per* St-Julien J.), 2006 QCCS 2656, 21 C.B.R. (5th) 289 (*per* Bouchard J.). All three judgments were appealed to the Quebec Court of Appeal.

B. *Quebec Court of Appeal, Forget, Doyon and Duval Hesler JJ.A.*

7 Duval Hesler J.A., writing for the Court of Appeal, allowed the appeals and set aside the Superior Court's judgments: 2007 QCCA 1837, 2007 QCCA 1835, 2007 QCCA 1813, [2008] R.J.Q. 39. She acknowledged that the QST and the GST are direct taxes payable by the recipient of

the good or service. But in her view, as a result of the 1992 amendments to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), the tax authorities must be treated as an ordinary creditor in such a case. They do not own tax amounts payable by purchasers of goods and services that are subject to the GST and QST, but instead have a claim against the supplier. Furthermore, any deemed trust in favour of the tax authorities ended at the time of the bankruptcy. The tax amounts in issue were therefore part of the bankrupt's patrimony but remained subject to any security interests that had been validly granted to creditors like the Caisse populaire Desjardins de Montmagny and the National Bank of Canada. This Court granted leave for three appeals from that judgment.

IV. Analysis

A. *Issues and Positions of the Parties*

8 The issue is the nature of the rights of the tax authorities, the trustee in bankruptcy and the secured creditors to GST and QST amounts that have been collected but not remitted or are collectible at the time of the bankruptcy of a supplier within the meaning of the *AQST* and the *ETA*. In sum, the tax authorities submit that they own these amounts. In their opinion, the trustee collects the taxes on their behalf, as their mandatary, and these amounts are not part of the bankrupt's patrimony. The respondents reply that the amounts are part of the bankrupt's patrimony, subject to any validly granted security interests. In their view, the Crown does not have a right of ownership in the tax amounts and enjoys only the rights of an ordinary creditor in a bankruptcy situation. To resolve this issue, it will be necessary to begin by considering the nature of the two taxes in issue, the GST and the QST, and the mechanism for administering them. I will also need, before ruling on the legal characterization of the Crown's rights, to discuss the effect of the 1992 amendments to the *BIA*.

B. *Nature of the GST and the QST*

9 The GST and the QST are similar types of taxes on consumption. The legal framework for imposing them was established almost 20 years ago now. They are considered to be direct taxes, and the ultimate recipient of taxable goods and services is responsible for paying them. However, the taxes are collected, and credits apply, at each step of the manufacturing and marketing chains. In principle, the supplier acts only as a mandatary of the Crown in collecting and remitting these taxes (*Reference re Quebec Sales Tax*, [1994] 2 S.C.R. 715, at pp. 720-22).

10 The GST, which was implemented in 1990 by legislation that amended the *ETA* (S.C. 1990, c. 45), replaced the former federal manufacturers' sales tax. The GST can be regarded as a value-added tax. It is collected at every stage of the manufacturing and marketing of goods and services and is payable by the recipient, who is regarded as the debtor in respect of the tax liability to the Crown (s. 165 *ETA*). However, the supplier is responsible for collecting and remitting the tax (s. 221(1) *ETA*). The supplier is deemed to hold the amounts so collected in trust for Her Majesty (s. 222(1) and (3) *ETA*) and must periodically file returns and make remittances. In addition, the Act establishes a system under which input credits can be claimed, at each step of the marketing and supply of the

good, in respect of the taxes the supplier has had to pay to his or her own suppliers (ss. 141.01 and 169(1) *ETA*). The ultimate recipient bears the full burden of the tax (R. Brakel & Associates Ltd., *Value-Added Taxation in Canada: GST, HST and QST* (2nd ed. 2003), at pp. 2-3). This Court has confirmed this as a valid exercise of the Parliament of Canada's taxing power (*Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445).

11 In parallel with this federal tax reform, an in-depth review of the consumption tax system took place in Quebec. In 1991, the National Assembly enacted new sales tax legislation, the *Act respecting the Québec sales tax and amending various fiscal legislation*, S.Q. 1991, c. 67. The National Assembly's intention in enacting this statute was to achieve extensive harmonization with the GST and to align this aspect of Quebec's tax system with the model chosen by the Parliament of Canada. The legislation came into force on July 1, 1992 (Brakel, at pp. 3-4). Under an agreement with the Government of Canada, the Quebec government is responsible for collecting both the GST and the QST in Quebec (Brakel, at p. 4). Moreover, pursuant to s. 20 of the *Act respecting the Ministère du Revenu*, R.S.Q. c. M-31 ("*AMR*"), amounts collected by suppliers of goods and services are deemed to be held in trust for the "State". This Court held that this new sales tax falls within the provincial taxing power under s. 92(2) of the *Constitution Act, 1867* (*Reference re Quebec Sales Tax*).

C. *Effects of the Amendments to the BIA on the Status of Claims of the Crown*

12 In 1992, the Parliament of Canada also made extensive changes to the *BIA*, and those changes are of particular relevance to this issue of the nature and extent of the Crown's rights to recover the GST and QST amounts. The amendments in question were set out in the *Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, S.C. 1992, c. 27. Some of these changes related to the Crown's priority in bankruptcy situations. The federal government seemed at the time to want to respond to criticisms that the system establishing the priority of the Crown's claims often left nothing for a bankrupt's ordinary creditors. A government spokesperson acknowledged these concerns at the time of the introduction of the legislation to revise the Crown priority system:

We also took steps to limit the priority of the Crown, one of the more blatantly unfair aspect[s] of the present Bankruptcy Act.

(*House of Commons Debates*, vol. II, 3rd Sess., 34th Parl., June 19, 1991, at p. 2106)

13 Felix Holtmann, the Chairman of the Standing Committee on Consumer and Corporate Affairs and Government Operations, also acknowledged the problems and injustices caused by the proliferation of deemed trusts developed to protect the Crown's claims. He stressed the need to reduce the extent of such trusts in order to achieve a better balance among creditors in bankruptcy situations:

> One of the main areas is Crown priority. Under the present Bankruptcy Act the Crown has a preferred claim for various types of taxes and ranks ahead of all unsecured creditors. In 1970 a study report made reference to Crown priority; then again in 1986 proposed bankruptcy amendments recommended the abolition of the Crown priority. With the Crown priority, creditors are less likely to participate in an insolvency, in a bankruptcy, and today rarely come out to meetings of creditors because there are no assets. The assets are fully secured to the secured creditors, banks and major lenders as well as to Crowns. As a result there is virtually nothing left for the unsecureds. We recommend that the Crown priority be abolished and that if the Crown wants to contract directly with the debtor, it be entitled to a contractual priority but not a Crown priority.
>
> (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 9, September 5, 1991, at p. 9:5)

14 During the parliamentary debates on Bill C-22 regarding the amendment of the *BIA*, comments by the government spokesperson confirmed that the government intended to reduce the Crown to the rank of an ordinary creditor in bankruptcy situations:

> A second very important point in the legislation is that the Government of Canada, the Crown, does not put itself in a priority position. It stands in line with the unsecured creditors in almost all cases except for the deductions of tax and unemployment owed.
>
> (*House of Commons Debates*, vol. IV, 3rd Sess., 34th Parl., November 1, 1991, at p. 4354)

In the course of the discussions in the Standing Committee on Consumer and Corporate Affairs and Government Operations, the government spokesperson had clearly expressed the intention to abolish the deemed trust in respect of the GST in bankruptcy situations:

> As far as the GST is concerned, if there is a deemed trust for GST, it will not come under this particular provision so it will not survive. If there is a statutory lien or priority, or a statutory security interest for GST, it will not take priority under this legislation unless it is a registered interest.
>
> (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 10, September 5,1991, at p. 10:18)

15 The amendments to the bankruptcy legislation appear to be consistent with the legislative intention announced during the parliamentary debates. First of all, s. 67 *BIA* reinforces the principle that all the bankrupt's property is part of the estate of the bankrupt and constitutes the common pledge of the creditors, although with the exception of property held in trust for another person. However, s. 67(2) *BIA* provides that, with certain exceptions, property may not be regarded as held in trust unless it would be so regarded in the absence of a statutory provision. This renders statutory trusts ineffective without affecting trusts resulting from the common law or the civil law or statutory trusts that secure claims of the federal and provincial Crowns related to source deductions for income tax, a comprehensive pension plan or the federal employment insurance program (s. 67(3) *BIA*). No mention is made of trusts related to the GST or to provincial taxes such as the QST. Moreover, s. 86(1) *BIA* confirms that the Crown is only an ordinary creditor in a bankruptcy situation:

> **86.** (1) In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

16 In addition, not long after these changes to the *BIA*, the Parliament of Canada enacted concordance amendments with regard to GST claims (S.C. 1993, c. 27). It added subsection (1.1) to s. 222 *ETA.* As a result of this provision, deemed trusts intended to secure GST claims are ineffective in bankruptcy situations:

> **222.** ...
>
> (1.1) Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

17 The Quebec legislation respecting the QST does not contain a provision similar to s. 222(1.1) *ETA* that renders the deemed trust in favour of the tax authorities ineffective in bankruptcy situations. However, according to a settled principle of constitutional law regarding the Parliament of Canada's legislative authority over bankruptcy and insolvency, the provincial legislatures may not modify the order of priority established in the *BIA*. In the event of conflict, the *BIA* will prevail and the provincial statute will be inapplicable regardless of the legislature's intention (*D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, 2005 SCC 52, [2005] 2 S.C.R. 564, at para. 12, *per* Deschamps J.).

18 The tax authorities do not dispute the clear terms of the statutory provisions. Rather, they argue that those provisions do not apply to the GST and the QST and that the Crown is not a creditor, but the owner of the tax amounts. Thus, the amounts collected or collectible at the time of

the bankruptcy in respect of the GST or the QST do not form part of the bankrupt's patrimony. As a result, they are not included in the property that is to be liquidated in accordance with the order of priority established in the *BIA*. It will therefore be necessary to resolve the issue of the legal characterization of the Crown's rights with respect to the GST and QST amounts. The characterization of those rights will essentially resolve the dispute before this Court.

D. *Legal Characterization of the Crown's Rights*

19 In this analysis, it is important to abide by the fundamental rules of contemporary statutory interpretation. Parliament's intent must be ascertained, and to do this, it is often necessary to review the statutory provisions at issue in their overall context (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 276). This approach casts doubt on the validity of the tax authorities' arguments.

20 The appellants' arguments consist of a few fundamental propositions. They submit, first, that the GST and the QST are direct taxes on consumption. They are imposed on the consumer, and more specifically on the ultimate recipient of a taxable good or service. The legislation establishes a direct link between the Crown and the recipient, as the former may claim the taxes payable directly from the latter if they have not been collected (s. 296(1)(*b*) *ETA*). The appellants contend that where the GST is collected by a trustee in bankruptcy, the trustee, like the bankrupt supplier, collects it as an agent of, and on behalf of, the Crown. And the Crown is in a similar legal situation where the QST is concerned. The recipient owes the sales tax to the Crown pursuant to ss. 16 and 82 *AQST*. The supplier collects the tax on the Crown's behalf and is deemed to be a mandatary of the Crown pursuant to s. 422 *AQST*. Moreover, under s. 23 *AMR*, a person who does not collect a tax he or she was required to collect becomes a debtor of the "State" for that amount. The appellants further submit that, in the context of the *ETA* and the *AQST*, the supplier, a mandatary of the Crown, is responsible, after supplying a taxable service or good to a consumer, for the recovery of property -- a GST or QST amount -- that belongs to the Crown and that remains Crown property, until it is remitted to the Crown. The legal situation is the same regardless of whether the tax is collected by the supplier or by a trustee after its bankruptcy. In the appellants' view, when the collected tax is remitted, the mandatary does not settle a claim, but remits to the Crown its own property. Moreover, according to this argument, this Court has established a general principle that, in performing its obligation, the mandatary does not discharge a debt, but delivers over property belonging to the mandator (*Victuni AG v. Minister of Revenue of Quebec*, [1980] 1 S.C.R. 580, at p. 584, *per* Pigeon J.).

21 This set of legal propositions disregards the mechanisms for administering the GST and the QST. The legal characterization of the relationships between the tax authorities and the suppliers and recipients of goods and services cannot be considered in isolation from the overall context of the system for the collection and remittance of these taxes and from the provisions of the *BIA*.

22 An initial comment must be made about the impact of the federal bankruptcy legislation. The

appellants are oversimplifying the trustee's role and, in particular, his or her legal situation vis-à-vis the bankrupt. This Court has noted the complexity of the trustee's duties in, for example, *Lefebvre (Trustee of)*, 2004 SCC 63, [2004] 3 S.C.R. 326, at paras. 35-37. The trustee's role is not limited to representing the bankrupt. The trustee manages the bankrupt's patrimony and is seised thereof as a result of the bankruptcy, but he or she also represents the creditors and is responsible to them for the liquidation and orderly distribution of the patrimony.

23 In the cases before the Court, the trustees were responsible for liquidating a patrimony that included the GST and QST amounts in issue, as the Court of Appeal concluded (see paras. 51-55). In her reasons, Duval Hesler J.A. clearly and correctly defined the nature of the trustee's role in this respect. The reason why the supplier was given the status of a mandatary was to ensure that the tax qualified as a direct tax so that the imposition, by the province of Quebec, of the QST in a form compatible with that of the federal GST would be constitutional (para. 50). However, the fact that this tax is ultimately borne by the recipient does not support a finding that the supplier and then the trustee, the bankrupt's representative, merely collect and remit the Crown's "property" or "thing". The nature of the collection mechanism for the two taxes suggests another interpretation of the legal situation.

24 This mechanism is designed to implement a direct tax that is also a tax on the value added at each stage of the production and marketing of the good or service until it is acquired by its ultimate recipient. In such a system, as Duval Hesler J.A. noted, _TRANSLATION_ "[t]he dollar collected is not the dollar remitted" (para. 52).

25 First of all, the collection mechanism does not require separate invoices for the GST and the QST. These taxes are indicated and included in the invoice or other document given to the recipient (s. 223 *ETA*; s. 425 *AQST*). Next, the tax amounts collected by suppliers are remitted in accordance with the accrual, not cash, method of accounting. At periodic intervals, which vary depending on the individual supplier's sales and sometimes on the nature of the business, suppliers remit to the tax authorities amounts corresponding to the tax amounts that have been billed for and are collectible during the reporting period in question even if these collectible amounts have not in fact been collected from the recipients. When sending remittances, suppliers deduct from the amounts being remitted credits corresponding to their own inputs, that is, to the taxes they have paid to their own suppliers. Thus, they remit net tax amounts based on the difference between the taxes they have collected and the taxes they themselves have paid (s. 228 *ETA*; s. 437 *AQST*). At times, under this system, they can obtain rebates.

26 Moreover, nothing in the legislation respecting the GST and the QST requires suppliers to keep the taxes they collect separate. Until a bankruptcy occurs, only the deemed trusts established by s. 22 *ETA* and s. 20 *AMR* lead to this legal result by giving the tax authorities a right to equivalent amounts from the suppliers' assets. Finally, while it is true that the recipient owes the tax to the Crown, a supplier who has remitted the tax owed by the recipient but has not collected it has a cause of action against the recipient (s. 224 *ETA*; s. 427 *AQST*).

27 The statutory mandate imposed on the supplier to collect the GST and the QST differs from the mandate in issue in *Victuni*, which related to the acquisition and development of an immovable. The mandate with respect to the two taxes involves the performance of obligations to collect and then to remit, not the amounts collected, but a balance resulting from offsetting claims of the Crown and the supplier. The existence of these offsetting claims confirms that claims for the amounts collected by suppliers are fungible, as this Court in fact pointed out in *British Colombia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, at pp. 34-35.

28 I note that the appellants' position amounts to maintaining that the deemed trusts established by ss. 222 *ETA* and 20 *AMR* continue to exist after a bankruptcy. The appellants' argument is inconsistent with the nature of their rights under the system for the collection and remittance of the GST and QST. It also conflicts with Parliament's clear intent and with the very explicit wording of the relevant statutory provisions regarding what is to happen if a supplier goes bankrupt. Before 1992, the Crown held a priority where certain tax claims were concerned. These claims were often protected by an increasingly complex series of statutory deemed trusts. The 1992 amendments to the *BIA* rendered these trusts ineffective in a bankruptcy situation, although there were exceptions with respect, for example, to claims for income tax source deductions (see, for example, *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94). Other than where these exceptions apply, when a debtor goes bankrupt, the Crown becomes an ordinary creditor. The trustee will give it the same priority as other creditors of the same rank. The trustee will be personally responsible for paying the GST or QST in respect of its own activities only (s. 265 *ETA*; s. 302.1 *AQST*).

29 Canadian tax authorities are bound by the choice of legislative policy now expressed in the *BIA*. The order of priority established in the *BIA* is also binding on the Quebec tax authorities, even though the *AMR* is silent on what happens to the deemed trust established in s. 20 thereof in the event of bankruptcy. The appellants' arguments conflict with both the words of the statutory provisions in question and their underlying legislative intent, and cannot be accepted.

V. Conclusion

30 For these reasons, I would affirm the decision of the Quebec Court of Appeal and dismiss the appellants' appeals with costs.

* * * * *

APPENDIX

Excise Tax Act, R.S.C. 1985, c. E-15

> **165.** (1) Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada tax in respect of the supply calculated at the rate of 5% on the value of the consideration for the supply.

...

221. (1) Every person who makes a taxable supply shall, as agent of Her Majesty in right of Canada, collect the tax under Division II payable by the recipient in respect of the supply.

...

222. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person,

whether or not the property is subject to a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

* * *

165. (1) Sous réserve des autres dispositions de la présente partie, l'acquéreur d'une fourniture taxable effectuée au Canada est tenu de payer à Sa Majesté du chef du Canada une taxe calculée au taux de 5% sur la valeur de la contrepartie de la fourniture.

...

221. (1) La personne qui effectue une fourniture taxable doit, à titre de mandataire de Sa Majesté du chef du Canada, percevoir la taxe payable par l'acquéreur en vertu de la section II.

...

222. (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

(1.1) Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la *Loi sur la faillite et l'insolvabilité*, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à

la section II.

...

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4)du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne -- y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens -- d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

An Act respecting the Québec sales tax, R.S.Q., c. T-0.1

16. Every recipient of a taxable supply made in Québec shall pay to the Minister of Revenue a tax in respect of the supply calculated at the rate of 7.5% on the value of the consideration for the supply.

...

422. Every person who makes a taxable supply shall, as a mandatary of the Minister, collect the tax payable by the recipient under section 16 in respect of the supply.

* * *

16. Tout acquéreur d'une fourniture taxable effectuée au Québec doit payer au ministre du Revenu une taxe à l'égard de la fourniture calculée au taux de 7,5 % sur la valeur de la contrepartie de la fourniture.

...

422. Toute personne qui effectue une fourniture taxable doit, à titre de mandataire du ministre, percevoir la taxe payable par l'acquéreur en vertu de l'article 16 à l'égard de cette fourniture.

An Act respecting the Ministère du Revenu, R.S.Q., c. M-31

20. Every person who deducts, withholds or collects any amount under a fiscal law is deemed to hold it in trust for the State, separately from the person's patrimony and the person's own funds, for payment to the State in the manner and at the time provided under a fiscal law.

Where at any time an amount deemed by the first paragraph to be held by a person in trust for the State is not paid to the State in the manner and at the time provided under a fiscal law, an amount equal to the amount thus deducted, withheld or collected is deemed, from the time the amount is deducted, withheld or collected, to be held in trust for the State, separately from the person's patrimony and the person's own funds, and to form a separate fund not forming part of the property of that person, whether or not the amount has in fact been held separately from that person's patrimony or that person's own funds.

...

23. Every person who does not collect a duty that he was bound to collect as a mandatary of the Minister or does not withhold a duty that he was bound to withhold, under a fiscal law or a regulation made under such a law, shall become a debtor of the State for the amount of that duty, with the exception of the withholding provided for in section 1015 of the Taxation Act (chapter I-3), unless the withholding concerns a duty that a person was required to withhold

from an amount paid to another person who is not resident in Canada for services performed in Québec.

...

24. Every person who deducts, withholds or collects an amount under a fiscal law is bound to pay to the Minister, at the date fixed by such law, or in accordance with the provision for such payment, an amount equal to that which the person must remit under the said Act.

...

* * *

20. Toute personne qui déduit, retient ou perçoit un montant quelconque en vertu d'une loi fiscale est réputée le détenir en fiducie pour l'État, séparé de son patrimoine et de ses propres fonds, et en vue de le verser à l'État selon les modalités et dans le délai prévus par une loi fiscale.

En cas de non-versement à l'État, selon les modalités et dans le délai prévus par une loi fiscale, d'un montant qu'une personne est réputée par le premier alinéa détenir en fiducie pour l'État, un montant égal au montant ainsi déduit, retenu ou perçu est réputé, à compter du moment où le montant est déduit, retenu ou perçu, être détenu en fiducie pour l'État, séparé de son patrimoine et de ses propres fonds, et former un fonds séparé ne faisant pas partie des biens de cette personne, que ce montant ait été ou non, dans les faits, tenu séparé du patrimoine de cette personne ou de ses propres fonds.

...

23. Toute personne qui ne perçoit pas un droit qu'elle était tenue de percevoir comme mandataire du ministre ou ne retient pas un droit qu'elle était tenue de retenir, en vertu d'une loi fiscale ou d'un règlement adopté en vertu d'une telle loi, devient débitrice envers l'État du montant de ce droit, à l'exception de la retenue prévue à l'article 1015 de la Loi sur les impôts (chapitre I-3), sauf si cette retenue concerne un droit qu'une personne devait retenir sur un montant payé à une autre personne qui ne réside pas au Canada pour services rendus au Québec.

...

24. Toute personne qui déduit, retient ou perçoit un montant en vertu d'une loi fiscale est tenue de payer au ministre, à la date fixée par cette loi ou

conformément à la disposition prévue pour un tel paiement, un montant égal à celui qu'elle est tenue de remettre en vertu de cette loi.

...

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

67. (1) The property of a bankrupt divisible among his creditors shall not comprise

(*a*) property held by the bankrupt in trust for any other person,

...

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

87. (1) A security provided for in federal or provincial legislation for the sole or principal purpose of securing a claim of Her Majesty in right of Canada or of a province or of a workers' compensation body is valid in relation to a bankruptcy or proposal only if the security is registered under a prescribed system of registration before the date of the initial bankruptcy event.

* * *

67. (1) Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants :

(*a*) les biens détenus par le failli en fiducie pour toute autre personne;

...

(2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé "disposition fédérale" au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province,

dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes : *a*) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

> *b*) cette province est "une province instituant un régime général de pensions" au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un "régime provincial de pensions" au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

86. (1) Dans le cadre d'une faillite ou d'une proposition, les réclamations prouvables -- y compris les réclamations garanties -- de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail prennent rang comme réclamations non garanties.

...

87. (1) Les garanties créées aux termes d'une loi fédérale ou provinciale dans le seul but -- ou principalement dans le but -- de protéger des réclamations mentionnées au paragraphe 86(1) ne sont valides, dans le cadre d'une faillite ou d'une proposition, que si elles ont été enregistrées, conformément à un système d'enregistrement prescrit, avant l'ouverture de la faillite.

Appeals dismissed with costs.

Solicitors:

Solicitor for the appellant the Deputy Minister of Revenue of Quebec: Department of Justice, Montréal.

Solicitor for the appellant Her Majesty The Queen: Attorney General of Canada, Montréal.

Solicitors for the respondents Caisse populaire Desjardins de Montmagny and Raymond Chabot Inc., in its capacity as trustee in bankruptcy of 9083-4185 Québec Inc.: Langlois Kronström Desjardins, Lévis. (32486)

Solicitors for the respondent Raymond Chabot Inc., in its capacity as Trustee for the estate of the debtor Consortium Promecan Inc.: McCarthy Tétrault, Montréal. (32489)

Solicitors for the respondent National Bank of Canada: Stein, Monast, Québec. (32492)

Solicitors for the intervener: McMillan, Montréal.

TAB 10

** Preliminary Version **

Case Name:
Sun Indalex Finance, LLC v. United Steelworkers

Sun Indalex Finance, LLC, Appellant;
v.
United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville, Respondents.
And between
George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors, Appellant;
v.
United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville, Respondents.
And between
FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited, Appellant;
v.
United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville, Respondents.
And between
United Steelworkers, Appellant;
v.
Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership) and Superintendent of Financial Services, Respondents, and
Superintendent of Financial Services, Insolvency Institute of Canada, Canadian Labour Congress, Canadian Federation of

Pensioners, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers Association, Interveners.

[2013] S.C.J. No. 6

[2013] A.C.S. no 6

2013 SCC 6

[2013] 1 S.C.R. 271

[2013] 1 R.C.S. 271

301 O.A.C. 1

96 C.B.R. (5th) 171

8 B.L.R. (5th) 1

354 D.L.R. (4th) 581

2013EXP-356

2013EXPT-246

J.E. 2013-185

D.T.E. 2013T-97

EYB 2013-217414

439 N.R. 235

2013 CarswellOnt 733

223 A.C.W.S. (3d) 1049

20 P.P.S.A.C. (3d) 1

2 C.C.P.B. (2d) 1

File No.: 34308.

Supreme Court of Canada

Heard: June 5, 2012;
Judgment: February 1, 2013.

Present: McLachlin C.J. and LeBel, Deschamps, Abella, Rothstein, Cromwell and Moldaver JJ.

(280 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Priority -- Appeals from judgment setting aside decision concluding that deemed trust did not apply to wind-up deficiencies allowed -- Statutory deemed trust extended to contributions employer had to make to ensure that pension fund was sufficient to cover liabilities upon wind-up -- However, deemed trust was superseded by security granted to creditor that loaned money to employer during insolvency proceedings -- Although employer, as plan administrator, might have put itself in position of conflict of interest by failing to give plan's members proper notice of motion requesting financing of its operations during restructuring process, there was no realistic possibility that, had members received notice and had CCAA court found they were secured creditors, it would have ordered priorities differently -- Consequently, it was not appropriate to order equitable remedy such as constructive trust ordered by Court of Appeal.

Pensions and benefits law -- Private pension plans -- Bankruptcy, effect of -- Appeals from judgment setting aside decision concluding that deemed trust did not apply to wind-up deficiencies allowed -- Statutory deemed trust extended to contributions employer had to make to ensure that pension fund was sufficient to cover liabilities upon wind-up -- However, deemed trust was superseded by security granted to creditor that loaned money to employer during insolvency proceedings -- Although employer, as plan administrator, might have put itself in position of conflict of interest by failing to give plan's members proper notice of motion requesting financing of its operations during restructuring process, there was no realistic possibility that, had members received notice and had CCAA court found they were secured creditors, it would have ordered priorities differently -- Consequently, it was not appropriate to order equitable remedy such as constructive trust ordered by Court of Appeal.

Appeals from a judgment of the Ontario Court of Appeal setting aside a decision concluding that a deemed trust did not apply to wind-up deficiencies. Indalex became insolvent in 2009. At that time, Indalex was the administrator of two registered pension plans. Indalex obtained protection under the Companies' Creditors Arrangement Act ("CCAA"). Both plans faced funding deficiencies when

Indalex filed for the CCAA stay. Indalex's financial distress threatened the interests of all the plan members. Indalex was authorized to borrow US$24.4 million from the DIP lenders and grant them priority over all other creditors. Indalex subsequently received a bid for approximately US$30 million, and the buyer did not assume responsibility for the pension plans' wind-up deficiencies. The plan members contended that Indalex had breached its fiduciary obligations by failing to meet its obligations as a plan administrator throughout the insolvency proceedings. The plan members brought motions for a declaration that a deemed trust equal in amount to the unfunded pension liability was enforceable against the proceeds of the sale. They contended that they had priority over the secured creditors. The court concluded that the deemed trust did not apply to the wind-up deficiencies because the associated payments were not "due" or "accruing due" as of the date of the wind up. The Ontario Court of Appeal allowed the plan members' appeals. It found that the deemed trust created by section 57(4) of the Pension Benefits Act applied to all amounts due with respect to plan wind-up deficiencies. The Court of Appeal also concluded that a constructive trust was an appropriate remedy for Indalex's breach of its fiduciary obligations.

HELD: Appeals allowed. A contribution had "accrued" when the liabilities were completely constituted, even if the payment itself would not fall due until a later date. The fact that the precise amount of the contribution was not determined as of the time of the wind-up did not make it a contingent contribution that could not have accrued for accounting purposes. The relevant provisions, the legislative history and the purpose were all consistent with inclusion of the wind-up deficiency in the protection afforded to members with respect to employer contributions upon the wind up of their pension plan. Therefore, Court of Appeal correctly held that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency with respect to salaried plan. It was difficult to accept the Court of Appeal's sweeping intimation that the debtor in possession ("DIP") lenders would have accepted that their claim ranked below claims resulting from the deemed trust. As a result of the application of the doctrine of federal paramountcy, the DIP charge superseded the deemed trust. Although the employer, as plan administrator, might have put itself in a position of conflict of interest by failing to give the plan members proper notice of a motion requesting financing of its operations during a restructuring process, there was no realistic possibility that, had the members received notice and had the CCAA court found that they were secured creditors, it would have ordered the priorities differently. Consequently, it was not appropriate to order an equitable remedy such as the constructive trust ordered by the Court of Appeal.

Statutes, Regulations and Rules Cited:

Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, S.C. 2007, c. 36,

Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to

other Acts, S.C. 2005, c. 47, s. 128

Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 122(1)(a)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2, s. 11

Pension Benefits Act, R.S.O. 1980, c. 373, s. 21(2), s. 23, s. 32

Pension Benefits Act, R.S.O. 1990, c. P.8, s. 1(1), s. 8(1)(a), s. 9, s. 10(1)12, s. 12, s. 19, s. 20, s. 22, s. 25, s. 26, s. 42, s. 56, s. 57, s. 57(3), s. 57(4), s. 58, s. 59, s. 68, s. 69, s. 70, s. 73, s. 74, s. 75, s. 75(1)(a), s. 75(1)(b)

Pension Benefits Act, 1965, S.O. 1965, c. 96, s. 22(2)

Pension Benefits Act, 1987, S.O. 1987, c. 35, s. 58, s. 59, s. 75(1), s. 76(1)

Pension Benefits Amendment Act, 1973, S.O. 1973, c. 113, s. 23(a)

Pension Benefits Amendment Act, 1980, S.O. 1980, c. 80,

Pension Benefits Amendment Act, 1983, S.O. 1983, c. 2, s. 21, s. 22, s. 32

Pension Benefits Amendment Act, 2010, S.O. 2010, c. 9, s. 52(5)

Personal Property Security Act, R.S.O. 1990, c. P.10, s. 30(7)

R.R.O. 1990, Reg. 909, s. 4(4)3, s. 5(1)(b), s. 5(1)(e), s. 14, s. 29, s. 31

Securing Pension Benefits Now and for the Future Act, 2010, S.O. 2010, c. 24, s. 21(2)

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Pensions -- Bankruptcy and Insolvency -- Priorities -- Company who was both employer and administrator of pension plans seeking protection from creditors under Companies' Creditors Arrangement Act ("CCAA") -- Pension funds not having sufficient assets to fulfill pension promises made to plan members -- Company entering into debtor in possession ("DIP") financing allowing it to continue to operate -- CCAA court granting priority to DIP lenders -- Proceeds of sale of business insufficient to pay back DIP lenders -- Whether pension wind-up deficiencies subject to deemed trust -- If so, whether deemed trust superseded by CCAA priority by virtue of doctrine of

federal paramountcy -- Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 57(3), 57(4), 75(1)(a), 75(1)(b) -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Pensions -- Trusts -- Company who was both employer and administrator of pension plans seeking protection from creditors under CCAA -- Pension funds not having sufficient assets to fulfill pension promises made to plan members -- Whether pension wind-up deficiencies subject to deemed trust -- Whether company as plan administrator breached fiduciary duties -- Whether pension plan members are entitled to constructive trust.

Civil Procedure -- Costs -- Appeals -- Standard of review -- Whether Court of Appeal erred in costs endorsement concerning one party.

Court Summary:

Indalex Limited ("Indalex"), the sponsor and administrator of two employee pension plans, one for salaried employees and the other for executive employees, became insolvent. Indalex sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The salaried plan was being wound up when the *CCAA* proceedings began. The executive plan had been closed but not wound up. Both plans had wind-up deficiencies.

In a series of court-sanctioned steps, the company was authorized to enter into debtor in possession ("DIP") financing in order to allow it to continue to operate. The *CCAA* court granted the DIP lenders, a syndicate of pre-filing senior secured creditors, priority over the claims of all other creditors. Repayment of these amounts was guaranteed by Indalex U.S.

Ultimately, with the approval of the *CCAA* court, Indalex sold its business but the purchaser did not assume pension liabilities. The proceeds of the sale were not sufficient to pay back the DIP lenders and so Indalex U.S., as guarantor, paid the shortfall and stepped into the shoes of the DIP lenders in terms of priority. The *CCAA* court authorized a payment in accordance with the priority but ordered an amount be held in reserve, leaving the plan members' arguments on their rights to the proceeds of the sale open for determination later.

The plan members challenged the priority granted in the *CCAA* proceedings. They claimed that they had priority in the amount of the wind-up deficiency by virtue of a statutory deemed trust under s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*") and a constructive trust arising from Indalex's alleged breaches of fiduciary duty as administrator of the pension funds. The judge at first instance dismissed the plan members' motions concluding that the deemed trust did not apply to wind up deficiencies. He held that, with respect to the wind-up deficiency, the plan members were unsecured creditors. The Court of Appeal reversed this ruling and held that the pension plan wind-up deficiencies were subject to deemed and constructive trusts which had priority over the DIP financing priority and over other secured creditors. In addition, the Court of Appeal rejected a claim brought by the United Steelworkers, which represented some members of the salaried plan, seeking payment of its costs from the latter's pension fund.

Held (LeBel and Abella JJ. dissenting): The Sun Indalex Finance, George L. Miller and FTI Consulting appeals should be allowed.

Held: The United Steelworkers appeal should be dismissed.

(1) Statutory Deemed Trust

Per **Deschamps** and Moldaver JJ.: It is common ground that the contributions provided for in s. 75(1)(a) of the *PBA* are covered by the deemed trust contemplated by s. 57(4) of the *PBA*. The only question is whether this statutory deemed trust also applies to the wind-up deficiency payments required by s. 75(1)(b). The response to this question as it relates to the salaried employees is affirmative in view of the provision's wording, context and purpose. The situation is different with respect to the executive plan as s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up.

The wind-up deemed trust provision (s. 57(4) *PBA*) does not place an express limit on the "employer contributions accrued to the date of the wind up but not yet due". Section 75(1)(a) explicitly refers to "an amount equal to the total of all payments" that have *accrued*, even those that were not yet due as of the date of the wind-up, whereas s. 75(1)(b) contemplates an "amount" that is calculated on the basis of the value of assets and of liabilities that have *accrued* when the plan is wound up. Since both the amount with respect to payments (s. 75(1)(a)) and the one ascertained by subtracting the assets from the liabilities accrued as of the date of the wind-up (s. 75(1)(b)) are to be paid upon wind up as employer contributions, they are both included in the ordinary meaning of the words of s. 57(4) of the *PBA*: "amount of money equal to employer contributions accrued to the date of the wind-up but not yet due under the plan or regulations".

The time when the calculation is actually made is not relevant as long as the liabilities are assessed as of the date of the wind-up. The fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes. As a result, the words "contributions accrued" can encompass the contributions mandated by s. 75(1)(b) of the *PBA*.

It can be seen from the legislative history that the protection has expanded from (1) only the service contributions that were due, to (2) amounts payable calculated as if the plan had been wound up, to (3) amounts that were due and had accrued upon wind-up but excluding the wind-up deficiency payments, to (4) all amounts due and accrued upon wind-up. Therefore, the legislative history leads to the conclusion that adopting a narrow interpretation that would dissociate the employer's payment provided for in s. 75(1)(b) of the *PBA* from the one provided for in s. 75(1)(a) would be contrary to the Ontario legislature's trend toward broadening the protection.

The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. The remedial purpose favours an approach that includes all wind-up payments in the value of the deemed trust. In this case, the Court of Appeal correctly held with respect to the salaried plan, that

Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

Per **LeBel** and Abella JJ.: There is agreement with the reasons of Deschamps J. on the statutory deemed trust issue.

Per McLachlin C.J. and Rothstein and **Cromwell** JJ.: Given that there can be no deemed trust for the executive plan because that plan had not been wound up at the relevant date, the main issue in connection with the salaried plan boils down to the narrow statutory interpretative question of whether the wind-up deficiency provided for in s. 75(1)(b) is "accrued to the date of the wind-up" as required by s. 57(4) of the *PBA*.

When the term "accrued" is used in relation to a sum of money, it will generally refer to an amount that is at the present time either quantified or exactly quantifiable but which may or may not be due. In the present case, s. 57(4) uses the word "accrued" in contrast to the word "due". Given the ordinary meaning of the word "accrued", the wind-up deficiency cannot be said to have "accrued" to the date of wind-up. The extent of the wind-up deficiency depends on employee rights that arise only upon wind-up and with respect to which employees make elections only after wind-up. The wind-up deficiency therefore is neither ascertained nor ascertainable on the date fixed for wind-up.

The broader statutory context reinforces the view according to which the most plausible grammatical and ordinary sense of the words "accrued to the date of wind up" is that the amounts referred to are precisely ascertained immediately before the effective date of the plan's wind-up. Moreover, the legislative evolution and history of the provisions at issue show that the legislature never intended to include the wind-up deficiency in a statutory deemed trust. Rather, they reinforce the legislative intent to *exclude* from the deemed trust liabilities that arise only *on* the date of wind-up.

The legislation differentiates between two types of employer liability relevant to this case. The first is the contributions required to cover current service costs and any other payments that are either due or have accrued on a daily basis up to the relevant time. These are the payments referred to in the current s. 75(1)(a), that is, payments due or accrued but not paid. The second relates to additional contributions required when a plan is wound up which I have referred to as the wind-up deficiency. These payments are addressed in s. 75(1)(b). The legislative history and evolution show that the deemed trusts under s. 57(3) and (4) were intended to apply only to the former amounts and that it was never the intention that there should be a deemed trust or a lien with respect to an employer's potential future liabilities that arise once the plan is wound up.

In this case, the s. 57(4) deemed trust does not apply to the wind-up deficiency. This conclusion to exclude the wind-up deficiency from the deemed trust is consistent with the broader purposes of the legislation. The legislature has created trusts over contributions that were due or accrued to the date of the wind-up in order to protect, to some degree, the rights of pension plan beneficiaries and employees from the claims of the employer's other creditors. However, there is also good reason to think that the legislature had in mind other competing objectives in not extending the deemed trust

to the wind-up deficiency. While the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. The decision as to the level of protection that should be provided to pension beneficiaries under the *PBA* is one to be left to the Ontario legislature.

(2) *Priority Ranking*

Per **Deschamps** and Moldaver JJ.: A statutory deemed trust under provincial legislation such as the *PBA* continues to apply in federally-regulated *CCAA* proceedings, subject to the doctrine of federal paramountcy. In this case, granting priority to the DIP lenders subordinates the claims of other stakeholders, including the plan members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

Per McLachlin C.J. and Rothstein and **Cromwell** JJ.: Although there is disagreement with Deschamps J. in connection with the scope of the s. 57(4) deemed trust, it is agreed that if there was a deemed trust in this case, it would be superseded by the DIP loan because of the operation of the doctrine of federal paramountcy.

Per **LeBel** and Abella JJ.: There is agreement with the reasons of Deschamps J. on the priority ranking issue as determined by operation of the doctrine of federal paramountcy.

(3) *Constructive Trust As A Remedy for Breach of Fiduciary Duties*

Per McLachlin C.J. and Rothstein and **Cromwell** JJ.: It cannot be the case that a conflict of interests arises simply because an employer, exercising its management powers in the best interests of the corporation, does something that has the potential to affect the beneficiaries of the corporation's pension plan. This conclusion flows inevitably from the statutory context. The existence of apparent conflicts that are inherent in the two roles of employer and pension plan administrator being performed by the same party cannot be a breach of fiduciary duty because those conflicts are specifically authorized by the statute which permits one party to play both roles. Rather, a situation of conflict of interest occurs when there is a substantial risk that the employer-administrator's representation of the plan beneficiaries would be materially and adversely affected by the employer-administrator's duties to the corporation.

Seeking an initial order protecting the corporation from actions by its creditors did not, on its own, give rise to any conflict of interest or duty on the part of Indalex. Likewise, failure to give notice of the initial *CCAA* proceedings was not a breach of fiduciary duty to avoid conflicts of interest in this case. Indalex's decision to act as an employer-administrator cannot give the plan members any greater benefit than they would have if their plan was managed by a third party administrator.

It was at the point of seeking and obtaining the DIP orders without notice to the plan beneficiaries

and seeking and obtaining the sale approval order that Indalex's interests as a corporation came into conflict with its duties as a pension plan administrator. However, the difficulty that arose here was not the existence of the conflict itself, but Indalex's failure to take steps so that the plans' beneficiaries would have the opportunity to have their interests protected in the *CCAA* proceedings as if the plans were administered by an independent administrator. In short, the difficulty was not the existence of the conflict, but the failure to address it.

An employer-administrator who finds itself in a conflict must bring the conflict to the attention of the *CCAA* judge. It is not enough to include the beneficiaries in the list of creditors; the judge must be made aware that the debtor, as an administrator of the plan is, or may be, in a conflict of interest. Accordingly, Indalex breached its fiduciary duty by failing to take steps to ensure that the pension plans had the opportunity to be as fully represented in those proceedings as if there had been an independent plan administrator, particularly when it sought the DIP financing approval, the sale approval and a motion to voluntarily enter into bankruptcy.

Regardless of this breach, a remedial constructive trust is only appropriate if the wrongdoer's acts give rise to an identifiable asset which it would be unjust for the wrongdoer (or sometimes a third party) to retain. There is no evidence to support the contention that Indalex's failure to meaningfully address conflicts of interest that arose during the *CCAA* proceedings resulted in any such asset. Furthermore, to impose a constructive trust in response to a breach of fiduciary duty to ensure for the pension plans some procedural protections that they in fact took advantage of in any case is an unjust response in all of the circumstances.

Per **Deschamps** and Moldaver JJ.: A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the corporate employer must be prepared to resolve conflicts where they arise. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.

In the instant case, Indalex's fiduciary obligations as plan administrator did in fact conflict with management decisions that needed to be taken in the best interests of the corporation. Specifically, in seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the *CCAA* court to override the plan members' priority. The corporation's interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator's duty to the plan members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator's duty to the plan members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the plan members.

As for the constructive trust remedy, it is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property. There is agreement with Cromwell J. that this condition was not met in the case at bar and his reasoning on this issue is adopted. Moreover, it was unreasonable for the Court of Appeal to reorder the priorities in this case.

Per **LeBel** and Abella JJ. (dissenting): A fiduciary relationship is a relationship, grounded in fact and law, between a vulnerable beneficiary and a fiduciary who holds and may exercise power over the beneficiary in situations recognized by law. It follows that before entering into an analysis of the fiduciary duties of an employer as administrator of a pension plan under the *PBA*, it is necessary to consider the position and characteristics of the pension beneficiaries. In the present case, the beneficiaries were in a very vulnerable position relative to Indalex.

Nothing in the *PBA* allows that the employer *qua* administrator will be held to a lower standard or will be subject to duties and obligations that are less stringent than those of an independent administrator. The employer is under no obligation to assume the burdens of administering the pension plans that it has agreed to set up or that are the legacy of previous decisions. However, if it decides to do so, a fiduciary relationship is created with the expectation that the employer will be able to avoid or resolve the conflicts of interest that might arise.

Indalex was in a conflict of interest from the moment it started to contemplate putting itself under the protection of the *CCAA* and proposing an arrangement to its creditors. From the corporate perspective, one could hardly find fault with such a decision. It was a business decision. But the trouble is that at the same time, Indalex was a fiduciary in relation to the members and retirees of its pension plans. The solution was not to place its function as administrator and its associated fiduciary duties in abeyance. Rather, it had to abandon this role and diligently transfer its function as manager to an independent administrator.

In the present case, the employer not only neglected its obligations towards the beneficiaries, but actually took a course of action that was actively inimical to their interests. The seriousness of these breaches amply justified the decision of the Court of Appeal to impose a constructive trust.

(4) *Costs in United Steelworkers Appeal*

Per McLachlin C.J. and Rothstein and **Cromwell** JJ.: There is no basis to interfere with the Court of Appeal's costs endorsement as it relates to United Steelworkers in this case. The litigation undertaken here raised novel points of law with all of the uncertainty and risk inherent in such an undertaking. The Court of Appeal in essence decided that the United Steelworkers, representing only 7 of 169 members of the salaried plan, should not without consultation be able to in effect impose the risks of that litigation on all of the plan members, the vast majority of whom were not union members. There is no error in principle in the Court of Appeal's refusal to order the United Steelworkers costs to be paid out of the pension fund, particularly in light of the disposition of the appeal to this Court.

Per **Deschamps** and Moldaver JJ.: There is agreement with the reasons of Cromwell J. on the issue of costs in the United Steelworkers appeal.

Per **LeBel** and Abella JJ.: There is agreement with the reasons of Cromwell J. on the issue of costs in the United Steelworkers appeal.

Cases Cited

By Deschamps J.

Referred to: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Hydro-Electric Power Commission of Ontario v. Albright* (1922), 64 S.C.R. 306; *Canadian Pacific Ltd. v. M.N.R.* (1998), 41 O.R. (3d) 606; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307; *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273; *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558.

By Cromwell J.

Referred to: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53; *Hydro-Electric Power Commission of Ontario v. Albright* (1922), 64 S.C.R. 306; *Canadian Pacific Ltd. v. M.N.R.* (1998), 41 O.R. (3d) 606; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152; *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273, aff'g 2008 ONCA 394, 67 C.C.P.B. 1; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247; *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403; *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177; *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560; *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631; *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282; *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4) 194; *Marine Drive Properties Ltd., Re*, 2009 BCSC 145, 52 C.B.R. (5) 47; *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5) 169; *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6459 (CanLII); *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299 (CanLII); *Nortel Networks Corp., Re* (2009), 75 C.C.P.B. 206; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4) 314; *Donkin v. Bugoy*, [1985] 2 S.C.R. 85; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217; *Peter v. Beblow*, [1993] 1 S.C.R. 980; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678; *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303.

By LeBel J. (dissenting)

Galambos v. Perez, 2009 SCC 48, [2009] 3 S.C.R. 247; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261; *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4) 293; *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217.

Statutes and Regulations Cited

Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, S.C. 2007, c. 36.

Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, S.C. 2005, c. 47, s. 128.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

Bill C-501, *An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection)*, 3 Sess., 40 Parl., March 24, 2010 (as am. by the Standing Committee on Industry, Science and Technology, March 1, 2011).

Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 122(1)(*a*).

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 2 "secured creditor", 11.

Pension Benefits Act, R.S.O. 1980, c. 373, ss. 21(2), 23, 32.

Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 1(1) "administrator","wind up", 8(1)(a), 9, 10(1)12, 12, 19, 20, 22, 25, 26, 42, 56, 57, 58, 59, 68, 69, 70, 73, 74, 75.

Pension Benefits Act, 1965, S.O. 1965, c. 96, s. 22(2).

Pension Benefits Act, 1987, S.O. 1987, c. 35, ss. 58, 59, 75(1), 76(1).

Pension Benefits Amendment Act, 1973, S.O. 1973, c. 113, s. 23*a*.

Pension Benefits Amendment Act, 1980, S.O. 1980, c. 80.

Pension Benefits Amendment Act, 1983, S.O. 1983, c. 2, ss. 21, 23, 32.

Pension Benefits Amendment Act, 2010, S.O. 2010, c. 9, s. 52(5).

Personal Property Security Act, R.S.O. 1990, c. P.10, s. 30(7).

R.R.O. 1990, Reg. 909, ss. 4(4)3, 5(1)(b), (e), 14, 29, 31.

Securing Pension Benefits Now and for the Future Act, 2010, S.O. 2010, c. 24, s. 21(2).

Authors Cited

Arnold, Brian J. *Timing and Income Taxation: The Principles of Income Measurement for Tax Purposes*. Toronto: Canadian Tax Foundation, 1983.

Black's Law Dictionary, 9 ed. St. Paul, Minn.: Thomson Reuters, 2009, "accrued liability".

Canada. Senate. Standing Committee on Banking, Trade and Commerce. *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*. Ottawa: Senate of Canada, 2003.

Canadian Institute of Chartered Accountants. *CICA Handbook -- Accounting*, Part II, *Accounting Standards for Private Enterprises*. Toronto: The Institute, 2012.

Driedger, Elmer A. *Construction of Statutes*, 2 ed. Toronto: Butterworths, 1983.

Dukelow, Daphne A. *The Dictionary of Canadian Law*, 4 ed. Toronto: Carswell, 2011, "accrued liability".

Hogg, Peter W., Joanne E. Magee and Jinyan Li. *Principles of Canadian Income Tax Law*, 7 ed. Toronto: Carswell, 2010.

Jackson, Georgina R., and Janis Sarra. "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007*. Toronto: Thomson Carswell, 2008, 41.

Kaplan, Ari N. *Pension Law*. Toronto: Irwin Law, 2006.

The Mercer Pension Manual, vol. 1, by William M. Mercer Limited. Toronto: Carswell, 1994 (loose-leaf updated November 2009, release 6).

Ontario. Legislative Assembly. *Legislature of Ontario Debates: Official Report (Hansard)*, No. 99, 2 Sess., 32 Parl., July 7, 1982, p. 3568.

Sarra, Janis P. *Rescue! The Companies' Creditors Arrangement Act*. Toronto: Thomson Carswell, 2007.

Waters' Law of Trusts in Canada, 3 ed. by Donovan W. M. Waters, Mark R. Gillen and Lionel D. Smith, eds. Toronto: Thomson Carswell, 2005.

History and Disposition:

APPEALS from a judgment of the Ontario Court of Appeal (MacPherson, Gillese and Juriansz JJ.A.), 2011 ONCA 265, 104 O.R. (3d) 641, 276 O.A.C. 347, 331 D.L.R. (4) 352, 75 C.B.R. (5) 19, 89 C.C.P.B. 39, 17 P.P.S.A.C. (3d) 194, [2011] O.J. No. 1621 (QL), 2011 CarswellOnt 2458, setting aside a decision of Campbell J., 2010 ONSC 1114, 79 C.C.P.B. 301, [2010] O.J. No. 974 (QL), 2010 CarswellOnt 893. Appeals allowed, LeBel and Abella JJ. dissenting.

APPEAL from a judgment of the Ontario Court of Appeal (MacPherson, Gillese and Juriansz JJ.A.), 2011 ONCA 578, 81 C.B.R. (5) 165, 92 C.C.P.B. 277, [2011] O.J. No. 3959 (QL), 2011 CarswellOnt 9077. Appeal dismissed.

Counsel:

Benjamin Zarnett, *Frederick L. Myers, Brian F. Empey* and *Peter Kolla*, for the appellant Sun Indalex Finance, LLC.

Harvey G. Chaiton and *George Benchetrit*, for the appellant George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors.

David R. Byers, Ashley John Taylor and *Nicholas Peter McHaffie*, for the appellant FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited.

Darrell L. Brown, for the appellant/respondent the United Steelworkers.

Andrew J. Hatnay and *Demetrios Yiokaris*, for the respondents Keith Carruthers, et al.

Hugh O'Reilly and *Amanda Darrach*, for the respondent Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership).

Mark Bailey, *Leonard Marsello* and *William MacLarkey*, for the respondent/intervener the Superintendent of Financial Services.

Robert I. Thornton and *D. J. Miller*, for the intervener the Insolvency Institute of Canada.

Steven Barrett and *Ethan Poskanzer*, for the intervener the Canadian Labour Congress.

Kenneth T. Rosenberg, *Andrew K. Lokan* and *Massimo Starnino*, for the intervener the Canadian Federation of Pensioners.

Éric Vallières, *Alexandre Forest* and *Yoine Goldstein,* for the intervener the Canadian Association of Insolvency and Restructuring Professionals.

Mahmud Jamal, *Jeremy Dacks* and *Tony Devir,* for the intervener the Canadian Bankers Association.

The judgment of Deschamps and Moldaver JJ. was delivered by

1 DESCHAMPS J.:-- Insolvency can trigger catastrophic consequences. Often, large claims of ordinary creditors are left unpaid. In insolvency situations, the promise of defined benefits made to employees during their employment is put at risk. These appeals illustrate the materialization of such a risk. Although the employer in this case breached a fiduciary duty, the harm suffered by the pension plans' beneficiaries results not from that breach, but from the employer's insolvency. For the following reasons, I would allow the appeals of the appellants Sun Indalex Finance, LLC; George L. Miller, Indalex U.S.'s trustee in bankruptcy and FTI Consulting Canada ULC.

2 To improve the prospect of pensioners receiving their full benefits after a pension plan is wound up, the Ontario legislature has protected contributions to the pension fund that have accrued but are not yet due at the time of the wind up by providing for a deemed trust that supersedes all other provincial priorities over certain assets of the plan sponsor (s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and s. 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*")). The parties disagree on the scope of the deemed trust. In my view, the relevant provisions and the context lead to the conclusion that it extends to contributions the employer must make to ensure that the pension fund is sufficient to cover liabilities upon wind up. In the instant case, however, the deemed trust is superseded by the security granted to the creditor that loaned money to the employer, Indalex Limited ("Indalex"), during the insolvency proceedings. In addition, although the employer, as plan administrator, may have put itself in a position of conflict of interest by failing to give the plan's members proper notice of a motion requesting financing of its operations during a restructuring process, there was no realistic possibility that, had the members received notice and had the *CCAA* court found that they were secured creditors, it would have ordered the priorities differently. Consequently, it would not be appropriate to order an equitable remedy such as the constructive trust ordered by the Court of Appeal.

I. Facts

3 Indalex is a wholly owned Canadian subsidiary of a U.S. company, Indalex Holding Corp. ("Indalex U.S."). Indalex and its related companies formed a corporate group (the "Indalex Group") that manufactured aluminum extrusions. The U.S. and Canadian operations were closely linked.

4 In 2009, a combination of high commodity prices and the economic recession's impact on the

end-user market for aluminum extrusions plunged the Indalex Group into insolvency. On March 20, 2009, Indalex U.S. filed for Chapter 11 bankruptcy protection in Delaware. On April 3, 2009, Indalex applied for a stay under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), and Morawetz J. granted the stay in an initial order. He also appointed FTI Consulting Canada ULC (the "Monitor") to act as monitor.

5 At that time, Indalex was the administrator of two registered pension plans. One was for its salaried employees (the "Salaried Plan"), the other for its executives (the "Executive Plan"). Members of the Salaried Plan included seven employees for whom the United Steelworkers ("USW") acted as bargaining agent. The Salaried Plan was in the process of being wound up when the *CCAA* proceedings began. The effective date of the wind up was December 31, 2006. The Executive Plan had been closed but not wound up. Overall, the deficiencies of the pension plans' funds concern 49 persons (members of the Salaried Plan and the Executive Plan are referred to collectively as the "Plan Members").

6 Pursuant to the initial order made by Morawetz J. on April 3, 2009, Indalex obtained protection under the *CCAA*. Both plans faced funding deficiencies when Indalex filed for the *CCAA* stay. The wind-up deficiency of the Salaried Plan was estimated at $1.8 million as of December 31, 2008. The funding deficiency of the Executive Plan was estimated at $3.0 million on a wind-up basis as of January 1, 2008.

7 From the beginning of the insolvency proceedings, the Indalex Group's reorganization strategy was to sell both Indalex and Indalex U.S. as a going concern while they were under *CCAA* and Chapter 11 protection. To this end, Indalex and Indalex U.S. sought to enter into a common agreement for debtor-in-possession ("DIP") financing under which the two companies could draw from joint credit facilities and would guarantee each other's liabilities.

8 Indalex's financial distress threatened the interests of all the Plan Members. If the reorganization failed and Indalex were liquidated under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), they would not have recovered any of their claims against Indalex for the underfunded pension liabilities, because the priority created by the provincial statute would not be recognized under the federal legislation: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453. Although the priority was not rendered ineffective by the *CCAA*, the Plan Members' position was uncertain.

9 The Indalex Group solicited terms from a variety of possible DIP lenders. In the end, it negotiated an agreement with a syndicate consisting of the pre-filing senior secured creditors. On April 8, 2009, the *CCAA* court issued an Amended and Restated Initial Order ("Amended Initial Order") authorizing Indalex to borrow US$24.4 million from the DIP lenders and grant them priority over all other creditors ("DIP charge") in that amount. In his endorsement of the order, Morawetz J. made a finding that Indalex would be unable to achieve a going-concern solution without DIP financing. Such financing was necessary to support Indalex's business until the sale

could be completed.

10 The Plan Members did not participate in the initial proceedings. The initial stay had been granted *ex parte*. The *CCAA* judge ordered Indalex to serve a copy of the stay order on every creditor owed $5,000 or more within 10 days of the initial order of April 3. As of April 8, when the motion to amend the initial order was heard, none of the Executive Plan's members had been served with that order; nor did any of them receive notice of the motion to amend it. The USW did receive short notice, but chose not to attend. Morawetz J. authorized Indalex to proceed on the basis of an abridged time for service. The Plan Members were given notice of all subsequent proceedings. None of the Plan Members appealed the Amended Initial Order to contest the DIP charge.

11 On June 12, 2009, Indalex applied for authorization to increase the DIP loan amount to US$29.5 million. At the hearing, the Executive Plan's members initially opposed the motion, seeking to reserve their rights. After it was confirmed that the motion was merely to increase the amount of the DIP charge (without changing the terms of the loan), they withdrew their opposition and the court granted the motion.

12 On April 22, 2009, the court extended the stay of proceedings and approved a marketing process for the sale of Indalex's assets. The Plan Members did not oppose the application to approve the marketing process. Under the approved bidding procedure, the Indalex Group solicited a wide variety of potential buyers.

13 Indalex received a bid from SAPA Holding AB ("SAPA"). It was for approximately US$30 million, and SAPA did not assume responsibility for the pension plans' wind-up deficiencies. According to the Monitor's estimate, the liquidation value of Indalex's assets was US$44.7 million. Indalex brought an application for an order approving a bidding procedure for a competitive auction and deeming SAPA's bid to be a qualifying bid. The Executive Plan's members opposed the application, expressing concern that the pension liabilities would not be assumed. Morawetz J. nevertheless issued the order on July 2, 2009; in it, he approved the bidding procedure for sale, noting that the Executive Plan's members could raise their objections at the time of approval of the final bid.

14 The bidding procedure did not trigger any competing bids. On July 20, 2009, Indalex and Indalex U.S. brought motions before their respective courts to approve the sale of substantially all their assets under the terms of SAPA's bid. Indalex also moved for approval of an interim distribution of the sale proceeds to the DIP lenders. The Plan Members opposed Indalex's motion. First, they argued that it was estimated that a forced liquidation would produce greater proceeds than SAPA's bid. Second, they contended that their claims had priority over that of the DIP lenders because the unfunded pension liabilities were subject to a statutory deemed trust under the *PBA*. They also contended that Indalex had breached its fiduciary obligations by failing to meet its obligations as a plan administrator throughout the insolvency proceedings.

15 The court dismissed the Plan Members' first objection, holding that there was no evidence

supporting the argument that a forced liquidation would be more beneficial to suppliers, customers and the 950 employees. It approved the sale on July 20, 2009. The order in which it did so directed the Monitor to make a distribution to the DIP lenders. With respect to the second objection, however, Campbell J. ordered the Monitor to hold a reserve in an amount to be determined by the Monitor, leaving the Plan Members' arguments based on their right to the proceeds of the sale open for determination at a later date.

16 The sale to SAPA closed on July 31, 2009. The Monitor collected $30.9 million in proceeds. It distributed US$17 million to the DIP lenders, paid certain fees, withheld a portion to cover various costs and retained $6.75 million in reserve pending determination of the Plan Members' rights. At the closing, Indalex owed US$27 million to the DIP lenders. The payment of US$17 million left a US$10 million shortfall in the amount owed to these lenders. The DIP lenders called on Indalex U.S. to cover this shortfall under the guarantee contained in the DIP lending agreement. Indalex U.S. paid the amount of the shortfall. Since Indalex U.S. was, as a term of the guarantee, subrogated to the DIP lenders' priority, it became the highest ranking creditor of Indalex, with a claim for US$10 million.

17 Following the sale of Indalex's assets, its directors resigned. Indalex U.S., a part of Indalex Group, took over the management of Indalex, whose assets were limited to the sale proceeds held by the Monitor. A Unanimous Shareholder Declaration was executed on August 12, 2009; in it, Mr. Keith Cooper was appointed to manage Indalex's affairs. Mr. Cooper was an employee of FTI Consulting Inc.

18 In accordance with the right reserved by the court on July 20, 2009, the Plan Members brought motions on August 28, 2009 for a declaration that a deemed trust equal in amount to the unfunded pension liability was enforceable against the proceeds of the sale. They contended that they had priority over the secured creditors pursuant to s. 57(4) of the PBA and s. 30(7) of the *PPSA*. Indalex, in turn, brought a motion for an assignment in bankruptcy to secure the priority regime it argued for in opposing the Plan Members' motions.

19 On October 14, 2009, while judgment was pending, Indalex U.S. converted the Chapter 11 restructuring proceeding in the U.S. into a Chapter 7 liquidation proceeding. On November 5, 2009, the Superintendent of Financial Services ("Superintendent") appointed the actuarial firm of Morneau Sobeco Limited Partnership ("Morneau") to replace Indalex as administrator of the plans.

20 On February 18, 2010, Campbell J. dismissed the Plan Members' motions, concluding that the deemed trust did not apply to the wind-up deficiencies, because the associated payments were not "due" or "accruing due" as of the date of the wind up. He found that the Executive Plan did not have a wind-up deficiency, since it had not yet been wound up. He thus found it unnecessary to rule on Indalex's motion for an assignment in bankruptcy (2010 ONSC 1114, 79 C.C.P.B. 301). The Plan Members appealed the dismissal of their motions.

21 The Ontario Court of Appeal allowed the Plan Members' appeals. It found that the deemed

trust created by s. 57(4) of the *PBA* applies to all amounts due with respect to plan wind-up deficiencies. Although the court noted that it was likely that no deemed trust existed for the Executive Plan on the plain meaning of the provision, it declined to address this question, because it found that the Executive Plan's members had a claim arising from Indalex's breach of its fiduciary obligations in failing to adequately protect the Plan Members' interests (2011 ONCA 265, 104 O.R. (3d) 641).

22 The Court of Appeal concluded that a constructive trust was an appropriate remedy for Indalex's breach of its fiduciary obligations. The court was of the view that this remedy did not harm the DIP lenders, but affected only Indalex U.S. It imposed a constructive trust over the reserved fund in favour of the Plan Members. Turning to the question of distribution, it also found that the deemed trust had priority over the DIP charge because the issue of federal paramountcy had not been raised when the Amended Initial Order was issued, and that Indalex had stated that it intended to comply with any deemed trust requirements. The Court of Appeal found that there was nothing in the record to suggest that not applying the paramountcy doctrine would frustrate Indalex's ability to restructure.

23 The Court of Appeal ordered the Monitor to make a distribution from the reserve fund in order to pay the amount of each plan's deficiency. It also issued a costs endorsement that approved payment of the costs of the Executive Plan's members from that plan's fund, but declined to order the payment of costs to the USW from the fund of the Salaried Plan (2011 ONCA 578, 81 C.B.R. (5th) 165).

24 The Monitor, together with Sun Indalex, a secured creditor of Indalex U.S., and George L. Miller, Indalex U.S.'s trustee in bankruptcy, appeals the Court of Appeal's order. Both the Superintendent and Morneau support the Plan Members' position as respondents. A number of stakeholders are also participating in the appeals to this Court. In addition, USW appeals the costs endorsement. As I agree with my colleague Cromwell J. on the appeal from the costs endorsement, I will not deal with it in these reasons.

II. Issues

25 The appeals raise four issues:

1. Does the deemed trust provided for in s. 57(4) of the *PBA* apply to wind-up deficiencies?
2. If so, does the deemed trust supersede the DIP charge?
3. Did Indalex have any fiduciary obligations to the Plan Members when making decisions in the context of the insolvency proceedings?
4. Did the Court of Appeal properly exercise its discretion in imposing a constructive trust to remedy the breaches of fiduciary duties?

III. Analysis

A. *Does the Deemed Trust Provided for in Section 57(4) of the PBA Apply to Wind-up Deficiencies?*

26 The first issue is whether the statutory deemed trust provided for in s. 57(4) of the *PBA* extends to wind-up deficiencies. This question is one of statutory interpretation, which requires examination of both the wording and context of the relevant provisions of the *PBA*. Section 57(4) of the *PBA* affords protection to members of a pension plan with respect to their employer's contributions upon wind up of the plan. The provision reads:

> **57...** .
>
> (4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

27 The most obvious interpretation is that where a plan is wound up, this provision protects all contributions that have accrued but are not yet due. The words used appear to include the contribution the employer is to make where a plan being wound up is in a deficit position. This quite straightforward interpretation, which is consistent with both the historical broadening of the protection and the remedial purpose of the provision, is being challenged on the basis of a narrow definition of the word "accrued". I do not find that this argument justifies limiting the protection afforded to plan members by the Ontario legislature.

28 The *PBA* sets out the rules for the operation of funded contributory defined benefit pension plans in Ontario. In an ongoing plan, an employer must pay into a fund all contributions it withholds from its employees' salaries. In addition, while the plan is ongoing, the employer must make two kinds of payments. One relates to current service contributions -- the employer's own regular contributions to the pension fund as required by the plan. The other ensures that the fund is sufficient to meet the plan's liabilities. The employees' interest in having the contributions made while the plan is ongoing is protected by a deemed trust provided for in s. 57(3) of the *PBA*.

29 The *PBA* also establishes a comprehensive scheme for winding up a pension plan. Section 75(1)(a) imposes on the employer the obligation to "pay" an amount equal to the total of all "payments" that are due or that have accrued and have not been paid into the fund. In addition, s. 75(1)(b) sets out a formula for calculating the amount that must be paid to ensure that the fund is sufficient to cover all liabilities upon wind up. Within six months after the effective date of the wind up, the plan administrator must file a wind-up report that lists the plan's assets and liabilities as of the date of the wind up. If the wind-up report shows an actuarial deficit, the employer must make wind-up deficiency payments. Consequently, s. 75(1)(a) and (b) jointly determine the amount of the

contributions owed when a plan is wound up.

30 It is common ground that the contributions provided for in s. 75(1)(a) are covered by the wind-up deemed trust. The only question is whether it also applies to the deficiency payments required by s. 75(1)(b). I would answer this question in the affirmative in view of the provision's wording, context and purpose.

31 It is readily apparent that the wind-up deemed trust provision (s. 57(4) PBA) does not place an express limit on the "employer contributions accrued to the date of the wind up but not yet due", and I find no reason to exclude contributions paid under s. 75(1)(b). Section 75(1)(a) explicitly refers to "an amount equal to the total of all payments" that have *accrued*, even those that were not yet due as of the date of the wind up, whereas s. 75(1)(b) contemplates an "amount" that is calculated on the basis of the value of assets and of liabilities that have *accrued* when the plan is wound up. Section 75(1) reads as follows:

> **75.** (1) Where a pension plan is wound up, the employer shall pay into the pension fund,
>
> (a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and
> (b) an amount equal to the amount by which,
>
> (i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,
> (ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and
> (iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,
>
> exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

32 Since both the amount with respect to payments (s. 75(1)(a)) and the one ascertained by subtracting the assets from the liabilities accrued as of the date of the wind up (s. 75(1)(b)) are to be paid upon wind up as employer contributions, they are both included in the ordinary meaning of the words of s. 57(4) of the *PBA*: "amount of money equal to employer contributions accrued to the

date of the wind up but not yet due under the plan or regulations". As I mentioned above, this reasoning is challenged in respect of s. 75(1)(b), not of s. 75(1)(a).

33 The appellant Sun Indalex argues that since the deficiency is not finally quantified until well after the effective date of the wind up, the liability of the employer cannot be said to have accrued. The Monitor adds that the payments the employer must make to satisfy its wind-up obligations may change over the five-year period within which s. 31 of the *PBA* Regulations, R.R.O. 1990, Reg. 909, requires that they be made. These parties illustrate their argument by referring to what occurred to the Salaried Plan's fund in the case at bar. In 2007-8, Indalex paid down the vast majority of the $1.6 million wind-up deficiency associated with the Salaried Plan as estimated in 2006. By the end of 2008, however, this deficiency had risen back up to $1.8 million as a result of a decline in the fund's asset value. According to this argument, the amount could not have accrued as of the date of the wind up, because it could not be calculated with certainty.

34 Unlike my colleague Cromwell J., I find this argument unconvincing. I instead agree with the Court of Appeal on this point. The wind-up deemed trust concerns "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". Since the employees cease to accumulate entitlements when the plan is wound up, the entitlements that are used to calculate the contributions have all been accumulated before the wind-up date. Thus the liabilities of the employer are complete -- have accrued -- before the wind up. The distinction between my approach and the one Cromwell J. takes is that he requires that it be possible to perform the calculation before the date of the wind up, whereas I am of the view that the time when the calculation is actually made is not relevant as long as the liabilities are assessed as of the date of the wind up. The date at which the liabilities are *reported* or the employer's *option* to spread its contributions as allowed by the regulations does not change the legal nature of the contributions.

35 In *Hydro-Electric Power Commission of Ontario v. Albright* (1922), 64 S.C.R. 306, Duff J. considered the meaning of the word "accrued" in interpreting the scope of a covenant. He found that

> the word "accrued" according to well recognized usage has, as applied to rights or liabilities the meaning simply of completely constituted -- and it may have this meaning although it appears from the context that the right completely constituted or the liability completely constituted is one which is only exercisable or enforceable *in futuro* -- a debt for example which is *debitum in praesenti solvendum in futuro*. [Emphasis added; pp. 312-13.]

36 Thus, a contribution has "accrued" when the liabilities are completely constituted, even if the payment itself will not fall due until a later date. If this principle is applied to the facts of this case, the liabilities related to contributions to the fund allocated for payment of the pension benefits contemplated in s. 75(1)(b) are completely constituted at the time of the wind up, because no pension entitlements arise after that date. In other words, no new liabilities accrue at the time of or after the wind up. Even the portion of the contributions that is related to the elections plan members

may make upon wind up has "accrued to the date of the wind up", because it is based on rights employees earned before the wind-up date.

37 The fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes (*Canadian Pacific Ltd. v. M.N.R.*, (1998), 41 O.R. (3d) 606 (C.A.), at p. 621). The use of the word "accrued" does not limit liabilities to amounts that can be determined with precision. As a result, the words "contributions accrued" can encompass the contributions mandated by s. 75(1)(b) of the *PBA*.

38 The legislative history supports my conclusion that wind-up deficiency contributions are protected by the deemed trust provision. The Ontario legislature has consistently expanded the protection afforded in respect of pension plan contributions. I cannot therefore accept an interpretation that would represent a drawback from the protection extended to employees. I will not reproduce the relevant provisions, since my colleague Cromwell J. quotes them.

39 The original statute provided solely for the employer's obligation to pay all amounts required to be paid to meet the test for solvency (*The Pension Benefits Act, 1965*, S.O. 1965, c. 96, s. 22(2)), but the legislature subsequently afforded employees the protection of a deemed trust on the employer's assets in an amount equal to the sums withheld from employees as contributions and sums due from the employer as service contributions (s. 23*a*, added by *The Pension Benefits Amendment Act, 1973*, S.O. 1973, c. 113, s. 6). In a later version, it protected not only contributions that were due, but also those that had accrued, with the amounts being calculated as if the plan had been wound up (*The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80).

40 Whereas *all* employer contributions were originally covered by a single provision, the legislature crafted a separate provision in 1980 that specifically imposed on the employer the obligation to fund the wind-up deficiency. At the time, it was clear from the words used in the provision that the amount related to the wind-up deficiency was excluded from the deemed trust protection (*The Pension Benefits Amendment Act, 1980*). In 1983, the legislature made a distinction between the deemed trust for ongoing employer contributions and the one for certain payments to be made upon wind up (ss. 23(4)(a) and 23(4)(b), added by *Pension Benefits Amendment Act, 1983*, S.O. 1983, c. 2, s. 3). In that version, the wind-up deficiency payments were still excluded from the deemed trust. However, the legislature once again made changes to the protection in 1987. The 1987 version is, in substance, the one that applies in the case at bar. In the *Pension Benefits Act, 1987*, S.O. 1987, c. 35, a specific wind-up deemed trust was maintained, but the wind up deficiency payments were no longer excluded from it, because the limitation that had been imposed until then with respect to payments that were due or had accrued while the plan was ongoing had been eliminated. My comments to the effect that the previous versions excluded the wind-up deficiency payments do not therefore apply to the 1987 statute, since it was materially different.

41 Whereas it is clear from the 1983 amendments that the deemed trust provided for in s.

23(4)(b) was intended to include only current service costs and special payments, this is less clear from the subsequent versions of the *PBA*. To give meaning to the 1987 amendment, I have to conclude that the words refer to a deemed trust in respect of *all* "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations".

42 The employer's liability upon wind up is now set out in a single section which elegantly parallels the wind-up deemed trust provision. It can be seen from the legislative history that the protection has expanded from (1) only the service contributions that were due, to (2) amounts payable calculated as if the plan had been wound up, to (3) amounts that were due and had accrued upon wind up but excluding the wind-up deficiency payments, to (4) all amounts due and accrued upon wind up.

43 Therefore, in my view, the legislative history leads to the conclusion that adopting a narrow interpretation that would dissociate the employer's payment provided for in s. 75(1)(b) of the *PBA* from the one provided for in s. 75(1)(a) would be contrary to the Ontario legislature's trend toward broadening the protection. Since the provision respecting wind-up payments sets out the amounts that are owed upon wind up, I see no historical, legal or logical reason to conclude that the wind-up deemed trust provision does not encompass all of them.

44 Thus, I am of the view that the words and context of s. 57(4) lend themselves easily to an interpretation that includes the wind-up deficiency payments, and I find additional support for this in the purpose of the provision. The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. This purpose militates against adopting the limited scope proposed by Indalex and some of the interveners. In the case of competing priorities between creditors, the remedial purpose favours an approach that includes all wind-up payments in the value of the deemed trust in order to achieve a broad protection.

45 In sum, the relevant provisions, the legislative history and the purpose are all consistent with inclusion of the wind-up deficiency in the protection afforded to members with respect to employer contributions upon the wind up of their pension plan. I therefore find that the Court of Appeal correctly held with respect to the Salaried Plan, which had been wound up as of December 31, 2006, that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

46 The situation is different with respect to the Executive Plan. Unlike s. 57(3), which provides that the deemed trust protecting employer contributions exists while a plan is ongoing, s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up. This is a choice made by the Ontario legislature. I would not interfere with it. Thus, the deemed trust entitlement arises only once the condition precedent of the plan being wound up has been fulfilled. This is true even if it is certain that the plan will be wound up in the future. At the time of the sale, the Executive Plan was in the process of being, but had not yet been, wound up. Consequently, the deemed trust provision does not apply to the employer's wind-up deficiency payments in respect of

that plan.

47 The Court of Appeal declined to decide whether a deemed trust arose in relation to the Executive Plan, stating that it was unnecessary to decide this issue. However, the court expressed concern that a reasoning that deprived the Executive Plan's members of the benefit of a deemed trust would mean that a company under *CCAA* protection could avoid the priority of the *PBA* deemed trust simply by not winding up an underfunded pension plan. The fear was that Indalex could have relied on its own inaction to avoid the consequences that flow from a wind up. I am not convinced that the Court of Appeal's concern has any impact on the question whether a deemed trust exists, and I doubt that an employer could avoid the consequences of such a security interest simply by refusing to wind up a pension plan. The Superintendent may take a number of steps, including ordering the wind up of a pension plan under s. 69(1) of the *PBA* in a variety of circumstances (see s. 69(1)(d), *PBA*). The Superintendent did not choose to order that the plan be wound up in this case.

B. *Does the Deemed Trust Supersede the DIP Charge?*

48 The finding that the interests of the Salaried Plan's members in all the employer's wind-up contributions to the Salaried Plan are protected by a deemed trust does not mean that part of the money reserved by the Monitor from the sale proceeds must be remitted to the Salaried Plan's fund. This will be the case only if the provincial priorities provided for in s. 30(7) of the *PPSA* ensure that the claim of the Salaried Plan's members has priority over the DIP charge. Section 30(7) reads as follows:

> (7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.

The effect of s. 30(7) is to enable the Salaried Plan's members to recover from the reserve fund, insofar as it relates to an account or inventory and its proceeds in Ontario, ahead of all other secured creditors.

49 The Appellants argue that any provincial deemed trust is subordinate to the DIP charge authorized by the *CCAA* order. They put forward two central arguments to support their contention. First, they submit that the *PBA* deemed trust does not apply in *CCAA* proceedings because the relevant priorities are those of the federal insolvency scheme, which do not include provincial deemed trusts. Second, they argue that by virtue of the doctrine of federal paramountcy the DIP charge supersedes the *PBA* deemed trust.

50 The Appellants' first argument would expand the holding of *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, so as to apply federal bankruptcy priorities to *CCAA* proceedings, with the effect that claims would be treated similarly under the *CCAA* and the *BIA*. In *Century Services*, the Court noted that there are points at which the two schemes

converge:

> Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. [para. 23]

51 In order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements. Yet this does not mean that courts may read bankruptcy priorities into the *CCAA* at will. Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to *CCAA* proceedings or to proposals under the *BIA*. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the *CCAA*, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation under the *BIA*. Indalex achieved the goal it was pursuing. It chose to sell its assets under the *CCAA*, not the *BIA*.

52 The provincial deemed trust under the *PBA* continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy (*Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60, at para. 43). The Court of Appeal therefore did not err in finding that at the end of a *CCAA* liquidation proceeding, priorities may be determined by the *PPSA*'s scheme rather than the federal scheme set out in the *BIA*.

53 The Appellants' second argument is that an order granting priority to the plan's members on the basis of the deemed trust provided for by the Ontario legislature would be unconstitutional in that it would conflict with the order granting priority to the DIP lenders that was made under the *CCAA*. They argue that the doctrine of paramountcy resolves this conflict, as it would render the provincial law inoperative to the extent that it is incompatible with the federal law.

54 There is a preliminary question that must be addressed before determining whether the doctrine of paramountcy applies in this context. This question arises because the Court of Appeal found that although the *CCAA* court had the power to authorize a DIP charge that would supersede the deemed trust, the order in this case did not have such an effect because paramountcy had not been invoked. As a result, the priority of the deemed trust over secured creditors by virtue of s. 30(7) of the *PPSA* remained in effect, and the Plan Members' claim ranked in priority to the claim of the DIP lenders established in the *CCAA* order.

55 With respect, I cannot accept this approach to the doctrine of federal paramountcy. This doctrine resolves conflicts in the application of overlapping valid provincial and federal legislation (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at paras. 32 and 69).

Paramountcy is a question of law. As a result, subject to the application of the rules on the admissibility of new evidence, it can be raised even if it was not invoked in an initial proceeding.

56 A party relying on paramountcy must "demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law" (*Canadian Western Bank*, at para. 75). This Court has in fact applied the doctrine of paramountcy in the area of bankruptcy and insolvency to come to the conclusion that a provincial legislature cannot, through measures such as a deemed trust, affect priorities granted under federal legislation (*Husky Oil*).

57 None of the parties question the validity of either the federal provision that enables a *CCAA* court to make an order authorizing a DIP charge or the provincial provision that establishes the priority of the deemed trust. However, in considering whether the *CCAA* court has, in exercising its discretion to assess a claim, validly affected a provincial priority, the reviewing court should remind itself of the rule of interpretation stated in *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 (at p. 356), and reproduced in *Canadian Western Bank* (at para. 75):

> When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

58 In the instant case, the *CCAA* judge, in authorizing the DIP charge, did not consider the fact that the Salaried Plan's members had a claim that was protected by a deemed trust, nor did he explicitly note that ordinary creditors, such as the Executive Plan's members, had not received notice of the DIP loan motion. However, he did consider factors that were relevant to the remedial objective of the *CCAA* and found that Indalex had in fact demonstrated that the *CCAA*'s purpose would be frustrated without the DIP charge. It will be helpful to quote the reasons he gave on April 17, 2009 in authorizing the DIP charge ((2009), 52 C.B.R. (5th) 61):

> (a) the Applicants are in need of the additional financing in order to support operations during the period of a going concern restructuring;
> (b) there is a benefit to the breathing space that would be afforded by the DIP Financing that will permit the Applicants to identify a going concern solution;
> (c) there is no other alternative available to the Applicants for a going concern solution;
> (d) a stand-alone solution is impractical given the integrated nature of the business of Indalex Canada and Indalex U.S.;
> (e) given the collateral base of Indalex U.S., the Monitor is satisfied that it is unlikely that the Post-Filing Guarantee with respect to the U.S. Additional Advances will ever be called and the Monitor is also satisfied that the

benefits to stakeholders far outweighs the risk associated with this aspect of the Post-Filing Guarantee;

(f) the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing against the assets of the Applicants;

(g) the Pre-Filing Security has been reviewed by counsel to the Monitor and it appears that the unsecured creditors of the Canadian debtors will be in no worse position as a result of the Post-Filing Guarantee than they were otherwise, prior to the CCAA filing, as a result of the limitation of the Canadian guarantee set forth in the draft Amended and Restated Initial Order ... ; and

(h) the balancing of the prejudice weighs in favour of the approval of the DIP Financing. [para. 9]

59 Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the *CCAA* judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate" (2009 CanLII 37906, at paras. 7 and 8).

60 In this case, compliance with the provincial law necessarily entails defiance of the order made under federal law. On the one hand, s. 30(7) of the *PPSA* required a part of the proceeds from the sale related to assets described in the provincial statute to be paid to the plan's administrator before other secured creditors were paid. On the other hand, the Amended Initial Order provided that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" (para. 45). Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the Plan Members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

C. *Did Indalex Have Fiduciary Obligations to the Plan Members?*

61 The fact that the DIP financing charge supersedes the deemed trust or that the interests of the Executive Plan's members are not protected by the deemed trust does not mean that Plan Members have no right to receive money out of the reserve fund. What remains to be considered is whether an equitable remedy, which could override all priorities, can and should be granted for a breach by Indalex of a fiduciary duty.

62 The first stage of a fiduciary duty analysis is to determine whether and when fiduciary obligations arise. The Court has recognized that there are circumstances in which a pension plan administrator has fiduciary obligations to plan members both at common law and under statute (*Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273, at para. 41). It is clear that the indicia of a fiduciary relationship attach in this case between the Plan Members and Indalex as plan administrator. Sun Indalex and the Monitor do not dispute this proposition.

63 However, Sun Indalex and the Monitor argue that the employer has a fiduciary duty only when it acts as plan administrator -- when it is wearing its administrator's "hat". They contend that, outside the plan administration context, when directors make decisions in the best interests of the corporation, the employer is wearing solely its "corporate hat". On this view, decisions made by the employer in its corporate capacity are not burdened by the corporation's fiduciary obligations to its pension plan members and, consequently, cannot be found to conflict with plan members' interests. This is not the correct approach to take in determining the scope of the fiduciary obligations of an employer acting as plan administrator.

64 Only persons or entities authorized by the *PBA* can act as plan administrators (ss. 1(1) and 8(1)(a)). The employer is one of them. A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the fact that the corporate employer can act as administrator of a pension plan means that s. 8(1)(a) of the *PBA* is based on the assumption that not all decisions taken by directors in managing a corporation will result in conflict with the corporation's duties to the plan's members. However, the corporate employer must be prepared to resolve conflicts where they arise. Reorganization proceedings place considerable burdens on any debtor, but these burdens do not release an employer that acts as plan administrator from its fiduciary obligations.

65 Section 22(4) of the *PBA* explicitly provides that a plan administrator must not permit its own interest to conflict with its duties in respect of the pension fund. Thus, where an employer's own interests do not converge with those of the plan's members, it must ask itself whether there is a potential conflict and, if so, what can be done to resolve the conflict. Where interests do conflict, I do not find the two hats metaphor helpful. The solution is not to determine whether a given decision can be classified as being related to either the management of the corporation or the administration of the pension plan. The employer may well take a sound management decision, and yet do something that harms the interests of the plan's members. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the

competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.

66 When the interests the employer seeks to advance on behalf of the corporation conflict with interests the employer has a duty to preserve as plan administrator, a solution must be found to ensure that the plan members' interests are taken care of. This may mean that the corporation puts the members on notice, or that it finds a replacement administrator, appoints representative counsel or finds some other means to resolve the conflict. The solution has to fit the problem, and the same solution may not be appropriate in every case.

67 In the instant case, Indalex's fiduciary obligations as plan administrator did in fact conflict with management decisions that needed to be taken in the best interests of the corporation. Indalex had a number of responsibilities as plan administrator. For example, s. 56(1) of the *PBA* required it to ensure that contributions were paid when due. Section 56(2) required that it notify the Superintendent if contributions were not paid when due. It was also up to Indalex under s. 59 to commence proceedings to obtain payment of contributions that were due but not paid. Indalex, as an employer, paid all the contributions that were due. However, its insolvency put contributions that had accrued to the date of the wind up at risk. In an insolvency context, the administrator's claim for contributions that have accrued is a provable claim.

68 In the context of this case, the fact that Indalex, as plan administrator, might have to claim accrued contributions from itself means that it would have to simultaneously adopt conflicting positions on whether contributions had accrued as of the date of liquidation and whether a deemed trust had arisen in respect of wind-up deficiencies. This is indicative of a clear conflict between Indalex's interests and those of the Plan Members. As soon as it saw, or ought to have seen, a potential for conflict, Indalex should have taken steps to ensure that the interests of the Plan Members were protected. It did not do so. On the contrary, it contested the position the Plan Members advanced. At the very least, Indalex breached its duty to avoid conflicts of interest (s. 22(4), *PBA*).

69 Since the Plan Members seek an equitable remedy, it is important to identify the point at which Indalex should have moved to ensure that their interests were safeguarded. Before doing so, I would stress that factual contexts are needed to analyse conflicts between interests, and that it is neither necessary nor useful to attempt to map out all the situations in which conflicts may arise.

70 As I mentioned above, insolvency puts the employer's contributions at risk. This does not mean that the decision to commence insolvency proceedings entails on its own a breach of a fiduciary obligation. The commencement of insolvency proceedings in this case on April 3, 2009 in an emergency situation was explained by Timothy R. J. Stubbs, the then-president of Indalex. The company was in default to its lender, it faced legal proceedings for unpaid bills, it had received a termination notice effective April 6 from its insurers, and suppliers had stopped supplying on credit. These circumstances called for urgent action by Indalex lest a creditor start bankruptcy proceedings

and in so doing jeopardize ongoing operations and jobs. Several facts lead me to conclude that the stay sought in this case did not, in and of itself, put Indalex in a conflict of interest.

71 First, a stay operates only to freeze the parties' rights. In most cases, stays are obtained *ex parte*. One of the reasons for refraining from giving notice of the initial stay motion is to avert a situation in which creditors race to court to secure benefits that they would not enjoy in insolvency. Subjecting as many creditors as possible to a single process is seen as a way to treat all of them more equitably. In this context, plan members are placed on the same footing as the other creditors and have no special entitlement to notice. Second, one of the conclusions of the order Indalex sought was that it was to be served on all creditors, with a few exceptions, within 10 days. The notice allowed any interested party to apply to vary the order. Third, Indalex was permitted to pay all pension benefits. Although the order excluded special solvency payments, no ruling was made at that point on the merits of the creditors' competing claims, and a stay gave the Plan Members the possibility of presenting their arguments on the deemed trust rather than losing it altogether as a result of a bankruptcy proceeding, which was the alternative.

72 Whereas the stay itself did not put Indalex in a conflict of interest, the proceedings that followed had adverse consequences. On April 8, 2009, Indalex brought a motion to amend and restate the initial order in order to apply for DIP financing. This motion had been foreseen. Mr. Stubbs had mentioned in the affidavit he signed in support of the initial order that the lenders had agreed to extend their financing, but that Indalex would be in need of authorization in order to secure financing to continue its operations. However, the initial order had not yet been served on the Plan Members as of April 8. Short notice of the motion was given to the USW rather than to all the individual Plan Members, but the USW did not appear. The Plan Members were quite simply not represented on the motion to amend the initial stay order requesting authorization to grant the DIP charge.

73 In seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the *CCAA* court to override the Plan Members' priority. This was a case in which Indalex's directors permitted the corporation's best interests to be put ahead of those of the Plan Members. The directors may have fulfilled their fiduciary duty to Indalex, but they placed Indalex in the position of failing to fulfil its obligations as plan administrator. The corporation's interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator's duty to the Plan Members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator's duty to the Plan Members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the Plan Members. Because Indalex supported the motion asking that a priority be granted to its lender, it could not at the same time argue for a priority based on the deemed trust.

74 The Court of Appeal found a number of other breaches. I agree with Cromwell J. that none of the subsequent proceedings had a negative impact on the Plan Members' rights. The events that occurred, in particular the second DIP financing motion and the sale process, were predictable and, in a way, typical of reorganizations. Notice was given in all cases. The Plan Members were represented by able counsel. More importantly, the court ordered that funds be reserved and that a full hearing be held to argue the issues.

75 The Monitor and George Miller, Indalex U.S.'s trustee in bankruptcy, argue that the Plan Members should have appealed the Amended Initial Order authorizing the DIP charge, and were precluded from subsequently arguing that their claim ranked in priority to that of the DIP lenders. They take the position that the collateral attack doctrine bars the Plan Members from challenging the DIP financing order. This argument is not convincing. The Plan Members did not receive notice of the motion to approve the DIP financing. Counsel for the Executive Plan's members presented the argument of that plan's members at the first opportunity and repeated it each time he had an occasion to do so. The only time he withdrew their opposition was at the hearing of the motion for authorization to increase the DIP loan amount after being told that the only purpose of the motion was to increase the amount of the authorized loan. The *CCAA* judge set a hearing date for the very purpose of presenting the arguments that Indalex, as plan administrator, could have presented when it requested the amendment to the initial order. It cannot now be argued, therefore, that the Plan Members are barred from defending their interests by the collateral attack doctrine.

D. *Would an Equitable Remedy Be Appropriate in the Circumstances?*

76 The definition of "secured creditor" in s. 2 of the *CCAA* includes a trust in respect of the debtor's property. The Amended Initial Order (at para. 45) provided that the DIP lenders' claims ranked in priority to all trusts, "statutory or otherwise". Indalex U.S. was subrogated to the DIP lenders' claim by operation of the guarantee in the DIP lending agreement.

77 Counsel for the Executive Plan's members argues that the doctrine of equitable subordination should apply to subordinate Indalex U.S.'s subrogated claim to those of the Plan Members. This Court discussed the doctrine of equitable subordination in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558, but did not endorse it, leaving it for future determination (p. 609). I do not need to endorse it here either. Suffice to say that there is no evidence that the lenders committed a wrong or that they engaged in inequitable conduct, and no party has contested the validity of Indalex U.S.'s payment of the US$10 million shortfall.

78 This leaves the constructive trust remedy ordered by the Court of Appeal. It is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property. I agree with my colleague Cromwell J. that this condition is not met in the case at bar. I adopt his reasoning on this issue.

79 Moreover, I am of the view that it was unreasonable for the Court of Appeal to reorder the priorities in this case. The breach of fiduciary duty identified in this case is, in substance, the lack of

notice. Since the Plan Members were allowed to fully argue their case at a hearing specifically held to adjudicate their rights, the *CCAA* court was in a position to fully appreciate the parties' positions.

80 It is difficult to see what gains the Plan Members would have secured had they received notice of the motion that resulted in the Amended Initial Order. The *CCAA* judge made it clear, and his finding is supported by logic, that there was no alternative to the DIP loan that would allow for the sale of the assets on a going-concern basis. The Plan Members presented no evidence to the contrary. They rely on conjecture alone. The Plan Members invoke other cases in which notice was given to plan members and in which the members were able to fully argue their positions. However, in none of those cases were plan members able to secure any additional benefits. Furthermore, the Plan Members were allowed to fully argue their case. As a result, even though Indalex breached its fiduciary duty to notify the Plan Members of the motion that resulted in the Amended Initial Order, their claim remains subordinate to that of Indalex U.S.

IV. Conclusion

81 There are good reasons for giving special protection to members of pension plans in insolvency proceedings. Parliament considered doing so before enacting the most recent amendments to the *CCAA*, but chose not to (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, in force September 18, 2009, SI/2009-68; see also Bill C-501, *An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection)*, 3rd Sess., 40th Parl., March 24, 2010 (subsequently amended by the Standing Committee on Industry, Science and Technology, March 1, 2011)). A report of the Standing Senate Committee on Banking, Trade and Commerce gave the following reasons for this choice:

> Although the Committee recognizes the vulnerability of current pensioners, we do not believe that changes to the BIA regarding pension claims should be made at this time. Current pensioners can also access retirement benefits from the Canada/Quebec Pension Plan, and the Old Age Security and Guaranteed Income Supplement programs, and may have private savings and Registered Retirement Savings Plans that can provide income for them in retirement. The desire expressed by some of our witnesses for greater protection for pensioners and for employees currently participating in an occupational pension plan must be balanced against the interests of others. As we noted earlier, insolvency - at its essence - is characterized by insufficient assets to satisfy everyone, and choices must be made.
>
> The Committee believes that granting the pension protection sought by some of the witnesses would be sufficiently unfair to other stakeholders that we cannot recommend the changes requested. For example, we feel that super

priority status could unnecessarily reduce the moneys available for distribution to creditors. In turn, credit availability and the cost of credit could be negatively affected, and all those seeking credit in Canada would be disadvantaged.

Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act (2003), at p. 98; see also p. 88.)

82 In an insolvency process, a *CCAA* court must consider the employer's fiduciary obligations to plan members as their plan administrator. It must grant a remedy where appropriate. However, courts should not use equity to do what they wish Parliament had done through legislation.

83 In view of the fact that the Plan Members were successful on the deemed trust and fiduciary duty issues, I would not order costs against them either in the Court of Appeal or in this Court.

84 I would therefore allow the main appeals without costs in this Court, set aside the orders made by the Court of Appeal, except with respect to orders contained in paras. 9 and 10 of the judgment of the Court of Appeal in the former executive members' appeal and restore the orders of Campbell J. dated February 18, 2010. I would dismiss USW's costs appeal without costs.

The reasons of McLachlin C.J. and Rothstein and Cromwell JJ. were delivered by

CROMWELL J. (Concurring in Result):--

I. Introduction

85 When a business becomes insolvent, many interests are at risk. Creditors may not be able to recover their debts, investors may lose their investments and employees may lose their jobs. If the business is the sponsor of an employee pension plan, the benefits promised by the plan are not immune from that risk. The circumstances leading to these appeals show how that risk can materialize. Pension plans and creditors find themselves in a zero-sum game with not enough money to go around. At a very general level, this case raises the issue of how the law balances the interests of pension plan beneficiaries with those of other creditors.

[para86 Indalex Limited, the sponsor and administrator of employee pension plans, became insolvent and sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Although all current contributions were up to date, the company's pension plans did not have sufficient assets to fulfill the pension promises made to their members. In a series of court-sanctioned steps, which were judged to be in the best interests of all stakeholders, the company borrowed a great deal of money to allow it to continue to operate. The parties injecting the operating money were given a super priority over the claims by other creditors.

When the business was sold, thereby preserving hundreds of jobs, there was a shortfall between the sale proceeds and the debt. The pension plan beneficiaries thus found themselves in a dispute about the priority of their claims. The appellant, Sun Indalex Finance LLC, claimed it had priority by virtue of the super priority granted in the *CCAA* proceedings. The trustee in bankruptcy of the U.S. Debtors (George Miller) and the Monitor (FTI Consulting) joined in the appeal. The plan beneficiaries claimed that they had priority by virtue of a statutory deemed trust under the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and a constructive trust arising from the company's alleged breaches of fiduciary duty.

[para87 The Ontario Court of Appeal sided with the plan beneficiaries and Sun Indalex, the trustee in bankruptcy and the Monitor all appeal. The specific legal points in issue are:

A. Did the Court of Appeal err in finding that the statutory deemed trust provided for in s. 57(4) of the *PBA* applied to the salaried plan's wind-up deficiency?

B. Did the Court of Appeal err in finding that Indalex breached the fiduciary duties it owed to the pension plan beneficiaries as the plans' administrator and in imposing a constructive trust as a remedy?

C. Did the Court of Appeal err in concluding that the super priority granted in the *CCAA* proceedings did not have priority by virtue of the doctrine of federal paramountcy?

D. Did the Court of Appeal err in its cost endorsement respecting the United Steelworkers ("USW")?

[para88 My view is that the deemed trust does not apply to the disputed funds, and even if it did, the super priority would override it. I conclude that the corporation failed in its duty to the plan beneficiaries as their administrator and that the beneficiaries ought to have been afforded more procedural protections in the *CCAA* proceedings. However, I also conclude that the Court of Appeal erred in using the equitable remedy of a constructive trust to defeat the super priority ordered by the *CCAA* judge. I would therefore allow the main appeals.

II. Facts and Proceedings Below

A. *Overview*

[para89 These appeals concern claims by pension fund members for amounts owed to them by the plans' sponsor and administrator which became insolvent.

90 Indalex Limited is the parent company of three non-operating Canadian companies. I will refer to both Indalex Limited individually and to the group of companies collectively as "Indalex", unless the context requires further clarity. Indalex Limited is the wholly owned subsidiary of its U.S. parent, Indalex Holding Corp. which owned and conducted related operations in the U.S. through its U.S. subsidiaries which I will refer to as the "U.S. debtors".

91 In late March and early April of 2009, Indalex and the U.S. debtors were insolvent and sought protection from their creditors, the former under the Canadian *CCAA*, and the latter under the United States Bankruptcy Code, 11 U.S.C., Chapter 11. The dispute giving rise to these appeals concern the priority granted to lenders in the *CCAA* process for funds advanced to Indalex and whether that priority overrides the claims of two of Indalex's pension plans for funds owed to them.

92 Indalex was the sponsor and administrator of two registered pension plans relevant to these proceedings, one for salaried employees and the other for executive employees. At the time of seeking *CCAA* protection, the salaried plan was being wound up (with a wind-up date of December 31, 2006) and was estimated to have a wind-up deficiency (as of the end of 2007) of roughly $2.252 million. The executive plan, while it was not being wound up, had been closed to new members since 2005. It was estimated to have a deficiency of roughly $2.996 million on wind up. At the time the *CCAA* proceedings were started, all regular current service contributions had been made to both plans.

93 Shortly after Indalex received *CCAA* protection, the *CCAA* judge authorized the company to enter into debtor in possession ("DIP") financing in order to allow it to continue to operate. The court granted the DIP lenders, a syndicate of banks, a "super priority" over "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise": initial order, at para. 35 (joint A.R., vol. I, at pp. 123-24). Repayment of these amounts was guaranteed by the U.S. debtors.

94 Ultimately, with the approval of the *CCAA* court, Indalex sold its business; the purchaser did not assume pension liabilities. A reserve fund was established by the *CCAA* Monitor to answer any outstanding claims. The proceeds of the sale were not sufficient to pay back the DIP lenders and so the U.S. debtors, as guarantors, paid the shortfall and stepped into the shoes of the DIP lenders in terms of priority.

95 The appellant Sun Indalex is a pre-*CCAA* secured creditor of both Indalex and the U.S. debtors. It claims the reserve fund on the basis that the US$10.75 million paid by the guarantors would otherwise have been available to Sun Indalex as a secured creditor of the U.S. debtors in the U.S. bankruptcy proceedings. The respondent plan beneficiaries claim the reserve fund on the basis that they have a wind-up deficiency which is covered by a deemed trust created by s. 57(4) of the *PBA*. This deemed trust includes "an amount of money equal to employer contributions <u>accrued to the date of the wind up but not yet due</u> under the plan or regulations" (s. 57(4)). They also claim the reserve fund on the basis of a constructive trust arising from Indalex's failure to live up to its fiduciary duties as plan administrator.

96 The reserve fund is not sufficient to pay back both Sun Indalex and the pension plans and so the main question on the main appeals is which of the creditors is entitled to priority for their respective claims.

97 The judge at first instance rejected the plan beneficiaries' deemed trust arguments and held that, with respect to the wind-up deficiency, the plan beneficiaries were unsecured creditors, ranking behind those benefitting from the "super priority" and secured creditors (2010 ONSC 1114, 79 C.C.P.B. 301). The Court of Appeal reversed this ruling and held that pension plan deficiencies were subject to deemed and constructive trusts which had priority over the DIP financing and over other secured creditors (2011 ONCA 265, 104 O.R. (3d) 641). Sun Indalex, the trustee in bankruptcy and the Monitor appeal.

B. *Indalex's CCAA Proceedings*

(1) The Initial Order (Joint A.R., vol. I, at p. 112)

98 As noted earlier, Indalex was in financial trouble and, on April 3, 2009, sought and obtained protection from its creditors under the *CCAA*. The order (which I will refer to as the initial order) also contained directions for service on creditors and others: paras. 39-41. The order also contained a so-called "comeback clause" allowing any interested party to apply for a variation of the order, provided that that party served notice on any other party likely to be affected by any such variation: para. 46. It is common ground that the plan beneficiaries did not receive notice of the application for the initial order but the *CCAA* court nevertheless approved the method of and time for service. Full particulars of the deficiencies in the pension plans were before the court in the motion material and the initial order addressed payment of the employer's current service pension contributions.

(2) The DIP Order (Joint A.R., vol. I, at p. 129)

99 On April 8, 2009, in what I will refer to as the DIP order, the *CCAA* judge, Morawetz J., authorized Indalex to borrow funds pursuant to a DIP credit agreement. The judge ordered among many other things, the following:

- He approved abridged notice: para. 1;

- He allowed Indalex to continue making current service contributions to the pension plans, but not special payments: paras. 7(a) and 9(b);

- He barred all proceedings against Indalex, except by consent of Indalex and the Monitor or leave of the court, until May 1, 2009: para. 15;

- He granted the DIP lenders a so-called super priority:

> THIS COURT ORDERS that each of the Administration Charge, the Directors' Charge and the DIP Lenders Charge (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trust, liens, charges and encumbrances, statutory or otherwise (collectively, "Encumbrances") in favour of any Person. [Emphasis added; para. 45.]

- He required Indalex to send notice of the order to all known creditors, other than employees and creditors to which Indalex owed less than $5,000 and stated that Indalex and the Monitor were "at liberty" to serve the Initial Order to interested parties: paras. 49-50.

100 In his endorsement for the DIP order, Morawetz J. found that "there is no other alternative available to the Applicants [Indalex] for a going concern solution" and that DIP financing was necessary: (2009), 52 C.B.R. (5th) 61 (Ont. S.C.J.), at para. 9(c). He noted that the Monitor in its report was of the view that approval of the DIP agreement was both necessary and in the best interests of Indalex and its stakeholders, including its creditors, employees, suppliers and customers: paras. 14-16.

101 The USW, which represented some of the members of the salaried plan, was served with notice of the motion that led to the DIP order, but did not appear. Morawetz J. specifically ordered as follows with regard to service:

> THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged so that this Application is properly returnable today and hereby dispenses with further service thereof. [DIP order, at para. 1]

(3) The DIP Extension Order (Joint A.R., vol. I, at p. 156)

102 On June 12, 2009, Morawetz J. heard and granted an application by Indalex to allow them to borrow approximately $5 million more from the DIP lenders, thus raising the allowed total to US$29.5 million.

103 Counsel for the former executives received the motion material the night before. Counsel for USW was also served with notice. At the motion, the former executives (along with second priority secured noteholders) sought to "reserve their rights with respect to the relief sought": 2009 CanLII 37906 (Ont. S.C.J.), at para. 4. Morawetz J. wrote that any "reservation of rights" would create

uncertainty for the DIP lenders with regard to priority, and may prevent them from extending further advances. Moreover, the parties had presented no alternative to increased DIP financing, which was both "necessary and appropriate" and would, it was to be hoped, "improve the position of the stakeholders": paras. 5-9.

(4) The Bidding Order ((2009), 79 C.C.P.B. 101 (Ont. S.C.J.))

104 On July 2, 2009, Indalex brought a motion for approval of proposed bidding procedures for Indalex's assets. Morawetz J. decided that a stalking horse bid by SAPA Holding AB ("SAPA") for Indalex's assets could count as a qualifying bid. Counsel on behalf of the members of the executive plan appeared, with the concern that "their position and views have not been considered in this process": para. 8. In his decision, Morawetz J. decided that these arguments could be dealt with later, at a sale approval motion: para. 10. The judge said:

> The position facing the retirees is unfortunate. The retirees are currently not receiving what they bargained for. However, reality cannot be ignored and the nature of the Applicants' insolvency is such that there are insufficient assets to meet its liabilities. The retirees are not alone in this respect. The objective of these proceedings is to achieve the best possible outcome for the stakeholders. [Emphasis added; para. 9.]

(5) The Sale Approval Order (Joint A.R., vol. I, at p. 166)

105 On July 20, 2009, Indalex brought two motions before Campbell J.

106 The first motion sought approval for the sale of Indalex's assets as a going concern to SAPA. SAPA was not to assume any pension liabilities. Campbell J. granted an order approving this sale.

107 The second motion sought approval for an interim distribution of the sale proceeds to the DIP lenders. Counsel on behalf of the executive plan members and the USW, representing some of the salaried employees, objected to the planned distribution of the sale proceeds on grounds that a statutory deemed trust applied to the deficiencies in their plans and that Indalex had breached fiduciary duties that it owed to them. Campbell J. ordered the Monitor to pay the DIP agent from the sale proceeds, but also ordered the Monitor to set up a reserve fund in an amount sufficient to answer, among other things, the claims of the plan beneficiaries pending resolution of those matters. Campbell J. ordered that the U.S. debtors be subrogated to the DIP lenders to the extent that the U.S. debtors were required under the guarantee to satisfy the DIP lenders' claims: para. 14.

(6) The Sale and Distribution of Funds

108 SAPA bought Indalex's assets on July 31, 2009. Taking the reserve fund into account, the sale did not produce sufficient funds to repay the DIP lenders in full and so the U.S. debtors paid

US$10,751,247 as guarantor to the DIP lenders: C.A. reasons, at para. 65.

(7) The Order Under Appeal

109 On August 28, 2009, Campbell J. heard claims by the USW (appearing on behalf of some members of the salaried plan) and counsel appearing on behalf of the executive plan members that the wind-up deficiency was subject to a deemed trust. He rejected these claims in a written decision on February 18, 2010. He decided that the s. 57(4) *PBA* deemed trust did not apply to wind-up deficiencies. The executive plan had not been wound up, and therefore there was no wind-up deficiency to be the subject of the deemed trust. As for the salaried plan, Campbell J. held that the wind-up deficiency was not an obligation that had "accrued to the date of the wind up" and as a result did not fall within the terms of the s. 57(4) deemed trust.

110 Indalex had asked for the stay granted under the initial order to be lifted so that it could assign itself into bankruptcy. Because he did not find a deemed trust, Campbell J. did not feel that he needed to decide on the motion to lift the stay.

(8) The Decision of the Ontario Court of Appeal

111 The Ontario Court of Appeal allowed an appeal from the decision of Campbell J.

112 Writing for a unanimous panel, Gillese J.A. decided that the s. 57(4) deemed trust is applicable to wind-up deficiencies. She took the view that s. 57(4)'s reference to "employer contributions accrued to the date of the wind up but not yet due" included all amounts that the employer owed on the wind-up of its pension plan: para. 101. In particular, she concluded that the deemed trust applied to the wind-up deficiency in the salaried plan. Gillese J.A. declined, however, to decide whether the deemed trust also applied to deficiencies in the executive plan, which had not been wound up by the relevant date: paras. 110-12. A decision on this latter point was unnecessary given her finding on the applicability of a constructive trust in this case.

113 Gillese J.A. found that the super priority provided for in the DIP order did not trump the deemed trust over the salaried plan's wind-up deficiency. Morawetz J. had not "invoked" the issue of paramountcy or made an explicit finding that the requirements of federal law required that the provincially created deemed trust must be overridden: paras. 178-79. Gillese J.A. also took the view that this Court's decision in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, did not mean that provincially created priorities that would be ineffective under the *Bankruptcy and Insolvency* Act, R.S.C. 1985, c. B-3 ("BIA"), were also ineffective under the *CCAA*: paras. 185-96. The deemed trust therefore ranked ahead of the DIP security.

114 In addition to her findings regarding deemed trusts, Gillese J.A. granted the plan beneficiaries a constructive trust over the amount of the reserve fund on the ground that Indalex, as pension plan administrator, had breached fiduciary duties that it owed to the plan beneficiaries during the *CCAA* proceedings.

115 She held that as a plan administrator who was also an employer, Indalex had fiduciary duties both to the plan beneficiaries and to the corporation: para. 129. In her view, Indalex was subject to both sets of duties throughout the *CCAA* proceedings and it had breached its duties to the plan beneficiaries in several ways. While Indalex had the right to initiate *CCAA* proceedings, this action made the plan beneficiaries vulnerable and therefore triggered its fiduciary obligations as plan administrator: paras. 132-33. Gillese J.A. enumerated the many ways in which she thought Indalex subsequently failed as plan administrator: it did nothing in the *CCAA* proceedings to fund the deficit in the underfunded plans; it applied for *CCAA* protection without notice to the beneficiaries; it obtained DIP financing on the condition that DIP lenders be granted a super priority over "statutory trusts"; it obtained this financing without notice to the plan beneficiaries; it sold its assets knowing the purchaser was not taking over the plans; and it attempted to enter into voluntary bankruptcy, which would defeat any deemed trust claims the beneficiaries might have asserted: para. 139. Gillese J.A. also noted that throughout the *CCAA* proceedings Indalex was in a conflict of interest because it was acting for both the corporation and the beneficiaries.

116 Indalex's failure to live up to its fiduciary duties meant that the plan beneficiaries were entitled to a constructive trust over the amount of the reserve fund: para. 204. Since the beneficiaries had been wronged by Indalex, and the U.S. debtors were not, with respect to Indalex, an "arm's length innocent third party" the appropriate response was to grant the beneficiaries a constructive trust: para. 204. Her conclusion on this point applied equally to the salaried and executive plans.

III. Analysis

A. *First Issue: Did the Court of Appeal Err in Finding That the Deemed Statutory Trust Provided for in Section 57(4) of the PBA Applied to the Salaried Plan's Wind-up Deficiency?*

(1) Introduction

117 The main issue addressed here concerns whether the statutory deemed trust provided for in s. 57(4) of the *PBA* applies to wind-up deficiencies, the payment of which is provided for in s. 75(1)(b).

118 The deemed trust created by s. 57(4) applies to "employer contributions accrued to the date of the wind-up but not yet due under the plan or regulations". Thus, to be subject to the deemed trust, the pension plan must be wound up and the amounts in question must meet three requirements. They must be (1) "employer contributions", (2) "accrued to the date of the wind-up" and (3) "not yet due". A wind-up deficiency arises "[w]here a pension plan is wound up": s. 75(1). I agree with my colleagues that there can be no deemed trust for the executive plan, because that plan had not been wound up at the relevant date. What follows, therefore, is relevant only to the salaried plan.

119 The wind-up deficiency payments are "employer contributions" which are "not yet due" as of

the date of wind-up within the meaning of the *PBA*. The main issue before us, therefore, boils down to the narrow interpretative question of whether the wind-up deficiency described in s. 75(1)(b) is "accrued to the date of the wind-up".

120 Campbell J. at first instance found that it was not, while the Court of Appeal reached the opposite conclusion. In essence, the Court of Appeal reasoned that the deemed trust in s. 57(4) "applies to all employer contributions that are required to be made pursuant to s. 75", that is, to "all amounts owed by the employer on the wind-up of its pension plan": para. 101.

121 I respectfully disagree with the Court of Appeal's conclusion for three main reasons. First, the most plausible grammatical and ordinary sense of the words "accrued to the date of the wind up" is that the amounts referred to are precisely ascertained immediately before the effective date of the plan's wind-up. The wind-up deficiency only arises upon wind-up and it is neither ascertained nor ascertainable on the date fixed for wind-up. Second, the broader statutory context reinforces this view: the language of the deemed trusts in s. 57(3) and (4) is virtually exactly repeated in s. 75(1)(a), suggesting that both deemed trusts refer to the liability on wind-up referred to in s. 75(1)(a) and not to the further and distinct wind-up deficiency liability created under s. 75(1)(b). Finally, the legislative evolution and history of these provisions show, in my view, that the legislature never intended to include the wind-up deficiency in a statutory deemed trust.

122 Before turning to the precise interpretative issue, it will be helpful to provide some context about the employer's wind-up obligations and the deemed trust provisions that are the subject of this dispute.

(2) Employer Obligations on Wind Up

123 A "wind up" means that the plan is terminated and the plan assets are distributed: see *PBA*, s. 1(1), definition of "wind up". The employer's liability on wind-up consists of two main components. The first is provided for in s. 75(1)(a) and includes "an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund". This liability applies to contributions that were due as at the wind-up date but does *not* include payments required by s. 75(1)(b) that arise as a result of the wind up: A. N. Kaplan, *Pension Law* (2006), at pp. 541-42. This second liability is known as the wind-up deficiency amount. The employer must pay all additional sums to the extent that the assets of the pension fund are insufficient to cover the value of all immediately vested and accelerated benefits and grow-in benefits: Kaplan, at p. 542. Without going into detail, there are certain statutory benefits that may arise only on wind-up, such as certain benefit enhancements and the potential for acceleration of pension entitlements. Thus, wind-up will usually result in additional employer liabilities over and above those arising from the obligation to pay all benefits provided for in the plan itself: see, e.g., ss. 73 and 74; Kaplan, at p. 542. As the Court of Appeal concluded, the payments provided for under s. 75(1)(a) are those which the employer had to make while the plan was ongoing, while s. 75(1)(b) refers to the employer's obligation to make up for any wind-up

deficiency: paras. 90-91.

124 For convenience, the provision as it then stood is set out here.

> **75.** (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,
>
> (a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and
> (b) an amount equal to the amount by which,
>
> (i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,
> (ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and
> (iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,
>
> exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

125 While a wind up is effective as of a fixed date, a wind up is nonetheless best thought of not simply as a moment or a single event, but as a process. It begins by a triggering event and continues until all of the plan assets have been distributed. To oversimplify somewhat, the wind-up process involves the following components.

126 The assets and liabilities of the plan as of the wind-up date must be determined. As noted earlier, the precise extent of the liability, while *fixed as of that date*, will not be ascertained or ascertainable *on that date*. The extent of the liability may depend on choices open to plan beneficiaries under the plan and on the exercise by them of certain statutory rights beyond the options that would otherwise have been available under the plan itself. The plan members must be notified of the wind-up and have their entitlements and options set out for them and given an opportunity to make their choices. The plan administrator must file a wind-up report which includes a statement of the plan's assets and liabilities, the benefits payable under the terms of the plan, and the method of allocating and distributing the assets including the priorities for the payment of benefits: *PBA*, s. 70(1), and R.R.O. 1990, Reg. 909, s. 29 (the "*PBA* Regulations").

127 Benefits to members may take the form of "cash refunds, immediate or deferred annuities, transfers to registered retirement saving plans, [etc.] ... In principle, the value of these benefits is the present value of the benefits accrued to the date of plan termination": The *Mercer Pension Manual* (loose-leaf), vol. 1, at p. 10-41. That present value is an actuarial calculation performed on the basis of various assumptions including assumptions about investment return, mortality and so forth.

128 If, when the assets and liabilities are calculated, the assets are insufficient to satisfy the liabilities, the employer (i.e. the plan sponsor) must make up for any wind-up deficiency: *PBA*, s. 75(1)(b). An employer can elect to space these payments out over the course of five years: *PBA* Regulations, s. 31(2). Because these payments are based on the extent to which there is a deficit between assets in the pension plan and the benefits owed to beneficiaries, their amount varies with the market and other assumed elements of the calculation over the course of the permitted five years.

129 To take the salaried plan as an example, at the time of wind-up, all regular current service contributions had been made: C.A. reasons, at para. 33. The wind-up deficiency was initially estimated to be $1,655,200. Indalex made special wind-up payments of $709,013 in 2007 and $875,313 in 2008, but as of December 31, 2008, the wind-up deficiency was $1,795,600 -- i.e. higher than it had been two years before, notwithstanding that payments of roughly $1.6 million had been made: C.A. reasons, at para. 32. Indalex made another payment of $601,000 in April 2009: C.A. reasons, at para. 32.

(3) The Deemed Trust Provisions

130 The *PBA* contains provisions whose purpose is to exempt money owing to a pension plan, and which is held or owing by the employer, from being seized or attached by the employer's other creditors: Kaplan, at p. 395. This is accomplished by creating a "deemed trust" with respect to certain pension contributions such that these amounts are held by the employer in trust for the employees or pension beneficiaries.

131 There are two deemed trusts that we must examine here, one relating to employer contributions that are *due but have not been paid* and another relating to employer contributions *accrued but not due*. This second deemed trust is the one in issue here, but it is important to understand how the two fit together.

132 The deemed trust relating to employer contributions "due and not paid" is found in s. 57(3). The *PBA* and *PBA* regulations contain many provisions relating to contributions required by employers, the due dates for which are specified. Briefly, the required contributions are these.

133 When a pension is ongoing, employers need to make regular current service cost contributions. These are made monthly, within 30 days after the month to which they relate: *PBA* Regulations, s. 4(4)3. There are also special payments, which relate to deficiencies between a pension plan's assets and liabilities. There are "going-concern" deficiencies and "solvency"

deficiencies, the distinction between which is unimportant for the purposes of these appeals. A plan administrator must regularly file actuarial reports, which may disclose deficiencies: *PBA* Regulations, s. 14. Where there is a going-concern deficiency the employer must make equal monthly payments over a 15-year period to rectify it: *PBA* Regulations, s. 5(1)(b). Where there is a solvency deficiency, the employer must make equal monthly payments over a five-year period to rectify it: *PBA* Regulations, s. 5(1)(e). Once these regular or special payments become due but have not been paid, they are subject to the s. 57(3) deemed trust.

134 I turn next to the s. 57(4) deemed trust, which gives rise to the question before us. The subsection provides that "[w]here a pension plan is wound up ... an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan <u>an amount of money equal to employer contributions accrued to the date of the wind up but not yet due</u> under the plan or regulations."

135 When a pension plan is wound up there will be an interrupted monthly payment period, which is sometimes referred to as the stub period. During this stub period regular and special liabilities will have accrued but not yet become due. Section 58(1) provides that money that an employer is required to pay "accrues on a daily basis". Because the amounts referred to in s. 57(4) are not yet due, they are not covered by the s. 57(3) deemed trust, which applies only to payments that are *due*. The two provisions, then, operate in tandem to create a trust over an employer's unfulfilled obligations, which are "due and not paid" as well as those which have "accrued to the date of the wind up but [are] not yet due".

(4) <u>The Interpretative Approach</u>

136 The issue we confront is one of statutory interpretation and the well-settled approach is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26. Taking this approach it is clear to me that the sponsor's obligation to pay a wind-up deficiency is not covered by the statutory deemed trust provided for in s. 57(4) of the *PBA*. In my view, the deficiency neither "accrued", nor did it arise within the period referred to by the words "to the date of the wind up".

(a) *Grammatical and Ordinary Sense of the Words "Accrued" and "to the Date of the Wind Up"*

137 The Court of Appeal failed to take sufficient account of the ordinary and grammatical meaning of the text of the provisions. It held that "the deemed trust in s. 57(4) applies <u>to all employer contributions that are required to be made pursuant to s. 75</u>": para. 101 (emphasis added). However, the plain words of the section show that this conclusion is erroneous. Section 75(1)(a) refers to liability for employer contributions that "<u>are due</u> ... and that have not been paid". These amounts are thus *not* included in the s. 57(4) deemed trust, because it addresses only amounts that

have "accrued to the date of the wind up but [are] not yet due". Amounts "due" are covered by the s. 57(3) deemed trust and not, as the Court of Appeal concluded by the deemed trust created by s. 57(4). The Court of Appeal therefore erred in finding, in effect, that amounts which "are due" could be included in a deemed trust covering amounts "not yet due".

138 In my view, the most plausible grammatical and ordinary sense of the phrase "accrued to the date of the wind up" in s. 57(4) is that it refers to the sums that are ascertained immediately before the effective wind-up date of the plan.

139 In the context of s. 57(4), the grammatical and ordinary sense of the term "accrued" is that the amount of the obligation is "fully constituted" and "ascertained" although it may not yet be payable. The amount of the wind-up deficiency is not fully constituted or ascertained (or even ascertainable) before or even on the date fixed for wind up and therefore cannot fall under s. 57(4).

140 Of course, the meaning of the word "accrued" may vary with context. In general, when the term "accrued" is used in relation to legal rights, its common meaning is that the right has become fully constituted even though the monetary implications of its enforcement are not yet known or knowable. Thus, we speak of the "accrual" of a cause of action in tort when all of the elements of the cause of action come into existence, even though the extent of the damage may well not be known or knowable at that time: see, e.g., *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53. However, when the term is used in relation to a sum of money, it will generally refer to an amount that is at the present time either quantified or exactly quantifiable but which may or may not be due.

141 In some contexts, a liability is said to accrue when it becomes due. An accrued liability is said to be "properly chargeable" or "owing on a given day" or "completely constituted": see, e.g., *Black's Law Dictionary* (9th ed. 2009), at p. 997, "accrued liability"; D.A. Dukelow, *The Dictionary of Canadian Law* (4th ed. 2011), at p. 13, "accrued liability"; *Hydro-Electric Power Commission of Ontario v. Albright* (1922), 64 S.C.R. 306.

142 In other contexts, an amount which has accrued may not yet be due. For example, we speak of "accrued interest" meaning a precise, quantified amount of interest that has been earned but may not yet be payable. The term "accrual" is used in the same way in "accrual accounting". In accrual method accounting, "transactions that give rise to revenue or costs are recognized in the accounts when they are earned and incurred respectively": B. J. Arnold, *Timing and Income Taxation: The Principles of Income Measurement for Tax Purposes* (1983), at p. 44. Revenue is earned when the recipient "substantially completes performance of everything he or she is required to do as long as the amount due is ascertainable and there is no uncertainty about its collection": P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (7th ed., 2010), at s. 6.5(b); see also Canadian Institute of Chartered Accountants, *CICA Handbook - Accounting*, Part II, s. 1000, at paras. 41-44. In this context, the amount must be ascertained at the time of accrual.

143 The *Hydro-Electric Power Commission* case offers a helpful definition of the word "accrued" in this sense. On a sale of shares, the vendor undertook to provide on completion "a sum estimated

by him to be equal to sinking fund payments [on the bonds and debentures] which shall have accrued but shall not be due at the time for completion": p. 344 (emphasis added). The bonds and debentures required the company to pay on July 1 of each year a fixed sum for each electrical horsepower sold and paid for during the preceding calendar year. A dispute arose as to what amounts were payable in this respect on completion. Duff J. held that in this context accrued meant "completely constituted", referring to this as a "well recognized usage": p. 312. He went on:

> Where ... a lump sum is made payable on a specified date and where, having regard to the purposes of the payment or to the terms of the instrument, this sum must be considered to be made up of an accumulation of sums in respect of which the right to receive payment is completely constituted before the date fixed for payment, then it is quite within the settled usage of lawyers to describe each of such accumulated parts as a sum accrued or accrued due before the date of payment: p. 316.

Thus, at every point at which a liability to pay a fixed sum arose under the terms of the contract, that liability accrued. It was fully constituted even though not yet due because the obligation to make the payment was in the future. In reaching this conclusion, Duff J. noted that the bonds and debentures used the word "accrued" in contrast to "due" and that this strengthened the interpretation of "accrued" as an obligation fully constituted but not yet payable. Similarly in s. 57(4), the word "accrued" is used in contrast to the word "due".

144 Given my understanding of the ordinary meaning of the word "accrued", I must respectfully disagree with my colleague, Justice Deschamps' position that the wind-up deficiency can be said to have "accrued" to the date of wind up. In her view, "[s]ince the employees cease to accumulate entitlements when the plan is wound up, the entitlements that are used to calculate the contributions have all been accumulated before the wind-up date" (para. 34) and "no new liabilities accrue at the time of or after the wind up" (para. 36). My colleague maintains that "[t]he fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes" (para. 37 referring to *Canadian Pacific Ltd. v. M.N.R.* (1998), 41 O.R. (3d) 606 (C.A.)).

145 I cannot agree that no new liability accrues on or after the wind up. As discussed in more detail earlier, the wind-up deficiency in s. 75(1)(b) is made up of the difference between the plan's assets and liabilities calculated as of the date of wind up. On wind up, the *PBA* accords statutory entitlements and protections to employees that would not otherwise be available: Kaplan, at p. 532. Wind up therefore gives rise to new liabilities. In particular, on wind up, and only on wind up, plan beneficiaries are entitled, under s. 74, to make elections regarding the payment of their benefits. The plan's liabilities cannot be determined until those elections are made. Contrary to what my colleague Justice Deschamps suggests, the extent of the wind-up deficiency depends on employee rights that arise only upon wind up and with respect to which employees make elections only after wind up.

146 Moreover, the wind-up deficiency will vary after wind up because the amount of money necessary to provide for the payment of the plan sponsor's liabilities will vary with the market. Section 31 of the *PBA* Regulations allows s. 75 payments to be spaced out over the course of five years. As we have seen, the amount of the wind-up deficiency will fluctuate over this period (I set out earlier how this amount in fact fluctuated markedly in the case of the salaried plan in issue here). Thus, while estimates are periodically made and reported after the wind up to determine how much the employer needs to pay, the precise amount of the wind-up deficiency is not ascertained or ascertainable on the date of the wind up.

147 I turn next to the ordinary and grammatical sense of the words "to the date of the wind up" in s. 57(4). In my view, these words indicate that only those contributions that accrue before the date of wind up, and not those amounts the liability for which arises only on the day of wind up -- that is, the wind-up deficiency -- are included.

148 Where the legislature intends to include the date of wind up, it has used suitable language to effect that purpose. For example, the English version of a provision amending the *PBA* in 2010 (c. 24, s. 21(2)), s. 68(2)(c), indicates which trade unions are entitled to notice of the wind up:

> (2) If the employer or the administrator, as the case may be, intends to wind up the pension plan, the administrator shall give written notice of the intended wind up to,
>
> ...
>
> (c) each trade union that represents members of the pension plan or that, on the date of the wind up, represented the members, former members or retired members of the pension plan;

In contrast to the phrase "to the date of wind up", "on the date of wind up" clearly includes the date of wind up. (The French version does not indicate a different intention.) Similarly, s. 70(6), which formed part of the *PBA* until 2012 (rep. S.0. 2010, c. 9, s. 52(5)), read as follows:

> (6) On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.

The words "on the effective date of the partial wind up" indicate that the members are entitled to those benefits from the date of the partial wind up, in the sense that members can claim their benefits beginning on the date of the wind up itself. This is how the legislature expresses itself when it wants to speak of a period of time including a specific date. By comparison, "to the date of the wind up" is devoid of language that would include the actual date of wind up. This conclusion is further supported by the structure of the *PBA* and its legislative history and evolution, to which I

will turn shortly.

149 To sum up with respect to the ordinary and grammatical meaning of the phrase "accrued to the date of the wind up", the most plausible ordinary and grammatical meaning is that such amounts are fully constituted and precisely ascertained immediately before the date fixed as the date of wind up. Thus, according to the ordinary and grammatical meaning of the words, the wind-up deficiency obligation set out in s. 75(1)(b) has not "accrued to the date of the wind up" as required by s. 57(4). Moreover, the liability for the wind-up deficiency arises where a pension plan is wound up (s. 75(1)(b)) and so it cannot be a liability that "accrued to the date of the wind up" (s. 57(4)).

(b) *The Scheme of the Act*

150 As discussed earlier, s. 57 establishes deemed trusts over funds which must be contributed to a pension plan, including the one in s. 57(4), which is at issue here. It is helpful to consider these deemed trusts in the context of the obligations to pay funds which give rise to them. Specifically, the relationship between the deemed trust provisions in s. 57(3) and (4), on one hand, and s. 75(1), which sets out liabilities on wind up on the other. According to my colleague Justice Deschamps, s. 75(1) "elegantly parallels the wind-up deemed trust provision" (para. 42) such that the deemed trusts must include the wind-up deficiency. I disagree. In my view, the deemed trusts parallel only s. 75(1)(a), which does not relate to the wind-up deficiency. The correspondence between the deemed trusts and s. 75(1)(a), and the absence of any such correspondence with s. 75(1)(b), makes it clear that the wind-up deficiency is not covered by the deemed trust provisions.

151 I would recall here the difference between the deemed trusts created by s. 57(3) and (4). While a plan is ongoing, there may be payments which the employer is required to, but has failed to make. The s. 57(3) trust applies to these payments because they are "due and not paid". When a plan is wound up, however, there will be payments that are outstanding in the sense that they are fully constituted, but not yet due. This occurs with respect to the so-called stub period referred to earlier. During this stub period, regular and special liabilities will accrue on a daily basis, as provided for in s. 58(1), but may not be due at the time of wind up. While s. 57(3) cannot apply to these payments because they are not yet due, the deemed trust under s. 57(4) applies to these payments because liability for them has "accrued to the date of the wind up" and they are "not yet due".

152 The important point is how these two deemed trust provisions relate to the wind-up liabilities as described in ss. 75(1)(a) and 75(1)(b). The two paragraphs refer to sums of money that are different in kind: while s. 75(1)(a) refers to liabilities that accrue before wind up and that are created elsewhere in the Act, s. 75(1)(b) creates a completely new liability that comes into existence only once the plan is wound up. There is no dispute, as I understand it, that these two paragraphs refer to different liabilities and that it is the liability described in s. 75(1)(b) that is the wind-up deficiency in issue here. The parties do not dispute that s. 75(1)(a) does *not* include wind-up deficiency payments.

153 It is striking how closely the text of s. 75(1)(a) -- which does not relate to the wind-up deficiency -- tracks the language of the deemed trust provisions in s. 57(3) and (4). As noted, s.

57(3) deals with "employer contributions due and not paid", while s. 57(4) deals with "employer contributions accrued to the date of the wind up but not yet due." Section 75(1)(a) includes both of these types of employer contributions. It refers to "payments that ... are due ... and that have not been paid" (i.e. subject to the deemed trust under s. 57(3)) or that have "accrued and that have not been paid" (i.e. subject to the deemed trust under s. 57(4) to the extent that these payments accrued to the date of wind up). This very close tracking of the language between s. 57(3) and (4) on the one hand and s. 75(1)(a) on the other, and the absence of any correspondence between the language of these deemed trust provisions with s. 75(1)(b), suggests that the s. 57(3) and (4) deemed trusts refer to the liability described in s. 75(1)(a) and not to the wind-up deficiency created by s. 75(1)(b). It is difficult to understand why, if the intention had been for s. 57(4) to capture the wind-up deficiency liability under s. 75(1)(b), the legislature would have so closely tracked the language of s. 75(1)(a) alone in creating the deemed trusts. Thus, in my respectful view, the elegant parallel to which my colleague, Justice Deschamps refers exists only between the deemed trust and s. 75(1)(a), and not between the deemed trust and the wind-up deficiency.

154 I conclude that the scheme of the *PBA* reinforces my conclusion that the ordinary grammatical sense of the words in s. 57(4) does not extend to the wind-up deficiency provided for in s. 75(1)(b).

(c) *Legislative History and Evolution*

155 Legislative history and evolution may form an important part of the overall context within which a provision should be interpreted. Legislative evolution refers to the various formulations of the provision while legislative history refers to evidence about the provision's conception, preparation and enactment: see, e.g., *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 43.

156 Both the legislative evolution and history of the *PBA* show that it was never the legislature's intention to include the wind-up deficiency in the deemed trust. The evolution and history of the *PBA* are rather intricate and sometimes difficult to follow so I will review them briefly here before delving into a more detailed analysis.

157 The deemed trust was first introduced into the *PBA* in 1973. At that time, it covered employee contributions held by the employer and employer contributions that were due but not paid. In 1980, the *PBA* was amended so that the deemed trust was expanded to include employer contributions whether they were due or not. Also, new provisions were added allowing for employee elections and requiring additional payments by the employer where a plan was wound up. The 1980 amendments gave rise to confusion on two fronts: first, it was unclear whether the payments that were required on wind up were subject to the deemed trust; second, it was unclear whether a lien over some employer contributions covered the same amount as the deemed trust. In 1983, both these points were clarified. The sections were reworded and rearranged to make it clear that the wind-up deficiency was distinct from the amounts covered by the deemed trust, and that the

lien and the deemed trust covered the same amount. A statement by the responsible Minister in 1982 confirms that *the deemed trusts were never intended to cover the wind-up deficiency*.

158 My colleague, Justice Deschamps maintains that this history suggests an evolution in the intention of the legislature from protecting "only the service contributions that were due ... to all amounts due and accrued upon wind up" (para. 42). I respectfully disagree. In my view, the history and evolution of the *PBA* leading up to and including 1983 show that the legislature never intended to include the wind-up deficiency in the deemed trust. Moreover, legislative evolution after 1983 confirms that this intention did not change.

(i) *The Pension Benefits Amendment Act,1973*, S.O. 1973, c. 113

159 So far as I can determine, statutory deemed trusts were first introduced into the *PBA* by *The Pension Benefits Amendment Act*, *1973*, S.O. 1973, c. 113, s. 6. Those amendments created deemed trusts over two amounts: employee pension contributions received by employers (s. 23*a* (1), similar to the deemed trust in the current s. 57(1)) and employer contributions that had fallen due under the plan (s. 23*a* (3), similar to the current s. 57(3) deemed trust for employer contributions "due and not paid"). The full text of these provisions and those referred to below, up to the current version of the 1990 Act, are found in the Appendix.

(ii) *The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80

160 Ontario undertook significant pension reform leading to *The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80; see Kaplan at pp. 54-56. I will concentrate on the deemed trust provisions and how they related to the liabilities on wind up and, for ease of reference, I will refer to the sections as they were renumbered in the 1980 consolidation: R.S.O. 1980, c. 373. The 1980 legislation expanded the deemed trust relating to employer contributions. Although far from clear, the new provisions appear to have created a deemed trust and lien over the employer contributions whether otherwise payable or not and calculated as if the plan had been wound up on the relevant date.

161 It was unclear after the reforms of 1980 whether the deemed trust applied to all employer contributions that arose on wind up. According to s. 23(4), on any given date, the trust extended to an amount to be determined "as if the plan had been wound up on that date". However, the provisions of the 1980 version of the Act did not explicitly state what such a calculation would include. Under s. 21(2) of the 1980 statute, the employer was obligated to pay on wind up "all amounts that would otherwise have been required to be paid to meet the tests for solvency ... , up to the date of such termination or winding up". Under s. 32, however, the employer had to make a payment on wind up that was to be "[i]n addition" to that due under s. 21(2). Whether the legislature intended that the trust should cover this latter payment was left unclear.

162 It was also unclear whether the lien applied to a different amount than was subject to the deemed trust. According to s. 23(3), "the members have a lien upon the assets of the employer in

such amount that in the ordinary course of business would be entered into the books of account whether so entered or not". This comes in the middle of two portions of the provision which explicitly refer to the deemed trust, but it is not clear whether the legislature intended to refer to the same amount throughout the provision.

(iii) *The Pension Benefits Amendment Act, 1983*, S.O. 1983, c. 2

163 The 1983 amendments substantially clarified the scope of the deemed trust and lien for employer contributions. They make clear that neither the deemed trust nor the lien applied to the wind-up deficiency; the responsible Minister confirmed that this was the intention of the amendments.

164 The new provision was amended by s. 3 of the 1983 amendments and is found in s. 23(4) which provided:

> (4) An employer who is required by a pension plan to contribute to the pension plan shall be deemed to hold in trust for the members of the pension plan an amount of money equal to the total of,
>
> (a) all moneys that the employer is required to pay into the pension plan to meet,
>
> (i) the current service cost, and
> (ii) the special payments prescribed by the regulations,
>
> that are due under the pension plan or the regulations and have not been paid into the pension plan; and
>
> (b) where the pension plan is terminated or wound up, any other money that the employer is liable to pay under clause 21 (2) (a).

Section 21(2)(a) provides that on wind up, the employers must pay an amount equal to *the current service cost and the special payments* that "have accrued to and including the date of the termination winding up but, under the terms of the pension plan or the regulations, are not due on that date"; the provision adds that these amounts shall be deemed to accrue on a daily basis. These provisions make it clear that the s. 23(4) deemed trust applies only to the special payments and current service costs that have accrued, on a daily basis, up to and including the date of wind up. The deemed trust clearly does not extend to the wind-up deficiency.

165 The provision referring to the additional payments required on wind up also makes clear that those payments are not within the scope of the deemed trust. These additional liabilities were described by s. 32, a provision very similar to s. 75(1)(b). These amounts are first, the amount guaranteed by the Guarantee Fund and, second, the value of pension benefits vested under the plan that exceed the value of the assets of the plan. Section 32(2) specifies that these amounts *are* "in addition to the amounts that the employer is liable to pay under subsection 21(2)" (which are the payments comparable to the current s. 75(1)(a) payments) and that *only the latter* fall within the deemed trust. The inevitable conclusion is that, in 1983, the wind-up deficiency was not included in the scope of the deemed trust.

166 The 1983 amendments also clarified the scope of the lien. They indicated that the scope of the lien was identical to the scope of the deemed trust. Section 23(5) specified that the lien extended only to the amounts that were deemed to be held in trust under s. 23(4) (i.e. the *current service costs and special payments that had accrued to and including the date of the wind up but are not yet due)*.

167 This makes two things clear: that the lien covers the same amounts as the deemed trust, and that neither covers the wind-up deficiency.

168 A brief, but significant piece of legislative history seems to me to dispel any possible doubt. In speaking at first reading of the 1983 amendments, the Minister responsible, the Honourable Robert Elgie said this:

> The first group of today's amendments makes up the housekeeping changes needed for us to do what we set out to do in late 1980; that is, to guarantee pension benefits following the windup of a defined pension benefit plan. These amendments will clarify the ways in which we can attain that goal.
>
> In Bill 214 [i.e. the 1980 amendments] the employees were given a lien on the employer's assets for employee contributions to a pension plan collected by the employer, as well as accrued employer contributions... .
>
> Unfortunately, this protection has resulted in different legal interpretations on the extent of the lien. An argument has been advanced that the amount of the lien includes an employer's potential future liability on the windup of a pension plan. This was never intended and is not necessary to provide the required protection. The amendment to section 23 clarified the intent of Bill 214. [Emphasis added.]
>
> (*Legislature of Ontario Debates: Official Report (Hansard)*, No. 99, 2nd Sess., 32nd Parl., July 7, 1982, p. 3568)

The 1983 amendments made the scope of the lien correspond precisely to the scope of the deemed trust over the employer's accrued contributions. It is thus clear from this statement that it was never the legislative intention that either should apply to "an employer's potential future liability" on wind up (i.e. the wind-up deficiency). In 1983, there is therefore, in my view, virtually irrefutable evidence of legislative intent to do exactly the opposite of what the Court of Appeal held in this case had been done.

169 Subsequent legislative evolution shows no change in this legislative intent. In fact, subsequent amendments demonstrate a clear legislative intent to exclude from the deemed trust employer liabilities that arise only upon wind up of the plan.

(iv) *Pension Benefits Act,1987*, S.O. 1987, c. 35

170 Amendments to the *PBA* in 1987 resulted in it being substantially in its current form. With those amendments, the extent of the deemed trusts was further clarified. The provision in the 1983 version of the Act combined within a single subsection a deemed trust for employer contributions that were due and not paid (s. 23(4)(a)) and employer contributions that had accrued to and including the date of wind up but which were not yet due (s. 23(4)(b), referring to s. 21(2)(a)). In the 1987 amendments, these two trusts were each given their own subsection and their scope was further clarified. Moreover, after the 1987 revision, one no longer had to refer to a separate provision (formerly s. 21(2)(a)) to determine the scope of the trust covering payments that were accrued but not yet due. Thus, while the substance of the provisions did not change in 1987, their form was simplified.

171 The new s. 58(3) (which is exactly the same as the current s. 57(3)) replaced the former s. 23(4)(a). This created a trust for employer contributions due and not paid. Section 58(4) (which is exactly the same as s. 57(4) stood at the time) replaced the former s. 23(4)(b) and part of s. 21(2)(a) and created a trust that arises on wind up and covers "employer contributions accrued to the date of the wind up but not yet due".

172 The 1987 amendment also shows that the legislature adverted to the difference between "to the date of the wind up" and "to and including" the date of wind up and chose the former. This is reflected in a small but significant change in the wording of the relevant provisions. The former provision, s. 23(4)(b), by referring to s. 21(2)(a) captured current service costs and special payments that "have accrued to and including the date of the termination or winding up." The new version in s. 58(4) deletes the words "and including", putting the section in its present form. This deletion, to my way of thinking, reinforces the legislative intent to *exclude* from the deemed trust liabilities that arise only *on* the date of wind up. Respectfully, the legislative record does not support Deschamps J.'s view that there was a legislative evolution towards a more expanded deemed trust. Quite the opposite.

173 To sum up, I draw the following conclusions from this review of the legislative evolution and history. The legislation differentiates between two types of employer liability relevant to this case.

The first is the contributions required to cover current service costs and any other payments that are either due or have accrued on a daily basis up to the relevant time. These are the payments referred to in the current s. 75(1)(a), that is, payments due or accrued but not paid. The second relates to additional contributions required when a plan is wound up which I have referred to as the wind-up deficiency. These payments are addressed in s. 75(1)(b). The legislative history and evolution show that the deemed trusts under s. 57(3) and (4) were intended to apply only to the former amounts and that it was never the intention that there should be a deemed trust or a lien with respect to an employer's potential future liabilities that arise once the plan is wound up.

(d) *The Purpose of the Legislation*

174 Excluding the wind-up deficiency from the deemed trust is consistent with the broader purposes of the legislation. Pension legislation aims at important protective purposes. These protective purposes, however, are not pursued at all costs and are clearly intended to be balanced with other important interests within the context of a carefully calibrated scheme: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152, at paras. 13-14.

175 In this instance, the legislature has created trusts over contributions that were due or accrued to the date of the wind up in order to protect, to some degree, the rights of pension plan beneficiaries and employees from the claims of the employer's other creditors. However, there is also good reason to think that the legislature had in mind other competing objectives in not extending the deemed trust to the wind-up deficiency.

176 First, if there were to be a deemed trust over all employer liabilities that arise when a plan is wound up, much simpler and clearer words could readily be found to achieve that objective.

177 Second, extending the deemed trust protections to the wind-up deficiency might well be viewed as counter-productive in the greater scheme of things. A deemed trust of that nature might give rise to considerable uncertainty on the part of other creditors and potential lenders. This uncertainty might not only complicate creditors' rights, but it might also affect the availability of funds from lenders. The wind-up liability is potentially large and, while the business is ongoing, the extent of the liability is unknown and unknowable for up to five years. Its amount may, as the facts of this case disclose, fluctuate dramatically during this time. A liability of this nature could make it very difficult to assess the creditworthiness of a borrower and make an appropriate apportionment of payment among creditors extremely difficult.

178 While I agree that the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. In her conclusion, Justice Deschamps notes that although the protection of pension plans is a worthy objective, courts should not use the law of equity to re-arrange the priorities that Parliament has established under the *CCAA*. This is a matter of policy where courts must defer to legislatures (reasons of Justice Deschamps, at para. 82). In my view, my colleague's comments on this point are

equally applicable to the policy decisions reflected in the text of the *PBA*. The decision as to the level of protection that should be provided to pension beneficiaries is one to be left to the Ontario legislature. Faced with the language in the *PBA*, I would be slow to infer that the broader protective purpose, with all its potential disadvantages, was intended. In short, the interpretation I would adopt is consistent with a balanced approach to protection of benefits which the legislature intended.

179 For these reasons, I am of the respectful view that the Court of Appeal erred in finding that the s. 57(4) deemed trust applied to the wind-up deficiency.

B. *Second Issue: Did the Court of Appeal Err in Finding That Indalex Breached the Fiduciary Duties it Owed to the Pension Beneficiaries as the Plans' Administrator and in Imposing a Constructive Trust as a Remedy?*

(1) Introduction

180 The Court of Appeal found that during the *CCAA* proceedings Indalex breached its fiduciary obligations as administrator of the pension plans: para. 116. As a remedy, it imposed a remedial constructive trust over the reserve fund, effectively giving the plan beneficiaries recovery of 100 cents on the dollar in priority to all other creditors, including creditors entitled to the super priority ordered by the *CCAA* court.

181 The breaches identified by the Court of Appeal fall into three categories. First, Indalex breached the prohibition against a fiduciary being in a position of conflict of interest because its interests in dealing with its insolvency conflicted with its duties as plan administrator to act in the best interests of the plans' members and beneficiaries: para. 142. According to the Court of Appeal, the simple fact that Indalex found itself in this position of conflict of interest was, of itself, a breach of its fiduciary duty as plan administrator. Second, Indalex breached its fiduciary duty by applying, without notice to the plans' beneficiaries, for *CCAA* protection: para. 139. Third, Indalex breached its fiduciary duty by seeking and/or obtaining various relief in the *CCAA* proceedings including the "super priority" in favour of the DIP lenders, approval of the sale of the business knowing that no payment would be made to the underfunded plans over the statutory deemed trusts and seeking to be put into bankruptcy with the intention of defeating the deemed trust claims: para. 139. As a remedy for these breaches of fiduciary duty the court imposed a constructive trust.

182 In my view, the Court of Appeal took much too expansive a view of the fiduciary duties owed by Indalex as plan administrator and found breaches where there were none. As I see it, the only breach of fiduciary duty committed by Indalex occurred when, upon insolvency, Indalex's corporate interests were in obvious conflict with its fiduciary duty as plan administrator to ensure that all contributions were made to the plans when due. The breach was not in failing to avoid this conflict -- the conflict itself was unavoidable. Its breach was in failing to address the conflict to ensure that the plan beneficiaries had the opportunity to have representation in the *CCAA* proceedings as if there were independent plan administrators. I also conclude that a remedial constructive trust is not available as a remedy for this breach.

183 This part of the appeals requires us to answer two questions which I will address in turn:

(i) What fiduciary duties did Indalex have in its role as plan administrator and did it breach them?
(ii) If so, was imposition of a constructive trust an appropriate remedy?

(2) What Fiduciary Duties did Indalex Have in its Role as Plan Administrator and Did it Breach Those Duties?

(a) *Legal Principles*

184 The appellants do not dispute that Indalex, in its role of administrator of the plans, had fiduciary duties to the members of the plan and that when it is acting in that role it can only act in the interests of the plans' beneficiaries. It is not necessary for present purposes to decide whether a pension plan administrator is a *per se* or *ad hoc* fiduciary, although it must surely be rare that a pension plan administrator would not have fiduciary duties in carrying out that role: *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273, at para. 41, aff'g 2008 ONCA 394, 67 C.C.P.B. 1, at para. 55.

185 However, the conclusion that Indalex as plan administrator had fiduciary duties to the plan beneficiaries is the beginning, not the end of the inquiry. This is because fiduciary duties do not exist at large, but arise from and relate to the specific legal interests at stake: *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 31. As La Forest J. put it in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574:

> The obligation imposed [on a fiduciary] may vary in its specific substance depending on the relationship ... [N]ot every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty... . It is only in relation to breaches of the specific obligations imposed because the relationship is one characterized as fiduciary that a claim for breach of fiduciary duty can be founded. [Emphasis added; pp. 646-47.]

186 The nature and scope of the fiduciary duty must, therefore, be assessed in the legal framework governing the relationship out of which the fiduciary duty arises: see, e.g., *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.,* 2011 SCC 23, [2011] 2 S.C.R. 175, at para. 141; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at paras. 36-37; *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403, at para. 41. So, for example, as a general rule, a fiduciary has a duty of loyalty including the duty to avoid conflicts of interest: see, e.g., *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, at para. 35; *Lac Minerals*, at pp. 646-47. However, this general rule may have to be modified in light of the legal framework within which a particular fiduciary duty must be exercised. In my respectful view, this is such a case.

(b) *The Legal Framework of Indalex's Dual Role as a Plan Administrator and*

Employer

187 In order to define the nature and scope of Indalex's role and fiduciary obligations as a plan administrator, we must examine the legal framework within which the administrator functions. This framework is established primarily by the plan documents and the relevant provisions of the *PBA*. It is to these sources, first and foremost, that we look in order to shape the specific fiduciary duties owed in this context.

188 Turning first to the plan documents, I take the salaried plan as an example. Under it, the company is appointed the plan administrator: art. 13.01. The term "Company" is defined to mean Indalex Limited and any reference in the plan to actions taken or discretion to be exercised by the Company means Indalex acting through the board of directors or any person authorized by the board for the purposes of the plan: art. 2.09. Article 13.01 provides that the "Management Committee of the Board of Directors of the Company will appoint a Pension and Benefits Committee to act on behalf of the Company in its capacity as administrator of the Plan. The Pension and Benefits Committee will decide conclusively all matters relating to the operation, interpretation and application of the Plan." Thus, the Pension and Benefits Committee is to act on behalf of the company and by virtue of art. 2.09 its acts are considered those of the company. Article 13.02 sets out the duties of the Pension and Benefits Committee which include the "performance of all administrative functions not performed by the Funding Agent, the Actuary or any group annuity contract issuer": art. 13.02(1).

189 The plan administrator also has statutory powers and duties by virtue of the *PBA*. Section 22 lists the general duties of plan administrators, three of which are particularly relevant to these appeals:

> **22.** (1) [Care, diligence and skill] The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.
>
> (2) [Special knowledge and skill] The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.
>
> ...
>
> (4) [Conflict of interest] An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the

administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

190 Not surprisingly, the powers and duties conferred on the administrator by the legislation are administrative in nature. For the most part they pertain to the internal management of the pension fund and to the relationship among the pension administrator, the beneficiaries, and the Superintendent of Financial Services ("Superintendent"). The list includes: applying to the Superintendent for registration of the plan and any amendments to it as well as filing annual information returns: ss. 9, 12 and 20 of the *PBA*; providing beneficiaries and eligible potential beneficiaries with information and documents: ss. 10(1)12 and 25; ensuring that the plan is administered in accordance with the *PBA* and its regulations and plan documents: s. 19; notifying beneficiaries of proposed amendments to the plan that would reduce benefits: s. 26; paying commuted value for pensions: s. 42; and filing wind-up reports if the plan is terminated: s. 70.

191 Of special relevance for this case are two additional provisions. Under s. 56, the administrator has a duty to ensure that pension payments are made when due and to notify the Superintendent if they are not and, under s. 59, the administrator has the authority to commence court proceedings when pension payments are not made.

192 The fiduciary duties that employer-administrators owe to plan beneficiaries relate to the statutory and other tasks described above; these are the "specific legal interests" with respect to which the employer-administrator's fiduciary duties attach.

193 Another important aspect of the legal context for Indalex's fiduciary duties as a plan administrator is that it was acting in the dual role of an employer-administrator. This dual role is expressly permitted under s. 8(1)(a) of the *PBA*, but this provision creates a situation where a single entity potentially owes two sets of fiduciary duties (one to the corporation and the other to the plan members).

194 This was the case for Indalex. As an employer-administrator, Indalex acted through its board of directors and so it was that body which owed fiduciary duties to the plan members. The board of directors also owed a fiduciary duty to the company to act in its best interests: *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 122(1)(*a*); *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, at para. 36. In deciding what is in the best interests of the corporation, a board may look to the interests of shareholders, employees, creditors and others. But where those interests are not aligned or may conflict, it is for the directors, acting lawfully and through the exercise of business judgment, to decide what is in the overall best interests of the corporation. Thus, the board of Indalex, as an employer-administrator, could not always act exclusively in the interests of the plan beneficiaries; it also owed duties to Indalex as a corporation.

(c) *Breaches of Fiduciary Duty*

195 Against the background of these legal principles, I turn to consider the Court of Appeal's

findings in relation to Indalex's breach of its fiduciary duties as administrator of the plans. As noted, they fall into three categories: being in a conflict of interest position; taking steps to reduce pension obligations in the *CCAA* proceedings; and seeking bankruptcy status.

(i) Conflict of Interest

196 The questions here are first what constitutes a conflict of interest or duty between Indalex as business decision-maker and Indalex as plan administrator and what must be done when a conflict arises?

197 The Court of Appeal in effect concluded that a conflict of interest arises whenever Indalex makes business decisions that have "the potential to affect the Plans beneficiaries' rights" (para. 132) and that whenever such a conflict of interest arose, the employer-administrator was immediately in breach of its fiduciary duties to the plan members. Respectfully, this position puts the matter far too broadly. It cannot be the case that a conflict arises simply because the employer, exercising its management powers in the best interests of the corporation, does something that has the potential to affect the plan beneficiaries.

198 This conclusion flows inevitably from the statutory context. The existence of apparent conflicts that are inherent in the two roles being performed by the same party cannot be a breach of fiduciary duty because those conflicts are specifically authorized by the statute which permits one party to play both roles. As noted earlier, the *PBA* specifically permits employers to act as plan administrators (s. 8(1)(a)). Moreover, the broader business interests of the employer corporation and the interests of pension beneficiaries in getting the promised benefits are almost always at least potentially in conflict. Every important business decision has the potential to put at risk the solvency of the corporation and therefore its ability to live up to its pension obligations. The employer, within the limits set out in the plan documents and the legislation generally, has the authority to amend the plan unilaterally and even to terminate it. These steps may well not serve the best interests of plan beneficiaries.

199 Similarly, the simple existence of the sort of conflicts of interest identified by the Court of Appeal -- those inherent in the employer's exercise of business judgment -- cannot of themselves be a breach of the administrator's fiduciary duty. Once again, that conclusion is inconsistent with the statutory scheme that expressly permits an employer to act as plan administrator.

200 How, then, should we identify conflicts of interest in this context?

201 In *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631, Binnie J. referred to the *Restatement Third, The Law Governing Lawyers* (2000), at s. 121, to explain when a conflict of interest occurs in the context of the lawyer-client relationship: para. 31. In my view, the same general principle, adapted to the circumstances, applies with respect to employer-administrators. Thus, a situation of conflict of interest occurs when there is a substantial risk that the employer-administrator's representation of the plan beneficiaries would be materially and adversely affected by the employer-administrator's

duties to the corporation. I would recall here, however, that the employer-administrator's obligation to represent the plan beneficiaries extends only to those tasks and duties that I have described above.

202 In light of the foregoing, I am of the view that the Court of Appeal erred when it found, in effect that a conflict of interest arose whenever Indalex was making decisions that "had the potential to affect the Plans beneficiaries' rights": para. 132. The Court of Appeal expressed both the potential for conflict of interest or duty and the fiduciary duty of the plan administrator much too broadly.

(ii) Steps in the CCAA Proceedings to Reduce Pension Obligations and Notice of Them

203 The Court of Appeal found that Indalex breached its fiduciary duty simply by commencing *CCAA* proceedings knowing that the plans were underfunded and by failing to give the plan beneficiaries notice of the proceedings: para. 139. As I understand the court's reasons, the decision to commence *CCAA* proceedings was solely the responsibility of the corporation and not part of the administration of the pension plan: para. 131. The difficulty which the Court of Appeal saw arose from the potential of the *CCAA* proceedings to result in a reduction of the corporation's pension obligations to the prejudice of the beneficiaries: paras. 131-32.

204 I respectfully disagree. Like Justice Deschamps, I find that seeking an initial order protecting the corporation from actions by its creditors did not, on its own, give rise to any conflict of interest or duty on the part of Indalex (reasons of Justice Deschamps, at para. 72).

205 First, it is important to remember that the purpose of *CCAA* proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:

> ... the purpose of the *CCAA* ... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57 (dissenting):

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

For this reason, I would be very reluctant to find that, simply by virtue of embarking on *CCAA* proceedings, an employer-administrator breaches its duties to plan members.

206 Second, the facts of this case do not support the contention that the interests of the plan beneficiaries and the employer were in conflict with respect to the decision to seek *CCAA* protection. It cannot seriously be suggested that some other course would have protected more fully the rights of the plan beneficiaries. The Court of Appeal did not suggest an alternative to seeking *CCAA* protection from creditors, nor did any of the parties. Indalex was in serious financial difficulty and its options were limited: either make a proposal to its creditors (under the *CCAA* or under the *BIA*), or go bankrupt. Moreover, the plan administrator's duty and authority do not extend to ensuring the solvency of the corporation and an independent administrator could not reasonably expect to be consulted about the plan sponsor's decision to seek *CCAA* protection. Finally, the application for *CCAA* proceedings did not reduce pension obligations other than to temporarily relieve the corporation of making special payments and it was the only step with any prospect of the pension funds obtaining from the insolvent corporation the money that would become due. There was thus no conflict of duty or interest between the administrator and the employer when protective action was taken for the purpose of preserving the *status quo* for the benefit of all stakeholders.

207 The Court of Appeal also found that it was a breach of fiduciary duty not to give the plan beneficiaries notice of the initial application for *CCAA* protection. Again, here, I must join Deschamps J. in disagreeing with the Court of Appeal's conclusion. Section 11(1) of the *CCAA* as it stood at the time of the proceedings, provided that parties could commence *CCAA* proceedings without giving notice to interested persons:

> **11.** (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

208 This provision was renumbered but not substantially changed when the Act was amended in September of 2009 (S.C. 2005, c. 47, s. 128, in force Sept. 18, 2009, SI/2009-68). Although it is not appropriate in every case, *CCAA* courts have discretion to make initial orders on an *ex parte* basis. This may be an appropriate -- even necessary -- step in order to prevent "creditors from moving to realize on their claims, essentially a 'stampede to the assets' once creditors learn of the debtor's financial distress": J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 55 ("*Rescue!*"); see also *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194, at para. 7. The respondents did not challenge Morawetz J.'s decision to exercise his discretion to make an *ex parte* order in this case.

209 This is not to say, however, that *ex parte* initial orders will always be required or acceptable. Without attempting to be exhaustive or to express any final view on these issues, I simply note that

there have been at least three ways in which courts have mitigated the possible negative effect on creditors of making orders without notice to potentially affected parties. First, courts have been reluctant to grant *ex parte* orders where the situation of the debtor company is not urgent. In *Rescue!*, Janis Sarra explains that courts are increasingly expecting applicants to have given notice before applying for a stay under the *CCAA*: p. 55. An example is *Marine Drive Properties Ltd,.Re*, 2009 BCSC 145, 52 C.B.R. (5th) 47, a case in which Butler J. held that "[i]nitial applications in *CCAA* proceedings should not be brought without notice merely because it is an application under that Act. The material before the court must be sufficient to indicate an emergent situation": para. 27. Second, courts have included "come-back" clauses in their initial orders so that parties could return to court at a later date to seek to set aside some or all of the order: *Rescue!*, at p. 55. Note that such a clause was included in the initial order by Morawetz J.: para. 46. Finally, courts have limited their initial orders to the issues that need to be resolved immediately and have left other issues to be resolved after all interested parties have been given notice. Thus, in *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169, Morawetz J. limited the initial *CCAA* order so that priorities were only granted over the party that had been given notice. The discussion of suspending special payments or granting creditors priority over pension beneficiaries was left to a later date, after the parties that would be affected had been given notice. A similar approach was taken in the case of *AbitibiBowater inc.(Arrangement relatif à)*, 2009 QCCS 6459 (CanLII). In his initial *CCAA* order, Gascon J. put off the decision regarding the suspension of past service contributions or special payments to the pension plans in question until the parties likely to be affected could be advised of the applicant's request: para. 7.

210 Failure to give notice of the initial *CCAA* proceedings was not a breach of fiduciary duty in this case. Indalex's decision to act as an employer-administrator cannot give the plan beneficiaries any greater benefit than they would have if their plan was managed by a third party administrator. Had there been a third party administrator in this case, Indalex would not have been under an obligation to tell the administrator that it was planning to enter *CCAA* proceedings. The respondents are asking this Court to give the advantage of Indalex's knowledge as employer to Indalex as the plan administrator in circumstances where the employer would have been unlikely to disclose the information itself. I am not prepared to blur the line between employers and administrators in this way.

211 I conclude that Indalex did not breach its fiduciary duty by commencing *CCAA* proceedings or by not giving notice to the plan beneficiaries of its intention to seek the initial *CCAA* order.

212 I turn next to the Court of Appeal's conclusion that seeking and obtaining the DIP orders without notice to the plan beneficiaries and seeking and obtaining the sale approval order constituted breaches of fiduciary duty.

213 To begin, I agree with the Court of Appeal that "just because the initial decision to commence *CCAA* proceedings is solely a corporate one ... does not mean that all subsequent decisions made during the proceedings are also solely corporate ones": para. 132. It was at this point

that Indalex's interests as a corporation came into conflict with its duties as a pension plan administrator.

214 The DIP orders could easily have the effect of making it impossible for Indalex to satisfy its funding obligations to the plan beneficiaries. When Indalex, through the exercise of business judgment, sought *CCAA* orders that would or might have this effect, it was in conflict with its duty as plan administrator to ensure that all contributions were paid when due.

215 I do not think, however, that the simple existence of this conflict of interest and duty, on its own, was a breach of fiduciary duty in these circumstances. As discussed earlier, the *PBA* expressly permits an employer to be a pension administrator and the statutory provisions about conflict of interest must be understood and applied in light of that fact. Moreover, an independent plan administrator would have no decision-making role with respect to the conduct of *CCAA* proceedings. So in my view, the difficulty that arose here was not the existence of the conflict itself, but Indalex's failure to take steps so that the plan beneficiaries would have the opportunity to have their interests protected in the *CCAA* proceedings as if the plans were administered by an independent administrator. In short, the difficulty was not the existence of the conflict, but the failure to address it.

216 Despite Indalex's failure to address its conflict of interest, the plan beneficiaries, through their own efforts, were represented at subsequent steps in the *CCAA* proceedings. The effect of Indalex's breach was therefore mitigated, a point which I will discuss in greater detail when I turn to the issue of the constructive trust.

217 Nevertheless, for the purposes of providing some guidance for future *CCAA* proceedings, I take this opportunity to briefly address what an employer-administrator can do to respond to these sorts of conflicts. First and foremost, an employer-administrator who finds itself in a conflict must bring the conflict to the attention of the *CCAA* judge. It is not enough to include the beneficiaries in the list of creditors; the judge must be made aware that the debtor, as an administrator of the plan is, or may be, in a conflict of interest.

218 Given their expertise and their knowledge of particular cases, *CCAA* judges are well placed to decide how best to ensure that the interests of the plan beneficiaries are fully represented in the context of "real-time" litigation under the *CCAA*. Knowing of the conflict, a *CCAA* judge might consider it appropriate to appoint an independent administrator or independent counsel as *amicus curiae* on terms appropriate to the particular case. Indeed, there have been cases in which representative counsel have been appointed to represent tort claimants, clients, pensioners and non-unionized employees in *CCAA* proceedings on terms determined by the judge: *Rescue!*, at p. 278; see, e.g., *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299 (CanLII); *Nortel Networks Corp., Re*, (2009), 75 C.C.P.B. 206 (Ont. S.C.J.). In other circumstances, a *CCAA* judge might find that it is feasible to give notice directly to the pension beneficiaries. In my view, notice, though desirable, may not always be feasible and decisions on such matters should be left to the

judicial discretion of the *CCAA* judge. Alternatively, the judge might consider limiting draws on the DIP facility until notice can be given to the beneficiaries: *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Ct. J. (Gen. Div.)), at para. 24. Ultimately, the appropriate response or combination of responses should be left to the discretion of the *CCAA* judge in a particular case. The point, as well expressed by the Court of Appeal, is that the insolvent corporation which is also a pension plan administrator cannot "simply ignore its obligations as the Plans' administrator once it decided to seek *CCAA* protection": para. 132.

219 I conclude that the Court of Appeal erred in finding that Indalex breached its fiduciary duties as plan administrator by taking the various steps it did in the *CCAA* proceedings. However, I agree with the Court of Appeal that it breached its fiduciary duty by failing to take steps to ensure that the plan beneficiaries had the opportunity to be as fully represented in those proceedings as if there had been an independent plan administrator.

(iii) The Bankruptcy Motion

220 At the same time Indalex applied for the sale approval order, it also applied to lift the *CCAA* stay so that it could file an assignment into bankruptcy. As Campbell J. put it, this was done "to ensure the priority regime [it] urged as the basis for resisting the deemed trust": para. 52. The Court of Appeal concluded that this was a breach of Indalex's fiduciary duties because the motion was brought "with the intention of defeating the deemed trust claims and ensuring that the Reserve Fund was transferred to [the U.S. debtors]": para. 139. I respectfully disagree.

221 It was certainly open to Indalex as an employer to bring a motion to voluntarily enter into bankruptcy. A pension plan administrator has no responsibility or authority in relation to that step. The problem here is not that the motion was brought, but that Indalex failed to meaningfully address the conflict between its corporate interests and its duties as plan administrator.

222 To sum up, I conclude that Indalex did not breach any fiduciary duty by undertaking *CCAA* proceedings or seeking the relief that it did. The breach arose from Indalex's failure to ensure that its pension plan beneficiaries had the opportunity to have their interests effectively represented in the insolvency proceedings, particularly when Indalex sought the DIP financing approval, the sale approval and the motion for bankruptcy.

(3) Was Imposing a Constructive Trust Appropriate in This Case?

223 The next issue is whether a remedial constructive trust is, as the Court of Appeal concluded, an appropriate remedy in response to the breach of fiduciary duty.

224 The Court of Appeal exercised its discretion to impose a constructive trust and its exercise of this discretion is entitled to deference. Only if the discretion has been exercised on the basis of an erroneous principle should the order be overturned on appeal: *Donkin v. Bugoy*, [1985] 2 S.C.R. 85, cited in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at para. 54, by Sopinka J. (dissenting, but not

on this point). In my respectful view, the Court of Appeal's erroneous conclusions about the scope of a plan administrator's fiduciary duties require us to examine the constructive trust issue anew. Moreover, the Court of Appeal, in my respectful opinion, erred in principle in finding that the asset in this case resulted from the breach of fiduciary duty such that it would be unjust for the party in breach to retain it.

225 As noted earlier, the Court of Appeal imposed a constructive trust in favour of the plan beneficiaries with respect to funds retained in the reserve fund equal to the total amount of the wind-up deficiency for both plans. In other words, upon insolvency of Indalex, the plan beneficiaries received 100 cents on the dollar as a result of a judicially imposed trust taking priority over secured creditors, and indeed over other unsecured creditors, assuming there was no deemed trust for the executive plan.

226 I have explained earlier why I take a different view than did the Court of Appeal of Indalex's breach of fiduciary duty. In light of what I conclude was the breach which could give rise to a remedy, my view is that the constructive trust cannot properly be imposed in this case and the Court of Appeal erred in principle in exercising its discretion to impose this remedy.

227 I part company with the Court of Appeal with respect to several aspects of its constructive trust analysis; it is far from clear to me that any of the conditions for imposing a constructive trust were present here. However, I will only address one of them in detail. As I will explain, a remedial constructive trust for a breach of fiduciary duty is only appropriate if the wrongdoer's acts give rise to an identifiable asset which it would be unjust for the wrongdoer (or sometimes a third party) to retain. In my view, Indalex's failure to meaningfully address conflicts of interest that arose during the *CCAA* proceedings did not result in any such asset.

228 As the Court of Appeal recognized, the governing authority concerning the remedial constructive trust outside the domain of unjust enrichment is *Soulos*. In *Soulos*, McLachlin J. (as she then was) wrote that a constructive trust may be an appropriate remedy for breach of fiduciary duty: paras. 19-45. She laid out four requirements that should generally be satisfied before a constructive trust will be imposed: para. 45. Although, in *Soulos*, McLachlin J. was careful to indicate that these are conditions that "generally" must be present, all parties in this case accept that these four conditions must be present before a remedial constructive trust may be ordered for breach of fiduciary duty. The four conditions are these:

> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
> (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
> (3) The plaintiff must show a legitimate reason for seeking a proprietary

remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;

(4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected. [para. 45]

229 My concern is with respect to the second requirement, that is, whether the breach resulted in an asset in the hands of Indalex. A constructive trust arises when the law imposes upon a party an obligation to hold specific property for another: D. W. M. Waters, M. R. Gillen and L. D. Smith, *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 454 ("*Waters'*"). The purpose of imposing a constructive trust as a remedy for a breach of duty or unjust enrichment is to prevent parties "from retaining property which in 'good conscience' they should not be permitted to retain": *Soulos*, *at* para. 17. It follows, therefore, that while the remedial constructive trust may be appropriate in a variety of situations, the wrongdoer's conduct toward the plaintiff must generally have given rise to assets in the hands of the wrongdoer (or of a third party in some situations) which cannot in justice and good conscience be retained. That cannot be said here.

230 The Court of Appeal held that this second condition was present because "[t]he assets [i.e. the reserve fund monies] are directly connected to the process in which Indalex committed its breaches of fiduciary obligation": para. 204. Respectfully, this conclusion is based on incorrect legal principles. To satisfy this second condition, it must be shown that the breach *resulted in* the assets being in Indalex's hands, not simply, as the Court of Appeal thought, that there was a "connection" between the assets and "the process" in which Indalex breached its fiduciary duty. Recall that in *Soulos* itself, *the defendant's acquisition of the disputed property was a direct result of his breach of his duty of loyalty* to the plaintiff: para. 48. This is not our case. As the Court observed, in the context of an unjust enrichment claim in *Peter v. Beblow*, [1993] 1 S.C.R. 980, at p. 995;

> ... for a constructive trust to arise, the plaintiff must establish a direct link to the property which is the subject of the trust by reason of the plaintiff's contribution.

231 While cases of breach of fiduciary duty are different in important ways from cases of unjust enrichment, La Forest J. (with Lamer J. concurring on this point) applied a similar standard for proprietary relief in *Lac Minerals*, a case in which wrongdoing was the basis for the constructive trust: p. 678, quoted in *Waters'*, at p. 471. His comments demonstrate the high standard to be met in order for a constructive trust to be awarded:

> The constructive trust awards a right in property, but that right can only arise once a right to relief has been established. In the vast majority of cases a constructive trust will not be the appropriate remedy... . [A] constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. [p. 678]

232 The relevant breach in this case was the failure of Indalex to meaningfully address the

conflicts of interest that arose in the course of the *CCAA* proceedings. (The breach that arose with respect to the bankruptcy motion is irrelevant because that motion was not addressed and therefore could not have given rise to the assets.) The "assets" in issue here are the funds in the reserve fund which were retained from the proceeds of the sale of Indalex as a going concern. Indalex's breach in this case did not give rise to the funds which were retained by the Monitor in the reserve fund.

233 Where does the respondents' claim of a procedural breach take them? Taking their position at its highest, it would be that the DIP approval proceedings and the sale would not have been approved. This position, however, is fatally flawed. Turning first to the DIP approval, there is no evidence to support the view that, had Indalex addressed its conflict in the DIP approval process, the DIP financing would have been rejected or granted on different terms. The *CCAA* judge, being fully aware of the pension situation, ruled that the DIP financing was "required", that there was "no other alternative available to the Applicants for a going concern solution", and that "the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing": endorsement of Morawetz J., April 8, 2009, at paras. 6 and 9. In effect, the respondents are claiming funds which arose only because of the process to which they now object. Taking into account that there was an absence of any evidence that more favourable financing terms were available, that the judge's decision was made with full knowledge of the plan beneficiaries' claims, and that he found that the DIP financing was necessary, the respondents' contention is not only speculative, it also directly contradicts the conclusions of the *CCAA* judge.

234 Turning next to the sale approval and the approval of the distribution of the assets, it is clear that the plan beneficiaries had independent representation but that this did not change the result. Although, perhaps with little thanks to Indalex, the interests of both plans were fully and ably represented before Campbell J. at the sale approval and interim distribution motions in July of 2009.

235 The executive plan retirees, through able counsel, objected to the sale on the basis that the liquidation values set out in the Monitor's seventh report would provide greater return for unsecured creditors. The motions judge dismissed this objection "on the basis that there was no clear evidence to support the proposition and in any event the transaction as approved did preserve value for suppliers, customers and preserve approximately 950 jobs": trial reasons of Campbell J., at para. 13 (emphasis added). Both the executive plan retirees and the USW, which represented some members of the salaried plan, objected to the proposed distribution of the sale proceeds. In response to this objection, it was agreed that those objections would be heard promptly and that the Monitor would retain sufficient funds to satisfy the pensioners' claims if they were upheld: trial reasons of Campbell J., at paras. 14-16.

236 There is no evidence to support the contention that Indalex's breach of its fiduciary duty as pension administrator resulted in the assets retained in the reserve fund. I therefore conclude that the Court of Appeal erred in law in finding that the second condition for imposing a constructive trust -- i.e. that the assets in the defendant's hands must be shown to have resulted from the defendant's

breaches of duty to the plaintiff -- had been established.

237 I would add only two further comments with respect to the constructive trust. A major concern of the Court of Appeal was that unless a constructive trust were imposed, the reserve funds would end up in the hands of other Indalex entities which were not operating at arm's length from Indalex. The U.S. debtors claimed the reserve fund because it had paid on its guarantee of the DIP loans and thereby stepped into the shoes of the DIP lender with respect to priority. Sun Indalex claims in the U.S. bankruptcy proceedings as a secured creditor of the U.S. debtors. The Court of Appeal put its concern this way: "To permit Sun Indalex to recover on behalf of [the U.S. debtors] would be to effectively permit the party who breached its fiduciary obligations to take the benefit of those breaches, to the detriment of those to whom the fiduciary obligations were owed": para. 199.

238 There are two difficulties with this approach, in my respectful view. The U.S. debtors paid real money to honour their guarantees. Moreover, unless there is a legal basis for ignoring the separate corporate personality of separate corporate entities, those separate corporate existences must be respected. Neither the parties nor the Court of Appeal advanced such a reason.

239 Finally, I would note that imposing a constructive trust was wholly disproportionate to Indalex's breach of fiduciary duty. Its breach -- the failure to meaningfully address the conflicts of interest that arose during the *CCAA* process -- had no adverse impact on the plan beneficiaries in the sale approval process which gave rise to the "asset" in issue. Their interests were fully represented and carefully considered before the sale was approved and the funds distributed. The sale was nonetheless judged to be in the best interests of the corporation, all things considered. In my respectful view, imposing a $6.75 million penalty on the other creditors as a remedial response to this breach is so grossly disproportionate to the breach as to be unreasonable.

240 A judicially ordered constructive trust, imposed long after the fact, is a remedy that tends to destabilize the certainty which is essential for commercial affairs and which is particularly important in financing a workout for an insolvent corporation. To impose a constructive trust in response to a breach of fiduciary duty to ensure for the plan beneficiaries some procedural protections that they in fact took advantage of in any case is an unjust response in all of the circumstances.

241 I conclude that a constructive trust is not an appropriate remedy in this case and that the Court of Appeal erred in principle by imposing it.

C. *Third Issue: Did the Court of Appeal Err in Concluding That the Super Priority Granted in the CCAA Proceedings Did Not Have Priority by Virtue of the Doctrine of Federal Paramountcy?*

242 Although I disagree with my colleague Justice Deschamps with respect to the scope of the s. 57(4) deemed trust, I agree that if there was a deemed trust in this case, it would be superseded by the DIP loan because of the operation of the doctrine of federal paramountcy: paras. 48-60.

D. *Fourth Issue: Did the Court of Appeal Err in its Cost Endorsement Respecting the USW?*

(1) Introduction

243 The disposition of costs in the Court of Appeal was somewhat complex. Although the costs appeal relates only to the costs of the USW, it is necessary in order to understand their position to set out the costs order below in full.

244 With respect to the costs of the appeal to the Court of Appeal, no order was made for or against the Monitor due to its prior agreement with the former executives and the USW. However, the court ordered that the former executives and the USW, as successful parties, were each entitled to costs on a partial indemnity basis fixed at $40,000 inclusive of taxes and disbursements from Sun Indalex and the U.S. Trustee, payable jointly and severally: costs endorsement, 2011 ONCA 578, 81 C.B.R. (5th) 165, at para. 7.

245 Morneau Shepell Ltd., the Superintendent, and the former executives reached an agreement with respect to legal fees and disbursements and the Court of Appeal approved that agreement. The former executives received full indemnity legal fees and disbursements in the amount of $269,913.78 to be paid from the executive plan attributable to each of the 14 former executives' accrued pension benefits, allocated among the 14 former executives in relation to their pension entitlement from the executive plan. In other words, the costs would not be borne by the other three members of the executive plan who did not participate in the proceedings: C.A. costs endorsement, at para. 2. The costs of the appeal payable by Sun Indalex and the U.S. Trustee were to be paid into the fund of the executive plan and allocated among the 14 former executives in relation to their pension entitlement from the executive plan.

246 USW sought an order for payment of its costs from the fund of the salaried plan. However, the Court of Appeal declined to make such an order because the USW was in a "materially different position" than that of the former executives: costs endorsement, at para. 3. The latter were beneficiaries to the pension fund (14 of the 17 members of the plan), and they consented to the payment of costs from their individual benefit entitlements. Those who had not consented would not be affected by the payment. In contrast, the USW was the bargaining agent (not the beneficiary) for only 7 of the 169 beneficiaries of the salaried plan, none of whom was given notice of, or consented to, the payment of legal costs from the salaried plan. Moreover, the USW sought and seeks an order that its costs be paid out of the fund. This request is significantly different than the order made in favour of the former executives. The former executives explicitly ensured that their choice to pursue the litigation would not put at risk the pension benefits of those members who did not retain counsel even though of course those members would benefit in the event the litigation was successful. The USW is not proposing to insulate the 162 members whom it does not represent from the risk of litigation; it seeks an order requiring all members to share the risk of the litigation even though it represents only 7 of the 169. The proposition advanced by the USW was thus materially different from that advanced on behalf of the executive plan and approved by the court.

(2) Standard of Review

247 In *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, Rothstein J. held that "costs awards are quintessentially discretionary": para. 126. Discretionary costs decisions should only be set aside on appeal if the court below "has made an error in principle or if the costs award is plainly wrong": *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27.

(3) Analysis

248 I do not see any basis to interfere with the Court of Appeal's costs endorsement in this case. In my view, the USW's submissions are largely based on an inaccurate reading of the Court of Appeal's costs endorsement. Contrary to what the USW submits, the Court of Appeal did *not* require the consent of plan beneficiaries as a prerequisite to ordering payment of costs from the fund. Nor is it correct to suggest that the costs endorsement would "restrict recovery of beneficiary costs to instances when there is a surplus in the pension trust fund" or "preclude financing of beneficiary action when a fund is in deficit": USW factum, at paras. 71 and 76. Nor would I read the Court of Appeal's brief costs endorsement as laying down a rule that a union representing pension beneficiaries cannot recover costs from the fund because the union itself is not a beneficiary.

249 The premise of the USW's appeal appears to be that it was entitled to costs because it met what it refers to in its submissions as the Costs Payment Test and that if the executive plan members got their costs out of their pension fund, the union should get its costs out of the salaried employees' pension fund. Respectfully, I do not accept the validity of either premise.

250 The decision whether to award costs from the pension fund remains a discretionary matter. In *Nolan*, Rothstein J. surveyed the various factors that courts have taken into account when deciding whether to award a litigant its costs out of a pension trust. The first broad inquiry considered in *Nolan* was into whether the litigation concerned the due administration of the trust. In connection with this inquiry, courts have considered the following factors: (1) whether the litigation was primarily about the construction of the plan documents; (2) whether it clarified a problematic area of the law; (3) whether it was the only means of clarifying the parties' rights; (4) whether the claim alleged maladministration; and (5) whether the litigation had no effect on other beneficiaries of the trust fund: *Nolan*, at para. 126.

251 The second broad inquiry discussed in *Nolan* was whether the litigation was ultimately adversarial: para. 127. The following factors have been considered: (1) whether the litigation included allegations by an unsuccessful party of a breach of fiduciary duty; (2) whether the litigation only benefited a class of members and would impose costs on other members if successful; and (3) whether the litigation had any merit.

252 I do not think that it is correct to elevate these two inquiries (which constitute the Costs Payment Test articulated by the USW) to a test for entitlement to costs in the pension context. The

factors set out in *Nolan* and other cases cited therein are best understood as highly relevant considerations guiding the exercise of judicial discretion with respect to costs.

253 The litigation undertaken here raised novel points of law with all of the uncertainty and risk inherent in such an undertaking. The Court of Appeal in essence decided that the USW, representing only 7 of 169 members of the plan, should not without consultation be able to in effect impose the risks of that litigation on all of the plan members, the vast majority of whom were not union members. Whatever arguments might be raised against the Court of Appeal's decision in light of the success of the litigation and the sharing by all plan members of the benefits, the failure of the litigation seems to me to leave no basis to impose the cost consequences of taking that risk on all of the plan members of an already underfunded plan.

254 The second premise of the USW appeal appears to be that if the executive plan members have their costs paid out of the fund, so too should the salaried plan members. Respectfully, however, this is not an accurate statement of the order made with respect to the executive plan.

255 The Court of Appeal's order with respect to the executive plan meant that only the pension fund attributable to those members of the plan who actually supported the litigation -- the vast majority I would add -- would contribute to the costs of the litigation even though all members of the plan would benefit in the case of success. As the Court of Appeal noted:

> The individual represented Retirees, who comprise 14 of 17 members of the Executive Plan, have consented to the payment of costs from their individual benefit entitlements. Those who have not consented will not be affected by the payment. [Costs endorsement, at para. 3]

256 The Court of Appeal therefore approved an agreement as to costs which did not put at further risk the pension funds available to satisfy the pension entitlements of those who did not support the litigation. Thus, the Court of Appeal did not apply what the USW refers to as the Costs Payment Test to the executive plan because the costs order was the product of agreement and did not order payment of costs out of the fund as a whole.

257 In the case of the USW request, there was no such agreement and no such limitation of risk to the supporters of the litigation.

258 I see no error in principle in the Court of Appeal's refusal to order the USW costs to be paid out of the pension fund, particularly in light of the disposition of the appeal to this Court. I would dismiss the USW costs appeal but without costs.

IV. <u>Disposition</u>

259 I would allow the Sun Indalex, FTI Consulting and George L. Miller appeals and, except as noted below, I would set aside the orders of the Ontario Court of Appeal and restore the February

18, 2010 orders of Campbell J.

260 With respect to costs, I would set aside the Court of Appeal's orders with respect to the costs of the appeals before that court and order that all parties bear their own costs in the Court of Appeal and in this Court.

261 I would not disturb paras. 9 and 10 of the order of the Court of Appeal in the former executives' appeal so that the full indemnity legal fees and disbursements of the former executives in the amount of $269,913.78 shall be paid from the fund of the executive plan attributable to each of the 14 former executives' accrued pension benefits, and specifically such amounts shall be allocated among the 14 former executives in relation to their pension entitlement from the executive plan and will not be borne by the other three members of the executive plan.

262 I would dismiss the USW costs appeal, but without costs.

The reasons of LeBel and Abella JJ. were delivered by

LeBEL J. (dissenting):--

I. Introduction

263 The members of two pension plans set up by Indalex Limited ("Indalex") stand to lose half or more of their pension benefits as a consequence of the insolvency of their employer and of the arrangement approved by the Ontario Superior Court of Justice under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The Court of Appeal for Ontario found that the members were entitled to a remedy. For different and partly conflicting reasons, my colleagues Justices Deschamps and Cromwell would hold that no remedy is available to them. With all due respect for their opinions, I would conclude, like the Court of Appeal, that the remedy of a constructive trust is open to them and should be imposed in the circumstances of this case, for the following reasons.

264 I do not intend to summarize the facts of this case, which were outlined by my colleagues. I will address these facts as needed in the course of my reasons. Before moving to my areas of disagreement with my colleagues, I will briefly indicate where and to what extent I agree with them on the relevant legal issues.

265 Like my colleagues, I conclude that no deemed trust could arise under s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), in the case of the Executive Plan because this plan had not been wound up when the *CCAA* proceedings were initiated. In the case of the Salaried Employees Plan, I agree with Deschamps J. that a deemed trust arises in respect of the wind-up deficiency. But, like her, I accept that the debtor-in-possession ("DIP") super priority prevails by

reason of the application of the federal paramountcy doctrine. I also agree that the costs appeal of the United Steelworkers should be dismissed.

266 But, with respect for the opinions of my colleagues, I take a different view of the nature and extent of the fiduciary duties of an employer who elects to act as administrator of a pension plan governed by the *PBA*. This dual status does not entitle the employer to greater leniency in the determination and exercise of its fiduciary duties or excuse wrongful actions. On the contrary, as we shall see below, I conclude that Indalex not only neglected its obligations towards the beneficiaries, but actually took a course of action that was actively inimical to their interests. The seriousness of these breaches amply justified the decision of the Court of Appeal to impose a constructive trust. To that extent, I propose to uphold the opinion of Gillese J.A. and the judgment of the Court of Appeal (2011 ONCA 265, 104 O.R. (3d) 641).

II. The Employer as Administrator of a Pension Plan: Its Fiduciary Duties

267 Before entering into an analysis of the obligations of an employer as administrator of a pension plan under the *PBA*, it is necessary to consider the position of the beneficiaries. Who are they? At what stage are they in their lives? What are their vulnerabilities? A fiduciary relationship is a relationship, grounded in fact and law, between a vulnerable beneficiary and a fiduciary who holds and may exercise power over the beneficiary in situations recognized by law. Any analysis of such a relationship requires careful consideration of the characteristics of the beneficiary. It ought not stop at the level of a theoretical and detached approach that fails to address how, very concretely, this relationship works or can be twisted, perverted or abused, as was the situation in this case.

268 The beneficiaries were in a very vulnerable position relative to Indalex. They did not enjoy the protection that the existence of an independent administrator might have given them. They had no say and no input in the management of the plans. The information about the plans and their situation came from Indalex in its dual role as employer and manager of the plans. Their particular vulnerability arose from their relationship with Indalex, acting both as their employer and as the administrator of their retirement plans. Their vulnerability was substantially a consequence of that specific relationship (*Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 68, *per* Cromwell J.). The nature of this relationship had very practical consequences on their interests. For example, as Gillese J.A. noted in her reasons (at para. 40) the consequences of the decisions made in the course of management of the plan and during the *CCAA* proceedings signify that the members of the Executive Plan stand to lose one-half to two-thirds of their retirement benefits, unless additional money is somehow paid into the plan. These losses of benefits are, in all probability, permanent in the case of the beneficiaries who have already retired or who are close to retirement. They deeply affect their lives and expectations. For most of them, what is lost is lost for good. No arrangement will allow them to get a start on a new life. We should not view the situation of the beneficiaries as regrettable but unavoidable collateral damage arising out of the ebbs and tides of the economy. In my view, the law should give the members some protection, as the Court of Appeal

intended when it imposed a constructive trust.

269 Indalex was in a conflict of interest from the moment it started to contemplate putting itself under the protection of the *CCAA* and proposing an arrangement to its creditors. From the corporate perspective, one could hardly find fault with such a decision. It was a business decision. But the trouble is that at the same time, Indalex was a fiduciary in relation to the members and retirees of its pension plans. The "two hats" analogy offers no defence to Indalex. It could not switch off the fiduciary relationship at will when it conflicted with its business obligations or decisions. Throughout the arrangement process and until it was replaced by an independent administrator (Morneau Shepell Ltd.) it remained a fiduciary.

270 It is true that the *PBA* allows an employer to act as an administrator of a pension plan in Ontario. In such cases, the legislature accepts that conflicts of interest may arise. But, in my opinion, nothing in the *PBA* allows that the employer *qua* administrator will be held to a lower standard or will be subject to duties and obligations that are less stringent than those of an independent administrator. The employer remains a fiduciary under the statute and at common law (*PBA*, s. 22(4)). The employer is under no obligation to assume the burdens of administering the pension plans that it has agreed to set up or that are the legacy of previous decisions. However, if it decides to do so, a fiduciary relationship is created with the expectation that the employer will be able to avoid or resolve the conflicts of interest that might arise. If this proves to be impossible, the employer is still "seized" with fiduciary duties, and cannot ignore them out of hand.

271 Once Indalex had considered the *CCAA* process and decided to proceed in that manner, it should have been obvious that such a move would trigger conflicts of interest with the beneficiaries of the pension plans and that these conflicts would become untenable, as per the terms of s. 22(4) of the *PBA*. Given the nature of its obligations as administrator and fiduciary, it was impossible to wear the "two hats". Indalex had to discharge its corporate duties, but at the same time it had to address its fiduciary obligations to the members and beneficiaries of the plans. I do not fault it for applying under the *CCAA*, but rather for not relinquishing its position as administrator of the plans at the time of the application. It even retained this position once it engaged in the arrangement process. Other conflicts and breaches of fiduciary duties and of fundamental rules of procedural equity in the Superior Court flowed from this first decision. Moreover, Indalex maintained a strongly adversarial attitude towards the interest of the beneficiaries throughout the arrangement process, while it was still, at least in form, the administrator of the plans.

272 The option given to employers to act as administrators of pension plans under the *PBA* does not constitute a licence to breach the fiduciary duties that flow from this function. It should not be viewed as an invitation for the courts to whitewash the consequences of such breaches. The option is predicated on the ability of the employer-administrator to avoid the conflicts of interests that cause these breaches. An employer deciding to assume the position of administrator cannot claim to be in the same situation as the Crown when it discharges fiduciary obligations towards certain groups in society under the Constitution or the law. For those cases, the Crown assumes those duties

because it is obligated to do so by virtue of its role, not because it chooses to do so. In such circumstances, the Crown must often balance conflicting interests and obligations to the broader society in the discharge of those fiduciary duties (*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at paras. 37-38). If Indalex found itself in a situation where it had to balance conflicting interests and obligations, as it essentially argues, it could not retain the position of administrator that it had willingly assumed. The solution was not to place its function as administrator and its associated fiduciary duties in abeyance. Rather, it had to abandon this role and diligently transfer its function as manager to an independent administrator.

273 Indalex could apply for protection under the *CCAA*. But, in so doing, it needed to make arrangements to avoid conflicts of interests. As nothing was done, the members of the plans were left to play catch up as best they could when the process that put in place the DIP financing and its super priority was initiated. The process had been launched in such a way that it took significant time before the beneficiaries could effectively participate in the process. In practice, the United Steelworkers union, which represented only a small group of the members of the Salaried Employees Plan, acted for them after the start of the procedures. The members of the Executive Plan hired counsel who appeared for them. But, throughout, there were problems with notices, delays and the ability to participate in the process. Indeed, during the *CCAA* proceedings, the Monitor and Indalex seemed to have been more concerned about keeping the members of the plans out of the process rather than ensuring that their voices could be heard. Two paragraphs of the submissions to this Court by Morneau Shepell Ltd., the subsequently appointed administrator of the plan, aptly sums up the behaviour of Indalex and the Monitor towards the beneficiaries, whose representations were always deemed to be either premature or late:

> When counsel for the Retirees again appeared at a motion to approve the bidding procedure, his objections were considered premature:
>
> In my view, the issues raised by the retirees do not have any impact on the Bidding Procedures. The issues can be raised by the retirees on any application to approve a transaction -- but that is for another day. [(2009), 79 C.C.P.B. 101 (Ont. S.C.J.), at para. 10, *per* Morawetz J.]
>
> Only when counsel appeared at the sale approval motion, as directed by the motions judge, were the concerns of the pension plan beneficiaries heard. At that time, the Appellants complain, the beneficiaries were too late and their motion constituted a collateral attack on the original DIP Order. However, it cannot be the case that stakeholder groups are too early, until they are too late. [Factum, at paras. 54-55]

274 I must also mention the failed attempt to assign Indalex in bankruptcy once the sale of its

business had been approved. One of the purposes of this action was essentially to harm the interests of the members of the plans. At the time, Indalex was still wearing its two hats, at least from a legal perspective. But its duties as a fiduciary were clearly not at the forefront of its concerns. There were constant conflicts of interest throughout the process. Indalex did not attempt to resolve them; it brushed them aside. In so acting, it breached its duties as a fiduciary and its statutory obligations under s. 22(4) *PBA*.

III. Procedural Fairness in *CCAA* Proceedings

275 The manner in which this matter was conducted in the Superior Court was, at least partially, the result of Indalex disregarding its fiduciary duties. The procedural issues that arose in that court did not assist in mitigating the consequences of these breaches. It is true that, in the end, the beneficiaries obtained, or were given, some information pertaining to the proceedings and that counsel appeared on their behalf at various stages of the proceedings. However, the basic problem is that the proceedings were not conducted according to the spirit and principles of the Canadian system of civil justice.

276 I accept that those procedures are often urgent. The situation of a debtor requires quick and efficient action. The turtle-like pace of some civil litigation would not meet the needs of the application of the *CCAA*. However, the conduct of proceedings under this statute is not solely an administrative process. It is also a judicial process conducted according to the tenets of the adversarial system. The fundamentals of such a system must not be ignored. All interested parties are entitled to a fair procedure that allows their voices to be raised and heard. It is not an answer to these concerns to say that nothing else could be done, that no other solution would have been better, that, in substance, hearing the members would have been a waste of time. In all branches of procedure whether in administrative law, criminal law or civil action, the rights to be informed and to be heard in some way remain fundamental principles of justice. Those principles retain their place in the *CCAA*, as some authors and judges have emphasized (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 55-56; *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. C.J. (Gen. Div.)), at para. 5, *per* Farley J.). This was not done in this case, as my colleagues admit, while they downplay the consequences of these procedural flaws and breaches.

IV. Imposing a Constructive Trust

277 In this context, I see no error in the decision of the Court of Appeal to impose a constructive trust (paras. 200-207). It was a fair decision that met the requirements of justice, under the principles set out by our Court in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, and in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217. The remedy of a constructive trust was justified in order to correct the wrong caused by Indalex (*Soulos*, at para. 36, *per* McLachlin J. (as she then was)). The facts of the situation met the four conditions that generally justify the imposition of a constructive trust (*Soulos*, at para. 45), as determined by Justice Gillese in her reasons, at paras. 203

and 204: (1) the defendant was under an equitable obligation in relation to the activities giving rise to the assets in his or her hands; (2) the assets in the hands of the defendant were shown to have resulted from deemed or actual agency activities of the defendant in breach of his or her equitable obligation to the plaintiff; (3) the plaintiff has shown a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendants remain faithful to their duties; and (4) there are no factors which would render imposition of a constructive trust unjust in all the circumstances of the case, such as the protection of the interests of intervening creditors.

278 In crafting such a remedy, the Court of Appeal was relying on the inherent powers of the courts to craft equitable remedies, not only in respect of procedural issues, but also of substantive questions. Section 9 of the *CCAA* is broadly drafted and does not deprive courts of their power to fill in gaps in the law when this is necessary in order to grant justice to the parties (G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law, 2007* (2008), 41, at pp. 78-79).

279 The imposition of the trust did not disregard the different corporate personalities of Indalex and Indalex U.S. It properly acknowledged the close relationship between the two companies, the second in effect controlling the first. This relationship could and needed to be taken into consideration in order to determine whether a constructive trust was a proper remedy.

280 For these reasons, I would uphold the imposition of a constructive trust and I would dismiss the appeal with costs to the respondents.

* * * * *

APPENDIX

The Pension Benefits Amendment Act, 1973, S.O. 1973, c. 113

> **6.** The said Act is amended by adding thereto the following sections:
>
> 23*a*. -- (1) Any sum received by an employer from an employee pursuant to an arrangement for the payment of such sum by the employer into a pension plan as the employee's contribution thereto shall be deemed to be held by the employer in trust for payment of the same after his receipt thereof into the pension plan as the employee's contribution thereto and the employer shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust.

(2) For the purposes of subsection 1, any sum withheld by an employer, whether by payroll deduction or otherwise, from moneys payable to an employee shall be deemed to be a sum received by the employer from the employee.

(3) Any sum required to be paid into a pension plan by an employer as the employer's contribution to the plan shall, when due under the plan, be deemed to be held by the employer in trust for payment of the same into the plan in accordance with the plan and this Act and the regulations as the employer's contribution and the employer shall not appropriate or convert any part of the amount required to be paid to the fund to his own use or to any use not authorized by the terms of the pension plan.

Pension Benefits Act, R.S.O. 1980, c. 373

21... .

(2) Upon the termination or winding up of a pension plan filed for registration as required by section 17, the employer is liable to pay all amounts that would otherwise have been required to be paid to meet the tests for solvency prescribed by the regulations, up to the date of such termination or winding up, to the insurer, administrator or trustee of the pension plan.

...

23. -- (1) Where a sum is received by an employer from an employee under an arrangement for the payment of the sum by the employer into a pension plan as the employee's contribution thereto, the employer shall be deemed to hold the sum in trust for the employee until the sum is paid into the pension plan whether or not the sum has in fact been kept separate and apart by the employer and the employee has a lien upon the assets of the employer for such amount that in the ordinary course of business would be entered in books of account whether so entered or not.

...

(3) Where an employer is required to make contributions to a pension plan, he shall be deemed to hold in trust for the members of the plan an amount calculated in accordance with subsection (4), whether or not,

(*a*) the employer contributions are payable into the plan under the terms of the plan or this Act; or

(*b*) the amount has been kept separate and apart by the employer,

and the members have a lien upon the assets of the employer in such amount that in the ordinary course of business would be entered into the books of account whether so entered or not.

(4) For the purpose of determining the amount deemed to be held in trust under subsection (3) on a specific date, the calculation shall be made as if the plan had been wound up on that date.

...

32. In addition to any amounts the employer is liable to pay under subsection 21 (2), where a defined benefit pension plan is terminated or wound up or the plan is amended so that it is no longer a defined benefit pension plan, the employer is liable to the plan for the difference between,

(*a*) the value of the assets of the plan; and

(*b*) the value of pension benefits guaranteed under subsection 31 (1) and any other pension benefit vested under the terms of the plan,

and the employer shall make payments to the insurer, trustee or administrator of the pension plan to fund the amount owing in such manner as is prescribed by regulation.

Pension Benefits Amendment Act, 1983, S.O. 1983, c. 2

2. Subsection 21 (2) of the said Act is repealed and the following substituted therefor:

(2) Upon the termination or winding up of a registered pension plan, the employer of employees covered by the pension plan shall pay to the administrator, insurer or trustee of the pension plan,

(a) an amount equal to,

(i) the current service cost, and
(ii) the special payments prescribed by the regulations,

that have accrued to and including the date of the termination or winding up but, under the terms of the pension plan or the regulations, are not due on that date; and

(b) all other payments that, by the terms of the pension plan or the regulations, are due from the employer to the pension plan but have not been paid at the date of the termination or winding up.

(2a) For the purposes of clause (2) (a), the current service cost and special payments shall be deemed to accrue on a daily basis.

3. Section 23 of the said Act is repealed and the following substituted therefor:

23. -- (1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension plan as the employee's contribution to the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension plan.

(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from moneys payable to an employee shall be deemed to be money received by the employer from the employee.

(3) The administrator or trustee of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsection (1).

(4) An employer who is required by a pension plan to contribute to the pension plan shall be deemed to hold in trust for the members of the pension plan an amount of money equal to the total of,

(a) all moneys that the employer is required to pay into the pension plan to meet,

(i) the current service cost, and
(ii) the special payments prescribed by the regulations,

that are due under the pension plan or the regulations and have not been paid into the pension plan; and

(b) where the pension plan is terminated or wound up, any other money that the employer is liable to pay under clause 21 (2) (a).

(5) The administrator or trustee of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsection (4).

(6) Subsections (1) and (4) apply whether or not the moneys mentioned in those subsections are kept separate and apart from other money.

...

8. Sections 32 and 33 of the said Act are repealed and the following substituted therefor:

32. -- (1) The employer of employees who are members of a defined benefit pension plan that the employer is bound by or to which the employer is a party and that is partly or wholly wound up shall pay to the administrator, insurer or trustee of the plan an amount of money equal to the amount by which the value of the pension benefits guaranteed by section 31 plus the value of the pension benefits vested under the defined benefit pension plan exceeds the value of the assets of the plan allocated in accordance with the regulations for payment of pension benefits accrued with respect to service in Ontario.

(2) The amount that the employer is required to pay under subsection (1) is in addition to the amounts that the employer is liable to pay under subsection 21 (2).

(3) The employer shall pay the amount required under subsection (1) to the administrator, insurer or trustee of the defined benefit pension plan in the manner prescribed by the regulations.

Pension Benefits Act, 1987, S.O. 1987, c. 35

58. -- (1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

...

(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

...

59. -- (1) Money that an employer is required to pay into a pension fund accrues on a daily basis.

(2) Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements.

...

75. -- (1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective

date of the wind up of the pension plan in whole or in part, has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

...

76. -- (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Commission declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 40 (3) (50 per cent rule) and section 75,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

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

57. (1) [Trust property] Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

(2) [Money withheld] For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employer from the employee.

(3) [Accrued contributions] An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

(4) [Wind up] Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

...

58. (1) [Accrual] Money that an employer is required to pay into a pension fund accrues on a daily basis.

(2) [Interest] Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements.

...

74. (1) [Activating events] This section applies if a person ceases to be a member of a pension plan on the effective date of one of the following activating events:

1. The wind up of a pension plan, if the effective date of the wind up is on or after April 1, 1987.
2. The employer's termination of the member's employment, if the effective date of the termination is on or after July 1, 2012. However, this paragraph does not apply if the termination occurs in any of the circumstances described in subsection (1.1).
3. The occurrence of such other events as may be prescribed in such circumstances as may be specified by regulation.

(1.1) [Same, termination of employment] Termination of employment is not an activating event if the termination is a result of wilful misconduct, disobedience or wilful neglect of duty by

the member that is not trivial and has not been condoned by the employer or if the termination occurs in such other circumstances as may be prescribed.

(1.2) [Exceptions, election by certain pension plans] This section does not apply with respect to a jointly sponsored pension plan or a multi-employer pension plan while an election made under section 74.1 for the plan and its members is in effect.

(1.3) [Benefit] A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least 55 on the effective date of the activating event has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the activating event had not occurred and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the activating event had not occurred and if the member's membership continued to that date.

(2) [Part year] In determining the combination of age plus employment or membership, one-twelfth credit shall be given for each month of age and for each month of continuous employment or membership on the effective date of the activating event.

(3) [Member for 10 years] Bridging benefits offered under the pension plan to which a member would be entitled if the activating event had not occurred and if his or her membership were continued shall be included in calculating the pension benefit under subsection (1.3) of a person who has at least 10 years of continuous employment with the employer or has been a member of the pension plan for at least 10 years.

(4) [Prorated bridging benefit] For the purposes of subsection (3), if the bridging benefit offered under the pension plan is not related to periods of employment or membership in the pension plan, the bridging benefit shall be prorated by the ratio that the member's actual period of employment bears to the period of employment that the member would have to the earliest date on

which the member would be entitled to payment of pension benefits and a full bridging benefit under the pension plan if the activating event had not occurred.

(5) [Notice of termination of employment] Membership in a pension plan that is wound up includes the period of notice of termination of employment required under Part XV of the *Employment Standards Act, 2000*.

(6) [Application of subs. (5)] Subsection (5) does not apply for the purpose of calculating the amount of a pension benefit of a member who is required to make contributions to the pension fund unless the member makes the contributions in respect of the period of notice of termination of employment.

(7) [Consent of employer] For the purposes of this section, where the consent of an employer is an eligibility requirement for entitlement to receive an ancillary benefit, the employer shall be deemed to have given the consent.

(7.1) [Consent of administrator, jointly sponsored pension plans] For the purposes of this section, where the consent of the administrator of a jointly sponsored pension plan is an eligibility requirement for entitlement to receive an ancillary benefit, the administrator shall be deemed to have given the consent.

(8) [Use in calculating pension benefit] A benefit described in clause (1.3) (a), (b) or (c) for which a member has met all eligibility requirements under this section shall be included in calculating the member's pension benefit or the commuted value of the pension benefit.

...

75. (1) [Liability of employer on wind up] Where a pension plan is wound up, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in

Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

Appeals of Sun Indalex Finance, George L. Miller and FTI Consulting allowed, LEBEL *and* ABELLA JJ. *dissenting. Appeal of USW dismissed.*

Solicitors:

Solicitors for the appellant Sun Indalex Finance, LLC: Goodmans, Toronto.

Solicitors for the appellant George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors: Chaitons, Toronto.

Solicitors for the appellant FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited: Stikeman Elliott, Toronto.

Solicitors for the appellant/respondent United Steelworkers: Sack Goldblatt Mitchell, Toronto.

Solicitors for the respondents Keith Carruthers, et al.: Koskie Minsky, Toronto.

Solicitors for the respondent Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership): Cavalluzzo Hayes Shilton McIntyre & Cornish, Toronto.

Solicitor for the respondent/intervener the Superintendent of Financial Services: Attorney General of Ontario, Toronto.

Solicitors for the intervener the Insolvency Institute of Canada: Thornton Grout Finnigan, Toronto.

Solicitors for the intervener the Canadian Labour Congress: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Canadian Federation of Pensioners: Paliare, Roland, Rosenberg, Rothstein, Toronto.

Solicitors for the intervener the Canadian Association of Insolvency and Restructuring Professionals: McMillan, Montréal.

Solicitors for the intervener the Canadian Bankers Association: Osler, Hoskin & Harcourt, Toronto.

TAB 11

2011 ONCA 265
Ontario Court of Appeal

Indalex Ltd., Re

2011 CarswellOnt 2458, 2011 C.E.B. & P.G.R. 8433 (headnote only), 2011 ONCA 265, [2011] W.D.F.L. 2503, [2011] W.D.F.L. 2504, [2011] O.J. No. 1621, 104 O.R. (3d) 641, 17 P.P.S.A.C. (3d) 194, 201 A.C.W.S. (3d) 553, 276 O.A.C. 347, 331 D.L.R. (4th) 352, 75 C.B.R. (5th) 19, 89 C.C.P.B. 39

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

And In the Matter of a Plan of Compromise or Arrangement of Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. (Applicants / Respondents)

J.C. MacPherson, E.E. Gillese, R.G. Juriansz JJ.A.

Heard: November 23-24, 2010
Judgment: April 7, 2011
Docket: CA C52187, CA C52346

Proceedings: reversing *Indalex Ltd., Re* (2010), 2010 CarswellOnt 893, 2010 ONSC 1114, 79 C.C.P.B. 301 (Ont. S.C.J. [Commercial List])

Counsel: Andrew J. Hatnay, Demetrios Yiokaris for Appellants, Former Executives
Darrell L. Brown for Appellants, United Steelworkers
Mark Bailey for Superintendent of Financial Services
Hugh O'Reilly, Adam Beatty for Intervenor, Morneau Sobeco Limited Partnership
Fred Myers, Brian Empey for Sun Indalex Finance, LLC
Ashley Taylor, Lesley Mercer for Monitor, FTI Consulting Canada ULC
Harvey Chaiton, George Benchetrit for George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the US Indalex Debtors

Subject: Insolvency; Estates and Trusts; Family; Property; Corporate and Commercial; Civil Practice and Procedure; International

APPEALS by pension claimants from judgment reported at *Indalex Ltd., Re* (2010), 2010 CarswellOnt 893, 2010 ONSC 1114, 79 C.C.P.B. 301 (Ont. S.C.J. [Commercial List]), dismissing pension claimants' motions for declaration that sale proceeds were subject to deemed trusts in favour of pension plan beneficiaries.

***E E. Gillese J.A.*:**

1 A Canadian company is insolvent. Its pension plans are underfunded and in the process of being wound up. The company is the administrator of the pension plans.

2 The company obtains protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (*CCAA*). A court order enables it to borrow funds pursuant to a debtor-in-possession (DIP) credit agreement. The order creates a "super-priority" charge in favour of the DIP lenders. The obligation to repay the DIP lenders is guaranteed by the company's U.S. parent company (the Guarantee).

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

3 The company is sold through the *CCAA* proceedings but the sale proceeds are insufficient to repay the DIP lenders. The U.S. parent company covers the shortfall, in accordance with its obligations under the Guarantee.

4 The *CCAA* monitor holds some of the sale proceeds in a reserve fund. The pension plan beneficiaries claim the money based on the deemed trust provisions in the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (*PBA*). The U.S. parent company claims the money based on its payment under the Guarantee.

5 Must the money in the reserve fund be used to pay the deficiencies in the pension plans in preference to the secured creditor? What fiduciary obligations, if any, does the company have in respect of its underfunded pension plans during the *CCAA* proceeding? These appeals wrestle with these difficult questions.

Overview

6 Indalex Limited was the sponsor and administrator of two registered pension plans: the Retirement Plan for Salaried Employees of Indalex Limited and Associated Companies (the Salaried Plan) and the Retirement Plan for Executive Employees of Indalex Limited and Associated Companies (the Executive Plan) (collectively, the Plans).

7 On March 20, 2009, Indalex's parent company and its U.S. based affiliates (collectively, Indalex U.S.) sought Chapter 11 protection in the United States.

8 On April 3, 2009, Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. (Indalex or the Applicants) obtained protection from their creditors under the *CCAA*. At that time, the Salaried Plan was in the process of being wound up. Both Plans were underfunded. FTI Consulting Canada ULC (the Monitor) was appointed as monitor.

9 On April 8, 2009, the court authorized Indalex to borrow funds pursuant to a DIP credit agreement. The court order gave the DIP lenders a super-priority charge on Indalex's property. Indalex U.S. guaranteed Indalex's obligation to repay the DIP lenders.

10 On July 20, 2009, Indalex moved for approval of the sale of its assets on a going-concern basis. It also moved for approval to distribute the sale proceeds to the DIP lenders, with the result that there would be nothing to fund the deficiencies in the Plans. Without further payments, the underfunded status of the Plans will translate into significant cuts to the retirees' pension benefits.

11 At the sale approval hearing, the United Steelworkers appeared on behalf of its members who had been employed by Indalex and are the beneficiaries of the Salaried Plan (the USW). In addition, a group of retired executives appeared on behalf of the beneficiaries of the Executive Plan (the Former Executives).

12 Both the USW and the Former Executives objected to the planned distribution of the sale proceeds. They asked that an amount representing the total underfunding of the Plans (the Deficiencies) be retained by the Monitor as undistributed proceeds, pending further court order. Their position was based on, among other things, the deemed trust provisions in the *PBA* that apply to unpaid amounts owing to a pension plan by an employer.

13 The court approved the sale. However, as a result of the USW and Former Executives' reservation of rights, the Monitor retained an additional $6.75 million of the sale proceeds in reserve (the Reserve Fund), an amount approximating the Deficiencies. [1]

14 The sale closed on July 31, 2009. The sale proceeds were insufficient to repay the DIP lenders. Indalex U.S. paid the shortfall of approximately US$10.75 million, pursuant to its obligations under the Guarantee.

15 In accordance with a process designed by the *CCAA* court, the USW and the Former Executives brought motions returnable on August 28, 2009, based on their deemed trust claims. They claimed the Reserve Fund was subject to deemed

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

trusts in favour of the Plans' beneficiaries and should be paid into the Plans in priority to Indalex U.S. They also claimed that during the *CCAA* proceedings, Indalex breached its fiduciary obligations to the Plans' beneficiaries.

16 Indalex then brought a motion in which it sought to lift the stay and assign itself into bankruptcy (the Indalex bankruptcy motion). This motion was directed to be heard on August 28, 2009, along with the USW and Former Executives' motions.

17 By orders dated February 18, 2010, (the Orders under Appeal), the *CCAA* judge dismissed the USW and Former Executives' motions on the basis that, at the date of sale, no deemed trust under the *PBA* had arisen in respect of either plan. He found it unnecessary to decide the Indalex bankruptcy motion.

18 The USW and the Former Executives (together, the appellants) appeal. They ask this court to order the Monitor to pay the Reserve Fund to the Plans.

19 On November 5, 2009, the Superintendent of Financial Services (Superintendent) appointed the actuarial firm of Morneau Sobeco Limited Partnership (Morneau) as administrator of the Plans.

20 Morneau was granted intervenor status. It supports the appellants.

21 The Superintendent also appeared. He, too, supports the appellants.

22 Sun Indalex, as the principal secured creditor of Indalex U.S., asks that the appeals be dismissed and the Reserve Fund be paid to it. As a result of its payment under the Guarantee, Indalex U.S. is subrogated to the rights of the DIP lenders. Its claim to the Reserve Fund is based on the super-priority charge.

23 The Monitor appeared. It supports Sun Indalex and asks that the appeals be dismissed. The Monitor and Sun Indalex will be referred to collectively as the respondents.

24 George L. Miller, the trustee of the bankruptcy estates of Indalex U.S., appointed under Chapter 7 of Title 11 of the United States Bankruptcy Code (the U.S. Trustee), was given leave to intervene. He joins with the Monitor and Sun Indalex in opposing these appeals.

25 For the reasons that follow, I would allow the appeals and order the Monitor to pay, from the Reserve Fund, amounts sufficient to satisfy the deficiencies in the Plans. For ease of reference, the various statutory provisions to which I make reference can be found in the schedules at the end of these reasons.

Background

26 Indalex Limited is a Canadian corporation. It is the entity through which the Indalex group of companies operates in Canada. It is a direct wholly-owned subsidiary of its U.S. parent, Indalex Holding Corp., which in turn is a wholly-owned subsidiary of Indalex Finance.

27 Together, the group of companies referred to as Indalex and Indalex U.S. were the second largest manufacturer of aluminum extrusions in the United States and Canada. Aluminum is a durable, light weight metal that can be strengthened through the extrusion process, which involves pushing aluminum through a die and forming it into strips, which can then be customized for a wide array of end-user markets.

28 Indalex Limited produced a portion of the raw material used in the extrusion process, called aluminum extrusion billets, through its casting division located in Toronto. It also processed the raw extrusion billets into extruded product at its Canadian extrusion plants, for sale to end users. In 2008, Indalex Limited accounted for approximately 32% of the Indalex group of companies total sales to third parties.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

29 Indalex Limited provided separate pension plans for its executives and salaried employees. The Plans were designed to pay pension benefits for the lives of the retirees and those of their designated beneficiaries. Indalex Limited was the sponsor and administrator of both Plans. The Plans were registered with the Financial Services Commission of Ontario (FSCO) and the Canadian Revenue Agency.

The Salaried Plan

30 The USW has several locals certified as bargaining agents on behalf of members employed with Indalex, including members who are beneficiaries of the Salaried Plan. It was certified to represent certain Indalex employees, seven of whom were members of the Salaried Plan and have deferred vested entitlements under that plan.

31 The Salaried Plan contains a defined benefit and defined contribution component.

32 Unlike the Executive Plan, the Salaried Plan was in the process of being wound up when Indalex began *CCAA* proceedings. The effective date of wind up is December 31, 2006. Special wind up payments were made in 2007 ($709,013), 2008 ($875,313) and 2009 ($601,000). As of December 31, 2008, the wind up deficiency was $1,795,600.

33 All current service contributions have been made to the Salaried Plan.

34 Article 4.02 of the Salaried Plan obligates Indalex to make sufficient contributions to the Salaried Plan. Article 14.03 of the Salaried Plan requires Indalex to remit "amounts due or that have accrued up to the effective date of the wind-up and which have not been paid into the Fund, as required by the Plan and Applicable Pension Legislation".

The Executive Plan

35 The Executive Plan is a defined benefit plan. Effective September 1, 2005, Indalex closed the Executive Plan to new members.

36 As of January 1, 2008, there were eighteen members of the Executive Plan, none of whom were active employees.

37 The Executive Plan is underfunded.

38 As of January 1, 2008, the Executive Plan had an estimated funding deficiency, on an ongoing basis, of $2,535,100. On a solvency basis, the funding deficiency was $1,102,800 and on a windup basis, the deficiency was $2,996,400. An actuarial review indicated that as of July 15, 2009, the wind up deficiency had increased to an estimated $3,200,000.

39 In 2008, Indalex made total special payments of $897,000 to the Executive Plan. No further special payments were due to be made to the Executive Plan until 2011. All current service contributions had been made.

40 Due to its underfunded status, the Former Executives' monthly pension benefits have already been cut by 30-40%. Unless money is paid into the Executive Plan, these cuts will become permanent. The Former Executives have also lost their supplemental pension benefits which were unfunded and terminated by Indalex after it obtained *CCAA* protection. Between the two cuts, the Former Executives have lost between one half and two-thirds of their pension benefits.

41 On June 26, 2009, counsel for the Former Executives sent a letter to counsel to Indalex and the Monitor, advising that the Former Executives reserved all rights to the deemed trust under s. 57(4) of the *PBA* in the *CCAA* proceedings. There was no response or objection to that letter from Indalex, the Monitor or any other party.

42 At the time the Orders under Appeal were made, the Executive Plan had not been wound up. However, a letter from counsel for the Monitor dated July 13, 2009, indicated that it was expected that the Executive Plan would be wound up.

43 On March 10, 2010, the Superintendent issued a Notice of Proposal to wind up the Executive Plan effective as of September 30, 2009. The wind up process is currently underway.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Pension and Corporate Governance During the CCAA Proceedings

44 Keith Cooper, the Senior Managing Director of FTI Consulting Inc., was a key advisor to the Indalex group of companies prior to and during the *CCAA* proceedings. On March 19, 2009, he was appointed the Chief Restructuring Officer for all of the Indalex U.S. based companies. However, he was responsible not only for Indalex U.S. but for the entire Indalex group of companies and subsidiaries, including the Applicants. Mr. Cooper described his role as being to maximize recovery for Indalex as a whole.

45 Mr. Cooper was the primary negotiator of the DIP credit agreement on behalf of Indalex. He does not recall discussing Indalex's pension obligations in respect of the Salaried and Executive Plans during the negotiation of the DIP credit agreement. He was aware that the Plans were underfunded and that pensions would be reduced if the shortfalls were not met.

46 FTI Consulting Inc., the company for which Mr. Cooper works, and the Monitor are affiliated entities. The Monitor (FTI Consulting Canada ULC) is a wholly-owned subsidiary of FTI Consulting Inc.

47 On July 31, 2009, all of the directors of Indalex resigned. On that same day, Indalex Holding Corp. (part of Indalex U.S.) became the management of Indalex. Thus, as of July 31, 2009, Indalex and Indalex U.S. formally had the same management.

48 On August 12, 2009, a Unanimous Shareholder Declaration was executed in which Mr. Cooper was appointed to direct the affairs of all Indalex entities.

49 On August 13, 2009, Indalex (which was now under the management of Indalex U.S.) announced its intention to bring a motion to bankrupt the Canadian company.

The CCAA Proceedings

The Initial Order, as amended (April 3 and 8, 2009)

50 On April 3, 2009, pursuant to the order of Morawetz J. [2009 CarswellOnt 9396 (Ont. S.C.J. [Commercial List])], Indalex obtained protection from its creditors under the *CCAA* (the Initial Order). A stay of proceedings against Indalex was ordered.

51 On April 8, 2009 [2009 CarswellOnt 1998 (Ont. S.C.J. [Commercial List])], the Initial Order was amended to authorize Indalex to borrow funds pursuant to a DIP credit agreement among Indalex, Indalex U.S. and a syndicate of lenders (the DIP lenders). JP Morgan Chase Bank, N.A. was the administrative agent (the DIP Agent). The DIP credit agreement contemplated that the DIP loan would be repaid from the proceeds derived from a going-concern sale of Indalex's assets on or before August 1, 2009.

52 Indalex's obligation to repay the DIP borrowings was guaranteed by Indalex U.S. The Guarantee was a condition to the extension of credit by the DIP lenders.

53 Paragraph 45 of the Initial Order, as amended, is the super-priority charge. It provides that the DIP lenders' charge "shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise", other than the Administration Charge and the Directors' Charge, as those terms are defined in the Initial Order.

The Initial Order is Further Amended (June 12, 2009)

54 On June 12, 2010, Morawetz J. heard and granted a motion by the Applicants for approval of an amendment to the DIP credit agreement to increase the borrowings by about $5 million, from US$24.36 million to US$29.5 million. This resulted in an order dated June 12, 2009, further amending the Initial Order (the June 12, 2009 order).

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

55 Counsel for the Former Executives was served with motion material on June 11, 2009, at 8:27 p.m. In response to an email from the Former Executives' counsel questioning the urgency of the motion, the Monitor's counsel responded that the motion was simply directed at obtaining more money under the DIP credit agreement.

56 At the hearing of the motion on June 12, 2010, the Former Executives initially sought to reserve their rights to confirm that the motion was about an increase to the DIP and nothing more. When that was confirmed, the Former Executives withdrew their reservation and the motion proceeded later that afternoon.

The Sale Approval Order (July 20, 2009)

57 Indalex brought two motions that were heard on July 20, 2009 [2009 CarswellOnt 9397 (Ont. S.C.J. [Commercial List])], by Campbell J. (the *CCAA* judge).

58 First, Indalex sought approval of a sale of its assets, as a going concern, to SAPA Holdings AB (SAPA). Total consideration for the sale of Indalex and Indalex U.S. was approximately US$151,183,000.00. The Canadian sale proceeds were to be paid to the Monitor.

59 As a term of the sale, SAPA assumed no responsibility or liability for the Plans.

60 Second, Indalex moved for approval of an interim distribution of the sale proceeds to the DIP lenders.

61 Both the Former Executives and the USW objected to the planned distribution of the sale proceeds. They asserted statutory deemed trust claims in respect of the underfunded pension liabilities in the Plans, arguing that preference was to be given for amounts owing to the Plans pursuant to ss. 57 and 75 of the *PBA*. They also relied on s. 30(7) of the Ontario *Personal Property Security Act*, R.S.O. 1990, c. P.10 (*PPSA)*, which expressly gives priority to the deemed trust in the *PBA* over secured creditors.

62 The Former Executives and the USW further argued that Indalex had breached its fiduciary duty to the Plans' beneficiaries by failing to adequately meet its obligations under the Plans and by abdicating its responsibilities as administrator once *CCAA* proceedings had been undertaken.

63 The court approved the sale in an order dated July 20, 2009 (the Sale Approval order). However, as a result of the USW and Former Executives' reservation of rights, the Monitor retained an additional $6.75 million of the sale proceeds in reserve, an amount approximating the Deficiencies.

64 It was agreed that an expedited hearing process would be undertaken in respect of the USW and Former Executives' deemed trust claims and that the Reserve Fund held by the Monitor would be sufficient, if required, to satisfy the deemed trust claims.

The Guarantee is Called on

65 On July 31, 2009, the sale to SAPA closed. The sale proceeds available for distribution were insufficient to repay the DIP loan in full. The Monitor made a payment of US$17,041,391.80 to the DIP Agent. This resulted in a shortfall of US$10,751,247.22 in respect of the DIP borrowings. The DIP Agent called on the Guarantee for the amount of the shortfall, which Indalex U.S. paid.

The Orders under Appeal (August 28, 2009)

66 The USW and Former Executives brought motions to determine their deemed trust claims. The motions were set for hearing on August 28, 2009. Indalex then filed its bankruptcy motion, in which it sought to file a voluntary assignment in bankruptcy.

67 By orders dated February 18, 2010, the *CCAA* judge dismissed the USW and Former Executives' motions.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

68 The *CCAA* judge found it unnecessary to deal with Indalex's bankruptcy motion.

The Reasons of the CCAA Judge

The Former Executives' Motion

69 The CCAA judge dismissed the Former Executives' motion on the basis that since the wind up of the Executive Plan had not yet taken place, there were no deficiencies in payments to that plan as of July 20, 2009. As there were no deficiencies in payments, there was no basis for a deemed trust.

The USW Motion

70 Because the Salaried Plan was in the process of being wound up, the CCAA judge dismissed the USW motion for different reasons.

71 The CCAA judge saw the issue raised on the USW motion to be whether the *PBA* required Indalex to pay the windup deficiency in the Salaried Plan as at the date of closing of the sale and transfer of assets, namely, July 20, 2009. In resolving the issue, the *CCAA* judge considered ss. 57 and 75 of the *PBA*. He called attention to the words "accrued to the date of the wind up but not yet due" in s. 57(4).

72 The *CCAA* judge also considered ss. 31(1) and (2) of R.R.O. 1990, Reg. 909 (the Regulations). He concluded that because s. 31 of the Regulations permitted Indalex to make up the deficiency in the Salaried Plan over a period of years, the amount of the yearly payments did not become due until it was required to be paid. Were it not for s. 31 of the Regulations, the *CCAA* judge stated that Indalex would have had an obligation under the *PBA* to pay in any deficiency as of the date of wind up.

73 The CCAA judge concluded:

> [49] ... I find that as of the date of closing and transfer of assets there were no amounts that were "due" or "accruing due" on July 20, 2010. On that date, Indalex was not required under the *PBA* or the Regulations thereunder to pay any amount into the [Salaried] Plan. There was an annual payment that would have become payable as at December 31, 2009 but for the stay provided for in the Initial Order under the CCAA.
>
> [50] Since as of July 20, 2009, there was no amount due or payable, no deemed trust arose in respect of the remaining deficiency arising as at the date of wind-up.
>
> [51] Since under the initial order priority was given to the DIP Lenders, they are entitled to be repaid the amounts currently held in escrow. Those entitled to windup deficiency remain as of that date unsecured creditors.

The Indalex Bankruptcy Motion

74 Having found that the deemed trust claims failed, the *CCAA* judge considered that the question of Indalex's assignment into bankruptcy might be moot. He went on, in para. 55 of his reasons for decision, to state:

> [55] ... In my view, **a voluntary assignment under the *BIA* should not be used to defeat a secured claim under valid Provincial legislation**, unless the Provincial legislation is in direct conflict with the provisions of Federal Insolvency Legislation such as the *CCAA* or the *BIA*. For that reason I did not entertain the bankruptcy assignment motion first.
>
> [Emphasis added.]

75 He found no conflict between the federal and provincial legislative regimes and allowed the Applicants to renew their request for bankruptcy relief in a further motion.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

The Issues

76 The central issue raised on these appeals is whether the *CCAA* judge erred in his interpretation of s. 57(4) of the *PBA* and, specifically, in finding that no deemed trust existed with respect to the Deficiencies as at July 20, 2009.

77 The USW and the Former Executives ask the court to decide a second issue: whether during the *CCAA* proceedings Indalex breached the fiduciary obligations that it owed to the Plans' beneficiaries by virtue of being the Plans' administrator. [2]

78 The U.S. Trustee's submission raises two additional issues. Does the collateral attack rule bar the appellants' deemed trust motions? Do the principles of cross-border insolvencies apply to these appeals?

79 The final issue that arises is that of remedy: how is the Reserve Fund to be distributed?

80 Given the centrality of the wind up process to these appeals, I will briefly outline the salient aspects of the wind up process before turning to a consideration of each of these issues.

Winding UP a Pension Plan

81 To understand the wind up process, one must first understand how the pension plan operates while it is ongoing.

82 A pension plan to which the employees contribute is called a contributory plan. In the case of contributory plans, the employer is obliged to remit the employee contributions, including payroll deductions, within a specified time frame. This aspect of an employer's obligations does not arise in these appeals.

83 In addition to remitting the employee contributions, if any, while a defined benefit pension plan is ongoing, the employer must make two types of contributions to ensure that the plan is adequately funded and capable of paying the promised pension benefits.

> 1. *Current service or "normal cost" contributions* — the employer contributions necessary to pay for current service costs in respect of benefits that are currently accruing to members as a result of their ongoing participation in the plan as active employees. These must be made in monthly instalments within 30 days after the month to which they relate.
>
> 2. *Special payments* — a plan administrator must file an actuarial report annually in which the pension plan is valued on two different bases: a "going-concern" basis, where it is assumed the plan will continue to operate indefinitely; and a "solvency" basis, where it is assumed that the employer will discontinue its business and wind up its plan. If the actuarial report discloses a going-concern liability, the employer is required to make monthly special payments over a 15 year period to fund the unfunded liability. If the actuarial report discloses a solvency deficiency, the employer is required to make monthly special payments over a 5 year period to fund the deficiency.

84 It is important to understand that the solvency valuation is not the same thing as a wind up report. To repeat, the solvency valuation is prepared while the pension plan is ongoing. A solvency valuation is required while the plan is ongoing because it is crucial that there be adequate funds with which to pay pensions if the company becomes insolvent and the plan is wound up.

85 The wind up of a pension plan is defined in the *PBA* as "the termination of the pension plan and the distribution of the assets of the pension fund" (s. 1(1)). At the effective date of wind up, the plan members cease to accrue further entitlements under the plan. Naturally, no new members may join the plan after the wind up date. The pension fund of a plan that is wound up continues to be subject to the *PBA* and the Regulations until all of the assets of the fund have been disbursed (s. 76).

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

86 Winding up a pension plan must be distinguished from closing the plan, which simply means that no new entrants are permitted to join the plan.

87 Under the *PBA*, there are two ways that a pension plan can be wound up. First, s. 68(1) recognizes that an employer [3] can voluntarily wind up the pension plan. Second, under s. 69(1), in certain circumstances, the Superintendent may order the wind up of the plan.

88 The *PBA* contains a detailed statutory scheme that must be followed when a pension plan is to be wound up. This scheme imposes obligations on the employer and plan administrator, including the following:

- The administrator has to give written notice of proposal to wind up to various people, including the Superintendent, and the notice must contain specified information (s. 68(2) and (4));
- A wind up date must be chosen and the administrator must file a wind up report showing, among other things, the plan's assets and liabilities as at that date (s. 70(1));
- No payments can be made out of the pension fund until the Superintendent has approved the wind up report (s. 70(4));
- Plan members with a certain combination of age and years of service or membership in the plan are entitled to additional benefits on wind up (grow-ins) (s. 74).

89 Importantly, s. 75 requires an employer to make two different categories of payment on plan wind up. Sections 75(1)(a) and (b) read as follows:

> **Liability of employer on wind up**
>
> **75.** (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,
>
> (a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and
>
> (b) an amount equal to the amount by which,
>
> (i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,
>
> (ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and
>
> (iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,
>
> exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

90 Section 75(1)(a) requires the employer to make all payments that are due immediately or that have accrued and not been paid into the pension fund. Any unpaid current service costs and unpaid special payments are caught by this subsection. In other words, by virtue of this subsection, any payments that the employer had to make while the plan was ongoing must be paid. It will be recalled that while the plan was ongoing, some special payments could be made over time.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

91 Section 75(1)(b) requires the employer to pay additional amounts into the pension fund if there are insufficient assets to cover the value of the pension benefits in the three categories set out in s. 75(1)(b).

92 It will be apparent that on wind up, an employer will often be faced with having to make significant additional contributions under s. 75(1)(b), in addition to being required to bring all contributions up to date because of s. 75(1)(a). Section 75(2) stipulates that "the employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times." Section 31 of the Regulations prescribes the manner and timing for the s. 75 wind up payments. It provides that the amounts an employer is to contribute under section 75 shall be by annual special payments, commencing at the effective date of the wind up, over not more than five years.

The PBA Deemed Trust

93 The central issue in these appeals is whether the *CCAA* judge erred in his interpretation of s. 57(4) of the *PBA*. Section 57(4) reads as follows:

> **57.** (4) **Where a pension plan is wound up** in whole or in part, **an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust** for the beneficiaries of the pension plan **an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.**
>
> [emphasis added]

94 The modern approach to statutory construction dictates that in interpreting s. 57(4), the words must be read

> in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [4]

95 Section 57(4) deems an employer to hold in trust an amount equal to the contributions "accrued to the date of wind up but not yet due under the plan or regulations". The question is: what employer contributions are caught by s. 57(4) and, thus, are subject to the deemed trust?

96 The introductory words of s. 57(4) refer to where a pension plan is "wound up". Therefore, to answer this question, one must refer to the wind up regime created by the *PBA* and Regulations, a summary of which is set out above.

97 It will be recalled that when a pension plan is wound up, an actuarial calculation is made of the assets and liabilities, as of the wind up date. Because the plan liabilities relate to service that was provided up to the wind up date and not beyond, it is clear that all plan liabilities are accrued as of the wind up date. Put another way, no additional liability can accrue following the wind up because all events crystallize on the windup date — all pension benefit accruals by members cease and all amounts that an employer is required to pay into a pension plan are calculated as of the wind up date. For the same reason, the amounts that s. 75 requires an employer to contribute to the pension fund, on wind up, are accrued to the date of wind up. The required contributions are the amounts that an employer must make to the pension fund so that the accrued pension benefits of the plan members can be paid.

98 It will be further recalled that s. 31 of the Regulations gives the employer up to five years in which to make all of the required s. 75 contributions. However, the fact that an employer is given time in which to pay the requisite contributions into the pension fund does not change the fact that the liabilities accrued by the wind up date.

99 This point is reinforced when one distinguishes amounts that are "accrued" from amounts that are "not yet due". In *Ontario Hydro-Electric Power Commission v. Albright* (1922), 64 S.C.R. 306 (S.C.C.), at para. 23, the Supreme Court of Canada explains that money is "due" when there is a legal obligation to pay it, whereas payments are "accrued" when the rights or obligations are constituted and the liability to pay exists, even if the payment does not need to be made until a later date (*i.e.* is not "due" until a later date).

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

100 Thus, just as s. 57(4) contemplates, while the amounts that the employer must contribute to the pension fund pursuant to s. 75 "accrued to the date of wind up", because of s. 31 those contributions are "not yet due under the ... regulations".

101 There is nothing in the wording of s. 57(4) to suggest that its scope is confined to the amounts payable under only s. 75(1)(a), as the respondents contend. On the contrary, the words of s. 57(4), given their grammatical and ordinary meaning, contemplate that all amounts owing to the pension plan on wind up are subject to the deemed trust, even if those amounts are not yet due under the plan or regulations. Therefore, the deemed trust in s. 57(4) applies to all employer contributions that are required to be made pursuant to s. 75. In short, the words "employer contributions accrued to the date of wind up but not yet due" in s. 57(4) include all amounts owed by the employer on the wind up of its pension plan.

102 This interpretation accords with a contextual analysis of s. 57(4).

103 As these appeals demonstrate, during the five-year "grace" period permitted by s. 31 of the Regulations, the rights of plan beneficiaries are at risk. Sections 57(4) and (5) provide some protection to the plan beneficiaries during that period. The employees' interest is in receiving their full pension entitlements. For that to happen, all s. 75 employer contributions must be made into the pension fund. The employer, on the other hand, has an interest in having a reasonable period of time within which to make the requisite s. 75 contributions. Section 31 of the Regulations gives the employer up to five years to make the contributions, during which time the deemed trust in s. 57(4) and the lien and charge in s. 57(5) provide a measure of protection for the employees over the amount of the unpaid employer contributions, contributions that had *accrued* to the date of wind up *but [were] not yet due under the regulations*.

104 Further, this interpretation is consistent with the overall purpose of the *PBA*, which is to establish minimum standards,[5] safeguard the rights of pension plan beneficiaries,[6] and ensure the solvency of pension plans so that pension promises will be fulfilled.[7] As the Supreme Court of Canada said in *Monsanto*, at para. 38:

> The Act is public policy legislation that recognizes the vital importance of long-term income security. As a legislative intervention in the administration of voluntary pension plans, its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans (citations omitted).

105 Much reference has been made to the two cases in which s. 57(4) has been discussed: *Ivaco Inc., Re* (2005), 12 C.B.R. (5th) 213 (Ont. S.C.J. [Commercial List]), aff'd (2006), 83 O.R. (3d) 108 (Ont. C.A.), and *Toronto Dominion Bank v. Usarco Ltd.* (1991), 42 E.T.R. 235 (Ont. Gen. Div.). In my view, these decisions are of little assistance in deciding this issue.

106 Factually, *Ivaco* and *Usarco* differ from the present case. In *Ivaco* and *Usarco*, the prospect of bankruptcy was firmly before the court whereas in this case, at its highest, there is a motion to lift the stay and file for bankruptcy.

107 Moreover, there are conflicting statements in *Ivaco* and *Usarco* regarding the applicability of the deemed trust to wind up deficiencies. In *Usarco*, a bankruptcy petition had been filed but no steps had been taken to proceed with the petition. The company was not under *CCAA* protection. In that context, Farley J., the motion judge, held that the deemed trust provision referred only to the regular contributions together with special contributions that were to have been made but had not been.[8] In *Ivaco*, the major financers and creditors wished to have the *CCAA* proceeding, which was functioning as a liquidation, transformed into a bankruptcy proceeding. The case was focused primarily on whether there was a reason to defeat the bankruptcy petition. In *Ivaco*, Farley J. took a different view of the scope of the s. 57(4) deemed trust, stating that in a non-bankruptcy situation, the company's assets were subject to a deemed trust on account of unpaid contributions and wind up liabilities.[9] On appeal, although this court indicated that it thought that Farley J.'s statement in *Usarco* was correct, it found it unnecessary to decide the matter. Accordingly, these decisions are not determinative of the scope of the deemed trust created by s. 57(4) of the *PBA*.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

108 The *CCAA* judge concluded that because Indalex had made the going-concern and special payments to the Salaried Plan at the date of closing, there were no amounts due to the Salaried Plan. Therefore, there could be no deemed trust. Respectfully, I disagree. As I have explained, the deemed trust in s. 57(4) is not limited to the payment of amounts contemplated by s. 75(1)(a). It applies to all payments required by s. 75(1), including payments mandated by s. 75(1)(b).

109 Accordingly, the deficiency in the Salaried Plan had accrued as of the date of wind up (December 31, 2006) and, pursuant to s. 57(4) of the *PBA*, was subject to a deemed trust. The *CCAA* judge erred in holding that no deemed trust existed with respect to that deficiency as at July 20, 2009. The consequences that flow from this conclusion are explored in the section below on how the Reserve Fund is to be distributed.

110 Are the unpaid liability payments owing to the Executive Plan also subject to the s. 57(4) deemed trust? The Former Executives, Superintendent and Morneau all contend that they are. On the plain wording of s. 57(4), I find it difficult to accept this argument — the introductory words of the provision speak to "where a pension plan is wound up". In other words, wind up of the pension plan appears to be a requirement for s. 57(4) to apply. If that is so, no deemed trust could arise unless and until a plan wind up occurred. As has been noted, the Executive Plan had not been wound up at the relevant time.

111 Having said this, I am troubled by the notion that Indalex can rely on its own inaction to avoid the consequences that flow from wind up. In its letter of July 13, 2009, counsel for the Monitor confirmed that the Executive Plan would be wound up. Indeed, the *CCAA* judge acknowledged that the material filed with the court showed an intention on the part of the Applicants to wind up the plan. If the deemed trust does not extend to the Executive Plan, in the circumstances of this case, it appears that the result would be a triumph of form over substance.

112 In the end, however, the question that drives these appeals is whether the Monitor should be directed to distribute the Reserve Fund to the Plans. As I explain below in the section on how the Reserve Fund should be distributed, in my view, such an order should be made. Consequently, it becomes unnecessary to decide whether the deemed trust applies to the deficiency in the Executive Plan and I decline to do so. It is a question that is best decided in a case where the result depends on it and a fuller record would enable the court to appreciate the broader implications of such a determination.

Did Indalex Breach Its Fiduciary Obligation?

113 The appellants say that Indalex, as administrator of the Plans, owed a fiduciary duty to the Plans' members and beneficiaries. Both appellants list a number of actions that Indalex took or failed to take during the *CCAA* proceedings that they say amounted to breaches of its fiduciary obligation. They contend that the appropriate remedy for those breaches is an order requiring the Reserve Fund to be paid into the Plans.

114 The Monitor acknowledges that pension plan administrators have both a statutory and common law duty to act in the best interests of the plan beneficiaries and to avoid conflicts of interest, and that these duties are "fiduciary in nature". However, the Monitor contends that Indalex took all of the impugned actions in its role as employer and, therefore, could not have breached the fiduciary duties it owed to the Plans' beneficiaries as administrator. In any event, the Monitor adds, the issue is moot because any such breaches would merely give rise to an unsecured claim outside the ambit of the deemed trusts created by the *PBA*.

115 Sun Indalex echoes the Monitor's latter argument and says that the allegations of breach of fiduciary duty are irrelevant in these appeals. Its submission on this issue is summarized in para. 79 of its factum:

> [79] There is no provision in the PBA that creates a deemed trust in respect of any claim for damages based on an alleged breach of fiduciary duty by an employer and there is no basis in the PBA for conferring a priority with respect to such a claim. If a claim for breach of fiduciary duty on the part of Indalex exists, it is merely an unsecured claim outside the ambit of the deemed trusts created by the PBA that does not have priority over Sun's secured claim or the super-priority DIP Lenders Charge.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

116 For the reasons that follow, I accept the appellants' submission that Indalex breached its fiduciary obligations as administrator during the *CCAA* proceedings. I deal with the question of what flows from that finding when deciding the issue of remedy.

117 It is clear that the administrator of a pension plan is subject to fiduciary obligations in respect of the plan members and beneficiaries. [10] These obligations arise both at common law and by virtue of s. 22 of the *PBA*.

118 The common law governing fiduciary relationships is well known. A fiduciary relationship will be held to exist where, given all the surrounding circumstances, one person could reasonably have expected that the other person in the relationship would act in the former's best interests. [11] The key factual characteristics of a fiduciary relationship are: the scope for the exercise of discretion or power; the ability to exercise that power unilaterally so as to affect the beneficiary's legal or practical interests; and, a peculiar vulnerability on the part of the beneficiary to the exercise of that discretion or power. [12]

119 It is readily apparent that these characteristics exist in the relationship between the pension plan administrator and the plan members and beneficiaries. The administrator has the power to unilaterally make decisions that affect the interests of plan members and beneficiaries as a result of its responsibility for the administration of the plan and management of the fund. Those decisions affect the beneficiaries' interests. The plan members and beneficiaries reasonably rely on the administrator to ensure that the plan and fund are properly administered. And, as these appeals demonstrate, they are peculiarly vulnerable to the administrator's exercise of its powers. Thus, at common law, Indalex as the Plans' administrator owed a fiduciary duty to the Plans' members and beneficiaries to act in their best interests.

120 Section 22 of the *PBA* also imposes a fiduciary duty on the administrator in the administration of the plan and fund. As well, it expressly prohibits the administrator from knowingly permitting its interest to conflict with its duties in respect of the pension fund. The relevant provisions in s. 22 read as follows:

> **Care, diligence and skill**
>
> **22.** (1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.
>
> **Special knowledge and skill**
>
> (2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.
>
> . . .
>
> **Conflict of interest**
>
> (4) An administrator ... shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

121 In Ontario, an employer is expressly permitted to act as the administrator of its pension plan: see ss. 1 and 8 of the *PBA*. [13] It is self-evident that the two roles can conflict from time to time. In *Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)* (1995), 18 C.C.P.B. 198 (Ont. Pension Comm.) (*Imperial Oil*), the Pension Commission of Ontario grappled with this statutorily sanctioned conflict in roles.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

122 In that case, the employer Imperial Oil was the administrator of two employee pension plans. Imperial Oil sought to file amendments to the pension plans with the PCO. Prior to the amendments, a plan member with 10 or more years of service with Imperial Oil whose employment was terminated for efficiency reasons was entitled to an enhanced early retirement annuity (the enhanced benefit). The effect of the amendments was to deny such an employee the enhanced benefit unless the employee would have been able to retire within five years of termination. Put another way, after the amendments, in addition to the other requirements, an employee had to be 50 years of age or older at the time his or her employment was terminated for efficiency reasons in order to receive the enhanced benefit.

123 The Superintendent accepted the amendments for registration.

124 Some six months after the amendments were passed, Imperial Oil terminated the employment of a large number of employees for efficiency reasons. A number of the affected employees had 10 or more years of service but, because they had not reached the age of 50, they were denied the enhanced benefit.

125 A group of former employees (the Entitlement 55 Group) objected to the registration of the amendments. They brought an application to the PCO, seeking a declaration that the amendments were void and an order compelling Imperial Oil to administer the pension plans according to the terms of the plans in place before the amendments were passed.

126 Among other things, the Entitlement 55 Group argued that when Imperial Oil amended the plans, it was acting in both its capacity as employer and its capacity as administrator of the plans. Thus, they contended, Imperial Oil placed itself in a conflict of interest situation prohibited by s. 22(4) of the *PBA* because in its role as employer it wished to reduce pension fund liabilities but in its role as administrator it had a duty to protect the interests of the beneficiaries who had reached the 10 year service qualification and thereby "qualified" for the enhanced benefit.

127 The PCO dismissed the application. In so doing, it rejected the submission that Imperial Oil had contravened s. 22(4) by passing the amendments. It held that Imperial Oil had acted solely in its capacity as employer when it passed the amendments.

128 The PCO acknowledged that the *PBA* allows an employer to wear "two hats" — one as employer and the other as administrator. However, at para. 33 of its reasons, the PCO explained that an employer plays a role in respect of the pension plan that is distinct from its role as administrator:

> Its role as employer permits it to make the decision to create a pension plan, to amend it and to wind it up. Once the plan and fund are in place, it becomes an administrator for the purposes of management of the fund and administration of the plan. If we were to hold that an employer was an administrator for all purposes once a plan was established, of what use would a power of amendment be? An employer could never use the power to amend the plan in a way that was to its benefit, as opposed to the benefit of the employees. Section 14 presupposes this power is with an employer as it created parameters around the exercise of a power of amendment.

129 The "two hats" analogy in *Imperial Oil* assists in understanding the parameters of the dual roles of an employer who is also the administrator of its pension plan. The employer, when managing its business, wears its corporate hat. Although the employer *qua* corporation must treat all stakeholders fairly when their interests conflict, the directors' ultimate duty is to act in the best interests of the corporation: see *BCE Inc., Re*, [2008] 3 S.C.R. 560 (S.C.C.), at paras. 81-84. On the other hand, when acting as the pension plan administrator, the employer wears its fiduciary hat and must act in the best interests of the plan's members and beneficiaries.

130 The question raised by these appeals is whether, as the respondents contend, Indalex wore only its corporate hat during the *CCAA* proceedings. In my view, it did not. As I will explain, during the *CCAA* proceedings, in the unique circumstances of this case, Indalex wore both its corporate and its administrator's hats.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

131 I begin from the position that Indalex had the right to make the decision to commence *CCAA* proceedings wearing solely its corporate hat. That decision is not part of the administration of the pension plan or fund nor does it necessarily engage the rights of the beneficiaries of the pension plan. For example, an employer might sell its business under *CCAA* protection, with the purchaser agreeing to continue the pension plan. In that situation, there should be no effect on the payment of pension benefits. Similarly, if the pension plan were fully funded, *CCAA* proceedings should have no effect on pension entitlements.

132 However, just because the initial decision to commence *CCAA* proceedings is solely a corporate one that does not mean that all subsequent decisions made during the proceedings are also solely corporate ones. In the circumstances of this case, Indalex could not simply ignore its obligations as the Plans' administrator once it decided to seek *CCAA* protection. Shortly after initiating *CCAA* proceedings, Indalex moved to obtain DIP financing, in which it agreed to give the DIP lenders a super-priority charge. At the same time, Indalex knew that the Plans were underfunded and that unless more funds were put into the Plans, pensions would have to be reduced. The decisions that Indalex was unilaterally making had the potential to affect the Plans beneficiaries' rights, at a time when they were particularly vulnerable. The peculiar vulnerability of pension plan beneficiaries was even greater than in the ordinary course because they were given no notice of the *CCAA* proceedings, had no real knowledge of what was transpiring and had no power to ensure that their interests were even considered — much less protected — during the DIP negotiations.

133 In concluding that Indalex was subject to its fiduciary duties as administrator as well as its corporate obligations during the *CCAA* proceedings, two points need to be made.

134 First, it is significant that Indalex is unclear as to what it thinks happened to its role as administrator during the *CCAA* proceedings. When cross-examined on this matter, Mr. Cooper gave various responses as to whom he believed filled that role: Indalex, a combination of him and the Monitor, and a combination of him and his staff. This confusion is understandable, given the number of roles that Mr. Cooper played in these proceedings. It will be recalled that prior to the commencement of the *CCAA* proceedings, he became the Chief Restructuring Officer for Indalex U.S., a position which included responsibility for the Canadian group of Indalex companies. In this position, he served as Indalex's primary negotiator of the DIP credit agreement. But, at the same time, he worked for FTI Consulting Inc. The Monitor is a wholly-owned subsidiary of FTI Consulting Inc. This blending of roles no doubt contributed to the apparent disregard for the obligations owed by the Plans' administrator.

135 In any event, it is not apparent to me that Indalex could ignore its role as administrator or divest itself of those obligations without taking formal steps through the Superintendent, plan amendment, the courts, or some combination thereof, to transfer that role to a suitable person. However, I will not consider this particular question further because it was not squarely raised and argued by the parties and, in any event, even if Mr. Cooper became the administrator, through his various roles, including as Chief Restructuring Officer for Indalex U.S., he is so clearly allied in interest with Indalex that the following analysis remains applicable.

136 Second, the respondents' submission that Indalex wore only its corporate hat during the proceedings is implicitly premised on the notion that an employer will wear its corporate hat or its administrator's hat, but never both. I do not accept this premise. Nor do I accept that the reasoning in *Imperial Oil*, which the respondents rely on, supports this submission.

137 In *Imperial Oil*, the PCO had to decide whether certain acts taken in respect of a pension plan were those of the employer or the administrator. Because the provision of pension plans is voluntary in Canada, the employer has the right to decide questions of plan design, including whether to offer a pension plan and, if it does, whether to end it. In part because of the wording of s. 14 of the *PBA* and in part because the amendments at issue in *Imperial Oil* were a matter of plan design, the PCO concluded that the employer was found to be acting solely in its corporate role when it passed the amendments. There is nothing in *Imperial Oil* to suggest that an employer cannot find itself in a position where it is wearing both hats at the same time.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

138 I turn next to the question of breach.

139 As previously noted, when Indalex commenced *CCAA* proceedings, it knew that the Plans were underfunded and that unless additional funds were put into the Plans, pensions would be reduced. Indalex did nothing in the *CCAA* proceedings to fund the deficit in the underfunded Plans. It took no steps to protect the vested rights of the Plans' beneficiaries to continue to receive their full pension entitlements. In fact, Indalex took active steps which undermined the possibility of additional funding to the Plans. It applied for *CCAA* protection without notice to the Plans' beneficiaries. It obtained a *CCAA* order that gave priority to the DIP lenders over "statutory trusts" without notice to the Plans' beneficiaries. It sold its assets without making any provision for the Plans. It knew the purchaser was not taking over the Plans. [14] It moved to obtain orders approving the sale and distributing the sale proceeds to the DIP lenders, knowing that no payment would be made to the underfunded Plans. And, Indalex U.S. directed Indalex to bring its bankruptcy motion with the intention of defeating the deemed trust claims and ensuring that the Reserve Fund was transferred to it. In short, Indalex did nothing to protect the best interests of the Plans' beneficiaries and, accordingly, was in breach of its fiduciary obligations as administrator.

140 Further, in my view, Indalex was in a conflict of interest position. As has been mentioned, Indalex's corporate duty was to treat all stakeholders fairly when their interests conflicted, but its ultimate duty was to act in the best interests of the corporation. Indalex's duty as administrator was to act in the Plans' beneficiaries best interests. It is apparent that in the circumstances of this case, these duties were in conflict.

141 The common law prohibition against conflict of interest is not confined to situations where the fiduciary's personal interest conflicts with those of the beneficiaries. It also precludes the fiduciary from placing itself in a position where it acts for two parties who are adverse in interest: *Davey v. Woolley, Hames, Dale & Dingwall* (1982), 35 O.R. (2d) 599 (Ont. C.A.), at para. 8. In *Davey*, a solicitor who acted for both sides of a business transaction was found to be in breach of his fiduciary obligations. Wilson J.A., writing for this court, explained that the conflict arose because the solicitor could not fulfill his duties in respect of both clients at the same time. At para. 18, she concluded that the solicitor was bound to refuse to act for the plaintiff in the circumstances.

142 The prohibition against a fiduciary being in a position of conflicting duties governs the situation in which Indalex found itself in during the *CCAA* proceedings.

143 Indalex was not at liberty to resolve the conflict in its duties by simply ignoring its role as administrator. A fiduciary relationship does not end simply because it becomes impossible of performance. At the point where its duty to the corporation conflicted with its duties as administrator, it was incumbent on Indalex to take steps to address the conflict.

144 Even if I am in error in concluding that Indalex was in breach of its common law fiduciary obligations, I would find that its actions amounted to a breach of s. 22(4) of the *PBA*. Section 22(4) prohibits an administrator from knowingly permitting its interest to conflict with its duties and powers in respect of the pension fund. Under s. 57(5) of the *PBA*, as administrator, Indalex had a lien and charge on its assets for the amount of the deemed trust. Any steps that it might have taken pursuant to s. 57(5), as administrator, would have been in respect of the pension fund. Thus, if nothing else, Indalex's actions during the *CCAA* proceedings demonstrate that it permitted its corporate interests to conflict with the administrator's duties and powers that flow from the lien and charge.

145 Having found that Indalex breached its fiduciary obligations to the Plans' beneficiaries, the question becomes: what flows from such a finding? I address that question below when considering the issue of how to distribute the Reserve Fund. At that time I will return to the arguments of the Monitor and Sun Indalex to the effect that such a finding is largely irrelevant in these proceedings.

Does the Collateral Attack Rule Bar the Deemed Trust Motions?

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

146 The U.S. Trustee submits that even if the *PBA* creates a deemed trust for any wind up deficiencies in the Plans, the appeals should be dismissed because the underlying motions are an impermissible collateral attack on previous orders made in the *CCAA* proceedings. His argument runs as follows.

147 The Initial Order, the June 12, 2009 order and the Sale Approval order (the "Court Orders") are all valid, enforceable court orders. The Court Orders gave super-priority rights to the DIP lenders and Indalex U.S. is subrogated to those rights. None of the Court Orders were appealed and no party sought to have them set aside or varied. As the appellants' motions seek to alter the priorities established by the Court Orders, they should be barred because they are an impermissible collateral attack on those orders.

148 I do not accept this submission for three reasons, the first two of which can be shortly stated.

149 First, this submission is an attack on the underlying motions. As such, it ought to have been raised below. The Former Executives say that the collateral attack doctrine was raised for the first time on appeal. Certainly, if it was raised below, the *CCAA* judge makes no reference to it. As a general rule, it is not appropriate to raise an issue for the first time on appeal. The exceptions to this general rule are very limited and do not apply in this case: see *Cusson v. Quan*, [2009] 3 S.C.R. 712 (S.C.C.), at paras. 36-37.

150 Second, the USW and the Former Executives raised the matter of the deemed trusts in the *CCAA* proceedings. The *CCAA* judge designed a process by which their claims would be resolved. They followed that process. The USW and Former Executives can scarcely be faulted for complying with a court-designed process. Further, the Sale Approval order acknowledged the deemed trust issue in that it required the Monitor to hold funds in reserve that were sufficient to satisfy the deemed trust claims. That acknowledgment is inconsistent with a subsequent claim of impermissible collateral attack.

151 Third, as I will now explain, an appreciation of the *CCAA* regime makes it apparent that the collateral attack rule does not apply in the circumstances of this case.

152 The collateral attack rule rests on the need for court orders to be treated as binding and conclusive unless they are set aside on appeal or lawfully quashed. Court orders may not be attacked collaterally. That is, a court order may not be attacked in proceedings other than those whose specific object is the reversal, variation, or nullification of the order. See *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.), at para. 8.

153 The fundamental policy behind the rule against collateral attacks is "to maintain the rule of law and to preserve the repute of the administration of justice": see *R. v. Litchfield*, [1993] 4 S.C.R. 333 (S.C.C.), at para. 22. If a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it: see *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 (S.C.C.), at para. 72.

154 The *CCAA* regime is designed to deal with all matters during an insolvent company's attempt to reorganize. The court-ordered stay of proceedings ensures that there is only one forum where parties can put forth their arguments and claims. By pre-empting other legal proceedings, the stay gives a corporation breathing space, which promotes the opportunity for reorganization.

155 The *CCAA* regime is a flexible, judicially supervised reorganization process that allows for creative and effective decisions: see *Ted Leroy Trucking Ltd., Re*, [2010] 3 S.C.R. 379 (S.C.C.), at para. 21. The *CCAA* judge is accorded broad discretion because the proceedings are a fact-based exercise that requires ongoing monitoring and because there is often a need for the court to act quickly. There is an underlying assumption, however, that the *CCAA* proceedings will provide an opportunity for affected persons to participate in the proceedings.

156 This assumption finds voice in para. 56 of the Initial Order, as amended, which permits any interested party to apply to the *CCAA* court to vary or amend the Initial Order (the come-back clause). That is precisely what the appellants

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

did. As interested parties, they went to the *CCAA* court to ask that the super-priority charge be varied or amended so that their claims could be properly recognised.

157 Moreover, I do not accept that the appellants failed to act promptly in asserting their claims. It was only when Indalex brought a motion for approval of the sale of its assets to SAPA and for a distribution of the sale proceeds to the DIP lenders that it became clear that Indalex intended to abandon the Plans in their underfunded states. The appellants immediately took steps to assert their claims in the very forum in which all of the Court Orders had been made, namely, the *CCAA* court.

158 The U.S. Trustee's argument that the Court Orders were never appealed is not persuasive. In *Algoma Steel Inc., Re* (2001), 147 O.A.C. 291 (Ont. C.A.), at paras. 7-9, this court stated that it is premature to grant leave to appeal from an initial order — brought on an urgent basis to deal with seemingly desperate circumstances — when the order specifically opens the proceeding to all interested parties and invites dissatisfied parties to bring their concerns to the court on a timely basis using a come-back provision.

159 As the Former Executives point out, had the appellants sought to advance their deemed trust claims by bringing a motion challenging the paragraph of the Initial Order that established the DIP super-priority charge, it is likely that they would have been met by a response that their motions were premature. Depending on the amount paid for the company and/or the arrangements made in respect of the Plans, the interests of the Plans' beneficiaries might not have been affected by a sale. Indeed, on July 2, 2009, when Indalex brought a motion to have the bidding procedures approved for the asset sale and the Former Executives objected because of concerns that the Plans were underfunded, the *CCAA* judge endorsed the record as follows: "The issues can be raised by the retirees on any application to approve a transaction — but that is for another day."

160 The appellants followed that direction. When Indalex moved to have the sale transaction approved and the jeopardy to the appellants' interests became apparent, they went to the *CCAA* court and raised the deemed trust issue. [15]

161 Thus, as I have said, I do not view the deemed trust motions as collateral attacks on the Court Orders. The motions were raised in a timely manner in the same court in which the orders were made. They can scarcely be termed attempts to circumvent decisions rendered against the USW and the Former Executives when no decision had ever been rendered in which their claims had been squarely raised and addressed. The process the USW and the Former Executives followed is exactly that which is contemplated in *CCAA* proceedings and, specifically, the come-back clause.

162 Even if the collateral attack rule were applicable, however, this is not a case for its strict application.

163 In *Litchfield*, the Supreme Court of Canada recognized that there will be situations in which the collateral attack rule should not be strictly applied. In that case, a physician had been charged with a number of counts of sexual assault on his patients. On motion, a judge (not the trial judge) ordered that the counts be severed and divided and three different trials be held. After one trial, the physician was acquitted. The Crown appealed. One of the grounds of appeal related to the pre-trial severance order. The question arose as to whether the Crown's challenge to the validity of the severance order violated the collateral attack rule.

164 At paras. 16-19 of *Litchfield*, Iacobucci J., writing for the majority, explains that "some flexibility" is needed in the application of the rule against collateral attacks. Strictly applied, the rule would prevent the trial judge from reviewing the severance order because the trial was not a proceeding whose specific object was the reversal, variation or nullification of the severance order. However, Iacobucci J. noted, the rule is not intended to immunize court orders from review. He reiterated the powerful rationale behind the rule: to maintain the rule of law and preserve the repute of the administration of justice. This promotes certainty and finality, key aspects of the orderly and functional administration of justice. However, he concluded that flexibility was warranted because permitting a collateral attack on the severance order did not offend the underlying rationale for the rule.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

165 Similarly, in *R. v. Domm* (1996), 31 O.R. (3d) 540 (Ont. C.A.), at para. 31, Doherty J.A., writing for this court, states that if a collateral attack can be taken without harm to the interests of the rule of law and the repute of the administration of justice, the rule should be relaxed. At para. 36 of *Domm*, he says that the rule must yield where a person has "no other effective means" of challenging the order in question.

166 I acknowledge that certainty and finality are necessary to the proper functioning of the legal system. And, I recognize that permitting the appellants' motions to proceed has generated some degree of uncertainty as to the priorities established by the Court Orders. However, in the circumstances of this case, there was no other effective means by which the appellants could assert their claims to a deemed trust. As has been mentioned, it was only when Indalex brought a motion for approval of the sale of its assets to SAPA and for a distribution of the sale proceeds to the DIP lenders that it became clear that Indalex intended to abandon the Plans in their underfunded states. The appellants immediately took steps to assert their claims in the very forum in which all of the Court Orders had been made, namely, the *CCAA* court. By permitting their motions to be heard, the *CCAA* judge did not damage the repute of the administration of justice. On the contrary, he strengthened it. He enabled the sale to proceed while ensuring that the competing claims to the Reserve Fund would be decided on the merits and expeditiously.

167 Nor can it be said, for the reasons already given about the nature of *CCAA* proceedings, that the deemed trust motions jeopardize the rule of law. Given the nature of a *CCAA* proceeding, the court must often make orders on an urgent and expedited basis, with little or no notice to creditors and other interested parties. Its processes are sufficiently flexible that it can accommodate situations such as the one that arose here. A strict application of the rule would preclude the appellants from having the opportunity to meaningfully challenge the super-priority charge in the Initial Order, as amended. In my view, that result would be a fundamental flaw in the *CCAA* process, one in which procedure triumphed over substance. As Iacobucci J. said in *Litchfield*, at para. 18, such a result cannot be accepted.

168 Accordingly, in my view, while the collateral attack rule does not apply, even if it did, there are compelling reasons in this case to relax its strict application.

Do The Principles of Cross-Border Insolvencies Apply?

169 The U.S. Trustee also submits that the principles of cross-border insolvencies should be applied when deciding these appeals. He contends that notwithstanding that separate proceedings were commenced in Canada and the U.S., those principles apply because the Applicants were direct and indirect subsidiaries of certain of the U.S. debtors, who commenced proceedings under Chapter 11 of Title 11 of the United States Bankruptcy Code in March 2009. Further, the U.S. Trustee contends that if the appellants' claims were to succeed, it would seriously undermine the basic principles underlying cross-border insolvencies and the confidence of foreign creditors and courts in the Canadian insolvency system.

170 While this argument provides context for the U.S. Trustee's collateral attack submission, I do not see it as disclosing any legal grounds relevant to these appeals. By order dated May 12, 2009, Morawetz J. approved a cross-border protocol in these proceedings that stipulates that the U.S. and Canadian courts retain exclusive jurisdiction over the proceedings in their respective jurisdictions. Furthermore, there is no evidence to support the U.S. Trustee's claim that allowing these appeals would impair future lending practices by U.S. companies. Finally, nothing has been raised which supports the notion that upholding valid provincial law in the circumstances of these appeals will undermine the principles of cross-border insolvencies.

How Is the Reserve Fund to Be Distributed?

The Salaried Plan

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

171 Having concluded that a deemed trust exists with respect to the deficiency in the Salaried Plan as at July 20, 2009, the question becomes whether the Monitor should be ordered to pay the amount of that deficiency, from the Reserve Fund, into the Salaried Plan.

172 The USW argues, on behalf of the beneficiaries of the Salaried Plan, that the deemed trust ranks in priority to all secured creditors and, therefore, the order should be made. Its argument rests on s. 30(7) of the *PPSA*, which reads as follows:

> **30. (7) A security interest** in an account or inventory and its proceeds **is subordinate to the interest of a person who is the beneficiary of a deemed trust** arising under the Employment *Standards Act* or **under the *Pension Benefits Act*.** [emphasis added]

173 The USW contends that as s. 30(7) gives priority to the *PBA* deemed trust and no finding of paramountcy was made in these proceedings, it must be given effect.

174 The respondents argue that the super-priority charge has priority over any deemed trusts and, therefore, the Reserve Fund should be paid to Sun Indalex, as the principal secured creditor of Indalex U.S. They point to well-established law that authorizes the court to grant super-priority to DIP lenders in *CCAA* proceedings and argue that without such a charge, DIP lenders will no longer provide financing to companies under *CCAA* protection. Without DIP funding they say, many companies under *CCAA* protection will be unable to continue in business until a compromise or arrangement has been worked out. Consequently, companies will file for bankruptcy where deemed trusts have no priority. This, they say, will frustrate the very purpose of the *CCAA*, which is to facilitate the making of compromises or arrangements between insolvent debtor companies and their creditors.

175 There is a great deal of force to the respondents' submissions. Indeed, in general, I agree with them. It is important that the courts not address the interests of pension plan beneficiaries in a manner that thwarts or even discourages DIP funding in future *CCAA* proceedings. Nonetheless, in the circumstances of this case, it is my view that the Monitor should be ordered to pay the amount of the deficiency, from the Reserve Fund, into the Salaried Plan.

176 The *CCAA* court has the authority to grant a super-priority charge to DIP lenders in *CCAA* proceedings. [16] I fully accept that the *CCAA* judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation, including the *PBA*. I also accept that without such a charge, DIP lenders may be unwilling to provide financing to companies under *CCAA* protection. However, this does not mean that the super-priority charge in question has the effect of overriding the deemed trust. To decide whether it does, one must turn to the doctrine of paramountcy.

177 Valid provincial laws continue to apply in federally regulated bankruptcy and insolvency proceedings absent an express finding of federal paramountcy. The onus is on the party relying on the doctrine of paramountcy to demonstrate that the federal and provincial laws are incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law: see *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 (S.C.C.), at para. 75 and *Nortel Networks Corp., Re* (2009), 99 O.R. (3d) 708 (Ont. C.A.), at para. 38, leave to appeal to S.C.C. refused, (S.C.C.).

178 In this case, there is nothing in the record to suggest that the issue of paramountcy was invoked on April 8, 2009, when Morawetz J. amended the Initial Order to include the super-priority charge. The documents before the court at that time did not alert the court to the issue or suggest that the *PBA* deemed trust would have to be overridden in order for Indalex to proceed with its DIP financing efforts while under *CCAA* protection. To the contrary, the affidavit of Timothy Stubbs, the then CEO of Indalex, sworn April 3, 2009, was the primary source of information before the court. In para. 74 of his affidavit, Mr. Stubbs deposes that Indalex intended to comply with all applicable laws including "regulatory deemed trust requirements".

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

179 While the super-priority charge provides that it ranks in priority over trusts, "statutory or otherwise", I do not read it as taking priority over the deemed trust in this case because the deemed trust was not identified by the court at the time the charge was granted and the affidavit evidence suggested such a priority was unnecessary. As no finding of paramountcy was made, valid provincial laws continue to operate: the super-priority charge does not override the *PBA* deemed trust. The two operate sequentially, with the deemed trust being satisfied first from the Reserve Fund.

180 Does this conclusion thwart the purpose of the *CCAA* regime, which is to facilitate the restructuring of failing businesses to avoid bankruptcy and liquidation? It does not appear that would have happened in the present case. The granting of a stay in a *CCAA* proceeding provides a company with breathing space so that it can restructure. In this case, the stay of proceedings gave Indalex the breathing space it needed to effect a sale of its business. Recall that this was a "liquidating CCAA" from the outset. There was no restructuring of the company. There was no plan of compromise or arrangement prepared and presented to creditors. Within days of obtaining *CCAA* protection, Indalex began a marketing process to sell itself. Very shortly thereafter, it sold its business as a going-concern. There is nothing in the record to suggest that giving the deemed trust priority would have frustrated Indalex's efforts to sell itself as a going-concern business.

181 What of the contention that recognition of the deemed trust will cause DIP lenders to be unwilling to advance funds in *CCAA* proceedings? It is important to recognize that the conclusion I have reached does not mean that a finding of paramountcy will never be made. That determination must be made on a case by case basis. There may well be situations in which paramountcy is invoked and the record satisfies the *CCAA* judge that application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy. But, this depends on the applicant clearly raising the issue of paramountcy, which will alert affected parties to the risks to their interests and put them in a position where they can take steps to protect their rights. That, however, is not this case.

182 Nor am I persuaded by the argument that if the deemed trust is given effect in the unique circumstances of this case, companies will file for bankruptcy instead of moving for *CCAA* protection. This argument suggests that companies will act based on the desire to avoid their pension obligations. That motivation does not conform with the obligations that directors owe to the corporation. The obligation to act in the best interests of the corporation suggests that companies will choose the route that maximizes recovery for creditors. As the respondents point out, Indalex sought a going-concern sale for exactly that reason. In addition, by selling its business as a going concern, Indalex preserved value for suppliers and customers who can continue to do business with the purchaser and preserved approximately 950 jobs for its former employees. Surely the desire to maximize recovery for their creditors — along with those other considerations — would have prevailed had Indalex known it would have to satisfy the deemed trust when considering whether to pursue bankruptcy or *CCAA* proceedings. In this regard, it is worth recalling that consideration for the sale exceeded $151 million, all DIP lenders were repaid in full, the Reserve Fund consists of undistributed proceeds, and the total deficiencies in the Plans appear to be approximately $6.75 million.

183 As for the suggestion that Indalex will pursue its bankruptcy motion in order to defeat the deemed trust, I would simply echo the comments of the *CCAA* judge that a voluntary assignment into bankruptcy should not be used to defeat a secured claim under valid provincial legislation. I would add this additional consideration: it is inappropriate for a *CCAA* applicant with a fiduciary duty to pension plan beneficiaries to seek to avoid those obligations to the benefit of a related party by invoking bankruptcy proceedings when no other creditor seeks to do so.

184 There is also the matter of Indalex U.S.'s apparent reliance on the super-priority charge when it gave the Guarantee. As explained more fully above, Indalex U.S. was fully aware of Indalex's obligations to the Plans when it entered into the Guarantee. Again as explained more fully above, there were a number of different steps that Indalex could have taken to deal with these obligations. It chose not to. This is not a case in which the secured creditor is an arm's length third party taken by surprise by the claims of the Plans' beneficiaries.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

185 A final consideration that must be addressed at this stage arises from the recent decision of the Supreme Court of Canada in *Century Services*, which was released after the oral hearing of the appeals. The parties were invited to make written submissions on the impact of *Century Services*, if any, on these appeals. I am grateful for the excellence of those submissions, which mirrors the quality of the original submissions.

186 *Century Services* deals with conflicting provisions in two pieces of federal legislation: s. 222(3) of the *Excise Tax Act*, R.S.C. 1985, c. E-15, which gives the federal Crown a deemed trust for unpaid GST, and s. 18.3(1) (now s. 37) of the *CCAA*, which expressly excludes deemed trusts in favour of the Crown from applying in *CCAA* proceedings. Deschamps J., for the majority, conducted a comprehensive analysis of the two conflicting sections and held that s. 18.3(1) of the *CCAA* prevails. In sum, *Century Services* stands for the proposition that s. 18.3(1) of the *CCAA* excludes the deemed trust for unpaid GST created by s. 222 of the *Excise Tax Act* from applying in a *CCAA* proceeding.

187 It will be readily apparent that *Century Services* is distinguishable from the present case in a number of ways. Three significant differences between it and the present appeals are worthy of note.

188 First, in *Century Services*, reorganization efforts had failed and the company sought leave to make an assignment into bankruptcy. Liquidation on a piecemeal basis through bankruptcy was inevitable. The *CCAA* proceedings in the present case, on the other hand, were successful — they resulted in the sale of Indalex's assets and the continuation of the business, albeit through another entity. It is not a situation in which transition to the bankruptcy regime was inevitable because efforts under the *CCAA* had failed.

189 Second, *Century Services* deals with competing provisions in two federal statutes. The conflict between the two provisions was patent: one or the other had to prevail. They could not be read together. Section 18.3(1) was found to prevail, in part because of its wording, which expressly excludes a deemed trust in favour of the Crown. The present appeals involve a consideration of the doctrine of federal paramountcy and whether a deemed trust under provincial legislation applies to a charge granted in a *CCAA* proceeding. Significantly, unlike the situation in *Century Services*, there is nothing in the *CCAA* that expressly excludes the provincial deemed trust for unpaid pension contributions from applying in *CCAA* proceedings. In these appeals, exclusion of the provincial deemed trust is dependent on the *CCAA* judge engaging in a factual examination and a determination that preservation of pension rights through the deemed trust would frustrate the purpose of the *CCAA* proceeding. Moreover, it is difficult to see how a finding of paramountcy would have been made on the record at the time the super-priority charge was made, given the evidence that Indalex intended to comply with all regulatory deemed trust requirements. [17]

190 Third, no issue of fiduciary duty arose in *Century Services*. In the present case, as discussed previously and again below, the impact of fiduciary duties during the *CCAA* proceeding plays a significant role.

191 The respondents contend that *Century Services* is crucial in the disposition of these appeals because it stands for the proposition that federal priorities under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*) apply in *CCAA* proceedings. If *Century Services* stood for that proposition, I would agree. In a series of cases, the Supreme Court of Canada has repeatedly said that a province cannot, by legislating a deemed trust, alter the scheme of priorities under the *BIA*: see, for example, *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 (S.C.C.).

192 However, in my view, *Century Services* does not stand for that unqualified proposition. In *Century Services*, Deschamps J. explains that the *CCAA* and *BIA* are to be read in an integrated fashion but she is at pains to say that the *BIA* scheme of liquidation and distribution is the backdrop for what happens *if a CCAA reorganization is unsuccessful*. [18] Here, as I have noted, the *CCAA* proceedings were successful.

193 Moreover, Deschamps J. repeatedly distinguishes the two regimes on the basis that the *BIA* is "characterized by a rules-based approach" [19] whereas the *CCAA* "offers a more flexible mechanism with greater judicial discretion". [20] Permitting the *PBA* deemed trust to survive, absent an express finding of paramountcy, is consistent with both those key

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

features of the *CCAA* proceedings — greater flexibility and greater judicial discretion on the part of the *CCAA* court. This flexibility and discretion on the part of the *CCAA* court enables it to meaningfully assess the baseline considerations of appropriateness, good faith and due diligence, referred to by Deschamps J. at para. 70 of *Century Services*.

194 The respondents point to paras. 47, 48 and 76 of *Century Services*, in which Deschamps J. notes the "strange asymmetry" that would occur if the *ETA* Crown priority were interpreted differently in *CCAA* proceedings than in *BIA* proceedings. She says this would encourage forum shopping in cases where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims. No "strange asymmetry" would occur in cases such as the present appeals. If the *CCAA* judge found that recognition of the *PBA* deemed trust would frustrate the purpose of the *CCAA* proceeding and paramountcy had been invoked, the *CCAA* judge would be free to make a super-priority charge that overrode the deemed trust. This approach leaves the *CCAA* court with greater flexibility and the ability to be "cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees". [21]

195 In para. 70 of her reasons, Deschamps J. exhorts the *CCAA* courts to be "mindful that chances for successful reorganizations are enhanced where participants achieve common ground and *all stakeholders are treated as advantageously and fairly as the circumstances permit*" [emphasis added]. The Plans' beneficiaries are stakeholders. And, once the deemed trust claims are recognized, they are not to be treated as mere unsecured creditors. If, as the respondents contend based on *Century Services*, the deemed trusts are automatically overridden, there will be no incentive for companies that are similarly situated to Indalex to attempt to deal with their underfunded pension plans. There will be no incentive to treat pension plan beneficiaries "as advantageously and fairly as the circumstances permit". The incentive will be to do as Indalex did — go to court without notice to the affected pension plan beneficiaries and negotiate as if the pension obligations did not exist.

196 Justice Deschamps also says that no "gap" should exist between the *BIA* and the *CCAA* and approves of Laskin J.A.'s reasoning to that effect at paras. 62-63 of *Ivaco*. [22] She explains that the gap is a situation "which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy". When the facts of the present case are considered carefully, it can be seen that a gap of this sort will not occur should the appeals be allowed. As I see it, the deemed trusts continued to exist during the *CCAA* proceedings although no steps could be taken to enforce them during the proceedings because of the stay. By the time of the Sale Approval Order, the *CCAA* court had become aware of the deemed trust claims. It dealt with the deemed trust claims as part of the *CCAA* proceedings, by deciding whether the undistributed sales proceeds held by the Monitor should go to Indalex U.S. or to the Plans' beneficiaries. Thus, rather than being a situation in which property interests that would be lost in bankruptcy were enforced at the conclusion of the *CCAA* proceedings, the property interests were dealt with as part of the *CCAA* proceedings.

197 However, even if I am wrong in concluding that the deemed trust has priority over the secured creditor in this case, I would make the order on the basis that it is the appropriate remedy for the breaches of fiduciary obligation.

198 It is important to keep in mind that the contest over the Reserve Fund is not a fight between the DIP lenders and the pensioners. The DIP lenders have been paid in full. The dispute is between the pensioners and Sun Indalex, the principal secured creditor of Indalex U.S. It is in that context that the court must consider the competing equities.

199 The *CCAA* was not designed to allow a company to avoid its pension obligations. To give effect to Indalex U.S.'s claim would be to sanction Indalex's breaches of fiduciary obligation. In the circumstances of this case, such a result would work an injustice. The equities are not equal. The Plans' beneficiaries were vulnerable to the exercise of power by Indalex. They were not part of the negotiations for the DIP financing nor were they involved in the sale negotiations. They had no opportunity to protect their interests and, as a result of Indalex's actions, there was no one who fulfilled the administrator's role. Indalex, on the other hand, was fully aware of the Plans' underfunding and the result to the pensioners of a failure to inject additional funds. It was Indalex who advised the *CCAA* court that it intended to comply

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

with "regulatory deemed trust requirements". To permit Sun Indalex to recover on behalf of Indalex U.S. would be to effectively permit the party who breached its fiduciary obligations to take the benefit of those breaches, to the detriment of those to whom the fiduciary obligations were owed.

200 I do not accept the respondents' argument that a finding that Indalex breached its fiduciary obligation is irrelevant because it would merely give rise to an unsecured claim and there is no basis for conferring a priority for such a claim. This view fundamentally misunderstands the rights of the pension plan beneficiaries. Even if there is no deemed trust, the Plans' beneficiaries are not mere unsecured creditors. They are unsecured creditors to whom Indalex owed a fiduciary duty by virtue of its role as the Plans' administrator. There is a significant difference, in my view, between being a mere unsecured creditor and being an unsecured creditor to whom a fiduciary duty is owed.

201 Further, the Supreme Court has repeatedly stated that equitable remedies are sufficiently flexible that they can be molded to meet the requirements of fairness and justice: see, for example, *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 (S.C.C.), at para. 86 and *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.), at para. 34.

202 In *Soulos*, at para. 36, McLachlin J. (as she then was) writing for the majority, held that constructive trusts may be imposed where "good conscience requires" it. She went on to identify two different types of cases in which constructive trusts may be ordered: 1) those in which property is obtained by a wrongful act of the defendant, notably breach of fiduciary duty or breach of the duty of loyalty; and, 2) those in which there may not have been a wrongful act, but where there has been unjust enrichment. While the second type of case — one in which there is unjust enrichment — is not relevant to these appeals, the first is.

203 At para. 45 of *Soulos*, McLachin J. sets out four conditions that should "generally be satisfied" if a constructive trust based on wrongful conduct is to be ordered:

> (1) the defendant must have been under an equitable obligation 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 which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

204 As I have already explained, in the circumstances of this case, Indalex's fiduciary obligations as administrator were engaged in relation to the *CCAA* proceedings and it is those proceedings that gave rise to the asset (*i.e.* the Reserve Fund) (condition 1). The assets that would flow to Indalex U.S., absent the constructive trust, are directly connected to the process in which Indalex committed its breaches of fiduciary obligation (condition 2). Without the proprietary remedy, the Plans' beneficiaries have no meaningful remedy. Moreover, there must be some incentive to require employers who are also the administrators of their pension plans to remain faithful to their duties (condition 3). And, because Indalex U.S. is not an arm's length innocent third party, imposing a constructive trust in favour of the Plans' beneficiaries is not unjust (condition 4).

The Executive Plan

205 As I explained above, it is not clear to me that a deemed trust arose in respect of the underfunded amounts in the Executive Plan because it had not been wound up at the time of sale. However, based on the breaches of fiduciary duty, the court is entitled to consider the equities of the parties competing for the Reserve Fund. For the reasons given in respect of the Salaried Plan in respect of those equities, I would make the same order in respect of the Executive Plan,

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

namely, that the Monitor pay the deficiency from the Reserve Fund to the Executive Plan in priority to those entitled under the super-priority charge.

206 In light of this conclusion, I find it unnecessary to deal with the Former Executives' submission that the doctrine of equitable subordination applies to remedy Indalex's breaches of fiduciary duty. In any event, I would decline to decide that issue as it was not argued below. It offends the general rule that appellate courts are not to entertain new issues on appeal.

Disposition

207 Accordingly, I would allow the appeals and declare that the claims of the USW and the Former Executives take priority over the claim asserted by Indalex U.S./Sun Indalex. I would order the Monitor to pay from the Reserve Fund into each of the Salaried Plan and the Executive Plan an amount sufficient to satisfy the deficiencies in each plan. I understand that the Reserve Fund is sufficient to satisfy the Deficiencies but if this proves problematic, the parties may return to the court for direction on that matter.

208 If the parties are unable to agree on costs, they may make brief written submissions on that matter. The appellants, Morneau and the Superintendent shall file their submissions within fifteen days of the date of release of these reasons. The respondents shall have a further seven days within which to file their submissions.

***J.C. MacPherson J.A.*:**

I agree.

***R.G. Juriansz J.A.*:**

I agree.

Schedule "A"

Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 1(1), 8, 14(1), 22, 57(1) - (5), 70(1), 74(1), 75(1), (2), 76

Definitions

1. (1) In this Act, ...

"administrator" means the person or persons that administer the pension plan; ...

"wind up" means the termination of a pension plan and the distribution of the assets of the pension fund;

Administrator

Requirement

8. (0.1) A pension plan must be administered by a person or entity described in subsection (1).

Prohibition

(0.2) No person or entity other than a person or entity described in subsection (1) shall administer a pension plan.

Administrator

(1) A pension plan is not eligible for registration unless it is administered by an administrator who is,

(a) the employer or, if there is more than one employer, one or more of the employers;

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(b) a pension committee composed of one or more representatives of,

(i) the employer or employers, or any person, other than the employer or employers, required to make contributions under the pension plan, and

(ii) members of the pension plan;

(c) a pension committee composed of representatives of members of the pension plan;

(d) the insurance company that provides the pension benefits under the pension plan, if all the pension benefits under the pension plan are guaranteed by the insurance company;

(e) if the pension plan is a multi-employer pension plan established pursuant to a collective agreement or a trust agreement, a board of trustees appointed pursuant to the pension plan or a trust agreement establishing the pension plan of whom at least one-half are representatives of members of the multi-employer pension plan, and a majority of such representatives of the members shall be Canadian citizens or landed immigrants;

(f) a corporation, board, agency or commission made responsible by an Act of the Legislature for the administration of the pension plan;

(g) a person appointed as administrator by the Superintendent under section 71; or

(h) such other person or entity as may be prescribed.

Additional members

(2) A pension committee, or a board of trustees, that is the administrator of a pension plan may include a representative or representatives of persons who are receiving pensions under the pension plan.

Interpretation

(3) For the purposes of clause (1) (b), "employer" includes the following persons and entities:

1. Affiliates within the meaning of the *Business Corporations Act* of the employer.

2. Such other persons or entities, or classes of persons or entities, as may be prescribed.

Reduction of benefits

14. (1) An amendment to a pension plan is void if the amendment purports to reduce,

(a) the amount or the commuted value of a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment;

(b) the amount or the commuted value of a pension or a deferred pension accrued under the pension plan; or

(c) the amount or the commuted value of an ancillary benefit for which a member or former member has met all eligibility requirements under the pension plan necessary to exercise the right to receive payment of the benefit.

Care, diligence and skill

22. (1)The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Special knowledge and skill

(2)The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.

Member of pension committee, etc.

(3)Subsection (2) applies with necessary modifications to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan.

Conflict of interest

(4)An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

Employment of agent

(5)Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.

Trustee of pension fund

(6)No person other than a prescribed person shall be a trustee of a pension fund.

Responsibility for agent

(7)An administrator of a pension plan who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable.

Employee or agent

(8)An employee or agent of an administrator is also subject to the standards that apply to the administrator under subsections (1), (2) and (4).

Trust property

57. (1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

Money withheld

(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employer from the employee.

Accrued contributions

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

Wind Up

(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

Lien and charge

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

Wind up report

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

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

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

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

(d) such other information as is prescribed.

Combination of age and years of employment

74. (1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

Liability of employer on wind up

75. (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

Payment

(2) The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times.

Pension fund continues subject to Act and regulations

76. The pension fund of a pension plan that is wound up continues to be subject to this Act and the regulations until all the assets of the pension fund have been disbursed.

Schedule "B"

Pension Benefits Act, *Regulation 909, R.R.O. 1990, s. 31(1), (2) and (3)*

31. (1) The liability to be funded under section 75 of the Act shall be funded by annual special payments commencing at the effective date of the wind up and made by the employer to the pension fund.

(2) The special payments under subsection (1) for each year shall be at least equal to the greater of,

(a) the amount required in the year to fund the employer's liabilities under section 75 of the Act in equal payments, payable annually in advance, over not more than five years; and

(b) the minimum special payments required for the year in which the plan is wound up, as determined in the reports filed or submitted under sections 3, 4, 5.3, 13 and 14, multiplied by the ratio of the basic Ontario liabilities of the plan to the total of the liabilities and increased liabilities of the plan as determined under clauses 30(2)(b) and (c).

(3) The special payments referred to in subsections (1) and (2) shall continue until the liability is funded.

Appeals allowed.

Footnotes

1 The Monitor retained the Reserve Fund as part of the Undistributed Proceeds. The Undistributed Proceeds also include amounts for the payment of cure costs, other costs associated with the completion of the SAPA transaction, legal and professional fees, and amounts owing under the DIP charge.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

2 The appellants had raised this issue below but it had not been dealt with by the *CCAA* judge.

3 Or, in the case of a multi-employer plan, the administrator.

4 *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.), at para. 26.

5 *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152 (S.C.C.), at para. 13, relying on *GenCorp Canada Inc. v. Ontario (Superintendent of Pensions)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.), at p. 503.

6 *Ibid.*

7 *Boucher c. Stelco Inc.*, [2005] 3 S.C.R. 279 (S.C.C.), at para. 24.

8 At para. 26.

9 At para. 11.

10 *Burke v. Hudson's Bay Co.*, [2010] 2 S.C.R. 273 (S.C.C.), at paras. 39-41.

11 *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.), at para. 32.

12 *Ibid*., at para. 30; *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.), at p. 646.

13 In contrast, Quebec legislation requires that plan administration be entrusted to a pension committee of at least three persons, including a representative of each of the active and inactive members of the plan and an independent member. See *Supplemental Pension Plans Act*, R.S.Q. c. R-15.1, s. 147.

14 On advice of counsel, Mr. Cooper refused to answer questions about what, if any, steps were taken to have the purchaser take over the Plans.

15 To the extent that the U.S. Trustee suggests that the Former Executives raised the deemed trust issue at the motion heard on June 12, 2010, I reject this submission. As explained in the background portion of these reasons, the Former Executives' reservation of rights on June 12, 2010, was to obtain time to confirm that the motion related solely to an increase in the DIP loan amount.

16 See, for example, *Intertan Canada Ltd., Re* (2009), 49 C.B.R. (5th) 232 (Ont. S.C.J. [Commercial List]). And, the granting of super-priority charges is referred to with approval in *Century Services*, at para. 62.

17 See para. 178 of these reasons.

18 See, for example, para. 23.

19 At para. 13, for example.

20 See, for example, para. 14.

21 *Century Services*, at para. 60.

22 At para. 78.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 12

December 17, 1996 HOUSE OF ASSEMBLY PROCEEDINGS Vol. XLIII No. 55

The House met at 2:00 p.m.

MR. SPEAKER (Snow): Order, please!

The members will have noted by now that there has been placed on each member's desk a personalized copy of the Bible, and this is presented by Gideons International, along with a letter which outlines the work that the Gideons International have been doing throughout the world.

In that regard the Chair would like to welcome a delegation to the Speaker's Gallery today, led by Mr. Laurie Chaulk, who is the field representative from Atlantic Canada, and Hazel Chaulk, the national president of the Ladies Auxiliary, and a number of representatives from the St. John's and Mount Pearl chapters of Gideon International.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: The hon. the Minister of Health.

MR. MATTHEWS: Thank you, Mr. Speaker.

I am delighted today to be joined in the Speaker's Gallery by a number of friends and colleagues from the Gideon organization, an organization with which I have had some association, and continue to, for the past twenty years.

For those of you who may not be familiar, in the unlikelihood that there is anybody who is not familiar with the organization known as Gideons International, I might just refresh your memory and mind by saying that it is an interdenominational group of business people and lay people who over the past seventy odd years have worked together across denominational lines to provide Scriptures to people in at least 172 countries of the world.

Mr. Speaker, the aim and objective of the organization is to ensure that individuals, to the greatest extent possible, have access to the Holy Scriptures for their personal use, and to that extent the Gideons have a long and historic record of programming that sees that happen in Grade V classes in all of our schools in the country where access is available, and that includes most of the schools of this Province.

In addition to that, of course, you will be familiar with the Gideon Bible as being something that is readily seen in hotel rooms, and in prisons and hospitals and other areas.

I am delighted as being one of the Gideon brethren that is here today to say on behalf of all members, I believe, of this Legislature, thank you to them for their consideration, for their diligence in not only ensuring that we have available to us in this Chamber and this House, as legislators, a copy of the Holy Scriptures, but also in the broader endeavour in which they work, and that is providing Scriptures generally around the world.

Thank you very much, Mr. Speaker, and thank you to the Gideons.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: The hon. the Opposition House Leader.

MR. H. HODDER: Thank you, Mr. Speaker.

I wish to join with my colleague, the Minister of Health, to share his comments relative to the work of the Gideons not just in Newfoundland and Labrador and throughout the country, indeed, throughout the world.

I wish to welcome to the Speaker's gallery some of the people whom I've known for many years, particularly Laurie and Hazel Chaulk and Sid Stacey. These are teacher colleagues of mine who have made it a point in their lives to live exemplary Christian lives and to lead our young people in this Province in their teaching profession in directions that follow the Judaeo-Christian philosophy.

Mr. Speaker, I share with my colleague the Minister of Health as well his compliments to the Gideons on their outreach ministry to those people who are in hospitals, to people who are in prisons, and people who have need for the consolation and wisdom that we find in the holy Scriptures. I want to thank the Gideons for their presentation, reminding all of us of our heritage and how we as people have a role to play in making sure that our society reflects the values that are contained in the Scriptures and are to be there as examples to all of us in our daily lives. Thank you very much, Mr. Speaker.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: The Chair would also like to welcome to the gallery today thirty democracy class students from Booth Memorial High School in the District of St. John's Centre. They are accompanied by their teachers Bill Dowdon and Ian Sparkes.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: The Chair would also like to welcome to the gallery today Mayor Ray Pollet from the City of Corner Brook.

SOME HON. MEMBERS: Hear, hear!

Oral Questions

MR. SPEAKER: The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker. My questions today are for the Premier. The Premier indicated yesterday he was going to speak with Prime Minister Chrétien regarding transfers to this Province. I ask the Premier if he could tell us what specific areas of concern he addressed with the Prime Minister.

MR. SPEAKER: The hon. the Premier.

PREMIER TOBIN: Mr. Speaker, I thank the Leader of the Opposition for his question. Basically all I've raised with the Prime Minister is the question that arises as a result of what we anticipate will be an increase in revenues to the Province once the Hibernia oil field comes on stream in 1997, and once, in addition to the Hibernia oil field coming on stream, the Terra Nova oil field comes on stream a few years subsequent to that event. In addition to that, there will be additional revenues flowing to the Province as a consequence of Voisey Bay coming on stream. All of these things of and by themselves are good and they will bring a revenue stream to the Province, but there is a consequence. The consequence is that as revenue flows into the Province from royalties there will be a decline in revenues in our revenue stream from equalization. All that we have indicated to the Federal Government is that we would like to explore ways in which we could keep a larger share of the revenue stream from resource development in the Province rather than seeing an outflow as a consequence of a reduction in equalization. What the Prime Minister has indicated on a number of occasions, I should say to the Leader of the Opposition, is that the Federal Government is open to a discussion of the issue.

There certainly is no agreement or discussion concluded at this stage but it is something we are going to pursue to see if Newfoundland can have a period of catch-up, if that is possible. I know this is something that both Premier McKenna and Premier Savage are interested in as well. We have collectively at one point discussed it with the Prime Minister so we will be exploring this in the new year to see if there is some additional benefit to be brought to the people and the Province of Newfoundland and Labrador.

MR. SPEAKER: The hon. the Leader of the Opposition on a supplementary.

MR. SULLIVAN: The Premier said he discussed basic revenues, or lack thereof, because of increased prosperity in the Province. I ask the Premier if he discussed the drastic cut this year of $87 million that we receive in the Canada health and social transfer for health, education and social services, a cut that was decided when he was our federal minister?

MR. SPEAKER: The hon. the Premier.

PREMIER TOBIN: Mr. Speaker, no, I did not discuss that with the Prime Minister.

MR. SPEAKER: The hon. the Leader of the Opposition on a supplementary.

MR. SULLIVAN: With reference to cuts in the upcoming fiscal year, which I know are a concern certainly to our Province and our fiscal situation, I ask the Premier if he discussed with the Prime Minister or any of his federal colleagues, or members in his Cabinet, about the further $60 million over and above the $87 million we are going to get under Canada Health and Social Transfers this year?

MR. SPEAKER: The hon. the Premier.

PREMIER TOBIN: Mr. Speaker, the Leader of the Opposition knows that there is a formula put in place with respect to the fiscal transfer to the Province. We know what the numbers are upfront. The formula is national in scope. The Leader of the Opposition now is attempting to score political points by getting up and asking specific questions about specific programs. It is fairly transparent what he is trying to do. I tell the Leader of the Opposition that what the Government of Newfoundland and Labrador is doing is working in collaboration and in co-operation with the Federal Government to go about the business of growing this economy.

One of the things I have discussed with the Prime Minister is the delivery of a $100 million economic development program for the Province of Newfoundland and Labrador that is unique to Newfoundland and Labrador. I discussed that with the Prime Minister. I discussed with the Prime Minister the ways in which the Federal Government and the Provincial Government can work together through a joint environmental assessment, the first of its kind in Canada, to facilitate the development of Voisey's Bay, the development of Terra Nova, the development of a transshipment facility, and the development of the largest and most technologically advanced smelter refinery complex in the world.

These and many other subjects I have discussed with the Prime Minister because I believe, Mr. Speaker, there is much to be positive about in the Province of Newfoundland and Labrador and I believe that we will make progress when we focus on the size of our potential instead of always being overwhelmed, as is the Leader of the Opposition, by the so-called size of our problem.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: A supplementary, the hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

The Premier stated yesterday that the Federal Government could not scrap the GST because it needed the money to reduce its deficit. Now, I say to the Premier, our Province is going to lose over $100 million by the Minister of Finance's admission on this BS tax that you and two other Liberal Premiers entered into in order to disguise the GST. Now, I say to the Premier, you are not in Ottawa now. Are you more concerned with saving money for the Federal Government or with looking after the affairs of this Province?

MR. SPEAKER: The hon. the Premier.

PREMIER TOBIN: Mr. Speaker, I am in St. John's, Newfoundland. I know exactly where I am. I am proud to be in St. John's, Newfoundland, proud to be in Newfoundland and Labrador and I am confident about the future of this Province. Mr. Speaker, we are not going to lose a nickel. I do not know what the Leader of the Opposition

is talking about. Clearly, he believes that if you leave $105 million in the pockets of the people, that is money lost. I happen to think that is a gain for the taxpayers, and God bless them!

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: A supplementary, the hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

If it were going into the pockets of the consumers in this Province, I would not be worrying, I say to the Premier, but that is not where it is going.

MR. SPEAKER: Order, please!

The hon. member is on a supplementary, I ask him to get to his question.

MR. SULLIVAN: In Question Period I will tell the Premier where it is going. Will you confirm, Premier, that our Province gave up $190 million in direct taxes to get the transshipment facility?

MR. SPEAKER: The hon. the Premier.

PREMIER TOBIN: Mr. Speaker, the Leader of the Opposition regularly stands up in the House, makes a statement which cannot absolutely be substantiated, then he sits down and says: `I will talk about it later.' Mr. Speaker, we have had the Leader of the Opposition stand here and talk about secret meetings that occurred, supposedly, in the last election campaign. He named Gerald Fallon, who has denied it. He named my brother - because he thought there was some political mileage in that - who has denied it. It turned out to be totally false. He has now stood up and said there is $105 million going to be lost in the Province and, Mr. Speaker, that is absolutely untrue. There is no money going to be lost in Newfoundland and Labrador. There will be less money flowing to government coffers and more money staying in the pockets of the people of Newfoundland and Labrador. Now, if the Leader of the Opposition is going to stand and say that it is going to disappear, Mr. Speaker, as the Leader of the Opposition, he at least has an obligation to give us some plausible explanation as to where he thinks this money is going to disappear.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: A supplementary, the hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

It is easy to know when the Premier is on the defensive - easy to know. I spoke for one hour on harmonization in this House when you were not here, and I said where it went. I will not take time in Question Period to repeat it but I will immediately after Question Period, I say to the Premier. I challenged you to a public debate on the issue and you refused. I will give you that chance again, Premier.

MR. SPEAKER: Order, please!

I ask the hon. member to get to his question.

MR. SULLIVAN: I ask the Premier: Will he confirm that in the transshipment facility, our Province gave up $190 million in direct taxes on that deal?

MR. SPEAKER: Order, please!

The hon. the Premier.

PREMIER TOBIN: Mr. Speaker, the Leader of the Opposition - and this I find amusing - keeps challenging us to public debates. I have to tell him, this is the people's House, it is a public House and if he has an answer to give, give it here and now with leave of members on this side of the House.

The Leader of the Opposition's notion of public debate, Mr. Speaker, of public policy discussion, is to make an accusation, then, having made the accusation, run for the hills. There is no need to run for the hills. We are here in the people's House and if he is going to say something, he should substantiate it. And on his latest accusation about a $190 million transfer, or giveaway, or money vaporising, Mr. Speaker, that statement is also false.

SOME HON. MEMBERS: Oh, oh!

MR. SPEAKER: Order, please!

The hon. the Leader of the Opposition, a supplementary.

MR. SULLIVAN: Thank you, Mr. Speaker.

In a meeting with the deputy minister and the assistant deputies, I was informed, with members of my staff, that we forfeited $190 million in revenues on taxation on the transshipment facility.

AN HON. MEMBER: Which deputy minister -

MR. SULLIVAN: Oh, I will tell you, I will tell you in due course.

MR. SPEAKER: Order, please!

I ask the hon. member to get to his question.

MR. SULLIVAN: We all want to see prosperity but we also ask the Premier: Will you come clean and lay the facts on the table and not be hiding them, so we can all make a determination what is best for the people of this Province?

MR. SPEAKER: The hon. the Premier.

PREMIER TOBIN: Mr. Speaker, you know, the Leader of the Opposition has been, on every occasion in this House, standing up in the face of every single positive, constructive development that has gone on in the Province of Newfoundland and Labrador and has searched diligently, Mr. Speaker, to find a bit of crisis and a bit of bad news to drag onto the floor of the House.

Mr. Speaker, I am going to say something to the Leader of the Opposition: I am so confident that his politics of bleakness, his politics of defeat, his politics of misery, his politics of defeatism and pessimism, are so unacceptable to the people of Newfoundland and Labrador, that I am going to leave him to stew in his own juice. Because I believe in Newfoundland and Labrador in 1996, and I believe in Newfoundland and Labrador in 1997. I believe we are making progress. We are making progress because the fundamentals in terms of our resource industry are right. We are making progress primarily, I say to the Leader of the Opposition -

MR. SPEAKER: Order, please!

PREMIER TOBIN: - and I will conclude, Mr. Speaker; the people of this Province believe in themselves and believe in their own abilities, and believe in their own strengths, and I say to the leader: Not even Scrooge, let alone the Leader of the Opposition, can steal this Christmas spirit in Newfoundland and Labrador!

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: Order, please!

The hon. the Leader of the Opposition, a supplementary.

MR. SULLIVAN: Thank you, Mr. Speaker.

You wouldn't know but the Premier had a monopoly on the interest of Newfoundlanders and Labradorians. Where were you when I worked in this Province, employing up to 200 jobs and reinvesting in the future of this Province? I believe strongly in the future of this Province, I say to the Premier.

I want to see transshipment. I want to see the facts on the table so we can see the merits, we can see the demerits, and we can render a judgement on what is best and what is not, not take it from political connivery by the Premier in documents that he will not table in this House.

MR. SPEAKER: Order, please!

I believe the hon. member just made a comment that is certainly unparliamentary - political connivery - and I ask him to withdraw that statement.

MR. SULLIVAN: Thank you, Mr. Speaker.

I withdraw the word `connivery' if it is used in -

MR. SPEAKER: Order, please!

That is all the hon. member -

MR. SULLIVAN: Yes, I withdraw it.

MR. SPEAKER: Okay, fine.

The hon. the Leader of the Opposition.

MR. SULLIVAN: I ask the Premier now: Will you lay on the Table of this House, letters of intent and the specific details of the benefits accrued from the transshipment facility so the public can see it and render a decision? Will you do that, Premier?

MR. SPEAKER: The hon. the Premier.

PREMIER TOBIN: Mr. Speaker, I can only say to the Leader of the Opposition, he should save some of his ammunition for the next election. It is still four years away.

We had an announcement of a transshipment facility for Newfoundland and Labrador. We had an analysis done by the Department of Industry, Trade and Technology, showing half-a-billion dollars of net economic benefit to the Province of Newfoundland and Labrador, and that information was given to the Leader of the Opposition and given to anybody else who asked for it, and the Leader of the Opposition said: Bah, humbug!.

Mr. Speaker, we had an attempt to try - and we are in the middle of it - to try and renegotiate the Churchill Falls power contract. We had a resolution put by a private member to the floor of the House to say that we stand behind the attempt to renegotiate the contract, and the Leader of the Opposition says: Bah, humbug!.

Mr. Speaker, we had an announcement by Inco that they are going to spend a billion dollars in the Province of Newfoundland and Labrador. The people of Argentia started a spontaneous parade -

MR. SPEAKER: Order, please!

PREMIER TOBIN: - celebrating the announcement, and the Leader of the Opposition said -

SOME HON. MEMBERS: Bah, humbug!

PREMIER TOBIN: Bah, humbug!

MR. SPEAKER: Order, please!

PREMIER TOBIN: Mr. Speaker, I say to the Leader of the Opposition: Bah, and humbug!

MR. SPEAKER: Order, please!

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: Order, please!

The hon. the Leader of the Opposition, a supplementary.

MR. SULLIVAN: Mr. Speaker, when the Premier cannot answer a question, he puts on a show for everybody. We all know how he acts, a little show by the Premier.

SOME HON. MEMBERS: Hear, hear!

MR. SULLIVAN: All I want Premier is an answer to a simple little question -

MR. SPEAKER: Order, please!

MR. SULLIVAN: Will you let the people of this Province see the details on the transshipment so we can draw a conclusion whether the decision you made in secret is best for this Province? If it is, I will support it, I say to the Premier. Will you do it?

MR. SPEAKER: Order, please!

The hon. the Minister of Industry, Trade and Technology.

MR. FUREY: Mr. Speaker, I should say to the House that we made arrangements to provide a full and comprehensive presentation to the Leader of the Opposition over a month and a half ago. It showed 300 construction jobs at this terminal, 300 at peak; it showed forty full-time jobs in the aftermath. What we talked about was 4 per cent RST exemption on Hibernia transshipped at crude. It talked about fuel tax exemptions, and then it went on, in this presentation, to talk about a positive net economic benefit to the Province over the life of the Hibernia field of $500 million to the economy of the Province.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: Order, please!

A supplementary, the hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker. While the Minister of Industry, Trade and Technology has such a great interest, I've requested from your department on several occasions the letter of intent pertaining to transshipment.

MR. SPEAKER: Order, please!

MR. SULLIVAN: In fact, I faxed to the minister today a written request for that. I haven't received it. Will you see, I say to the minister, that I will receive letters of intent and information pertaining to it? I have been denied it for the past two to three months, Mr. Speaker. Will you ensure that I now receive it?

MR. SPEAKER: The hon. the Minister of Industry, Trade and Technology.

MR. FUREY: Mr. Speaker, the hon. Leader of the Opposition is in dreamland. This was negotiated and made public three months ago. All of the information was made public. It was made public at a press conference. There were literally hundreds of people there. We didn't just stop there. We heard the fuss the hon. member made in the public media trying to grandstand, so we invited him to my department. We sat him down, we made a presentation, and when the numbers got complicated we showed him pictures.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: Order, please!

A supplementary, the hon. the Leader of the Opposition.

MR. SULLIVAN: I say to the Minister of Industry, Trade and Technology, the Premier said at a news conference he would provide it. I called and asked for it. His ADM told me: We don't have it. He said: But we can do an overhead presentation of the generalities. I want to see, minister - you've been denying it for three months, your department. I ask to see the specifics on this deal so we can draw conclusions in the best interest of the people of this Province.

MR. SPEAKER: The hon. the Minister of Industry, Trade and Technology.

MR. FUREY: Mr. Speaker, we have given every single detail. We have explained the 4 per cent RST exemption on Hibernia-related crude. We mapped out and traced for him the fuel tax exemptions which were conceded by the Province. We showed the benefits on the construction side. We showed the benefits of the 100 Newfoundlanders who will take jobs on the two supertankers. What is the hon. member saying? That he wanted this to go to Nova Scotia? We worked very hard for this for the Province of Newfoundland and Labrador.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: A supplementary, the hon. the Leader of the Opposition.

MR. SULLIVAN: It is getting very interesting, Mr. Speaker. In fact, on the overheads there are some of the pages they removed and had to get permission from the Premier before they could send it to us, I would say to you, on generalities.

Will the minister and the Premier admit that their department is hiding the specifics of this deal, keeping it from the people of this Province? I haven't rendered a judgement whether it is good or bad, but I think I have a right, I will say to the Premier and the minister, to be able to see the details so we can render an informed decision on what is best for the people of this Province. Will you provide those specifics?

MR. SPEAKER: The hon. the Minister of Industry, Trade and Technology.

MR. FUREY: Mr. Speaker, when the hon. member came over for the presentation which lasted for a couple of hours I'm told by the Assistant Deputy Minister Mr. Spracklin, who is a very good economist, that the hon. Leader of the Opposition thanked him, thought it was a very comprehensive presentation, thought all the questions were answered honourably and straightforwardly, and all of the details and all of the numbers were given to him. So I can only go by what these senior civil servants who were hired by the former government that are still in our government gave. They gave full and straight and comprehensive answers. I think the hon. member is just fishing. He is on a great fishing expedition.

MR. SPEAKER: A supplementary, the hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

I feel compelled to stand here in this House on inaccuracies by this minister when the DM is not there now - in fact, he is not even there, the one I met with - there is a new DM, I say to him, and I have thanked him for the meeting which I requested and scheduled.

MR. SPEAKER: Order, please!

I ask the hon. member to get to his question.

MR. SULLIVAN: One more time, a final supplementary, Mr. Speaker. I will just ask the minister: If you and the Premier have nothing to hide, let us put it out in a public forum. Let us see the benefits and let us see the areas where we made compromises and let us see if it is an overall good deal. I want to see that and I will support it if it is. Will you provide to us those figures so we can render that judgement, not an outline or sketch of overheads that do not go into any specifics?

MR. SPEAKER: The hon. the Premier.

PREMIER TOBIN: Mr. Speaker, all of the elements of the arrangement that was reached on the transshipment facility were made public at the time the facility was announced. The Leader of the Opposition knows that. The 500 people who were there at the press conference know that and, Mr. Speaker, the Leader of the Opposition, I have no idea what he is doing. I mean, he is spending his time trying to tear down every bit of positive development in the Province.

Mr. Speaker, I say to the Leader of the Opposition, and I ask him to reflect upon what I am saying: there will come a time for us, three or four years hence, to look at another election campaign. In the meantime, all of us in this place - and the obligation is on me as well him - have an obligation on occasion to put aside the partisanship a bit and to try and build Newfoundland and Labrador. We cannot build up the Province if we try to tear down our potential as a way of trying to score political points on each other. I say to the Leader of the Opposition, we saw in the last election campaign an announcement, Sir, by your party, that the transshipment facility after the election was going to be announced for Nova Scotia. That was the major declaration of the Conservative Party. The major reality is, it has been announced for Newfoundland and Labrador and you should try to get used to it!

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: Order, please!

The hon. the Member for Kilbride.

MR. E. BYRNE: Thank you, Mr. Speaker.

Some fourteen months ago, a working group was put together to work towards a better labour relations climate in the Province. Recently, they tabled in the House a document containing forty-eight recommendations called, `New Centuries, New Realities.' Now that the minister has had some time to look at those recommendations and what is contained within the covers of the document, can he tell the House when he sees government acting upon those recommendations? And will it be a comprehensive action on the part of government in terms of whether they will implement all of the recommendations contained in this very comprehensive plan?

MR. SPEAKER: The hon. the Minister of Environment and Labour.

MR. K. AYLWARD: Thank you, Mr. Speaker. I thank the member for his question.

A presentation has been made to government of the documents, that has been developed by the working group on labour relations. They have done a very good job of putting together a report which the government is now considering and over the next few weeks we will take our time to look at the document carefully. We will examine the recommendations carefully. We are also going to discuss further with the working group and also

other groups who have an interest both in labour and in management, on a go-forward basis to see where we can move ahead, to make sure that we have a proper labour relations climate.

Mr. Speaker, we are going to need a good labour relations climate in the Province for all of the new industry that the Premier is attracting to the Province. We are going to work towards ensuring that we do have a proper labour relations climate, Mr. Speaker, because of all of the great, great work that is being done in this Province to attract business. And as we create those new opportunities, we want to make sure that workers in the Province are going to have a good labour relations climate. We are also going to ensure that employers who come to the Province have a good labour relations climate.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: A supplementary, the hon. the Member for Kilbride.

MR. E. BYRNE: Thank you, Mr. Speaker.

Let me say to the minister, that will work towards a better labour relations climate, based upon our natural advantages, which seem to me, are our resources and are not necessarily contained on the other side of the House.

In the report, Mr. Speaker, the working group clearly says to the minister that the recommendations contained here have been arrived at as a result of compromise and trade-offs based upon both business and labour and that implementing these recommendations on a piecemeal sort of approach, or only some of the recommendations, would be harmful and would place in jeopardy - or would provide balance to one group over another.

MR. SPEAKER: Order, please!

I ask the hon. member to get to his question.

MR. E. BYRNE: Will the minister make a commitment that the recommendations contained within this report are very worthwhile, Mr. Speaker, which outline a framework for a labour relations climate heading into the next century? Will he make a commitment today that all of these recommendations from one to forty-eight will be implemented? Can he inform the House, please?

MR. SPEAKER: The hon. the Minister of Environment and Labour.

MR. K. AYLWARD: Mr. Speaker, again, I thank the member for his question. I want to say that the report was well put together. The facilitator, Mr. Austin Thorne, did a great job of putting it together.

SOME HON. MEMBERS: Hear, hear!

MR. K. AYLWARD: We are going to look at the report in a comprehensive fashion. I will not say we are going to accept it carte blanche. We will look at the total report and we will examine all the recommendations. We are going to also have further consultation with business, industry, and labour to ensure that as we evaluate the options that we put in place a proper and very much a positive labour relations climate for all the new business activity that government is now creating.

Thank you, Mr. Speaker.

MR. SPEAKER: The hon. the Member for Bonavista South.

MR. FITZGERALD: Thank you, Mr. Speaker.

My question is to the Minister of Fisheries and Aquaculture. Yesterday, I asked the Premier to confirm reports that Spanish and Portuguese fishing activity has increased dramatically since 1995. In fact, it has increased by 500 per cent in spite of the statement to the House by the Premier a couple of weeks ago. The Premier stated that

he could not confirm those reports since he was not aware of any increased fishing activity. I now ask the Minister of Fisheries and Aquaculture if he is aware of this serious situation, and if so, what is he doing to correct it?

MR. SPEAKER: The hon. the Minister of Fisheries and Aquaculture.

MR. EFFORD: Mr. Speaker, the hon. member opposite is assuming there is a serious situation out there. What we know is that there are more boats fishing this year than last year, but there are observers on all the boats and that is a major improvement over past history. Assuming there is something happening and finding out is another thing. The Minister of Fisheries and Oceans of Canada has said very clearly that he is going to check into it and monitor it on a day-to-day basis, and I have the confidence he will do that.

MR. SPEAKER: The hon. the Member for Bonavista South on a supplementary.

MR. FITZGERALD: Thank you, Mr. Speaker.

There are no assumptions, Mr. Speaker, we know the fishing activity that is out there. It has been clearly reported. Minister, you must have made time last night to speak with your cousins during the expensive love-in down at Hotel Newfoundland. I ask the minister: When will Minister Mifflin act to stop this raping of our turbot stocks, since the allowable quota for this particular year has already been taken?

MR. SPEAKER: The hon. the Minister of Fisheries and Aquaculture.

MR. EFFORD: Mr. Speaker, prior to 1985 when I decided to run for politics, I wanted to know how many family members I had in the great district of Port de Grave, and I found out I had 250, mostly cousins. I was not in Port de Grave last night. I was at Hotel Newfoundland, so my cousins are in Port de Grave, they were not at Hotel Newfoundland. Let the hon. member gets his relationships correct.

Now, I would be honoured if the Prime Minister of Canada saw fit in his busy schedule to sit down and meet with the Minister of Fisheries and Aquaculture for Newfoundland, and if he called me his cousin I would be very honoured. Minister Mifflin and myself are in continuous dialogue on a regular basis, on all activities in the fishing industry of Newfoundland and Labrador, inside and outside the 200 mile limit.

I have never heard the hon. member stand up once in this House and ask a question or do something about the 10 million seals that are out there in the ocean eating fish. If a boat turns up in our direction that is the issue. We are concerned about all activities, inside and outside the 200 mile limit.

MR. SPEAKER: The hon. the Member for Bonavista South on a supplementary.

MR. FITZGERALD: Thank you, Mr. Speaker.

I agree with the minister that probably there were not too many of his cousins down at Hotel Newfoundland, because they are probably like my cousins, they could not afford to pay $500.

MR. SPEAKER: Order, please!

I ask the hon. member to get to his question.

MR. FITZGERALD: Minister, I call on you to admit to the people of Newfoundland and Labrador right here today, that the turbot war was a farce. It was an expensive spectacle put forward to showcase the federal minister at that time, and the real reason that the Spaniards and Portuguese temporarily vacated the Nose and Tail of the Grands Banks -

MR. SPEAKER: Order, please!

I think the hon. member has asked his question.

MR. FITZGERALD: I am asking the question, Mr. Speaker.

Mr. Speaker, will the minister admit that the Spanish and Portuguese vacating the Nose and Tail of the Grand Banks was really for economic reasons and not the intimidation created by the now Premier?

MR. SPEAKER: The hon. the Minister of Fisheries and Aquaculture.

MR. EFFORD: First of all, let me tell the hon. member, my cousins can afford to go to dinner. Now, make no mistake about that. Let me tell the hon. member something else. Let me get on a serious point here. Prior to the Spanish War, there were in excess of eighty vessels fishing 365 days a year on the Grand Banks with no observers, with all the fishing activity that could take place with undersized mesh and everything that they could possibly do wrong. Today, there are less than thirty vessels fishing on the Grand Banks. We know there are observers on each and every vessel. We know that there is a controlled fishery, that there is co-operation between the EU and Canada, and we know that there are major gains being made.

Is he also saying that we would like to revert to the way it was, that we take all observers off the boats? Get your act together and let us talk some sense in this House!

MR. SPEAKER: Order, please!

I ask the hon. the minister to take his seat.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: The hon. the Member for St. John's South.

MR. OSBORNE: Thank you, Mr. Speaker.

My questions today are for the Minister of Justice.

The Justice minister was the head of a Cabinet committee charged with an in-depth total review of the industry department. I ask the Minister of Justice: Has this review been concluded, and when can we expect to see it tabled?

MR. SPEAKER: The hon. the Minister of Justice.

MR. DECKER: Mr. Speaker, I am not sure what the hon. member is talking about. Is he talking about the program review?

AN HON. MEMBER: (Inaudible).

MR. DECKER: The program review is an internal study which is being carried out by ministers. It will be dealt with by Cabinet in due course. Until then, it would not be proper to discuss the issue, before Cabinet has had an opportunity to deal with it.

MR. SPEAKER: The time for Oral Questions has elapsed.

Orders of the Day

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Order No. 26, Bill No. 45. Motion No. 3, the closure motion, Mr. Speaker.

MR. SPEAKER: The hon. Government House Leader is moving, pursuant to Standing Order 50, is it, the motion on closure.

MR. TULK: Yes, closure on Bill No. 45.

MR. SPEAKER: All those in favour of the motion, `aye.'

SOME HON. MEMBERS: Aye!

MR. SPEAKER: Against.

SOME HON. MEMBERS: Nay!

MR. SPEAKER: Carried.

We are now dealing with Order No. 26. We are on second reading of the bill.

The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

The Premier was wondering what is going to happen to the $105 million, or the $150 million I advocate, in there, so I am going to explain to him now basically what might happen there.

I asked the Minister of Finance and Treasury Board yesterday, and I would like the minister to clarify this for me, if it is at all possible. When we look at the GST revenue base we had in the Province last year, according to the figures I received provincially and federally, it has ranged from $279 million to $283 million depending on what month you took. It varied. According to that, there will be a shortfall of $240 million when you take the GST that was collected last year and take that 7 per cent and convert it to an 8 per cent equivalent to what our Province is going to get. When you look at that, there is a $240 million shortfall.

The Minister of Finance and Treasury Board indicated that there is an insurance tax. I think he said the insurance tax is going to bring us in around...$35 million, he said, roughly - or $25 million was the figure he used the first time. He came back after and made a correction. I think he said $35 million the second time. The private sale of vehicles, I think he indicated, is going to be $25 million, and then he indicated, by freezing the tax on tobacco and liquor it is going to be another in the $25 million range, for a total, he said, of about $75 million on those three specific areas.

Now, he said there is going to be another $15 million -

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: I will get to the Premier's question in a minute, now. The Minister of Finance and Treasury Board could check this out in the meantime. There were some other taxes of minor ones, and other taxes he said, that would bring it up to $90 million. So when you subtract $90 million from $240 million, you get $150 million. The minister has not provided information that shows basically where the difference is. Unless the Minister of Finance and Treasury Board can provide to me figures that show it is $105 million, I advocate it is $150 million. Based on the mathematics used in his Budget, based on the answers to his questions in the House of Assembly, there is going to be a $150 million shortfall. In year three, all our money is going to be used up and we will be stuck with a $150-million hole in the Budget.

We all know what happened on the GST. We are all well aware of the Finance minister coming out and admitting he was wrong, saying that they promised to scrap it and abolish it, and he admitted that. Sheila Copps did a poll that showed she could get re-elected in Hamilton East and then she admitted it and went out and got re-elected, as everybody expected. There were no surprises. Now the Prime Minister of Canada will not admit it. He will not admit that he told us the GST would be abolished. The Prime Minister tries to skate around the issue. The Premier of this Province also was one of those who was going to scrap and abolish the GST.

Now, what he has done - and I am in the process of explaining where the $105 million - he wanted so eagerly to know in Question Period. I am getting to that very shortly, I am sure he will be eager to find out and now, he decides to cover up to give the impression that the GST is eliminated when actually it is hidden now by the only three Liberal governments out of ten in this country and the federal government, it is hidden into a tax, with tax-inclusive pricing, and in the tax-inclusive pricing, it is detrimental and now I am getting to answer the Premier's question in Question Period, the reason why it is not going into the pockets of consumers is because the tax-inclusive pricing increases the base cost of the goods.

Anybody out there in business today will tell you, and in accounting out in the fields, that when you add extra costs on to the base price of the goods, whether it is transportation, repackaging, remarking, extra costs of converting cash registers and ongoing costs, is going to be negative and is not going to bite into the profits of businesses, it is going to be absorbed in the cost of the goods and will be a profit margin on top of that. Here is the example I used the last day: I said a hundred-dollar item today at 7 per cent GST and 12 per cent RST, will cost $119.84. With a hundred-dollar item, after tax-in pricing, other related costs, some retailers could be charging $104, it might be $102, it might be 105 depending on the item and the cost of change over in your business, when you put your 15 per cent on top of that basic cost, you are back up to $120. So, what has happened?

What happened with GST and some experts will tell you, GST was supposed to put money back into the pockets of consumers but it became an inflationary tax. Inflationary, because the cost incurred in that tax did not go into the pockets and the profits, did not filter out and go back to the consumer to increase consumer spending but reduced consumer spending, and was absorbed into the basic cost of the goods. I made that point yesterday on an Open Line show.

I had a call from a person who told me he has over thirty years in business. You are absolutely right, he said. I have been in that business in retail and dealing with (inaudible), what you are saying is exactly correct. He said the cost, I have seen it happen there, business does not pass on increased costs of doing business, and let us look at an example: In Ontario, they are shipping goods down, a lot of produce come into this Province from Ontario and right across the country from non-harmonized areas. When you ship in a pre-price, those major corporations on their products, what do they do? If it comes into Newfoundland, you have to have your tax-in pricing. It is going on the shelf, tax-in pricing. When you have tax-in pricing, not only the extra cost of that labelling the wholesale, warehousing aspects here, you also have - just look at a small business person.

A small business person, or large whatever the case may be, you have to reprogram your cash registers, reticketing of these items and you have increased costs. Here is what one company said: A Quebec based company, called MMG Management Group, announced the closure of its stores in New Brunswick and here is what they said: Like the metropolitan Greenberg red apple, they indicated the new tax is going to cost $695,000 to implement, that is a one-time cost and it is going to cost $563,000 annually to manage. I mean, who, do you think pays out this $563,000? I mean, is it that the business is going to absorb that? No.

It is always great to see a reduction in taxes for the consumer, but I don't see the logic in reducing taxes to a consumer and adding up the cost price which brings it back to where it was. That does not make sense, and when that happens, the consumer does not gain, but our Province loses over $100 million in revenue. One hundred million dollars in revenue, so I say to the Minister of Finance and Treasury Board: Where is our Province going to make up over $100 million in revenue that he said we are going to be short? Are there going to be cutbacks in Education further? Are we going to cut back health care further, or social services or are we going to increase other taxes to make up for that shortfall of $100-and some million? He said the economy is going to grow. Well, let us look at it two ways, let us look at both sides of that. If the economy was going to grow, we would get those taxes anyway in extra corporate, extra income tax, and other taxes. If it grows because of harmonization there could be some residual benefits come back, but if it is going to grow anyway we have forfeited future taxes to our Province. What happens if it does not increase?

The Minister of Social Services just released a Strategic Social Plan that said that between now and 2016 the economic prospects in this Province will not be good - released by this government - and that there will be less people working, paying more taxes. There will be more people to support because of an aging population, and

we will have a problem with being able to deliver the social programs of the future. That is what the Minister of Social Services said in that government document that was carefully put together, that went out around this Province to people, in dealing with the future problems we are going to have here in our Province.

I have a grave concern when we do not do responsible planning. It looks great in the short term. There is too much of this short term, to hell with the future, look after today, and don't worry about your children of tomorrow, because we are in a rut in this Province because previous governments - no matter what their political stripe - did not see the need to be able to maintain their debt as a percentage of their GDP.

I said before, I do not think we should go out and start trying to pay off a $5.8 billion direct debt. What I have been saying is important is that we have to be able to, during a mandate of government, maintain the debt levels, and as the economy grows, as the GDP increases - inflation would drive up a GDP number - as it grows, and you keep the debt similar, it comes more insignificant with each passing year. But we do not need to incur more debt on top of what we have, to pass that on to future generations.

We are at a unique time in our history. This past year or two has been very positive on the budgets of provinces of Canada because we have had some of the lowest borrowing rates we have ever had. Much of the saving in the federal budget has been because of abnormally low interest rates. Now, while the low interest rates did not stimulate economic growth in other areas, it did drastically reduce the borrowing costs, and when we have to borrow at high costs, and we have a lot of debt on our books, at 11 per cent and higher, and when you can borrow on the market today in half of that, it is a considerable saving. How many people want to see hundreds of millions of dollars going out of the treasury of this Province to pay down on debt? It bothers me that that number increases, and I feel we must look at the future of this Province in delivering the programs we need to deliver, the social programs, our health and education and social services, but we have to have a revenue on this side to be able to sustain those programs.

We have made a decision on harmonization, or they are in the process of making a decision, that is going to siphon $150 million - based on figures I received from the minister's response and from federal and provincial departments - out of this economy, badly needed, $150 million, that is not going to do anything to stimulate growth because it is not going back into the pockets of consumers to increase consumer spending.

If it would do that I could applaud that, but that is not happening. I want to see a single harmonized tax in this entire country because I think it is good, and I do not think tax-inclusive pricing is bad if all the provinces of Canada buy into the deal, because then you have the level playing field. You do not have certain areas incurring increased cost to the basic price of goods because of that, and you have advantages that are going to filter back.

Now, when 6.6 per cent of this country buys into a harmonized tax, and 93.4 per cent of the country does not, you have the big majority of the country outside this harmonized tax area and there is inherent cost built into the system. Everything you read will tell you, right through numerous people, consumer groups out there, chambers of commerce, businesses, and it is not only... Businesses are there to make money. You cannot put all your faith in what they tell you, but when you have gone through it you know that when goods get marked up - if the tax goes up on gasoline, for example, let's say five cents a gallon, do they keep the same profit by retailers? Or if the price of goods goes up by 5 per cent? No, you have to increase your profits in proportion with the cost of the goods. Profits are generally a percent of that cost of goods, percent of business, look at a profit line. So a 20 per cent profit on a ten dollar item is a big difference from a 20 per cent profit on a one dollar item. So as we increase cost of goods we proportionately increase our profit margins on goods. That is why increasing the basic cost of a good, even if the extra 4 per cent does not all go on the cost, there is some that is going to go into the profit and that is not going to go into consumer pockets. That is going to go into the price that the consumer is going to pay at the cash register.

The Government of Quebec, in 1993, looked at this tax inclusive pricing. They did an analysis. They came back this year and did another one and they came to the conclusion that it is not an option; a major province, the second largest in this country. Here we don't do an analysis, we don't look at it, the minister can't provide it. We don't look at the impact it is going to have, what he did. Nobody can complain dropping the price of cars from 12 per cent to 8 per cent. You can't complain about that. But the minister saw it as an avenue, that in this

Province we are going to lose a lot of revenue, and because it was coming in April 1, decided it is better to act now and give that break. Car dealers are going to benefit and it is fantastic to see it happen but we were going to lose revenues anyway, and they were going to hold off. So, why not get the revenues now and at least help the car industry in the process?

Now, there are people out there too who were not too excited. There are people who may want that new fridge, stove or furniture. In Labrador, Northern Newfoundland - I mean a mode of transportation, the ski-doo, is a major method of transportation in many parts of Labrador. It is their main method of transportation. Even if vehicles that are used in Labrador, or areas of the Province that do not have the same access to transportation, were afforded similar things, it would be considered to be fair. In other words, we would be accelerating the date on which we are bringing in harmonization, when we have not even had a chance to debate it in the House. These decisions were made before the bill was called here for second reading in the House.

There are numerous fundamental problems with this harmonization. What is wrong with a bill when the price of a fur coat goes down - you can go out and buy a mink coat or a fur coat cheaper after April 1 then you could on March 31, but you go in and you pay an extra 8 per cent in taxes on children's clothing or school supplies, or your light bill is going to go up.

The Minister of Social Services - I asked a question, made a reference yesterday: What happened with the $51 supplement to add to people during the wintertime, for people on social assistance to heat their homes? They need that extra money in the winter because $50 extra spending in the winter is not very much compared to summer spending. Are you now going to increase that supplement out to those marginal income people, well below the poverty line? Are you going to increase that? Are there extra costs we are going to be incurring because of that? I mean, they are decisions the minister is going to have to make in the future. Is it now that this increase is going to chew up some of that cost? Is it going to chew it up in clothing, in heating, electricity.

Basic personal services are gone up. Less disposable income for the social services people, which means even their standard is going to be down. Other marginal people, the people out there today working for $200 a week and less, who are just above the level for social assistance, are some of the hardest hit people out there. They are just above that line where they can get assistance. These people now with young kids - and many of them have young kids - who have to spend a significant portion of their income, right now, on clothing, on shelter, with heat and electricity and the basic necessities, are now going to see an increase from 7 per cent to 15 per cent. There is something radically wrong with a system that takes $100-odd million out of our economy and benefits the rich at the expense of the poor. It is not a balanced system of taxation in the Province and it is not moral, I say; it is not.

There have to be avenues when you have harmonization. First of all, I oppose it on the grounds of tax inclusive pricing. There are ways to deal with rectifying this. If you move tax inclusive pricing, if you look at a distribution of the taxation levels, there are numerous ways that would completely restructure this particular bill and certainly would make it palatable to the federal government. What we have done here is we have bent over to the federal government on an initiative that grew out of a desire to get rid of the GST, that failed in every other province in Canada that has an NDP or a PC or a Bloc leader in this country. Every single one said no. The only ones that said yes are some of the poorest provinces in the country: Newfoundland, Nova Scotia and New Brunswick. Why? Where are the benefits?

New Brunswick said: We will rebate to those people that I'm just talking about now. We will give some money back to them. Nova Scotia, I think. are talking about - what? - $8 million to send back, and they are saying it isn't enough. They are talking about that now. The Premier said in answers to questions during question period yesterday: We will look at things and we will see how it will impact. You don't go through with a significant piece of legislation and wander in the dark and feel your way. You do your analysis. You look at how it impacts on people. How many millions more are on the bills of low-income people below $10,000, or below $20,000, or $30,000?

MR. E. BYRNE: But that doesn't matter in the long run. That isn't why the deal was signed. That doesn't matter to them. That has nothing to do with why the deal was signed.

MR. SULLIVAN: That has relevance. It should be based on basic economics and retaining revenues, that we have discretionary income to spend for the people in our Province. We have forfeited over $100 million in extra revenues, and we now do not have discretion over where it is spent in this Province. That takes away a great degree of autonomy over taxation and to be able to regulate levels in the future.

If it is a two-way street, you might live with the autonomy part. But when the federal government can up its taxes under this agreement twice - it can up it twice without consent of the provinces. It can unilaterally increase it twice. But this Province, if it wants to increase it, must get a majority. If it wants to decrease it, if it is as prosperous as the Premier is telling us when he rants and raves about prosperity on the horizon, and we all hope it is, if it is as prosperous, wouldn't we want to give a break to our low-income people and the people on these necessities?

We have to get unanimous approval. New Brunswick has to say yes, Nova Scotia has to say yes, and the federal government has to say yes. In other words, Frank McKenna has to say yes for us to be able to give a break to people here in our Province; or John Savage, or whoever is going to replace him, whatever PC leader is going to replace him.

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: They are refunding money back to these people. That is what they are doing. They are saying: These people, the low-income people who have to pay extra on clothing, who have extra heat and light, will now have a rebate system like the federal does on GST, to go back in the pockets of these people. We are the only province now that does not.

The Premier answered yesterday in question period, I would say to the Member for Conception Bay East & Bell Island: We will look at things next year and tell you how it is going. It is there in Hansard. You will see it in yesterday's Hansard in his response to me. I mean, that isn't -

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: I'm saying it hasn't even gotten to the legislature in New Brunswick and it has made a decision. The legislature went to what is called a public hearing in a legislative process in Nova Scotia where the public had an input. I have said here from day 1, this wasn't in the red book. It wasn't an election campaign, it wasn't a part of the platform. It was signed very shortly after. They knew it was coming down the pipe. They wouldn't let the public discuss it.

I challenge the Premier to public debates on it. Anywhere, any time, any place, at his convenience, morning, noon or night, any time in a twenty-four hour period, I will be available, and I will discuss the merits and demerits of this; and the Premier wouldn't do it. Because the Premier knows he can't base it on fact, the Premier knows he can't stand on that. It is only a smoke screen to buy time with a $348 million pay off to get us by the next election, and then to hell with the future of Newfoundlanders and Labradorians. That is a very poor attitude to have, political decisions in the Province here. We have to make decisions that are based on a solid premise here for the betterment of us all.

I said before, I hope to live here in this Province the rest of my life; and my children. I'm genuinely interested in the future of every Newfoundlander and Labradorian. The Premier talks as if he has a monopoly on the future, on the interests of people in this Province. There are people here in the Legislature who are very genuinely interested. People ran in politics so they can get involved in a way that can help shape and improve the prospects of people in the Province. How can we do it when the public can't have input?

We went around the Province on committees, I can tell you. You would laugh at it, if you knew some of the things committees went around this Province on. Here we have a major taxation scheme and he won't allow it? He wouldn't allow it to go out in the public? He won't allow it to go to a committee of the House?

MR. SPEAKER: Order, please!

The hon. member's time is up.

MR. SULLIVAN: By leave, Mr. Speaker.

SOME HON. MEMBERS: No leave!

MR. SPEAKER: The hon. member doesn't have leave.

MR. TULK: Take a minute, Loyola, to clue up, take a minute.

MR. SULLIVAN: Sure, a minute won't -

MR. SPEAKER: Order, please!

MR. SULLIVAN: Okay, thank you, I will just take a minute.

MR. SPEAKER: Order, please!

The hon. the Leader of the Opposition, by leave.

MR. SULLIVAN: Thank you, Mr. Speaker.

I won't abuse the time. I will just finish what I'm saying. There are some very valid points, I say to the Member of the House of Assembly, on harmonization. It is not an area on which the Opposition is stalling. I have asked simple things: Put it out; let us hear what the people have to say; let us hear what experts out there have to say. Come on, let us deal with this on a rational level, not on a political level, and let us see what is best for the future of Newfoundlanders and Labradorians.

I will judge anything on its merit. I stood on education legislation; numerous things we supported. We expedited processes there, and we have not unduly delayed. I can say we have moved education rapidly through this House, and other issues and other bills, up to twelve in a day. We are not going to resist in areas where we feel there is no need, but when there is a genuine concern that is going to affect Newfoundlanders and Labradorians... We cannot turn the clock back on this deal when it is done and gone too far, because on basic principle they will not do it.

I will leave you with one single question. Has this government looked at what happens with other provinces, if this deal falls apart? What happens with the $348 million? What contingencies has our Province built in to deal with this when it falls flat overall in Canada and we do not get this Blended Sales Tax, or this BS tax, right across the country?

Thank you, Mr. Speaker.

MR. SPEAKER: The hon. the Member for Conception Bay South.

MR. FRENCH: Thank you, Mr. Speaker.

I rise today to say again a few words on the tax harmonization and especially, of course, the motion on closure on this particular bill.

I think that this bill has a great deal of importance for the people of this Province. Some of it, over the next hour or so, will probably be repeated. I do not know how people on the other side of this House feel, but the phone calls that I get clearly indicate that all is not well with this particular piece of legislation, and most of the calls that I get - or all of the calls I get, concerning this particular piece of legislation are certainly not in favour of it but are, indeed, opposed to it.

I guess, over the last several weeks, or certainly since December 13, there is quite a move on, certainly by the federal Liberal Government, to backtrack, to cover up, to do whatever they can, to say that -

AN HON. MEMBER: Be nice, Bob.

MR. FRENCH: I have difficulty being nice on this; I really do. I will be quite honest about that. When they made a promise to the people of Canada to do away with this particular bill, I do not know how the Minister of Health, or any other minister, can sit there and say it was a great thing that they did and now we are not going to do away with it; we are going to leave it into being.

AN HON. MEMBER: They should never have brought it in.

MR. FRENCH: I agree, it should never have been brought in. As a matter of fact, if this member here had sat in the House of Commons when it came up, he would be sitting by himself today because this member here would have had his convictions and would have stood on his own two feet and would have voted against this piece of legislation.

SOME HON. MEMBERS: Hear, hear!

MR. FRENCH: Let me tell you that today, I would have stood on my own two feet.

AN HON. MEMBER: (Inaudible) support us (inaudible).

MR. FRENCH: No, Sir, I certainly did not on this particular piece of legislation. I certainly did not support it.

AN HON. MEMBER: This man supported it.

MR. FRENCH: He probably did.

AN HON. MEMBER: \`Lloyd' is a member of the 500 Club.

MR. FRENCH: Oh, I see. I was not aware of that. Oh, I see; he was a member of the 500 Club.

As a matter of fact, during the campaign back in February when I walked through Holyrood, I knocked on a gentleman's door and he told me he could not support me because of Brian Mulroney.

AN HON. MEMBER: He would not?

MR. FRENCH: He would not.

MR. SULLIVAN: \`Bob', he ran for us in 1989.

MR. FRENCH: Did he? He ran for us in 1989.

AN HON. MEMBER: Thank God, he did not get elected.

MR. FRENCH: Thank goodness, then, he did not make it.

AN HON. MEMBER: He is a member of both 500 Clubs.

MR. FRENCH: So he is a member of both 500 Clubs? He ran for the nomination and still did not make it.

Mr. Speaker, I, as one member of this House, will not be supporting this legislation. I think my colleagues on this side of the House know me well enough, and I guess, respect my opinion, what I think about it. I, for one, supposing I stand alone here later on tonight or tomorrow, will certainly not be voting for this piece of legislation.

Now, it is great that the minister could bring in the news on Friday to reduce the taxation on cars, and that is great for the motor vehicle industry in this Province, and I have no problem with anyone who is capable of buying a new car, to be able to save.

AN HON. MEMBER: (Inaudible).

MR. FRENCH: Well, they are suffering and will continue to suffer. I would much sooner, if something had to come today or come last Friday, I would much sooner have talked about children's clothing or talked about our light bills. That is what I would much sooner have seen.

It is very interesting, and I made it a point to get some things from the Nova Scotia Legislature as it relates to this particular piece of business. It is called the BST tax and I have my own interpretation of that, of course, Mr. Speaker, which I certainly will not repeat here. A lot of questions were asked in the House in Nova Scotia: Who is this deal really for? Are the young people of Nova Scotia - and this is what went on in their Legislature as it related to this piece of business. It is certainly not for the young, it is certainly not for the old, and it is certainly not, as in this Province, for the working poor of the Province. It goes on and on into great detail and so on, which I will not bother to get into today, but those are just some notes out of the Nova Scotia Legislature.

I would like to read here from the *Globe and Mail* of December 13. It says: Of particular importance this week has been a clip played on the CBC radio. This was an August 1993 call-in show on a Toronto radio station, CFRB, in which Mr. Chrétien was asked about the GST: `So will you abolish it?' `Yes, I will abolish it,' he replied. Of course, now, he and some of his cohorts in Ottawa are saying this was taken out of context. Well, if you are asked a direct question and you give a direct answer, how in the name of goodness is it taken out of context? He was asked, and he answered, `Yes, I will abolish it,' and then his cohorts say, `Well, it was taken out of context.' Well, I would really like to know how we can interpret that as taking the Prime Minister of this country out of context? Although I do understand that in the last day or so, he certainly tried to cover his tracks, but I do not know if he is doing it very successfully or not.

Privately, of course, the Liberal strategists agree that for this GST there will be a heavy toll to pay, and if anybody thinks it is going to go away before the next election, then they are sadly mistaken. The people are not going to forget a promise to abolish this tax when this tax did not get abolished. Now, in this Province, I guess, we sold out. We got short-term gain for long-term pain, and this pain, Mr. Speaker, will be long-term. I find it interesting that we do not even have the right, if we want to increase or decrease. We do not even have the right to do that on our own. We do not have that right.

The compensation package, as we see it today - and I will not get into that, because I think our leader has done an eloquent job in talking about the figures and what we will owe once this program runs out, what we are going to be short on. It is very interesting to note that his figures came from the Department of Finance and yet in this House he cannot get answers to his questions. Tax harmonization in this Province, certainly back in February, was not an election issue, but was signed in principle by the Premier soon after the election, that (inaudible) a pending deal was hidden from the people.

MR. MATTHEWS: (Inaudible).

MR. FRENCH: Good.

MR. MATTHEWS: Thank you very much.

MR. FRENCH: You are welcome. I enjoyed yours, thank you. Thank you, I say to the Minister of Health.

AN HON. MEMBER: (Inaudible).

MR. FRENCH: Oh, I will put that in especially for you.

AN HON. MEMBER: Sympathy cards (inaudible).

MR. FRENCH: Sympathy cards, yes.

MR. E. BYRNE: One week the Minister of Health says he has nothing to do with hospital boards (inaudible) hospital board.

MR. FRENCH: Yes, and next day he does.

MR. E. BYRNE: (Inaudible), yesterday he had everything to do with them.

MR. FRENCH: Yes, it depends on what suits him. It depends what day of the week he is on.

Now, the three Liberal Premiers gave a pre-election gift to Mr. Chrétien, who is nervous as people remind him of his broken promise to get rid of the GST. I say to the Government House Leader, this will have an impact and the people across this country will not forget Mr. Chrétien for not abolishing this tax. This will not go away, it has not gone away and it will not go away and I believe there is even some talk of maybe getting the federal election - I saw that somewhere today in print - of actually getting the federal election off the ground much sooner, before Canadians, we, in Newfoundland and Labrador, Nova Scotia, New Brunswick have a chance to see exactly what this tax is going to do to us and to the people of this Province. We will have an opportunity to see how this unfolds and how it presents itself to the people of this Province.

Now, when I look back, earlier this year, the calls I had, Mr. Speaker, from people on social assistance who lost out on the sixty-one dollars, who lost out on the drugs, who lost all of this and now, if they have small children, Mr. Speaker, and a lot of them do, they are going to pay more for children's clothing. If we are going to pay a light bill that goes up every month - some of the calls I have had, and I am sure every member of this House has had them, from people who are about to lose their electricity. And how we have all worked - I say this to both sides of the House - how we have all worked to try to help in having people's power reconnected. We have all talked to Social Services, or most of us have, about what these people have to do to try to pay off the debt.

I mean, an individual who called me would have actually had to pay out almost as much, Mr. Speaker, or more than he was taking in. He certainly would not have enough left for food or clothing or anything else. And now, we are going to raise the cost of electricity in this Province to consumers, Mr. Speaker. I think that that is totally, totally, totally wrong.

Again, Mr. Speaker, I have to question British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec and Prince Edward Island, who did not, would not sign on to this particular agreement. Certainly, all have been asked but none of them have signed on. Why? It must be because the agreement is no good for those particular provinces, and I say that it will turn out to be no good for this Province either.

Mr. Speaker, the poor in this Province spend a greater percentage of their income on essentials that will cease to be tax exempt. Heating fuel, as I said, electricity, children's clothing, even funerals, Mr. Speaker, haircuts, legal fees, books, the tax rate on basic necessities will more than double because of this HST. Again, I say to you, Sir, that is totally wrong.

Of course, between now and the next federal election, the people in this country of ours will remember exactly what happened with this. It just blows me away to see that you will pay less for a fur coat and more for children's clothing. As a matter of fact, I believe one of the radio stations quoted last night at the Liberal dinner: There was more mink at the Liberal dinner last night than there was on a farm. There was more mink at the Liberal dinner last night, that walked through the doors, than there would be on a farm.

MR. TULK: (Inaudible).

MR. FRENCH: I am just quoting now. I do not know if it is true or false. I would say the Government House Leader would know more about that than I do.

SOME HON. MEMBERS: Oh, oh!

MR. FRENCH: Go on!

AN HON. MEMBER: (Inaudible) `Beaton Tulks' (inaudible).

MR. FRENCH: Go on! I have some difficulty with that.

AN HON. MEMBER: Do not be so ridiculous! The reality is that this tax will, in effect, increase children's (inaudible) to buy a fur coat.

MR. TULK: (Inaudible).

MR. FRENCH: I doubt that somehow. I really doubt that, I say to the Government House Leader.

Mr. Speaker, we are going to lose our autonomy to set tax rates under this deal, as I said the other day. Ottawa can raise the taxes unilaterally. Any province can veto a tax decrease. If our revenue needs increase, what will we do to get the extra revenue? If our revenue needs decrease, how will we give a sales tax break? We will not give a sales tax break because we cannot do it without the permission of the rest of them. So how are we going to do it? We cannot do it.

The Finance minister tells glowing stories about the economy growing to make up for the loss of the revenue under the HST. But the government's Social Advisory Committee document says that the next few years will bring an economic downturn because of fewer workers, fewer paying taxes, more seniors with needs, and smaller populations and declining transfers. Both cannot be true. The Finance minister is painting a rosy picture, I say, just to sell the tax harmonization bill to the people of this Province. It will not work in this Province.

The government is breaking its promise to put education reform savings back into education because the HST deal will leave it in a revenue crisis. The government rushed into a bad deal without considering the consequences and is desperately selling the deal, not because it is good for the Province, but because they think it is good for the Liberal Party of Canada. That is my assessment of this particular piece of legislation. There should be more to this than just trying to build a very clear and clean road for the Prime Minister of Canada who, like I said earlier, in the last three or four days has done more backtracking - if we could run forward in the Olympics like he has backtracked in the last three or four days, we probably would have won twenty more medals.

The new tax means duplication in tax processing. The cost of this - this new tax will cost this Province jobs. Again, when I spoke on this, I think it was on Friday, I mentioned people in the government departments here who have gone out and met with the revenue people from the Government of Canada, only when they came back to be none the wiser than when they left this building to go. They have been told little or nothing, which to me is a disgrace to be going forward, especially at this time of the year, not knowing once we come back after Christmas: Are you going to get your notice, am I going to get my notice?

I believe, Mr. Speaker, and believe most sincerely, that this is wrong. I think the people of our Province and our employees deserve much better than what we have been getting and what we have been given. We have seen that when the Premier said nobody in Newfoundland need worry any more in 1996 about employment. No more lay offs. The next day when he went to Ottawa we started getting ready to march 143 out of health care, and over the next year or two years we are going to march another 100 out right along with them. That is a shame. Now, under this here, we are going to drive more people away than we are going to employ. That is wrong, I say.

AN HON. MEMBER: (Inaudible).

MR. FRENCH: Just let me say to the Minister of Health, if we were in charge we would certainly look at ways to do it, and we certainly would be doing it differently. We wouldn't have the Premier of our Province coming out, standing up to the local press and to everybody else saying: We aren't going to lay off anybody else! The next day, and even the minister probably knew this, I don't know if he did or not, 143 - if he doesn't he shouldn't be minister, I say to him.

MR. SPEAKER: Order, please! Order, please!

The hon. member's time is up.

MR. FRENCH: By leave, Mr. Speaker?

SOME HON. MEMBERS: By leave!

MR. SPEAKER: Does the hon. member have leave?

SOME HON. MEMBERS: (Inaudible).

MR. SPEAKER: The hon. member by leave.

MR. FRENCH: I just want to, in conclusion, Mr. Speaker, on that particular point I was talking about, to say that we can't afford to lose any more jobs. If the Minister of Health thinks I'm kidding I will tell him another story, because he believes so much in health care in this Province. On the fifth floor of the Health Sciences Centre one room in there has been cleaned once in the last three days -

SOME HON. MEMBERS: No leave!

MR. FRENCH: - stuff wasted on the floors, Mr. Speaker, not cleaned up -

MR. SPEAKER: Order, please! Order, please!

MR. FRENCH: - and the Minister of Health can sit there and (inaudible) your life, Mr. Speaker.

MR. SPEAKER: Order, please!

The hon. member's time leave has been withdrawn.

MR. FRENCH: He knows what I'm saying!

MR. SPEAKER: I ask the member to take his seat.

MR. FRENCH: He knows what I'm saying is true. Thank you.

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: If he was going to stay on the bill, sure we would give him leave to conclude.

Mr. Speaker, I move that this House not adjourn at 5:00 p.m.

SOME HON. MEMBERS: Oh, oh!

MR. SPEAKER: Order, please!

It has been moved and seconded that this House not adjourn at 5:00 p.m.

All in favour of the motion.

SOME HON. MEMBERS: Aye!

MR. SPEAKER: Opposed.

SOME HON. MEMBERS: Nay!

MR. SPEAKER: Carried.

The hon. the Member for St. John's East.

MR. OTTENHEIMER: Thank you, Mr. Speaker. I'm pleased once again to participate in this debate on the proposed HST legislation. Just a couple of days ago we had an opportunity during second reading to explore some of the arguments against the proposed legislation. It is clear that the provinces in Atlantic Canada, which represent a region which entered into this somewhat secret deal, this memorandum of agreement, or whatever it is called, between this region of Canada and the federal government, that the opposition parties in these three parties in these three provinces in this one region, and indeed many of the citizens of each province, have voiced their objection to this legislation which is now before this particular Legislature, has come before another provincial legislature, and is due to be finalized in another in the not-too-distant future.

There is significant debate I would suggest amongst individuals and groups and associations, and indeed political parties, opposition parties, which have great difficulty with the legislation which has been entered into secretly between, I would suggest, a federal Liberal government and three provincial Liberal governments. That sounds to me to be somewhat suspicious and has to be assessed very carefully before the legislation reaches its conclusion.

Mr. Speaker, I would like to review, in a discussion on tax harmonization, the actual specifics as it relates to actual dollars and cents and what this act will mean to the people of this Province. It is careful, Mr. Speaker, that we review in detail the actual figures and with some projections as to the shortfall that this Province will realize after year five. We have to ask certain questions and I will begin with, how much is earned now in sales tax revenues? When we look at the budget and we look at the estimates, Mr. Speaker, we see that in 1995-96 the sales tax revenue from RST in this Province totalled some $565 million. The federal sales tax or GST from Newfoundland, in the most recent twelve month period, totals $283 million for a total sales tax revenue from this Province, from the Province of Newfoundland and Labrador, in this twelve month period, a grand total of $848 million. So that is the figure, Mr. Speaker, that we begin with in our assessment of where we are today and it is important that we carry this discussion along to see exactly where we will be in year five. When we get to that figure it will be clear, I suggest to the members opposite, it will be clear why the members on this side of the House have serious objections to the provisions of this bill.

The question then has to be asked, how much will be earned under the new sales tax, the new envisaged tax? We have to remember that the current GST rate is 7 per cent. The new value added tax rate will be increased to 15 per cent and everything now taxed with GST will be taxed with the new value added tax. So the total revenue should increase by a factor of 15/7. So let's take the figure that we have already suggested will be the federal sales tax figure, which is $283 million. We multiply that, Mr. Speaker, by the 15 per cent, which is the value added tax over the 7 per cent GST tax rate and we end up with a result of $606 million. Now we have that figure, Mr. Speaker, we have to do an analysis by asking ourselves the following question, how much will Newfoundland get under the new tax act because this is our own provincial legislation which is subsequent to this secretive agreement entered into between this Province and the federal Government of Canada.

How much will Newfoundland realize under this new tax? We have a total value added tax revenue of $606 million, which is calculated, Mr. Speaker, by the formula which I just referred to. We now subtract Ottawa's share and when we do that we have a figure of $283 million which has to be subtracted from the $606 million. So Newfoundland's share, Mr. Speaker, of the value added tax revenue now totals $323 million and these are reliable figures obviously, Mr. Speaker, that we have retrieved from our own internal documentation, public documentation which is released by this Province and factors into these figures, the figures revealed by the federal government as well.

How much will Newfoundland be short compared to what it gets now? Again, the current RST revenues in Newfoundland total $565 million. Newfoundland's share of the value added tax revenue, the figure which we just addressed a moment ago, $323 million. So Newfoundland will be short - I would suggest, Mr. Speaker, that Newfoundland will be short in sales tax revenue to the tune of $242 million a year. When the calculations are complete that is the bottom line. So the question has to be asked, is this a good deal for this Province? Upon

careful review, Mr. Speaker, is this arrangement, this secret deal, this arrangement between Newfoundland and other provinces within this region and the Federal Government of Canada, is this an arrangement which is in the best interest of Newfoundlanders and Labradorians? The clear answer to that question must be `no', and the people must stand up and be counted, and raise objections to the proposed legislation.

What about the federal compensation? Federal compensation starts in year one, and it decreases each year, so it sounds good right now. The immediate benefit sounds very attractive, but it whittles itself away. We see a diminishing effect as we continue from year one to two to three to four and finally five, to the point that the benefit which this Province appears to receive at this point is virtually eliminated completely upon the expiry of five years. As I have indicated, it starts in year one, and this now decreases each year over four years.

Mr. Speaker, it is now important, in my view, to do an assessment of this five-year period. Let's try to project exactly what each year means, and how this shortfall will directly impact upon this Province in terms of the tax revenues of this Province. How much will we be short in years one and two?

Mr. Speaker, we have Newfoundland being short $242 million, and we now have to subtract the Newfoundland percentage of 5 per cent, which is $12 million, so the difference Ottawa pays, which is 100 per cent of the difference in years one and two, will be $230 million. So Newfoundland is short $12 million in each of years one and two.

How much are we short in year three? Again, we have the beginning figure of $242 million. Again we subtract the 5 per cent, again the same amount of $12 million. The difference is $230 million, which we arrived at earlier, and Ottawa pays 50 per cent of this difference, because in year three it is now 50 per cent of this difference, and that would be deducting or subtracting $115 million from the $230 million. Newfoundland will then be requested to pay the additional 50 per cent, so again one-half of $230 million equals $115 million. We add again the 5 per cent subtracted value, which is $12 million, so Newfoundland's shortfall using these figures is $127 million. So, after year three we see a shortfall of $127 million.

Let's now move to year four. It is the same figure. Newfoundland will be short $242 million. We subtract 5 per cent, which Newfoundland pays, which is $12 million; the difference, $230 million. Ottawa will now pay 25 per cent of the difference, not 50 per cent, and not 100 per cent, which are the amounts that we started with in years one, two and three. Ottawa now only pays 25 per cent of the difference, equalling $58 million. Newfoundland pays the other 75 per cent, which equals $172 million, and again we have to add the 5 per cent which we subtracted above, for another $12 million, so Newfoundland's shortfall in year four is $184 million.

You can see that the shortfall increases. It is an escalating shortfall. That is what this tax is all about. As time goes on, our shortfall increases, the Federal Government contribution decreases, and the obligation on the people of this Province reaches a point which is almost unmanageable; it is almost out of control.

Mr. Speaker, there has to be careful review of what the bottom line is with respect to this piece of legislation. Newfoundlanders are not being given the truth. Newfoundlanders are not being given the facts. The reality of this harmonization tax bill is that after a period of time Newfoundlanders will be called upon, through this legislation, to dig deeper in their pockets to get funds to compensate the Federal Government of this country simply because this act allows it. I say, Mr. Speaker, that is not good enough. The people of this Province deserve and demand better.

Let us have a look at year five, how much we are short in year five and every year from then on. Newfoundland will be short again. We have our commencement figure of $242 million. In year five and thereafter Ottawa pays us nothing to compensate for our loss in revenue, absolutely nothing. There is no contribution by the federal government after year five, and that is what is frightful about this act, and that is why the people of this Province have to be given the reality, have to be given the details, so that they can then truly assess the impact of this legislation.

After year five Ottawa does not pay this Province one red cent so let us review what Newfoundland is short. In year one we are short $12 million, in year two we are short $12 million, in year three, using those figures and

using those calculations, a deficit of $127 million, in year four a deficit of $184 million, and in year five and each subsequent year, in year five and each year thereafter a deficit of $242 million. That is the end result. That is what this legislation means to the people of this Province, and that is why I would argue that individuals who in the past supported this position, and I am referring very specifically to Mr. Nunziata, basically challenged the Prime Minister several days ago and issued rationale as to why he could no longer support what was being done over GST.

As recently as last night, Mr. Speaker, we saw the Prime Minister of this country attempting to give some form of an apology to the people of this country, an apology, which I would suggest, is not being bought by the people of this country. It is half-hearted, it is qualified, it is conditional, and that is not an apology. An apology, Mr. Speaker, has to be complete. It has to be unconditional, it has to be genuine, and these particular qualities did not accompany the alleged apology or explanation as given by the Prime Minister last night here in our city, and the people of this country will not accept a conditional apology. The message was loud and clear with respect to what the federal Liberal Party of this country stood for with respect to GST.

It was a faint effort, I would suggest, to the people of this country, and the people, as I indicated earlier, simply will not buy it. There have been questions raised, there have been challenges raised, and we see in this Province, for example, a group in our own city, the St. John's Board of Trade, who say that a hidden tax will make our prices appear to be far higher than they would pay at home and this could, at first glance, discourage buying and goods being sold on the open market. People simply will not know what it is they are being taxed for. What is the true tax amount? What is real? What is hidden? It is a feature of this tax regime which is not being accepted by the many critics and many simply commentators, not necessarily critics, but commentators of this tax regime.

The only way government will find it can hope to make up for that shortfall, and let us keep in mind that after year five and each subsequent year we have a shortfall of $242 million, so how does the federal government and indeed this government, the provincial government, plan to cope with this deficit and shortfall? There are several options which are available. Increase other taxes which obviously would be income tax, property tax, or service assessments that are offered by the government. They can ask the people of this Province, when faced with this deficit, to dig in once again, to dig deeper to find solutions to the tax revenue woes of the provincial government of the day. It can create new taxes. It can be creative. Insurance, for example, they can put taxes on insurance. They find new ways to ask the consumers of this Province to deal with the deficit, to deal with the consequences of, to put it simply, poor legislation. It can ask it to have the people of this Province again experience more cuts, closing of hospital beds, reduced spending in health care, reduced benefits in social services, reduced expenses in education, closure of schools. All of these social programs, Mr. Speaker, will be further reduced. The people of this Province will be asked once again to tighten where obviously it is simply impossible to do so. That is how the government, Mr. Speaker, will have to deal with the shortfall which is anticipated after year five.

It can generally, Mr. Speaker, generate more revenues through economic growth but I would suggest that is a positive thing if it can generate economic growth, Mr. Speaker, that is a positive thing as my colleague just indicated, if it can be done and if the government has the wherewithal to find the ways and to find the mechanisms, Mr. Speaker, to generate economic growth. So the government is being forced, now it seems to me, Mr. Speaker, to try and find ways to compensate for a deficit which it, in and of itself has caused. These are projections, Mr. Speaker, these figures which I have used in this assessment appear to be very reliable. They are figures which we collect from provincial government documentation, from the federal government documentation and we see in a summary that the impact of this legislation after year five, is such that ordinary Newfoundlanders and Labradorians will be called upon to, as I have stated, dig deeper in their pockets to find ways, Mr. Speaker, to correct the mistakes, to correct the concealment and to correct the truth of this legislation.

So in conclusion, Mr. Speaker, it is essential that we look very closely at this legislation. It is essential that there be a very careful analysis made of the revenues, of the impact of these revenues vis-à-vis the federal government and the provincial government. It is essential that we do a careful analysis of the impact of this legislation after years one through to year five and only then, will we be able to see, Mr. Speaker, only then will we be able to

see what the true impact of harmonized sales tax, this legislation will be on the ordinary Newfoundlander and Labradorian.

Thank you, Mr. Speaker.

MR. SPEAKER: The hon. the Member for Baie Verte.

MR. SHELLEY: Thank you very much, Mr. Speaker.

I am glad to rise today to make a few more comments on this ludicrous bill that is before the House today. It is amazing, here we are, just a few days before the Christmas break and this type of legislation is before the House that we have to debate. I don't think it should even be here at this point, Mr. Speaker. Where it should be is at public debate so that people can get the pros and cons, and if the government is saying all these positive things and they have nothing to worry about, well let us let people see it up front, Mr. Speaker, so let us just talk about it specifically for a few minutes on the positives and negatives.

Yes, there are positives. There is no doubt, Mr. Speaker, that there are positives and one of the positives is that, as of now, you can go out and buy a new car and, Mr. Speaker, if you have the intentions of buying a new car and if you have the money to buy a new car, that is great, I am glad for those people. I wish I was about to buy a new car now, there is a good savings on cars and that is fine, I agree with that, Mr. Speaker. Now, let us look at, maybe some of the negatives of it. How many people in this Province are ready to go out to buy a new car next week or next month, or, are they really going to buy a second-hand car or, are they going to buy a cheaper car or really, are they going to buy a car at all? That is what we have to ask ourselves and if you start to weigh out, and I ask all members in the House to take the pros and cons, as we should do because there are positives to it, one positive is the harmonizing of sales tax of any kind, I agree with harmonizing of the sales tax, it makes it clearer we hope but, Mr. Speaker, the negatives outweigh the positives, I say to the members of the House and if you really get down to it, you find out where the negatives are and whom they affect.

Whom do they affect, Mr. Speaker? They affect the lower income people in the Province and, Mr. Speaker, the middle income people in the Province, more. Day after day, I hear it all over the Province, all over my district and throughout the Province, about the middle income people. I will come back to the lower income in a second. The middle income people, the people who just scrape by, the people who pay their bills, the people who can send their children to college, the people who can do all of the normal things, or the average things, who have kids in college, who have a car, not a great car, have a decent house, not a super rich house; it is the middle of the road person that this also affects, because the truth is, the negatives that we talk about are the necessities of life. They are not whether you are going to get a fur coat, or if you are going to get a $25,000 car. They are about paying for your light bill. They are about paying your electricity bill. They are about putting gas in the car every second or third day if you have kids that you bring to school, or because of the travel that you have to do. Those are two of the negatives.

Mr. Speaker, let's just talk about this particular so-called break that we gave the car dealers. I am glad for the car dealers, too, because hopefully that will add jobs to the economy in some small way, and that is a positive, but let's talk about who really saves in this.

The truth is that the more money you have, the richer you are, the bigger and more expensive car you are going to buy, and therefore the bigger break. On the other hand, the poorer you are, and the less you are going to pay for your car, the less you are going to save. So this great, big benefit for the car dealer has to be put in perspective of who is the richest down to the poorest.

I think the example was already given of a $20,000 car - that is average for a new car - 4 per cent which you would save on that would be something like $800. So you are going to save $800 when you buy that car. But when you go to a $30,000 car you are talking about a $1,200 saving. So the point is that the richer you are, the more expensive car you buy, the better break you get with this deal on the car tax. But the lower income you have, and the cheaper the car you buy, the less advantage you have from this.

What this deal does with the cars is really show what this whole bill is all about. For the richer people, the people who spend more money, there is a bigger break, and for the people on lower income, the less break you get. That is a fact. That is not made up. There is nothing fictitious about it. It is plain and simple. The more -

AN HON. MEMBER: (Inaudible).

MR. SHELLEY: I am being specific to the car dealership situation. The more that you spend on a car, the more money you have, the bigger break you get. The less money you have to buy a car, the lesser break you get.

Mr. Speaker, the people who are on lower incomes have no intention of going out and buying a new car this year. If they are lucky they will trade in their old one and get another secondhand one, or they will keep the old bomb that they have and try to keep it on the road. That is the reality for a lot of people in the Province, so this was no great news to them.

Also with this particular issue on the car dealership are the people who raised a legitimate concern of other businesses, snowmobilers. If you go somewhere in Labrador, pretty quickly they will tell you that a snowmobile to them is as important, as essential, as a car, I say to the Member for Labrador, and I am sure he agrees. If you go to the people in Nain, Goose Bay, Labrador City... I lived in Labrador City. In Goose Bay there are at least two ski-doos in every driveway, sometimes three, and they do not just use them for recreational purposes. The Members for Labrador know this. For the people in Labrador City and Goose Bay, especially up and down the Coast, the ski-doo becomes a very essential part of their way of life. They use their ski-doo more than a car, especially in the winter months. They jump on their ski-doo because there are paths all through. I do not know what it is like in Goose Bay - maybe the member can tell me - but in Labrador City there are all kinds of paths through the houses and roadways, and everything else. They use their ski-doo to go to the store. They use it to go to the stadium. They use it for all of those things, not just for recreational use of going ice fishing or whatever. Mr. Speaker, those people who talked about their situation with the ski-doos have a legitimate beef with all of this. Why not them, if cars were considered essential?

Of course, I also heard some comment from a furniture store that thought the same thing. They said furniture was essential. Why not them?

Mr. Speaker, it seems what happened here, when it comes to the car dealership, the truth is it was similar to the situation with the smelter with Labrador. Just before they announced the smelter for Argentia, all of a sudden the government started throwing all kinds of little goodies, a motor registration office for Labrador City. Then they talked about $20,000 for a heritage fund somewhere in Labrador. All of this was thrown out. The same thing with this tax; we use the analogy. Just before the HST comes into being, the government is going to throw out a couple of little goodies to calm people down. That is what they are doing, throwing out a couple of little goodies to calm people down, saying (inaudible) tax. Look what we can do for you. We can bring down the price of a car for you.

Well, Mr. Speaker, it hasn't worked. It hasn't worked, it isn't working, it isn't going to work. Because the simple blatant politics of this is that there was a lie told about the GST during the last federal election, admitted to that, and continuous every day. Now we get apologies from the Prime Minister, finally.

It was a funny thing how he apologized. He apologized, but then in the same breath he said how he didn't want to leave an impression. That is how the Prime Minister rebutted on this. He didn't want to leave a full apology, but he said; Okay, I will apologize anyway because it was an honest mistake. That is what he said: I will apologize anyway because it is an honest mistake. But at the same time he said: But I hope I didn't leave the impression with people that we were going to scrap the GST.

You can twist it any way you want, but the recording from this CFRB radio station back in August 1993 - and it is recorded, it is there for anybody to listen to, and you can't change the words around. You can't change the context of that. The question was directly to the Prime Minister: So, Mr. Chrétien, will you abolish it? They were talking about the GST. The reply, and this is the reply by the Prime Minister of the country: Yes, I will abolish it.

How can you twist that or turn it so that you leave a wrong impression like the Prime Minister said? It isn't the wrong impression. What it is is an impression that got him elected in the last federal election. It was plain and simple. You go around anywhere in this Province during the last federal election, and what was the big plank of the red book? We are going to scrap the GST. Sheila Copps admitted it. She called a by-election on it because she knew she had made a mistake, she knew she didn't tell the truth about the GST, and what happened? She called a by-election. What happens a little while later? Paul Martin, the finance minister, apologizes for the Prime Minister. The Prime Minister kept denying it, and lo and behold, he comes to Newfoundland just last night and finally apologizes.

But as he was apologizing he took it right back. Because he said: I apologize, but I still maintain that I did not leave that kind of impression. It is so ridiculous. Then we have `Sheila Flops' who decides that she is going to call a by-election, have the democratic fiasco of the century, and move back. All of a sudden Sheila decides that she is going to prove to Canadians that she can get elected again. Who is going to believe that Sheila Copps didn't have her poll done and have her soldiers in order to win her by-election?

That by-election proved absolutely nothing. Sheila Copps, she decided to do her poll and then she was going to run. Nice safe seat. `Sheila Flops,' the Deputy Prime Minister of the country, Proved it on a by-election, she says. She didn't prove it to Canadians. All she did was prove it to her own district who has a lot of support for her in her own district, and why wouldn't she? The Deputy Prime Minister of Canada, government in power. Why would they go against her? Because they would be threatened. They would lose their Deputy Prime Minister, that is what they were afraid of. Then Paul Martin, out of respect for the Prime Minister, stands up in front of national media and apologizes for the Prime Minister. Then the Prime Minister ends up back in Newfoundland just yesterday apologizing, but in the same breath saying: I didn't mean to leave the wrong impression.

What kind of wrong impression was it? Then: Privately, Liberal strategists agreed that they will have a heavy GST toll to pay, and quote, from a Liberal strategist: If anybody thinks this is going away before the next election they are sadly mistaken, said one. This is our Achilles' heel.

The only way to get any respect back from the people across this country from the Prime Minister is to unequivocally announce that he did mislead the people of this country during the election so they would become the governing party of this country. That is exactly what it was. It was the main plank throughout this Province, throughout every province in Canada, that the GST would be scrapped, the bad GST, the Mulroney GST.

AN HON. MEMBER: What does scrap mean?

MR. SHELLEY: Scrap, abolish. Mr. Speaker, there is no definition to it, I say to my colleague, because when he said abolish it I would abolish it. The context of the sentence is there, twist it as you may.

The bottom line is that this is very political. It is, you can't deny that.

MR. E. BYRNE: Paul, who is the Member for Signal Hill - Quidi Vidi?

MR. SHELLEY: The Member for Signal Hill - Quidi Vidi, Mr. Speaker, was here for about ten minutes after Question Period to see if there was any - oh, that is right, I can't talk about it. I won't mention, Mr. Speaker, that the Member for Signal Hill - Quidi Vidi is not here.

MR. H. HODDER: Talk about Jean Payne and the soup kitchen.

MR. SHELLEY: I won't mention that, Mr. Speaker. I won't mention the fact that he is not here and that he is probably still drinking soup with the hon. Jean Payne, Mr. Speaker. She is not here either.

MR. H. HODDER: Jean Payne was inquiring of all hon. members yesterday whether they had their soup or not.

MR. SHELLEY: I thought it only applied to ministers too. The least he could have done was have a bowl of soup before he had the caribou and the steelhead trout.

Mr. Speaker, this bill has raised its ugly head in this country and we are about to head into a federal election. Simply put, Mr. Speaker, the three Liberal premiers of Canada, in three Atlantic provinces are the only ones that supported this, Mr. Speaker. They did it for a simple reason and that is the Liberal Prime Minister of Canada and the GST coverup. The GST in disguise, the BST. You name it, it is there.

MR. J. BYRNE: Blended.

MR. SHELLEY: Mr. Speaker, the Blended Sales Tax, the BST but that is what it all came down to. It is three provinces - this whole issue comes down to the politics of the GST coverup from the last federal election. The second point is that the poorest people, the most vulnerable people in today's society in this Province, the poorest and the middle income people will be mostly negatively impacted by this. There is no doubt about that. You can see it in the very example of buying a car that the disposable income of the lower income people - and if you sit down with any low income or middle income person in this Province today and just quickly, in about twenty minutes, go over their budget with them and you ask them where they spend most of their disposal income, from 70 per cent to 80 per cent of it is on essentials, if not more, Mr. Speaker. That is a conservative amount. That 70 per cent to 80 per cent of their disposal income for a monthly budget goes to necessities such as fuel, electricity, children's clothes and so on, Mr. Speaker, the necessities, that is what it is.

Mr. Speaker, I will tell you a little story about coming in here on Monday. While I was driving to Deer Lake to fly into St. John's I was listening to the Open Line and they were talking about the HST and right in the middle of the Open Line Show, Fillatre's Funeral Home on the West Coast were advertising for prearranged funerals because they said by April 1, when the HST comes in, it is going to cost more to die. So it is best to get your prearranged funerals done now before the tax comes in. Now, Mr. Speaker, can you imagine? Funeral home companies are going around this Province advertising to get your funeral arranged now so that it is cheaper because it is going to double. It is going to more than double. It is going to go from 7 per cent to 15 per cent, funeral taxes. There is no exaggeration, well I would consider looking into it.

MR. H. HODDER: The Liberals were all in a line-up.

MR. SHELLEY: It is pretty bad when a nineteen or twenty year old is driving around and hears that you had better make prearrangement for your funeral now because the taxes are going to go up on it. That is an awful way to trick people into it, Mr. Speaker.

MR. H. HODDER: Clothes have gone up, the cost of living has gone up and the cost of dying has gone up.

MR. SHELLEY: The cost of living, the cost of dying, Mr. Speaker, so where do you go? The only way out of it is not to be born. So, Mr. Speaker, those are the three main things that I would like to raise in this debate. It is the whole idea of the GST and the coverup and the root of this problem, which started with the last federal election. Now lo and behold our Premier, the boy of the Prime Minister of Canada, his mentor has decided, along with Mr. McKenna and Mr. Savage, that they are going to appease their Liberal Prime Minister and make sure that they help him out. What Mr. Chrétien said is: Boys, you got to help me out. Somebody has to harmonize the tax because we got it in our red book. I can't go around saying I was going to scrap it but I did say we were going to harmonize it in the red book. He is right to that extent. In the red book he did say harmonization but he did, on many occasions, as was quoted here, he did say he was going to abolish it. He was going to harmonize it.

AN HON. MEMBER: (Inaudible).

MR. SHELLEY: Oh, what about what a man says in public? Mr. Chrétien was asked: So will you abolish it? Mr. Chrétien says -

AN HON. MEMBER: (Inaudible).

MR. SHELLEY: Well, Mr. Speaker, I quote, `Mr. Chrétien: so will you abolish it?' `Yes, I will abolish it.' Now how can you judge that? Oh he did harmonize it but he also says -

AN HON. MEMBER: (Inaudible).

MR. SHELLEY: That is right but like the lady, Mr. Speaker, like Joanne Savoie, the Montreal waitress who turned to the Prime Minister the other night at the Town Hall and pointed at him and said: Sir, I voted for you and I voted for you because you said you would scrap the GST, and he said: I did not say that, you should have read the red book. She said: Sir, I did not need to read the red book because I believed you. That is what she said to him, she said: Sir, I believed you that is why I voted for you, I did not want to read the red book, I should not have to read the red book if I could believe you, so she said: I did not.

So, Mr. Speaker, that is what I say to the Government House Leader, that this lady, along with millions of people across this country, that lady was an example of the rest of the country, Mr. Speaker, I heard it in my own district, I heard it throughout when the now Premier was running as our MP in my district, he was also saying the same thing: The GST will be gone when we take over. Mr. Speaker, I suppose that is about true as my colleague for Kilbride said, it is about as true as the Spanish will be gone, 500 per cent increase, Mr. Speaker, Spanish, and the Spanish war is on, according to the Minister of Fisheries and Aquaculture, the Spanish war is on, Mr. Speaker. I thought it was over. Somebody should mention to the Minister of Fisheries and Aquaculture that the Gulf war is over too. The Gulf war is over, somebody should tell him about that, that is over, the Spanish war, the Gulf war.

But, Mr. Speaker, you talk about misleading people and the whole extravagance of what happened with the Spanish war, about how the Spanish were all forced into the harbour of St. John's, how they were arrested for illegal nets, illegal everything, no licences, you name it, it was illegal, guaranteed all proven but, were they put in prison, Mr. Speaker, were they interrogated? No, Mr. Speaker, they were put up in accommodations and taken very good care of and then what happened? We gave them back their frozen fish, made sure it was not spoiled so we froze it for them. We borrowed their nets for $40,000 or $50,000, brought that to New York City and held up a little turbot and stored it all, we wouldn't want the prisoners' fish to spoil while they were incarcerated, put them up in a nice hotel, took care of them, the best of grub - I wonder if the Spanish fishermen were in the St. John's lock-up, Mr. Speaker? When they were arrested, I wonder, did they go to the St. John's lock-up, I wonder, Mr. Speaker? Then the great, big net down in New York and at the United Nations, and the Premier holding up the Spanish turbot and we had all the problems solved.

The Member for Bonavista South, made it clear today, he described it to a `T', the farce, what is the end result -

MR. SPEAKER: Order, please!

The hon. member's time is up.

MR. SHELLEY: By leave, Mr. Speaker?

AN HON. MEMBER: By leave.

MR. SHELLEY: Yes, a minute to clue up?

AN HON. MEMBER: Yes.

MR. SHELLEY: One minute to clue up, I appreciate that.

Thank you, Mr. Speaker, so I will get off that for a second just to conclude on a couple of comments on the GST.

Three-pronged, I say to the Government House Leader, three reasons why I will not support this bill, this tax. One, and most formidable is that, it was a commitment, not even a promise, it is stronger than a promise, it was a commitment by the federal government to abolish the GST and they never followed through. Two, because it

will negatively impact the poorest and the most vulnerable people in this Province, Mr. Speaker, and three, although I would like to believe, I do not believe when the Minister of Finance and Treasury Board says we are going to have a boom in two years, that we will not miss the $105 million once the three or four years run out, I do not believe that is going to happen, Mr. Speaker. I would like to believe it, but we have to start doing some things for the long-term in this Province, not short-term gain for long-term pain. I will have a few more comments to make later on.

Thank you.

MR. SPEAKER: The hon. the Member for Kilbride.

MR. E. BYRNE: Thank you, Mr. Speaker.

I rise to make a twenty-minute commentary on the HST, GST. Only twenty minutes because government has introduced a closure motion on this particular issue. Three members on this side of the House have not even had a chance to debate the main motion. I have been in the House since 1993 and I have seen closure introduced on a number of occasions but not before appropriate debate.

Now, Mr. Speaker, at the core of this issue on HST, is government's spin and the Premier's spin, the Minister of Finance and Treasury Board's spin that what we are doing in essence is passing on $105 million savings to the people of Newfoundland and Labrador. Now, that is what has been said publicly, That is what the Minister of Finance and Treasury Board said.

In their initial press release the minister said: Well, I mean, consultation is still open. In our next budgetary review process we can still consult. The reality is, Mr. Speaker, the deal is done. Now, who is for this deal? Who will save $105 million? Will it be the people who have three and four kids in their family? Will they save $105 million? They will have to buy a lot of new cars, they will have to buy a lot of new washers and dryers, they will have to get a lot of new haircuts, in order to compensate for the cost of increase in children's clothing.

It is a sad commentary on any government, and in particular on all members, I think, when we pass legislation in this House which allows for the sale of a fur coat to become less expensive, and on taxes on children's clothing to become absolutely more expensive. Average people, people who make $80,000 and less in this Province, will be the big losers if this tax regime comes into play on April 1. Mark it down. Why will they become the big losers? That is the question we have to ask, and that is the question I hope to answer today.

Lower middle income Canadians and Newfoundlanders and Labradorians will on average pay more for electricity, for home heating fuel, for children's clothes, will pay more to buy goods and services. The reality in terms of what this legislation will do to the average home owner and the average taxpayer and the average ratepayer, who are all the same person, will have far more detrimental affects on that end than it will in terms of the average cost that will be paid to us.

What about new home owners or new home builders? The cost of building a new home today compared to what it will be after April 1 will rise dramatically as a result of HST. The other question, in terms of legal services. What will be the cost of legal services as a result of HST? Will they go down? No they won't. They will increase. The cost of real estate fees will increase, These are legitimate, everyday costs that consumers and people in this Province must buy.

The biggest arguments I've seen forthcoming have been on a sort of fairy tale level, a level that says any time we reduce taxes to the people of the Province, that we reduce taxes from a 19 per cent regime to a 15 per cent regime in this case, it will automatically produce positive results for the people of this Province. I don't think so. While that is a laudable goal, the details, as in much of what we do here, legislation that is passed in the House, the details and regulations tell the story. While it is something that every government should aim for in reducing taxes, at the same time the reduction in taxes, whose back will bear the brunt of it?

The reality is that we don't have as many horses pulling the economy along today as we used to. We have far fewer horses pulling along and trying to support far more people. That is the reality of it. Socially, each and every year since 1989 the amount of people who are on Social Services have increased dramatically, and there is no expected decrease within the next five to seven years. In government's own Strategic Social Plan, that is indicated. Our labour force is shrinking tremendously, so our ability to generate more revenue and more taxes at this point in time is also shrinking. While there are exciting resource developments on the horizon, some on the immediate horizon, some in the long term, we have no guarantee yet that as a result of increasing revenue coming in from those resource developments the federal government on the same hand will not reduce dollar for dollar off equalization transfer payments. But yet, HST is going to be a good thing.

The real story, if you look at what the federal government did in the HST zone, if it truly believed that HST would be good, then why didn't it pass on, or why didn't it inherit, the same philosophy for something it does itself? When it came to Canada Post and postage and HST the federal government on the one hand made postage exempt, because it would cost far too much in their own estimates, far too much, and this is the telltale sign. When it came to government's own corporation they exempted it from the HST zone because it would cost too much to produce another issue of postage, but yet when it comes to the business sector of our economy what happened? They did not apply the same standard. They did not apply the same standard, Mr. Speaker, simply because this deal has nothing to do with passing on savings to consumers. It has nothing to do at all with passing on savings above and beyond what we would normally expect to consumers and people in this Province.

It has everything to do with saving face. That is what it has to do with, a deal signed so shortly after the election, a Memorandum of Understanding, negotiated, not talked about in public. No Memorandum of Understanding was released to the general public. It was negotiated over the summer and early October the Minister of Finance stands up, calls a press conference, and tells how wonderful it will be, and admits in the press conference that they have some concern over the impact of the HST on lower and middle class incomes.

The Minister of Finance knows that lower and middle class incomes make up the bulk of our Province. They make up the bulk of the people who are supporting the economy in this Province today. The Member for Port au Port has certainly to ask himself a question, like all members, how many people in his district make $80,000 a year or plus? He lives in a district where, probably more than any other district, depends more greatly upon social services and government programs than any other, and there are many other regions in the Province in the same boat. Will his district, and people in his district, be better served by the HST? No, they will not. What about the Member for Placentia & St. Mary's? What about the constituents in his district? Will they be better served by HST? Not likely.

MR. SPARROW: Yes, they will.

MR. E. BYRNE: They will be? Well, I look forward to the opportunity, when these members I just referred to, actually stand up in the House and enlighten us, in their normal eloquent fashion, on how the constituents in their districts will be better served.

The reality, Mr. Speaker, is this is how it works. The Premier made a deal. He tells Cabinet it is going to happen and he expects twenty puppets on the back bench to support it no matter what takes place. That is exactly what is happening here.

April 1 will mark a different sort of approach afterwards. When people wake up on May 1 and see that insurance rates have gone up, see that electricity rates have gone up, see that gas has gone up, and see that home heating fuel has gone up, will they be phoning people and saying, what a great initiative, what a tremendous initiative by government this HST is. It is a tremendous initiative and has done so well for us. The fact is we are all going to have to buy new cars to be able to afford to put gas in them. That is what is going to have to happen. We are all going to have to buy new cars to realize savings, to be able to afford to put gas in the car, to be able to get insurance on our cars, and our homes, etc.

Do we think for one minute that input tax credits back to contractors is going to be passed on to each and every consumer? It will never happen. Government has said what they want to do is deregulate. They want to reduce

taxes, that government does not have the ability to get involved in regulation. It does so, we regulate the economy now. We prescribe hours of work, we prescribe minimum labour standards. We prescribe the amount that people should get paid at a minimum level. What is happening here now is not right and it will not produce any net economic benefits for the people of the Province.

At the end of the day where will this Province make up $105 million? Even if there is a deal on equalization and transfer, even if there are thousands of new jobs in our economy, our gross domestic product will have to grow tremendously if we want to make up a shortfall of $105 million, and if we cannot make up that shortfall what will suffer at the end of the day? What services will suffer at the end of the day because we do not have $105 million in our revenue pot for budgetary purposes?

The Member for Twillingate & Fogo knows what will suffer because the same things will suffer in his district as will suffer in mine. That is the bottom line. Will help the Minister of Industry, Trade and Technology?

AN HON. MEMBER: (inaudible)

MR. E. BYRNE: No, it's a folder my daughter gave to me this morning. She gave me a box of them actually.

AN HON. MEMBER: How old is she?

MR. E. BYRNE: She is three-and-a-half. She really likes Barney, but I told her I couldn't take that philosophy into the House today because the Liberals are not really in a caring, sharing mood. They are not really in a cooperative mood, like many of the kids' programs we see.

HST, closure, is going to come to Committee stage. The House Leader is in a predicament. He is in a jam. We are going to see closure on Committee on HST; and I would say that if he wants every piece of legislation before Friday, closure will be introduced in this House between now and Friday, in a matter of three days - he will have to introduce closure in a matter of three days - more than any other time since Confederation, if he wants it, because that is what it is going to take.

There was no need for closure to be brought in this particular issue. The House of Assembly should be called back in late January or early February. There is a lot of legislation on the books. The government does not need this legislation until April 1. We can debate it two weeks after Christmas. Let's move on with every other piece of legislation if he wants, but that is not what is going to happen. A high-handed, uneven approach existed today.

Minister of Environment and Labour, what will HST do to the labour relations climate? Will it have any impact? What will it do to business investment? Will it be more attractive to businesses? Will it cost businesses more to adjust to the new HST reality, the new HST regulations? It certainly will.

The reality is that this piece of legislation is a result of an agreement between a Premier, a new Premier and a new Cabinet, and an old and tired Prime Minister and an old and tired Federal Cabinet.

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: All the crowd will show for supper tonight but they will not come in the House, will they? Only the stalwarts will stick around.

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: Hearing is always very good. The Jack attack is on the way. You can send up the white flags after.

Ultimately businesses within the HST zone, in terms of tourism, will HST be applied within the zone as we, or any person, travels within the zone? Yes, it will. What about when we travel outside of Atlantic Canada? Will HST apply if we book tickets here, or will it apply for people who are booking tickets to fly in? No, it will not.

It is beyond comprehension how the Federal Government can get involved with taxation initiatives, that one standard applies to a particular region while another standard does not apply to another region, and in the Western region of Canada it does not apply at all. It is beyond belief, really.

The Province of P.E.I. opted out. Why did they opt out of the agreement? If this is such a good deal, is the new government of P.E.I. looking seriously at opting into the HST zone in their regulation? No, they are not, because it does not work. It will not produce benefits to the people of the Province.

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: I am always nice to the Government House Leader. I am always nice to him. He is not always nice to me, but I am always nice to him.

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: I could not let myself down, not to be nice to you or any one of you over there. I would not let myself down.

AN HON. MEMBER: Why?

MR. E. BYRNE: I said, I would not let myself down not to be nice to any one of you over there, even though you are not nice to me. That is irrelevant. That really has nothing to do with the issue at all.

Mr. Speaker, HST is a bad deal, period. It was signed for one reason and one reason only, so the Prime Minister of Canada could, in an attempt, save some face. What do we get? We have a $348 million cheque in the bank right now collecting interest. We can't use it until April 1 and it will continue to collect interest. It sounds good.

MR. J. BYRNE: How much?

MR. E. BYRNE: $33,000 a day.

MR. J. BYRNE: How much money did they give us?

MR. E. BYRNE: $348 million. The reality is, how is it that $348 million - this is a legitimate question - how is it that $348 million is only collecting for us, $33,000 a day? What type of interest rate has it been invested in? Think about it, 2.5 per cent, 3 per cent?

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: My god, 2.5 per cent to 3 per cent. I spoke to officials in the Department of Finance and asked the same question. We have a $348 million cheque in one hand, we deposit it so it collects interest for us on the other hand at less than 3 per cent.

MR. J. BYRNE: What bank?

MR. E. BYRNE: Who are we dealing with? That's a fact, less than 3 per cent. $33,000 a day and change is what that $348 million is collecting for us and it is about 3 per cent or a little less than 3 per cent today it is collecting. I could take $5,000 now, bring it to a bank and get 7.5 per cent to 8 per cent interest.

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: No they are not, no. Not according to the officials of the Department of Finance. If you do the math on it, $348 million collecting $33,000 a day, is not 8 per cent. Think about it, it is not 8 per cent. On $348 million, that is what we are collecting. You will end up with, I think, in a year about $40 million to $50 million surplus on the $348 million. I am just trying to think. I am just trying to recall the information that was given to

me from the Department of Finance dealing with the cheque that you got for HST, the $348 million, even though you cannot use it right now.

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: That is what I understand. Do the times table on it, 365 days a year. You can't use it at the moment is what I am saying. Not until April 1, that is part of the agreement. You should know that, you are in the Cabinet, sacred heart! You should know that, you are in the Cabinet. That is why it is collecting daily interest, you can't use it right now.

AN HON. MEMBER: The Minister of Education, they don't tell him anything.

MR. E. BYRNE: Pardon me?

AN HON. MEMBER: They don't tell the Minister of Education anything.

MR. E. BYRNE: That's right, because one week - that's exactly right. We have seen an example of that. Last week parents were going to decide and this week, well they don't have the ultimate say, the boards are going to decide. Well that is a question that will become evident in time but the information - the Government House Leader is doing some calculations on it but the information came from the Department of Finance.

The reality is, Mr. Speaker, we have a one lump payment that at the end of the day will not cover our losses. People of the Province are going to be worse off as a result of it. We are going to pay more for basic necessities of living and that is the reality that this HST will bring upon the people of this Province. I can't use my colleagues line, he said even the Clerk thinks I am doing a good job but he has already used that line. I can't use that.

AN HON. MEMBER: He has the potential to be Steve Neary.

MR. E. BYRNE: Oh, he is the Steve Neary in the Caucus.

MR. SPEAKER: Order, please!

MR. E. BYRNE: People in the Province on education are asking the same question, Mr. Speaker, to the minister. Is this minister ever going to be relevant or not? All the talk about me being relevant.

Mr. Speaker, I will sit down. I said my bit and piece on it. I wish I had more time but I don't, with that, thank you very much.

AN HON. MEMBER: Steve is going to be quiet today.

MR. SPEAKER: The hon. the Member for Bonavista South.

MR. FITZGERALD: Thank you, Mr. Speaker. I can't say that I am happy to stand here today and take part in this debate, Mr. Speaker, because when you see the activities of this House being crunched, being walked on and trampled on by members of the opposite side, when you see the hobnailed boots and hear them clicking up across this floor, Mr. Speaker, then you know that democracy is not at work.

When my colleague from Kilbride talked about the possibility of setting a record here in this House with the number of closures that will have been brought in within the next two or three days, I think he might be 100 per cent right. I think the Government House Leader might be able to set a record but I am not so sure if it is a record that he will be proud of but it will be a record that I would think that he might set within the next two to three days, the numbers of closures that he will be seen to be bringing to this House in order to get some legislation through in the time frames that he talked about.

But, Mr. Speaker, there is no need of that. All we are asking for, and there are dozens of pieces of legislation there, that can pass through this House without debate. Some of it is just a matter of it going through the first reading, second reading, Committee then to be proclaimed in law, but instead, the minister comes forward or the government of the day comes forward and brings in this HST, Bill 45 and say we want it now, we want it before Christmas. You do not need it until April 1, I say to members opposite, it is a very, very substantive piece of legislation that should be taken out for consultation and let the people of this Province know exactly what they can expect when we implement this blended sales tax or harmonized sales tax.

It is something that everybody in this Province should know what we are getting into because it was not an election issue. It was not brought up at all during the last election. We heard of all the positive things that happened, how the economy of this Province was going to be revitalized, the wonderful things that the Premier was going to do, the now Premier, when he returned to Newfoundland, after we got over the charade that happened for the leadership and the Premier was anointed, the Minister of Education chickened out and the Minister of Fisheries and Aquaculture chickened out and the old chicken plucker himself, where is he? He is not here. The first time I ever saw two news conferences called to tell somebody they were doing something. First time, and it was a record, to tell people they never had the guts to run.

The Minister of Education, did it in a little bit of a different fashion. He just threw out a little bit of bait and baited people along, wanted people to prod him and build him up because, if you realize, Mr. Speaker, the Minister of Education needed that in order to win his district because he was not a real popular person that year. The Education Bill could have had the minister into big trouble so he threw out his name, he was smart. He may have had his picture in the (inaudible) when he played hockey but he will never get it, Mr. Speaker, in the history books of this Province, I can guarantee him that because he did not have the guts to come forward. He may have had his picture in the (inaudible) when he played hockey but he will never get his name in the history books of this Province. He will never have the guts to run for the leadership, Mr. Speaker, and he missed his chance. You can see him, you can see the Adam's apple going up and down in his throat every time the Premier gets up to speak and gets soft with the shaking and the rattling there in his seat, shake, rattle and roll and he says to himself: If only I had run; and I believe the Minister of Education could have been the Premier today. I firmly believe that, I don't say that to offer praise or to make him feel bad but I honestly believe that had he run, he would have been the Premier of this Province today. I firmly believe that but he has missed his call in life, missed the boat that will never come his way again. Opportunity only knocks once.

The Minister of Finance and Treasury Board, never had a chance, no way. The Minister of Finance and Treasury Board looks good, Mr. Speaker, and is in love with himself but does not have a chance of going any farther than he has gone in this government today.

AN HON. MEMBER: (Inaudible).

MR. FITZGERALD: There is a lot over there on that side like that. The Member for Labrador West is going to be the one-term wonder of this government. I tell you right now, and I shout it out loud enough for everybody to hear: The Member for Labrador West, a wonderful fellow - I am not the fellow who is going to put him out - he is a likeable guy, a nice fellow, but he will never, ever win his seat again. It is too bad. He is history unless he sheds the frock and sheds the red coat, and sits - we do not want him here - sits down there. That is the only place he will win his seat the next time around, and he had better take heed or he will be back putting marrettes on the wires down with IOC again. He had better take heed or that is where he will end up.

The Member for Labrador West, I understand, is being called home, not representing his people, the same thing as happened to the Member for Eagle River, and I am not going to get into that because everybody knows what the Member for Eagle River did. Everybody knows how he took on everybody -

MR. E. BYRNE: The Salt Fish Corporation.

MR. FITZGERALD: - including the Salt Fish Corporation -

MR. E. BYRNE: John Crosbie.

MR. FITZGERALD: - John Crosbie, Morrisey Johnson, every Tory that was up in Ottawa.

MR. E. BYRNE: Then he took on his constituents.

MR. FITZGERALD: But he made the one mistake of taking on his constituents. That is the mistake he made. Finally, when he had to go to ask forgiveness, the people came out and turned their backs on him. That is what is going to happen to the Member for Labrador West. Once you lose sight of your people, you are lost.

AN HON. MEMBER: (Inaudible).

MR. FITZGERALD: `Chuck Furey'? `Chuck' does not care anymore. `Chuck' is financially independent. He will not run anymore, will not stay any longer than this term, and I doubt if he will hang around that long.

AN HON. MEMBER: The Minister of Justice?

MR. FITZGERALD: The Minister of Justice, gone.

SOME HON. MEMBERS: Hear, hear!

MR. FITZGERALD: Does not have a chance, will not be there anymore, even if he wanted to. He is gone.

AN HON. MEMBER: He knows it.

MR. FITZGERALD: He knows it, but he has enough sense to realize it and he will not go back looking to the people anymore. A lot of them there in that front bench will not be there anymore. In fact, I said, when the House opened, that if I were in charge of the seating plan, I would have the front row back in the third row, and the second row up in the front row, and some of the people in the third row moved up in the middle row, if you can follow that.

AN HON. MEMBER: (Inaudible).

MR. FITZGERALD: I beg your pardon?

AN HON. MEMBER: (Inaudible).

MR. FITZGERALD: That is probably the reason why. It is a good idea.

Here he is now, Mr. Speaker. The Member for Conception Bay East and Bell Island went down in my district during the election to organize the district.

AN HON. MEMBER: He never?

MR. FITZGERALD: Yes, he did, he and the Member for Terra Nova were down there. They were knocking on doors. I know they were talking to people down there. They did such a wonderful job in organizing the Liberal Party there, and -

AN HON. MEMBER: (Inaudible) the Member for Terra Nova. He fooled me up.

MR. FITZGERALD: No, it wasn't the Member for Terra Nova. Yes, it was the former Member for Terra Nova who fooled you up, no doubt about that. She said to one of the members: Roger Fitzgerald is going to be hard to beat because he does all of those silly things. He goes into people's houses to have coffee.

SOME HON. MEMBERS: Hear, hear!

AN HON. MEMBER: You mean, you talk to your constituents.

MR. FITZGERALD: In other words, I talk to my constituents and listen to them.

AN HON. MEMBER: All those silly things.

AN HON. MEMBER: (Inaudible) silly things. You know them all by name?

MR. FITZGERALD: And I know them all by name - most of them. Most of them might know me.

AN HON. MEMBER: (Inaudible).

MR. FITZGERALD: He is from my district. He knows what is happening down there, and he knows the hurt that is going to be brought about by this piece of legislation.

AN HON. MEMBER: Did his aunts vote (inaudible)?

MR. FITZGERALD: His aunts probably did. They are good people. I know them quite well. And he has been a good minister. I say, the Minister of Environment and Labour has been a good minister, no doubt about that.

SOME HON. MEMBERS: Hear, hear!

MR. FITZGERALD: In fact, he came down to my district to help solve a problem, and it was a problem that had been there for the last twenty years. Finally, this minister was one of the people who stepped in and said: We have to do something about this. This is wrong. No matter which district it is in, it is wrong and has to be corrected; and it was.

AN HON. MEMBER: (Inaudible).

MR. FITZGERALD: I beg your pardon?

AN HON. MEMBER: (Inaudible).

MR. FITZGERALD: No, but he did come down and help solve the problem there, and that is what should be done. If you are a Minister of the Crown, you are a Minister of the Crown for Newfoundland and Labrador, not just Liberal districts or Tory districts.

AN HON. MEMBER: (Inaudible).

MR. FITZGERALD: The Minister of Forest Resources and Agrifoods has been a good man since he has been the Government House Leader. He is a changed man, and I do not know how he could sit back there. In fact, it is the first time I got a good look at the minister, because all of the last term he used to sit like this. He could not look at anybody. He could not look over here, he could not look at his own people, and he could not look at his own leader, but it is all completely different now.

MR. OSBORNE: Give us your synopsis on Roger Grimes.

MR. FITZGERALD: I just did that.

That is the difference, but he is doing a good job now that he is there. I must say, the few times I have had occasion to call him, he has been very accommodating.

MR. SPEAKER: Order, please!

I remind the hon. member that we are debating An Act To Implement The Comprehensive Integrated Tax Coordination Agreement Between The Government Of Canada And The Government Of Newfoundland And Labrador. I ask the member to be relevant.

MR. FITZGERALD: Mr. Speaker, those are the people who brought in the Act and if I cannot refer to the authors, then how can I refer to the Act? Those are the authors of the Act, so I would suggest when I speak to the authors that I am being relevant, not to overshadow your ruling, Mr. Speaker.

This is certainly a bill brought before this House that can do nothing but hurt people. It can do nothing but create hardship for most of the people in Newfoundland and Labrador today. I guess, the first thing that comes in our minds is the 15 per cent that is going to be stuck on our hydro bills. The Minister of ITT does not care much about that because what is another 8 per cent on his hydro bill? It does not matter, Mr. Speaker. The cheque will be written, somebody will take it, and that will be it, it will be paid, but I can assure you that there are a lot of people out in my district who will be hurt when they have to go and probably witness another $20 or $30 a week stuck on their hydro bills. It is money they cannot afford.

The Minister of Fisheries and Aquaculture just rolled in and interrupted in his usual fashion. He had the Spanish War going there in Question Period. The next thing was the Spanish Armada. The Minister of Fisheries and Aquaculture knows very well what is happening out there today, and he knows very well that there are a lot of people out there today who cannot afford to go out and buy fur coats, and spend another 8 per cent on their hydro bill, on their haircuts, legal fees, funerals, and the list goes on.

If members went to their constituencies and asked their constituents what they thought of allowing this particular bill to be brought forward, knowing they would have an increase of 7 per cent or 8 per cent on some of the necessities in their lives today, how many people out there would go and give it their blessing, Mr. Speaker? There have been enough bankruptcies in this Province already. There have been enough businesses close shop. There have been enough layoffs, and that is all I can see happening with this piece of legislation.

Let us go back to the Prime Minister. At least one or two people in the Prime Minister's office have enough guts to speak out and say it is wrong, and that is more than we find on the other side here. I can understand the Cabinet ministers not wanting to speak out, or not wanting to speak up, because they have to go along with their leader. They have been sworn to secrecy. They have been sworn to uphold the thoughts of the leader, and they have been sworn to have Cabinet solidarity. I can understand the Cabinet ministers but I cannot understand people who sit in the back benches of this government today, if they are representing their constituents, staying quiet when they see hardship brought on each and every one of them. I cannot understand that.

All we are doing here as Opposition, Mr. Speaker, is saying, slow down the process. Take this particular bill, Bill 45, out to the people. Use the consultation process, use the committees of the House that former Premier Wells had seen a need for and put together. That is the reason why the House committees, Mr. Speaker, were implemented; that is why they were put in place.

AN HON. MEMBER: The great Democrat.

MR. FITZGERALD: The great Democrat, Mr. Wells and Mr. `Eddie Escobar,' the former Government House Leader, was even more democratic than this House Leader here. At least, Mr. Speaker, it was only after everybody in the House had time to debate an issue that he brought in closure.

I would say, never before in the history of democracy has such a hobnailed, hard-nosed boot style of politics ever been introduced in the Legislature. This is the order of the day. The Minister of Fisheries and Aquaculture, if you talk to him privately, will tell you that he disagrees with that bill. He will tell you that he disagrees with that bill. He will not say it in public because of Cabinet solidarity, but you talk to him privately and he will tell you: You are going a good job, keep it up, because I do not want to see any hurt brought to my people.

People in the back benches - the Member for Terra Nova, if he were to speak honestly, he would stand here today and say that this bill should go to the people, because he believes in the democratic process.

MR. TULK: (Inaudible).

MR. FITZGERALD: God bless him, I wish he were. He believes in the democratic process and it should be taken to the people to have input. That is all we are asking, Mr. Speaker. The committee reports back to the Clerk if the House is not in session, they report back to the Government House Leader if we are sitting, and after we have had hearings, after the committee reports back, and if people out there, if Newfoundlanders and Labradorians agree that this is a good piece of legislation, there would be no need for closure. There would be no need for any more debate. It will pass through the House.

I say to the Government House Leader, there are lots of bills here. That is what he should be dealing with at this time. Not introducing closure on a bill that should be gone before committee and a bill he does not need until April 1 of next year. He does not need it. But it is the same old tactic - bring everybody back two weeks before Christmas, sit every night, let them speak out, wear them down, and we will introduce closure. By 1:00 a.m. they will be talked out and they will go home.

That is not the way the democratic process works. This is the people's House and this is where people's opinions and people's views should be brought to the floor. But it is being stifled by members opposite, and that is wrong.

MR. EFFORD: That is only your opinion.

MR. FITZGERALD: That is my opinion, and that is the opinion of 90 per cent of the people in this House, I say to the Member for Port de Grave.

Mr. Speaker, when you look at the hurt that is out there today, when you look at the people who are unable to find a job and the people out there who struggle every day, whether they are getting a TAGS cheque, an unemployment cheque, a social services cheque or a government cheque, Mr. Speaker, and some of those have gotten very scarce. When you see those people who struggle every day to keep body and soul together, when you see them have to struggle every day to put bread and butter on the table, and you go out and tell them that now you are going to tax their hydro... Mr. Speaker, you are going to give them a break on new cars, you are going to give them a break on new furniture but you are going to attack children's clothing, you are going to attack school books, you are going to attack everything that those people require as necessities and which they now cannot afford. To me, that is wrong; that is not representing your people.

It is one thing, Mr. Speaker, to come in here and get lost in the crowd. It is another to come in here and stand for the people who sent you here. Because they certainly did not send the Member for Labrador West into this House to represent the Premier or to go along with the Premier's wishes. Nobody sent me here, Mr. Speaker, to go along with the opinions and the views of my leader if it were going to hurt them, nobody, and I will never do that.

MR. SPEAKER: Order, please!

The hon. member's time is up.

MR. FITZGERALD: I will never do that. If there is anything ever brought into this House -

MR. SPEAKER: Order, please!

The hon. member's time is up.

AN HON. MEMBER: By leave.

MR. FITZGERALD: If there is anything ever brought into this House that is detrimental to the people I represent, I will stand and be counted.

MR. SPEAKER: Order, please!

The hon. member does not have leave. I ask the hon. member to take his seat.

MR. FITZGERALD: In conclusion, Mr. Speaker, I will sit and allow somebody else to take part in this debate.

MR. SPEAKER: The hon. the Member for Cartwright - L'Anse au-Clair.

MS JONES: Thank you, Mr. Speaker.

I want to rise today and have a few words on the harmonized sales tax. First of all, I guess I would like to say that I certainly support any tax reductions for consumers of the Province and any tax reductions that are going to apply across the board and help them make savings in everyday aspects of their lives.

What I would like to do is just talk a little bit about how the sales tax is going to affect the people of my district. It is certainly not going to mean any savings for the people of Coastal Labrador when we talk about hydro-electricity. I have a part of this Province which is still on diesel electricity. They are paying the highest rates of most people in the Province when it comes to electricity and it is through no fault of their own. But what we are doing today is, we are saying to these people, we are going to charge you another 8 per cent increase on what you are already paying, and that is not fair, Mr. Speaker. It is not fair to the people who have to live in the coastal areas of this Province, to the people who are already paying the high prices of diesel electricity.

When we talk about savings for consumers and savings for people, I have to revert to the exemption that was placed on building materials, on taxes on building materials, going to the people of Labrador. For years that has been one program that has allowed us to correct the inequity within this Province. It has given the people in Labrador an opportunity to buy building materials from the Island, and the cost reduction in taxes has allowed them to subsidize the transportation on getting those building materials in. With this sales tax we are saying to them: We are going to charge you an extra 15 per cent taxes on these building materials. We are no longer going to give you the claw-back on GST, but rather we are going to up the price. That, Mr. Speaker, I cannot support. It is unfair to the people who live there.

This tax affects a lot of small items that consumers use in their everyday lives. It affects small ticket items that a lot of low-income families are dependent upon, people in my district as well. There has been a lot of talk about the taxes that are going to be placed on children's clothing. I would just like to tell you a story about how this works in my district. We do not shop for clothing in stores in our communities, we shop by catalogue. So we are not only paying an 8 per cent increase on the tax of the item, we are also paying a 15 per cent increase on the postage charged to get that item to the consumer. So there are two taxes for parents in communities where I live.

This is very unfair. When we look at harmonizing taxes or making tax reductions in the Province, I agree that it be done for the benefit of everyone, and in this case it is not.

AN HON. MEMBER: (Inaudible).

MS JONES: Not bad at all, boy. If you could all be as good as Chrétien, we would not have any problems, I suppose. But that is not the case, I say to the hon. member, unfortunately.

AN HON. MEMBER: Come on! You and Harvey, come on over!

MS JONES: I cannot come over.

MR. SPEAKER: Order, please!

MS JONES: The only reason why I would cross is if you scrapped this tax program right now.

SOME HON. MEMBERS: Hear, hear!

MS JONES: I am just telling you about the implications that this is going to have in my district. I say to the Government House Leader, stand up and scrap the program and I will be right over!

SOME HON. MEMBERS: Hear, hear!

SOME HON. MEMBERS: Oh, oh!

MR. SPEAKER: Order, please!

AN HON. MEMBER: (Inaudible).

MS JONES: I enjoyed the trout.

MR. SPEAKER: Order, please! Order, please!

MS JONES: Mr. Speaker, we are implementing a tax here that, yes, is going to cause some savings to consumers, but the savings are on high ticket items. The savings are going to be for a select group of people in this Province. The people I represent live in a part of this Province that are already going through one of the highest cost of living.

MR. SPEAKER: Order, please!

The Chair has recognized the hon. Member for Cartwright - L'Anse-au-Clair. If other members wish to debate, they will have to wait until she is finished. If they wish to engage in conversation, they will have to do so outside the Chamber.

SOME HON. MEMBERS: Hear, hear!

MS JONES: Thank you, Mr. Speaker. It is nice to know that you all have an opinion on this Harmonized Sales Tax, and I am sure you are just agreeing with me.

I was saying that the people this tax is going to harm the most are the lower income people in this Province. The people in my district have just gone through a tremendous downsizing in their economic base. We are trying to build it back up. We are doing so with the highest cost of living in this Province, but we are doing it with a positive attitude. We are looking at the right avenues, and we are trying to pull it together. All of a sudden today we are saying to these people who are coming off TAGS and going on social assistance programs, these people who are trying to build new industries, that we are going to slap you with another 8 per cent increase on your diesel/hydro bill, that we are going to slap you with a 15 per cent tax increase on building materials, a tax increase from which you have been exempt for a number of years. We are going to slap you with an 8 per cent increase on your gasoline and your diesel. That is not acceptable to me, and it is not acceptable to the people I represent in my district.

SOME HON. MEMBERS: Hear, hear!

MS JONES: As I said earlier, yes, we have to reform the tax base of this Province and, yes, we have to look at implementing taxes that are going to help people get off social assistance, going to help people to increase their standard of living, help low income families provide a better living for themselves and the communities in which they live, but we are not going to be doing it by taxing the everyday services that they depend upon and that they use.

Mr. Speaker, I have no other choice but to vote against the Harmonized Sales Tax, as it will not benefit the people of my district.

Thank you very much.

MR. SPEAKER: Order, please!

Could we have quiet here, please, while we put the amendment? I assume that members have spoken and we are now ready for the question on the amendment.

All those in favour of the amendment, `aye'.

SOME HON. MEMBERS: Aye.

MR. SPEAKER: All those against, `nay'.

AN HON. MEMBER: (Inaudible) Division.

MR. SPEAKER: Division?

AN HON. MEMBER: Division. Call in the members.

MR. SPEAKER: Call in the members.

Is the House ready? Are members ready?

Division

MR. SPEAKER: All those in favour of the amendment please rise.

Mr. Edward Byrne, Mr. Fitzgerald, Mr. Jack Byrne, Mr. Osborne, Mr. Ottenheimer, Mr. French, Ms. Jones.

MR. SPEAKER: All those against the motion please stand.

The hon. the Minister of Forest Resources and Agrifoods, the hon. the Minister of Fisheries and Aquaculture, the hon. the Minister of Municipal and Provincial Affairs, Mr. Walsh, the hon. the Minister of Mines and Energy, the hon. the Minister of Education, Mr. Lush, Mr. Penney, the hon. the Minister of Works, Services and Transportation, the hon. the Minister of Environment and Labour, the hon. the Minister of Tourism, Culture and Recreation, the hon. the Minister of Development and Rural Renewal, the hon. the Minister of Government Services and Lands, Mr. Noel, Mr. Oldford, Mr. Canning, Mr. Smith, Mr. Ramsay, Mr. Woodford, Mr. Mercer, Mr. Reid, Ms Thistle, Mr. Sparrow.

CLERK: Mr. Speaker, ten `ayes' and twenty-three `nays'.

MR. SPEAKER: I declare the amendment defeated.

December 17, 1996 HOUSE OF ASSEMBLY PROCEEDINGS Vol. XLIII No. 55A

[Continuation of sitting.]

MR. TULK: Mr. Speaker, I presume the next order of business is to call the main motion and then we vote on that after people have spoken. Is that it?

MR. SPEAKER (Snow): We are back to the main motion now, yes.

MR. TULK: Yes.

MR. SPEAKER: The hon. the Member for Cape St. Francis.

SOME HON. MEMBERS: Hear, hear!

MR. J. BYRNE: Thank you, Mr. Speaker.

I cannot say I am pleased to stand in my place today.

MR. EFFORD: The man who won the poll.

MR. SPEAKER: Order, please!

MR. J. BYRNE: The Minister of Fisheries and Aquaculture is at it again. I do not want to hurt his feelings or get him too upset here tonight, Mr. Speaker, so I will just try to ignore him for now.

In the meantime, Bill No. 45. One thing I did not mention the other day when I was on my feet with respect to Bill 45 is closure. I do not know it escaped me that I did not say a few words on that. At least I do not remember saying a few words about closure. I did not think that the Government House Leader would be following in the footsteps of the previous Government House Leader who brought in closure more times in the matter of a week, I think - in the matter of one week they brought in closure more times than it had been brought in since 1949.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: In one week? I believe it was something like four or five times in one week.

MR. TULK: It was the former Government House Leader?

MR. J. BYRNE: I think so.

MR. TULK: Bad man.

MR. J. BYRNE: Bad man. The Government House Leader who is sitting in his place today, Mr. Speaker, says the previous Government House Leader was a bad man. I would not necessarily agree with that. I think he was doing his job, but he just got carried away with it.

Closure on Bill No. 45 was brought in on Friday the thirteenth. And I referred to it the other day. In the bill itself, in one of the formulas, it refers to NUMDAYS. So, on Friday the thirteenth they brought in this legislation. Anybody who is superstitious would think that this may not be a good thing for the people of Newfoundland and Labrador. The closure bill to be brought in, does not give the people of the Province enough time to have a say on this bill, through the members of the House of Assembly. It does not give them enough time to have their say and to properly study, review and have a look at the bill and all the clauses in it.

I have not, to this point in time, seen any members on the opposite side of the House speak to this bill, other than the Member for Conception Bay East & Bell Island. I think there may be one other member planning to get to his feet and say a few words. The Member for Conception Bay East & Bell Island was on his feet - and I have to give him credit, every now and then the Member for Conception Bay East & Bell Island gets to his feet, more so than other members on the opposite side. The only member on the opposite side, I think, who probably got up more often than the Member for Conception Bay East & Bell Island was the former Member for Eagle River. He was up all the time. On anything that went on in the House, he was up doing the performance for the then-premier, Mr. Clyde Wells.

The Member for Conception Bay East & Bell Island made a couple of points. One of them was that there is going to be $105 million put back into the economy of the Province with this tax harmonization. What he neglected to say was that we are going to be short in revenues by $242 million. In due course, that is what is coming down when this bill is fully implemented. At this time, I believe they have $348 million in the bank garnering interest and what have you.

I ask: What is that telling the people of the Province of Newfoundland and Labrador? Obviously, the government has been bought off: `Listen, you put this through for us now and we will give you X amount of money up front' - an attempt at a short-term fix, Mr. Speaker. In other words, short-term gain for long-term pain, as I think someone referred to it.

Now, the Minister of Finance has been on his feet talking about all the positive things that are happening in the Province. And I agree with him, there are a number of positive things happening in this Province. The transshipment site is great for Newfoundland and Labrador, and the Argentia smelter, and Voisey's Bay and some other smaller things ongoing in the Province, but will that turn the economy around? I sincerely hope so, Mr. Speaker. I sincerely hope that will turn the economy around because that is what this government is depending upon.

The Minister of Finance says that the shortfalls will be made up when the economy begins to boom and expand in the next two or three years, and hopefully, it will happen, but it is a lot to put your faith on. We heard it before, Mr. Speaker, with Come by Chance, with Churchill Falls, with the oil refinery in Holyrood, with Long Harbour and, of course, with Hibernia. Now, Hibernia, Mr. Speaker, was a great thing for Newfoundland and Labrador, great when it came along, great timing, because only for that, many more people would have been leaving this Province, a lot more than have left over the past few years; and that is an issue, in itself. The Minister of Finance is talking about the economy expanding, yet, our population is decreasing. So, if our population is decreasing, obviously, there are fewer people paying income tax, fewer people paying retail sales tax and fewer people paying property taxes. All over the Province, there are homes being abandoned and left. So, to say that this is going to be a good thing for the people of Newfoundland and Labrador, I believe is really, really, really stretching it, Mr. Speaker.

Now, the amount of taxes that the people of the Province pay all the time - I am going to get into that in a little while, Mr. Speaker. But this bill itself, I say in all sincerity, will hurt the lower-income people in the Province, people who are on the lower end of the scale, on the working income scale, not to mention the people on social assistance. But take, for example, the working poor, the people who are making $5, $6, $7 or $8 dollars an hour and less. These are the people who are going to be hit hard when they have to pay extra money for their heating bills, for their electricity, for their oil, for their school supplies, for their clothing, Mr. Speaker. When families now, with three or four children, have to come up with extra money in the Fall of the year, each year when their children are being sent off to school, to clothe them, when they have to buy their winter clothing, their heavy coats and their heavy pants, and so on, for the Winter. An extra 8 per cent is quite a burden on these individuals and it is not something that we should be taking lightly.

Now, when this bill was brought before the House, we knew it was at a time when it would be rushed. Closure would be brought in, Mr. Speaker, we knew that. There was no doubt about that, because it was a time of restraint on the number of pieces of legislation before this House. So we know that the government brought this in at a time when there would be very little debate on this bill, where the people in the Province really could not organize and get up against this bill like they are doing in other provinces. So that is something that the people of the Province should be well aware of, and know the tactics of this Administration.

Now, the bill, itself, is before this House and there are only three provinces in Canada that have agreed to go along with this tax harmonization. It is strange - the only common denominator with respect to this bill, in the other two provinces, is that they have a Liberal Administration.

We all know here, it has been said here before, of course by people on this side of the House, not so much by people on that side of the House, but we all know that in the last federal election the Prime Minister made promises that he could not keep. He knew when he was making them he could not keep them. As a matter of fact, he is in the media these past couple of days saying that he could not keep that promise. Even if made the promise he knew, being realistic, it was something he could not keep. Because $16 billion taken out of the economy, how could he promise such a thing? Yet, he promised it verbally, and he promised it in black-and-white.

Now, he has the Minister of Finance, Mr. Martin, on television, through the news media, trying to sweep it aside, saying that it really could not make sense to do that, and he apologized for it. But that is not going to wipe the slate clean. The Prime Minister, as I said, has been in the media twice, I believe, trying to get around it, saying it was something they really could not do, and maybe it was an honest mistake, and so on. An honest mistake? That is like the Minister of Education right here in this Province getting in the media the past few days saying: We never promised that we would redirect the savings in education. In actual fact, we all know what really went

on. We know the money was geared to go into the classroom. It was supposed to. We know that the people in the Province voted on that. They were told that. We were told that was going to happen.

The Prime Minister went around this country and said they would abolish the GST, Mr. Speaker. Abolish does not mean harmonize, it does not mean bring together with something. It means to get rid of, to scrap, the GST. The Deputy Prime Minister, Sheila Copps, publicly stated during the election, if they did not get rid of the GST, she would resign. What happened with the Deputy Prime Minister? She was refusing to resign until such time as she had that much pressure on her, and there was probably a poll done -

AN HON. MEMBER: Who's that?

MR. J. BYRNE: The Deputy Prime Minister. Then she went to the Prime Minister and said: If you call a quick by-election now, I will resign and we will try to make it look good, and the people will forgive us. Sure enough, she resigned - crocodile tears all over the place, and she got re-elected. It was supposed to wipe the plate clean, but it did not. It is only these past weeks, Mr. Speaker, maybe last week, I was watching television and I saw the Prime Minister on one of those town hall meetings. The Prime Minister was there taking questions. Well, Mr. Speaker, I was totally amazed, shocked. The Prime Minister was there sitting back taking questions, and it was put to him point-blank: `You promised to abolish the GST.' He replied: `I did not promise that - you should have read the Red Book.' Mr. Speaker, how arrogant can an individual be? That is the first sign that an administration is in trouble. Now we have five or six months, maybe, to a general election and they are backtracking head over tail, trying to work the GST around.

That is why they got three Liberal premiers to agree to a tax harmonization which is going to do nothing for the people in their provinces, but which is doing something for the Federal Government and the Prime Minister of the country, to try to make him look good. The Minister of Education is over there making some kinds of weird noises and statements.

MR. GRIMES: You should talk a bit faster. I know you only have so much to say.

MR. J. BYRNE: Well, I have so much to say. I can speak a lot faster, I say to the minister, but then, I can talk a lot slower, too. Now, which would you prefer, I ask the Minister of Education?

Mr. Speaker, the Prime Minister of this country made all kinds of promises. The people who ran for him in all the districts in this country made all kinds of promises with respect to the GST and they have not been fulfilled to this day.

Now, getting back to the HST, which is what we are talking about here. It is all a combination, it all goes hand in hand like a hand in a glove. The Premier of this Province has agreed to help get the Prime Minister, the Deputy Prime Minister, the Minister of Finance and his whole Administration out of trouble. On the backs of whom, Mr. Speaker? On the backs of the people of this Province - that is what the Premier is doing and it is not right. It is not fair to the people of the Province - and I do not mind saying so, Mr. Speaker, in this House - that the Premier will be one of the three agreeing to blend the GST and the provincial sales tax.

The Premier stands in his place, every opportunity he gets, and says: Well, you guys, the Opposition, why are you against reducing the taxes from 20 per cent down to 15 per cent? Now, Mr. Speaker, that is twisting, that is why the Premier is now getting the name ` Tornado' - `Tornado', the twister, Mr. Speaker. He is twisting, twisting, twisting; that is all they ever do on that side of the House. Ask a question of any of them, Mr. Speaker, and you get twisting, twisting, twisting and they try to throw it back to this side of the House, that we are at fault - when we do not agree with something that we are simply asking questions. But leave no doubt here, Mr. Speaker, on this one. The questions we are asking here are leading to the fact that we are against tax harmonization and Bill 45.

The Member for Cartwright - L'Anse au Clair stood in her place a few minutes ago, and she is opposing it. She is opposing this bill because she knows that it is going to hurt the people in her district, the people who put her

in this seat in the House of Assembly. And there are members on that side of the House who, if they sit back and think about it and look at it, will know that it is going to hurt, in the long term, the people of their districts.

Now, apparently, the Minister of Finance and Treasury Board has stated it is something they are looking at and maybe in three years time - that this is like a pilot project, and I stand to be corrected on that. But, if this is a pilot project, Mr. Speaker, it can be a very, very expensive pilot project for the people of this Province, let me tell you that. What happens when we have all the businesses in this Province putting untold dollars, untold fortunes into converting their equipment, and all of a sudden the system falls apart? And let me tell you, Mr. Speaker, more than likely it will, because it is going to become too costly.

Three or four years down the road when we feel the full impact of it, when the government has to start making up for monies they are planning on getting, but have lost, what are they going to do? Are they going to increase taxes? I hope not, because, I say, it will be to their detriment. Are they going to cut services more than they have cut them already? Is it possible that the government can cut services more than they have over the past five or six years? I cannot see it. I have been speaking to the people in my district and to people all over the Province. The services in this Province -

MR. EFFORD: What would you suggest we do?

AN HON. MEMBER: Get rid of the Cabinet.

MR. J. BYRNE: That should be a good move.

Mr. Speaker, I have to laugh at this, too - I really do. The Minister of Fisheries and Aquaculture is over there asking: What would you do? Whenever a question is asked of the Premier, the response is: What would you do? Whenever a question is asked of the Minister of Health: What would you do? I mean, all of them, Mr. Speaker, ask: What would you do? What would you do? They are the government, Mr. Speaker, and they want us to tell them what their job is! You figure it out, I say to the Minister of Fisheries and Aquaculture, that is what you are being paid for. We are not going to do your job for you. We will do it - when we are on that side of the House, we will do the job, and do it right. And it is coming soon, very soon. Keep on the trail you are on today, I say to the Minister of Fisheries and Aquaculture, and we will do it soon - very, very soon.

The Minister of Fisheries and Aquaculture is interrupting again. I tell the minister not to get too lippy, because I have some pictures we can show him that were recently taken -

MR. EFFORD: At least they are worth looking at.

MR. J. BYRNE: Oh, there is no doubt about that, they are worth looking at, I can guarantee you. They are worth looking at - yes, sir! Do you want to see them?

AN HON. MEMBER: Yes.

MR. J. BYRNE: Okay, I will show you. In due course, everything in due course, Mr. Speaker.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: Losing track? No, I like this going back and forth because it gives me a break, Mr. Speaker.

The Prime Minister of the country was in Newfoundland last night, trying to talk to the Liberal members opposite, and the people of the Province, trying to tell them how good the HST is. And I imagine, Mr. Speaker, that some of those people, some of those members, and some of the ministers, too, came away believing that this is a good thing for the Province. They actually do believe it - but I know there are some over there who do not. When they were trying to push through the privatization of Newfoundland Hydro, when the people got up against it and the opposition rose, there are some over there who backed off it.

The Government House Leader sitting here today - I say to him: You pulled a faster one than the previous Government House Leader, because you are a little bit smarter. Believe that, if that is a possibility.

MR. TULK: What?

MR. J. BYRNE: You are a little bit smarter than the previous Government House Leader.

MR. TULK: Why?

MR. J. BYRNE: Because of the way you are putting this bill through the House. If the previous Government House Leader had done the same thing with the Hydro bill, if he had sneaked it through, people would not know a thing about it. Now, we are getting this one pushed through and the people are being crucified.

MR. TULK: If you do not want Ed Roberts to have a stroke, you call (inaudible) a copy of Hansard for us and he will have (inaudible).

MR. J. BYRNE: Okay.

So, what are they doing now, Mr. Speaker? They are taking this bill and sneaking it through, as I said, a couple of days before Christmas.

MR. EFFORD: You topped the polls, did you not, `Jack'?

MR. J. BYRNE: Pardon?

MR. EFFORD: You topped the polls over there for the best Opposition -

MR. J. BYRNE: On this side of the House, we are all equal, we are all as one, I say to the Minister of Fisheries and Aquaculture.

AN HON. MEMBER: Which one?

MR. J. BYRNE: Which one?

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: We do not have what?

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: I am not talking about money.

MR. SPEAKER: Order, please!

The hon. member's time is up.

MR. J. BYRNE: By leave?

SOME HON. MEMBERS: No leave.

MR. J. BYRNE: Just in conclusion.

SOME HON. MEMBERS: Oh, oh!

MR. SPEAKER: Order, please!

The hon. the Member for St. John's South.

MR. OSBORNE: Thank you, Mr. Speaker.

SOME HON. MEMBERS: Hear, hear!

MR. TULK: I apologize (inaudible) Tory, Mr. Speaker. That is the only way I can get out of it.

MR. OSBORNE: Mr. Speaker, the Government House Leader is talking about apologies. I say to the Government House Leader, the Prime Minister, his federal cousin, was watching TV last Friday and saw me apologize, and said, `Now, there's a smart man.' And he would not apologize, himself, on Friday for the GST.

AN HON. MEMBER: (Inaudible) to do it.

MR. OSBORNE: That is right. He would not apologize on Saturday. He would not apologize on Sunday. Mr. Speaker, he waited until Monday when he could be in St. John's, closer to me, to apologize for the GST. Look at the precedent that I set right here. The Prime Minister of Canada took my lead and apologized. It is about time the Prime Minister realized that he made a mistake, and apologized. At least I did it right away.

MR. EFFORD: Did you tell the Prime Minister you are the last man to let him down?

MR. SPEAKER: Order, please!

MR. OSBORNE: You are the first one I would let down.

SOME HON. MEMBERS: Hear, hear!

MR. OSBORNE: Thank you, Mr. Speaker, for calming down the jungle on the other side, the rabbling panthers.

Mr. Speaker, I am up to talk about a very important issue here, the GST and the HST, and the Minister of Fisheries and Aquaculture over there - it is almost your anniversary, is it not? It was almost a year ago today that you called a press conference yourself to apologize for not having the guts to run against Tobin.

SOME HON. MEMBERS: Hear, hear!

AN HON. MEMBER: That was a rough day for him.

MR. OSBORNE: That was a rough day for him.

Mr. Speaker, we are here to talk about an important issue, an issue in which this government is going to subject the people of our Province, the working poor and the welfare class, to tougher taxes than what they are presently endured to pay.

Mr. Speaker, under the HST -

SOME HON. MEMBERS: Oh, oh!

MR. SPEAKER: Order, please!

MR. EFFORD: You are in conflict, buddy!

MR. J. BYRNE: You are not in your seat.

MR. OSBORNE: Mr. Speaker, I am not the only one here who is in conflict. Not only is the Minister of Fisheries and Aquaculture generally out of order, he is truly out of order now because he is not even in his seat.

AN HON. MEMBER: Ask for protection from the Speaker. He will drive him back into his seat. You ask the Speaker, he will take care of him.

MR. OSBORNE: He is being driven out of the House now.

Mr. Speaker, the HST -

AN HON. MEMBER: (Inaudible).

MR. OSBORNE: I drove him back further than he ever was before. One of these days he will be a backbencher, for sure. He belongs back there, `the minister of wan-a-bees'.

Mr. Speaker, I was just handed something out of the *Globe and Mail*. It says, `Rock On'. Did you see this? Rock On. It said: `Newfoundlanders will travel to the ends of the earth for a good party, so why not Ottawa?' Did you read this?

AN HON. MEMBER: (Inaudible).

MR. OSBORNE: `And why not the Liberal caucus Christmas bash, the site where, this week, two members of the Newfoundland House of Assembly, Chuck Furey, Minister of Industry, Trade and Technology, and Jim Walsh, a former minister in Clyde Wells' Cabinet, had tongues waging. The buzz at the bar was that the pair might be trying' -

MR. SPEAKER: Order, please!

I remind the hon. member that we are now debating the main motion on Bill 45.

MR. OSBORNE: I am getting to an important issue.

MR. SPEAKER: We are debating the principle of the bill and I ask him to make his comments relevant.

MR. OSBORNE: Thank you, Mr. Speaker.

I was getting to the fact that if the hon. ministers went to Ottawa, they would further impose items on Newfoundlanders such as the HST and subject us to hardship.

Mr. Speaker, there are a number of issues in the tax harmonization that we would like to talk about. We, on this side of the House, I think all Opposition members, including the Independent member and the NDP member, realize that this HST deal is not a good deal for Newfoundland. I believe that all Opposition members feel strongly enough about this HST deal that we are all going to vote against this legislation.

Mr. Speaker, it does not surprise me that all government members will vote in favour of this. I feel that they are almost Tobin automatons, they will do whatever they are told to do by the Premier. The three Liberal premiers, Mr. Speaker, gave a pre-election promise to Mr. Chrétien who is still nervous about the GST and is looking for a way to mask it. He is looking for a way to cover up the GST so that he can come back in the next election and say that he delivered on his promise. But we all know that this is not delivering on his promise, this is just masking the GST.

The Federal Government are still going to get their 7 per cent. They are still getting their GST, Mr. Speaker, by putting this HST through, and this HST will cause the poor to spend a greater percentage of their income on essentials that will cease to be tax exempt. It will cause home heating fuels and electricity to increase in price because of the extra tax burden. By doing this, the working poor and people who are subject to having to resort to social assistance will have to pay more out of pocket. It will cost them more in taxes to heat their homes, for gasoline, for children's clothing, for haircuts and so on.

We have been told over the past number of days that the HST deal is going to put $105 million back into the economy. Mr. Speaker, I find this hard to accept because of the fact that while it is taking $105 million out of our tax revenue on the RST, the government are going to impose a levy on insurances which is going to take away from that $105 million that is going back into the economy. They are going to impose levies on the sale of used cars, the taxes on used cars, which will take money out of that $105 million. So it is not actually $105 million into the economy as we are told, as we are led to believe by government members.

The working class poor and the social assistance recipients in our Province are already going through tough enough times. We do not have to impose the HST on these people and subject them to higher taxes on a number of essential items.

Mr. Speaker, if we truly want our economy to rebound, we cannot impose an HST which is going to cause our housing industry to slow down. We cannot impose an HST which is going to drive the working class poor and the recipients of social assistance out of the Province and increase the rate of out-migration, because these people just cannot afford to stay, and provide a means for themselves to live in Newfoundland and Labrador. We are taxing people out of the Province.

It is quite clear that most people in Atlantic Canada do not want the HST. Nova Scotians do not want it. As a matter of fact, in Nova Scotia and New Brunswick, the HST is referred to as the BS Tax. I would say that that is probably a very accurate statement, the BS Tax. Here it has already been dubbed as the HST, the `horrible sales tax'. When this tax is actually imposed and people are subject to higher taxes on basic essentials, they are going to realize that this tax is not a good tax for Newfoundland and Labrador. As the Member for Cartwright - L'Anse au Clair said, it is not a good tax for her constituents. I am saying it is not a good tax for my constituents. My hon. colleagues on this side of the House have all said it is not a good tax for their constituents.

I would say, Mr. Speaker, it is not a good tax for the constituents of the Province of Newfoundland and Labrador, with the exception of the upper class, who will be the only people really to truly benefit from the HST. The upper class are the people who can afford to buy big ticket items. They are the people who are purchasing new vehicles every couple of years, purchasing big ticket items like skiddoos and so on. So, the HST is for a certain class, and it is going to further draw apart the two classes of people who live in this Province, the wealthy and the not wealthy.

Mr. Speaker, this HST is not a good deal. It places less tax on fur coats and more on children's clothing. Who is really benefitting from this tax? It is not the majority of Newfoundlanders and Labradorians. The Retail Council of Canada says that the cost of conversion will exceed the savings from harmonization. Most businesses cannot absorb the costs without increasing their prices or laying off employees, so how will this improve our economy? How will this spur our economy? You are looking at a potential of further out-migration because of the tax, you are looking at a potential of further lay-offs because businesses have to absorb the cost of implementing the tax, you are looking at a slowdown in the housing industry. It does not add up. How is this going to benefit our economy? How is this going to improve our economy?

The $105 million that we are promised is being put back into the economy is actually being taken away in dribs and drabs, such as the levy on insurances, the taxes on used cars, and I am sure the government will find many other ways to impose levies and further taxes on the people of Newfoundland and Labrador and take that $105 million back in taxes.

Mr. Speaker, the HST will drive up the price of electricity when thousands of consumers have just finished telling the government and the Public Utilities Board and Newfoundland Power that they do not want an increase in utility rates.

The tax harmonization was not an election issue, but it is designed to mask an election promise made by the Prime Minister to scrap the GST. The St. John's Board of Trade says that a hidden tax will make our prices appear too high to tourists who come to spend their tourism dollars to visit our Province, to see our unique way of life here in Newfoundland and Labrador. Most tourists will go home, I would say, having bought fewer items than they initially intended to buy, because with this hidden tax, the tax is marked into the price. The prices of

products in Bangor, Maine, the prices in New Hampshire and the prices in Houston are going to appear to be only 50 per cent of what they are here in Newfoundland and Labrador. The sticker price shock will actually cause a lot of tourists not to buy as much as they intended to buy when they first came to Newfoundland and Labrador.

Mr. Speaker, this tax is not a good tax for Newfoundland and Labrador. This tax will not create great benefit as was promised by the many members on the government side of the House. We will lose our autonomy to set tax rates under this new deal. Ottawa can raise taxes unilaterally. We do not have that option. Any province can veto a tax decrease. We alone do not have the option of decreasing taxes. If our revenue needs increase, we will not be able to get the extra tax revenue from the sales tax, and if our revenue needs decrease, we will not be able to offer a tax break. We will lose our autonomy under the HST.

The finance minister tells of glowing stories about the economy growing to make up for the lost revenue under the HST but the Government Social Advisory Council Committee document says that the next few years are going to bring an economic downturn in Newfoundland and Labrador because of fewer workers, because of fewer people paying taxes, because of more seniors with needs, because of out-migration, a smaller population and because of declining transfers. Both cannot be true. I ask, who is telling the truth here? Both cannot be true. The finance minister is painting a rosy picture to sell this tax harmonization to the people of Newfoundland and Labrador. This is a horrible sales tax. The government is breaking its promise, as an example, to put money saved from education reform back into education and part of the reason, Mr. Speaker, one would suggest, is because the HST is going to leave the Province with a tax revenue crisis.

Mr. Speaker, not only has the Prime Minister of Canada broken the promise to scrap the GST but the education minister and the Government of Newfoundland and Labrador have broken their promise to redirect education savings because of the reform back into education.

Mr. Speaker, to make up for lost revenue, the government is going to have to introduce new taxes on insurance rates and the private sale of vehicles with higher rates than people are now paying. There is no benefit in this tax, Mr. Speaker. This is a rosy painted picture for the people of Newfoundland and Labrador. It is not an accurate picture, it is not a true picture. This tax is a BS tax.

Mr. Speaker, the cost of the extra jobs that is going to be borne by this Province because of the implementation of the tax is a further reason for us not to accept the HST. There are going to be jobs lost. The people who are now working with RST, some of those jobs are going to be lost and Newfoundland is not one of the provinces that are going to pick up jobs because of the new HST deal. Does it not seem ironic? We are signing on to the deal, but the jobs created because of the HST deal will not be coming to Newfoundland. Mr. Speaker, this picture stinks. This tax stinks. This is truly the BS Tax.

We will lose tax processing jobs because of tax harmonization. There is going to be out-migration because of tax harmonization. There is no contingency plan put in place in case the economic and revenue growth that is painted by the members of the government does not occur to the levels projected by the Minister of Finance and Treasury Board. Mr. Speaker, blind faith does not open hospital beds or better our education.

This tax, Mr. Speaker, is not acceptable to most people in this Province. If the government feel that they can introduce this tax, that they can bring it in and put it in place and that most people are going to forget about it, if they think that most people are going to forget that this tax is taking extra money out of their pockets, the working poor and the people on social assistance - if people do not realize right now that this tax is going to cost them more money, they will realize it once it is implemented.

The Chrétien Government in Ottawa had three years to try to get people to forget about their promise to scrap the GST and it did not work. People remember the GST is not gone. The people of this Province will not forget that this tax is going to cost them more money. The Provincial Government may think that by bringing this tax in now they have plenty of time for the people in the Province to forget about the tax, they have plenty of time for the people of the Province to forget that the tax was put in place, by the next election. But as the people of Canada remember, the GST is not scrapped. The people of our Province will remember that this HST is a

horrible sales tax. The people of our Province do not want this tax, and come the next election, they are going to remember that this tax is not acceptable, and it will come back to haunt the Liberal Government of today, Mr. Speaker.

MR. SPEAKER (Barrett): Order, please!

The hon. member's time is up.

MR. OSBORNE: By leave, Mr. Speaker.

MR. SPEAKER: Does the hon. member have leave?

SOME HON. MEMBERS: No leave!

MR. SPEAKER: The hon. member does not have leave.

MR. OSBORNE: A minute to clue up, Mr. Speaker.

AN HON. MEMBER: No, Mr. Speaker.

MR. SPEAKER: The hon. member does not have leave.

MR. OSBORNE: Thank you, Mr. Speaker.

MR. SPEAKER: If the hon. the Minister speaks now he closes the debate.

The hon. the Government House Leader.

MR. TULK: Mr. Speaker, it gives me great pleasure on behalf of the Minister of Finance and Treasury Board, who is away doing business On Her Majesty's Service, and doing his master's duty, to move second reading of Bill No. 45.

MR. SPEAKER: Is it the pleasure of the House that the said bill be now read a second time?

All those in favour, say `Aye'.

SOME HON. MEMBERS: Aye.

MR. SPEAKER: Those against, `Nay'.

SOME HON. MEMBERS: Nay.

MR. SPEAKER: Carried.

AN HON. MEMBER: Division.

MR. SPEAKER: Division.

Division

MR. SPEAKER: Is the House ready for the question?

All those in favour of the motion, please stand.

CLERK: The hon. the Minister of Forest Resources and Agrifoods; the hon. the Minister of Industry, Trade and Technology; the hon. the Minister of Justice and Attorney General; the hon. the Minister of Fisheries and Aquaculture; the hon. the Minister of Municipal and Provincial Affairs; Mr. Walsh; the hon. the Minister of

Mines and Energy; the hon. the Minister of Education; Mr. Lush; Mr. Penney; the hon. the Minister of Works, Services and Transportation; the hon. the Minister of Development and Rural Renewal; the hon. the Minister of Tourism, Culture and Recreation; the hon. the Minister of Government Services and Lands; Mr. Oldford; Mr. Canning; Mr. Smith; Mr. Ramsay; Ms Hodder; Mr. Woodford; Mr. Mercer; Mr. Reid; Ms Thistle; Mr. Sparrow; Mr. Wiseman.

MR. SPEAKER: All those against, please stand.

CLERK: The hon. the Leader of the Opposition; Mr. Hodder; Mr. Shelley; Mr. Edward Byrne; Mr. Fitzgerald; Mr. Jack Byrne; Mr. Osborne; Mr. Ottenheimer; Mr. French; Ms Jones.

Mr. Speaker, twenty-five `ayes' and ten `nays'.

MR. SPEAKER: I declare the motion carried.

On motion, a bill, "An Act To Implement The Comprehensive Integrated Tax Coordination Agreement Between The Government Of Canada And The Government Of Newfoundland And Labrador," read a second time, ordered referred to a Committee of the Whole House on tomorrow. (Bill No. 45)

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker, I understand we are going to break for supper at 6:00 p.m. but I would like, before we do that, to call second reading of a bill, "An Act Respecting Pension Benefits". (Bill No. 46)

Motion, second reading of a bill, "An Act Respecting Pension Benefits". (Bill No. 46)

MR. SPEAKER: The hon. the Minister of Government Services and Lands.

MR. McLEAN: Thank you, Mr. Speaker.

SOME HON. MEMBERS: Hear, hear!

MR. McLEAN: I rise to introduce second reading to a new Act called the Pensions Benefits Act. This Act was originally initiated by the Department of Finance back through the reform process and, Mr. Speaker, the new Act has many positive aspects. It brings our provincial legislation in line with that of other Canadian jurisdictions and provides for the affordability of pensions within the Province and within Canada.

Mr. Speaker, I will just read off a few of the notes from the new Act so that if there is any further discussion and questions we could do it in Committee or third reading - Committee, I guess.

It provides fair and consistent treatment to employees and enhances benefits for members of pension plans. It promotes increased security of pension benefits and assists Newfoundlanders and Labradorians in preparation for retirement.

This Act provides, among other benefits, protection of spouses, including recognition of common-law spouses upon death of a member, and a framework for a division of benefits upon marriage breakdown.

This new bill enables employees to be members of pension plans earlier than previously permitted. It now enables part-time employees to be members of pension plans, as well.

Mr. Speaker, I am just highlighting a few of the items that are brought forward in this new pensions Act. It enables employees to receive benefits under a pension plan after two years of membership.

AN HON. MEMBER: How tall are you, `Ernie'?

SOME HON. MEMBERS: Hear, hear!

AN HON. MEMBER: What kind of shoes do you wear?

MR. McLEAN: I say to the member opposite, I am tall enough and I wear a man-sized shoe.

SOME HON. MEMBERS: Hear, hear!

MR. McLEAN: Mr. Speaker, this new bill also increases provisions to enable terminating plan members to transfer pension benefits upon termination of employment. These are new sections of this Act that were not in the previous one.

This new bill increases spousal protection upon death of a member before and after retirement. It introduces an earlier retirement option at age fifty-five. It recognizes common-law spouses for survivor benefits. This new bill also provides for spouses, following divorce or legal separation, to sever ties with the member and to receive their own pension covering the marriage period.

AN HON. MEMBER: Uh-oh!

SOME HON. MEMBERS: Hear, hear!

MR. McLEAN: He is getting married on New Year's Day, hey? You should have got married last week.

Mr. Speaker, this bill also ensures that benefits be equally cost-shared by employees and employers. It is called a 50 per cent rule, which will be part of the new benefits of this Act.

The new Pension Benefits Act addresses various pension issues in accordance with a national consensus on pension reform, and will serve to encourage employee participation in pension plans in the Province. This new Act brings it in line, certainly, with the other jurisdictions in Canada.

Pension plans are a vital part of the retirement income system for the Province and for Canada. The intent of the Pension Benefits Act is to provide minimum standards for all employer-sponsored pension plans in the Province, and to ensure monies that are allocated by employers and employees for retirement purposes are remitted on time, invested wisely, and used to provide retirement income.

Canada has three pillars in its retirement income system: Old age security, Canada Pension Plan, and employer-sponsored pension plans and personal retirement savings plans. The change in this portion of the population aged sixty-five and over will have a dramatic impact on the ability of government to fund the social security programs now in place. Employer-sponsored pension plans and personal retirement savings plans will continue to play a major role in assisting working Newfoundlanders and Labradorians and their families in preparing for retirement.

Mr. Speaker, the Pension Benefits Act regulates all employer-sponsored pension plans and ensures that monies contributed by both employers and employees are utilized for the purpose of providing retirement incomes.

While the Pension Benefits Act governs approximately 90,000 persons and 240 registered pension plans, the public sector plans, including MHAs, uniformed services, teacher and public service pension plans, will be exempt from the major provisions of the Act because of the funded liability.

Mr. Speaker, I am pleased to be able to introduce to second reading this legislation, which will provide increased pension benefits for workers in the Province.

Thank you, Mr. Speaker.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Speaker.

Mr. Speaker, I am pleased to stand in my place today and say a few words with respect to this Bill 46.

MR. EFFORD: That is a note (inaudible).

MR. J. BYRNE: I just made a few notes as the minister was speaking, I say to the Minister of Fisheries and Aquaculture.

MR. EFFORD: The `Jack' attack.

MR. J. BYRNE: You should always pray that you never have a `Jack' attack, my son.

Mr. Speaker, the minister stood in his place and introduced this bill, and he talked about a lot of positive things coming from this bill, a lot of positive steps and amendments and so on.

MR. EFFORD: (Inaudible).

MR. J. BYRNE: There is no point in your talking to me across the House when I am talking because I cannot hear you, I say to the Minister of Fisheries and Aquaculture, unless you speak up.

Mr. Speaker, he talked about many positive aspects of this proposed legislation. He says now that it is going to be in line with other Canadian jurisdictions, and that very well, in itself, may be a good thing. But it appears to me, this Administration seems to think anything that is good on the mainland, or anything that is operating on the mainland of Canada, is automatically a good thing for the people of Newfoundland and Labrador. In actual fact, in most instances it is a matter of fact that you have to wait and see whether, indeed, it is a good thing for the people of Newfoundland and Labrador, when they are putting in legislation that is comparable to other provinces in the country.

The minister talked about the portability of pensions. Obviously, that can be a good thing for people who are in the pension plans, that they can transfer -

MR. EFFORD: (Inaudible).

MR. J. BYRNE: I can adjourn the debate at any time at all, I say to the Minister of Fisheries and Aquaculture, if he wants.

The portability of pensions can certainly be a good item. It can be a positive thing for the people who are involved in the various pensions that this bill covers and applies to.

The explanatory note of this bill - it is a very thick bill; it is something like the Minister of Fisheries and Aquaculture. This bill would revise the law respecting pension benefits. It is a very short explanation but a very thick, thick bill.

The minister did not go into a lot of detail with respect to the - he said it enhances the benefits.

MR. EFFORD: (Inaudible) clause-by-clause.

MR. J. BYRNE: I say to the Minister of Fisheries and Aquaculture, we will be getting into it clause-by-clause. It may come sooner than you think, and you may be sorry you said that. Every member on this side of the House will probably be speaking to it clause-by-clause. I do not think that the members on the other side of the House will speak to it clause-by-clause, because there are quite a few clauses in this bill. Looking at it now, there are eighty-one clauses, Mr. Speaker. Can you imagine nine people - well nine, for sure, on this side of the House - getting up and speaking? Nine times eighty-one, Mr. Speaker, that would be quite a few speeches, I would say.

SOME HON. MEMBERS: Hear, hear!

MR. J. BYRNE: Now, they may have a calculator on that side of the House who can sit down and figure it out - well, sobeit.

MR. CANNING: You are turning red.

MR. J. BYRNE: Red? Well, it will be the first time I turned red here. The Member for Labrador West would not turn me red, I tell you that, Mr. Speaker.

You saw a prime example yesterday of what I thought of the colour red, especially when it is in print. I wiped off the desk, just like that, the red Liberal book. Mr. Speaker, the Minister of Finance -

MR. H. HODDER: (Inaudible).

MR. J. BYRNE: I do not know where it went. It may have crawled away somewhere, I say to the Member for Waterford Valley.

The minister was quite sincere in introducing this bill, no doubt about it, and he believes that everything is in it, no doubt in my mind. I am wondering, though, if the minister has actually sat down and read this clause-by-clause. I do not know whether he did or not, Mr. Speaker.

Now, the Minister of Fisheries -

MR. McLEAN: (Inaudible).

MR. J. BYRNE: Three times? Well, now, I have to put that on record, Mr. Speaker. The Minister of Government Services and Lands just said he read this bill three times. I have to compliment him. Now, if the Government House Leader is in agreement, I will adjourn debate and come back later and finish off my few words at 7:00 p.m.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: I am not going to do it yet. Now, the Minister of Industry, Trade and Technology - you can thank him. He is the one who had to butt in then and say something.

MR. TULK: `Jack', are you going to adjourn the debate or what?

MR. J. BYRNE: Not yet, no.

MR. TULK: Well, you said you would.

MR. J. BYRNE: I said, if the minister was in agreement I would.

MR. TULK: Well, I am ready.

MR. J. BYRNE: Okay, Mr. Speaker, seeing it is 5:57, I will adjourn debate. I will pick up on the Minister of Industry, Trade and Technology later.

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker, we have agreement that we will have supper and be back at 7:00 p.m.

MR. SPEAKER: It is the agreement that we recess until 7:00 p.m.

Recess

MR. SPEAKER (Penney): Order, please!

The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Speaker.

I will just continue on with a few words, as I adjourned debate on Bill 46, "An Act Respecting Pension Benefits". As I said before, when the minister was on his feet introducing the bill he mentioned a number of points. He did not go into a lot of detail with respect to the bill, itself, but going through it, there are some good things. The minister referred to a few of them. He did not say a lot about them, but he did refer to them.

He talked about clauses in the bill with respect to preparation for retirement. Now, "An Act Respecting Pension Benefits" would be dealing with people's retirement, there is no doubt there. The one factor in the bill, not to get into clause-by-clause at this point - it is only second reading; but there is a clause there that deals with the definition of spouses and common-law spouses. What will happen in due course - there is nothing in the existing legislation, I believe, to actually define spouses or common-law spouses - in actual fact, the pensions now will be, I suppose, if a couple are living together for a certain period of time - I think it may be three years - they could be entitled to a percentage of a person's pension. That is probably a positive thing. I would imagine if a couple wants to spend three years or five years of their time together, they go through a lot of different events in their lives over that period of time and certainly, they should be entitled to that as if they were married. A married couple, of course, if they decide to split up, divorce, or what have you, this bill also addresses the situation with respect to divorce.

The bill also deals with the situation where, if a person is involved in a pension for over two years, I think the minister said, they would be entitled to refunds on the pensions if they decide to end their employment, I would imagine.

Back to divorce, the minister made a few comments on that. The pension covers marriage - well, I cannot read my own writing now, but -

AN HON. MEMBER: But you are making a lot of sense.

MR. J. BYRNE: I am making a lot of sense.

Mr. Speaker, this bill has a lot of potential. The point that the minister made with respect to the situation within Canada itself now, and how the future generations who are going to be requiring their pensions - for example, my parents were entitled to the Canada Pension, the old age pension, and the -

AN HON. MEMBER: Your parents are entitled to Canada Pension?

MR. J. BYRNE: The old age pension, and my father with respect to his own employment pension when he worked with the Federal Government. The way things are going in this day and age, with the way the economy is, and with the `baby boomers', as they are referred to, what is going to happen in the future with pensions in this country? I do not know if there are too many people who can answer that question at this point in time, but it certainly seems that people will have to basically fend for themselves. There is some doubt, too, as to whether the pensions - the Federal Government pensions, the old age pension, or what have you - will be sufficient in the future to cover all of the people who will be making claims on pensions, in particular, I suppose, the `baby boomers'. The `baby boomers' were, and are now at the present stage, Mr. Speaker, paying into pensions - they are paying into all the Federal Government pensions if they are employed, of course. And they will take advantage, hopefully, of drawing on those pensions.

The problem is, now, with the population decrease, certainly the population of Canada. In certain provinces, of course, the population is increasing, but we wonder at this time if, in the future, there will be enough people in the workforce to actually put sufficient money into it to cover the drastic drain on pension schemes in the future.

The minister mentioned about people having to put money aside for their own pensions in registered retirement savings plans. I imagine that is what he was referring to. Of course, there are a lot of private industry pensions

out there also, but it seems to be getting harder and harder all the time now to contribute to registered retirement savings plans. In order to survive these hard times, people seem to be drawing more and more upon their registered retirement savings plans.

The experts will tell you that is not a good thing to do, because, of course, when you withdraw from your registered retirement savings plans, you pay a heavy tax at that time. Also, it adds to your income for the year - if you are lucky enough to have registered retirement savings plans. It adds it to your income, so in actual fact, you may wind up paying higher income tax at the end of the year. You may be having to put a lot more money into the system than you took out to get over the hump. That is the sad part about registered retirement savings plans and the present state of the economy.

The minister spoke on a number of points. He talked about the transfer of pensions on the termination of employment. Now, I think that is a good move, that once a person is employed and wants to transfer his contributions to his pension plan, then he can transfer it. Of course, he would be able to carry the pension money with him. In actual fact, when I worked with the government back in 1983, after seven years - I left in 1983 - I transferred my pension, what little money I had coming to me, into a registered retirement savings plan. That was a good move for me at the time. Obviously, that type of thing is a positive step.

The other point that the minister mentioned was the 50 per cent rule. If I understand him correctly and read this right, the employer now will be required to contribute 50 per cent on any given pension plan. I am not quite familiar with that, but I would take it to say that in the old Act, from what I know, there was no actual definition of what an employer was required to contribute. This now will require employers to contribute 50 per cent.

MR. FUREY: (Inaudible).

MR. J. BYRNE: I would say what? I ask the Minister of industry, Trade and Technology. What did he say?

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: I do not know what he said either - he is usually not that intelligent anyway. Mr. Speaker, I will continue on. The Minister of Industry, Trade and Technology is trying to say a few smart words over there. He very seldom gets on his feet to speak to bills. Only when he gets into Question Period, if he is asked questions, he tries to answer them; but he very seldom answers - he twists it.

AN HON. MEMBER: (Inaudible) only when he is told.

MR. J. BYRNE: Only when he is told. Do you have that much control? I ask the Government House Leader. Do you have much control over the Minister of -

MR. OSBORNE: `Jack', I have to correct you on that. He is one of the better ones for giving answers - most of them over there will not.

MR. J. BYRNE: You think now that is what I wanted to say? The Minister of Industry, Trade and Technology, if he gives an answer well, let us just say they are long-winded answers, for sure. He is very long-winded. He gets up to give an answer and you would not know but he is giving a speech. But at least he is on his feet every now and then speaking to whatever concerns that are presented.

MR. FUREY: (Inaudible) my member.

MR. J. BYRNE: Your member. I listened to what the member had to say. I do not necessarily agree with it, but I listened to what he had to say.

MR. FUREY: You disagree with your colleague, then?

MR. J. BYRNE: We disagree all the time on points of issue. It is a free, open party. We have our own opinions.

MR. FUREY: (Inaudible).

MR. J. BYRNE: What can I say? Well, I would not want you to be going up in that poll too often, I say to the Minister of industry, Trade and Technology, it puts too much pressure on you to stay there.

MR. TULK: Where is that brown envelope we carried over to you?

MR. J. BYRNE: The what?

MR. TULK: That brown envelope. `Roger' pulled that off on me some fast.

MR. J. BYRNE: Who?

MR. TULK: `Grimes'.

MR. J. BYRNE: I have no clue as to what you are talking about. The Government House Leader is trying to accuse his colleague over there now of doing something that I am not quite sure is very professional. But I know there was something that landed on my desk in a white envelope. I opened it up. God knows what was in it, I say to the Government House Leader. I do not know of what he is trying to accuse the Minister of Education, but he is accusing him of something.

Mr. Speaker, back to the 50 per cent rule - before, we got off the topic.

AN HON. MEMBER: Tickets to the Chrétien dinner last night, boy (inaudible).

MR. J. BYRNE: Tickets to the -

MR. FUREY: Do you have those notes read out yet, or what?

MR. J. BYRNE: Oh yes, Mr. Chrétien - the Prime Minister's dinner last night. I just saw him on the news and he said: `Well, I apologize for thinking. I made a mistake about thinking. I made a mistake if I was thinking.' Now, that is the statement the Prime Minister made. So he made a mistake if he were thinking. Thinking - now there you go.

MR. CANNING: (Inaudible).

MR. TULK: You are likely to go up on an air bus there now.

MR. J. BYRNE: The only time, I say to the Member for Labrador West, that I am not thinking, is when I am asleep.

MR. TULK: We will ship you out on an air bus come Christmas.

MR. J. BYRNE: On a what?

MR. TULK: On an air bus.

MR. J. BYRNE: I say to the Government House Leader, he has a lot of bills before this House that he is trying to get through, Mr. Speaker, trying to rush through this House, and he is over there now, trying to prolong my debate, when, here I was, coming in to sit down and not to say too much.

MR. SPEAKER: Order, please! Order, please!

I ask the hon. member to restrict himself to the contents of the bill.

MR. J. BYRNE: Thank you, Mr. Speaker.

I shall restrict myself to the bill.

Now, just to reiterate what I had said earlier, Mr. Speaker, on the minister's comments with respect to this bill, I would imagine what the minister had to say -

MR. SPEAKER: I also ask all hon. members to stop interrupting.

MR. J. BYRNE: Thank you, Mr. Speaker, a very good ruling. Thank you very much.

To reiterate what the minister said with respect to this bill. Of course, what he said would have to be relevant, I would think, Mr. Speaker, and as I said earlier, he talked about the bill being in line with other jurisdictions within Canada. And maybe so, maybe it will be in line with other jurisdictions within Canada. But that does not necessarily mean it is a good thing.

Now, I am starting to speak a little bit slower, because the Minister of Education just came in and he likes me to speak slow so that he can understand what I am saying, Mr. Speaker. So the minister -

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: Pardon?

AN HON. MEMBER: Seventy-eight on a thirty-three speed.

MR. J. BYRNE: There you go.

MR. TULK: Bring that (inaudible) relevant.

MR. J. BYRNE: I have to stick to relevance on this, Mr. Speaker.

In relevance, with respect to this bill, what the Government House Leader is saying is, if I do a good job on the bill, by the results of a certain poll that was done not long ago, I will rise even higher in the polls. That is what he is saying, Mr. Speaker. Therefore, the relevancy is there and I shall try to do my best.

MR. TULK: Could I get a copy of that speech?

MR. J. BYRNE: You can have 1,000 copies, you can have 10,000 copies of this speech, you can have 50,000 copies of this speech, you can have 100,000 copies of this speech, you can have 200,000 copies of this speech, you can have what you want. All you have to do is go outside to Hansard and ask them for X number of copies. Mr. Speaker, the number of copies that the Government House Leader wants of this speech is completely and totally up to himself. He can request it from Hansard and I am sure they will be only too glad to run them off for him; they would even deliver them to his office.

MR. TULK: (Inaudible) a white Christmas.

MR. J. BYRNE: Mr. Speaker, a white Christmas, everyone wants a white Christmas. They were trying to find out if there was a Santa Claus and the post office delivered thousands and thousands of letters to the judge. Well, the Government House Leader can have thousands and thousands and thousands of copies of this speech. And I am doing a good job, Mr. Speaker.

Now, I am going to skip over a few notes that I have here, Mr. Speaker, I do not know how much time I have left.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: Notes, look, look, I say just look. My son, we are only getting warmed up here now.

Mr. Speaker, this bill, "An Act Respecting Pension Benefits", is subject to the approval of the minister. Now, the superintendent is subject to the approval of the minister - or anything that he does. In other bills that went through this House, Mr. Speaker, since we came here, the Expropriation bill, the Thorburn Road Planning Act, a number of other bills, gives him a lot more authority, more authority all the time to the minister of that department. Now, Mr. Speaker, this bill is doing the exact same thing again.

It is getting to the point that a superintendent who is going to be, of course, under the jurisdiction of the minister, cannot do too much without the approval of the minister. Section 6.(2) "The superintendent, subject to the approval of the minister, has the control and supervision of the administration of this Act, and has the following powers and duties: (a) to examine all pension plans and all amendments to those plans that are filed for registration under this Act;" The superintendent has the power to do that, and rightly so, but, it is subject to what the minister says, and if the minister tells him to do one thing or not to do another, well, then, accordingly, he has to dance to the minister's tune.

MR. TULK: Say that again - I did not hear.

MR. J. BYRNE: Say it again? I will say it again. There are some people, Mr. Speaker, who did not hear what I had to say. There are a few points which have to be read out, that the people of the Province should know: what authority the superintendent has, under this bill, Mr. Speaker, and I will get into that in a few minutes.

One of the superintendent's duties is (b) "to register and issue certificates of registration in respect of all pension plans that are filed for registration under this Act and comply with the standards for registration;" Now, Mr. Speaker, that is just what you would expect a superintendent of registration for this Act to be responsible for; that is not a problem. I think most people would agree, that is a regular duty, a common duty of an individual in that position.

Also, he or she has the right (c) "to refuse to register a pension plan that does not comply with this Act;" Now, Mr. Speaker, he/she has the right to refuse a plan that does not comply with this Act, but where are the regulations? What regulations, Mr. Speaker, would be in place to say if the pension plan complies or does not comply with this Act? Will the minister have the authority to say: yes, that it does comply with the Act or it does not comply with the conditions of the Act? Will the minister have the sole authority to say yes, to X company or to whomever, that it complies, or no, it does not comply with the Act? So, Mr. Speaker, will the superintendent have the authority? Will there be regulations in place for the superintendent to make that decision or will the superintendent's decision be overridden by the minister to say, no, it does not comply or, yes, it does comply. So maybe we will have to put in place some regulations to deal with that specific incident.

Also, the superintendent has the right (d) "to carry out periodic or other inspections and audits of registered pension plans;" Quite rightly, that should be within the authority or the jurisdiction of the superintendent - no problem at all, Mr. Speaker.

MR. FUREY: (Inaudible).

MR. J. BYRNE: I say to the Minister of Industry, Trade and Technology, that has happened a few times; I know it happened a few times to me. I almost said something that time. I would say it but it will be taken wrong and negative comments would be made.

MR. FUREY: (Inaudible) a few times like that.

MR. J. BYRNE: Yes, like that. That is the truth, I say to the Minister of Industry, Trade and Technology.

Mr. Speaker, the superintendent has the right (e) "to revoke the registration and cancel" -

AN HON. MEMBER: Your voice is cracking `Jack'.

AN HON. MEMBER: He loses his voice a scattered time.

MR. J. BYRNE: Mr. Speaker, I have at least another six or seven speeches to make tonight on various bills so I had better - I will speak more quietly.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: It is coming. The superintendent has the right, (e), "to revoke the registration and cancel the certificate of registration for a pension plan that ceases to comply with the requirements of this Act;"

Now, back to the previous point I was making: will it be left completely up to the superintendent to make that decision, Mr. Speaker, or will it be up to the minister to make that decision, and/or will there be regulations put in place - or are there regulations in place now - I do not believe there are - but will there be regulations put in place that will guide the superintendent of registration with respect to this Act? Or will there be regulations put in place that will guide the minister to determine if the pension plan should be cancelled? ..."the certificate of registration for a pension plan that ceases to comply with the requirements of this Act;" So who is going to make that decision? another weakness in this bill.

As I said earlier, the minister can have a lot of authority here, too much authority, as do ministers in other departments. Now, the minister or the superintendent has the right, (g) "to assess and collect fees for the registration and annual supervision of pension plans; and" (h) "to perform other functions and duties that the Lieutenant-Governor in Council may assign."

Now, Mr. Speaker, "to assess and collect fees": The question is, what fees? For what services? How much would these fees be? Will there be a certain scale of fees that will be in the regulations, or there will be regulations? Will the minister have the authority to tell the superintendent what fees should be charged, how much the fees should be, when the fees should change? Will it be a yearly change? Will it be like an annual increase automatically to these fees? The minister can have a lot of authority with respect to this bill.

Also, in section 6(4), "The superintendent may place a pension plan under trusteeship and appoint one or more persons to act as trustee of the plan where, in the opinion of the superintendent, it is necessary to do so." In the opinion of the superintendent: Would you not believe again that there should be regulations in place that the superintendent would be required to follow? There is no mention of it here, not that I know of. As I said, what are the guidelines the superintendent will refer to when forming such an opinion? Now, that can be pretty - what would be the right word? -lackadaisical, or it could be pretty well open to his own discretion, or opinion, that these regulations would be put in place; a bit too loose for me, Mr. Speaker.

Also, the superintendent, under section 6(5)(b), can decide where "special circumstances exist." Special circumstances exist: again open to the discretion, to the opinion of the superintendent. Again, as I said earlier, it is under the control of the minister, and the minister can be the god, the minister can be the overruling factor in anything that happens within this bill. We see that in a lot of bills. There is no doubt about it that the minister has a lot of authority. I have no major concern with that, as long as the minister has someone to answer to, and some regulations to guide him. Now, we still do not know what the special circumstances will be.

Again, just to repeat, the minister has the authority to set the special circumstances through the superintendent. So, in actual fact, if you really want to sit back and think about it, something like this could become political. I am not saying it would - that would depend, of course, on the minister in the position at the time, or it could actually depend on the person who is filling the position of superintendent.

Here, also, is a very important point, Mr. Speaker: Section 8.(1) "The minister may" (b) "authorize the Canadian association of pension supervisory authorities to exercise or perform powers and functions of the superintendent".

Now, I say to the minister, this is a very important point and he should be listening to this one. Is this what the minister intends, that in actual fact, the Canadian association of pension supervisory authorities could exercise and perform powers and functions of the superintendent? In actual fact, the powers of the superintendent could

be going outside the Province to guide the enforcement of this Act. So, actually, we could have someone from outside the Province controlling what is going on inside the Province of Newfoundland and Labrador.

Mr. Speaker, it does not make sense to me. Is that what is supposed to happen? I expect, in Committee, we will address that. The minister will probably have to take a look at it. Is the government planning to transfer control over provincial pensions to another pension authority? That is the question I ask the Minister of Government Services and Lands with respect to that section.

Now also, as I mentioned earlier, in Section 10, "The minister may set fees for the administration of this Act." The question, of course, is, what types of fees, the amount of these fees, as I mentioned earlier, and what guidelines are in place for the determination of these fees? Mr. Speaker, these are a few of the concerns, a few of the questions that I have with respect to this bill. I am sure there are people on this side of the House who have more to say.

AN HON. MEMBER: Make it mistake-free.

MR. J. BYRNE: Mistake-free? Who? No one is perfect. There is only one man who is going to walk on water around here and he is - How much time do I have left, Mr. Speaker?

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: Yes, I say to the Minister of Industry, Trade and Technology, that is a good one. It certainly applied to you, no doubt about it. I wish that I had the opportunity that the Minister of Industry, Trade and Technology has had in the past little while - and I am not talking about his winnings either, Mr. Speaker, with the Lotto 649. But he is busy - a busy man all the time.

I may as well continue, Mr. Speaker. This bill allows the pension fund to be maintained by a board, agency, commission or corporation made responsible by an act of Legislature and the administration of the pension fund. Now, why is this clause so broad, I ask you, Mr. Minister? Who knows who will be responsible for a pension fund? What guidelines would the government employ in their determination of what body would be eligible to administer a pension fund? Now that is the point that I have brought up on a number of occasions with respect to the guidelines. It is prevalent throughout this bill, Mr. Speaker, that there are no guidelines for many of these clauses in this bill. There are no guidelines, there are no conditions put forward, with respect to this bill. I think that is something that needs to be addressed, and the minister should address it in Committee.

Also, Mr. Speaker, in section 19(3), "the superintendent may register a pension plan if the superintendent is of the opinion that registration is justified in the circumstances of the plan and the members." Now, what does that say to you? Just what written guidelines are in place for the superintendent when formulating his opinion? Every time I get to anything in this bill it always comes back to guidelines and regulations, of which there are none from my perspective.

I'm going to sit down for a few minutes and see what other members have to say on this bill.

Thank you for your time, Mr. Speaker.

MR. SPEAKER: The hon. the Member for Kilbride.

MR. E. BYRNE: Thank you, Mr. Speaker.

How do you follow an act like that? How do you step into the shoes of the Member for Cape St. Francis after at least his 120th soliloquy and speech in this House in the last three and a half weeks? I was reading Hansard last week and from page 1 to page 15 the Member for Cape St. Francis, on and on and on.

I won't belabour the issue too much. I stand to make a few reference points to the bill, An Act Respecting Pension Benefits, more to what I don't see in the Pension Benefits Act and what I think government should

contemplate seriously over the coming years, and even over the coming weeks. Program review: It is an opportune time. The Minister of Justice is chairing a program review committee that is looking at ways in which we can save government money. I have some suggestions.

AN HON. MEMBER: The Premier saved some last week, didn't he.

MR. E. BYRNE: He saved some, yes. No doubt about it. I have another suggestion for you on how to save some more. I think, Mr. Speaker, what we should be looking at, what isn't in this particular piece of legislation, is reform to the MHA pension act. That is what we need to talk about. Yes we do, indeed we do need to have a chat about reform of the pension act of government members in this House.

Maybe we should start considering a way in which all of can look at limiting liability, forever and a day, of the taxpayer of the Province. Some reforms of pension plans that have gone on across the country have looked at a notion of portability of pension plans or a portable RRSP type of option. When members leave, if they are eligible for pension, no matter if they are eligible or not, whatever contributions are made up until a period of time, personal contributions matched by government, when the day is done, when they are finished sitting in this House and their day is over, that they take that portable RRSP with them; and the taxpayer of the Province is, forever and a day, not on the hook. That is a topic that -

MR. DICKS: Good idea, let's see how it works.

MR. E. BYRNE: Pardon me?

MR. DICKS: Good idea. Let's start with (inaudible) and see how it works.

MR. E. BYRNE: Well, you can start with me. I would have to serve eighteen years consecutively. Let's start with the Minister of Finance and Treasury Board and see how it works. We can start with the Government House Leader and see how it works. We can start with other ministers who are weeks away from reform pension plan and see how it works.

The truth is, Mr. Speaker, there are other areas in terms of pension reform we should look at. The government has control over this, government has the ability to handle it. I had representation from a group of iron workers not so long ago, I think it was back in August or November. About fifty of them came in. In total they represented about 700 to 800 people who worked at the Hibernia site who contributed to a pension plan but who right now - they were permanent workers, they left the site when the type of work that they were scheduled to do was completed, it was over, it was done. Not one of those workers can take their pension plan with them, dealing with one of the particular unions.

It is an important point, because there is a lot of money, a lot of investment, leaving this Province in terms of the administration of pension funds. We aren't talking hundreds of thousands of dollars, we are talking hundreds of millions of dollars.

In one particular case, which I want to just bring to the attention of the House, these forty or fifty people - about forty-five I think came to see me and we met for over an hour-and-a-half - they worked in excess of twelve to eighteen months at the Hibernia site. They were permit workers so to speak. They were part of the union while they were on site. Once their job was completed, their task was completed, the job that they were hired for was completed, they left. But their contributions to the international pension plan that were made here, made possible by jobs here, made possible by the exploration of a resource here, their contributions were made into an international fund that crossed the straits and ended up being administered in Toronto, Boston, New York, Chicago and places like that. That is exactly where those funds ended up.

As I said, we are not talking about hundreds of thousands of dollars, we are talking about hundreds of millions. In one particular case, one worker had worked, I think, seventeen-and-a-half months. His contributions alone for that period were about $24,000 to that pension fund, to the local union which in turn sent most of it to the international union for administration. He is not entitled to get any of that back. He cannot access it right now,

he cannot access it in the future, and when he turns sixty or sixty-five, when according to the plan he should be able to get it, he cannot because he is not a member of the local. Now there were 700 people in that position at least - that's with one local - 700 people in that position who contributed significantly, anywhere between $5,000 and $30,000 each over a period of time; a significant amount of money.

Pension reform, Mr. Speaker, is important. The administration of pensions is important. Affordability of pensions is important. A pension is a right that was achieved through collective bargaining, through pressure upon governments to introduce them, pressure upon management, the corporate world of Newfoundland and Labrador and certainly corporate Canada some fifty years ago; but there are institutions like this that are in trouble right now. If the strain and pressure continues on them, we have to look for other ways. If that particular issue with that one local union were resolved, as an example, those people, if they paid into a pension plan, would be able to get that money back. But nobody seems to be sticking up for them, Mr. Speaker, nobody.

MR. A. REID: (Inaudible).

MR. E. BYRNE: No, I didn't say that. It seems as if nobody is sticking up for them. It seems like that, I said. I am not saying that the Member for Carbonear, for example, has not gone to bat on this issue. I am not saying that any member on the government side or on the Opposition side has not either. What I am saying is, to this point in time I have made several representations to the international union and to the local down there, because they are governed by their own administration, they are governed by their own constitution. It is something that each and every union in Newfoundland and Labrador -

AN HON. MEMBER: They don't have to (inaudible).

MR. E. BYRNE: Go ahead.

AN HON. MEMBER: (Inaudible). What we have to make sure of, before Terra Nova starts and all the other work starts in all of those places, is that there has to be something written in the law that (inaudible). You are absolutely right.

MR. E. BYRNE: Dead on. That is what has to happen. What we are talking about - I mean, this has gone on in excess of thirty years.

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: Yes, exactly. We are talking about multi-billion dollar investment funds, pension funds being administered by people outside of, not only the Province but outside of Canada, that are maintaining satellite offices in Canada just to create the appearance and perception that there is administration of the fund in Canada. That is not true.

The Minister of Municipal and Provincial Affairs is dead on. What needs to happen is a legislative change, a regulatory change, to ensure that that money that has been made or contributed to pension plans as a result of resource exploitation in this Province, as a result of people working in this Province by people in this Province, stays in this Province. I mean, the pooling of resources and the capital that can be made by pooling of resources is an area that we have to really, really think about. We aren't doing enough right now to ensure that.

The administration of pension funds in this particular issue is in trouble. Pension funds across the country are in trouble. It represents the unfunded liability portion with respect to pensions. The teachers' pension plan specifically represents a significant and major problem for this Province, for the teachers, but ultimately for the people of this Province; not just the group that it represents, but our reliability as a government to be able to deal with that problem in the future, to be able to deal with that problem effectively, is really in question. Time is ticking. That is one thing that I don't see in this piece of legislation, or any, I guess, negotiations the Minister of Education is involved in, ongoing, or rolling negotiations with the NLTA over the pension fund contributions.

Mr. Speaker, with respect to the issue raised specifically with the construction industry, there are significant reforms that could be achieved there if government has the will to do it. It certainly has the power to do it. Much more of the administration of pension funds should be able to stay in this Province so we can realize more benefits.

Thank you, Mr. Speaker.

MR. SPEAKER (Barrett): The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

I will make a few comments here pertaining to this particular bill on pension benefits. There are a few particular points here. I was just actually going through some of the details there and looking at a few of the specific notes, and certainly listening to the minister when he introduced the bill.

There are some aspects to it here, I think, that are certainly positive and bring it to light. For example, in the past, under various pension plans, upon termination especially too, there hasn't always been - there have been surpluses in particular plans, I think, and opportunity now to be able to relegate this for the individual into an annuity or whatever avenue is open is an option that is available there. Any surpluses there could be allocated to the specific individual or directed as we see fit. It said it requires an employer to fund at least 50 per cent of the value of the pension benefits upon the member's termination, which is certainly appropriate.

Traditionally, there had to be long periods of time in which members could be vested into a specific plan. Certainly now, whether you are working two, eight, ten, twenty or thirty years, whatever, when you work a certain period of time shouldn't you have the opportunity - and the minimum level set here in reference to this is a two-year period, in which you can contribute. It is only appropriate, if the opportunity is there, that you should have certain benefits accrued. You might work for ten employers for three years each for thirty years and not be eligible for any particular type of pension. At least under this legislation now there is an opportunity, under that provision, that you could have benefits that could accrue to you because you change employers.

Today in society, it isn't uncommon at all to have many different employers. In fact, years ago you probably had one employer for life. Now with the job situation, and certainly working for this government too, as members know too well, there is a good chance you are going to need to be looking for another employer. We have seen a fair number, even in large corporations today. It is not just government. Large corporations today, major corporations in this country, have gone through substantial downsizing, rightsizing I guess, as government likes to call it. What it results in is a lot less people out there working, whether it is for government or larger corporations.

IBM, for example, went through a massive change when thousands and thousands of employees went out the door. To go to another employer for only two or three years, then to another one and maybe there is an opportunity with another company, and you keep jumping companies to take on different jobs, to have the opportunity under pension to be able to carry these and to do transfers to these particular funds, has to be perceived as being fully positive. It is not an age where when you go to work you spend thirty years with the one employer and then retire. That does not happen.

The Minister of Industry, Trade and Technology knows full well, when you are working for him or working for government here, they are going to ensure that your employment is going to be of a short duration, I can tell you. Then the minister who is in charge of this program review is going to ensure that at least another 1,000 people will be out looking for another employer, and they would like to be able to carry their pension benefits over from one to another.

I asked, I think, the Minister of Mines and Energy one day here in the House, and the Premier, and he did not know - I am not sure if he checked on it since - whether people who are retired can take that income that is in the plan due to them and buy annuity for them outside, shall we say, a particular plan. He said: No, he does not

know what I am talking about. I mean, the minister has said that so often: He does not know what I am talking about.

DR. GIBBONS: I don't want to know anything.

MR. SULLIVAN: He is not even interested in knowing anything about it.

DR. GIBBONS: That's right.

MR. SULLIVAN: I asked him one day and he said: No, I am not interfering with Hydro. He said: Arm's length, not interfering. A little chat with the minister: Well, I just told them, he said, don't go collect your money until we have a meeting with you. He told Hydro not to collect it. Now, if that is not arm's length - then I came back and asked him and he said: Well, yes, I asked them to do that. So you are either at arm's length or you are not.

We have seen the Minister of Health, I can tell you, regarding arm's length. He is head first in some areas and the next one, he is arm's length. He has his own standards.

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: Yes, if he had ten arms I would say he would have his tentacles everywhere.

AN HON. MEMBER: He is an octopus.

MR. SULLIVAN: He is an octopus, yes. He has his own ADM involved in writing reports. Can you imagine? And this relates to -

MR. SPEAKER: Order, please!

I think the hon. member just made an unparliamentary remark.

AN HON. MEMBER: What was that? Which one?

MR. SPEAKER: I think it is unparliamentary to refer to an hon. member as an octopus.

SOME HON. MEMBERS: Hear, hear!

MR. SULLIVAN: Okay. Instead of using a metaphor, Mr. Speaker, I will use a simile, is it? The minister, sometimes acts like he is an octopus. I think that would be acceptable. He just acts like he is and that means -

MR. SPEAKER: I ask the hon. member to withdraw.

MR. SULLIVAN: - he is well-armed, he comes prepared.

MR. SPEAKER: Order, please!

I ask the hon. member to withdraw.

MR. SULLIVAN: I withdraw, Mr. Speaker. I withdraw the remark. It is unparliamentary. I certainly did not intend to call the minister one of those eight-tentacle creatures, is it? They have eight tentacles. I would never call the Minister of Health that, not at all. I can tell you, the Minister of Health was probably called worse than what I called him before, but there are better terms. I think he is out trying to do an honest hard-working job to ensure that people under his employ benefit from the pensions that they are hoping to receive in twenty or thirty years' time.

MR. H. HODDER: He's trying?

MR. SULLIVAN: I said, I think.

MR. H. HODDER: Oh, you think, oh.

MR. SULLIVAN: Yes. I would never want to say anything too definitive about the minister.

MR. H. HODDER: I thought you were going to cross to the other side or something.

MR. SULLIVAN: Not at all. I'm trying to keep this relevant to pensions here. I wouldn't dare want to move too far away from the subject at hand, because there are some important aspects here in this that I feel certainly deserve some merit, and those are the minimum requirements established to qualify pensions and to be able to carry that pension forward. I mean, the portability and movement of pensions, I think, is essential in a changing society. That minister, yes, the Minister of Health, the very minister, has seen to it that hundreds and hundreds of people would love to avail of the opportunities provided here in Bill No. 46. Yes, they would love to be able to do it.

More so, Mr. Speaker, a lot of people would prefer that they never have to use some of the provisions here in this act. So, is the minister preparing, and are they preparing, for people now to get out of this pension plan, to move it out into a private area?

In fact, I think section 15, when I look through it, if I remember correctly - I think it is section 15. I have to find this. Section 15 says: "A pension fund shall be maintained by one or a combination of the following: (a) a government" - okay, that is one option - a public service pension plan." While we are on that topic, before I get any farther, the Hydro pension. I understand, Minister of Finance and Treasury Board - maybe I could ask him tomorrow in question period. The bill we approved about a year ago, I say to the minister, that was going to set up a Hydro pension plan, I understand that isn't done yet. You only had a year. So you haven't done anything with that yet?

AN HON. MEMBER: Officials are working on it.

MR. SULLIVAN: Working on it, okay. They are working on it. A year to set up a pension plan and they are still working on it. Are they going to be here next year, or are you going to have new people?

AN HON. MEMBER: We have dedicated officials working on it.

MR. SULLIVAN: Yes. I would say to the minister, if they are a year working on it and we don't know where we are heading, I think you should look for really dedicated officials to work on it, if you could, because we want to see that.

Under section 15(b) it says it can be maintained by "an insurance company under a contract of insurance." That is possible. We can have pension plans. So maybe all this big debt the Premier talks about, who ever heard tell last February of a $9 billion debt in this Province? Anyone ever hear tell of that? No. We have a $5.9 billion direct debt. We only have actually a $6.9 billion debt, excluding unfunded liabilities, when you consider the $1.5 billion sinking fund surpluses that we have there to apply against that debt. So I mean, we get figures out there in the public view that have never been used before. We never heard tell of this back last year and last spring.

It also states under section 15(c) that "a trust in Canada governed by a written trust agreement under which the trustees are (i) a trust corporation referred under the Trust and Loan Corporations Licensing Act" is referred to; and in (ii), "3 or more individuals, at least 3 of whom reside in Canada and at least one of whom is independent of any employer contributing to the pension fund, to the extent the individual is neither a significant shareholder, partner, proprietor..." and so on.

It goes on to say - and I'm just wondering what the intention is in this particular act - in 15(d): "a board, agency, commission or corporation made responsible... for the administration of the pension fund." Are we looking at making major changes, I ask the minister, in the particular pension fund and the administration of the public

sector pension plan? Of course if we do, the employer on an unfunded liability would be responsible for half the unfunded liabilities in that fund, I would assume.

If we apply that to - let's take the Newfoundland and Labrador Teachers' Association fund. My understanding is that the employer would be responsible for more than 50 per cent in this case, which is the government of this Province, because there was an unfunded liability directly applied and committed to be put there of about $250 million by this government initially. Then, after that amount, once the government's share is put in to match what the teachers had put in, that was spent in the general treasury of the Province, then it should be on a shared basis.

Nobody expects government to fund fully. We expect it to be shared on an equal basis, and that is a basic understanding, I think, in those pension plans. It does reiterate here, and it does hold government responsible. There was one, I think, payment made. I'm sure the Minister of Finance and Treasury Board might know this. I think there was one payment made of $20 million or $25 million, I'm not sure, $20 million dollars I think, that was put in that out of $250 million, which means there is another $200-and some million to go in. The unfunded liability in that fund is about $1.5 billion, which means the other $1.25 billion must be shared equally between the government and the employees, or the teachers, retired, current or future teachers, whatever the case may be.

The same with the public service pension plan. The liabilities that are in that plan now would have to be borne equally by, even if you farm it out and sell it out to some other particular third party or corporation, would have to be done in a similar manner. So I think it is important that we look closely at this bill, because there are various provisions. It does give the superintendent - that is in clause 6(2) - control and supervision of the act. The minister can exercise his powers under this act without any written guidelines to that affect under section 6(2) in this act. Very, very extensive powers are given in that particular section.

Mr. Speaker, we do have in this Province a considerable unfunded liability under our pensions. Of course, we get the pension fund tabled here in the House on an annual basis, that highlights really the importance of contributing, and ensure that we get back on a healthy basis in the Province. Because the Minister of Social Services and the government tell us that we are going to have less people working, tell us we are going to have less paying into the plan, we are going to have more people to support, so we are going to need to do something.

The Minister of Finance and Treasury Board tells us that isn't going to happen. He tells us that isn't going to happen. We are going to grow so much, this economy is going to rebound and be so prosperous here, that we are going to have all this extra money we are going to make up, over $150 million on the harmonization, that we will have to make the Province healthy and to be able to contribute and ensure that provisions in Bill No. 46 here, the pension plan act, are carried out in compliance with specific sections of this act.

I received many calls on this issue. I guess I've received five or six, if that is many, over the past year, from people who are into a plan and want to get their pension out and they can't do it because it is locked in and because of the age restrictions. I guess that has advantages, but sometimes there are various areas where the individuals might want to have certain flexibilities in their particular plan. We don't see flexibilities in that end of it, but we do see the vesting and the locking in provisions here under clause 43 which the minister referred to in the particular act. It has locking in provisions there, and they do set minimum standards.

Different plans now have minimum standards, I think, of vesting there. MHAs about five years, I think. What is it in some other plans generally? I think five years now, generally speaking, in most areas. It is down to five. Now this is going to have a provision here, overall, under that aspect, to have a minimum of two years within the plan to give flexibility to move from one area of the plan to the other.

There are a few points there, I say to the minister, on eligibility and vesting. The 50 per cent rule, for example, on contributions is to be expected.

AN HON. MEMBER: The galleries are filling up.

MR. SULLIVAN: If I keep on speaking here, we are going to have a full House here tonight, I say to the Speaker. They are really starting to move here.

AN HON. MEMBER: (Inaudible) public meeting in LaPoile.

MR. SULLIVAN: Yes, there have been meetings there.

There is also reference too in clause 47 right on down to clause 56. It talks about opportunities and benefits. Under the heading of marriage breakdown it says, when a pension plan has to be divvied up - nobody wants to deal with that provision but there is some provision that, when a spouse has an entitlement the opportunity to be able to reap at least some of the benefits accrued or, as being a contributor, I guess, in some way, shape or form, as determined by the courts, there is an opportunity now to be able to have that amount taken out, relegated and used for that purpose, rather than just being draw from the plan on an ongoing basis. It gives an advantage to individuals who want to get rid of the shackles that they are held on, who have to depend on an ongoing plan without flexibility. It does give flexibility between the spouse and the member now, an opportunity to sort of segregate those and make independent decisions as opposed to one being done under the general heading.

Of course, under clause 57, there is surplus entitlement, an ongoing plan upon termination. If there are certain particular surpluses, it outlines in clause 57(2) an opportunity to be able make some provisions to do something about the transfer of those surpluses there upon termination of the plan. That is important, to be able to make those specific provisions. That is number - let me find it here for a moment now.

AN HON. MEMBER: What are you looking for, 46?

MR. SULLIVAN: No, clause 56. I had a little comment there I was going to make on clause 56. No, it is not clause 56, clause 57.

It says: No part of the surplus may be paid by the employer unless (a) the payment is permitted by regulations; and (b) the superintendent consents in writing to the payment.

Basically, that gives permission because sometimes pension plans can be in surplus and there are others, of course - Unfortunately, the Public Service Pension Plan, the Newfoundland and Labrador Teachers Association and the Members of the House of Assembly plans and other plans are not in the situation now where we have tremendous surplus, I say to my colleagues here. I don't think we will have to deal with that situation in our lifetime. I am sure there are pension plans out there that are fully funded and there is more of an emphasis today upon getting a fully-funded plan because for many years we failed to realize the importance of contributing to a plan.

We do not want future generations to have to make up the difference and pay the price for what we do today. We would like to move in the direction and we have, in certain areas, made up that gap by increasing premiums or by the allocations of per cent. I think in the Newfoundland and Labrador Teachers Association it was reduced from 2.2 per cent down to 2 per cent basically. In addition, with increasing premiums, to be able to be allowed to make up some of that unfunded liability, at least stop the slide. We are going to get into a period now in the next while - and there are undergoing similar problems in the Canada Pension Plan - where there have to be significant increases in premiums to be able to make up the shortfall that is occurring.

So, Mr. Speaker, there are some points here certainly of concern. I am sure overall there are some positive elements here and I am sure when we get an opportunity to get to committee we will take a closer look at it. It gives us time to have a more detailed analysis. There are a lot of bills coming on us at one time, very lengthy, and we are getting through them all. These are just some of the points we wanted to make now and any others we can certainly make in due course.

Thank you.

MR. SPEAKER: If the hon. the Minister speaks now, he will close the debate.

The hon. the Minister of Government Services and Lands.

MR. McLEAN: Thank you, Mr. Speaker.

Just a few notes to close off second reading of this bill.

Mr. Speaker, some of the points that have been made on the bill itself and the areas I think of importance are - certainly the portability of pensions is one of the key issues that we need to deal with. A number of other issues that have been brought forward, compared to the last pension benefits act, are the areas of eligibility for memberships, early retirement, spousal benefits and the division of benefits upon marriage break downs, as some of the hon. members have mentioned. The portability of pension benefits and the surplus distribution are all new items for this particular act and certainly such reform issues have served to encourage employee participation in pension plans.

Mr. Speaker, I would also say that the difference between the publicly funded pension plans and this private one, is that the private sector pension plans are required to operate on a fully funded basis. If unfunded liabilities occur, the public benefits bill provides strick payment procedures to eliminate any unfunded liabilities. As a result, a new bill will not impose financial difficulties to private plans since the plans are and have always been required to continually maintain assets in the fund to cover any incurred liabilities.

Mr. Speaker, this act certainly secures the future for people in the Province who are looking to obtain funds from a pension. This act provides enhanced pension benefit coverage for the people of the Province through the increased payments, procedures and conditions, as well as improved investment regulations and monitoring requirements, and the act promotes increased security of pension benefits promised.

Mr. Speaker, in response to the Member for Cape St. Francis, the previous act required that employees pay 9 per cent and the employer pay 1 per cent. In this new bill, it is 50/50. It is a 50 per cent rule.

Mr. Speaker, I would now move second reading of this bill.

On motion, a bill, "An Act Respecting Pension Benefits," read a second time, ordered referred to a Committee of the Whole House on tomorrow. (Bill No. 46)

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker, I am going to move to Order No. 30, Bill No. 30, "An Act Respecting The Good Faith Donation And Distribution Of Food," second reading of a bill. Once Your Honour has read it, I will introduce the bill.

Motion, second reading of a bill, "An Act Respecting The Good Faith Donation And Distribution Of Food". (Bill No. 30)

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker, let me very quickly say, as the Premier said the other day, that really, I guess, this bill is a result of - and I say this in a totally non-partisan fashion - the efforts of the Member for Bonavista South and, of course, the agreement of the Premier and the total agreement on this side, that we should move this bill and move quickly on it.

I think we were prepared, and I think the hon. member will say this is correct when he stands up to speak to this bill, as I suspect he will, that indeed the government was prepared to move fairly quickly to see that this bill was made into law, but we found ourselves at the mercy of the single NDP member in this House who felt that we would in some way be distributing substandard food to people in the Province, and promptly went out and moved that kind of feeling in the public.

I have to say to the Member for Bonavista South, that I wish tonight, really, I could move through this bill, do it by unanimous consent, and put it right through to third reading. Unfortunately, I have to say to him that in the past four or five days I have had a number of calls. I think this afternoon the Member for Virginia Waters distributed a petition from some people who have concerns about what this bill might indeed do. I suspect, and I do not want to second-guess anything here, but I suspect it is largely a result of the kind of stuff that was in the paper over the weekend from the Member for Signal Hill - Quidi Vidi.

What I am proposing to do, what we are proposing to do as a government, is to move second reading of this bill, send it to Committee, let the Social Services Committee of the House deal with it, and when we come back in the spring hopefully we will be in a position that we will have satisfied - and I believe that is all it is, at this point in time - the fears of people out there that we are somehow going to treat other people less than we would treat our own.

MR. SULLIVAN: (Inaudible) our conversation.

MR. TULK: Don't get uptight, now. I am doing something that I do not have to do, so don't get too uptight about it.

Mr. Speaker, having said that -

MR. REID: Withdraw the bill if they don't go along with it.

MR. TULK: No. I say to the Minister of Municipal and Provincial Affairs, that I cannot be that partisan, that I will not do that, that I will not follow the Leader of the Opposition and withdraw this bill because we are in dispute on another bill. I will not do that. I will not make his own member suffer for, shall we say, the sookieness of the Leader of the Opposition. I will not do that. I will try to act above the partisan level of the hon. gentlemen.

SOME HON. MEMBERS: Hear, hear!

MR. TULK: Mr. Speaker, having said that, let me say to the Member for Bonavista South, that I believe he wants to speak on this bill, and when he does I am going to move it into committee - I show him the motion today - and that the Social Services Committee report to the House before March 31, 1997, or in case the House is not open they deposit their report with the Clerk of the Legislature.

MR. SPEAKER: The hon. the Member for Bonavista South.

MR. FITZGERALD: Thank you, Mr. Speaker.

Mr. Speaker, I thank the Government House Leader for allowing this bill to be introduced into the Legislature, and I thank the Premier as well. It was a bill that was brought forward by me some eighteen months ago. It was a bill that I believed in at that time, and I thought it would be providing a great service to many of the people in this Province who have no other choice but to use food banks in order to access food and, I suppose, to fulfil a need, when their pay cheque, whether it is from Social Services, unemployment insurance or a TAGS cheque, doesn't allow them enough money to go out and buy food for their families.

MR. E. BYRNE: You are in agreement with the bill, are you?

MR. FITZGERALD: Yes, I say to the member, I'm in total agreement. I would rather see the bill introduced here and go to Committee and be passed. That is what I would like to see done, Mr. Speaker. In that way we would allow this piece of legislation to become active. It would go through, be proclaimed, and become a piece of legislation that would go on the books and allow people to donate food and, I suppose, to provide a need there now rather than later.

I understand where the member is coming from, I understand the minister's concerns. I know the actions of my wealthy socialist friend who sits to my far right there. I'm aware of the actions of that particular gentleman. It was only the other day, when I was out in the corridors of the House there having a scrum, when the Member for Signal Hill - Quidi Vidi walked around behind the reporters saying: I won't support that bill, I don't believe in double standards, I don't believe in serving rotten food, I don't believe in doing any of this.

It might be unfair to stand her and talk about somebody when they aren't present, but what I had intended to say I'm going to say anyway, Mr. Speaker, and I'm going to say it here right now. If that same member believes this is such a bad piece of legislation, and if that same member believes we in this House believe in double standards, I suggest that he probably change his double standard. We are sitting here with a member in this House -

SOME HON. MEMBERS: Hear, hear!

MR. FITZGERALD: - collecting a full pay cheque from this Assembly by working here as a part-time member.

SOME HON. MEMBERS: Hear, hear!

MR. FITZGERALD: What I say to that same member - and I wish he were here - is let him take his T4 slips at the end of the year and lay them on the Clerk's Table, and I will take mine, Mr. Speaker. Everything that I make over and above the salary that I make as a representative of the people I will donate to the food banks, and what he makes over and above the salary that he makes in this House of Assembly I suggest that he donate to the food bank.

SOME HON. MEMBERS: Hear, hear!

MR. FITZGERALD: Maybe we wouldn't need a piece of legislation like this. It is nothing but shameful for that man to get on with such bull. Nothing but shameful, Mr. Speaker.

AN HON. MEMBER: The champion of the poor and downtrodden.

MR. FITZGERALD: That is exactly what he professes to be, Mr. Speaker. Then he goes out on the airwaves and he talks about how the Opposition will not allow him to respond to ministerial statements. Where is he today? Where is the man today?

SOME HON. MEMBERS: Gone! Gone!

MR. FITZGERALD: Gone! He came in here the other day, and when the Government House Leader passed this bill through first reading he came in and he got all upset again. He said: How come you didn't wait for me to come back? You wouldn't know but the whole House of Assembly revolves around the wealthy socialist to my right. It is ridiculous! Ridiculous!

SOME HON. MEMBERS: Hear, hear!

MR. WALSH: On a point of order, Mr. Speaker.

MR. SPEAKER: Order, please!

The hon. the Member for Conception Bay East and Bell Island, on a point of order.

MR. WALSH: Mr. Speaker, I think it is probably alright for us to have some fun here this evening, but it is probably somewhat unfair for us to be here tonight speaking of a member who is not here, who may very well be out spending some of the $300,000, $400,000 or $500,000 that he made this past week. I don't think it should be done. You should leave the member alone; he is not here to defend himself.

MR. SPEAKER: Order, please!

I ask the hon. member to take his seat for a moment.

To that point of order, it has been ruled in this House on numerous occasions that it is unparliamentary to refer to any hon. member for his presence or absence in the House. The Chair was paying very close attention to what the hon. Member for Bonavista South was saying. He was making reference to a member to his right. He was making reference to a member, a particular member, this other member, but he did not refer specifically to any member by name or by district. So the Chair cannot rule him out of order.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: The hon. the Member for Bonavista South.

MR. FITZGERALD: Thank you, Mr. Speaker.

Mr. Speaker, this is a bill that has received a fair amount of debate in this House already. It received a full evening of debate back eighteen months ago. Things have not changed from that particular time, other than the need for this bill is probably worse now than it was eighteen months ago. It is a bill that is not going to serve rotten food, or adulterated food, to the poor or to the people who are using food banks. It is a bill where we can stand up and say that we do not believe in food banks and we do not believe that this particular bill has any place in the Legislature of this Province.

Well, I do not believe in unemployment insurance, and I do not believe in social services, and I do not believe in food banks, but, Mr. Speaker, the thing is, that we have to deal with reality. We do have food banks, we do have unemployment, and we do have social services.

This is a bill that would simply relieve the liability from grocery stores, from any donors of food to food banks, if it is done in a way that if some litigation appears and it was not intended to intentionally hurt or maim or kill somebody. That is what this bill does. We are not talking about food that is outdated. We are talking about food that probably does not appear in a cosmetic fashion in order to be able to be put on supermarket shelves for marketable purposes. That is all we are talking about. We are not talking about food where the expiry date has disappeared. We are talking about food that may be able to be taken from the supermarket shelves and taken to a food bank and distributed before the `best before' date has expired. That is what we are talking about here, nothing more than that. In fact, we are probably talking about better food than most of us here in this House eat, or the food that we are eating every day. That is what it is.

I have talked to people who are very familiar with this piece of legislation in other jurisdictions in this country. Similar legislation exists in five other provinces; it exists in fifty states south of the border, and there is no reason why we cannot introduce it here. I think when it does become effective, and when it is proclaimed into law, that the giving to our food banks, and the response that we will see, will certainly increase many, many fold to what we are experiencing today.

Mr. Speaker, that is all it is. It is a bill that would provide that and only that, and the great fears and concerns out there are certainly unwarranted.

Thank you.

MR. SPEAKER: The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

I certainly congratulate the Member for Bonavista South who attempted to get this through the House in the last session and it died on the Order Paper. I say now, by referring this to Committee and bringing it back next spring in a new session, with the House being prorogued, it will die on the Order Paper and will have to be

reintroduced again. That is my understanding, that it will die on the Order Paper, which means it will not come up. I say to the Government House Leader, if this goes to Committee and next spring is to be brought back with a new session of the House, the House is prorogued, we would have to bring it back again?

MR. TULK: A point of order, Mr. Speaker.

MR. SPEAKER: The hon. the Government House Leader, on a point of order.

MR. TULK: Let me just say to the hon. gentleman, that when this House closes for Christmas the House is not prorogued.

MR. SULLIVAN: I didn't say that.

MR. TULK: No, no. The House is not prorogued; let me say that to him. We could be here for two weeks before - I know that in most cases most governments prorogue the House, come back one day in February or March and prorogue the House, and then we start a new session.

AN HON. MEMBER: (Inaudible).

MR. SPEAKER: Order, please!

MR. TULK: In this particular case this is not necessary. Let me just say to him, that if the Committee report is back here, as soon as the Committee report is back, I think we will move the bill at least close to unanimously, regardless of whether it is a new session or whether it is a continuation of this one. There will be no hesitation at all, whatsoever.

MR. SPEAKER: Is the hon. the Leader of the Opposition speaking to the point of order?

MR. SULLIVAN: No, not to the point of order, Mr. Speaker.

MR. SPEAKER: There is no point of order. The Government House Leader took advantage of the opportunity for further clarification.

The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

I respond in reference to the Government House Leader when he mentioned that it would come back next spring.

MR. TULK: It will come back, as soon as the committee reports (inaudible).

MR. SULLIVAN: Yes, I know.

The Government House Leader said last spring - that is why I felt it was necessary to indicate that when the House prorogues, which would normally be in March, as an example, and a new session of the House would start with a new Throne Speech, I indicated it would be the second time it would die on the Order Paper and would come back again. I accept the Government House Leader's word that it will come back again.

He did make a point, and I think it is worthy of note, he did indicate that it should go to Committee because the Member for Signal Hill - Quidi Vidi had a concern, and to give it adequate time. He made some reference to it and some petitions -

MR. TULK: On a point of order, Mr. Speaker.

MR. SPEAKER: The hon. the Government House Leader, on a point of order.

MR. TULK: Mr. Speaker, the hon. gentleman can twist and move this around all he likes; I don't care. He can stay there all night at it. The truth of the matter is that I had several representations this weekend after the stuff appeared in the paper from this gentleman over here. I had several representations from people, people I know very well, who are in charitable organizations here in this town that feed people. As a matter of fact, I believe - what is the name of the guy who you used as -

AN HON. MEMBER: (Inaudible).

MR. TULK: Yes, I think there might even be some doubt in his mind now, although he did not call me himself, but having talked to some other people I think there might even -

AN HON. MEMBER: There is no doubt that he is for it.

MR. TULK: Okay, but I know that some of the other people who talked to him have doubt in their mind as to whether we are doing what he said, what the gentleman from Quidi Vidi said. I did commit to those people. I said: We will go back and do this in Committee to allay your fears, and that is what we are doing.

MR. SPEAKER: Is the hon. the Leader of the Opposition speaking to the point of order?

MR. SULLIVAN: No.

MR. SPEAKER: There is no point of order. Again, the Government House Leader is using the opportunity for further clarification.

The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

I certainly do not criticize going to Committee at all, I say to the Government House Leader. In fact, I think it is a process that we could utilize a lot more. If there are concerns out there - I heard Mr. Walters on yesterday. He was very emphatic. He looked at it. He fully endorses it. He represents the Community Food Sharing Association. But there may be other people who are not fully informed and I respect that. I think the Committee is a time to deal with that, and I certainly am very much in favour of bills coming into this House getting put to Committee.

Back to the bill, certainly my colleague from Bonavista South has indicated, and I think, it is a well-intentioned bill. I think at the time he was social services critic and he certainly was dealing with many, many cases. People who he is aware of, as a representative, many of his constituents, too, in situations like all of our constituents, have an opportunity and may benefit from this specific bill.

Some of the concerns out there may be that we may be giving a second-class type of food to people, and that is not the intention. I think anybody who looks at the bill, if someone knowingly does that, or it is not fit for human consumption, there are provisions here to ensure that these people would be liable if they did so. It is there to assist. It will have an opportunity, certainly, over the next while, and if it does not have an opportunity to get back in this session then certainly in the next session, or whenever it happens. I say that the sooner it happens, the better, I think, and that more people can benefit from this.

One of the reasons, I think, my colleague brought it back is that it is coming on the Christmas season and it is an opportunity in a lot of these areas. There are a lot of people out there hurting today, and to have something at this time of the year may entice supermarkets and other large chains to be able to dump some of this extra food on people's tables, to put it out there so that they could have this opportunity.

This is a good time of the year to look at that in a giving spirit, without them having to have the legal repercussions that may be put upon them for putting forth something that they consider - one of the examples

used: maybe the fork of a forklift may go through part of a whole pallet but might only damage but one or two items. These might be discarded, and the rest could be put to good use well within the expiry date.

There are many opportunities there. They use discretion. The Community Food Sharing Association has indicated that. They use discretion. They would never put out food that they do not consider meets the standard there. I felt, with the time of the year - now, anytime it happens is good, but certainly the faster the better. It is an opportunity.

I do certainly congratulate the Premier and the Government House Leader for bringing this bill into the House. I have to congratulate them on that. It is something that my colleague had tried before, but it did not work. It just got put aside. Now they see the need for it, and hopefully we can expedite it in the future as fast as possible so people can benefit from it.

Thank you, Mr. Speaker.

MR. SPEAKER: The hon. the Opposition House Leader.

MR. H. HODDER: Thank you, Mr. Speaker.

I just wanted to rise for a couple of minutes to compliment my colleague, the Member for Bonavista South, and to say to him, through the House, that we appreciate his efforts. I know that he has done a great deal of research on this particular matter. He has consulted with a number of jurisdictions in the United States at the state level and he has consulted with every province in Canada.

Mr. Speaker, I just wanted to say to the House, that the intent of this bill is not that we would ever, ever, offer food that was of any tainted quality. That is not what this bill is about. This bill is about making donations possible, making sure that food that goes to waste in this country is made available to those who need it. Mr. Speaker, if you look at the bill, it makes it quite clear. It says that if any of the food is adulterated, rotten or otherwise unfit for human consumption, it is not to be distributed.

Now, Mr. Speaker, I know some of the corporate people in this Province very well, and I have been associated with food banks through my church and other agencies for a long time. I can assure you that these people will not cause anything to happen that would in any way jeopardise the health or safety of anyone. Mr. Speaker, we also know from all the reports, how extensive poverty is in our country and in our Province. We know that there are more children in Canada today who are hungry than there were five years ago. There are more children in Newfoundland and Labrador today who are hungry than there were five years ago.

Mr. Speaker, what we are saying is that this bill enables us to be able to address this issue, not in a way that would exonerate the Department of Social Services from its responsibilities nor will it preclude the Department of Health from ensuring that food is monitored correctly and that all of the health care concerns are addressed.

So, Mr. Speaker, we commend our colleague from Bonavista South. We say to the government and to the Government House Leader, that this is appreciated, not for me or for members in this House, but appreciated by the children and parents in Newfoundland and Labrador who have genuine needs and know what the real face of poverty is all about, and are happy to be able to address their concerns in this kind of a way.

So, Mr. Speaker, again I want to say to all hon. members, if you read all the literature - I have in front of me here, The Royal Commission on Education, *Our Children Our Future*, and there is a lot of literature there. I won't get into reading it all nor do I intend to reference it, but it is there.

AN HON. MEMBER: Read it, boy. Read it all.

MR. H. HODDER: My colleagues here are encouraging me to keep speaking, but I do think that we want to note some of the reports, and commend the government and the Premier, as head of the government, in making

this particular piece of legislation possible, and commend them for sending it off to the Social Services Committee for further review.

Thank you very much, Mr. Speaker.

MR. TULK: Nice move. I would have stood up, said five words and sit down.

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker -

MR. SPEAKER: Order, please! Order, please!

If the minister speaks now, he will close the debate.

The hon. the Government House Leader.

MR. TULK: Mr. Speaker, I believe - and I will ask the clerks for clarification - I believe that once we pass this bill in second reading, I am supposed to move a motion.

So, Mr. Speaker, having said that, I too, like the Member for Bonavista South, would wish that we could do this in the spirit of Christmas. I wish that we had had the discussion that we had on Friday, maybe in the first part of November. We would have put it out for ten days to committee and then come back. Unfortunately, we are going to have to bypass this Christmas season, but hopefully next Christmas season this will be in effect to help the people of this Province, especially the children of this Province.

So I will, on that basis, move second reading, Mr. Speaker.

Motion, a bill, "An Act Respecting The Good Faith Donation And Distribution Of Food", read a second time. (Bill No. 30).

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker, I move, pursuant to Standing Order 54.2(1), that the bill entitled, "An Act Respecting The Good Faith Donation And Distribution Of Food," (Bill No. 30), having received second reading, be referred to the Standing Committee on Social Services, and the report of the Committee be tabled in the House before March 31, 1997, or be deposited with the Clerk of the House before that date if the House is not in session.

MR. SPEAKER: It is moved and seconded that the said bill be referred to the Standing Committee on Social Services pursuant to Order 54.2(1).

On motion, a bill, "An Act Respecting The Good Faith Donation And Distribution Of Food," referred to the Standing Committee on Social Services pursuant to Standing Order 54.2(1). (Bill No. 30)

The hon. the Government House Leader.

MR. TULK: Mr. Speaker, Order No. 28 - to long for me to read - Bill No. 51.

Motion, second reading of a bill, "An Act To Amend The Automobile Dealers Act, The Insurance Adjusters, Agents and Brokers Act, The Insurance Companies Act, The Real Estate Trading Act And The Trust And Loan Corporation Licensing Act". (Bill No. 51)

MR. SPEAKER: The hon. the Minister of Government Services and Lands.

SOME HON. MEMBERS: Hear, hear!

MR. McLEAN: Thank you, Mr. Speaker.

Mr. Speaker, this bill is introduced to cut out some red tape. Simply put, it is to do with licensing procedures. In keeping with our regulatory reform initiative, the government will only license individuals and companies when it is considered necessary for protection of the consumer. In future, government will only require that individuals be licensed when there is a qualifying examination required to enter an industry. As a result, government will no longer be licensing individual collectors and automobile sales persons. However, we will continue to license companies in these industries and the companies will be held accountable for the actions of their employees and representatives. Mr. Speaker, we are moving into a more streamlined approach to licensing procedures.

In addition, Mr. Speaker, the requirement to issue an annual license under the acts mentioned will be changed so that a one time license will be issued with annual reporting requirements. We have determined that the expiration of a license in these industries at the end of each year serves no purpose for consumer protection. It is also considered a waste of time and money to be printing new licenses every year. It is more important to receive information on the companies and individuals which we license and to expend more effort in monitoring their compliance with legislation.

Mr. Speaker, we are confident that these initiatives will improve consumer protection and result in a more efficient licensing system.

Thank you, Mr. Speaker.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Speaker.

AN HON. MEMBER: One hour, Jack, one hour.

MR. J. BYRNE: One hour. I don't think, Mr. Speaker, my voice will last for one hour without a break. Maybe fifty-eight minutes or so.

Mr. Speaker, I will state the name of the bill that the Government House Leader couldn't, wouldn't, shouldn't or whatever, Mr. Speaker. Bill 51, "An Act To Amend The Automobile Dealers Act, The Insurance Adjusters, Agents And Brokers Act, The Insurance Companies Act, The Real Estate Trading Act And The Trust And Loan Corporation Licensing Act." Well, Mr. Speaker, just in case somebody didn't get that I probably should repeat it.

Mr. Speaker, basically - I have to agree with the minister - a lot of this bill was addressed in the regulatory reform review that happened under the previous administration, I do believe. The minister mentioned that there is going to be a reduction in red tape. We heard that story before, just the same, when they were talking about the one-stop shopping, when the previous administration talked about consolidating the branch offices of different departments and what have you. They would cut red tape and it would be to the benefit of the public in every way, shape and form. In actual fact, Mr. Speaker, that did not occur. It was not of benefit to the public. As a matter of fact, from what I understand, in some of the centres that were put together by Government Services and Lands there was staff put in those centres and they were actually sent back to the offices where they came from. The situation with respect to cutting red tape never occurred by any stretch of the imagination.

Mr. Speaker, if an individual went in and applied for a piece of land, a building lot approval or what have you, he still had to go to the Department of Works, Services and Transportation, if it was required, he still had to go to the Department of Environment and Lands, and he still had to go to the Department of Health. So the fact that the minister states that this will cut red tape doesn't necessarily mean that it will cut red tape. I just thought I would mention that.

The minister talked about regulatory reform, and I already mentioned that, Mr. Speaker. In actual fact, it was addressed somewhat, and this probably consolidates or helps to bring about the regulatory reform that he was talking about. It remains to be seen, as I said earlier, if it will be of benefit to the public.

Mr. Speaker, this bill also talks about the licensing and the protection of the consumer. Of course, that is the responsibility of any government department on any government level, municipal, provincial and/or federal. The protection of the consumer is all-important. Of course, there have to be steps and measures put in place to protect the consumer at all times. Hopefully this bill will help address the concerns of consumers with respect to the bills, and the actions that are controlled in the bill, or the pieces of legislation that this bill hopes to address.

Mr. Speaker, this bill also deals with the licensing of companies, not individuals. That is, I believe, getting to the point now where, say in the automobile industry, if an individual makes application, through the department, to be licensed to be an automobile sales person he is licensed and goes to work in any given company within the Province, I would assume. This bill now licences the companies and not necessarily the individual. Therefore, when an individual goes to work for the company, the company itself is responsible for the actions of the employee.

Mr. Speaker, I think that is normal procedure in most any business. If I have a company and I have an individual working for me, and that person goes out and breaks the law when he is working for me, when he is doing the work of my company - well actually, the company can be held liable anyway,. So in actual fact I would say that this section or this portion of the bill could actually be cutting red tape, so I could actually agree with the minister on that point.

Also, the minister talks about the licensing and the annual reporting. Now that they are getting away from actually licensing individuals with respect to automobile dealerships and, I suppose, automobile salespersons, the company now would have to report each year. Therefore, the actual licensing of a company wouldn't have to take place each year. The minister may want to address that. I am not quite sure on that point.

Also, when the minister was up on his feet he talked about the fact that licensing people each year, every year, is a waste of time. I suppose, if it is a waste of time it can be a drain on the resources of the department and of the government in general. So, this piece of legislation, although it deals with so many acts, is possibly a positive piece of legislation.

The minister told me that the last bill he put through, or Bill 46, he read three times. I wonder how much he studied this bill, Mr. Speaker. If he is introducing it into the House I am sure he is well informed. He indicates he read it once, so if he read it once I assume he has a peripheral knowledge of what is going on here. I am sure that his staff keep him well informed, give him good notes to inform him of what is going on with respect to this bill.

Of course, Mr. Speaker, as I said earlier, the primary focus of this bill is to eliminate the annual licensing requirements under these acts, all the acts that were mentioned here, in favour of a one-time licence, except where step progression is required for licensing. I think the minister may want to address that when he gets on his feet, what he meant by step progression with respect to the registration being maintained.

Mr. Speaker, this bill also would eliminate licences for direct sellers and automobile persons, and I already addressed that. With respect to the Automobile Dealers Act, this bill removes the definition of a salesperson from the act and subsequent amendments remove all references to salespersons, and deals mostly with the dealerships themselves, the companies and what have you, and that has been addressed.

Mr. Speaker, I am not going to go on for a long time on this bill. I think that the minister has covered it somewhat; he did not get into a lot of detail. There are a few points I will continue to make.

The present act stipulates, when a salesperson ceases to be an employee of a particular dealership, the dealer shall notify the registrar, who upon receipt of this notification, shall terminate the registration of the salesperson. Also, the present act indicates that an automobile dealer shall not retain the services of a salesperson who is not registered under this act. This bill now repeals those sections, and they have already been addressed.

Another area of the bill, Mr. Speaker, repeals subsection 2(f) of the Direct Sellers Act and, through a subsequent clause, changes the definition of `licence' to mean a licence issued to a vendor by eliminating any reference to an individual or a salesperson, and that is basically the same thing that has been going on in the Automobile Dealers Act.

Mr. Speaker, I know there are a few people on this side of the House who may wish to speak to this, hopefully -

MR. OSBORNE: What do you think about the (inaudible)?

MR. J. BYRNE: That is up to the individual, Mr. Speaker.

This bill also has a provision which indicates that the acts of any individual under the vendor's employ who is acting on the vendor's behalf are considered not only to be the individual's acts but also the acts of the vendor. Basically what they are talking about here I think, Mr. Speaker, is the fact that anybody who is acting on behalf of a company or a vendor - the same thing is done under the Automobile Dealership Act - not only the person is liable but the company itself may be held liable for the actions of the individuals in it's employ.

Basically, there is not much more to say on this, Mr. Speaker. I think what I will do is give the Member for St. John's East an opportunity to say a few words.

Thank you, Mr. Speaker.

MR. SPEAKER: The hon. the Member for St. John's East.

MR. OTTENHEIMER: Thank you, Mr. Speaker.

This piece of legislation attempts to consolidate many of the provisions of other acts, as we can see by the name, An Act To Amend The Automobile Dealers Act, The Direct Sellers Act, The Insurance Adjusters, Agents And Brokers Act, The Insurance Companies Act, The Real Estate Trading Act And The Trust And Loan Corporations Licensing Act.

Essentially, Mr. Speaker, the legislation attempts to have a one-time licensing provision with, of course, the provision that there be an annual fee paid by each registrant. So it eliminates the annual licensing requirements under these acts in favour of a one-time license, "except where step progression is required for licensing with registration to be maintained, subject to the filing of annual reports and payment of an annual fee."

Mr. Speaker, I guess it is fair to say that this legislation is really consumer protection oriented. It protects the consumer to ensure that individuals are appropriately registered, that the fees have been paid, and that there is a registry in place so the government at all times is aware of who is acting as an automobile dealer and salesman, who is acting as a direct seller under the direct act, who is an insurance adjuster, an insurance agent, an insurance broker. There will now be a full-fledged registration system on insurance agents, real estate brokers and real estate agents. Essentially, it is a registration program for all these individuals. There is the protection of the consumer, and there is the fact that, I would think, and I guess the minister will agree with me, there is now no longer any need for an annual registration. It is a one-shot deal, on the understanding, of course, that the fee for registration is paid on an annual basis.

AN HON. MEMBER: (Inaudible).

MR. OTTENHEIMER: Pardon me?

AN HON. MEMBER: (Inaudible).

MR. OTTENHEIMER: Okay.

Mr. Speaker, under the Automobile Dealers Act, section 1(2) removes the definition of salespersons from the act, and subsequent amendments remove all references to salespersons as well. Section 4(1) repeals section 8 of

the existing act, and it was this section which provided for the necessity of a salesperson to be registered. So according to section 8(4) of the present act, an application for registration as a salesperson in the former registration had to be accompanied by a written notice given by a registered automobile dealer stating that the applicant, if granted the licence, is authorized to act as a salesperson representing that automobile dealer. Section 4(2) of this bill repeals this provision.

With respect to the Direct Sellers Act, section 17 of the bill repeals section 2(f) of the Direct Sellers Act, and through a substitute clause changes the definition of licence to mean a licence issued to a vendor by eliminating any reference to a salesperson. So in some ways it broadens the definition of certain provisions and terminology in the act.

Mr. Speaker, a few points on the Insurance Adjusters, Agents and Brokers Act. Section 40 of this bill repeals section 12 of the act which prescribed a specific date on which the licence expired. In its place section 12.(1) is substituted, which allows a licence to remain in effect "subject to the filing of annual reports and payment of an annual fee as prescribed by the minister, and subject to the qualifications and the requirements of the Act and regulations until it is either suspended, revoked or cancelled under this Act."

Also, under the Insurance Companies Act there is the appropriate registration for insurance agents and brokers. Under the Real Estate Trading Act there are essentially housekeeping changes, Mr. Speaker, and many of the same changes referred to previously in the other bills.

So, Mr. Speaker, other than the title which the minister referred to earlier, it is legislation which is housekeeping. I support the fact that it is an effort to protect the consumer more and more. It has a unified system of registration for individuals who wish to act as sellers, direct sellers, agents, brokers or traders in this Province. Perhaps what is the most disconcerting thing about this piece of legislation is indeed the title itself.

Thank you, Mr. Speaker.

MR. SPEAKER: The hon. the Minister of Government Services and Lands, if he speaks now he will close the debate.

MR. McLEAN: Thank you, Mr. Speaker.

Just a couple of points. I guess the point of this particular piece of legislation is to try and reform some of the cumbersome procedures that we have been having all along in terms of the licensing of sales persons. Our feeling is that the companies who employ these sales persons should have the responsibility to certainly ensure that the sales persons follow through with the proper procedures in terms of being the employees.

Just a couple of other points, Mr. Speaker. I think the government has to get away from micro-managing these types of companies and stick to the regulatory process and ensure that the companies are acting in the appropriate manner and fashion. We feel that this particular piece of legislation will certainly do that and enhance that.

Mr. Speaker, I move second reading of this bill.

On motion, a bill, "An Act To Amend The Automobile Dealers Act, The Direct Sellers Act, The Insurance Adjusters, Agents And Brokers Act, The Insurance Companies Act, The Real Estate Trading Act And The Trust And Loan Corporation Licensing Act," read a second time, ordered referred to a Committee of the Whole House on tomorrow. (Bill No. 51)

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker, Order 29, second reading of a bill, "An Act Respecting The Newfoundland And Labrador Volunteer Service Medal," Bill No. 29. I would ask the Minister of Municipal and Provincial Affairs to open the debate.

Motion, second reading of a bill, "An Act Respecting The Newfoundland And Labrador Volunteer Service Medal." (Bill No. 29)

MR. SPEAKER: The hon. the Minister of Municipal and Provincial Affairs.

MR. A. REID: Mr. Speaker, for new members who were elected in the last election in February to the House of Assembly, they are probably not aware of this particular bill, but some of us older types remember the Speech from the Throne, 1995. This House announced that it would create a volunteer service medal for people in Newfoundland and Labrador. It was a question of us proceeding then into a new government in February and we agreed, and it was mentioned also in this Speech from the Throne when we opened the House in the spring.

Mr. Speaker, I don't think I need to go into a long dissertation about this volunteer service medal. This is open to anyone in Newfoundland and Labrador and I think if you read the bill you will see that it will be controlled by an independent panel of people in the Province. It won't be a matter that will be taken very lightly. It will be a medal that will have to be deserved and, of course, none of us sitting in the House of Assembly or any politician in the Senate or in the House of Commons will be eligible for it, at least while we are sitting.

I will say that our idea of a medal back some three or four years ago, when we talked about it, at the time Premier Wells had a discussion with a number of people in the Province who had been asking for this and we felt there was a need. There are a number of people who have done exemplary service to the Province, both in the Province and outside, and we are really the only province in Canada that doesn't have some sort of recognition that we can bestow upon Newfoundlanders and Labradorians for special services that they provide to mankind, I guess, both inside the Province and outside.

Mr. Speaker, this shouldn't cause any amount of debate. If I remember correctly, those sitting on the opposite side two years ago, when we first talked about this first, also suggested - I think the Opposition party was in on the discussions with the then-premier, and I think at that particular time we had agreed to do this.

Mr. Speaker, with that said, I leave it open to anyone else who needs to discuss the proposed bill.

MR. SPEAKER: The hon. the Member for Conception Bay South.

MR. FRENCH: Thank you, Mr. Speaker.

I would just like to take a couple of minutes here on this particular piece of legislation. First of all, to compliment the Minister of Municipal and Provincial Affairs for bringing in such a piece of legislation. I agree, Mr. Speaker, that this particular piece of legislation is long overdue, and is something, I guess, that this Province should have had a long time ago.

I guess, from my own background, having been involved with a sporting group for ten years as a provincial president, I saw lots of people who have been involved around this Province, from St. John's right to Labrador, who were not only involved with my particular sport but were involved with everything that took place in their communities; people who would be very deserving of such a medal, Mr. Speaker, who gave freely of their time. A lot of them travelled parts of this Province, not only into the City of St. John's but also to different parts of the mainland, of course always at an expense to themselves, to make their communities and their part of Newfoundland and Labrador a better place in which to live for the people of this Province.

I would like to say, Mr. Speaker, that I certainly won't have any problem supporting such a bill. It will be very interesting to see the medal. I suggest that it be designed as quickly as possible so that we in this House can have the opportunity, of course, to look at it, and the different groups throughout this Province. Off the top of my head I can think of two or three people who, certainly, it won't take me long to do up resumés and put forth recommendations for; when I think of the people in this Province who are in all kinds of sports halls of fames, right throughout this Province and right throughout Canada.

I say that this is long overdue. I'm glad to see it is here. The quicker we can get a suitable medal designed, get it out, get the committee in place, and get on with honouring some of the people in Newfoundland and Labrador, men and women who both deserve such an award, the better.

Thank you.

MR. SPEAKER: The hon. the Opposition House Leader.

MR. H. HODDER: Thank you, Mr. Speaker.

I rise to speak on this particular matter because this matter was addressed in the Throne Speech and we recognize that volunteers in Newfoundland and Labrador perform exemplary services. As the slogan said, on one or two occasions when we had Volunteer Week, `Volunteers indeed are the heart of the community.'

Mr. Speaker, it is an occasion where -

MR. GRIMES: (Inaudible).

MR. H. HODDER: I say to the Minister of Education, if he is interested in prolonging the debate, then maybe he should continue with the trend of thought and the attempt at intimidation that he is doing. I did not intend to speak very long but with encouragement like that I could go on for half an hour very easily, and I do have a half hour. So, I say to the Government House Leader, if he will control his folks over there, then we can get through this particular act, do it properly and show that we truly value the volunteers of Newfoundland and Labrador.

Mr. Speaker, I was saying, the volunteers in our community: What would our communities be if we did not have the volunteers? In the City of Mount Pearl we have a long tradition of recognizing our volunteers. When I occupied the Chair of Mayor, and my successor, we tried our best to make sure that the volunteers in the community were recognized in a variety of ways and so, we organized such things as citizen-of-the-year functions.

Mr. Speaker, every year in Mount Pearl we have people who go out and find those in the community who have performed services that are outstanding. What I like about that kind of function is, very often it is not the political person, it is not the person who is out there on the frontline, but it is often that person, that lady or that gentleman, who spends hours and hours and hours going throughout the community, probably campaigning for the Heart Fund or doing something that makes the community tick.

Mr. Speaker, I can assure you that many people in Mount Pearl today are pleased that somebody cared enough to nominated them for recognition in their own community. I can tell you that when you are nominated and you find yourself receiving a plaque, even if you are not named as the citizen of the year, just to be nominated in itself is a very distinct honour.

So, Mr. Speaker, I say to the government, it is about time that Newfoundland and Labrador come up with the rest of Canada, that we bring in this kind of award and recognize the unsung heroes of our community who are not paid.

I do have a couple of things that I want to note. I wanted to note in section 6, for the minister's attention, if he could direct his attention to section 6 - I just have one little problem with that section, and that is where it says, "Where a person who would be eligible to receive a medal under this Act has died since the recommendation for an award was made public, a medal may be awarded to a relative of the volunteer as prescribed by the regulations." I have a little difficulty with the words `may be awarded'. That indicates that the medal may indeed be received by a person who did not perform the service. I have no difficulty with posthumous awards. In many cases we should look at being able to have awards given posthumously, but that is not what it says. It says that, "... a medal may be awarded to a relative." It may be received by the relative, I say to the minister, but the award should be distinctive to the person to whom the honour is given. I do have a little difficulty with that.

I will be proposing, at Committee stage, an amendment there to make clear that the medal is not to be awarded to somebody other than the person who is being honoured, or in the case of where a person has died, that it is awarded in that person's name posthumously. I would ask him if he would make note of that, and maybe that could be cleared up so that there would be clear language in clause no. 6.

AN HON. MEMBER: Repeat that again. I haven't got it all.

MR. H. HODDER: I do not have it here, but I can certainly consult with the minister on a more adequate sentence, because the language that is here does not lend itself to good legislation and it can be misinterpreted. So I would say to the minister, maybe at Committee stage we might be able to come forward with a change of wording there to more clearly say what is intended. I know what the minister intends, but it does not quite say that here.

Now, Mr. Speaker, my colleague, the Member for Conception Bay South, made note of the work that is done with the sports community in the Province. We would like to see some way in which we could, in this Province, have somewhere where we could go, one of the archives, and see little write-ups on the people who have been awarded the Newfoundland and Labrador Volunteer Service Medal. For example, if we are going to recognize some person, say in Carbonear, it might be interesting to all Newfoundlanders and Labradorians to have a little write-up on that person so we could share that person's contribution to his or her community, and to the Province, have it written down so that everybody could know why that person has been honoured. That kind of literature should be made available and maybe, for example, shared on the internet, on the government's internet page.

We might be able to have a category there for the Newfoundland and Labrador Volunteer Service Medals, and anybody who wanted to find out why a person in Happy Valley - Goose Bay or Marystown or Carbonear had received an award, there would be a little write-up on that person to indicate that this is why it happened. Or the minister might want to consider something like they do in the Sports Hall of Fame. There can be somewhere where we can have these things preserved.

One of the things that we do not want to have happen with this medal is that it be given out to people who, shall we say, have not made substantial contributions. Those who have made substantial contributions, we want to see that they are properly recognized, not only in their own communities but throughout the entire Province. Maybe the minister could consider some ways in which that might be facilitated, because these people and their contributions are the property not just of themselves but the property of all Newfoundlanders and Labradorians.

I think it would be incumbent upon the minister, if he could, to have some way of preserving the contributions, so that when someone is recognized, we can follow it up and then have it appropriately shared with all Newfoundlanders and Labradorians. I will just make one suggestion of maybe having an internet page which might simply be called, `Newfoundland and Labrador Medals', that kind of thing, so then we could have little write-ups on people. You might be very impressed, Mr. Minister, as to how many people would find that very interesting. For those people who are recipients, they themselves would feel a great deal of honour to be recognized in a public manner, not just on one particular day but have their contribution preserved for all posterity.

Mr. Speaker, I thank you for the opportunity to speak and I certainly support the initiative put forward by the hon. the Premier on behalf of the government.

MR. SPEAKER: The hon. the Member for Bonavista South.

MR. FITZGERALD: Thank you, Mr. Speaker.

AN HON. MEMBER: (Inaudible).

MR. FITZGERALD: No, I will get you some after. I need a favour done from you too.

Thank you, Mr. Speaker.

I rise tonight to speak on Bill No. 29, "An Act Respecting The Newfoundland And Labrador Volunteer Service Medal," and I compliment the minister for bringing this bill forward. It is the Premier's bill but the minister introduced it. The minister has done a very good job in this session of the House.

AN HON. MEMBER: Who?

MR. FITZGERALD: The Minister of Municipal and Provincial Affairs has done a very good job. He has brought forward many, many good pieces of legislation. It almost seems like he is house cleaning. He is getting ready to go somewhere, Mr. Speaker, taking care of business. Working overtime, Mr. Speaker, that is exactly what he is doing. I don't know where he is going or who is going to decide where he goes or anything like that, but he is doing a good job with those pieces of legislation that are being brought before this House.

MR. E. BYRNE: (Inaudible) St. John's, Mount Pearl area.

MR. FITZGERALD: Yes, that's a big one. That is a very contentious one, I say to the Member for Kilbride. He is probably not willing to bring that forward because he doesn't want to bring anything forward that would make him any lesser in the eyes of many people who sit in the front benches here. I can understand that; and for obvious reasons, I suppose.

This piece of legislation that is in the Premier's name, Mr. Speaker, is an excellent piece of legislation. There is nobody, I suppose, who knows better than some of us who sit in this House the value of volunteers on this Island and in Labrador today. Far too often our volunteers are criticized, overlooked and taken for granted by the very people who should reach out and tap them on the shoulder and say thank you. Many people don't get involved in doing volunteer work for pats on the back, for thank you letters or letters of recognition but it sure feels good when you are a volunteer, you do something and somebody comes up and just touches you on the shoulder and says thank you. Much as you are not doing it for those two simple words, it certainly feels good, Mr. Speaker.

When we look at these services that volunteers are providing in our fire departments, in our town councils, our Lions Clubs, our Kinsmen Clubs and every other organization right across this Province today, when you look at the services, Mr. Speaker, that those men and women are performing and you consider what it would cost if we had to pay somebody to do even parts of it, it would certainly be a burden on this government. Well, it wouldn't be a burden on the government because there is no way it could afford to pay for such services.

When we think of town councils, Mr. Speaker, not all councils out there today pay their town council members. Not all firemen out there today even get a simple stipend at the end of the year, or a turkey for Christmas, because most municipalities can't afford to bring forward such small gifts, if you would. This is a situation whereby somebody in their wisdom decided they were going to introduce a volunteer service medal. Somebody, Mr. Speaker, decided it was high time that we recognize the services of some of those volunteers, and we provide them with something they can wear to distinguish them, and show they are good community minded people out performing a service that was badly needed in the community.

I compliment the minister for doing that, and it is something that should be done. The minister didn't say if there was a limit as to how many medals were going to be struck, or if there was a limit as to how many medals would be allowed to be distributed, or awarded I guess is the word, each year. That isn't stated. I would imagine that people will submit. There will be a suitable application and there will be an address, and some community leaders or some community organization will probably have to nominate and put forward the reasons as to why that particular person is to be nominated and why they think he should be entitled to receive this honourary award. Mr. Speaker, that is the way it should be done.

We should be very careful in doing some kinds of those things. I was a volunteer firemen for eleven years in my community, and we started out -

AN HON. MEMBER: Are you looking for a medal?

MR. FITZGERALD: No, I'm not looking for a medal. In fact, I was a volunteer all my adult life. This is the only job I've had where I've been doing something to help people and getting paid for it; it is the only job. Up until now I've been a volunteer in my community and in my area for all of my adult life. In fact, I was recognized as the citizen of the year in the area where I lived back in, I think, 1984. I was very proud of that, to be recognized for the things that I enjoy doing, because I did enjoy doing those types of things, and the recognition certainly felt good when somebody came out and bestowed the honour of citizen of the year upon me, Mr. Speaker.

Going back to my fire department days, I say to members who are gathered, we used to select a fireman of the year. Every year somebody would be selected as fireman of the year. You could only pick one. Sometimes there would be seven or eight or nine or ten people, but you could only pick one, and I always had a real problem with that. I always had a real problem with picking somebody out and saying: You are the best. Because to me it seemed like you were belittling or you weren't showing the proper recognition for somebody else who was doing as much as they could, but because of certain circumstances somebody did a little bit more or shone a little bit brighter than somebody else. I had a real problem with that, but I know that isn't the intent here, because we can recognize as many people as we can. We are talking about a much bigger group rather than a close-knit organization where you only pick one person out and nobody else gets recognized. I know that isn't the intent.

Mr. Speaker, it is certainly a good piece of legislation, and it is certainly time that we stood in our place and recognized volunteers for the things that they do, because it hasn't been done before. It has never been done before, Mr. Speaker, other than, as I said, in small groups. When you look at the things that have been acquired - and the Minister of Municipal and Provincial Affairs probably knows more about this than anybody else here in the House, being the Minister of Municipal and Provincial Affairs. When he sees the number of town council offices, the number of fire departments, the number of fire trucks and the amount of equipment, the Lions Clubs, the Kinsmen clubs and the Knights of Columbus clubs that have been built by people coming to his office and his department looking for funding for this and funding for something else - they all come with one thing in mind. They all come for the betterment of their community and to provide a service.

The minister knows full well, when we talk about volunteers, what it means. I think it isn't only in rural Newfoundland. You see volunteers in St. John's or in Kilbride. Wherever you go you see troops of volunteers working and doing good jobs. The Minister of Health should certainly be aware of them as well. In fact, it was only last Thursday night that I left here after question period and drove down to Bonavista to attend a seniors' function there. The Lions Club in Bonavista every year provides a supper for the seniors in the area there. I would suggest there were probably 300 people. There were volunteers that bought the supper and prepared the supper. They went out and asked for donations in order to get the vegetables and the roast beef and all that kind of thing.

That particular night, in addition, Mr. Speaker, to providing a supper for the seniors in the area, there was one lady recognized there by the Lions Club as being the volunteer of the year. It was a young lady who was in Level III this year, and she was recognized for all the time and effort that she is spending at the Golden Heights Manor, in serving meals, in feeding the residents there, in playing games with them and this kind of thing. That to me is not unbelievable, because it happens, but it is certainly exceptional when you see a young lady in Level III, grade XII, going out and donating so much of her time.

AN HON. MEMBER: Where was this, Roger?

MR. FITZGERALD: Down in Bonavista on Thursday night, a Level III student. That is what she was recognized for. Lots of times people get involved in organizations and that because it brings some benefit to them as well as providing a volunteer service. But this one lady, and her name was Susan Russel, she had put in in excess of 700 hours this year doing volunteer work. When you consider somebody who goes to work every day, forty hours a week, a normal working year is probably 2,000 hours. This young lady, in addition to her studies, in addition to going to school and taking part in all the school programs, had spent 700 hours at the Golden Heights Manor doing volunteer work. I doubt very much if the Minister of Health ever sent her a letter of congratulations. I doubt it very much. At least the Minister of Municipal and Provincial Affairs is saying now we are going to recognize some of those people.

I say to the Minister of Health, that down in Bonavista on Thursday night - I travelled down to attend a seniors' function. The Lions Club down in Bonavista provided its annual supper to the seniors there whereby they gathered them all - there were quite a few there from the Golden Heights Manor, and from the Alzheimer's unit from the hospital. This one young lady, Susan Russel, was recognized by the Lions Club there. She is a Level III student at Discovery Collegiate. She was recognized and provided with a little certificate for volunteer services of over 700 hours at the Golden Heights Manor.

AN HON. MEMBER: From Bonavista?

MR. FITZGERALD: She is from Bonavista. Over 700 hours, minister, at the Golden Heights Manor. That is in addition to going to school. That is almost one-half the normal working time that you and I would work by getting up every morning and going to work at a regular job, and working from eight to five every day. That is certainly commendable, to see a young person spend that kind of time with seniors in the community.

AN HON. MEMBER: Susan Russel?

MR. FITZGERALD: Her name is Susan Russel and she is from Bonavista. It is only today, in fact, that I wrote her a little note, but it would be nice if the Minister of Health could recognize her as well, because that is what it takes. We may not be able to go out and pin medals on everyone who does those kinds of things, but the least we can do is recognize their activity in the communities and say thank you. Mr. Speaker, without those people I can assure you that many of the seniors in places like the Golden Heights Manor or The Greenwood Rest Home or the Seaside Lodge or Shirley's Haven, without them, I am afraid they would have to wait a lot longer sometimes for their meals. They would not have the luxury of being able to go and play bingo games and take part in other games, and have outings, Mr. Speaker.

Lots of times they have a bus there in Bonavista and the patients can board the bus and travel up and down the area visiting communities, and it is all done by volunteers, for the most part, coming in and donating their time. We see them here in the hospitals here in St. John's; we see the candy stripers. It goes all the way down the line, or up the line if you would, to counsellors, fire-department members and other service clubs right across this Province. That is what makes a community, Mr. Speaker. It is not the paved roads or the government wharf or the slipway, Mr. Speaker, it is community-minded volunteers who take some pride in where they live, who see a need for a service and come out and offer themselves and provide it. That is what makes the community tick, that is why we are proud to be Newfoundlanders, and that is why, when you talk to people who have to leave this Province to find a job, they leave with a knot in their hearts because they want to come back again and enjoy living in the communities of Newfoundland and Labrador, for this kind of service that is performed by volunteers in our committees.

I compliment the minister for bringing forward this piece of legislation. The Premier's name is on it but I know that the minister fully supports it, as he brought it forward. As I said, minister, when those awards are put forward, lets not say we are only going to strike two this year, let us do it and recognize the people who deserve those awards and be proud to recognize them.

Mr. Speaker, I understand there are other people here who want to speak on this particular bill. I say once again, thank you for such a bill. It is about time that we start recognizing those people. Being a volunteer myself, I know what it would have meant to me if somebody had written me a letter, the minister, or if I had gotten something that I could put here and say: This is in recognition of some of the things I have done.

The Member for Marystown, I am aware of the things with which she has been involved and the many hours of work she has put into her community, from knowing other people down there and hearing from her. I am sure she wouldn't mind standing in her place and speaking for a bill such as this. Mr. Speaker, it is something that should be done and once again, it is time that we recognize those people who are helping our communities and allowing us to live and survive here in Newfoundland.

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker, I move that this House do not adjourn at ten o'clock.

MR. SPEAKER: It is moved and seconded that the House do not adjourn at ten o'clock.

All those in favour, `aye'.

SOME HON. MEMBERS: Aye.

MR. SPEAKER: Against, `Nay'.

Carried.

The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

I would like to rise to make a few comments on this bill. In the Throne Speech, back last winter I guess, I made a few brief comments at the time and the Premier made reference to it also. My colleague for Bonavista South certainly did, I guess, a tremendous job of indicating why and how important it is to have such a volunteer service medal.

My colleague for Waterford Valley did make reference to it, and I'm sure the minister will probably take a look at this in the wording, I think, so I won't beat that point to death there. It states in an earlier section, just to put it in -

MR. TULK: As a matter of fact, Mr. Speaker, just -

MR. SPEAKER: Order, please!

The hon. the Government House Leader.

MR. TULK: I will stand up on a point of order, Mr. Speaker.

MR. SPEAKER: The hon. the Minister of Forest Resources and Agrifoods, on a point of order.

MR. TULK: Just to tell the hon. gentleman, I've just asked the Minister of Municipal and Provincial Affairs if he would get together with the Member for Waterford Valley and see if they can work out something before we move into Committee.

MR. SPEAKER: The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

Certainly I won't comment further there, other than to say that in the context - and I'm sure the Member for Waterford Valley has duly noted. In section 3, it says the government shall award a medal to each person who meets certain qualifications. Then it mentions in another section it can award it to a relative of a person who has met the qualifications. For consistency, I'm sure that an appropriate amendment will me made.

Mr. Speaker, there are many people out in our communities today who are certainly worthy of honour and recognition. I think it is important in this bill that it be reserved for people who exemplify a high level of service, not just meeting, of course, the minimum requirements here, which are: a long-standing resident of the Province, a Canadian citizen, and who has contributed a minimum of ten years above and beyond the call of duty. Every community out there has these people. I'm sure many of my colleagues here in the House are people who have been involved very heavily in community service, in many organizations, giving of their time. People who generally run for political office are people who have been fairly prominent in their community. I know members on both sides of this House have been distinguished in many ways in the community.

I know some of my colleagues, and I'm sure on both sides - I know my colleague from Conception Bay South was citizen of the year, and I'm sure there are other people. I had the opportunity to be the recipient of a Canadian volunteer award, and I know what an honour it was to receive the Canada volunteer award for service in the health care field, bestowed by the federal Department of Health.

It is important, I think, that people who have long-standing service in the community - and in my capacity in the past as being president of a Canadian service organization I had an opportunity to present many particular plaques to people recognizing their long distinguished career, some of those requiring a minimum of ten years of service.

Especially today in times of government cutbacks, it has been said that the volunteer sector is what enables people to be able to get the level of service they can. For many years people expected governments to provide them any service, but today it is more important than ever before to have a strong volunteer sector out in the community. As the motto suggests, Non sibi sed omnibus, or Not for yourself but for others, is an important part in being unselfish, doing it not for your own gain but in the service of others.

We know many people out there today get involved in volunteer organizations because a family member needed that service or because they have kids involved in organizations. But many other people, because of their nature and their community spirit, because they want to see their communities as a better place to live, get involved in such basic volunteer service work, whether it be the hospitals or to visit the seniors homes. It is a typical visit.

I know many individuals make regular visits to the seniors' homes. Many people without families or whose families live far away, they need someone to come in and assist, even for companionship, and an opportunity to provide service there where it is not possible to have a staff that can man those levels and so on with sufficient numbers of people to be able to provide an optimum level of service. Many people just have the opportunity to function with an adequate level of service. So that is very important.

The committee, which is going to be composed of seven members, certainly is well represented here by people who have an understanding. By having a Chairperson who is there for a maximum of three years, up to that limit, it allows a person to be able to set a certain standard of excellence in receiving a medal, that it is not going to be passed out without having the greatest amount of concern and the greatest amount of discretion in the presentation of such a medal. It is not something that we want to become commonplace. We want it to be reserved for those who have a distinguished service, not just those who meet the requirements of a minimum of ten years. It says: ... in an area, who have given service to his or her community beyond his or her normal duties or responsibilities. That can be interpreted to be very general. It can apply probably to 90 per cent of volunteers almost. There has to be a method in which a committee sets its own criteria and standards, within the confines of this legislation, to ensure that people who are recipients of this are people that are very deserving.

Mr. Speaker, I know the Minister of Education is quite entertained there and I think is starting to feel the effects of the hour. It is not my intention to bore him to death.

With that, I will make just a few closing comments. Mr. Speaker, I trust that the appropriate regulations and standards will follow, to ensure that the responsibilities are not lightly discharged, and will duly recognize people who don't normally get recognized within their specific group. Because there are many people out there who are recognized by their own organizations on an ongoing basis. Sometimes many people out there, giving volunteer service, do not have an opportunity to be recognized by any particular organization. I know of people who have received life memberships within various associations and numerous service organizations, but there are many people out there, as my colleague from Bonavista South mentioned, who give a considerable amount of time and there is no one there to recognize them with such a medal.

A Newfoundland and Labrador Volunteer Service Medal is one that can be used especially for those who are out working, as it says, in the motto, `Not for yourself but in the service of others.'

With that, Mr. Speaker, I conclude my remarks on this reading of the bill.

MR. SPEAKER: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Speaker.

Mr. Speaker, it is a pleasure to speak on Bill 29, "An Act Respecting The Newfoundland And Labrador Volunteer Service Medal."

MR. MATTHEWS: It is no pleasure (inaudible).

MR. J. BYRNE: Well, I am thoroughly pleased, if it is no pleasure for the Minister of Health to listen to me. I will say that to you.

MR. MATTHEWS: I'll suffer through it.

MR. J. BYRNE: Well, suffer through it. Don't get too sick, I say to the Minister of Health, don't get too sick. You might have problems getting a bit of health care in the Province. You may get into a bit of trouble trying to get a bit of health care, I say to the Minister of Health.

Mr. Speaker, this bill is a good bill. It is a bill that is going to show appreciation to the people in the Province, the volunteers in the Province of Newfoundland and Labrador. I have stood in this place many times, Mr. Speaker, and spoken of volunteers in this Province, the volunteers that make the world go round, that make this Province spin. I expect that this medal, this award, will be a very prestigious award. It should be a prestigious award. I expect there are going to be people seeking this medal and hoping to get it. It will mean something.

The medal itself will be given to people who have been chosen by a selection committee, which is a very good move, I would say to the minister who is putting this bill forward on behalf of the Premier. It is going to go to a volunteer who has served at least ten years, I suppose, above and beyond the call of duty with respect to his own job, and dealing with volunteers within the Province.

Mr. Speaker, some of the people, I suppose, who would be considered for this award would be the people who served on town councils for over ten years, and there are many of them out there. There are many, many people out there who served on town councils for over ten years. There are people who served as fire chiefs in volunteer fire departments for many years.

AN HON. MEMBER: (Inaudible) keep speaking (inaudible).

MR. J. BYRNE: Well, speak on Jack.

Mr. Speaker, we have volunteers in the fire departments who have been there for over ten years, fifteen or twenty years. So I say to the Minister of Health -

MR. MATTHEWS: I had to come over and listen, Jack, because I love it.

MR. J. BYRNE: I am afraid to say, the Minister of Health said he loves me. I don't know what he means by that. I won't comment on that at all.

Mr. Speaker, there are a lot of volunteer organizations within the Province of Newfoundland and Labrador. There are sports organizations in which we have men and women, and young men and young women, serving on these volunteer sports organizations, such as the minor hockey associations all over the Province. With the minor hockey associations we have coaches who volunteer their time every year, for years and years and years. We have the Hockey Moms, an association that contributed for years to the well-being of the young people in the Province. We have the organizations themselves. We have the minor hockey organizations and the people on the executive, like the president, vice-president, secretary and treasurer, these people; people on the executive of the Northeast Minor Hockey Association in my district.

AN HON. MEMBER: What bill are you speaking on?

MR. J. BYRNE: Bill 29.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: For awhile.

We have other sports organizations, such as the softball organizations throughout the Province, that people serve on for years and years and years, and volunteer their time.

DR. GIBBONS: (Inaudible).

MR. J. BYRNE: It is not? It is not for that? The Minister of Education said it is for those individuals. We are talking about volunteers, now, who go on for years to serve the public of this Province.

We have the various Lions Clubs in the Province. For instance, in Pouch Cove there is a Lions Club, and actually a former president of that club, who is now the district governor, Clayton King, was serving for fourteen years in the Lions Club. In actual fact, he is a former Mayor of Pouch Cove also.

AN HON. MEMBER: Served in every position.

MR. J. BYRNE: Served in every position, too.

AN HON. MEMBER: On the local executive.

MR. J. BYRNE: On the local executive of the Lions Club. He had the Lionesses in Pouch Cove. Also, we have the Kinsmen Clubs in the Province, all over the Province, in a great number of communities. We have a Kinsmen Club in Torbay that just a few years ago was very active and got together and built a senior citizen's complex in Torbay, and there are a number of seniors at that complex at this very moment. That was a great, great success on behalf of the Kinsmen. We have all the volunteers who deal with the Scouts, the Cubs, the Beavers, and those organizations. As I said before, this is a medal that is going to be well appreciated and much sought after, I expect.

Many of these volunteers over the years used their own money and paid their own expenses. Often times they try to operate on fund raising, which most of the volunteer clubs do, of course, but they often times put their own money into these organizations, especially with respect to travel. They put untold hours, days, nights, weeks, months and years into their chosen volunteer organization, and it means a lot to them. I'm sure this bill and the Volunteer Service Medal are going to be well appreciated. It is nice to see that the Premier is a man of his word. I think this was mentioned in the Throne Speech last spring.

It is a good bill, I would say again, Mr. Speaker. What is going to be printed on the medal, Not for yourself but for others, is very good wording to go on the bill. I think the people who receive this will think it is good wording, that they will appreciate it. I know the individuals who will be honoured to be presented with this medal will hang it in a place of honour in their homes, and they will certainly promote this medal; not in the fact that they will be praising themselves, but in the fact that the Province has decided to put forth such a medal to honour the volunteers within the Province of Newfoundland and Labrador.

With that, Mr. Speaker, I am going to sit down and see if anyone else would like to say a few words.

MR. SPEAKER: The hon. the Member for Kilbride.

MR. E. BYRNE: Thank you, Mr. Speaker.

I will make a few brief remarks. I won't belabour the issue too much, probably five or six minutes. This is a piece of legislation that I think every member endorses and supports, because it recognizes achievement and it recognizes sacrifice by community people. The Member for Bonavista South, I believe, summed it all up when he talked about how communities, in rural Newfoundland in particular, were built on voluntarism.

Certainly in my district there are many individuals who have participated in the volunteer sector, who have contributed greatly and left some long-standing achievements. The Goulds Lions Club comes to mind; people who have been involved with that, Barb Howlett, Lioness, Eugene Howlett, who some members on the opposite side know very well, Ron Whitten, Derek Rideout, people who have left a lot with the community. For example, the volunteer fire department in the Goulds. All of its equipment, a vast majority of the equipment that is in it today, is there because of the Lions Club. It is there because of the money it raised, it is there because of the community spirit it demonstrated in building the community.

Recently, as the Minister of Municipal and Provincial Affairs would acknowledge and know, in terms of the arena that went into the Goulds, it was done in large part, or was able to be done largely due to the fact that the Lions Club wrote a $75,000 cheque right off the bat as a contribution to what it believes was a recognized and long-standing need in the community. It took out its checkbook and wrote a $75,000 cheque for that initiative.

In Kilbride, Mr. Speaker, people have been involved with Kinsmen, Lions Clubs, and in particular the recreation commission. People come to mind, like Ed Power who, for over the past twenty years, has been a member of the recreation commission, and has contributed greatly to the development of young people in the area in sporting activities, recreational activities, and many, many more.

I think it is a piece of legislation that we all can endorse and we all can support. I look forward to the speedy delivery of this piece of legislation and to the medals being received and put out by government.

Thank you.

MR. SPEAKER: If the hon. the Minister speaks now he will close the debate.

The hon. the Minister of Municipal and Provincial Affairs.

MR. A. REID: Mr. Speaker, I would like to thank the House for the comments they made.

I will make two final comments and say that I agree with the hon. Member for Waterford Valley, that the word `awarded' should be moved out of Section 6. I am hoping that he is going to come back in committee and make an amendment to that.

I will make a final comment and say to you that this medal is not intended to be struck for thousands of people in the Province. It is going to be a unique medal for only the people who the committee think truly deserve such a distinction. I hope that at the end of the day this does not become something that everybody expects to obtain, Mr. Speaker, like the federal medal that was struck some two years ago which has lost its value in a lot of cases to a lot of people because so many people, at the end of the day, ended up with the medal.

The other question would be, of course, the cost of producing a large number of medals like this. I hope when the Premier and the Executive Council, at the end of the day, appoint the committee that they do consider His Honour, the Lieutenant-Governor now ready to retire, Lieutenant-Governor Russell, because he was another one of the people who convinced the ex-Premier with going ahead with this bill.

With that, I move second reading, Mr. Speaker.

On motion, a bill, "An Act Respecting The Newfoundland And Labrador Volunteer Service Medal," read a second time, ordered referred to a Committee of the Whole House on tomorrow. (Bill No. 29)

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker, Bill No. 32, "An Act Respecting The Protection Of Heritage Animals."

Motion, second reading of a bill, "An Act Respecting The Protection Of Heritage Animals". (Bill No. 32)

MR. SPEAKER: The hon. the Minister of Forest Resources and Agrifoods.

MR. TULK: Mr. Speaker, I am not going to dwell too long on this. Again I am sorry that my -

AN HON. MEMBER: Learned colleague.

MR. TULK: No, he is not my learned colleague. The last fellow used to stand here and say that.

The member who introduced this bill is not here to participate in the debate and I have done it all now tonight. I got up and moved a bill put forward by the Tory Opposition in this House. I am now getting up and moving a bill that was really pushed by a group that is not even a party in this House, not even considered to be a parliamentary group. I can't mention the fact that he is not here, I can't do that; I am not allowed. I am not allowed to do that. Mr. Speaker, here I am moving a bill - now there is only one thing left in this world for me to do.

AN HON. MEMBER: (Inaudible).

MR. TULK: No, no. That is to move something for that so-called - I am not sure if she calls herself an Independent Liberal or what she calls herself - but that Independent who is sitting down there south of Jack. I am sorry, south of the Member for -

AN HON. MEMBER: Cartwright - L'Anse au-Clair.

MR. TULK: Yes, that's where she is from, Cartwright - L'Anse au-Clair.

Mr. Speaker, this bill, I think, has an interest group in this Province. I think it says something for all of us really, although some people will probably belittle the bill somewhat. I say to you that it has been moved because of the - the resolution, I think, had unanimous consent.

Mr. Speaker, this bill is designed to protect certain animals in the Province. If you read clause 3 of the bill it says, "The purpose of this Act is to provide the means for the recognition and protection of heritage animals within the province." In this particular case, Mr. Speaker, what is being proposed here is that we put in place this heritage act to protect animals such as, in this case, the Newfoundland pony.

I also want to say to the House, Mr. Speaker, that it is my intention to include as the first - if the hon. gentlemen opposite would like to hear this. It is not in the bill. I thought there would be some reference to it in the note but there is not. Besides declaring the Newfoundland pony a heritage animal, it is also the intention of the government, after speaking with the minister and the members for Labrador, to declare the Labrador Husky a heritage animal as well over the next little while.

Mr. Speaker, I can say to hon. members that there is a great deal of interest in this bill. As a matter of fact, I am breaking a little bit of a promise to a fellow from out in Gambo who wanted to drive in, I say to the Member for Terra Nova, to see this bill presented in the House. A Mr. Collins - what's his first name?

MR. LUSH: I don't know because there are several.

MR. TULK: There are several. There is a Mr. Collins out there who was going to drive in to see when this bill was read in the House for a second time. So when we get to committee I am going to have to call him and tell him. Maybe what I will do, when we get to third reading, is say: Come in now. I don't know if he is going to be able to come in on Sunday or not, but if he is able to come in on Sunday I think, Mr. Speaker, I will have to call him and say: Third reading of this bill should occur on Sunday and we would appreciate your coming in to see the bill passed into law.

Mr. Speaker, I am not going to dwell on this bill much longer. Everybody in this House knows what it is about.

AN HON. MEMBER: By leave.

MR. TULK: Oh, no, I do not need any leave. I have an hour, I say to the hon. gentleman. I know my rights here. I have an hour to go on with this bill but I think it is totally unnecessary. I think everybody in this House understands what we are trying to do here, and I want to just reiterate -

AN HON. MEMBER: (Inaudible).

MR. TULK: Well, you guys can do what you like. That is up to you.

I just want to reiterate, that this bill is intended to protect certain animals in the Province, and shortly there will be a paper go to Cabinet, once this bill is passed, to make the Newfoundland pony and the Labrador husky heritage animals.

Thank you, Mr. Speaker.

MR. SPEAKER: The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

I think it is important that I have a few comments.

MR. MATTHEWS: It is not important for us.

MR. SULLIVAN: No, but I wish the Minister of Health would pony up and we would get our health care system back on track. I do not want to get back to that tentacle approach again, I say to the minister, but there are times when he is head first into it and there are other times when he is arm's length. I cannot find out where the minister is going, backing in, sideways. He is in or he is out. He is in all directions. But I did want to have a few brief comments.

MR. H. HODDER: But there is a part of the pony that reminds you of the minister.

MR. SULLIVAN: Yes, there is so, no doubt about it. There is some resemblance between certain parts of the anatomy of the pony, I say, and somebody responsible for the preservation of the standards in this Province and the health of individuals. I would not dare make direct references other than those of great generalities. I have too much respect for the Minister of Health, as much as I like to taunt him, to make any particular accusations.

MR. H. HODDER: He would make a good tail twister.

MR. SULLIVAN: Yes, it is possible he would.

AN HON. MEMBER: Talking about the back end of the (inaudible).

MR. SULLIVAN: I made no reference - I did not use the word `back', I did not use the word `posterior', but I do say to the minister, it does say under the definition of animal, all non-human vertebrates, so we are not dealing with humans. We are dealing with the phylum Chordata, subphylum Vertebrata, but it excludes humans in that category, I say to the Minister of Health.

I did want to have a few comments and I will keep them brief. I do not want to beat this one to death, as much as people like me.

One of my constituents has several Newfoundland ponies, lives up in Burnt Cove.

AN HON. MEMBER: Name them.

MR. SULLIVAN: There was Donner and Blitzen and Comet - but seriously, if you -

MR. TULK: If you do what you are doing now, it will not do you any good. Don't get carried away. (Inaudible) to your constituents.

MR. SULLIVAN: I will not get carried away. I can say, my constituents know me a lot better than they know the Government House Leader.

I will extend this invitation. Last winter it was not possible because in Bowring Park there was no snow, but the year before in Bowring Parking, in the winter, one of my constituents had sleigh rides with the Newfoundland pony. In the summertime they had those carriage rides. They do weddings there, and they have the carriages and the sleigh in the winter. They have pony rides up in my district in Bay Bulls. They usually set up at the various fairs and folk festivals. He goes to any sports days or special events around and has little Newfoundland pony rides for the young kids especially, and even for the bigger kids, adults and so on. There is an opportunity for horseback riding. He has a whole group of Newfoundland ponies that he treasures, I can tell you, probably every bit as much as he values humans, even though we are dealing with non-human vertebrates in this instance. They are cared for, they are looked after, they are fed on a prescribed schedule. His kids are involved in the process, this man and his wife. In fact, he has gone to great lengths to preserve and contribute to certainly the preservation of the Newfoundland pony, and to use it as a good working pony there. He has established a long reputation.

I say to the minister, it is certainly admirable to see this. We aren't going to do like we did about three, four years ago when we spent two weeks in the House with no legislation and we had talked about, I think, the puffin when we brought in that bill.

AN HON. MEMBER: (Inaudible)?

MR. SULLIVAN: That is back about four years ago.

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: Yes. We had another Government House Leader who wasn't too good at getting business through the House. I must say I'm delighted in this session that we have an assistant to the Government House Leader, the Minister of Municipal and Provincial Affairs, who is tremendous at expediting the business of this House.

AN HON. MEMBER: I will tell you, he is (inaudible).

MR. SULLIVAN: Yes sirree. He made sure that the Government House Leader ponied up, I can tell you. He made sure he did his job, and he did a good job of doing that.

With that, I'm certainly supportive of the preservation of the Newfoundland pony. It has served a long particular use in this Province. In my district there are still several Newfoundland ponies. That is just one of the species identified here. This could be the designation of any heritage animal. I think the Government House Leader referred to the husky -

MR. TULK: The Labrador husky.

MR. SULLIVAN: The Labrador husky. He made reference also to -

MR. TULK: What I would like to do with that is consult with the minister. There is a great deal of talk about the Newfoundland pony, there is no doubt about that. What I want to do is, through the minister and the members for Labrador, consult with the people of Labrador, with the (inaudible) society up there (inaudible).

MR. SULLIVAN: Sure. Because it has played a very important role in life in Labrador, the Newfoundland pony, certainly, more so on the Island portion of this Province. They have had -

MR. TULK: The Newfoundland pony (inaudible).

MR. SULLIVAN: Yes, they have distinctive roles. It was a real workhorse there, pardon the pun. It, I must say, is one that Newfoundlanders are proud of. It is a very dependable animal and one that certainly has earned the right to ensure that it is preserved, and that people, for future generations, will be able to understand and treasure and have access to the history of this pony and the role it played in the development of this Province.

With that, Mr. Speaker, I conclude my remarks on this bill.

MR. SPEAKER: The hon. the Opposition House Leader.

MR. H. HODDER: Thank you, Mr. Speaker.

I too want to join with the Leader of the Opposition. I thank the Minister of Health for his encouragement. I'm delighted when he sidetracks me because I just add on to the minutes. I thought the Minister of Health was interested in getting us out of here tonight. But it is a case of where the Minister of Health is giving us all kinds of encouragement to -

SOME HON. MEMBERS: (Inaudible)!

MR. H. HODDER: I thank the Minister of Health for his encouragement, and the Minister of Education for his encouragement. With that encouragement I will probably be - I was going to be about a minute and a half, but I think now I will take three or five or maybe ten minutes. I've got thirty.

Mr. Speaker, I want to say to the Government House Leader, and it is relative to section 5 -

MR. TULK: Mr. Speaker, I want to just say to the hon. gentleman, on a point of order -

MR. SPEAKER: The hon. the Government House Leader, on a point of order.

MR. TULK: I took some advice one time from the brother of the Member for St. John's Centre. South? Centre?

AN HON. MEMBER: East.

MR. TULK: Whatever.

MR. SULLIVAN: Somewhere down there.

MR. TULK: Somewhere down there. He is a senator now. His advice to me one time, when I was over there as Opposition House Leader and I was trying to get a member over there to sit down - he was sat down next to me and it was late, about 3:00 a.m., you know what was on the go - he said to me: He has a right to speak, and he has a right to speak as long as he wants to speak. You know that, even though I am the Government House Leader. So speak on; three minutes, thirty minutes.

MR. SPEAKER: There is no point of order.

The hon. the Opposition House Leader.

MR. H. HODDER: What a point of order, Mr. Speaker, as the clock ticks, and now the Government House Leader has taken up two minutes. Now I am going to have to speak a little bit longer.

I want to say to the Government House Leader, though, that the Chair has ruled on the point of order.

Section 5.(1) states, "A person shall not, except with the consent of the minister or his or her designate, destroy, interfere with, or dispose of a heritage animal". I want to ask: Does this mean that different heritage animals will enjoy different levels of protection?

MR. TULK: (Inaudible).

MR. H. HODDER: It says here, "A person shall not, except with the consent of the minister or his or her designate, destroy, interfere with, or dispose of a heritage animal". I was wondering what we mean by, "...with the consent of the minister...". Certainly the minister would not be giving his consent to interfere with, to destroy, or to dispose of a heritage animal.

AN HON. MEMBER: (Inaudible).

MR. H. HODDER: If you say, "...except with the consent of the minister...", it might indicate that the minister may, at times, give consent to destroy, interfere with, or dispose of a heritage animal, and therefore different heritage animals might enjoy different levels of protection.

MR. TULK: Mr. Speaker, if I could just...

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: I will not take the hon. gentleman's time, if he needs the thirty minutes, but I just want to say to him that if a minister designated a heritage animal - the Newfoundland Pony Society, in the case of the Newfoundland pony, are the people who are going to see that this animal is protected. It is under their umbrella.

I think if you did anything out of the way with those people, once you had done that, you would be hard put to explain what you are doing. I would not want to be the minister to do it. I think I would be in an awful state politically. I think those people would hammer me politically for having done something with a heritage animal which ought not to be done.

So I suspect what would happen here is that the level of protection, or the level of non-interference that an animal would enjoy, would be protected by the society themselves as opposed to what the minister might or might not want to do.

MR. SPEAKER: The hon. the Opposition House Leader.

MR. H. HODDER: What I wanted to ask the minister was: Supposing, for example, we were to designate a particular animal, let's say the Pine Marten, as a heritage animal, and then we were to look at the Pine Marten's habitat, now that we have designated it as a heritage animal, does that mean that there are certain areas of the Province that we would then have to designate to protect that animal? I know it is under endangered species.

MR. TULK: (Inaudible) type of agreement with the society that you would set up before you did it.

MR. H. HODDER: Okay.

MR. TULK: As the minister, I don't think you can (inaudible) to Newfoundland.

MR. H. HODDER: I also wanted to look at the section that talks about the penalties. The penalties for non-compliance, or for interfering with a heritage animal, are quite steep.

MR. TULK: And so they should be.

MR. H. HODDER: And so they should be. There is no provision, though, for something that happens accidentally. Is there some way in which - I suppose, you have to show some wilfulness or some intent? I'm wondering if the provision for accidentally hurting or destroying a heritage animal is adequately provided for.

MR. TULK: Mr. Speaker, if you look at clause 9: "The minister may prescribe regulations (a) for the preservation, promotion and protection of heritage animals including (i) the terms and conditions under which a heritage animal may be disposed of or destroyed...." (Inaudible) an animal is killed by (inaudible).

MR. H. HODDER: Yes. So there is some leeway built in. Section 9 does permit that to be carried forward, I would agree, under regulations.

MR. TULK: (Inaudible).

MR. SPEAKER: Order, please!

I remind the hon. Opposition House Leader that we are in second reading of the bill which is approval in principle. The Committee of the Whole House is the place to get into specifics of the bill and the exchange across the House.

The hon. the Opposition House Leader.

MR. H. HODDER: Thank you, Mr. Speaker.

The end result of our discussion back and forth would mean we would facilitate matters more expeditiously when we come to Committee of the Whole House on the bill, if it is agreeable to the Government House Leader and to the Chair.

I just have one other concern. That is in, I believe, it is section 6(1)(a). You are talking here about designating "a society to act in the preservation of heritage animals." Reading through it there, that society shall define the characteristics of the class, of the breed, and also prescribe methods for establishing a breed book and all that kind of thing. I wanted to ask the minister: There isn't anything here, though, which says that the government would offer any funding to this heritage society. Without any funding provisions, these societies may be purely voluntary, and I'm wondering if that is the intent of the Ministry, to establish the society and then have it operate purely on a voluntary basis.

MR. TULK: Do you want an answer to that in closing debate?

MR. SPEAKER: If the hon. the Minister speaks now, he will close the debate.

MR. TULK: Close the debate?

AN HON. MEMBER: Do it now.

AN HON. MEMBER: By leave.

MR. SPEAKER: The hon. minister is closing the debate?

MR. TULK: Yes. I understand you want me to answer that question while I'm closing the debate.

AN HON. MEMBER: (Inaudible).

MR. TULK: Okay. Well, I will answer it by leave then, if you will.

Mr. Speaker, if you talk about the Newfoundland Pony Society, for example, that particular group of people, I've had a fair amount of discussion with them, and the truth of the matter is that at this point in time they don't want us. I don't know if I should say, don't want us, but they have never requested that we give funding to them. I would suspect that you would deal with each one on its own merits. I think the important first step is to get the legislation in place, and to see that indeed there is such an act that you can act under.

What we are doing here, what you always do I guess when you put those pieces of legislation in place, is you are opening up government - it doesn't matter about the party - to the, shall I say, upward pressure of people to do certain things about animals. This is a step forward, and I've no doubt that somewhere down the road some government, some minister, will have to deal with a society. I don't know what the society might be; it might be the `Partridge Forever Society,' if you declare that animal a heritage animal. Some society will come forward to a government and say: Look, in order for us to be able to protect this animal - for example, we are helping the Newfoundland Pony Society with community pastures. We have given them, I think, it is - don't hold me to this

- I think it is two that we have turned over to them to put the Newfoundland pony into. That is, I guess, a form of help. Even though it isn't financial dollars, it is a form of help.

I have no doubt that when other people come forward it will have to be worked out on an individual basis with each group of people. What you are doing here is opening up the government and saying: Alright, yes, we now have this heritage bill. Once a society is established, then you come and sit down and negotiate with us.

MR. SPEAKER: The hon. the Opposition House Leader.

MR. H. HODDER: Thank you, Mr. Speaker.

I just wanted to note one other final comment. In section 5 where it says: the minister may, by order, exempt a heritage animal from the application of subsection (1): Again we are talking about the phrase which says: Except with the consent of the minister or his or her designate. For example, section 5, reading clauses (1) and (3) together, does this mean that if you had, for example, a Newfoundland pony that was old and, you know, had obviously major health problems that you would have to apply to the minister to have the animal put down?

MR. TULK: No. What would happen, I would suspect, is that somebody would contact (inaudible).

MR. H. HODDER: Okay. So the provisions of the humane society would still apply and there would be no more bureaucracy than is necessary?

MR. TULK: (Inaudible). The minister would have tremendous pressure (inaudible).

MR. H. HODDER: Mr. Speaker, I thank the minister for the dialogue back and forth. I am not sure if any of my colleagues wish to have a few more comments. If not, then the minister will close the debate.

MR. SPEAKER: If the hon. minister speaks now, he closes the debate.

MR. TULK: I am not going to take any more time of the House. I will just move second reading of this bill.

On motion, a bill, "An Act Respecting The Protection Of Heritage Animals", read a second time, ordered referred to a Committee of the Whole House presently, by leave. (Bill No. 32).

MR. TULK: Mr. Speaker, I move that the House resolve itself into Committee of the Whole to consider certain bills starting with Bill No. 44, "An Act Respecting Judgement Enforcement."

On motion, that the House resolve itself into Committee of the Whole, to consider certain bills, Mr. Speaker left the Chair.

Committee of the Whole

CHAIR (Penney): Order, please!

The hon. the Government House Leader.

MR. TULK: Mr. Chairman, Order No. 16, Bill No. 44, Committee of the Whole on a bill, "An Act Respecting Judgement Enforcement", the Minister of Justice.

CHAIR: Bill No.44, "An Act Respecting Judgement Enforcement."

The hon. the Minister of Justice.

MR. DECKER: I would like to propose an amendment to this bill, Mr. Chairman, Bill No. 44.

AN HON. MEMBER: (Inaudible).

MR. DECKER: Yes. As a result of the Social Services Committee, this amendment was put forward and it is an amendment which I am quite pleased to agree to, Mr. Chairman.

The bill would be amended by renumbering clause 204 as clause 205, and by adding immediately after clause 203 the following: After the expiration of not more than three years after the coming into force of this act, the minister shall refer this act to a Committee for the purpose of undertaking a comprehensive review of the provisions and operation of this act. I so move.

CHAIR: The hon. the Member for St. John's East.

MR. OTTENHEIMER: Thank you, Mr. Chairman.

I wish to speak to this amendment and just indicate, as the minister correctly points out, this is the result of hearings before the Social Services Committee, where it was agreed to by all members of that committee that this amendment would be appropriate to deal effectively with the legislation known as Bill No. 44, the Judgement Enforcement Act.

Mr. Chairman, the reason why this amendment was put forward, and as indicated agreed to by all parties, was that, as can be seen by the legislation, Bill 44, it is comprehensive legislation. It, in fact, unifies and codifies execution law in this Province, and it is the result of many years of effort by what was originally referred to as the Law Reform Commission. The work was finalized presumably by various interest groups including officials from the Department of Justice.

Mr. Chairman, it was felt that where the rights of creditors and debtors are affected, to the extent that they are, in this legislation that really we had to have a mechanism in place whereby a review of the legislation, and the impact that the legislation had on both creditors and debtors, had to be established. It was felt by the committee, upon discussion of the various components of the bill, and having heard some representations as well, it was felt that the minister ought to be in a position, after a period of no greater than three years. that this committee be struck to review the impact and the consequences of the legislation.

The act, as I have indicated, is comprehensive. It contains some 200 clauses, and to deal effectively with it would be perhaps a very difficult task. Therefore, the review committee which will be set, and the review mechanism which is really the subject matter of this amendment, it was felt would be the most appropriate way to deal with the impact of this legislation.

MR. TULK: (Inaudible).

MR. OTTENHEIMER: Yes, and I might add, to the Government House Leader and also to the minister, that this was done with the recommendation as well of the High Sheriff who was present at the committee meetings.

MR. TULK: (Inaudible).

MR. OTTENHEIMER: That, too. The solicitors from the minister's department, who worked diligently in the preparation of this legislation, felt that this review component was appropriate.

I have no difficulty whatsoever in seconding the amendment as put forward by the hon. minister.

On motion, Causes 1 through to 203, carried.

On motion, amendment carried

On motion, Clause 204, as amended, carried.

On motion, Clause 205, carried.

Motion, that the Committee report having passed Bill No. 44, with amendment, carried.

CHAIR: The hon. the Government House Leader.

MR. TULK: Mr. Chairman, the next bill I want to call is Bill No. 26, "An Act To Amend The Labour Standards Act."

CHAIR: Do you want to wait for the minister?

MR. TULK: If you do not mind, Mr. Chairman, I have one minister here. I could move, with the permission of the House, to "An Act To Amend The Urban And Rural Planning Act."

CHAIR: Order, please!

If the hon. Government House Leader would be so kind as to cooperate with the Chair by calling the orders by order number?

MR. TULK: Order No. 19, Bill No. 35, "An Act To Amend The Urban And Rural Planning Act." I believe there is an amendment to that.

CHAIR: Bill No. 35, "An Act To Amend The Urban And Rural Planning Act."

The hon. the Minister of Municipal and Provincial Affairs.

MR. A. REID: Mr. Chairman, I move an amendment to clause 2 of the bill. The bill is amended by striking out the phrase "by the applicant" and by striking out the words "that applicant" and substituting the words "the appellant" in the proposed section 8.1(3). This amendment will ensure that the proposed subsection refers not to the applicant but to the appellant, and is consistent with section 8 of the Act to which the proposed subsection refers.

This was brought forward in second reading and the Clerk at the Table reviewed it, and our legal opinion is that this would follow along the lines of what was put forward by a member of the Opposition. We submit this amendment to Bill No. 35.

CHAIR: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Chairman.

I don't have any problem with that amendment being put forward by the minister but I have a couple of amendments that I would like to put forward myself, Mr. Chairman, with respect to Bill No. 35.

Mr. Chairman, the amendment that I would like to put forward is, that Bill No. 35, "An Act To Amend The Urban And Rural Planning Act", which is now before the House, be amended by deleting in clause 4, the figure "14" and substituting therefore the figure "21".

AN HON. MEMBER: I would like to have a copy.

MR. J. BYRNE: Sure. There are all kinds of copies.

The current act says: the town shall publish notice of a municipal plan hearing at least four weeks beforehand. It also says: the minister has to inform the town of the hearing date at least one month beforehand. This gives the town a week to get the notice in the paper. The bill reduces the four weeks to two weeks and it also reduces the one month to two weeks. That could lead to an impossible situation. If the minister gives the town the minimum notice of two weeks, the town is bound by law to have the notice published in the local paper on the same day. The Act itself says the notice to the town has to be sufficiently far in advance to allow the council a reasonable time to arrange the first publication of the notice required.

This amendment gives the town an extra week's minimum notice, since most (inaudible) weekly.

MR. H. HODDER: On a point of order, Mr. Chairman?

CHAIR: Order, please!

The hon. the Opposition House Leader, on a point of order.

MR. H. HODDER: I just wanted to ask: I understand that we do have the amendment by the hon. the minister now before the Table. We also have, I think, an amendment put forward by my colleague here. Are we going to handle all of the amendments right now, before the Table, and then go through them in sequence at the end, or shall we deal with them in the order which they are passed in? I wanted to address the question to my hon. colleague opposite?

CHAIR: We will call them in the order that they appear in the bill.

MR. TULK: (Inaudible).

MR. H. HODDER: Okay.

The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Chairman.

I certainly have no problem with that. Does the minister understand what I have been saying with respect to that amendment?

MR. A. REID: (Inaudible).

MR. J. BYRNE: Yes, sure. We are in Committee, yes.

CHAIR: The hon. the Minister of Municipal and Provincial Affairs.

MR. A. REID: Just to speak on the hon. member's comment, Mr. Chairman, not to close.

You municipal people, pay attention to what I am saying. The Federation of Municipalities, the administrators and the town councils have asked for the fourteen days. What happens in a local area where there is a local - right now we have to gazette this. This has to be gazetted under the old act. The changes here will allow a council in an area to publish it themselves in their local paper. We have done a survey around the Province and seven days is ample time. We could have gone to seven days - seven days is ample time to publish - but we moved it up to fourteen, which would give them two weeks. All the communities said: Two weeks are plenty for us. You have to remember that a lot of these will not be challenged and they will not be heard, so there is really no need.

The approval process will be speeded up by reducing from one month down to fourteen days the notice period required for the proposed public hearing. This is for public hearings, now, only for public hearings. The notice will now only have to appear in a local newspaper and not in *The Newfoundland Gazette* which, in itself, would reduce costs to communities, number one, and time because of the long lead period required to have a notice inserted in that publication. The long lead time to get it in the Gazette means it could mean as much as two or three months, the way the system operates now.

If the hearing does not have to proceed because no representations are being made, cancellation can be carried out by the staff in consultation with the municipality, so avoiding any ministerial approval on a routine matter.

What I say to the hon. member - and I can understand and appreciate where he is coming from with moving it to twenty-one - but if you do this, if you move this to twenty-one, you will be going against the wishes of rural municipalities, especially rural municipalities in the Province that have no problem. Anybody living in Baie Verte or Carbonear, or in rural Newfoundland, knows that all we need is a couple of days to give notice to the

newspaper and the next week then it is in the paper. So I plead with the hon. member to at least take my word for it tonight and he can check it himself. If he finds out that I am misleading the House, then come back and say that. But the municipalities and the Federation of Municipalities have recommended the fourteen days so we can speed it up.

I will just give the hon. member an example. We had a problem in Bay Roberts with the town council, who recommended against a permit. It took seven months to get a resolution on that particular problem, and I think that is much too long. All I am saying here, in this particular act, is to give the municipalities themselves the authority and the amount of time they need to do the work themselves rather than have me, as a minister, or my department, tangled up in it, in the bureaucracy, which means at the end of the day it is probably going to take six or seven months to do it.

I ask the member, just think about the fourteen days. Think about the local papers, and how easy it is to get things into the local papers, and I think you will agree then, at the end of the day, that what I am saying is probably the best course of action.

CHAIR: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Chairman.

The minister may be very well correct in what he is saying, but just for point of clarification for myself, if the minister only gives two weeks notice to the town, and the town is required to give two weeks notice, how can that be done?

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: For the notice of the public hearing?

MR. A. REID: I don't give notice to the towns now, the towns have to give notice themselves.

CHAIR: Order, please!

For the sake of Hansard, I would ask that the microphone be turned on in front of the minister.

The hon. the Minister of Municipal and Provincial Affairs.

MR. A. REID: I am not sure what the hon. member is referring to, whether I take a month to give notice. I do not give notice.

AN HON. MEMBER: Councils gives it.

MR. A. REID: Yes, councils gives notice themselves. If there is an appeal registered then it is up to the town council, in this particular act then, to make notices available to the local paper, okay? If there is a change to their plan then it is not a question of me giving notice to the town. The town, then, will have the responsibility themselves to make it known to the public, and they have fourteen days to do that, that there is going to be a change.

We are talking about planning here.

MR. J. BYRNE: Yes.

MR. A. REID: So why would I give a town a month's notice or need a month to give a town notice? If someone from a town comes into my office and says: We are proposing a change to our plan, and there is a motion of council to change the plan, then I will immediately - I won't, because I'm hoping it won't even come back to me - my department will immediately tell the town to advertize that there is a change to the town plan. Anyone

wishing to make a representation to the town plan can come to a hearing. They have fourteen days then to advertize that that hearing is going on. Okay?

MR. J. BYRNE: Fine.

CHAIR: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Chairman.

I take the minister at his word and assume that what he says is correct, and so be it. If the municipalities have no problem with it, I certainly don't have any problem with it. I just wanted to bring that point forth.

AN HON. MEMBER: Are you withdrawing the amendment?

MR. J. BYRNE: I withdraw the amendment.

Mr. Chairman, another amendment to Bill No. 35 is with respect to clause 9. I wish to move the following amendment: That clause 9 of Bill No. 35, "An Act To Amend The Urban And Rural Planning Act," which is now before the House, be amended by inserting in paragraph 124(4)(d) immediately after the word "notice" the words "but only if a condition defined in this act for the rejecting of purchase notice holds."

The bill says, in section 9(1)124.(3)(d), one of the options of a minister is to "reject the purchase notice." There are no qualifications on that phrase in that subsection. The minister's ability to reject a purchase notice must be limited by conditions set out in the act. This amendment says exactly that: The minister shall reject a purchase notice only for conditions spelled out in the act.

To me, it is that the minister just has too much discretion.

CHAIR: The hon. the Minister of Municipal and Provincial Affairs.

MR. A. REID: Mr. Chairman, I'm trying to be nice to this gentleman and I'm having difficulty in accepting - I don't know what he is talking about here. I haven't the foggiest idea.

SOME HON. MEMBERS: (Inaudible)!

CHAIR: Order, please! Order, please!

MR. A. REID: I apologize to the hon. member, but I just don't know what you are talking about. Maybe the Member for Waterford Valley can explain it to me.

CHAIR: The hon. the Member for Cape St. Francis.

MR. GRIMES: Explain it again. Never mind reading off the sheet, explain it to him.

MR. E. BYRNE: Listen to him.

MR. J. BYRNE: Take your time now.

Mr. Chairman, I said - did you get a copy of the amendment?

AN HON. MEMBER: Yes.

MR. J. BYRNE: Okay. It says here: Immediately after the word "notice" the words "but only if a condition defined in this act for rejecting the purchase notice holds."

What we are saying to the minister is that the bill says one of the options of the minister is to reject a purchase notice. There are no qualifications on that phrase in the subsection, and the minister's ability to reject a purchase notice must be limited by conditions set out in the act; not just the complete discretion of the minister.

MR. A. REID: Where are the conditions set out in the act?

MR. J. BYRNE: That is what we asking for, to put conditions in the act.

MR. A. REID: Yes, but I would have to set conditions then and put them in the act.

MR. J. BYRNE: Yes, you would have to.

MR. A. REID: I can't accept that, not tonight. If, Mr. Chairman, the hon. member wishes to change the act as such to accommodate his - he is asking me to change the total act to accommodate this particular section. What I suggest to the hon. member is let me work on this for him, and if we feel we need to change the act to accommodate this then I would propose that we will bring the act back in the spring and do it.

For the time being, I would have to provide the conditions in the act for this particular section to apply. I would have to list the conditions in the original act for this to apply.

CHAIR: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Basically what we are saying to the minister is that at this point in time the minister can reject a purchase notice for whatever reason he wants. There is nothing in the act to say that he has to follow these guidelines.

What we are saying to the minister is that if there is going to be this clause in the act, that they reject a purchase notice only for a condition that will be spelled out in the act. It is not there now. So the minister, if somebody comes forward for a purchase notice, if I want a purchase notice, can say no, and that is it. I want something in the act that is going to say: You are saying no for this reason.

CHAIR: The hon. the Minister of Municipal and Provincial Affairs.

MR. A. REID: Mr. Chairman, I think what the hon. member basically is trying to do is take away the authority, I suppose, under the act, that the minister has.

MR. J. BYRNE: No.

MR. A. REID: For the record, I will read the explanatory note that was provided to me.

The proposed amendments to this particular section, 124, are designed only to clarify the present wording of the section. It is only to clarify what is in the act right now.

What the hon. member is proposing is a change to the act, a complete change to the act. The major change to the act has nothing to do with clarifying at least what is in the act right now. So I am suggesting to the hon. member that if you feel strongly about this, please bring this to me, and the amendment to me, and I will deal with this, and if it is feasible we will change it in the next session. But I cannot stand here tonight and argue back and forth on this particular point and say at the end of the day that I am going to reject this. The municipalities have been waiting for this for years and, as far as I am concerned, this is probably one of the freest pieces of legislation that has come out of the Urban and Rural Planning Act since it was incorporated some thirty years ago. So I think I am being free.

I would suggest to the hon. member that he speak to me tomorrow and that I arrange a meeting with my staff, and I will provide him with the opportunity to change the act come next spring. Let's do that if we think it is worthwhile doing.

Other than that, I am not going to vote in favour of the amendment.

CHAIR: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Mr. Chairman, just to be clear on it, clause 9.(3)(d) of the bill says the minister may reject the purchase notice. It is right in this bill; he may reject the purchase notice, not for any given reasons. He may do it. So that is all this is addressing, not the act but this amendment to this bill itself. Can you see that, on page 6 (d)?

AN HON. MEMBER: I know what you are saying.

MR. J. BYRNE: So that can be amended; there is no problem here.

AN HON. MEMBER: (Inaudible).

CHAIR: Order, please!

Would the hon. the Government House Leader like to be recognized?

MR. TULK: No, I am sorry.

CHAIR: The hon. the Member for Cape St. Francis.

AN HON. MEMBER: I am trying to read (inaudible).

MR. J. BYRNE: And you need to read it, I would say.

To the minister, with respect to this, if the minister is prepared - and he has stated already that he would meet with myself and members of the department to address this concern for the winter session or next spring, I can let that go at this point in time.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: You will?

AN HON. MEMBER: Yes.

MR. J. BYRNE: You understand the point I am making, and you will address it?

CHAIR: The hon. the Minister of Municipal and Provincial Affairs.

MR. A. REID: I will certainly address it, Mr. Chairman. Through experience, I have found that without somebody at the end of the day having the authority to judge whether you should or you shouldn't - and there is nothing in the Urban and Rural Planning Act that gives anyone that authority other than the minister. On several occasions, since I have been minister, even though it has been recommended by commissioners to do things, I have rejected the commissioners' reports and gone contrary to the commissioners' reports for various reasons.

Now I will say quite honestly to the member: You cannot do that unless you have some backing from your staff, and somebody has to have authority to accept or reject the purchase notice, and in this particular case, it is the minister. Now if it is not going to be the minister, then somewhere in the Act it will have to identify someone who will have the authority.

AN HON. MEMBER: Designate somebody.

MR. A. REID: Yes, designate somebody to either reject or accept the purchase notice. So, if it is not the minister who is going to be?

MR. J. BYRNE: There have to be reasons. You just can't say no.

MR. A. REID: Why not?

AN HON. MEMBER: Based on what, Art?

MR. J. BYRNE: Based on what, what criteria?

MR. A. REID: Well, always based on recommendations from the urban and rural planning people in your department and in most cases from your town council, in most cases -

AN HON. MEMBER: (Inaudible).

MR. A. REID: Pardon me?

AN HON. MEMBER: (Inaudible).

CHAIR: Order, please! Order, please!

MR. E. BYRNE: Shouldn't it set out in a general way what those conditions or criteria would be?

MR. A. REID: It is pretty difficult when you are talking of purchase notices. Now, you are talking about purchasing a piece of property. Councils have a tendency sometimes to want to purchase pieces of property around this Province for no legitimate reason. I had one last year who wanted to purchase a piece of property because they wanted to dig a well in the middle of the piece of property, and I had no other choice, even though everybody recommended that I do it, I had no other choice but to turn it down because it did not make any sense.

Now, I could have taken that, I suppose, and asked the magistrate to decide on it, or a judge, but then the community that is doing this, it would cost them a fortune. So, at the end of the day, somebody is going to have to have the authority to make that decision. Let me go back and say, just to stop the argument on it, that I will address it and I will provide the opportunity for the hon. member to come with me and we will sit down with the urban and rural planning people, discuss it and get it ready for the spring.

CHAIR: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Mr. Chairman, the minister referred to the purchase notice of a municipality wanting to buy a piece of land to put a well on it. Isn't this also the reverse situation if there is a piece of land zoned -

MR. A. REID: Yes.

MR. J. BYRNE: - and the individual cannot utilize that land for the purposes he or she wants to utilize it? Then he goes to the municipality and requires those people to purchase it,and the minister can say no to it? That is the point I am trying to make, that you can then say no outright, without any reason. That is what I want addressed and if you are going to address that for me I withdraw it at this point in time.

CHAIR: Has the hon. member withdrawn his amendment?

MR. J. BYRNE: For now, yes, Mr. Chairman.

CHAIR: Shall clause 1 carry?

MR. J. BYRNE: I would like to say a few words, Mr. Chairman.

CHAIR: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Mr. Chairman, with respect to Bill No. 35, amendment to the Urban And Rural Planning Act, there are three basic problems. We addressed them somewhat previously but I want to say a few more words about this bill, Bill No. 35.

It gives the minister new power to impose fees for appeals, Mr. Chairman. Now, that is not something that was there before, that if an individual wants to appeal a decision of a municipality or what have you, that a fee could be set out to that individual. Now, Mr. Chairman, what would that appeal be, and how much would the appeal be, Mr. Chairman? Is there a maximum and a minimum?

MR. A. REID: (Inaudible).

MR. J. BYRNE: Is that in the bill, I say to the minister?

MR. A. REID: No, it is in the regulations.

MR. J. BYRNE: That is in the regulations. So the $100, that is the maximum? I say to the minister, would that be the maximum?

MR. A. REID: That is the fee.

MR. J. BYRNE: That is the fee.

MR. A. REID: There is no maximum and no minimum. The proposed fee is $100 per appeal.

MR. J. BYRNE: Per appeal. I didn't see that in the bill anywhere when I -

MR. A. REID: No, it is in regulations, it isn't in the bill.

MR. J. BYRNE: In regulations. The Minister of Municipal and Provincial Affairs says it is $100 for an appeal. That isn't something I thought was there.

It also gives the minister power to set an even shorter period of notice for public hearings. You have already dealt with that, Mr. Chairman, so we are going to address that over the winter months and maybe bring it back in the spring sitting. It gives the minister new power to use his own discretion in deciding whether to purchase land, and that is the point that we were just on about.

There are a number of other concerns that I'm going to try and highlight here now, Mr. Chairman. The new act says that someone appealing a decision of an authorized administrator under this act must also now submit a fee. Who is the authorized administrator? I expect the authorized administrator is going to be the municipality, as one would expect, but not necessarily so. Also, the authorized council is also empowered to establish fees that may be charged to a person who makes an appeal. Mr. Minister, is that also set out in the regulations that it is just $100 for the municipality also?

MR. A. REID: Yes, it will include both the appellant and the municipality or vice versa.

MR. J. BYRNE: Mr. Chairman, clauses 3, 4, 5 and 6 of this bill reduce the time of notice for public hearings. We have also addressed that, so that should be okay in due course.

The minister may reject the purchase notice. Again, that is something I addressed earlier, so I'm not going to get into it.

I don't know if anybody else wants to speak to this bill, but I will tell you, I've said what I'm going to say on it at this point in time.

A bill, "An Act To Amend The Urban And Rural Planning Act." (Bill No. 35)

On motion, clause 1 carried.

CHAIR: Shall clause 2 carry?

There was an amendment to clause 2.

On motion, amendment carried.

On motion, clause 2 as amended, carried.

On motion, clauses 3 through 9, carried.

Motion, that the Committee report having passed the bill with amendment, carried.

CHAIR: The hon. the Government House Leader.

MR. TULK: Mr. Chairman, my absent friend has returned. Bill No. 26, "An Act To Amend The Labour Standards Act."

CHAIR: Order No. 18, Bill No. 26, "An Act To Amend The Labour Standards Act."

The hon. the Minister of Environment and Labour.

MR. K. AYLWARD: Thank you, Mr. Chairman.

We introduced the bill a few days ago. The bill is a follow-up to the Labour Standards Act which made some recommendations the past year to the Department of Environment and Labour. Part of those recommendations included an increase to the minimum wage which we carried out earlier in the fall.

The two amendments we are talking about here would see a section added to increase paid vacation leave up to three weeks after fifteen years of service, recognizing seniority of workers in a workplace. Presently two weeks and 4 per cent entitlement is what a worker is entitled to. This would expand it to three weeks vacation, or six weeks vacation pay after fifteen years. So, it is an expansion of that benefit for workers.

Clause 4 would expand entitlement to bereavement leave to include –

CHAIR: Order, please!

There is an unacceptable level of noise in the chamber. The Chair is having some difficulty hearing what the minister is saying. I ask for cooperation from all members.

MR. K. AYLWARD: Clause 4 would expand entitlement to bereavement leave to include leave upon the death of a grandchild. Right now that clause does not include leave upon the death of a grandchild. This is an expansion of that definition of bereavement leave.

So those are two amendments to the Labour Standards Act we are proposing there today, and we are looking at some further recommendations to look forward to in the Spring session. Again, it is a follow-up to the increase in the minimum wage.

Thank you.

CHAIR: The hon. the Member for Kilbride.

MR. E. BYRNE: Mr. Chairman, as was noted in debate in second reading on Bill 26, we have no serious problems with this piece of legislation. It expands benefits to workers and expands the notion of bereavement to grandparents.

I move that we move this piece of legislation through committee.

A bill, "An Act To Amend The Labour Standards Act." (Bill No.26)

On motion, clauses 1 through 4, carried.

Motion, that the committee report having passed the bill without amendment, carried.

CHAIR: The hon. the Government House Leader.

MR. TULK: Mr. Chairman, the next order I gave to the Opposition House Leader today was Committee of the Whole on a bill, "An Act To Amend The Physiotherapy Act." (Bill No. 49). I think there was an amendment that was proposed to that by - who was it? It was the health critic. I think the minister is going to explain why it is not necessary to accept the amendment anyway.

CHAIR: Bill No. 49, "An Act To Amend The Physiotherapy Act."

The hon. the Minister of Health.

MR. MATTHEWS: Thank you, Mr. Chairman.

We discussed Bill 49 briefly when we went through second reading. This bill and the structure of the amendments that are put forward in this bill have been on the basis of extensive consultation with the physiotherapists in the Province, and it would be, in my judgement, inappropriate to amend it in any fashion without going back to them for appropriate consultations. I am not at all certain that the amendment would represent their points of view or represent a position they would want to have incorporated in it.

For that reason I would move, Mr. Chairman, that the bill be moved through committee without the amendment having been put, and if it has been put not be passed.

CHAIR: The hon. the Opposition House Leader.

MR. H. HODDER: Thank you, Mr. Speaker.

With regard to Bill No. 49, the Physiotherapy Act, there was some discussion, I say to the hon. minister, a few days ago when the bill was first introduced. It was indicated by the Government House Leader that there would be some consultation and we on this side agreed to withdraw the amendment and to have further consultation with the physiotherapy society. We have done that and we are now satisfied that the bill, as written, represents the view points of the physiotherapists and their society in the Province, and we recommend that the bill be passed in Committee as written, or the amendment to the bill be passed as written.

A bill, "An Act To Amend The Physiotherapy Act." (Bill No. 49)

On motion, clause 1, carried.

Motion, that the Committee report having passed the bill without amendment, carried.

MR. TULK: Mr. Chairman, Bill No. 50 - there is no need of getting the Minister of Finance and Treasury Board in here.

CHAIR: Bill No. 50, Order No. 25, "An Act To Amend The Liquor Control Act And The Liquor Corporation Act."

The hon. the Opposition House Leader.

MR. H. HODDER: Mr. Chairman, we on this side believe we can proceed with this. I do understand the Leader of the Opposition has a few comments he wishes to make, but I don't believe (inaudible).

AN HON. MEMBER: They said it would never be done! They said it would never be done!

CHAIR: Order, please! Order, please!

SOME HON. MEMBERS: (Inaudible)!

CHAIR: Order, please!

The hon. the Government House Leader.

MR. TULK: Mr. Chairman, I know it is a rare occasion when you see the Member for Port de Grave, the Minister of Fisheries and Aquaculture, on the other side of the House, but we are trying to do something here, so I would ask if you would call order. I'm trying to hear the hon. gentleman.

CHAIR: The hon. the Opposition House Leader.

MR. H. HODDER: Mr. Chairman, I agree that the Minister of Fisheries and Aquaculture is out of order more often than he is in order.

To the Government House Leader, we believe we can proceed with this act without the necessity of having the Minister of Finance and Treasury Board present in the Chamber.

CHAIR: Shall clause 1 carry?

The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Chairman.

I would like to preface it by saying, I can see that the Minister of Fisheries and Aquaculture is getting pretty comfortable on our side of the House. That started last Wednesday night. He got so comfortable last Wednesday, he enjoyed our company so much, he makes more than frequent visits to our side of the House. I have to say it again, we do have proof, we do have photographs.

MR. EFFORD: (Inaudible) watch your back.

MR. SULLIVAN: Don't worry, this is the last job he wants as leader. He had his chance in January, I say to him, and he didn't want it. Don't you worry!

SOME HON. MEMBERS: Hear, hear!

MR. SULLIVAN: I won't have to worry about my back from the Minister of Fisheries and Aquaculture, I can assure you. No sir! In fact, I don't have to worry about anybody. If anybody wants to sneak up behind me, come right ahead, I would say to the Government House Leader.

SOME HON. MEMBERS: (Inaudible).

MR. SULLIVAN: I might be gone in a week, but I'm not one who looks over my shoulder, I say to the minister. I only look back if I want to go that way, so I keep focusing, looking ahead, I would say to the Government House Leader.

I don't really feel comfortable with the Minister of Fisheries and Aquaculture here, I say, Mr. Chairman, but there are a couple of points I wanted to make on this bill. I made reference to it before, and I'm sure the Minister of Finance and Treasury Board is aware of these. There is concern over what happens under a privatized liquor

commission with the same particular act, the same responsibility now, people are going to have in the licensing, the inspection, grants, possession, sale, delivery of alcoholic beverages, which is under the control aspect; and the corporation act that has profiting, marketing, the business plans, the regulating their stores, and so on.

We have liquor sales, liquor marketing, and we have liquor controls, all under the one. The same people we have out going to regulate, to promote it and market it, are going to be asked to control it and to enforce it. Wouldn't that be basically - it says in the Explanatory Notes: "Clause 1 of this Bill would amend the definition of `board' in the Liquor Control Act to reflect the creation of a single board to administer both the Liquor Control Act and the Liquor Corporation Act." In other words, the same people now who are governed under two separate Acts. The corporation, as I mentioned, whose job is to promote and market the set business plan to ensure that we get certain profits, and considerable ones at that, I might add, well up in the tens of millions, $70-some million, I believe, back to this Province, and then, we are going to have the one board that is going to go out and put controls on it. What kinds of controls are we going to get? Are we going to have a lack of control? More profits? More promotion? Less enforcement? More sales? Is there a potential conflict in the responsibilities of putting this under the one? Is it a step forward to reaching privatization, basically, in this? And are the interests of the public going to be protected sufficiently under the specifics there, when we have all of these grouped under the one?

If not - if they are, is there going to be some agency of the Crown that is going to be able to have responsibility for the control aspect of this, that is going to be separate? Of course, government and the corporation, under the Act, has a responsibility to set out its plan, in fact, to earmark what profit it wants returned to the government, and set its prices in accordance with that, and its level of taxation - and then turn around to the same board? So there must be, if there is privatization of the liquor commission - which the minister is pursuing, and for which he is going to great lengths, I might add, sending people across the country, to Alberta - I understand they have a contingency in Alberta, finding out how they do things there.

Has the minister - and maybe he can get back to me, certainly, at another time - looked at that aspect of it, how that is done in Alberta, how those controls and marketing aspects are being regulated there? Is there going to be a free-for-all with unlimited controls on the sale and enforcement aspect? And the same people who are out enforcing it and trying to ensure that the rules are adhered to, and that consumption is within a specified period, are they out pushing it and marketing?

That is very similar to a piece of legislation I saw here in the House before - that the now Minister of Fisheries and Aquaculture brought in - the .05, which, while it promotes responsible driving, the police officer becomes a judge and a jury. That is one of the few pieces of legislation I am aware of - I do not know if there are any others - in which a single piece of legislation in this Province is without an appeal mechanism. When the police officer says, `You are at .05' you have no right of appeal. You are convicted on the spot. You pay your money, you lose your licence for twenty-four hours, and there is not a court in the land to which you can appeal to have this corrected. That is a very regressive piece of legislation. The .05 is not the point I would be debating. The point I would be debating is no mechanism to appeal and say: Look, at least there could be something wrong. It might not be calibrated properly. The machine might have been off, and you should not have been .05, and now there is not an appeal in the land, and that is wrong. That is basically wrong. It is an infringement on the rights of individuals to defence through appeal within the system.

AN HON. MEMBER: What about the Highway Traffic Act?

MR. SULLIVAN: Well, under the Highway Traffic Act, I say to the minister, you can go to court. You can go to a court on a ticket, and challenge that in court, and have your day in court, but on .05 you do not have your day in court. The police officer is the judge and the jury. I would like to know, and maybe the minister can point it out, what other legislation is there in that area under which we do not have the right at least to say: I want my day in court.

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: No, I am talking about the control of liquor now.

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: No, but it is on the topic and that is not -

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: No, it is not. I wandered off a little bit, I admit that, but when I talked about the control of liquor being under the same board as the marketing of liquor, that particular aspect does raise a concern for people.

Now, this legislation would not normally be in question. If privatization is the avenue taken, the legislation could be bad. If it is not, it may not, in itself, be harmful. But the potential is there for that, and when the government is pursuing it, enough to go to great lengths to send a delegation to other provinces to look at how they privatized their liquor corporations, it must be the intent of government to be looking in that direction, I say to the minister. Once again, I say, the Liquor Control Division is responsible for licensing. It does inspections of facilities to see that they adhere to the regulations: Are you operating at the proper hours? Do you have the proper facilities there for dispensing of alcoholic beverages in your facility, whether it may be in store, that has a beer license, whether -

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: Well, at least there is one person being entertained here. I cannot guarantee there is a second one, I say to the minister.

Now, maybe while the Premier is here, it may be an opportunity, I say to the minister - the Premier's party was so bad the other night, the Minister of Fisheries and Aquaculture came back to our party and had a tremendous time.

MR. EFFORD: Oh, I had a good time wherever.

MR. SULLIVAN: I can tell you, he livened up our party, and the Minister of Government Services and Lands and the Member for Torngat Mountains, I think, can attest to that. They saw him with their own eyes, I can tell you and -

MR. ANDERSEN: Can you remember?

MR. SULLIVAN: Oh yes, I sure can. I have a long memory, I say to the member. How good, I am not so sure, but a long memory. Even if I had a bad memory, I say to the Member for Torngat Mountains, I would remember the Minister of Fisheries and Aquaculture; and everybody else in the room would, even if they had a bad memory. And just in case our memory fail, we do have some photographs in case the need arises. Now, I do not intend to put them on public display, I say to the minister, but I intend every now and then to show them to the minister just to ensure he stays in check and he does -

MR. EFFORD: (Inaudible) show him how to have a good party!

PREMIER TOBIN: (Inaudible).

MR. SULLIVAN: Yes, he sure did, and Premier, he said to me in the House last week: `I had to come back. Your party was so dull I had to come back and liven it up.' `You sure did that!' I said to the minister. He really had a rousing party. Nobody went home very early. I know when I went at a quarter-to-one, I looked over my shoulder, one of the few times I do, I say to the minister - and that is because the minister was at the party - and he was still there. I am not sure if he locked up, I cannot say, but we -

MR. H. HODDER: No, no, but this year we did not have to change the locks like we did before.

MR. SULLIVAN: Back to Bill No. 50, I say to the minister. Sometimes I just stray off the topic and -

MR. WISEMAN: (Inaudible).

MR. H. HODDER: No, `the legal beagle' from Topsail -

MR. SULLIVAN: I do not think we should get into that legal aspect now - the beagle. Everybody needs a beagle, I suppose - not everybody needs a legal beagle, I say to the member.

AN HON. MEMBER: What member?

MR. SULLIVAN: I am glad you asked that, I say to the member. I have been asking the same question since the House started. And the people of Topsail were asking: What member?

Seriously, back to the bill and the point I want to reiterate because I think it is important. I want to reiterate: In the specific bill, how is the same board supposed to regulate - especially if it is a privatized liquor corporation - the inspection, the licensing, the standards you have for dispensing alcoholic beverages, the regulation of it in your stores - and the same board is going to come out and govern? Without government control, out in a privatized state, basically, there have to be some mechanisms. Then, the marketing aspect and the business plan, the promotion, the return back to government, how is that going to be done under the one board?

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: I am talking about clause 1 of the bill, which says: "Paragraph 2(d) of the Liquor Control Act...", and so on. I say to the minister, from the Explanatory Notes, `Clause 1 of this Bill would amend the definition of "board"....' The board will be defined in the Liquor Control Act to reflect the creation of a single board to administer both the Liquor Control Act and the Liquor Corporation Act. Now, we are going to have the same board. And he was asking which section I was referring to.

The point I am making is: Does the minister have a concern that in a privatized corporation, the board that would be responsible for marketing - I think the Minister of Government Services and Lands, with whom I have been speaking, he was asking the question there and has been following.

MR. TULK: (Inaudible).

MR. SULLIVAN: Yes, I know.

MR. TULK: Oh, he was asking you (inaudible)?

MR. SULLIVAN: Yes. Maybe he will discuss it with the Minister of Finance and Treasury Board. The same board responsible now to market the product, to push the sales of the product, to get it out in the public to try to increase sales as much as possible, get a return - that is the job of marketing a product - is the same board now that is going to put the clamps on operating hours, on licenses, inspections, and those specific areas. Is there a potential conflict in the operations there, and how does government intend to deal with those specific areas?

AN HON. MEMBER: (Inaudible) regulation (inaudible).

MR. SULLIVAN: Pardon?

AN HON. MEMBER: (Inaudible) by regulation (inaudible).

MR. SULLIVAN: Okay, then, you would deal with regulation, but regulations certainly follow from the enactment here. But still the regulations are being governed under one specific act or board as dealing with it in a private setting. What happens if it is privatized and out in the private domain, the public? How can government get its teeth and claws into regulation? Would it set up sort of a Crown agency then, I ask the minister, that is going to have a degree of control over that? Would they have an agency to deal with that?

These are just some of the potential concerns, not necessarily ones that would be evident under the current structure, but they are concerns where, when you move it away from government control, there are certain public interests that would need to be served. I think we need to ensure that is addressed. Maybe the minister has plans and mechanisms to deal with that, but I feel it sufficient to air those particular points here and to hopefully, during the course of the bill, have them addressed in some manner.

Thank you, Mr. Chairman.

On motion, clauses 1 through 12, carried.

Motion, that the Committee report having passed the bill without amendment, carried.

CHAIR: The hon. the Government House Leader.

MR. TULK: Bill No. 39, entitled, "An Act To Amend The Freedom Of Information Act And The Privacy Act".

CHAIR: The hon. the Member for St. John's East.

MR. OTTENHEIMER: Thank you, Mr. Chairman.

With respect to Bill No. 39, An Act To Amend The Freedom Of Information Act And The Privacy Act, I wish to propose amendments. I can give copies to the Clerk. I have two amendments here.

Mr. Chairman, I have provided copies to the hon. the minister and the Government House Leader. Basically, what these amendments do, is they set up a regime for both Acts, both the Privacy Act and the Freedom of Information Act. It obviously amends both section 1 which deals with the Freedom of Information Act and section 2 which deals with the Privacy Act. Both are worded almost identically, so I will not repeat the two, but I wish to review one in some detail by simply indicating as follows:

The Freedom of Information Act is amended by adding immediately after section 10 the following section:

Section 10.1(1) will now become: "The Minister of Justice shall appoint three members of the public who together shall constitute a committee, and

(a) this committee shall be the same as a committee convened under the Privacy Act to consider the release of information regarding the criminal history of an individual."

Subsection (b), Mr. Chairman: "This committee shall convene from time to time as directed by the minister."

Subsection (c): "A committee member shall be bound by an oath or affirmation not to reveal any action or negligence to any person or group, any part or the whole of the contents of the information that is the prescribed subject matter for the deliberations of the committee, except to provide a report referred to in subsection 3 to the minister."

Under subsection (d): "A committee member shall ensure any notes on the deliberations on a matter are destroyed in a secure manner forthwith upon the completion of those deliberations."

Subsection 2 in the amendment: Where,

(a) "a person referred to in section 4 requests in writing of the appropriate minister the release of information regarding the criminal history of an individual;" or (b) "the request referred to in (a):

(i) identifies to the exclusion of all others the individual regarding whom the information is being sought,

(ii) states the nature of the criminal activity regarding which the information is being sought, and

(iii) states the reason or reasons that, in the opinion of the person making the request, it is in the public interest to disclose to the public the information being requested;

(c) the criminal activity stated in the request is of a nature that, in the opinion of the minister, it is in the public interest to disclose, and disclosing such information is consistent with the intent of the Release of High Risk Offender Information Protocol."

I say to members opposite, Mr. Chairman, that is the basis of the amendment, that there is consistency with the High Risk Offender Information Protocol.

And (d) "the information is not currently at the disposal of the public after having been disclosed by the minister under subsection (5),

the minister shall obtain by secure means the requested criminal history and shall cause to be convened a meeting of the committee referred to in subsection (1) and shall provide to the committee by secure means copies of the request and the criminal history."

Subsection (3) states: "The committee, after being called together and provided with a request and a criminal history referred to in subsection 2 by the minister,

(a) shall meet in a secure place to review and discuss the contents of the request and the criminal history, the copies of which shall be secured at all times between deliberations and after the last deliberation returned to the minister;"

Subsection (b): shall be bound in the deliberations and decision by the terms and intent of the Release of High Risk Offender Information Protocol;"

And (c): "shall decide by majority vote whether it is reasonable to conclude, based on the criminal history, that the individual poses a danger to the public and whether to release to the public any or all of the criminal history of the individual is consistent with the release of High Risk Offender Information Protocol; and the decisions of the committee on these matters shall be binding on the actions of the minister in this regard;"

Under section (d) in the amendment: "shall, after having made a decision, provide forthwith by secure means to the minister

(i) the request and the criminal history provided by the minister to the committee, and

(ii) the details of the criminal history that shall be released to the public."

Under subsection 4: "Forthwith after receiving a decision of the committee on a matter and at least two days prior to the release of any information by a minister regarding the criminal history of an individual and forthwith after the minister receives the report of the decision of the committee on this matter, the minister shall inform or shall make every reasonable effort to inform that individual of the nature of the information regarding that individual that shall be released and the date on which the information shall be released."

Section 5: "The minister shall release all of and only that information that the committee provides to the minister for release, and shall distribute that information in a reasonable manner, and the information so released shall be considered public information."

Subsection 6: "A minister shall not release information under this Act regarding the criminal history of an individual except where the conditions of this section are satisfied and except where the release of this information is consistent with the terms and intent of the Release of High Risk Offender Information Protocol."

We see here, Mr. Chairman, an attempt in this legislation being consistent with the federal legislation which, of course, is the intent of this provincial legislation to begin with. But what is important here, under subsection (7): "Subsection 10(1) does not apply in respect of the release of information under section 10.1."

Section 8: "The Minister shall, subject to the approval of the Lieutenant-Governor in Council, fix the fees to be paid to the members of each board."

Subsection 9: "Where the terms of this Act are satisfied, no action lies against the minister or a member of the committee or the committee as a whole as a result of

(a) the provision by the minister to the committee of information,

(b) the deliberations of the committee,

(c) the decision of the committee,

(d) the report of the committee, or

(e) the disclosure of information regarding the criminal history of an individual that follows upon the release of information by the minister.

Mr. Chairman, that is subsection 1, and it deals specifically with an amendment to the Freedom of Information Act. Subsection 2 is the specific reference to the Privacy Act, and is essentially the same wording as what was read earlier with respect to the Freedom of Information Act.

The purpose of this amendment, Mr. Chairman, is to take all of the decision-making power, all of the authority, all of the discretion, from the minister. It sets up an independent committee which can deal with these features with respect to the release of names of individuals being consistent with and in accordance with the release of the High Risk Offender Information Protocol, the information which was released some while ago by the Minister of Justice.

I would ask that these amendments be given due consideration. I understand that my colleague, the Member for Waterford Valley, is going to speak to this amendment, as well.

Thank you, Mr. Chairman.

CHAIR: The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Chairman.

I just had some comments pertaining to this and my colleague just went thorough the Freedom Of Information Act amendment and also the amendment to the Privacy Act. They are parallel amendments and they have a great degree of merit, I say, Mr. Chairman, because they are taking decisions, basically, from the minister and putting them with three members of the public who form a committee. I think it is important that this three-member committee would be able to take a look at the release of this information regarding the criminal history of an individual. It is very important, Mr. Chairman, and a very serious matter as that information can be very confidential. Great discretion should be used in putting this out in the public forum. Of course, the minister would have the authority to convene this committee from time to time at the minister's discretion, to ensure that information can be duly looked at by an independent committee where they could then make a decision, rather than the minister being empowered to make such a decision.

The members of the committee in this responsible position, of course, would be bound by an oath or an affirmation not to reveal by action or negligence, any of the contents that that member has been privy to in reaching a decision. I think it is important to ensure that somebody other than the minister would have an opportunity to assess this information. It gives it sort of an independent aspect, still called at the convenience of the minister. In subsection 10.1(1) subsection (d), it says: the member "shall ensure any notes on the deliberations on a matter are destroyed in a secure manner forthwith upon the completion of those deliberations." Because, when decisions are made, it is important that this information that was privy to that committee should stay in the committee and should be destroyed forthwith when a decision is rendered.

If the committee should at such time again have to deal with other individuals, they would be disposed in similar manner to see that all steps are taken to ensure that the privacy of individuals is adhered to. It is important that all the information is requested - this is part of subsection 2 - whereas the person referred to in section 4, request in writing, the appropriate minister, the release of information regarding the history, the request referred to must identify to the exclusion of all others, the individual, regarding whom the information is being sought, the nature of the activity that is being sought, of course, in rendering its decision and the reason or reasons that, in the opinion of the person who makes that request, it is in the public interest to disclose information being requested. It is not every instance that is important, that information be disclosed to the public and confidential information - I think it is something that should be looked at in a committee because many decisions and particular aspects of government are referred to a committee.

In fact, there is a police complaints commission set up to look at specific complaints not just to be determined by the minister or by the Chief of Police or by other committees, but by somebody who is independent and can assess these. In this case, we do have in the police complaints commissioner, an independent person who could render that. This committee, which would function similarly, basically a three person committee, would be assembled when the need arises to deal with this specific request. It is not something that should be just left to the whim of a minister. We think it is very, very important and it should be carefully weighed with as much discussion and thought as possible in rendering a decision. It is consistent with the intent of the release, it says, of High Risk Offender Information Protocol, and this cannot be at the disposal of the public after having been disclosed by the minister under Subsection 5.

Mr. Chairman, it is very important that utmost care be used in releasing because somebody's reputation and the right as an individual to be able to pursue a livelihood after a period of time or when they have served a particular period of time, whether it be incarceration or whatever, for a particular offence. There is such a thing as rehabilitation and the right of individuals not to release to the public such information. There are occasions, too, where the release of this information is important and that is why the minister should not, at his whim or disposal, be able to make decisions. I know the minister may have advice within his or her department, but it is important, I think, that a committee be out there that would look in great detail at the repercussions.

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: That is correct, he does, but when you have three people out there in the community in the court of public opinion - well, if we look at how the Police Complaints Commission works, I mean, that is effective, that has an arm's length process, and that enables decisions to be made on complaints. We can still have one made here on the release of information. When we talk about arm's length we have seen examples with the Minister of Health and how in parallel situations we have had head-first involvement and then we had arm's length when dealing with one board. We have seen ministers in one board being head-first, and then in others they are at arm's length.

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: When it is convenient for a minister to do so, but at least a committee that is appointed, that is taken from the public out there, and can weigh the pros and cons of releasing information that is very important to ensure the integrity of the system and the individual, and important, too, I say to the minister, very important, to protect the public. And if they are going to be advantaged by the release of information - information that is confidential - sometimes it is in the public interest to release that information. At other times it is important to weigh the information, and sometimes it is not in the best interest of the individual and is not going to, in ways, unduly put the public at any risk. Then there has to be great discretion used, because we do not want to see cases where the public are put at risk. So we have a responsibility to look at it in a very non-partisan manner to ensure that these particular rights are preserved and there is an opportunity to do so.

My colleague, the Member for St. John's East, opposed these amendments to the Freedom of Information Act And The Privacy Act. It is a very good amendment and it does not in any way change. It does not in any way take away from the intent of this legislation. In fact, it strengthens this legislation, I say to my colleague. It does

not take from it, it does not detract. In fact it would build extra public confidence out there and put extra teeth in this legislation by enabling a committee to exercise this.

If it were something that was going to deviate from the intent of this Act it would be something different, but these amendments are directly in line with the intent of the legislation, and amendments that I think are important and that members of this House should seriously look at supporting because they are only going to ensure that there is a greater discretion used by a committee over which the minister has control of the time and placement.

The Minister of Education must have the most head nods, I would say, in this House in its history. He does about 150 a day. When he nods this way I assume he has gone to sleep but he is still going lateral. He is still nodding laterally, so he is still alert and listening. When he gets into a vertical nod I will sit down, I say to the minister, and conclude my remarks. While he is still smiling he must be really enjoying it. I assume that you are going to support this proposed legislation.

I am sure the Minister of Justice would support anything that would add public credibility to decision-making, something that goes a little bit deeper than the minister went in his legislation, to give certain rights to a committee to make decisions that are, after all - amendments by my colleague, the critic for Justice - going to ensure that the best interests of the public are protected, and also the individuals, and the right of that particular person to have someone use the utmost discretion in determining whether information should be revealed to the public.

That is a very serious issue, that you can never go to extreme limits to use good judgement. Sometimes by giving a minister powers to do something - many times I have seen ministers use their discretion that has not been very good discretion and judgement. We do not have to go too far -

CHAIR: Order, please!

There is an agreement here that we would limit the debate at this stage to ten minutes. The hon. member can speak as many times as he wishes but there must be an intervening speaker, and your ten minutes are up.

MR. SULLIVAN: With leave for a minute, maybe I will not get up anymore.

AN HON. MEMBER: Okay, (inaudible).

MR. SULLIVAN: No, someone else is waiting to speak, so I will sit down, Mr. Chairman.

CHAIR: The hon. the Minister of Justice.

MR. DECKER: Mr. Chairman, I thank hon. members for the time they put into considering this amendment.

MR. H. HODDER: (Inaudible).

CHAIR: Order, please!

This is Committee stage and -

MR. H. HODDER: (Inaudible) you do not close debate.

AN HON. MEMBER: Of course, you do not close debate.

CHAIR: That happens in second reading only, I point out to the hon. member.

MR. DECKER: Will someone take the hon. the Opposition House Leader outside and teach him the rules of the House, Mr. Chairman?

CHAIR: The hon. the Minister of Justice.

MR. DECKER: I recognize the sincerity of hon. members opposite who put forward this amendment; however, the reason we are amending these Acts has to do with releasing information when high-risk offenders are being released from prison. What this amendment would do is put in place a very complicated, convoluted system which would delay getting information to the committee.

If I could just explain to members what happens: the word comes down that John Doe is about to be released from prison and there is a good chance that John Doe will re-offend. Now, there is no time to waste. We have to have a system where we can move quickly. We have put the protocol committee in place which is given the information that John Doe is being released, and given the information of what John Doe has done, and then the committee decides whether or not to make this information available to the public.

If we were to accept this amendment, we would have to put another committee in place, Mr. Chairman, and then there is, I think, a two-day waiting period for the committee to report back to the minister and so on and so forth. By that time, the high-risk offender could be out and there could be another victim. So, you know, notwithstanding the fact that I recognize the sincerity of members opposite, it is just not practical for us at this time to accept this amendment; therefore, I will be asking my colleagues to vote against it.

However, I will tell hon. members opposite that over the winter, I will review some of the things they have put forward and we will consider it, but in the meantime, we do not have time to waste, Mr. Chairman -

AN HON. MEMBER: You could be gone then.

MR. DECKER: If I am gone then, Mr. Chairman, my successor will do it. The King is dead. Long live the King.

Thank you, Mr. Chairman.

MR. FITZGERALD: `Decker', you will be driving the big, white limousine, retired after this.

CHAIR: The hon. the Opposition House Leader.

MR. H. HODDER: Thank you, Mr. Speaker.

First of all, I want to compliment my colleague, the Member for St. John's East on his research and his knowledge of these matters. The Minister of Justice, when someone gets a chance to read it to him - he has admitted that he does not have time to read it now, and it will take him a couple months to read it, and then, of course, he will have to get someone else to explain it to him. Our problem is that we have no guarantee the Minister of Justice is even going to be here when the next session opens. All kinds of rumours abound that the Minister of Justice may be - or there might be a new Minister of Justice by that time.

Mr. Chairman, what the amendment basically says is that we believe the issue of the release of information is so important that the minister should consult with three members of the public who shall form a committee. We are not talking about people who are untrained in these matters, we are talking about people who have extensive knowledge of the legal system and who have the proper background to be able to render decisions relative to the release of information on any particular person.

Mr. Chairman, the general thrust of this amendment put forward to the government, I do believe finds support in the population and it is certainly, you know, the correct thing to do because none of us want to run the risk of having our young people, or anybody for that matter, particularly our young people, potentially exposed to risks that we can prevent. Therefore, knowledge within the community is essential if we are going to ensure that people who have a tendency to, shall we say, be involved in violent crime - yes, they have a right to be released to society if they have served their time, and all prisoners do get out of prison unless they happen to be criminally insane or whatever. Consequently, what we are doing is trying to have a system in place which gives

both the people in the community and the prisoner, shall we say, respectful rights of each other. Therefore, this particular amendment would assure that there would not be any arbitrary decisions on the part of the minister, we would have the community at large to be participants in the decision-making.

I accept the fact that the Minister of Justice said that he is going to look at these matters. I know that he has to consult with the legal people within his department and the people who would write the legislation for the government. That is to be expected. We do not put forward these amendments, and, in particular, this amendment, you know, in haste. There has been a great deal of thought and some consultation has occurred, and we are certainly saying that we believe we could have a little different approach that would not take away from the substance of the government's initiative but would again, leave the decision-making not so much exclusively with the minister but would allow for more of a collective decision by people within the community. That is the intent and, of course, as the member has said, it would apply to both the Freedom of Information Act And The Privacy Act.

We commend this information to the minister and ask him, if he cannot support it today, whether he would take it under advisement and then, potentially, if there is some way, you might want to come back for amendments later on after giving it consideration. We would ask members again today, when the vote is called, if they will support the amendment put forward by my colleague. Again, we will be understanding, given the nature of how amendments are put forward in the House, to the position that is taken by the hon. the Minister of Justice.

Mr. Speaker, I believe we have one more speaker from this side, so I will yield to my colleague if he wishes to make a further comment.

CHAIR: The hon. the Member for Kilbride.

MR. E. BYRNE: Thank you, Mr. Chairman.

I stand to support the amendment put forward by my colleague, the Member for St. John's East. Certainly, his background, not only as a lawyer, certainly brings added credibility and weight to what the member has asked for. The minister's explanation frankly does not - that over the next little while, maybe over Christmas, he will have his officials have a look at it and report back. There are some legitimate concerns that have been raised by the member. I do not think the minister has answered them correctly.

The Freedom Of Information Act, the proposed amendment, for example, just to read it for the record, as is done: that "The Minister of Justice shall appoint three members of the public who together shall constitute a committee...' It goes on, Mr. Chairman, to say: 10.1(1)(a) "this committee shall be the same as a committee convened under the Privacy Act to consider the release of information regarding the criminal history of an individual," - a very legitimate amendment, I would suggest to government and to the Minister of Justice. There does not seem to be anything wrong with that. The minister can, at any time, if accepting this amendment, could appoint a committee of his choosing that would deal at arm's length with such information.

It goes on to say, (b) "this committee shall convene from time to time as directed by the minister," so the minister will direct the committee. There may be a number of requests before the committee for the release of information. The committee, at the discretion of the minister, will be called to deal with matters that the minister sets forth. So the minister is in control certainly of when the committee meets, who sits on the committee but not necessarily deciding what information will or will not be released. It is a very detailed amendment. It goes on to say, (c) "a committee member shall be bound by an oath or affirmation not to reveal by action or negligence to any person or group any part or the whole of the contents of the information that is prescribed subject matter for the deliberations of the committee, except to provide a report referred to in subsection (3) to the minister." (d) " a committee member shall ensure any notes on the deliberations on a matter are destroyed in a secure manner forthwith upon the completion of those deliberations." That can be done right with the minister. It can be done right after the committee deliberates, because what we are talking about, Mr. Chairman, is the freedom of information and what we are allowed to have access to or not to have access to.

The amendment goes on to say, Mr. Chairman - and it is very detailed again, but it is important that we reiterate it, discuss it further - it goes on to say that (2) "Where," (a) "a person referred to in section (4) requests in writing of the appropriate minister the release of information regarding the criminal history of an individual, the request referred to in (a) identifies to the exclusion of all others the individual regarding whom the information is being sought.

I would suggest to my colleagues in the House that would be, I guess, a basic principle upon which the law refers in this matter and something that would be absolutely required. It states the nature of the criminal activity regarding which the information is being sought. It states the reason or reasons that, in the opinion of the person making the request, it is in the public interest to disclose to the public the information being requested.

There have been times, Mr. Chairman, certainly within the last several months -

MR. EFFORD: The Chairman is not even listening.

MR. E. BYRNE: Neither is the Minister of Fisheries and Aquaculture.

MR. EFFORD: You have that right.

MR. E. BYRNE: And the Member for Kilbride really does not care if the Minister of Fisheries and Aquaculture is listening or not, or if the Chairman is listening or not. I have a few minutes to say a few words and I will continue to say them.

As I was going to say, Mr. Chairman, there have been many occasions, not many, but certainly some more high-profile situations, where information was not released possibly that should have been released, or information was released that should not have been released to the public. Many communities have been affected by certainly criminal activity, all communities, by criminals coming back in, and that maybe information on re-entry of some people should have been outlined in a more detailed fashion to the community.

It goes on to say: The minister shall obtain by secure means the requested criminal history, and shall cause to be convened a meeting of the committee referred to in subsection (1) and shall provide to the committee by secure means copies of the requested criminal history. That is pretty standard. The committee, after being called together and provided with a request and a criminal history referred to in subsection (2) by the minister - and this is very important - (a) shall meet in a secure place - fair enough - shall be bound in their deliberations and decision by the terms and intent of the release of high-risk offender information protocol.

It goes on to say: The committee shall decide by majority vote whether it is reasonable to conclude, based on the criminal history, that the individual poses a danger to the public, and whether the release to the public of any or all of the criminal history of the individual is consistent with the release of high-risk offender information protocol, and the decisions of the committee on these matters shall be binding on the actions of the minister and in this regard shall, after having made the decision, provide forthwith by secure means to the minister.

This is where this amendment makes sense, that it removes from the minister the actual decision-making process relating to this. It removes from the minister, and ultimately through government, any notion, whether perceived or real, of political tampering. It sets out clearly for a committee to decide. The minister has the obligation and the right to appoint; the minister has the obligation and the right to call the meetings, when they will occur, but the minister and government will be bound by the decisions of this committee.

It is a very common-sense approach, a very realistic approach and, I would say to the government, a very inclusive approach, because the minister and government have an opportunity to bring forward people from the community who have experience, tangible experience - not political experience but tangible experience - relating to this matter. It could be individuals from the John Howard Society, I would suggest. It could be a respected member from the Bar. It could be a respected member from rehabilitative services. But the reality is that it sets in motion a process by which government has to, and the minister in particular, live by the decisions set forth by that committee.

Mr. Chairman, I contend that the minister's response is really nothing more than saying: We will have a look at it. The reality is we can move this amendment now, the House can pass it -

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: Go ahead. What one are you referring to?

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: In terms of it being too rushed?

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: Well, let's compare apples (audible) -

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: Good point. If we were comparing apples to apples. I mean, this is - we moved, yes, to some extent.

Mr. Chairman, I believe that the amendment put forward has been put forward by somebody with credibility, somebody who has a tremendous legal experience, and somebody who has given some thought to this, somebody who in a profession has dealt with this on a day-to-day basis. I would suggest that the amendment is more than reasonable.

With that, Mr. Chairman, I will sit down. Thank you.

CHAIR: The hon. the Member for Bonavista South.

MR. FITZGERALD: Thank you, Mr. Chairman.

I rise to add a few words to Bill No. 39, "An Act To Amend The Freedom Of Information Act And The Privacy Act."

Here again we are seeing the situation whereby there is an amendment brought forward, and the Government House Leader seems like he is afraid to entertain an amendment because he might find himself back here again saying that the amendment that was brought forward is wrong or it isn't written in legislative terms or whatever. It makes you wonder why we go through this process by sitting here in the House and rushing a piece of legislation through. You see amendments brought forward, good amendments from reputable people. We aren't talking about some layman who wrote up a resolution to a legal bill. We are seeing an amendment brought forward by somebody who is quite familiar with the legalities of bringing forward amendments. In fact, probably much more familiar than the minister who introduced it.

The Government House Leader seems to be reluctant to entertain it in case, Mr. Chairman, we find ourselves back here having to make changes again. I say that isn't the way it should be. If there is a piece of legislation brought forward in this House, and if there is an amendment to be brought forward, and if it makes more sense than the bill the way it is presented here, then why shouldn't we entertain an amendment?

AN HON. MEMBER: (Inaudible) a week ago (inaudible)?

MR. FITZGERALD: Because it wasn't called, Mr. Chairman. This is the process that we go through. We come here 2:00 in the afternoon and sometimes we know what is being called, and other times we don't. We don't decide on the operation of this House, I say to members opposite. Members opposite decide the operation of the House, members opposite decide what pieces of legislation are going to be introduced, how it is going to be introduced, what the debate is going to be, and when the House closes. This is all done by members opposite. When we bring forward an amendment to a piece of legislation, then it seems that the whole thing is stifled for

the simple reason that we don't have time to deal with it. I'm not so sure that is the way this Legislature should work.

The bill, "An Act To Amend The Freedom Of Information Act And The Privacy Act," is amended by adding immediately after section 12 the following section: That the Minister of Justice shall appoint three members of the public who together shall constitute a committee. Mr. Chairman, what the Member for St. John's East is asking for here, what his suggestion is, is that we not put all the powers of deciding what information is to be released and what information is to be made available only with the Minister of Justice.

What he is saying is that the Minister of Justice should put forward a committee. The committee should be the same as a committee convened under the Freedom Of Information Act, to consider the release of information regarding the criminal history of an individual. Mr. Chairman, those three people can be appointed by the Minister of Justice. It is a situation whereby three reputable people will be making a decision on what information is released regarding a person who is released from incarceration into the community, and the people in the community deserve to know exactly that. What they are doing, Mr. Chairman, is taking some of the power I suppose away from the minister again, and putting it into the hands of a committee; and I don't think that is too much to ask.

This is being put forward, Mr. Chairman, because we have some concerns that this power will be bestowed on some of the members opposite, especially the ministers opposite.

This committee shall convene from time to time as directed by the minister. Here again, the minister is in control. He will decide when the committee is convened and he will decide the times that they meet, which is the way that it should be. That is exactly what we are suggesting, that is what the amendment states, that is what we are saying, and the Minister of Fisheries and Aquaculture agrees with it as he shouts across the House.

A committee member shall be bound by an oath, by affirmation not to reveal, by action or negligence, to any person or group, any part or the whole of the contents of the information that is prescribed subject matter for the deliberations of the committee, except to provide a report referred to in subsection 3 to the minister, and a committee member shall insure any notes on the deliberations on a matter described in a source manner forthwith upon the completion of those deliberations.

Mr. Chairman, maybe it is the situation that this particular amendment is probably twenty times longer than the bill. Maybe, that is why the Government House Leader decides that it is too much to deal with at this particular time. It might be too cumbersome to deal with at twelve o'clock at night. Mr. Chairman, as I said, it is not our wish to be sitting here at this time but it is our responsibility to bring forward an amendment such as this because we think that it makes sense.

Where, in the opinion of the Minister of Justice, the disclosure of information regarding the criminal history of an individual is in the public interest, the minister shall make in writing a request for the release of information. Not too much to ask for, Mr. Chairman. If there is a good committee in place, then what is wrong with the minister, if he needs information, to request that information by writing? The request referred to in (a) shall: 1, Identify to the exclusion of all others, the individual regarding whom the information is being sought, state the nature of the criminal activity regarding which the information is being sought; and 3, state the reason or reasons, that in the opinion of the minister, if it is in the public's interest to disclose to the public the information being requested and explain how disclosing such information is consistent with the intent of the release of high-risk offender information protocol.

The minister shall obtain by secure means the requested criminal history and shall cause to be convened a meeting of the committee referred to in subsection 1, and shall provide to the committee by secure means copies of the request and a criminal history. The committee, after being called together and provided with the request and the criminal history referred to in subsection 2 by the minister - 3(a) clearly states - shall meet in a secure place to review and discuss the contents of the request and the criminal history. Copies of which shall be secured at all times between deliberations and after the last deliberation returned to the minister. Mr. Chairman, once

again all the information that is obtained by the committee will go back to the minister and be at the minister's disposal.

Mr. Chairman, 3(b): shall be bound in their deliberations and decisions by the terms and intent of the Release of High Risk Offender Information Protocol.

Subsection 3(c), Mr. Chairman: shall decide by majority vote whether it is reasonable to conclude, based on the criminal history, that the individual poses a danger to the public and whether to release to the public any or all of the criminal history of the individual is consistent with the Release of High Risk Offender Information Protocol; and the decisions of the committee on these matters shall be binding on the actions of the minister in this regard.

Mr. Chairman, 3(d): shall, after having made a decision, provide forthwith by secure means to the minister (i) the request and the criminal history provided by the minister to the committee, and (ii) the details of the criminal history that shall be released to the public.

Mr. Chairman, this committee will certainly worked through the direction of the Minister of Justice, but what it will do will be include three individuals who will be putting forward those suggestions, putting forward the information, making the information available to the people in the community, whatever they deem fit rather than just what the Minister of Justice wants them to hear or what he decides to put forward.

Mr. Chairman, (4): Forthwith after receiving a decision of the committee on a matter and at least two days prior to the release of any information by a minister regarding the criminal history of an individual and forthwith after the minister receives the report of the decision of the committee on this matter, the minister shall inform or shall make every reasonable effort to inform that individual of the nature of the information regarding that individual that shall be released and the date on which the information shall be released.

CHAIR: Order, please!

The hon. member's time is up.

The hon. the Member for Cape St. Francis.

SOME HON. MEMBERS: Hear, hear!

MR. J. BYRNE: Mr. Chairman, I am certainly pleased to stand in my place again tonight to support the amendment put forward by the Member for St. John's East. The strange thing about Bill 39 - well it is not really strange at all, I would say. It is commonplace now in this Legislature, in this sitting of the House, that we give more authority to the minister. We saw it given to the Minister of Fisheries.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: It used to be. Actually, I could tell you a good story about that. My hair used to be as white as the driven snow, but I can't tell you about it because you will only make fun and it is a very serious story.

Anyway, Mr. Chairman -

AN HON. MEMBER: Do you have it dyed, Jack? Do you dye it?

MR. J. BYRNE: Dye it? I don't dye it.

Mr. Chairman, this amendment that has been put forward by the Member for St. John's East, as I said earlier. The minister is trying to get more authority in this bill, Bill 39, just as the Minister of Fisheries tried to get more authority in the Fish Inspection Act, just as the Minister of Government, Services and Lands is trying to get more authority. The Minister of Fisheries and Aquaculture is at it again. I have to say this, I was trying not to say it, I was trying to keep it back and not say it, but I have to say to the Minister of Fisheries and Aquaculture: You

know something, if he woke up this morning and he had two clues, the people of the Province would realize that he had doubled his intelligence overnight; doubled his intelligence overnight, with two clues.

SOME HON. MEMBERS: (Inaudible).

MR. J. BYRNE: The Minister of Fisheries and Aquaculture can count to ten? You are doing a good job. You can count to ten.

MR. EFFORD: Backwards.

MR. E. BYRNE: And he can manage it backwards, I say, Minister.

Mr. Chairman, Bill No. 39 tries to do a number of things. The Member for St. John's East is trying to address some of the authority that has been given to the minister. Of course, one of the things that the bill does is allow someone to make a freedom of information request for information on a criminal history of any person. Anybody can go in and ask for the freedom of information and look for information on the criminal history of any given individual. Presumably, upon the request the minister or designate would review the criminal history documents and form an opinion about the merits of releasing it. Can you imagine, Mr. Chairman, one individual having the authority to do that?

The amendment that was being put forward by the Member for St. John's East certainly addresses that. The member is proposing that government appoint a committee, I think it is a three-member committee, to address that, to look at the request, to study the request of the individual or groups who are looking for the criminal history of an individual.

The three-member committee - of course, three minds are better than one. Certainly, Mr. Chairman, when we speak of certain ministers, I suppose - and we never know who is going to be the minister. The present minister may very well be capable of deciding if the information should be released, to review the information, to look at the individuals who are requesting the information, and to make a decision if it should or should not be released. That doesn't necessarily mean to say that any future minister may be of the same type or of the same stature, whatever the case may be. The Member for St. John's East is trying to address that concern.

Mr. Chairman, something else that this bill is trying to do is allow the minister and any and all of his or her designates to have access to the criminal histories of individuals. Not a very good idea, I don't think. Why should the Minister of Justice have the authority to look at anybody's file, say, without a proper review by a proper committee?

MR. McLEAN: (Inaudible).

MR. J. BYRNE: That is right, I say to the Minister of Government Services and Lands.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: It is like this, I say to the Government House Leader, he is wondering if I work at an airport, or if I've ever worked at an airport. Mr. Chairman, on a night like tonight, when we are sitting at 11:46 in the evening discussing legislation that should have been brought forth back in October, when there would have been lots of time given to all members of the House to properly discuss the matters that are being put forward, rather than being rammed and forced and pushed through the House of Assembly at 11:46 p.m., a few days before Christmas Eve, the minister is talking about me working elsewhere. Maybe sometimes I would like to work elsewhere, but I'm doing the job that I'm here to do.

MR. McLEAN: (Inaudible).

MR. J. BYRNE: What is the Minister of Government Services and Lands' problem?

MR. McLEAN: (Inaudible) in your hands.

MR. J. BYRNE: In my hands? Copious notes. I thank God for copious notes, Mr. Chairman.

The bill that is being put forward in this House, Bill 39, puts no limitations on the searches for criminal history information. Therefore, the minister and his designate can go and look for the criminal history of any individual. The question which begs to be answered is: Why would the minister want it? Now, often times it could be quite legitimate and he should have access to it, Mr. Chairman, but it should have to go before a committee first, as the Member for St. John's East proposes. We may have an individual looking for this information for negative reasons, to put it bluntly. He may be wanting the information to use against an individual. I do not think that one individual, such as the minister or his designate, should have the authority to do that.

Mr. Chairman, this bill puts no limits on the release of criminal history information other than if, in the opinion of the minister or his or her designate, it is in the public interest to disclose it. So, we have here again a person within the Department of Justice, and it may not even be within the Department of Justice, the minister or his designate, who may say it is okay to release such information. Again, the amendment that is being put forward by the Member for St. John's East certainly addresses that concern with respect to putting a three member committee in place.

Also, Mr. Chairman, this bill, Bill 39, puts no limits on the kinds of criminal history and information a minister or designate can release. So in actual fact the information that could be released, or in the opinion of the minister or his or her designate should be released, there is no limit on it. There is no limit to the type of information that can be released.

SOME HON. MEMBERS: Oh, oh!

MR. J. BYRNE: A great way to get attention in the House of Assembly is to just stop talking then everybody listens. I will just stand for ten minutes and let everybody listen.

Mr. Chairman, as I said earlier, the bill puts no limits on how - here is a very good point - the criminal history of information is released. An individual can request the information on the criminal history of any individual and you might see it plastered on the internet, you might see it plastered on the television, you might see it on posters, anywhere, Mr. Chairman. You might see it on a poster in a town hall somewhere. So again the amendment of the Member for St. John's East will address that.

The Minister of Justice says that maybe we could review this. Let us have it and we will look at it over the Winter months and come back in the Spring session and address it. I heard that before. I heard it here, I think, twice tonight, the same reply to an amendment: Well, we will look at it over the Winter months. Of course, the reason why we get that answer is to speed up the passage of this legislation, so that we will not have to deal with the amendment and admit, I suppose, Mr. Chairman, that the amendment that is being put forward is a good amendment, a legitimate amendment, a logical amendment, and it makes sense. It certainly makes sense when you get people on this side of the House standing up and speaking to it.

Another point that the bill addresses, Mr. Chairman -

CHAIR: Order, please!

The hon. member's time is up.

AN HON. MEMBER: By leave.

AN HON. MEMBER: No leave.

CHAIR: The hon. member does not have leave.

The hon. the Member for St. John's East.

MR. OTTENHEIMER: Thank you, Mr. Chairman.

I have two amendments on Bill No. 39, Mr. Chairman, that I would like to submit. To move the following: that Clause 1 of Bill 39, "An Act To Amend The Freedom Of Information Act And the Privacy Act," which is now before the House be amended by adding in Paragraph 10(2)(f) immediately after the word "disclose" the words - and I open the quotation - "however a minister shall not release information regarding the criminal history of an individual except where the release of this information is consistent with the terms and the intent of the Release of High Risk Offender Information Protocol."

Mr. Chairman, what this amendment does is make sure that the provincial legislation is consistent with the federal legislation with respect to the high risk offender information protocol. That is the purpose of this legislation.

When this bill was introduced, Mr. Chairman, by the Minister of Justice and the Attorney General some while ago, it was being done to allow provincial legislation to run concurrent with federal legislation. So all this amendment is saying is that it be consistent with the terms and the intent of the release of high risk offender information protocol.

Clause 2 of Bill 39, "An Act To Amend The Freedom Of Information Act And The Privacy Act", which is now before the House, be amended by renumbering section 13 as subsection 13(1) and adding immediately thereafter the following subsection: "(2) Notwithstanding subsection (1), a minister shall not release information regarding the criminal history of an individual except where the release of this information is consistent with the terms and intent of the release of High Risk Offender Information Protocol."

So this section essentially accomplishes the same thing, Mr. Chairman. It ensures that information being released be consistent with the federal legislation concerning the release of information and the identity of high-risk offenders.

Mr. Chairman, it is important that the identity of individuals and that civil rights and civil liberties protection be uppermost in the minds of government and government officials, through the minister and the minister's office, at all times.

The first amendment that is being submitted puts in place a committee which is independent, which acts outside of the power of the minister. What these amendments do is ensure that any information be consistent with the protocol which was outlined earlier by the Minister of Justice. Mr. Chairman, I would ask that these amendments be given due consideration.

Thank you, Mr. Chairman.

CHAIR: Shall the amendment to clause 1 carry?

AN HON. MEMBER: (Inaudible).

CHAIR: Before I recognize the hon. the Leader of the Opposition, my understanding is that we are debating an amendment to the Freedom of Information Act. There are two amendments. Is it the intent that the amendment be voted on first, and then if that is defeated that the second one - we need some clarification at the Chair.

MR. SULLIVAN: Mr. Chairman, when the first amendment is passed, the second one becomes redundant.

CHAIR: Okay.

MR. SULLIVAN: In the unfortunate incident that number one is not passed, number two then would be the one that -

CHAIR: We have two amendments on the go right now.

MR. TULK: A point of order, Mr. Chairman.

CHAIR: The hon. the Government House Leader.

MR. TULK: A point of order, Mr. Chairman.

I would like, if I could -

SOME HON. MEMBERS: Oh, oh!

CHAIR: Order, please!

The Chair is trying to -

MR. TULK: I am on a point of order on the amendments.

CHAIR: I am not talking about the hon. member; I am talking about his colleagues.

I said, "Order, please!" to your hon. colleagues, not to you.

MR. TULK: As I understood it, he just moved another amendment.

On a point of order, Mr. Chairman.

CHAIR: Yes, that is what I am saying. You are on a point of order, but I am asking your hon. members to be quiet so I can hear what the hon. member is saying.

MR. TULK: Oh, this crowd?

CHAIR: Yes.

MR. TULK: Mr. Chairman, on a point of order. I understand that we -

SOME HON. MEMBERS: (Inaudible).

CHAIR: Order, please! Order, please!

MR. TULK: I'm having problems keeping track of the amendments here.

AN HON. MEMBER: You have that much paper on the go, it is wonder you can see it.

CHAIR: Order, please! Order, please!

Can we hear what the hon. Government House Leader has to say.

MR. TULK: There was a four-page amendment that was proposed to a bill that was two paragraphs long. Now I understand we have a couple of more here somewhere, another amendment here somewhere. Are we saying if we defeat this one, the first one, that the second one then comes into play, or are we saying that if we pass the first one the second one is redundant? A redundant amendment?

CHAIR: The hon. the Member for St. John's East.

MR. OTTENHEIMER: Thank you, Mr. Chairman. The purpose of the -

CHAIR: On the point of order?

MR. OTTENHEIMER: Yes. Just to respond to the hon. Government House Leader. The first two amendments, if in fact the amendments are defeated, we would then go to the second two amendments. If the first two amendments are accepted, the second two amendments are withdrawn; as simple as that.

MR. TULK: Mr. Chairman, if I could, to that point of order?

CHAIR: The hon. the Government House Leader.

MR. TULK: I would suggest to the Chair - and I think I'm correct - that before we can entertain the second one, if that is the case, then we will have to defeat or pass, whatever we are going to do as a Legislature, the first one. The hon. gentleman has already proposed a second one. How do you know what the House is going to do?

SOME HON. MEMBERS: (Inaudible).

CHAIR: Order, please! Order, please!

The Chair just wants to clarify. The Chair interrupted the hon. Member for St. John's East because the Chair wanted to clarify the intent of the amendments, and the Chair would like to see that we would dispose of the first amendment before we debate the second amendment. As the night draws on it is going to be much more difficult to keep these things clear, and the Chair has to keep it clear in terms of what we are doing here.

SOME HON. MEMBERS: (Inaudible).

CHAIR: Order, please! Order, please!

I think we should vote on this first amendment and then we can go on and debate the second amendment. Or if the first amendment is passed, of course we will pass the clause of the bill and move on.

The hon. the Opposition House Leader.

MR. H. HODDER: Yes, Mr. Chairman. The -

MR. SHELLEY: We can't help it if they can't keep up with us.

CHAIR: Order, please! Order, please!

The hon. Member for Baie Verte - I would like to hear what the Opposition House Leader has to say.

MR. H. HODDER: If I could, what I would propose would be that we would move to the amendment, have the vote, and then we will see what the House decides. Then, when you call clause 1 again for approval, the Member for St. John's East can then stand in his place and move a further amendment if that is necessary. I think that was what was generally discussed with the Chair a few moments ago when the Member for Lewisporte was in the Chair.

CHAIR: The hon. the Government House Leader.

MR. TULK: Mr. Chairman, may I make a suggestion? We have agreed to break at 12:00 or 12:30 p.m. Perhaps the Chair would like, during the recess period, to go out and then come back and give us some clear direction as to what we should do?

CHAIR: The Chair is clear what he wants to do right now.

SOME HON. MEMBERS: Hear, hear!

CHAIR: The hon. the Government House Leader.

MR. TULK: The truth of the matter is, that you now have in front of you two amendments that have been moved.

CHAIR: Yes.

MR. TULK: They have been moved. One, I say to you, is out of order because the first amendment has not been dealt with.

CHAIR: That is what the Chair is interrupting about.

MR. TULK: So it is out of order.

CHAIR: The Chair is clear and wants to vote on the first amendments.

MR. TULK: Is the first one out of order?

AN HON. MEMBER: No.

MR. TULK: Is the second one out of order?

CHAIR: No, the second one is not out of order but will get rid of the first one.

SOME HON. MEMBERS: Oh, oh!

MR. SPEAKER: Order, please!

The Chair is not prepared to argue the points with hon. members.

All those in favour of the amendment to clause 1, `aye'.

SOME HON. MEMBERS: Aye.

CHAIR: Those against, `nay'.

SOME HON. MEMBERS: Nay.

CHAIR: Amendment to clause 2.

All those in favour of the amendment, `aye'.

SOME HON. MEMBERS: Aye.

CHAIR: Those against, 'nay'.

SOME HON. MEMBERS: Nay.

CHAIR: I declare the amendments defeated.

The hon. the Member for St. John's East will propose his amendments.

MR. OTTENHEIMER: Thank you, Mr. Chairman.

MR. TULK: Mr. Chairman, on a point of order.

CHAIR: The hon. the Government House Leader.

MR. TULK: I have to say to you that we just defeated two amendments?

CHAIR: Yes.

MR. TULK: Go on, Mr. Chairman, go on.

CHAIR: Order, please!

As has been directed by the Government House Leader, the agreement was that we break at 12:00 midnight now that the Chair is clear.

Recess

CHAIR: Order, please!

Clause 1.

The hon. the Member for St. John's East.

MR. OTTENHEIMER: Thank you, Mr. Chairman.

Just continuing on with the second pair, I guess, of amendments with respect -

MR. GRIMES: One at a time. Don't confuse us.

MR. OTTENHEIMER: There are two pairs, I say to the Minister of Education, and that is why there is confusion. There are two amendments to section one -

AN HON. MEMBER: The first pair was defeated.

MR. OTTENHEIMER: That is right, they are gone. Now we are dealing with the second pair, I say to the minister, Mr. Chairman.

Again the wording is identical because we are dealing with two different acts. We are dealing with the Freedom of Information Act and we are dealing with the Privacy Act: "Notwithstanding subsection (1), a minister shall not release information regarding the criminal history of an individual except where the release of this information is consistent with the terms and intent of the Release of High Risk Offender Information Protocol."

Mr. Chairman, I've already discussed the relevance of these amendments and why these amendments are being put forward. Again, just for clarification, being put forward to allow any release of information or any release of a person's identity to be consistent with the federal regulation with respect to the release of High Risk Offender Information Protocol.

Thank you, Mr. Chairman.

CHAIR: The hon. the Opposition House Leader.

MR. H. HODDER: Mr. Chairman, we again want to draw the attention of the hon. House to the amendments put forward by my colleague. Again, the intent is that we would give, I guess you could call it, greater clarity to the powers of the minister. We wanted again to go and say to the government that it should be reconsidering some of those matters. Because in clause 1 what the amendment is saying is: "a minister shall not release information regarding the criminal history of an individual except where the release of this information is consistent with the terms and intent of the Release of High Risk Offender Information Protocol," which is a federal piece of information.

Mr. Chairman, we highly commend this matter to the Minister of Fisheries and Aquaculture, knowing that he doesn't understand it, and that he probably isn't following the matter.

The same thing is true with clause 2 of Bill No. 39. Again we are asking the government to consider this kind of a constraint on the powers of the minister, saying that the information be released would be only when it was consistent with the intent and the terms contained in the Release of High Risk Offender Information Protocol.

Again, we are cognizant of the rights of the community to know, and we are cognizant as well of the rights of the individual who is the offender. We believe we should say to the government that we should be very careful about releasing information. We agree with the thrust of what the government is doing. We are simply saying that the minister should have some constraints on him or her as to the manner in which the information is released to the public.

The prior amendments which the government members did not accept talk about having a committee that would guide the minister in that matter. For whatever reason the members of the House said no, and that is their right. I mean, parliament means that we bring forward our suggestions as an Opposition, and it is a right of the government to say: No, thank you, we don't want to do that. That is all part of democracy. Anyway, we have a right to bring forward those amendments and we shall continue to bring forward amendments to all pieces of legislation as the evening unfolds and as the day unfolds or tomorrow unfolds, whatever.

So, Mr. Chairman, we do want to again say to the members of the House that we are supporting the intent. We want to have some restraint on the power of the minister.

With that, Mr. Chairman, I will sum up in case my colleagues want to have a word.

CHAIR: The hon. the Premier.

SOME HON. MEMBERS: Hear, hear!

PREMIER TOBIN: Mr. Chairman, I rise to express my support for the initiative being put forward by the government. I have just a brief presentation and that is to pay tribute to the Table officers, Mr. Chairman, including yourself, who have sat here with such quiet dignity and such close and scrupulous attention to every word being uttered. Mr. Chairman, we know that there is an obligation by those who sit around the Table to that.

What I really wanted to do is to draw the attention of the House to the presence in the press gallery of the best journalist who has ever covered -

SOME HON. MEMBERS: Hear, hear!

PREMIER TOBIN: - the workings of the House of Assembly.

Mr. Chairman, I have taken note that Mr. Scott Chafe of VOCM has carefully and scrupulously covered every single word uttered by the Opposition House Leader. Now this is clearly a tribute to the elegance of the Opposition House Leader, but more importantly, a tribute to the diligence in the sense of responsibility of Mr. Scott Chafe. Mr. Chairman, let the House show its appreciation for this extraordinary service for the people.

SOME HON. MEMBERS: Hear, hear!

CHAIR: All those in favour of the amendment, `aye'.

SOME HON. MEMBERS: Aye.

CHAIR: All those against, `nay'.

SOME HON. MEMBERS: Nay.

CHAIR: I declare the amendment defeated.

On motion, clause 1, carried.

MR. H. HODDER: On a point of order, Mr. Chairman.

CHAIR: The hon. the Opposition House Leader.

MR. H. HODDER: Mr. Chairman, there is some confusion with that vote. When it was called, there were all kinds of ayes and nays. I am not sure of your decision but I do accept it.

CHAIR: Order, please!

The Chair declared the amendment defeated and has passed clause 1.

Amendment to clause 2.

All those in favour of the amendment, `aye'.

SOME HON. MEMBERS: Aye.

CHAIR: Against, `Nay'.

SOME HON. MEMBERS: Nay.

CHAIR: I declare the amendment defeated.

On motion, clause 2, carried.

A bill, "An Act To Amend The Freedom Of Information Act And The Privacy Act." (Bill No. 39)

Motion, that the Committee report having passed the bill without amendment, carried.

CHAIR: The hon. the Government House Leader.

MR. TULK: Mr. Chairman, Order 21, Bill No. 38, "An Act To Amend The City Of St. John's Act (No.2)."

CHAIR: Shall clause 1 carry?

The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Chairman.

I want to say a few words on Bill 38, "An Act To Amend The City Of St. John's Act."

MR. GRIMES: (Inaudible).

MR. J. BYRNE: What's you problem over there now? Are you looking forward to the amendments, I say to the Minister of Education?

MR. GRIMES: (Inaudible).

MR. J. BYRNE: Yes, I do.

MR. GRIMES: Well, get on with it then.

MR. J. BYRNE: In due course.

MR. GRIMES: (Inaudible).

AN HON. MEMBER: Go home, boy. You don't have to stay here.

MR. J. BYRNE: The Minister of Education is very testy. You will not be missed very much if you decide to leave, I say to the Minister of Education. You can leave any time you feel like it. So be it, and goodbye.

CHAIR: Order, please!

I remind hon members that we are debating the clause by clause study of the bill and I ask hon. members to restrain from shouting across the House. I would like to listen to the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Chairman.

I propose to move the following amendment: That Clause 2 of Bill 38 - I am going to read this slow because the Minister of Education has a hard time understanding - "An Act To Amend The City Of St. John's Act (No. 2)," which is now before the House be amended by (1) deleting in subsection 402.3(4) the word "Fees" and substituting therefor the following: "Subject to Subsection 402.3(4.1), fees"; and (2) adding immediately after subsection (4) the following subsection: "(4.1) -

CHAIR: Order, please!

Are all these amendments to Clause 2?

MR. J. BYRNE: This is just an amendment.

CHAIR: Is it an amendment to Clause 2?

MR. J. BYRNE: It is an amendment to -

CHAIR: All the amendments are here?

MR. J. BYRNE: Yes.

CHAIR: All to clause 2?

MR. J. BYRNE: Yes.

CHAIR: Okay.

MR. J. BYRNE: Anyway: "(4.1) A municipal authority in a municipality that is or has at any time been served by the regional fire service of this region of the Province may inform the regional fire service committee and the city and the minister of (a) its intent to be served by the regional fire service; and (b) its dissatisfaction with the fee rate determined by the regional fire service committee, and the minister shall forthwith appoint an arbitrator who shall consult with the municipal authority and the city and the committee for a period of one month after which the arbitrator shall determine a fee rate for the municipal authority and the period of time during which the fee structure shall apply, and the decision of the arbitrator shall be binding on the municipal authority and on the city and on the committee, and shall constitute the contract referred to in subsection (3) between the municipal authority and the city." It is seconded by the hon. Member for Bonavista South.

CHAIR: The Chair would like to have a copy of the amendment.

MR. J. BYRNE: I passed the copies.

Mr. Chairman, this amendment deals with the municipality that is or has been associated with the regional fire committee and intends for the same municipalities who use the services of the regional fire committee and who have dissatisfaction with the rate determined - those are any municipalities that were previously involved that are not now involved with the St. John's Regional Fire Committee. I just want to know if that is in order and then we will continue to debate it.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: Okay, Mr. Chairman.

This has been a situation with the St. John's Regional Fire Authority, Mr. Chairman, for a number of years with a few of the municipalities in and around St. John's. I have spoken to it many times in the House of Assembly. It is a situation which I have tried to get straightened out on numerous occasions, and the various municipalities have been quite concerned.

I should start at the beginning, I suppose. It is going to take some time to actually explain everything that went on over the years, Mr. Chairman. Basically, the most recent history is that the Mayor of Logy Bay - Middle Cove - Outer Cove, myself, the minister and a member from the Premier's office had a meeting to discuss the situation. At that meeting it was basically discussed that if we could get an arbitrator put in place to set the rates that would be charged to the small Town of Logy Bay - Middle Cove - Outer Cove, it would be a positive thing for that town.

Mr. Chairman, the minister agreed that he would be interested in receiving a letter from the Town of Logy Bay - Middle Cove - Outer Cove and, on December 5, the Mayor of Logy Bay - Middle Cove - Outer Cove wrote to the minister and proposed -

SOME HON. MEMBERS: Oh, oh!

MR. J. BYRNE: This is a very serious situation.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: What did he say?

MR. E. BYRNE: Is there any truth (inaudible) you took a Dale Carnegie course (inaudible).

MR. J. BYRNE: I am not sure who made that statement.

MR. EFFORD: I did!

MR. J. BYRNE: Well, if the Minister of Fisheries and Aquaculture made it, I don't see him on his feet too often. I am sure he did not take any Dale Carnegie course; I can guarantee you that. I can guarantee you that he did not take any Dale Carnegie course.

AN HON. MEMBER: He took it and failed it.

MR. J. BYRNE: He took it and failed it. That is what happened.

Mr. Chairman, the Mayor of Logy Bay - Middle Cove - Outer Cove -

MR. EFFORD: (Inaudible).

MR. E. BYRNE: (Inaudible). We have the pictures of the Christmas party. If he takes out that book (inaudible), you take out the pictures from the Christmas party. Tell him. Take out the pictures, Jack.

MR. J. BYRNE: We have some fine pictures of the minister; I can guarantee you that. The minister made a comment the other day that he would not bring that book out any more, but we will produce the pictures in due course. I am being sidetracked now from this very serious situation.

The Mayor of Logy Bay - Middle Cove - Outer Cove wrote to the minister on the concerns that we talked about, and he again addressed the opportunity, if there was a possibility that we could have an arbitrator. Then, of course, on December 10, I was dropped off a letter, I think by the Minister of Municipal and Provincial Affairs, which was signed by the Mayor of St. John's and signed by the Mayor of Mount Pearl, basically rejecting the idea of an arbitrator.

Now the City of St. John's, of course, from the beginning were opposed to the idea of an arbitrator. The Mayor of Logy Bay - Middle Cove - Outer Cove, on a number of occasions, Mr. Chairman, proposed that an arbitrator be appointed, but the City of St. John's opposed that and it was a (inaudible) thing for them. The rates for fire-fighting services in the Town of Logy Bay - Middle Cove - Outer Cove increased from $15,000 a year to $130,000 a year, and that seemed to be an abnormally high rate to pay for fire-fighting services.

Now, back in 1992, Mr. Chairman, the town of Logy Bay - Middle Cove - Outer Cove made a presentation to the regional committee on fire fighting and they brought up a lot of points with respect to the rate that was being charged. Some of the concerns, again, that were addressed at that point in time were the services that would be provided. The cost recovery formula was a factor that the municipalities, at that time, were having a problem with, Mr. Chairman.

Now, Mr. Chairman, one of the factors that was involved with respect to the municipalities in the town of Logy Bay - Middle Cove - Outer Cove, of course, is the fact that they are so far away from a fire hydrant. There is no water and sewer within the town, Mr. Chairman, and the closest fire department -

CHAIR: Order, please!

The hon. member's time is up.

MR. EFFORD: No leave.

AN HON. MEMBER: No leave.

MR. EFFORD: Oh, give him leave, give him leave.

CHAIR: The hon. the Opposition House Leader.

MR. H. HODDER: Mr. Chairman, I don't necessarily share the same viewpoint but -

CHAIR: Before the hon. member speaks, the amendment is in order.

MR. H. HODDER: - I would enjoy the opportunity to be convinced and I give the member a chance to say all over again, in the next ten minutes, exactly what he said in the last ten minutes.

CHAIR: Order, please!

I remind the hon. members about repetition.

The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Mr. Chairman, you don't have to worry about repetition in the next ten minutes because I have about a good fifty or sixty minutes of straightforward facts with no repetition.

Now again, Mr. Chairman, the cost recovery formula was a very important factor that the towns disagreed with. Another factor that the towns had a problem with was the business tax. The city of St. John's has large amounts of revenues from the businesses within the city of St. John's. The question at that point in time, Mr. Chairman, was if in fact the businesses were paying their fair share for the fire fighting services, when you compare it to what the town of Logy Bay - Middle Cove - Outer Cove was receiving?

Now the five towns involved at the time, Mr. Chairman, were the Town of Logy Bay - Middle Cove - Outer Cove, the Town of Paradise, the Town of Portugal Cove - St. Phillips, the Town of Petty Harbour, the City of St. John's and the City of Mount Pearl. Of course the new formula that was brought in, Mr. Chairman, that was never approved by Cabinet, that never became a legal formula because it was not approved by Cabinet, was based on the assessed value of properties within the municipalities. Mr. Chairman, when the assessed values were put in place the Town of Logy Bay - Middle Cove - Outer Cove went from $15,000 to $130,000. Again,

the Town of Logy Bay - Middle Cove - Outer Cove felt that the service they were getting was not equivalent to the amount of money that they were paying.

Now, the Town of Portugal Cove - St. Phillips - all of us, all five towns, had a meeting with the then Premier and I remember sitting at the table and the Premier -

AN HON. MEMBER: You fellows should never have told him that.

AN HON. MEMBER: It's your mistake. It's your own fault. We haven't been able to get him to shut up since.

MR. J. BYRNE: I am speaking, Mr. Chairman, to this bill because it has been a pet peeve of mine from the beginning, since this was introduced. The St. John's Regional Fire Department and the five towns had a meeting back in '92, I believe it was, with the then Premier, Mr. Wells. The Premier, at that meeting, turned to me and asked: Why should the cost recovery formula not be based on assessed value only? I explained to him, Mr. Chairman, as I explained to the minister, as I explained in this House before, why the cost recovery formula should not be based on assessed value. He turned to his minister - there is no point of the Minister of Fisheries trying to yap across the House because I am not listening to him. I cannot hear him above my own voice so he might as well sit down, be quite, pay attention, and be ready to hear a lot more from this side of the House tonight.

Mr. Chairman, the five towns met with the Premier. He turned to his minister and said: Mr. Minister, if that is the case tell the mayor it is not going to happen, that the formula will not be based on the assessed value.

SOME HON. MEMBERS: Oh, oh!

CHAIR: Order, please!

I ask the hon. Minister of Fisheries -

AN HON. MEMBER: Name him, Mr. Chairman, name him.

CHAIR: Order, please!

I ask the hon. Member for Cape St. Francis to take his seat until we have established order in the House.

AN HON. MEMBER: That could take a while, Mr. Chairman.

CHAIR: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Chairman.

Now, when you look at the cost recovery formula, Mr. Chairman, based on assessed value, within the City of St. John's there are all the federal and provincial government buildings that I think are not really taken into consideration to the extent that they should be when you are looking at the assessed value within the Town of Logy Bay -Middle Cove - Outer Cove. Apparently a deduction of 15 per cent of the total operating cost is applied for the Province's contribution to cover fire protection; 15 per cent, when you look at the cost of the assessed value of the buildings in the City of St. John's.

If you look at the Confederation Buildings, if you look at the hospitals within the city, if you look at what used to be the Philip Building down there which is now a government building, when all of these buildings within the City of St. John's are taken into consideration certainly it should reduce the amount that the Town of Logy Bay - Middle Cove - Outer Cove should have to pay.

AN HON. MEMBER: (Inaudible)

MR. J. BYRNE: Yes, I saw that. I have that letter here and I referred to it.

AN HON. MEMBER: What is it?

MR. J. BYRNE: A letter from both cities.

Now, Mr. Chairman, with respect to the potential for major fires. Why the Town of Logy Bay - Middle Cove - Outer Cove has a problem with this is because of the simple fact that they still do not have the same potential for major fires as the City of St. John's and the City of Mount Pearl have. In the Town of Logy Bay - Middle Cove - Outer Cove, as with the other municipalities that were involved, the smaller towns, there is no row housing, there is no –

MR. MATTHEWS: (Inaudible)

MR. J. BYRNE: I am trying to do something for the Town of Logy Bay - Middle Cove - Outer Cove, I say to the Minister of Health. I am trying to get a fair rate charged to the municipality of Logy Bay - Middle Cove - Outer Cove for fire fighting services. That is all I am trying to do, and that is all I have ever done, I say to the Minister of Health. I have not even gotten into the study that was done for the volunteer fire department yet. I have not even gotten into that, Mr. Chairman.

The potential for major fires within the Town of Logy Bay - Middle Cove - Outer Cove is not nearly as great as in both cities. Therefore, there is certain equipment that is on standby all the time for major fires that could occur within the cities of St. John's and Mount Pearl. That is not a major potential in the Town of Logy Bay - Middle Cove - Outer Cove, therefore they should not have to pay the same percentage based on the assessed value, Mr. Chairman. Now, that is one point, but there is another aspect.

MR. MATTHEWS: Are you certain?

MR. J. BYRNE: Big time serious. Yes, I am serious.

MR. MATTHEWS: Are you certain? I did not say serious.

MR. J. BYRNE: Oh, certain. Definitely certain. Sure I'm certain.

In Logy Bay - Middle Cove - Outer Cove, or in the smaller municipalities, we don't have multi-storey buildings such as the various hotels in the city. We don't have row housing, like we saw a major fire in on, was it Military Road, where one house caught fire and probably a dozen burned. We had the CLB Armoury -

MR. MATTHEWS: Show some leadership and move a motion to include it all in the City of St. John's. Then Harvey will second it and he will add Mount Pearl to it. That will solve all your problems.

MR. J. BYRNE: I say to the Minister of Health, you must live in the City of St. John's, do you? That was tried. I mean, the previous Minister of Municipal and Provincial Affairs tried to put forward regional fire-fighting on the northeast Avalon. What they did was they named four or five towns within the legislation, and the cities of Mount Pearl and St. John's. It was explained at that point in time, Mr. Chairman, that it could not work, that it would not work.

I remember attending a meeting, Mr. Chairman, in the City of St. John's. I was, as a mayor, chairman. I was a chairman, a committee member. All the mayors were members. We were at the City of St. John's committee discussing fire-fighting and the services. We were discussing the services, and what happened? The then-deputy mayor made a statement that what would happen is we would discuss the concerns of the smaller municipalities and then we would do what was best for the City of St. John's. Therefore, that is what the problem was, and that was inherent in the St. John's regional fire-fighting.

I've disagreed with the mayor of St. John's on this, I disagreed with the previous mayor on this. I can't stand up here now in the House of Assembly and agree to something that I disagreed with before I became an MHA. That

would be hypocritical. I'm only saying the same thing today as I said back in 1992, and I'm going to continue to say it, and I'm saying it. I'm putting a motion forth.

MR. GRIMES: (Inaudible).

MR. J. BYRNE: I say to the Minister of Education, if that one is not adopted I have another one I'm going to speak to, Mr. Chairman.

Also, Mr. Chairman, with respect to the City of St. John's, if you look at the dangerous materials that are stored within the boundaries of the cities of St. John's and Mount Pearl.

AN HON. MEMBER: Jack, have they got a fire department out there now?

MR. J. BYRNE: No.

Mr. Chairman, dangerous materials within -

AN HON. MEMBER: Are they looking for a fire department?

MR. J. BYRNE: I am getting into that.

With respect to dangerous materials, Mr. Chairman, there are dangerous materials stored within the cities of St. John's and Mount Pearl. There may be some within -

CHAIR: Order, please!

The hon. member's time is up.

MR. J. BYRNE: - the smaller municipalities but not near the quantity that will be stored within -

CHAIR: Order, please!

The hon. member's time is up.

MR. EFFORD: No leave!

CHAIR: The hon. the Member for Kilbride.

MR. E. BYRNE: Thank you, Mr. Chairman.

MR. A. REID: (Inaudible).

MR. E. BYRNE: The Chairman recognized the Member for Kilbride.

MR. A. REID: The custom is that you go back and forth across the House.

MR. E. BYRNE: I'm sorry. If you would like to speak to it.

CHAIR: The hon. the Minister of Municipal and Provincial Affairs.

MR. A. REID: I have no intention of -

CHAIR: Order, please!

The Chair apologizes, but hon. members sometimes stand, and they stand not to speak. In this case, we will recognize the hon. the Minister of Municipal and Provincial Affairs.

MR. A. REID: Mr. Chairman, I guess I will have to concede to my hon. colleague for Cape St. Francis. I will have to give in to him once and for all, I suppose, and let him feel like he is winning the battle. Because he is standing alone in this House tonight with no support in his own caucus, and certainly no support on this side of the House, as it relates to the fire-fighting service.

What I will do is I will give in and I will make a statement here tonight that if Logy Bay - Middle Cove - Outer Cove doesn't want to be part of the fire service of St. John's and Mount Pearl, then they can create their own. If they want to go off on their own and buy their own fire truck, and have their own service, I think I will give in and let them do it. Now, don't you think that is the gracious thing for us to do as a department?

SOME HON. MEMBERS: Hear, hear!

MR. A. REID: If Logy Bay doesn't want to be part of the service, then I say: Do what everyone else did, except Mount Pearl and St. John's, and back out. Buy your own fire truck and look after your own fire fighting. Now, I cannot do much more than that.

SOME HON. MEMBERS: Hear, hear!

CHAIR: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Chairman.

The Minister of Municipal and Provincial Affairs just stood in his place and said something that he knows -

AN HON. MEMBER: That you cannot accept.

MR. J. BYRNE: We can't accept the very great cost to the people of Logy Bay - Middle Cove - Outer Cove, that was heaped upon them by this administration and the previous administration.

The minister knows that the Mayor of Logy Bay - Middle Cove - Outer Cove met with him last week, or a couple of weeks ago, and talked about a volunteer fire department. He has already done that with respect to the legislation. The fact of the matter is that when he changed the legislation to allow the municipalities to withdraw from the St. John's Regional Fire Department, that Portugal Cove - St. Phillips had their own fire hall down there and are well on their way to having a fire department, that Paradise out there, with the population they have, could afford a volunteer fire department. He knows that. He knows that in Logy Bay - Middle Cove - Outer Cove, with 2,000 people, the rate jumped from $15,000 to $130,000 a year for a service that was the same service given to them for an amount of money that was being asked for by municipal affairs. They increased it from $15,000 to $30,000. They went from $30,000 to $45,000 on their own, without a cost recovery formula in place, a legal cost recovery formula.

So for the minister to stand in his place here now and make those statements is being a bit - I will not say the word. He is trying to be a bit smart at this point in time, and this is a very serious issue for 2,000 people.

The Town of Logy Bay - Middle Cove - Outer Cove has had a person come in and study the cost of putting in a volunteer fire department, and the minister has already given them permission in writing to borrow over $300,000 to put in their own volunteer fire department. What he is not telling you is how much it is costing the people of the Town of Logy Bay - Middle Cove - Outer Cove, that it is increasing from $15,000 to $130,000.

The City of St. John's made an offer that they would reduce it by $30,000 a year. This is based on the assessed value, Mr. Chairman, and what happened in the last assessment is that the assessments within the Town of Logy Bay - Middle Cove - Outer Cove went up from 40 per cent to 60 per cent because municipal affairs had waited ten years to do an assessment on the properties within the Town of Logy Bay - Middle Cove - Outer Cove. So, in actual fact, the bill can be anywhere, up to $150,000, for the same service they were getting ten years ago. We do not have a fire hydrant in the town. Kent's Pond is the closest fire department. If Kent's Pond is out, Kenmount has to respond to a fire in Logy Bay - Middle Cove - Outer Cove.

I had a meeting with the Premier and told him that if we had a fire in Doran's Lane in Outer Cove, if a house caught fire down there, it would burn to the ground; and within months we had a fire down there and the house burned to the ground. That is how serious this situation is. The minister can get up and be as smart as he wants to be, but it is not fun. This is a serious situation. I am tired of talking to the minister and trying to do something with this legislation. The answer we get when we send it off to the minister is a letter dropped off to me, signed by the two mayors of the cities that are going to be responsible for the fire-fighting service within the area. What do you expect them to sign, I say to the minister? There are 2000 people in the town of Logy Bay - Middle Cove - Outer Cove.

MR. A. REID: Well, talk to the two mayors instead of talking to us and (inaudible)

MR. J. BYRNE: It was the government that brought this legislation in. It was the government that gave the service to both cities, and they did not ask for it, I say to the minister. It was given to them. They were told to take it. So it is not the City of Mount Pearl and the City of St. John's. They were put in a situation where they had no choice. So it is up to the minister and this government to address and resolve the situation.

AN HON. MEMBER: Put the question.

MR. J. BYRNE: Put the question! I am not near finished on this yet, Mr. Chairman. I will keep it going all night.

Now, Mr. Chairman, the situation is this, again, that -

AN HON. MEMBER: (Inaudible)

MR. J. BYRNE: Unless you are deaf you certainly heard it before, I can guarantee you that.

MR. FITZGERALD: You are doing a good job, Jack.

MR. J. BYRNE: When I got sidetracked, Mr. Chairman, I was on dangerous materials.

MR. A. REID: Why did they agree with it? Why (inaudible) signed an agreement to do this the way we have done it, exactly the way we have done it?

MR. J. BYRNE: Who signed it?

AN HON. MEMBER: Logy Bay, he said.

MR. A. REID: (Inaudible) fire fighting since last January. Not one (inaudible) since last January.

MR. J. BYRNE: Now, you have to be accurate with respect to what you are saying, Mr. Chairman. What happened was that the towns agreed upon a formula to pay back to the City of St. John's the arrears that were based upon a cost recovery formula. The towns did agree on that, the arrears, how much they would pay back, and the towns have been paying that, but they have not been paying the rate that has been charged for 1996 which is the same basically as was for the cost recovery formula. That was never changed. We can talk about an agreement being signed but the agreement that was signed was for arrears. That is what was agreed upon, Mr. Chairman, nothing more, nothing less. So therefore, Mr. Chairman, that will address that point.

Now, to get back to the dangerous materials, Mr. Chairman. As I said, in the City of St. John's there is a much larger quantity of dangerous materials stored and there has to be certain equipment on standby in case there is a fire because of certain gases that could come forward, I suppose, Mr. Chairman. It is not likely to happen in the Town of Logy Bay - Middle Cove - Outer Cove. It is not likely to happen in Torbay. It is possible but not probable. It is more probable within the City of St. John's and the City of Mount Pearl. That is something we are paying for that maybe we should not have to pay for.

Also, Mr. Chairman, there are the rescue units. Based on an assessed study of Logy Bay - Middle Cove - Outer Cove we are utilizing the rescue units 1.18 per cent of the actual responses. So we feel that that is not a case to be made for the city, that we would have to pay for the standby cost for the rescue units.

MR. MATTHEWS: Well, what do you want?

MR. J. BYRNE: I say to the Minister of Health, all we want is a reasonable rate. The Town of Logy Bay - Middle Cove - Outer Cove agreed, all the towns agreed to binding arbitration. Let's put something in place and put binding arbitration there, and we will agree to it. If it is $50,000 or $150,000, we would be forced to pay it. But, who said no to that? The City of St. John's said no binding arbitration. How much more reasonable can a group get, I say to the Minister of Health? We agreed to binding arbitration.

Another factor is the response time. We all know how important it is for a response time for fire-fighting equipment to get to a fire. The response time, Mr. Chairman, of course within the far reaches of Logy Bay - Middle Cove - Outer Cove, is much longer than in most areas of the City of St. John's. If a fire happens, and hopefully it doesn't, the response time, say, to Elizabeth Avenue - because where all the fire departments are situated the response time within the city is quicker than the response time into Logy Bay - Middle Cove - Outer Cove. Hopefully, Mr. Chairman -

CHAIR: Order, please!

The hon. member's time is up.

The hon. the Member for Bonavista South.

MR. MATTHEWS: Bonavista is going to pay for it now, Jack.

MR. FITZGERALD: Thank you, Mr. Chairman.

No, I say to the hon. Minister of Health, Bonavista is not going to pay for it, but what the member is asking for here I don't think is unreasonable. What he is asking for, Mr. Chairman, is a fair charge for fire-fighting. He is talking about 2,000 people living in Logy Bay - Middle Cove - Outer Cove and he is witnessing a bill that went from $15,000 a year to well in excess of $100,000 a year. That isn't acceptable, I say to the Minister of Health, in Bonavista, it isn't acceptable in Twillingate, and it certainly isn't acceptable in Logy Bay - Middle Cove - Outer Cove.

Mr. Chairman, it is another situation where you see the big Cities of St. John's and Mount Pearl, laying the heavy hand on the smaller communities in the outlying area. It is another example where you see the big city coming forward and saying: Yes, we will provide you with fire protection but we won't charge you -

AN HON. MEMBER: Inaudible!

MR. E. BYRNE: I will tell you in a few minutes what St. John's loses. I am going to tell you all about a new part of St. John's and what it hasn't got since amalgamation, and we will see if you are so smart then with your tongue.

AN HON. MEMBER: (Inaudible) looking after the crowd down there.

MR. E. BYRNE: Absolutely not! Don't be ridiculous, boy! We will talk about it in a few minutes.

AN HON. MEMBER: Inaudible.

MR. E. BYRNE: We will talk about it in a few minutes.

MR. FITZGERALD: That is the so-called crowd, Minister, that keeps your city going.

MR. E. BYRNE: Paid for by the community, I say to the Member for Twillingate & Fogo, paid for by the community.

MR. FITZGERALD: That is the so-called crowd, Mr. Chairman, who keep the City of St. John's going. Those are the people you find at the shopping centres. Those are the people who come here and spend their money. Those are the people who keep your fair city going today.

What those people are asking for, what the 2,000 residents are asking for, is a fair charge for fire-fighting services. It isn't enough that there is no fire department located in this particular area. The response has now to come from St. John's. We are going to be going out there now, if the minister allows this piece of legislation to go through, and charge them almost 500 per cent to what they were charged last year, and that isn't right in anybody's books, Mr. Chairman. If we are going to go there and charge this particular town for fire-fighting services, then let's charge them a rate they can afford, let's charge them a rate which is acceptable to the people there.

They know, Mr. Chairman, what the service is worth. They know, and I don't think they objected to paying the fee that was there before. They probably wouldn't object to paying twice the amount they were paying before, but it is certainly unreasonable to expect to charge 2,000 people, living outside city limits, without any responding fire department in close vicinity of their particular area, $120,000 a year. Mr. Chairman, that is unreasonable and I certainly concur with the member when he expresses his concerns.

With that, Mr. Chairman, I will pass it back to the member again. I did want to express a view on this particular piece of legislation and I commend the member for speaking out for his constituents and putting their concerns forward in this House. That is why he was sent here and he will do nothing less than that tonight, and I am sure that before the night is over, that at least the minister will know the feelings of those people out there and know how wrong this piece of legislation is.

CHAIR: The hon. the Member for Kilbride.

MR. E. BYRNE: Thank you, Mr. Chairman.

MR. MATTHEWS: (Inaudible).

MR. E. BYRNE: Don't be ridiculous, I say to the Minister of Health. If you want to sit down and learn something, sit down and keep your mouth shut for ten minutes, you might learn something.

The reality of what this member is saying here right now is that he should be supportive. What he is asking for, on behalf of the people in the towns affected, is a fair and legitimate service; that's all. He has talked about binding arbitration. Why did the rest of the city involved in the regional fire services plan opt out? I know as a member who represents a "new part of this city", the fighting and scratching that we had to do just to get a composite crew in the Goulds. We had fire insurance companies come in and say that they would not provide fire insurance to parts of the district because there wasn't a reasonable fire service available, yet it was part of the City of St. John's. The minister knows that, it was part of the City of St. John's. We had fire insurance companies come in and say they would not and could not provide fire insurance because if a house burned down, they did not have a certain degree of comfort that a legitimate fire service will be able to respond in time. That, sir, happened to people who pay taxes to the City of St. John's -

MR. MATTHEWS: Do you want your constituents to pay for fire fighting? I will send a copy of Hansard.

MR. E. BYRNE: No, what I support, I say to the minister - send a copy of Hansard to my constituents?

AN HON. MEMBER: Yes.

MR. E. BYRNE: I will pay for the postage if you send it and anything that comes from you to my constituents, I am sure they are going to take a second look.

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: Pardon me?

AN HON. MEMBER: Your money and my time (inaudible).

MR. E. BYRNE: My money and your time. The problem is, that with your money, you spend no time in the Province minister, that is half the problem.

The reality is, Mr. Chairman, what people are asking for is fair and legitimate services. The Minister of Health says: You want the people of St. John's to pay for your services. No. This member has indicated clearly, up front, openly and honestly, that what the people in the affected area said is that they would be part of the agreement. If consensus or agreement could not be reached amongst all the partners to that agreement, send it to binding arbitration. It is a fair process, a process each and every one of us has to live by.

I support the member in his efforts to try to get a fair and legitimate fire service for the people in his town. I went through it for the last three years and the people of the Goulds did too.

CHAIR: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Chairman.

Now, the Minister of Health is over there yapping away. Let me tell you something: From the comments that he has made, I would say he knows as little about fire-fighting within the northeast Avalon region as he does about the Department of Health, what is going on in the Department of Health and what is going on within hospitals in this Province.

AN HON. MEMBER: He knows more about fire-fighting in St. Petersburg, Florida than he knows what is going on here.

MR. J. BYRNE: Yes, that is right. He knows more about fire-fighting in St. Petersburg, Florida than he knows about what is going on here.

MR. J. BYRNE: Yes, that is right. He knows more about fire-fighting in St. Petersburg, Florida, than about what goes on around here, Mr. Chairman. He has made a statement with respect to the services, and wants the members and the people of St. John's to pay for the services down there. It is because of them that the area is going broke. I will let him know that the Town of Logy Bay - Middle Cove - Outer Cove is in the black, have been in the black since they started, and the minister can confirm it. They have been in the black. They owe no money. The only money they owe is on the principle that they are being charged too much -

MR. MATTHEWS: (Inaudible).

MR. J. BYRNE: The Town of Logy Bay - Middle Cove - Outer Cove, they do not owe any money.

MR. MATTHEWS: What do you expect? You cannot but owe money if you do not pay your bills.

MR. J. BYRNE: Here he is trying to be smart instead of listening to reason. Listen now. The situation and reality of it is that what money they owe - they pay for everything they have, Mr. Chairman. They have buildings down there that they built, a small town of 2,000. They pay their bills. They owe no money to Municipal and Provincial Affairs. All the money they owe, they owe on principle and they refuse to pay it until they get something worked out. Not only that, I would not doubt but that they have the money set aside. But on principle alone they have a good point.

With respect, the Minister of Health asked the question: Why do they not set up their own? The Town of Logy Bay - Middle Cove - Outer Cove went to Torbay, which has a volunteer fire department, and asked Torbay would it respond. They would actually buy a fully-equipped fire truck for the Town of Logy Bay - Middle Cove

- Outer Cove. That is that they offered it, but the Town of Torbay came back and said they could not do it, it could not respond because it was a volunteer department, and because of the topography of the area it would take too long for them to respond. That is the point we are bringing up with respect to the City of St. John's. It may take too long for the City of St. John's to respond.

Now, Mr. Chairman, when the City of St. John's responds, hopefully, when they are called upon, they would respond from Kent's Pond and not have to respond from Kenmount. If that is the case, once they get to the town of Logy Bay - Middle Cove - Outer Cove there are no fire hydrants in that area for them to access. So we are not getting the same service as the people in the cities of Mount Pearl and St. John's. Therefore, how can you expect us to pay the same rate, I ask the ministers opposite?

AN HON. MEMBER: You are not being charged the same rate! You are misleading this House. You are not being charged the same rate!

MR. J. BYRNE: Mr. Chairman, the minister says I am misleading the House and they are not being charged the same rate. They are being charged the rate on the assessed value of the property within the town.

AN HON. MEMBER: Less 20 per cent!

MR. J. BYRNE: I already addressed that, if the minister had been listening.

AN HON. MEMBER: You had better address it again.

MR. J. BYRNE: Quite clearly, the Town agreed they would drop it by 20 per cent, which worked out to be $30,000 a year, on the $130,000 that was being charged. But when you look at the new assessments that were done last year, the rates increased up to 40 per cent to 50 per cent, the assessed value, so it went up from $130,000 to $150,000 again, Mr. Chairman. Let us be quite clear on that. They are still being charged the same total amount. In the budget for 1992, the rate for fire-fighting went up by 850 per cent.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: I am getting him convinced, yes.

Now, Mr. Chairman, for the Town of Logy Bay - Middle Cove - Outer Cove to pay that rate, an increase of 50 per cent to 60 per cent of the mill rate would have to be implemented to cover the cost of fire-fighting. Mr. Chairman, that seems to be quite high. The actual cost of fire-fighting for our town would take - now, there is a factor. The actual cost of fire-fighting for the town of Logy Bay - Middle Cove - Outer Cove would be 25 per cent of the budget. I wonder does 25 per cent of the budget for the city of Mount Pearl and the city of St. John's go for fire-fighting costs within the cities? I think not, Mr. Chairman.

CHAIR: Order, please!

The level of noise in the House is absolutely unacceptable. If it does not stop, I will ask the member to take his seat until such time as the level of decorum is acceptable to the Chair.

The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Chairman.

Now, for the town to cover the cost of fire-fighting, their mil rate would have to be eight to nine mils. That does not sound too high, really, when you compare it to some of the other rates in the city of St. John's, but -

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: Nine mils.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: Yes, but - the Minister of Health is at it again - the town does not have water and sewer, does not have sidewalks, does not have engineering services, does not have the same fire-fighting, so the Town pay their way on everything they have down there, I say to the minister. I would say it has been the attitude of this Administration and the previous Administration, that the towns not take on things they cannot afford. However, we have many municipalities in this Province in the situation today where they are overloaded and their debt is too high. The Town of Logy Bay - Middle Cove - Outer Cove was acting quite reasonably and quite responsibly in not taking on things they could not handle, and things they do not need.

Let us do some comparative costs on the similar-sized towns in the Northeast Avalon. This is based on the 1992 figure. Logy Bay - Middle Cove - Outer Cove are asked to pay $130,000. For the Town of Witless Bay, in 1992, it was $10,000. The Town of Bay Bulls is hardly worth mentioning, but they were paying $2,500 to Witless Bay for protection. The Town of Flatrock was paying $9,000 to the Town of Torbay. We approached Torbay but they could not service us because they were servicing Flatrock and the Town of Torbay; $9,000 as compared to $130,000. The Town of Pouch Cove, with a population of 2,000, back in 1992 paid $30,000; and the Town of Logy Bay - Middle Cove - Outer Cove had a population of l,800, which is closer to 2,000 now. That $30,000 is the figure they quoted me in 1992, compared to $130,000 for the Town of Logy Bay - Middle Cove - Outer Cove. Again, is that reasonable? Is it fair? Bauline, $4,500; the Town of Torbay, back in 1992 - when our cost would have been $130,000, which was being charged by the regional fire-fighting committee - with a population of over twice the population of Logy Bay - Middle Cove - Outer Cove, was paying $33,000. They now tell me that is up to $60,000 to $70,000 for 1992. The Town of Logy Bay - Middle Cove - Outer Cove, I am sure, would not have a problem with $60,000 or $70,000, even with half the population of Torbay. I am sure they would not have a problem with $80,000. I am sure they would go along with that, but to go with $130,000 is just not reasonable to expect.

Mr. Chairman, those are some of the things that the Town of Logy Bay - Middle Cove - Outer Cove has been saying over the past four years. The point, too, of course, is that the cost recovery formula was never approved by Cabinet. Now, the minister has changed legislation and allowed the municipalities to go out on their own and set up their own fire departments. The Town of Logy Bay - Middle Cove - Outer Cove have taken a look at that, Mr. Chairman, and this is what they have come up with.

CHAIR: Order, please!

The hon. member's time is up.

The hon. the Member for Baie Verte.

MR. SHELLEY: Thank you very much, Mr. Chairman.

I am glad to get up to support my colleague and make a point simply to the Minister of Health who keeps blabbering across the House all night. My colleague right now, Mr. Chairman, is speaking on behalf of his constituents, I say to the minister. That is what he is doing exactly and he is looking for a bit of fairness and balance. Let binding arbitration settle the whole case so that it is done through a proper procedure. People in his district hear this member speak on their behalf and ask for what they think is rightfully theirs, that is what they are doing. And I would say that it could be worked out, I say to the minister, if he would only give it the opportunity.

The member has made some very legitimate points. He has obviously thought this out. Not just today, Mr. Chairman, but over the months, even the last couple of years, the member has continued to raise these points and he has made some good, fair and reasonable points. He does not say that it has to be all settled in one clump, but he does say it is something that could be worked out so that his constituents do get fair service and have fair input as to who pays what bills. But, Mr. Chairman, for the minister to blabber across the House about rural Newfoundland and how the City of St. John's are carrying rural Newfoundlanders - I think it is exactly the opposite. And for the minister to say - and we can check Hansard later when we get copies of it - that the

member's constituents are not paying their bills. Did the minister say that the member's constituents in Outer Cover were not paying their bills? How does he know what their finances are? The member has made some legitimate points, so I say I support -

MR. E. BYRNE: (Inaudible) muzzle the Minister of Health now, it is about time.

MR. SHELLEY: I think the muzzle has started in the House and it is a smart thing for the House Leader to do that, Mr. Chairman.

I agree with the Member for Cape St. Francis. He made some very legitimate points, raising concerns on behalf of his constituents, and I think he should continue to do so.

CHAIR: The hon. the Member for Conception Bay South.

MR. FRENCH: Mr. Speaker, I had not intended to speak on this bill at all. As a matter of fact, I was going to let my colleague go, but after listening to the Minister of Health for the past twenty minutes sit there and refer to rural communities and who should pay whose bill - the minister knows absolutely nothing, zilch, zilch, about volunteer fire departments. If we ran over him in CBS with the fire truck he would not know what hit him. If we ran over him at high noon with our fire truck, he would not know what struck him because he knows absolutely nothing about volunteer fire departments. Now, I will not get into volunteer fire departments with him tonight because if I did I would keep him here for the next two weeks and he would never get a chance to pay his taxes in Florida because he would be still here going around my district with me with the volunteer fire department in Conception Bay South and a volunteer fire department in the town of Holyrood.

Now, Mr. Chairman, who should pay for this? I think that this member has a right to stand in this House of Assembly and fight for the rights of his constituents. I believe, as my first time being in here, that it was the constituents of my district who put me in here, it will be my constituents who can take me out. I believe that the member has a right to stand in here and if it is a 500 per cent increase that they are looking for, then I think that is morally wrong. I believe that the town should pay for their fire protection. I have absolutely no problem with that, and I do not think the member has any problem with that, none whatsoever, but I think there has to be some fairness and some balance to this so that these people can work out a formula whereby everybody comes to a suitable conclusion on the amount of money that should be paid, and I am not so sure we are doing it here.

I disagree with my colleague here, who was at one time the mayor of Mount Pearl, and I disagree with my colleague across the House who was also the mayor of Mount Pearl. You have to remember that there was a time when both of these municipalities, when they were going to go in with St. John's or Mount Pearl, they screamed murder, and now they are out on their own and, of course, large municipalities like to swallow up the smaller ones. When I was a municipal councillor in my district and they were going to put us in with the City of St. John's, I was running around to these meetings screaming blue murder, as well.

I believe that the member has a right to come here. I think it is wrong, the percentage of increase they are trying to put on Logy Bay - Outer Cove - Middle Cove. I think there has to be a solution and there should be a solution. I think they should pay for fire protection the same as we all have to pay for fire protection but I do not agree with the amount and the increases that have gone on.

Thank you.

CHAIR: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Chairman.

Now, to continue. I want to make it quite clear, and I have said it before in the House of Assembly, that in no way, by any stretch of the imagination would I be questioning the abilities and the professionalism of the fire department itself. That is not the question. The debate is with the cities, the service being supplied, and the amount being charged. Simply put, that is it, Mr. Chairman.

With respect to volunteer fire departments for the town of Logy Bay - Middle Cove - Outer Cove, the Town recently had a study done by a person who was quite capable of doing this. It was November 5 that it was given to the Town, and some of the things it dealt with was the geography of the area, the training, the recruitment for the volunteer fire department, the fire prevention program, capital expenditures and estimates of the fire station, the annual operating expenditures, communications, and the conclusion, Mr. Chairman. Of course, the amounts that would be set aside to do this, the budget itself worked out to be, the fire department, the facility itself, would cost a total of $431,320.

Now, some of the equipment that would be required would be a 625-gallon-per-minute pumper and equipment, $158,000, a four-wheel drive $35,000, breathing apparatus, portable pumps, nozzles, all this equipment would cost $276,700. They had an estimate of $100,000 to build the fire station itself. Communications would be another $46,000, training aids and what have you, $6,120 for a total of $431,000. To operate that facility for a year would cost approximately $36,700. Now, that may be a bit low and some people are questioning that, but the description and the budget involved Mr. Chairman, is quite detailed and covers everything from fund-raising to mileage, license fees, gasoline, electricity, first-aid supplies and what have you, so, Mr. Chairman, that is what it will cost the Town.

Now, the Town could go ahead, I suppose, and borrow half-a-million dollars on the authority of the Minister of Municipal and Provincial Affairs and pay it off over a ten-year period and have a volunteer fire department but, the people in the town are wondering, you know, if in fact it would make sense to do that. We had a public meeting and there were a lot of questions and concerns raised, so the Town is planning on getting back with a more detailed breakdown of the cost of putting in a volunteer fire department. So, Mr. Chairman, the Town of Logy Bay - Middle Cove -Outer Cove did look at a volunteer fire department. They also did a response time and the total responses in 1994 and 1995, and responses from January to September of 1996 - and this is very interesting, Mr. Chairman - the total responses in 1994 was thirteen responses and the cost per response would have been $10,769. Now, what did they respond to? Because, that may not seem to be outrageous if there were major fires, $10,769, Mr. Chairman. But they responded to one chimney fire, one garbage fire, one rescue, a false alarm, a forest and brush fire, a vehicle, one of a smell of smoke, three medical and two structure fires, and the total would have been $140,000 for that. Now, is that logical and reasonable, I ask you, Mr. Chairman? I do not think so.

In 1995, they had twenty-three responses at a cost of $6,068 per response. They had three chimney fires, three alarm bells, two rescues, six medical where the ambulance went out or whatever and took someone to the hospital, a forest brush fire, two; one vehicle fire, structure, four, and a motor vehicle accident, one. Now, Mr. Chairman, that is not reasonable by any stretch of the imagination. With respect to January 1 to September 23, 1996, Mr. Chairman, they had twelve responses, at basically $8,750 per response. In that period, they had one chimney fire, one garbage fire, two rescues, one false alarm, two structure fires, a motor vehicle accident and a forest and brush fire, and that was to the end of September, 1996 and, Mr. Chairman, that is the type of thing that has been happening in the Town of Logy Bay - Middle Cove - Outer Cove.

This report that was done for the Town is quite detailed and certainly gives you some comparisons as to what a volunteer fire department can do for the Town and at what cost. Mr. Chairman, as I said earlier, I have spoken a number of times in this House on this. I have had meetings with various ministers, I had meetings with the previous Premier, and I honestly believe that the Town is not being treated fairly with respect to the amount of money they would have to pay for fire-fighting costs. I want to reiterate that the Town are willing to go to binding arbitration and are willing to pay their bills, Mr. Chairman, always have been. There is not a bill owed by the Town for anything else other than for fire-fighting. So, Mr. Chairman, this is only a reasonable request. I do not know how the minister could address it. I think he has responded - I have not seen the letter to the Town of Logy Bay - Middle Cove - Outer Cove. I would imagine it is along the lines of the letter that was distributed here tonight, signed by the mayors of St. John's and Mount Pearl.

This is an opportunity, Mr. Chairman, in which I wanted to get up again and say what had happened with respect to fire-fighting in the Northeast Avalon. Hopefully, the minister can do something to resolve the situation. I do

not know what his closing comments will be, and I do not know if I can add any more. I have pretty well said what I had to say.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: You are looking good over there. It is a good seat for you, I say to the....

Yes. I think I have said what I am going to say on this bill, and hopefully, in the near future, we can have this resolved to the benefit of everybody concerned.

Thank you, Mr. Chairman.

On motion, clause 1 carried.

CHAIR: Shall the amendment to clause 2 carry?

All in favour, please say `Aye'.

SOME HON. MEMBERS: Aye!

CHAIR: Opposed, nay.

SOME HON. MEMBERS: Nay!

AN HON. MEMBER: Division, Mr. Chairman.

CHAIR: Call in the members.

Division

CHAIR: Is the House ready for the question?

SOME HON. MEMBERS: Yes.

CHAIR: All in favour of the amendment, signify by standing.

SOME HON. MEMBERS: Hear, hear!

CLERK: The hon. the Leader of the Opposition, Mr. Shelley, Mr. Edward Byrne, Mr. Fitzgerald, Mr. Jack Byrne, Mr. French.

CHAIR: All against the amendment, please stand.

SOME HON. MEMBERS: Hear, hear!

CLERK: The hon. the Minister of Forest Resources and Agrifoods, the hon. the Minister of Justice and Attorney General, the hon. the Minister of Fisheries and Aquaculture, the hon. the Minister of Municipal and Provincial Affairs, Mr. Walsh, the hon. the Minister of Finance and Treasury Board, the hon. the Minister of Mines and Energy, the hon. the Minister of Education, Mr. Lush, Mr. Barrett, Mr. Langdon, the hon. the Minister of Works, Services and Transportation, the hon. the Minister of Environment and Labour, the hon. the Minister of Development and Rural Renewal, the hon. the Minister of Health, the hon. the Minister of Tourism, Culture and Recreation, the hon. the Minister of Government Services and Lands, Mr. Oldford, Mr. Andersen, Mr. Canning, Mr. Smith, Mr. Ramsay, Mr. Woodford, Mr. Mercer, Mr. Reid, Ms Thistle, Mr. Sparrow, Mr. Wiseman, Mr. Osborne, Mr. Ottenheimer, Ms Jones.

AN HON. MEMBER: Bring back Harvey now. We want Harvey back.

CLERK: Mr. Chair, six ayes and thirty-one nays.

CHAIR: I declare the amendment defeated.

On motion, clauses 2 and 3, carried.

A bill, "An Act To Amend The City Of St. John's Act (No. 2)." (Bill No. 38)

Motion, that the Committee report having passed the bill without amendment, carried.

CHAIR: The hon. the Government House Leader.

MR. TULK: Mr. Chairman, Order No. 17, Committee of the Whole on a bill, "An Act To Amend The Expropriation Act," Bill No. 33.

CHAIR: Bill No. 33, "An Act To Amend The Expropriation Act".

The hon. the Member for Conception Bay South

MR. FRENCH: Thank you, Mr. Chairman.

MR. EFFORD: (Inaudible).

MR. FRENCH: Sit back, John, and relax. I am relaxed tonight, boy; two big pieces of pizza. Tim Horton's donuts make the Minister of Health happy. I am full now and ready to roll; good now for another couple of hours.

AN HON. MEMBER: A small drink.

MR. FRENCH: A small drink will keep you going for tonight.

I must say, Mr. Chairman, I would like to congratulate my two members. They certainly showed some backbone which I cannot say about some on the other side.

Anyway, I will now get into the -

MR. TULK: (Inaudible).

MR. EFFORD: (Inaudible).

CHAIR: Order, please! Order, please!

AN HON. MEMBER: It is just as well for me to resign now, isn't it? Just as well for me to resign right now.

CHAIR: Order, please!

I ask the hon. member to take his seat.

The Chair will recognize the hon. Member for Conception Bay South when there is a level of decorum in the Chamber that is acceptable.

The hon. the Member for Conception Bay South.

MR. FRENCH: Thank you, Mr. Chairman.

I would like to take the time tonight, Mr. Chairman, to discuss the bill on Expropriation, Bill No. 33. As well, Mr. Chairman, as I go through tonight I will probably need a bit of direction from the Chair. Under clause 2 I

have some amendments to move. So, if it is in order -

MR. GRIMES: Don't feel obligated.

MR. FRENCH: Oh, I don't feel obligated, Minister of Education, not in the least. I have a sleeping bag for you; so when you get a little bit tired let me know. I will make sure you are covered over and tucked in for an hour or so. We will be doing Education about six o'clock, you will be well-rested by then.

AN HON. MEMBER: That early?

MR. FRENCH: Well maybe. It might be eight or it might be nine.

MR. EFFORD: (Inaudible).

MR. FRENCH: I say to the Minister of Fisheries and Aquaculture, if I could haul it over his head, maybe we would not find him anymore.

I would like to move some amendments here, Mr. Chairman. Clause 2 of Bill No. 33 -

SOME HON. MEMBERS: Hear, hear!

AN HON. MEMBER: (Inaudible).

MR. FRENCH: I hope this does not go into my ten minutes, Mr. Chairman.

MR. TULK: On a point of order, Mr. Chairman.

CHAIR: The hon. the Government House Leader, on a point of order.

MR. TULK: We just had a very important piece of legislation that passed through this Legislature and some of his hon. colleagues stood up and voted against their colleagues, which they had a right to do. We were led to believe that when the hon. gentleman came back, we should give him a chance to put himself on the record, where he stood on that amendment.

Mr. Chairman, I want to say to the hon. gentleman, now that he is back in the House, we are willing to give him leave to stand up and say: Here I stand, four square, either for or against this amendment.

SOME HON. MEMBERS: Oh, oh!

MR. H. HODDER: Mr. Chairman, to that point of order. On the condition that we begin the debate all over again, then I will make a decision (inaudible).

CHAIR: Order, please! Order, please!

The Chair has not recognized the member yet.

SOME HON. MEMBERS: Oh, oh!

CHAIR: Order, please! Order, please!

I will ask the hon. member to take his seat.

SOME HON. MEMBERS: Oh, oh!

CHAIR: The hon. the Member for Conception Bay East & Bell Island. Does he wish to speak to the point of order?

MR. WALSH: (Inaudible), Mr. Chairman.

CHAIR: Point of order.

MR. WALSH: Mr. Chairman, what the Government House Leader is suggesting is not without precedent in this House of Assembly. As a matter of fact, the then-government, who are the people on that side, were sitting on this side when the hon. Leo Barry, the Member for Mount Scio - Bell Island, was unable to return to the Chamber in time for a division vote, and in actual fact was given permission by leave of his own request to cast his vote so that the House would know for posterity's sake how he voted. So precedent has been set, and the hon. Member for Waterford Valley could certainly take advantage of that precedent.

CHAIR: The hon. the Opposition House Leader.

MR. H. HODDER: Thank you, Mr. Chairman.

CHAIR: Do you wish to speak to this point of order?

MR. H. HODDER: I don't want to get dragged into this kind of situation, but I remember very important bills here on education reform, on Term 17, when certain members were absent from the House, and when they came back they never asked to vote. There is no rule here that says that a member should or is obliged to vote. If I had been here I would have voted, but the vote is called, it is over with, let's get on with it.

SOME HON. MEMBERS: (Inaudible)!

CHAIR: Order, please! Order, please!

If hon. members will allow, the Chair will rule on the point of order, but the Chair is not prepared to rule until such time as it can be heard.

The Standing Orders of the House require that everybody who is present in the Chamber at the time that the vote is called must vote. Nobody can abstain from voting. The hon. Opposition House Leader has been extended the courtesy of having his vote recorded if he so wishes, but the Chamber and the Chair cannot require him to do so.

The Chair has already recognized the hon. the Member for Conception Bay South.

MR. FRENCH: Thank you, Mr. Chairman.

I hope all of that wrangling didn't come out of my ten minutes. If it did, I'm up.

Now then, I would like to move some amendments.

CHAIR: I would remind the hon. member that he can speak to the debate as often as he wishes.

MR. FRENCH: Okay. Thank you, Mr. Chairman.

I would like to move some amendments: That Clause 2 of Bill 33, An Act To Amend The Expropriation Act, which is now before the House be amended by adding in subsection 19(2) immediately following the word "minister" the words "or -

SOME HON. MEMBERS: (Inaudible).

CHAIR: Order, please! Order, please!

The Chair is having some difficulty. The hon. member is trying to present an amendment to the House. If other members are not interested in hearing what the amendment is, maybe they could leave the Chamber so that the Chair could hear.

The hon. the Member for Conception Bay South.

MR. FRENCH: Thank you, Mr. Chairman.

That Clause 2 of Bill 33, An Act To Amend The Expropriation Act, which is now before the House be amended by adding in subsection 19(2) immediately following the word "minister" the words "or by the owner of land expropriated or detrimentally affected by the expropriation".

Would you want the explanations now or after? You want them now, I guess.

CHAIR: Is this amendment all to the same clause?

MR. FRENCH: Yes, Mr. Chairman. Most of them are to clause 2. There are several to clause 2, so I would like to move them first.

SOME HON. MEMBERS: (Inaudible).

MR. FRENCH: Yes, I have three, Mr. Chairman, to clause 2.

CHAIR: The hon. member can continue. The Chair will rule on the admissibility of the amendment when he sees it in print.

MR. FRENCH: Thank you, Mr. Chairman.

As well, Mr. Chairman: That clause 2 of Bill 33, An Act To Amend The Expropriation Act, which is now before the House be amended by adding immediately following subsection 19(2), the following subsection: "(3) Where the circumstances in either paragraph (1)(a) or paragraph (1)(b) hold, the minister shall make an application under subsection (2) forthwith."

CHAIR: Order, please!

The Chair must ask for clarification. Is this amendment to clause 2?

MR. FRENCH: Yes, Sir.

CHAIR: Clause 2?

MR. FRENCH: Yes, Mr. Chairman, yes.

CHAIR: I would repeat the question and ask the hon. member one more time. Is he absolutely certain this is to clause 2?

MR. FRENCH: Yes they are, yes, both to clause 2.

CHAIR: Very well. I would ask the hon. member to continue.

MR. FRENCH: So I have two amendments, Mr. Chairman, for clause 2.

AN HON. MEMBER: Excuse me for a second. You are going through all these. I am going to give them a copy now. Where are you at right now?

MR. FRENCH: But there are only two amendments.

AN HON. MEMBER: Clause 5.

MR. FRENCH: No, it says clause 2.

AN HON. MEMBER: It is clause 5 in the bill.

MR. FRENCH: Oh, clause 5 in the bill?

AN HON. MEMBER: (Inaudible).

MR. FRENCH: No she didn't. No, boy, not on this one.

AN HON. MEMBER: Do you want me to give him a copy of all the amendments?

MR. FRENCH: Yes, give him a copy of those.

AN HON. MEMBER: Every one of them, is what I'm asking you.

MR. FRENCH: Yes, give them all to him.

AN HON. MEMBER: Explanation and everything.

MR. FRENCH: Yes, give them all.

CHAIR: Order, please! Order, please!

I will ask the hon. member one more time if he would like to have a look at the bill and look at his amendment, and ask him one more time if it is, in fact, clause 2 or clause 5 that he is reading the amendment to.

MR. TULK: On a point of order, Mr. Chairman.

CHAIR: The hon. the Government House Leader, on a point of order.

MR. TULK: Mr. Chairman, the hon. gentleman seems to have so many pages over there in his hand that he doesn't know what he has. If he wants to take a minute, we are going to be very lenient and give him one minute to clear up the confusion over there. We know they are all gone tizzy over there, gone here, there and everywhere, as a result of their House Leader pulling the carpet out from under them, leaving them, running away from a vote. Just imagine, a House Leader running away from a vote. So, Mr. Chairman, we are prepared to give them a minute. Now, it is 2:04 a.m. We are prepared to give them a minute.

CHAIR: Order, please!

There is no point of order. If the hon. member needs a minute to get his notes in order, that is fine; he can have that by leave.

The hon. the Member for Conception Bay South.

MR. FRENCH: The numbers I have here are different. So those two amendments that I moved are to clause 5.

AN HON. MEMBER: (Inaudible) clause 2?

MR. FRENCH: No.

AN HON. MEMBER: (Inaudible).

MR. FRENCH: Harvey, do you want to do that? Because I also have some amendments to what I consider to be clause 11, John. You had better make sure it is clause 11.

Do you want to let those two go?

AN HON. MEMBER: (Inaudible).

MR. FRENCH: You might even agree, you know. You might give them a chance.

CHAIR: Order, please!

It really does not matter. The Chair will call the clauses in numerical order anyway.

MR. TULK: Yes, when we get to clause 5 you move the amendment.

MR. FRENCH: Okay.

MR. TULK: Call clause 2, 3 or 4, whatever it is.

On motion, clauses 1 through to 4, carried.

CHAIR: Shall clause 5 carry?

The hon. the Member for Conception Bay South.

MR. FRENCH: Thank you.

Do you now have copies? Do you wish me to read those again, Mr. Chairman?

CHAIR: If the hon. member wishes to read them into the record, that is fine.

MR. FRENCH: The first one is: "An Act To Amend The Expropriation Act", which is now before the House be amended in subsection 19(2) immediately following the word "minister" the words "or by the owner of land expropriated or detrimentally affected by the expropriation".

As well: That clause 5 of the bill, "An Act To Amend The Expropriation Act", which is now before the House be amended by adding immediately following subsection 19(2), the following subsection: "(3) Where the circumstances in either paragraph 1(a) or paragraph 1(b) hold, the minister shall make an application under subsection (2) forthwith."

SOME HON. MEMBERS: Oh, oh!

CHAIR: Order, please!

The Chair is rapidly losing patience. If nobody else in this hon. Chamber wants to hear the amendments that the hon. member is presenting, the Chair does.

The hon. the Member for Conception Bay South.

MR. FRENCH: Thank you, Mr. Chairman.

The first one there amends clause 5 and adds reference to the owner of the land to be expropriated. The bill says only the minister can refer a disputed expropriation to the Public Utilities Board for a decision. This amendment also gives the owner the right so that the owner, he or she, can refer the matter to the PUB for a decision.

If, Mr. Chairman, we are going to go to the Public Utilities Board to have expropriations determined, then this particular clause, clause 5, with 19(2) that we have added, will now give the land owner the opportunity which is not in the act, the opportunity, if they so desire, to send the expropriation to the Public Utilities Board.

AN HON. MEMBER: (Inaudible) to vote.

MR. FRENCH: Oh, I don't care how you are voting. You are going to be here for another couple of hours anyway. Sit back, relax, take it easy.

As well, Mr. Chairman, in clause 5 we have added subsection (3). The bill does not say the minister has to refer a disputed matter to the PUB right away. He or she could delay that particular purpose, and that would leave the land owner exposed, of course. This amendment says the minister must immediately refer the matter forthwith to the Public Utilities Board for discussion. We would like to put in these two particular amendments, so that when we do, we at least give the landowner some protection. We also give the landowner the right to refer the matter to the Public Utilities Board, because before we could set up a board under this particular piece of legislation. We are not going to do that any more. We are going to allow the minister only to refer to the Public Utilities Board and we think that is wrong, Mr. Chairman, and that in actual fact this clause here gives the landowner the same right I guess, as it would give the minister. If the minister can refer then why can't the owner of the land?

Again, the same thing –

MR. FITZGERALD: I can't hear a word here, Mr. Chairman.

CHAIR: Order, please!

It has been several times, since the hon. Member for Conception Bay South stood to address the amendments, that the Chair has asked for order in the House. The ruling of the Chair seems to be adhered to for not more than about two or three seconds. So I am going to ask one more time that we have quiet, silence, in the House so that the Chair can at least hear what the hon. member is saying. If other members are not interested, I will ask them to leave and if they will not leave because I asked them, then I will see to it that they leave.

The hon. the Member for Conception Bay South.

MR. FRENCH: Thank you, Mr. Chairman.

So that is why, Mr. Chairman, I move these two particular amendments, to give protection to the owner of the land. I hope the minister has a copy so that she can review this. I don't think it makes such a great difference but I think it should be added for the protection of the landowner, to cover him or her under this particular piece of legislation.

Having said that, Mr. Chairman, I will sit down and will allow one of my colleagues to go next.

CHAIR: The hon. the Member for Baie Verte.

MR. SHELLEY: Thank you very much, Mr. Chairman.

I am glad to rise on this particular bill, Mr. Chairman. As a matter of fact, I have been waiting all night to get to a very substantial bill in this House this evening. I would say to most hon. members in the House, this is one of the most substantial bills that have come to this House this evening. There are some very good points, as a matter of fact, Mr. Chairman, although there was a mistake with the number, as to what clause it was. Overall it is a very important bill. There are a lot of good points and there has been a lot of good research done on this particular one. We are going to make a couple of points on this particular bill. Mr. Chairman there was some good research done by my colleague, by the critic.

Mr. Chairman, the stated intention of the bill is basically to have the PUB and not the arbitration board determine the compensation paid to the landowner. Right away this caused them to question some very important things as far as the landowner is concerned and how he can be covered. Under the old act, failure of the minister and the landowner to agree on the compensation of the expropriated land meant an arbitration board was appointed in that particular case. Under this bill the board is the PUB and the PUB is more likely to do that. What it does is it takes away from and intimidates the landowner in this particular situation. It moves it into the hands of the PUB. So, Mr. Chairman, that is one of the points.

The second point to be made, and my colleague has already alluded to it a couple of times now, is that the minister decides whether it is referred to the board or not. What has happened here is all of a sudden the minister is dictating and there is no more arbitration. There is no more using an arbitrator and using fairness and balance. It now seems as if the minister takes over everything. The minister decides, in this particular bill, whether to refer it to the board or not. The landowner no longer has a rep on the decision-making board. That is another point brought out in this bill that sort of strikes you. There is no rep when the land is in dispute.

Mr. Chairman, this bill raises the cost of the process and intimidates the landowner. What landowner is going to come forward if he knows he has to spend a undue amount? The expenses now are not just a small amount, but we are now talking about increased charges to the landowner that are obviously going to intimidate that person to begin with, so that the minister has the upper hand. The fairness and balance, arbitration, using both sides, and cooperating, all those things that did go on are now out the window, Mr. Chairman. That is what happens in this bill. There are some very serious concerns that have been put together by my colleagues here.

Of course, there is intimidation of landowners when the minister offers nothing. If the minister has made no award offer prior to referring a claim to the PUB for a decision, the PUB decides which party pays the cost. The minister has the power to send the matter to the PUB without first offering any compensation whatsoever. Mr. Chairman, that is not fairness.

I know the minister has made comments to the fact that this may be an archaic system and something that should be changed. I think it is only PEI and Newfoundland now that have this particular system. I could be corrected on that, but I think it is only PEI and Newfoundland now that have this particular system, our old act. Mr. Chairman, there may be changes that are possible. Nobody disputes that and improvements can certainly be made.

My point is: Are these the right ways to change this, Mr. Chairman? It seems as if the minister dictates exactly who goes where. If the landowner, as is his right, decides that the compensation is not fair, what happens? The minister decides if it goes to the PUB or not. He is the one who can refer it to the PUB for recommendations, and that is not fair. What is happening now is a dictatorship.

Not only that, but as we have already mentioned, the bill raises the cost of the process and intimidates landowners into accepting the minister's offer. In Section 34 - and it is still the case - if the board does not award the landowner more than the minister offered, the landowner must pay all costs, expenses and fees incurred in the award process, Mr. Chairman. While the old process involved three arbitrators and one scenographer this bill will drive up the cost.

Section 34.2, specifics: The expenses include the cost of councils, engineers, evaluators, stenographers, accountants and other assistants employed by the board, as well as salaries and expenses of the members of the board while employed at that hearing. I do not know what the exact cost is. I do not know if we done some calculations on that, but it is somewhere in the area of $15,000. Now, what landowner is not going to be intimidated by that and turned off from even trying to raise his case, if he has to pay that cost to start with? So, the intimidation factor is there and it is also the factor that is going to make him shy away from this process, that he has to foot the bill for God knows how much, according to the bill now, Mr. Chairman.

So, while I agree that the system we now have is archaic and that some changes that can be made, are they made in the right direction? I would ask the minister to look at some of the suggestions and the amendments made. There may be some very good ones there that the minister might want to accept. I say to the Government House Leader, there are some very good points. There are five major ones and they mostly deal with clauses 5 and 11 in this bill. I think they can be addressed and maybe even worked out by the minister if he is -

MR. TULK: (Inaudible).

MR. SHELLEY: Oh! I say to the Government House Leader, I have heard this said several times tonight. Mr. Chairman, I had no intention of being here tonight and I don't think any member did. This should have been addressed in the House today, maybe, and debated. Maybe tomorrow it could be debated or maybe the House

should have been brought back in October so that we could deal with, Mr. Chairman. Instead, what are we doing? Instead, we are here at the last minute, just a week before Christmas, trying to rush these bills through. We have not even gotten into HST and the education reform, and here we are trying to rush through, Mr. Chairman.

I make note to the minister, the Minister of Education and the people that have criticized this tonight, that, yes, there was some trash legislation, as the Government House Leader said the other night. That is what he said.

MR. TULK: A real charade, my son.

MR. SHELLEY: I agree with you, it is a real charade. You are absolutely right, it is a charade. We should not be dealing with this very serious piece of legislation at 2:19 a.m.

AN HON. MEMBER: (Inaudible).

MR. SHELLEY: But the homework is done on it, Mr. Chairman. It is too bad -

MR. TULK: No, the homework is not done on it (inaudible).

MR. SHELLEY: Yes it was, I say to the Government House Leader, it certainly was. The homework was done on it and the points are there. Now whether they came to the floor tonight or whether they came 2:00 this afternoon is up to the Government House Leader. We should have been back here in October dealing with these bills, the HST and so on, instead of waiting until the last minute to bring them in.

Mr. Chairman, we can stand here and argue all night or until the wee hours of the morning with the minister. The truth is, the House should have been opened in October. I had no problem sitting back when some of my colleagues made some good points tonight on some other minor legislation.

MR. TULK: (Inaudible).

MR. SHELLEY: Mr. Chairman, who has the floor? I will get a point in as soon as the Government House Leader quiets down a little bit.

Mr. Chairman, I say to the minister now, who is responsible for this bill, the truth is this is one of the most substantive pieces of legislation to come before this House today. It is. It is certainly a lot more substantive than all the foolishness that went on with the bill just before that - I can say that - the one that the Member for Cape St. Francis

MR. J. BYRNE: (Inaudible).

MR. SHELLEY: I am talking about substantive in comparison to this.

CHAIR: Order, please!

I ask that the hon. member be afforded the opportunity to make his case without interruption.

MR. SHELLEY: Thank you very much, Mr. Chairman, I appreciate it.

I will say, in seriousness - and it is hard to be serious at 2:20 a.m. but I am serious about this - this is one of the bills, one of the pieces of legislation, that we studied, all of us as a Caucus, and brought up five or six points on. I still say, if the minister looks at them, they are legitimate points. Out of all the bills that we discussed here tonight I would say that it is the most substantive piece of legislation offered here in this session.

Mr. Chairman, when you talk about expropriation of land and the ability of the landowner to put forward a fair case and to have his case heard, I think it is a fair thing. The six points brought forward are something that I would ask the minister - although it is the wee hours of the morning and it is hard to be serious, I suppose, at this

time, when people are getting edgy and so on. We can't rush this piece of legislation. I think that every member in this House owes it to themselves -

AN HON. MEMBER: (Inaudible)?

MR. SHELLEY: Who's bill is it? Judy's bill. The minister -

AN HON. MEMBER: (Inaudible).

MR. SHELLEY: I know. It is 2:20 a.m., so you can miss that too. The Minister for Development and Rural Renewal.

This particular bill is very important. There are some very serious concerns. Every member in the House should, Mr. Chairman, take notice of the amendments that we put forward, take them very seriously, consider some of the suggestions made by my colleague. There was some very good homework done on this particular bill, and it is very serious.

I would just read through, very briefly, some of the points we made. They mostly involve clauses 5 and 11. Those were the biggest - we believe, anyway, some of the most important points are made in clauses 5 and 11. Quite simply, Mr. Chairman -

CHAIR: Order, please!

The hon. member's time is up.

MR. SHELLEY: Okay, Mr. Chairman. I will get a chance to make a few more points again in a second.

CHAIR: The hon. the Member for St. John's South.

MR. OSBORNE: Thank you, Mr. Chairman.

Just a few brief words I would like to say regarding "An Act To Amend The Expropriation Act". I guess the stated intention of the bill was to have the Public Utilities Board and not an arbitration board determine the compensation paid to landowners when property is to be expropriated. If you look closely at clauses 5 and 11 of this bill, as my hon. colleague, the Member for Conception Bay South mentioned a little earlier - and he is submitting amendments to these - we find some flaws that we would like to address.

First of all, compensation is set by the Public Utilities Board and not an arbitration board. Under the old Act, a failure of the minister and landlord to agree on compensation for the expropriated land means that an arbitration board would be appointed in that particular case. The minister would appoint an arbitrator, the landlord would appoint an arbitrator, and there would be a third arbitrator, or trial judge, appointed as well. In addition, there would be a stenographer.

Under the new Act the board will be the Public Utilities Board, and the Public Utilities Board is probably more costly and less swift, since it is already bogged down with other responsibilities. So, Mr. Chairman, we see that this is one major flaw under "An Act To Amend The Expropriation Act".

Another is the fact that the minister would decide whether to refer to the Board. The decision is up to the minister on whether or not the minister would decide at all to refer to the Public Utilities Board. Under the old Act, if the minister and landlord could not agree on compensation, then the appointment of an arbitration board becomes automatic. Under the bill, the minister is given the power to make the application to the Board, and it therefore stands to reason that he will have a choice of whether or not, and when, to refer the matter to the Public Utilities Board. The landowner has no such power to apply to the Public Utilities Board, only the minister.

This, I believe, is another serious flaw. It leaves the landowner at a disadvantage and gives the minister more powers. The minister can decide whether or not he is going to send it, and actually when he would send it, to the Public Utilities Board. There is no power of that nature given to the landowner.

Mr. Chairman, those are a couple of the flaws. A third one: the landowner no longer has a rep on the decision-making board. This is a very serious concern that we, on this side of the House, have. It seems like the new bill is taking powers away from the landowner and giving more powers to the minister. And, in this particular case, the landowners have nobody else to turn to, other than the minister, in the event of a dispute.

Under the old Act, one of the three members of the decision-making board is on the board at the landowner's request. He is a landowner's arbitrator. The landowner's arbitrator can veto the minister's choice of the third arbitrator, and the award decision of any two arbitrators is final.

Mr. Chairman, under this bill, the Public Utilities Board decides, and the landowner has no say in the composition of the board, which can be as small as one commissioner, nor does the landowner have a rep on that board. He must hire and pay for independent legal counsel.

Mr. Chairman, in the event of a disagreement between the landowner and the minister, it can become very costly to the landowner now to fight the decision by the minister on what compensation is, whereas in the previous bill, there was certain protection set out for the landowner. That is not the case under the new bill.

There is no rep when land is in dispute. Under the old Act, when the ownership of land is in dispute, or the owner cannot be found, the minister is obliged to appoint an arbitrator to represent the missing landowner. There is no one on the Public Utilities Board to represent the missing landowner, so who, in this case, will make a case and defend the rights of the missing or disputed landowner now?

All throughout the new bill, "An Act To Amend The Expropriation Act", every point in clauses 5 and 11 basically abolishes the landowner's rights and gives further rights to the minister. As I have mentioned, if there is a dispute between the landowner and the minister, the landowner would have absolutely no recourse other than to hire legal counsel and go to the Public Utilities Board. It is a very serious matter, actually.

This bill raises the cost of the process and intimidates landowners into accepting the minister's offer, and that is a very true fear that landowners will face. In the event of the smelter or by-pass roads and so on, landowners almost have no choice but to accept the offer of the minister because it would be so costly to hire legal counsel and go through the Public Utilities Board to fight the decision of the minister. As a result, landowners who do not have the financial resources to fight the decision of the minister are therefore intimidated by this new process.

It is still the case that if the board does not award the landowner more than the minister offered, the landowner must pay all costs. Expenses and fees incurred in the award process must be paid by the landowner. While the old process involved just three arbitrators and a stenographer, this bill will drive up costs.

Section 32 (2) specifies that expenses include, "...costs of counsel, engineers, valuators, stenographers, accountants and other assistants employed by the board, as well as the salaries and expenses of the members of the board while employed in and about the hearing."

Mr. Chairman, this new bill, "An Act To Amend The Expropriation Act", has several flaws, as far as I can see; not flaws in the printing or the way the intended legislation is written, but flaws in the fact that the landowner has far fewer rights. There is nobody to stand up for or to represent the landowner on the Public Utilities Board, and the cost of the landowner fighting his case becomes much more expensive. The Public Utilities Board could be frivolous in commissioning more input than is warranted.

Mr. Chairman, the government could be mean-spirited, commissioning expensive input to increase costs and intimidating landowners who fear they will not get an increase and would have to pay costs, and this is basically

the full impact of the new bill, the fact that the landowner is going to incur much more cost in order to fight for his rights.

CHAIR: Order, please!

The hon. member's time is up.

MR. OSBORNE: By leaver, Mr. Chairman?

CHAIR: Does the hon. member have leave?

SOME HON. MEMBERS: Yes.

CHAIR: The hon. the Member for St. John's South, by leave.

MR. OSBORNE: Thank you, Mr. Chairman.

I can see, in the wee hours of the morning, the government is becoming very compassionate to our causes.

AN HON. MEMBER: They are worn down.

MR. OSBORNE: They are worn down.

The government may spare no expense in beefing up council to convince the Public Utilities Board not to increase the award while the landowner may not be able to afford to compete. Mr. Chairman, we, on this side of the House, are very compassionate towards the landowner. We feel that the landowner here has fewer rights than under the old Act. And the cost of fighting to get a fair market evaluation, in some cases, for land that is being expropriated, that cost would probably intimidate some landowners to just accept the minister's offer. I am sure that this is, in a nutshell, what the minister is looking for here.

The bill intimidates landowners even when the minister offers nothing. The minister has made no award offer prior to referring a claim to the Public Utilities Board for decision. The Public Utilities Board decides which party pays the costs. The minister has the power to send the matter to the Public Utilities Board without first offering any compensation. I cannot imagine it, but that is a fact.

The landowner, Mr. Chairman, knows the Public Utilities Board could award all costs to him and he could end up with no compensation from the government to offset the expenses. The landowner might be persuaded to accept nothing for the land rather than face the risk of paying the Public Utilities Board costs and get nothing.

You can call this, Mr. Chairman, persuasion by implicit threat. The stark reality here is that the landowner has far fewer rights while the minister has more rights. The landowner in this particular case, has very few rights as far as fighting the minister's decision on an award is concerned, and, Mr. Chairman, the stark reality, unfortunately, is that in many cases the landowner will feel intimidated into accepting the minister's offer without going to the Public Utilities Board. The landowner will feel intimidated, even if it is a very low offer, even if the government are just expropriating without any reimbursement to the landowner.

Mr. Chairman, many landowners will feel intimidated to just accept the minister's offer as opposed to the threat of having to bear all the costs of the Public Utilities Board.

MR. GRIMES: Tell us a few jokes now.

MR. OSBORNE: I cannot, I say to the Minister of Education, because the Minister of Fisheries is not here.

Mr. Chairman, I guess the stark reality is that we, on this side of the House, feel very compassionate towards the landowners, and this new bill is going to take away the rights of the landowners and, in fact, give more powers

to the minister. The minister will have more rights. The minister can actually expropriate land, with little or no compensation to the landowner.

MR. TULK: There is only one way to (inaudible) gets up and states his position on that and then we will close her down.

MR. OSBORNE: Then, otherwise, I will be here until six o'clock.

SOME HON. MEMBERS: Oh, oh!

MR. OSBORNE: Mr. Chairman, we, on this side of the House, feel that there is a need to introduce amendments to this Act in order to protect landowners. Mr. Chairman, under almost every Act that is being introduced, the ministers of this present Administration are requiring more power for themselves. In many cases, I think the present Administration is giving ministers too many powers and too much control.

Mr. Chairman, unfortunately, the rights of the landowner in many cases, in this particular bill, are not looked after. The rights of the landowner are not taken into consideration. This gives so much power to the minister and his department that they can expropriate land and the landowners are almost powerless. That is the reality under this new bill. And, unfortunately, if this bill gets passed in its present form, what are we going to do to protect the rights of the landowners? The minister is empowered here with too much control, the landowners have very few rights, and may be faced with all costs.

Having said that, Mr. Chairman, I will pass to one of my colleagues because I know we all want to speak on this particular bill.

Thank you, Mr. Chairman.

CHAIR: The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Chairman.

I feel I have an obligation to comment on those amendments moved by my colleague, the Member for Conception Bay South. In fact, I think they are very sensible amendments, and if the minister pays attention he will see why. I just want to outline that clause 5, section 19.(1) of the Act, says that the minister - and I think it is a very, very important amendment, and I will tell you why, but first I will put it into the proper context.

It says: "Where (a) the minister and the owner of land expropriated or detrimentally affected by the expropriation cannot agree on the amount of compensation to be paid for the expropriated land or on account of being detrimentally affected;

(b) the owner cannot be found or there is a doubt as to the ownership of the land; or

(c) for another reason the minister considers it expedient

the amount of compensation to be paid shall be fixed by the board."

It goes on to mention, and here is where the amendment is:

"(2) An application to fix compensation under subsection (1) shall be made by the minister."

So an application to fix compensation can be made by the minister. Why could it not - and this is what the amendment says - Why could it not be made by the owner of the land that is being expropriated or that is detrimentally affected by the expropriation? Now, if it is going to the Board, why should the minister, if a person feels he is unduly affected by that expropriation, should not that individual out there be allowed to put it to the Board, also, to render a decision? That is all the amendment states and I think that is fair game.

Where the circumstances in either paragraph 1 (a) if somebody is detrimentally affected or in 1(b) where the owner cannot be found or there is doubt as to who owns the land, it says: "The minister shall make an application under subsection 2 forthwith." We are saying: If it is in doubt, the minister `shall', not has the choice to do it, he shall make it, because it is only fair that if people are affected by this, they should have an opportunity to have their day in court. Why should they be subjected - and this is referring to other clauses - to a very expensive process where they will have to pay the full cost of it?

Some of the other amendments that will be coming up, in clause 11, for example, that we will be dealing with, I am sure my colleague, the Member for Conception Bay South, has some very sensible ones to put forth and they are not outlandish by any stretch of the imagination, they are just saying: Why should the minister be the only person who can refer it to the Public Utilities Board to render a decision? If you are unjustly affected by this, why can you not make application to have it heard? That is not too much to expect.

Now, there are many people out there today who have not been given the appropriate compensation for expropriated land, and there has been a process in place whereby arbitration, an arbitration board -

MR. GRIMES: The corner of your collar is sticking out.

MR. SULLIVAN: Okay. If it really bothers you, I say to the minister, I will leave the collar out but I will put the coat out farther, okay?

MR. GRIMES: Okay. It is distracting.

MR. SULLIVAN: I am sorry about that.

MR. GRIMES: I have to pay attention to what you say.

MR. SULLIVAN: I guess it will be well-turned up by twelve or two o'clock or five tomorrow, I say to the minister. I might even go back for a change later on today.

AN HON. MEMBER: Today. Two o'clock tomorrow.

MR. SULLIVAN: So we will not have tomorrow today, I guess, in parliamentary terms, right? There will not be tomorrow today. We may have tomorrow tomorrow, but we will not have tomorrow today? Okay, that makes sense in parliamentary language but, try telling that to somebody out there in the real world - not in here in a little bubble, out in the real world, and accurately so, probably, they will think that politicians are a bit crazy. I mean, you cannot blame them.

MR. GRIMES: The most sensible thing you have said since you have been Leader of the Opposition.

MR. SULLIVAN: Thank you, because I always value the advice of the Minister of Education. His word is as good as anybody's in this Province, it is a bond, an honour that everybody knows what he means. The little package he carried under his arm up to Ottawa, with the Premier, that said: We need this, we have one of the worst education systems in Canada. `We need this for the young people in the Province,' that is what the Premier said. And the minister ran up with his little folder that said: Savings will be redirected -

CHAIR: Order, please!

I remind the hon. member that he is debating "An Act To Amend The Expropriation Act".

MR. SULLIVAN: Thank you, Mr. Chairman.

We would not want to expropriate the Minister of Education. We would not want to do that at all. And even if we did it, I think the government should be justly rewarded for that expropriation. He would be a tremendous loss over there. He is one of the few people who can stay serious in a matter of levity here, I must say. The minister managed to keep his composure.

In this Act, it is only proper that people who are unjustly affected by the expropriation of land should be able to have certain rights to make a referral to a board instead of just the minister -

MR. E. BYRNE: `Loyola', the Minister of Fisheries and Aquaculture looks like he did the other night at the Christmas party.

MR. SULLIVAN: No sir, the Minister of Fisheries and Aquaculture does not look like he did the other night at the Christmas party. It is a different Minister of Fisheries and Aquaculture. It is a complete transformation, I say. Maybe he is at the embryonic stages of his aquaculture, I do not know, but he is certainly not

CHAIR: Order, please!

I remind the hon. member again that we are debating "An Act To Amend The Expropriation Act", and I would ask him to keep his debate relevant to the content of the Act.

MR. SULLIVAN: If we wanted to expropriate, it is possible that you may want to expropriate an aquaculture area in this Province. If that has happened, do you not think the people who have the property that is being expropriated should get fair compensation?

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: You can have it all.

I am sure the minister would not want to expropriate valuable property that people spent their lifetime putting money into, or the minister -

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: That is not what you said last Wednesday. They were your buddies, I can tell you.

AN HON. MEMBER: God forgive you!

MR. SULLIVAN: Yes, maybe God forgive you. God forbid the people who do not get just compensation for expropriated land. What is wrong, with people whose land is affected, having a representative sitting on a board, to appoint a person to sit on an arbitration board? What is wrong with that? I ask the minister. I think it is important that the compensation - under the old Act, if there is a dispute, the compensation to be fixed shall be made by an arbitration board, it says, and the minister shall appoint an arbitrator and shall notify a landlord in writing that a board is to be appointed. It is going to change now. Under the new Act, in clause 5.19.(2), "An application to fix compensation under subsection (1) shall be made by the minister."

What happens? The current Act where we have an arbitration where an individual can have representation - it is automatically represented if there is a dispute over the compensation.

CHAIR: Order, please!

The hon. member's time is up.

SOME HON. MEMBERS: No leave!

AN HON. MEMBER: Oh, we should give him some leave.

CHAIR: The hon. the Member for Bonavista South.

MR. FITZGERALD: Thank you, Mr. Chairman.

I rise tonight to speak on the amendment as put forward by my colleague, the Member for Conception Bay South, on Bill 33, "An Act To Amend The Expropriation Act."

Mr. Chairman, here is another situation where the government of the day has brought forward a piece of legislation that is certainly not in the best interest of the residents of this Province. Mr. Chairman, up until now, if a piece or a parcel of land was to be expropriated, the minister would appoint a person to a board. The landowner would appoint somebody to a board and together they would agree on a chairman of that particular board. Together they would agree on a chairman and the landowner would bring forward his opinions and his arguments as to why he thought a piece of land was worth a set fee.

Now, Mr. Chairman, the government of the day, the minister of the day, decides that we are not going to deal with this anymore. We are not going to give the landowners a right to go and appear before an arbitration board. We are going to go now and put this in the Public Utilities Board, bring it under their jurisdiction, and by doing that we are also going to make sure that the landowner, if he does not accept the price as put forward by the minister's department, then we will make him responsible for paying the full fees as well. The fees and the costs of travel, the fees and costs of the meetings of the Public Utilities Board, the fees and costs of a stenographer. Mr. Chairman, this is all going to be passed back to the landowner, if the landowner's argument is lost. I ask the government: Where is the fairness of that? Many, many times in this Province, we see a piece of land that is expropriated. It may be a small section of land to improve a section of roadway. It may be a section of land to widen an intersection, but by taking that particular piece of land, then maybe two or three building lots may be lost in the meantime. So it is not only the value of a piece of land that is being taken to carry out a change in a government - some direction from government, like a roadway or an intersection, but by doing that and offering the landowner fair compensation for the small section of land that is taken, many, many times a much larger section of land may be deemed unsuitable then for a building lot or for other purposes for which this land was intended, or could be used for.

A prime example, I suppose, of what could happen is the road that is being put through over on the West Coast now. The bypass road on the back of the Deer Lake area there. Mr. Chairman, it was only a few weeks ago or a month ago where - I think it was shown on television - the road construction crew had just about wiped out a section of land there to the point that the home-owners house and the land was probably of very little resale value because of the acts of this particular construction company. This particular landowner went to plead to government to buy her house and land because she was being harassed with flying rock every time they would blast. The road was going right on the back of her property, on the back of her house.

AN HON. MEMBER: Where?

MR. FITZGERALD: Over on the West Coast. I am not exactly sure where it was. Maybe the Member for Humber Valley knows what I am referring to. It was probably in his district. It was in a show that was on the television news probably a month-and-a-half ago.

MR. FITZGERALD: Was it in your district?

AN HON. MEMBER: That was in my district.

MR. WOODFORD: Strawberry Hill (inaudible).

MR. FITZGERALD: Down by Strawberry Hill? Was that the new bypass road that was going in over in Pasadena?

AN HON. MEMBER: Yes.

MR. FITZGERALD: Right, that was the section of land. It was on the news. It was on *Here and Now*. Most people must have seen it. That was a prime example of people having a concern about this piece of legislation now. Here, a lady went and pleaded to government to offer her a fair value for her property because she was harassed so much with the construction company and with the fear of what would happen once that road was

opened up and traffic started going back and forth. The government of the day turned their back and said, `No, we do not want the land.' We do not mind if the rocks are coming down through your roof and going in through your windows. They just walked away from it, and that is wrong.

If people are going to go out there today and take possession of a piece of land, then they should offer and supply a fair market value for the piece of land they are buying, for the piece of land they are expropriating; not only, as I referred to, the section of land that they use, but if they are destroying or changing the value of a greater section of land because they want this small area to do what government deems necessary, then they should give them the value of the complete piece of land.

Today, if this piece of legislation is allowed to pass, if the property owner is not satisfied with the value that is offered by government, then they have to have a pretty heavy back pocket, I say to members opposite, in order to go and probably take a chance on spending $10,000 or $12,000 or $15,000 and lose the case, lose the battle. They might end up with the unfair value that was offered in the first place having to be accepted just to pay legal fess.

The way that this particular -

AN HON. MEMBER: (Inaudible).

MR. FITZGERALD: I saw that. Thank you very much; we have a new errand boy.

Mr. Chairman, that is the unfairness of this Act. Before, it was a fair process whereby the landowner would put forward a representative, the government or his department would put forward a representative, and there would be a chairman who would be agreed to by both parties. That was fair, and the ruling would have had to be accepted. The ruling was binding, and a fair value - or at least I did not hear anybody say that the way the process worked was unfair. I do not know why the government want to change it. I fear that I know. I fear that I know the reason why government wants to bring in this piece of legislation.

AN HON. MEMBER: Why?

MR. FITZGERALD: When you look at some of the things that they are doing now around rural Newfoundland, you are looking at bypass roads that they are talking about putting in. There is talk of one going by Clarenville. There is talk of another going by Gander to bypass the businesses. That is a story in itself. It is a situation where the Town of Gander does not want a bypass road, I can assure you. It is a situation where the Town of Clarenville does not want a bypass road, because they see what has happened. The Minister from Labrador nods his head. He is looking for a road. He does not want it to bypass anything. He wants to route it through all the communities. I fear, Minister, that a lot of your people may be affected by this particular bill. Once you get into - hopefully you will, and I believe you will - once you get into your Trans-Labrador Highway, you are going to see a lot of people having to come back and then go through the courts or through the Public Utilities Board, and have to go by the rules of this particular bill.

CHAIR: Order, please!

The hon. member's time is up.

MR. FITZGERALD: That will be the time when people are going to come to you and talk about the unfairness. They are going to come and ask why you did not stand in your place here in this House at 2:57 in the morning -

CHAIR: Order, please!

MR. FITZGERALD: Mr. Speaker, I will rise again.

CHAIR: The hon. the Member for St. John's South.

MR. OSBORNE: Thank you, Mr. Chairman.

MR. GRIMES: Why did you ask for leave the last time if you were going to get up again?

MR. OSBORNE: I thought of something else I wanted to say.

MR. GRIMES: Well, that is for the birds.

MR. OSBORNE: There are two important clauses here that we must keep in mind, clauses 5 and 11. Clause 5 repeals sections 19 and 20 and replaces them with new appeals processes with the Public Utilities Board instead of an arbitration board, and many protections for the landowners are eliminated. Clause 11 repeals subsections 34.(2), 34.(3), and 34.(4), and replaces them with new clauses that will cost the person appealing a lot of money.

Mr. Chairman, this is the reason why we, on this side of the House, are so intent on debating this for many, many hours, if need be, because we feel it is very discriminatory that the landowners are going to have their rights taken away while, at the same time, they are going to have to bear the costs, and potentially a lot of money, to fight the decision of the minister on the expropriation of their land and what value they are going to get for their land.

Just some further specific details on clauses 5 and 11, Mr. Chairman. Under the current Act, when the minister and the owner of the land impacted by expropriation cannot agree on compensation, or where the owner is in doubt or missing, or for any other reason the minister considers appropriate, the amount of compensation shall be fixed by an arbitration board. Under the new Act, in the same circumstances, the amount of compensation shall be fixed by the Public Utilities Board, so right here, it is quite clear that the rights of the landowner are taken away.

Under the current Act, when there is a dispute, the compensation to be fixed shall be made by the arbitration board and the minister shall appoint an arbitrator and shall notify in writing the landowner that the board is to be appointed. That is the current section 20.3. Under the new Act, an application to fix compensation shall be made by the minister - this is the new section 19.2, and it is the case that under the current Act, the appointment of an arbitration board becomes automatic when there is a dispute over compensation, but that is not the case with the new bill.

Is it the case that under the new Act, the minster has the choice of whether and when to make application to the Public Utilities Board to resolve this matter? I mean, really, when you think about it, the minister can decide when he wants to send it, and whether or not he is even going to send it, to the Public Utilities Board. The landowner has absolutely no say in the matter at all. So, Mr. Chairman, I find it very discriminatory towards the landowner and very unfair to the landowner that under the new Act, not only does he have no say and does not have the ability to appoint an arbitrator on his behalf, but his case may not even be heard, it may just be cut and dried. The Act gives the aggrieved person no power to demand or speed up a Public Utilities Board hearing.

Mr. Chairman, throughout this entire new bill, "An Act To Amend The Expropriation Act", we see, especially through clauses 5 and 11, that the rights of the landowner are taken away and the rights of the minister are actually increased. Clearly, the Public Utilities Board process can be far more expensive than that of a three-member, one-stenographer, temporary board. The Public Utilities Board can increase the cost by commissioning frivolous input and the government can act in a mean-spirited way to increase costs at no great risk to itself but at great risk to the landowner.

Mr. Chairman, the new process, unlike the current one, allows the government to beef up its council and spare no expense to try to win the expropriation case. The potentially unlimited cost would serve as a deterrent to anybody considering to challenge the government's compensation offer. Mr. Chairman, unless the board's award is greater than that offered by the government, the aggrieved person must pay all costs and expenses.

The new subsection 34.5, Mr. Chairman, which is the same as the current subsection 4, is even more ominous, given the new process. If the government makes no offer for the land prior to expropriation, the board

determines which party pays the cost. The minister, without providing any compensation offer, which a landowner would almost certainly object to, could order the Public Utilities Board hearing. The cost, which could become borne by the person whose land is up for expropriation, could be quite high.

Under sections 21, 23, 24 and 25 to be repealed. Under the current Act, section 21, the minister, subject to Cabinet, sets board member fees but these would now be determined under the Public Utilities Board legislation. Under the current Act, section 23, the board has civil court power to call witnesses, demand evidence, subpoena documents and administer oaths. The Public Utilities Board can do this, as well, under subsections 63, 93, 96 and 98.

Mr. Chairman, it is quite clear here that the rights of the landowner are taken away, while the rights of the minister are further enshrined. While the current Act, section 24, sets fees for hearing witnesses, is there such a provision in the new Act for the Public Utilities Board's legislation? Provision for a stenographer in the current section 25 is taken care of elsewhere under the new scheme Public Utilities Board, section 97. The new Act does away with three provisions of the current Act, 32.2, which states that the board shall include in the award its findings on all questions of law, and the amount of compensation and the awards. Section 32.3, the award to arbitrators shall be considered to be the award of the board; section 32.4, the board may correct in an award a clerical mistake or error arising from an accidental slip or omission.

The minister's defence of this new bill, Mr. Chairman, is that the arbitration board system is archaic and only Newfoundland and PEI still have it. Mr. Chairman, another defence of the minister for this new bill is that the arbitrators see themselves as advocates and failed to work together co-operatively to find a solution. A third defence by the minister, of this new bill, Mr. Chairman, is that the arbitrators are appointed for a single case and this prevents the development of arbitration expertise.

Mr. Chairman, it is quite clear that this new bill is designed for the protection of the minister and the minister's department and takes away the protection of the landowners. It is quite clear that the intent of this new bill is to make it easier to expropriate land and, in actual fact, to make it more difficult for the landowner to fight the expropriation pay out.

CHAIR: Order, please!

The hon. member's time is up.

MR. OSBORNE: Thank you, Mr. Chairman.

CHAIR: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Chairman.

I want to say a few words on Bill No. 33, on the amendment put forward by the Member for Conception Bay South.

Mr. Chairman, again with respect to this bill, as in similar situations with other bills that have been going through this House of Assembly is the fact that this bill is giving undue authority to the minister, which is, as I said, not necessary. Under the old act, of course, the failure of the minister and landowner to agree on compensation for expropriation, basically means an arbitration board was appointed for that particular case. Usually there are three people appointed and one person is appointed by the landowner.

Mr. Chairman, with respect to this bill, the board is going to be the PUB, and the PUB is probably more costly and less swift since it is already bogged down with other responsibilities. So, what we may have here is a case where a piece of land is being expropriated and a value being put on it, and it is being questioned, of course, by the landowner or the property owner. He or she may not be satisfied with the price being put forward, if indeed, Mr. Chairman, there is a price put forward. Then, it would have to go to the PUB. How long, Mr. Chairman, might that be? Would it put undue delays on the government for instance, if they were trying to do some sort of

project whereby they needed to acquire the property in question very rapidly, in a very urgent situation? If it went to the PUB, they may have to wait for the PUB to be called together to address the concerns and the value put on the property. Whereas, of course, Mr. Chairman, the arbitration board would be appointed fairly quickly, I would imagine. It would basically depend upon the minister and the landowner getting together and agreeing upon the board that would be appointed, and then they would sit down in a very timely fashion, I say to you, Mr. Chairman, and address the concerns of the individual.

Of course, the concerns may not involve only the price, I suppose, that would be set for the land, the assessed value by the department, but it could deal with the amount of land that is being taken. The property owner could very well think, Mr. Chairman, that the amount of land being taken is excessive and that the government or the municipality, whatever, may not need the amount of land that is being expropriated. So that is a concern, I suppose, aside from the value of the land itself. That is a point that would have to be addressed, Mr. Chairman, by the PUB.

Also, Mr. Chairman, the minister would have the authority to decide if it is referred to the board or not. That is another authority and power that would be given to the minister, that he would decide if, in fact, it should be referred to the board. Under this bill the minister is given the power to make application to the board, and it therefore stands to reason that he will have the choice of whether and when to refer the matter to the PUB. The landowner has no such power to apply to the PUB. So here is a situation, again, where the minister is given the authority, more power than is required -

MR. GRIMES: That is enough.

MR. J. BYRNE: Not at all, I say to the Minister of Education, not enough yet on this piece of legislation. This is a very important piece of legislation, Mr. Chairman, a very controversial piece of legislation, I say to the Minister of Education, and it has to be addressed. That is why we are on this side of the House, to address the concerns and to bring forward the concerns of the public with respect to any legislation that comes before this House.

Mr. Chairman, we are on our feet at 3:12 a.m. to address the concerns of the public, the people of this Province, when it comes to this bill, Bill 33, which is to address the expropriation of properties within the Province.

As I said, the bill itself is very controversial and, as I said earlier, the landowner has no power, as the minister has, to refer it to the PUB. So, in fact, if the minister decides to refer it to the PUB he can, and if the property owner decides that they want to refer it to the PUB, he or she cannot do that. In actual fact that is an unfairness inherent in this bill, Mr. Chairman. Some of the amendments that are being put forward by the Member for Conception Bay South will help, certainly, to address the unfairness in this bill.

Mr. Chairman, we have seen a number of bills go through this House during this winter sitting which are being put before the House a few days before Christmas, that are being rushed and forced through the House of Assembly when, indeed, the House could have been opened much earlier. The legislation that is being put forward, the bills that are being put forward, could have had plenty of debate, not in a rushed fashion and not requiring the Opposition to be sitting in the House of Assembly at 3:00 a.m. trying to address legislation going through this House.

Also, Mr. Chairman, with respect to this legislation, the landowner no longer has a rep on the decision-making board. Previously, with respect to the legislation, or the Expropriation Act, the landowner could appoint a person to the board and have some basically some equal say on what is happening with respect to his piece of land, or the piece of land that is being expropriated, or his property that is being expropriated, for whatever reason the government or the municipality may or may not want it. So the landowner does not have the same right as the minister does to do such a thing.

Under the old act, of course, one of the three members of the decision-making board is the landowner's arbitrator. The landowner's arbitrator can veto the minister's choice of the third arbitrator - but that will not be the case in the future - and the award decision of any two arbitrators is final.

Under this bill, the PUB decides, and the landowner has no say in the composition of that board, nor does the landowner have a rep on the board, and he must hire and pay for independent legal counsel.

In actual fact, before now, a person could actually appeal the appraisal of his property and appoint an individual to the board, but now he may have to hire legal counsel to make his case for him. That, in effect, will possibly deter the landowner or the property owner from appealing. If we have a piece of property within the municipality or wherever, and it is not assessed at a very high value, Mr. Chairman, it may be the government's intention to basically deter the individual from applying to have an appeal heard, because the cost may be excessive to the individual. If he has to hire legal counsel, in actual fact it may not be sensible, or it may prove fearful for the individual to appeal his estimate which would be given to him by the government.

Mr. Chairman, actually the minister doesn't even have to put a value on the piece of land itself, or the property. The problem with this is, if indeed it goes to the PUB and the PUB does not set the same value on the land as the owner sets on it - say he valued it at $10,000 and the PUB comes out with $9,999. The individual may have to foot the full cost of the appeal. The appeal itself could be excessive, because now the PUB could require or want to hire lawyers. They may want to hire engineers or other consultants, appraisers, or what have you, to make their case for them, or the government might want to do that, and the individual could end up paying the full cost.

Now, if we have a piece of land that could be valued at $40,000, $50,000 or $100,000, who knows, and the costs are excessive, it will certainly be a deterrent to the applicant or to the individual, Mr. Chairman, to appeal the value of the land. That in itself is certainly a deterrent. As I said earlier, Mr. Chairman, this bill raises the cost of the process and intimidates landowners into accepting the minister's offer.

Section 34(2) specifies that expenses "...include costs of counsel, engineers, valuators, stenographers, accountants and other assistants employed by the board as well as the salaries and expenses of the members of the board while employed in and about the hearing." The PUB could be frivolous in commissioning more input than is warranted, and who would really know that until after the fact? It could be after the fact.

CHAIR (Barrett): Order, please!

The hon. member's time is up.

MR. J. BYRNE: Thank you, Mr. Chairman.

CHAIR: The hon. the Member for St. John's South.

MR. OSBORNE: Thank you, Mr. Chairman.

I realize that I have spoken on this a couple of times previously, but I feel so strongly about protecting the rights of landowners in this Province that I feel compelled to stand and speak on it again.

Mr. Chairman, there are some serious concerns that we, the members of the Opposition, have with this particular piece of legislation, "An Act To Amend The Expropriation Act." Most particularly, we feel that the rights of the landowner must be taken into consideration. This is particularly the case with clauses 5 and 11 of the bill. This is the reason we are putting forth amendments on clauses 5 and 11 of the bill. We feel very strongly that we must look out for and protect the rights of the landowners in the case of land expropriation.

There must be some reason the government is putting forth this piece of legislation now. I don't know. Is it for the land in Argentia for the smelter, is it for mining development, is it for the transshipment facility, or the by-pass road from the Goulds? That is a question we don't know the answer to, but for some reason the government is giving itself more power in this new bill to expropriate land from innocent landowners, and the landowners will have few rights to fight with regard to the amount that the government is offering in compensation for the expropriation of the land.

I really find it appalling, Mr. Chairman, that most members on the other side of the House will vote for this legislation, and will vote down the amendments. They will vote to give the government more power to expropriate land and less power to the landowners. Mr. Chairman, it is unbelievable! I think that, even at this early hour, 3:20 in the morning, if the members of the government, the members on the other side of the House, were to listen to their consciences and really consider the landowners, they would vote in favour of our amendments before they voted in favour of the bill.

Mr. Chairman, if the land is expropriated the landowners have very few rights. Instead of having an arbitrator represent them now, they actually have to pay legal counsel to represent them on the Public Utilities Board, instead of a three-member arbitration committee. Under the old system, the government would have an arbitrator, the landowner would have an arbitrator, and there would be a third, independent arbitrator, and you would only need two of the three to settle on an amount that the landowner would get for the expropriation of his land.

Mr. Chairman, it is unfortunate that under this new bill that right of the landowner is taken away. The landowner here is put at a loss, and it is because of the government, because of the new bill, "An Act To Amend The Expropriation Act," Bill No. 33.

If the land is to be expropriated, right now the landowner, under the present system, can get an arbitrator at no cost to him, unless indeed the three-member board decides that the amount the landowner is getting in compensation is less than or the same as what the government initially offered. Under the new system, Mr. Chairman, the landowner has to pay for legal counsel, for stenographers and for surveyors. The landowner would have to bear all costs, not only the minor costs under the old clauses, but there would be much more cost to the landowner if this new bill was passed.

MR. FUREY: What's your point?

MR. OSBORNE: I say to the Minister of Industry, Trade and Technology, who has joined our clerical staff around the centre table, my point is that it is now a deterrent to the landowners. It gives more power to the government. It is a deterrent to the landowners to actually fight with regard to the amount that they are receiving in compensation under the expropriation. The landowners will more than likely decide that because of the high cost, in the event they lose, that they aren't going to fight expropriation. The government can take their land for much less than what they would offer under the old act.

The landowners, Mr. Chairman, are put at a disadvantage. Under the new legislation, they would be put at a disadvantage; so much so that a lot of them will just decide not to fight the expropriation of their land. They will just accept whatever it is the government is offering, because of the fact that they are afraid they will have to pay all costs associated with fighting it.

Unfortunately, Mr. Chairman, under this new system, under the new legislation, the landowner would have to pay for civil court witnesses, subpoena documents, administered oaths and so on, as well as his own legal counsel. There is no provision in the new act for legislation to protect the landowner in the event of an expropriation. Even a stenographer would have to be paid for by the landowner, if indeed he was awarded less, or even the same, through the board under the new legislation.

Mr. Chairman, it is a deterrent for landowners to stand up and protect themselves, it is a deterrent for landowners to stand up for what is right, and it is a deterrent for landowners to expect to get their full and fair share, something that this government promised: a full and fair share. This new legislation would be a deterrent to landowners to get their full and fair share for their land. Mr. Chairman, that is a crime. I do not know how we could pass legislation without providing protection for the people of Newfoundland and Labrador so that they can get their full and fair share.

It is unfortunate, Mr. Chairman, that the government has promised a full and fair share during an election campaign. They have repeated that promise many times over since the election, and unfortunately this new legislation will not give landowners their full and fair share. It takes it away. It diminishes their rights as

landowners. It gives the government further rights, more rights under the Expropriation Act, and the government can actually expropriate land now for very little, and in some cases nothing, because the landowners are deterred from fighting for their rights because they are afraid that they are going to have to pay all the legal costs, stenographer costs, the cost of the Public Utilities Board, the whole shot. Mr. Chairman, I find it appalling.

With that, Mr. Chairman, I am going to let one of the other members of my caucus speak on this act.

Thank you very much.

CHAIR: The hon. the Opposition House Leader.

MR. H. HODDER: Thank you very much, Mr. Chairman.

AN HON. MEMBER: The man who ran, the man who wouldn't vote.

Are you up to vote now?

MR. H. HODDER: Am I up to vote now? When the question is called, -

MR. TULK: A point of order, Mr. Chairman.

CHAIR: Order, please!

The hon. the Government House Leader, on a point of order.

AN HON. MEMBER: He ran away.

MR. TULK: Yes, what was the number of that bill?

CHAIR: Order, please!

MR. TULK: On a point of order, Mr. Chairman, the hon. gentleman just now -

MR. GRIMES: Bill 39.

MR. TULK: Bill 39?

MR. GRIMES: Yes. Call it that, anyway.

MR. TULK: "An Act To Amend The City Of St. John's Act (No. 2)", Bill 38. The hon. gentleman was out. He ducked out, he slithered out, and now he is back. We want to know now if he wants to record his vote so that he will be known in posterity.

CHAIR: There is no point of order.

The hon. the Opposition House Leader.

MR. H. HODDER: Thank you very much, Mr. Chairman.

I certainly appreciate the protection that the Chair gives me in these matters. Certainly, I acknowledge that I was away from the House for about ten minutes, and at that time there was a vote called.

AN HON. MEMBER: (Inaudible).

MR. H. HODDER: If the Minister of Industry, Trade and Technology had to record all of the votes that were taken in his absence, we would be here for a full week.

Mr. Chairman, I want to take this opportunity to make a few comments on the bill that we are now considering which, of course, is Bill No. 33. Under this particular bill we have the effect, of course, of the minister having the right to expropriate land without what we would consider due process and protection for the landowner. The question we ask is: Why would you do this now?

You know, when we look at the developments that are taking place in the Province, as my colleague from Bonavista South said just now, if we look at the situation of the land that would be needed, for example, in the Goulds area, and the implications this bill would have for landowners who might have to give up land for the Goulds Bypass or the bifurcation road as it used to be called a few years ago, we have concerns. The old process was to have an arbitrator appointed by the minister, an arbitrator appointed by the landowner and then having an independent third party make the decisions. We have had that process in the Province for a long time, and turning it all over to the Public Utilities Board is fraught with risks.

So, we say to the government that we are concerned that the landowners in the Goulds will not be adequately protected. We are concerned that landowners in Gander, when they put the road and change the route of the highway to Gander, that this expropriation may very well negatively impact on people who would be required to give up their land.

So, Mr. Chairman, what we are saying is that we are concerned with the ordinary person. There used to be a fair process, and we want some more guarantees that the public utilities process will be fair, but we don't see those guarantees in this particular piece of legislation.

That is not to say that the Public Utilities Board of itself is an unfair group, but we don't see built in legislation protections for the small person, the individual, the landowner. So, I would say to the House that the difficulty we have is when you switch that process over, we ask the question: Who is going to pay the expenses for the landowner? Who is going to pay the legal costs? Who is going to pay the cost of the engineering studies? Who is going to pay the cost of all of the expenses associated with having appraisals done. When we find that there may not be, in some cases, any representative at all for the landowner, we have concerns. The difficulty we have with this particular piece of legislation, the Expropriation Act, is we ask: Why?

Has this act been brought in so we can have a process that we will get land for industrial sites? Is that why it is brought in now? Is it brought in because we have new highways being built, and the present process does not work fast enough for the government? Is it being brought in because we feel that the Public Utilities Board would be fairer to the government? Certainly, we are not convinced it would be fair to the individual landowner. So, Mr. Chairman, we say that the individual landowner is not adequately guaranteed fair representation.

Then we have the issue where there is a missing landowner. In other words, in some cases we cannot identify who the landowner is or we can't make contact with that landowner. In this particular case, under the old process, when the landowner could not be found the minister was obliged to appoint an arbitrator who would represent the missing landowner. In the new act, however, there is no one on the Public Utilities Board to represent that missing landowner. So, who will make the case for and who will defend the missing landowner? We have some difficulties with that particular aspect of the bill as well.

Then we have the issue of the costs that are involved. We know that the bill says the landowner must pay all costs, expenses and fees incurred in the award process if the board does not award the landowner more than the minister offered. In other words, this process that we are now going to embark upon is a process that intimidates the landowner: You better accept what the minister offers because if you don't accept it and you go through the Public Utilities Board and happen not to be successful in getting more money, then you are going to pay all the expenses. We're saying, is that fair? Is it fair that we should say to a landowner: If you don't accept what the minister is offering you, if you challenge it and you want to seek some kind of an independent arbitration on this - then we say to the government opposite, we ask the basic question: Is that a fair process? Is it fair to say to landowners: If we happen to not award in your favour then you are going to have to pay all the expenses associated with the appeal? In the old process that was not the case. In the new process we know now that there would be an incentive for the Public Utilities Board not to award any higher cost than have already been offered by the minister or by the Crown.

Now, we don't think that the Public Utilities Board will be frivolous in making their decisions. We don't think that they would deliberately go out and say: Well, we can't award the landowner anything because then we won't be able to charge the landowner the cost, but we do acknowledge that the Public Utilities Board has to operate within its budget. Therefore, awarding cost might be a way of being able to keep within their budgetary structure.

Mr. Chairman, government of itself could be - I won't say they would be - they could be very mean-spirited. They could commission expensive input to increase costs and they could, directly or indirectly, intimidate landowners to accept what they have offered. Therefore we say that that kind of process there is not an adequate process.

So, Mr. Chairman, I just wanted to say to all hon. members, that there are some risks in this particular piece of legislation. We have concerns about ordinary Newfoundlanders and Labradorians who will be intimidated, who will be frustrated, who will be on the minister's steps time after time after time to try to see if they can get a fair approach, a reasonable approach, an honest approach, an approach that would say that it meets the qualities of integrity.

So we have great fears of what is going to happen. So, Mr. Chairman, for the benefit of the ordinary person, for the benefit of the person who inherits a piece of land, for the person who has paid off a piece of land with his or her mortgage over twenty-five years or thirty years and now find themselves having their property taken, their lifesavings in jeopardy - we are saying we are going to turn all that over to a Public Utilities Board and they are going to make a decision as to what the cost is going to be. We say: Is that fair? Are there guarantees here that protect the individual?

On all of those questions we have concerns. We have concerns that the process is not guaranteed to be reasonable and that it intimidates the landowners, in particular in cases where the minister, for example, might offer what might appear to be a reasonable award but the person may feel that, well, we have some questions as to whether we will appeal it. Then, when they look at all the costs involved, and the potential risk, if they have to spend $10,000 to present a case and run the risk of not winning anything, then they might be hesitant.

CHAIR: Order, please!

The hon. member's time is up.

MR. H. HODDER: This is nothing more than a process to frustrate the ordinary Newfoundlander and Labradorian.

CHAIR: Order, please!

The hon. the Member for Baie Verte.

MR. SHELLEY: Mr. Chairman, I am glad to get up for the second time now to make some comments on this. There are some very, very good points. The ministers opposite must be listening because they are so concerned, and have interrupted so often on all the points that were made by my colleagues thus far in this debate. The Minister of Education is now ready to admit, that, as a matter of fact they do have some very good points and that they raised some very serious concerns that the government and minister should consider, Mr. Chairman.

It is a real shame that the minister is not in her seat to hear this. I hope she is listening outside. It is now 3:40 in the morning and maybe she is having a little nap outside. I ask her Cabinet colleagues, her ministers in Cabinet, if they would make sure she knows about these points. I know the Minister of Education, the House Leader and the Minister of ITT have been listening very closely and they are starting to agree with us. At 3:40 in the morning they are starting to realize that there are some legitimate points being made here. As a matter of fact, Mr. Chairman, they make a lot of sense.

We have raised six very serious points and it is the most substantive piece of legislation we have talked about since entering this House at 2:00 p.m. today.

MR. GRIMES: We have already heard it.

MR. SHELLEY: Well, we are going to tell you again because it is just starting to sink in. The Minister of Education is making a good point and I agree with him, he has heard it already. So if he has heard it already it means it made sense to him and it is starting to sink in. I think if we keep at it, maybe by 4:30 a.m. or so the Minister of Education, the Minister of Industry, Trade and Technology and so on will be nodding their heads and saying: You know what, they are absolutely right and they are making some very good points.

MR. SULLIVAN: Why do they have advertisements showing the same thing over and over again?

MR. SHELLEY: So it will finally sink in. The first time you see an advertisement on a car you do not buy that car right away, you wait until you see it over and over and over. Just like the energizer, not the copper top, you do it over and over and over until it sinks in.

Mr. Chairman, my colleagues here are going to ask that the Minister of Education and the Minister of ITT make sure they go in and wake up the Minister of Development and Rural Renewal, who put forward this bill, and make sure she knows the points that we put forward here tonight.

We will list them again, six very good points. I will list them and talk about each one specifically.

AN HON. MEMBER: Table them.

MR. SHELLEY: We will table them. There is lots of time to table them. We have some more amendments yet, more amendments that make sense, Mr. Chairman. We have just touched the tip of the iceberg with this so far. We are getting more energy as we go. We are so encouraged and so enthusiastic about what we are doing, and encouraged that so many members are paying attention to our points, that maybe it is going to strike home. Maybe, Mr. Chairman, around 6:00 a.m. or when the sun is just coming up over Signal Hill, the light is going to hit the ministers and they are going to come to life. They are going to say: We have seen the light and we agree with the Opposition. They have made some good points. We are going to go out and wake up the Minister of Development and Rural Renewal and tell her: You had better go in and listen to the Opposition. They are making some very good points. I've seen the light. Just like the advertisement, we have to keep going and going until the Minister of ITT just nods and says: Yes, you are right, I agree, you are making some very good points.

Mr. Chairman, seriously, the first time we read this bill, our caucus members, everybody said the same thing, that there are some serious concerns here. It is too bad this had to come 3:00 in the morning, that it didn't come -

AN HON. MEMBER: What do you mean 3:00 a.m.? It's 3:45 a.m.

MR. SHELLEY: Three forty-five in the morning, whatever, Mr. Chairman. It is too bad it had to come then because it is a serious bill. I hope the minister responsible comes back to the House while we are debating this so we can make the points to her, and instead of making a joke of it and making light of it that she take it seriously.

Mr. Chairman, the Minister of Education is on his way out now to wake up the Minister of Development and Rural Renewal. He is about to tell her - he agreed with me, in just four minutes' speaking. In just four minutes' speaking, the Minister of Development and Rural Renewal -

MR. SULLIVAN: Works, Services and Transportation.

AN HON. MEMBER: You don't even know what bill you are talking about.

MR. TULK: A point of order, Mr. Chairman.

CHAIR: The hon. the Government House Leader, on a point of order.

MR. SHELLEY: I am sorry! The Minister of Works, Services and Transportation.

MR. TULK: You have it right.

MR. SHELLEY: Yes, there are two females (inaudible).

MR. TULK: I won't make a point of order, Mr. Chairman, but I do want him to be correct. I know he is tired.

MR. SHELLEY: Mr. Chairman, I would like to remind the Government House Leader that it is 3:45 in the morning, but that the Minister for Government Services and Lands looked over at me and said: It is the minister of rural development. Didn't he?

AN HON. MEMBER: (Inaudible).

MR. SHELLEY: Yes, I know. Did you hear what I said? It is late. Anyway, the Minister of Government Services and Lands said: No, it is the -

AN HON. MEMBER: (Inaudible).

MR. SHELLEY: It is your mistake, right?

AN HON. MEMBER: (Inaudible).

MR. SHELLEY: No, it isn't here.

MR. H. HODDER: Are you saying that you confused that minister with the Minister of Works, Services and Transportation?

MR. SHELLEY: Yes, he told me. I was referring to the Minister of Works, Services and Transportation earlier.

MR. H. HODDER: I tell you, it is late.

MR. SHELLEY: Actually, the Minister of Government Services and Lands told me it was the minister of rural development. So I stand corrected with the minister. No problem. We can handle that at 3:45 in the morning, Mr. Chairman.

I would say the Minister of Education just went out to wake up the Minister of Works, Services and Transportation to tell her we are making some very good points on this. He is going to let her know, and he is going to give a wake-up call to the entire Cabinet.

Not only the rest of the legislation that we talked about here tonight, we had the Member for Bonavista South put forward a motion that the government finally saw the light after eighteen months, because he brought it forward eighteen months ago, and bang! It took eighteen months to do that, so we don't mind taking tonight and tomorrow morning to get this point through.

Hopefully, Mr. Chairman, it is a brighter government now. There are some changes over there, not a lot, but there are some positive changes, some new members that look very promising, I should say. Maybe they see the light on these particular amendments and suggestions from the Opposition more quickly than they saw what the Member for Bonavista South brought forth.

There are some good points, Mr. Chairman. We mentioned six of those that they should look at. Mostly they have to do with clauses 5 and 11. Now the amendments are in clause 11. Basically, the intention of the bill is to have the PUB and not arbitration boards determine the compensation paid to the landowner when property is

expropriated. That is the whole gist of clause 5. That is what happens there. In clause 11, of course, they also make significant changes.

Six of the points are: That compensation is set by the Pub now, not arbitration boards. The minister decides whether to refer to the board or not, and I will make a comment about that in a second. The landowner no longer has a rep on the decision making board. Right away you can see how it is moving away from the person who has their land taken away and the rights they should have, right on back to the minister. We are going to dictate everything to you now. You don't have any decision making. We don't want anybody representing you. The government is going to tell you how much you pay and where you go from there. Forget about the person who just lost their land, or just had their land expropriated. We are going to leave everything in the minister's hands. You have no say any more. That is what happened here.

There is no rep when the land is in dispute. The bill raises the cost of the process and intimidates the landowners into accepting the minister's offer. Mr. Chairman, now the landowner, whose land is in dispute, is going to have to pay for the stenographers, the administration, and so on. I do not know if we have a final figure on what it would cost for an appeal to be covered. Was that $15,000 to $20,000? It could be different, with administration, stenographers, and different things.

Very simply, Mr. Chairman, a person who feels that he has just cause for arguing about how much he was allocated for the land is going to be turned off right away. It almost like blackmail. We don't want you arguing with us. We will tell you what to do. As a matter of fact, if you want to argue with us you are going to have to pay for it. That is what they are doing here. It is nothing short of intimidation on behalf of the government, that when a person has land expropriated from them, they have to face the minister. The minister will tell them where to go from there, and they refer the land. The bill intimidates the landowners even when the minister offers nothing. If the minister does not offer anything, where does the landowner go? If we have a minister who is arrogant enough, and there could be a great chance of that, especially if there is a shuffle over there -

AN HON. MEMBER: He won't even refer it.

MR. SHELLEY: No. When the shuffle comes, Mr. Chairman, and we do end up with a very arrogant minister - and God knows who that could be - if they decide that they do not like this person or, for whatever personal reason, decide not to offer anything for the land, the landowner then has to decide if he is going to hire legal counsel, if he is going to pay $15,000 or $20,000 -

CHAIR: Order, please!

The hon. member's time is up.

MR. SHELLEY: Already, Mr. Chairman? How fast that went.

CHAIR: The hon. the Member for Conception Bay East and Bell Island.

MR. WALSH: Thank you, Mr. Chairman.

Mr. Chairman, I do not intend to take up a whole lot of time. As we all know, it is 3:50 a.m., and fortunately for us at this point in time, we understand maybe that one of the local radio stations, VOCM, may be carrying the debate of the House of Assembly.

SOME HON. MEMBERS: Hear, hear!

MR. WALSH: I think, Mr. Chairman, what is regrettable to all of us is that they did not start carrying debate in this House of Assembly at 2:00 this afternoon. The reason I say that is because we have spent fourteen hours here listening to, in most cases, the same speech nine times, being repeated time after time after time by each of the individuals on the other side. Now, parliamentary procedure permits them to do that, to stand up one after the other and speak, and there is no problem in doing that with any piece of legislation. But, Mr. Chairman, it

reminds me of putting nine people in a room and trying to decide what station you are going to listen to or what television program you are going to watch. The first person says: Let's watch channel 3, and the second person says: Let's watch channel 3; and the third person says: Let's watch channel 3, and the fourth person says: Let's watch channel 3. After awhile, we all know what channel we are going to watch. We all know we are going to listen to speech after speech after speech. The sad part about it -

MR. E. BYRNE: A point of order, Mr. Chairman.

CHAIR: The hon. the Member for Kilbride, on a point of order.

MR. E. BYRNE: Mr. Chairman, I understood that we were debating Bill 33, "An Act To Amend The Expropriation Act." I have not heard anything from the Member for Conception Bay East and Bell Island yet dealing with that piece of legislation.

MR. SULLIVAN: He is not getting a good reception on Channel 3.

AN HON. MEMBER: No, that is for sure. He is not coming through here at all.

MR. H. HODDER: Change the channel.

CHAIR: Order, please!

To that point of order, I remind the hon. the Member for Conception Bay East & Bell Island that we are debating an amendment to the Expropriation Act and I would ask him to be relevant.

AN HON. MEMBER: You are out of order in more ways than one.

MR. WALSH: Thank you, Mr. Chairman.

I could carry on a little longer but I guess that is yet one more example, when someone is trying to make a point in the House of Assembly, about the fact that we are being delayed here at a cost of some $6,000 an hour, listening to the kind of rhetoric we have heard from other speakers earlier and the kind of rhetoric we will probably hear for the next two or three hours. But I am glad, Mr. Chairman, that the people of the Province have an opportunity, at 4:00 a.m., to hear exactly how Her Majesty's Loyal Opposition are treating the House of Assembly, and indeed, treating the way the money can be expropriated and spent in the Province.

CHAIR: Order, please!

I remind the hon. member to be relevant.

The hon. the Member for Kilbride.

MR. E. BYRNE: Thank you, Mr. Chairman.

I am not sure if the Member for Conception Bay East & Bell Island was in the room at all tonight, just like the Member to my far right. The reality is, Mr. Chairman, it is too bad that VOCM is not carrying us live each and every day, because they would understand then that the only people who stand up and speak in this House of Assembly are the nine members in Opposition!

SOME HON. MEMBERS: Hear, hear!

MR. E. BYRNE: The Member for Conception Bay East & Bell Island wants to talk about the same bills over and over. He has heard the same speech nine times. Let me remind him, we have dealt with Bill 44 today. We have dealt with Bill 26. We have dealt with Bill 35, Bill 49, Bill 50, Bill 39, Bill 38 and we are now dealing with Bill 33.

MR. SULLIVAN: And second readings on five more.

MR. E. BYRNE: And second readings on five more bills - not the same speech, I would suggest to the member and all members, on each and every bill. These members came here tonight, each and every one of us came here tonight prepared to move amendments dealing with what we saw as legitimate amendments to pieces of legislation. That is what we are here for - exactly what we are here for. With respect to the Expropriation Act, it is very important.

The Member for Conception Bay East & Bell Island believes that VOCM is taping us live. I have no idea if they are or not. I hope they are, because clearly, it is the only time, if there is a live debate, that we will see any member on the government side, particularly in the back benches, stand up and say anything about anything on any given day.

The Expropriation Act, Mr. Chairman, is an important piece of legislation. The change that government is introducing in this Act will have significant impact on people when it comes to government expropriating land from landowners, it is as simple as that. A very tangible example is the Goulds Bypass Road in my district. Right now, government is negotiating with landowners.

Now, it is really interesting that four weeks ago I met with the deputy minister dealing with this issue and landowners had come to me; we met with officials from the department to work out what they felt would be a fair process because they were not sure what - they were sure that what they were being offered was not what they wanted. What they were being offered per acre of land was not what it was worth. But they wanted to know what would happen in the event that - government's offer, on the one hand, they did not agree with and their counter-offer, if government did not agree with it, what would happen then? Under the old regime, under the regime that now exists before this piece of legislation is proclaimed into law, what would happen is simply this: an independent arbitrator would be appointed. There would be a landowner rep, a rep from Government Services, an independent chairperson, and the landowner and the department would have to agree that whatever the decision was would be final and binding.

A fair process. It does not cost the landowner a single penny to go through that process, to work out a disagreement with government. Now, if the Member for Conception Bay East & Bell Island thinks this is insignificant and is not worth debating, well, he is sadly wrong. Because I say to the people in my district that it is worth debating. Because what will happen to those people who are coming before government right now is that it will cost them thousands of dollars, not only in lost land prices, but thousands of dollars out of their back pockets to go and fight big, bad government. That is exactly what is going to happen.

In putting it over to the Public Utilities Board to make the Public Utilities Board decide, the landowner, or people who own land, those people who cannot even afford it - it could be an acre of land, it could be twenty acres of land; whatever the case may be - people who do not have disposable cash and disposable income in their pockets, they are going to be required at their own expense to come forward to the Public Utilities Board, at the risk that the Public Utilities Board may render a judgement that the entire cost of the process could be borne by them. That is exactly what is happening here.

When I spoke to the deputy minister about it, that is not exactly what he told me. This legislation was not even tabled in the House. The House, in fact, was not even called back to sit. I left that meeting saying, this is too clean, this is too smooth. Something else is going on here. For the last several months government, particularly the Department of Works, Services and Transportation, has negotiated with property owners - people who own homes who are sitting on a fifty foot, seventy-five foot frontage, 150-foot back, because it is very easy to attach a value to it. It is a three-bedroom home, single detached dwelling. It may be worth $100,000 - very easy to attach a value to that. But they have not been dealing with landowners on the Ruby Line who are going to lose twenty acres of farmland, some of which has just come out of the agricultural freeze, which ups the value of it. A lot of it has.

Now when this piece of legislation was tabled in the House, I knew why they were delaying. I knew exactly why they were delaying. But that is only one reason. There are many other things happening across the Province.

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: Exactly. I do not expect him to care about the people in my district. That is my job. But I do expect him, and I guess his own constituents can expect him, to care about what happens to them if land is taken from them. If he believes this is insignificant, maybe you should stand up outside the political rhetoric, I say to the member, and tell us what representations you have made to government, what representations you have made to the minister, what meetings you have had to suggest a better option than what is being suggested in Bill No. 33. Because the option that is now being proposed does not work. It works for one person and one person only. It works for government.

Government may come in right now and say to a landowner: We are going to offer you $10 an acre. That is our final offer. If you don't like it, appeal it. That is going to put the onus and the burden upon landowners, property owners, to go to the PUB no matter where they live in the Province. They could come from Labrador, they could come from St. Anthony, they could come from Burgeo. But the onus and the burden will be on them to come to the PUB at their own expense, with the danger that the entire process - at the end of the day the Public Utilities Board can say: No, we deny the application that you made before us. But we also say to you, in bringing forward the application, that all costs associated with this hearing will be borne by you and those people who are with you.

If that is a definition of fairness and a definition of how government treats people, then I do not buy that definition. If the Member for Conception Bay East & Bell Island wants to get up and accuse us of continuous rhetoric and of becoming politically frivolous, let him do so, because we heard nothing from him tonight - he did not speak to this piece of legislation. If he wants to stand up and put on the table some concrete proposals that would effectively deal with the issue at hand, then let him do it. But we have not heard it yet, I have to say, Mr. Chairman. And I hope VOCM is listening and the people of the Province are listening, because you will never hear him do it. With that, I will sit down.

Thank you.

CHAIR: The hon. the Member for Conception Bay South.

MR. FRENCH: Thank you, Mr. Chairman.

I hope, too, the people of Newfoundland and Labrador are listening. What we have proposed here tonight are two very simple amendments. We are still held up on these two particular amendments. Why somebody would have any problem with these amendments is beyond me. Why I should have been running around here at four o'clock this afternoon passing out amendments, I have no idea. We came here tonight prepared to debate this and if the Minister of Education wishes to go home, he does not have to stay, he can leave. So can I, and when I get around to when my time comes to leave, later on tonight, I will leave. We did not have the bill two or three months ago, I say to the Minister of Education.

AN HON. MEMBER: (Inaudible) have the bill two weeks ago, Minister.

MR. FRENCH: That is right, and now, all of a sudden, we have this Act. Is it brought in for the Goulds bypass? Do we want to do the people in the Goulds out of their money? Is that why we brought this in? Then, I hope the people of Newfoundland and Labrador are listening. What this first amendment says, and says quite clearly, is that we also give the owner of the property the right to appeal the decision to the PUB. We do not agree with it going to the PUB but if we have to have that, then at least give the landowner some protection and some rights under this piece of legislation.

Mr. Chairman, the other amendment to this bill: The bill does not say that the minister has to refer the disputed matter to the PUB. So, again, all we are asking for here is that the minister would put this bill immediately. That is what we are asking for, two very simple things in these two particular amendments. Why they are not being accepted, I have absolutely no idea.

AN HON. MEMBER: You do not know if they are accepted or not.

MR. FRENCH: Oh, I know they are not accepted. The minister is not here. I have heard your House Leader say they are not acceptable, and they are not going to be acceptable. So we are going to keep talking about these two amendments that have been moved, and as I said, the longer we are here - if we are here all night, sobeit. It really does not bother me if I am here all night. I am sure it does not bother the Minister of Education.

AN HON. MEMBER: Put it to a vote and find out (inaudible).

MR. FRENCH: Well, sure we will. When we are finished speaking we will gladly put it to a vote and we will see then what happens. We will see where you stand. We will see where your backbone is if you have the nerve to get up and vote against your own legislation. We will see if you have that nerve, and I doubt very much that you will. I doubt that there is anybody over there who is going to stand up because there is no backbone, there is - oh, he is awake! He finally woke up! He was out sleeping! He is awake! Good, good. I hope you had your bottle, I hope you are alright. It is good to see you back in here after having a nice little nap for yourself, I say to the Member for Burgeo & LaPoile. I am glad to see that he came back with us. He was out rounding them up for awhile but somebody told me he fell asleep on them.

Mr. Chairman, those two amendments. Why they will not be passed, I have no idea of knowing. But anyway, sobeit. I will sit down now, and if anybody else wishes to get up, they certainly can.

CHAIR: The hon. the Member for Bonavista South.

MR. FITZGERALD: That was a good contribution, Mr. Chairman, an excellent speech by the Member for Conception Bay South. I found out that we were not on the radio, and I say to the Member for Conception Bay East & Bell Island, that was another feeble attempt of a wasted speech. After calling his two supporters out in the district to tune in, it was not even carried. The Member for St. John's West just moved at least fifteen points ahead of the member in his bid for the federal election. He has no worry about defeating Bonnie Hickey in the federal election. He does not have a chance.

It is 4:05 in the morning. I do not know how long the Government House Leader intends to keep us here, but I can assure him that if I am here much longer he will not be getting a wedding gift from me. I will make that known right here now that the set of pillow cases will be taken back. The set of pillow cases will be carried back to the store, I say to the Government House Leader. If he has no more respect for the members of this House than to sit them here all night, then I will not be supplying a wedding gift to the Government House Leader.

SOME HON. MEMBERS: Hear, hear!

AN HON. MEMBER: I agree with you; I am taking back my gift, too.

MR. TULK: (Inaudible).

MR. FITZGERALD: The pillow slips is what I talked about and they are going back, you are not getting that.

Mr. Chairman, the Minister of Education has sat here in his seat all night and has contributed absolutely nothing other than to be interrupting and throwing barbs across the House. I think it is about time you named the member and let him go home and enjoy a nice sleep and let the people's House get on with its business.

There is only one member I see on the opposite side who will stand in his place and represent his people. There is only one member I can see on the opposite side who, when the chips are down for the constituents in his district, that he will get up and represent them - only one I have seen in this House so far.

MR. MATTHEWS: (Inaudible).

MR. FITZGERALD: No, it is not you. You are the fellow who carries out the polls. You are the poll man from St. John's North, I say, and it certainly is not you. It is the member sitting down there, the Member for Torngat

Mountains, the only member in this House sitting on the opposite side who will stand in his place and represent his people.

SOME HON. MEMBERS: Hear, hear!

MR. FITZGERALD: I firmly believe that. The three pieces of char you gave me, Sir, I hope to enjoy it tomorrow. It really looks good and I am sure I will enjoy it over Christmas. God bless you!

SOME HON. MEMBERS: Hear, hear!

MR. FITZGERALD: I might do that.

SOME HON. MEMBERS: Hear, hear!

MR. FITZGERALD: Thank you. There will be no sharing with the Member for St. John's North, no sharing of char, I can guarantee you that. But anything else I have -

AN HON. MEMBER: (Inaudible) brought in the food bill.

SOME HON. MEMBERS: Hear, hear!

MR. FITZGERALD: That was for the needy, I say to the minister. If I was at a food bank, that was for the needy. The minister, with condominiums in Florida, and condominiums in Toronto, and a mansion up in Cowan Heights, driving a Jaguar and a Cadillac, and a 4-wheel drive in his driveway, I certainly would not class him as a poor person. In fact, I was going to have a private chat with the Member for St. John's North, and I was going to make a request. I have not done it yet but I will do it right now, and I will do it publicly. Next year, we are going to experience a big event in my district. We are going to have a Royal visit. We are having a Royal visit in my district next year, and I hope to be part of that. I hope to be there, even though I am not a monarchist. I was going to ask the minister if I could borrow some of his jewellery to wear for those three days. For those three days, I would like to borrow some of the Minister of Health's jewellery, some of his gold, his gold tie-clips and his cuff-links and his necklaces, and all of that.

AN HON. MEMBER: She does not know about it yet, but I have bangles for the wife for Christmas.

MR. FITZGERALD: I do not want any bangles, I say to the hon. member. I certainly do not want any bangles.

Mr. Chairman, we are debating a very serious bill here tonight, the expropriation of land. It is obvious why this particular bill was brought in at this time, I suppose, before the House closes for the winter recess. It is a bill that government wants, and the government needs it for obvious reasons. It is an expropriation bill, so why do they want it? I guess they are going to go expropriating some land.

AN HON. MEMBER: (Inaudible) all over.

MR. FITZGERALD: And it is going to be all over. The Member for Kilbride knows about what is happening in his district, with a new road going there. The members from Labrador are well aware of what is happening down there. We are well aware of what is happening in Argentia, all positive things, the building of roads and the building of smelters and refineries, all positive things that will happen and create employment. They need this bill whereby they can go out and expropriate people's land, people's prized possessions, and go and offer them a paltry sum of money and say: Either take this or walk away from it, and here is your option: If you do not take what we offer you, then the alternative is to take it before the Public Utilities Board, and we will tell you approximately what the cost is going to be. It will probably cost you $10,000 or $12,000. We are going to offer $20,000 for your land. It is worth $50,000, but that is all we are going to offer you, so you make up your mind whether you want to take a chance on losing that. Because we control the Public Utilities Board. Even though they are supposed to operate at arm's length from government, we control them. We appoint the people to the board, and the decisions that this board will bring in are the decisions you will have to live by.

We have seen what the Public Utilities Board has done in the past. We have seen some of the decisions that they have brought in in the past. We have seen the way that they ruled when Newfoundland Power went before them for rate increases. We have seen what has happened when the insurance companies have gone before them for rate increases. Never, or very seldom, have those increases not been granted. When you see an insurance company, or Newfoundland Power, or the telephone company, or some of the cable companies, going before the CRTC or the Public Utilities Board, whatever the case might be, usually they have their homework done, and when they go and look for a raise they usually come out getting pretty close to what they wanted. But the consumer is always the person who is left holding the bag. The consumer is always the person, Mr. Chairman, who is left paying the bill.

This is what is going to happen with this expropriation Act, "An Act To Amend The Expropriation Act", Bill No. 33. The amendments that the Member for Conception Bay South has put forward are good amendments to that particular bill. It will give some protection to landowners out there who might be faced with expropriation. It will certainly make it much more palatable than what the government and the Minister of Works, Services and Transportation are putting forward. All we are asking is to treat everybody fairly. Nobody seemed to have complained and nobody seemed to have had any problem with the way it was operating before, whereby there was equal representation there.

The minister would appoint a member, the landowner would appoint a member, and there would be a chairperson put forward with the consensus of both parties. That seemed to have worked very well. When there was a decision made, I have not heard too many complaints of what happened after, that there were appeals and people were unhappy with the decision that was made. It worked because you had people on that particular board who had the respect of the people who were coming forward and looking for a fair return for their property.

Now I fear that is not going to happen. Now it is going to be the heavy hand of government reaching out and saying: This is what your land is worth, this is what we will give you. Take it and shut up, or else you can come back and you can go through the process of -

CHAIR (Penney): Order, please! Order, please!

The hon. member's time is up.

AN HON. MEMBER: By leave!

AN HON. MEMBER: (Inaudible) carry on.

MR. FITZGERALD: No, I do not want to carry on.

CHAIR: The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Chairman.

The Member for Bonavista South is not carrying on at all, I say. He is talking about something very factual, and I think there were very legitimate amendments made here.

When you look at the nature of the amendments, I say with all sincerity, the nature of those amendments are not unusual amendments at all. I think they are quite representative of people who may be unjustly treated and subjected to very high costs on a dispute mechanism that is in place. What has been wrong with the current system? Has it not been working properly? Have there been grave concerns with getting settlements under the current system of arbitration, that we needed to move into a very expensive one for a landowner, where it restricts the right of that landowner to seek a dispute mechanism to resolve it to his satisfaction?

That is not in the provisions under the proposed amendments to this Act, and it was there before, and it is not too much to expect. Under the old Act, if there was a failure by the minister or the landowner to agree on

compensation for any land that was expropriated, it would go to an arbitration board to rule on that particular case. The minister could appoint an arbitrator, the landowner could have a representative there, a third person could be agreed upon and, of course, as mentioned earlier, too, a stenographer to record the proceedings of that particular committee. And the board would come back with a solution, at least an arbitration ruling, on the specific price that person should get for his land.

Now, that is not what is in this new bill, it is not what is in this amendment. Because under this new bill, it says the board now becomes the Public Utilities Board. And the Public Utilities Board can be very expensive. We just saw an example recently of the cost that was incurred in this government to fight on behalf of consumers. We are taking a situation now and we are throwing a cost back on consumers and asking the consumer to pay the cost of going to the Public Utilities Board to fight for something they feel is appropriate, and getting fair compensation for their land.

It is not always swift either, I might add, with the Public Utilities Board. They may have a fair number of matters to discuss, there could be a backlog in getting a settlement on their land and it could be a very slow process, and that could be cumbersome, too, for landowners who have land in dispute.

Now, under the old Act, and that is section 19.(2), if the minister and the landowner cannot agree on compensation, then the appointment of an arbitration board becomes automatic, under the current provisions of section 19.(2). But, under this bill, the minister is given the power now to make application to the board, and it therefore stands to reason that he will have the choice of whether, and when, the minister wants to refer the matter to the Public Utilities Board. It is not an automatic matter, it is a matter of choice if the minister sees fit, if the minister wants to do it, or when the minister wants to do it. That is in the proposal and the landowner does not have the power to apply to the Public Utilities Board. The landowner now, also does not have a representative representing him, putting forth those concerns, and normally, in cases, it is pretty typical in many appeal processes that the person who is affected, has the potential to be affected in a negative way by the decision, has the right to have a representative there.

We hear of many instances of boards operating that have a representative for a consumer or for an appellant, who have an opportunity to be represented. This is not the case with the Public Utilities Board - and it takes away from landowners, their rights to have this representation and I do not feel that is appropriate. Also, when the land is in dispute, there is no representative, of course, because under the old Act - and I referred to that to some extent earlier - when the ownership of land is in dispute or as it says in 19.(1) subsection (b) "the owner cannot be found or there is doubt as to the ownership of the land," the minister then is obliged to appoint an arbitrator to represent the missing landlord.

There is no one on the PUB to represent the missing landowner in this case, so, who is going to make the case for, or defend the rights of the missing or the disputed landowner in this instance? Of course, the provision is not here. Now, this bill has the effect of raising the costs of the processes and it could intimidate landowners in accepting a minister's offer. When you look at the cost - they may have to pay thousands and thousands of dollars to take a case to the Public Utilities Board and then have to pay all the costs associated with the Public Utilities Board - it could be a disincentive, and a person might have to take what he can get. Because we are putting into place now a system that is going to make it difficult for the landowner to take a chance to move forward. And it is not appropriate that a landowner should be put in such a predicament where the landowner is behind the eight ball when he wants to present a case to the Public Utilities Board or to the normal arbitration board, as would be the case before. This could be called a form or coercion or persuasion or intimidation of people out there who may feel that what is offered is not a fair price for their land.

My colleague, the Member for Kilbride, made reference to instances where a person may feel he is being unjustly awarded and may have to settle and take something that would be less than they could have achieved, under an arbitration that would not have been costly to the person affected.

The purpose of the board should be to get fair compensation for the landowner. But the cards are stacked against the landowner in this instance, and it makes it more difficult and costly for the landowner to go through a dispute mechanism. Not only that, it does not have the option, in instances, because the minister can decide if it

should get to that stage. And that is why the amendments in clause 5, section 19.(2), moved by my colleague, the Member for Conception Bay South, just added a simple addition to number two to say: "An application to fix compensation under subsection (1) shall be made by the minister", and we have added: "or by the owner of the land expropriated or detrimentally affected by the expropriation." Why should not an application be made by the person who is detrimentally affected by the decision? Why should we have the minister be the one who can make application to fix compensation under subsection (1) in section 19, which is shown here in clause 5 of this Act?

The second amendment that was moved relates to, by adding in a subsection 3, section 19 in the bill, "where, the circumstances in either paragraph 1(a) or 1(b) hold, the minister shall make an application under subsection 2 forthwith." In other words, where the circumstances under paragraph 1(a) pertains to the minister and the owner of the land expropriated or detrimentally affected by the expropriation, if they cannot agree on the terms of the compensation to be paid for the land or, on account of being detrimentally affected, in one instance, and secondly, in (b) "the owner cannot be found or there is doubt as to the ownership of the land", we are saying the amount of compensation shall be fixed by the board and, of course, an application to this shall be done by the minister.

Now, it is only appropriate that fair compensation should be given and that can only be done when there is a fair process - a process that does not subject the landowner to a high risk in being told a certain value and that is being upheld. Not only will he get a lower value than he feels it is worth, he also will have to pick up the costs associated with it if he is not successful in obtaining a fair price. Now, we are moved into people being unfairly treated in a user-pay system - a completely user-pay system, transferring the cost from government for certain services down upon the person availing of these services. If we start using the same scenario, do we use the same scenario in health care if you avail of the system?

CHAIR: Order, please!

The hon. member's time is up.

MR. SULLIVAN: Thank you, Mr. Chairman.

Shall clause 5 carry?

The hon. the Member for St. John's East.

MR. OTTENHEIMER: Thank you, Mr. Chairman.

Bill No. 33, "An Act To Amend The Expropriation Act," has tonight sparked exciting debate on this side of the House, and I notice that members opposite are listening intently to the words of wisdom being espoused by my colleagues to my left and to my right.

MR. TULK: You are halucinating because (inaudible).

MR. OTTENHEIMER: I think I probably am, nevertheless, it is exciting debate. At 4:25 in the morning I would agree with you, nevertheless it is exciting debate.

SOME HON. MEMBERS: Hear, hear!

MR. OTTENHEIMER: Section No. 5, subsections 19 and 20 of the Act are repealed and the following substituted: "19.(1) Where the minister and the owner of land expropriated or detrimentally" -

AN HON. MEMBER: (inaudible).

MR. OTTENHEIMER: No. 5.

- "affected by the expropriation cannot agree on the amount of compensation to be paid for the expropriated land or on account of being detrimentally affected; (b) the owner cannot be found or there is doubt as to the ownership of the land; or (c) for another reason the minister considers it expedient, the amount of compensation to be paid shall be fixed by the board."

I guess, Mr. Chairman, it is this whole issue of the board and the role that the board will play as it affects expropriation and as it affects property owners within our Province. Because the intention of this bill is to have the Public Utilities Board, and not the traditional route of arbitration boards, determine the compensation paid to the landowner when property is expropriated. We have had a traditional method of arbitration whereby when expropriation proceedings took place before an arbitration board, a position would be made by both property owners and their representatives, or counsel, and that would then be refuted by government and government solicitors, and obviously, a board would make a decision as to what the fair market value would be and would be payable to a property owner and landowner.

Of course, the purpose of this legislation is to change the whole context of expropriation procedures in the Province and essentially allow the Public Utilities Board to have that power to determine the compensation paid to a landowner when property is expropriated. If you look at clause 5, there are some changes that are worthy of some review and consideration, Mr. Chairman, and they include the following: that compensation is set by the Public Utilities Board and not an arbitration board. So it gives significant power, I would suggest, to the Public Utilities Board, to essentially make all decisions as it relates to the rights of property owners and landowners within our Province.

The minister in question will decide whether to refer it to the board in the first place, and in this case we are talking about the Minister of Works, Services and Transportation, so there is ministerial power and authority to make the decision as to whether or not there should be a reference to the board for determination on the issue of expropriation.

Mr. Chairman, the landowner no longer has a representation on the decision-making board, and this is significant, because under the expropriation procedures there were always provisions in the legislation to have direct input on the arbitration board by the landowner rep and, of course, this will be significantly altered when we look at the new provisions with respect to the decision-making powers of the board.

Also, there is no representation when land is in dispute. The bill raises the cost of process and intimidates landowners into accepting the minister's offers. The issue of cost is a significant issue, Mr. Chairman, because there is clearly a disincentive to a property owner to even pursue an issue or to bring an issue forward to the Public Utilities Board, because it seems to me that there is a penalty provision. If there is an arbitration or an expropriation issue being presented to the Public Utilities Board, and if, in fact, the applicant is not successful, well, the cost implications are then carried over to the applicant. That seems to me to be most unfair, and as I said, acts as a disincentive.

There are more comments I wish to make on this particular piece of legislation in the not-too-distant future.

Thank you, Mr. Chairman.

CHAIR: The hon. the Opposition House Leader.

MR. H. HODDER: Mr. Chairman, I believe, after some discussion with the Government House Leader, we have agreement that we will -

SOME HON. MEMBERS: (Inaudible).

CHAIR: Order, please! Order, please!

The Chair is trying to determine what -

AN HON. MEMBER: (Inaudible).

CHAIR: Order, please!

MR. H. HODDER: Thank you, Mr. Chairman.

I do believe, after some discussion with my colleague across the way, the Government House Leader, we have an agreement to have a short recess that will be for about ten to fifteen minutes - not less than ten but not more than fifteen - in order that we might be able to caucus with our colleagues.

MR. TULK: Mr. Chairman, the hon. gentleman wishes to have a discussion with his caucus. As a matter of fact, I encourage that, I have no problem with it. Sure, we will reconvene at not later than 4:45 a.m.

CHAIR: The House will recess until not later than 4:45 a.m.

Recess

CHAIR: Order, please!

For the benefit of hon. members, there are two amendments to clause 5, and we will vote on them individually. The first one is:

"That clause 5 of Bill 33, An Act To Amend The Expropriation Act, which is now before the House, be amended by adding in subsection 19.(2) immediately following the word `minister' the words `or by the owner of land expropriated or detrimentally affected by the expropriation.'"

All in favour of the amendment, please say `aye'.

SOME HON. MEMBERS: Aye!

CHAIR: Opposed, `nay'.

SOME HON. MEMBERS: Nay!

CHAIR: I declare the amendment defeated.

The second amendment reads:

"That clause 5 of Bill 33, An Act To Amend The Expropriation Act, which is now before the House be amended by adding immediately following subsection 19.(2), the following subsection: `(3) Where the circumstances in either paragraph (1)(a) or paragraph (1)(b) hold, the minister shall make an application under subsection (2) forthwith.'"

All in favour of the amendment.

SOME HON. MEMBERS: Aye!

CHAIR: Opposed.

SOME HON. MEMBERS: Nay!

CHAIR: I declare the amendment defeated.

On motion, clauses 5 through 10 carried.

CHAIR: Clause 11 has an amendment which has been read into the record.

All in favour of the amendment.

MR. SULLIVAN: Mr. Chairman.

CHAIR: The hon. the Leader of the Opposition.

MR. SULLIVAN: Mr. Chairman, were both amendments read into the record, or just one in clause 11.

CHAIR: The Chair has the following amendment: That clause 11 of Bill 33, "An Act To Amend The Expropriation Act", which is now before the House, be amended by (1) deleting in subsection 34(3) the word "greater" and substituting therefore the words "not less"; and (2) deleting in subsection 34(4) the words "does not exceed" and substituting the words "is less than".

MR. SULLIVAN: Thank you, Mr. Chairman.

CHAIR: Is there another amendment other than this?

AN HON. MEMBER: (Inaudible).

CHAIR: Well, do you wish to vote on this one?

MR. SULLIVAN: Yes, I do. Well I will speak on it first and then we could move the amendment after we have dealt with that one.

CHAIR: The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Chairman.

It still does not detract from the right to move an amendment that we consider to be a substantial amendment, that is going to make some changes in it, I say to the minister. If it is defeated, well so be it. It is not going to deny the democratic right to make an amendment. We have moved an amendment that the word "greater" be deleted and the words "not less" be substituted in subsection 34(3). It would now read, with that amendment: Where the compensation awarded by the board in a case is greater than the sum that the minister offered in writing for the land that was expropriated or detrimentally affected, the minister shall pay costs and all expenses..."

We are moving too: ....awarded by the board in a case that is not less than the sum that the minister offered in writing which certainly makes a substantial difference in the way that it is viewed; because there have to be certain rights to the landowner, the person who has property, the right to be able to put a mechanism in place whereby if a certain figure is not appropriate or where somebody is detrimentally affected by it, there should be an avenue open upon the setting of that figure where it is less than the sum that they are offered in writing.

If the compensation awarded in the case is greater than that, it says: The minister shall pay the costs. So in other words, why should individuals have to pay a substantial cost there? Granted, we don't advocate that landowners should be free from all basic costs involved in the process. That is not what is being advocated here, but on the other hand, they should not be restricted in their ability to be able to at least have the minister or the Crown pay some of the costs associated with this.

Mr. Chairman, I have no further comment on that amendment. We do have another amendment to make, if you wish to deal with this amendment.

CHAIR: All in favour of the amendment, `aye'.

SOME HON. MEMBERS: Aye.

CHAIR: Opposed, `nay'.

SOME HON. MEMBERS: Nay.

CHAIR: I declare the amendment defeated.

The hon. the Leader of the Opposition.

MR. SULLIVAN: Mr. Chairman, I move the following amendment: That clause 11 of Bill 33, "An Act To Amend The Expropriation Act", which is now before the House be amended by deleting in subsection 34(5) the words "party designated by the board" and substituting therefore the word "minister".

That would now read, Mr. Chairman: Where in respect of land expropriated or detrimentally affected no sum was offered before expropriation, costs and all expenses in connection with the hearing held by the board shall be paid by the minister. "By the party designated by the board" is the current wording that is in the amendment to the act. It is fairly significant, I say to the minister, fairly significant.

Overall, the purpose of the basic amendments moved is to give, certainly, some rights, minimal cost, to a person who feels that the land might be expropriated and there is not a sufficient price tag on that land. It is only fair that they should have an opportunity, as we alluded to earlier, to have the right in that case not to be at the minister's discretion, and also that they not be left picking up the total cost pertaining to it.

Since there is no arbitration ruling now, it is going to a board, and there could be considerable cost. If there were going to be more minimal costs - in an arbitration there would be a reduced level of cost. It would not be as financially burdensome upon the individual in that case, and then you could look at whether there are certain costs they should pick up in the process.

We are not saying that the Province has to pay outright for basically every, single thing, just because something is appealed or they may wish to bring it to the Public Utilities Board; but at least they should have the right to be able to have some of the costs covered, because the Public Utilities Board can be a very expensive process. There could also be delays in the process and the landowner whose land was expropriated could be incurring costs. These cases would not necessarily incur lower costs in arbitration, but there could be differences of thousands and thousands of dollars in the process. It is a high risk for the landowner to take, and there could be extra coercion, persuasion, pressures and so on to get a settlement that might not be fair.

Mr. Chairman, I propose and certainly speak in favour of that amendment.

CHAIR: All in favour of the amendment, `aye'.

SOME HON. MEMBERS: Aye.

CHAIR: Opposed, `nay'.

SOME HON. MEMBERS: Nay.

CHAIR: I declare the amendment defeated.

On motion, clauses 11 through 15, carried.

A bill, "An Act To Amend The Expropriation Act." (Bill No. 33)

Motion, that the Committee report having passed the bill without amendment, carried:

CHAIR: The hon. the Government House Leader.

MR. TULK: Mr. Chairman, Committee of the Whole on a bill, "An Act To Amend The Lands Act," Bill No. 22.

CHAIR: Bill No. 22, "An Act To Amend The Lands Act."

Shall clause 1 carry?

The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Chairman.

There is just one point I want to bring to the minister's attention. Basically, I suppose, it should be an amendment, which I was going to put forward, that calls for Bill 22, "An Act To Amend The Lands Act", which is now before the House to be amended by deleting the parenthesis and the letter `d'.

The reason for that is that on March 20, 1996, the government introduced Bill 1, the Regulatory Reform Act. Clause 39 of that bill stated: Paragraph 41(d) of the Lands Act is repealed. So you are basically asking for something that does not exist.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: Basically, the amendment is that clause 4 of Bill 22, "An Act To Amend The Lands Act", which is now before the House be amended by deleting the parenthesis and the letter `d'.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: It has already been deleted, I say to the minister, for your own information if you want to deal with it here. Did you get what I said?

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: On March 20, 1996, the government introduced Bill 1, the Regulatory Reform Act. Clause 39 of the bill stated: Paragraph 41(d) of the Lands Act is repealed. That bill passed through committee stage on June 17, 1996 without amendment, and was given third reading and Royal Assent. On June 18, 1996 it became law. So section 41(d) is not in the act any more anyway. It is only housekeeping.

MR. TULK: If I could, Mr. Chairman, I would like to ask a question.

CHAIR: The hon. the Government House Leader.

MR. TULK: If, indeed, that contention is true. Is that in fact true, what the hon. gentleman is claiming?

AN HON. MEMBER: Well, I do not know. I mean, it is certainly possible.

CHAIR: The hon. the Government House Leader.

MR. TULK: Mr. Chairman, let me just say to the hon. gentleman, if I could, the point is though, if it is deleted it is deleted, so that it is gone and the bill will be changed accordingly.

CHAIR: The hon. the Minister of Government Services and Lands.

MR. McLEAN: Thank you, Mr. Chairman.

Just a couple of clarifications. When we went through second reading, the hon. Member for Cape St. Francis asked a question about the amending of section 6, where we increased the levels from twenty hectares to a maximum of 100, and we did not really clarify it for him which section was included to determine that 100 was the maximum. If he looks at section 8, it determines that 100 have to go to the Lieutenant-Governor in Council anyway; so that clarifies that.

In relation to section 41(d), 41(d) might have been repealed earlier but is repealed now anyway because sections (a) (b) (c) and (d) of the Act are repealed and you are only left with 41(e) which refers back to section 8, which indicates that 100 hectares are the maximum.

CHAIR: The hon. the Government House Leader.

MR. TULK: I understand the law clerk said it is repealed, so it is repealed.

On motion, clauses 1 through 4, carried.

A bill, "An Act To Amend The Lands Act." (Bill No. 22)

Motion, that the Committee report having passed the bill without amendment, carried:

CHAIR: The hon. the Government House Leader.

MR. TULK: Mr. Chairman, Order 14, Committee of the Whole on a bill, "An Act To Amend The Fish Inspection Act", Bill No. 21.

CHAIR: Bill No. 21, "An Act To Amend The Fish Inspection Act."

On motion, clauses 1 and 2, carried.

Motion that the Committee report having passed the bill without amendment, carried:

MR. TULK: Mr. Chairman, I move that the Committee rise and report progress on the bills.

On motion, that the Committee rise, report progress and ask leave to sit again. Mr. Speaker returned to the Chair.

MR. SPEAKER (Snow): The hon. the Member for Lewisporte.

MR. PENNEY: Mr. Speaker, the Committee of the Whole have considered the matters to them referred, have directed me to report Bill Nos. 26, 49, 50, 39, 38, 33, 22 and 21 passed without amendment and Bill Nos. 44 and 35 with amendments, and ask leave to sit again.

MR. SPEAKER (Snow): The Chairman of the Committee of the Whole reports that it has considered the matters to it referred and has directed him to report having passed Bill Nos. 26, 49, 50, 39, 38, 33, 22 and 21 without amendments.

On motion, report received and adopted, bills ordered read a third time on tomorrow.

MR. SPEAKER: The Chairman of the Committee of the Whole also reports that it has considered the matters to it referred and has directed him to report having passed Bill Nos. 44 and 35 with some amendments.

On motion, report received and adopted.

On motion, amendments to Bill No. 44 and 35 read a first and second time, bills ordered read a third time on tomorrow.

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker, Order No. 2.

Could I ask the Opposition House Leader, if he has any problems with Order Nos. 2 through 13? Because if I could, I would just call Order Nos. 2 through 13 as third reading.

MR. H. HODDER: (Inaudible)?

MR. TULK: Yes, from Order No. 2 down to Order No. 13.

While he is thinking that over, let me call Order No. 2, third reading of a bill, "An Act To Amend The Registered Nurses Act."

On motion, a bill, "An Act To Amend The Registered Nurses Act," read a third time, ordered passed and its title be as on the Order Paper. (Bill No. 23)

MR. TULK: Do you have any trouble with them? I will call them all?

AN HON. MEMBER: No, call them individually. (Inaudible).

MR. TULK: Okay. Order No. 3, third reading of a bill, An Act To Amend The Portability Of Pensions Act (No.2), Bill No. 28.

On motion, a bill, "An Act To Amend The Portability Of Pensions Act (No.2)," read a third time, ordered passed and its title be as on the Order Paper. (Bill No. 28)

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Order No. 4, third reading of a bill, An Act To Amend The City Of St. John's Act, Bill No. 25.

On motion, a bill, "An Act To Amend The City Of St. John's Act," read a third time, ordered passed and its title be as on the Order Paper. (Bill No. 25)

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Order No. 5, third reading of a bill, An Act To Amend The Assessment Act And The St. John's Assessment Act, Bill No. 36.

On motion, a bill, "An Act To Amend The Assessment Act And The St. John's Assessment Act," read a third time, ordered passed and its title be as on the Order Paper. (Bill No. 36)

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Order Nos. 6 to 13, Mr. Speaker.

On motion, the following bills read a third time, ordered passed and their titles be as on the Order Paper:

A bill, "An Act To Amend The St. John's Municipal Elections Act." (Bill No. 37)

A bill, "An Act To Amend The City Of Mount Pearl Act." (Bill No. 41)

A bill, "An Act To Amend The City Of Corner Brook Act." (Bill No. 40)

A bill, "An Act Respecting A Provincial College." (Bill No. 47)

A bill, "An Act To Amend The Dental Act." (Bill No. 31)

A bill, "An Act To Provide Firefighters With Protection From Personal Liability." (Bill No. 43)

A bill, "An Act To Amend The Jury Act." (Bill No. 24)

A bill, "An Act To Amend The Municipalities Act." (Bill No. 42)

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker, I move that the House resolve itself into Committee of the Whole to consider Bill No. 27 and maybe (inaudible).

On motion, that the House resolve itself into Committee of the Whole, Mr. Speaker left the Chair.

Committee of the Whole

CHAIR: Order, please!

The hon. the Government House Leader.

MR. TULK: Mr. Chairman, Order No. 23, "An Act Respecting Education," Bill No. 27.

CHAIR: Bill No. 27, "An Act Respecting Education."

Shall clause 1 carry?

The hon. the Member for St. John's East.

MR. OTTENHEIMER: Thank you, Mr. Chairman.

With respect to Bill 27, "An Act Respecting Education", there are a couple of amendments which I would like to present, if I may.

Mr. Chairman, the first refers to Section 3(5)(b), dealing with denominational education commission. Under Section 3(5)(b) the amendment - and there is a copy of the amendment which has just been passed around - is as follows: Paragraph 3(5)(b) of the bill is deleted and the following substituted: Denominational Education Commission under "3(5)(b) develop and support religious education courses.' The explanatory note which accompanies the amendment, Mr. Chairman, is that: This amendment more clearly defines religious education to mean the subject of religious education.

It is simply meant for clarification purposes because the way the existing wording is, if we look at paragraph 3(5)(b) it says: develop and support programs in religious education. By simply adding the words "religious education courses", Mr. Chairman, from a clarification point of view, it simply makes it clear that we are talking specifically about the course in religious education as opposed to religious education generally. Again, it is for clarification purposes, but nevertheless it is an amendment which is perhaps worthy of some note.

I don't know if there is any response that the minister would like to make at this time on that point, before I get to the other amendment.

CHAIR: The hon. the Minister of Education.

MR. GRIMES: Thank you, Mr. Chairman.

In response to the proposed amendment, I am just a little surprised, I guess, that the hon. member would present it in this form. We have already exchanged information on several other amendments that will be moved, some suggested by the member opposite, others from the denominational representatives, others from the teachers association, and so on.

Mr. Chairman, this very minor change in wording, one way or another, means nothing. I cannot see why you would agree to this change now when we have had no prior notice of it, after the fact that we have been dealing with this issue for a couple of weeks.

The hon. member did a great job of proposing some amendments that we discussed in detail with legal council. All the stakeholders in education, to my knowledge, the denominational education councils whose prime function it is to develop religious education programming, the teachers association, the home and school federation, and the school trustees all looked at this legislation and saw nothing wrong with the wording as it is in Section 3(5)(b). So I cannot see any purpose in changing it just for the sake of changing a few words, when everybody else who has looked at it thinks it is fine the way it is.

CHAIR: The hon. the Member for St. John's East.

MR. OTTENHEIMER: Mr. Chairman, Paragraph 6(a) and (d) of the Bill are amended by deleting the word "equipment" and substituting the word "renovation."

The purpose for this amendment, Mr. Chairman, is again one of clarification. The authority for equipment is provided to school boards through Section 102 of Bill No. 48, and it is from that point of view that this amendment is suggesting the deletion of the word "equipment" and substitution for the word "renovation." Again, for clarification purposes, maybe the minister would respond to that amendment. That is Paragraph 6(a) and (d).

CHAIR: The hon. the Minister of Education.

MR. GRIMES: Thank you, Mr. Chairman.

Again, we had that information checked as a result of representation and questions raised by the hon. member in terms of debate at second reading, and again all of the stakeholders in education, to my knowledge, are quite comfortable with the language that is there. They understand that in terms of the work of the construction board, erection and extension from school boards cover off any possibilities with respect to the rest.

In Sections (e) and (f), Mr. Chairman, it covers off the other possibilities of developing policies for preventative maintenance repair and reconstruction of buildings, and so on, and that those issues are dealt with there.

The equipment of schools, as we discussed at second reading, is the whole notion of having the board deal with basic lab materials such as desks and basic supply of equipment other than consumables, such as a fundamental supply of Bunsen burners, beakers, test tubes, and things of that nature; and this language is necessary.

The maintenance of schools is a different issue that is covered in a different section and it is not appropriate to put into sections (a) and (d).

CHAIR: The hon. the Member for St. John's East.

MR. OTTENHEIMER: Mr. Chairman, a third amendment being brought forward: 1. Section 10 of Bill No. 27 is amended to become Section 11. I have copies here I can distribute.

"11. The Act or section of this Act shall come into force on a date to be proclaimed by the Lieutenant-Governor in Council."

Section 10 of the bill would read as follows: - and, Mr. Chairman, this should come as no surprise. It is an issue that has been debated in this House for the past week. It has been presented by the Leader of our party and by myself as critic, and it has been responded to on numerous occasions by the minister.

Section 10 of the bill would now read as follows: Resource Recovery "10. That resources realized from reductions in duplication of school boards, administrative offices, schools and transportation systems through the enactment of the Education Act, 1996 shall be devoted to improving the quality of teaching and learning."

Mr. Chairman, this particular amendment is all-encompassing. It is clearly recognition of the fact that it is the position of members on this side of the House that funding in education, or savings from reduced expenses, I guess, in education, and reform measures that have taken place and are in the process of taking place, that any

cost recovery would be redirected to schools and classrooms in this Province. As indicated, it has been a position of this party in recent weeks. It has been debated frequently in this House. The minister has responded to this particular issue on numerous occasions.

We will simply restate our position, I would say, that there has been a position maintained by the previous government, I would suggest, and certainly the present government as well with respect to its obligation, to ensure that any funds available as a result of measures taken dealing with the issue of school reform would be redirected to ongoing educational programs and classrooms in this Province.

Mr. Chairman, as indicated, this particular amendment is all-encompassing. It is one which has been dealt with at some length. We take pride, I might add, in presenting this amendment at this time, and having section 10 of the bill now read: And recognizing a provision for resource recovery with respect to this particular provision of the Education Act.

CHAIR: The hon. the Minister of Education.

MR. GRIMES: Thank you, Mr. Chairman.

I recognize fully the political debate with respect to the issue of whether or not there was a commitment of some sort to maintain funds from any efficiencies within education for the purpose of improving the quality of teaching and learning, but that is exactly where it needs to remain, Mr. Chairman, as a political debate. It has been a political debate now for a week or more in the last little while and it will probably be a political debate into the future. I think even the members opposite in moving it recognize that there is absolutely no place for this in legislation.

It is nowhere else in the country, it is nowhere else in the world. It doesn't exist in the universe, Mr. Chairman, that we know of, that you would, on a specific item in one part of a budget in one department, put something in legislation saying that under no circumstances could you alter the budget. It isn't appropriate. We won't be supporting it. We fully expect that there will be other opportunities to fully debate politically the question of whether or not there was a commitment to keep funding in education but it certainly won't be supported as a piece of legislation.

While I am speaking, Mr. Chairman, I might also briefly indicate that there is an amendment to clause 8(1), which the table has and which the hon. member opposite has, with respect to clarifying the date between the abolition of the current denominational councils and the existence and working of the new commission. The new clause 8(1), that the table has, will certainly be supporting that amendment, that: When the commission is established but, in any event, not later than twenty-one days after the commencement of this Act, a denominational education council, established under Section 4 of the former Act is abolished; so that the current 8(1) would be deleted and replaced by this new 8(1) that will be moved by the House Leader on behalf of the government when you get through the final clauses.

So we will support an amendment in clause 8 but we will not be supporting the amendment proposed in clause 10.

CHAIR: The hon. the Member for St. John's East.

MR. OTTENHEIMER: Thank you, Mr. Chairman.

Mr. Chairman, the thrust behind the resource recovery provision obviously is that as the result of -

SOME HON. MEMBERS: Oh, oh!

CHAIR: Order, please!

The Chair is having some difficulty hearing the hon. member.

The hon. the Member for St. John's East.

MR. OTTENHEIMER: Thank you, Mr. Chairman.

The wording under section 10, as has being proposed, Mr. Chairman, deals with resources realized from reductions in duplication of school boards, administrative officers, schools and transportation systems. Mr. Chairman, it is the changes and reforms which have taken place in the recent past which have obviously resulted in significant savings to this government, and it is time that this government looked closely and clearly at where these savings ought to be redirected.

We have seen example after example, Mr. Chairman, whether it be in the recent report with respect to special needs children, whether it is the discontinuation of public examinations, whether it is the cancellation of a kindergarten program which was certainly widely acclaimed by those individuals who were involved in the pilot program. We see program after program being slashed, being cancelled and being postponed. Mr. Chairman, the purpose for redirection of funds is obviously to recognize that our education system, the children of this Province, need to rely on the fact that savings which have been realized, as a result of the reforms over the past little while, could be certainly put in their direction for their benefit, both short-term and long-term.

Mr. Chairman, this piece of legislation under Bill 27 deals primarily with the denominational education commission. Most of the changes and most of the amendments which the hon. minister has referred to deal specifically with the Schools Act as opposed to the Education Act. The Education Act is more of a constitutional nature, in that it recognizes the denominational education commission, the financial structure and of course the school construction board is also envisaged. The duties of the school construction board are outlined under section 6 and obviously there is the regulatory regime which is referred to in section 7.

Most of the discussion that members on this side had with respect to this whole educational school debate, Mr. Chairman, will be reserved for a number of amendments which will be put forward pursuant to various provisions and sections of the Schools Act.

Other than the three amendments which have been put forward concerning Bill 27, there are no further comments which I wish to make at this time. I do not know if my colleague, the Leader of the Opposition, has a comment which he would wish to make, or the Opposition House Leader.

Thank you, Mr. Chairman.

CHAIR: The hon. the Opposition House Leader.

MR. H. HODDER: Thank you very much, Mr. Chairman.

I just want to rise and make a few comments relative to Bill 27, which has been introduced by my colleague from St. John's East, and to say that there are certain parts of Bill 27 for which we certainly have a great deal of support. We believe that the general thrust of the bill is okay. We certainly commend the government for initiatives on the Province-wide construction board, the reduction of the number of school boards, and that kind of thing. However, my colleague has concerns, as do the people of Newfoundland and Labrador, over the fact that the efficiencies that will be achieved by the school boards will not result in that money in some cases, according to the minister, being redirected toward the classrooms of the Province.

Mr. Chairman, the amendments that we have brought forward would make it a commitment of the minister that any of the monies to be saved by changes in the denominational education committees - and we know that denominational education committees across this Province have hundreds of thousands of dollars. In fact, two years ago the denominational education committees were costing the Province nearly $1 million. We believe that kind of money should be redirected to the classrooms.

The Member for St. John's East, in making his amendments on Bill 27 and Bill 48, wants to bring to the minister's attention the fact that there were commitments that were made, and that there were statements made

by the then Premier of the Province and by the then Minister of Education. They have been documented in the public press, and they have been shown to the minister. There are quotations in Hansard which show that any efficiencies would be directed towards making the total funding available for education in this Province more readily accessible to children and to the classrooms of our students. However, in the last few days we have listened with some concern as the minister has said: No, no, a commitment was not a commitment. Consequently, we have real concerns about that kind of statement.

I say to the hon. the minister, he has done a good job in trying to skate around that issue, but certainly many people in this Province are not convinced by his statements. They knew when they went out to participate in the public meetings, they knew when they participated in the referendum, and we all knew when we stood here - in my case, I took a very strong position on Term 17. The whole thrust of that was that we could not have four competing school systems, that we could not have buses crossing each other's paths, that we would have children going to the nearest school, that we would have, where possible, larger schools, and where not possible we would have more money to be put into small schools in some of the parts of the Province where it isn't possible to have larger schools, because of the size of the population and distance from the nearest other school.

We were committed to all of that. We were told that the whole purpose was to improve the quality of learning. Our greatest fear now is that, now that we have taken out of education in the last two years about $50 million, and we anticipate that there will be substantial savings - if you listen to what the royal commission on education said about savings in buses, and listen to what the Minister of Education said two years ago about savings in restructuring buses, one would believe there are literally tens of millions of dollars we could have that could be redirected toward children with learning disabilities. We know there will never ever be enough money to address all the needs of all the children. But now that we are going to achieve efficiencies, and putting it in the context of where we were, shall we say, two years ago, I would have anticipated now that we would be able to address the issues that Dr. Patricia Canning noted in her report on special matters.

We know that many of the initiatives in the royal commission have not been acted upon. We know that the minister shelved his kindergarten program. There was a great deal of thought, research and commitment that went into that kindergarten program. Last year the minister said: I don't have the money. So a $1 million program was simply put on the shelf. We are now saying to the minister, when you bring in those efficiencies, yes we should do it. I support reform. I have been consistent ever since I've come to this House about the issues of reform, have been a very strong proponent of it, very strong proponent of change at both the administration level, but more importantly to make sure that we are able to have real change happen at the classroom level.

Mr. Chairman, if we are going to spend the same old dollars and we are going to spend the dollars in the same manner we are now spending them, then we have to ask ourselves, what was the real purpose of the education reforms.

When I spoke first on this matter in the House I said two things. I said: First of all, the churches of this Province were motivated by power, they were motivated by position, and the government was motivated by it's stressing the financial considerations. I haven't changed from that. Now that the minister, in the last few days, has said that he isn't going to redirect his money towards children, then we have to say that the whole purpose of reform was not for betterment of education, but was merely for the financial considerations we now see self-evident.

I say to this House, that when we talk about educational reform we talk about it in terms of the classrooms. We spent the last years talking about it in terms of its organizational structure, but if it isn't going to be translated into more dollars and better learning programs than the whole purpose, the whole philosophy, is at risk.

What we are saying to the minister today is that my colleague for St. John's East, the critic for this caucus on education, has put forward an amendment. He has reminded the government, and the minister in particular, of the commitments that were made. We believe these commitments were substantial, and that they cannot be excused by saying: If you understood that, then that is not what we meant. Consequently, what I am saying to the minister is, be careful we do not betray the trust that was given to the government when we voted for the referendum in the affirmative, and be careful lest we fail to really put the money at the classroom level. Because that is where the action is, that is where we need to put money - into early childhood education. We need to put

it into early intervention programs. We need to address the issues that Dr. Patricia Canning identified, and which Dr. Len Williams identified in his report. If we do not, then we have not really fulfilled the mandate given to the government in the referendum, or indeed we have not really fulfilled the mandate the government told the people would be the main thrust of its education reform.

I say to my colleagues opposite, there is a price to be paid when politicians say one thing and do something else; and, on this issue, that is what has been the focus in the public press in the last few days. With these comments, Mr. Chairman, I will yield and see if any other of my colleagues wishes to have a comment.

CHAIR: The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Chairman.

I, too, want to make a few comments on Bill No. 27. I feel strongly that in Bill No. 27, as in Bill No. 48, there was a commitment given that, with the restructuring of the boards, with the restructuring of the school system, money would go back into the education system, regardless of what the minister or this government may say. The Education Referendum: A Decision on the Future of Education in Newfoundland and Labrador, was sent out to every household in this Province. Everybody had an opportunity to read what is stated in it.

It says: Restructuring is only one step in a much broader program of reform. It continues: It is necessary because we need to reduce duplication of service, decrease the number of decision-making bodies, and make the system more accountable to the public. Making the system more efficient will allow resources to be put to better use in improving teaching and learning.

It was sold to the people of the Province back on September 5 1995 on the basis that money would go back to improve teaching and learning in the classrooms of our Province. That is what the people of the Province were told, and it is something for which this government should be held responsible. When they presented this, they knew our deficit situation. It did not increase. We went through a year with a small surplus in 1995-1996, and we wound up this year with only $14-point some million. So we are in the same basic fiscal situation in this Province that we were when the commitment was made and the brochure was circulated to all the households in the Province.

Furthermore, I told the Premier I would go to Ottawa on conditions, certain conditions I stipulated before I would go, and he agreed in this House to follow those conditions. Here is what he took to Ottawa and here is what was presented to the people, in these two sentences: Significant savings would be realized annually from the administrative changes, student transportation efficiencies, and school consolidation which will result from the education reform process. The proposed reforms will provide the opportunity to redirect these savings to the classroom level for the benefit of our students.

That was stated in a package that was sold to the House of Commons, that was sold to the Senators, and sold to the people generally, in a package prepared by this government to promote and sell the concept of reform in the Province. It was an agreement, a promise of what they would do, and they reneged on that promise. The Premier, here in the House of Assembly on May 23, stood in his place and said: `We have to pay the bills today, we have to find efficiencies.' It is no longer acceptable against that backdrop that we should sustain excess bureaucracy at a time when we need our dollars to go to work in the classrooms of Newfoundland and Labrador, not in the administrative rooms of Newfoundland and Labrador.

Mr. Chairman, this government sold a bill of goods to the people under certain pretence, the same as Jean Chrétien sold to the people on GST, the same, basic thing - the same as Sheila Copps who admitted it, even though before admitting it, she had to do a poll to see whether she would be re-elected. She did a poll, and they told her, in Hamilton East, she would have been elected without any problem; that is what the poll stated when it was publicly released. And then she decided she did not tell the truth so she resigned and said they did not abolish it - `I will run again,' and that is easy enough when you know you are going to be re-elected.

The Minister of Finance came out on a commitment and he apologized and said: he might have basically -

CHAIR: Order, please! Order, please!

I remind the hon. member, we are debating "An Act Respecting Education", we are in Committee of the Whole, and debate should be relevant to the clauses of the bill.

MR. SULLIVAN: I am talking about giving a commitment. The commitment given to the people of this Province is similar and parallels the commitment given by Prime Minister Chrétien in the last election. I will go back to the specifics again of the brochure this government circulated to the people of this Province, a brochure that every householder in the Province received. It indicated making the system more efficient, saying: It will allow resources to be put to better use in improving teaching and learning. That is what was indicated and there are other things in this brochure, too.

The Premier of the Province was very apt to tell the people in Ottawa, the Senators and the House of Commons - and he carried a brochure that he passed out to the media which said: Significant savings are going to be realized annually from the administrative changes, student transportation efficiencies and school consolidations which will result from the Education Reform process. He said: The proposed reforms will provide the opportunity to redirect `these savings', not some of these savings, not some savings, to redirect `these savings' from administrative changes, from student transportation efficiencies and school consolidations, to redirect these savings to the classroom level for the benefit of our students. That is there in the package government prepared and distributed to try to sell this program, to convince the people of this Province, the Senators and also the people of the House of Commons to support this. Because we are going to put the money back into the system, that is what we told the people of Newfoundland and Labrador we are going to do, that is what we told the Senators and the House of Commons to get it through there, and that is what the Premier said here, in the House of Assembly back in May. That is the commitment he gave but he is going back on his word.

The Minister of Education is going back on a covenant, an agreement when they sold this package to the people of the Province, and that undermines the basic premise upon which people voted in the referendum. People voted on the referendum in this Province, Mr. Chairman, they voted because they thought their children in the schools today would have access to a better education that would come from increased efficiencies by having no duplication of buses, by not having too many boards, by not having too many schools or too many administrative buildings in the Province because we could use these dollars to enhance educational opportunities for our children in the Province, and now, we are being told by the Premier, by the Minister of Education, very blatantly told: `We never said that,' when it is here in print all over the place for people to read. And that is not fulfilling a commitment that they gave the people of this Province; they are reneging on a commitment to the people of this Province. Paul Martin gave a commitment and he came back and apologized, saying he was wrong. He said it was not basically truthful. Sheila Copps, even though it was after her poll, made a similar statement that parallels what the Premier of the Province has indicated here.

Since education bills were called here, we spent less than two hours on those two bills in second reading, and we have spent less than an hour - a half hour, fifteen or twenty minutes on this. We have spent about two hours on two very important bills on the future of this Province. We moved it through in jig-time in July and we have expedited this process every way possible. I am going to stand, and I am going to have my say on a matter that I believe is important to the children of our Province. I spent twenty years in a classroom in the Province and I put the interest of the children first. But when people stand up and tell us something and sell it to the people and it is not worth the paper it is written on because it undermines the process, it may not have legal repercussions but it certainly has moral and ethical repercussions on the people of this Province by backing down on concrete direct things.

The Premier even went a bit further than that, he went to the extreme. I will not even mention again what he said in Ottawa in the Liberal caucus, but the Minister of Industry, Trade and Technology certainly knows what I am talking about. We had an exchange the other day on it. What he said about the education system in this Province I would not repeat - to sell it in Ottawa -

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: No, not the Minister of Industry, Trade and Technology, at all - the Premier of this Province, and what he said to try to sell a package, how desperate our people were, to run down our education professionals in this Province, to sell a package to them in Ottawa. We did not need to do that. I have great respect for the professional people in this Province in the education system. I went to Ottawa and, where necessary, I stated the belief - the Minister of Education was there - and occasionally, I say to the minister, I had to correct the Premier in the caucus.

(Inaudible) ask the Minister of Education - I said: `No Premier, that is not correct. That is not my interpretation.' The NDP caucus, for example, we were allowed to meet with them; and I went to indicate what I considered to be facts, not to over-exaggerate and sell something. I said from day one that the people here in this Province had the opportunity on February 22, and the people who opposed it had their say, and they passed up the opportunity. We had a referendum initially, and then when we had an election and it did not become an issue in this election, people had their chance, the Premier of this Province had a mandate to proceed after February 22. I agreed with it and I supported it on that basis, not solely on the referendum. I think it was manipulated to a degree because this House closed and we could not debate the question and we could not participate in the process. We were shut out of the process and I resented that and I voted against it.

It may not have been the best question put to the people. It may not have been the best amendment for Term 17, and I took offence to it, that as a member of the Legislature I did not have an opportunity to come here. When Quebec called their legislature, the people participated democratically in the question that was put to them. That is only a fair request from people here. We were not treated democratically - it was not put through.

I turned a blind eye to the antics that the Premier used to sell it. I sold it because I believed in it and not because I wanted to sensationalize and criticize the system of education here in our Province.

CHAIR: Order, please!

The hon. member's time is up.

MR. SULLIVAN: By leave, Mr. Chairman.

A minute would be fine, or I could get up again. If I could have a minute, I will wrap up and I will not speak again.

CHAIR: The hon. the Leader of the Opposition, by leave.

MR. SULLIVAN: In conclusion, Mr. Chairman, they have not played the game on this from day one. The finger has been pointed at everybody else but the real culprits in the system. It has been pointed at the Senators in Ottawa - and I do not have any sympathy for the Senators. I do not believe we should have a Senate, the way it is structured. I am not an admirer of the Senate, but fingers were pointed in the wrong direction at people there.

We all know that the Liberals have more members in the Senate than the PCs, and if you cannot win it with your own majority there, you have a problem. In the House of Commons, there are only ten people, basically, outside the Liberals, who went against it. All the rest were Liberals, 75 per cent. Granted, there may not be many others there, but there are a lot of Bloc and a lot of Reform, a couple of PCs and a few NDPs in the House of Commons. You look at the vote there, and look at the Senate. It was not defeated for those reasons. There was too much sensationalism on this issue, and trying to make a political issue out of something that is near and dear to the people of the Province.

The people in my district voted 62 per cent or 63 per cent against it, but the people in my district want it, and I think they would make a choice that they would select the best possible education for their children, regardless of whether it is uni-denominational, whether it is interdenominational, whether it is non-denominational, whatever the case may be. I think a majority of the people would make a decision in the best interest of their children, regardless of denomination. That is my personal feeling.

As education critic I said, back in 1993 - and I will finish with this - that I believe in neighbourhood schools. I quoted it. I have the clip in there to show it. I believe in the rights of parents to choose where their kids can go to school, and they should have priority in the neighbourhood that the parent so desires.

I disagreed with the government when they made a decision out in Corner Brook, just before becoming education critic, when they, by not exercising their power, the Minister of Education forced kids to go across the city of Corner Brook to another school out of their neighbourhood. They did not exercise their powers. Under section 61, I believe, in the Schools Act, they had the power to do that. It is not right. They are setting it under a false pretence, basically, and the children of this Province are the ones who have been paying the price.

Thank you, Mr. Chairman.

On motion, clauses 1 and 2 carried.

AN HON. MEMBER: Clause 3.

CHAIR: All in favour of the amendment to clause 3, please say `aye'.

SOME HON. MEMBERS: Aye.

CHAIR: Opposed, `nay'.

SOME HON. MEMBERS: Nay.

CHAIR: I declare the amendment defeated.

On motion, clauses 3 through 5, carried.

AN HON. MEMBER: Clause 6.

CHAIR: All in favour of the amendment to clause 6, proposed by the hon. the Member for St. John's East, please say, `aye'.

SOME HON. MEMBERS: Aye.

CHAIR: Opposed, `nay'.

SOME HON. MEMBERS: Nay.

CHAIR: I declare the amendment defeated.

On motion, clauses 6 and 7, carried.

CHAIR: Shall clause 8 carry?

MR. GRIMES: Mr. Chairman.

CHAIR: The hon. the Minister of Education and Training.

MR. GRIMES: Thank you, Mr. Chairman.

The Table has an amendment to clause 8, and I believe members opposite have an amendment to clause 8, deleting the current subclause 8.(1) and substituting the following as per the tabled amendment. The new 8.(1) would read: `When the commission is established, but in any event, not later than twenty-one days after the commencement of this Act, a denominational education council established under section 4 of the former Act is abolished.

On motion, amendment carried.

On motion clause 8, as amended, carried.

On motion, clause 9 carried.

CHAIR: There is an amendment to clause 10 presented by the Member for St. John's East.

All in favour of the amendment, please say, `aye'.

SOME HON. MEMBERS: Aye.

CHAIR: Those against, `nay'.

SOME HON. MEMBERS: Nay.

CHAIR: I declare the amendment defeated.

On motion, clause 10, carried.

A bill, "An Act Respecting Education." (Bill No. 27)

Motion, that the Committee report having passed the bill with amendments, carried.

CHAIR: The hon. the Government House Leader.

MR. TULK: Mr. Chairman, Order No. 22, "An Act To Revise The Law Respecting The Operation Of Schools In The Province". (Bill No. 48)

CHAIR: Bill No. 48, "An Act To Revise The Law Respecting The Operation Of Schools In The Province".

The hon. the Member for St. John's East.

MR. OTTENHEIMER: Thank you, Mr. Chairman.

Mr. Chairman, this bill, Bill 48, "An Act To Revise The Law Respecting The Operation Of Schools In The Province" is comprehensive legislation - legislation which has been debated at length in this House in second reading, in particular, approximately ten days ago.

Mr. Chairman, there has been much debate on much of the subject matter contained within Bill 48 over the past several days. We are dealing, in particular, with areas such as student rights and rights of parents, obligations of teachers, obligations of school boards, the issue of a francophone board, for example, and property issues, uni-denominational designation, interdenominational designation and so on. It is a piece of legislation that contains, in its draft form, some 121 clauses. I am looking forward, Mr. Chairman, to debating, at Committee stage, each clause on a clause-by-clause basis, because there are implications which are important when we closely analyze and assess each clause individually. There are implications for the students, teachers and administrators, and indeed, the public at large. It is legislation which has to be carefully reviewed. I look forward to doing that at the Committee stage.

There are a few provisions on which I would like to take some time right now, Mr. Chairman, and give some particular attention to. For example, under section 6, it states, "(1) A parent of a student may provide, at home or elsewhere, instruction for that student where the student is excused from attending a school under paragraph 5(c)." Then it states, "(2) A student who is excused from attending school under paragraph 5(c) shall be enrolled under section 15." There are certainly implications, Mr. Chairman, from what is meant by home instruction, under what conditions home instruction may take place and what exemptions that may exist for children who wish to be or parents who wish to educate their children in this particular way.

Clause 7, Mr. Chairman, indicates how approval and in what manner approval may be given. It states, " The period for which a student may be excused from attending a school under paragraph 5(c) (a) shall be valid for no longer than a school year; and (b) may be renewed upon application to the director each school year." That particular section, in my view, Mr. Chairman, does not provide specifics or details as to how that discretion by the school board director is to be exercised. There is no indication, Mr. Chairman, upon review of this section, how this provision may be reviewed or renewed upon application and again, the manner in which this review is done.

Under student records, Mr. Chairman, 12.(1), we see that, "A student record shall be maintained for each student in the manner required by a policy directive of the minister." It is interesting to review the provisions of this section - to be very careful, and in fact to scrutinize, I guess, exactly how the rights of young people are protected. There are provisions that when a person exceeds the age of nineteen, that person obviously, as an adult, is free to request information with respect to school records, and obviously, a parent or guardian will be charged with that responsibility prior to age nineteen.

Also, under section 12.(6), if I may read it: "Without the written permission of the parent of a student, or the student if the student is 19 years of age or older... (b) a person shall not be required to give evidence respecting the content of the student record in a trial, inquiry, examination, hearing or other proceeding."

I would suggest the wording of this particular provision is somewhat conflicting, and it is just poor sentence structure. It is difficult to follow. When we look at clause (b) and read it right after clause (a), it is clearly simply an example of inconsistent wording in the draft legislation.

Under section 13 there is discussion of fees. Section 13(1) states that "A fee shall not be imposed upon a student or parent of a student with respect to the enrolment or attendance of that student or a program or course of study undertaken by that student in a public school." The minister has indicated there is indeed being contemplated by the department at this present time, an enlarged system of busing whereby school fees will be assessed. This seems to conflict, I say to the minister, with section 13, which makes it clear that fees shall not be imposed. So there is somewhat of an inconsistency, I would suggest, in section 13.

With respect to section 14, I understand there is an amendment that will be put forward by the hon. minister dealing with the issue of a student authorization under a Canadian visitor's visa, and that inconsistency and conflict in the wording appears to be corrected by the amendment being put forward by the minister.

Under Part II, the section for Parents, it states under section 16 that "A parent shall ensure that his or her child attends school unless the child is excused from attendance under this Act." It appears, too, that this particular provision under section 17(1), where it states that "A parent who neglects or refuses to enrol his or her child in school or does not ensure that his or her child attends school is guilty of an offence." Under section 17, it appears that this inconsistency in the legislation, or question that could be raised, is also being corrected by a proposed amendment, in that there is now a qualification with respect to exactly what is meant by a parent who neglects or refuses to enrol his or her child, in that there is a qualification or a limitation or an interpretation which will assist all parties in trying to have some greater understanding as to what is meant by section 17 of the bill.

Section 18 states that there is a duty to report. It is a troublesome section, I say to the minister, because this is a duty to the public at large. Section 18(1) states that "A person who has reason to believe that (a) a child who is required to be enrolled under section 15 is not enrolled; or (b) a child who is receiving instruction under section 6 is not receiving instruction in accordance with this Act, shall report that belief to the director for the district in which that child resides."

The difficulty with this is that there is a duty on the public at large, an onus on a member of the public to insist that a child who is clearly absent from his or her obligation to attend school, there is a duty on a member of the public to report that belief to the director of the school board. The concern that I have and the question that I raised to the minister in debate on second reading is, well, what are the limitations, Mr. Chairman? When is it that this duty to report is absolute? Is it possible that a person may be further penalized or reprimanded for

simply not following through with his or her obligation to report to the director of a school board the fact that a child is not attending school as he or she is required to do?

So, Mr. Chairman, that particular provision is somewhat troublesome. I am somewhat disappointed that there appears to be no attempt by the minister to correct this inconsistency. It is an area of concern, I would suggest, not only for educators, students or parents but, indeed, all members of the public who are confronted with the fact that there is a legal obligation, Mr. Chairman -

MR. TULK: No leave.

MR. OTTENHEIMER: Time up, Mr. Chairman?

CHAIR: Time up.

MR. OTTENHEIMER: No leave, Mr. Government House Leader? You are sure?

Thank you, Mr. Chairman.

CHAIR: The hon. the Government House Leader.

MR. TULK: Mr. Chairman, I give notice that I will on tomorrow move, pursuant to Standing Order 50, that the debate on Bill No. 48, entitled, "An Act To Revise The Law Respecting The Operation Of Schools In The Province," standing in the name of the hon. the Minister of Education, shall not be further adjourned and that further consideration of any resolution or resolutions, clause or clauses, section or sections, schedule or schedules, preamble or preambles, title or titles or whatever else might be related to debate in Committee of the Whole House respecting Bill No. 48, shall be the first business of the Committee when next called by the House and shall not be further postponed. That is called the hobnailed boots.

Mr. Chairman, I move that the Committee rise, report progress and ask leave to sit again.

On motion, that the Committee rise, report progress and ask leave to sit again, Mr. Speaker returned to the Chair.

MR. SPEAKER (Snow): The hon. the Member for Bellevue.

MR. BARRETT: Mr. Speaker, the Committee of the Whole have considered the matters to them referred, have directed me to report Bill No. 27 with amendments, and ask leave to sit again.

On motion, report received and adopted, Committee ordered to sit again on tomorrow.

On motion, amendments to Bill No. 27 read a first and second time, ordered read a third time on tomorrow.

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker, I have another little motion here which I have to move sooner or later, either now or at some time today when we get into private members' -

MR. E. BYRNE: No, put it back in your pocket, boy.

MR. TULK: No, no, it is just as well to move it now as move it at 2:00 p.m.

Mr. Speaker, I give notice that I will on tomorrow move, pursuant to Standing Order 50, that the debate on Bill No. 45 entitled, "An Act To Implement the Comprehensive Integrated Tax Coordination Agreement between the Government of Canada and the Government of Newfoundland and Labrador", standing in the name of the hon. the Minister of Finance and Treasury Board shall not be further adjourned and that further consideration of any resolution or resolutions, clause or clauses, section or sections, schedule or schedules, preamble or preambles, title or titles or whatever else might be related to debate in Committee of the Whole House respecting Bill No.

45, shall be the first business of the Committee when next called by the House and shall not be further postponed. That is the second boot.

Having given notice of that, Mr. Speaker, I move that the House adjourn until 2:00 p.m. tomorrow. The parliamentary day being tomorrow, the calendar day being today. Mr. Speaker, I move that the House adjourn.

On motion, the House at its rising adjourned until tomorrow, at 2:00 p.m.

TAB 13

Case Name:

Indalex Ltd. (Re)

RE: IN THE MATTER OF a Plan of Compromise or Arrangement of Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc., Applicants

[2013] O.J. No. 5916

2013 ONSC 7932

236 A.C.W.S. (3d) 292

9 C.C.P.B. (2d) 64

9 C.B.R. (6th) 270

2013 CarswellOnt 18028

Court File No. CV-09-8122-00CL

Ontario Superior Court of Justice
Commercial List

D.M. Brown J.

Heard: December 19, 2013.
Judgment: December 21, 2013.

(12 paras.)

Counsel:

A. Taylor and Y. Katirai, for the Monitor, FTI Consulting Canada ULC.

B. Empey, for Sun Indalex Finance, LLC.

H. O'Reilly, for Morneau Shepell Ltd., Administrator of the Salaried and Executive Plans.

D. Brown, for the United Steelworkers.

D. McPhail, for the Financial Services Commission of Ontario.

H. Chaiton, for the Chapter 7 Trustee of the Bankruptcy Estates of the US Indalex Debtors.

A. Hatney, for Keith Carruthers et al.

REASONS FOR DECISION

D.M. BROWN J.:--

I. Motions to approve a settlement and to amend a pension plan to implement the settlement

1 This appears to be the final chapter in the Indalex saga.

2 The Monitor, FTI Consulting, moved for the approval of a settlement agreement. Morneau Shepell Ltd., in its capacity as administrator of the Retirement Plan for Salaried Employees of Indalex Limited and Associated Companies and the Retirement Plan for Executive Employees of Indalex Limited and Associated Companies, moved for an order amending the Salaried Plan to give effect to the Settlement Agreement. On December 19, 2013, I granted both motions with reasons to follow.

II. The Monitor's Settlement Motion

3 After the Supreme Court of Canada released its decision in *Sun Indalex Finance, LLC v. United Steelworkers*[1] on February 1, 2013, the Monitor paid the US Trustee approximately U.S. $10.751 pursuant to an approval and vesting order. As of late November, the Monitor was holding $4.06 million and US $918,055 available for distribution to the creditors of the estate, subject to administration costs.

4 In March counsel for the USW and Retired Executives requested that the Monitor distribute those funds to the Salaried Plan and the Executive Plan. The Monitor was faced with a number of parties asserting priority claims: (i) US Trustee - US $5.4 million; (ii) Salaried Plan - $5.008 million; (iii) Executive Plan - $3.305 million; and, (iv) Sun Indalex Finance, LLC - $38.049 million. Priority for the claims by the Salaried Plan and the Executive Plan rested on the deemed trust, lien and charge provisions of the Ontario *Pension Benefits Act*. In addition, 347 creditors had filed claims of approximately $33.8 million. Although the US Trustee did not file a proof of claim, it informed the Monitor that there were payments of about $12.355 million made by US debtors to the applicants which could potentially constitute preferential payments under the US Code.

5 In June, 2013, the Monitor secured a litigation timetable order to determine threshold issues

relating to the distribution of estate funds. Some of the issues related to the claims advanced by the two pension plans, including: (i) whether the deemed trust claimed by the Executive Plan was enforceable against Indalex's accounts or inventory; (ii) the effect of a bankruptcy order on the existence, enforceability and priority of both Plans' deemed trust claims; and (iii) whether the beneficiaries of the Plans were "secured creditors" of Indalex for purposes of the *Bankruptcy and Insolvency Act*.

6 In the result, on September 13, 2013, Sun, the US Trustee, the Pension Administrators, the Superintendent, the Retired Executives and the USW reached a Settlement Agreement under which the funds in the hands of the Monitor would be distributed, in general terms, as follows:

(i) The distribution of $1.405 million to (i) the Pensions Administrator for deposit to the Salaried Plan ($650,000), (ii) $105,000 to the USW for seven members of the Salaried Plan, (iii) $15,000 to four members of the Executive Plan, (iv) $350,000 to counsel in trust for the Retired Executives, and (v) $285,000 to counsel as partial reimbursement of the legal fees of the Retired Executives; and,

(ii) The balance of the funds would be paid to the US Trustee on behalf of the bankruptcy estates of the US Debtors without prejudice to the claims of Sun in those proceedings.

Other provisions of the Settlement Agreement dealt with releases and the lack of need to indemnify certain D&O claims.

7 The US Trustee received US court approval to enter into the Settlement Agreement on October 10, 2013.

8 The Monitor recommended approval of the Settlement Agreement because costly and lengthy litigation would be required to determine the outstanding competing claims against estate funds.

9 I accepted the Monitor's recommendation, especially given that no interested party voiced any opposition to the approval order sought. The Settlement Agreement is a reasonable, proportionate resolution of the outstanding claims. Accordingly, I granted the approval order, together with orders discharging the D&O Charge, authorizing the distribution of funds, and approving the fees and disbursements of the Monitor ($1.038 million for the period April 3, 2009 to November 17, 2013) and Monitor's counsel ($1.734 million for the same period of time).

III. Motion by the Salaried Plan Administrator

10 Implementation of the Settlement Agreement requires an amendment to the Salaried Plan, specifically the addition of a paragraph excluding the Salaried Plan members represented by the USW from the $650,000 to be deposited into the Plan. Notice of the proposed amendment was sent to all Salaried Plan members.

11 No party opposed the proposed amendment. However, the applicant, Indalex Limited, is the employer under the Salaried Plan and, as such, the only party entitled to amend the Salaried Plan. The Administrator reported that neither Indalex Limited nor the US Trustee was willing or able to take the corporate steps necessary to enact the proposed amendment.

12 I granted an order amending the Salaried Plan as proposed by the Administrator. Although no clear explanation was given about why Indalex Limited, as employer, would not or could not amend the Salaried Plan, the need for the amendment in order to implement the Settlement Agreement was established. Indalex Limited, by filing an application under the *Companies' Creditors Arrangement Act* invoked the jurisdiction of this Court, including the general power of this Court under *CCAA* s. 11 to "make any order that it considers appropriate in the circumstances". That power includes the ability of the Court to amend a pension plan of an applicant where the amendment is necessary to give effect to a reasonable compromise of claims against the estate of the applicant, where notice of the proposed amendment is given to all affected persons, and where no affected person objects to the amendment sought. Consequently, I granted the Plan amending order requested by the Administrator.

D.M. BROWN J.

1 2013 SCC 6.

TAB 14

Court File No. CV-12-9539-00CL

Timminco Limited
Bécancour Silicon Inc.

TWENTY-FIFTH REPORT OF THE MONITOR

June 9, 2014

Court File No. CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

TWENTY-FIFTH REPORT TO THE COURT
SUBMITTED BY FTI CONSULTING CANADA INC.,
IN ITS CAPACITY AS MONITOR

INTRODUCTION

1. On January 3, 2012, Timminco Limited ("**Timminco**") and its wholly owned subsidiary, Bécancour Silicon Inc. ("**BSI**", together with Timminco, the "**Timminco Entities**") made an application under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended (the "**CCAA**") and an initial order (the "**Initial Order**") was made by the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) (the "**Court**"), granting, *inter alia*, a stay of proceedings against the Timminco Entities until February 2, 2012, (the "**Stay Period**") and appointing FTI Consulting Canada Inc. as monitor of the Timminco Entities (the "**Monitor**"). The proceedings commenced by the Timminco Entities under the CCAA will be referred to herein as the "**CCAA Proceedings**".

2. The Stay Period has been extended a number of times. Pursuant to the Order of the Honourable Mr. Justice Newbould granted December 16, 2014 (the "**December 16 Order**") the Stay Period currently expires on June 16, 2014.

3. On June 15, 2012, the Honourable Mr. Justice Morawetz granted an order approving a procedure for the submission, review and adjudication of claims against the Timminco Entities and of claims against the directors and officers of the Timminco Entities (the "**Claims Procedure Order**"). The Claims Bar Date was set at 5:00 p.m. Toronto time on July 23, 2012. The Monitor has reviewed all claims and been in contact with various claimants in order to attempt to resolve a variety of outstanding issues.

4. By Order of the Honourable Mr. Justice Newbould dated August 17, 2012, Russell Hill Advisory Services Inc. ("**Russell Hill**") was appointed as Chief Restructuring Officer (the "**CRO**") of the Timminco Entities and the engagement letter dated July 24, 2012, between Russell Hill and the Timminco Entities (the "**CRO Agreement**") was approved.

5. The CRO Agreement was for an initial term of six months with any extension to be negotiated with the Monitor subject to approval of the Court. The CRO Agreement was extended a number of times pursuant to the terms of the CRO Extension Agreement dated April 25, 2013 approved by the Court on May 14, 2013.

6. The CRO was discharged on December 16, 2013 pursuant to the provisions of the December 16 Order. On the same date, Mr. Justice Newbould issued an Order (the "**Monitor Powers Order**") expanding the powers of the Monitor to enable the Monitor to complete the estate in the name of and on behalf of the Timminco Entities.

7. To date, the Monitor has filed twenty-four reports on various matters relating to the CCAA Proceedings. This, the Monitor's Twenty-Fifth Report, should be read in conjunction with the Monitor's Twenty-Fourth Report, a copy of which is attached hereto as **Appendix A** for ease of reference. The purpose of the Monitor's Twenty-Fifth Report is to:

(a) Provide further information with respect to the Monitor's motion for advice and directions from the Court in respect of a motion for leave to appeal and, if granted, an appeal by the Timminco Entities, acting by the Monitor, of the decision of the Honourable Mr. Justice Mongeon the Superior Court of Québec (Commercial Division) delivered January 24, 2014 in respect of the priority of the BSI Pension Reimbursement Claims as described in the Monitor's Twenty-Fourth Report (the "**Advice and Directions Motion**") and to inform the Court of the Monitor's decision to seek to withdraw the Advice and Direction Motion and not pursue the appeal;

(b) Request the granting of an Order declaring that the Unresolved D&O Claim, as hereinafter defined, is not a claim secured by the D&O Charge;

(c) Request the granting of an Order authorizing the Monitor, subject to holding such reserves as it deems appropriate in its sole discretion, to make distributions from the estates of Timminco and BSI as described in this report; and

(d) Request the granting of an Order extending the Stay Period until September 30, 2014.

TERMS OF REFERENCE

8. In preparing this report, the Monitor has relied upon unaudited financial information of the Timminco Entities, the Timminco Entities' books and records, certain financial information prepared by the Timminco Entities and discussions with various parties.

9. Except as described in this Report:

(a) The Monitor has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would comply with Generally Accepted Assurance Standards pursuant to the Canadian Institute of Chartered Accountants Handbook;

(b) The Monitor has not examined or reviewed financial forecasts and projections referred to in this report in a manner that would comply with the procedures described in the Canadian Institute of Chartered Accountants Handbook;

10. Future oriented financial information reported or relied on in preparing this report is based on management's assumptions regarding future events; actual results may vary from forecast and such variations may be material.

11. The Monitor has prepared this Report in connection with the motion described in its Notice of Motion dated March 3, 2014, returnable June 12, 2014, and its Notice of Motion dated June 9, 2014, returnable on a date to be fixed by the Court at a 9:30 Chambers appointment scheduled for June 10, 2014. The Report should not be relied on for other purposes.

12. Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian Dollars. Capitalized terms not otherwise defined herein have the meanings defined in the previous reports of the Monitor, the Initial Order or other Order of the Court issued in the CCAA Proceedings.

THE ADVICE AND DIRECTIONS MOTION

BACKGROUND

13. On August 28, 2012, the Honourable Mr. Justice Newbould granted an Order authorizing and directing an interim distribution to be made by the Monitor to Investissement Quebec ("**IQ**"), a secured creditor of BSI (the "**Interim Distribution Order**"). The Interim Distribution Order authorized an initial distribution of $25,393,057.43. In accordance with the endorsement of the Honourable Justice Newbould dated August 31, 2012, the Monitor made a subsequent distribution to IQ of $1,213,000. A final distribution in the amount of $1,714,879.90 was made on January 31, 2013 following completion of the Working Capital Settlement Agreement as defined and described in the Monitor's Eighteenth Report.

14. The Interim Distribution Order also provided for a process for other parties that had filed a secured claim against BSI in accordance with the Claims Procedure Order to assert priority over the monies paid to IQ and approved a reimbursement agreement dated August 28, 2012 between BSI, the Monitor and IQ (the "**Reimbursement Agreement**") pursuant to which IQ is obliged to reimburse any portion of the Interim Distribution necessary to satisfy any Reimbursement Claim (as defined in the Reimbursement Agreement) that is proven to have priority over IQ's security.

15. Pursuant to an Order of the Honourable Mr. Justice Morawetz granted October 18, 2012, the Priority Claim Adjudication Protocol was approved and two claims were designated as Reimbursement Claims, being:

    (a) A claim on behalf of Mercer Canada ("**Mercer**"), as administrator of the Haley Pension Plan, and on behalf of the beneficiaries of that plan (the "**Mercer Reimbursement Claim**"), which claim was supported by The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("**USW**"); and

(b) A claim by Le Comité de retraite du Régime de rentes pour les employés nonsyndiqués de Silicium Bécancour Inc. and a claim by Le Comité de retraite du Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (collectively, the "**BSI Pension Committees**") (the "**BSI Pension Reimbursement Claims**").

16. On October 24, 2012, both Mercer and the USW informed the Monitor and IQ that they would not be pursuing the Mercer Reimbursement Claim.

17. Pursuant to the Priority Claim Adjudication Protocol, the adjudication of whether the BSI Pension Reimbursement Claims constitute Priority Claims (as defined in the Interim Distribution Order) was to be determined exclusively by the Superior Court of Québec (Commercial Division) (the "**Quebec Court**"). The motion for such determination is referred to herein as the "**Quebec Priority Motion**".

18. The BSI Pension Reimbursement Claims consisted of the following:

(a) The unpaid special payments due to the BSI Pension Plan for unionized employees (the "**BSI Union Plan**");

(b) The unpaid special payments due to the BSI Pension Plan for non-unionized employees (the "**BSI Non-union Plan**");

(c) The solvency deficit of the BSI Union Plan; and

(d) The solvency deficit of the BSI Non-union Plan.

19. Special payments for the BSI Union Plan (the "**BSI Union Plan Special Payments**") were stated to be in the amount of $93,810 per month, with $668,690 claimed as owing for the months December 2011 to June 2012. The solvency deficit for the BSI Union Plan (the **"BSI Union Plan Deficit"**) was estimated to be $9,889,600 at December 31, 2011. Special payments for the BSI Non-union Plan (the "**BSI Non-union Plan Special Payments**" and together with the BSI Union Plan Special Payments, the "**BSI Special Payments**") were stated to be in the amount of $41,710 per month, with $297,520 claimed as owing for the months December 2011 to June 2012. The solvency deficit for the BSI Non-union Plan (the **"BSI Non-union Plan Deficit"** and together with the BSI Union Plan Deficit, the "**BSI Plan Deficits**") was estimated to be $3,998,700 at December 31, 2011.

20. Pursuant to Section C of the Priority Adjudication Protocol, any appeal from an order of the Quebec Court on the Quebec Priority Motion shall be to the Court of Appeal of Quebec and in determining whether the BSI Reimbursement Claims constitute Priority Claims, the determination of the quantum of such Priority Claims was postponed until after the determination of the nature of the claim and will be determined in accordance with the Claims Procedure Order or further order of the Court.

21. The Quebec Priority Motion was heard by the Honourable Mr. Justice Mongeon of the Quebec Court on May 27 and 28, 2013, who reserved his decision.

22. On January 24, 2014, Mr. Justice Mongeon released his decision in respect of the Quebec Priority Motion (the "**Quebec Priority Decision**"). Mr. Justice Mongeon found that:

    (a) The unpaid BSI Special Payments and interest thereon are subject to a deemed trust that is enforceable against IQ;

(b) The unpaid BSI Special Payments and interest thereon are unassignable and unseizable, are excluded from the application of IQ's movable and immovable hypothec without delivery and have priority over IQ's secured claim; and

(c) The BSI Plan Deficits are not subject to a deemed trust and do not have priority over IQ's secured claim.

23. The quanta of the claims in respect of the BSI Special Payments and interest thereon (collectively, the "**BSI Deemed Trust Claim**") ranking in priority to IQ and subject to reimbursement under the Reimbursement Agreement is yet to be determined.

24. On or around February 11, 2014, the Monitor learned that IQ would not be seeking leave to appeal the Quebec Priority Decision.

25. In order to protect the rights of Timminco, which has asserted the largest unsecured claim against BSI, the rights of unsecured creditors of BSI and the rights of the Timminco Pension Plan which have asserted deemed trust claims over amounts owing to Timminco and to ensure that rights of affected creditors are not adversely affected by the passage of time, Timminco and BSI, acting by the Monitor, filed a motion seeking leave to appeal the Quebec Priority Decision on February 14, 2014 (the "**Leave Motion**").

26. The Leave Motion is expressly subject to the Monitor seeking advice and directions of the Ontario Superior Court of Justice. The grounds for the appeal are that the Quebec Priority Decision contains several errors of law and raises legal issues of public interest as it:

(a) Creates a statutory deemed trust in contradiction to the previous judicial decisions on this issue by the same First Instance Judge;

(b) Creates a priority for those deemed trusts in contradiction to Supreme Court of Canada case law;

(c) Contrary to prior case law in Quebec, provides that a purported priority created by provincial legislation remains operative in a proceeding under the federal CCAA;

(d) Affects the interests of pension plans and pensioners of the Timminco Pension Plan who have valid deemed trust claims in Ontario in accordance with applicable legislation and the decision of the Supreme Court of Canada in *re. lndalex*; and

(e) Prejudices the rights of other unsecured creditors of BSI.

27. On March 3, 2014, the Monitor served the Advice and Directions Motion, including the Twenty-Fourth Report setting out the reasons for the need for advice and directions of the Court.

ADDITIONAL INFORMATION IN RESPECT OF THE IQ CLAIM

28. The final distribution to IQ described earlier in this report was made based on a pay-out statement provide by IQ dated January 29, 2013 (the "**January 29 Statement**"). Based on that pay-out statement, it was the belief and understanding of both the Monitor and the CRO that as a result of the distributions made, IQ was fully paid and had no additional claim against the estate.

29. While in attendance at Court on March 6, 2014 for a scheduling hearing in respect of the Advice and Directions Motion, the Monitor was informed by counsel to the BSI Pension Committees that the materials filed by IQ in the Quebec Priority Motion included a statement of account dated March 18, 2013 that showed IQ having an outstanding claim of $1,197,804.82. The Monitor was unaware of that statement.

30. The Monitor's analysis and conclusions in its Twenty-Fourth Report were based on the assumption that IQ was paid in full and that the remaining BSI realizations, totalling approximately $1.4 million, less additional costs of the CCAA Proceeding, would be available to unsecured creditors of BSI in the event that the Leave Motion was successful.

31. Following receipt of the information that IQ may have amounts that remained outstanding on its secured claim, the Monitor requested that IQ provide an explanation of how it was claiming that amounts were outstanding when the full amount shown on the January 29 Statement has been paid.

32. In a letter dated March 26, 2014 (the "**March 26 Letter**"), counsel to IQ stated that the January 29 Pay-out Statement had a clerical error that resulted in the omission of $1,074,217.30 (the "**Reserve Amount**") from the January 29 Statement. A copy of the March 26 Letter is attached hereto as **Appendix B**.

33. Following receipt of the March 26 Letter, the Monitor requested and received various additional information from IQ with respect to its alleged claim and the calculation thereof.

34. On April 9, 2014, counsel to IQ provided a revised updated statement of account dated March 27, 2014, showing the amount owing to IQ to be $1,339,269.03 (the "**March 27 Statement**").

35. Following receipt of the March 27 Statement, the Monitor requested and received various additional information from IQ with respect to its alleged claim and the calculation thereof.

36. The Monitor has now concluded its analysis of the IQ Claim. Based on that analysis, the Monitor is satisfied that IQ did indeed make an error in the January 29 Statement, but is of the view that the IQ Claim should not include interest of $141,464.21 accrued since February 1, 2013.

37. As described in the affidavit of Sean Dunphy sworn August 23, 2012 and filed in support of the Timminco Entities' motion for the Interim Distribution Order, the stated purpose of entering into the Reimbursement Agreement and making distributions to IQ while preserving the ability for other creditors of BSI to assert a claim ranking in priority to IQ (i.e. the Quebec Priority Motion) was to halt the interest expense. But for IQ's clerical error in the January 29 Statement, the Reserve Amount would have been paid on February 1, 2013 and no further interest would have accrued. Given the stated purpose of making distributions to IQ in advance of the final determination of the Quebec Priority Motion and the reliance placed on the January 29 Statement by the Timminco Entities, the Monitor does not believe that IQ should be entitled to interest after February 1, 2014 and the outstanding IQ Claim should be $1,197,804.82 rather than $1,339,269.03.

38. The Monitor has discussed its position with IQ and IQ has confirmed that it accepts the Monitor's position with respect to interest accruing after February 1, 2013 and that IQ's outstanding claim amounts to $1,197,804.82 (the "**IQ Claim**").

ADDITIONAL INFORMATION IN RESPECT OF THE ENTERPRISE ARSENAULT CLAIM

39. Enterprise Arsenault ("**EA**") filed a secured claim pursuant to the Claims Procedure in the amount of $306,956.84 (the "**EA Claim**") with the EA Claim purportedly secured by a hypothec registered against the HP2 Facility and the Silica Fumes Property, although the amount of the claim relating to each property was not specified. While the Monitor did not dispute the amount of the EA Claim, the Monitor disallowed the claim status of the claim as secured on the bases that:

    (a) EA failed to perfect its hypothec within the required timeframe of six months; and

    (b) Any amount of the claim that was attributable to the Silica Fumes Property would be unsecured as there was no realizable value.

40. EA disputed the Monitor's Notice of Disallowance, asserting that it was not necessary from them to take additional steps in respect of the perfection of the hypothec as paragraph 7 of the Approval and Vesting Order states that "the proceeds of sale stood in the stead of the assets and that all Claims shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale".

41. Based on additional information recently provided by EA, including confirmation that all of the outstanding amount relates to work performed on the HP2 facility, and advice recently received from its legal counsel, the Monitor now accepts EA's assertion that, as a result of the wording of the Approval and Vesting Order, it was not necessary to take further steps to perfect the hypothec after the granting of the Approval and Vesting Order. EA and the Monitor have agreed that EA has a secured claim for work performed on the HP2 facility in the amount of $200,000 (the "**EA Secured Claim**") and that the EA Secured Claim ranks in priority to the IQ Claim in respect of the BSI monies held by the Monitor.

42. The Monitor has discussed the foregoing with IQ and IQ has confirmed that it does not dispute the quantum, validity or priority of the EA Secured Claim.

IMPACT OF THE IQ CLAIM ON THE ADVICE AND DIRECTIONS MOTION

43. There is approximately $1.25 million, less additional costs of the proceeding, in the estate of BSI that is available to creditors beyond the amount already paid to IQ. Given the EA Secured Claim and the IQ Claim, there would be no monies available to available to unsecured creditors of BSI even if the Quebec Priority Decision was overturned on appeal. This result is materially different than what was believed would have been the case at the time of the Monitor's Twenty-Fourth Report when the IQ Claim was unknown.

44. As EA is not impacted by an appeal of the Quebec Priority Decision, there are therefore no creditors with any economic interest in an appeal of the Quebec Priority Motion, other than IQ which chose not to seek leave to appeal the Quebec Priority Decision.

THE MONITOR'S CONCLUSION AND RECOMMENDATION

45. While the Monitor continues to believe that the grounds for an appeal of the Quebec Priority Decision are sound and that clarification of the conflicting case law on the issue would be in the public interest, it does not believe that further expenditure of the Timminco Entities' funds pursuing the Advice and Directions Motion, the Leave Motion or the appeal of the Quebec Priority Decision is justified.

46. Accordingly, the Monitor intends to seek to withdraw the Advice and Directions Motion and the Leave Motion.

QUANTIFICATION OF BSI DEEMED TRUST CLAIM

47. As noted earlier in this report, pursuant to Section C of the Priority Adjudication Protocol the determination of the quantum of the BSI Deemed Trust Claim was postponed until after the determination of the nature of the claim and will be determined in accordance with the Claims Procedure Order or further order of the Court.

48. The Monitor intends to discuss the process for the quantification of the BSI Deemed Trust Claim with counsel for the BSI Pension Committees and counsel for IQ and expects to provide a report thereon to the Court prior to the return of the motion.

D&O CHARGE

49. Paragraphs 26 and 27 of the Initial Order state:

> “26. THIS COURT ORDERS that the Timminco Entities shall indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers of the Timminco Entities after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.
>
> 27. THIS COURT ORDERS that the directors and officers of the Timminco Entities shall be entitled to the benefit of and are hereby granted a charge (the "D&O Charge") on the Property, which charge shall not exceed an aggregate amount of $400,000, as security for the indemnity provided in paragraph 26 of this Order. The D&O Charge shall have the priority set out in paragraphs 38 and 40 herein.”

50. Twenty-nine claims in the aggregate amount of $15,760,643 were filed as D&O Claims pursuant to the Claims Procedure Order. Of these, 28 claims in the aggregate amount of $760,143 were finally determined to not be valid D&O Claims.

51. The remaining claim of $15,000,000 was filed by the Communications, Energy and Paperworkers Union (the “**CEP**”) and was disallowed by the Monitor. The Monitor’s disallowance was disputed and the claim remains unresolved (the “**Unresolved D&O Claim**”).

52. The Unresolved D&O Claim claims liability on the part of one former director and officer and two former officers of BSI in respect of alleged breaches of fiduciary duty failure to disclose information to the pension committee relating to a corporate restructuring of BSI and the creation of QSLP in or around 2010.

53. In the opinion of the Monitor, the Unresolved D&O Claim is not a claim which is secured by the D&O Charge as the amount claimed is not an obligation or liability incurred by virtue of being a director or officer of the Timminco Entities after the commencement of the CCAA Proceedings.

54. D&O Counsel has agreed that the Unresolved D&O Claim would be dealt with by D&O Counsel outside the Claims Procedure as provided for in paragraph 34 of the Claims Procedure Order.

55. In order to make distributions to creditors of Timminco and BSI in accordance with their legal priorities, the D&O Charge must be released.

56. Accordingly, the Monitor now seeks an Order:

(a) Declaring that the Unresolved D&O Claim is not secured by the D&O Charge; and

(b) Releasing the D&O Charge.

DISTRIBUTIONS TO CREDITORS

57. The Monitor currently holds approximately $2.42 million. Applying the Cost Allocation Methodology approved by the Order of the Honourable Mr. Justice Newbould granted December 16, 2013, approximately $1.17 million is for the estate of Timminco (the "**Timminco Estate Funds**") and approximately $1.25 million is for the estate of BSI (the "**BSI Estate Funds**"), each subject to additional costs and disbursements.

58. Pursuant to paragraph 2.1 of the Reimbursement Agreement, IQ is required to reimburse to BSI by payrnent to the Monitor such portion of the Interim Distribution as may be necessary to satisfy the BSI Deemed Trust Claim.

59. Subject to the approval of the Court and subject to the costs of the completion of the Timminco CCAA Proceedings, the Monitor will be in a position to make the following distributions from the estate of BSI:

(a) To EA on account of the EA Secured Claim; and

(b) Absent a bankruptcy of BSI and a determination that such bankruptcy reverses the priority of the BSI Deemed Trust over the secured claim of IQ, to the BSI Pension Committees on account of the BSI Deemed Trust Claim once the quantum is agreed or otherwise finally determined and IQ has reimbursed the necessary amount.

60. As previously reported, there is a deemed trust claim in respect of the solvency deficit of the Timminco pension plan (the "**Haley Deemed Trust**"), which was estimated to be approximately $5.1 million as at January 1, 2012. The Administrator estimates the solvency deficit to be approximately $4.3 million as at February 28, 2014. While the Monitor has not yet agreed the quantum of the Haley Deemed Trust Claim, absent a bankruptcy of Timminco overturning the Haley Deemed Trust and subject to the costs of the completion of the Timminco CCAA Proceedings, the remaining Timminco Estate Funds would be payable to the Administrator of the Haley Plan unless the Haley Deemed Trust Claim was less than $1.17 million (the amount of funds available to the Timminco estate).

61. Bankruptcies of Timminco and BSI may overturn the Haley Deemed Trust and the BSI Deemed Trust. To date, no creditor has taken steps to seek a bankruptcy of either Timminco or BSI.

62. Accordingly, the Monitor respectfully requests an Order from the Court authorizing the Monitor, subject to holding such reserves as it deems appropriate in its sole discretion, to make distributions from time to time as follows:

(a) From Timminco on account of the Haley Deemed Trust, once the quantum of the Haley Deemed Trust Claim is finally determined, or is determined to be in excess of the amount available to the Timminco estate; and

(b) From BSI on account of the EA Secured Claim and account of the BSI Deemed Trust Claim once the quantum of the BSI Deemed Trust Claim is agreed or otherwise finally determined and IQ has reimbursed the necessary amount.

EXTENSION OF THE STAY PERIOD

MATTERS REMAINING TO BE COMPLETED

63. The only known significant activities remaining to be completed prior to the termination of the CCAA Proceedings and the discharge of the Monitor are as follows:

(a) Completing the quantification of the BSI Deemed Trust Claim and the Haley Plan Deemed Trust Claim;

(b) Completing the distributions described herein and matters related thereto;

(c) Statutory and administrative duties and filings; and

(d) Termination of CCAA Proceedings and discharge of Monitor and matters ancillary thereto.

64. In addition, the Monitor very recently received a call from a party expressing an interest in the tax attributes of the corporate shells and a potential transaction that could provide additional value to creditors. That party has told the Monitor that it will provide a term sheet for consideration, though has not yet done so. Accordingly, the Monitor cannot provide any comment at this time as to the nature of the potential transaction or the likelihood that it would be beneficial for the estate to pursue the potential transaction.

STAY PERIOD EXTENSION

65. The Stay Period currently expires on June 16, 2014. Additional time is required for the Timminco Entities to complete the remaining matters in the CCAA Proceedings as described earlier in this report. Accordingly, the Timminco Entities now seek an extension of the Stay Period to September 30, 2014.

66. As at the date of this report, the Timminco Entities have cash on hand, including amounts held by the Monitor, of approximately $2.4 million. The Timminco Entities therefore appear to have sufficient funding for the extension of the Stay Period.

67. Based on the information currently available, the Monitor believes that creditors would not be materially prejudiced by an extension of the Stay Period to September 30, 2014.

68. The Monitor also believes that the Timminco Entities have acted, and are acting, in good faith and with due diligence and that circumstances exist that make an extension of the Stay Period appropriate.

The Monitor respectfully submits to the Court this, its Twenty-Fifth Report.

Dated this 9th day of June, 2014.

FTI Consulting Canada Inc.
In its capacity as Monitor of
Timminco Limited and Bécancour Silicon Inc.

Nigel D. Meakin
Senior Managing Director

Toni Vanderlaan
Senior Managing Director

Appendix A

The Monitor's Twenty-Fourth Report

Court File No. CV-12-9539-00CL

Timminco Limited
Bécancour Silicon Inc.

TWENTY-FOURTH REPORT OF THE MONITOR

March 3, 2014

Court File No. CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

TWENTY-FOURTH REPORT TO THE COURT SUBMITTED BY FTI CONSULTING CANADA INC., IN ITS CAPACITY AS MONITOR

INTRODUCTION

1. On January 3, 2012, Timminco Limited ("**Timminco**") and its wholly owned subsidiary, Bécancour Silicon Inc. ("**BSI**", together with Timminco, the "**Timminco Entities**") made an application under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended (the "**CCAA**") and an initial order (the "**Initial Order**") was made by the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) (the "**Court**"), granting, *inter alia*, a stay of proceedings against the Timminco Entities until February 2, 2012, (the "**Stay Period**") and appointing FTI Consulting Canada Inc. as monitor of the Timminco Entities (the "**Monitor**"). The proceedings commenced by the Timminco Entities under the CCAA will be referred to herein as the "**CCAA Proceedings**".

2. The Stay Period has been extended a number of times. Pursuant to the Order of the Honourable Mr. Justice Newbould granted December 16, 2014 (the "**December 16 Order**") the Stay Period currently expires on June 16, 2014.

3. Pursuant to the Order of the Honourable Mr. Justice Morawetz dated January 16, 2012, the Timminco Entities' obligations to make all contributions or payments (other than normal cost contributions, contributions to a defined contribution provision, and employee contributions deducted from pay) to its pension plans were suspended pending further order of the Court.

4. Pursuant to the Order of the Honourable Mr. Justice Morawetz dated March 9, 2012 (the "**Bidding Procedures Order**"), the Timminco Entities were authorized to enter into the Stalking Horse Agreement and the Bidding Procedures were approved, each as defined in the Monitor's Fourth Report.

5. As described in the Monitor's Seventh Report, the marketing process was completed and the Auction was conducted by the Timminco Entities, in consultation with the Monitor, on April 24 and 25, 2012, pursuant to the Bidding Procedures Order. At the conclusion of the Auction, the asset purchase agreement entered into between the Timminco Entities and QSI Partners Ltd. (the "**QSI APA**") and the asset purchase agreement between the Timminco Entities and FerroAtlantica, S.A. (the "**Ferro APA**") were collectively designated as the Successful Bid.

6. The Ferro APA was approved pursuant to an Order granted by the Court on May 22, 2012. The QSI APA was approved pursuant to an Order granted by the Court on June 1, 2012. Closing under the Ferro APA occurred on June 14, 2012. Closing under the QSI APA occurred on June 13, 2012.

7. On June 15, 2012, the Honourable Mr. Justice Morawetz granted an order approving a procedure for the submission, review and adjudication of claims against the Timminco Entities and of claims against the directors and officers of the Timminco Entities (the "**Claims Procedure Order**"). The Claims Bar Date was set at 5:00 p.m. Toronto time on July 23, 2012. The Monitor has reviewed all claims and been in contact with various claimants in order to attempt to resolve a variety of outstanding issues.

8. By Order of the Honourable Mr. Justice Newbould dated August 17, 2012, Russell Hill Advisory Services Inc. ("**Russell Hill**") was appointed as Chief Restructuring Officer (the "**CRO**") of the Timminco Entities and the engagement letter dated July 24, 2012, between Russell Hill and the Timminco Entities (the "**CRO Agreement**") was approved.

9. The CRO Agreement was for an initial term of six months with any extension to be negotiated with the Monitor subject to approval of the Court. The CRO Agreement was extended a number of times pursuant to the terms of the CRO Extension Agreement dated April 25, 2013 approved by the Court on May 14, 2013.

10. The CRO was discharged on December 16, 2013 pursuant to the provisions of the December 16 Order. On the same date, Mr. Justice Newbould issued an Order (the "**Monitor Powers Order**") expanding the powers of the Monitor to enable the Monitor to complete the estate in the name of and on behalf of the Timminco Entities. A copy of the Monitor Powers Order is attached hereto as **Appendix A** for ease of reference.

11. To date, the Monitor has filed twenty-three reports on various matters relating to the CCAA Proceedings. The purpose of this, the Monitor's Twenty-Fourth Report, is to seek advice and directions from the Court in respect of a motion for leave to appeal and, if granted, an appeal by the Timminco Entities, acting by the Monitor, of the decision of the Honourable Mr. Justice Mongeon the Superior Court of Québec (Commercial Division) delivered January 24, 2014 in respect of the priority of the BSI Pension Reimbursement Claims described later in this report.

TERMS OF REFERENCE

12. In preparing this report, the Monitor has relied upon unaudited financial information of the Timminco Entities, the Timminco Entities' books and records, certain financial information prepared by the Timminco Entities and discussions with the Timminco Entities' management and others.

13. Except as described in this Report:

    (a) The Monitor has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would comply with Generally Accepted Assurance Standards pursuant to the Canadian Institute of Chartered Accountants Handbook;

    (b) The Monitor has not examined or reviewed financial forecasts and projections referred to in this report in a manner that would comply with the procedures described in the Canadian Institute of Chartered Accountants Handbook;

14. Future oriented financial information reported or relied on in preparing this report is based on management's assumptions regarding future events; actual results may vary from forecast and such variations may be material.

15. The Monitor has prepared this Report in connection with the motion described in its Notice of Motion dated March 3, 2014, returnable at a date to be set by the Court at a scheduling conference on March 6, 2014. The Report should not be relied on for other purposes.

16. Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian Dollars. Capitalized terms not otherwise defined herein have the meanings defined in the previous reports of the Monitor, the Initial Order or other Order of the Court issued in the CCAA Proceedings.

BACKGROUND

17. On August 28, 2012, the Honourable Mr. Justice Newbould granted an Order authorizing and directing an interim distribution to be made by the Monitor to Investissement Quebec ("**IQ**"), a secured creditor of BSI (the "**Interim Distribution Order**"). The Interim Distribution Order authorized an initial distribution of $25,393,057.43. In accordance with the endorsement of the Honourable Justice Newbould dated August 31, 2012, the Monitor made a subsequent distribution to IQ of $1,213,000. A final distribution in the amount of $1,714,879.90 was made on January 31, 2013 following completion of the Working Capital Settlement Agreement as defined and described in the Monitor's Eighteenth Report.

18. The Interim Distribution Order also provided for a process for other parties that had filed a secured claim against BSI in accordance with the Claims Procedure Order to assert priority over IQ and approved a reimbursement agreement dated August 28, 2012 between BSI, the Monitor and IQ (the "**Reimbursement Agreement**") pursuant to which IQ is obliged to reimburse any portion of the Interim Distribution necessary to satisfy any Reimbursement Claim (as defined in the Reimbursement Agreement) that is proven to have priority over IQ's security. A copy of the Reimbursement Agreement is attached hereto as **Appendix B**.

19. Pursuant to an Order of the Honourable Mr. Justice Morawetz granted October 18, 2012, a copy of which is attached hereto as **Appendix C**, the Priority Claim Adjudication Protocol was approved and two claims were designated as Reimbursement Claims, being:

    (a) A claim on behalf of Mercer Canada ("**Mercer**"), as administrator of the Haley Pension Plan, and on behalf of the beneficiaries of that plan (the "**Mercer Reimbursement Claim**"), which claim was supported by The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("**USW**"); and

(b) A claim by Le Comité de retraite du Régime de rentes pour les employés nonsyndiqués de Silicium Bécancour Inc. and a claim by Le Comité de retraite du Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (collectively, the “**BSI Pension Committees**“) (the “**BSI Pension Reimbursement Claims**”).

20. On October 24, 2012, both Mercer and the USW informed the Monitor and IQ that they would not be pursuing the Mercer Reimbursement Claim.

21. Pursuant to the Priority Claim Adjudication Protocol, the adjudication of whether the BSI Pension Reimbursement Claims constitute Priority Claims (as defined in the Interim Distribution Order) was to be determined exclusively by the Superior Court of Québec (Commercial Division) (the “**Quebec Court**”). The motion for such determination is referred to herein as the “**Quebec Priority Motion**”.

22. The BSI Pension Reimbursement Claims consisted of the following:

(a) The unpaid special payments due to the BSI Pension Plan for unionized employees (the “**BSI Union Plan**”);

(b) The unpaid special payments due to the BSI Pension Plan for non-unionized employees (the “**BSI Non-union Plan**”);

(c) The solvency deficit of the BSI Union Plan; and

(d) The solvency deficit of the BSI Non-union Plan.

23. Special payments for the BSI Union Plan (the "**BSI Union Plan Special Payments**") were in the amount of $93,810 per month, with $668,690 claimed as owing for the months December 2011 to June 2012. The solvency deficit for the BSI Union Plan (the **"BSI Union Plan Deficit"**) was estimated to be $9,889,600 at December 31, 2011. Special payments for the BSI Non-union Plan (the "**BSI Non-union Plan Special Payments**" and together with the BSI Union Plan Special Payments, the "**BSI Special Payments**") were in the amount of $41,710 per month, with $297,520 claimed as owing for the months December 2011 to June 2012. The solvency deficit for the BSI Non-union Plan (the **"BSI Non-union Plan Deficit"** and together with the BSI Union Plan Deficit, the "**BSI Plan Deficits**") was estimated to be $3,998,700 at December 31, 2011.

24. Pursuant to Section C of the Priority Adjudication Protocol, any appeal from an order of the Quebec Court on the Quebec Priority Motion shall be to the Court of Appeal of Quebec and in determining whether the BSI Reimbursement Claims constitute Priority Claims, the determination of the quantum of such Priority Claims was postponed until after the determination of the nature of the claim and will be determined in accordance with the Claims Procedure Order or further order of the Court.

25. The Quebec Priority Motion was heard by the Honourable Mr. Justice Mongeon of the Quebec Court on May 27 and 28, 2013, who reserved his decision.

26. On January 24, 2014, Mr. Justice Mongeon released his decision in respect of the Quebec Priority Motion (the "**Quebec Priority Decision**"). A copy of a translation of the Quebec Priority Decision prepared by a translator at the Monitor's Counsel, together with an affidavit of certification, is attached hereto as **Appendix D**. Mr. Justice Mongeon found that:

    (a) The unpaid BSI Special Payments and interest thereon are subject to a deemed trust that is enforceable against IQ;

(b) The unpaid BSI Special Payments and interest thereon are unassignable and unseizable, are excluded from the application of IQ's movable and immovable hypothec without delivery and have priority over IQ's secured claim; and

(c) The BSI Plan Deficits are not subject to a deemed trust and do not have priority over IQ's secured claim.

27. The quantum of the claims in respect of the BSI Special Payments and interest thereon (collectively, the "**Deemed Trust Claim**") ranking in priority to IQ and subject to reimbursement under the Reimbursement Agreement is yet to be determined.

MOTION FOR LEAVE TO APPEAL

28. On or around February 11, 2014, the Monitor learned that IQ would not be seeking leave to appeal the Quebec Priority Decision.

29. In order to protect the rights of Timminco, which has asserted the largest unsecured claim against BSI, the rights of unsecured creditors of BSI and the rights of the Timminco Pension Plan which have asserted deemed trust claims over amounts owing to Timminco and to ensure that rights of affected creditors are not adversely affected by the passage of time, Timminco and BSI, acting by the Monitor, filed a motion seeking leave to appeal the Quebec Priority Decision on February 14, 2014 (the "**Leave Motion**").

30. The Leave Motion, a copy of which is attached hereto as **Appendix E**, is expressly subject to the Monitor seeking advice and directions of the Ontario Superior Court of Justice. The grounds for the appeal are that the Quebec Priority Decision contains several errors of law and raises legal issues of public interest as it:

(a) Creates a statutory deemed trust in contradiction to the previous judicial decisions on this issue by the same First Instance Judge;

(b) Creates a priority for those deemed trusts in contradiction to Supreme Court of Canada case law;

(c) Contrary to prior case law in Quebec, provides that a purported priority created by provincial legislation remains operative in a proceeding under the federal CCAA;

(d) Affects the interests of pension plans and pensioners of the Timminco Pension Plan who have valid deemed trust claims in Ontario in accordance with applicable legislation and the decision of the Supreme Court of Canada in *re. lndalex*; and

(e) Prejudices the rights of other unsecured creditors of BSI.

MOTION FOR ADVICE AND DIRECTIONS

THE MONITOR'S POWERS

31. As noted earlier in this report, the CRO was discharged pursuant to the December 16 Order and the Monitor Powers Order was granted to provide for the ability to complete the CCAA Proceedings in the absence of any remaining management or employees of the Timminco Entities.

32. Paragraphs 4 and 5 of the Monitor Powers Order articulate a number of powers and duties that the Monitor is authorized, but not required, to take in the name of and on behalf of the Timminco Entities (the "**Monitor's Increased Powers**"), including, *inter alia*:

> "to perform such other functions as this Court may order from time to time"

33. Paragraph 8 of the Monitor Powers Order states:

> "THIS COURT ORDERS that, in addition to its prescribed rights in the CCAA, the Monitor's Existing Powers, the

> Monitor's Increased Powers and all other authority granted to the Monitor in all Orders granted in these CCAA Proceedings, the Monitor is empowered and authorized to take such additional actions and execute such documents, in the name of and on behalf of the Timminco Entities, as the Monitor considers necessary or desirable in order to respond to matters resulting from (a) the pending decision of Justice Mongeon in the Superior Court of Quebec (Commercial Division) pursuant to the Priority Claim Adjudication Protocol approved by the Order of the Honourable Mr. Justice Morawetz dated October 18, 2012 and any motions for leave to appeal or appeals relating thereto; and (b) the pending decision of Justice Morawetz in the Ontario Superior Court of Justice (Commercial Division) relating to a motion to lift the stay of proceedings brought by the plaintiff St. Clair Pennyfeather in the action with the Court File No. CV-09-378701-00CP; and (c) any motions for leave to appeal or appeals relating thereto." *emphasis added*

34. Accordingly, the Monitor is of the view that it is empowered and authorized to seek leave to appeal in response to the Quebec Priority Decision if the Monitor considers it necessary or desirable to do so.

THE NEED FOR ADVICE AND DIRECTIONS

35. As set out in the Monitor's Twenty-Third Report, there is approximately $1.4 million, less additional costs of the proceeding, in the estate of BSI that is available to creditors beyond the amount already paid to IQ (the "**Estate Funds**").

36. As a result of the Quebec Priority Decision, IQ would be required to reimburse the amount of the Deemed Trust Claim and would have an unpaid secured claim in an amount equal to the Deemed Trust Claim, payable from the Estate Funds. While the quantum of the Deemed Trust Claim is yet to be determined, the amount of $966,210 plus interest is asserted to be owing for the months December 2011 to June 2012. Accordingly, it would appear that a material portion, if not all, of the Estate Funds otherwise available to unsecured creditors of BSI would be paid to IQ as a result of the Quebec Priority Decision and there would be little or nothing available for unsecured creditors of BSI.

37. If the Quebec Priority Decision was overturned on appeal, the Estate Funds would be available for distribution to unsecured creditors of BSI.

38. The largest unsecured claim against BSI is the claim of Timminco in the amount of approximately $143 million as at the CCAA filing date (the "**Timminco Claim**"), representing approximately 87% of unsecured claims. The Monitor has not completed its adjudication of the Timminco Claim as its review has been deferred pending the final outcome of the Quebec Priority Motion in order to avoid incurring unnecessary costs. The Monitor notes, however, that the affidavit of Peter Kalins sworn January 2, 2012 and filed in support of the Timminco Entities application under the CCAA stated the following:

> "**<u>Intercompany Indebtedness</u>**

> 69. Timminco has been extending funds over the years to BSI, on an unsecured basis, to provide capital to BSI to support growth opportunities and fund operating cash flow deficits. These funding activities have resulted in intercompany indebtedness in the approximate amount of $136 million as at November 30, 2011."

39. The claims in respect of the BSI Plan Deficits are asserted at approximately $14 million in the aggregate, representing approximately 8.5% of unsecured claims against BSI. The amount of the BSI Pension Plan Deficits could be materially lower if the applicable discount rate has increased since the 2011 deficiency estimate.

40. Claims of other unsecured creditors of BSI total approximately $17.5 million in the aggregate.

41. Any distribution in the CCAA Proceedings on account of Timminco's claim against BSI would be subject to the deemed trust in respect of the solvency deficit of the Timminco pension plan, which was estimated to be approximately $5.1 million as at January 1, 2012.

42. Accordingly, the Quebec Priority Decision benefits the BSI Union Plan and the BSI Non-Union Plan, but adversely affects IQ (to the extent that the Deemed Trust Claims exceed the Estate Funds), the general body of unsecured creditors of BSI including Timminco, and the Timminco pension plan.

43. A successful appeal of the Quebec Priority Decision would benefit IQ (to the extent that the Deemed Trust Claims exceed the Estate Funds), the general body of unsecured creditors of BSI including Timminco, and the Timminco pension plan, but would adversely impact the BSI Union Plan and the BSI Non-Union.

44. IQ is represented by counsel but has chosen not to seek leave to appeal.

45. The Timminco Pension Plan is represented by counsel, but it is unclear whether it would have standing to appeal the Quebec Priority Decision.

46. The unsecured creditors of BSI are not generally represented.

47. The Monitor represents the interests of all creditors of both Timminco and BSI. In this situation, there is conflict between the interests of competing groups of creditors and one group or the other could be adversely affected by the decisions and actions of the Timminco Entities, acting by the Monitor, in respect of the Leave Motion and, if granted, an appeal of the Quebec Priority Decision, including any decision to not proceed with the Leave Motion.

48. Accordingly, while the Monitor is of the view that it is empowered and authorized, for and on behalf of the Timminco Entities, to file the Leave Motion and seek leave to appeal in response to the Quebec Priority Decision in accordance with the powers granted to it or as may be further ordered by the Court, the Monitor seeks the advice and directions of the Court in respect of whether the Leave Motion should proceed and, if the Leave Motion is granted, the prosecution of an appeal of the Quebec Priority Decision.

The Monitor respectfully submits to the Court this, its Twenty-Fourth Report.

Dated this 3rd day of March, 2014.

FTI Consulting Canada Inc.
In its capacity as Monitor of
Timminco Limited and Bécancour Silicon Inc.

Nigel D. Meakin
Senior Managing Director

Toni Vanderlaan
Senior Managing Director

Appendix A

The Monitor Powers Order

Court File No. CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	MONDAY, THE 16TH DAY
	)	
JUSTICE NEWBOULD	)	OF DECEMBER, 2013

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Applicants

ORDER
(Re Expansion of Monitor Powers)

THIS MOTION, made by Timminco Limited ("**Timminco**") and Bécancour Silicon Inc. ("**BSI**" and, together, the "**Timminco Entities**"), for an order authorizing and directing the Timminco Entities to pay the Funds (as defined below) to FTI Consulting Canada Inc. in its capacity as the court appointed monitor of the Timminco Entities (the "**Monitor**") and expanding the powers of the Monitor was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Sean Dunphy sworn December 5, 2013 (the "**Dunphy Affidavit**"), and the Twenty-Third Report of the Monitor dated December 6, 2013 (the "**Twenty-Third Report**"), and on hearing the submissions of counsel for the Timminco Entities and the Monitor, no one appearing for any other person on the

service list, although duly served as appears from the affidavit of service of Kathryn Esaw sworn December 6, 2013, filed:

PAYMENTS TO MONITOR

1. **THIS COURT ORDERS** that the Timminco Entities are authorized and directed to (a) transfer, direct and pay over to the Monitor forthwith and in any event by no later than 4:00 pm EST on December 16, 2013, all monies currently held in accounts in the name of and/or controlled by the Timminco Entities; and (b) transfer, direct and pay over to the Monitor forthwith all monies received by the Timminco Entities after the date hereof (all such monies, together with any monies received on behalf of the Timminco Entities, the "**Funds**"), which Funds shall continue to be Property (as defined at paragraph 4 of the Initial Order of the Honourable Mr. Justice Morawetz dated January 3, 2012, the "**Initial Order**") of the Timminco Entities.

2. **THIS COURT ORDERS** that all Persons (as defined at paragraph 19 the Initial Order) in possession or control of Property, including for greater certainty any monies, belonging to or owed to the Timminco Entities shall forthwith advise the Monitor of such and shall grant immediate and continued access to the Property to the Monitor, and shall forthwith deliver all such Property to the Monitor upon the Monitor's request, other than documents or information which cannot be disclosed or provided to the Monitor due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

3. **THIS COURT ORDERS** that the Administration Charge, the Directors' Charge and the DIP Lenders Charge (as defined in the Initial Order) shall continue to apply to the Property of the Timminco Entities, including the Funds in accordance with their priority as established by the Initial Order.

ADDITIONAL POWERS OF THE MONITOR

4. **THIS COURT ORDERS** the Monitor of the Timminco Entities shall continue to be authorized and directed, and is authorized, but not required, in the name of and on behalf of the Timminco Entities, if appropriate, to :

(a) complete the Claims Procedure established by the Claims Procedure Order of Mr. Justice Morawetz dated June 15, 2013 (the "**Claims Procedure Order**") and settle, resolve and/or adjudicate the remaining disputed Claims and any other outstanding items in the Claims Procedure in accordance with the Claims Procedure Order, without consulting with the Timminco Entities; and

(b) take such further steps and seek such amendments to the Claims Procedure Order or additional orders as the Monitor considers necessary or appropriate in order to fully determine, resolve or deal with any Claims or D&O claims (as both are defined in the Claims Procedure Order).

5. **THIS COURT ORDERS** that the Monitor is authorized, but not required, in the name of and on behalf of the Timminco Entities, to

(a) seek the directions of this Honourable Court in respect of the validity and quantum, if any, of the D&O Claims and whether such claims are secured by the D&O Charge (as defined at paragraph 27 of the Initial Order);

(b) take such steps as may be necessary or appropriate to seek and obtain recovery of the proceeds of sale of the Memphis Property (as described in the Dunphy Affidavit) and matters ancillary thereto;

(c) file any and all tax returns of the Timminco Entities with any governmental tax authority that the Monitor considers necessary or desirable;

(d) claim any and all rebates, refunds or other amounts of tax (including sales taxes, capital taxes and income taxes) paid by or payable to the Timminco Entities;

(e) engage, deal, communicate, negotiate, agree and settle with any and all governmental authorities on behalf of the Timminco Entities and all such government authorities shall treat the Monitor as the authorized representative of the Timminco Entities. Any rebates, refunds or other amounts received by the Monitor on account of taxes paid by or payable to the Timminco Entities shall form part of the Funds;

(f) to seek the directions of this Honourable Court in respect of the distribution of the Funds and/or any Property to creditors or to deal with and/or abandon any Property and any matters related thereto;

(g) to seek directions from this Honourable Court in respect of the filing of any plan of arrangement or compromise or the termination of these proceedings commenced by the Timminco Entities under the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") pursuant to the Initial Order (the "**CCAA Proceedings**"), the discharge of the Monitor and all incidental and ancillary matters thereto; and

to perform such other functions as this Court may order from time to time (collectively, with paragraph 4 of this Order, the "**Monitor's Increased Powers**").

6. **THIS COURT ORDERS** that the Monitor's Increased Powers shall be in addition to the powers of the Monitor set out in any previous order of the Court (the "**Monitor's Existing Powers**")

7. **THIS COURT ORDERS** that the Monitor is prohibited from causing the Timminco Entities to make a voluntary assignment in bankruptcy without further Order of this Court.

8. THIS COURT ORDERS that, in addition to its prescribed rights in the CCAA, the Monitor's Existing Powers, the Monitor's Increased Powers and all other authority granted to the Monitor in all Orders granted in these CCAA Proceedings, the Monitor is empowered and authorized to take such additional actions and execute such documents, in the name of and on behalf of the Timminco Entities, as the Monitor considers necessary or desirable in order to respond to matters resulting from (a) the pending decision of Justice Mongeon in the Superior Court of Quebec (Commercial Division) pursuant to the Priority Claim Adjudication Protocol approved by the Order of the Honourable Mr. Justice Morawetz dated October 18, 2012 and any motions for leave to appeal or appeals relating thereto; and (b) the pending decision of Justice Morawetz in the Ontario Superior Court of Justice (Commercial Division) relating to a motion to lift the stay of proceedings brought by the plaintiff St. Clair Pennyfeather in the action with the Court File No. CV-09-378701-00CP; and (c) any motions for leave to appeal or appeals relating thereto.

9. **THIS COURT ORDERS** that in exercising the Monitor's Increased Powers, the Monitor shall not take possession of any real property belonging to the Timminco Entities.

10. **THIS COURT ORDERS** that, except as required by the CCAA or as provided for in any Orders issued by the Court in respect of the CCAA Proceedings, the Monitor shall not be authorized or directed to act in any other manner, and shall have no responsibility for any other duties or functions whatsoever other than by further Order of this Court.

11. **THIS COURT ORDERS** that the Monitor shall be at liberty to engage such persons as the Monitor deems necessary or advisable respecting the exercise of the Monitor's Existing Powers and the Monitor's Increased Powers.

12. **THIS COURT ORDERS** that, in addition to its prescribed rights under the CCAA, the powers granted by the Initial Order, this Order and all other orders granted in these proceedings, the Monitor is empowered and authorized to take such additional actions and execute such additional documents, in the name of and on behalf of the Timminco Entities, that may be incidental or ancillary to its prescribed rights and the powers granted to it, in order to facilitate the orderly completion of these proceedings and the winding up of the Timminco Entities' estates.

13. **THIS COURT ORDERS** that the Monitor shall continue to hold the Funds, and the Monitor is authorized and directed:

(a) to pay the reasonable fees and disbursements of the Monitor, counsel to the Monitor and counsel to the Timminco Entities, in the name of and on behalf of the Timminco Entities;

(b) to pay all post-filing liabilities properly incurred by the Timminco Entities in the ordinary course of business which have not been previously paid, in the name of and on behalf of the Timminco Entities;

(c) to pay all costs associated with any actions taken by the Monitor pursuant to paragraph 11 of this Order; and

(d) to return to Court in order to seek such further authority or directions as the Monitor considers appropriate with respect to the use or distribution of the Funds.

14. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor

shall incur no liability or obligation as a result of the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA, any other applicable legislation or any other Order granted in the CCAA Proceedings.

15. **THIS COURT ORDERS** that, except as specifically provided for herein, nothing in this Order shall vary or amend any order or endorsement previously granted in the CCAA Proceedings.

GENERAL

16. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Monitor, the CRO, and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Monitor and to the CRO, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order.

DEC 16 2013

Court File No. CV-12-9539-00CL

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

ORDER
(Re Expanded Monitor Powers)

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Ashley John Taylor LSUC#: 39932E
Tel: (416) 869-5236
Maria Konyukhova LSUC#: 52880V
Tel: (416) 869-5230
Kathryn Esaw LSUC#: 58264F
Tel: (416) 869-5230
Fax: (416) 947-0866

Lawyers for the Applicants

Appendix B

The Reimbursement Agreement

Execution Version

REIMBURSEMENT AGREEMENT

THIS AGREEMENT is made as of August 28th, 2012,

BETWEEN

BÉCANCOUR SILICON INC. ("**BSI**")

-and-

INVESTISSEMENT QUÉBEC (together with any successors thereof "**IQ**")

-and-

FTI CANADA CONSULTING INC., solely in its capacity as court-appointed monitor (the "**Monitor**") of Timminco Limited ("**Timminco**") and BSI and not in its personal capacity or corporate capacity

RECITALS

A. On January 3, 2012, Timminco and BSI (collectively, the "**Timminco Entities**") commenced proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA Proceedings**"), and an initial order was made by the Ontario Superior Court of Justice (Commercial List) (the "**Court**") pursuant to which, among other things, FTI Consulting Canada Inc. was appointed as Monitor.

B. Pursuant to a term loan agreement, dated July 10, 2009, between BSI and IQ (the "**Loan Agreement**"), IQ advanced funds to BSI in the principal amount of $25,000,000. The amount outstanding under the Loan Agreement (including principal and interest accrued to date but excluding applicable costs and expenses) as at August 17, 2012 was $29,118,708.44. The amount owing by BSI to IQ from time to time under the Loan Agreement shall hereinafter be referred to as the "**Indebtedness**".

C. The Indebtedness is secured by, *inter alia*, a charge upon all of BSI's present and future assets, undertaking and properties (the "**Collateral**") pursuant to the terms of a Hypothec Universelle dated July 10, 2009 between BSI and IQ (the "**IQ Security**").

D. The Monitor is in possession of certain proceeds from the realization of Collateral (collectively, the "**Proceeds**").

E. IQ asserts a claim to the Proceeds, and the other Collateral pursuant to the IQ Security. Certain Claims (as defined below) have been asserted against BSI in the CCAA Proceedings pursuant to the Claims Procedure Order. The holders of these Claims may assert that the Claims are Priority Claims (as defined below).

F. As a condition precedent to BSI bringing a motion before the Court authorizing and directing the Monitor to make an initial interim distribution to IQ in the amount of $27,393,057.43 in partial repayment of the Indebtedness (the "**Initial Distribution**") together with such additional distributions to IQ up to the amount of the Indebtedness that the Monitor in its discretion considers to be reasonable and appropriate in light of all circumstances (the "**Subsequent Distributions**" and together with the Initial Distribution the "**Interim Distribution**") BSI requires that IQ enter into this Agreement.

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

SECTION 1 - INTERPRETATION

1.1 Definitions

In this Agreement:

(1) "**Agreement**" means this agreement and all attached schedules, as the same may be supplemented, amended, restated, updated or replaced from time to time;

(2) "**Business Day**" means a day on which banks are open for business in the City of Toronto, but does not include a Saturday, Sunday or statutory holiday in the Province of Ontario;

(3) "**CCAA Proceedings**" has the meaning set out in the Recitals;

(4) "**Claim**" means a claim as defined in the Claims Procedure Order and submitted in compliance with the procedure set out in the Claims Procedure Order;

(5) "**Claims Procedure Order**" means the order of the Court dated June 15, 2012 dealing with, *inter alia*, the solicitation, classification and adjudication of Claims against the Timminco Entities;

(6) "**Collateral**" has the meaning set out in the Recitals;

(7) "**Court**" has the meaning set out in the Recitals or such other court of competent jurisdiction with respect to the applicable matter in dispute;

(8) "**Finally Determined**", means the validity, quantum and priority of a Reimbursement Claim have been finally determined in accordance with the Priority Claim Adjudication Process and the Claims Procedure Order;

(9) "**Indebtedness**" has the meaning set out in the Recitals;

(10) "**Initial Distribution**" has the meaning set out in the Recitals;

(11) "**Interim Distribution**" has the meaning set out in the Recitals;

(12) **"Interim Distribution Order"** means an order of the Court authorizing and directing the Monitor to make the Interim Distribution and providing for the Priority Claims Adjudication Process;

(13) **"IQ Security"** has the meaning set out in the Recitals;

(14) **"Proceeds"** has the meaning set out in the Recitals;

(15) **"Priority Claim"** means a Reimbursement Claim that has been Finally Determined to be secured against the Collateral by security ranking in priority to the IQ Security or a Reimbursement Claim that has otherwise been Finally Determined to be entitled to payment in priority to the Indebtedness;

(16) **"Priority Claimant"** means a creditor holding a Reimbursement Claim which creditor asserts that such Reimbursement Claim is a Priority Claim;

(17) **"Priority Claim Adjudication Process"** means the process to be established by the Interim Distribution Order whereby the Monitor, IQ or a Priority Claimant may submit a dispute regarding the priority of a Reimbursement Claim to be adjudicated in accordance with paragraphs 20-27 of the Claims Procedure Order; provided, however, such adjudication process will provide that the quantum and validity of a Reimbursement Claim determined to be a Priority Claim will not be voluntarily settled without the consent of IQ, acting reasonably;

(18) **"Reimbursement Claim"** means a Claim that is held by Priority Claimant and has been added to Schedule "**A**" in accordance with the protocol set out on Schedule "**A**";

(19) **"Reimbursement Payment"** has the meaning set out in Section 2.1; and

(20) **"Subsequent Distributions"** has the meaning set out in the Recitals.

(21) **"Timminco Entities"** has the meaning set out in the Recitals.

1.2 Interpretation Not Affected by Headings, etc.

The division of this Agreement into sections and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this Agreement. Unless otherwise indicated, all references to a "section" followed by a number and/or a letter refer to the specified section of this Agreement. The terms "this Agreement", "hereof", "herein" and "hereunder" and similar expressions refer to this Agreement and not to any particular section hereof.

1.3 Extended Meanings

Words importing the singular include the plural and vice versa, words importing gender include all genders and words importing persons include individuals, partnerships, associations, trusts, unincorporated organizations, corporations and governmental authorities. The term "including" means "including, without limitation," and such terms as "includes" have similar meanings.

SECTION 2 - REIMBURSEMENT

2.1 IQ Undertaking

Subject to the terms hereof, IQ hereby undertakes and agrees to reimburse to BSI by payment to the Monitor such portion of the Interim Distribution as may be necessary to satisfy any Reimbursement Claim, or portion thereof, that has been Finally Determined to be a Priority Claim (a "**Reimbursement Payment**"). Such Reimbursement Payment shall be made by IQ to the Monitor, by way of immediately payable funds within (7) seven business days following the time that a Reimbursement Claim has been Finally Determined to be a Priority Claim.

2.2 Limitation of Liability

Notwithstanding any other provision of this Agreement, the liability of IQ to reimburse the Interim Distribution pursuant to this Agreement shall be limited to the lesser of: (a) the aggregate amount of all Reimbursement Claims that are Finally Determined to be Priority Claims; and (ii) the aggregate amount of the Interim Distribution received by IQ.

2.3 Distributions

Provided that the Interim Distribution Order is issued, the Monitor shall distribute the Initial Distribution to IQ or its designee. The Monitor shall be entitled but under no obligation to distribute the Subsequent Distributions to IQ. The Monitor shall be entitled to disburse the balance of the Proceeds to parties other than IQ only in accordance with existing or future orders of the Court.

2.4 Term

This Agreement and the liability of IQ to BSI with respect to any Reimbursement Claim shall terminate on the earlier of: (a) (2) two months from the date of the issuance of the Interim Distribution Order; and (b) the date such Reimbursement Claim has been Finally Determined and all reimbursement obligations of IQ hereunder in respect thereof have been satisfied (the "**Term**"); provided, however, if the process to Finally Determine a Reimbursement Claim has been commenced during the Term, the Term will be extended until the date such Reimbursement Claim is actually Finally Determined and any reimbursement obligation of IQ in respect of such Reimbursement Claim is satisfied.

2.5 IQ Security and Interest

Upon receipt of the Interim Distribution, or any portion thereof, by IQ, or any designee of IQ, no further interest will continue to accrue on the amount of the repaid Indebtedness unless a Reimbursement Payment is made. If a Reimbursement Payment is made pursuant to this Agreement, the amount of the Reimbursement Payment shall be added back to the Indebtedness and such amount (plus all interest accrued thereon (i) from the date the Reimbursement Payment is made if the Priority Claim in respect of which the Reimbursement Payment is made has not borne interest since the date the Interim Distribution was made; and, (ii) from the date the Interim Distribution was made if the Priority Claim in respect of which the Reimbursement Payment is made has borne interest from the date of the Interim Distribution) shall be secured by

the IQ Security. BSI acknowledges and agrees that: (a) the payment of the Initial Distribution to IQ does not discharge all of the Indebtedness; (b) the Collateral and Proceeds remain subject to the IQ Security until such time as the Indebtedness is indefeasibly paid in full; and (c) all legal costs incurred by IQ in connection with the CCAA Proceedings prior to or after the entering into of this Agreement are to be included in the Indebtedness in accordance with the Loan Agreement.

2.6 Use of Interim Distribution

Subject to Section 2.1, BSI and the Monitor each acknowledge and agree that IQ shall have the full use of the Interim Distribution and IQ shall have no obligation to hold the amount of the Interim Distribution in trust or keep it separate and apart from its general assets.

SECTION 3 - GENERAL

3.1 Notice

All notices and other communications pursuant to this Agreement shall be in writing and delivered or transmitted by facsimile or other electronic transmission as follows:

(a) in the case of BSI:

Bécancour Silicon Inc.
c/o Russell Hill Advisory Services Inc.
150 King Street West
Suite 2401
Toronto, Ontario
M5H 1J9

Attention: Sean Dunphy
Fax No.: 416.364.3451
Email: sdunphy@timminco.com

with a copy to:

Stikeman Elliott LLP
199 Bay Street
5300 Commerce Court West
Toronto, Ontario
M5L 1B9

Attention: Ashley Taylor
Fax No.: 416.947.0866
Email: ataylor@stikeman.com

(b) in the case of IQ:

Direction des créances spéciales
413, rue Saint-Jacques, bureau 500
Montreal, PQ H2Y 1N9

Attention: François Lamothe
Fax No.: 514.873.1212
Email: Francois.Lamothe@invest-quebec.com

with a copy to:

Fasken Martineau DuMoulin LLP
333 Bay Street, Suite 2400
Toronto, ON M5H 2T6

Attention: Aubrey Kauffman
Fax No.: 416-364-7813
Email: akauffman@fasken.com

(c) in the case of the Monitor:

FTI Canada Consulting Inc.
TD Waterhouse Tower
79 Wellington St. W., Suite 2010
Toronto ON M5K 1G8

Attention: Nigel Meakin
Fax No.: 416-649-8101
Email: nigel.meakin@fticonsulting.com

with a copy to:

Blake, Cassels & Graydon LLP
199 Bay Street, Suite 4000
Toronto, ON M5L 1A9

Attention: Linc Rogers
Fax No.: 416-863-2653
Email: linc.rogers@blakes.com

Any such notice or other communication, if given by personal delivery, will be deemed to have been given on the day of actual delivery thereof and, if transmitted by fax or other electronic transmission before 5:00 p.m. (Toronto time) on a Business Day, will be deemed to have been given on the Business Day, and if transmitted by fax or other electronic transmission after 5:00 p.m. (Toronto time) on a Business Day, will be deemed to have been given on the Business Day after the date of transmission. The parties may update their respective contact information by providing notice to the other parties to the Agreement in accordance with this Section.

3.2 Entire Agreement

This Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof.

3.3 Governing Law

This Agreement shall be governed by the laws of the Province of Ontario and the federal laws of Canada applicable therein.

3.4 Benefit of Agreement

This Agreement shall enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

3.5 Further Assurances

At the reasonable request of another party to this Agreement, each of the parties hereto agrees to do, execute and deliver all such further acts, instruments or documents as may be necessary to give effect to this Agreement and the mutual obligations contained herein.

3.6 Counterparts

This Agreement may be signed in counterparts, by original, facsimile or other electronic transmission, and each such counterpart taken together shall constitute a binding agreement among all the parties hereto.

3.7 Court Approval

It is a condition precedent to the effectiveness of this Agreement that it be approved by the Court.

3.8 Capacity of the Monitor

IQ and BSI acknowledge and agree that FTI Consulting Canada Inc. is party to this Agreement solely in its capacity as court-appointed monitor and not in its personal or corporate capacity and shall have no liability under this Agreement of any kind in its personal or corporate capacity.

[Signatures following on next page]

This Agreement is made as of the date first above written.

BÉCANCOUR SILICON INC.

By: ______________________________
Name: Sean Dunphy for
Title: Russell Hill Advisory Services Inc
CRO.

INVESTISSEMENT QUÉBEC

By: ______________________________
Name:
Title:

Acknowledged and consented to this ______ day of August, 2012

FTI CANADA CONSULTING INC., solely in its capacity as court-appointed monitor of Timminco Limited and Bécancour Silicon Inc. and not in its personal or corporate capacity

By: ______________________________
Name:
Title:

This Agreement is made as of the date first above written.

BÉCANCOUR SILICON INC.

By: ________________________________

Name:

Title:

INVESTISSEMENT QUÉBEC

By: ________________________________

Name: ALEJANDRO MORALES

Title: Director Special Loans

Acknowledged and consented to this ______ day of August, 2012

FTI CANADA CONSULTING INC., solely in its capacity as court-appointed monitor of Timminco Limited and Bécancour Silicon Inc. and not in its personal or corporate capacity

By: ________________________________

Name:

Title:

This Agreement is made as of the date first above written.

BÉCANCOUR SILICON INC.

By: ______________________________
Name:
Title:

INVESTISSEMENT QUÉBEC

By: ______________________________
Name:
Title:

Acknowledged and consented to this 28th day of August, 2012

FTI CANADA CONSULTING INC., solely in its capacity as court-appointed monitor of Timminco Limited and Bécancour Silicon Inc. and not in its personal or corporate capacity

By: ______________________________
Name: Ms. Toni Vanderlaan
Title: Managing Director

SCHEDULE "A"
REIMBURSEMENT CLAIMS*

The parties agree that this Schedule "A" will be updated in accordance with the following protocol:

1. Within (7) seven days of the date of the Interim Distribution Order is issued by the Court, a creditor that has filed a Claim as a secured Claim in accordance with the provisions of the Claims Procedure Order, must provide a written notice to the Monitor, IQ and BSI, in accordance with the notice provisions of this Agreement, which states (a) the name of the creditor; (b) the quantum of the claim that the creditor asserts constitutes a Priority Claim; and (c) in a summary manner only, the basis on which the Claim constitutes a Priority Claim. If a creditor fails to file a notice in accordance with this paragraph, its Claim shall not constitute a Reimbursement Claim for the purpose of this Agreement and its Claim shall not be added to this Schedule "A".

2. If the Monitor, IQ and BSI collectively agree that the basis on which the creditor (that satisfies the criteria set out in paragraph 1 above) asserts its Claim is a Priority Claim establishes a genuine issue for adjudication, the Claim shall constitute a Reimbursement Claim for the purpose of this Agreement and shall be added to this Schedule "A".

3. If the Monitor, IQ and BSI do not agree that the basis on which a creditor (that satisfies the criteria set out in paragraph 1 above) establishes a genuine issue for adjudication, then the Monitor shall seek advice and direction from the Court, on notice to the applicable creditor, IQ and BSI as to whether the Claim establishes a genuine issue for adjudication. If the Court concludes the Claim does establish a genuine issue for adjudication, the Claim shall constitute a Reimbursement Claim for the purpose of this Agreement and shall be added to this Schedule "A". If the Court concludes the Claim does not establish a genuine issue for adjudication then the Claim shall not constitute a Reimbursement Claim for the purpose of this Agreement and shall not be added to this Schedule "A".

Appendix C

The Priority Claim Adjudication Protocol

Court File No. CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]

THE HONOURABLE	)	~~WEDNESDAY~~ THURSDAY, THE ~~10th~~ 18th DAY OF
	)	
JUSTICE MORAWETZ	)	OCTOBER 2012

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Applicants

ORDER
(Approval of Priority Claim Adjudication Protocol)

This Motion, made by Investissement Québec for an order approving the Priority Claim Adjudication Protocol and referring the adjudication of the BSI Pension Reimbursement Claims to the Superior Court of Québec (Commercial Division) was heard this day at 330 University Avenue, Toronto, ON.

On the consent of counsel for Timminco Limited and Bécancour Silicon Inc., FTI Consulting Canada Inc., in its capacity as court-appointed Monitor of the Timminco entities, Investissement Québec, Mercer Canada, the administrator of the Haley Pension Plan, The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW") and BSI Union and Non-Union employee Pension Committees:

1. **THIS COURT ORDERS** that the Priority Claim Adjudication Protocol, attached hereto as Schedule "A", be and the same is hereby authorized and approved.

2. **THIS COURT ORDERS** that the adjudication of whether the BSI Pension Reimbursement Claims are Priority Claims, all as defined in the attached Priority Claim Adjudication Protocol, be and the same is hereby referred exclusively to the Superior Court of Québec (Commercial Division) to be determined in accordance with the Priority Claim Adjudication Protocol.

3. **THIS COURT HEREBY REQUESTS** the aid and recognition of the Superior Court of Québec (Commercial Division) to give effect to this order and to adjudicate whether the BSI Pension Reimbursement Claims constitute Priority Claims in accordance with the terms of the Priority Claims Adjudication Protocol.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

OCT 19 2012

DM_TOR/275047.00020/5934058.1

SCHEDULE "A"

Court File No. CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Applicants

PRIORITY CLAIM ADJUDICATION PROTOCOL

A. OVERVIEW

1. In accordance with the Reimbursement Agreement (the "**Reimbursement Agreement**") among Investissement Québec ("**IQ**"), FTI Consulting Canada Inc., as court-appointed Monitor, and Bécancour Silicon Inc., dated August 28, 2012 and the August 28, 2012 Interim Distribution Order (the "**Interim Distribution Order**")[1], two (2) sets of claims have been designated as Reimbursement Claims, namely:

   (i) a claim on behalf of Mercer Canada ("**Mercer**"), as administrator of the Haley Pension Plan, and on behalf of the beneficiaries of that plan (the "**Mercer Reimbursement Claim**"), which claim is supported by The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("**USW**"); and

   (ii) a claim by Le Comité de retraite du Régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc. and a claim by Le Comité de retraite du Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (collectively the "**BSI Pension Committees**") (the "**BSI Pension Reimbursement Claims**").

2. IQ disputes that the above Reimbursement Claims have priority over the IQ Security and the parties do not anticipate the dispute will be resolved through the consented resolution process

[1] Unless otherwise indicated, any capitalized terms used but not defined herein shall have the meaning ascribed to such term in the Reimbursement Agreement and the Interim Distribution Order.

provided for in the Interim Distribution Order. Accordingly, an adjudication is required to determine whether such Reimbursement Claims constitute Priority Claims.

The following is the protocol for the adjudication of whether the Reimbursement Claims constitute Priority Claims.

B. THE MERCER REIMBURSEMENT CLAIM

1. The Mercer Reimbursement Claim shall be adjudicated by way of a motion before this Court wherein Mercer and USW will be the moving parties and IQ will be the respondent. If at any time Mercer shall cease the prosecution of the Mercer Reimbursement Claim, the USW shall be entitled to prosecute the Mercer Reimbursement Claim in the place and stead of Mercer.

As issues to be adjudicated regarding the Mercer Reimbursement Claim (such as, by way of example, substantive consolidation) may impact on other stakeholders of BSI or Timminco, the motion material hereafter described shall be served on the service list herein. Any creditor of the Timminco Entities or the Monitor, or the Timminco Entities themselves (“**Interested Stakeholders**”) shall have the right to file material and participate in the motion proceedings in accordance with the following timetable:

(i) Mercer and USW, if so advised, will deliver moving party motion material by October 29, 2012;

(ii) IQ and Interested Stakeholders, if any, shall deliver responding material by November 30, 2012;

(iii) Mercer and USW will deliver reply material, if so advised, by December 17, 2012;

(iv) cross-examinations on filed affidavits, if required, will be conducted during the week of January 13, 2012. During this period, the examination of Peter Kalins, (a former officer and director of Timminco and BSI) as a witness to the motion, shall be conducted if consented to by Peter Kalins or if an appropriate court order has been obtained;

(v) Mercer and USW, if so advised, will deliver moving party’s facta by January 25, 2013;

(vi) IQ and any Interested Stakeholders will deliver responding facta by February 13, 2013;

(vii) Mercer and USW will deliver reply facta by February 20, 2013, if so advised; and

(viii) the hearing of the motion will take place during the week of February 25, 2013.

2. In determining whether the Mercer Reimbursement Claim constitutes a Priority Claim, the determination of the quantum of such Priority Claim shall be postponed until after the determination of the nature of the claim and will be determined in accordance with the Claims Procedure Order or further order of the Court.

C. THE BSI PENSION REIMBURSEMENT CLAIMS

1. The adjudication of whether the BSI Reimbursement Claims constitute Priority Claims shall be referred exclusively to the Superior Court of Québec (Commercial Division) wherein the BSI Pension Committees will be the moving parties and IQ will be the respondent in accordance with the following timetable:

(i) the BSI Pension Committees shall deliver their motion to institute proceedings within 60 days after the Order is made referring this matter to the Superior Court of Québec (Commercial Division);

(ii) IQ and any Interested Stakeholders shall deliver their Statement of Defence within 30 days after receipt of the motion to institute proceedings;

(iii) the BSI Pension Committees shall have up to 30 days after receipt of the IQ defence to deliver their response, if any;

(iv) examinations, if necessary, are to be conducted by January 11, 2013;

(v) written arguments and joint books of procedure and exhibits shall be delivered at least 2 weeks before the hearing of the motion; and

(vi) the hearing of the motion is to be scheduled between February 18, 2013 and March 15, 2013 based upon a 1-2 day hearing.

For greater certainty, any appeal from an order of the Superior Court of Québec (Commercial Division) herein shall be to the Court of Appeal of Québec.

2. In determining whether the BSI Reimbursement Claims constitute Priority Claims, the determination of the quantum of such Priority Claims shall be postponed until after the determination of the nature of the claim and will be determined in accordance with the Claims Procedure Order or further order of the Court.

D. MONITOR'S REPORT

1. The Monitor, if it deems it necessary and appropriate to do so, may file a report with the court in connection with adjudication of either Reimbursement Claim.

In the matter of the *Companies' Creditors Arrangement Act*,
R.S.C. 1985, c. C-36, As Amended

And in the Matter of a Plan of Compromise or Arrangement
of Timminco Limited and Bécancour Silicon Inc.

Applicants

Court File No. CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
Commercial List

Proceedings commenced at

TORONTO

ORDER
(Approval of Priority Claim Adjudication Protocol)

Fasken Martineau DuMoulin LLP
Barristers and Solicitors
Patent and Trade-mark Agents
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto, ON M5H 2T6

Aubrey E. Kauffman (LSUC: 18829N)

Tel: 416 868 3538
Fax: 416 364 7813

Lawyers for Investissement Québec

DM_TOR/275047.00020/5934058.1

CITATION: Timminco Limited (Re), 2012 ONSC 5959
COURT FILE NO.: CV-12-9539-00CL
DATE: 20121018

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC., Applicants**

BEFORE: **MORAWETZ J.**

COUNSEL: **S. J. Weisz, for FTI Consulting Canada Inc., in its capacity as court-appointed Monitor of the Timminco Entities**

HEARD: **OCTOBER 18, 2012**

ENDORSEMENT

[1] On consent of Timminco Limited and Bécancour Silicon Inc., FIT Consulting Canada Inc., in its capacity as court-appointed Monitor of the Timminco Entities, Investissement Québec, Mercer Canada, the Administrator of the Haley Pension Plan, The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW") and BSI Union and Non-Union Employee Pension Committees, the Priority Claim Adjudication Protocol is approved. The adjudication of whether the BSI Pension Reimbursement Claims are Priority Claims is referred to the Superior Court of Québec (Commercial Division) to be determined in accordance with the terms of the Priority Claims Adjudication Protocol.

[2] This determination has been made pursuant to s. 17 of the CCAA, and I express my thanks, in advance, to the Superior Court of Québec.

[3] To the extent leave is required to proceed, such leave is granted.

MORAWETZ J.

Date: October 18, 2012

Appendix D

The Quebec Priority Decision
(English Translation)

[TRANSLATION]

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No: 500-11-043844-121

DATE: January 24, 2014

PRESIDING: THE HONOURABLE ROBERT MONGEON, J.S.C.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF:

TIMMINCO LIMITÉE
-and-
BÉCANCOUR SILICON INC.
Debtors
-and-
FTI CONSULTING INC.
Monitor
-and-
Comité de retraite du Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc.
-and-
Comité de retraite du Régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc.
Petitioners
v.
INVESTISSEMENT QUÉBEC
Respondent

JUDGMENT ON DIRECTIONS AND DECLARATORY JUDGMENT RELATING TO PRIORITY CLAIMS (Sections 11 and 17 CCAA)

2014 QCCS 174 (CanLII)

INTRODUCTION AND BACKGROUND

[1] Bécancour Silicon Inc. (“BSI”) is a subsidiary of Timminco Inc. (“TI”).

[2] BSI and TI have been under the protection of the *Companies' Creditors Arrangement Act,* R.S.C., 1985, c. C-36 as amended (the “CCAA”) since January 3, 2012, following the issuance of an initial order by Justice Geoffrey Morawetz of the Ontario Superior Court of Justice.

[3] By a subsequent order rendered on January 16, 2012 (the “Suspension Order”)[1], all special payments to be made by BSI in favour of the two defined benefit pension plans for the benefit of its unionized[2] and non-unionized[3] employees were suspended.

[4] Those plans are governed by their constituting contracts (P-1 and P-2) and by the *Supplemental Pension Plans Act,* R.S.Q., c. R-15.1 as amended (the “SPPA”). It is admitted that BSI, the employer, has paid the current service contributions and special payments until January 31, 2012 and that the current service contributions are paid up to today.

[5] The two pension plans P-1 and P-2 have been (or are about to be) terminated, given that these two plans have, for all practical purposes, no participating employees left. Moreover, these pension plans are in a state of solvency deficit.

[6] On December 31, 2011, the unionized employees' pension plan's solvency deficit was $9,889,600.00 (exhibit P-3) while that of the non-unionized employees' was $3,998,700.00 (exhibit P-4).[4]

[7] In order to clear, at least partially, the above-mentioned solvency deficits, BSI had to pay special payments of $93,810.00 and of $41,710.00 per month into the above-mentioned pension plans' funds (exhibits P-3 and P-4). These special payments have been suspended since the above-mentioned Suspension Order.

[8] The Petitioner Pension Committees consider that their above-mentioned claims constitute priority claims that rank ahead of the claim of the Respondent Investissement Québec (“IQ”), who holds a universal hypothec without delivery on all of BSI's movable and immovable property pursuant to which it received about $29 million in reimbursement of its claim.

[9] This judgment deals with the status of these priority claims.

[10] The two Petitioners allege that their priority claims should be recognized as such by the Court, ranking ahead of IQ's claim and of the said payment of more than $29 million made by the Monitor to IQ within the context of the liquidation of BSI's assets made under the CCAA.

---

[1] Written reasons filed on February 2, 2012.
[2] Exhibit P-1.
[3] Exhibit P-2.
[4] As of July 20, 2012, the Pension Committees' priority claims totalled $10,558,290.00 and $4,296,220.00 respectively (exhibits P-3, P-4, P-13 and P-14).

2014 QCCS 174 (CanLII)

2014 QCCS 174 (CanLII)

[11] The parties have also agreed to stipulate that if the Petitioners' claims are recognized as priority claims in whole or in part, IQ shall reimburse the said claims which could add up to $14.8 million (subject to adjustment) to both Pension Committees in accordance with their respective interests. However, if the Court determines that the claims in question are not priority claims, IQ will have nothing to reimburse. Such a scenario would, since there is no (or very little) residual amount available to reimburse non-priority claims, result in the pension funds being deprived of considerable amounts, resulting in the reduction of the retirees' retirement benefits of up to near 40%. We can therefore easily understand the importance of the question to the retirees.

CHRONOLOGY OF RELEVANT FACTS

[12] Here is the chronology of the relevant facts and documents that are necessary for a good understanding of the questions to be resolved and for the resolution of the present dispute:

a) January 3, 2012: First order of Justice Morawetz staying all claims against TI and its subsidiary BSI, with an effective date of January 3, 2012, at 12:01 a.m.;

b) January 16, 2012: Suspension Order regarding TI's and BSI's special payments. Justice Morawetz was of the opinion that TI's and/or BSI's financial statements did not allow them to meet such obligations. Furthermore, Justice Morawetz wrote (in his reasons filed on February 2, 2012):

> **[56] The courts have characterized special (or amortization) payments as pre-filing obligations which are stayed upon an initial order being granted under the CCAA. (See *AbitibiBowater Inc.*, (Re) reflex, (2009) 57 C.B.R. (5th) 285 (Q.S.C.); *Collins & Aikman Automotive Canada Inc.* 2007 CanLII 45908 (ON SC), (2007), 37 C.B.R. (5th) 282 (Ont. S.C.J.) and *Fraser Papers Inc. (Re)* 2009 CanLII 39776 (ON SC), (2009), 55 C.B.R. (5th) 217 (Ont. S.C.J.).**
>
> **[57] I accept the submission of counsel to the Applicants to the effect that courts in Ontario and Quebec have addressed the issue of suspending special (or amortization) payments in the context of a CCAA restructuring and have ordered the suspension of such payments where the failure to stay the obligation would jeopardize the business of the debtor company and the company's ability to restructure.**
>
> **…**
>
> **[60] Counsel to the Timminco Entities submits that where it is necessary to achieve the objective of the CCAA, the court has the jurisdiction to make an order under the CCAA suspending the payment of the pension contributions, even if such order conflicts with, or overrides, the QSPPA or the PBA.**
>
> **[61] The evidence has established that the Timminco Entities are in a severe liquidity crisis and, if required to make the pension contributions, will**

not have sufficient funds to continue operating. The Timminco Entities would then be forced to cease operations to the detriment of their stakeholders, including their employees and pensioners.

[62] On the facts before me, I am satisfied that the application of the QSPPA and the PBA would frustrate the Timminco Entities ability to restructure and avoid bankruptcy. Indeed, while the Timminco Entities continue to make Normal Cost Contributions to the pension plans, requiring them to pay what they owe in respect of special and amortization payments for those plans would deprive them of sufficient funds to continue operating, forcing them to cease operations to the detriment of their stakeholders, including their employees and pensioners.

(emphasis added)

c) June 13-14, 2012: Sale of substantially all of TI's and BSI's major assets. These sales had been approved beforehand by Justice Morawetz (exhibit P-10). The sales of assets generated $30.8 million in liquidity;[5]

d) August 17, 2012: Appointment of a CRO ("Chief Restructuring Officer");

e) August 28, 2012: Reimbursement of the loan (secured by a hypothec on the universality of BSI's assets) in the amount of $25 million plus some accrued interest (see exhibits P-11 and P-16). This payment was made subject to the Petitioner Pension Committees' rights;

f) September 7, 2012: Requests from the Petitioner Pension Committees for priority over a) both Pension Plans' solvency deficits ($9,889,600.00 and $3,998,700.00) subject to adjustment and b) the balance of unpaid special payments for the months of December 2011 to June 2012 ($668,690.00 and $297,520.00), the whole as appears from exhibit P-17.

g) October 18, 2012: Order from Justice Morawetz, following a request from the parties (exhibit P-19), to transfer the Pension Committees' motion to the Superior Court of Québec (exhibit P-20). The parties also agreed that the motion would be split, with the Quebec Court first ruling on the questions of law before deciding the quantum of the claims, if applicable.

[13] More specifically, exhibit P-20 reproduces Justice Morawetz's order approving a "Priority Claim Adjudication Protocol" ("the Protocol") under which the Superior Court of Ontario asks the

[5] Monitor's Report no. 13, exhibit P-5, paragraph 7.

2014 QCCS 174 (CanLII)

Superior Court of Québec to determine if the Petitioner Pension Committees' claims have priority over, notably, IQ's claim.[6]

[14] The Protocol states the following:

> **A. OVERVIEW**
>
> **1. In accordance with the Reimbursement Agreement (the « Reimbursement Agreement ») among Investissement Québec (« IQ »), FTI Consulting Canada Inc., as court-appointed Monitor, and Bécancour Silicon Inc., dated August 28, 2012 and the August 28, 2012 Interim Distribution Order (the « Interim Distribution Order »), two (2) sets of claims have been designated as Reimbursement Claims, namely :**
>
> **…**
>
> **(ii) a claim by Le Comté (sic) de retraite du Régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc. and a claim by Le Comité de retraite du Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (collectively the « BSI Pension Committees ») (the « BSI Pension Reimbursement Claims »).**
>
> **2. IQ disputes that the above Reimbursement Claims have priority over the IQ Security and the parties do not anticipate the dispute will be resolved through the consented resolution process provided for in the Interim Distribution Order. Accordingly, an adjudication is required to determine whether such Reimbursement Claims constitute Priority Claims.**
>
> **The following is the protocol for the adjudication of whether the Reimbursement Claims constitute Priority Claims.**
>
> **…**

---

[6] See paragraphs 1 to 3 of the order :

1. **THIS COURT ORDERS that the Priority claim Adjudication Protocol, attached hereto as Schedule « A », be and the same is hereby authorized and approved.**
2. **THIS COURT ORDERS that the adjudication of whether the BSI Pension Reimbursement Claims are Priority Claims, all as defined in the attached Priority Claim Adjudication Protocol, be and the same is hereby referred exclusively to the Superior Court of Québec (Commercial Division) to be determined in accordance with the Priority Claim Adjudication Protocol.**
3. **THIS COURT HEREBY REQUESTS the aid and recognition of the Superior Court of Québec (Commercial Division) to give effect to this order and to adjudicate whether the BSI Pension Reimbursement Claims constitute Priority Claims in accordance with the terms of the Priority Claims Adjudication Protocol.**

2014 QCCS 174 (CanLII)

[15] The Pension Committees' motion for directions and declaratory judgment relating to the priority claims was filed on December 17, 2012. At the parties' request, the schedule was modified and the hearing on the questions of law was heard before the undersigned on May 27 and 28, 2013.

2014 QCCS 174 (CanLII)

[16] The Pension Committees formulate the questions of law as follows [TRANSLATION]:

> **49. The question in issue is to determine whether the claims of the Pension Committees have priority over Investissement Québec's claim. The question of the status of the Pension Committees' claims as regards the DIP Charges is not a question in issue and has already been decided by Justice Morawetz (see the Order of February 8, 2012, Exhibit P-9).**
>
> **50. BSI stopped paying special payments pursuant to the Order of January 16, 2012 which suspended them. On July 23, 2012, the unpaid accrued special payments (with interest) totaled approximately $1 million for the two Pension Plans (see letters of July 20, 2012, Exhibit P-3 and Exhibit P-4).**
>
> **51. Solvency deficits (which would include unpaid special payments) for both Pension Plans on December 31, 2011 totaled approximately $14 million (see letters of July 20, 2012, Exhibit P-3 and Exhibit P-4) and will be crystallized if the Pension Plans' termination by the Régie des Rentes du Québec is completed.**
>
> **52. Under Quebec law applicable to the question in issue, the amounts claimed by the Pension Committees for the special payments and solvency deficits are deemed to be held in trust by the employer BSI in favour of the Pension Plans.**
>
> **53. It is clear that such deemed trusts have priority over Investissement Québec's secured claim.**
>
> **(emphasis added)**

[17] Once the Court has decided on the existence or not of a deemed trust affecting the Pension Committees' claims, the next step is to determine the effect of such a deemed trust on IQ's hypothecary claim.

[18] The Petitioner Committees therefore ask the Court to [TRANSLATION]:

> **DECLARE as being Priority Claims under the Repayment Agreement confirmed by the Order of the Superior Court of Justice (Commercial List) of Ontario on August 28, 2012, the following claims:**

1. the unpaid special payments due to the Silicium Bécancour Inc.'s Pension Plan fund for unionized employees;

2. the unpaid special payments due to the Silicium Bécancour Inc.'s Pension Plan fund for non-unionized employees;

3. the solvency deficit of Silicium Bécancour Inc.'s Pension Plan for unionized employees; and

4. the solvency deficit of Silicium Bécancour Inc.'s Pension Plan for non-unionized employees.

TAKE NOTICE of paragraph C.2. of the Adjudication Protocol so that the Priority Claims' quantums shall be determined once this Honourable Court has decided the nature of the claims, and shall be determined according to the Claims Procedure Order or by an order of this Court.

TAKE NOTICE of paragraph 9 of the Order of August 28, 2012 from the Superior Court of Justice (Commercial List) of Ontario and the Reimbursement Convention in Schedule "A" thereof, whereby Investissement Québec will reimburse the sums declared by this Court as having priority, if applicable, over Silicium Bécancour Inc. through the Monitor, FTI Consulting Inc., so that Silicium Bécancour Inc. transfers these sums to the Petitioners.

[19] In the alternative, and in the absence of recognition that the SPPA creates such a trust, the Pension Committees ask the Court to use its inherent powers and/or those established by Article 46 of the Québec *Code of Civil Procedure* to conclude that there is a priority claim in their favour.

[20] The question as to whether section 49 SPPA creates such a trust has already been addressed in the *White Birch*[7] case, where the undersigned answered the question in the negative. Moreover, this decision states that if it does exist, the deemed trust of section 49 SPPA is affected by the application of the doctrine of paramountcy of federal statutes over provincial statutes when there is a conflict between the two legislative regimes. In *White Birch*, the court had to determine whether the deemed trust of section 49 SPPA would have had priority over the super-priority claim of the "DIP" lender authorized under the CCAA.

[21] The Petitioner Pension Committees challenge this analysis. They allege that the conclusion that section 49 SPPA does not create a deemed trust is wrong in law. They thus raise the issue again, but with certain additional and reformulated arguments which deserve consideration.

---

[7] *White Birch Paper Holding Co. (Arrangement relatif à)* 2012 QCCS 1679.

2014 QCCS 174 (CanLII)

[22] As for the Respondent IQ's position, its arguments follow in every respect the above-mentioned *White Birch* case. On the strength of this decision, IQ alleges that the Pension Committees' Motion has no legal basis and must be dismissed.

[23] Let us first of all analyze in detail how the situation presented itself in the *White Birch* case: while one of the largest paper mills in Canada was under the protection of the CCAA and an initial order suspended the special payments payable by the employer to several defined benefit pension plans, a motion was filed to order the debtor to continue paying those special payments. It was shortly after the decision of the Court of Appeal of Ontario in the *Indalex*[8] case, which recognized that this kind of obligation must be honoured by employers despite CCAA protection, because these sums are deemed to be held in trust by employers for the benefit of the pension plans concerned and this trust is not affected by the CCAA restructuring process.

[24] In the *White Birch* case, the petitioning unions, pension committees and retirement groups argued in particular that section 49 SPPA created, under Quebec law, the same kind of trust as the one established under Section 57 of the Ontario *Pension Benefits Act.*[9] The essence of the *White Birch* decision is that section 49 SPPA does not create a deemed trust by operation of law under Quebec law. Starting from there, the special payments or the balances of the solvency deficits of the pension plans do not benefit from any priority over other debts of the employer and are only ordinary unsecured debts.

[25] The present action, based on an almost identical factual frame, should therefore, at first blush, have the same result: in the absence of a trust enforceable against IQ, the Pension Committees' motion should be dismissed. However, as we shall see later, the facts of this case are not exactly the same and certain legal arguments pleaded in the proceedings or raised by the Court were not been addressed in the *White Birch* case.

THE PARTIES' ARGUMENTS

[26] The Pension Committees argue that even if the *White Birch* decision raises and answers the question as to whether section 49 SPPA creates a trust in Quebec law in the negative, the whole question should be revisited.

[27] First, the Pension Committees seek the undersigned's intervention as a judge acting under the authority of the CCAA, so that his decision be made within the framework of the general objective of the Act and … "to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets."[10]

[28] However, a preliminary question arises as to whether the undersigned is acting as a judge supervising the CCAA process or as a decision-maker delegated by the supervisory judge to hear and settle a dispute between two creditors who both allege that they have priority over the other's claim, in light of the Quebec legislative context.

---

[8] The Court of Appeal for Ontario's decision is reported at 2011 ONCA 265.

[9] R.S.O. 1990, c. P-8. Note, however, that in Ontario solvency deficits are affected by section 57(4) of said act, while in Québec, the contributions are affected by section 49 SPPA.

[10] *Century Services Inc. v. Canada (Attorney General)* [2010] 3 S.C.R. 379, paragraph [15].

2014 QCCS 174 (CanLII)

[29] The undersigned is of the opinion that he is not acting as a supervisory judge but as a delegated decision-maker (analogous to a "Claims Officer") designated as such under a claims determination protocol established under the CCAA.

2014 QCCS 174 (CanLII)

[30] The Pension Committees argue, firstly, that the SPPA is a law of public interest. This is not disputed. The principles set out in this regard, notably by Justice Pierre Dalphond in the *Hydro-Québec* decision[11] rendered by the Court of Appeal in 2005, are entirely apposite. The same applies to those in the *Monsanto*[12] and *Buschau*[13] cases.

[31] The Pension Committees also point out the fact that, unlike in the *White Birch*[14] and *Indalex*[15] cases, the dispute is not between the debtor's creditor and a "DIP" lender enjoying a super-priority under the CCAA. They are right and the undersigned does not intend to provide IQ with any super-priority under the CCAA. Besides, IQ does not claim any. IQ only invokes its status as a secured creditor under its universal hypothec.

PETITIONERS' POSITION ON THE DEEMED TRUST OF SECTION 49 SPPA

[32] The existence of a deemed trust created by section 49 SPPA remains the Pension Committees' main argument.

[33] Their reasoning is as follows:

a) First, section 49 SPPA reads as follows:

> **"Until contributions and accrued interest are paid into the pension fund or to the insurer, they are deemed to be held in trust by the employer, whether or not the latter has kept them separate from his property."**
>
> **(emphasis added)**

b) This section must be read in conjunction with article 1262 C.C.Q. which provides that:

> **"A trust is established by contract, whether by onerous title or gratuitously, by will, or, in certain cases, by operation of law. Where authorized by law, it may also be established by judgment."**

---

11 *APRHQ v. Hydro-Québec*, 2005 QCCA 304, paragraph 32.
12 *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* [2004] 3 S.C.R. 152, paragraph 38.
13 *Buschau v. Rogers Communications Inc.* [2006] 1 S.C.R. 973, paragraph 19.
14 2012 QCCS 1679, paragraphs 216 and 217.
15 2013 SCC 6, paragraphs 58 and 59.

(emphasis added)

Therefore, in the Petitioners' opinion, the employer is the settlor of the trust under section 49 SPPA, the trust patrimony is constituted by the contributions to be paid, the pension fund in question is the trustee and the transfer of property (or separation of property) is deemed to exist under the terms of section 49.

2014 QCCS 174 (CanLII)

c) Since the *Civil Code of Québec* provides, at article 1262, that a trust can be established, notably by operation of law, it follows, according to the Petitioner Committees, that the plain text of section 49 SPPA is sufficient to constitute a trust that is enforceable against BSI's creditors, whether they have priority or not.

d) The Pension Committees' theory excludes the application of article 1260 C.C.Q. to the trust established by operation of law. This is what they plead in their outline of arguments, at paragraphs 54, 55 and 56 [TRANSLATION]:

> **54. There are several types of trusts that are created in different ways, as set out in article 1262 CCQ.**
>
> > **1262. A trust is established by contract, whether by onerous title or gratuitously, by will, or, in certain cases, by operation of law. Where authorized by law, it may also be established by judgment.**
>
> **55. If a trust is established by contract, article 1260 CCQ provides that this trust must meet certain formal requirements.**
>
> > **1260. A trust results from an act whereby a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer.**
>
> **56. Article 1262 CCQ thus recognizes trusts established by operation of law. To create such a trust, the legislator does so through legislation, <u>without the trust so created having to meet the formal requirements set out at article 1260 CCQ</u>. The legislator therefore has the power to create trusts by way of a statutory provision of deemed trusts. This is precisely the effect of the wording of section 49 SPPA: this section states that regardless of whether or not the amounts were held separately from the property of the employer, they are nevertheless deemed to be held in trust in a distinct patrimony by appropriation for the benefit of BSI's Pension Committees.**
>
> **(emphasis added)**

e) Consequently, in the Petitioners' opinion, article 1262 C.C.Q. allows for the creation of a trust by sole operation of law and the statute may then provide for the existence of a valid trust even if the four conditions for the existence of a trust under the *Civil Code* set out at article 1260 C.C.Q. are not met. The statute may therefore specifically set aside one of

those conditions. According to them, this is exactly what section 49 SPPA does by eliminating the condition under article 1260 C.C.Q. requiring trust property to be separated from the settlor's patrimony.

f) Furthermore, the Petitioner Committees allege that their reasoning meets the requirements of article 1261 C.C.Q. At paragraph 57 of their outline of arguments, they plead [TRANSLATION]:

> **57. Article 1261 applies to all forms of trusts, including those established by operation of law.**
>
> > **1261. The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right.**

g) Thus, the Petitioner Committees allege that the amounts of the special payments that are due but unpaid constitute a patrimony by appropriation, autonomous and distinct from that of the settlor, under the legal control of a trustee and deemed separate from the property of the settlor (the employer), even if this patrimony has not been separated from the other property of this settlor.[16]

h) Thus, the concept of a deemed trust is sufficient for BSI's assets to be charged with a priority trust charge that removes them from the employer's property and from the common pledge of its creditors.[17]

i) In conclusion, the Petitioner Committees suggest that if section 49 SPPA needed to comply with the essential conditions of article 1260 C.C.Q., section 49 SPPA would have no

2014 QCCS 174 (CanLII)

---

[16] See paragraph 58, Petitioners' Outline of Arguments.

[17] See: "*Loi sur les régimes complémentaires de retraite, Annotations et Commentaires*", Régie des Rentes du Québec, Bibliothèque Nationale du Québec, 1998, p. 49-3 [TRANSLATION]:

"By a legal fiction or legal presumption, the legislator considers that the contributions to be paid and the accrued interest are held in trust. As the trust is a patrimony by appropriation distinct from that of the employer, the assets deemed to be held in trust are thus subtracted from the employer's property, which is the common pledge of its creditors, in accordance with article 2645 of the *Civil Code of Québec*.

…

This article could thus be invoked against the employer's creditor who takes possession of the bank account or of the latter's claims under, for example, articles 2721 or 2773 of the *Civil Code of Québec*,

…

See also Lyne Duhaime: "*Les aspects juridiques des régimes de retraite*", Publications CCH Ltée, Brossard, 2011, p. 138 [TRANSLATION]:

Until they are paid to the pension fund, contributions and accrued interest shall be deemed held in trust by the employer, whether or not the latter kept them separate from its property. This means that in a state of insolvency or bankruptcy, contributions and accrued interest would not be part of the employer's patrimony and would therefore be protected from the creditors' claims."

(emphasis added)

effect, which would be contrary to the basic principle of statutory interpretation that the legislature does not speak in vain, and we must perforce give meaning to a clear legislative text. Furthermore, the SPPA, being a statute of specific application, must be interpreted as taking precedence over a statute of general application such as the *Civil Code of Québec*.

2014 QCCS 174 (CanLII)

IQ'S POSITION ON THE DEEMED TRUST OF SECTION 49 SPPA

[34] IQ invokes in its favour the principles already set forth in the *AbitibiBowater*[18] and *White Birch*[19] cases.

[35] IQ insists, more specifically, that a trust established by operation of law, as provided for by article 1262 C.C.Q., must comply with all of the requirements of article 1260 C.C.Q. Citing, in particular, the author Jacques Beaulne[20], IQ points out that the four criteria of article 1260 CCQ must be met, namely:

a) the transfer of property from the settlor's patrimony;

b) to another patrimony;

c) which property is appropriated to a particular purpose;

d) which a trustee undertakes to hold and administer.

[36] Citing the *Bank of Nova Scotia v. Thibault*[21] and *White Birch*[22] cases, IQ reminds us that (as per Justice Deschamps in *Thibault*):

> [TRANSLATION] **… "The trust model cannot, however, be misused so as to encompass contracts under which the settlor retains all rights in the patrimony. I must therefore conclude that the Plan does not have the characteristics of a trust."**

---

[18] *AbitibiBowater (Arrangement relatif à)* 2009, QCCS 2028, Justice Danièle Mayrand, J.S.C. writes [TRANSLATION]:

> [34] (…) Besides, the Court of Appeal of Ontario, in the *Ivaco* case, while deciding on the scope of Section 57(3) of the *Pension Benefits Act* (the terms of which are to the same effect as those of Section 49 SPPA), states the following regarding deemed trusts;
>
> ...
>
> "This Legislative designation by itself does not create a real trust. If the province wants to require an employer to keep its unpaid contributions to a pension plan in a separate account, it must legislate that separation. It has not done so."

[19] *White Birch Paper Holding Company (Arrangement relatif à)* 2012, QCCS 1679, pages 43 and 44.

[20] Beaulne, Jacques, *Droit des fiducies*, 2nd edition. Collection Bleue, Montréal, 2005, page 129. See also to the same effect : Commentaires du Ministre de la justice, tome 1, le Code civil du Québec, art. 1260, page 748; Duhaime Lyne, op. cit. page 15; Claxton, John B. *Langage du droit de la fiducie*, Revue du Barreau EYB2002, RDB64, pages 6 to 8.

[21] [2004] 1 S.C.R. 758, page 22, paragraph 41. It should be specified here that it was not a deemed trust or one created by operation of law, but a contractual registered retirement savings plan.

[22] 2012 QCCS 1679, page 56, paragraph 169.

and that (by the undersigned in *White Birch*) [TRANSLATION]:

> **"The comparison to the situation before us is obvious: here, White Birch did not dispose of anything. It keeps the entire control over the property intended to be part of a trust and creates no patrimony by appropriation."**

2014 QCCS 174 (CanLII)

[37] IQ therefore argues that, since BSI never disposed of certain assets in order to constitute a distinct patrimony, there can be no real trust applicable in the present case.[23]

[38] Before proceeding further, it is necessary to establish the purpose of section 49 SPPA.

[39] Section 49 SPPA has been in effect since the statute was enacted in 1989.

[40] At the time, the new provisions of the *Civil Code of Québec* did not exist. The concept of a trust as it was found in the *Civil Code of Lower Canada* had nothing equivalent or comparable to the law as it currently stands.

[41] However, the kind of provision found in section 49 SPPA could already be found in several Quebec tax statutes. The notion of "presumed trust" or "deemed trust" was not unknown.

[42] But first, it is necessary to determine what such a deemed trust applies to, provided that it exists and is enforceable against IQ.

[43] Let us first examine the relevant provisions of the SPPA, cited by the parties in their respective submissions. When citing these provisions, some introductory comments will be necessary.

RELEVANT STATUTORY PROVISIONS OF THE SPPA

[44] The concept of a "pension plan" is set out in section 6 SPPA:

> **A pension plan is a contract under which retirement benefits are provided to the member, under given conditions and at a given age, the funding of which is ensured by contributions payable either by the employer only, or by both the employer and the member.**
>
> **Every pension plan, with the exception of insured plans, shall have a pension fund into which, in particular, contributions and the income derived therefrom**

[23] See, in particular, *White Birch Paper Holding Company (Arrangement relatif à)* 2012 QCCS 1679, at paragraphs 173, 174, 189 and 191 cited by IQ in its Outline of Arguments, pages 11 and 12, paragraphs 67 and 68.

are paid. The pension fund shall constitute a trust patrimony appropriated mainly to the payment of the refunds and pension benefits to which the members and beneficiaries are entitled.

2014 QCCS 174 (CanLII)

[45] According to IQ, this is a perfect and complete trust, created by operation of law and fully respecting the provisions of article 1260 C.C.Q. This statutory trust is, moreover, cited as a model of its kind.

[46] This section creates a pension fund, which is a trust patrimony distinct from the assets of the employer (the settlor), a trust appropriation (the contributions), under the responsibility of the trustees (the fund officers).[24]

[47] Sections 7, 8 and 9 SPPA[25] distinguish between plans that are defined benefit, defined contribution, insured and uninsured.

[48] In the case before us, the plans are uninsured defined benefit plans.

[49] Sections 37 to 52 SPPA establish the nature of various contributions, the obligation to pay them to the pension fund, as well as the modalities of collection and remittance of such contributions to the pension plans in question. There is no need to reproduce these sections, since all parties agree in recognizing that:

a) A *member contribution* is the active member's contribution while an *employer contribution* is the employer's contribution (section 37 SPPA);

b) A *current service contribution* is the amount that the employer is required to pay to the plan and represents all the pension benefits provided for by pension plans in respect of completed service. It usually consists of all of the member and employer contributions covering a given period of time (section 38 SPPA)[26].

---

[24] See also sections 14 to 18 SPPA which detail all the elements of a pension plan.

[25] 7. A defined contribution pension plan is a plan under which employer contributions and, where applicable, member contributions, or the method used for calculating them, are set in advance and the normal pension payable is based on the amounts credited to the member.

A defined benefit pension plan is a plan under which the normal pension payable is either a set amount, independent of the member's remuneration, or an amount corresponding to a percentage of the member's remuneration.

A defined benefit-defined contribution pension plan is a plan under which employer contributions and, where applicable, member contributions and the normal pension, or the method used for calculating them, are set in advance.

8. A contributory pension plan is a plan to which member contributions are paid by the members.

9. An insured pension plan is a plan under which refunds and pension benefits are at all times guaranteed by an insurer.

[26] See also sections 138 and 139 SPPA that determine the calculation of the current service contribution.

These three types of contributions are not in dispute in the present case. They have all been collected and remitted to the Petitioner pension funds.

c) Section 39 SPPA establishes another type of contribution: it is the *special payment*. This contribution aims at compensating, in accordance with certain terms determined by the plan's actuaries, the funding deficit and/or solvency deficit of the plan, made necessary by fluctuations of the pension fund's assets and all of the obligations of said fund towards its members and retirees.

2014 QCCS 174 (CanLII)

[50] The employer BSI's special payments are at issue here.

[51] As indicated above, all agree that the "contributions" remitted or to be remitted by the employer include all member contributions that were collected from the participating employees and the employer contribution, these two components constituting the current service contribution, to which the special payment is added if necessary.

[52] Then comes section 49 SPPA which states that "contributions" are deemed to be held in trust by the employer whether or not the latter has kept them separate from its property.

[53] It is thus established that the special payments are affected by the application of section 49 SPPA. It cannot be concluded that only the contributions collected or deducted by the employer are covered by this section.

[54] If section 49 SPPA creates a trust enforceable against IQ, it must therefore be concluded that the special payments that are unpaid since the Suspension Order of Justice Morawetz will be covered by this trust.

ADDITIONAL ARGUMENTS OF THE PENSION FUNDS

[55] The Pension Committees add that the other applicable SPPA provisions are sections 228 and 264.

[56] The Pension Committees argue that not only are the special payments covered by the deemed trust of section 49 SPPA, but that the solvency deficits are also covered. However, this argument cannot withstand analysis for long. Section 228 SPPA rather states that:

> **228. The amount to be funded to ensure full payment of the benefits of the members or beneficiaries affected by the withdrawal of an employer from a multi-employer pension plan or the termination of a pension plan shall constitute a debt of the employer. The amount to be funded shall be established at the date of termination.**
>
> **If, at the date of termination, the employer has failed to pay contributions into the pension fund or to the insurer, as the case may be, the debt shall be the amount by which the amount to be funded exceeds such contributions.**

> **In the case of a multi-employer plan, this section applies to every employer who is a party to the plan and to whom a group of benefits under subdivision 3 consisting of the benefits of the members or beneficiaries affected by the withdrawal or termination pertains.**
>
> **(emphasis added)**

2014 QCCS 174 (CanLII)

[57] This section is part of Chapter XIII of the SPPA, which deals with the rights of members and beneficiaries on winding-up.[27] This chapter also deals with the termination of a plan when there are no more active members.[28]

[58] A process of winding-up is then initiated[29] and when the assets of the plan are insufficient, section 228 applies: the employer is thus <u>indebted</u> to the plan. This <u>debt does not constitute a contribution</u>. Moreover, in none of the provisions of the SPPA that define a contribution is there any reference that could lead to the conclusion that the solvency deficits are covered by section 49 SPPA.

[59] It therefore seems clear that the deemed trust of section 49 SPPA can only apply to the "*contributions*" covered by this section and not to the solvency deficits. Moreover, the reimbursement of those deficits is governed by a set of specific rules.[30]

[60] Finally, the Petitioner Pension Committees invoke section 264 SPPA which reads as follows:

> **264. Unless otherwise provided by law, the following amounts or contributions are unassignable and unseizable:**
>
> **(1) all <u>contributions</u> paid <u>or payable</u> into the pension fund or to the insurer, with accrued interest;**
>
> **(2) all amounts refunded or pension benefits paid under a pension plan or this Act;**
>
> **(3) all amounts awarded to the spouse of a member following partition or any other transfer of benefits effected pursuant to Chapter VIII, with accrued interest, and the benefits deriving from such amounts.**
>
> **Except as far as they derive from additional voluntary contributions or represent a portion of the surplus assets allocated after termination of the plan, any of the above-mentioned amounts that have been transferred to a pension plan contemplated by section 98, with accrued interest, and any refunds of benefits resulting from such amounts, and any pension or payment**

---

[27] Sections 198 and following SPPA.
[28] Section 205(3) SPPA.
[29] Sections 208 and following SPPA.
[30] Sections 229-230 and 230.0.01 to 230.0.012.

> **having replaced a pension pursuant to section 92 are also unassignable and unseizable.**
>
> **(emphasis added)**

2014 QCCS 174 (CanLII)

[61] The Petitioner Committees plead that the notions of unassignability and unseizability of the "*contributions paid or payable into the pension fund*" reinforce their argument that these same contributions are subject to the deemed trust of section 49 SPPA. Conversely, if the due and unpaid contributions are covered by a deemed trust, section 264 SPPA must then apply to them and make them unassignable and unseizable. Thus, it would be impossible for the employer and its creditors to have any access to the amounts that represent or that may represent a contribution "*to be paid*" into the pension fund. By the combined effect of sections 49 and 264 SPPA, the unpaid special payments and the interest thereon would constitute priority claims over that of IQ.

[62] IQ's position is that this section may only be applied to the amounts that have clearly been identified as contributions and that have clearly been separated from the rest of the employer's patrimony. For example, if the employer opens a separate account in which it deposits the contributions to be paid into the pension fund, these amounts are then unassignable and unseizable. In IQ's opinion, section 264 SPPA may only apply if there is a separation of patrimonies.

[63] Otherwise, from a practical point of view, whenever an employer pays an amount of money to a creditor, the latter would then have to ensure (or the employer would have to demonstrate to this creditor) that all the contributions to be paid into the pension fund have been paid, and that the solvency deficit is adequately covered, or else see these amounts claimed by the concerned pension committee, as in the present case.

[64] This would, according to IQ, make no sense.

[65] It follows that an employer could never be certain that it has validly paid a debt to a third party, where the employer has, for example, been late in paying one of its contributions or failed to ensure its employees' pension plan(s) are adequately funded so as to avoid any risk of deficit.

[66] In IQ's opinion, the effect of this section is therefore to render unassignable and unseizable any contribution identified as such, which will be materially separated from the employer's patrimony in order to make a payment to a pension fund.

TRUST PROVISIONS OF THE *CIVIL CODE OF QUÉBEC*

[67] Since 1994, the Quebec law of trusts has undergone a complete transformation.

[68] All trusts under Quebec law have since then been subject to the rules laid down at articles 1260 and following C.C.Q.

[69] There is no longer any question in Quebec law of recognizing anything other than trusts under the Civil Code. Anglo-Saxon law trusts or those deriving from the Common Law in force in other Canadian provinces thus have no legal existence.

[70] The Civil Code is a law of general application because of its importance, because of the multitude of subjects it covers and because we find therein all of the provisions governing our civil law and our private law. However, the Petitioner Pension Plans submit that the SPPA is a law of specific application, the provisions of which must prevail over a law of general application.

[71] This proposition is somewhat more tenuous in light of the fact that an entire chapter on trusts has been inserted in the Civil Code. According to IQ, it cannot be concluded, from the mere fact that this chapter is inserted in the Civil Code, that its specific provisions in trust matters lose their status as a law of specific application, such that the SPPA's provisions take precedence over articles 1260 and following of the *Civil Code*.

[72] The relevant provisions of the *Civil Code* are as follows:

> **1260. A trust results from an act whereby a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer.**
>
> **(emphasis added)**

[73] This article, as we have seen, establishes the essential components of a trust under Quebec law:

- the existence of a settlor;
- the need for a transfer from his patrimony to another patrimony;
- specific property;
- appropriated to a particular purpose.

[74] Article 1261 provides as follows:

> **1261. The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right.**
>
> **(emphasis added)**

[75] There must therefore, according to this view, be a complete transfer of money or property to constitute an autonomous and distinct patrimony from that of the settlor, trustee and beneficiary and it must be such that none of them could assert any real right therein.

2014 QCCS 174 (CanLII)

[76] Article 1262 C.C.Q. specifies the ways in which a trust is established:

> **1262. A trust is established by contract, whether by onerous title or gratuitously, by will, <u>or, in certain cases, by operation of law</u>. Where authorized by law, it may also be established by judgment.**
>
> **(emphasis added)**

[77] If the law allows the creation of a trust under article 1262 C.C.Q., can the law derogate from the criteria of article 1260 C.C.Q.?

[78] Article 1263 C.C.Q. reads as follows:

> **1263. The purpose of an onerous trust established by contract may be to secure the performance of an obligation. If that is the case, to have effect against third persons, the trust must be published in the register of personal and movable real rights or in the land register, according to the movable or immovable nature of the property transferred in trust.**
>
> **In case of default by the settlor, the trustee is governed by the rules regarding the exercise of hypothecary rights set out in the Book on Prior Claims and Hypothecs.**

[79] It is interesting to note that, in order to be enforceable against third parties (here, IQ is a third party), a <u>contractual trust</u> must be published in the RPMRR (Register of Personal and Movable Real Rights) or in the Land Register. A trust created by operation of law enforceable against third parties does not appear to have the same requirement even where the trust secures the payment of a contribution from the employer to a pension plan.

[80] From the foregoing, the Court concludes that, if section 49 SPPA creates a true deemed trust that is enforceable against IQ:

a) this deemed trust will apply to all contributions not paid to the Petitioner Pension Committees;

b) more specifically, it will apply to special payments covered by the Suspension Order issued by Justice Morawetz;

c) however, this deemed trust will only apply to contributions and not to the solvency deficits, which are debts of the employer as provided in section 228 SPPA;

d) Section 264 SPPA may also apply to the unpaid contributions to the Pension Committees and not to the solvency deficits.

[81] It remains to be determined

2014 QCCS 174 (CanLII)

a) whether section 49 SPPA creates a deemed trust that is enforceable against IQ; and

b) in the affirmative, whether the property covered by such deemed trust is unassignable and unseizable, and thus excluded from the hypothecary security held by IQ.

2014 QCCS 174 (CanLII)

ANALYSIS

a) The deemed trust of Section 49 SPPA

[82] For the reasons that follow and despite the undersigned's analysis in the *White Birch* case, it must be concluded that section 49 SPPA creates a deemed trust that may be set up against IQ. However, the present case deals with a different issue than the *White Birch* and *Indalex* cases. In both of those matters, the court had to decide whether the special payments or the pension plans' solvency deficits took precedence over the claim of the "DIP" lender, a claim which was protected by a super-priority under the CCAA, while provincial law provided for the existence of a deemed trust applicable to the contributions or actuarial deficits in question.

[83] The present proceedings relate to the priority of claims of two creditors who do not benefit from super priorities, while the Debtor BSI is in the process of reimbursing its creditors according to their respective priorities as established by Quebec law. It is therefore necessary to determine whether, under Quebec law, the order of priority attached to each of these claims allows the Pension Committees to claim priority over IQ.

[84] Thus, even though we must conclude that a trust can be created by operation of law under section 49 SPPA, such a conclusion, if it had been reached in *White Birch*, would not have had any impact on the outcome of that case because the issue was quite different.

[85] Indeed, the final conclusion arrived at in *White Birch* remains the same, since the doctrine of the paramountcy of federal law ensures that the section 49 SPPA trust, if it had been acknowledged, would not have been granted priority over the super-priority claim of the DIP lender.[31]

[86] The issue of deemed trusts in Quebec law has given rise to several decisions in the last 20 years, especially in tax matters and almost exclusively in the context of bankruptcy. However, even if the deemed trust of section 49 SPPA is found in a very different context, the way our courts have analyzed the deemed trust in tax matters allows us to understand how we must analyze the one purportedly created by section 49 SPPA.

[87] We must go back to the *Nolisair*[32] case where the Court of Appeal reversed a decision of Justice Roland Durand dated October 16, 1994.[33] In that case, the Ministry of Revenue claimed

---

[31] See *Century Services*, above.
[32] *Re: Faillite de Nolisair International Inc. v. Le Sous-ministre du revenu du Québec* (1997) AZ 97011738 (C.A.).

the benefit of a deemed trust and filed a proof of priority claim covering all of the debtor's assets. The trustee rejected this claim, alleging the absence of such a trust because *Nolisair* had not kept the deductions at source collected from its employees in an account separate from its own patrimony. The Deputy Minister of Revenue argued in reply that section 20 of the *Act Respecting the Ministère du Revenu*[34] (the "ARMR") created such a deemed trust.

[88] Justice Durand decided at first instance that section 20 ARMR did not create a trust within the meaning of section 67(3) of the *Bankruptcy and Insolvency Act*.

[89] In parallel with the *Nolisair* case, Justice Roger Banford decided, in *Sécurité Saglac (1992) Inc. v. Sous-ministre du revenu du Québec*,[35] that the same section 20 ARMR did create a deemed trust.

[90] Both cases were heard at the same time by the Court of Appeal and were the subject of two separate decisions, one allowing the appeal from Justice Durand's decision[36] and the other dismissing the appeal from Justice Banford's.[37]

[91] The Court of Appeal, by a two-to-one majority, acknowledged the existence of a deemed trust created by section 20 ARMR, which then read as follows:

> **20. Every person who <u>deducts, withholds or collects</u> any amount under a fiscal law is deemed to hold it in trust for her Majesty in right of Québec.**
>
> **<u>Any such amount must be kept</u> by the person who deducted, withheld or collected it, <u>distinctly and separately from his own funds</u> and, in the case of a winding-up, assignment or bankruptcy, an amount equal to the amount thus deducted, withheld or collected <u>must be considered to form a separate fund not forming part of the property</u> subject to a winding-up, assignment or bankruptcy.**
>
> **However, the person may, when he files a return with the Minister under section 468 or 470 of the Act respecting the Québec sales tax and amending various fiscal legislation (*1991, chapter 67*), withdraw from the total funds held separately and distinctly from his own funds, the amounts that he is entitled to deduct and that he has actually deducted in the calculation of the amount to be remitted.**

[92] We note, and this is the point, that the text covers amounts "deducted, withheld or collected" by a person for tax purposes, and not amounts owed by that person. Thus, the

---

[33] 700-11-000069-932 (S.C. St-Jérôme) AZ-94021150.
[34] R.S.Q. c. M-31.
[35] S.C. Chicoutimi, no. 150-11-000012-930.
[36] 1997 CanLII 10022 (QC. CA);
[37] 1997 CanLII 10026 (QC. CA).

2014 QCCS 174 (CanLII)

amounts in question were amounts that did not belong and never did belong to the person in question.

[93] It will also be noted that section 20 ARMR, as it then was, did not contain the following words, which were added a few months later pursuant to an amendment[38]:

> **"… whether or not the amount has in fact been held separately from the patrimony of that person or from his own funds."**

[94] Incidentally, it is because of the absence of these words that Justice Durand refused to recognize the deemed trust of section 20 ARMR. We note, however, the presence of these same words in section 49 SPPA.

[95] Despite the benefit of this amendment, Justice Banford (in the *Sécurité Saglac* case) at first instance and Justice Chamberland in the Court of Appeal, based on an analysis of the words … "*an amount equal to the amount thus deducted, withheld or collected must be considered to form a separate fund*" … in the second paragraph of section 20 ARMR, decided that the text was sufficient for this section to create a deemed trust by operation of law. Justice Chamberland concluded in these terms [TRANSLATION]:[39]

> **<u>The deemed trust</u>**
>
> **For the purposes of this opinion, by "deemed trust" I mean the trust that <u>exists only because the legislator</u>, whether federal or provincial, <u>says that it exists, whereas, in fact, it does not have all the features of a trust</u>. The existence of a trust depends on the combined presence of <u>three certainties</u>: 1) certainty about the <u>intention of the settlor to create a trust</u>, 2) certainty about the <u>identity of the beneficiary of the trust</u>, and 3) certainty about the <u>property that is subject to the trust</u>, in the sense that the property must be held by the trustee in a way that is <u>autonomous and distinct from his own patrimony</u> (L.W. HOULDEN and C.H. MORAWETZ, <u>Bankruptcy and Insolvency Law of Canada</u>, 3rd Ed., updated 1996 (No 7), at pages 3-17 to 3-30, chapter entitled "Trust Property").**
>
> **…**
>
> **<u>A deemed trust is one of the "devices which legislators often employ in order to recover moneys which ought to have lawfully been paid to them but have been unlawfully misappropriated by a debtor who subsequently encounters financial difficulty and is forced into winding up its business"</u> (<u>Royal Bank of Canada</u> *v.* <u>Sparrow Electric Corp. 1997 CanLII 377 (SCC)</u>, [1997] 1 S.C.R. 411, Justice Gonthier, at page 435).**

[38] Section 39, An *Act to amend the Tobacco Tax Act, The Act respecting the Ministère du Revenu and other fiscal legislation*, S.Q. 1993 c. 79 assented to December 17, 1993 and applicable to any bankruptcy, winding-up or assignment occurring after April 23, 1993.

[39] Opinion of Justice Chamberland in *Sécurité Saglac*.

2014 QCCS 174 (CanLII)

Returning to the first question raised by this dispute, it thus involves deciding whether section 20 of the *Act Respecting the Ministère du Revenu* creates a deemed trust.

The appellant pleads that it does not because some words, in its opinion essential to the creation of a deemed trust – and found, for example, in paragraph 5 of section 227 of the federal *Income Tax Act* – are not there. In short, without the words "whether or not the amount has in fact been held separately from the patrimony of that person or from his own funds", section 20 of the *Act respecting the Ministère du Revenu* would not create a deemed trust; it would only confirm the existence of a real trust, only enforceable against the mass of creditors if the deducted amounts were actually held separately by the debtor, which is not the case here.

I do not share this view.

…

In fact, the text of section 20 is different from the one studied by the Superior Court, in 1977, in the Joe's Steak House case, supra. The legislator added the words – "an amount equal to the amount thus deducted, withheld or collected" – that have, in my opinion, the same effect – the creation of a deemed trust – even though the words "whether or not the amount has in fact been held separately from the patrimony of that person or from his own funds", used in paragraph 227(5) of the federal ITA, are not there.

Let's compare the text of Section 20 at the time of the Joe's Steak House case, supra, (in 1979) and during the period in dispute (in 1992):

1979	1992
Every person who deducts, withholds or collects any amount under a fiscal law is deemed to hold it in trust for her Majesty in right of Québec.	**Every person who deducts, withholds or collects any amount under a fiscal law is deemed to hold it in trust for her Majesty in right of Québec.**
Any such amount must be kept by the person who deducted, withheld or collected it, distinctly and separately from his own funds and in the event of a winding-up, assignment or bankruptcy, must be considered to form a separate fund not forming part of the property subject to a winding-up, assignment or bankruptcy.	**Any such amount must be kept by the person who deducted, withheld or collected it, distinctly and separately from his own funds and, in the event of a winding-up, assignment or bankruptcy, an amount equal to the amount thus deducted, withheld or collected must be considered to form a separate fund not forming part of the property subject to the winding-up, assignment or bankruptcy.**

2014 QCCS 174 (CanLII)

[…]

(emphasis added)

The first paragraph is identical: the legislator expressly provides, using the words "is deemed", that a person who deducted, withheld or collected any amount under a fiscal law holds this amount in trust and that her Majesty in right of Québec is the beneficiary of that trust. The beginning of the second paragraph is also identical; the legislator creates an obligation for the person to hold the amount so deducted, withheld or collected "distinctly and separately from his own funds". If this is the case, there is a real trust and, in the event of a bankruptcy, these amounts constitute the "property held by the bankrupt in trust for any other person", within the meaning of section 67(1)(a) of the BIA, and they are not part of the bankrupt's property.

The second part of the second paragraph was amended by adding the words "an amount equal to the amount thus deducted, withheld or collected …".[2] The addition of these words can only be explained, in my opinion, by the intention of the legislator to create a deemed trust and distinguish it from the real trust by expressly eliminating the need to respect the third essential condition for the existence of a trust, which is for a trustee to hold the property that is subject to the trust in a way that is autonomous and distinct from his own patrimony. Indeed, the words "an amount equal to the amount thus deducted, withheld or collected" are unnecessary in a context where the bankrupt keeps an account distinct and separate from its own funds for the amounts deducted, withheld or collected; the words only make sense if the bankrupt does not keep such a distinct and separate account. In this context, those words were sufficient to conclude as to the creation of a deemed trust; the first paragraph and the beginning of the second paragraph of section 20 addressed a real trust while the first paragraph and the end of the second addressed a deemed trust.

This is the basis for my conclusion that the legislator has created a deemed trust even if it did not use all of the words of the federal legislator from paragraph 5 of section 227. The use of the words "an amount equal to the amount thus deducted, withheld or collected" rendered, in my opinion, unnecessary the use of the words "whether or not the amount has in fact been held separately from the patrimony of that person or from his own funds".

(emphasis added)

[96] This long citation shows the way in which the Court of Appeal concluded as to the existence of a deemed trust based on the words chosen by the legislator. By applying this kind of analysis to section 49 SPPA, we must first question whether the text of this section is clear and complete enough to conclude as to the existence of a deemed trust. Such an exercise satisfies the Court that we must answer this question affirmatively, especially when noting that section 49 SPPA contains the words then presumed missing in section 20 ARMR and that later ensured that section 20 ARMR does indeed create a deemed trust.

2014 QCCS 174 (CanLII)

[97] Thus, for Justice Chamberland, the words used by the legislator in the former section 20 ARMR were sufficiently clear to establish a deemed trust, causing deductions deducted, withheld or collected by the debtor to constitute a well-defined trust patrimony, "... considered to form a separate fund not forming part of the property ..." of said debtor in the context of an assignment or a bankruptcy.

2014 QCCS 174 (CanLII)

[98] Despite the interest and the logic of the reasoning, the Supreme Court did not see things the same way.

[99] In both the *Nolisair* and *Sécurité Saglac* cases, Justice Fish, then on the Court of Appeal, dissented. In his view, in the absence of the words added to section 20 ARMR by the 1993 amendment, that section did not create a deemed trust.[40] He wrote:

> **"In fact and in effect, these deductions simply consisted in book keeping entries: no moneys were actually retained by the employer in an identifiable form, separate from the employer's own funds."**

[100] In Justice Fish's opinion, the 1993 amendment remedied the problem for the future but not for the two cases before the Court, since the facts arose on a date prior to the coming into force of the amendment. He agreed with the reasoning of Justice Durand in *Nolisair* and disagreed with the reasoning of Justice Banford in *Sécurité Saglac*.

[101] However, a careful reading of Justice Fish's opinion shows that the 1993 amendment only had the effect of rendering section 20 ARMR compatible with section 67 of the *Bankruptcy and Insolvency Act* and section 227 of the *Income Tax Act*.

[102] Justice Fish thus wrote, and this is where he disagrees with the reasoning of Justice Chamberland:

> **As I have already mentioned, the Minister of Revenue seeks to recover, from an estate in bankruptcy, income tax and pension contributions that were deducted at source by the debtor, but not separated from the rest of the debtor's patrimony, and never remitted to the government.**
>
> **To succeed on this claim, <u>the Minister must establish that s. 20 MRA, prior to its amendment in 1993, created a deemed trust "substantially similar to subs. 227(4) of the Income Tax Act"</u>, within the meaning of s. 67(3)(a). The Minister must demonstrate as well that the Crown's beneficial interest under the trust attached to unremitted deductions at source <u>whether or not the amounts deducted were held separately from the patrimony of the bankrupt debtor</u>.**
>
> **Deductions at source under the ITA are in law the property of the employee. The employer, at the point of withholding, therefore holds the amounts**

---

[40] Opinion of Justice Fish in *Nolisair* in the Court of Appeal.

deducted as trustee of a fund belonging to the employees, not to the Crown. It is subs. 227(4) ITA that has the effect of making Her Majesty the beneficiary under that trust.

When the employer fails to retain the deductions in a separate fund, however, Her Majesty's beneficial interest becomes intermingled with the employer's general assets and "Her Majesty's claim ... then becomes that of a beneficiary under a non-existent trust".

Here, the employer failed to separate the source deductions from his own property. Accordingly, the deemed trust created by s. 20 MRA, if it were "substantially similar" to the deemed trust of subs. 227(4) ITA, would likewise make the Minister of Revenue "a beneficiary under a non-existent trust".

In considering whether a provincial deemed trust is substantially similar to the federal standard created by subs. 227(4), however, one cannot insulate the text of subs. 227(4) from its context. Subsection 227(5) is linked by reference to subs. 227(4) and, together, the two subsections may be said to create a coherent whole in the context of a bankruptcy.

For the purposes of disposing of the appeal, we should therefore, I believe, take into account the impact of subs. 227(5) ITA on the kind of deemed trust that will meet the requirements of subs. 67(3) BIA. In my view, we are also bound to read subs. 67(3) in a manner that respects the evident intent of Parliament to place deemed trusts, provincial and federal, on the same footing with respect to priority in the event of a bankruptcy.

To benefit from the full protection afforded by subs. 67(3), the deemed trust referred to in subs. 227(4) ITA must also conform to subs. 227(5). And to be eligible for that same protection, a provincial provision creating a deemed trust must be "substantially similar", having essentially the same reach and complying with the same basic requirements.

In particular, the provincial deemed trust must, to achieve the result of its federal counterpart under subs. 227(5), explicitly impress upon the amount of the unremitted deductions at source whether or not that amount has in fact been kept separate and apart from the debtor's own moneys or from the assets of the estate.

Prior to its amendment in 1993, s. 20 MRA did not, in my respectful view, meet this test.

Accordingly, even on the assumption that subs. 67(3) BIA authorized the creation by Quebec of a deemed trust substantially similar to the type contemplated either by subs. 227(4) ITA read alone, or by subss. 227(4) and (5) read together, I would feel bound to dismiss the appeal.

(emphasis added)

[103] Recalling thereafter the cases of *Re: Deslauriers Construction Productions Ltd* (1970) 3 O.R. 599 (C.A.), *Dauphin Plains Credit Union Ltd v. Xyloid Industries Ltd* [980] (sic) 1

2014 QCCS 174 (CanLII)

SCR 1182, *British Columbia v. Henfrey Samson Bélair Ltd* [1989] 2 SCR 24 and *Royal Bank of Canada v. Sparrow Electric Corp.* [1997] 1 SCR 411, Justice Fish concluded that the text of section 20 ARMR, as it existed prior to the 1993 amendment, did not meet the requirements of sections 67 BIA and 227(5) of the federal *Income Tax Act*. The text of the 1993 amendment had the effect of solving the problem of the deemed trust of section 20 ARMR but we have to admit that the text of section 49 SPPA contains "sacramental" words confirming the existence of a deemed trust, whether or not the employer has kept the contributions it must remit to the Petitioner Pension Committees separate from its other property.

2014 QCCS 174 (CanLII)

[104] The *Saglac* and *Nolisair* cases were appealed to the Supreme Court of Canada[41] and in a short and unanimous decision, the decisions of the Court of Appeal were reversed in favour of Justice Fish's dissent, without adding anything.

[105] The combined opinion of Justices Chamberland and Fish demonstrates in fact one thing only: for a deemed trust to exist, it is necessary that the language used to constitute it is unequivocal and that it demonstrates that the amounts or property deemed held in trust really are held as such, even without separating the said property or amounts from the remaining property of the debtor.

[106] This is what appears to exist in the present case, from the reading of section 49 SPPA.

[107] Nevertheless, several years later, in *Québec (Sous-ministre du Revenu) v. De Courval*, 2009 QCCA 409[42], the Court of Appeal had to determine the conditions for the existence of a trust within the meaning of section 20 of the *Act Respecting the Ministère du Revenu*. Justice Dutil wrote [TRANSLATION]:

> **[10] Based on a judgment of the Superior Court in the case of the bankruptcy of *Chibou-Vrac inc. (Syndic de)* and *Groupe Thibault Van Houtte & Associés ltée*, the trial judge concluded that QST may be held in a deemed trust within the meaning of Section 20 *ARMR*. However, for these amounts of money not to be considered the property of the bankrupt, for the purposes of paragraph 67(1)a) of the *Bankruptcy and Insolvency Act (BIA)*, it must be a real trust, which is not the case here.**
>
> **[11] The trial judge also believes that the *obiter dictum* of Justice Letarte, in the case of *Giguère (Syndic de) v. Lloyd Woodfine* [*Giguère*], regarding amounts held in trust, "cannot serve as a legal basis which would result in a profound change to the prior jurisprudence on the question of the application of sections 15.3.1 and 20 of the Act."**

[108] After quoting the relevant provisions of the *Act Respecting the Ministère du Revenu* and the *Bankruptcy and Insolvency Act*, Justice Dutil put the problem in these terms [TRANSLATION]:

---

[41] 1999, 1 SCR 759.
[42] On appeal of a decision of the undersigned in Services Sécurité Québec.

2014 QCCS 174 (CanLII)

[19] The trustee contends that section 20 *ARMR* confers no right of ownership upon the fiscal authorities with respect to amounts due as QST. Based on a recent decision of this Court in *9083-4185 Québec inc. (Syndic de*) *and Caisse populaire Desjardins de Montmagny* [*9083-4185 Québec inc.*], the trustee pleads that paragraph 67(2) *BIA* ensures that the property held in trust for Her Majesty, through a legislative provision, remains the bankrupt's property. Only that held by a bankrupt person for another person in a real trust is excluded from the bankruptcy. In addition, since the amounts held in trust are intermingled with other funds, they are no longer identifiable. Consequently, the Minister cannot be their owner.

…

[28] Section 20 ARMR provides that a person who collects an amount payable under a tax law is deemed to hold it for the State, separated from his patrimony and his own funds. It specifies that in case of non-payment to the State within the time and in the prescribed manner, this amount is deemed to constitute a separate fund not forming part of the property of that person.

[29] Pursuant to this section, there is thus a presumption that the amounts held by the Bank, as at July 10, 2006, were held in trust for the State. However, these amounts collected by the debtor had been deposited in an account where it also held other amounts from different sources. It was therefore only a trust created by the ARMR and not a real trust.

[30] In the case of *British Columbia v. Henfrey Samson Belair Ltd.* [*British Columbia*], the Supreme Court explained that when the tax money is mingled with other money, there is no more common law trust:

… At the moment of collection of the tax, there is a deemed statutory trust. At that moment the trust property is identifiable and the trust meets the requirements for a trust under the principles of trust law. The difficulty in this, as in most cases, is that the trust property soon ceases to be identifiable. The tax money is mingled with other money in the hands of the merchant and converted to other property so that it cannot be traced. At this point it is no longer a trust under general principles of law. In an attempt to meet this problem, s. 18(1)(*b*) states that tax collected shall be deemed to be held separate from and form no part of the collector's money, assets or estate. But, as the presence of the deeming provision tacitly acknowledges, the reality is that after conversion the statutory trust bears little resemblance to a true trust. …

[31] I therefore conclude that the notice sent under section 15 *ARMR* has not transformed this deemed trust into a real trust, which could have in fact ensured that these assets are not included in the property of the bankrupt debtor pursuant to paragraph 67(1)a) *BIA*.

> **[32] Indeed, paragraph 67(2) *BIA* provides that, subject to certain exceptions (including, among others, deductions at source), property shall not be regarded as held in trust for the purposes of the *BIA* unless it would be so regarded in the absence of statutory provision. But this is precisely so in the present case: the amounts were deemed to be held in trust under section 20 *ARMR*, but there was no real trust.**

2014 QCCS 174 (CanLII)

[109] This decision thus followed the logic of the Supreme Court case of *Sparrow Electric*[43], where it was established that the bank security granted to the Royal Bank of Canada pursuant to section 427 of the *Bank Act* (BA)[44] took priority over the deemed trust found in section 227(5) of the *Income Tax Act* (ITA)[45].

[110] In *Sparrow*, the Supreme Court held that the security of section 427 of the *Bank Act* had been put in place before the debtor failed to remit to the State the tax withholding provided for by section 227(5) ITA. Therefore, in the absence of any other provision giving priority ranking to the deemed trust, the terms of the bank security were not affected by the subsequent default of the debtor towards the Federal Crown.

[111] Here is how Justice Gonthier (dissenting on the merits) puts the problem:

> **23 It has been unfortunate that the development of the case law, to this point, has not inspired the degree of certainty which is so manifestly desirable in this area of commercial law. Indeed, the jurisprudence has been referred to as a "troubled area of the law" (*Manitoba (Minister of Labour) v. Omega Autobody Ltd. (Receiver of)* 1989 CanLII 178 (MB CA) (1989), 59 D.L.R. (4th) 34 (Man. C.A.), at p. 36), and has been the subject of, at times, scathing academic criticism (Roderick J. Wood, "Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*" (1995), 10 *B.F.L.R.* 429, and Roderick J. Wood and Michael I. Wylie, "Non-Consensual Security Interests in Personal Property" (1992), 30 *Alta. L. Rev.* 1055). The general view, I believe, has been summarized by Professor Wood in his most helpful case commentary, "Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*", *supra*, at p. 430: "[i]t is somewhat of an embarrassment that after more than two decades we still cannot confidently predict the outcome of a priority dispute between a deemed trust and a security interest". The above judicial and academic commentary, I believe, invites this Court to proceed steadfastly towards the pronouncement of clear principles to be applied in determining the priority between statutory trusts and consensual security interests.**

[112] Contrary to the majority holding, Justice Gonthier found principles in the *Sparrow Electric* case that allowed him to conclude as to the existence of a priority ranking of the Crown's deemed trust over the bank's conventional security. Despite the length of the text that follows, it is necessary to reproduce it:

---

[43] *Royal Bank of Canada v. Sparrow Electric Corp*. [1997] 1 SCR 411.
[44] SC 1991, c. 46.
[45] RSC 1985, c. 1.

2014 QCCS 174 (CanLII)

30 This Court recently had occasion to review the principles of law to be applied to the interpretation of tax legislation. In *Alberta (Treasury Branches) v. M.N.R.; Toronto-Dominion Bank v. M.N.R.*, 1996 CanLII 244 (SCC), [1996] 1 S.C.R. 963, at pp. 975-76, Cory J. quoted this Court's decision in *Friesen v. Canada*, 1995 CanLII 62 (SCC), [1995] 3 S.C.R. 103, at pp. 112-14, <u>where the relevant principles were summarized as follows</u>:

> **In interpreting sections of the *Income Tax Act*, the correct approach, as set out by Estey J. in Stubart Investments Ltd. v. The Queen, 1984 CanLII 20 (SCC), [1984] 1 S.C.R. 536, is to <u>apply the plain meaning rule</u>. Estey J. at p. 578 relied on the following passage from E. A. Driedger, Construction of Statutes (2nd ed. 1983), at p. 87:**
>
>> **Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.**
>
> **The principle that <u>the plain meaning of the relevant sections of the Income Tax Act is to prevail unless the transaction is a sham</u> has recently been affirmed by this Court in Canada v. Antosko, 1994 CanLII 88 (SCC), [1994] 2 S.C.R. 312. Iacobucci J., writing for the Court, held at pp. 326-27 that:**
>
>> **While it is true that the courts must view discrete sections of the *Income Tax Act* in light of the other provisions of the Act and of the purpose of the legislation, and that they must analyze a given transaction in the context of economic and commercial reality, such techniques cannot alter the result where the words of the statute are clear and plain and where the legal and practical effect of the transaction is undisputed: *Mattabi Mines Ltd. v. Ontario (Minister of Revenue)*, 1988 CanLII 58 (SCC), [1988] 2 S.C.R. 175, at p. 194; see also *Symes v. Canada*, 1993 CanLII 55 (SCC), [1993] 4 S.C.R. 695.**
>
> **I accept the following comments on the *Antosko* case in P. W. Hogg and J. E. Magee, *Principles of Canadian Income Tax Law* (1995), Section 22.3c) "Strict and purposive interpretation", at pp. 453-54:**
>
>> **It would introduce intolerable uncertainty into the Income Tax Act if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision.... (The *Antosko* case) is simply a recognition that "object and purpose" can play only a limited role in the interpretation of a statute that is as precise and detailed as the Income Tax Act. When a provision is couched in specific language that admits of no doubt or ambiguity in its application to the facts, then the provision must be applied regardless of its object and purpose. Only when the statutory language admits of some doubt or ambiguity in its application to the facts is it useful to resort to the object and purpose of the provision.**

At pp. 976-77 of *Alberta (Treasury Branches)*, *supra*, Cory J. concluded:

> **Thus, when there is neither any doubt as to the meaning of the legislation nor any ambiguity in its application to the facts then the statutory provision must be**

applied regardless of its object or purpose. I recognize that agile legal minds could probably find an ambiguity in as simple a request as "close the door please" and most certainly in even the shortest and clearest of the ten commandments. However, the very history of this case with the clear differences of opinion expressed as between the trial judges and the Court of Appeal of Alberta indicates that for able and experienced legal minds, neither the meaning of the legislation nor its application to the facts is clear. It would therefore seem to be appropriate to consider the object and purpose of the legislation. Even if the ambiguity were not apparent, it is significant that in order to determine the clear and plain meaning of the statute it is always appropriate to consider the "scheme of the Act, the object of the Act, and the intention of Parliament".

31 In the present case, I find the language in s. 227(5) to be clear and unambiguous, especially when viewed as a provision directly following s. 227(4), which renders amounts unremitted as held in trust for Her Majesty. In my view, this section is designed to, upon liquidation, assignment, receivership or bankruptcy, seek out and attach Her Majesty's beneficial interest to property of the debtor which at that time is in existence. The trust is not in truth a real one, as the subject matter of the trust cannot be identified from the date of creation of the trust: D. W. M. Waters, *Law of Trusts in Canada* (2nd ed. 1984), at p. 117. However, s. 227(5) has the effect of revitalizing the trust whose subject matter has lost all identity. This identification of the subject matter of the trust therefore occurs *ex post facto*. In this respect, I agree with the conclusion of Twaddle J.A. in *Roynat*, *supra*, where he states the effect of s. 227(5) as follows, at p. 647: "Her Majesty has a statutory right of access to whatever assets the employer then has, out of which to realize the original trust debt due to Her".

32 I add that this approach was taken to a provision substantially similar to s. 227(5) by Gale C.J. in *Re Deslauriers Construction Products Ltd.*, *supra*, at p. 601, whose reasoning was affirmed by this Court in *Dauphin Plains*, *supra*. The *Deslauriers* case, *supra*, involved a priority competition between a trustee-in-bankruptcy and a statutory deemed trust provision created under the *Canada Pension Plan*, S.C. 1964-65, c. 51. Section 24(3) and (4) of that Act stated:

24....

(3) Where an employer has deducted an amount from the remuneration of an employee as or on account of any contribution required to be made by the employee but has not remitted such amount to the Receiver General of Canada, the employer shall keep such amount separate and apart from his own moneys and shall be deemed to hold the amount so deducted in trust for Her Majesty.

(4) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (3) is deemed to be held in trust for Her Majesty shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.

2014 QCCS 174 (CanLII)

2014 QCCS 174 (CanLII)

This Court in *Dauphin Plains*, *supra*, at p. 1198, approved of Gale C.J.'s conclusion as to the interpretation of s. 24(4) (at p. 601 of *Deslauriers*, *supra*):

> **It seems to us that s-s. (4), and particularly the concluding six words thereof, were inserted in the Act specifically for the purpose of taking the moneys equivalent to the deductions out of the estate of the bankrupt by the creation of a trust and making those moneys the property of the Minister.**

33 This interpretation of s. 227(5) also has the virtue of being consistent with the scheme of distribution under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3. Section 67 of that Act expressly removes claims for unremitted payroll deductions, which are held in trust (*inter alia*) pursuant to s. 227 *ITA*, from the bankrupt's estate:

> **67. (1) The property of a bankrupt divisible among his creditors shall not comprise**
>
> **(*a*) property held by the bankrupt in trust for any other person,**
>
> **...**
>
> **(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.**
>
> **(3) Subsection (2) does not apply in respect of subsections 227(4) and (5) of the *Income Tax Act*, subsections 23(3) and (4) of the *Canada Pension Plan* or subsections 57(2) and (3) of the *Unemployment Insurance Act*....**

It is to be observed that in addition to attaching Her Majesty's interest to the debtor's property upon the triggering of any of the events mentioned in s. 227(5), the deemed trust operates to the benefit of Her Majesty in a secondary manner. Namely, s. 227(5) permits Her Majesty's interest to attach to collateral which is subject to a fixed charge if the deductions giving rise to Her Majesty's claim arose before that charge attached to that collateral. This proposition flows from the decision of this Court in *Dauphin Plains*, *supra*. *Dauphin Plains* involved a determination as to priority in respect of the proceeds of a liquidation sale of a receiver-manager. In that case, the claims of Her Majesty (*inter alia*) arose by virtue of the non-remittance of payroll deductions in regard to payments under the *Canada Pension Plan*, R.S.C. 1970, c. C-5, and the *Unemployment Insurance Act*, *1971*, S.C. 1970-71-72, c. 48. Those Acts provided Her Majesty with claims pursuant to deemed trusts whose language is substantially similar to the version of s. 227(4) and (5) at issue in this appeal. In finding that these claims took precedence over a

floating charge which had crystallized after the deductions at issue were actually made, Pigeon J. stated at p. 1199:

> **It should first be observed that, for reasons similar to those on which the decision in the *Avco* case, *supra*, was based, the claim for Pension Plan and Unemployment Insurance deductions cannot affect the proceeds of realization of property subject to a fixed and specific charge. From the moment such charge was created, the assets subject thereto, were no longer the property of the debtor except subject to that charge. The claim for the deductions arose subsequently and thus cannot affect this charge in the absence of a statute specifically so providing. However, the floating charge did not crystallize prior to the issue of the writ and the appointment of the receiver. In the present case it makes no difference which of the two dates is selected, both are subsequent to the deductions. [Emphasis added.]**

Thus, s. 227(5) alternatively permits Her Majesty's interest to attach retroactively to the disputed collateral if the competing security interest has attached after the deductions giving rise to Her Majesty's claim in fact occurred. Conceptually, the s. 227(5) deemed trust allows Her Majesty's claim to go back in time and attach its outstanding s. 227(4) interest to the collateral before that collateral became subject to a fixed charge. The same result occurs when a statutory lien attaches prior to the mortgaging of disputed collateral. In *Avco*, *supra*, this Court *per* Martland J. commented upon just such a scenario, at p. 706:

> **From that date, the lien attaches to the employer's property and, as provided in subs. (1), it will take priority over any other claim, including an assignment or mortgage. In other words, after the lien attaches, its priority is unaffected by a disposition of his property made by the employer. Where a mortgage has been made prior to the lien attaching, it is not affected. The lien will only attach to the employer's equity in that property. [Emphasis added.]**

[113] Justice Gonthier thus recognizes in these statements that the provisions of the ITA created a deemed trust, but that these provisions may not be sufficient to give priority ranking to the Crown's claim. To do this, it was necessary for section 227(5) ITA (as it then existed) to grant such priority.

[114] Justice Gonthier adds:

76 In the case at bar, the GSA contained an express licence permitting Sparrow to sell inventory in the course of its business and use the proceeds available; the BAS contained an implied licence to this effect. While it is true that the GSA contained a trust proceeds clause, I find that this cannot have the effect of limiting the scope of the licence where the real arrangement between the parties was, as expressly stated, that Sparrow could use the proceeds of inventory in the course of its business. The bank in this case was not a small inventory financier who required Sparrow to immediately remit proceeds of inventory to it. To the contrary, the bank was a large scale lender who permitted Sparrow to use inventory sales to maintain the viability of its

2014 QCCS 174 (CanLII)

enterprise. For these reasons, applying Professor Wood's test, I find that under the licence to "sell ... inventory" "in the ordinary course of ... business" and "use [the] [m]oneys available" the bank permitted Sparrow to sell inventory to pay wages and, necessarily, payroll deduction obligations.

77 For all these reasons, through the application of the licence theory, it is my conclusion that the appellant's s. 227(5) deemed trust must take priority over the bank's security interests in the disputed collateral. The trust fund representing the deducted amounts, while without identified subject matter from the date of its inception, is capable of identifying property subject to that trust *ex post facto*. To reiterate, the bank consented to the reduction in its security in inventory in order to pay wage deductions at the time those deductions were made, and s. 227(5) *ITA* has the effect of carrying forward that consent to the time of receivership. By consenting to the payment of wages out of the proceeds of inventory during the course of Sparrow's business, the bank *ipso facto* consented to the statutory scheme under the *ITA* designed to cover unpaid wage deductions. In short, in the present case the licence to deal with inventory proceeds coupled with the statutory scheme in s. 227(4) and (5) *ITA* gives priority to Her Majesty's claims for statutory wage deductions. This result is obtained both in regard to the bank's GSA, and its BAS.

2014 QCCS 174 (CanLII)

[115] Justice Gonthier eventually concluded as follows:

87 It is possible to summarize my conclusions in this case into the following five propositions:

1. **Priorities between statutory trusts and consensual security interests are resolved by determining which interest has an attached interest in the disputed collateral at the time the statutory trust becomes operative.**

2. **The s. 227(5) *ITA* deemed trust attaches to any property of the debtor which exists upon liquidation, assignment, bankruptcy or receivership.**

3. **For example, if deductions are made prior to the attachment of a fixed charge over collateral, the s. 227(5) deemed trust will engage to retroactively attach Her Majesty's beneficial interest to that collateral. The fixed charge over that collateral will thereafter be subject to Her Majesty's pre-existing claims for unremitted payroll deductions.**

4. **Otherwise, if a security interest is in the nature of a fixed and specific charge, that interest gives the holder legal title to the collateral, such that a subsequent competing statutory trust will not be able to attach its interest. In such a case, all the statutory trust can attach to is the equity of redemption in the collateral.**

> **5. However, as an exception to propositions 2 and 4, where the holder of a fixed security interest permits the debtor to sell the collateral, this may provide an opportunity for the statutory trust to attach. Whether this actually occurs depends entirely on the facts of each case. The test is whether, at the time the deductions occurred, the debtor had the right to sell the collateral and use the proceeds to pay the obligation to which the statutory trust is related.**

2014 QCCS 174 (CanLII)

[116] The majority, however, agreed with Justice Iacobucci's opinion, which refused to see in the provisions of the ITA the sacramental words that would allow for the priority of the deemed trust in favour of the Crown over the previous securities of the Royal Bank.

[117] Rather, Justice Iacobucci states as follows:

> **11 The deeming is thus not a mechanism for undoing an existing security interest, but rather a device for going back in time and seeking out an asset that was not, at the moment the income taxes came due, subject to any competing security interest. In short, the deemed trust provision cannot be effective unless it is <u>first</u> determined that there is some unencumbered asset out of which the trust may be deemed. The deeming follows the answering of the chattel security question; it does not determine the answer.**
>
> **12 Indeed, Gonthier J. does seize on the peculiar nature of the deemed trust as a possible ground for distinguishing the Crown's interest from rival interests. However, his argument differs from the one I have outlined to the extent that it emphasizes the deemed performance of the obligation to the Crown. It appears to be my colleague's position that the licence to sell represents a reduction in the value of the security interest only with respect to performed obligations but not with respect to unperformed ones. In his view, this represents a sufficient check on the licence theory. I agree that, if the distinction between performed and unperformed obligations were maintainable, then the likelihood of the licence consuming the security interest would be greatly reduced. However, in my view, the distinction cannot be maintained. As Gonthier J. says more than once in his reasons, the licence theory rests on the consent of the parties. But the parties to this case consented to the sale of inventory "in the ordinary course of Debtor's business". The language is unqualified. No distinction is drawn between performed and unperformed obligations. The only performance that is contemplated in the licence is the actual sale of the inventory and the application of the proceeds to a debt. And, as I have already argued, the deeming mechanism does not furnish the needed actual sale. Accordingly, I conclude that if the words of the licence are to be given their due as an *indicium* of the parties' intent, then there can be no distinction between performed and unperformed obligations.**
>
> **13 My colleague places great emphasis on the fact that the debtor covenanted, in the general security agreement, "to pay all taxes, rates, levies, assessments and other charges of every nature which may be lawfully levied,**

> **assessed or imposed against or in respect of Debtor or Collateral as and when the same become due and payable". But this covenant is not part of the licence. And in any event, it is merely a covenant to obey the law. It adds nothing to s. 153(1) *ITA*. Furthermore, it does not prescribe the outcome of a priority contest. What is more, the covenant to pay taxes is only one of several in the agreement. Another covenant provides that the debtor shall "carry on and conduct the business of Debtor in a proper and efficient manner". Presumably the debtor might incur subsequent debts in the course of carrying on and conducting its business. Gonthier J. advances no principle that might permit the settlement of priority disputes as between the Crown and subsequent lenders. In the event of a dispute, both would have the benefit of the licence to sell inventory and of express covenants, so that some other criterion would have to be found to determine which takes priority. Here, as before, the prospect of a reversal of the ordinary priority rules is immediate and troubling.**

2014 QCCS 174 (CanLII)

[118] And further, he adds:

> **23 Moreover, and for reasons I have already given, there is every likelihood that a broad interpretation of the licence theory would do violence to the *PPSA*. The Act clearly contemplates that inventory financing will be an important commercial device. But allowing the mere potential operation of a licence to sell to defeat a security interest in inventory would deprive the interest of all efficacy. It would not be any sort of security against subsequent obligations.**
>
> **24 Finally, I wish to emphasize that it is open to Parliament to step in and assign absolute priority to the deemed trust. A clear illustration of how this might be done is afforded by s. 224(1.2) *ITA*, which vests certain moneys in the Crown "notwithstanding any security interest in those moneys" and provides that they "shall be paid to the Receiver General in priority to any such security interest". All that is needed to effect the desired result is clear language of that kind. In the absence of such clear language, judicial innovation is undesirable, both because the issue is policy charged and because a legislative mandate is apt to be clearer than a rule whose precise bounds will become fixed only as a result of expensive and lengthy litigation.**
>
> **(emphasis added)**

[119] We therefore know how to avoid the impact of the *Sparrow Electric* case. All that is necessary to ensure the primacy of the deemed trust over movable hypothecs without delivery is for the SPPA to contain wording having the same legal effect as the amendment to the ITA. We must examine whether section 264 SPPA meets this requirement.

[120] Thus, in 2009, after the case of *SMRQ v. De Courval*, we have to admit that the Court of Appeal was not inclined to read the existence of a deemed trust into section 20 ARMR, whereas the decisions in the *Nolisair* and *Sécurité Saglac* cases offer a very different reading of the statute (with or without the words that were added to it by the 1993 amendment).

[121] Moreover, the opinion of the undersigned in *White Birch* was, among other things, based on the Court of Appeal's interpretation in *De Courval*.

[122] Furthermore, the decision of the Court of Appeal in *SMRQ v. De Courval* has been criticized and was not followed by the Federal Court of Appeal in *Toronto-Dominion Bank v. Canada*, reported at 2010 FCA 174.

[123] Then came the case of *Banque nationale du Canada v. Agence du revenu du Québec* 2011, QCCA 1943 on appeal from a Court of Québec decision, 2009, QCCQ 8079[46]. This case is another illustration of the difficulty of interpreting the concept of deemed trust (in section 20 ARMR). There, Justice Gilson Lachance of the Court of Québec concluded that section 20 ARMR created a deemed trust, but did so without considering the decision of the Court of Appeal in the above-mentioned case of *Québec (SMRQ) v. De Courval*[47] and without analyzing the trust provisions of the *Civil Code of Québec*.

[124] Justice Lachance, however, analyzes the scope of section 20 ARMR on the claims of secured creditors, in light of *R. v. First Vancouver Finance* and *Great West Transport Ltd.*, 2002 SCC 49, [2002] 2 SCR 720, which likened the deemed trust of section 227(4.1) BIA to a "floating charge[48] in favour of Her Majesty over all the tax debtor's assets."[49]

[125] Justice Lachance's decision was appealed[50] and Justice Dalphond accepted the reasoning of the trial judge, except for a correction of numbers.

[126] Here is how justice Dalphond addressed the issue [TRANSLATION]:

> **[16] The trial judge concludes that Revenu Québec benefits from a deemed trust under section 20 of the *Act respecting the Ministère du Revenu*, R.S.Q., c. M-31 (ARMR), on the amounts deducted at source by Canouxa. This trust attaches, according to him, to all the tax debtor's assets, except for assets sold in the ordinary course of business, in which case the trust attaches to the proceeds of this sale or to the replacement property. The BNC, creditor of Canouxa, is not a third-party purchaser and is subject to the trust, as the Supreme Court established in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49 (CanLII), [2002] 2 S.C.R. 720, 2002 SCC 49. Moreover, this situation is not modified by the bankruptcy of Canouxa under section 67(1)(a) of the *Bankruptcy and Insolvency Act*, R.S.C., (1985), c. B-3 (BIA). The legislative intent is to subject the secured creditors to the deemed trust in the event of a bankruptcy, which carries an obligation to deliver to the tax authority the proceeds from the sale of property subject to this trust.**

[46] The decision of the Court of Québec is dated July 16, 2009.
[47] The decision of the Court of Appeal is dated March 3, 2009.
[48] This notion of "floating charge" was ruled out in *White Birch*[48] at paragraphs [203] to [207].
[49] Paragraph 18 [2009] QCCQ 8099. See also paragraph [25] of the same decision.
[50] *Banque Nationale du Canada v. Agence du revenu du Québec*, 2011 QCCA 1943.

2014 QCCS 174 (CanLII)

[127] However, he adds that:

> **[29] I have no hesitation in concluding that the amounts claimed from the tax debtor under section 1015 of the *Taxation Act*, C.Q.L.R. c. I-3 (withholdings on salary) are of the same nature as those referred to in paragraphs 227(4) or (4.1) of the *Income Tax Act* and that the provincial act provides for a tax similar to that of federal act. The same goes for QPP contributions in relation to those for CPP.**
>
> **[30] As to the nature and extent of the invoked trust, they are outlined in section 20 ARMR:**
>
> > **20. Every person who deducts, withholds or collects any amount under a fiscal law is deemed to hold it in trust for the State, separately from the person's patrimony and the person's own funds, for payment to the State in the manner and at the time provided under a fiscal law.**
> >
> > **Where at any time an amount deemed by the first paragraph to be held by a person in trust for the State is not paid to the State in the manner and at the time provided under a fiscal law, an amount equal to the amount thus deducted, withheld or collected is deemed, from the time the amount is deducted, withheld or collected, to be held in trust for the State, separately from the person's patrimony and the person's own funds, and to form a separate fund not forming part of the property of that person, whether or not the amount has in fact been held separately from that person's patrimony or that person's own funds.**
> >
> > **However, the person may, when filing a return with the Minister under section 468 or 470 of the Act respecting the Québec sales tax (chapter T-0.1), withdraw from the total amount that the person is deemed by the first paragraph to hold in trust for the State, the amounts that the person is entitled to deduct and that the person has actually deducted in the calculation of the amount to be remitted.**
> >
> > **(emphasis added)**
>
> **[31] The deemed trust is therefore on the collected amounts and, in case of non-remittance, on equivalent amounts belonging to the tax debtor. The situation is equivalent to that provided by section 227 (4) of the *Income Tax Act*, R.S.C. (1985), c. 1 (5th Supp.), but does not extend to other property of the debtor, as provided by Section 227 (4.1) of the federal Act:**
>
> > **227(4) Trust for moneys deducted**
> >
> > **Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3))**

2014 QCCS 174 (CanLII)

of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.

(4.1) Extension of trust

Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed

(*a*) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest

and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

(emphasis added)

[32] Commenting on section 227 of the federal act, Justice Iacobucci wrote in *First Vancouver Finance*:

27 In response to *Sparrow Electric*, the deemed trust provisions were amended in 1998 (retroactively to 1994) to their current form. Most notably, the words "notwithstanding any security interest … in the amount so deducted or withheld" were added to s. 227(4). As well, s. 227(4.1) (formerly s. 227(5)) expanded the scope of the deemed trust to include "property held by any secured creditor … that but for a security interest … would be property of the person". Section 227(4.1) was also amended to remove reference to the triggering events of liquidation, bankruptcy, etc., instead deeming property of the tax debtor and of secured creditors to be held in trust "at any time an amount deemed by

2014 QCCS 174 (CanLII)

> **<u>subsection (4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act".</u> Finally, <u>s. 227(4.1)</u> now explicitly deems the trust to operate "from the time the amount was deducted or withheld".**
>
> **28 It is apparent from these changes that the intent of Parliament when drafting <u>ss. 227(4</u>) and <u>227(4.1)</u> was to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect. This is clear from the use of the words "notwithstanding any security interest" in both <u>ss. 227(4)</u> and <u>227(4.1)</u>. In other words, Parliament has reacted to the interpretation of the deemed trust provisions in *Sparrow Electric*, and has amended the provisions to grant priority to the deemed trust in situations where the Minister and secured creditors of a tax debtor both claim an interest in the tax debtor's property.**
>
> **29 As noted above, Parliament has also amended the deemed trust provisions in regard to the timing of the trust. Reference to events triggering operation of the deemed trust such as liquidation or bankruptcy have been removed. <u>Section 227(4.1)</u> now states that the deemed trust begins to operate "at any time [source deductions are] … not paid to Her Majesty in the manner and at the time provided under this Act" (emphasis added). Thus, the deemed trust is now triggered at the moment a default in remitting source deductions occurs. Further, pursuant to <u>s. 227(4.1)(*a*)</u>, the trust is deemed to be in effect "from the time the amount was deducted or withheld". Thus, while a default in remitting source deductions triggers the operation of the trust, the trust is deemed to have been in existence retroactively to the time the source deductions were made. <u>It is evident from these changes that Parliament has made a concerted effort to broaden and strengthen the deemed trust in order to facilitate the collection efforts of the Minister</u>.**
>
> **(emphasis added)**

[128] Thus, the deemed trust of section 20 ARMR is unambiguously recognized. Furthermore, the interpretation given by Justice Dalphond removes doubts and, once this interpretation is applied to section 49 SPPA, the undersigned must conclude that this provision creates a deemed trust attaching to the contributions that are suspended and unpaid to the Petitioner Pension Committees.

[129] Several authors support such a conclusion.

[130] Louis Payette, in his text "*Les sûretés réelles dans le Code civil du Québec*", 2010, EYB2010SUR3, indicates in paragraph 63, pages 19 and 20, that the legislator may provide that a deemed trust by operation of law may exist to the extent that the property covered by the trust is only deemed to be held in trust (i.e. without physical separation from the debtor's patrimony). At paragraph 1821 of the same text, page 104, Me Payette adds [TRANSLATION]:

2014 QCCS 174 (CanLII)

> **Some laws create a fiction whereby the property of a taxpayer is "deemed" to be held in trust for the benefit of the public authorities of which he is the debtor. The existence of a hypothec on a property does not prevent the creation of such trusts on this property and taking in payment does not result in their extinction; the person who takes in payment must therefore account for the amounts due to the beneficiary of the deemed trust, in the amount of the property's value or resale price.**

[131] See also John Claxton "*Studies on the Quebec Law of Trust*", Thomson Carswell 2005, pages 84 and following, no. 4.2 and following, viz: "*Trust Constituted by Operation of Law*"; Roger P. Simard in *Juris Classeur Québec – sûretés* viz: "*Fiducies réputées*".

[132] This review of the relevant case law on deemed trusts therefore allows for the following conclusions:

a) For a deemed trust to exist in Quebec law, the legislator must intervene clearly in this regard. Such is the case here;

b) The deemed trust of section 49 SPPA states that it produces its effects whether or not there is physical separation of the property covered by the trust from the employer's patrimony. These words, once they were added to the provisions of section 20 of the ITA, allowed the deemed trust to produce the effects intended by the legislator. Upon reflection, it is clear that the same words used in section 49 SPPA must produce the same effects;

c) Contrary to what the undersigned concluded in *White Birch*, *supra*, section 49 SPPA creates a trust by operation of law within the meaning of article 1262 C.C.Q. and ensures that the special payments due and unpaid because of Justice Morawetz's Suspension Order are covered by that deemed trust, which therefore must produce its effects;

d) However, this is not sufficient to conclude that this trust has priority ranking over IQ's movable hypothec on all of BSI's property;

e) Indeed, in contrast to the "Personal Property Security Acts" in some other provinces, Quebec has no legislative provision that would cause a deemed trust to take precedence over legal or conventional securities found in the *Civil Code of Québec*;

f) Therefore, unless the SPPA contains other provisions ensuring that the property covered by the deemed trust of section 49 SPPA escapes IQ's universal hypothec, the latter should therefore be given full effect in respect of all of BSI's property, defeating any possibility for the Petitioner Pension Committees to recover anything;

2014 QCCS 174 (CanLII)

g) We must therefore decide whether section 264 SPPA remedies the issue and ensures that the property covered by the deemed trust of section 49 SPPA is not affected by IQ's universal hypothec. That is the question we must now discuss.

b) **The effect of section 264 SPPA on IQ's claim**

[133] The Pension Committees argue that section 264 SPPA reinforces their argument that the special payments are covered by a deemed trust and are not part of the common pledge of BSI's creditors.

[134] The relevant portion of section 264 SPPA reads as follows:

> **264. Unless otherwise provided by law, the following amounts or contributions are unassignable and unseizable:**
>
> **(1) all contributions paid or payable into the pension fund or to the insurer, with accrued interest;**

[135] Any contribution paid or payable to the pension fund of BSI's unionized and non-unionized employees would therefore be unassignable or unseizable. To give meaning to this provision, one must conclude that the contributions ... "payable" ... literally are out of the reach of BSI's other creditors, whether or not such creditors are secured, and whether they benefit from a security which is earlier than the due date of the paid or unpaid contributions.

[136] The word "contribution" used in section 264 SPPA must have the same meaning as in section 49 SPPA. It therefore includes the special payment "payable" but that has been suspended since the issuance of the initial order.

[137] The Pension Committees also argue that section 264 SPPA is not the only provision which would make the contributions unpaid to the pension fund unseizable. Article 553(7) of the *Code of Civil Procedure* indeed states that they are unseizable:

> **(7) Benefits payable under a supplemental pension plan to which an employer contributes on behalf of his employees, other amounts declared unseizable by an Act governing such plans and contributions paid or to be paid into such plans.**
>
> **(emphasis added)**

[138] Consequently, these amounts do not form part of the common pledge of BSI's creditors and could not be subject to a hypothec or other form of appropriation in favour of a third party.

[139] Articles 2644 and 2645 C.C.Q. reinforce this approach:

> **Art. 2644. The property of a debtor is charged with the performance of his obligations and is the common pledge of his creditors.**

2014 QCCS 174 (CanLII)

> **Art. 2645. Any person under a personal obligation charges, for its performance, all his property, movable and immovable, present and future, <u>except property which is exempt from seizure or property which is the object of a division of patrimony permitted by law</u>.**
>
> **However, the debtor may agree with his creditor to be bound to fulfil his obligation only from the property they designate.**
>
> **(emphasis added)**

[140] It thus follows, according to the Petitioner Committees, that the special payments suspended by the initial order are unassignable and unseizable pursuant to section 264 SPPA, in addition to being covered by a deemed trust pursuant to section 49 SPPA. The combined effect of these two provisions therefore ensures that the amounts unpaid to the pension plans are excluded from BSI's patrimony and cannot be used to reimburse IQ's hypothecary claim.

[141] In *Marché Bernard Lemay v. Beljaars*, 2003 CanLII 30892, the Superior Court decided as follows [TRANSLATION]:

> **[40] The provisions of this special act [the SPPA] should prevail over the general provisions of the Civil Code or of the Act respecting trust companies … and are very clear.**
>
> **[41] It seems obvious that section 264 SPPA, combined with <u>article 553(7) C.C.P.</u> which also deals with unseizability, giving this status to the rights granted under a pension plan, must take precedence over all other less relevant or less specific provisions because they are more general, such as the Civil Code articles on the subject that we have dealt with.**

2014 QCCS 174 (CanLII)

[142] See also: *Loi sur les régimes complémentaires de retraite – Annotations et Commentaires* by the Régie des rentes du Québec, Bibliothèque nationale du Québec 1998, paragraph 264.3.[51]

[143] Furthermore, in the context of bankruptcy, these amounts would also not be included in the "property of the bankrupt" and would not be part of the seisin of a trustee, considering the wording of section 67(1)(b) BIA which provides as follows:

> **67. (1) The property of a bankrupt divisible among his creditors shall not comprise**
>
> **(*a*) property held by the bankrupt in trust for any other person;**
>
> **(*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;**
>
> **(emphasis added)**

[144] We must admit that these arguments are, at first blush, convincing.

[145] IQ argues, contrary to the foregoing, that for section 264 SPPA to apply, there must have been a physical separation of the contributions to be paid in order for their unassignable and unseizable status to receive full application. IQ adds that these contributions have been subject to a suspension order since the initial order issued by Justice Morawetz. These contributions are therefore not "due and payable."

[146] The undersigned does not agree with this argument.

[147] The undersigned is of the opinion that sections 49 and 264 SPPA should indeed be read and interpreted in the same context.

---

[51] [TRANSLATION] Unseizable property is property that cannot be the object of an *inter vivos* transfer, whether for consideration or free of charge. An assignment of rights could be realized by the sale of the assigned property, by its donation, by its use as a security or simply through the waiver of a right in the property. Unseizable property, on the other hand, cannot be subject to seizure, which is a procedure whereby a creditor puts property belonging to its debtor under judicial control in order to preserve its rights*. Note that there are two types of seizures: seizure by garnishment, which is to order the holder of property not to dispose of it, and seizure in execution, which is to order the holder of property to return it in order to pay a debt to its owner.

…

Article 2465 of the *Civil Code of Québec* provides that a person who is personally obligated is required to fulfill his obligation on all his movable and immovable property, present and future, unless it is unseizable. Thus, in general, a person's property is seizable; it is only exceptionally that it is unseizable. Section 264 therefore constitutes an exception to the general rule. ...

(emphasis added)

2014 QCCS 174 (CanLII)

[148] If section 49 SPPA creates a deemed trust enforceable against IQ, this means that the property covered by the deemed trust is not only easily identifiable and that the amounts it represents are available, but that in fact they are clearly “identified” by the very effect of section 49 SPPA. Similarly, section 264 SPPA may apply to amounts to which section 49 SPPA applies.

[149] It will therefore no longer be necessary in this particular context to physically separate the special payments to be paid from BSI’s remaining assets for the proceeds of those contributions to be unassignable and unseizable pursuant to section 264 SPPA, as it is not necessary to do so in order for the deemed trust of section 49 SPPA to produce its effects.

[150] To this effect, section 264 SPPA completes the logic of section 49 SPPA; otherwise, these two provisions would be entirely stripped of their meaning, scope and effect.

[151] When the Petitioner Pension Committees’ motion was drafted, BSI’s only assets consisted of a cash amount of some $30 million. The parties agreed that this amount should be paid to IQ to mitigate the impact of the accrued interest on its debt.

[152] The section 49 SPPA deemed trust could therefore attach to this portion of BSI’s cash assets representing the total special payments due and not yet paid to the Petitioner Pension Committees because of the Suspension Order, without it being necessary to separate these amounts from the rest of BSI’s liquid assets and, consequently, the unassignability and unseizability of such amounts, pursuant to section 264 SPPA, could affect them.

[153] Finally, the fact that the amounts have been distributed to IQ, subject to the Petitioner Pension Committees’ rights, does not have the effect of making these assets lose their status of unassignable and unseizable trust property.

[154] As to IQ’s argument to the effect that during the suspension of special payments by the issuing of the initial order rendered by Justice Morawetz, no special payment was due and not yet paid (and hence, no amount could be subject to section 49 SPPA or section 264 SPPA), this argument must also be rejected. Indeed, we must distinguish between the effect of staying the obligation to pay such amounts and their being subject to sections 49 and 264 SPPA. These sections cover any <u>not yet paid</u> amount. We must distinguish between the exigibility of a debt and a (temporary) suspension of the obligation to make payment. Therefore, contributions remain due and payable but only the actual payment of such amounts is suspended.

[155] The notion of the unassignability and unseizability of due and not yet paid contributions prevents the employer and its creditors from using these funds for purposes other than those specified in the SPPA. These amounts thus cannot be subject to a universal hypothec on movable property, with or without delivery.

[156] The result of the foregoing is that the reasoning of the *Sparrow Electric* decision cannot apply in this case.

2014 QCCS 174 (CanLII)

[157] IQ also pleads the application of the case of *Poulin v. Morency*[52], in which the issue was to determine whether the sums contributed by an employee to an unseizable pension plan had lost their unseizability following the transfer of the plan's assets to an RRSP. The Court of Appeal of Québec decided that the entire RRSP of the appellant Poulin was seizable, which was upheld by the Supreme Court, and that the unseizability provision did not protect the sums transferred into an RRSP at the request of the appellant for investment purposes.

[158] In the present case, the employer's contributions that are due and not yet paid to the Petitioner Pension Committees are unassignable and unseizable. The sale of BSI's assets and their transformation into cash assets therefore does not remove the unassignable and unseizable status of said contributions.

[159] In *Poulin* v. *Morency* (*supra*), it was the transfer of the funds in question into an RRSP that caused the amounts in dispute to lose their unassignability and unseizability, because the amounts in question necessarily had to have come under the control of the appellant before they ended up in an RRSP. Moreover, as discussed by Justice Gonthier[53], when the Quebec legislature intended to extend the unseizability of certain sums referred to in section 264 SPPA, it did so expressly[54].

[160] Finally, we must admit that section 264 SPPA has, by analogy, more or less the same effect as section 30(7) of the *Ontario Personal Property Security Act* (RSO 1990, c. D-10 (sic)), commonly called the "PPSA", which subordinates the security interest to the interest of a beneficiary of a deemed trust created by a statute relating to pension plans. As confirmed by the Supreme Court in *Indalex*, were it not for the application of the doctrine of federal legislative paramountcy, such a deemed trust would have had priority over a secured claim pursuant to a security interest granted by a debtor.

[161] The granting of a security interest in favour of IQ in the nature of a movable and immovable hypothec without delivery, even though duly registered with the RDPRM, does not nullify the effect of this status. If that were the case, section 264 SPPA would have no practical effect. In fact, the due and unpaid contributions not belonging to BSI, notably because of the effect of the section 49 SPPA deemed trust on those assets, are neither part of BSI's assets nor the common pledge of its creditors.

[162] In conclusion, the Court is of the opinion that:

1) the special payments at issue in this case are subject to a deemed trust created by operation of law;

2) said contributions are unassignable and unseizable;

---

52 1999 3 SRC 351; 1999 CanLii 662

53 See paragraphs 37 and following of his opinion.

54 See article 264(3), paragraph 2. See also section 28(3) of the *Regulation respecting supplementary pension plans* (1990) 122 C.O. II-3246.

2014 QCCS 174 (CanLII)

3) they are not affected by IQ's universal hypothec, even if such special payments became payable to the Petitioner Pension Committees after the creation of said universal hypothec.

2014 QCCS 174 (CanLII)

General conclusion

[163] We are at the end of a reorganization process under the CCAA which took the form of a sale of BSI's assets to a new entity (which will continue the activities of BSI). The task is now to distribute the proceeds of the asset sale to BSI's creditors. Those creditors do not hold any super-priority that could have been given to them under the CCAA. The priority to be given to the Pension Committees' claims, on the one hand, and to IQ's claims, on the other hand, must be analyzed in light of Quebec law only. There is no question of the application of the doctrine of federal legislative paramountcy over provincial legislation.

[164] Here, two obstacles prevent the exercise of IQ's rights over all of BSI's assets: some of those assets are unassignable and unseizable in addition to being subject to a deemed trust.

[165] The special payments that remain unpaid since the Suspension Order of January 16, 2012 are therefore outside IQ's reach. The pension plans' solvency deficits existing on the date of their termination are not covered by section 49 or section 264 SPPA.

[166] Sections 49 and 264 SPPA must be read and applied restrictively given that they create an exceptional regime. A deemed trust must not be interpreted in a broad and liberal way, even if the SPPA, as a whole, must be interpreted broadly. We cannot extend the application of section 49 or section 264 SPPA to solvency deficits.

[167] Section 49 SPPA applies only to contributions and to accrued interest on those contributions.

[168] It is the combined effect of sections 49 and 264 SPPA that subtract BSI's assets in the amount of the special payments unpaid to the Pension Committees (plus interest thereon) from IQ's hypothecary claim. Those two provisions have the effect of literally removing assets from the common pledge of BSI's creditors.

[169] In the Supreme Court case of *Indalex*, Justice Deschamps wrote:

> **[51] … Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to CCAA proceedings or to proposals under the BIA. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the CCAA, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation**

under the BIA. Indalex achieved the goal it was pursuing. It chose to sell its assets under the CCAA, not the BIA.

[52] <u>The provincial deemed trust under the PBA continues to apply in CCAA proceedings, subject to the doctrine of federal paramountcy</u> (Crystalline Investments Ltd. v. Domgroup Ltd., 2004 SCC 3 (CanLII), 2004 SCC 3, [2004] 1 S.C.R. 60, at para. 43). The Court of Appeal therefore did not err in finding that at the end of a CCAA liquidation proceeding, priorities may be determined by the PPSA's scheme rather than the federal scheme set out in the BIA.

(emphasis added)

2014 QCCS 174 (CanLII)

[170] The same applies to the deemed trust of section 49 SPPA and to the protection that section 264 SPPA gives to these assets.

[171] In the absence of the application of the doctrine of federal paramountcy, it must be concluded that these provisions should be given full effect.

[172] Let us imagine the following scenario: rather than ending up in a context of reorganization under the CCAA, BSI could have simply decided to sell its assets to a new company before paying its creditors with the proceeds of the sale, without discharging its obligation to pay the Petitioner Pension Committees the special payments due to them. The above reasoning would have applied without further questioning. The Court is of the view that, in the context of the present debate, that reasoning should be applied.

[173] With respect to those who think differently, the undersigned is of the opinion that the issues cannot be resolved by reference to the *Sparrow Electric* case nor by reference to section 37 CCAA. In *Sparrow*, there was no question of unassignability or unseizability of the amounts owing to the federal Crown but only of the non-priority application of the amounts covered by the deemed trust contained in the ITA, a problem which was corrected by a subsequent amendment to the *Income Tax Act*. Here, the property covered by the deemed trust is literally excluded from the scope of IQ's security. For IQ, this property is unseizable because it cannot form part of any assignment or transfer by BSI.

[174] It is neither useful nor possible to resort to the inherent powers of the Superior Court under article 46 C.C.P. to ensure that the special payments are paid to the Pension Committees, because they are to be paid in any case. It is not appropriate to apply this concept to allow the Petitioners to recover the solvency deficits, since those deficits are clearly identified as debts of the employer (section 228 SPPA) and clearly excluded from the scope of section 49 SPPA. In the presence of statutory provisions as clear as this, there is no justification for using the inherent powers of the Court, as the legislator has already taken a position on the issue.

[175] This debate was very well prepared and argued by the attorneys involved. Even after the hearing on May 27 and 28, 2013, the attorneys were able to submit several additional texts to the undersigned, clarifying some of their positions or answering questions of the undersigned. The Court is grateful to them and thanks them. Exchanges between attorneys ranged from June to October 2013, which partly explains the length of the deliberation.

2014 QCCS 174 (CanLII)

FOR ALL THESE REASONS, the Court

[176] **GRANTS** the Petitioner Pension Committees' motion in part;

[177] **DECLARES** that the special payments and interest thereon not paid to the Petitioner Pension Committees are subject to a deemed trust that is enforceable against the Respondent Investissement Québec Inc. pursuant to section 49 SPPA;

[178] **DECLARES** that these contributions and the interest thereon are unassignable and unseizable, are excluded from the scope of Investissement Québec Inc.'s movable and immovable hypothec without delivery and have priority over the latter's claim, by the combined effect of sections 49 and 264 SPPA;

[179] **DISMISSES** the Petitioner Pension Committees' motion with respect to their argument that the pension plans' solvency deficits have the same status as the special payments and the interest thereon;

[180] **ADJOURNS** the motion for directions to a date to be determined for purposes of determining the quantum of the amounts to be reimbursed to the Petitioner Pension Committees by Investissement Québec Inc.;

[181] **THE WHOLE**, without costs.

____

ROBERT MONGEON, J.S.C.

Me Tina Hobday
Me Alexander Herman
Langlois Kronström Desjardins
Attorneys for the plaintiff

Me Charles Mercier
Me Émilie Truchon
Fasken Martineau
Attorneys for the defendant

Me Adam Spiro
Me Steven Weisz
Blake, Cassels & Graydon
Attorneys for the respondent

Hearing dates: May 27 and 28, 2013.

AFFIDAVIT

I, the undersigned, **ADAM T. SPIRO**, attorney with the law firm Blake, Cassels & Graydon LLP, located at 600, De Maisonneuve Blvd. West, Suite 2200, Montréal, Québec, H3A 3J2, Canada, do hereby solemnly declare and say:

1. I am a duly registered member of the Bar of the Province of Québec;

2. I understand both French and English;

3. I have compared the English translation of the following:

   judgment of the Superior Court (Commercial Division) relating to Priority Claims (Sections 11 and 17 CCAA) – Canada – Province of Québec – District of Montréal – N°: 500-11-043844-121 dated January 24, 2014

   (hereinafter referred to as the "Document");

4. I certify that the English version of the Document is in all material respects a true and correct translation;

5. All facts herein are true.

AND I HAVE SIGNED

ADAM T. SPIRO

SWORN TO before me in Montréal,
Province of Québec, on February 27, 2014.

Commissioner of Oaths for all Judicial Districts
of the Province of Québec

Appendix E

The Leave Motion

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-09-
S.C. : 500-11-043844-121

COURT OF APPEAL

TIMMINCO LIMITÉE a corporation duly incorporate pursuant to the laws of the province of Ontario, having its head office at 150 King Street West, Toronto, Ontario, M5H 1J9

-and-

BÉCANCOUR SILICON INC. a corporation duly incorporate pursuant to the laws of the province of Quebec, having its head office at 6500 rue Yvon-Trudeau, Bécancour, Québec, G9H 2V8

Debtors/APPELLANTS

v.

COMITÉ DE RETRAITE DU RÉGIME DE RENTES POUR LES EMPLOYÉS SYNDIQUÉS DE SILICIUM BÉCANCOUR INC.

-and-

COMITÉ DE RETRAITE DU RÉGIME DE RENTES POUR LES EMPLOYÉS NON-SYNDIQUÉS DE SILICIUM BÉCANCOUR INC.

Petitioners/RESPONDENTS

-and-

INVESTISSEMENT QUÉBEC a joint stock company duly constituted by special act under the laws of the province of Queebc, having its head office at 1200, route de l'Église, Suite 500, Québec, Québec, G1V 5A3

Respondent/MISE EN CAUSE

-and-

FTI CONSULTING CANADA INC. a corporation duly incorporate pursuant to the laws of Canada, having its registered office at 1200 Waterfront Centre, 200 Burrard Street, Vancouver, British Columbia, V6C 3L6

Monitor/MONITOR

APPELLANT'S MOTION FOR LEAVE TO APPEAL
(Sections 13 and 14 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 and Article 26 (or subsidiarily, Articles 29 and 511) of the *Code of Civil Procedure*)

TO ONE OF THE HONOURABLE JUDGES OF THE COURT OF APPEAL, SITTING IN AND FOR THE DISTRICT OF MONTREAL, THE PETITIONERS STATE AS FOLLOWS:

1. The Appellant Debtors hereby seeks leave to appeal the judgment rendered on January 24, 2014 by the Honourable Robert Mongeon, J.S.C. (the "**First Instance Judge**") in the case bearing docket number 500-11-043844-121 (the "**Judgment**"). A copy of the First Instance Judgment is attached hereto as **Schedule 1**.

2. FTI Consulting Canada Inc. (the "**Monitor**") was appointed Monitor of the Debtors pursuant to the Order of the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) (the "**Ontario Court**") dated January 3, 2012 which granted the Debtors protection from their creditors pursuant to the provisions of the *Creditors, Companies Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**") (the "**Initial Order**"), a copy of which is attached as **Schedule 2**.

3. The Appellants are bringing this Motion pursuant to the special powers granted to the Monitor to take certain actions in the name of and on behalf of the Appellants by an Order of Justice Newbould of the Ontario Court dated December 16, 2013, a copy of which is attached hereto as **Schedule 3**.

4. This Motion is being filed by the Appellants to ensure that the rights of affected creditors are not prejudiced by the passage of time and the expiry of the delay to seek leave to appeal, and the Appellants will seek directions from the Ontario Court before proceeding with this Motion.

5. By the Judgment, the First Instance Judge granted in part the Respondents' *Requête pour directives et jugement déclaratoire* (the "**Motion for Directions**"), a copy of which is attached hereto as **Schedule 4**.

6. The Motion for Directions sought a declaration that special payments due but not paid by the Appellant, Bécancour Silicon Inc. ("**BSI**"), to the pension plans represented by the Respondents as well as the solvency deficits of those pension plans constituted priority claims against the Appellants in the context of the proceedings in respect of the Appellants under the CCAA.

7. The Judgment ruled, *inter alia*, that:

   a) special payments due but not paid to the Respondents by BSI are subject to a deemed trust created by the operation of law pursuant to s. 49 of the *Supplemental Pension Plans Act*, R.S.Q., c. R-15.1 as amended (the "**SPPA**");

   b) these deemed trusts were priority claims that ranked ahead of the Mise en Cause's claim as first-ranking secured creditor pursuant to ss. 49 and 264 of the SPPA; and

   c) solvency deficits were not the subject of a deemed trust pursuant to the SPPA, and the Respondents therefore do not have any priority claim in this regard.

8. The Judgment contains several errors of law and raises legal issues of public order as it:

   a) creates a statutory deemed trust in contradiction to the previous judicial decisions on this issue by the same First Instance Judge;

   b) creates a priority for those deemed trusts in contradiction to Supreme Court of Canada case law;

   c) contrary to prior case law in Quebec, provides that a purported priority created by provincial legislation remains operative in a proceeding under the federal CCAA;

   d) affects the interests of pension plans and pensioners of Timminco ("**Timminco Pension Plans**") who have valid deemed trust claims in Ontario in accordance with applicable legislation and the Supreme Court of Canada decision in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6; and

   e) prejudices the rights of other ordinary unsecured creditors of BSI.

9. The Appellant Timminco Limitée ("**Timminco**") is the largest unsecured creditor of BSI, and this Motion is brought to protect the rights of unsecured creditors of BSI and the Timminco Pension Plans having valid deemed trust claims.

I. THE PARTIES

10. The Appellants are Debtors that are subject to the above-captioned CCAA restructuring proceedings, as mentioned above.

11. The Monitor is the Monitor in the aforementioned CCAA proceedings, as mentioned above.

12. The Respondents represent the interests of the beneficiaries of two defined benefit pension plans for the benefit of the unionized and non-unionized employees of BSI.

13. The Mise en Cause was granted a first-ranking hypothec over the universality of BSI's movable and immovable property.

II. PROCEDURAL CONTEXT AND BACKGROUND

14. On December 31, 2011, the unionized employees' pension plan's solvency deficit was $9,889,600.00 while that of the non-unionized employees was $3,998,700.00.

15. In order to satisfy, at least partially, the above-mentioned solvency deficits, BSI would have had to pay special payments of $93,910.00 and of $41,710.00 per month in the above-mentioned pension plans' funds. These special payments had been stayed by the Stay Order (defined below).

16. The Appellants have been under the protection of the CCCA since January 3, 2012, following the issuance of the Initial Order (Schedule 3).

17. By a subsequent order rendered on January 16, 2012 (the "**Stay Order**"), all special payments to be made by BSI in favor of the Respondents were stayed, as appears from a copy of the Stay Order attached hereto as **Schedule 5**.

18. On June 13-14, 2012, substantially all of the Appellants' assets were sold, generating $30.8 million of proceeds, following orders by Justice Morawetz approving the sales in question, copies of which are attached hereto, *en liasse*, as **Schedule 6**.

19. On August 28, 2012, the Mise en Cause's loan (secured by a hypothec on the universality of BSI's movable and immovable property) was reimbursed in the initial amount of $25 million plus some accrued interest (subject to the Respondents' reservation of rights), and, as a result of subsequent distributions, a total aggregate amount of approximately $29 million;

20. Respondents' position was that their above-mentioned claims constitute priority claims that rank ahead of the claim of the Mise en Cause, who holds a hypothec without delivery on all of BSI's movable and immovable property.

21. The parties also agreed to stipulate that if the Respondents' claims are recognized as priority claims in whole or in part, the Mise en Cause would reimburse the said claims to both Respondents in accordance with their respective interests. However, if the Court was to determine that the claims in question are not priority claims, the Mise en Cause would have nothing to reimburse.

22. On October 18, 2012, following a request from the Mise en Cause Justice Morawetz issued an Order referring the adjudication of the priority dispute over the special payments balance and the solvency deficits to the Superior Court of Québec and requested the aid and assistance of the Superior Court of Québec in accordance with the Court-approved Priority Claims Adjudication Protocol, as appears from the copy of this Order attached hereto as **Schedule 7**.

III. THE JUDGMENT

23. In the Judgment, the First Instance Judge ruled that special payments were subject to a deemed trust created by operation of law, that they were unassignable and unseizable and that they were not affected by the Mise en Cause's universal hypothec, even if they became payable after the granting of said universal hypothec.

24. First Instance Judge ruled that the amounts of solvency deficit, on the other hand, were not subject to such a trust.

IV. RIGHT TO APPEAL

25. The Appellants respectfully submit that leave to appeal the Judgment should be granted pursuant to Sections 13 and 14 of the CCAA (and Article 26 of the *Code of Civil Proceedure* (the "**CCP**"), or subsidiarily Articles 29 and 511 of the CCP).

26. The Judgment is a final judgment pursuant to Article 26(1) of the CCP, or, subsidiarily it in part decides the issues pursuant to Article 29(1) of the CCP.

27. The pursuit of justice requires the intervention of this Honourable Court to reform the Judgment, as:

    a) the rights of the mass of BSI creditors are detrimentally affected as a result thereof;

    b) the rights of pensioners under the Timminco Pension Plans with valid deemed trust claims are affected; and

c) the creation of a deemed trust by operation of law that has priority over a first-ranking universal hypothec is a novelty that will completely alter the commercial interests and expectations of economic actors throughout the province.

28. Furthermore, in light of the above, it is in the interest of justice to stay the proceedings before the Superior Court of Quebec in the present file in order to avoid the cost of the progression of proceedings to determine quantum until this Court has rendered a final decision in relation to the Judgment.

V. GROUNDS OF APPEAL

29. The Judgment rules on a purely legal issue, i.e. whether the Respondents claims constitute a deemed trust pursuant to the SPPA with priority over the Mise en Cause's universal hypothec.

30. The Motion Judge erred in law by issuing the ruling found in the judgment, and summarized above at paragraphs 7, 23 and 24.

31. In particular, the intervention of this Honourable Court is required to reform the errors of law found in the Judgment.

32. More specifically, the Judgment contradicts previous case law on the issue, including case law from the Supreme Court of Canada, and is inconsistent with the general law of trusts in Québec.

33. The Appellants reserve the right to raise such other grounds as may be directed by the Ontario Court.

VI. CONCLUSION

34. For the reasons more fully expounded above, the Appellants submit that the intervention of this Honourable Court is required to reform the Judgment.

35. The Appellants reserves the right to amend the present Motion.

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

GRANT the present Motion for leave to appeal;

AUTORIZE the Appellants to appeal the judgment rendered on January 24, 2014 by the Honourable Robert Mongeon, J.S.C. of the Superior Court of Québec, District of Montreal, Commercial Division in file number 500-11-043844-121;

STAY the proceedings in Court file number 500-11-043844-121 pending the appeal;

THE WHOLE without costs, save in the discretion of the Court;

AND IN THE FINAL JUDGMENT, MAY IT PLEASE THIS HONOURABLE COURT TO:

GRANT the present appeal;

REFORM the judgment rendered on January 24, 2014 by the Honourable Robert Mongeon, J.S.C.

DECLARE that the special payments owing and unpaid by BSI to the Respondents do not constitute a deemed trust;

SUBSIDIARILY, DECLARE that, if the special payments owing and unpaid by BSI to the Respondents do constitute a deemed trust, they do not have priority over the claims of the Mise en Cause or over other unsecured creditors;

RENDER any other order or declaration that the Court deems necessary, which may be sought by the Appellants at the direction of the Ontario Court:

THE WHOLE, without costs, save in the discretion of the Court.

Montreal, this 14th day of February, 2014

Blake, Cassels & Graydon

BLAKE, CASSELS & GRAYDON LLP
Counsel for (the Monitor in the name of and on behalf of) the Appellants

AFFIDAVIT

I, **Adam T. Spiro**, an attorney practicing at 600 de Maisonneuve Boulevard West, Suite 2200, Montreal, Quebec, H3A 3J2 affirm as follows:

1. I am one of the attorneys in the present file;

2. I have read the Appellant's Motion for Leave to Appeal and all the facts alleged therein not otherwise supported by the Schedules hereto are true.

AND I HAVE SIGNED:

ADAM T. SPIRO

SWORN TO BEFORE ME in Montreal
this 14th day of February 2014

Edith Messier 80,049
Commissioner of Oaths

COMMISSAIRE À L'ASSERMENTATION
COMMISSIONER FOR OATHS
EDITH MESSIER
#80 049
POUR LE QUÉBEC / FOR QUEBEC

NOTICE OF PRESENTATION

TO: M^{tre} Tina Hobday
Langlois Kronström Desjardins, LLP
1002 Sherbrooke Street West, 28th Floor
Montréal, Quebec H3A 3L6

Attorneys for the Respondents

M^{tre} Charles Mercier
Fasken Martineau DuMoulin LLP
140 Grande Allée Est, Suite 800
Quebec City, Quebec G1R 5M8

Attorneys for the Mise en Cause

TAKE NOTICE that the present Motion for leave to appeal an interlocutory judgment will be presented for decision before the Court of Appeal on **April 11, 2014**, at 9:30 a.m., at 100 Notre-Dame Street East, Montreal, Quebec, H2Y 4B6, in room **RC-18**.

PLEASE GOVERN YOURSELF ACCORDINGLY.

Montreal, February 14, 2014

Blake, Cassels & Graydon

BLAKE, CASSELS & GRAYDON LLP
Counsel for the (the Monitor in the name of and on behalf of) the Appellants

8403452.3

COUR SUPÉRIEURE
(Chambre Commerciale)

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

2014 QCCS 174 (CanLII)

N° : 500-11-043844-121

DATE : Le 24 janvier 2014

SOUS LA PRÉSIDENCE DE : L'HONORABLE ROBERT MONGEON, J.C.S.

DANS L'AFFAIRE DE LA LOI SUR LES ARRANGEMENTS AVEC LES CRÉANCIERS DES COMPAGNIES, L.R.C. (1985), c. C-36, EN SA VERSION MODIFIÉE ET DANS L'AFFAIRE D'UN PLAN DE TRANSACTION OU D'ARRANGEMENT DE :

TIMMINCO LIMITÉE
-et-
BÉCANCOUR SILICON INC.
Débitrices
-et-
FTI CONSULTING INC.
Contrôleur
-et-
Comité de retraite du Régime de rentes pour les employés syndiqués de Silicium, Bécancour Inc.
-et-
Comité de retraite du Régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc.
Requérants
c.
INVESTISSEMENT QUÉBEC
Intimée

JUGEMENT SUR DIRECTIVES ET JUGEMENT DÉCLARATOIRE TOUCHANT CERTAINES RÉCLAMATIONS PRIORITAIRES
(Articles 11 et 17 LACC)

JM1838

2014 QCCS 174 (CanLII)

INTRODUCTION ET MISE EN SITUATION

[1] Bécancour Silicon Inc. ou, dans sa dénomination française, Silicium Bécancour Inc. (SBI) est une société filiale de Timminco Inc. (TI).

[2] SBI et TI sont sous la protection de la *Loi sur les arrangements avec les créanciers des compagnies L.R.C. (1985) c. c-36* telle qu'amendée (la LACC) depuis le 3 janvier 2012, suite à l'émission d'une ordonnance initiale prononcée par le juge Geoffrey Morawetz de la Cour supérieure de justice de l'Ontario.

[3] Par ordonnance subséquente rendue le 16 janvier 2012 (l'« Ordonnance de Suspension »)[1], tous les paiements d'équilibre devant être effectués par SBI en faveur de deux régimes de retraite à prestations déterminées au bénéfice de ses employés syndiqués[2] et non-syndiqués[3] ont été suspendus.

[4] Ces régimes sont régis d'une part par les contrats les constituant (P-1 et P-2) et par la *Loi sur les régimes complémentaires de retraite, LRQ c. R-15.1* telle qu'amendée (la LRCR). Il est admis que les cotisations d'exercice et d'équilibre ont été versées par l'employeur SBI jusqu'au 31 janvier 2012 et que les cotisations d'exercice ont été versées jusqu'à date.

[5] Les deux régimes de retraite P-1 et P-2 sont (ou sont sur le point de le devenir) en situation de terminaison de régime vu que ces deux régimes n'ont, à toutes fins pratiques, plus d'employés participants. De plus, ces régimes de retraite sont en situation de déficit actuariel de solvabilité.

[6] Au 31 décembre 2011, le déficit actuariel de solvabilité du régime des employés syndiqués était de 9 889 600,00$ (pièce P-3) tandis que celui des employés non-syndiqués était de 3 998 700,00$ (pièce P-4)[4].

[7] Pour effacer, du moins en partie, les déficits actuariels précités, SBI devait verser des cotisations d'équilibre de 93 810,00$ et de 41 710,00$ par mois dans les caisses des deux régimes précités (pièces P-3 et P-4). Ces cotisations d'équilibre sont suspendues depuis l'Ordonnance de Suspension précitée.

---

[1] Motifs écrits déposés le 2 février 2012.
[2] Pièce P-1.
[3] Pièce P-2.
[4] En date du 20 juillet 2012, les réclamations prioritaires des Comités de retraite totalisent 10 558 290,00$ et 4 296 220,00$ respectivement (pièces P-3, P-4, P-13 et P-14).

[8] Les Comités de retraite requérants sont d'avis que leurs réclamations précitées constituent des créances prioritaires prenant rang avant celle de l'Intimée Investissement Québec (IQ), qui détient une hypothèque universelle sans dépossession sur la totalité des biens meubles et immeubles de SBI et en vertu de laquelle elle a reçu un paiement de quelques 29 millions de dollars en remboursement de sa créance.

2014 QCCS 174 (CanLII)

[9] L'objet du présent jugement porte sur le statut de ces réclamations prioritaires.

[10] Les deux Comités de retraite requérants prétendent que leurs réclamations prioritaires se doivent d'être reconnues comme telles par le Tribunal, prenant rang devant celle de IQ et dudit paiement de plus de 29 millions$ effectué par le Contrôleur en faveur de IQ dans le cadre d'un processus de liquidation des actifs de SBI effectué sous l'empire de la LACC.

[11] Les parties sont aussi d'accord pour stipuler que si les réclamations des requérants sont reconnues comme prioritaires en tout ou en partie, IQ devra rembourser lesdites réclamations pouvant aller jusqu'à 14.8 millions$ (sauf à parfaire) aux deux Comités de retraite selon leurs intérêts respectifs. Par contre, si le Tribunal vient à la conclusion que les réclamations en question ne sont pas prioritaires, IQ n'aura rien à rembourser. Un tel scénario ferait en sorte que, puisqu'il n'existe pas (ou très peu) de reliquat disponible pour rembourser les réclamations non-prioritaires, les caisses de retraite seraient privées de sommes importantes qui auront comme conséquence l'amputation des prestations de retraite des retraités pouvant aller jusqu'à hauteur de près de 40%. On réalise donc facilement l'importance de la question pour les retraités.

LA CHRONOLOGIE DES FAITS PERTINENTS

[12] Voici la chronologie des faits et des documents pertinents et nécessaires à une bonne compréhension des questions à résoudre et de la solution du présent litige:

a) 3 janvier 2012 : Première ordonnance du juge Morawetz visant la suspension de toutes les procédures de réclamation contre TI et sa filiale SBI, avec date effective à 0h01 le 3 janvier 2012;

b) 16 janvier 2012 : Ordonnance de Suspension des cotisations d'équilibre par TI et SBI. Le juge Morawetz était d'avis d'une part que les états financiers de TI et/ou de SBI ne leur permettaient pas d'assumer de telles obligations. De plus, le juge Morawetz a écrit (dans ses motifs déposés le 2 février 2012) :

> **[56] The courts have characterized special (or amortization) payments as pre-filing obligations which are stayed upon an initial order being granted under the CCAA. (See *AbitibiBowater Inc.*, (Re) reflex, (2009) 57 C.B.R. (5th) 285 (Q.S.C.); *Collins & Aikman Automotive Canada Inc.* 2007 CanLII 45908**

(ON SC), (2007), 37 C.B.R. (5th) 282 (Ont. S.C.J.) and *Fraser Papers Inc. (Re)* 2009 CanLII 39776 (ON SC), (2009), 55 C.B.R. (5th) 217 (Ont. S.C.J.).

[57] I accept the submission of counsel to the Applicants to the effect that courts in Ontario and Quebec have addressed the issue of suspending special (or amortization) payments in the context of a CCAA restructuring and have ordered the suspension of such payments where the failure to stay the obligation would jeopardize the business of the debtor company and the company's ability to restructure.

…

[60] Counsel to the Timminco Entities submits that where it is necessary to achieve the objective of the CCAA, the court has the jurisdiction to make an order under the CCAA suspending the payment of the pension contributions, even if such order conflicts with, or overrides, the QSPPA or the PBA.

[61] The evidence has established that the Timminco Entities are in a severe liquidity crisis and, if required to make the pension contributions, will not have sufficient funds to continue operating. The Timminco Entities would then be forced to cease operations to the detriment of their stakeholders, including their employees and pensioners.

[62] On the facts before me, I am satisfied that the application of the QSPPA and the PBA would frustrate the Timminco Entities ability to restructure and avoid bankruptcy. Indeed, while the Timminco Entities continue to make Normal Cost Contributions to the pension plans, requiring them to pay what they owe in respect of special and amortization payments for those plans would deprive them of sufficient funds to continue operating, forcing them to cease operations to the detriment of their stakeholders, including their employees and pensioners.

(soulignements ajoutés)

c) 13-14 juin 2012 : Vente de la quasi-totalité des actifs importants appartenant à SBI et à TI. Ces ventes avaient été préalablement approuvées par le juge Morawetz (pièce P-10). Les ventes d'actifs ont généré des liquidités de 30.8 millions$[5];

d) 17 août 2012 : Nomination d'un CRO (« Chief Restructuring Officer »);

e) 28 août 2012 : Remboursement du prêt (garanti par hypothèque sur l'universalité des biens de SBI) au montant de 25 millions$ plus certains intérêts accumulés (voir pièces P-11 et P-

[5] Rapport no. 13 du Contrôleur, pièce P-5, paragraphe 7.

2014 QCCS 174 (CanLII)

16). Ce paiement a été fait sous réserve des droits des Comités de retraite requérants;

f) 7 septembre 2012 : Demandes de priorité des Comités de retraite requérants couvrant a) les deux déficits actuariels de solvabilité des deux régimes (9 889 600,00$ et 3 998 700,00$) sauf à parfaire et b) le solde des cotisations d'équilibre non versées pour les mois de décembre 2011 à juin 2012 (668 690,00$ et 297 520,00$), le tout selon la pièce P-17.

g) 18 octobre 2012 : Ordonnance du juge Morawetz, suite à une demande des parties (pièce P-19) visant à référer la requête des Comités de retraite à la Cour supérieure du Québec (pièce P-20). Les parties ont aussi convenu que la requête serait scindée, le tribunal québécois devant d'abord se prononcer sur les questions de droit avant de se prononcer dans un deuxième temps sur le quantum des réclamations, le cas échéant.

[13] Plus spécifiquement, la pièce P-20 reproduit l'ordonnance du juge Morawetz approuvant un « Priority Claim Adjudication Protocol » (« le Protocole ») aux termes duquel la Cour supérieure de l'Ontario demande à la Cour supérieure du Québec de déterminer si les réclamations des Comités de retraite requérants jouissent d'une priorité notamment sur la réclamation de IQ[6].

[14] Le Protocole stipule ce qui suit :

A. OVERVIEW

1. In accordance with the Reimbursement Agreement (the « Reimbursement Agreement ») among Investissement Québec (« IQ »), FTI

2014 QCCS 174 (CanLII)

[6] Voir paragraphes 1 à 3 de l'ordonnance:

1. THIS COURT ORDERS that the Priority claim Adjudication Protocol, attached hereto as Schedule « A », be and the same is hereby authorized and approved.

2. THIS COURT ORDERS that the adjudication of whether the BSI Pension Reimbursement Claims are Priority Claims, all as defined in the attached Priority Claim Adjudication Protocol, be and the same is hereby referred exclusively to the Superior Court of Québec (Commercial Division) to be determined in accordance with the Priority Claim Adjudication Protocol.

3. THIS COURT HEREBY REQUESTS the aid and recognition of the Superior Court of Québec (Commercial Division) to give effect to this order and to adjudicate whether the BSI Pension Reimbursement Claims constitute Priority Claims in accordance with the terms of the Priority Claims Adjudication Protocol.

Consulting Canada Inc., as court-appointed Monitor, and Bécancour Silicon Inc., dated August 28, 2012 and the August 28, 2012 Interim Distribution Order (the « Interim Distribution Order »), two (2) sets of claims have been designated as Reimbursement Claims, namely :

…

(ii) a claim by Le Comté de retraite du Régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc. and a claim by Le Comité de retraite du Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (collectively the « BSI Pension Committees ») (the « BSI Pension Reimbursement Claims »).

2. IQ disputes that the above Reimbursement Claims have priority over the IQ Security and the parties do not anticipate the dispute will be resolved through the consented resolution process provided for in the Interim Distribution Order. Accordingly, an adjudication is required to determine whether such Reimbursement Claims constitute Priority Claims.

The following is the protocol for the adjudication of whether the Reimbursement Claims constitute Priority Claims.

…

[15] La Requête des Comités de retraite pour directives et jugement déclaratoire touchant les réclamations prioritaires a donc été déposée le 17 décembre 2012. A la demande des parties, l'échéancier a été modifié et l'audition des questions de droit a été débattue les 27 et 28 mai 2013 devant le soussigné.

[16] Voici comment les Comités de retraite formulent les questions de droit :

49. La question en litige est de déterminer si les <u>réclamations des Comités de retraite ont priorité sur la créance d'Investissement Québec</u>. La question du statut des réclamations des Comités de retraite vis-à-vis les DIP Charges n'est pas une question en litige et a déjà été tranchée par le juge Morawetz (voir l'Ordonnance du 8 février 2012, Pièce P-9).

50. SBI a cessé de verser les cotisations d'équilibre suite à l'Ordonnance du 16 janvier 2012 qui les a suspendues. Au 23 juillet 2012, les cotisations d'équilibre (avec intérêts) accumulés mais non-versées pour les deux Régimes de retraite totalisaient environ 1 million de dollars (voir lettres du 20 juillet 2012, Pièce P-3 et Pièce P-4).

51. Les déficits de solvabilité (qui incluraient les cotisations d'équilibre non-versées) pour les deux Régimes de retraite au 31 décembre 2011 totalisaient environ 14 millions de dollars (voir lettres du 20 juillet 2012, Pièce P-3 et Pièce P-4) et seront cristallisés si la terminaison

2014 QCCS 174 (CanLII)

des Régimes de retraite par la Régie des rentes du Québec est complétée.

52. **<u>En vertu du droit québécois applicable à la question en litige, les montants réclamés par les Comités de retraite pour les cotisations d'équilibre et pour les déficits actuariels, sont réputés détenus en fiducie par l'employeur SBI en faveur des Régimes de retraite.</u>**

53. **<u>Il est évident que de telles fiducies réputées ont un rang prioritaire sur la réclamation garantie d'Investissement Québec.</u>**

(soulignements ajoutés)

2014 QCCS 174 (CanLII)

[17] Une fois que le Tribunal aura statué sur l'existence ou non d'une fiducie réputée affectant les créances des Comités de retraite, une seconde étape devra déterminer l'effet d'une telle fiducie réputée sur la créance hypothécaire de IQ.

[18] Les Comités requérants demandent donc au Tribunal de :

DÉCLARER comme étant des Réclamations prioritaires [Priority Claims] en vertu de la Convention de remboursement entérinée par l'Ordonnance du 28 août 2012 de la Cour supérieure de justice (Rôle commercial) de l'Ontario, les réclamations suivantes :

1. **les cotisations d'équilibre non versées à la Caisse de retraite du Régime de rentes des employés syndiqués de Silicium Bécancour Inc.;**

2. **les cotisations d'équilibre non versées à la Caisse de retraite du Régime de rentes des employés non syndiqués de Silicium Bécancour Inc.;**

3. **le déficit actuariel de solvabilité du Régime de rentes des employés syndiqués de Silicium Bécancour Inc.; et**

4. **le déficit actuariel de solvabilité du Régime de rentes des employés non-syndiqués de Silicium Bécancour Inc.**

PRENDRE ACTE du paragraphe C.2. du Protocole d'adjudication afin que les quantums des Réclamations prioritaires [Priority Claims] soient déterminés une fois que cette honorable Cour aura décidé sur la nature des réclamations, et soient déterminés selon l'Ordonnance du Processus de réclamation [Claims Procedure Order] ou selon une ordonnance de cette Cour.

PRENDRE ACTE du paragraphe 9 de l'Ordonnance du 28 août 2012 de la Cour supérieure de justice (Rôle commercial) de l'Ontario et de la Convention de remboursement à l'annexe « A » de celle-ci, en vertu de laquelle Investissement Québec remboursera les sommes déclarées par

cette Cour comme étant prioritaires, le cas échéant, à Silicium Bécancour Inc. par l'entremise du Contrôleur, FTI Consulting Inc., afin que Silicium Bécancour Inc. transmette ces sommes aux Requérants.

2014 QCCS 174 (CanLII)

[19] Subsidiairement et à défaut de reconnaître que la LRCR crée une telle fiducie, les Comités de retraite demandent au Tribunal d'utiliser ses pouvoirs inhérents et/ou découlant de l'article 46 du Code de Procédure Civile du Québec pour conclure à l'existence d'une créance prioritaire en leur faveur.

[20] La question de savoir si l'article 49 LRCR crée une telle fiducie a déjà été abordée dans l'affaire *White Birch*[7] alors que le soussigné a répondu négativement à la question. Au surplus, ce jugement énonce que si elle existe, la fiducie réputée de l'article 49 LRC est affectée par l'application de la doctrine de la préséance des lois fédérales sur les lois provinciales lorsqu'il y a conflit entre ces deux régimes législatifs. Dans *White Birch*, il s'agissait de déterminer si la fiducie réputée de l'article 49 LRCR aurait eu priorité sur la créance super-prioritaire du prêteur « DIP » autorisée sous l'empire de la LACC.

[21] Les Comités de retraite requérants contestent cette analyse. Ils prétendent que la conclusion voulant que l'article 49 LRCR ne crée pas de fiducie réputée est mal fondée en droit. Ils reviennent donc à la charge mais avec certains arguments additionnels et reformulés qui méritent d'être examinés.

[22] Quant à la position de l'Intimée IQ, ses arguments suivent en tous points l'affaire White Birch précitée. Forte de cette décision, IQ prétend que la Requête des Comités de retraite n'a donc aucun fondement légal et doit être rejetée.

[23] Voyons, dans un premier temps et plus en détail la situation telle qu'elle se présentait dans l'affaire *White Birch* : alors que l'une des plus importantes papetières au Canada, est sous la protection de la LACC et qu'une ordonnance initiale suspend les cotisations d'équilibre payables par l'employeur à l'endroit de plusieurs régimes de retraite à prestations déterminées, une requête est déposée visant à ordonner à la débitrice de continuer à verser lesdites cotisations d'équilibre. Nous sommes au lendemain de la décision de la Cour d'appel de l'Ontario dans l'affaire *Indalex*[8], qui vient de reconnaître que ce genre d'obligation doit être honoré par les employeurs malgré la protection de la LACC, et ce, notamment, parce que ces sommes sont réputées être détenues en fiducie par les employeurs au bénéfice des Régimes de retraite concernés et que cette fiducie n'est pas affectée par le processus de restructuration de la LACC.

---

[7] White Birch Paper Holding Co. (Arrangement relatif à) 2012 QCCS 1679.
[8] La décision de la Cour d'appel de l'Ontario est rapportée à 2011 ONCA 265.

[24] Dans l'affaire *White Birch*, les syndicats, comtés de retraite et regroupements de retraités requérants ont notamment plaidé que l'article 49 LRCR créait, en droit québécois, le même genre de fiducie que celle qui était créée aux termes de l'article 57 du *Pensions Benefit Act*[9] de l'Ontario. L'essentiel du jugement *White Birch* décide que l'article 49 LRCR ne crée pas de fiducie légale réputée selon le droit québécois. Partant de là, les cotisations d'équilibre ou encore les soldes des déficits actuariels des régimes de retraite ne jouissent d'aucune priorité par rapport aux autres dettes de l'employeur et ne constituent que des dettes chirographaires.

[25] Le présent recours, basé sur une trame factuelle quasi-identique, devrait donc à première vue suivre le même sort : en l'absence d'une fiducie opposable à IQ, la requête des Comités de retraite devrait donc être rejetée. Par contre, comme nous le verrons plus loin, les faits du présent dossier ne sont pas exactement les mêmes et certains arguments juridiques plaidés en l'instance ou soulevés par le Tribunal n'ont pas été abordés dans l'affaire *White Birch*.

LES ARGUMENTS DES PARTIES

[26] Les Comités de retraite soutiennent que même si la décision dans *White Birch* énonce et répond négativement à la question de savoir si l'article 49 LRCR crée une fiducie en droit québécois, il y a lieu de revoir l'ensemble de la question.

[27] Dans un premier temps, les Comités de retraite recherchent l'intervention du soussigné comme juge agissant sous l'autorité de la LACC afin que sa décision soit prise dans l'objectif général de cette loi et … « de permettre au débiteur de continuer d'exercer ses activités et, dans le cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif. »[10]

[28] Toutefois, une question préliminaire se pose visant à déterminer si le soussigné agit à titre de juge superviseur du processus en vertu de la LACC ou s'il agit à titre de décideur délégué par le juge superviseur pour entendre et régler un différend entre deux créanciers qui prétendent avoir un droit prioritaire sur la créance de l'autre, à la lumière du contexte législatif du Québec.

[29] Le soussigné est d'avis qu'il n'agit pas à titre de juge superviseur mais à titre de décideur délégué, (analogue à un « Claims Officer ») désigné comme tel en vertu d'un Protocole de détermination de réclamations établi sous l'empire de la LACC.

[30] Les Comités de retraite plaident, dans un premier temps, que la LRCR est une loi d'intérêt public. Cela n'est pas contredit. Les principes énoncés en ce sens,

[9] RSO 1990 c. P-8. A noter, cependant, qu'en Ontario, ce sont les déficits actuariels qui sont touchés par l'article 57(4) de ladite loi, tandis qu'au Québec, ce sont les cotisations qui sont visées par l'article 49 LRCR.

[10] *Century Services Inc. c. Canada* (Procureur Général) [2010] 3 R.C.S. 379, paragraphe [15].

2014 QCCS 174 (CanLII)

notamment par le juge Pierre Dalphond dans l'arrêt *Hydro-Québec* [11] rendu par la Cour d'appel en 2005, sont tout à fait justes. Il en va de même pour ceux que l'on retrouve dans les affaires *Monsanto*[12] et *Buschau*.[13]

[31] Les Comités de retraite font aussi état du fait que, contrairement aux affaires *White Birch*[14] et *Indalex*,[15] le litige ne se situe pas entre un créancier de la débitrice et un prêteur « DIP » jouissant d'une super-priorité en vertu de la LACC. Ils ont raison et le soussigné n'entend pas faire bénéficier IQ d'une quelconque super-priorité découlant de la LACC. D'ailleurs, IQ n'en réclame aucune. IQ n'invoque que son statut de créancière garantie aux termes de son hypothèque universelle.

POSITION DES REQUÉRANTS SUR LA FIDUCIE RÉPUTÉE DE L'ARTICLE 49 LRCR

[32] L'existence d'une fiducie réputée créée par l'article 49 LRCR demeure le principal argument des Comités de retraite.

[33] Leur raisonnement est le suivant :

a) Tout d'abord, l'article 49 LRCR se lit comme suit :

> **« Jusqu'à leur versement à la caisse de retraite ou à l'assureur, les cotisations et les intérêts accumulés sont réputés détenus en fiducie par l'employeur, que ce dernier les ait ou non gardés séparément de ses biens. »**
>
> **(soulignements ajoutés)**

b) Cet article doit se lire avec l'article 1262 C.c.Q. qui se lit ainsi :

> **« La fiducie est établie par contrat, à titre onéreux ou gratuit, par testament ou, dans certains cas, par la loi. Elle peut aussi, lorsque la loi l'autorise, être établie par jugement. »**
>
> **(soulignements ajoutés)**

Donc, pour les requérants, le constituant de la fiducie de l'article 49 LRCR est l'employeur, le patrimoine fiduciaire est constitué des cotisations à être versées, le fiduciaire est la caisse de retraite concernée et le transfert des biens (ou les séparation des biens) est réputé exister selon les termes de l'article 49.

---

[11] *APRHQ c. Hydro-Québec*, 2005 QCCA 304, paragraphe 32.
[12] *Monsanto c. Surintendant des services financiers* [2004] 3 RCS 152, paragraphe 38.
[13] *Buschau c. Rogers Communications Inc*. [2006] 1 RCS 973, paragraphe 19.
[14] 2012 QCCS 1679, paragraphes 216 et 217.
[15] 2013 CSC 6, paragraphes 58 et 59.

2014 QCCS 174 (CanLII)

c) Étant donné que le Code civil du Québec prévoit à son article 1262 qu'une fiducie peut être établie, notamment par la loi, il s'ensuit toujours, selon les Comités requérants, que le simple texte de l'article 49 LRCR est suffisant pour constituer une véritable fiducie opposable aux créanciers de BSI, prioritaires ou non.

d) La thèse des Comités de retraite exclut l'application de l'article 1260 C.c.Q. à la fiducie créée par la loi. Voici ce qu'ils plaident dans leur plan d'argumentation aux paragraphes 54, 55 et 56 :

> **54. Il y a plusieurs formes de fiducies qui sont créées par différents moyens, tel qu'énoncé à l'article 1262 CCQ.**
>
> > **1262. La fiducie est établie par contrat, à titre onéreux ou gratuit, par testament ou, dans certains cas, par la loi. Elle peut aussi, lorsque la loi l'autorise, être établie par jugement.**
>
> **55. Si une fiducie est établie par contrat, l'article 1260 CCQ stipule que cette fiducie doit rencontrer certaines conditions formelles.**
>
> > **1260. La fiducie résulte d'un acte par lequel une personne, le constituant, transfère de son patrimoine à un autre patrimoine qu'il constitue, des biens qu'il affecte à une fin particulière et qu'un fiduciaire s'oblige, par le fait de son acceptation, à détenir et à administrer.**
>
> **56. L'article 1262 CCQ reconnaît aussi la fiducie établie par la loi. Afin que le législateur crée une telle fiducie, il le fait par législation <u>sans que cette création n'ait à rencontrer les conditions formelles prévues à l'article 1260 CCQ</u>. Le législateur a donc le pouvoir de créer des fiducies par voie d'une disposition statutaire de fiducies réputées. C'est exactement l'effet du texte de l'article 49 Loi RCR : cet article énonce que peu importe si les montants ont été gardés séparément ou non des biens de l'employeur, ils sont néanmoins réputés être détenus en fiducie dans un patrimoine d'affectation distinct pour le bénéfice des Comités de retraite de SBI.**
>
> **(soulignements ajoutés)**

e) Ainsi, pour les Requérants, l'article 1262 C.c.Q. permet la création d'une fiducie par le seul effet de la loi et la loi peut alors prévoir l'existence d'une fiducie valide même si les quatre conditions d'existence de la fiducie du *Code civil* prévues à l'article 1260 C.c.Q. ne sont pas remplies. Il suffit alors que la loi écarte spécifiquement l'une de ces conditions. Selon eux, c'est exactement ce que fait l'article 49 LRCR en éliminant la condition de l'article 1260 C.c.Q.

2014 QCCS 174 (CanLII)

exigeant que les biens mis en fiducie soient séparés du patrimoine du constituant.

f) Plus encore, les Comités requérants prétendent que leur raisonnement correspond aux exigences de l'article 1261 C.c.Q. Ils plaident au paragraphe 57 de leur plan d'argumentation :

> **57. L'article 1261 s'applique à toutes formes de fiducies, incluant celles établies par la loi.**
>
> > **1261. Le patrimoine fiduciaire, formé des biens transférés en fiducie, constitue un patrimoine d'affectation autonome et distinct de celui du constituant, du fiduciaire ou du bénéficiaire sur lequel aucun d'entre eux n'a de droit réel.**

g) Ainsi, les Comités requérants prétendent que les montants des cotisations d'équilibre, dues mais non versées, constituent un patrimoine d'affectation autonome et distinct de celui du constituant, sous le contrôle juridique d'un fiduciaire et réputé séparé des biens du constituant (l'employeur), même si ce patrimoine n'a pas été séparé des autres biens de ce même constituant.[16]

h) Ainsi, le concept de fiducie réputée suffit pour que les actifs de SBI soient grevés d'une charge fiduciaire prioritaire qui les soustrait des biens de l'employeur et du gage commun des créanciers de ce dernier.[17]

i) Pour conclure, les Comités requérants suggèrent que s'il fallait que l'article 49 LRCR se conforme aux conditions essentielles de l'article 1260 C.c.Q., l'article 49 LRCR n'aurait aucun effet, ce qui serait contraire au principe de base

---

[16] Voir paragraphe 58, Plan d'Argumentation des Requérants.

[17] Voir : ; « *Loi sur les régimes complémentaires de retraite, Annotations et Commentaires* », Régie des rentes du Québec, Bibliothèque Nationale du Québec, 1998, p. 49-3 :

> « Par une fiction juridique ou présomption légale, le législateur considère que les cotisations à verser et les intérêts accumulés sont détenus en fiducie. Comme la fiducie constitue un patrimoine d'affectation distinct de celui de l'employeur, les biens réputés détenus en fiducie se trouvent donc soustraits des biens de l'employeur, lesquels constituent le gage commun de ses créanciers, conformément à l'article 2645 du *Code civil du Québec*.
>
> […]
>
> Ainsi le présent article pourrait être invoqué à l'encontre du créancier de l'employeur qui prend possession du compte bancaire ou des créances de ce dernier en vertu par exemple des articles 2721 ou 2773 du Code civil du Québec,
>
> […]

Voir aussi Lyne Duhaime : « *Les aspects juridiques des régimes de retraite* », Publications CCH Ltée, Brossard, 2011, p. 138 :

> « Jusqu'à leur versement à la caisse de retraite, les cotisations et les intérêts accumulés sont réputés détenus en fiducie par l'employeur, que ce dernier les ait ou non gardés séparément de ses biens. Ceci signifie que dans une situation d'insolvabilité ou de faillite, les cotisations et intérêts ainsi accumulés ne feraient pas partie du patrimoine de l'employeur et seraient donc à l'abri des réclamations des créanciers. »
>
> (soulignements ajoutés)

2014 QCCS 174 (CanLII)

d'interprétation des lois voulant que le législateur ne parle pas pour ne rien dire et qu'il faut nécessairement donner un sens à un texte législatif clair. De plus, la LRCR étant une loi d'application spécifique, elle doit être interprétée comme ayant préséance sur une loi d'application générale telle que le Code civil du Québec.

2014 QCCS 174 (CanLII)

POSITION DE IQ SUR LA FIDUCIE RÉPUTÉE DE L'ARTICLE 49 LRCR

[34] IQ reprend à son crédit les principes déjà énoncés dans les dossiers *AbitibiBowater*[18] et *White Birch*[19].

[35] IQ insiste plus particulièrement sur le fait que toute fiducie établie par la loi, tel que le prévoit l'article 1262 C.c.Q., doit se conformer à toutes les exigences de l'article 1260 C.c.Q. Citant notamment l'auteur Jacques Beaulne[20], IQ souligne que les quatre éléments de l'article 1260 C.c.Q. doivent être rencontrés, soit :

a) le transfert d'un bien du patrimoine du constituant

b) à un autre patrimoine;

c) dont les biens sont affectés à une fin particulière;

d) qu'un fiduciaire s'oblige à détenir et à administrer.

[36] Citant les affaires *Banque de Nouvelle-Écosse c. Thibault*[21] et *White Birch*[22], IQ rappelle que (par la juge Deschamps dans *Thibault*) :

> **… « le modèle de la fiducie ne peut être travesti pour incorporer des contrats où le constituant conserve tous les droits sur le patrimoine. Je conclus donc que le Régime n'a pas les caractéristiques d'une fiducie. »**

et que (par le soussigné dans White Birch) :

---

[18] *AbitibiBowater (Arrangement relatif à*) 2009, QCCS 2028, juge Danièle Mayrand, j.c.s. qui écrit :

> [34] (…) D'ailleurs, la Cour d'appel de l'Ontario, dans l'affaire *Ivaco*, alors qu'elle décide de la portée de l'article 57(3) du *Pension Benefit Act* (dont les termes sont au même effet que ceux de l'article 49 LRCR), mentionne ce qui suit à l'égard des fiducies présumées (Deemed Trust);
> (…)
> « This Legislative designation by itself does not create a true trust. If the province w ants to require an employer to keep its unpaid contributions to a pension plan in a separate account, it must legislate that separation. It has not done so. » »

[19] *White Birch Paper Holding Company (Arrangement relatif à)* 2012 QCCS 1679, pages 43 et 44.

[20] Beaulne, Jacques, *Droit des fiducies*, 2e édition. Collection Bleue, Montréal, 2005, page 129.
Voir aussi au même effet : Commentaires du Ministre de la justice, tome 1, le Code civil du Québec, art. 1260, page 748; Duhaime Lyne, op.cit. page 15; Claxton, John B. *Langage du droit de la fiducie*, Revue du Barreau EYB2002, RDB64, pages 6 à 8.

[21] [2004] 1 RCS 758, page 22, paragraphe 41. Il faut spécifier ici qu'il ne s'agissait pas d'une fiducie présumée ou créée par une loi mais d'un régime contractuel d'épargne enregistré de retraite.

[22] 2012 QCCS 1679, page 56, paragraphe 169.

> **« La comparaison dans la situation qui nous occupe est flagrante : ici, White Birch ne se départit de rien. Elle garde l'entier contrôle sur les biens censés faire partie d'une fiducie et ne crée aucun patrimoine d'affectation. »**

2014 QCCS 174 (CanLII)

[37] IQ soutient donc que, SBI ne s'étant jamais départie de certains actifs en vue de constituer un patrimoine distinct, il ne peut y avoir de fiducie réelle applicable en l'espèce[23].

[38] Avant de poursuivre plus loin, il est nécessaire d'établir ce sur quoi porte l'article 49 LRCR.

[39] L'article 49 LRCR date de la promulgation de la loi, soit depuis 1989.

[40] A l'époque, les nouvelles dispositions du *Code civil du Québec* n'existaient pas. La notion de fiducie telle qu'elle se retrouvait au *Code civil du Bas-Canada* n'avait rien d'équivalent ni de comparable au droit actuel.

[41] Par contre, le genre de disposition que l'on retrouve à l'article 49 LRCR se retrouvait déjà dans plusieurs lois fiscales québécoises. La notion de « fiducie présumée » « ou de fiducie réputée » n'était pas inconnue.

[42] Mais d'abord, il faut déterminer ce sur quoi porterait cette fiducie réputée, pour autant qu'elle existe et qu'elle soit opposable à IQ.

[43] Voyons, dans un premier temps, les dispositions pertinentes de la LRCR, reprises par les parties dans leurs positions respectives. Au fur et à mesure de leur citation, certains commentaires liminaires s'avéreront nécessaires.

LES DISPOSITIONS LÉGISLATIVES PERTINENTES DE LA LRCR

[44] La notion de régime de retraite est énoncée à l'article 6 LRCR :

> **Un régime de retraite est un contrat en vertu duquel le participant bénéficie d'une prestation de retraite dans des conditions et à compter d'un âge donnés, dont le financement est assuré par des cotisations à la charge soit de l'employeur seul, soit de l'employeur et du participant.**
>
> **À moins qu'il ne soit garanti, tout régime de retraite doit avoir une caisse de retraite où sont notamment versés les cotisations ainsi que les revenus qui en résultent. Cette caisse constitue un patrimoine fiduciaire affecté principalement au versement des remboursements et prestations auxquels ont droit les participants et bénéficiaires.**

---

[23] Voir notamment *White Birch Paper Holding Company (Arrangement relatif à)* 2012 QCCS 1679, aux paragraphes 173, 174, 189 et 191 cités par QI dans son Plan d'Argumentation, pages 11 et 12, paragraphes 67 et 68.

[45] Voici, selon IQ, une fiducie parfaite et complète, créée par la loi et qui respecte en tous points les dispositions de l'article 1260 C.c.Q. Cette fiducie légale est d'ailleurs citée en exemple comme un modèle du genre.

[46] Cet article crée une caisse de retraite, donc un patrimoine fiduciaire séparé des actifs de l'employeur (le constituant), un apport fiduciaire (les cotisations), sous la responsabilité de fiduciaires (les dirigeants de la caisse)[24].

[47] Les articles 7, 8 et 9 LRCR[25] distinguent entre les régimes à prestation déterminée, à cotisations déterminées, garantis ou non-garantis.

[48] Dans le cas qui nous occupe, les régimes sont non-garantis et à prestations déterminées.

[49] Les articles 37 à 52 LRCR établissent la nature des diverses cotisations, l'obligation de les verser à la caisse de retraite ainsi que les modalités de perception et de versement de ces mêmes cotisations aux régimes de retraite concernés. Il n'y a pas lieu de reproduire ces articles, toutes les parties s'entendent pour reconnaître que :

a) la *cotisation salariale* est la quote-part du participant alors que la *cotisation patronale* est constituée de la quote-part de l'employeur (article 37 LRCR) ;

b) la *cotisation d'exercice* est la somme que l'employeur doit verser au régime et qui représente la totalité des prestations prévues aux régimes de retraite au titre des services effectués. Il s'agit normalement de la

[24] Voir aussi les articles 14 à 18 LRCR qui détaillent toutes les composantes d'un régime de retraite.

[25] 7. Le régime de retraite est à cotisation déterminée s'il détermine à l'avance les cotisations patronales et, le cas échéant, les cotisations salariales, ou la méthode pour les calculer, et si la rente normale est fonction des sommes portées au compte du participant.

Il est à prestations déterminées si la rente normale est soit un montant déterminé, indépendant de la rémunération du participant, soit un montant qui correspond à un pourcentage de cette rémunération.

Il est à cotisation et prestations déterminées s'il détermine à l'avance les cotisations patronales et, le cas échéant, les cotisations salariales, ainsi que la rente normale, ou la méthode pour les calculer.

8. Le régime de retraite est contributif si le participant y verse des cotisations salariales.

9. Est garanti le régime de retraite dont les remboursements et prestations sont à tout moment garantis par un assureur.

2014 QCCS 174 (CanLII)

totalité des cotisations salariales et patronales couvrant une période donnée (article 38 LRCR)[26].

Précisons tout de suite que ces trois types de cotisatons ne sont pas ici en litige. Elles ont toutes été perçues et versées aux caisses de retraite requérants.

c) L'article 39 LRCR établit un autre type de cotisation : c'est la *cotisation d'équilibre*. Cette cotisation vise à compenser, selon certaines modalités déterminées par les actuaires du régime, les déficits actuariels de capitalisation et/ou de solvabilité du régime, rendues nécessaires par la fluctuation de l'actif de la caisse de retraite et l'ensemble des obligations de cette même caisse face à ses participants et retraités.

2014 QCCS 174 (CanLII)

[50] Ce sont les cotisations d'équilibre de l'employeur SBI qui sont ici en jeu.

[51] Tel qu'indiqué ci-haut, tous s'entendent pour soutenir que les « cotisations » versées ou à être versées par l'employeur regroupent l'ensemble des cotisations salariales qu'il a perçues de ses employés participants, de sa cotisation patronale, ces deux éléments constituant la cotisation d'exercice, à laquelle la cotisation d'équilibre vient s'ajouter lorsque celle-ci est nécessaire.

[52] Vient alors l'article 49 LRCR qui stipule que les « cotisations » sont réputées détenues en fiducie par l'employeur que ce dernier les ait gardées ou non séparément de ses biens.

[53] Il est donc acquis que les cotisations d'équilibre sont touchées par l'application de l'article 49 LRCR. On ne saurait conclure que seules les cotisations perçues ou déduites par l'employeur sont visées par cet article.

[54] Si l'article 49 LRCR crée une véritable fiducie opposable à IQ, il faut donc conclure que les cotisations d'équilibre non versées depuis l'ordonnance du juge Morawetz les suspendant seront visées par cette fiducie.

<u>LES ARGUMENTS ADDITIONNELS DES CAISSES DE RETRAITE</u>

[55] Les Comités de retraite ajoutent que les autres dispositions de la LRCR pouvant trouver application sont les articles 228 et 264 LRCR.

[56] Les Comités de retraite plaident en effet que non seulement les cotisations d'équilibre sont couvertes par la fiducie réputée de l'article 49 LRCR mais aussi que les soldes des déficits actuariels sont aussi couverts. Or, cet argument additionnel ne peut résister longuement à l'analyse. L'article 228 LRCR affirme plutôt que :

---

[26] Voir aussi les articles 138 et 139 LRCR qui déterminent le calcul de la cotisation d'exercice.

> **228. Constitue une dette de l'employeur le manque d'actif nécessaire à l'acquittement des droits des participants ou bénéficiaires visés par le retrait d'un employeur partie à un régime interentreprises ou par la terminaison d'un régime de retraite. Ce manque d'actif doit être établi à la date de la terminaison.**
>
> **Si l'employeur a, à la date de la terminaison, omis de verser des cotisations à la caisse de retraite ou, selon le cas, à l'assureur, cette dette est l'excédent du manque d'actif sur ces cotisations.**
>
> **Dans le cas d'un régime interentreprises, le présent article s'applique à chaque employeur partie au régime et auquel se rapporte un groupe de droits formé en application de la sous-section 3 et composé des droits de participants ou bénéficiaires visé par le retrait ou la terminaison.**
>
> **(soulignements ajoutés)**

[57] Cet article fait partie du chapitre XIII de la LRCR qui traite de la liquidation des droits des participants et des bénéficiaires[27]. Ce chapitre traite aussi de la terminaison d'un régime lorsqu'il n'y a plus de participant actif[28].

[58] Un processus de liquidation est alors mis en branle[29] et lorsque l'actif du régime s'avère insuffisant, l'article 228 s'applique : l'employeur est donc endetté envers le régime. Cette dette ne constitue pas une cotisation. D'ailleurs, nulle part dans les dispositions de la LRCR définissant ce qu'est une cotisation ne peut-on trouver une quelconque référence permettant de conclure que les soldes des déficits actuariels sont visés par l'article 49 LRCR.

[59] Il semble donc clair que la fiducie réputée de l'article 49 LRCR ne peut s'appliquer qu'aux « *cotisations* » visées par cet article et non aux soldes des déficits actuariels. D'ailleurs, le remboursement de ces soldes est régi par une série de règles particulières.[30]

[60] Finalement, les Comités de retraite requérants invoquent l'article 264 LRCR qui se lit ainsi :

> **264. Sauf dispositions contraires de la loi, est incessible et insaisissable:**
>
> **1° toute cotisation versée ou qui doit être versée à la caisse de retraite ou à l'assureur, ainsi que les intérêts accumulés;**
>
> **2° toute somme remboursée ou toute prestation versée en vertu d'un régime de retraite ou de la présente loi;**

[27] Articles 198 ss. LRCR.
[28] Article 205(3e) LRCR.
[29] Articles 208 ss. LRCR.
[30] Articles 229-230 et 230.0.01 à 230.0.012.

2014 QCCS 174 (CanLII)

> **3° toute somme attribuée au conjoint du participant à la suite d'un partage ou d'une autre cession de droits visés au chapitre VIII, avec les intérêts accumulés, ainsi que les prestations constituées avec ces sommes.**
>
> **Sauf dans la mesure où elles proviennent de cotisations volontaires ou représentent une part d'excédent d'actif attribuée après la terminaison d'un régime de retraite, l'incessibilité et l'insaisissabilité valent également à l'égard des sommes susmentionnées qui ont fait l'objet d'un transfert dans un régime de retraite visé à l'article 98, avec les intérêts accumulés, de tout remboursement de ces sommes et de toute prestation en résultant, ainsi qu'à l'égard de la rente ou du paiement ayant remplacé une rente en application de l'article 92.**
>
> **(soulignements ajoutés)**

2014 QCCS 174 (CanLII)

[61] Les Comités requérants plaident que la notion d'incessibilité et d'insaisissabilité des « *cotisations versées ou à être versées à la caisse de retraite* » vient renforcer leur argument que ces mêmes *cotisations* sont assujetties à la fiducie réputée de l'article 49 LRCR. Inversement, si les cotisations dues mais non versées font l'objet d'une fiducie réputée, l'article 264 LRCR doit alors s'appliquer à celles-ci et les rendre incessibles et insaisissables. Ainsi, il serait impossible pour l'employeur et ses créanciers d'avoir un quelconque accès aux sommes représentant ou pouvant représenter une cotisation « *à être versée* » à la caisse de retraite. Par l'effet combiné des articles 49 et 264 LRCR, les cotisations d'équilibre non versées et les intérêts y afférant constitueraient des créances prioritaires à celle de IQ.

[62] La position de IQ est de soutenir que cet article ne peut s'adresser qu'aux sommes qui ont été clairement identifiées comme des cotisations et qui ont été clairement séparées du reste du patrimoine de l'employeur. Par exemple, si l'employeur ouvre un compte séparé dans lequel il dépose les cotisations qui seront versées à la caisse de retraite, ces sommes sont alors insaisissables et incessibles. Pour IQ, l'article 264 LRCR ne peut s'appliquer que s'il y a séparation de patrimoines.

[63] Sinon, sur le plan pratique, à chaque fois qu'un employeur paie une somme d'argent à un créancier, ce dernier devrait alors s'assurer (ou l'employeur devrait être en mesure de lui démontrer) que toutes les cotisations à être versées à la caisse de retraite sont payées, et que le déficit actuariel est adéquatement couvert sous peine de voir ces montants réclamés par le Comité de retraite concerné, comme c'est le cas en l'espèce.

[64] Cela ne ferait, selon IQ, aucun sens.

[65] Il s'ensuivrait que tout employeur ne pourrait jamais être certain qu'il a payé valablement une dette à un tiers, lorsqu'il serait, par exemple, en retard de paiement

sur l'une ou l'autre de ses cotisations ou encore que le ou les régimes de retraite de ses employés soient adéquatement pourvus de manière à éviter tout risque de déficit.

[66] Pour IQ, la portée de cet article serait donc de rendre incessible ou insaisissable toute cotisation identifiée comme telle qui aura fait l'objet d'une séparation physique du patrimoine de l'employeur en vue d'effectuer un paiement à une caisse de retraite.

2014 QCCS 174 (CanLII)

LES DISPOSITIONS DU *CODE CIVIL DU QUEBEC* EN MATIERE DE FIDUCIES

[67] Depuis 1994, le droit des fiducies au Québec a subi une transformation complète.

[68] Toutes les fiducies de droit québécois sont dorénavant assujetties aux règles édictées par les articles 1260 et suivants C.c.Q.

[69] Il n'est définitivement plus question au Québec de reconnaître autre chose que la fiducie du Code civil. Les fiducies de droit anglo-saxon ou dérivant de la Common Law en vigueur dans les autres provinces canadiennes n'ont donc pas d'existence légale.

[70] Le Code civil est une loi d'application générale de par son importance, de la multitude des sujets qu'elle couvre et du fait que l'on y retrouve l'ensemble des dispositions gouvernant notre droit civil et notre droit privé. Par contre, les Régimes de retraite requérants soutiennent que la LRCR est une loi spécifique dont les dispositions doivent l'emporter sur une loi d'application générale.

[71] La question se pose différemment lorsqu'un chapitre entier consacré à un concept comme la fiducie est inséré au Code civil. On ne peut, selon IQ, du simple fait que ce chapitre est inséré au *Code civil*, conclure que les dispositions particulières en matière de fiducie perdent leur statut de loi particulière au point de prétendre que les dispositions de la LRCR, elles, auraient préséance sur les articles 1260 et suivants du *Code civil*.

[72] Les articles pertinents du *Code civil* sont les suivants :

> **1260. La fiducie résulte d'un acte par lequel une personne, le constituant, transfère de son patrimoine à un autre patrimoine qu'il constitue, des biens qu'il affecte à une fin particulière et qu'un fiduciaire s'oblige, par le fait de son acceptation, à détenir et à administrer.**
>
> **(soulignements ajoutés)**

[73] Cet article, comme nous l'avons vu, détermine les composantes essentielles d'une fiducie de droit québécois :

- l'existence d'un constituant;
- la nécessité d'un transfert de son patrimoine à un autre patrimoine;
- des biens spécifiques;
- affectés à une fin particulière.

[74] L'article 1261 édicte ce qui suit :

> **1261. Le patrimoine fiduciaire, formé des biens transférés en fiducie, constitue un patrimoine d'affectation autonome et distinct de celui du constituant, du fiduciaire ou du bénéficiaire, sur lequel aucun d'entre eux n'a de droit réel.**
>
> **(soulignements ajoutés)**

[75] Il faut donc, selon cette façon de voir, qu'il y ait transfert complet des sommes ou des biens pour constituer un patrimoine autonome et distinct de celui du constituant, du fiduciaire et du bénéficiaire et que ni l'un ni l'autre d'entre eux ne puisse y faire valoir un quelconque droit réel.

[76] L'article 1262 C.c.Q. énonce les modes d'établissement d'une fiducie :

> **1262. La fiducie est établie par contrat, à titre onéreux ou gratuit, par testament ou, dans certains cas, par la loi. Elle peut aussi, lorsque la loi l'autorise, être établie par jugement.**
>
> **(soulignements ajoutés)**

[77] Si la loi permet la création d'une fiducie selon l'article 1262 C.c.Q., la loi peut-elle déroger aux critères de l'article 1260 C.c.Q.?

[78] L'article 1263 C.c.Q. se lit ainsi :

> **1263. La fiducie établie par contrat à titre onéreux peut avoir pour objet de garantir l'exécution d'une obligation. En ce cas, la fiducie doit, pour être opposable aux tiers, être publiée au registre des droits personnels et réels mobiliers ou au registre foncier, selon la nature mobilière ou immobilière des biens transférés en fiducie.**
>
> **Le fiduciaire est, en cas de défaut du constituant, assujetti aux règles relatives à l'exercice des droits hypothécaires énoncées au livre Des priorités et des hypothèques.**

[79] Il est intéressant de noter ici que pour être opposable aux tiers (ici, IQ est un tiers), la fiducie contractuelle doit être publiée au RDPRM ou au registre foncier. Une

2014 QCCS 174 (CanLII)

fiducie créée par la loi opposable au tiers ne semble pas requérir un tel élément même si la fiducie a pour objet de garantir le paiement d'une cotisation par l'employeur à un régime de retraite.

2014 QCCS 174 (CanLII)

[80] De ce qui précède, le Tribunal conclut que si l'article 49 LRCR crée une véritable fiducie réputée opposable à IQ :

a) cette fiducie réputée s'appliquera à toutes les cotisations non versées aux Comités de retraite requérants;

b) plus spécifiquement, elle s'appliquera aux cotisations d'équilibre ayant fait l'objet de l'Ordonnance de Suspension émise par le juge Morawetz;

c) par contre, cette fiducie réputée ne s'appliquera qu'aux cotisations et non aux soldes déficits actuariels qui, eux, sont des dettes de l'employeur conformément aux dispositions de l'article 228 LRCR.

d) l'article 264 LRCR pourra s'appliquer aussi aux cotisations non versées aux Comités de retraite et non aux soldes des déficits actuariels.

[81] Il reste à déterminer

a) si l'article 49 LRCR crée une fiducie réputée opposable à IQ; et

b) si oui, les biens visés par une telle fiducie réputée sont incessibles et insaisissables et, partant de là, s'ils sont exclus de la garantie hypothécaire dont bénéficie IQ.

ANALYSE

a) **La fiducie réputée de l'article 49 LRCR**

[82] Pour les motifs qui suivent et malgré l'analyse du soussigné dans l'affaire *White Birch*, force est de conclure que l'article 49 LRCR crée une fiducie réputée opposable à la créance de IQ. Toutefois, le présent dossier touche une question différente des affaires *White Birch* et *Indalex*. Dans ces deux dossiers, il s'agissait de décider si les contributions d'équilibre ou les soldes des déficits actuariels des régimes de retraite avaient préséance sur la créance du prêteur « DIP », elle-même protégée par une super-priorité en vertu de la LACC, et ce, alors que la loi provinciale entrevoyait l'existence d'une fiducie réputée applicable aux cotisations ou soldes actuariels en question, selon le cas.

[83] La présente instance porte sur la priorité des créances de deux créanciers qui ne bénéficient pas de super-priorités alors que la débitrice SBI est au stade de rembourser ses créanciers selon leur priorités respectives établies par le droit québécois. Il s'agit donc de décider si, aux termes du droit québécois, l'ordre de

priorité attaché à chacune de ces créances fait en sorte que les Comités de retraite peuvent se réclamer d'un rang prioritaire à celui de IQ.

[84] Ainsi, même si l'on doit conclure à l'existence d'une fiducie créée par la loi en vertu de l'article 49 LRCR, une telle conclusion, si elle avait été retenue dans *White Birch* n'aurait pas eu d'impact sur la finalité de ce débat car la question était toute autre.

[85] En effet, la conclusion finale retenue dans *White Birch* demeure la même car la doctrine de la préséance du droit fédéral fait en sorte que la fiducie de l'article 49 LRCR, si elle avait été retenue, ne lui aurait pas donné priorité de rang sur la créance super-prioritaire du prêteur DIP.[31]

[86] La question des fiducies réputées en droit québécois a donné lieu à plusieurs décisions au cours des quelques 20 dernières années, surtout en matière fiscale et presqu'exclusivement dans un contexte de faillite. Cependant, même si la fiducie réputée de l'article 49 LRCR s'inscrit dans un contexte fort différent, la façon dont nos tribunaux ont analysé la fiducie réputée en matière fiscale nous permet de comprendre comment l'on doit s'y prendre pour analyser celle que nous suggère l'article 49 LRCR.

[87] Il faut remonter à l'affaire *Nolisair*[32] alors que la Cour d'appel renversait un jugement du juge Roland Durand du 16 octobre 1994[33]. Le fond du litige portait sur la fiducie présumée dont se réclamait alors le Ministère du revenu et qui avait déposé une preuve de réclamation prioritaire couvrant l'ensemble des actifs de la débitrice. Le syndic a rejeté cette réclamation, alléguant l'absence d'une telle fiducie au motif que *Nolisair* n'avait pas gardé les retenues à la source perçues de ses employés dans un compte séparé de son patrimoine. Le SMRQ objectait que l'article 20 de la *Loi sur le Ministère du revenu*[34] (la LMRQ) créait une telle fiducie présumée.

[88] Le juge Durand a décidé en première instance que l'article 20 LMRQ ne créait pas de fiducie au sens de l'article 67(3) de la *Loi sur la faillite et l'insolvabilité.*

[89] Parallèlement à l'affaire *Nolisair,* le juge Roger Banford décidait dans l'affaire *Sécurité Saglac (1992) Inc. c. Sous-ministre du revenu du Québec*[35] que ce même article 20 créait une fiducie présumée.

[90] Les deux dossiers ont été entendus en même temps par la Cour d'appel et ont fait l'objet de deux jugements séparés, l'un accueillant l'appel formé à l'endroit du

[31] Voir *Century Services* précité.
[32] Re : Faillite de *Nolisair International Inc. c. Le Sous-ministre du revenu du Québec* (1997) AZ 97011738 (C.A.).
[33] 700-11-000069-932 (C.S. St-Jérôme) AZ-94021150.
[34] *LRQ c. M-31.*
[35] C.S. Chicoutimi, no. 150-11-000012-930.

2014 QCCS 174 (CanLII)

jugement du juge Durand[36] et l'autre rejetant l'appel formé à l'endroit de celui du juge Banford[37].

[91] La Cour d'appel, à deux juges contre un, a alors reconnu l'existence d'une fiducie réputée créée par l'article 20 LMRQ qui se lisait alors ainsi :

> **20. Toute personne qui déduit, retient ou perçoit un montant quelconque en vertu d'une loi fiscale est réputée le détenir en fiducie pour Sa Majesté aux droits du Québec.**
>
> **Un tel montant doit être tenu, par la personne qui l'a déduit, retenu ou perçu, distinctement et séparément de ses propres fonds et dans les cas d'une liquidation, cession ou faillite, un montant égal au montant ainsi déduit, retenu ou perçu doit être considéré comme formant un fonds séparé ne faisant pas partie des biens sujets à la liquidation, cession ou faillite.**
>
> **Toutefois, cette personne peut, lors de la production au ministre d'une déclaration en vertu des articles 468 ou 470 de la *Loi sur la taxe de vente au Québec* et modifiant certaines dispositions législatives d'ordre fiscal (*1991 c. 67*) retirer du total des fonds tenus séparément et distinctement de ses propres fonds, les montants qu'elle a droit de déduire et qu'elle a effectivement déduits dans le calcul de son montant à remettre.**

[92] On aura remarqué , et c'est là l'intérêt de la chose, que ce texte vise des montants « déduits, retenus ou perçus » par une personne à des fins fiscales et non des montants dus par cette même personne. Somme toute, les sommes ici visées sont des sommes qui n'appartiennent pas et qui n'ont jamais appartenu à la personne en question.

[93] On aura aussi remarqué que l'article 20 LMRQ, tel qu'il existait alors, ne contenait pas les mots qui y seront ajoutés quelques mois plus tard et qui se liront, après l'amendement en question[38] :

> **« … que ce montant ait été ou non, dans les faits tenu séparé des éléments du patrimoine de cette personne ou de ses propres fonds. »**

[94] C'est d'ailleurs à cause de l'absence de ces mots que le juge Durand refusera de reconnaître la fiducie réputée de l'article 20 LMRQ. On remarquera, cependant, la présence de ces mêmes mots dans l'article 49 LRCR.

---

[36] 1997 CanLii 10022 (QC.CA); 1

[37] 1997 Canlii 10026 (QC.CA).

[38] Article 39, *Loi* modifiant la *Loi concernant l'Impôt sur le tabac*, la *Loi sur le Ministère du Revenu* et d'autres dispositions législatives d'ordre fiscal L.Q. *1993 c. 79* sanctionnée le 17 décembre 1993 et applicable à toute faillite, liquidation ou cession survenue après le 23 avril 1993.

2014 QCCS 174 (CanLII)

[95] Malgré le bénéfice de cet amendement, les juges Bamford (dans l'affaire *Sécurité Saglac*) en première instance et Chamberland en Cour d'appel, se basant sur une analyse des mots … « *un montant égal au montant ainsi déduit, retenu ou perçu doit être considéré comme formant un fonds séparé* »… du deuxième alinéa de l'article 20 LMRQ ont décidé que le texte était suffisant pour que cet article puisse créer une fiducie réputée créée par la loi. Le juge Chamberlalnd conclut en ces termes[39] :

> **La fiducie réputée**
>
> **Aux fins de cette opinion, j'entends par «fiducie réputée» la fiducie qui n'existe que parce que le législateur, provincial ou fédéral, dit qu'elle existe, alors que, dans les faits, elle ne revêt pas tous les attributs d'une fiducie. L'existence de la fiducie dépend de la présence conjuguée de trois certitudes: 1) certitude quant à l'intention du constituant de créer une fiducie, 2) certitude quant à l'identité du bénéficiaire de la fiducie, et enfin, 3) certitude quant aux biens assujettis à la fiducie, en ce sens que ces biens doivent être conservés par le fiduciaire de façon autonome et distincte de son patrimoine (L.W. HOULDEN et C.H. MORAWETZ, Bankruptcy and Insolvency Law of Canada, 3rd Ed., mis à jour 1996 (No 7), aux pages 3-17 à 3-30, chapitre intitulé «Trust Property»).**
>
> **…**
>
> **La fiducie réputée est l'un «des moyens auxquels les législateurs ont souvent recours pour recouvrer des sommes qui auraient dû leur être versées, mais qui ont été illégalement détournées par un débiteur qui a, par la suite, éprouvé des difficultés financières et s'est vu forcé de liquider son entreprise» (Banque Royale c. Sparrow Electric Corp., 1997 CanLII 377 (CSC), [1997] 1 R.C.S. 411, le juge Gonthier, à la page 435).**
>
> **Revenant à la première question soulevée par ce litige, il s'agit donc de décider si l'article 20 de la LMRevenu Québec crée une fiducie réputée.**
>
> **L'appelant plaide que non parce que certains mots, à son avis essentiels à la création d'une fiducie réputée - et que l'on retrouve, par exemple, au paragraphe 5 de l'article 227 de la LIR fédérale - ne s'y trouvent pas. En somme, en l'absence des mots «que ce montant ait été ou non, en fait, tenu séparé des propres fonds de la personne ou des éléments du patrimoine», l'article 20 de la LMRevenu Québec ne créerait pas de fiducie réputée; il ne ferait que confirmer l'existence d'une fiducie réelle, opposable à la masse des créanciers que dans la mesure où les**

[39] Opinion du juge Chamberland dans *Sécurité Saglac*.

2014 QCCS 174 (CanLII)

sommes déduites ont été réellement détenues à part par le débiteur, ce qui n'est pas le cas en l'espèce.

Je ne partage pas ce point de vue.

…

De fait, le texte de l'article 20 est bien différent de celui que la Cour supérieure étudiait, en 1977, dans l'affaire Joe's Steak House, précitée. Le législateur y a ajouté des mots -«un montant égal au montant ainsi déduit, retenu ou perçu» - qui ont, à mon avis, le même effet - la création d'une fiducie réputée - même si les mots «que ce montant ait été ou non, en fait, tenu séparé des propres fonds de la personne ou des éléments du patrimoine», utilisés au paragraphe 227(5) de la LIR fédérale ne s'y trouvent pas.

Comparons les textes de l'article 20 à l'époque de l'affaire Joe's Steak House, précitée, (en 1979) et durant la période en litige (en 1992):

Toute personne qui déduit, retient ou perçoit un montant quelconque en vertu d'une loi fiscale est réputée le détenir en fiducie pour Sa Majesté aux droits du Québec.

Un tel montant doit être tenu par la personne qui l'a déduit, retenu ou perçu distinctement et séparément de ses propres fonds et dans les cas d'une liquidation, cession ou faillite, doit être considéré comme formant un fonds séparé ne faisant pas partie des biens sujets à la liquidation, cession ou faillite.

Toute personne qui déduit, retient ou perçoit un montant quelconque en vertu d'une loi fiscale est réputée le détenir en fiducie pour Sa Majesté aux droits du Québec.

Un tel montant doit être tenu, par la personne qui l'a déduit, retenu ou perçu, distinctement et séparément de ses propres fonds et dans les cas d'une liquidation, cession ou faillite, un montant égal au montant ainsi déduit, retenu ou perçu doit être considéré comme formant un fonds séparé ne faisant pas partie des biens sujets à la liquidation, cession ou faillite.

[...]

(soulignements ajoutés)

2014 QCCS 174 (CanLII)

> **Le premier paragraphe est identique; le législateur y prévoit expressément, en utilisant les mots «est réputée», qu'une personne qui a déduit, retenu ou perçu un montant en vertu d'une loi fiscale détient ce montant en fiducie et que Sa Majesté aux droits du Québec est la bénéficiaire de cette fiducie. Le début du deuxième paragraphe est également identique; le législateur y crée l'obligation pour la personne visée de tenir le montant ainsi déduit, retenu ou perçu «distinctement et séparément de ses propres fonds». Si tel est le cas, il y a fiducie réelle et, advenant faillite, ces montants constituent des «biens détenus par le failli en fiducie pour toute autre personne», au sens de l'alinéa 67(1)(a) de la Loi FI, et ils ne sont pas compris dans les biens du failli.**
>
> **La seconde partie du deuxième paragraphe a été modifiée par l'ajout des mots «un montant égal au montant ainsi déduit, retenu ou perçu [...]».[2] L'ajout de ces mots ne s'explique, à mon avis, que par la volonté du législateur de créer une fiducie réputée et de la distinguer de la fiducie réelle en éliminant expressément la nécessité de respecter la troisième des conditions essentielles à l'existence d'une fiducie, soit le fait pour le fiduciaire de conserver les biens affectés à la fiducie séparément et distinctement de son patrimoine. En effet, les mots «un montant égal au montant ainsi déduit, retenu ou perçu» sont inutiles dans le contexte où le failli tient un compte distinct et séparé de ses propres fonds pour les montants déduits, retenus ou perçus; les mots n'ont de sens que si le failli ne tient pas un tel compte distinct et séparé. Dans le contexte, ces mots suffisaient pour conclure à la création d'une fiducie réputée; le premier paragraphe de l'article 20 et le début du second visaient la fiducie réelle alors que le premier paragraphe et la fin du second visaient la fiducie réputée.**
>
> **D'où, à mon avis, la conclusion que le législateur a ainsi créé une fiducie réputée même s'il n'a pas repris tous les mots du législateur fédéral au paragraphe 5 de l'article 227. L'utilisation des mots «un montant égal au montant ainsi déduit, retenu ou perçu» rendait, à mon avis, inutile l'utilisation des mots «que ce montant ait été ou non, en fait, tenu séparé des propres fonds de la personne».**
>
> **(soulignements ajoutés)**

[96] Cette longue citation indique la manière retenue alors par la Cour d'appel pour conclure à l'existence d'une fiducie réputée en se basant sur les mots retenus par le législateur. En appliquant ce genre d'analyse à l'article 49 LRCR, on doit d'abord se poser la question à savoir si le texte de cet article est suffisamment clair et complet pour conclure à l'existence d'une fiducie réputée. Un tel exercice convainc le Tribunal que l'on doit répondre affirmativement à cette question surtout lorsque l'on constate que l'article 49 LRCR reprend les mots alors présumés manquants à l'article 20 LMRQ et qui, plus tard, feront en sorte que l'article 20 LMRQ crée effectivement une fiducie réputée.

2014 QCCS 174 (CanLII)

[97] Ainsi, pour le juge Chamberland, les mots utilisés par le Législateur dans l'ancien article 20 LMR étaient suffisamment clairs pour établir une fiducie réputée, faisant des déductions déduites, retenues ou perçues par la partie débitrice un patrimoine fiduciaire suffisamment bien défini, « …comme formant un fonds séparé ne faisant pas partie des biens… » de ladite débitrice dans le contexte d'une cession ou d'une faillite.

2014 QCCS 174 (CanLII)

[98] Malgré l'intérêt et la logique du raisonnement, la Cour suprême ne verra pas les choses de la même façon.

[99] Tant dans *Nolisair* que dans *Sécurité Saglac*, le juge Fish, siégeant alors à la Cour d'appel, était dissident. Pour lui, en l'absence des mots ajoutés à l'article 20 LMRQ par l'amendement de 1993, ledit article ne créait pas de fiducie réputée[40]. Il écrira :

> **« In fact and in effect, these deductions simply consisted in book keeping entries: no moneys were actually retained by the employer in an identifiable form, separate from the employer's own funds."**

[100] Pour le juge Fish, l'amendement de 1993 vient corriger le problème pour le futur mais non pour les deux cas dont la Cour est saisie, dont les faits remontent à une date antérieure à la prise d'effet dudit amendement. Il se dit d'accord avec le raisonnement du juge Durand dans *Nolisair* et en désaccord avec celui du juge Banford dans *Sécurité Saglac.*

[101] Par contre, une lecture attentive de l'opinion du juge Fish fait ressortir que l'amendement de 1993 n'a pour effet que de rendre l'article 20 LMRQ compatible avec l'article 67 de la *Loi sur la faillite et l'insolvabilité* et l'article 227 de la *Loi sur les impôts fédérale.*

[102] Le juge Fish écrira donc, et c'est là où il est en désaccord avec le raisonnement du juge Chamberland :

> **As I have already mentioned, the Minister of Revenue seeks to recover, from an estate in bankruptcy, income tax and pension contributions that were deducted at source by the debtor, but not separated from the rest of the debtor's patrimony, and never remitted to the government.**
>
> **To succeed on this claim, <u>the Minister must establish that s. 20 MRA, prior to its amendment in 1993, created a deemed trust "substantially similar to subs. 227(4) of the Income Tax Act"</u>, within the meaning of s. 67(3)(a). The Minister must demonstrate as well that the Crown's beneficial interest under the trust attached to unremitted deductions at source <u>whether or not the amounts deducted were held separately from the patrimony of the bankrupt debtor.</u>**

[40] Opinion du juge Fish dans *Nolisair* en Cour d'appel.

Deductions at source under the ITA are in law the property of the employee. The employer, at the point of withholding, therefore holds the amounts deducted as trustee of a fund belonging to the employees, not to the Crown. It is subs. 227(4) ITA that has the effect of making Her Majesty the beneficiary under that trust.

When the employer fails to retain the deductions in a separate fund, however, Her Majesty's beneficial interest becomes intermingled with the employer's general assets and "Her Majesty's claim ... then becomes that of a beneficiary under a non-existent trust".

Here, the employer failed to separate the source deductions from his own property. Accordingly, the deemed trust created by s. 20 MRA, if it were "substantially similar" to the deemed trust of subs. 227(4) ITA, would likewise make the Minister of Revenue "a beneficiary under a non-existent trust".

In considering whether a provincial deemed trust is substantially similar to the federal standard created by subs. 227(4), however, one cannot insulate the text of subs. 227(4) from its context. Subsection 227(5) is linked by reference to subs. 227(4) and, together, the two subsections may be said to create a coherent whole in the context of a bankruptcy.

For the purposes of disposing of the appeal, we should therefore, I believe, take into account the impact of subs. 227(5) ITA on the kind of deemed trust that will meet the requirements of subs. 67(3) BIA. In my view, we are also bound to read subs. 67(3) in a manner that respects the evident intent of Parliament to place deemed trusts, provincial and federal, on the same footing with respect to priority in the event of a bankruptcy.

To benefit from the full protection afforded by subs. 67(3), the deemed trust referred to in subs. 227(4) ITA must also conform to subs. 227(5). And to be eligible for that same protection, a provincial provision creating a deemed trust must be "substantially similar", having essentially the same reach and complying with the same basic requirements.

In particular, the provincial deemed trust must, to achieve the result of its federal counterpart under subs. 227(5), explicitly impress upon the amount of the unremitted deductions at source whether or not that amount has in fact been kept separate and apart from the debtor's own moneys or from the assets of the estate.

Prior to its amendment in 1993, s. 20 MRA did not, in my respectful view, meet this test.

Accordingly, even on the assumption that subs. 67(3) BIA authorized the creation by Quebec of a deemed trust substantially similar to the type

2014 QCCS 174 (CanLII)

contemplated either by subs. 227(4) ITA read alone, or by subss. 227(4) and (5) read together, I would feel bound to dismiss the appeal.

(soulignements ajoutés)

2014 QCCS 174 (CanLII)

[103] Rappelant par la suite les affaires Re: *Deslauriers Construction Productions Ltd* (1970)3 O.R. 599 (C.A.), *Dauphin Plains Credit Union Ltd c. Xyloid Industries Ltd* [980] 1 S.C.R. 1182, *British Columbia c. Henfrey Samson Bélair Ltd* [l989] 2 SCR 24 et *Royal Bank of Canada c. Sparrow Electric Corp.* [1997] 1 S.C.R. 411, le juge Fish conclut que le texte de l'article 20 LMRQ, tel qu'il existait antérieurement à l'amendement de 1993, ne rencontrait pas les exigences des articles 67 LFI et 227(5) de la *Loi fédérale sur les impôts*. Le texte de l'amendement de 1993 a eu pour effet de régler le problème de la fiducie présumée de l'article 20 LMRQ mais force est de constater que le texte de l'article 49 LRCR contient les mots « sacramentels » confirmant l'existence d'une fiducie réputée, même si l'employeur n'a pas gardé les cotisations qu'il doit verser aux Comités de retraite requérants séparées ou non de ses autres biens.

[104] Les affaires *Saglac* et *Nolisair* ont été portées en appel devant la Cour suprême du Canada[41] et dans un jugement aussi court qu'unanime, les jugements de la Cour d'appel ont été renversés au profit de la dissidence du juge Fish, sans rien y ajouter.

[105] L'opinion combinée des juges Chamberland et Fish démontre en fait une seule chose : pour qu'une fiducie réputée existe, il faut que le langage qui la constitue soit sans équivoque et qu'il démontre que les sommes ou biens réputés être détenus en fiducie le sont, même sans séparation desdits biens ou sommes du reste des actifs de la partie débitrice.

[106] C'est ce qui semble exister en l'espèce, à la lecture de l'article 49 LRCR.

[107] Pourtant, plusieurs années plus tard, dans *Québec (Sous-ministre du Revenu) c. De Courval,* 2009 QCCA 409[42], la Cour d'appel avait à décider des conditions d'existence ou non d'une fiducie au sens de l'article 20 de la *Loi sur le Ministère du Revenu*. La juge Dutil a écrit ceci :

[10] S'appuyant sur un jugement de la Cour supérieure, dans l'affaire de la faillite de *Chibou-Vrac inc. (Syndic de)* et *Groupe Thibault Van Houtte & Associés ltée*, le juge de première instance conclut que la TVQ peut être détenue dans une fiducie présumée au sens de l'article 20 *LMR*. Toutefois, pour que ces sommes d'argent ne soient pas considérées comme des biens du failli, par l'application de l'alinéa 67(1)a) de la *Loi sur la faillite et l'insolvabilité* (*LFI*), il doit s'agir d'une fiducie réelle, ce qui n'est pas le cas en l'espèce.

---

[41] 1999, 1 RCS 759.

[42] En appel du jugement du soussigné dans Services Sécurité Québec.

> **[11] Le juge de première instance estime également que l'*obiter dictum* du juge Letarte, dans l'arrêt *Giguère (Syndic de) c. Lloyd Woodfine* [*Giguère*], concernant des sommes détenues en fiducie, « ne peut servir de base juridique qui aurait pour effet de modifier profondément tout le courant jurisprudentiel antérieur sur la question de l'application des articles 15.3.1 et 20 de la Loi. »**

[108] Après avoir cité les dispositions pertinentes de la *Loi sur le Ministère du Revenu* et de la *Loi sur la faillite et l'insolvabilité*, la juge Dutil pose le problème en ces termes :

> **[19] Le syndic soutient que l'article 20 *LMR* ne confère aucun droit de propriété aux autorités fiscales en ce qui a trait aux montants dus à titre de TVQ. Prenant appui sur un arrêt récent de notre Cour, dans *9083-4185 Québec inc. (Syndic de) et Caisse populaire Desjardins de Montmagny* [*9083-4185 Québec inc.*], le syndic plaide que le paragraphe 67(2) *LFI* fait en sorte que des biens détenus dans une fiducie pour Sa Majesté, par le biais d'une disposition législative, demeurent des biens du failli. Seuls ceux détenus par un failli dans une fiducie réelle, pour une autre personne, sont exclus de la faillite. En outre, puisque les sommes détenues en fiducie sont entremêlées avec d'autres fonds, elles ne sont plus identifiables. En conséquence, le ministre ne peut en être propriétaire.**
>
> **…**
>
> **[28] L'article 20 *LMR* édicte qu'une personne qui perçoit un montant dû en vertu d'une loi fiscale est réputée le détenir pour l'État, séparé de son patrimoine et de ses propres fonds. Il précise qu'en cas de non-versement à l'État dans le délai et selon les modalités prescrites, ce montant est réputé former un fonds séparé ne faisant pas partie des biens de cette personne.**
>
> **[29] En vertu de cet article, il y avait donc une présomption que les montants détenus par la Banque en date du 10 juillet 2006 l'étaient en fiducie pour l'État. Toutefois, ces montants perçus par la débitrice avaient été déposés dans un compte où elle en détenait également d'autres provenant de différentes sources. Il ne s'agissait donc que d'une fiducie créée par l'effet de la *LMR* et non d'une fiducie réelle.**
>
> **[30] Dans l'arrêt *Colombie-Britannique c. Henfrey, Samson, Belair Ltd.* [*Colombie-Britannique*], la Cour suprême explique que dès que le montant de la taxe est confondu avec d'autres sommes, il n'existe plus de fiducie de common law :**
>
> **[…] Au moment de la perception de la taxe, il y a fiducie légale réputée. À ce moment-là, le bien en fiducie est identifiable et la fiducie répond aux exigences d'une fiducie établie en vertu des principes généraux du droit. La difficulté que présente l'espèce, qui est la même que dans la plupart**

2014 QCCS 174 (CanLII)

des cas, vient de ce que le bien en fiducie cesse bientôt d'être identifiable. Le montant de la taxe est confondu avec d'autres sommes que détient le marchand et immédiatement affecté à l'acquisition d'autres biens de sorte qu'il est impossible de le retracer. Dès lors, il n'existe plus de fiducie de *common law*. Pour obvier à ce problème, l'al. 18(1)b) prévoit que la taxe perçue sera réputée être détenue de manière séparée et distincte des deniers, de l'actif ou du patrimoine de celui qui l'a perçue. Mais, comme l'existence de la disposition déterminative le reconnaît tacitement, en réalité, après l'affectation de la somme, la fiducie légale ressemble peu à une fiducie véritable. […]

[31] Je conclus donc que l'avis expédié en vertu de l'article 15 *LMR* n'a pas transformé cette fiducie présumée en fiducie réelle, ce qui aurait pu, effectivement, faire en sorte que ces biens ne soient pas compris dans le patrimoine de la débitrice faillie en vertu de l'alinéa 67(1)a) *LFI*.

[32] En effet, le paragraphe 67(2) *LFI* édicte que, sous réserve de certaines exceptions (dont entre autres les retenues à la source), un bien n'est pas considéré être détenu en fiducie aux fins de la *LFI* si, en l'absence d'une disposition législative, il ne le serait pas. Or, c'est exactement le cas dans la présente affaire : les montants étaient réputés être détenus en fiducie en vertu de l'article 20 *LMR*, mais il n'existait aucune fiducie réelle.

[109] Cette décision suivait alors la logique de l'arrêt Sparrow Electric[43] en Cour suprême, où il fut établi que la garantie bancaire consentie à la Banque Royale du Canada en vertu de l'article 427 de la *Loi sur les banques* (LB)[44] avait priorité sur la fiducie réputée que l'on retrouve à l'article 227(5) de la *Loi sur l'impôt sur le revenu* (LIR)[45].

[110] Pour conclure ainsi dans *Sparrow*, la Cour suprême a dû constater que la garantie de l'article 427 de la *Loi sur les banques* avait été mise en place avant que la débitrice soit en défaut de remettre à l'État les retenues fiscales prévues à l'article 227(5) LIR. Donc, en l'absence d'une autre disposition donnant priorité de rang à la fiducie réputée, les termes de la garantie bancaire n'étaient pas affectés par le défaut subséquent de la débitrice à l'égard de la Couronne fédérale.

[111] Voici comment le juge Gonthier (dissident sur le fond) pose le problème :

23 Il est malheureux que, jusqu'à maintenant, la jurisprudence n'ait pas su susciter la certitude qui est si manifestement souhaitable dans ce domaine du droit commercial. En fait, la jurisprudence a été qualifiée de [TRADUCTION] «secteur trouble du droit» (*Manitoba (Minister of Labour) c. Omega Autobody Ltd. (Receiver of)* 1989 CanLII 178 (MB CA), (1989), 59

43 Royal Bank of Canada c. Sparrow Electric Corp. [1997] 1 RCS 411.
44 LC (1991) ch. 46.
45 LRC (1985) ch. 1.

2014 QCCS 174 (CanLII)

> **D.L.R. (4th) 34 (C.A. Man.), à la p. 36), et elle a fait l'objet, à certains moments, de critiques acerbes de la part d'auteurs de doctrine (Roderick J. Wood, «Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*» (1995), 10 *B.F.L.R.* 429, ainsi que Roderick J. Wood et Michael I. Wylie, «Non-Consensual Security Interests in Personal Property» (1992), 30 *Alta. L. Rev*. 1055). L'opinion générale a, je crois, été résumée par le professeur Wood dans son commentaire de décision fort utile, «Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*», *loc. cit.*, à la p. 430: [TRADUCTION] «[i]l est quelque peu embarrassant de constater qu'après plus de deux décennies, nous ne pouvons toujours pas prédire en toute confiance le résultat d'un litige quant à la priorité de rang entre une fiducie réputée et une garantie». Les commentaires ci-dessus tirés de la jurisprudence et de la doctrine invitent, je crois, notre Cour à s'orienter résolument vers une énonciation de principes clairs qui permettront de déterminer la priorité de rang entre les fiducies légales et les garanties consensuelles.**

[112] Contrairement à ce que soutiendra la majorité, le juge Gonthier retrouvera dans les éléments de l'affaire *Sparrow Electric* les principes lui permettant de conclure à l'existence d'une priorité de rang de la fiducie réputée de la Couronne sur la garantie conventionnelle de la banque. Malgré la longueur du texte qui suit, il y a lieu de le reproduire :

> **30 Notre Cour a récemment eu l'occasion d'examiner les principes de droit qui doivent être appliqués à l'interprétation des lois fiscales. Dans *Alberta (Treasury Branches) c. M.R.N.; Banque Toronto-Dominion c. M.R.N.*, 1996 CanLII 244 (CSC), [1996] 1 R.C.S. 963, aux pp. 975 et 976, le juge Cory cite l'arrêt de notre Cour *Friesen c. Canada*, 1995 CanLII 62 (CSC), [1995] 3 R.C.S. 103, où les principes pertinents sont résumés ainsi, aux pp. 112 à 114:**
>
> > **Pour interpréter les dispositions de la Loi de l'impôt sur le revenu, il convient, comme l'affirme le juge Estey dans l'arrêt Stubart Investments Ltd. c. La Reine, 1984 CanLII 20 (CSC), [1984] 1 R.C.S. 536, d'appliquer la règle du sens ordinaire. À la page 578, le juge Estey se fonde sur le passage suivant de l'ouvrage de E. A. Driedger, intitulé Construction of Statutes (2e éd. 1983), à la p. 87:**
> >
> > > **[TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.**
> >
> > **Le principe voulant que le sens ordinaire des dispositions pertinentes de la Loi de l'impôt sur le revenu prévale, à moins d'être en présence d'une opération simulée, a récemment été approuvé par notre Cour dans l'arrêt Canada c. Antosko, 1994 CanLII 88 (CSC), [1994] 2 R.C.S. 312. Le juge Iacobucci affirme, au nom de la Cour, aux pp. 326 et 327:**

2014 QCCS 174 (CanLII)

> **Même si les tribunaux doivent examiner un article de la *Loi de l'impôt sur le revenu* à la lumière des autres dispositions de la Loi et de son objet, et qu'ils doivent analyser une opération donnée en fonction de la réalité économique et commerciale, ces techniques ne sauraient altérer le résultat lorsque les termes de la Loi sont clairs et nets et que l'effet juridique et pratique de l'opération est incontesté: *Mattabi Mines Ltd. c. Ontario (Ministre du Revenu)*, 1988 CanLII 58 (CSC), [1988] 2 R.C.S. 175, à la p. 194; voir également *Symes c. Canada*, 1993 CanLII 55 (CSC), [1993] 4 R.C.S. 695.**

> **J'accepte les commentaires suivants qui ont été faits à l'égard de l'arrêt *Antosko* dans l'ouvrage de P. W. Hogg et J. E. Magee, intitulé *Principles of Canadian Income Tax Law* (1995), dans la section 22.3c) [TRADUCTION] «Interprétation stricte et fondée sur l'objet visé», aux pp. 453 et 454:**

> **[TRADUCTION] La Loi de l'impôt sur le revenu serait empreinte d'une incertitude intolérable si le libellé clair d'une disposition détaillée de la Loi était nuancé par des exceptions tacites tirées de la conception qu'un tribunal a de l'objet de la disposition. (. . .) (L'arrêt *Antosko*) ne fait que reconnaître que «l'objet» ne peut jouer qu'un rôle limité dans l'interprétation d'une loi aussi précise et détaillée que la Loi de l'impôt sur le revenu. Lorsqu'une disposition est rédigée dans des termes précis qui n'engendrent aucun doute ni aucune ambiguïté quant à son application aux faits, elle doit être appliquée nonobstant son objet. Ce n'est que lorsque le libellé de la loi engendre un certain doute ou une certaine ambiguïté, quant à son application aux faits, qu'il est utile de recourir à l'objet de la disposition.**

Aux pages 976 et 977 de l'arrêt *Alberta (Treasury Branches)*, précité, le juge Cory conclut:

> **En conséquence, lorsqu'il n'y a aucun doute quant au sens d'une mesure législative ni aucune ambiguïté quant à son application aux faits, elle doit être appliquée indépendamment de son objet. Je reconnais que des juristes habiles pourraient probablement déceler une ambiguïté dans une demande aussi simple que «fermez la porte, s'il vous plaît», et très certainement même dans le plus court et le plus clair des dix commandements. Cependant, l'historique même de la présente affaire, conjugué aux divergences évidentes d'opinions entre les juges de première instance et la Cour d'appel de l'Alberta, révèle que, pour des juristes doués et expérimentés, ni le sens de la mesure législative ni son application aux faits ne sont clairs. Il semblerait donc convenir d'examiner l'objet de la mesure législative. Même si l'ambiguïté n'était pas apparente, il importe de signaler qu'il convient toujours d'examiner «l'esprit de la loi, l'objet de la loi et l'intention du législateur» pour déterminer le sens manifeste et ordinaire de la loi en cause.**

31 En l'espèce, j'estime que le texte du par. 227(5) est clair et sans ambiguïté, compte tenu, particulièrement, du fait que cette disposition suit immédiatement le par. 227(4), qui prévoit que les sommes non versées sont conservées en fiducie pour Sa Majesté. À mon avis, ce

2014 QCCS 174 (CanLII)

paragraphe vise, en cas de liquidation, cession, mise sous séquestre ou faillite, à rattacher le droit que Sa Majesté détient à titre bénéficiaire aux biens que le débiteur possède alors. À vrai dire, la fiducie n'est pas réelle, étant donné que son objet ne peut être identifié à compter de la date de création de la fiducie: D. W. M. Waters, *Law of Trusts in Canada* (2e éd. 1984), à la p. 117. Cependant, le par. 227(5) a pour effet de revitaliser la fiducie dont l'objet a perdu toute identité. L'identification de l'objet de la fiducie est donc faite après coup. À cet égard, je suis d'accord avec la conclusion que le juge Twaddle tire dans l'arrêt *Roynat*, précité, lorsqu'il affirme, à la p. 647, au sujet de l'effet du par. 227(5), que [TRADUCTION] «la Loi confère à Sa Majesté un droit d'accès à tous les éléments d'actif, quels qu'ils soient, que l'employeur possède alors, au moyen desquels elle peut réaliser la fiducie initiale dont elle est bénéficiaire».

32 J'ajoute que, dans l'arrêt *Re Deslauriers Construction Products Ltd.*, précité, à la p. 601, le juge en chef Gale a adopté ce point de vue relativement à une disposition semblable au par. 227(5), et que notre Cour a confirmé la validité de son raisonnement dans l'arrêt *Dauphin Plains*, précité. Dans l'affaire *Deslauriers*, précitée, un syndic de faillite et le bénéficiaire d'une fiducie légale réputée créée par le *Régime de pensions du Canada*, S.C. 1964-65, ch. 51, se faisaient la lutte pour obtenir la priorité de rang. Les paragraphes 24(3) et (4) de cette loi prévoyaient ceci:

> **24. . . .**
>
> **(3) L'employeur qui a déduit de la rémunération d'un employé un montant au titre de la cotisation que ce dernier est tenu de verser, ou à valoir sur celle-ci, mais ne l'a pas remis au receveur général du Canada, doit garder ce montant à part, en un compte distinct du sien et il est réputé détenir le montant ainsi déduit en fiducie pour Sa Majesté.**
>
> **(4) En cas de liquidation, de cession ou de faillite d'un employeur, un montant égal à celui qui, selon le paragraphe (3), est réputé détenu en fiducie pour Sa Majesté doit être considéré comme étant séparé et ne formant pas partie des biens en liquidation, cession ou faillite, que ce montant ait été ou non, en fait, conservé distinct et séparé des propres fonds de l'employeur ou de la masse des biens.**

À la page 1198 de l'arrêt *Dauphin Plains*, précité, notre Cour approuve la conclusion du juge en chef Gale (à la p. 601 de l'arrêt *Deslauriers*, précité) quant à l'interprétation du par. 24(4):

> **[TRADUCTION] Il nous semble que le par. (4), en particulier les six derniers mots, a été inséré dans la Loi dans le but spécifique de soustraire de la masse des biens du failli, par la création d'une fiducie, un montant équivalent aux déductions et d'en faire la propriété du ministre.**

2014 QCCS 174 (CanLII)

33 Cette interprétation du par. 227(5) a aussi l'avantage d'être compatible avec le régime de répartition établi par la *Loi sur la faillite et l'insolvabilité*, L.R.C. (1985), ch. B-3. L'article 67 de cette loi retire expressément de la masse des biens du failli les créances relatives à des retenues sur la paye non versées et conservées en fiducie (notamment) en vertu de l'art. 227 *LIR*:

> **67. (1) Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants:**
>
> ***a*) les biens détenus par le failli en fiducie pour toute autre personne;**
>
> **. . .**
>
> **(2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.**
>
> **(3) Le paragraphe (2) ne s'applique pas à l'égard des paragraphes 227(4) et (5) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) et (4) du *Régime de pensions du Canada* ou des paragraphes 57(2) et (3) de la *Loi sur l'assurance-chômage* . . .**

Il faut remarquer qu'en plus de rattacher le droit de Sa Majesté aux biens du débiteur lorsque survient l'un des événements précisés au par. 227(5), la fiducie réputée profite encore à Sa Majesté d'une manière accessoire, en ce sens que le par. 227(5) permet de rattacher le droit de Sa Majesté à un bien donné en garantie qui est grevé d'un privilège fixe, si les déductions à l'origine de la demande de Sa Majesté ont été faites avant que le privilège ne soit rattaché au bien donné en garantie. Cette proposition découle de l'arrêt de notre Cour *Dauphin Plains*, précité, où il était question de déterminer l'ordre de priorité quant au produit d'une vente de liquidation d'un administrateur-séquestre. Dans cette affaire, les créances de Sa Majesté (notamment) résultaient du non-versement de retenues sur la paye liées à l'application du *Régime de pensions du Canada*, S.R.C. 1970, ch. C-5, et de la *Loi de 1971 sur l'assurance-chômage*, S.C. 1970-71-72, ch. 48. Ces lois rendaient Sa Majesté bénéficiaire de créances conformément à des fiducies réputées créées en vertu de dispositions dont le texte était fort semblable à celui des par. 227(4) et (5) dont il est question en l'espèce. En concluant que ces créances avaient priorité sur un privilège flottant qui s'était cristallisé après que les retenues en cause eurent été faites, le juge Pigeon a affirmé à la p. 1199:

> **Il faut d'abord faire remarquer que, pour des raisons analogues à celles qui motivent l'arrêt *Avco* précité, la réclamation des déductions**

2014 QCCS 174 (CanLII)

> **au titre du Régime de pensions et de l'assurance-chômage ne peut affecter le produit de la réalisation de biens grevés d'un privilège fixe et spécifique. À partir de la création de cette charge, l'actif qui en est grevé n'est plus la propriété du débiteur qu'à charge de ce privilège. La réclamation des déductions est née plus tard et ne peut donc primer ce privilège en l'absence d'une loi le prescrivant spécifiquement. Cependant, le privilège général ne s'est pas cristallisé avant la délivrance du bref d'assignation et la nomination du séquestre. En l'espèce, que l'on choisisse l'une ou l'autre date n'a pas d'importance, les deux étant postérieures aux déductions. [Je souligne.]**
>
> **Ainsi, le par. 227(5) permet subsidiairement de rattacher rétroactivement le droit de Sa Majesté au bien en litige donné en garantie, si la garantie concurrente s'est concrétisée après que les déductions à l'origine de la créance de Sa Majesté eurent été faites. Sur le plan conceptuel, la fiducie réputée, visée au par. 227(5), permet à la créance de Sa Majesté de s'appliquer rétroactivement et de rattacher le droit qu'elle possède en vertu du par. 227(4) au bien donné en garantie avant qu'il devienne grevé d'un privilège fixe. La même chose se produit lorsqu'un privilège légal s'applique avant la constitution d'une hypothèque sur un bien en litige donné en garantie. Dans l'arrêt *Avco*, précité, le juge Martland, s'exprimant au nom de notre Cour, fait le commentaire suivant au sujet d'un tel scénario (à la p. 706):**
>
> **À compter de ce jour, le privilège s'applique aux biens de l'employeur et, comme le prévoit le par. (1), il prévaut sur toute autre créance, y compris une cession ou une hypothèque. En d'autres termes, lorsque le privilège s'applique, l'ordre de préférence n'est pas modifié par une disposition du bien par l'employeur. L'hypothèque consentie avant la création du privilège n'est pas touchée. Le privilège s'applique uniquement au droit de l'employeur dans ce bien. [Je souligne.]**

[113] Le juge Gonthier reconnaît donc dans ces énoncés que les dispositions de la LIR créent une fiducie réputée mais que ces dispositions ne sont pas nécessairement suffisantes pour donner priorité de rang à la créance de la Couronne. Pour ce faire, il faut que l'article 227(5) LIR (tel qu'il existait alors) accorde cette priorité.

[114] Le juge Gonthier ajoute :

> **76 En l'espèce, la CGG accordait expressément à Sparrow la permission de vendre les biens de l'inventaire dans le cours de ses affaires et d'utiliser le produit dont elle disposerait; la GLB comportait implicitement la même permission. Bien qu'il soit vrai que la CGG comportait une clause de produit en fiducie, je considère que cela ne peut pas avoir pour effet de limiter la portée de la permission alors que l'arrangement réel intervenu entre les parties voulait, comme cela a été précisé, que Sparrow puisse utiliser le produit de la vente des biens de l'inventaire dans le cours de ses affaires. Dans cette affaire, la banque n'était pas un petit financier de biens d'inventaire, qui exigeait que**

2014 QCCS 174 (CanLII)

Sparrow lui verse immédiatement le produit de la vente des biens de l'inventaire. Au contraire, la banque était un gros bailleur de fonds qui permettait à Sparrow d'utiliser le produit de la vente des biens de l'inventaire pour maintenir la viabilité de son entreprise. Pour ces motifs, appliquant le critère du professeur Wood, je conclus que, en vertu de la permission de «vendre [. . .] les biens figurant dans l'inventaire» «dans le cours normal de[s] affaires» et d'«utiliser les sommes d'argent dont [elle] dispose[rait]», la banque permettait à Sparrow de vendre les biens de l'inventaire pour payer des salaires et, nécessairement, pour verser des retenues sur la paye.

77 Pour tous ces motifs, en application de la thèse de la permission, je conclus que la fiducie réputée dont bénéficie l'appelante en vertu du par. 227(5) doit avoir priorité de rang sur les garanties que la banque détient sur les biens en litige donnés en garantie. Le fonds en fiducie constitué des retenues effectuées, bien que sans objet identifié au moment de sa constitution, est capable de viser après coup les biens faisant l'objet de cette fiducie. Encore une fois, la banque a consenti à la diminution de sa garantie sur les biens de l'inventaire pour payer les retenues sur la paye au moment où elles ont été effectuées, et le par. 227(5) *LIR* a pour effet de reporter ce consentement jusqu'au moment de la mise sous séquestre. En consentant à ce que Sparrow paie les salaires au moyen du produit de la vente des biens de l'inventaire dans le cours de ses affaires, la banque consentait par le fait même au régime légal de recouvrement des retenues sur la paye non versées, établi par la *LIR*. Bref, en l'espèce, la permission d'aliéner le produit de la vente des biens figurant dans l'inventaire, conjuguée au régime légal des par. 227(4) et (5) *LIR*, accorde priorité de rang aux demandes de Sa Majesté relatives aux retenues légales sur la paye. Cela vaut tant à l'égard de la CGG de la banque que de sa GLB.

[115] Le juge Gonthier finira par conclure ainsi :

87 Il est possible de résumer mes conclusions en l'espèce au moyen des cinq propositions suivantes:

1. **On résout la question de la priorité de rang entre des fiducies légales et des garanties consensuelles en déterminant quel droit grève les biens en litige donnés en garantie, au moment où la fiducie légale devient opérante.**

2. **La fiducie réputée du par. 227(5) *LIR* grève tous les biens du débiteur qui existent au moment de la liquidation, cession, faillite ou mise sous séquestre.**

3. **Par exemple, si des retenues sont effectuées avant qu'un privilège fixe grève les biens donnés en garantie, la fiducie réputée du par. 227(5) fera en sorte que le droit que Sa Majesté possède à titre bénéficiaire grèvera rétroactivement ces biens. Le privilège fixe**

2014 QCCS 174 (CanLII)

> **applicable à ces biens sera, par la suite, assujetti aux créances préexistantes de Sa Majesté relatives aux retenues sur la paye non versées.**
>
> **4. Sous cette réserve, si une garantie tient d'un privilège fixe et spécifique, elle confère à son détenteur le droit de propriété sur les biens donnés en garantie, de sorte qu'une fiducie légale concurrente subséquente ne pourra pas s'y appliquer. Dans ce cas, tout ce que la fiducie légale peut grever est le droit de rachat que l'*equity* reconnaît relativement aux biens donnés en garantie.**
>
> **5. Cependant, à titre d'exception aux deuxième et quatrième propositions, si le détenteur d'une garantie fixe permet au débiteur de vendre les biens donnés en garantie, cela peut donner ouverture à l'application de la fiducie légale. Cette éventualité dépend entièrement des faits de chaque affaire. Le critère applicable consiste à déterminer si, au moment où les retenues ont été effectuées, le débiteur avait le droit de vendre les biens donnés en garantie et d'utiliser le produit de cette vente pour exécuter l'obligation liée à la fiducie légale.**

2014 QCCS 174 (CanLII)

[116] Les juges majoritaires se rallieront cependant à l'opinion du juge Iacobucci qui refuse de voir dans les dispositions de la LIR, les mots sacramentels permettant de confirmer la priorité de la fiducie réputée de la Couronne sur les garanties antérieures de la Banque Royale.

[117] Le juge Iacobucci énonce plutôt ce qui suit :

> **11 La présomption n'est donc pas un moyen de supprimer une garantie existante. Elle permet plutôt de retourner en arrière pour chercher un élément d'actif qui, au moment où l'impôt est devenu exigible, n'était pas assujetti à une garantie opposée. Bref, la disposition en matière de fiducie réputée ne peut s'appliquer que s'il est <u>préalablement</u> déterminé qu'il existe des éléments d'actifs libres de toute charge qui peuvent faire l'objet d'une fiducie réputée. La présomption suit la réponse à la question de la garantie mobilière; elle ne détermine pas cette réponse.**
>
> **12 En fait, le juge Gonthier considère que la nature particulière de la fiducie réputée peut justifier l'établissement d'une distinction entre le droit de Sa Majesté et les droits opposés. Toutefois, son argument diffère de celui que j'ai exposé dans la mesure où il met l'accent sur l'exécution réputée de l'obligation qui existe envers Sa Majesté. Mon collègue semble considérer que la permission de vendre ne contribue à réduire la valeur de la garantie qu'à l'égard des obligations exécutées et non à l'égard des obligations inexécutées. À son avis, cela représente un obstacle suffisant à la thèse de la permission. Je conviens que, si la distinction entre les obligations exécutées et les obligations inexécutées**

> **pouvait être maintenue, la probabilité que la permission anéantisse la garantie serait alors considérablement réduite. J'estime cependant que cette distinction ne saurait être maintenue. Comme le juge Gonthier l'affirme à plus d'une reprise dans ses motifs, la thèse de la permission repose sur le consentement des parties. Toutefois, les parties en l'espèce ont consenti à ce que les biens figurant dans l'inventaire soient vendus [TRADUCTION] «dans le cours normal de[s] affaires [du débiteur]». Les termes utilisés sont formels. Aucune distinction n'est établie entre les obligations exécutées et les obligations inexécutées. La seule exécution prévue par la permission est la vente réelle des biens figurant dans l'inventaire et l'utilisation du produit de cette vente pour rembourser une dette. Comme je l'ai déjà affirmé, le mécanisme de la présomption ne satisfait pas à l'exigence de vente réelle. Je conclus donc que si l'on veut rendre justice au libellé de la permission en tant qu'indice de l'intention des parties, il ne saurait y avoir de distinction entre les obligations exécutées et les obligations inexécutées.**
>
> **13 Mon collègue attache beaucoup d'importance au fait que le débiteur s'est engagé, dans la convention de garantie générale, à [TRADUCTION] «payer tous les impôts, tarifs, redevances, cotisations et autres sommes de toute nature qui peuvent être légalement perçues, cotisées ou imposées à l'égard du débiteur ou d'un bien donné en garantie, lorsque ces sommes sont dues et exigibles». Toutefois, cet engagement qui, du reste, n'est qu'un engagement à respecter la loi, ne fait pas partie de la permission donnée. Il n'ajoute rien au par. 153(1) *LIR*. Il ne prescrit pas non plus l'issue d'une lutte pour obtenir la priorité de rang. Qui plus est, l'engagement à payer des impôts n'est qu'un seul parmi plusieurs engagements contenus dans la convention. Un autre engagement veut que le débiteur [TRADUCTION] «exploite [son] entreprise [. . .] d'une manière appropriée et efficiente». Le débiteur pourrait vraisemblablement contracter des dettes subséquentes en exploitant son entreprise. Le juge Gonthier n'énonce aucun principe qui pourrait permettre de régler les luttes que Sa Majesté et des prêteurs subséquents se feraient pour obtenir la priorité de rang. En cas de conflit, chacun d'eux bénéficierait de la permission de vendre les biens figurant dans l'inventaire ainsi que d'engagements explicites, de sorte qu'il faudrait trouver un autre critère pour déterminer qui a priorité. Ici, comme auparavant, la perspective d'un renversement des règles ordinaires en matière de priorité est immédiate et inquiétante.**

[118] Et plus loin, il ajoute :

> **23 De plus, pour les raisons que j'ai déjà exposées, il est fort probable qu'une interprétation large de la thèse de la permission contreviendrait à la *PPSA*. La Loi prévoit clairement que le financement des biens figurant dans un inventaire est un outil commercial important. Toutefois, permettre que la simple mise à exécution potentielle d'une permission de vendre fasse obstacle à une garantie sur les biens figurant dans un**

2014 QCCS 174 (CanLII)

> **inventaire dépouillerait cette garantie de toute efficacité. Ce ne serait plus une garantie contre des obligations subséquentes.**
>
> **24 Finalement, je tiens à souligner qu'il est loisible au législateur d'intervenir et d'accorder la priorité absolue à la fiducie réputée. Le paragraphe 224(1.2) *LIR* illustre clairement comment cela pourrait se faire. Cette disposition attribue à Sa Majesté certaines sommes «malgré toute autre garantie au titre de ce[s] somme[s]», et prévoit qu'elles «doi[vent] être payée[s] au receveur général par priorité sur toute autre garantie au titre de ce[s] somme[s]». Pour obtenir le résultat souhaité, il suffit d'utiliser des termes aussi clairs. En l'absence de pareils termes, l'innovation judiciaire n'est pas souhaitable parce qu'il s'agit d'une question qui regorge de considérations de principe et parce qu'une prescription du législateur est plus susceptible d'être claire qu'une règle dont les limites précises ne seront établies que par suite d'une longue et coûteuse série de poursuites.**
>
> **(soulignements ajoutés)**

[119] On sait donc comment éviter l'impact de l'arrêt *Sparrow Electric*. Il suffit que la LRCR comporte un texte produisant le même effet juridique que l'amendement apporté à la LIR pour assurer la préséance de la fiducie réputée de la LIR sur les hypothèques mobilières sans dépossession. Il faudra voir si l'article 264 LRCR rencontre cet objectif.

[120] Donc, en 2009, après l'affaire *SMRQ c. De Courval*, force est de constater que la Cour d'appel n'est pas enclin à lire dans l'article 20 LMRQ l'existence d'une fiducie réputée, alors que les jugements dans les affaires *Nolisair* et *Sécurité Saglac* proposent une lecture fort différente du texte de loi (avec ou sans les mots qui y furent ajoutés par l'amendement de 1993).

[121] D'ailleurs, l'opinion du soussigné dans *White Birch* a été, entre autres choses, basée sur l'interprétation de la Cour d'appel dans *De Courval*.

[122] Par ailleurs, la décision de la Cour d'appel dans *SMRQ c. De Courval* a été critiquée et non suivie par la Cour d'appel fédérale dans une affaire de la *Banque Toronto Dominion c. S.M. la Reine* rapportée à 2010 CAF 174.

[123] Vient alors l'affaire *Banque nationale du Canada c. Agence du revenu du Québec*, 2011, QCCA 1943 en appel d'un jugement de la Cour du Québec, 2009, QCCQ 8079[46]. Cette affaire est une autre illustration de la difficulté d'interprétation de la notion de fiducie réputée (dans l'article 20 LMRQ). Dans cette instance, le juge Gilson Lachance de la Cour du Québec a conclu que l'article 20 LMRQ créait une fiducie réputée mais sans considérer ni l'arrêt de la Cour d'appel dans *Québec*

---

[46] La décision de la Cour du Québec date du 16 juillet 2009.

2014 QCCS 174 (CanLII)

(SMRQ) c. De Courval précitée[47] et sans non plus analyser les dispositions du *Code civil du Québec* en matière de fiducies.

[124] Le juge Lachance analyse cependant la portée de l'article 20 LMRQ sur les créances de créanciers garants, à la lumière de *R. c. First Vancouver Finance* et *Great West Transport Ltd* [2002] CSC 49; [2002] 2 RCS 720, qui a apparenté la fiducie réputée de l'article 227 (4.1) LFI à une « charge flottante[48] grevant la totalité des biens du débiteur fiscal au profit de Sa Majesté »[49].

[125] La décision du juge Lachance a fait l'objet d'un appel[50] et le juge Dalphond accepte le raisonnement du juge de première instance sauf en ce qui a trait à une correction de chiffres.

[126] Voici comment le juge Dalphond aborde la question :

> **[16] Le premier juge conclut que Revenu Québec bénéficie d'une fiducie présumée en vertu de l'article 20 de la *Loi sur le ministère du Revenu*, L.R.Q., c. M-31 (LMR), sur les sommes retenues à la source par Canouxa. Cette fiducie s'applique, selon lui, sur l'ensemble des biens de la débitrice fiscale, sauf sur les biens vendus dans le cours normal des activités de l'entreprise, où la fiducie se transporte sur le produit de cette vente ou sur le bien de remplacement. La BNC, créancière de Canouxa, n'est pas un tiers acquéreur et est assujettie à la fiducie, comme la Cour suprême l'a établi dans l'arrêt *First Vancouver Finance c. M.R.N.*, 2002 CSC 49 (CanLII), [2002] 2 R.C.S. 720, 2002 CSC 49. De plus, cette situation n'est pas modifiée par la faillite de Canouxa selon l'article 67(1)a) de la *Loi sur la faillite et l'insolvabilité*, L.R.C. (1985), ch. B-3 (LFI). L'intention du législateur est d'assujettir les créanciers garantis au respect de la fiducie présumée en cas de faillite, ce qui emporte une obligation de remettre à l'autorité fiscale le produit de la vente des biens assujettis à cette fiducie.**

[127] Il ajoute cependant ce qui suit :

> **[29] Je n'ai pas d'hésitation à conclure que les sommes réclamées de la débitrice fiscale en vertu de l'art. 1015 de la *Loi sur les impôts*, L.R.Q., c. I-3 (retenues à la source sur salaire) sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu* et que la loi provinciale prévoit un impôt semblable à celle de la loi fédérale. Il en va de même pour les contributions au RRQ par rapport à celles au RPC.**

---

[47] L'arrêt de la Cour d'appel est du 3 mars 2009.

[48] Cette notion de « charge flottante » a été écartée dans *White Birch[48] aux paragraphes [203] à [207].*

[49] Paragraphe 18 [2009] QCCQ 8099. Voir aussi paragraphe [25] de la même décision.

[50] Banque Natinale du Canada c. Agence du Revenu du Québec, 2011, QCCA 1943.

2014 QCCS 174 (CanLII)

[30] Quant à la nature et l'étendue de l'assiette de la fiducie invoquée, elles sont précisées à l'article 20 LMR :

> **20. Toute personne qui déduit, retient ou perçoit un montant quelconque en vertu d'une loi fiscale est réputée le détenir en fiducie pour l'État, séparé de son patrimoine et de ses propres fonds, et en vue de le verser à l'État selon les modalités et dans le délai prévus par une loi fiscale.**
>
> **En cas de non-versement à l'État, selon les modalités et dans le délai prévus par une loi fiscale, d'un montant qu'une personne est réputée par le premier alinéa détenir en fiducie pour l'État, un montant égal au montant ainsi déduit, retenu ou perçu est réputé, à compter du moment où le montant est déduit, retenu ou perçu, être détenu en fiducie pour l'État, séparé de son patrimoine et de ses propres fonds, et former un fonds séparé ne faisant pas partie des biens de cette personne, que ce montant ait été ou non, dans les faits, tenu séparé du patrimoine de cette personne ou de ses propres fonds.**
>
> **Toutefois, cette personne peut, lors de la production au ministre d'une déclaration en vertu des articles 468 ou 470 de la Loi sur la taxe de vente du Québec (chapitre T-0.1), retirer du montant total qu'elle est réputée par le premier alinéa détenir en fiducie pour l'État, les montants qu'elle a droit de déduire et qu'elle a effectivement déduits dans le calcul de son montant à remettre. [je souligne]**

2014 QCCS 174 (CanLII)

[31] La fiducie présumée porte donc sur les montants perçus et, en cas de non-remise, sur des montants équivalents appartenant au débiteur fiscal. La situation est donc équivalente à ce que prévoit l'art. 227 (4) de la *Loi de l'impôt sur le revenu*, L.R.C. (1985), c. 1 (5e suppl.), mais ne s'étend pas aux biens autres du débiteur, comme le prévoit l'art. 227 (4.1) de la loi fédérale :

> **227(4) Montant détenu en fiducie**
>
> **Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l'absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi.**
>
> **(4.1) Non-versement**
>
> **Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus**

> **par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne, et les biens détenus par son créancier garanti au sens du paragraphe 224(1.3) qui, en l'absence d'une garantie au sens du même paragraphe, seraient ceux de la personne, d'une valeur égale à ce montant sont réputés:**
>
> **a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu, séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;**
>
> **b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est déduit ou retenu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à une telle garantie.**
>
> **Ces biens sont des biens dans lesquels Sa Majesté a un droit de bénéficiaire malgré toute autre garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie. [je souligne]**

2014 QCCS 174 (CanLII)

[32] Commentant l'art. 227 de la loi fédérale, M. le juge Iacobucci écrit dans *First Vancouver Finance* :

> **27 Le législateur a donné suite à l'arrêt *Sparrow Electric* en modifiant les dispositions relatives à la fiducie réputée en 1998 (avec effet rétroactif en 1994) pour adopter leur libellé actuel. Plus particulièrement, les mots « malgré toute autre garantie [...] le concernant » ont été ajoutés au par. 227(4). De même, le par. 227(4.1) (l'ancien par. 227(5)) a accru la portée de la fiducie réputée de façon qu'elle englobe les « biens détenus par son créancier garanti [...] qui, en l'absence d'une garantie [...] seraient ceux de la personne ». Le paragraphe 227(4.1) a également été modifié par la suppression du renvoi aux événements déclencheurs (liquidation, faillite, etc.), le législateur établissant plutôt une présomption selon laquelle les biens du débiteur fiscal et de ses créanciers garantis sont détenus en fiducie « en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté ». Enfin, le par. 227(4.1) précise désormais que les biens sont réputés être détenus en fiducie « à compter du moment où le montant est déduit ou retenu ».**
>
> **28 Ces modifications démontrent que le législateur a voulu que les par. 227(4) et (4.1) accordent la priorité de rang à la fiducie réputée lorsque les biens sont par ailleurs grevés d'une garantie, que celle-ci ait pris effet avant ou après les retenues à la source ou l'application de la fiducie réputée. C'est ce qui ressort clairement de l'expression « malgré toute autre garantie » employée aux par. 227(4) et (4.1). En d'autres termes, vu la manière dont les dispositions relatives à la fiducie réputée avaient été interprétées dans l'affaire *Sparrow Electric*, le législateur les a modifiées de façon à accorder la priorité de rang à la fiducie réputée lorsque le**

ministre et des créanciers garantis font valoir concurremment un droit sur les biens du débiteur fiscal.

29 Comme je l'indique précédemment, le législateur a également modifié le moment auquel la fiducie se matérialise. Tout renvoi à un événement déclencheur emportant l'application de la fiducie, comme la liquidation ou la faillite, a été supprimé. Le paragraphe 227(4.1) dispose désormais qu'une fiducie réputée s'applique « en cas de non-versement [de retenues à la source] à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi » (je souligne). Ainsi, l'application de la fiducie réputée est désormais enclenchée dès qu'il y a manquement à l'obligation de verser les retenues à la source. En outre, suivant l'al. 227(4.1)a), les biens sont réputés être détenus en fiducie « à compter du moment où le montant est déduit ou retenu » Par conséquent, bien que l'omission de verser les retenues à la source enclenche l'application de la fiducie, cette dernière est réputée prendre effet rétroactivement au moment où les retenues à la source ont été faites. Ces modifications révèlent que le législateur a manifestement voulu consolider la fiducie réputée et en accroître la portée afin de faciliter les opérations de recouvrement du ministre. *[je souligne]*

[128] Ainsi, la fiducie réputée de l'article 20 LMRQ est donc reconnue sans équivoque. Plus encore, l'interprétation que nous donne le juge Dalphond dissipe les doutes et, une fois cette interprétation appliquée au texte de l'article 49 LRCR, le soussigné doit conclure que cette disposition établit une fiducie réputée touchant les cotisations suspendues et non versées aux Comités de retraite requérants.

[129] Plusieurs auteurs supportent une telle conclusion.

[130] Louis Payette dans son texte « *Les sûretés réelles dans le Code civil du Québec* », 2010, EYB2010SUR3, indique au paragraphe 63, pages 19 et 20, que le législateur peut prévoir qu'une fiducie légale réputée peut exister dans la mesure où les biens visés par la fiducie sont simplement réputés détenus en fiducie (i.e. sans séparation physique du patrimoine du débiteur). Au paragraphe 1821 du même texte, page 104, Me Payette ajoute :

Certaines lois créent une fiction aux termes de laquelle les biens d'un contribuable sont « réputés » être détenus en fiducie au profit des pouvoirs publics dont il est le débiteur. L'existence d'une hypothèque sur un bien n'empêche pas la naissance de telles fiducies sur ce bien et une prise en paiement n'entraîne pas leur extinction; le preneur en paiement doit par conséquent rendre compte des sommes dues au bénéficiaire de la fiducie présumée, à hauteur de la valeur du bien ou du prix de sa revente.

[131] Voir aussi John Claxton « *Studies on the Quebec Law of Trust* », Thomson Carswell 2005, pages 84 et suivantes, nos. 4.2 et suivants, viz : « *Trust Constituted*

2014 QCCS 174 (CanLII)

by Operation of Law»; Roger P. Simard dans *Juris Classeur Québec – sûreté* viz : « *Fiducies réputées* ».

[132] Cette revue de la jurisprudence pertinente en matière de fiducies réputées permet donc de conclure ainsi :

a) Pour qu'une fiducie réputée existe en droit québécois, il faut que le législateur intervienne clairement en ce sens. C'est le cas en l'espèce.

b) La fiducie réputée de l'article 49 LRCR stipule que celle-ci produit ses effets, qu'il y ait ou qu'il n'y ait pas séparation physique des biens visés par la fiducie du patrimoine de l'employeur. Ces mots, une fois qu'ils furent ajoutés aux dispositions de l'article 20 de la LIR, ont permis à cette dernière fiducie réputée de produire les effets visés par le législateur. Après réflexion, il apparaît évident que les mêmes mots utilisés dans l'article 49 LRCR doivent produire les mêmes effets;

c) Contrairement à ce que le soussigné a conclu dans *Whilte Birch* précitée, l'article 49 LRCR crée une véritable fiducie légale au sens de l'article 1262 C.c.Q. et fait en sorte que les cotisations d'équilibre dues et non payées à cause de l'effet suspensif de l'ordonnance du juge Morawetz sont visées par ladite fiducie réputée, laquelle doit donc produire ses effets;

d) Cependant, cela n'est pas suffisant pour conclure que cette fiducie prend rang avant l'hypothèque mobilière sur l'universalité des biens de SBI en faveur de IQ;

e) En effet, contrairement aux « Personal Property Security Acts » de certaines autres provinces, le Québec ne possède aucune disposition législative faisant en sorte qu'une fiducie réputée puisse avoir préséance sur les sûretés légales ou conventionnelles que l'on retrouve au Code civil du Québec;

f) Donc, à moins que la LRCR ne contienne d'autres dispositions faisant en sorte que les biens visés par la fiducie réputée de l'article 49 LRCR échappent à l'hypothèque universelle de IQ, cette dernière devra donc recevoir son plein effet à l'égard de la totalité des biens de SBI, défaisant en cela toute possibilité de récupération par les Comités de retraite requérants;

g) Il faut donc décider si l'article 264 LRCR permet de remédier à la question et faire en sorte que les biens faisant l'objet de la fiducie réputée de l'article 49 LRCR ne soient pas touchés par l'hypothèque universelle de IQ. Voilà la question que l'on doit maintenant débattre.

2014 QCCS 174 (CanLII)

b) **<u>L'effet de l'article 264 LRCR sur la créance de IQ</u>**

[133] Les Comités de retraite plaident que l'article 264 LRCR vient renforcer leur thèse selon laquelle les cotisations d'équilibre sont affectées d'une fiducie réputée et ne font pas partie du gage commun des créanciers de SBI.

[134] Rappelons ici la disposition pertinente de l'article 264 LRCR :

> **264. Sauf dispositions contraires de la loi, est <u>incessible</u> et <u>insaisissable</u>:**
>
> **1° toute <u>cotisation</u> versée <u>ou qui doit être versée</u> à la caisse de retraite ou à l'assureur, ainsi que les intérêts accumulés;**

[135] Serait donc insaisissable ou incessible toute cotisation versée ou qui doit être versée à la caisse de retraite des employés syndiqués on non-syndiqués de SBI. S'il faut donner un sens à cet article, il faut conclure que les cotisations … « à être versées »… sont littéralement hors de la portée des autres créanciers de SBI, que ces derniers soient garantis ou non, qu'ils bénéficient d'une garantie antérieure à la date d'exigibilité des cotisations payées ou non.

[136] Le mot « cotisation » utilisé à l'article 264 LRCR se doit d'avoir le même sens que celui qu'on lui donne à l'article 49 LRCR. Il inclut donc la cotisation d'équilibre « qui doit être versée » mais qui fait l'objet d'une suspension depuis l'émission de l'ordonnance initiale.

[137] Les Comités de retraite plaident aussi que l'article 264 LRCR n'est pas la seule disposition qui rendrait insaisissables les cotisations non versées à la caisse de retraite. L'article 553(7) du *Code de procédure civile* stipule en effet que sont insaisissables :

> **7. Les prestations accordées au titre d'un régime complémentaire de retraite auquel cotise un employeur pour le compte des employés, les autres sommes déclarées insaisissables par une loi régissant ces régimes <u>ainsi que les cotisations qui sont ou qui doivent être versées à ces régimes.</u>**
>
> **(soulignement ajouté)**

[138] En conséquence, ces montants ne tomberaient pas dans le gage commun des créanciers de SBI et ne pourraient faire l'objet ni d'une hypothèque ou d'une autre forme d'affectation en faveur d'un tiers.

[139] Les articles 2644 et 2645 C.c.Q. viennent renforcer cette approche :

> **Art. 2644. Les biens du débiteur sont affectés à l'exécution de ses obligations et constituent le gage commun de ses créanciers.**

2014 QCCS 174 (CanLII)

> **Art. 2645. Quiconque est obligé personnellement est tenu de remplir son engagement sur tous ses biens meubles et immeubles, présents et à venir, à l'exception de ceux qui sont insaisissables et de ceux qui font l'objet d'une division de patrimoine permise par la loi.**
>
> **Toutefois, le débiteur peut convenir avec son créancier qu'il ne sera tenu de remplir son engagement que sur les bines qu'ils désignent**
>
> **(soulignement ajouté)**

2014 QCCS 174 (CanLII)

[140] Il s'ensuit donc, selon les Comités requérants que les cotisations d'équilibre suspendues par l'ordonnance initiale sont incessibles et insaisissables en vertu de l'article 264 LRCR en plus de faire l'objet d'une fiducie réputée selon l'article 49 LRCR. L'effet combiné de ces deux dispositions fait donc en sorte que les sommes non versées aux régimes de retraite sont exclues du patrimoine de SBI et ne peuvent être utilisées pour rembourser la créance hypothécaire de IQ.

[141] Dans *Marché Bernard Lemay c. Beljaars*, 2003 CanLii 30892, la Cour supérieure a décidé ce qui suit :

> **[40] Les dispositions de cette loi particulière [la LRCR] devraient primer sur les articles généraux du Code civil ou de la Loi sur les sociétés de fiducie… et sont très claires.**
>
> **[41] Il semble évident que l'article 264 de la LRCR, jumelé à l'article 553,7 C.p.c. qui traite aussi de l'insaisissabilité, conférant ce caractère aux droits accordés au titre d'un régime de retraite, doivent primer sur toutes autres dispositions moins pertinentes ou moins spécifiques parce que plus générales, comme les articles du Code civil sur le sujet et dont nous avons traité.**

[142] Voir aussi : *Loi sur les régimes complémentaires de retraite – Annotations et Commentaires* par la Régie des rentes du Québec, Bibliothèque nationale du Québec 1998, paragraphe 264.3.[51]

---

[51] Un bien incessible est un bien qui ne peut faire l'objet d'une transmission entre vifs, que ce soit à titre onéreux ou à titre gratuit. La cession de droit pourrait se concrétiser par la vente du bien cédé, par sa donation, par sa mise en garantie ou tout simplement au moyen d'une renonciation à un droit dans le bien. Le bien insaisissable, quant à lui, ne peut faire l'objet d'une saisie, qui est une procédure en vertu de laquelle un créancier met sous le contrôle de la justice des biens qui appartiennent à son débiteur dans le but d'assurer la conservation de ses droits*. Soulignons qu'il existe deux types de saisies : la saisie-arrêt, qui consiste à ordonner au détenteur d'un bien de ne pas s'en départir, et la saisie-exécution, qui consiste à ordonner au détenteur d'un bien de le remettre afin de payer la créance de son propriétaire.

…

[143] Qui plus est, dans un contexte de faillite, ces sommes n'entreraient pas, non plus, dans les « biens du failli » et ne feraient pas partie de la saisine d'un syndic, vu le libellé de l'article 67(1)(b) LFI qui édicte que :

> **67(1) Les biens d'un failli constituant le patrimoine attribué à ses créanciers ne comprennent pas les biens suivants :**
>
> **a) les biens détenus par le failli en fiducie pour toute autre personne;**
>
> **b) les biens qui, selon le droit applicable dans la province dans laquelle ils sont situé et où réside le failli, ne peuvent faire l'objet d'une mesure d'exécution ou de saisie contre celui-ci;**
>
> **(soulignements ajoutés)**

[144] Force est de reconnaître que ces arguments sont, à première vue, convaincants.

[145] IQ prétend, à l'encontre de ce qui précède, que pour que l'article 264 LRCR puisse recevoir application, il faut qu'il y ait eu séparation physique des cotisations qui doivent être versées pour que leur qualité d'incessibilité et d'insaisissabilité puisse recevoir pleine application. IQ ajoute que ces cotisations font l'objet d'une ordonnance de suspension de paiement suite à l'ordonnance initiale prononcée par le juge Morawetz. Ces cotisations ne seraient donc pas « dues et exigibles ».

[146] Le soussigné n'est pas d'accord avec une telle proposition.

[147] Le soussigné est d'avis qu'effectivement, les articles 49 et 264 LRCR doivent être lus et interprétés dans le même contexte.

[148] Si l'article 49 LRCR crée une fiducie réputée opposable à IQ, cela veut dire que les biens visés par la fiducie réputée sont non seulement facilement identifiables et que les montants qu'ils représentent sont disponibles mais qu'effectivement, ils se trouvent clairement « identifiés » par l'effet même de l'article 49. De même, l'article 264 LRCR peut s'appliquer aux montants auxquels l'article 49 LRCR s'applique.

[149] Il ne sera donc pas plus nécessaire dans ce contexte particulier de procéder à une séparation physique des cotisations d'équilibre à être versées du reste des actifs de SBI pour que le produit desdites cotisations jouissent du caractère d'incessibilité et

---

> L'article 2465 du *Code civil du Québec* prévoit qu'une personne qui est obligée personnellement est tenue de remplir son engagement sur tous ses biens meubles et immeubles, présents et à venir, à moins qu'ils ne soient insaisissables. Ainsi, en règle générale, les biens d'une personne sont saisissables; ce n'est qu'exceptionnellement qu'ils sont insaisissables. L'article 264 constitue donc une exception à la règle générale. …
>
> (soulignements ajoutés)

2014 QCCS 174 (CanLII)

d'insaisissabilité que leur procure l'article 264 LRCR, qu'il n'est nécessaire de le faire pour que la fiducie réputée de l'article 49 LRCR ne produise ses effets.

[150] En ce sens, l'article 264 LRCR vient compléter la logique de l'article 49 LRCR et, autrement, ces deux mêmes articles deviennent complètement dénudés de leur sens de leur portée et de leur effet.

[151] Lorsque la requête des Comités de retraite requérants est formulée, les seuls actifs de SBI sont constitués d'une somme liquide de quelques 30 millions$. Les parties ont convenu que ce montant devait être versé à IQ pour atténuer l'impact des intérêts courant sur la créance de cette dernière.

[152] La fiducie réputée de l'article 49 LRCR pouvait donc affecter cette portion des liquidités de SBI représentant le total des cotisations d'équilibre dues et non encore versées aux Comités de retraite requérants, à cause de l'ordonnance du suspension, sans qu'il soit nécessaire de les séparer du reste des actifs liquides de SBI et, du même fait, les caractères d'incessibilité et d'insaisissabilité de ces mêmes montants aux termes de l'article 264 LRCR pouvaient les affecter.

[153] Finalement, le fait que les sommes aient été distribuées à IQ sous réserve des droits des Comités de retraite requérants n'ont pas eu pour effet de faire perdre à ces actifs leur caractère de biens fiduciaires, incessibles et insaisissables.

[154] Quant à l'argument de IQ à l'effet que lors de la suspension des paiements des cotisations d'équilibre par l'émission de l'ordonnance initiale rendue par le juge Morawetz, aucune cotisation d'équilibre n'était due et non encore versée (et, partant, aucune somme ne pouvait être assujettie ni à l'article 49 LRCR, ni à l'article 264 LRCR), cet argument doit aussi être rejeté. En effet, il faut distinguer entre l'effet suspensif de l'obligation de payer ces sommes et leur assujettissement aux l'articles 49 et 264 LRCR. Ces articles couvrent toute somme non encore versée. Il faut distinguer entre l'exigibilité d'une dette et une suspension (temporaire) de l'obligation d'en effectuer le paiement. Les cotisations demeurent donc dues et exigibles mais seule l'exécution du paiement de ces sommes est suspendue.

[155] La notion d'incessibilité et d'insaisissabilité des cotisations dues et non versées empêche l'employeur et ses créanciers d'utiliser ces sommes à des fins autres que celles prévues à la LRCR. Ces sommes ne peuvent donc faire l'objet d'une hypothèque mobilière universelle avec ou sans dépossession.

[156] La conséquence de ce qui précède est que le raisonnement de l'arrêt Sparrow Electric ne peut s'appliquer en l'espèce.

[157] IQ plaide aussi l'application de l'affaire *Poulin c. Morency*[52], où il s'agissait de déterminer si les sommes cotisées par un employé dans un régime de retraite

[52] 1999 3 RCS 351; 1999 CanLii 662

2014 QCCS 174 (CanLII)

insaisissable avait perdu son caractère d'insaisissabilité suite au transfert des biens du régime à un REER. La Cour d'appel du Québec avait décidé que la totalité du REER de l'appelant Poulin était saisissable, ce qui fut confirmé par la Cour suprême, et que la disposition d'insaisissabilité ne protégeait pas les sommes transférées à la demande de l'appelant aux fins d'investissement dans un REER.

2014 QCCS 174 (CanLII)

[158] En l'instance, sont incessibles et insaisissables les cotisations dues par l'employeur et qui ne sont pas encore versées aux Comités de retraite requérants. La vente des actifs de SBI et leur transformation en actifs liquides n'enlève donc rien au caractère d'incessibilité et d'insaisissabilité desdites cotisations.

[159] Dans *Poulin c. Morency* (précitée) ce qui a fait perdre le caractère d'insaisissabilité et d'incessibilité aux sommes en litige, c'est leur transfert dans un REER car alors les sommes en question devaient nécessairement passer sous le contrôle de l'appelant avant qu'elles aboutissent dans un REER. D'ailleurs, comme l'expose le juge Gonthier[53] lorsque le législateur québécois veut étendre l'insaisissabilité de certaines sommes visées par l'article 264 LRCR, il le fait expressément[54].

[160] Finalement, force est de constater que l'article 264 LRCR a, par analogie, sensiblement le même effet que l'article 30(7) de la *Loi ontarienne sur les sûretés mobilières* (LRO 1990, ch. D-10) que l'on appelle communément le « PPSA » et qui subordonne les sûretés mobilières à l'intérêt du bénéficiaire d'une fiducie réputée créée par une loi portant sur les régimes de retraite. Comme le confirme la Cour suprême dans *Indalex,* n'eût été de l'application de la doctrine de la prépondérance du droit fédéral, une telle fiducie réputée aurait eu priorité sur une créance garantie en vertu d'une sûreté consentie par une débitrice.

[161] L'exécution d'une garantie en faveur de IQ de la nature d'une hypothèque immobilière et mobilière sans dépossession, même dûment enregistrée au RDPRM, n'a pas pour effet d'anéantir ce caractère. Si c'était le cas, l'article 264 LRCR n'aurait aucun effet pratique. De fait, les cotisations à être versées et qui ne l'ont pas été n'appartenant pas à SBI à cause notamment de l'effet de la fiducie réputée de l'article 49 LRCR portant sur les mêmes actifs, ne font ni partie des biens de SBI ni du gage commun des créanciers de cette dernière.

[162] En conclusion, le Tribunal est d'avis que :

1) les cotisations d'équilibre objet du présent litige, font l'objet d'une fiducie réputée créée par la loi;

2) lesdites cotisations sont incessibles et insaisissables;

---

[53] Voir les paragraphes 37 et suivants de son opinion.

[54] Voir article 264(3), second alinéa. Voir aussi l'article 28(3) du Règlement sur les régimes complémentaires de retraite (1990) 122 C.O. II-3246.

3) elles ne sont pas affectées par l'hypothèque universelle dont bénéficie IQ, et ce, même si lesdites cotisations d'équilibre sont devenues payables aux Comités de retraite requérants après la mise ne place de ladite hypothèque universelle.

2014 QCCS 174 (CanLII)

Conclusion générale

[163] Nous sommes à la fin d'un processus de réorganisation sous l'empire de la LACC qui a pris la forme d'une vente des actifs de SBI à une nouvelle entité (qui continuera les activités de cette dernière). Il s'agit maintenant de distribuer le produit de cette vente d'actifs aux créanciers de SBI. Ces créanciers ne détiennent aucune super-priorité qui aurait pu leur être accordée sous l'empire de la LACC. La priorité accordée aux créances des Comités de retraite, d'une part, et de IQ, d'autre part, doit donc être analysée à la seule lumière du droit québécois. Il n'est nullement question de l'application de la doctrine de la préséance du droit fédéral sur le droit provincial.

[164] S'opposent ici deux obstacles à l'exercice du droit de IQ sur la totalité des actifs de SBI : certains de ces actifs sont incessibles et insaisissables en plus de faire l'objet d'une fiducie réputée.

[165] Sont donc hors de la portée de IQ, les cotisations d'équilibre non versées depuis l'ordonnance de suspension du 16 janvier 2012. Les déficits actuariels des régimes de retraite existant à la date de terminaison de ces derniers ne sont visés ni par l'article 49 ni par l'article 264 LRCR.

[166] Les articles 49 et 264 LRCR doivent être lus et appliqués restrictivement compte tenu du fait qu'ils créent un régime exceptionnel. Une fiducie réputée ne peut faire l'objet d'une interprétation large et libérale, et ce, même si la LRCR, dans son ensemble, doit être interprétée de façon généreuse. On ne peut donc étendre l'application de l'article 49 ou de l'article 264 LRCR aux déficits actuariels.

[167] L'article 49 LRCR ne s'applique qu'aux cotisations et aux intérêts accumulés sur ces cotisations.

[168] C'est l'effet combiné des articles 49 et 264 LRCR qui viennent soustraire les actifs de SBI représentant le montant des cotisations d'équilibre non versées aux Comités de retraite (plus les intérêts y afférant) à la créance hypothécaire de IQ. Ces deux dispositions ont pour effet de sortir littéralement ces actifs du gage commun des créanciers de SBI.

[169] Dans *Indalex* en Cour suprême, la juge Deschamps écrit :

> **[51] … <u>Les priorités dont bénéficient les créanciers sont définies par la législation provinciale, à moins que ces droits soient écartés par une loi fédérale</u>. Le législateur fédéral n'a pas expressément édicté que toutes les priorités établies en matière de faillite s'appliquent aux instances**

> **relevant de la LACC ou aux propositions régies par la LFI. Bien que les créanciers d'une société tentant de se réorganiser puissent, dans leurs négociations, tenir compte des droits qu'ils pourraient exercer en cas de faillite, ces droits ne constituent rien de plus qu'une considération tant que la faillite n'est pas survenue. Au début des procédures en matière d'insolvabilité, Indalex a choisi un processus régi par la LACC, ne laissant aucun doute sur le fait que, bien qu'elle cherchât à protéger les emplois, elle ne demeurerait pas leur employeur. Nous ne sommes pas en présence d'un cas où l'échec d'un arrangement a entraîné la liquidation d'une société sous le régime de la LFI. Indalex a atteint l'objectif qu'elle poursuivait. Elle a choisi de vendre son actif sous le régime de la LACC, et non sous celui de la LFI.**
>
> **[52] La fiducie réputée créée par la LRR continue de s'appliquer dans les instances relevant de la LACC, sous réserve de la doctrine de la prépondérance fédérale (Crystalline Investments Ltd. c. Domgroup Ltd., 2004 CSC 3 (CanLII), 2004 CSC 3, [2004] 1 R.C.S. 60, par. 43). La Cour d'appel a donc jugé à bon droit que, à l'issue d'un processus de liquidation relevant de la LACC, les priorités peuvent être établies selon le régime prévu dans la LSM, plutôt que selon le régime fédéral établi dans la LFI.**
>
> **(soulignements ajoutés)**

[170] Il en va de même pour la fiducie réputée de l'article 49 LRCR et de la protection que l'article 264 LRCR accorde à ces actifs.

[171] En l'absence de l'application de la doctrine de la prépondérance fédérale, force est de conclure que ces dispositions doivent recevoir leur plein effet.

[172] Supposons le scénario suivant : au lieu de se retrouver dans un contexte de réorganisation sous l'empire de la LACC, SBI aurait tout simplement décidé de vendre ses actifs à une nouvelle société avant de payer ses créanciers à même le produit de cette vente, sans pour autant faire honneur à son obligation de verser aux Comités de retraite requérants les cotisations d'équilibre qui leur sont dues. Le raisonnement qui précède aurait été applicable sans que l'on s'interroge plus loin. Le Tribunal est d'avis que dans le contexte du présent débat, ce raisonnement doit être appliqué.

[173] Avec égards pour l'opinion contraire, le soussigné est d'avis que les questions en litige ne se résolvent ni par une référence à l'affaire *Sparrow Electric* ni par une référence à l'article 37 LACC. Dans *Sparrow*, il n'était pas question d'insaisissabilité ou d'incessibilité des sommes devant revenir à la Couronne fédérale mais uniquement de la non-application prioritaire des sommes visées par la fiducie réputée contenue à la LIR, problème qui a été corrigé par un amendement subséquent à la *Loi de l'impôt*. Ici, les biens constituant l'assiette de la fiducie réputée sont littéralement exclus de l'application de la garantie dont bénéficie IQ. Pour IQ, ces biens sont inaccessibles car ils ne peuvent faire partie d'une quelconque cession ou transfert par SBI.

2014 QCCS 174 (CanLII)

[174] Il n'est, non plus, ni utile, ni possible d'en référer aux pouvoirs inhérents de la Cour supérieure sous l'empire de l'article 46 C.p.c. pour faire en sorte que les cotisations d'équilibre soient versées aux Comités de retraite, car elles le sont de toutes façons. Il n'est pas approprié d'appliquer ce concept afin de permettre à ces mêmes requérants de récupérer les soldes des déficits actuariels réclamés, ces déficits étant clairement identifiés comme des dettes de l'employeur (article 228 LR R) et clairement exclus de la portée de l'article 49 LRCR. En présence de dispositions législatives aussi claires, il n'y a aucune justification de recourir aux pouvoirs inhérents de la Cour, le législateur ayant déjà pris position sur la question.

[175] Ce débat a été fort bien préparé et plaidé par les procureurs impliqués. Même après l'audition des 27 et 28 mai 2013, les procureurs ont pu soumettre plusieurs textes additionnels au soussigné, clarifiant certaines de leurs positions ou répondant aux questions du soussigné. Le Tribunal leur en sait gré et les remercie. Les échanges entre les procureurs se sont échelonnés de juin à octobre 2013, ce qui explique en partie la longueur du délibéré.

POUR L'ENSEMBLE DE CES MOTIFS, le Tribunal

[176] **ACCUEILLE** en partie la requête des Comités de retraite requérants;

[177] **DÉCLARE** que les cotisations d'équilibre ainsi que les intérêts y afférant et non versés aux Comités de retraite requérants font l'objet d'une fiducie réputée opposable à l'Intimée Investissement Québec Inc. aux termes de l'article 49 LRCR.

[178] **DÉCLARE** que ces cotisations et intérêts y afférant sont incessibles et insaisissables, sont exclus de l'application de l'hypothèque mobilière et immobilière sans dépossession dont bénéficie Investissement Québec Inc. et ont priorité sur la créance de cette dernière, par l'effet combiné des articles 49 et 264 LRCR.

[179] **REJETTE** la requête des Comités de retraite requérants quant à leur prétention que les déficits actuariels desdits régimes de retraite jouissent du même avantage que les cotisations d'équilibre et des intérêts y afférant.

[180] **CONTINUE** la requête pour directives à une date à être déterminée pour fins de fixation du quantum des sommes devant être remboursées aux Comités de retraite requérants par Investissement Québec Inc.

[181] **LE TOUT**, sans frais

ROBERT MONGEON, J.C.S.

2014 QCCS 174 (CanLII)

Me Tina Hobday
Me Alexander Herman
Langlois Kronström Desjardins
Procureurs de la partie demanderesse

Me Charles Mercier
Me Émilie Truchon
Fasken Martineau
Procureurs de la partie défenderesse

Me Adam Spiro
Me Steven Weisz
Blake, Cassels & Graydon
Procureurs de la partie intimée

Date d'audience : Les 27 et 28 mai 2013

2014 QCCS 174 (CanLII)

Court File No. 12-CL- 9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	TUESDAY, THE 3RD
	)	
JUSTICE MORAWETZ	)	DAY OF JANUARY, 2012

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Applicants

INITIAL ORDER

THIS APPLICATION, made by Timminco Limited ("**Timminco**") and Bécancour Silicon Inc. ("**BSI**" and, together with Timminco, the "**Timminco Entities**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Peter A.M. Kalins sworn January 2, 2012 and the Exhibits attached thereto (the "**Kalins Affidavit**"), and on being advised that Investissement Québec ("**IQ**") was given notice of this application, and on hearing the submissions of counsel for the Timminco Entities and FTI Consulting Canada Inc. and on reading the consent of FTI Consulting Canada Inc. to act as the Monitor (the "**Monitor**"),

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that the Timminco Entities are companies to which the CCAA applies.

PLAN OF ARRANGEMENT

3. **THIS COURT ORDERS** that one or both of the Timminco Entities shall have the authority to file and may, subject to further order of this Court, file with this Court a plan or plans of compromise or arrangement (hereinafter referred to as the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

4. **THIS COURT ORDERS** that the Timminco Entities shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Timminco Entities shall continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property. The Timminco Entities shall be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively, the "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. **THIS COURT ORDERS** that the Timminco Entities shall be entitled to continue to utilize the central cash management system currently in place as described in the

Kalins Affidavit or replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Timminco Entities of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Timminco Entities, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

6. **THIS COURT ORDERS** that, notwithstanding anything to the contrary contained herein, the Timminco Entities are authorized and empowered to continue to negotiate discounts on their invoices with customers in exchange for early payment at discount rates consistent with rates previously provided by the Timminco Entities ~~or~~ and as approved by the Monitor or the Court and is authorized and empowered to continue to accept such discounted amounts in full satisfaction of the associated gross amount owing by such customer.

7. **THIS COURT ORDERS** that the Timminco Entities shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses, and similar amounts owed to any Assistants, payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

b) the fees and disbursements of any Assistants retained or employed by the Timminco Entities in respect of these proceedings, at their standard rates and charges.

8. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Timminco Entities shall be entitled but not required to pay all reasonable expenses incurred by the Timminco Entities in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and

b) payment for goods or services actually supplied to the Timminco Entities following the date of this Order.

9. **THIS COURT ORDERS** that the Timminco Entities shall remit, in accordance with legal requirements, or pay:

a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Québec Pension Plan, and (iv) income taxes;

b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Timminco Entities in connection with the sale of goods and services by the Timminco Entities, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the

date of this Order but not required to be remitted until on or after the date of this Order, and

c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Timminco Entities.

10. **THIS COURT ORDERS** that until a real property lease or a lease with respect to use of a portable structure is assigned, disclaimed or resiliated in accordance with the CCAA, the Timminco Entities shall pay all amounts constituting rent or payable as rent under real property leases or a lease with respect to use of portable structure (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Timminco Entities and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

11. **THIS COURT ORDERS** that, except as specifically permitted herein, the Timminco Entities are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Timminco Entities to any of their creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

12. **THIS COURT ORDERS** that Québec Silicon Limited Partnership ("**QSLP**") and Québec Silicon General Partner Inc. ("**QSGP**") shall provide access to the Timminco Entities or permit the Timminco Entities to make, retain and take away copies of books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of QSLP, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**QSLP Records**") and grant to the Timminco Entities unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 12 or in paragraph 13 of this Order shall require the delivery of QSLP Records, or the granting of access to QSLP Records, which may not be disclosed or provided to the Timminco Entities due to privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

13. **THIS COURT ORDERS** that QSLP and QSGP shall provide access to the Timminco Entities or permit the Timminco Entities to make, retain and take away copies of books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of BSI, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**BSI Records**") and grant to the Timminco Entities unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 13 or in paragraph 12 of this Order shall require the delivery of BSI Records, or the granting of access to BSI Records, which may not be disclosed or provided to the Timminco Entities due to privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

14. **THIS COURT ORDERS** that if any QSLP Records or BSI Records are stored or otherwise contained on a computer or other electronic system of information storage,

whether by independent service provider or otherwise, all individuals, firms, corporations, or any other entities in possession or control of such QSLP Records or BSI Records shall forthwith give unfettered access to the Timminco Entities for the purpose of allowing the Timminco Entities to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Timminco Entities deem expedient, and shall not alter, erase or destroy any QSLP Records or BSI Records without the prior written consent of the Timminco Entities. Further, for the purposes of this paragraph, all Persons shall provide the Timminco Entities with all such assistance in gaining immediate access to the information in the records as the Timminco Entities may require including providing the Timminco Entities with instructions on the use of any computer or other system and providing the Timminco Entities with any and all access codes, account names and account numbers that may be required to gain access to the information.

RESTRUCTURING

15. **THIS COURT ORDERS** that the Timminco Entities shall, subject to such requirements as are imposed by the CCAA, have the right to:

a) permanently or temporarily cease, downsize or shut down any of its business or operations and to dispose of redundant or non-material assets not exceeding $100,000 in any one transaction or $1,000,000 in the aggregate,

b) terminate the employment of such of its employees or Assistants or temporarily lay off such of its employees or Assistants as it deems appropriate, and

c) pursue all avenues of refinancing of their Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

d) all of the foregoing to permit the Timminco Entities to proceed with an orderly restructuring of the Business (the "**Restructuring**").

16. **THIS COURT ORDERS** that the Timminco Entities shall provide each of the relevant landlords with notice of the Timminco Entities' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Timminco Entities' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Timminco Entities, or by further Order of this Court upon application by the Timminco Entities on at least two (2) days' notice to such landlord and any such secured creditors. If the Timminco Entities disclaim or resiliate the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer or resiliation of the lease shall be without prejudice to the Timminco Entities' claim to the fixtures in dispute.

17. **THIS COURT ORDERS** that if a notice of disclaimer or resiliation is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Timminco Entities and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Timminco Entities in respect of such lease or leased premises and such landlord shall be entitled to notify the Timminco Entities of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers

advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE TIMMINCO ENTITIES OR THE PROPERTY

18. **THIS COURT ORDERS** that until and including February 2, 2012, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Timminco Entities or the Monitor, or affecting the Business or the Property, except with the written consent of the Timminco Entities and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Timminco Entities or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

19. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Timminco Entities or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Timminco Entities and the Monitor, or leave of this Court, provided that nothing in this Order shall (a) empower the Timminco Entities to carry on any business which the Timminco Entities are not lawfully entitled to carry on, (b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (c) prevent the filing of any registration to preserve or perfect a security interest, or (d) prevent the registration of a claim for lien.

20. **THIS COURT ORDERS** that, without limiting anything contained in paragraphs 19 and 21 hereof, any and all rights, remedies, modifications of existing rights and events deemed to occur pursuant to the QSLP Agreements (as defined in the paragraph 23 of the Kalins Affidavit) upon or as a result of (a) an Act of Insolvency (as

that term is used in the Kalins Affidavit) occurring with respect to BSI, (b) any default or non-performance by the Timminco Entities, (c) the making or filing of these proceedings, or (d) any allegation, admission or evidence in these proceedings, are hereby stayed and suspended except with the written consent of the Timminco Entities and the Monitor, or leave of this Court. Without limiting the foregoing, the operation of any provision of any QSLP Agreement that purports to (y) effect or cause a cessation of any rights of the Timminco Entities, or (z) to accelerate, terminate, discontinue, alter, interfere with, repudiate, cancel, suspend or modify such agreement or arrangement as a result of any default or non-performance by or the insolvency of the Timminco Entities, the making or filing of these proceedings, or any allegation, admission or evidence in these proceedings, is hereby stayed and restrained and any steps or actions purported to be taken by any counterparty to any of the QSLP Agreements and any event that is deemed to have occurred in respect of the QSLP Agreements shall be null and void and of no effect.

NO INTERFERENCE WITH RIGHTS

21. **THIS COURT ORDERS** that during the Stay Period, no Person having oral or written agreements with the Timminco Entities shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform or provide any right, renewal right, contract, agreement, licence, permit or access right in favour of or held by the Timminco Entities, including without limitation, access rights held by BSI with respect to the Quebec Silicon Real Property and the Becancour Properties (as these terms are defined in the Kalins Affidavit), except with the written consent of the Timminco Entities and the Monitor, or leave of this Court.

CONTINUATION OF SUPPLY

22. **THIS COURT ORDERS** that during the Stay Period, all Persons, including QSLP and QSGP, having oral or written agreements with the Timminco Entities or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services,

centralized banking services, payroll services, insurance, transportation services, utility, customs clearing or other services to the Business or the Timminco Entities, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Timminco Entities, and that the Timminco Entities shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Timminco Entities in accordance with normal payment practices of the Timminco Entities or such other practices as may be agreed upon by the supplier or service provider and each of the Timminco Entities and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

23. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Timminco Entities. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

24. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Timminco Entities with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Timminco Entities whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or

arrangement in respect of the Timminco Entities, if one is filed, is sanctioned by this Court or is refused by the creditors of the Timminco Entities or this Court.

25. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors of QSGP serving as BSI's nominated or appointed representatives on the Board of Directors of QSGP or any of the former, current or future officers of the Timminco Entities also serving as officers of QSGP (collectively, the "**QSGP/BSI Directors**") with respect to any claim against the QSGP/BSI Directors that arose before the date hereof and that relates to any obligations of QSGP or QSLP whereby the QSGP/BSI Directors are alleged under any law to be liable in their capacity as directors or officers of QSGP for the payment or performance of such obligations, until a compromise or arrangement in respect of the Timminco Entities, if one is filed, is sanctioned by this Court or is refused by the creditors of the Timminco Entities or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

26. **THIS COURT ORDERS** that the Timminco Entities shall indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers of the Timminco Entities after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

27. **THIS COURT ORDERS** that the directors and officers of the Timminco Entities shall be entitled to the benefit of and are hereby granted a charge (the "**D&O Charge**") on the Property, which charge shall not exceed an aggregate amount of $400,000, as security for the indemnity provided in paragraph 26 of this Order. The D&O Charge shall have the priority set out in paragraphs 38 and 40 herein.

28. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the D&O Charge, and (b) the Timminco Entities' directors and officers shall only be entitled to the benefit of the D&O Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 26 of this Order.

APPOINTMENT OF MONITOR

29. **THIS COURT ORDERS** that FTI Consulting Canada Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Timminco Entities with the powers and obligations set out in the CCAA or set forth herein and that the Timminco Entities and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Timminco Entities pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

30. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Timminco Entities' receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) advise the Timminco Entities in the development of the Plan and any amendments to the Plan;

(d) assist the Timminco Entities, to the extent required by the Timminco Entities, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(e) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Timminco Entities, to the extent that is necessary to adequately assess the Timminco Entities' business and financial affairs or to perform its duties arising under this Order;

(f) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(g) hold and administer funds in connection with arrangements made among the Timminco Entities, any counter-parties, and the Monitor, or by Order of this Court; and

(h) perform such other duties as are required by this Order or by this Court from time to time.

31. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

32. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or

other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Civil Code of Québec, the Québec *Environment Quality Act*, the Ontario *Mining Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

33. **THIS COURT ORDERS** that that the Monitor shall provide any creditor of the Timminco Entities with information provided by the Timminco Entities in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Timminco Entities is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Timminco Entities may agree.

34. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

35. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and counsel to the Timminco Entities shall be paid their reasonable fees and disbursements, in each

case at their standard rates and charges, by the Timminco Entities as part of the costs of these proceedings. The Timminco Entities are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Timminco Entities on a weekly basis and, in addition, the Timminco Entities are hereby authorized and directed to pay to the Monitor, counsel to the Monitor, and counsel to the Timminco Entities, retainers in the amounts of $75,000, $30,000 and $100,000, respectively, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

36. **THIS COURT ORDERS** that ~~at the request of the Timminco Entities, any party of interest, or this Court,~~ the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

37. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, if any, and the Timminco Entities' counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $1 million, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 38 and 40 hereof.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

38. **THIS COURT ORDERS** that the priorities of the Administration Charge and the D&O Charge (collectively, the "**Charges**"), as among them, shall be as follows:

First – the Administration Charge (to the maximum amount of $500,000);

Second – the D&O Charge (to the maximum amount of $400,000); and

Third – the Administration Charge (to the maximum amount of $500,000) ranking behind all Encumbrances (as defined below) pending return of the Comeback Motion (as defined below).

39. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

40. **THIS COURT ORDERS** that, the Charges shall constitute a charge on the Property and the D&O Charge and the Administration Charge to a maximum amount of $500,000 shall rank ahead in priority to the existing security interests of IQ, but behind all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, including any deemed trust created under the Ontario *Pension Benefits Act* or the Quebec *Supplemental Pension Plans Act* (collectively, the "**Encumbrances**") in favour of any Persons that have not been served with notice of this application. The Applicants and the beneficiaries of the Charges shall be entitled to seek priority ahead of the Encumbrances on notice to those parties likely to be affected by such priority (it being the intention of the Timminco Entities to seek priority for the Charges ahead of all such Encumbrances at the Comeback Motion.

41. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Timminco Entities shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges unless the Timminco Entities also obtain the prior written consent of the Monitor and the beneficiaries of the D&O Charge and the Administration Charge, or further Order of this Court.

42. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the

Charges (collectively, the "**Chargees**") shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Timminco Entities, and notwithstanding any provision to the contrary in any Agreement:

(a) the creation of the Charges shall not create or be deemed to constitute a breach by the Timminco Entities of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and

(c) the payments made by the Timminco Entities pursuant to this Order and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

43. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Timminco Entities' interest in such real property leases.

SERVICE AND NOTICE

44. **THIS COURT ORDERS** that the Monitor shall (a) without delay, publish in *The Globe and Mail*, National Edition, and *La Presse*, in French, once a week for two weeks a notice containing the information prescribed under the CCAA, and (b) within five

business days after the date of this Order (i) make this Order publicly available in the manner prescribed under the CCAA, (ii) send, in the prescribed manner, a notice to every known creditor who has a claim against the Timminco Entities of more than $1,000, and (iii) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder, provided that the Monitor shall not make the names and addresses of individuals who are creditors publicly available.

45. **THIS COURT ORDERS** that the Timminco Entities and the Monitor be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Timminco Entities' creditors or other interested parties at their respective addresses as last shown on the records of the Timminco Entities and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

46. **THIS COURT ORDERS** that the Timminco Entities, the Monitor, and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, and the Monitor may post a copy of any or all such materials on its website at http://cfcanada.fticonsulting.com/timminco.

47. **THIS COURT ORDERS** that the Timminco Entities are authorized to serve their court materials with respect to the comeback motion expected to be heard ~~the week of~~ January 12, 2012 (the "**Comeback Motion**") by forwarding a copy of this Order and any additional materials to be filed with respect to the Comeback Motion by electronic transmission, where available, or by courier to the parties likely to be affected by the

relief to be sought on the Comeback Motion at such parties' respective addresses as last shown on the records of the Timminco Entities as soon as practicable. The Timminco Entities shall serve the beneficiaries of the BSI Non-Union Pension Plan, the BSI Union Pension Plan and the Haley Pension Plan by serving in the manner described above the pension plan committees for the BSI Non-Union Pension Plan and the BSI Union Pension Plan, Financial Services Commission of Ontario, and the Régie Des Rentes Du Québec.

GENERAL

48. **THIS COURT ORDERS** that the Timminco Entities or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

49. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Timminco Entities, the Business or the Property.

50. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Timminco Entities, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Timminco Entities and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Timminco Entities and the Monitor and their respective agents in carrying out the terms of this Order.

51. **THIS COURT ORDERS** that each of the Timminco Entities and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order

and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

52. **THIS COURT ORDERS** that any interested party (including the Timminco Entities and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

53. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

[illegible]RED AT / [illegible] À TORONTO
[illegible] BOOK NO:
LE / DANS LE [illegible] NO.:

JAN 3 2012

[illegible] PAR:

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

Court File No. 12-CL-9539-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

(Applicants)

ONTARIO
SUPERIOR COURT OF JUSTICE COMMERCIAL LIST

Proceeding commenced at Toronto

INITIAL ORDER

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Ashley John Taylor LSUC#: 39932E
Tel: (416) 869-5236
Maria Konyukhova LSUC#: 52880V
Tel: (416) 869-5230
Kathryn Esaw LSUC#: 5826F
Tel: (416) 869-6820
Fax: (416) 861-0445

Lawyers for the Monitor

Court File No. CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	MONDAY, THE 16TH DAY
	)	
JUSTICE NEWBOULD	)	OF DECEMBER, 2013

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Applicants

ORDER
(Re Expansion of Monitor Powers)

THIS MOTION, made by Timminco Limited ("**Timminco**") and Bécancour Silicon Inc. ("**BSI**" and, together, the "**Timminco Entities**"), for an order authorizing and directing the Timminco Entities to pay the Funds (as defined below) to FTI Consulting Canada Inc. in its capacity as the court appointed monitor of the Timminco Entities (the "**Monitor**") and expanding the powers of the Monitor was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Sean Dunphy sworn December 5, 2013 (the "**Dunphy Affidavit**"), and the Twenty-Third Report of the Monitor dated December 6, 2013 (the "**Twenty-Third Report**"), and on hearing the submissions of counsel for the Timminco Entities and the Monitor, no one appearing for any other person on the

service list, although duly served as appears from the affidavit of service of Kathryn Esaw sworn December 6, 2013, filed:

PAYMENTS TO MONITOR

1. **THIS COURT ORDERS** that the Timminco Entities are authorized and directed to (a) transfer, direct and pay over to the Monitor forthwith and in any event by no later than 4:00 pm EST on December 16, 2013, all monies currently held in accounts in the name of and/or controlled by the Timminco Entities; and (b) transfer, direct and pay over to the Monitor forthwith all monies received by the Timminco Entities after the date hereof (all such monies, together with any monies received on behalf of the Timminco Entities, the "**Funds**"), which Funds shall continue to be Property (as defined at paragraph 4 of the Initial Order of the Honourable Mr. Justice Morawetz dated January 3, 2012, the "**Initial Order**") of the Timminco Entities.

2. **THIS COURT ORDERS** that all Persons (as defined at paragraph 19 the Initial Order) in possession or control of Property, including for greater certainty any monies, belonging to or owed to the Timminco Entities shall forthwith advise the Monitor of such and shall grant immediate and continued access to the Property to the Monitor, and shall forthwith deliver all such Property to the Monitor upon the Monitor's request, other than documents or information which cannot be disclosed or provided to the Monitor due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

3. **THIS COURT ORDERS** that the Administration Charge, the Directors' Charge and the DIP Lenders Charge (as defined in the Initial Order) shall continue to apply to the Property of the Timminco Entities, including the Funds in accordance with their priority as established by the Initial Order.

ADDITIONAL POWERS OF THE MONITOR

4. **THIS COURT ORDERS** the Monitor of the Timminco Entities shall continue to be authorized and directed, and is authorized, but not required, in the name of and on behalf of the Timminco Entities, if appropriate, to :

(a) complete the Claims Procedure established by the Claims Procedure Order of Mr. Justice Morawetz dated June 15, 2013 (the "**Claims Procedure Order**") and settle, resolve and/or adjudicate the remaining disputed Claims and any other outstanding items in the Claims Procedure in accordance with the Claims Procedure Order, without consulting with the Timminco Entities; and

(b) take such further steps and seek such amendments to the Claims Procedure Order or additional orders as the Monitor considers necessary or appropriate in order to fully determine, resolve or deal with any Claims or D&O claims (as both are defined in the Claims Procedure Order).

5. **THIS COURT ORDERS** that the Monitor is authorized, but not required, in the name of and on behalf of the Timminco Entities, to

(a) seek the directions of this Honourable Court in respect of the validity and quantum, if any, of the D&O Claims and whether such claims are secured by the D&O Charge (as defined at paragraph 27 of the Initial Order);

(b) take such steps as may be necessary or appropriate to seek and obtain recovery of the proceeds of sale of the Memphis Property (as described in the Dunphy Affidavit) and matters ancillary thereto;

(c) file any and all tax returns of the Timminco Entities with any governmental tax authority that the Monitor considers necessary or desirable;

(d) claim any and all rebates, refunds or other amounts of tax (including sales taxes, capital taxes and income taxes) paid by or payable to the Timminco Entities;

(e) engage, deal, communicate, negotiate, agree and settle with any and all governmental authorities on behalf of the Timminco Entities and all such government authorities shall treat the Monitor as the authorized representative of the Timminco Entities. Any rebates, refunds or other amounts received by the Monitor on account of taxes paid by or payable to the Timminco Entities shall form part of the Funds;

(f) to seek the directions of this Honourable Court in respect of the distribution of the Funds and/or any Property to creditors or to deal with and/or abandon any Property and any matters related thereto;

(g) to seek directions from this Honourable Court in respect of the filing of any plan of arrangement or compromise or the termination of these proceedings commenced by the Timminco Entities under the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") pursuant to the Initial Order (the "**CCAA Proceedings**"), the discharge of the Monitor and all incidental and ancillary matters thereto; and

to perform such other functions as this Court may order from time to time (collectively, with paragraph 4 of this Order, the "**Monitor's Increased Powers**").

6. **THIS COURT ORDERS** that the Monitor's Increased Powers shall be in addition to the powers of the Monitor set out in any previous order of the Court (the "**Monitor's Existing Powers**")

7. **THIS COURT ORDERS** that the Monitor is prohibited from causing the Timminco Entities to make a voluntary assignment in bankruptcy without further Order of this Court.

8. THIS COURT ORDERS that, in addition to its prescribed rights in the CCAA, the Monitor's Existing Powers, the Monitor's Increased Powers and all other authority granted to the Monitor in all Orders granted in these CCAA Proceedings, the Monitor is empowered and authorized to take such additional actions and execute such documents, in the name of and on behalf of the Timminco Entities, as the Monitor considers necessary or desirable in order to respond to matters resulting from (a) the pending decision of Justice Mongeon in the Superior Court of Quebec (Commercial Division) pursuant to the Priority Claim Adjudication Protocol approved by the Order of the Honourable Mr. Justice Morawetz dated October 18, 2012 and any motions for leave to appeal or appeals relating thereto; and (b) the pending decision of Justice Morawetz in the Ontario Superior Court of Justice (Commercial Division) relating to a motion to lift the stay of proceedings brought by the plaintiff St. Clair Pennyfeather in the action with the Court File No. CV-09-378701-00CP; and (c) any motions for leave to appeal or appeals relating thereto.

9. **THIS COURT ORDERS** that in exercising the Monitor's Increased Powers, the Monitor shall not take possession of any real property belonging to the Timminco Entities.

10. **THIS COURT ORDERS** that, except as required by the CCAA or as provided for in any Orders issued by the Court in respect of the CCAA Proceedings, the Monitor shall not be authorized or directed to act in any other manner, and shall have no responsibility for any other duties or functions whatsoever other than by further Order of this Court.

11. **THIS COURT ORDERS** that the Monitor shall be at liberty to engage such persons as the Monitor deems necessary or advisable respecting the exercise of the Monitor's Existing Powers and the Monitor's Increased Powers.

12. **THIS COURT ORDERS** that, in addition to its prescribed rights under the CCAA, the powers granted by the Initial Order, this Order and all other orders granted in these proceedings, the Monitor is empowered and authorized to take such additional actions and execute such additional documents, in the name of and on behalf of the Timminco Entities, that may be incidental or ancillary to its prescribed rights and the powers granted to it, in order to facilitate the orderly completion of these proceedings and the winding up of the Timminco Entities' estates.

13. **THIS COURT ORDERS** that the Monitor shall continue to hold the Funds, and the Monitor is authorized and directed:

(a) to pay the reasonable fees and disbursements of the Monitor, counsel to the Monitor and counsel to the Timminco Entities, in the name of and on behalf of the Timminco Entities;

(b) to pay all post-filing liabilities properly incurred by the Timminco Entities in the ordinary course of business which have not been previously paid, in the name of and on behalf of the Timminco Entities;

(c) to pay all costs associated with any actions taken by the Monitor pursuant to paragraph 11 of this Order; and

(d) to return to Court in order to seek such further authority or directions as the Monitor considers appropriate with respect to the use or distribution of the Funds.

14. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor

shall incur no liability or obligation as a result of the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA, any other applicable legislation or any other Order granted in the CCAA Proceedings.

15. **THIS COURT ORDERS** that, except as specifically provided for herein, nothing in this Order shall vary or amend any order or endorsement previously granted in the CCAA Proceedings.

GENERAL

16. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Monitor, the CRO, and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Monitor and to the CRO, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order.

DEC 16 2013

Court File No. CV-12-9539-00CL

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

ORDER
(Re Expanded Monitor Powers)

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Ashley John Taylor LSUC#: 39932E
Tel: (416) 869-5236
Maria Konyukhova LSUC#: 52880V
Tel: (416) 869-5230
Kathryn Esaw LSUC#: 58264F
Tel: (416) 869-5230
Fax: (416) 947-0866

Lawyers for the Applicants

C A N A D A

PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

N° :

[N° (Cour Supérieure de justice - Ontario) : CV-12-9539-00CL]

C O U R S U P É R I E U R E
(Chambre commerciale)

DANS L'AFFAIRE DE LA *LOI SUR LES ARRANGEMENTS AVEC LES CRÉANCIERS DES COMPAGNIES*, L.R.C. (1985), c. C-36, EN SA VERSION MODIFIÉE
ET DANS L'AFFAIRE D'UN PLAN DE TRANSACTION OU D'ARRANGEMENT DE :

TIMMINCO LIMITÉE -et-
BÉCANCOUR SILICON INC.

Débitrices

- et -

FTI CONSULTING INC.

Contrôleur

- et -

Comité de retraite du Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc., ayant une place d'affaires au 6500, rue Yvon-Trudeau, en la ville de Bécancour, district de Trois-Rivières, Province de Québec, G9H 2V8;

- et -

Comité de retraite du Régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc., ayant une place d'affaires au 6500, rue Yvon-Trudeau, en la ville de Bécancour, district de Trois-Rivières, Province de Québec, G9H 2V8;

Requérants

c.

INVESTISSEMENT QUÉBEC, ayant une place d'affaires au 600, rue de la Gauchetière Ouest, bureau 1500, en les cité et district de Montréal, Province de Québec, H3B 4L8;

Intimée

REQUÊTE POUR DIRECTIVES ET JUGEMENT DÉCLARATOIRE TOUCHANT LES RÉCLAMATIONS PRIORITAIRES (ARTICLES 11 ET 17 LACC)

(Référé au tribunal siégeant dans le district judiciaire de Montréal par Ordonnance de la Cour supérieure de justice de l'Ontario datée du 18 octobre 2012)

À L'HONORABLE MARK SCHRAGER, J.C.S., SIÉGEANT EN CHAMBRE COMMERCIALE POUR LE DISTRICT DE MONTRÉAL, LES REQUÉRANTS EXPOSENT CE QUI SUIT :

I. INTRODUCTION

1. La présente requête consiste en une demande référée à la Cour supérieure du Québec par la Cour supérieure de justice (Rôle commercial) de l'Ontario, dans le contexte d'une procédure de restructuration sous la *Loi sur les arrangements avec les créanciers des compagnies* qui procède en Ontario.

2. La question à trancher entre les Requérants et l'Intimée concerne l'interprétation et l'application du droit québécois à l'égard de réclamations de régimes de retraite québécois, des droits d'un créancier acquis au Québec ainsi que de la priorité de ces réclamations, s'il y a lieu, sur le produit de ventes d'actifs situés au Québec, tel qu'il sera élaboré ci-dessous.

II. LES PARTIES

3. Le premier Co-Requérant, le Comité de retraite du Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (le « Comité de retraite des syndiqués »), administre le Régime de rentes pour les participants et bénéficiaires syndiqués de la compagnie Silicium Bécancour Inc. (« SBI ») établi sous la *Loi sur les régimes complémentaires de retraite* (le « Régime de retraite des syndiqués »), tel qu'il appert du Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. en vigueur le 1er janvier 2006 et daté du 11 décembre 2006, produit au soutien de la présente comme **Pièce P-1**.

4. Le deuxième Co-Requérant, le Comité de retraite du Régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc. (le « Comité de retraite des non-syndiqués » et, ensemble avec le Comité de retraite des syndiqués, les « Comités de retraite »), administre un Régime de rentes pour les participants et bénéficiaires non-syndiqués de SBI établi sous la *Loi sur les régimes complémentaires de retraite* (le « Régime de retraite des non-syndiqués ») et, ensemble avec le Régime de retraite des syndiqués, les « Régimes de retraite »), tel qu'il appert de la copie du Régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc., au 1er janvier 2007 et daté du 18 mai 2007, produite au soutien de la présente comme **Pièce P-2**.

5. L'Intimée, Investissement Québec, est un organisme gouvernemental constitué par le gouvernement du Québec en vertu de la *Loi sur Investissement Québec*, chapitre I-16.0.1.

III. <u>LES FAITS</u>

A. Le déficit de solvabilité et les cotisations d'équilibre

6. En vertu des dispositions des Régimes de retraite, Pièce P-1 et Pièce P-2, et de la *Loi sur les régimes complémentaires de retraite* (« Loi RCR »), SBI avait l'obligation de verser une cotisation patronale pour chaque exercice financier, ce qui inclut les cotisations d'exercice et les cotisations d'équilibre, aux Comités de retraite pour être déposées à la caisse de retraite du Régime de retraite des syndiqués (la « Caisse des syndiqués ») et à la caisse de retraite du Régime de retraite des non-syndiqués (la « Caisse des non-syndiqués » et, ensemble avec la Caisse des syndiqués, les « Caisses de retraite »).

7. En vertu de la Loi RCR, toute somme due par SBI pour l'acquittement des droits des participants ou bénéficiaires visés doit, dès sa détermination, être versée par SBI aux Caisses de retraite.

8. En date du 31 décembre 2011, il existait un déficit actuariel de solvabilité estimé dans la Caisse des syndiqués de 9 889 600 $, tel qu'il appert du rapport préparé par Mercer (Canada) Limited (« Mercer ») pour le Régime de retraite des syndiqués en date du 20 juillet 2012 (le « Rapport Mercer (Syndiqués) »), produit au soutien de la présente comme **Pièce P-3**.

9. Toujours en date du 31 décembre 2011, il existait un déficit actuariel de solvabilité estimé dans la Caisse des non-syndiqués de 3 998 700 $, tel qu'il appert du rapport préparé par Mercer pour le Régime de retraite des non-syndiqués en date du 20 juillet 2012 (le « Rapport Mercer (Non-Syndiqués) »), produit au soutien de la présente comme **Pièce P-4**.

10. En vertu de la Loi RCR, l'existence de tels déficits créait des obligations de versement de cotisations d'équilibre de la part de SBI aux Caisses de retraite afin de combler les déficits actuariels sur une période de temps.

11. En raison de l'existence du déficit actuariel de solvabilité du Régime de retraite des syndiqués en date du 31 décembre 2011, SBI avait l'obligation de verser à la Caisse des syndiqués des cotisations d'équilibre mensuelles au montant de 93 810 $, tel qu'il appert de l'annexe II du Rapport Mercer (Syndiqués), Pièce P-3.

12. De plus, en raison de l'existence du déficit actuariel de solvabilité du Régime de retraite des non-syndiqués en date du 31 décembre 2011, SBI avait l'obligation de verser à la Caisse des non-syndiqués des cotisations d'équilibre mensuelles au montant de 41 710 $, tel qu'il appert de l'annexe II du Rapport Mercer (Non-Syndiqués), Pièce P-4.

13. Depuis le 16 janvier 2012, SBI a cessé de verser les cotisations d'équilibre aux Caisses de retraite, suite à une décision de la Cour supérieure de justice (Rôle commercial) de l'Ontario (la « Cour ontarienne ») qui a ordonné la suspension des cotisations d'équilibre de SBI envers les Caisses de retraite pour la durée de la suspension des procédures dans le contexte de la restructuration entreprise sous la *Loi sur les arrangements avec les créanciers des compagnies* (« la LACC »), tel qu'il sera élaboré ci-dessous.

B. Le début des procédures en Ontario sous la LACC

14. SBI est une filiale entièrement détenue par Timminco Limited, cette dernière ayant une place d'affaires à Toronto dans la Province de l'Ontario (« Timminco » et, ensemble avec SBI, les « Entités Timminco »), tel qu'il appert du 13e Rapport du Contrôleur daté du 27 août 2012, au paragraphe 1, produit au soutien de la présente comme **Pièce P-5**.

15. En date du 3 janvier 2012, les Entités Timminco ont amorcé un processus de restructuration en vertu de la LACC sous la supervision de la Cour ontarienne, numéro de cour CV-12-9539-00CL, présidée par l'honorable juge Morawetz, lequel a ordonné la suspension de toute procédure contre les Entités Timminco, tel qu'il appert du *Initial Application Record* du 2 janvier 2012 (sans les pièces, mais incluant l'affidavit de Peter Kalins du 2 janvier 2012 ainsi que la Pièce « A » au soutien de l'affidavit), l'Ordonnance initiale du 3 janvier 2012 (l'« Ordonnance initiale ») et le *Endorsement* du 4 janvier 2012, produits au soutien de la présente *en liasse* comme **Pièce P-6**.

16. L'Ordonnance initiale incluait aussi une demande par la Cour ontarienne requérant l'aide et la reconnaissance de tout tribunal ayant juridiction au Canada afin de prendre acte de l'Ordonnance initiale, de rendre eux-mêmes les jugements nécessaires et souhaitables ainsi que d'assister les Entités Timminco, le Contrôleur et leurs agents dans l'exécution de l'Ordonnance initiale, tel qu'il appert du paragraphe 50 de l'Ordonnance initiale déjà produite comme Pièce P-6.

17. En date du 16 janvier 2012, l'honorable juge Morawetz a ordonné la suspension du versement des cotisations d'équilibre par les Entités Timminco, dont SBI, aux Caisses de retraite, tel qu'il appert du *Motion Record* du 5 janvier 2012 (sans les pièces mais incluant l'affidavit de Peter Kalins du 5 janvier 2012) et l'Ordonnance du 16 janvier 2012, produits au soutien de la présente *en liasse* comme **Pièce P-7**.

18. Dans ses motifs soutenant l'ordonnance de suspendre les cotisations d'équilibre, l'honorable juge Morawetz s'est basé sur les états financiers des Entités Timminco pour en venir à la conclusion qu'à cette date, si les Entités Timminco étaient obligées de payer les cotisations d'équilibre aux Caisses de retraite, elles n'auraient pas les fonds nécessaires pour continuer d'exploiter leurs entreprises. L'application de la Loi RCR mènerait alors les Entités Timminco vers la faillite et irait à l'encontre des objectifs de la LACC, causant inévitablement préjudice à tous les intervenants, incluant les employés et les retraités, tel qu'il appert des motifs de l'honorable juge Morawetz dans son *Endorsement*, aux paragraphes 27, 28, 62, 63 et 69, en date du 2 février 2012, produit au soutien de la présente comme **Pièce P-8**.

19. SBI cessa ainsi de verser les cotisations d'équilibre dues aux Caisses de retraite en date du 16 janvier 2012.

20. En date du 8 février 2012, la Cour ontarienne a approuvé le financement intérimaire [*DIP financing*] par QSI Partners Ltd. (« QSI ») et a ordonné une super-priorité en faveur de ce dernier, tel qu'il appert de l'Ordonnance du 8 février 2012 et du *Endorsement* du 9 février 2012 (dont la permission d'appeler a été rejeté par la Cour d'appel de l'Ontario le 20 juillet 2012), produits au soutien de la présente *en liasse* comme **Pièce P-9**.

21. Les conclusions de l'Ordonnance initiale furent reconduites à plusieurs reprises par l'honorable juge Morawetz et prendront fin le 31 janvier 2013, à moins que les Entités Timminco ne requièrent une autre prorogation de l'Ordonnance initiale.

C. La vente des actifs de SBI

22. Des actifs importants de SBI ont étés vendus sous la supervision de la Cour ontarienne, notamment les actifs de silicium métallurgique qui ont été vendus à QSI en date du 13 juin 2012 et les actifs solaires qui ont été vendus à Ferroatlantica, S.A. (« Ferro ») en date du 14 juin 2012, tel qu'il appert des Ordonnances de la Cour ontarienne datées du 22 mai 2012 et du 1er juin 2012 approuvant les ventes d'actifs et les *Endorsements* du 18 mai 2012 et du 1er juin 2012, produits au soutien de la présente *en liasse* comme **Pièce P-10** et du 13e Rapport du Contrôleur daté du 27 août 2012, au paragraphe 6, Pièce P-5.

23. Les actifs vendus représentent substantiellement tous les actifs d'exploitation de SBI [*operating assets*], tel qu'il appert de l'affidavit du chef de la restructuration des Entités Timminco [*Chief Restructuring Officer* ou *CRO*], M. Sean Dunphy (« CRO »), du 23 août 2012, au paragraphe 6, sous l'onglet « 2 » de la requête des Entités Timminco du 23 août 2012, produite au soutien de la présente comme **Pièce P-11**.

24. Suite aux ventes de leurs actifs, les Entités Timminco ont récupéré une somme d'approximativement 30,8 millions $, tel qu'il appert du 13e Rapport du Contrôleur, au paragraphe 7, Pièce P-5.

25. Par conséquent, suite à la vente des actifs, les Entités Timminco se sont mis dans une situation beaucoup plus favorable quant à leur capacité de présenter à leurs créanciers un plan d'arrangement acceptable à ces derniers.

D. Le processus de réclamation

26. Suite à la vente d'actifs, un processus de réclamation a débuté suite à l'approbation de la Cour ontarienne par une ordonnance datée du 15 juin 2012 indiquant que des réclamations pouvaient être soumises à l'encontre des Entités Timminco [*Claims Procedure*] (le « Processus de réclamation »), tel qu'il appert de l'Ordonnance du 15 juin 2012, produite en versions anglaise et française au soutien de la présente, *en liasse*, comme **Pièce P-12**.

27. Selon les termes du Processus de réclamation, le Comité de retraite des syndiqués a soumis deux réclamations garanties :

    1) Une réclamation pour le déficit actuariel de solvabilité du Régime de retraite des syndiqués au montant de 9 889 600 $, comme il a été établi au 31 décembre 2011 dans le Rapport Mercer (Syndiqués); et

    2) Une réclamation pour les cotisations d'équilibre non versées pour décembre 2011 à juin 2012, représentant un montant de 668 690 $, tel qu'il a été établi dans le Rapport Mercer (Syndiqués);

tel qu'il appert de la preuve de réclamation soumise par le Comité de retraite des syndiqués au Contrôleur le 20 juillet 2012, produite au soutien de la présente comme **Pièce P-13**.

28. Selon les termes du Processus de réclamation, le Comité de retraite des non-syndiqués a soumis deux réclamations garanties :

    1) Une réclamation pour le déficit actuariel de solvabilité du Régime de retraite des non-syndiqués au montant de 3 998 700 $, comme il a été établi au 31 décembre 2011 dans le Rapport Mercer (Non-Syndiqués); et

    2) Une réclamation pour les cotisations d'équilibre non versées de décembre 2011 à juin 2012, étant un montant de 297 520 $, tel qu'il a été établi dans le Rapport Mercer (Non-Syndiqués);

    tel qu'il appert de la preuve de réclamation soumise par le Comité de retraite des non-syndiqués au Contrôleur le 20 juillet 2012, produite au soutien de la présente comme **Pièce P-14**.

E. La nomination du CRO

29. Les Entités Timminco ont ensuite nommé un chef de la restructuration ou CRO, M. Sean Dunphy, décision qui a été approuvée par la Cour ontarienne en date du 17 août 2012.

F. Le processus de remboursement à Investissement Québec

30. Le 10 juillet 2009, Investissement Québec consentait un prêt au montant de 25 000 000 $ à SBI, garanti par une hypothèque sur l'universalité des biens de SBI (le « Prêt »), tel qu'il appert de l'offre de prêt signée par les parties le 10 juillet 2009 et l'hypothèque universelle du 10 juillet 2009, reproduites, *en liasse*, sous les onglets « 2.B » et « 2.C » de la requête des Entités Timminco du 23 août 2012, Pièce P-11.

31. Le Prêt n'est donc pas de même nature qu'un financement DIP, étant un prêt conventionnel. Le prêt n'a donc pas été mis en place afin de soutenir la restructuration des Entités Timminco et n'a donc pas été accordé avec l'objectif de supporter les Entités Timminco dans le cadre et avec les objectifs de la LACC.

32. Afin de limiter les intérêts sur le Prêt qui s'accumulaient par tranche d'environ 10 000 $ par jour, Investissement Québec, le Contrôleur et les Entités Timminco ont conclu une entente afin que soit remboursé le Prêt ainsi que la majorité des intérêts, tel qu'il appert de l'affidavit du CRO, reproduit, *en liasse*, sous l'onglet « 2 » de la requête des Entités Timminco du 23 août 2012, Pièce P-11.

33. Le 28 août 2012, la Cour ontarienne a entériné un processus par lequel le Prêt serait remboursé au montant de 25 393 057,43 $ (le « Processus de remboursement »), tel qu'il appert de l'Ordonnance de la Cour ontarienne du 28 août 2012, incluant notamment à l'annexe « A » une convention de remboursement [*Reimbursement Agreement*] (la « Convention de remboursement »), produite au soutien de la présente comme **Pièce P-15**, et le 16e Rapport du Contrôleur daté du 28 novembre 2012, au paragraphe 8, produit au soutien de la présente comme **Pièce P-16**.

34. Il était également stipulé à l'Ordonnance du 28 août 2012 que la Cour ontarienne requérait l'aide et la reconnaissance de tout tribunal ayant juridiction au Canada afin de prendre acte de l'Ordonnance, de rendre eux-mêmes les jugements nécessaires et souhaitables ainsi que d'assister les Entités Timminco, le Contrôleur et leurs agents dans l'exécution de l'Ordonnance, tel qu'il appert de l'Ordonnance du 28 août 2012, Pièce P-15, au paragraphe 50.

35. Suite à l'Ordonnance du 28 août 2012, le Contrôleur, qui détenait le produit de vente des actifs du 13 juin 2012 et du 14 juin 2012, a payé à Investissement Québec la somme de 25 393 058 $, tel qu'il appert du 16e Rapport du Contrôleur daté du 28 novembre 2012, au paragraphe 8, Pièce P-16.

36. Faisant suite à une Ordonnance additionnelle rendue le 31 août 2012, le Contrôleur a aussi payé un montant additionnel de 1 213 000 $ en faveur d'Investissement Québec, tel qu'il appert du 16e Rapport du Contrôleur daté du 28 novembre 2012, au paragraphe 8, Pièce P-16.

37. Le remboursement du Prêt a donc été effectué sous réserve des droits des créanciers pouvant détenir des créances prioritaires à Investissement Québec, dont notamment les Comités de retraite.

38. Conformément au Processus de remboursement, les créanciers ayant déposé des réclamations garanties en vertu du Processus de réclamation du 15 juin 2012 devaient soumettre au tribunal une demande de priorité [*Priority Assertion*] quant aux sommes versées à Investissement Québec en remboursement du Prêt.

G. Les réclamations de remboursement des Comités de retraite

39. En vertu du Processus de remboursement du Prêt, entériné par la Cour ontarienne le 28 août 2012, et notamment de la Convention de remboursement à l'annexe « A » de l'Ordonnance du 28 août 2012, les Comités de retraite ont encore une fois soumis les montants qu'ils réclamaient, cette fois-ci sous forme de demandes de priorité [*Priority Assertions*] (les « Demandes de priorité des Comités de retraite ») :

1) Le Comité de retraite des syndiqués a soumis deux demandes : une pour le déficit actuariel de solvabilité du Régime de retraite des syndiqués au montant de 9 889 600 $, tel qu'établi le 31 décembre 2011 dans le Rapport Mercer (Syndiqués); et l'autre pour les cotisations d'équilibre non versées de décembre 2011 à juin 2012, soit un montant de 668 690 $, tel qui a été établi dans le Rapport Mercer (Syndiqués); et

2) Le Comité de retraite des non-syndiqués a soumis deux demandes : une pour le déficit actuariel de solvabilité du Régime de retraite des syndiqués au montant de 3 998 700 $, tel qu'établi au 31 décembre 2011 dans le Rapport Mercer (Non-Syndiqués); et l'autre pour les cotisations d'équilibre non versées pour les mois de décembre 2011 à juin 2012, soit un montant de 297 520 $, tel qu'établi dans le Rapport Mercer (Non-Syndiqués);

tel qu'il appert de l'avis des Demandes de priorité des Comités de retraite du 7 septembre 2012 et signifié aux Contrôleur, SBI et Investissement Québec, produit au soutien de la présente comme **Pièce P-17**.

40. Le 12 septembre 2012, le Contrôleur, Investissement Québec et SBI ont consenti à ce que les Demandes de priorité des Comités de retraite soient catégorisées en tant que réclamations de remboursement sous le Processus de remboursement [*Reimbursement Claims*] (les « Réclamations de remboursement des Comités de retraite ») et que les réclamations des Comités de retraite soient ajoutées à l'annexe « A » du Processus de remboursement, tel qu'il appert du courriel transmis par le procureur du Contrôleur aux procureurs des Comités de retraite et daté le 12 septembre 2012, produit au soutien de la présente comme **Pièce P-18**.

H. Le transfert de la demande au Québec

41. Considérant que les questions soumises par les Comités de retraite étaient des questions de droit applicable dans la province de Québec, les parties ont convenu d'un protocole par lequel les Réclamations de remboursement des Comités de retraite seraient entendues par la Cour supérieure du Québec (Chambre commerciale) (le « Protocole d'adjudication »), ce protocole ayant été présenté à l'honorable juge Morawetz de la Cour ontarienne le 10 octobre 2012.

42. À la demande du juge Morawetz, les procureurs du Contrôleur ont rédigé une lettre pour confirmer la position selon laquelle la question devant être tranchée entre les Comités de retraite et Investissement Québec, concernant l'interprétation et l'application du droit québécois à l'égard de réclamations des Comités de retraite, des droits d'Investissement Québec et de la priorité relative de ces réclamations sur les produits de ventes sur des actifs au Québec, serait

tranchée de façon plus efficace et moins coûteuse par la Cour supérieure du Québec (Chambre commerciale) (la « Cour supérieure du Québec »), tel qu'il appert de la lettre des procureurs du Contrôleur datée le 10 octobre 2012, produite au soutien de la présente comme **Pièce P-19**.

43. La lettre du 10 octobre 2012 a aussi confirmé la demande à l'effet que l'honorable juge Morawetz réfère le dossier des Réclamations de remboursement des Comités de retraite à la Cour supérieure du Québec, en demandant l'aide et l'assistance de celle-ci, tel qu'il appert de la lettre des procureurs du Contrôleur datée le 10 octobre 2012, Pièce P-19.

44. Par l'Ordonnance du 18 octobre 2012, l'honorable juge Morawetz a accordé la demande des Comités de retraite, d'Investissement Québec, des Entités Timminco et du Contrôleur pour que la détermination des Réclamations de remboursement des Comités de retraite soit entendue devant la Cour supérieure du Québec en conformité avec le Protocole d'adjudication, tel qu'il appert de l'Ordonnance du 18 octobre 2012 approuvant le Protocole d'adjudication, produite au soutien de la présente comme **Pièce P-20**.

45. Également et conformément à l'Ordonnance du 18 octobre 2012, l'honorable juge Morawetz a demandé l'aide et la reconnaissance de la Cour supérieure du Québec afin de donner acte de l'Ordonnance du 18 octobre 2012, de déterminer si les Réclamations de remboursement des Comités de retraite avaient priorité sur le Prêt en vertu du Protocole d'adjudication, ainsi que pour entériner le Protocole d'adjudication, tel qu'il appert de l'Ordonnance du 18 octobre 2012 approuvant le Protocole d'adjudication, Pièce P-20.

46. Les Comités de retraite et Investissement Québec ont donc convenu d'un échéancier à suivre dans le dossier devant la Cour supérieure du Québec afin de s'assurer du bon déroulement et de l'efficacité du processus, tel qu'il appert du Protocole d'adjudication à la section C.1, en annexe à l'Ordonnance du 18 octobre 2012, Pièce P-20.

47. De plus, les Comités de retraite, Investissement Québec, les Entités Timminco et le Contrôleur ont convenu que les questions de droit seraient débattues devant la Cour supérieure du Québec dans un premier temps et que les questions ayant trait à la fixation des montants exacts des réclamations prioritaires à être versées aux Comités de retraite seraient débattues ultérieurement, le cas échéant, tel qu'il appert du Protocole d'adjudication à la section C.2, à annexe « A » de l'Ordonnance du 18 octobre 2012, Pièce P-20.

IV. LES QUESTIONS DE DROIT

48. Les questions de droit dans ce dossier, comme dans tous les dossiers en vertu de la LACC, doivent être analysées dans leur contexte factuel, dont les faits particulièrement importants sont :

    - la quasi-totalité des actifs de SBI ont étés vendus à QSI et Ferro en juin 2012;
    - le Contrôleur est à analyser toutes les réclamations afin de distribuer le produit des ventes aux créanciers;
    - Investissement Québec avait une créance garantie et a été remboursé environ 27 millions de dollars sujet aux Réclamations Prioritaires [*Priority Claims*]; et
    - certaines sommes (soit environ 4.5 millions de dollars) ont déjà été retenues du produit des ventes pour les *DIP Charges* (incluant le remboursement du *DIP Lender* QSI).

49. La question en litige est de déterminer si les réclamations des Comités de retraite ont priorité sur la créance d'Investissement Québec. La question du statut des réclamations des Comités de retraite vis-à-vis les *DIP Charges* n'est pas une question en litige et a déjà été tranchée par le juge Morawetz (voir l'Ordonnance du 8 février 2012, Pièce P-9).

50. SBI a cessé de verser les cotisations d'équilibre suite à l'Ordonnance du 16 janvier 2012 qui les a suspendues. Au 23 juillet 2012, les cotisations d'équilibre (avec intérêts) accumulés mais non-versées pour les deux Régimes de retraite totalisaient environ 1 million de dollars (voir lettres du 20 juillet 2012, Pièce P-3 et Pièce P-4).

51. Les déficits de solvabilité (qui incluraient les cotisations d'équilibre non-versées) pour les deux Régimes de retraite au 31 décembre 2011 totalisaient environ 14 millions de dollars (voir lettres du 20 juillet 2012, Pièce P-3 et Pièce P-4) et seront cristallisés si la terminaison des Régimes de retraite par la Régie des rentes du Québec est complétée.

52. En vertu du droit québécois applicable à la question en litige, les montants réclamés par les Comités de retraite pour les cotisations d'équilibre et pour les déficits actuariels, sont réputés détenus en fiducie par l'employeur SBI en faveur des Régimes de retraite.

53. Il est évident que de telles fiducies réputées ont un rang prioritaire sur la réclamation garantie d'Investissement Québec.

54. Il est donc respectueusement soumis que les Réclamations de remboursement des Comités de retraite constituent des réclamations prioritaires en vertu de la Convention de remboursement à l'annexe « A » de l'Ordonnance du 28 août 2012, Pièce P-15.

55. Conformément au paragraphe C.2. du Protocole d'adjudication (Pièce P-20), les Comités de retraite réservent leurs droits de parfaire les montants réclamés, suite à la détermination de la nature de leurs réclamations par cette Cour.

56. Conformément au paragraphe 9 de l'Ordonnance du 28 août 2012 de la Cour ontarienne et de la Convention de remboursement à l'annexe « A » de celle-ci (Pièce P-15), Investissement Québec remboursera les sommes déclarées par cette Cour comme étant prioritaires, le cas échéant, à Silicium Bécancour Inc. par l'entremise du Contrôleur, FTI Consulting Inc., afin que Silicium Bécancour Inc. transmette ces sommes aux Requérants.

57. Cette Requête est bien fondée en faits et en droit.

PAR CES MOTIFS, PLAISE AU TRIBUNAL :

D'ACCUEILLIR la présente requête.

PRENDRE ACTE de l'Ordonnance de la Cour supérieure de justice (Rôle commercial) de l'Ontario du 18 octobre 2012, ainsi que du Protocole d'adjudication à l'annexe « A » de celle-ci, à l'effet que la Cour supérieure du Québec (Chambre commerciale) détermine si les Réclamations de remboursement du Comité de retraite du Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. et du Comité de retraite du Régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc. sont des Réclamations prioritaires [*Priority Claims*], et ce, selon les dispositions du Protocol d'adjudication.

DÉCLARER comme étant des Réclamations prioritaires [*Priority Claims*] en vertu de la Convention de remboursement entérinée par l'Ordonnance du 28 août 2012 de la Cour supérieure de justice (Rôle commercial) de l'Ontario, les réclamations suivantes :

1. les cotisations d'équilibre non versées à la Caisse de retraite du Régime de rentes des employés syndiqués de Silicium Bécancour Inc.;
2. les cotisations d'équilibre non versées à la Caisse de retraite du Régime de rentes des employés non syndiqués de Silicium Bécancour Inc.;
3. le déficit actuariel de solvabilité du Régime de rentes des employés syndiqués de Silicium Bécancour Inc.; et
4. le déficit actuariel de solvabilité du Régime de rentes des employés non-syndiqués de Silicium Bécancour Inc.

PRENDRE ACTE du paragraphe C.2. du Protocole d'adjudication afin que les quantums des Réclamations prioritaires [*Priority Claims*] soient déterminés une fois que cette honorable Cour aura décidé sur la nature des réclamations, et soient déterminés selon l'Ordonnance du Processus de réclamation [*Claims Procedure Order*] ou selon une ordonnance cette Cour.

PRENDRE ACTE du paragraphe 9 de l'Ordonnance du 28 août 2012 de la Cour supérieure de justice (Rôle commercial) de l'Ontario et de la Convention de remboursement à l'annexe « A » de celle-ci, en vertu de laquelle Investissement Québec remboursera les sommes déclarées par cette Cour comme étant prioritaires, le cas échéant, à Silicium Bécancour Inc. par l'entremise du Contrôleur, FTI Consulting Inc., afin que Silicium Bécancour Inc. transmette ces sommes aux Requérants.

LE TOUT SANS FRAIS.

MONTRÉAL, le 17 décembre 2012

(S) LANGLOIS KRONSTRÖM DESJARDINS, S.E.N.C.R.L.

LANGLOIS KRONSTRÖM DESJARDINS, S.E.N.C.R.L.
Procureurs des Requérants

AFFIDAVIT

Je, soussigné, RENÉ BOISVERT, exerçant ma profession au 6500, rue Yvon-Trudeau, en la ville de Bécancour, district de Trois-Rivières, affirme solennellement ce qui suit:

1. Je suis président du Comité de retraite du Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. et président du Comité de retraite du Régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc.;

2. Tous les faits allégués dans la présente requête relativement au Régime de rentes pour employés syndiqués de Silicium Bécancour Inc. et au Régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc. sont vrais.

ET J'AI SIGNE :

René Boisvert

RENÉ BOISVERT

Affirmé solennellement devant moi à Bécancour, ce 17 décembre 2012

Marie Claude Fortin #135931

Commissaire à l'assermentation pour le Québec

AVIS DE PRÉSENTATION

À : INVESTISSEMENT QUÉBEC
À l'attention de : Me Charles Mercier
FASKEN MARTINEAU
140, Grande Allée Est
Bureau 800
Québec (Québec) G1R 5M8

Procureurs de l'intimée INVESTISSEMENT QUÉBEC

PRENEZ AVIS que la présente *Requête pour directives et jugement déclaratoire touchant les réclamations prioritaires* sera présentée pour adjudication devant l'honorable juge Mark Schrager, j.c.s., siégeant dans et pour le district de Montréal, au Palais de justice de Montréal, au 1 rue Notre-Dame Est, à une date et une salle à être déterminées.

VEUILLEZ AGIR EN CONSÉQUENCE.

MONTRÉAL, le 17 décembre 2012

(S) LANGLOIS KRONSTRÖM DESJARDINS, S.E.N.C.R.L.

LANGLOIS KRONSTRÖM DESJARDINS, S.E.N.C.R.L.
Procureurs des Requérants

Court File No. CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	MONDAY, THE 16TH
	)	
JUSTICE MORAWETZ	)	DAY OF JANUARY, 2012

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Applicants

ORDER
(Re Special Payments, KERPs and Super-Priority of Administration Charge and D&O Charge)

THIS MOTION, made by Timminco Limited ("**Timminco**") and Bécancour Silicon Inc. ("**BSI**" and, together with Timminco, the "**Timminco Entities**") for an order, *inter alia*, (a) suspending the Timminco Entities' special payment obligations with respect to their Pension Plans (as defined below), (b) approving the KERPs and KERP Charge (both as defined below), and (c) granting super-priority to the Administration Charge and the D&O Charge (both as defined in the Initial Order of the Honourable Mr. Justice Morawetz dated January 3, 2012 (the "**Initial Order**"), was heard Thursday, January 12, 2012 at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Peter A.M. Kalins sworn January 5, 2012 and the Exhibits attached thereto (the "**Comeback Affidavit**"), the First Report (the "**First Report**") of FTI Consulting Canada Inc. in its capacity as the Court-appointed Monitor of the Timminco Entities (the "**Monitor**"), the Confidential Supplement to

the First Report, and the Second Report of the Monitor, and on being advised that those parties disclosed on the Service List attached to the Notice of Motion as Schedule "A", including, Investissement Québec ("**IQ**") and Bank of America, N.A., and (b) the members of the pension plan committees for Bécancour Non-Union Pension Plan and the Bécancour Union Pension Plan (as these terms are defined in the Comeback Affidavit), La Section Locale 184 De Syndicat Canadien des Communciations, de l'Energie et du Papier ("**CEP**"), the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("**USW**"), the Superintendent of Financial Services, and the Régie Des Rentes Du Québec, were served with the Notice of Motion and Motion Record, and on hearing the submissions of counsel for the Timminco Entities, the Monitor, IQ, CEP, USW, the Superintendent of Financial Services and AMG Advanced Metallurgical Group N.V., no one appearing for any other person on the service list, although duly served as appears from the affidavits of service of Kathryn Esaw sworn January 6, 2012 and January 10, 2012, filed,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

SUSPENSION OF SPECIAL PAYMENTS UNDER PENSION PLANS

2. **THIS COURT ORDERS** that the Timminco Entities' obligations to make all contributions or payments (other than normal cost contributions, contributions to a defined contribution provision, and employee contributions deducted from pay) ("**Pension Contributions**") to the following pension plans (together, the "**Pension Plans**") are hereby suspended pending further order of this Court:

(a) the Régime de rentes pour les employés non syndiqués de Silicium Bécancour Inc. (Québec Registration Number 26042);

(b) the Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (Québec Registration Number 32063); and

(c) the Retirement Pension Plan for The Haley Plant Hourly Employees of Timminco Metals, A Division of Timminco Limited (Ontario Registration Number 0589648).

3. **THIS COURT ORDERS** that the directors, officers, officials and agents of the Timminco Entities shall not incur any liability as a result of the failure of the Timminco Entities to make the Pension Contributions during the Stay Period (as defined in the Initial Order).

KEY EMPLOYEE RETENTION PLANS

4. **THIS COURT ORDERS** that the Timminco Entities' key employee retention plans (the "**KERPs**") in the forms attached to the confidential supplement to the First Report of the Monitor (the "**Confidential Supplement**") are hereby approved and the Timminco Entities are authorized and directed to make the payments contemplated thereunder in accordance with the terms and conditions of the KERPs.

5. **THIS COURT ORDERS** that the employees of the Timminco Entities subject to the KERPs shall be entitled to the benefit of and are hereby granted a charge (the "**KERP Charge**") on the Property (as defined in the Initial Order), which charge shall not exceed an aggregate amount of $269,000, to secure amounts owing to such employees under the KERPs. The KERP Charge shall have the priority set out in paragraphs 9 and 10 hereof.

6. **THIS COURT ORDERS** that the filing, registration or perfection of the KERP Charge shall not be required, and that the KERP Charge shall be valid and

enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the KERP Charge coming into existence, notwithstanding any such failure to file, register, record or perfect.

7. **THIS COURT ORDERS** that the KERP Charge shall not be rendered invalid or unenforceable and the rights and remedies of the beneficiaries of the KERP Charges shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 (the "**BIA**"), or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances (as defined below), contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Timminco Entities, and notwithstanding any provision to the contrary in any Agreement:

(a) the creation of the KERP Charge shall not create or be deemed to constitute a breach by the Timminco Entities of any Agreement to which either of them is a party;

(b) the KERP Charge beneficiaries shall not have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the KERP Charge; and

(c) the payments made by the Timminco Entities pursuant to this Order and the granting of the KERP Charge, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

8. **THIS COURT ORDERS** that the KERP Charge created by this Order over leases of real property in Canada shall only be a charge in the Timminco Entities' interest in such real property leases.

PRIORITY OF CHARGES

9. **THIS COURT ORDERS** that the priorities of the Administration Charge and the D&O Charge, as first established in paragraph 38 of the Initial Order, and the KERP Charge (collectively, the "**Charges**"), as among them, shall from this date forth be as follows:

First – the Administration Charge (to a maximum amount of $1 million);

Second – the KERP Charge (to a maximum amount of $269,000); and

Third – the D&O Charge (to a maximum amount of $400,000).

10. **THIS COURT ORDERS** that, notwithstanding paragraph 40 of the Initial Order, the Charges shall constitute charges on the Property and, subject to section 11.8(8) of the CCAA, such Charges shall rank ahead in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise (collectively, "**Encumbrances**") in favour of any person, notwithstanding the order of perfection or attachment, including without limitation any deemed trust created under the Ontario *Pension Benefits Act,* or the Quebec *Supplemental Pension Plans Act* in favour of any person.

11. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Timminco Entities shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges unless the Timminco Entities also obtain the prior written consent of the Monitor and the beneficiaries of the Charges or further Order of this Court.

SEALING THE CONFIDENTIAL SUPPLEMENT

12. **THIS COURT ORDERS** that, subject to further order of this Court, the Confidential Supplement shall be sealed, kept confidential and not form part of the public record, but rather shall be placed, separate and apart from all other contents of the Court file, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order and shall only be opened upon further Order of this Court.

GENERAL

13. **THIS COURT ORDERS** that any interested party (including the Timminco Entities and the Monitor) may bring a motion to this Court to vary or amend this Order (provided that the beneficiary of any Charge shall be entitled to rely on the Charges up to and including the day on which such Charge or the priority granted to such Charge may be varied or amended), which motion must be returnable by no later than February 2, 2012 or such later date as the parties affected may agree, on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

FEB - 7 2012

Court File No. CV-12-9539-00CL

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

ORDER
(Re Special Payments, KERPs and Super-Priority of Administration Charge and D&O Charge)

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Ashley John Taylor LSUC#: 39932E
Tel: (416) 869-5236
Maria Konyukhova LSUC#: 52880V
Tel: (416) 869-5230
Kathryn Esaw LSUC#: 58264F
Tel: (416) 869-5230
Fax: (416) 947-0866

Lawyers for the Applicants

5912854 v7

Court File No. 12-CL-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	TUESDAY, THE 22ND
	)	
JUSTICE MORAWETZ	)	DAY OF MAY, 2012

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Applicants

COURT OF JUSTICE SUPERIOR COUR SUPÉRIEURE DE JUSTICE

APPROVAL AND VESTING ORDER
(Re Sale of Solar Assets)

THIS MOTION, made by Timminco Limited ("**Timminco**") and Bécancour Silicon Inc. ("**BSI**" and, together with Timminco, the "**Timminco Entities**"), for an order approving the sale transaction (the "**F.A. Transaction**") contemplated by the Agreement of Purchase and Sale (the "**F.A. Agreement**") between the Timminco Entities and Grupo FerroAtlantica, S.A. made and entered into as of April 25, 2012, to the Affidavit of Peter A.M. Kalins sworn May 9, 2012 (the "**May 9 Affidavit**") as Exhibit "K", vesting the Timminco Entities' right, title and interest in and to the Purchased Assets (as defined in the F.A. Agreement) in and to Grupo FerroAtlantica, S.A., including any assignee thereof permitted under the F.A. Agreement (the "**Purchaser**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the May 9 Affidavit and the Seventh Report of FTI Consulting Inc., in its capacity as Court-appointed Monitor of the Timminco Entities (the "**Monitor**") dated May 15, 2012, and on being advised that those parties disclosed on the Service List attached to the Motion Record were served with the Notice of Motion and Motion Record, and on hearing the submissions of counsel for the Timminco Entities, the Monitor, the Purchaser, Investissement Québec, QSI Partners Ltd., Dow Corning Corporation, La Section Locale 184 De Syndicat Canadien des Communciations, de l'Energie et du Papier, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AMG Advanced Metallurgical Group N.V., the Financial Services Commission of Ontario, and Mercer (Canada) Limited, in its capacity as the administrator of the Retirement Pension Plan for the Haley Plant Hourly Employees of Timminco Metals, A Division of Timminco Limited (Ontario Registration Number 0589648), no one appearing for any other person on the service list, although duly served as appears from the affidavit of service of Kathryn Esaw sworn May 10, 2012, filed,

1. **THIS COURT ORDERS** that that any defined term used but not defined herein shall have the meaning ascribed to such term in the F.A. Agreement.

2. **THIS COURT ORDERS AND DECLARES** that the F.A. Transaction and the F.A. Agreement are hereby approved. The Timminco Entities and the Monitor are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the F.A. Transaction and for the conveyance of the Purchased Assets to the Purchaser.

3. **THIS COURT ORDERS AND DECLARES** that this Order shall constitute the only authorization required by the Timminco Entities to proceed

with the F.A. Transaction and that no shareholder approval shall be required in connection therewith.

4. **THIS COURT ORDERS AND DECLARES** that upon the delivery of a Monitor's certificate to the Purchaser substantially in the form attached as Schedule "A" hereto (the "**Monitor's Certificate**"), all of the Timminco Entities' right, title and interest in and to the Purchased Assets shall vest, without further instrument of transfer or assignment, absolutely in the Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (a) any encumbrances or charges created by the Court, including by the Initial Order of the Honourable Mr. Justice Morawetz dated January 3, 2012, the Order (Re Special Payments, KERPs and Super-Priority of Administration Charge and D&O Charge) of the Honourable Mr. Justice Morawetz dated January 16, 2012, and the DIP Order of the Honourable Mr. Justice Morawetz dated February 8, 2012, as amended; (b) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario), the *Civil Code of Québec*, or any other personal property registry system; (c) all Claims in respect of or relating to any debts, liabilities or other obligations of any of the Timminco Entities that do not constitute Assumed Obligations; and (d) those Claims listed on Schedule B hereto; and, for greater certainty, this Court orders that all Encumbrances or charges affecting or relating to the Purchased Assets other than the Permitted Encumbrances are hereby expunged and discharged as against the Purchased Assets and the Purchaser.

5. **THIS COURT ORDERS** the Land Registrar of the Land Registry Office for the Registration Division of Nicolet (Nicolet 2), upon presentation of the Monitor's Certificate and a certified copy of this Order accompanied by the required application for registration and upon payment of the prescribed fees, but without the necessity to file a certificate of non-appeal, to publish this Order and (a) to proceed with an entry on the index of immovables showing the Purchaser as the absolute owner in regards to the immovable property known and designated as:

> An immovable situated in the City of Bécancour, Province of Québec, known and designated as being composed of lot number THREE MILLION TWO HUNDRED AND NINETY-FOUR THOUSAND AND FIFTY-FOUR (3 294 054) of the Cadastre of Québec, Registration Division of Nicolet (Nicolet 2); and
>
> lot number FOUR MILLION ONE HUNDRED AND TEN THOUSAND FIVE HUNDRED AND NINETY-EIGHT (4 110 598) of the Cadastre of Québec, Registration Division of Nicolet (Nicolet 2) with the buildings thereon erected bearing civic address 5500 Yvon-Trudeau Street, city of Bécancour, province of Québec, G9H 0G1 (together, the "**HP1 Property**")

and (b) to proceed with the radiation and cancellation of any and all hypothecs, legal hypothecs and Encumbrances (the "**HP1 Encumbrances**") on the Purchased Assets, including the HP1 Property, but not the Encumbrances listed at Schedule "B" to the F.A. Agreement (the "**Permitted Encumbrances**"), including, without limitation, the radiation and cancellation of the rights resulting from the following deeds published at the said Land Registry:

- Hypothecs pursuant to a Deed of universal hypothec granted by Bécancour Silicon Inc. in favour of Investissement Québec registered in the Registry Office for the registration division of Nicolet (Nicolet 2), on July 14, 2009, under number 16 368 865; and

- Legal hypothec against Bécancour Silicon Inc. in favour of Entreprises Arseneault Inc. registered in the Registry Office for the registration division of Nicolet (Nicolet 2), on January 20, 2012, under number 18 783 570.

6. **THIS COURT ORDERS** the Registrar of the Québec Register of Personal and Movable Real Rights, upon presentation of the required form with a true copy of this Order and the Monitor's Certificate, but without the necessity to file a certificate of non-appeal, to reduce the scope of all hypothecs in connection with the Purchased Assets including: 1) registered under number 09-0420851-0001 in connection with the HP1 Property and to cancel, release and discharge, or partially cancel, release or discharge, all of the HP1 Encumbrances to the extent that such HP1 Encumbrances relate to the Purchased Assets, as described in Schedule C hereto, including without limitation the full or partial cancellation, release or discharge of the HP1 Encumbrances as may be registered under the following:

- Conventional hypothec without delivery signed between Bécancour Silicon Inc., Québec Silicon General Partner Inc. and Investissement Québec on October 29, 2010 and registered at the Register of Personal and Movable Real Rights ("**RPMRR**") on November 1, 2010 at 9:00 a.m. under number 10-0763732-0001;

- Conventional hypothec without delivery signed between Bécancour Silicon Inc. and Investissement Québec on July 10, 2009 and registered at the RPMRR on July 13, 2009 at 9:36 a.m. under number 09-0420851-0001;

- Rights of ownership of the lessor signed between Bécancour Silicon Inc. and Services Financiers CIT Ltée on March 23, 2007 and registered at the RPMRR on April 3, 2007 at 2:00 p.m. under number 07-0171528-0001;

- Rights of ownership of the lessor signed between Bécancour Silicon Inc. and Services Financiers CIT Ltée on March 15, 2006 and registered at the RPMRR on March 28, 2006 at 9:00 a.m. under number 06-0156193-0001;

- Rights of ownership of the lessor signed between Bécancour Silicon Inc. and De Lage Landen Financial Services Canada Inc. on November 10, 2011 and registered at the RPMRR on November 10, 2011 at 12:47 p.m. under number 11-0869515-0001;

- Rights resulting from a lease and assignment of the rights signed between Bécancour Silicon Inc. and 3566072 Canada Inc. (Toyota Credit Canada Inc., as assignee) on November 26, 2010 and registered at the RPMRR on December 9, 2010 at 2:42 p.m. under number 10-0867561-0001;

- Rights resulting from a lease signed between Bécancour Silicon Inc. and De Lage Landen Financial Services Canada Inc. on March 2, 2010 and registered at the RPMRR on March 3, 2010 at 9:00 a.m. under number 10-0118577-0002;

- Rights resulting from a lease signed between Bécancour Silicon Inc. and De Lage Landen Financial Services Canada Inc. on January 8, 2009 and registered at the RPMRR on January 9, 2009 at 9:00 a.m. under number 09-0010080-0001;

- Rights of ownership of the lessor signed between Bécancour Silicon Inc. and Les Services Financiers Caterpillar Limitée on November 20, 2007 and registered at the RPMRR on November 30, 2007 at 2:26 p.m. under number 07-0688294-0001;

- Rights resulting from a lease signed between Bécancour Silicon Inc., Québec Silicon Limited Partnership and GE VFS Canada Limited

Partnership on September 28, 2007 and registered at the RPMRR on October 2, 2007 at 9:00 a.m. under number 07-0563868-0001; and

- Rights resulting from a lease signed between Bécancour Silicon Inc. and Prodair Canada Ltée on July 21, 2003 and registered at the RPMRR on August 22, 2003 at 2:46 p.m. under number 03-0441026-0001;

with such full or partial cancellations, releases or discharges relating only to the Purchased Assets, as described in Schedule C hereto, in order to allow the transfer to the Purchaser of the Purchased Assets, including the HP1 Property free and clear of any and all Encumbrances created by those hypothecs; and 2) in connection with the Solar Equipment located at the HP2 Property (lot 4 702 497, of the Cadastre of Québec, registration division of Nicolet (Nicolet 2) (the "**HP2 Property**"), servicing the HP2 Property and however installed to in or affixed to or forming part of the HP2 Property registered under number 10-0763732-0001 and to cancel, release and discharge, or partially cancel, release or discharge, any and all hypothecs, legal hypothecs and Encumbrances (the "**HP2 Encumbrances**") to the extent that such HP2 Encumbrances relate to the Purchased Assets, as described in Schedule C hereto, including without limitation the full or partial cancellation, release or discharge of the HP2 Encumbrances as may be registered under the following:

- Conventional hypothec without delivery signed between Bécancour Silicon Inc., Québec Silicon General Partner Inc. and Investissement Québec on October 29, 2010 and registered at the Register of Personal and Movable Real Rights ("**RPMRR**") on November 1, 2010 at 9:00 a.m. under number 10-0763732-0001;

- Conventional hypothec without delivery signed between Bécancour Silicon Inc. and Investissement Québec on July 10, 2009 and registered at the RPMRR on July 13, 2009 at 9:36 a.m. under number 09-0420851-0001;

- Rights of ownership of the lessor signed between Bécancour Silicon Inc. and Services Financiers CIT Ltée on March 23, 2007 and registered at the RPMRR on April 3, 2007 at 2:00 p.m. under number 07-0171528-0001;

- Rights of ownership of the lessor signed between Bécancour Silicon Inc. and Services Financiers CIT Ltée on March 15, 2006 and registered at the RPMRR on March 28, 2006 at 9:00 a.m. under number 06-0156193-0001;

- Rights of ownership of the lessor signed between Bécancour Silicon Inc. and De Lage Landen Financial Services Canada Inc. on November 10, 2011 and registered at the RPMRR on November 10, 2011 at 12:47 p.m. under number 11-0869515-0001;

- Rights resulting from a lease and assignment of the rights signed between Bécancour Silicon Inc. and 3566072 Canada Inc. (Toyota Credit Canada Inc., as assignee) on November 26, 2010 and registered at the RPMRR on December 9, 2010 at 2:42 p.m. under number 10-0867561-0001;

- Rights resulting from a lease signed between Bécancour Silicon Inc. and De Lage Landen Financial Services Canada Inc. on March 2, 2010 and registered at the RPMRR on March 3, 2010 at 9:00 a.m. under number 10-0118577-0002;

- Rights resulting from a lease signed between Bécancour Silicon Inc. and De Lage Landen Financial Services Canada Inc. on January 8, 2009 and registered at the RPMRR on January 9, 2009 at 9:00 a.m. under number 09-0010080-0001;

- Rights of ownership of the lessor signed between Bécancour Silicon Inc. and Les Services Financiers Caterpillar Limitée on November 20, 2007 and

registered at the RPMRR on November 30, 2007 at 2:26 p.m. under number 07-0688294-0001;

- Rights resulting from a lease signed between Bécancour Silicon Inc., Québec Silicon Limited Partnership and GE VFS Canada Limited Partnership on September 28, 2007 and registered at the RPMRR on October 2, 2007 at 9:00 a.m. under number 07-0563868-0001; and
- Rights resulting from a lease signed between Bécancour Silicon Inc. and Prodair Canada Ltée on July 21, 2003 and registered at the RPMRR on August 22, 2003 at 2:46 p.m. under number 03-0441026-0001;

with such full or partial cancellations, releases or discharges relating only to the Purchased Assets, as described in Schedule C hereto, in order to allow the transfer to the Purchaser of the Solar Equipment free and clear of any and all Encumbrances created by those hypothecs.

7. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Purchased Assets held by the Monitor shall stand in the place and stead of the Purchased Assets, and that from and after the delivery of the Monitor's Certificate, all Claims shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

8. **THIS COURT ORDERS** that the Monitor may rely on written notice from the Timminco Entities and the Purchaser regarding fulfillment or, if applicable, waiver of conditions to closing under the F.A. Agreement and shall have no liability with respect to delivery of the Monitor's Certificate.

9. **THIS COURT ORDERS AND DIRECTS** the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof.

10. **THIS COURT ORDERS** that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Timminco Entities and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of the Timminco Entities;

the vesting of the Purchased Assets in the Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Timminco Entities and shall not be void or voidable by creditors of the Timminco Entities, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

11. **THIS COURT ORDERS AND DECLARES** that the F.A. Transaction is exempt from any requirement under any applicable federal or provincial law to obtain shareholder approval and is exempt from the application of the *Bulk Sales Act* (Ontario).

ASSISTANCE OF OTHER COURTS

12. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories of Canada as against all persons and parties against who it may otherwise be enforced.

13. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Monitor and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Monitor, as an officer of this Court, and to the Purchaser as may be necessary or desirable to give full effect to this Order or to assist the Monitor and the Purchaser and their respective agents in carrying out the terms of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

MAY 25 2012

Schedule "A"
Form of Monitor's Certificate

Court File No. CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Applicants

MONITOR'S CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (the "**Court**") dated January 3, 2012, FTI Consulting Canada Inc. was appointed as the monitor (the "**Monitor**") of Timminco Limited ("**Timminco**") and Bécancour Silicon Inc. ("**BSI**" and, together with Timminco, the "**Timminco Entities**");

B. Pursuant to an Order of the Court dated May ●, 2012, the Court approved the Agreement of Purchase and Sale (the "**QSI Agreement**") made and entered into as of April 25, 2012, between the Timminco Entities, QSI Partners Ltd. and Globe Speciality Metals, Inc. and provided for the vesting in QSI Partners Ltd., including any assignee thereof permitted under the QSI Agreement ("**QSI**") of the Timminco Entities' right, title and interest in and to the Purchased Assets, which vesting is to be effective with respect to the Purchased Assets upon the delivery by the Monitor to QSI of a certificate certifying (a) that the Monitor has received written confirmation in the form and substance satisfactory to the Monitor from the Parties

that the conditions to Closing have been satisfied or waived by the applicable Parties, and (b) that the Monitor has received the Closing Cash Purchase Price; and

C. Unless otherwise indicated herein, defined terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the QSI Agreement.

THE MONITOR CERTIFIES the following:

1. The Monitor has received written confirmation from QSI and the Timminco Entities, in the form and substance satisfactory to the Monitor, that:

    (a) the conditions to Closing as set out in section 5 of the QSI Agreement; and

    (b) the deliveries as set out in section 6.2 and section 6.3 (other than this Certificate) of the QSI Agreement;

    have been satisfied or waived by QSI and the Timminco Entities, as applicable;

2. The Monitor has received the Closing Cash Purchase Price; and

3. This Certificate was delivered by the Monitor to the Timminco Entities at ________ [TIME] on _________________ [DATE].

FTI Consulting Canada Inc., in its capacity as the Court-appointed Monitor of the Timminco Entities and not in its personal capacity

Per: ________________________________

Name:

Title:

5963662 v1

SCHEDULE "B"
CLAIMS

1. Hypothecs pursuant to a Deed of universal hypothec granted by Bécancour Silicon Inc. in favour of Investissement Québec registered in the Registry Office for the registration division of Nicolet (Nicolet 2), on July 14, 2009, under number 16 368 865; and

2. Legal hypothec against Bécancour Silicon Inc. in favour of Entreprises Arseneault Inc. registered in the Registry Office for the registration division of Nicolet (Nicolet 2), on January 20, 2012, under number 18 783 570.

3. Conventional hypothec without delivery signed between Bécancour Silicon Inc., Québec Silicon General Partner Inc. and Investissement Québec on October 29, 2010 and registered at the Register of Personal and Movable Real Rights ("**RPMRR**") on November 1, 2010 at 9:00 a.m. under number 10-0763732-0001;

4. Conventional hypothec without delivery signed between Bécancour Silicon Inc. and Investissement Québec on July 10, 2009 and registered at the RPMRR on July 13, 2009 at 9:36 a.m. under number 09-0420851-0001;

5. Rights of ownership of the lessor signed between Bécancour Silicon Inc. and Services Financiers CIT Ltée on March 23, 2007 and registered at the RPMRR on April 3, 2007 at 2:00 p.m. under number 07-0171528-0001;

6. Rights of ownership of the lessor signed between Bécancour Silicon Inc. and Services Financiers CIT Ltée on March 15, 2006 and registered at the RPMRR on March 28, 2006 at 9:00 a.m. under number 06-0156193-0001;

7. Rights of ownership of the lessor signed between Bécancour Silicon Inc. and De Lage Landen Financial Services Canada Inc. on November 10, 2011 and registered at the RPMRR on November 10, 2011 at 12:47 p.m. under number 11-0869515-0001;

8. Rights resulting from a lease and assignment of the rights signed between Bécancour Silicon Inc. and 3566072 Canada Inc. (Toyota Credit Canada Inc., as assignee) on November 26, 2010 and registered at the RPMRR on December 9, 2010 at 2:42 p.m. under number 10-0867561-0001;

9. Rights resulting from a lease signed between Bécancour Silicon Inc. and De Lage Landen Financial Services Canada Inc. on March 2, 2010 and registered at the RPMRR on March 3, 2010 at 9:00 a.m. under number 10-0118577-0002;

10. Rights resulting from a lease signed between Bécancour Silicon Inc. and De Lage Landen Financial Services Canada Inc. on January 8, 2009 and registered at the RPMRR on January 9, 2009 at 9:00 a.m. under number 09-0010080-0001;

11. Rights of ownership of the lessor signed between Bécancour Silicon Inc. and Les Services Financiers Caterpillar Limitée on November 20, 2007 and registered at the RPMRR on November 30, 2007 at 2:26 p.m. under number 07-0688294-0001;

12. Rights resulting from a lease signed between Bécancour Silicon Inc., Québec Silicon Limited Partnership and GE VFS Canada Limited Partnership on September 28, 2007 and registered at the RPMRR on October 2, 2007 at 9:00 a.m. under number 07-0563868-0001;

13. Rights resulting from a lease signed between Bécancour Silicon Inc. and Prodair Canada Ltée on July 21, 2003 and registered at the RPMRR on August 22, 2003 at 2:46 p.m. under number 03-0441026-0001; and

14. Rights resulting from a lease signed between Silicium Bécancour and Prodair Canada Ltée on October 18, 2006 and registered at the RPMRR on January 4, 2007 at 10:30 a.m. under number 07-0004266-0001.

SCHEDULE "C"
PURCHASED ASSETS DESCRIPTION FOR VOLUNTARY REDUCTIONS
UNDER THE RPMRR

Fixed assets

Becancour Silicon Inc.,High Purity No.1 (HP1), 5500 Yvon-Trudeau, Bécancour, Québec				
Ref. #	Qty	Item	Manufacturer	Description
1	1	Vibratory Screener	Vibrotech	With 40-HP Drive
2	1	Melting Furnace (#11)	Major	1,600° C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 7S-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System, Spare Door
3	1	Melting Furnace (#12)	Major	1,600° C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 7S-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System, Spare Door
4	1	Melting Furnace (#13)	Major	1,600°C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 7S-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System, Spare Door
5	1	Bridge Crane (#1)	COH	with 32-Ton Main Cable Hoist, 10-Ton Auxiliary Cable Hoist, Integral Digital Hook Scale, Radio Controls

Fixed assets

Becancour Silicon Inc.,High Purity No.1 (HP1), 5500 Yvon-Trudeau, Bécancour, Québec

Ref. #	Qty	Item	Manufacturer	Description
6	1	Bridge Crane (#2)	COH	with 32-Ton Main Cable Hoist, 10-Ton Auxiliary Cable Hoist, Integral Digital Hook Scale, Radio Controls
7	1	10MT crane	Kone Cranes	
8	Lot	Casting Area Support Equipment		(3) Ladle Hooks, (4) Slag Scraper Attachments, (4) 5' x 7' x 3'D Scrap Bins, 2-Point Cable Type Grapple, Cable Type Clam Shell Crane Bucket, *Approx. (100) 7' x 11' x 32"D Steel Pans, (10) Cast Iron Casting Pots, (30) 7' x 10' x 6'D Steel Slag Hopper, with Cast iron abrasive plate lining, **(7) cooling Frames 10' x 8' x 6', etc.
9	1	Arc Welding Power Source	Miller	
10	1	Ramp	Ramp Master	with Hydraulic Ramp Height Adjustment
11	1	Dust Collection System (#11)	Wheelabrator	248°F Operating temperature with 125-HP blower motor, inline spark arrester, 44"Dia x approx. 100' of ductwork, Fire protection sprinklers
12	1	Dust Collection System (#12)	Wheelabrator	248°F Operating temperature with 125-HP blower motor, inline spark arrester, 44"Dia x approx. 100' of ductwork, Fire protection sprinklers
13	1	Dust Collection System (#13)	Wheelabrator	248°F Operating temperature with 125-HP blower motor, inline spark arrester, 44"Dia x approx. 100' of ductwork, Fire protection sprinklers
14	1	Dust collector (29)	Wheelabrator	Not installed, outside
15	1	Saw	King Canada	10" abrasive sample cutting
16	1	Drill	Holti	DD130 - core cutting sample
17	6	Electromagnet ic Stirring purification	ABB	each with 8' x 10' x 10' Container, with Electromagnetic Power Supply, Est. 20 Gal Glycol Chilling System, Pumps, Controls, Deionized Water System, ABB PLC Controls, Self Contained Air Conditioner System, with Cart Mounted Electromagnet, Cable Wench, Etc.
18	2	Casting Pots	Unknown	with (3) insulated covers
19	lot	Crushing system Silicon Jack Hammer screening station		steel rock screen, kent hydraulic articulating boom, kent pneumatic jack hammer, 50-HP hydraulic system, with fire resistant oil
20	1	Platform scale	Metler Toledo	Est. 20,000-Lb. Capacity

Fixed assets

Becancour Silicon Inc.,High Purity No.1 (HP1), 5500 Yvon-Trudeau, Bécancour, Québec

Ref. #	Qty	Item	Manufacturer	Description
		Air compressor room		
21	1	Air Dryer (DTX-600-DDS-E)	Domnick Hunter	600-CFM
22	1	Air Dryer (DTA600-DS)	Domnick Hunter	600-CFM
23	1	Rotary screw type air compressor	Atlas Copco	GA90, API606885
24	1	Rotary screw type air compressor	Atlas Copco	GA90, API604948
25	1	Refractory Paste repair gunning mact	Unknown	with 32"Dia. Pressure pot. Guns, hoses
		Maintenance area		
26	1	Electric Furnace	Wilt	12-kw rated capacity, 42"x60"x16"
27	1	Disassembled paint room, 12'x12'x8' with (1) entry door		
28	1	H-Frame hydraulic shop press	OTC	
29	1	Geared Head Engine Lathe	Harrison	Spindle speeds: 34-750-RPM, with Tailstock and thread chasing
30	1	Pipe Threader	Ridgid	with spare thread dies
31	1	Drill press	General	75-500M1, 77075006
32	1	Radial Arm Dirll	Tehcno	R2-40, 2080
33	1	Grinder	Scantool	6"tilting belt
34	1	Metal cutting band saw	General	10"x12" horizontal
35	1	Arc Welding Power Source	Miller	Goldstar 452 CC/DC, LH400634C
36	1	Arc Welding Power Source	Miller	Dimension 452, LJ310022C, with wire feeder
37	1	Arc Welding Power Source	Miller	Syncrowave 350LX
38	1	Plasma cutting system	Hypertherm	Powermax 800, 800-014893
39	1	Double end grinder	General	10"pedestal type
40	1	Metal cutting band saw	General	14" vertical
41	1	Fume collector (portable)	Diversitech	
42	1	Hydraulic Hammer attachment	Tramac	SC-50
43	lot	Miscellaneous support equipment throughout HP1		Assorted sections of shelving, storage cabinets, hand and power tools, welding supplies, work benches, inspections equipment
44	1	Bridge crane	Kone Cranes	with 10-ton cable hoist, radial controls
45	3	Bridge crane	Kone Cranes	*5,000 lbs capacity single girder. Note: (1) crane not installed)

Fixed assets

Becancour Silicon Inc.,High Purity No.1 (HP1), 5500 Yvon-Trudeau, Bécancour, Québec

Ref. #	Qty	Item	Manufacturer	Description
46	1	Welder	Miller	Big 40, LH021915
47	1	Scale	Unknown	80,000 lbs capacity, In-Ground
		Shipping department		
		Screen and hand picking system :		
48	1	Feed hopper	MGR	12'x 8'
49	1	Belt conveyor		30"X x 12'L Power
50	1	Vibratory Screener		20"Wx32"L, with plastic screen
51	1	Belt conveyor		30"Wx7'L hand pick
52	1	Mezzanine		
		Vehicles		
53	1	Floor Sweeper	Tennant	S30-1119
53	1	Floor Sweeper	Tennant	S30-1562
54	1	Wheel Loader	Caterpillar	HJA6D01358
55	1	Wheel Loader (05)	Caterpillar	CAT0966HEA6D01529
56	1	Wheel Loader (07)	Caterpillar	CAT0966HAA6D02255
57	1	Forklift (02)	Hyster	L177V02164F
58	1	Forklift (01)	Hyster	G005D14975W
59	1	forklift (5)	Hyster	G019E01612E
60	1	Forklift (JCB 930) - (04)	JCB	SIP93002YF0822387
61	1	Forklift (03)	Raymond	EZ-A-00-16588
62	1	Forklift (06)	Hyster	G005D13590V
63	1	Forklift (07)	Hyster	P005V02182G
64	1	Forklift (08)	Hyster	P005V02179G
65	1	Forklift (25)	Hyster	POO5V01855F
66	1	Forklift (26)	Hyster	POO5V01848F
67	1	Forklift (28)	Hyster	PO05V02175G
69	1	Excavator	Gradall	5200000749
70	1	Excavator	Caterpillar	CCK01973
71	1	Tractor	Freightliner	1FVHC5CV19HAB7583
73	3	Hydraulic breaker	Tramac	700
74	1	Hydraulic breaker	Tramac	SC-50

Fixed assets

Becancour Silicon Inc.,High Purity No.1 (HP1), 5500 Yvon-Trudeau, Bécancour, Québec

Ref. #	Qty	Item	Manufacturer	Description
75	1	Pickup truck	Dodge RAM 1500	1B7HC13Y8VJ612188
76	1	Pickup truck	Chevrolet SLE1500	2GTEK19R4W1532579
77	1	Pickup truck	Ford F-150	2FTRX07L42CA39978
78	1	Pickup truck	Ford F-150	2FTRX18WX2CA96782
80	1	Lifting platform		HD7845
		Process electrical equipment		
81	1	Transformer	Unknown	1,750/2,333 kVa, Onan/Onaf, Pri.: kV, Y Sec.: 600V D
82	1	Transformer	Ferranti Packard	2,500 kVa, Onan, Pri.: 25 kV, Y Sec.: 600V D
83	1	Transformer	Moloney	2,000 kVa, Onan/Onaf, Pri.: 25kV, Y Sec.: 600V D (crystallization)
84	1	Breaker	Unknown	25 kV, 600A
85	1	Equipment for control and protection of breaker		box, switch, announciator, indicator, relays, etc.
86	1	Switchgear	Westinghouse	Complete with (4) Vertical Sections, (2) Main Disconnects, DS-420, 600V, 2,000 A, with ampector relays LSI, (1) Bustie DS-420, 600 V, 2,000 A Disconnect, with ampector relay LSI, (6) Secondary disconnects, DS-416, 600V, 1,600 A, with ampector relay LSI, (2) Measuring customer electronic relays, (2) DSPMKII modules, with T9A sensors

Fixed assets

Becancour Silicon Inc.,High Purity No.1 (HP1), 5500 Yvon-Trudeau, Bécancour, Québec				
Ref. #	Qty	Item	Manufacturer	Description
87	1	Switchgear (crystallization)	Westinghouse	Complete with (2) Vertical sections, (1) main disconnect DS-420 600V 2,000 A with ampectro
88	2	480 kVA capacitor banks	Automatic	
89	lot	Motor control centers		(3) 600V, 1,200 A bus bracing, with (6) sections and lot of starter and switch, (1) 600 V, 1,200 A bus bracing, with (8) sections and lot of starter and switch, (2) 600 V, 1,200 A bus bracing, with (8) sections and lot of starter and switch (crystallization)
90	lot	miscellaneous process electrical equipment		Cabinet with battery charger, complete with 46 Ni-Cd battery, (2) logix Model 5000 PLC control system with rack, cards, processor, etc. Transformer, 600C@120-208V, panelboard 600 V & 120-208V, disconnect switch
91	40	Steel boxes		
92	1	Mold breaking station		
93	1	Mold Piercing Station		
94	1	Boxing Station		
95	1	Packaging station		
96		Computer equipment		
97		Spare parts		All spare parts in the HP1 storage room, except those belonging to AMGC

Fixed assets

Ref. #	Qty	Item	Manufacturer	Description
1	1	Melting Furnace (#21)	Major	1,600° C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System
2	1	Melting Furnace (#22)	Major	1,600° C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System
3	1	Melting Furnace (#23)	Major	1,600° C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System

Fixed assets

Ref. #	Qty	Item	Manufacturer	Description
4	1	Melting Furnace (#24)	Major	1,600^{0} C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System
5	1	Bridge Crane	COH	with 50-Ton Main Cable Hoist, 20-Ton Auxilliary Cable Hoist, Class C Rated, with Radio Controls
6	1	Bridge Crane	COH	with 50-Ton Main Cable Hoist, 20-Ton Auxilliary Cable Hoist, Class C Rated, with Radio Controls
7	1	Bridge Crane	COH	with 50-Ton Main Cable Hoist, 20-Ton Auxilliary Cable Hoist,Radio Controls
8	1	Bridge Crane	COH	with 50-Ton Main Cable Hoist, 20-Ton Auxilliary Cable Hoist,Radio Controls
9	1	Bridge Crane	Kone Crane	5 MT uninstalled
10	4	Melting Furnaces (#25 to #28)	Major	1,600 °C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System (Note : These furnace systems are partially installed. All components are on site.)

Fixed assets

Ref. #	Qty	Item	Manufacturer	Description
11	1	Melting Furnace (#29)	Major	1,600° C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System (Note : This furnace system is not installed. All components are on site.)
12	4	Electromagnet Stirrer	ABB	with 8' x 10' x 10' Container**, with Electromagnetic Power Supply, Est. 20 Gal Glycol Chilling System, Pumps, Controls, Deionized Water System, Allen-Bradley PLC Controls, Self Contained Air Conditioner System, with Cart Mounted Electromagnet, Cable Wench, Etc.
13	3	Electromagnet Stirrer	ABB	with 8' x 10' x 10' Container**, with Electromagnetic Power Supply, Est. 20 Gal Glycol Chilling System, Pumps, Controls, Deionized Water System, Allen-Bradley PLC Controls, Self Contained Air Conditioner System, with Cart Mounted Electromagnet, Cable Wench, Etc. (Note : Not Installed)
14	1	Platform Scale	Undefined Make	Est. 20,000-lb Capacity
16	1	Dust Collection System (#22)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower
17	1	Dust Collection System (#23)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower
18	1	Dust Collection System (#24)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower

Fixed assets

Ref. #	Qty	Item	Manufacturer	Description
19	1	Dust Collection System (#25)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower (Note : Ductwork Not Installed, Part of Furnace Projects in Process)
20	1	Dust Collection System (#26)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower (Note : Ductwork Not Installed, Part of Furnace Projects in Process)
21	1	Dust Collection System (#27)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower (Note : Ductwork Not Installed, Part of Furnace Projects in Process)
22	1	Dust Collection System (#28)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower (Note : Ductwork Not Installed, Part of Furnace Projects in Process)
23	1	Gunning Machine	Unknown	with 42" Dia. Holding Tnak, Hoses, Guns
25	1	Forklift Truck (#24) - H360HD	Hyster	
26	1	Scale	Unknown	
27	6	Casting Mold		
28	1	2 ton Mold		
29	1	Mold Piercing Station		
30	69	Steel Boxes		
31		Computer equipment		Pursuant to agreement between FA and BSI

Fixed assets

Ref. #	Qty	Item	Manufacturer	Description
		Electrical Sub Station :		
32	1	Item removed		
33	4	Transformer	Maloney	2,000/2,667 kVa, Onan-Onaf, Pri.: 25kV D, Sec. : 600 V Y
34	1	Transformer	Maloney	4,000/5,320 kVa, Onan-Onaf, Pri.: 25kV D, Sec. : 4,16 kV
35	1	Item removed		
36	3	Breaker	Unknown	25 kV, 800 A
37	lot	Ancillary Breaker Equip.		Box, Switch, Announciator, Indicator, Relays For Control and Protective Relay of Breaker
38	2	Switchgear	Westinghouse	Complete with (4) Vertical Sections, (2) Main Disconnects, DS-420, 600V, 2,000 A, with Amptector Relay LSI, (1) Bustie DS-420, 600 V, 2,000 A. with Amptector Relay LSI, (6) Secondary Disconnects, DS-416, 600 V, 1,600 A, LSI, (2) Measuring Customer Electronic Relays, (2) DSPMKII Modules with T9A Sensors
39	4	Automatic		480 kVa, 600 V Capacitor Banks
40	Lot	Motor control Centers, Complete		(4) 600V, 1,200 A, 42 kVa Bus Bracing, with (5) Sections, Starter, Switch, (4) 600V, 1,200 A, 42 kVa Bus Bracing, with (4) Sections, Starter, Switch (1) 600 V, 1,200 A, 42 kVa Bus Bracing, with (8) Sections Starter, Switch
41	Lot	Miscellaneous Process Electrical Equipment		Pursuant to agreement between FA and BSI
42	1	Excavator	Gradall	52000000743
43	2	Hydraulic rotary grinding	Tramac	TCH60
79	1	Pickup truck	Chevrolet S-10	1GCCS19X638237398

Court File No. CV-12-9539-00CL

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

APPROVAL AND VESTING ORDER

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Ashley John Taylor LSUC#: 39932E
Tel: (416) 869-5236
Maria Konyukhova LSUC#: 52880V
Tel: (416) 869-5230
Kathryn Esaw LSUC#: 58264F
Tel: (416) 869-6820
Fax: (416) 947-0866

Lawyers for the Timminco Entities

Court File No. 12-CL-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	FRIDAY, THE 1ST
	)	
JUSTICE MORAWETZ	)	DAY OF JUNE, 2012

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

SUPERIOR COURT OF JUSTICE
COUR SUPÉRIEURE DE JUSTICE

Applicants

APPROVAL AND VESTING ORDER
(Re Sale of Silicon Metal Assets)

THIS MOTION, made by Timminco Limited ("**Timminco**") and Bécancour Silicon Inc. ("**BSI**" and, together with Timminco, the "**Timminco Entities**"), for an order (a) approving the sale and other related transactions (the "**QSI Transaction**") contemplated by the Agreement of Purchase and Sale made and entered into as of April 25, 2012, as amended by the Amending Agreement dated as of June 1, 2012, between the Timminco Entities, QSI Partners Ltd. ("**QSI**") and Globe Specialty Medals, Inc. (the "**QSI Agreement**"), a copy of which is attached to the Affidavit of Peter A.M. Kalins sworn May 9, 2012 (the "**May 9 Affidavit**") as Exhibit "C", vesting the Timminco Entities' right, title and interest in and to the Purchased Assets (as defined in the QSI Agreement) in and to one or more of QSI and its permitted assignee(s); and (b) approving the HP2

Transaction (as defined herein) was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Motion Record of the Timminco Entities, the Supplemental Motion Record of the Timminco Entities, the Affidavit of Rahib Assal sworn May 28, 2012, the Second Supplemental Motion Record of the Timminco Entities, the Responding Motion Record of Dow Corning Corporation ("**DCC**"), the Supplemental Responding Motion Record of DCC, the Responding Motion Record of Wacker Chemie AG ("**Wacker**"), the Affidavit of Dr. Tobias Brandis sworn May 25, 2012, the Responding Motion Record of QSI, and the Seventh Report, Eighth Report and Ninth Report of FTI Consulting Inc., in its capacity as Court-appointed Monitor of the Timminco Entities (the "**Monitor**") dated May 15, May 20 and May 27, 2012, respectively, and on being advised that those parties disclosed on the Service List attached to the Motion Record were served with the Notice of Motion and Motion Record, and on hearing the submissions of counsel for the Timminco Entities, the Monitor, QSI Partners Ltd., DCC, Wacker, Mercer Canada, the Administrator of the Haley Pension Plan, BSI Non-Union Employee Pension Committee, La Section Locale 184 De Syndicat Canadien des Communciations, de l'Energie et du Papier and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, no one appearing for any other person on the service list, although duly served as appears from the affidavit of service of Kathryn Esaw sworn May 10, 2012, filed,

1. **THIS COURT ORDERS** that any defined term used but not defined herein shall have the meaning ascribed to such term in the QSI Agreement.

QSI TRANSACTION

2. **THIS COURT ORDERS AND DECLARES** that the QSI Transaction and the QSI Agreement are hereby approved. The Timminco Entities and the

Monitor are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the QSI Transaction and for the conveyance of the rights, title and interest of BSI in and to the Purchased Assets pursuant to the QSI Agreement.

3. **THIS COURT ORDERS AND DECLARES** that upon the delivery of a Monitor's certificate to QSI substantially in the form attached as Schedule "A" hereto (the "**Monitor's Certificate**"), all of the Timminco Entities' right, title and interest in and to the Purchased Assets shall vest, without further instrument of transfer or assignment, absolutely in QSI and/or one or more permitted assignees pursuant to section 9.11 of the QSI Agreement, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (a) any encumbrances or charges created by the Court, including by the Initial Order of the Honourable Mr. Justice Morawetz dated January 3, 2012, the Order (Re Special Payments, KERPs and Super-Priority of Administration Charge and D&O Charge) of the Honourable Mr. Justice Morawetz dated January 16, 2012, and the DIP Order of the Honourable Mr. Justice Morawetz dated February 8, 2012; (b) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario), the *Civil Code of Québec*, or any other personal property registry system; and (c) those Claims listed on Schedule C hereto (all of which are collectively referred to as the "**Encumbrances**", which term shall not include the Permitted Encumbrances, as defined in paragraph 14 of this Order); and (d) any rights or remedies of any person arising under the Limited Partnership Agreement or the Shareholders Agreement in connection with (i) the

transfer of the QSLP Equity, the Limited Partnership Agreement or the Shareholders Agreement, (ii) the Timminco Entities' insolvency or these CCAA Proceedings, or (iii) any pre-Closing breach of contract; and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets.

4. **THIS COURT ORDERS** the Registrar of the Québec Register of Personal and Movable Real Rights, upon presentation of the required form with a true copy of this Order and the Monitor's Certificate, but without the necessity to file a certificate of non-appeal, to reduce the scope of the hypothecs registered under numbers 10-0763732-0001 and 09-0420851-0001 in connection with the HP2 Property (as defined below) and to cancel, release and discharge, or partially cancel, release or discharge, any and all encumbrances (the "**HP2 Encumbrances**") on the HP2 Property to the extent that such HP2 Encumbrances relate to the Purchased Assets, as described in Schedule D hereto, including without limitation as may be registered under the following:

- Conventional hypothec without delivery signed between Bécancour Silicon Inc., Québec Silicon General Partner Inc. and Investissement Québec on October 29, 2010 and registered at the Register of Personal and Movable Real Rights ("**RPMRR**") on November 1, 2010 at 9:00 a.m. under number 10-0763732-0001;

- Conventional hypothec without delivery signed between Bécancour Silicon Inc. and Investissement Québec on July 10, 2009 and registered at the RPMRR on July 13, 2009 at 9:36 a.m. under number 09-0420851-0001;

with such full or partial cancellations, releases or discharges relating only to the Purchased Assets, as described in Schedule D hereto, in order to allow the

transfer to QSLP, as purchaser, or its permitted assignee(s) of the HP2 Property free and clear of any and all encumbrances created by those hypothecs.

5. **THIS COURT ORDERS** that forthwith following Closing QSI and/or one or more permitted assignees pursuant to section 9.11 of the QSI Agreement shall pay all existing monetary defaults in relation to the Assigned Agreements, other than those arising by reason of the Timminco Entities' insolvency, the commencement of these CCAA Proceedings, or the Timminco Entities' failure to perform a non-monetary obligation; provided that in accordance with section 2.4 of the QSI Agreement, the foregoing obligation to pay shall only apply up to the maximum aggregate amount of Cdn$10 million, and that the Timminco Entities shall pay forthwith after Closing any amounts in respect of such existing monetary defaults in excess of such Cdn$10 million threshold, other than those arising by reason of the Timminco Entities' insolvency, the commencement of these CCAA Proceedings, or the Timminco Entities' failure to perform a non-monetary obligation; provided further that the Timminco Entities, in accordance with section 2.5(c) of the QSI Agreement, shall forthwith after Closing pay or provide for all Post-Filing Costs in respect of the Assigned Agreements and QSI and/or one or more permitted assignees pursuant to section 9.11 of the QSI Agreement shall have no liability for such Post-Filing Costs.

6. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Purchased Assets held by the Monitor shall stand in the place and stead of the Purchased Assets, and that from and after the delivery of the Monitor's Certificate, all Claims and Encumbrances shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

7. **THIS COURT ORDERS** that the Monitor may rely on written notice from the Timminco Entities and QSI regarding fulfillment of conditions to closing under the QSI Agreement and shall have no liability with respect to delivery of the Monitor's Certificate.

8. **THIS COURT ORDERS AND DIRECTS** the Monitor to file a copy of the Monitor's Certificate with the Court, forthwith after delivery thereof.

9. **THIS COURT ORDERS** that, notwithstanding:

(a) the pendency of these CCAA proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Timminco Entities and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of the Timminco Entities;

the vesting of the Purchased Assets in and to QSI and/or one or more permitted assignees pursuant to section 9.11 of the QSI Agreement and the vesting of the HP2 property in and to QSGP, as general partner of QSLP, as purchaser, pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Timminco Entities and shall not be void or voidable by creditors of the Timminco Entities, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

10. **THIS COURT ORDERS AND DECLARES** that the QSI Transaction is exempt from any requirement under any applicable federal or provincial law to obtain shareholder approval and is exempt from the application of the *Bulk Sales Act* (Ontario).

11. **THIS COURT ORDERS** that the Timminco Entities are authorized and directed to disclose and transfer to QSI and its permitted assignee(s) all information (including information relating to the employment relationship) in BSI's records pertaining to BSI's past and current employees in Québec. QSI and its permitted assignee(s), as applicable, shall comply with all applicable laws relating to privacy and the protection of personal information in connection with such employee information and shall be entitled to use such employee information in a manner which is in all material respects identical to the use of such information by the Timminco Entities.

HP2 TRANSACTION

12. **THIS COURT ORDERS AND DECLARES** that the transactions contemplated by the HP2 Transaction Documents (the "**HP2 Transaction**") are hereby approved, subject to QSGP entering into the QSLP Access Agreement with Grupo FerroAtlantica, S.A., or its permitted assignee(s). The Timminco Entities and the Monitor are hereby authorized to take such additional steps and execute the HP2 Transaction Documents and such additional documents as may be necessary or desirable for the completion of the HP2 Transaction.

13. **THIS COURT ORDERS AND DECLARES** that upon the delivery of a Monitor's certificate to QSGP substantially in the form attached as Schedule "B" hereto (the "**HP2 Transaction Monitor's Certificate**"), all of BSI's right, title and interest in and to the HP2 Property and the dust collector no. 21 located on the HP2 Property and the related ducts connecting Furnaces no. 2 located at the QSLP Facility (collectively, the "**Dust Collector**") shall vest, without further

instrument of transfer or assignment, absolutely in QSGP, acting as general partner of QSLP, as purchaser, free and clear of and from any and all Claims; and, for greater certainty, this Court orders that all of the Claims or charges affecting or relating to the HP2 Property and the Dust Collector are hereby expunged and discharged as against the HP2 Property and the Dust Collector.

14. **THIS COURT ORDERS** the Land Registrar of the Land Registry Office for the Registration Division of Nicolet (Nicolet 2), upon presentation of the HP2 Transaction Monitor's Certificate and a certified copy of this Order accompanied by the required application for registration and upon payment of the prescribed fees, but without the necessity to file a certificate of non-appeal, to publish this Order and (a) to proceed with an entry on the index of immovables to register this Order transferring all of the rights, title and interest of BSI, in and to:

> an immovable situated in the City of Bécancour, Province of Québec, known and designated as being lot number FOUR MILLION SEVEN HUNDRED AND TWO THOUSAND FOUR HUNDRED NINETY-SEVEN (4 702 497) of the Cadastre of Québec, Registration Division of Nicolet (Nicolet 2) with all buildings thereon erected bearing civic address 6400 Yvon-Trudeau Street, city of Bécancour, province of Québec, G9H 2V8 (the "**HP2 Property**")

to QSGP, as general partner of QSLP, as purchaser, and (b) to proceed with the radiation and cancellation of any and all HP2 Encumbrances, but not the encumbrances listed at Schedule "E" to the QSI Agreement (the "**Permitted Encumbrances**"), including without limitation, the radiation and cancellation of the rights resulting from the following deeds published at the said Land Registry:

- Hypothec pursuant to a Deed of universal hypothec granted by Silicium Québec Commandité Inc. and by Bécancour Silicon Inc. in favour of Investissement Québec registered in the Registry Office for the registration division of Nicolet (Nicolet 2), on November 1, 2010, under number 17 670 388; and

- Consent to Cadastral Amendment granted by Investissement Québec by Deed registered in the Registry Office for the registration division of Nicolet (Nicolet 2), on February 23rd, 2011, under number 17 924 788.

ASSISTANCE OF OTHER COURTS

15. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Timminco Entities and their agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUN 05 2012

Schedule "A"
Form of Monitor's Certificate

Court File No. CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Applicants

MONITOR'S CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (the "**Court**") dated January 3, 2012, FTI Consulting Canada Inc. was appointed as the monitor (the "**Monitor**") of Timminco Limited ("**Timminco**") and Bécancour Silicon Inc. ("**BSI**" and, together with Timminco, the "**Timminco Entities**");

B. Pursuant to an Order of the Court dated May ●, 2012, the Court approved the Agreement of Purchase and Sale (the "**QSI Agreement**") made and entered into as of April 25, 2012, between the Timminco Entities, QSI Partners Ltd. and Globe Speciality Metals, Inc. and provided for the vesting in QSI Partners Ltd., including any assignee thereof permitted under the QSI Agreement ("**QSI**") of the Timminco Entities' right, title and interest in and to the Purchased Assets, which vesting is to be effective with respect to the Purchased Assets upon the delivery by the Monitor to QSI of a certificate certifying (a) that the Monitor has received written confirmation in the form and substance satisfactory to the Monitor from the Parties

that the conditions to Closing have been satisfied or waived by the applicable Parties, and (b) that the Monitor has received the Closing Cash Purchase Price; and

C. Unless otherwise indicated herein, defined terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the QSI Agreement.

THE MONITOR CERTIFIES the following:

1. The Monitor has received written confirmation from QSI and the Timminco Entities, in the form and substance satisfactory to the Monitor, that:

   (a) the conditions to Closing as set out in section 5 of the QSI Agreement; and

   (b) the deliveries as set out in section 6.2 and section 6.3 (other than this Certificate) of the QSI Agreement;

   have been satisfied or waived by QSI and the Timminco Entities, as applicable;

2. The Monitor has received the Closing Cash Purchase Price; and

3. This Certificate was delivered by the Monitor to the Timminco Entities at ________ [TIME] on __________________ [DATE].

FTI Consulting Canada Inc., in its capacity as the Court-appointed Monitor of the Timminco Entities and not in its personal capacity

Per: ____________________________

Name:

Title:

Schedule "B"
Form of HP2 Transaction Monitor's Certificate

Court File No. CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Applicants

MONITOR'S CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (the "**Court**") dated January 3, 2012, FTI Consulting Canada Inc. was appointed as the monitor (the "**Monitor**") of Timminco Limited ("**Timminco**") and Bécancour Silicon Inc. ("**BSI**" and, together with Timminco, the "**Timminco Entities**");

B. Pursuant to an Order of the Court dated June 1, 2012 (the "**Order**"), the Court approved the Agreement of Purchase and Sale (the "**QSI Agreement**") made and entered into as of April 25, 2012, as amended by an Amending Agreement dated June 1, 2012, between the Timminco Entities, QSI Partners Ltd. and Globe Speciality Metals, Inc. and provided for the vesting in QSI Partners Ltd., including any assignee thereof permitted under the QSI Agreement ("**QSI**") of the Timminco Entities' right, title and interest in and to the Purchased Assets;

C. Pursuant to the Order the Timminco Entities and the Monitor are authorized to take such additional steps and execute such additional documents as may be

necessary or desirable for the completion of the HP2 Transaction (as defined in the Order) and for the vesting of all of BSI's right, title and interest in and to the HP2 Property (as defined in the Order) and the Dust Collector (as defined in the Order) to Québec Silicon General Partner Inc. ("**QSGP**"), acting as general partner of Québec Silicon Limited Partnership ("**QSLP**"), with such vesting to be effective upon the delivery by the Monitor to QSGP of a certificate certifying that the Monitor has received written confirmation, in form and substance satisfactory to the Monitor from the Timminco Entities and QSGP, that the HP2 Transaction Documents have been executed and delivered by the parties thereto immediately prior to the completion of the QSI Transaction (as defined in the Order); and

D. Unless otherwise indicated herein, defined terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the QSI Agreement.

THE MONITOR CERTIFIES the following:

1. The Monitor has received written confirmation from the Timminco Entities and QSGP, in form and substance satisfactory to the Monitor, that the parties intend on completing the HP2 Transaction and the HP2 Transaction Documents have been executed and delivered by the parties thereto;

2. The Monitor has received written confirmation from QSI and the Timminco Entities, in form and substance satisfactory to the Monitor, that:

   (a) the conditions to Closing as set out in section 5 of the QSI Agreement; and

   (b) the deliveries as set out in section 6.2 and section 6.3 (other than the Monitor's Certificate and the Closing Cash Purchase Price) of the QSI Agreement;

have been satisfied or waived by QSI and the Timminco Entities, as applicable; and

3. This Certificate was delivered by the Monitor to QSGP at ________ [TIME] on __________________ [DATE].

FTI Consulting Canada Inc., in its capacity as the Court-appointed Monitor of the Timminco Entities and not in its personal capacity

Per: ______________________________

Name:

Title:

SCHEDULE "C"
CLAIMS

1. Hypothec pursuant to a Deed of universal hypothec granted by Silicium Québec Commandité Inc. and by Bécancour Silicon Inc. in favour of Investissement Québec registered in the Registry Office for the registration division of Nicolet (Nicolet 2), on November 1, 2010, under number 17 670 388;

2. Consent to Cadastral Amendment granted by Investissement Québec by Deed registered in the Registry Office for the registration division of Nicolet (Nicolet 2), on February 23rd, 2011, under number 17 924 788;

3. Conventional hypothec without delivery signed between Bécancour Silicon Inc., Québec Silicon General Partner Inc. and Investissement Québec on October 29, 2010 and registered at the Register of Personal and Movable Real Rights ("**RPMRR**") on November 1, 2010 at 9:00 a.m. under number 10-0763732-0001;

4. Conventional hypothec without delivery signed between Bécancour Silicon Inc. and Investissement Québec on July 10, 2009 and registered at the RPMRR on July 13, 2009 at 9:36 a.m. under number 09-0420851-0001;

SCHEDULE "D"
PURCHASED ASSET DESCRIPTION FOR VOLUNTARY REDUCTIONS UNDER THE RPMRR

All movable property of Bécancour Silicon Inc. ("**BSI**") transferred to QSI Partners Ltd. ("**QSI**") pursuant to the agreement of purchase and sale (the "**APA**") dated April 25, 2012 between, *inter alia*, BSI and QSI including the QSLP Equity, the QSLP Contracts, the Silicon Metal Contracts, the Silicon Metal Accounts Receivable (in each case as defined below), the intellectual property relating to BSI's silicon metal business, the pre-paid expenses relating to BSI's silicon metal business and the silicon metals inventory and the packing supply inventory relating to BSI's silicon metal business and for greater certainty excluding the movable property set forth in Annex 2 to Schedule D.

The following defined terms have the meanings set out below:

"**BSI Owned Property**" means the real property described in Annex 1 to Schedule D;

"**Closing**" means the successful completion of the Transaction (as defined below);

"**Contracts**" means all of the contracts and other written agreements to which the Vendors (as defined below) or either one of them are parties constituting part of the Purchased Assets (as defined below);

"**Litigation Claims**" means, collectively, (i) any and all rights of actions or claims whatsoever of either Vendor against third parties arising by reason of any facts or circumstances that occurred or existed before the Closing but excluding any such rights of actions or claims of either Vendor against counterparties to any Contract, and (ii) all amounts owing or received in respect of any such rights of actions or claims;

"**Purchased Assets**" means, collectively, the Purchased Silicon Metal Assets (as defined below), and the BSI Owned Property;

"**Purchased Silicon Metal Assets**" means all of BSI's right, title and interest, in and to the QSLP Equity, the QSLP Contracts, the Silicon Metal Contracts and the Silicon Metal Accounts Receivable (each as defined below), the intellectual property relating to BSI's silicon metal business, the pre-paid expenses relating to BSI's silicon metal business and the silicon metals inventory and the packing supply inventory relating to BSI's silicon metal business;

"**QSGP**" means Québec Silicon General Partner Inc., a corporation formed under the laws of Québec, and its successors and assigns;

"**QSLP**" means Québec Silicon Limited Partnership, a limited partnership formed under the laws of Québec, and its successors and assigns;

"**QSLP Contracts**" means (a) the Amended and Restated Limited Partnership Agreement dated October 1, 2010 by and between Bécancour Silicon Inc., Dow Corning Canada Inc. and QSGP, as amended by the First Amendment thereto dated October 14, 2010 and (b) the Shareholders Agreement dated October 1, 2010 by and between Bécancour Silicon Inc., Dow Corning Netherlands, B.V. (now known as DC Global Holdings S.a.r.l.) and Québec Silicon General Partner Inc.

"**QSLP Equity**" means, collectively, 51,000 units in the capital of QSLP and 51 Class A Shares in the capital of QSGP, in each case, registered in the name of BSI;

"**Silicon Metal Accounts Receivable**" means all accounts receivable (net of doubtful accounts) owing to BSI in respect of the silicon metals business of BSI except for (i) any tax refunds or credits or (ii) any Litigation Claims;

"**Silicon Metal Contracts**" means (a) the Long-Term Supply Agreement dated June 1, 2011, and effective January 1, 2011, between Bécancour Silicon Inc. and Wacker Chemie AG, as amended by Amendment No. 1 thereto dated September 6, 2011, (b) the Output and Supply Agreement among Québec Silicon Limited Partnership, Bécancour Silicon Inc. and Dow Corning Corporation dated October 1, 2010, as amended by: (i) Amendment No. 1 dated November 16, 2010, effective as of October 1, 2010; (ii) Amendment No. 2 dated November 1, 2011, effective as of October 1, 2010; and (iii) Amendment No. 3 dated November 1, 2011, effective as of October 20, 2011, (c) the Purchase Order dated November 17, 2011 between Alliages Zabo Inc. and Silicium Bécancour Inc. for the sale and delivery of silicon metal, (d) the Purchase Order dated December 13, 2011 between Cable Alcan and Bécancour Silicon Inc. for the sale and delivery silicon metal and (e) the Purchase Order dated January 9, 2012 between GNP Ceramics, LLC and Bécancour Silicon Inc. for the sale and delivery of silicon metal.

"**Transaction**" means the transaction of purchase and sale contemplated by the APA;

"**Vendors**" means collectively, Timminco Limited and BSI.

ANNEX 1 to SCHEDULE D

HP2 PROPERTY:

DESCRIPTION OF IMMOVABLE

All of BSI's right, title and interest in and to:

An immovable situated in the City of Bécancour, Province of Québec, known and designated as being lot number FOUR MILLION SEVEN HUNDRED AND TWO THOUSAND FOUR HUNDRED NINETY-SEVEN (4 702 497) of the Cadastre of Québec, Registration Division of Nicolet (Nicolet 2).

With the buildings and all other structures, fixtures, equipment and ancillary improvements located thereon (other than Excluded Assets), including the building bearing the civic address 6400 Yvon-Trudeau Street, City of Bécancour, Province of Québec, G9H 2V8.

The whole as it is currently found with all that is or will be incorporated, attached, joined or united by accession to this immovable and that is considered an immovable under the law.

ANNEX 2 to SCHEDULE D

See attached.

Fixed assets

Becancour Silicon Inc.,High Purity No.1 (HP1), 5500 Yvon-Trudeau, Bécancour, Québec

Ref. #	Qty	Item	Manufacturer	Description
1	1	Vibratory Screener	Vibrotech	With 40-HP Drive
2	1	Melting Furnace (#11)	Major	1,600° C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System, Spare Door
3	1	Melting Furnace (#12)	Major	1,600° C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System, Spare Door
4	1	Melting Furnace (#13)	Major	1,600°C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System, Spare Door
5	1	Bridge Crane (#1)	COH	with 32-Ton Main Cable Hoist, 10-Ton Auxiliary Cable Hoist, Integral Digital Hook Scale, Radio Controls

Fixed assets

Becancour Silicon Inc.,High Purity No.1 (HP1), 5500 Yvon-Trudeau, Bécancour, Québec

Ref. #	Qty	Item	Manufacturer	Description
6	1	Bridge Crane (#2)	COH	with 32-Ton Main Cable Hoist, 10-Ton Auxiliary Cable Hoist, Integral Digital Hook Scale, Radio Controls
7	1	10MT crane	Kone Cranes	
8	Lot	Casting Area Support Equipment		(3) Ladle Hooks, (4) Slag Scraper Attachments, (4) 5' x 7' x 3'D Scrap Bins, 2-Point Cable Type Grapple, Cable Type Clam Shell Crane Bucket, *Approx. (100) 7' x 11' x 32"D Steel Pans, (10) Cast Iron Casting Pots, (30) 7' x 10' x 6'D Steel Slag Hopper, with Cast iron abrasive plate lining, **(7) cooling Frames 10' x 8' x 6', etc.
9	1	Arc Welding Power Source	Miller	
10	1	Ramp	Ramp Master	with Hydraulic Ramp Height Adjustment
11	1	Dust Collection System (#11)	Wheelabrator	248°F Operating temperature with 125-HP blower motor, inline spark arrester, 44"Dia x approx. 100' of ductwork, Fire protection sprinklers
12	1	Dust Collection System (#12)	Wheelabrator	248°F Operating temperature with 12S-HP blower motor, inline spark arrester, 44"Dia x approx. 100' of ductwork, Fire protection sprinklers
13	1	Dust Collection System (#13)	Wheelabrator	248°F Operating temperature with 12S-HP blower motor, inline spark arrester, 44"Dia x approx. 100' of ductwork, Fire protection sprinklers
14	1	Dust collector (29)	Wheelabrator	Not installed, outside
1S	1	Saw	King Canada	10" abrasive sample cutting
16	1	Drill	Holti	DD130 - core cutting sample
17	6	Electromagnet ic Stirring purification	ABB	each with 8' x 10' x 10' Container, with Electromagnetic Power Supply, Est. 20 Gal Glycol Chilling System, Pumps, Controls, Deionized Water System, ABB PLC Controls, Self Contained Air Conditioner System, with Cart Mounted Electromagnet, Cable Wench, Etc.
18	2	Casting Pots	Unknown	with (3) insulated covers
19	lot	Crushing system Silicon Jack Hammer screening station		steel rock screen, kent hydraulic articulating boom, kent pneumatic jack hammer, 50-HP hydraulic system, with fire resistant oil
20	1	Platform scale	Metler Toledo	Est. 20,000-Lb. Capacity

Becancour Silicon Inc.,High Purity No.1 (HP1), 5500 Yvon-Trudeau, Bécancour, Québec

Ref. #	Qty	Item	Manufacturer	Description
		Air compressor room		
21	1	Air Dryer (DTX-600-DDS-E)	Domnick Hunter	600-CFM
22	1	Air Dryer (DTA600-DS)	Domnick Hunter	600-CFM
23	1	Rotary screw type air compressor	Atlas Copco	GA90, API606885
24	1	Rotary screw type air compressor	Atlas Copco	GA90, API604948
25	1	Refractory Paste repair gunning macl	Unknown	with 32"Dia. Pressure pot. Guns, hoses
		Maintenance area		
26	1	Electric Furnace	Wilt	12-kw rated capacity, 42"x60"x16"
27	1	Disassembled paint room, 12'x12'x8' with (1) entry door		
28	1	H-Frame hydraulic shop press	OTC	
29	1	Geared Head Engine Lathe	Harrison	Spindle speeds: 34-750-RPM, with Tailstock and thread chasing
30	1	Pipe Threader	Ridgid	with spare thread dies
31	1	Drill press	General	75-500M1, 77075006
32	1	Radial Arm Dirll	Tehcno	R2-40, 2080
33	1	Grinder	Scantool	6"tilting belt
34	1	Metal cutting band saw	General	10"x12" horizontal
35	1	Arc Welding Power Source	Miller	Goldstar 452 CC/DC, LH400634C
36	1	Arc Welding Power Source	Miller	Dimension 452, LJ310022C, with wire feeder
37	1	Arc Welding Power Source	Miller	Syncrowave 350LX
38	1	Plasma cutting system	Hypertherm	Powermax 800, 800-014893
39	1	Double end grinder	General	10"pedestal type
40	1	Metal cutting band saw	General	14" vertical
41	1	Fume collector (portable)	Diversitech	
42	1	Hydraulic Hammer attachment	Tramac	SC-50
43	lot	Miscellaneous support equipment throughout HP1		Assorted sections of shelving, storage cabinets, hand and power tools, welding supplies, work benches, inspections equipment
44	1	Bridge crane	Kone Cranes	with 10-ton cable hoist, radial controls
45	3	Bridge crane	Kone Cranes	*5,000 lbs capacity single girder. Note: (1) crane not installed)

Fixed assets

Becancour Silicon Inc.,High Purity No.1 (HP1), 5500 Yvon-Trudeau, Bécancour, Québec

Ref. #	Qty	Item	Manufacturer	Description
46	1	Welder	Miller	Big 40, LH021915
47	1	Scale	Unknown	80,000 lbs capacity, In-Ground
		Shipping department		
		Screen and hand picking system :		
48	1	Feed hopper	MGR	12'x 8'
49	1	Belt conveyor		30"X x 12'L Power
50	1	Vibratory Screener		20"Wx32"L, with plastic screen
51	1	Belt conveyor		30"Wx7'L hand pick
52	1	Mezzanine		
		Vehicles		
53	1	Floor Sweeper	Tennant	S30-1119
53	1	Floor Sweeper	Tennant	S30-1562
54	1	Wheel Loader	Caterpillar	HJA6D01358
55	1	Wheel Loader (05)	Caterpillar	CAT0966HEA6D01529
56	1	Wheel Loader (07)	Caterpillar	CAT0966HAA6D02255
57	1	Forklift (02)	Hyster	L177V02164F
58	1	Forklift (01)	Hyster	G005D14975W
59	1	forklift (5)	Hyster	G019E01612E
60	1	Forklift (JCB 930) - (04)	JCB	SIP93002YF0822387
61	1	Forklift (03)	Raymond	EZ-A-00-16588
62	1	Forklift (06)	Hyster	G005D13590V
63	1	Forklift (07)	Hyster	P005V02182G
64	1	Forklift (08)	Hyster	P005V02179G
65	1	Forklift (25)	Hyster	POO5V01855F
66	1	Forklift (26)	Hyster	POO5V01848F
67	1	Forklift (28)	Hyster	POO5V02175G
69	1	Excavator	Gradall	5200000749
70	1	Excavator	Caterpillar	CCK01973
71	1	Tractor	Freightliner	1FVHC5CV19HAB7583
73	3	Hydraulic breaker	Tramac	700
74	1	Hydraulic breaker	Tramac	SC-50

Fixed assets

Becancour Silicon Inc.,High Purity No.1 (HP1), 5500 Yvon-Trudeau, Bécancour, Québec

Ref. #	Qty	Item	Manufacturer	Description
75	1	Pickup truck	Dodge RAM 1500	1B7HC13Y8VJ612188
76	1	Pickup truck	Chevrolet SLE1500	2GTEK19R4W1532579
77	1	Pickup truck	Ford F-150	2FTRX07L42CA39978
78	1	Pickup truck	Ford F-150	2FTRX18WX2CA96782
80	1	Lifting platform		HD7845
		Process electrical equipment		
81	1	Transformer	Unknown	1,750/2,333 kVa, Onan/Onaf, Pri.: kV, Y Sec.: 600V D
82	1	Transformer	Ferranti Packard	2,500 kVa, Onan, Pri.: 25 kV, Y Sec.: 600V D
83	1	Transformer	Moloney	2,000 kVa, Onan/Onaf, Pri.: 25kV, Y Sec.: 600V D (crystallization)
84	1	Breaker	Unknown	25 kV, 600A
85	1	Equipment for control and protection of breaker		box, switch, announciator, indicator, relays, etc.
86	1	Switchgear	Westinghouse	Complete with (4) Vertical Sections, (2) Main Disconnects, DS-420, 600V, 2,000 A, with ampector relays LSI, (1) Bustie DS-420, 600 V, 2,000 A Disconnect, with ampector relay LSI, (6) Secondary disconnects, DS-416, 600V, 1,600 A, with ampector relay LSI, (2) Measuring customer electronic relays, (2) DSPMKII modules, with T9A sensors

Becancour Silicon Inc.,High Purity No.1 (HP1), 5500 Yvon-Trudeau, Bécancour, Québec

Ref. #	Qty	Item	Manufacturer	Description
87	1	Switchgear (crystallization)	Westinghouse	Complete with (2) Vertical sections, (1) main disconnect, DS-420, 600V, 2,000 A, with ampectro
88	2	480 kVA capacitor banks	Automatic	
89	lot	Motor control centers		(3) 600V, 1,200 A bus bracing, with (6) sections and lot of starter and switch, (1) 600 V, 1,200 A bus bracing, with (8) sections and lot of starter and switch, (2) 600 V, 1,200 A bus bracing, with (8) sections and lot of starter and switch (crystallization)
90	lot	miscellaneous process electrical equipment		Cabinet with battery charger, complete with 46 Ni-Cd battery, (2) logix Model 5000 PLC control system with rack, cards, processor, etc. Transformer, 600C@120-208V, panelboard 600 V & 120-208V, disconnect switch
91	40	Steel boxes		
92	1	Mold breaking station		
93	1	Mold Piercing Station		
94	1	Boxing Station		
95	1	Packaging station		
96		Computer equipment		
97		Spare parts		All spare parts in the HP1 storage room, except those belonging to AMGC

Fixed assets

Ref. #	Qty	Item	Manufacturer	Description
1	1	Melting Furnace (#21)	Major	1,600° C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System
2	1	Melting Furnace (#22)	Major	1,600° C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System
3	1	Melting Furnace (#23)	Major	1,600° C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System

Fixed assets

Ref. #	Qty	Item	Manufacturer	Description
4	1	Melting Furnace (#24)	Major	1,600° C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System
5	1	Bridge Crane	COH	with 50-Ton Main Cable Hoist, 20-Ton Auxilliary Cable Hoist, Class C Rated, with Radio Controls
6	1	Bridge Crane	COH	with 50-Ton Main Cable Hoist, 20-Ton Auxilliary Cable Hoist, Class C Rated, with Radio Controls
7	1	Bridge Crane	COH	with 50-Ton Main Cable Hoist, 20-Ton Auxilliary Cable Hoist,Radio Controls
8	1	Bridge Crane	COH	with 50-Ton Main Cable Hoist, 20-Ton Auxilliary Cable Hoist,Radio Controls
9	1	Bridge Crane	Kone Crane	5 MT uninstalled
10	4	Melting Furnaces (#25 to #28)	Major	1,600 °C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System (Note : These furnace systems are partially installed. All components are on site.)

Fixed assets

Ref. #	Qty	Item	Manufacturer	Description
11	1	Melting Furnace (#29)	Major	1,600° C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System (Note : This furnace system is not installed. All components are on site.)
12	4	Electromagnet Stirrer	ABB	with 8' x 10' x 10' Container**, with Electromagnetic Power Supply, Est. 20 Gal Glycol Chilling System, Pumps, Controls, Deionized Water System, Allen-Bradley PLC Controls, Self Contained Air Conditioner System, with Cart Mounted Electromagnet, Cable Wench, Etc.
13	3	Electromagnet Stirrer	ABB	with 8' x 10' x 10' Container**, with Electromagnetic Power Supply, Est. 20 Gal Glycol Chilling System, Pumps, Controls, Deionized Water System, Allen-Bradley PLC Controls, Self Contained Air Conditioner System, with Cart Mounted Electromagnet, Cable Wench, Etc. (Note : Not Installed)
14	1	Platform Scale	Undefined Make	Est. 20,000-lb Capacity
16	1	Dust Collection System (#22)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower
17	1	Dust Collection System (#23)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower
18	1	Dust Collection System (#24)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower

Fixed assets

Becancour Silicon Inc.,High Purity No.2 (HP2), 6500 Yvon-Trudeau, Bécancour, Québec				
Ref. #	Qty	Item	Manufacturer	Description
19	1	Dust Collection System (#25)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower (Note : Ductwork Not Installed, Part of Furnace Projects in Process)
20	1	Dust Collection System (#26)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower (Note : Ductwork Not Installed, Part of Furnace Projects in Process)
21	1	Dust Collection System (#27)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower (Note : Ductwork Not Installed, Part of Furnace Projects in Process)
22	1	Dust Collection System (#28)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower (Note : Ductwork Not Installed, Part of Furnace Projects in Process)
23	1	Gunning Machine	Unknown	with 42" Dia. Holding Tnak, Hoses, Guns
25	1	Forklift Truck (#24) - H360HD	Hyster	
26	1	Scale	Unknown	
27	6	Casting Mold		
28	1	2 ton Mold		
29	1	Mold Piercing Station		
30	69	Steel Boxes		
31		Computer equipment		Pursuant to agreement between FA and BSI

Fixed assets

Ref. #	Qty	Item	Manufacturer	Description
		Electrical Sub Station :		
32	1	Item removed		
33	4	Transformer	Maloney	2,000/2,667 kVa, Onan-Onaf, Pri.: 25kV D, Sec. : 600 V Y
34	1	Transformer	Maloney	4,000/5,320 kVa, Onan-Onaf, Pri.: 25kV D, Sec. : 4,16 kV
35	1	Item removed		
36	3	Breaker	Unknown	25 kV, 800 A
37	lot	Ancillary Breaker Equip.		Box, Switch, Announciator, Indicator, Relays For Control and Protective Relay of Breaker
38	2	Switchgear	Westinghouse	Complete with (4) Vertical Sections, (2) Main Disconnects, DS-420, 600V, 2,000 A, with Amptector Relay LSI, (1) Bustie DS-420, 600 V, 2,000 A. with Amptector Relay LSI, (6) Secondary Disconnects, DS-416, 600 V, 1,600 A, LSI, (2) Measuring Customer Electronic Relays, (2) DSPMKII Modules with T9A Sensors
39	4	Automatic		480 kVa, 600 V Capacitor Banks
40	Lot	Motor control Centers, Complete		(4) 600V, 1,200 A, 42 kVa Bus Bracing, with (5) Sections, Starter, Switch, (4) 600V, 1,200 A, 42 kVa Bus Bracing, with (4) Sections, Starter, Switch (1) 600 V, 1,200 A, 42 kVa Bus Bracing, with (8) Sections Starter, Switch
41	Lot	Miscellaneous Process Electrical Equipment		Pursuant to agreement between FA and BSI
42	1	Excavator	Gradall	52000000743
43	2	Hydraulic rotary grinding	Tramac	TCH60
79	1	Pickup truck	Chevrolet S-10	1GCCS19X638237398

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

Court File No. CV-12-9539-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

APPROVAL AND VESTING ORDER

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Ashley John Taylor LSUC#: 39932E
Tel: (416) 869-5236
Maria Konyukhova LSUC#: 52880V
Tel: (416) 869-5230
Kathryn Esaw LSUC#: 58264F
Tel: (416) 869-6820
Fax: (416) 947-0866

Lawyers for the Applicants

Court File No. CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]

THE HONOURABLE	)	~~WEDNESDAY~~ THURSDAY, THE ~~10th~~ 18th DAY OF
	)	
JUSTICE MORAWETZ	)	OCTOBER 2012

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Applicants

ORDER
(Approval of Priority Claim Adjudication Protocol)

This Motion, made by Investissement Québec for an order approving the Priority Claim Adjudication Protocol and referring the adjudication of the BSI Pension Reimbursement Claims to the Superior Court of Québec (Commercial Division) was heard this day at 330 University Avenue, Toronto, ON.

On the consent of counsel for Timminco Limited and Bécancour Silicon Inc., FTI Consulting Canada Inc., in its capacity as court-appointed Monitor of the Timminco entities, Investissement Québec, Mercer Canada, the administrator of the Haley Pension Plan, The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW") and BSI Union and Non-Union employee Pension Committees:

1. **THIS COURT ORDERS** that the Priority Claim Adjudication Protocol, attached hereto as Schedule "A", be and the same is hereby authorized and approved.

2. **THIS COURT ORDERS** that the adjudication of whether the BSI Pension Reimbursement Claims are Priority Claims, all as defined in the attached Priority Claim Adjudication Protocol, be and the same is hereby referred exclusively to the Superior Court of Québec (Commercial Division) to be determined in accordance with the Priority Claim Adjudication Protocol.

3. **THIS COURT HEREBY REQUESTS** the aid and recognition of the Superior Court of Québec (Commercial Division) to give effect to this order and to adjudicate whether the BSI Pension Reimbursement Claims constitute Priority Claims in accordance with the terms of the Priority Claims Adjudication Protocol.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:
OCT 19 2012

SCHEDULE "A"

Court File No. CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Applicants

PRIORITY CLAIM ADJUDICATION PROTOCOL

A. OVERVIEW

1. In accordance with the Reimbursement Agreement (the "**Reimbursement Agreement**") among Investissement Québec ("**IQ**"), FTI Consulting Canada Inc., as court-appointed Monitor, and Bécancour Silicon Inc., dated August 28, 2012 and the August 28, 2012 Interim Distribution Order (the "**Interim Distribution Order**")[1], two (2) sets of claims have been designated as Reimbursement Claims, namely:

(i) a claim on behalf of Mercer Canada ("**Mercer**"), as administrator of the Haley Pension Plan, and on behalf of the beneficiaries of that plan (the "**Mercer Reimbursement Claim**"), which claim is supported by The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("**USW**"); and

(ii) a claim by Le Comité de retraite du Régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc. and a claim by Le Comité de retraite du Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (collectively the "**BSI Pension Committees**") (the "**BSI Pension Reimbursement Claims**").

2. IQ disputes that the above Reimbursement Claims have priority over the IQ Security and the parties do not anticipate the dispute will be resolved through the consented resolution process

[1] Unless otherwise indicated, any capitalized terms used but not defined herein shall have the meaning ascribed to such term in the Reimbursement Agreement and the Interim Distribution Order.

provided for in the Interim Distribution Order. Accordingly, an adjudication is required to determine whether such Reimbursement Claims constitute Priority Claims.

The following is the protocol for the adjudication of whether the Reimbursement Claims constitute Priority Claims.

B. THE MERCER REIMBURSEMENT CLAIM

1. The Mercer Reimbursement Claim shall be adjudicated by way of a motion before this Court wherein Mercer and USW will be the moving parties and IQ will be the respondent. If at any time Mercer shall cease the prosecution of the Mercer Reimbursement Claim, the USW shall be entitled to prosecute the Mercer Reimbursement Claim in the place and stead of Mercer.

As issues to be adjudicated regarding the Mercer Reimbursement Claim (such as, by way of example, substantive consolidation) may impact on other stakeholders of BSI or Timminco, the motion material hereafter described shall be served on the service list herein. Any creditor of the Timminco Entities or the Monitor, or the Timminco Entities themselves ("**Interested Stakeholders**") shall have the right to file material and participate in the motion proceedings in accordance with the following timetable:

(i) Mercer and USW, if so advised, will deliver moving party motion material by October 29, 2012;

(ii) IQ and Interested Stakeholders, if any, shall deliver responding material by November 30, 2012;

(iii) Mercer and USW will deliver reply material, if so advised, by December 17, 2012;

(iv) cross-examinations on filed affidavits, if required, will be conducted during the week of January 13, 2012. During this period, the examination of Peter Kalins, (a former officer and director of Timminco and BSI) as a witness to the motion, shall be conducted if consented to by Peter Kalins or if an appropriate court order has been obtained;

(v) Mercer and USW, if so advised, will deliver moving party's facta by January 25, 2013;

(vi) IQ and any Interested Stakeholders will deliver responding facta by February 13, 2013;

(vii) Mercer and USW will deliver reply facta by February 20, 2013, if so advised; and

(viii) the hearing of the motion will take place during the week of February 25, 2013.

2. In determining whether the Mercer Reimbursement Claim constitutes a Priority Claim, the determination of the quantum of such Priority Claim shall be postponed until after the determination of the nature of the claim and will be determined in accordance with the Claims Procedure Order or further order of the Court.

C. THE BSI PENSION REIMBURSEMENT CLAIMS

1. The adjudication of whether the BSI Reimbursement Claims constitute Priority Claims shall be referred exclusively to the Superior Court of Québec (Commercial Division) wherein the BSI Pension Committees will be the moving parties and IQ will be the respondent in accordance with the following timetable:

   (i) the BSI Pension Committees shall deliver their motion to institute proceedings within 60 days after the Order is made referring this matter to the Superior Court of Québec (Commercial Division);

   (ii) IQ and any Interested Stakeholders shall deliver their Statement of Defence within 30 days after receipt of the motion to institute proceedings;

   (iii) the BSI Pension Committees shall have up to 30 days after receipt of the IQ defence to deliver their response, if any;

   (iv) examinations, if necessary, are to be conducted by January 11, 2013;

   (v) written arguments and joint books of procedure and exhibits shall be delivered at least 2 weeks before the hearing of the motion; and

   (vi) the hearing of the motion is to be scheduled between February 18, 2013 and March 15, 2013 based upon a 1-2 day hearing.

For greater certainty, any appeal from an order of the Superior Court of Québec (Commercial Division) herein shall be to the Court of Appeal of Québec.

2. In determining whether the BSI Reimbursement Claims constitute Priority Claims, the determination of the quantum of such Priority Claims shall be postponed until after the determination of the nature of the claim and will be determined in accordance with the Claims Procedure Order or further order of the Court.

D. MONITOR'S REPORT

1. The Monitor, if it deems it necessary and appropriate to do so, may file a report with the court in connection with adjudication of either Reimbursement Claim.

In the matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, As Amended

And in the Matter of a Plan of Compromise or Arrangement of Timminco Limited and Bécancour Silicon Inc.

Applicants

Court File No. CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
Commercial List

Proceedings commenced at

TORONTO

ORDER
(Approval of Priority Claim Adjudication Protocol)

Fasken Martineau DuMoulin LLP
Barristers and Solicitors
Patent and Trade-mark Agents
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto, ON M5H 2T6

Aubrey E. Kauffman (LSUC: 18829N)

Tel: 416 868 3538
Fax: 416 364 7813

Lawyers for Investissement Québec

DM_TOR/275047.00020/5934058.1

CITATION: Timminco Limited (Re), 2012 ONSC 5959
COURT FILE NO.: CV-12-9539-00CL
DATE: 20121018

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC., Applicants**

BEFORE: **MORAWETZ J.**

COUNSEL: **S. J. Weisz, for FTI Consulting Canada Inc., in its capacity as court-appointed Monitor of the Timminco Entities**

HEARD: **OCTOBER 18, 2012**

ENDORSEMENT

[1] On consent of Timminco Limited and Bécancour Silicon Inc., FIT Consulting Canada Inc., in its capacity as court-appointed Monitor of the Timminco Entities, Investissement Québec, Mercer Canada, the Administrator of the Haley Pension Plan, The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW") and BSI Union and Non-Union Employee Pension Committees, the Priority Claim Adjudication Protocol is approved. The adjudication of whether the BSI Pension Reimbursement Claims are Priority Claims is referred to the Superior Court of Québec (Commercial Division) to be determined in accordance with the terms of the Priority Claims Adjudication Protocol.

[2] This determination has been made pursuant to s. 17 of the CCAA, and I express my thanks, in advance, to the Superior Court of Québec.

[3] To the extent leave is required to proceed, such leave is granted.

MORAWETZ J.

Date: October 18, 2012

N°: 500-09

COURT OF APPEAL
DISTRICT OF MONTRÉAL

TIMMINCO LIMITEE AND
BÉCANCOUR SILICON INC.
Debtors/APPELANTS

v.

COMITÉ DE RETRAITE DU RÉGIME DE RENTES POUR LES EMPLOYÉS SYNDIQUÉS DE SILICIUM BÉCANCOUR INC. & AL.
Petitioners/RESPONDENTS

AND

INVESTISSEMENT QUÉBEC
Respondent/MISE EN CAUSE

AND

FTI CONSULTING CANADA INC.
Monitor/MONITOR

APPELANT'S MOTION FOR LEAVE TO APPEAL AND SCHEDULES 1 TO 7
(Ss. 13 and 14 CCAA & Art. 26, 29, 511 CCP)

ORIGINAL

Blakes

Mtre Adam T. Spiro **BB-8098**
BLAKE, CASSELS & GRAYDON LLP
Barristers & Solicitors
600 de Maisonneuve Blvd. West
Suite 2200
Montréal, Québec H3A 3J2
Telephone: 514-982-5074
Fax: 514-982-4099
Email: adam.spiro@blakes.com
Our File: 79294-2

Appendix B

The March 26 Letter

Fasken Martineau DuMoulin LLP
Barristers and Solicitors
Patent and Trade-mark Agents

Suite 800
140 Grande Allée East
Québec, Quebec, Canada G1R 5M8

418 640 2000 Telephone
418 647 2455 Facsimile
1 800 463 2827 Toll free

www.fasken.com

Charles Mercier
Direct +1 418 640 2046
cmercier@fasken.com

March 26, 2014
File No.: 275047.00020/16471

Mr. Nigel Meakin
Senior Managing Director
FTI Consulting
TD Waterhouse Tower
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto, ON M5K 1G8

Dear Mr. Meakin:

**Re: Bécancour Silicon Inc. ("BSI")/Investissement Québec ("IQ")
Balance owing to IQ**

Further to our recent discussions we are writing to you in order to:

(a) explain a clerical error contained in IQ's statement of account dated January 29, 2013; and

(b) Provide you with the balance that remains owing from BSI to IQ.

Statement of Account Dated April 19, 2012 (As At April 30, 2012) – Attachment "A"

This statement shows IQ's calculation of the statement of account as at April 30, 2012. (This statement was provided to our firm but was not sent to the Monitor. The statement, however, is required in order to understand the background facts that led to the clerical error.) You will see that the statement contains an entry for interest as at March 30, 2012 in the amount of $1,074,217.30. By way of explanation, the fiscal year end of IQ is March 31. As a result of BSI's default IQ had taken a reserve on interest arrears owing as at the year-end in the amount of $1,074,217.30 for accounting purposes (the "Reserve Amount"). The Reserve Amount was removed from IQ's computerized accounting records. When the statement dated April 19, 2012 was prepared, the Reserve Amount was manually added back into the statement.

Statement of Account Dated June 7, 2012 (As At May 31, 2012) – Attachment "B"

This statement of account was sent to the Monitor under cover of an email from Aubrey Kauffman dated June 8, 2012. In the line item setting out interest to May 31, 2012 ($1,609,417.66), the Reserve Amount has been manually added back into interest amount.

Statement of Account Dated August 1, 2012 (As At August 17, 2012) – Attachment "C"

This statement of account was sent to the Monitor under cover of an email from Aubrey Kauffman dated August 8, 2012. In the line item dealing with interest to July 31, 2012 ($2,191,296.60), the Reserve Amount has, again, been manually added back into that number. (This statement of account was filed as exhibit I-5 in the Québec priority proceedings.)

Statement of Account Dated January 29, 2013 (As At January 29, 2013) – Attachment "D"

This statement of account was sent to the Monitor under cover of an email from Aubrey Kauffman dated January 30, 2013. The statement was prepared after receipt of payment of the sums of $25,393,057.43 and $1,213,000 in August 2012. It is in this statement that the clerical error was made. You will see a line item for interest as at January 29, 2013 in the amount of $1,437,899.24. The clerk preparing this statement did not manually add back in the Reserve Amount. Accordingly, the statement of account understates the amount owing by approximately $1,074,217.30 (plus subsequent interest thereon).

We note that if one were to take the balance owing as at August 17, 2012 and deduct from that amount the 2 payments received at the end of August 2012, the balance remaining would be substantially more than the balance shown on the erroneous January 29, 2013 statement of account.

Statement Of Account Dated March 18, 2013 (As At March 18, 2013) – Attachment "E"

This statement of account was filed as exhibit I-6 in the Quebec priority proceedings. We understand that the Monitor and its counsel were provided with a copy of the exhibit. We are also attaching a spreadsheet showing the actual calculation of the amounts set out in the statement (Attachment "F"). This statement properly shows the capitalized interest ($1,437,371.05) and the Reserve Amount in the amount of $1,074,217.30. The statement also reflects the 4 payments received from the Monitor. As a result of

including the Reserve Amount in the calculation the balance properly owing as at March 31, 2013 is the sum of $1,197,804.82.

We trust that the above demonstrates the clerical error made in the statement of account dated January 29, 2013 and how it came about. The proper balance that remains owing is $1,197,804.82, together with interest from March 18, 2013. IQ regrets any inconvenience that this slip may have caused to the Monitor and the Estate.

We also enclose, as requested, Fasken Martineau DuMoulin's invoices up until the payout of February 1, 2013, part of which were redacted.

Should you have any questions with respect to the above, please do not hesitate to contact the undersigned.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

Charles Mercier

CM/AEK/ima
Encl.

FACILITER · FINANCER · PROPULSER

A

Montréal, le 19 avril 2012

Silicium Bécancour Inc.
6500, rue Yvon-Trudeau
Bécancour (Québec) G9H 2V8

No dossier: D122446

ÉTAT DE COMPTE
AU 2012-04-30

Numéro de dossier :		D122446
Montant du prêt autorisé :		25 000 000,00 $
Montant du prêt déboursé :		25 000 000,00 $
Intérêts capitalisés :		1 437 371,05 $
Solde du prêt en capital :		26 437 371,05 $
Capital à recevoir:		0,00 $
Intérêts à recevoir au 31 mars 2012 :		1 074 217,30 $
Intérêts courus à recevoir au 2012-04-30 :		270 605,79 $
Sous-Total :		**27 782 194,14 $**
Déboursés payés :		133 871,25 $
Déboursés engagés et à payer :		124 066,40 $
Total :		**28 040 131,79 $**
Solde dû et exigible :		**28 040 131,79 $**
Type de taux :		Préférentiel + 9,0% soit 12,0%
Date d'échéance du prêt :		2019-07
Nombre de versements de capital en arrérages :		N/A
Nombre de versements d'intérêts en arrérages :		5 mois incluant avril 2012
Dernier versement de capital :		Début du remb en août 2012
Dernier versement d'intérêts :		Novembre 2011
Per diem :		**9 108,92 $**

413, rue St-Jacques, bureau 500, Montréal (Québec) H2Y 1N9 CANADA
514 873-4375 1 866 870-0437 Télécopieur : 514 873-1212
www.investquebec.com

FACILITER · FINANCER · PROPULSER

B

Le 7 juin 2012

Silicium Bécancour Inc.
6500, rue Yvon-Trudeau
Bécancour (Québec) G9H 2V8

No dossier: D122446

ÉTAT DE COMPTE
AU 2012-05-31

Numéro de dossier :		D122446
Montant du prêt autorisé :		25 000 000,00 $
Montant du prêt déboursé :		25 000 000,00 $
Intérêts capitalisés :		1 437 371,05 $
Solde du prêt :		26 437 371,05 $
Capital à recevoir:		0,00 $
Intérêts à recevoir au 31 mai 2012 :		1 609 417,66 $
Intérêts courus à recevoir au 7 juin 2012 :		62 598,24 $
Sous-Total :		**28 109 386,95 $**
Déboursés payés :		239 244,07 $
Déboursés engagés et à payer :		51 482,52 $
Total :		**28 400 113,54$**
Solde dû et exigible :		28 400 113,54$
Type de taux :		Préférentiel + 9,0% soit 12,0%
Date d'échéance du prêt :		2019-07
Nombre de versements de capital en arrérages :		N/A
Nombre de versements d'intérêts en arrérages :		6 mois incluant mai 2012
Dernier versement de capital :		Début du remb. en août 2012
Dernier versement d'intérêts :		Novembre 2011
Per diem :		**8 942,61 $**

François Lamothe
Directeur de portefeuille - Créances spéciales
Direction des créances spéciales

413, rue St-Jacques, bureau 500, Montréal (Québec) H2Y 1N9 CANADA
514 873-4375 1 866 870-0437 Télécopieur : 514 873-1212
www.investquebec.com

FACILITER · FINANCER · PROPULSER

C

Le 1er août 2012

Silicium Bécancour Inc.
6500, rue Yvon-Trudeau
Bécancour (Québec) G9H 2V8

No dossier: D122446

ÉTAT DE COMPTE
AU 2012-08-17

Numéro de dossier :		D122446
Montant du prêt autorisé :		25 000 000,00 $
Montant du prêt déboursé :		25 000 000,00 $
Intérêts capitalisés :		1 437 371,05 $
Solde du prêt :		26 437 371,05 $
Capital à recevoir:		0,00 $
Intérêts à recevoir au 31 juillet 2012 :		2 191 296,60 $
Intérêts courus à recevoir au 17 août 2012 :		159 569,62 $
Sous-Total :		**28 788 237,27 $**
Déboursés payés :		305 849,29 $
Déboursés engagés et à payer :		(1) 24 621,88 $
Total :		**29 118 708,44 $**
Solde dû et exigible :		**29 118 708,44 $**
Type de taux :		Préférentiel + 9,0% soit 12,0%
Date d'échéance du prêt :		2019-07
Nombre de versements de capital en arrérages :		N/A
Nombre de versements d'intérêts en arrérages :		8 mois incluant juillet 2012
Dernier versement de capital :		Début du remb. en août 2012
Dernier versement d'intérêts :		Novembre 2011
Per diem :		**9 438,77 $**

1) Includes Fasken's fees until July 11,2012.

François Lamothe
Directeur de portefeuille - Créances spéciales
Direction des créances spéciales

413, rue St-Jacques, bureau 500, Montréal (Québec) H2Y 1N9 CANADA
514 873-4375 1 866 870-0437 Télécopieur : 514 873-1212
www.investquebec.com

FACILITER · FINANCER · PROPULSER

Le 29 janvier 2013

Silicium Bécancour Inc.
6500, rue Yvon-Trudeau
Bécancour (Québec) G9H 2V8

No dossier: D122446

ÉTAT DE COMPTE
AU 2013-01-29

Numéro de dossier :		D122446
Montant du prêt autorisé :		25 000 000,00 $
Montant du prêt déboursé :		25 000 000,00 $
Solde du prêt :		0,00 $
Intérêts à recevoir au 29 janvier 2013 :		1 437 899,24 $
Sous-Total :		**1 437 899,24 $**
Déboursés payés :		(1) 275 918,81 $
Déboursés engagés et à payer :		0,00 $
Total :		**1 713 817,90$**
Solde dû et exigible :		1 713 817,90$
Type de taux :		Préférentiel + 9,0% soit 12,0%
Date d'échéance du prêt :		2019-07
Nombre de versements de capital en arrérages :		N/A
Nombre de versements d'intérêts en arrérages :		13 mois excluant janvier 2013
Dernier versement de capital :		2012-09-01
Dernier versement d'intérêts :		Août 2012
Per diem :		**531,02 $**

1) Inclus les honoraires professionnels de Fasken jusqu'au 6 décembre 2012.

François Lamothe
Coordonnateur - Créances spéciales
Direction des créances spéciales

413, rue St-Jacques, bureau 500, Montréal (Québec) H2Y 1N9 CANADA
514 873-4375 1 866 870-0437 Télécopieur : 514 873-1212
www.investquebec.com

FACILITER · FINANCER · PROPULSER

Le 18 mars 2013

Silicium Bécancour Inc.
6500, rue Yvon-Trudeau
Bécancour (Québec) G9H 2V8

No dossier: D122446

ÉTAT DE COMPTE
AU 2013-03-18

Solde du prêt au 31 mars 2012 :			25 000 000,00 $
Plus : Intérêts capitalisés			1 437 371,05 $
Plus : Intérêts en arrérages			1 074 217,30 $
Plus : Intérêts du 1er avril 2012 au 1er février 2013			1 527 301,59 $
Plus : Frais d'honoraires professionnels			479 852,25 $
Moins : Encaissements effectués :			
2012-08-30		25 393 057,43 $	
2012-08-31		1 213 000,00 $	
2013-02-01		927 879,94 $	
2013-02-01		787 000,00 $	(28 320 937,37) $
Solde :			1 197 804,82 $
Type de taux :			Préférentiel + 9,0%, soit 12,0%
Date d'échéance du prêt :			2019-07
Dernier versement de capital :			Août 2012
Dernier versement d'intérêts :			Février 2013

François Lamothe
Coordonnateur - Créances spéciales
Direction des créances spéciales

413, rue St-Jacques, bureau 500, Montréal (Québec) H2Y 1N9 CANADA
514 873-4375 1 866 870-0437 Télécopieur : 514 873-1212
www.investquebec.com

F

Silicium Bécancour inc.
Suivi des soldes à recevoir et encaissements
au 18 mars 2013

Solde du prêt en capital (incluant les intérêts capitalisés)	26 437 371,05	
Arrérages d'intérêts	1 074 217,30	
Solde initial à recevoir, excluant les frais		**27 511 588,35**

		Intérêts	Encaissements	Solde en capital et Intérêts	
				27 511 588,35	
2012-04-01	2012-04-30	270 605,79		27 782 194,14	
2012-05-01	2012-05-31	282 376,40		28 064 570,54	
2012-06-01	2012-06-30	276 044,96		28 340 615,49	
2012-07-01	2012-07-31	288 052,16		28 628 667,65	
2012-08-01	2012-08-30	281 593,45		28 910 261,10	
2012-08-30	2012-08-30		25 393 057,43	3 517 203,67	
2012-08-31	2012-08-31	1 153,18		3 518 356,85	
2012-08-31	2012-08-31		1 044 313,62	2 474 043,23	
2012-09-01	2012-09-30	24 334,85		2 498 378,09	
2012-10-01	2012-10-31	25 393,35		2 523 771,44	
2012-11-01	2012-11-30	24 823,98		2 548 595,42	
2012-12-01	2012-12-31	25 903,76		2 574 499,17	
2013-01-01	2013-01-31	26 167,04		2 600 666,22	
2013-02-01	2013-02-01	852,68		2 601 518,89	
2013-02-01	2013-02-01		851 642,10	1 749 876,79	
2013-02-01	**2013-02-01**		787 000,00	**962 876,79**	962 876,79
			28 076 013,15		

Honoraires professionnels			
Total des factures	457 002,14		
TPS (5%)	22 850,11		
	479 852,25		479 852,25
moins : encaissements			
2012-08-31		168 686,38	
2013-02-01		76 237,84	
		244 924,22	-244 924,22
Total des encaissements		**28 320 937,37**	
Solde à recevoir			**1 197 804,82**

Encaissements :

2012-08-30	25 393 057,43
2012-08-31 (1 044 313,62 + 168 686,38)	1 213 000,00
2013-02-01 (851 642,10 + 76 237,84)	927 879,94
2013-02-01	787 000,00
	28 320 937,37

Fasken Martineau DuMoulin S.E.N.C.R.L., s.r.l.
Avocats
Agents de brevets et marques de commerce

Bureau 800
140, Grande Allée Est
Québec (Québec) Canada G1R 5M8

418 640 2000 Téléphone
418 647 2455 Télécopieur

Date: 18 avril 2012
Notre Dossier: 275047.00020
Note d'honoraires: 640318
TPS #: 87937 6127 RT0002
TVQ #: 1023151835 TQ0002

Investissement Québec
413, rue Saint-Jacques
Bureau 500
Montréal (Québec) H2Y 1N9

Pour services professionnels rendus au 13 avril 2012 en relation avec le dossier suivant:

Silicium Québec s.e.c. / Timminco

Total des honoraires	$ 43 100,00
Total des débours	818,41
Total des taxes	6 575,98
Montant total dû	**CAD $ 50,494.39**

Payable sur réception. Intérêt au taux de 1.25% par mois (15% par année) ajouté à toute somme en souffrance depuis 30 jours ou plus. Les déboursés non débités à votre compte à la date du présent état vous seront facturés ultérieurement.

02/01/12	Prepare for update call. Attendance at update call with Company and Monitor re stalking horse proposal. Dictation of memo			
	Aubrey Kauffman	1,60 h	$ 775,00/h	$ 1 240,00
02/01/12	Discussion Appel conférence avec Christine Fillion, Peter Kalins, François Lamothe, Ashley Taylor, Jean Chiasson, Doug Fastuca, Nigel Meakin, Iya Touré et Aubrey Kauffman.			
	Charles Mercier	0,80 h	$ 265,00/h	$ 212,00
02/02/12	Finalization o memo and e mail to Mercier;			
	Aubrey Kauffman	0,40 h	$ 775,00/h	$ 310,00
02/02/12	Vérification de la note . Courriel . Étude du jugement sur la charge administrative et la suspension des paiements spéciaux aux fonds de pension.			
	Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
02/03/12	Révision du factum the CEP et des affidavits produits.			
	Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
02/06/12	Attendance at court on the conclusion of the DIP approval motion and reporting to Mercier;			
	Aubrey Kauffman	2,50 h	$ 775,00/h	$ 1 937,50
02/07/12	E mails to Mercier re reimbursement of cost request. Tcw Meakin;			
	Aubrey Kauffman	0,60 h	$ 775,00/h	$ 465,00
02/07/12	Courriel de C. Fillion, réponse. Courriel à A. Kauffman re: disbursement request from QSI.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
02/07/12	Courriel de C. Fillion.			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
02/08/12	Review of Blakes draft opinion and e mail to Mercier. Various e mails re expense reimbursement;			
	Aubrey Kauffman	0,40 h	$ 775,00/h	$ 310,00
02/08/12	Courriel de Linc Rogers, avocat de FTI (jugement Morawetz sur le DIP). Courriel du Linc Rogers re: opinion sur les garanties IQ, vérification.			
	Charles Mercier	0,80 h	$ 265,00/h	$ 212,00
02/08/12	Appel conférence avec Christine Fillion et François Méthot. Courriel de Nigel Meakin. Étude des décisions du juge sur la suspension des paiements des			

Re: Silicium Québec s.e.c. / Timminco

Date	Description	Heures	Taux	Montant
	pensions. Charles Mercier	0,90 h	$ 265,00/h	$ 238,50
02/09/12	Review of reasons for decision re DIP Charge; Aubrey Kauffman	0,40 h	$ 775,00/h	$ 310,00
02/09/12	Appel conférence avec Christine Fillion, François Lamothe et Jean Chiasson, honoraires du stalking horse. Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
02/10/12	Révision de l'opinion du procureur du contrôleur (FTI) sur les garanties de IQ. Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
02/14/12	E mail to client re Reimbursement Fee. Aa conference call with client, Monitor and Company; Aubrey Kauffman	0,90 h	$ 775,00/h	$ 697,50
02/14/12	Conversation téléphonique avec François Lamothe (Stalking horse). Courriel de François Lamothe. Conversation téléphonique avec François Lamothe. Appel conférence avec Timminco. Charles Mercier	1,20 h	$ 265,00/h	$ 318,00
02/14/12	Conférence avec Iya Touré, François Lamothe et Jean Chiasson. Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
02/20/12	Révision des conventions relatives à la vente de certains actifs de Bécancour Silicium inc. (BSI) à Québec Silicium SEC (QSLP), consultation de Sedar. Courriel à Nigel Meakin et D. Fastuca, demande de documents non disponibles. Charles Mercier	2,00 h	$ 265,00/h	$ 530,00
02/22/12	Review of Notice of Appeal and e mail to Mercier; Aubrey Kauffman	0,30 h	$ 775,00/h	$ 232,50
02/22/12	Correspondance de Me Orr re: recours collectif. Requête de CEP en appel des décisions du juge Morawetz concernant les charges prioritaires. Charles Mercier	0,70 h	$ 265,00/h	$ 185,50
02/23/12	Review of Monitor update; Aubrey Kauffman	0,30 h	$ 775,00/h	$ 232,50
02/23/12	Courriel de Nigel Meakin. Étude des documents transmis par Nigel Meakin, Annexe B to Exhibit B of the Frame work Agreement. Charles Mercier	1,20 h	$ 265,00/h	$ 318,00
02/23/12	Nouveaux avis d'appel de CEP concernant le jugement du 2 février 2012 ordonnant la suspension des paiements spéciaux aux fonds de pension et autres priorités et avis d'appel concernant le jugement du 9 février accordant le financement DIP et la			

Date	Description	Heures	Taux	Montant
	priorité y afférente. 2e avis d'appel du jugement du 2 février 2012 par CEP. Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
02/23/12	Courriel de Nigel Meakin, état de la situation. Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
02/24/12	Étude [redacted] [redacted]. Charles Mercier	2,50 h	$ 265,00/h	$ 662,50
02/24/12	Rencontre avec Charles Mercier concernant [redacted] [redacted] Émilie Truchon	0,90 h	$ 165,00/h	$ 148,50
02/24/12	Recherches sur Corail, Azimut et le site de la CRT afin de trouver des plaintes (décisions concernant Bécancour Silicon inc. ou Québec Silicon LP); séance de travail avec Émilie Truchon". Laurence Déry	0,70 h	$ 215,00/h	$ 150,50
02/27/12	Révision des procédures d'appel de United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union. Charles Mercier	0,70 h	$ 265,00/h	$ 185,50
02/27/12	Obtention de la fiche d'évaluation foncière des propriétés sises aux 5355 du Chemin-de-Fer, 5500 Yvon-Trudeau et 6500 Yvon-Trudeau à Bécancour et obtention d'une copie de l'index des immeubles relatif à chacune de ces trois propriétés. Marie Huot	0,80 h	$ 110,00/h	$ 88,00
02/28/12	Review of of Draft Stalking Horse APA and Bid Procedures. Dictation of e mail of comments for Mercier; Aubrey Kauffman	2,00 h	$ 775,00/h	$ 1 550,00
02/28/12	Courriel de Nigel Meakin. Courriel à Nigel Meakin. Courriel à Iya Touré, Christine Fillion, F. Lamothe et Jean Chiasson. Courriel de Iya Touré. Charles Mercier	0,80 h	$ 265,00/h	$ 212,00
02/28/12	Vérification du Asset purchase Agreement (étendu de l'ordonnance de radiation de la Cour sur les droits d'IQ). Appel conférence avec les gens d'IQ. Charles Mercier	2,00 h	$ 265,00/h	$ 530,00
02/29/12	Attendance at update call with the Company and the Monitor; Aubrey Kauffman	0,40 h	$ 775,00/h	$ 310,00
02/29/12	Révision des documents transmis pour la vente par Stalking Horse. Appel conférence avec le contrôleur et les gens de Timminco. Appel conférence avec les gens d'IQ. Vérification du recours collectif contre Timminco, courriel à IQ.			

	Charles Mercier	2,00 h	$ 265,00/h	$ 530,00
03/02/12	E mail to Taylor re bid; Aubrey Kauffman	0,20 h	$ 775,00/h	$ 155,00
03/02/12	Correspondance avec Nigel Meakin (APA and amendment letter), vérification. Conversation téléphonique avec François Lamothe et Jean Chiasson (disclosure letter à QSI - signée). Courriel de Jean Chiasson. Charles Mercier	0,90 h	$ 265,00/h	$ 238,50
03/05/12	Courriel de Jean Chiasson (Stalking horse) et entente BSI / Sudamin. Conversation téléphonique avec Jean Chiasson. Courriel à tous re: Sudamin et S. Horse). Charles Mercier	0,60 h	$ 265,00/h	$ 159,00
03/05/12	Correspondance de Me Hatney, procureur du gestionnaire (Mercer) du Haley Pension' Plan. Comparution de Mercer Canada Ltd. Courriel de Jean Chiasson, convention Sudamin. Charles Mercier	0,70 h	$ 265,00/h	$ 185,50
03/06/12	E mail with Stikeman and Mercier re Stalking Horse Motion; Aubrey Kauffman	0,30 h	$ 775,00/h	$ 232,50
03/06/12	Document de Nigel Meakin re: disclosure letter, vérification. Révision des conventions relatives au Stalking Horse en regard de la transaction avec Wacher et Sudamin effectuée par BSI en août 2011. Charles Mercier	3,50 h	$ 265,00/h	$ 927,50
03/07/12	Review of documentation re Sudamin issue. Telephone call with Mercier re Sudamin. Conference call with clients and Mercier. E mail to Company and Monitor. Review of Stalking Horse Approval motion. Review of factum. Review of letter from Koskie firm re pension Administrator. Review of Monitor's Fourth Report; Aubrey Kauffman	3,80 h	$ 775,00/h	$ 2 945,00
03/07/12	Conversation téléphonique avec Jean Chiasson. Charles Mercier	1,40 h	$ 265,00/h	$ 371,00
03/07/12	Révision des conventions de production liant QSLP. Discussions sur les options d'IQ quant au traitement accordé à Sudamin. Appel conférence avec IQ Team. Charles Mercier	2,20 h	$ 265,00/h	$ 583,00
03/07/12	Étude de la procédure de Stalking Horse Charles Mercier	2,00 h	$ 265,00/h	$ 530,00
03/07/12	Complément de recherche concernant la réclamation au titre des régimes de pension de retraite des salariés.			

	Émilie Truchon	2,00 h	$ 165,00/h	$ 330,00
03/08/12	Conference call with IQ, Company and Monitor. Conference call with clients. Telephone call with Taylor. Briefing G. Phoenix for Motion;			
	Aubrey Kauffman	1,10 h	$ 775,00/h	$ 852,50
03/08/12	Telephone call with Mercier;			
	Aubrey Kauffman	0,20 h	$ 775,00/h	$ 155,00
03/08/12	Conversation téléphonique avec A. Kauffman; conversation téléphonique avec Jean Chiasson; courriel à Jean Chiasson; appel conférence avec le contrôleur et Timminco [redacted] appel conférence avec IQ/Team; courriel de F. Lamothe.			
	Charles Mercier	1,60 h	$ 265,00/h	$ 424,00
03/08/12	Documents relatifs à une demande présentable le 26 mars 2012 concernant une demande de levée de suspension des procédures en faveur du recours collectif de Penny Brother vs Timminco; affidavit de Jean Simoneau au soutien de la contestation de CEP du Stalking Horse.			
	Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
03/08/12	Reviewing motion materials.			
	R. Graham Phoenix	0,80 h	$ 475,00/h	$ 380,00
03/09/12	Attendance at Stalking Horse Approval motion;			
	Aubrey Kauffman	1,00 h	$ 775,00/h	$ 775,00
03/09/12	Preparation for, travel to and attendance on motion by CCAA Debtors re: stalking horse sales process.			
	R. Graham Phoenix	3,30 h	$ 475,00/h	$ 1 567,50
03/12/12	Révision de l'ordonnance de la Cour autorisant le Stalking Horge.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
03/13/12	Transmission d'un compte rendu de l'audition sur le Stalking Horge; conversation téléphonique avec Jean Chiasson.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
03/13/12	Transmission d'un compte rendu de l'audition sur le stalking horse. Conversation téléphonique avec Jean Chiasson.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
03/15/12	Review of Phoenix e mail;			
	Aubrey Kauffman	0,20 h	$ 775,00/h	$ 155,00
03/15/12	Recherche jurisprudentielle et doctrinale concernant [redacted]			

	Émilie Truchon	1,20 h	$ 165,00/h	$ 198,00
03/16/12	Correspondance de Graham Phoenix, re: AMG.			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
03/16/12	Recherche jurisprudentielle et doctrinale			
	Émilie Truchon	6,60 h	$ 165,00/h	$ 1 089,00
03/19/12	Correspondance à Jean Chiasson (AMG).			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
03/20/12	Conversation téléphonique avec Stéphanie Murphy (IQ). Vérification des délais du Stalking Horse Bid phase I.			
	Charles Mercier	0,70 h	$ 265,00/h	$ 185,50
03/21/12	Courriel de K. Orr (recours collectif).			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
03/21/12	Analyse jurisprudentielle concernant			
	Émilie Truchon	1,30 h	$ 165,00/h	$ 214,50
03/22/12	Lecture des factures et autorités de M. Walsh et de Timminco à l'encontre de la demande de levée de suspension requise par Mme Penny Feather (recours collectifs vs Timminco et ses administrateurs).			
	Charles Mercier	2,50 h	$ 265,00/h	$ 662,50
03/22/12	Recherche jurisprudentielle et doctrinale; note à Me Charles Mercier concernant la			
	Émilie Truchon	4,50 h	$ 165,00/h	$ 742,50
03/23/12	Review of CEP leave to appeal material (2 motion records). Review of Pennyfeather motion material (lift stay);			
	Aubrey Kauffman	0,90 h	$ 775,00/h	$ 697,50
03/23/12	Révision des requêtes pour permission d'en appeler de CEP concernant les jugements du 2 et 9 février 2012 accordant des charges prioritaires sur les actifs de Timminco / BSI.			
	Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
03/23/12	Recherche dans la législation canadienne et québécoise en ce qui concerne			
	Émilie Truchon	3,50 h	$ 165,00/h	$ 577,50

Re: Silicium Québec s.e.c. / Timminco

03/26/12	Review of leave to appeal factum of CEP;			
	Aubrey Kauffman	0,40 h	$ 775,00/h	$ 310,00
03/26/12	Courriel de M. Meakin. Révision du mémoire de CEP en appel de la décision du juge Morawetz du 9 février 2012 et du 2 février.			
	Charles Mercier	1,20 h	$ 265,00/h	$ 318,00
03/26/12	Recherche dans la législation canadienne et québécoise en ce qui concerne [redacted]			
	Émilie Truchon	2,70 h	$ 165,00/h	$ 445,50
03/27/12	Review of summary of offers. Attendance at update conference call:			
	Aubrey Kauffman	0,50 h	$ 775,00/h	$ 387,50
03/27/12	Document de Nigel Meikin, contrôleur (Phase I bids), étude. Appel conférence avec IQ, Timminco/BSI et le contrôleur.			
	Charles Mercier	0,70 h	$ 265,00/h	$ 185,50
03/27/12	Conversation téléphonique avec F. Lamothe. Vérification quant au [redacted]			
	Charles Mercier	0,80 h	$ 265,00/h	$ 212,00
03/27/12	Courriel à Nigel Meakin.			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
03/27/12	Courriel de Peter Kalins, griefs contre QSCL.			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
03/27/12	Recherche dans la législation canadienne et québécoise en ce qui concerne les [redacted]			
	Émilie Truchon	0,90 h	$ 165,00/h	$ 148,50
03/28/12	Révision des procédures intentées par CEP et autres ordonnances. Rapport à François Lamothe.			
	Charles Mercier	1,50 h	$ 265,00/h	$ 397,50
03/28/12	Analyse de la législation canadienne et québécoise concernant [redacted]			
	Émilie Truchon	0,40 h	$ 165,00/h	$ 66,00
03/28/12	Consultation du registre foncier en ligne et obtention de deux copies d'actes inscrits dans la circonscription foncière de Nicolet.			
	Marie Huot	0,20 h	$ 110,00/h	$ 22,00
03/30/12	Discussions avec Mme Sylvie Pinsonnault et avec Me Pierre B. Lafrenière			
	Claude Girard	0,40 h	$ 360,00/h	$ 144,00

Re: Silicium Québec s.e.c. / Timminco

04/02/12	Conversation téléphonique avec François Lamothe. Courriel à François Lamothe (griefs). Révision du dossier de mise en vente des actifs. Révision des griefs et des conventions de vente initiales.			
	Charles Mercier	2,50 h	$ 265,00/h	$ 662,50
04/03/12	Verification des hypothèques consenties à IQ par Bécancour Silicium inc. et par Québec Bécancour Commandité inc. sur le 650 rue Yvon-Trudeau, Bécancour.			
	Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
04/05/12	Conversation téléphonique avec François Lamothe. Courriel de François Lamothe. Confirmation des rendez-vous téléphoniques du 10 avril.			
	Charles Mercier	0,80 h	$ 265,00/h	$ 212,00
04/09/12	Review of motion record re Extension of Phase II deadline. E mail to Mercier. Review of Monitor's Report;			
	Aubrey Kauffman	0,80 h	$ 775,00/h	$ 620,00
04/09/12	Requête pour prolonger le délai de dépôt des offres de la phase II du processus de vente (Stalking Horse). Étude de la requête, affidavit, projet de jugement et monitor's report. Lettre de Jim Orr (recours collectif).			
	Charles Mercier	1,20 h	$ 265,00/h	$ 318,00
04/10/12	E mails re extension motion and meetings with prospective purchasers. Tcw Taylor and reporting e mail to client. ;			
	Aubrey Kauffman	0,90 h	$ 775,00/h	$ 697,50
04/10/12	Échange de courriels sur les appels. Conférence [redacted]			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
04/10/12	Conversation téléphonique avec François Lamothe. Courriel de Nigel Meakin [redacted] Instructions pour la requête pour extension Phase II du processus de vente. Courriel à François Lamothe.			
	Charles Mercier	0,90 h	$ 265,00/h	$ 238,50
04/10/12	Révision des questions concernant les Fonds de pension en prévision des appels conférences avec [redacted]			
	Charles Mercier	2,00 h	$ 265,00/h	$ 530,00
04/10/12	Courriel de Catherine Esaw, report de l'audition sur la requête pour extensionner la phase II. Courriel d'Audrey Kauffman (report d'audition). Courriels de François Lamothe re: [redacted]. Courriel de Nigel Meakin [redacted] Courriels de Nigel Meakin [redacted].			
	Charles Mercier	1,30 h	$ 265,00/h	$ 344,50
04/11/12	Telephone call with client. Telephone call with [redacted] Telephone call with Meakin and drafting of reporting e mail. Review of responding motion record of Globe/QSI re extension motion;			

	Aubrey Kauffman	4,20 h	$ 775,00/h	$ 3 255,00
04/11/12	Conversation téléphonique avec François Lamothe. Conversation téléphonique avec Aubrey Kauffman. Appel conférence avec les représentations de [redacted] et appel conférence IQ Team. Appel conférence avec les représentants de [redacted] Appel conférence IQ Team. Rapport d'Aubrey Kauffman sur [redacted]			
	Charles Mercier	3,50 h	$ 265,00/h	$ 927,50
04/11/12	Factum de QSI à l'encontre de la demande de prolongation de délais de la Phase II de l'appel d'offres de Timminco.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
04/12/12	Telephone call with client re statement for Monitor. Aa conference calls with prospective purchasers (2) and discussion with client;			
	Aubrey Kauffman	1,90 h	$ 775,00/h	$ 1 472,50
04/12/12	Courriel de Nigel Meakin, appel conférence avec Dow. Courriel de Catherine Esaw, entente entre QSI et Timminco sur les délais de la Phase II des offres. Réception de la décision du juge Morawetz concernant la levée de suspension des recours pour permettre à St-Clair Pennyfeather d'en appeler à la Cour Supérieure (recours collectifs contres les administrateurs de Timminco).			
	Charles Mercier	0,60 h	$ 265,00/h	$ 159,00
04/12/12	Conférence téléphonique avec [redacted] Révision de la procédure concernant l'encan. Appel conférence avec [redacted]			
	Charles Mercier	1,50 h	$ 265,00/h	$ 397,50
04/12/12	Appel conférence IQ Team sur les conversations [redacted]			
	Charles Mercier	0,40 h	$ 265,00/h	$ 106,00
04/13/12	Courriel de Nigel Meakin re: annulation de l'appel conférence avec [redacted]			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00

Notre Dossier: 275047.00020
Note d'honoraires: 640318

Re: Silicium Québec s.e.c. / Timminco

Total des honoraires	**$ 43 100,00**	
TPS	2 155,00	
TVQ	4 299,23	
Total des taxes sur les honoraires	$ 6 454,23	
Total des honoraires incluant les taxes		$ 49 554,23
DÉBOURS		
Non taxables		
Bureau d'enregistrement	6,00	
Taxables		
Téléphones	3,90	
Reliures	16,71	
Copies	654,00	
Frais de recherche en ligne	137,80	
Total des débours	818,41	
TPS	40,69	
TVQ	81,06	
Total des taxes sur les débours	$ 121,75	
Total des débours incluant les taxes		$ 940,16
Total de la présente facture		**CAD $ 50 494,39**

Sommaire des taxes

TPS	2 195,69
TVQ	4 380,29
Total des taxes de la présente facture	6 575,98

Fasken Martineau DuMoulin S.E.N.C.R.L., s.r.l.
Avocats
Agents de brevets et marques de commerce

Bureau 800
140, Grande Allée Est
Québec (Québec) Canada G1R 5M8

418 640 2000 Téléphone
418 647 2455 Télécopieur

Date: 23 avril 2012
Notre Dossier: 275047.00020
Note d'honoraires: 642069
TPS #: 87937 6127 RT0002
TVQ #: 1023151835 TQ0002

Investissement Québec
413, rue Saint-Jacques
Bureau 500
Montréal (Québec) H2Y 1N9

Pour services professionnels rendus au 31 janvier 2012 en relation avec le dossier suivant:

Silicium Québec s.e.c. / Timminco

Total des honoraires	$ 49 716,00
Total des débours	810,26
Total des taxes	7 551,13
Montant total dû	**CAD $ 58,077.39**

Payable sur réception. Intérêt au taux de 1.25% par mois (15% par année) ajouté à toute somme en souffrance depuis 30 jours ou plus. Les déboursés non débités à votre compte à la date du présent état vous seront facturés ultérieurement.

Vancouver Calgary Toronto Ottawa Montréal Québec Londres Paris Johannesburg

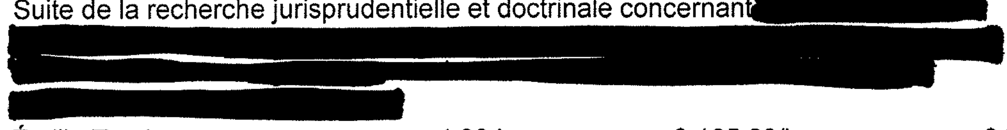
Notre Dossier: 275047.00020
Note d'honoraires: 642069

Re: Silicium Québec s.e.c. / Timminco

Date	Description	Heures	Taux	Montant
12/20/11	Rencontre avec MM. Jocelyn Renaud et Jean Chiasson de Raymond Chabot Grant Thornton Charles Mercier	2,00 h	$ 260,00/h	$ 520,00
12/20/11	Étude de la convention de société en commandite, de la convention entre actionnaires du Commandité et des documents accessoires; correspondance; discussion sur les options de Dow Corning. Charles Mercier	3,00 h	$ 260,00/h	$ 780,00
12/20/11	Examiner divers documents avant la rencontre avec MM. Jean Chiasson et Jocelyn Renaud et Me Charles Mercier; discussions avec Mme Christine Fillion et M. Iya Touré d'Investissement Québec Claude Girard	2,00 h	$ 350,00/h	$ 700,00
12/21/11	Correspondance de M. Jean Chiasson concernant les fonds de pension; étude de la décision de la Cour d'appel de l'Ontario sur les fonds de pension Charles Mercier	0,90 h	$ 260,00/h	$ 234,00
12/21/11	Conversation téléphonique avec M. Jean Chiasson. Charles Mercier	0,20 h	$ 260,00/h	$ 52,00
12/22/11	Séance de travail sur la convention de société en commandite, la convention entre actionnaires [caviardé] conversation téléphonique avec M. Jean Chiasson. Charles Mercier	1,80 h	$ 260,00/h	$ 468,00
12/22/11	Examiner les inscriptions au RDPRM; séance de travail avec Me Charles Mercier; discussion avec M. Jean Chiasson; conférence téléphonique avec plusieurs intervenants Claude Girard	4,50 h	$ 350,00/h	$ 1 575,00
12/23/11	Appel conférence avec des représentants d'Investissement Québec et de RCGT Charles Mercier	2,00 h	$ 260,00/h	$ 520,00
12/23/11	Recherche législative et doctrinale concernant [caviardé] Émilie Truchon	6,30 h	$ 150,00/h	$ 945,00
12/24/11	Discussions sur [caviardé], conversation téléphonique avec M. Stuart Brotman. Échange de courriels. Charles Mercier	0,50 h	$ 260,00/h	$ 130,00
12/24/11	Recherche [caviardé] conversation téléphonique avec M. Jean Chiasson; projet de note à M. Jean Chiasson			

Date	Description	Heures	Taux	Montant
	Charles Mercier	4,00 h	$ 260,00/h	$ 1 040,00
12/27/11	Travail sur le projet de note destiné à M. Jean Chiasson; révision des conventions et autorités; courriel à M. Jean Chiasson			
	Charles Mercier	2,70 h	$ 260,00/h	$ 702,00
12/29/11	Conversation téléphonique avec Me Claude Girard concernant [caviardé] conversation téléphonique avec M. Jean Chiasson [caviardé]			
	Charles Mercier	0,60 h	$ 260,00/h	$ 156,00
12/29/11	Discussions avec Mes Danièle Leroux et Charles Mercier [caviardé]			
	Claude Girard	1,40 h	$ 350,00/h	$ 490,00
12/31/11	Courriel de Me Ashley Taylor; examen du projet d'ordonnance initiale et de l'affidavit de Timminco (Peter Kalins); conversation téléphonique avec M. Jean Chiasson			
	Charles Mercier	3,30 h	$ 260,00/h	$ 858,00
01/02/12	Telephone call and emails with Me Charles Mercier; review of draft affidavit and order; emails and calls with Stikemans.			
	Aubrey Kauffman	5,30 h	$ 775,00/h	$ 4 107,50
01/02/12	Conversation téléphonique avec M. Jean Chiasson; conférence téléphonique avec Mme Christine Fillion et MM. Jean Chiasson, Yves Lafrance et Iya Touré.			
	Charles Mercier	0,70 h	$ 265,00/h	$ 185,50
01/02/12	Courriel à Me Ashley Taylor, procureur de Timminco inc.; conversations téléphoniques avec Me Aubrey Kauffman; conversation téléphonique avec Me Ashley Taylor; révision des documents officiels signifiés par les procureurs de Timminco; échange de courriels avec Mes Ashley Taylor et Aubrey Kauffman; instructions à Me Aubrey Kauffman.			
	Charles Mercier	3,20 h	$ 265,00/h	$ 848,00
01/03/12	Preparation for Court; review of Application Record and exhibits; negotiations with Stikeman and FTI re: size of Administrative Charge; attendance at Court; reporting to Me Charles Mercier; telephone calls and emails regarding cessation of payment of special payments.			
	Aubrey Kauffman	5,70 h	$ 775,00/h	$ 4 417,50
01/03/12	Échange de courriels avec Me Ashley Kauffman re: charge administrative; courriel aux personnes concernées re: rapport d'audition de Me Aubrey Kauffman; conversation téléphonique avec Me Aubrey Kauffman re: paiements de fonds de pension en retard.			
	Charles Mercier	1,40 h	$ 265,00/h	$ 371,00

Re: Silicium Québec s.e.c. / Timminco

01/04/12	Étude d'autorités sur la demande de suspension de cotisations spéciales aux régimes de pension de Timminco et BSI; révision de la requête pour l'émission d'une ordonnance initiale et l'ordonnance initiale; vérification du cash flow produit pour un mois; révision de la Loi sur les régimes complémentaires de retraite; étude des motifs du juge Morawetz.			
	Charles Mercier	5,00 h	$ 265,00/h	$ 1 325,00
01/04/12	Recherche jurisprudentielle et doctrinale concernant			
	Émilie Truchon	6,40 h	$ 165,00/h	$ 1 056,00
01/05/12	Review of detailed cash flow provided by FTI and discussion with Me Charles Mercier; conference call with FTI and counsel re: Administrative Charge, special contributions and security review; review of IQ loan agreements; summary email to Me Charles Mercier in view of a conference call.			
	Aubrey Kauffman	2,50 h	$ 775,00/h	$ 1 937,50
01/05/12	Courriel de M. Nigel Meakin; examen d'un nouveau cash flow; conversation téléphonique avec Mme Christine Fillion et MM. Iya Touré et François Lamothe; conversation téléphonique avec Me Aubrey Kauffman sur le nouveau cash flow; courriels à Linc Rogers, Blakes concernant les garanties d'Investissement Québec; appel conférence avec Mes Ashley Taylor, Aubrey Kauffman et Linc Rogers et M. Nigel Meakin re: nouveau cash flow et demande quant à la priorité de la charge administrative.			
	Charles Mercier	3,00 h	$ 265,00/h	$ 795,00
01/05/12	Étude de la nouvelle requête de Timminco concernant la suspension de paiement au Fonds de pension et priorités additionnelles; courriels à Mme Christine Fillion et M. Michel Lavoie.			
	Charles Mercier	1,30 h	$ 265,00/h	$ 344,50
01/05/12	Suite de la recherche jurisprudentielle et doctrinale concernant 			
	Émilie Truchon	4,30 h	$ 165,00/h	$ 709,50
01/06/12	Review of motion record re KERP and Administrative fee priority; review of Monitor's First Report; emails with Me Charles Mercier.			
	Aubrey Kauffman	1,20 h	$ 775,00/h	$ 930,00
01/06/12	Courriel de M. Michel Lavoie; révision de la requête pour suspendre les «special payments» et demande de marges prioritaires additionnelles; révision du relevé RDPRM pour BSI.			
	Charles Mercier	1,20 h	$ 265,00/h	$ 318,00

Re: Silicium Québec s.e.c. / Timminco

01/06/12	Appel conférence avec Mme Christine Fillion et MM. François Lamothe, Iya Touré et Michel Lavoie; [redacted]			
	Charles Mercier	3,50 h	$ 265,00/h	$ 927,50
01/06/12	Appel conférence avec le contrôleur et Timminco; appel conférence avec MM. Iya Touré, François Lamothe et Michel Lavoie; travail sur un projet de note.			
	Charles Mercier	2,70 h	$ 265,00/h	$ 715,50
01/06/12	Filed Notice of Appearance			
	D. Amyot	0,40 h	$ 125,00/h	$ 50,00
01/06/12	Recherche jurisprudentielle et doctrinale concernant [redacted].			
	Émilie Truchon	5,50 h	$ 165,00/h	$ 907,50
01/07/12	Note de service à Me Charles Mercier concernant l'état des recherches [redacted]			
	Émilie Truchon	3,90 h	$ 165,00/h	$ 643,50
01/09/12	Telephone call with Me Charles Mercier to discuss instructions with respect to the motion on next Thursday; reviewing Stikeman factum and email of comments to Me Charles Mercier.			
	Aubrey Kauffman	1,60 h	$ 775,00/h	$ 1 240,00
01/09/12	Travail sur le projet de la note concernant la requête du 12 janvier 2012; courriel à Mme Christine Fillion et MM. Iya Touré et François Lamothe; courriel à Nne Jackie Moher re: service liste du contrôleur; étude du premier rapport du contrôleur, révision des notes au soutien du cash flow (exhibit N) relativement à la demande d'ordonnance initiale; étude des commentaires destinés aux employés disponibles sur le site du contrôleur.			
	Charles Mercier	2,20 h	$ 265,00/h	$ 583,00
01/09/12	Étude du factum produit par Timminco au soutien de la requête du 12 janvier 2012.			
	Charles Mercier	1,50 h	$ 265,00/h	$ 397,50
01/10/12	Review of authorities brief re priming motion; telephone call with Gage - counsel to AMG.			
	Aubrey Kauffman	0,80 h	$ 775,00/h	$ 620,00
01/10/12	Comparution du syndicat des communications, de l'énergie et du papier; examen du recueil d'autorités de Timminco.			
	Charles Mercier	0,70 h	$ 265,00/h	$ 185,50
01/10/12	Courriel à Investissement Québec concernant les instructions; suivi à Me			

Notre Dossier: 275047.00020
Note d'honoraires: 642069

Re: Silicium Québec s.e.c. / Timminco

Date	Description	Heures	Taux	Montant
	Kauffman; courriel de M. Jean Chiasson; courriel à Me Kauffman. Charles Mercier	0,70 h	$ 265,00/h	$ 185,50
01/11/12	Emails with Me Charles Mercier concerning the position of Investissement Québec re the relief sought in the Jan 12; review of Monitor's second report; review of union responding motion record and factum; [redacted]. Aubrey Kauffman	1,40 h	$ 775,00/h	$ 1 085,00
01/11/12	Courriel de Mme Christine Fillion; courriel à Me Kauffman; comparution de Service Workers International Union, réception du second rapport du contrôleur, courriel de Me Kauffman; examen des autorités et factures de communications, Energy & Paper Workers Union of Canada; note à Me Aubrey Kauffman; discussions sur la position des communications, Energy & Paper workers Union of Canada; révision de l'arrêt Abitibi Bowater (8 mai 2009). Charles Mercier	4,50 h	$ 265,00/h	$ 1 192,50
01/12/12	Prepare for motion re priorities and suspension of special payments; reporting to Me Charles Mercier. Aubrey Kauffman	5,00 h	$ 775,00/h	$ 3 875,00
01/12/12	Révision de la requête du 12 janvier 2012 de Timminco re: retard de paiements spéciaux du fonds de pension, garanties consenties à Investissement Québec; discussions sur l'audition du 12 janvier au matin. Charles Mercier	1,70 h	$ 265,00/h	$ 450,50
01/12/12	Note suite à l'audition [redacted]. Charles Mercier	0,40 h	$ 265,00/h	$ 106,00
01/13/12	Conversation téléphonique avec M. Jean Chiasson; comparution du contrôleur. Charles Mercier	0,60 h	$ 265,00/h	$ 159,00
01/14/12	Suite de la note à Me Charles Mercier concernant le droit des employés au remboursement du régime de pension en vertu de la Loi sur les arrangements avec les créanciers des compagnies. Émilie Truchon	1,40 h	$ 165,00/h	$ 231,00
01/16/12	Courriel de Me Esaw. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
01/17/12	Review of Judge Morawetz endorsement. Aubrey Kauffman	0,30 h	$ 775,00/h	$ 232,50
01/17/12	Rédaction d'une note à Me Charles Mercier à l'égard de la recherche jurisprudentielle et doctrinale [redacted] Émilie Truchon	1,60 h	$ 165,00/h	$ 264,00

Notre Dossier: 275047.00020
Note d'honoraires: 642069

Re: Silicium Québec s.e.c. / Timminco

01/18/12	Review of draft order and approving; emails re call with Corporation.			
	Aubrey Kauffman	0,40 h	$ 775,00/h	$ 310,00
01/18/12	Correspondance de l'avocat de Timminco; courriel de M. Nigel Meakin.			
	Charles Mercier	0,40 h	$ 265,00/h	$ 106,00
01/18/12	Rédaction d'une note à Me Charles Mercier concernant la recherche jurisprudentielle et doctrinale [redacted]			
	Émilie Truchon	5,40 h	$ 165,00/h	$ 891,00
01/19/12	Appel conférence avec le contrôleur et les représentants de Timminco.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
01/20/12	Review of revised draft order and commenting in email.			
	Aubrey Kauffman	0,30 h	$ 775,00/h	$ 232,50
01/20/12	Révision de la requête pour l'autorisation d'un financement intérimaire.			
	Charles Mercier	1,50 h	$ 265,00/h	$ 397,50
01/23/12	Review of DIP approval motion record and review of DIP agreement; telephone call with Me Charles Mercier.			
	Aubrey Kauffman	1,10 h	$ 775,00/h	$ 852,50
01/23/12	Étude de l'offre DIP; discussion sur l'offre DIP.			
	Charles Mercier	0,70 h	$ 265,00/h	$ 185,50
01/24/12	Réception du troisième rapport du contrôleur; échange de courriels avec Mme Christine Fillion; instructions à Me Aubrey Kauffman.			
	Charles Mercier	0,70 h	$ 265,00/h	$ 185,50
01/24/12	Révision du troisième rapport du contrôleur.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
01/25/12	Review of the Monitor's Third Report; review of the Corporation's Factum.			
	Aubrey Kauffman	0,90 h	$ 775,00/h	$ 697,50
01/26/12	Étude de la plaidoirie écrite de Timminco au soutien de sa requête pour autoriser le DIP.			
	Charles Mercier	0,70 h	$ 265,00/h	$ 185,50
01/26/12	Étude des projets d'ordonnance et du cahier d'autorités.			
	Charles Mercier	0,70 h	$ 265,00/h	$ 185,50
01/27/12	Attendance at Court on motion to approve DIP and extend the stay.			
	Aubrey Kauffman	5,50 h	$ 775,00/h	$ 4 262,50
01/27/12	Conversation téléphonique avec M. Raynald Poulin, discussion concernant la			

	contestation de l'ordonnance DIP.			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
01/30/12	Emails with Me Charles Mercier re unions.			
	Aubrey Kauffman	0,20 h	$ 775,00/h	$ 155,00
01/30/12	Rapport sur l'audition du 27 janvier 2012.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
01/31/12	Avis d'appel conférence (Stalking - Horse).			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00

Notre Dossier: 275047.00020
Note d'honoraires: 642069

Re: Silicium Québec s.e.c. / Timminco

Total des honoraires	**$ 49 716,00**	
TPS	2 485,80	
TVQ	4 959,17	
Total des taxes sur les honoraires	$ 7 444,97	
Total des honoraires incluant les taxes		$ 57 160,97
DÉBOURS		
Non taxables		
Frais judiciaires	102,00	
Taxables		
Télécopieur	4,50	
Téléphones	4,11	
Copies	369,50	
Numérisation de document	24,25	
Frais de recherche en ligne	305,90	
Total des débours	810,26	
TPS	35,50	
TVQ	70,66	
Total des taxes sur les débours	$ 106,16	
Total des débours incluant les taxes		$ 916,42
Total de la présente facture		**CAD $ 58 077,39**

Sommaire des taxes

TPS	2 521,30
TVQ	5 029,83
Total des taxes de la présente facture	7 551,13

Fasken Martineau DuMoulin S.E.N.C.R.L., s.r.l.
Avocats
Agents de brevets et marques de commerce

Bureau 800
140, Grande Allée Est
Québec (Québec) Canada G1R 5M8

418 640 2000 Téléphone
418 647 2455 Télécopieur

Date: 31 mai 2012
Notre Dossier: 275047.00020
Note d'honoraires: 650711
TPS #: 87937 6127 RT0002
TVQ #: 1023151835 TQ0002

Investissement Québec
413, rue Saint-Jacques
Bureau 500
Montréal (Québec) H2Y 1N9

Pour services professionnels rendus au 25 mai 2012 en relation avec le dossier suivant:

Silicium Québec s.e.c. / Timminco

Total des honoraires	$ 38 970,00
Total des débours	436,70
Total des taxes	5 895,26
Montant total dû	**CAD $ 45,301.96**

Payable sur réception. Intérêt au taux de 1.25% par mois (15% par année) ajouté à toute somme en souffrance depuis 30 jours ou plus. Les déboursés non débités à votre compte à la date du présent état vous seront facturés ultérieurement.

Re: Silicium Québec s.e.c. / Timminco

04/16/12	Révision des notes suite aux appels effectués avec les "Phase I bidder". Revue des décisions du juge Morawetz, éléments de contestation des syndicats.			
	Charles Mercier	1,20 h	$ 265,00/h	$ 318,00
04/17/12	Review of Timminco responding factum re unions' leave to appeal motion.			
	Aubrey Kauffman	0,60 h	$ 775,00/h	$ 465,00
04/17/12	Contestation de la requête de CEP pour permission d'en appeler de la décision d'accorder une super-priorité au prêteur-DIP signifiée par Timminco / Bécancour avec pièces à l'appui, étude.			
	Charles Mercier	2,00 h	$ 265,00/h	$ 530,00
04/20/12	Conversation téléphonique avec M. François Lamothe.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
04/20/12	Courriel de M. François Lamothe, [redacted].			
	Charles Mercier	0,40 h	$ 265,00/h	$ 106,00
04/23/12	Telephone call with Monitor, clients and QSI. Review of bid summary and bid documents. Telephone call with clients.			
	Aubrey Kauffman	2,10 h	$ 775,00/h	$ 1 627,50
04/23/12	Conversation téléphonique avec M. François Lamothe. Courriel à M. François Lamothe. [redacted].			
	Charles Mercier	0,90 h	$ 265,00/h	$ 238,50
04/23/12	Recherche de législation et jurisprudentielle en ce qui concerne [redacted]			
	Émilie Truchon	2,40 h	$ 165,00/h	$ 396,00
04/24/12	Review of Bidding Procedures. Review of motion Record re stay extension. Review of summary table. Telephone call with Me Charles Mercier. Various calls and e mails throughout the day and evening with Monitor, Company and clients.			
	Aubrey Kauffman	7,00 h	$ 775,00/h	$ 5 425,00
04/24/12	Vérification du tableau des participants à la Phase III. Conversation téléphonique avec M. François Lamothe.			
	Charles Mercier	0,70 h	$ 265,00/h	$ 185,50
04/24/12	Appel conférence avec le contrôleur. Appel conférence avec les représentants d'IQ.			
	Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
04/24/12	Deuxième appel conférence avec le contrôleur. Conversation téléphonique avec M. François Lamothe. Deuxième appel conférence avec les représentants d'IQ. Troisième appel conférence IQ / contrôleur. Troisième appel conférence avec les			

Notre Dossier: 275047.00020
Note d'honoraires: 650711

Re: Silicium Québec s.e.c. / Timminco

	représentants d'IQ.			
	Charles Mercier	2,40 h	$ 265,00/h	$ 636,00
04/24/12	Conversation téléphonique avec M. François Lamothe. Étude de la requête et pièces en prolongation du "stay".			
	Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
04/24/12	Recherche législative, jurisprudentielle et doctrinale			
	Émilie Truchon	7,50 h	$ 165,00/h	$ 1 237,50
04/25/12	Telephone calls and e mails with clients, Monitor and Company through out the day re auction. Review of Monitor Report and Company factum re extension.			
	Aubrey Kauffman	1,60 h	$ 775,00/h	$ 1 240,00
04/25/12	Courriel de Ashley Taylor sur l'évolution de l'encan (ronde 35, 25 avril 2012, 8h23). Appel conférence avec les représentants d'IQ et MDEIE. Appel conférence avec M. François Lamothe et Iya Touré. Appel conférence avec les représentants d'IQ et contrôleur.			
	Charles Mercier	6,30 h	$ 265,00/h	$ 1 669,50
04/25/12	Recherche législative, jurisprudentielle et doctrinale			
	Émilie Truchon	2,30 h	$ 165,00/h	$ 379,50
04/26/12	Review of extension motion material.			
	Aubrey Kauffman	0,40 h	$ 775,00/h	$ 310,00
04/26/12	Recherche législative, jurisprudentielle et doctrinale			
	Émilie Truchon	1,40 h	$ 165,00/h	$ 231,00
04/27/12	Recherche législative, jurisprudentielle et doctrinale			
	Émilie Truchon	0,60 h	$ 165,00/h	$ 99,00
04/30/12	Correspondance avec Ashley Taylor.			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
05/01/12	Review of reasons re class action stay. Emails re distribution motion.			
	Aubrey Kauffman	0,50 h	$ 775,00/h	$ 387,50

Notre Dossier: 275047.00020
Note d'honoraires: 650711

Re: Silicium Québec s.e.c. / Timminco

05/01/12	Réception et étude des motifs du juge sur la demande de poursuite du recours collectif Pennyfeather.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
05/04/12	Emails with Ashley Taylor re update.			
	Aubrey Kauffman	0,20 h	$ 775,00/h	$ 155,00
05/08/12	Review of Timminco motion record re disclaimer of Timmins agreement. Email to clients re distribution motion. Telephone call with Ashley Taylor re update and reporting email to clients.			
	Aubrey Kauffman	1,10 h	$ 775,00/h	$ 852,50
05/08/12	Requête en regard du contrat de M. Timmins de la parti de Timminco. Factum de Jolin Walsh sur la prolongation de délai demandée par Timminco. Notice of Abandonment sur l'appel de CEP.			
	Charles Mercier	1,30 h	$ 265,00/h	$ 344,50
05/08/12	Conversation téléphonique avec M. François Lamothe. [redacted]			
	Charles Mercier	0,60 h	$ 265,00/h	$ 159,00
05/08/12	Recherche jurisprudentielle et doctrinale [redacted]			
	Émilie Truchon	1,80 h	$ 165,00/h	$ 297,00
05/09/12	E mail to Ashley Taylor re CEP. E mail re lifting of hypothec.			
	Aubrey Kauffman	0,40 h	$ 775,00/h	$ 310,00
05/09/12	Conversation téléphonique avec M. François Lamothe. [redacted] Conversation téléphonique avec M. François Lamothe. Courriel de Me Kathryn Esaw.			
	Charles Mercier	1,30 h	$ 265,00/h	$ 344,50
05/10/12	Review of motion record re sale approval and assignment of DCC contracts. Review of law re forced assignments. Telephone call with Ashley Taylor. Reporting e mail to clients.			
	Aubrey Kauffman	2,80 h	$ 775,00/h	$ 2 170,00
05/10/12	Étude de la requête pour approbation de l'offre du gagnant de l'encan. Conversation téléphonique avec M. François Lamothe. [redacted]. Conversation téléphonique avec Me Kathryn Esaw.			
	Charles Mercier	3,10 h	$ 265,00/h	$ 821,50

Notre Dossier: 275047.00020
Note d'honoraires: 650711

Re: Silicium Québec s.e.c. / Timminco

05/10/12	[redacted] Vérification des droits d'IQ qui seront affectés par la purge de droits réels. Correspondances concernant l'audition du 18 mai pour approuver la vente.			
	Charles Mercier	2,70 h	$ 265,00/h	$ 715,50
05/11/12	Attendance at conference call with counsel and conference call with Morawetz. Reporting to clients.			
	Aubrey Kauffman	1,20 h	$ 775,00/h	$ 930,00
05/11/12	Conversation téléphonique avec M. François Lamothe. [redacted] Courriels concernant le processus d'autorisation de la vente d'actifs. Échange de courriels avec Me Kathryn Esaw.			
	Charles Mercier	1,30 h	$ 265,00/h	$ 344,50
05/11/12	Échange de courriels avec Me Kathryn Esaw.			
	Charles Mercier	0,40 h	$ 265,00/h	$ 106,00
05/11/12	Mise à jour de l'index des immeubles; obtention des plans des lots rénovés via Infolot; examen des charges affectant chaque propriété.			
	Marie Huot	1,50 h	$ 110,00/h	$ 165,00
05/14/12	[redacted] Emails to Charles Mercier re HP1 Property hypothec issue.			
	Aubrey Kauffman	0,60 h	$ 775,00/h	$ 465,00
05/14/12	Vérification du projet de jugement autorisant la vente à Grupo Ferro Atlantica, SA et ses impacts sur les garanties IQ; appel conférence avec Me Kathryn Esaw, avocate pour Timminco; vérification des plans concernant les lots donnés en garantie à IQ; vérification des garanties mobilières d'IQ sur les actifs vendus publiées au RDPRM; échange de courriels avec Nigel Meakin.			
	Charles Mercier	5,00 h	$ 265,00/h	$ 1 325,00
05/14/12	Courriel à M. François Lamothe.			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
05/14/12	Examen des charges affectant chacun des trois immeubles; entretien avec Charles Mercier.			
	Marie Huot	0,80 h	$ 110,00/h	$ 88,00
05/14/12	Recherches en ligne au RDPRM pour Silicium Bécancour inc.			
	Marie Huot	0,30 h	$ 110,00/h	$ 33,00
05/15/12	Étude de l'affidavit de Joe Reinaldi de Dow Corning Canada et documents joints. Affidavit de M. Timming et pièces au soutien d'une requête présentable au même moment que l'autorisation de ventre à Ferro.			
	Charles Mercier	1,20 h	$ 265,00/h	$ 318,00

Notre Dossier: 275047.00020
Note d'honoraires: 650711

Re: Silicium Québec s.e.c. / Timminco

05/16/12	Review of DCC and Wacker responding records. Review of Monitor's 7th Report. Reporting e mails to clients.			
	Aubrey Kauffman	1,40 h	$ 775,00/h	$ 1 085,00
05/16/12	Réception du projet de certificat du contrôleur sur le closing de Ferro. Étude du 7e rapport du contrôleur. Courriel à M. François Lamothe et al.			
	Charles Mercier	1,10 h	$ 265,00/h	$ 291,50
05/17/12	Telephone call with client. Telephone call with Ashley Taylor. E mail to client. Review of Stikeman factum and Timmins motion record. E mail to clients re cah flow/DIP.			
	Aubrey Kauffman	1,10 h	$ 775,00/h	$ 852,50
05/17/12	Correspondance concernant les auditions pour approbation de vente d'actifs.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
05/18/12	Attendance at court on Ferro Sale Approval motion and Timmons trust motion.			
	Aubrey Kauffman	7,00 h	$ 775,00/h	$ 5 425,00
05/18/12	Étude de l'affidavit et pièces produites par Wacker Chimie. Étude de la procédure déposée par CEP. Étude du factum de Timminco/BSI. Révision des clause des ententes QSI et Wacker concernant une éventuelle ordonnance additionnelle de DIP à 2.5 mm. Appel conférence avec les représentants d'IQ.			
	Charles Mercier	3,70 h	$ 265,00/h	$ 980,50
05/22/12	Étude du 8e rapport du contrôleur.			
	Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
05/23/12	Review of emails re Sale Approval and Assignment motion.			
	Aubrey Kauffman	0,40 h	$ 775,00/h	$ 310,00
05/24/12	Prepare for motion- review of affidavit material and facta. E mail of comments to Stikeman and Tory's.			
	Aubrey Kauffman	2,90 h	$ 775,00/h	$ 2 247,50
05/25/12	Review of Brandis affidavit.			
	Aubrey Kauffman	0,30 h	$ 775,00/h	$ 232,50
05/25/12	Étude de l'affidavit additionnel de DCC (Joe Duraldi). Étude du Factum de Timminco.			
	Charles Mercier	1,30 h	$ 265,00/h	$ 344,50
05/25/12	Étude de la plaidoirie écrite de QSI sur la vente à QSI. Étude de la plaidoirie écrite de Dow Corning Canada sur la vente QSI. Étude de l'affidavit de Tobias Brandis (Wacher).			
	Charles Mercier	2,00 h	$ 265,00/h	$ 530,00

Notre Dossier: 275047.00020
Note d'honoraires: 650711

Re: Silicium Québec s.e.c. / Timminco

Total des honoraires	**$ 38 970,00**	
TPS	1 948,50	
TVQ	3 887,26	
Total des taxes sur les honoraires	$ 5 835,76	
Total des honoraires incluant les taxes		$ 44 805,76
DÉBOURS		
Non taxables		
Frais divers	6,30	
Bureau d'enregistrement	17,00	
RDPRM	16,20	
Taxables		
Téléphones	2,75	
Copies	285,00	
Numérisation de document	1,25	
Frais de recherche en ligne	108,20	
Total des débours	436,70	
TPS	19,88	
TVQ	39,62	
Total des taxes sur les débours	$ 59,50	
Total des débours incluant les taxes		$ 496,20
Total de la présente facture		**CAD $ 45 301,96**

Sommaire des taxes

TPS	1 968,38
TVQ	3 926,88
Total des taxes de la présente facture	5 895,26

Fasken Martineau DuMoulin S.E.N.C.R.L., s.r.l.
Avocats
Agents de brevets et marques de commerce

Bureau 800
140, Grande Allée Est
Québec (Québec) Canada G1R 5M8

418 640 2000 Téléphone
418 647 2455 Télécopieur

Date: 17 juillet 2012
Notre Dossier: 275047.00020
Note d'honoraires: 660002
TPS #: 87937 6127 RT0002
TVQ #: 1023151835 TQ0002

Investissement Québec
413, rue Saint-Jacques
Bureau 500
Montréal (Québec) H2Y 1N9

Pour services professionnels rendus au 11 juillet 2012 en relation avec le dossier suivant:

Silicium Québec s.e.c. / Timminco

Total des honoraires	$ 23 312,00
Total des débours	137,41
Total des taxes	3 511,54
Montant total dû	**CAD $ 26,960.95**

Payable sur réception. Intérêt au taux de 1.25% par mois (15% par année) ajouté à toute somme en souffrance depuis 30 jours ou plus. Les déboursés non débités à votre compte à la date du présent état vous seront facturés ultérieurement.

Notre Dossier: 275047.00020
Note d'honoraires: 660002

Re: Silicium Québec s.e.c. / Timminco

05/28/12	Review of Dow Corning factum and Monitor's 9th Report; emails to Mtre Charles Mercier; emails to Stikeman; review of cases referred to in facta; preparation of submissions			
	Aubrey Kauffman	3,50 h	$ 775,00/h	$ 2 712,50
05/28/12	Étude du 9e rapport du contrôleur			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
05/28/12	Échanges concernant les Cure Costs sur le contrat d'approvisionnement (Supply Agreement) signé entre Bécancour Silicon Inc. et Dow Corning, impact pour Investissement Québec			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
05/29/12	Attendance at court on Sale Approval/Dow Corning Assignment motion			
	Aubrey Kauffman	6,40 h	$ 775,00/h	$ 4 960,00
05/29/12	Affidavit additionnel de Timminco re: clauses de la garantie de Bank of America concernant les droits dans les parts de QSLP; vérification de l'hypothèque d'Investissement Québec et de l'amendement à la lettre d'offre portant sur les parts dans QSLP et les actions dans QSGP			
	Charles Mercier	1,50 h	$ 265,00/h	$ 397,50
05/30/12	Conversation téléphonique avec M. François Lamothe; étude de l'affidavit déposé par Dow Corning; étude de l'argumentation produite par Timminco à l'encontre des arguments de M. Timmins; endossement du Juge Morawetz sur la vente à Ferro et commentaires requis par CEP			
	Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
05/31/12	Review of Supplementary affidavit of Dow Corning ; email to and call with Mtre Mercier; Tcw Bish for QSI; email to McElchran for Dow Corning			
	Aubrey Kauffman	0,90 h	$ 775,00/h	$ 697,50
05/31/12	Discussion sur la stratégie [redacted]			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
05/31/12	Correspondance relative à «dislaimer of the Sudamin contract»; documentation additionnelle produite par M. Thomas Timmins; Timminco second supplementary motion record (QST sale)			
	Charles Mercier	0,70 h	$ 265,00/h	$ 185,50
06/01/12	Preparation for court, attendance at court and reporting to client with respect to the settlement of the motion			
	Aubrey Kauffman	2,10 h	$ 775,00/h	$ 1 627,50
06/04/12	Review of court material re: Timmins disclaimer motion			
	Aubrey Kauffman	0,50 h	$ 775,00/h	$ 387,50

Date	Description	Heures	Taux	Montant
06/04/12	Étude du 10e rapport du contrôleur; étude de l'ordonnance du juge Morawetz datée du 1er juin 2012 concernant les actifs de Silicium Métal			
	Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
06/05/12	Review of Mr. Justice Morawetz' endorsement and issued order			
	Aubrey Kauffman	0,20 h	$ 775,00/h	$ 155,00
06/06/12	Telephone call with purchaser's counsel re: discharge of Québec security; telephone call with Stikeman's re: closing; telephone call with Mtre Charles Mercier			
	Aubrey Kauffman	0,60 h	$ 775,00/h	$ 465,00
06/06/12	Conversation téléphonique avec M. François Lamothe; conversation téléphonique avec Me Benjamin Gross; courriel à M. François Lamothe			
	Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
06/06/12	Documents de mainlevée de la part du procureur de QSI et examen; vérification du jugement du 1er juin; conversation téléphonique avec Me Benjamin Gross; conversation téléphonique avec M. François Lamothe; deuxième version des documents de mainlevée; transmission à M. François Lamothe			
	Charles Mercier	1,50 h	$ 265,00/h	$ 397,50
06/07/12	Courriel de Me Messier (Lavery/QSI) re: projet de mainlevée de l'hypothèque immobilière IQ et examen; corrections au projet de mainlevée générale; conversation téléphonique avec M. François Lamothe; courriel de Me Benjamin Gross			
	Charles Mercier	2,20 h	$ 265,00/h	$ 583,00
06/07/12	Discussion avec MM. Keith Hanna et François Lamothe; session de travail sur le projet de mainlevée; discussion et correspondance avec Me Benjamin Gross, QSI; correspondance avec M. Keith Hanna			
	Charles Mercier	1,50 h	$ 265,00/h	$ 397,50
06/08/12	Review of motion record re: claims process; telephone call with Mtre Charles Mercier; email to Stikeman's and the Monitor re Excluded Claims			
	Aubrey Kauffman	1,10 h	$ 775,00/h	$ 852,50
06/08/12	Courriel de M. Keith Hanna, vérification du formulaire RV pour radiation au RDPRM; requête pour autoriser la procédure de preuve de réclamation de Timminco			
	Charles Mercier	0,80 h	$ 265,00/h	$ 212,00
06/08/12	Discussion sur le traitement de la créance d'Investissement Québec en regard de la procédure de production des preuves de réclamation; échange avec le Monitor et son procureur; discussions sur la production de l'état de compte au 31 mai 2012; courriel de M. François Lamothe; conversation téléphonique avec M. Keith Hanna; courriel de M. Keith Hanna, versions finales des documents de mainlevée des garanties d'Investissement Québec et vérification; courriel à Me Gross; courriel à			

Notre Dossier: 275047.00020
Note d'honoraires: 660002

Re: Silicium Québec s.e.c. / Timminco

Date	Description	Heures	Taux	Montant
	IQ re: claims procedure; documents signés de M. Keith Hanna; courriel à M. Keith Hanna, signature manquante Charles Mercier	2,80 h	$ 265,00/h	$ 742,00
06/08/12	Conversation téléphonique avec M. François Lamothe; courriel à Me Gross; courriel de M. Keith Hanna; transmission à Me Benjamin Gross Charles Mercier	0,80 h	$ 265,00/h	$ 212,00
06/11/12	Email to Stikeman's re: Excluded Claim issue Aubrey Kauffman	0,30 h	$ 775,00/h	$ 232,50
06/12/12	Emails re: amendments to the definition of Excluded Claim Aubrey Kauffman	0,20 h	$ 775,00/h	$ 155,00
06/13/12	[redacted] révision de l'ordonnance pour un DIP additionnel de 2 500 000 $; révision de l'ordonnance amendée sur la procédure pour prouver une créance; révision du 11e rapport du contrôleur Charles Mercier	1,40 h	$ 265,00/h	$ 371,00
06/13/12	Révision du Factum de Timminco sur la procédure de preuve de réclamation Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
06/13/12	Lettre de Mme Marie-Ève Legault d'Investissement Québec; documents de radiation signés et vérification; lettre à Me Benjamin Gross Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
06/14/12	Call for Claims Order; review of revised order; review of Company factum; review of Monitor's report and attendance at court Aubrey Kauffman	5,00 h	$ 775,00/h	$ 3 875,00
06/14/12	Courriel du procureur de Bécancour Silicon Inc. re: non-unionized and unionized employees, amendements à l'ordonnance sur la procédure de production de preuves de réclamation; discussions concernant des risques pour IQ relatifs à l'amendement proposé; courriel à M. François Lamothe Charles Mercier	0,90 h	$ 265,00/h	$ 238,50
06/14/12	Conversation téléphonique avec M. François Lamothe; courriel à M. Nigel Meakin re: ordonnance de distribution; échange de courriels avec M. Nigel Meakin; courriel de Me Benjamin Gross; vérification des documents à transmettre à Me Benjamin Gross Charles Mercier	1,30 h	$ 265,00/h	$ 344,50
06/15/12	Courriel à Me Benjamin Gross; conversation téléphonique avec M. François Lamothe Charles Mercier	0,40 h	$ 265,00/h	$ 106,00

Date	Description	Heures	Taux	Montant
06/15/12	Révision de l'ordonnance concernant la procédure de dépôt des preuves de réclamation; révision de l'ordonnance sur la prolongation du "stay period" et autres éléments Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
06/18/12	Courriel de Me Benjamin Gross, étude des certificats du contrôleur relatifs à la transaction de vente à QSI et la finalisation de la HP2 transaction Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
06/18/12	Courriel de Me Benjamin Gross, processus de radiation de l'hypothèque d'Investissement Québec sur les biens vendus; vérification des documents au RDPRM Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
06/19/12	Avis de la procédure pour production de preuve de réclamation, validation de la date limite au 23 juillet 2012 Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
06/21/12	Documents attestant des radiations de l'hypothèque d'Investissement Québec sur les actifs vendus; courriels à Me Benjamin Gross (2) Charles Mercier	0,70 h	$ 265,00/h	$ 185,50
06/26/12	Courriel de Me Messier (Lavery/QSI); vérification des enregistrements Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
06/27/12	Courriel de Me Benjamin Gross et signature de BSI sur la mainlevée consentie par Investissement Québec Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
07/04/12	Conversation téléphonique avec M. François Lamothe; échange de courriels avec M. François Lamothe et examen Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
07/06/12	Update email to Stikeman re: distribution motion Aubrey Kauffman	0,20 h	$ 775,00/h	$ 155,00
07/10/12	Update email with Stikeman re: claims process Aubrey Kauffman	0,30 h	$ 775,00/h	$ 232,50
07/11/12	Telephone call with clients to discuss the distribution motion timing Aubrey Kauffman	0,30 h	$ 775,00/h	$ 232,50
07/11/12	Appel conférence avec les représentants d'Investissement Québec Charles Mercier	0,40 h	$ 265,00/h	$ 106,00

Notre Dossier: 275047.00020
Note d'honoraires: 660002

Re: Silicium Québec s.e.c. / Timminco

Total des honoraires	**$ 23 312,00**	
TPS	1 165,60	
TVQ	2 325,37	
Total des taxes sur les honoraires	$ 3 490,97	
Total des honoraires incluant les taxes		$ 26 802,97

DÉBOURS

Taxables

Téléphones	33,75	
Service de messagerie	12,66	
Copies	91,00	
Total des débours	137,41	
TPS	6,87	
TVQ	13,70	
Total des taxes sur les débours	$ 20,57	
Total des débours incluant les taxes		$ 157,98
Total de la présente facture		**CAD $ 26 960,95**

Sommaire des taxes

TPS	1 172,47
TVQ	2 339,07
Total des taxes de la présente facture	3 511,54

Fasken Martineau DuMoulin S.E.N.C.R.L., s.r.l.
Avocats
Agents de brevets et marques de commerce

Bureau 800
140, Grande Allée Est
Québec (Québec) Canada G1R 5M8

418 640 2000 Téléphone
418 647 2455 Télécopieur

Date: 14 septembre 2012
Notre Dossier: 275047.00020
Note d'honoraires: 672140
TPS #: 87937 6127 RT0002
TVQ #: 1023151835 TQ0002

Investissement Québec
413, rue Saint-Jacques
Bureau 500
Montréal (Québec) H2Y 1N9

Pour services professionnels rendus au 31 août 2012 en relation avec le dossier suivant:

Silicium Québec s.e.c. / Timminco

Total des honoraires	$ 46 347,50
Total des débours	270,34
Total des taxes	6 981,07
Montant total dû	**CAD $ 53,598.91**

Payable sur réception. Intérêt au taux de 1.25% par mois (15% par année) ajouté à toute somme en souffrance depuis 30 jours ou plus. Les déboursés non débités à votre compte à la date du présent état vous seront facturés ultérieurement.

Notre Dossier: 275047.00020
Note d'honoraires: 672140

Re: Silicium Québec s.e.c. / Timminco

Date	Description	Hours	Rate	Amount
07/26/12	Review of Court of Appeal endorsement rejecting Union leave to Appeal. Telephone call to Monitor for update re distribution motion;			
	Aubrey Kauffman	0,40 h	$ 775,00/h	$ 310,00
07/27/12	E mails to the Monitor re distribution motion. Reporting e mail to client. Telephone call with client			
	Aubrey Kauffman	0,80 h	$ 775,00/h	$ 620,00
07/30/12	Telephone call with Monitor re logistics of payout statement. Telephone call with Stikemans. E mail to client;			
	Aubrey Kauffman	0,50 h	$ 775,00/h	$ 387,50
07/31/12	Telephone call with Stikemans re distribution motion. Telephone call with client Telephone call with Stikeman re substantive consolidation issue. Review of pension background. E mail to clients:			
	Aubrey Kauffman	1,40 h	$ 775,00/h	$ 1 085,00
08/01/12	Telephone call with client re consolidation issue. E mail to Stikemans. Review of chronology re pension issue. Telephone call with Koskie Minsky;			
	Aubrey Kauffman	0,50 h	$ 775,00/h	$ 387,50
08/02/12	Telephone call with Monitor and client re reimbursement agreement. E mails to Fasken personal re preparation of reimbursement agreement;			
	Aubrey Kauffman	0,60 h	$ 775,00/h	$ 465,00
08/02/12	Instructions from A. Kauffman; discussed with S. Brotman; reviewed initial affidavit and initial order; sourced precedent re reimbursement agreement;			
	Conor O'Neill	1,80 h	$ 425,00/h	$ 765,00
08/03/12	Drafted reimbursement agreement;			
	Conor O'Neill	5,10 h	$ 425,00/h	$ 2 167,50
08/03/12	Conference with A. Kauffman regarding reimbursement agreement; Conference with C. O'Neill re same;			
	Stuart Brotman	0,40 h	$ 675,00/h	$ 270,00
08/07/12	Review of memo of law re substantive consolidation;			
	Aubrey Kauffman	0,30 h	$ 775,00/h	$ 232,50
08/07/12	Edited draft reimbursement agreement; discussed same with S. Brotman; revisions to reimbursement agreement pursuant to comments from S. Brotman;			
	Conor O'Neill	2,60 h	$ 425,00/h	$ 1 105,00
08/07/12	Reviewing first draft of reimbursement agreement; Conference with C. O'Neill re same; Reviewing and revising second draft of reimbursement agreement;			

Date	Description	Heures	Taux	Montant
	Conference with A. Kauffman re same; Stuart Brotman	2,00 h	$ 675,00/h	$ 1 350,00
08/08/12	Review of and commenting on Reimbursement Agreement. Telephone call with Mr. François Lamothe. E mails to IQ, CRO and Monitor. Telephone call with Hatnay (lawyer for Ontario pension). Reporting e mail to CRO/Monitor; Aubrey Kauffman	2,80 h	$ 775,00/h	$ 2 170,00
08/09/12	Discussion of Reimbursement Agreement with CRO; Aubrey Kauffman	0,40 h	$ 775,00/h	$ 310,00
08/10/12	Review of Monitor's comments on Reimbursement Agreement. Telephone call with Monitor and Monitor's counsel to discuss issues; Aubrey Kauffman	1,10 h	$ 775,00/h	$ 852,50
08/13/12	Review of revised Reimbursement Agreement. Telephone call with Mtre Charles Mercier. Drafting of e mail with comments for the Monitor; Aubrey Kauffman	1,10 h	$ 775,00/h	$ 852,50
08/13/12	Étude du jugement de la Cour concernant le recours de M. Timmins. Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
08/13/12	Vérification de la correspondance concernant l'état de créance d'Investissement Québec. Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
08/13/12	Courriel de M. Jean Chiasson (re: Chief Restructuring Officer). Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
08/13/12	Conversation téléphonique avec Marc-André Morales. Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
08/13/12	Courriel du Chief Restructuring Officer (Sean Murphy). Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
08/13/12	Motion for the nomination of a Chief Restructuring Officer: étude de la requête et pièces. Charles Mercier	1,50 h	$ 265,00/h	$ 397,50
08/14/12	Review of Proofs of Claim documentation and e mail to Monitor and counsel. Review of Monitor's 12th Report. Telephone call with Mtre Charles Mercier re claims. Tcw Rogers re claims. Rvo spread sheet. E mail to Mtre Mercier; Aubrey Kauffman	2,40 h	$ 775,00/h	$ 1 860,00
08/14/12	Échanges de courriels avec Lino Rogers, re: Reimbursement Agreement (2). Charles Mercier	0,30 h	$ 265,00/h	$ 79,50

Notre Dossier: 275047.00020
Note d'honoraires: 672140

Re: Silicium Québec s.e.c. / Timminco

Date	Description	Heures	Taux	Montant
08/14/12	Réception d'un tableau relatif aux preuves de réclamation reçues par le moniteur et de deux lettres et Annexes reçues de LKD, avocats pour les employés syndiqués et non-syndiqués à la retraite de l'usine de Silicium Bécancour inc.; étude. Charles Mercier	2,50 h	$ 265,00/h	$ 662,50
08/15/12	Telephone call to Hatnay; Aubrey Kauffman	0,20 h	$ 775,00/h	$ 155,00
08/15/12	Vérification de certaines autorités pour qualifier le statut de créancier des employés syndiqués et non-syndiqués à la retraite de l'usine Silicium Bécancour inc. Charles Mercier	2,50 h	$ 265,00/h	$ 662,50
08/15/12	Étude du tableau des réclamations préparé par le contrôleur; commentaires sur les réclamations et les possibilités que certains créanciers prétendent avoir des droits prioritaires à Investissement Québec (Reimbursement Agreement). Charles Mercier	1,50 h	$ 265,00/h	$ 397,50
08/16/12	Review of factum re appointment of CRO. Review of e mail from the MOE re the CRO issue. Telephone call with Monitor's counsel re Reimbursement Agreement; Aubrey Kauffman	0,50 h	$ 775,00/h	$ 387,50
08/16/12	Étude du factum de Timminco sur la requête pour nomination d'un Chief Restructuring Officer et autorités; courriel du représentant du Ministère de l'Environnement, Ontario. Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
08/16/12	Correspondance concernant la présentation de la requête de Timminco pour nomination d'un Chief Restructuring Officer. Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
08/17/12	Review of Ministry of the Environment's comments on the CRO order. Attendance at court on motion to appoint the CRO; Aubrey Kauffman	1,30 h	$ 775,00/h	$ 1 007,50
08/17/12	Réception des arguments du Ministère de l'environnement quant à la demande de nomination d'un Chief Restructuring Officer. Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
08/17/12	Discussions sur la Convention de remboursement (vérification des créanciers qui prétendent avoir une garantie). Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
08/19/12	Negotiations re Reimbursement Agreement; Aubrey Kauffman	0,40 h	$ 775,00/h	$ 310,00
08/20/12	Telephone call with Rogers re Reimbursement Agreement; Aubrey Kauffman	0,40 h	$ 775,00/h	$ 310,00

Notre Dossier: 275047.00020
Note d'honoraires: 672140

Re: Silicium Québec s.e.c. / Timminco

Date	Description	Heures	Taux	Montant
08/20/12	Conversation téléphonique avec M. François Lamothe. Charles Mercier	0,40 h	$ 265,00/h	$ 106,00
08/20/12	Courriel à M. François Lamothe. Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
08/20/12	Réception de la note de Me Kauffman au CRO et contrôleur. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
08/21/12	Telephone call with Rogers re Reimbursement Agreement. Telephone call with Stikeman's re timing of motion. Review of revised Reimbursement Agreement. E mail to Mtre Charles Mercier and client. Telephone call with Dunphy. Telephone call with clients; Aubrey Kauffman	1,60 h	$ 775,00/h	$ 1 240,00
08/21/12	Courriel de M. Murphy, CRO. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
08/21/12	Version finale du "Disbursement Agreement"; étude. Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
08/21/12	Courriel de l'avocat du contrôleur. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
08/21/12	Conversation téléphonique avec M. François Lamothe. Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
08/21/12	Appel conférence avec MM. François Lamothe et Keith Hanna et Me Aubrey Kauffman. Charles Mercier	0,40 h	$ 265,00/h	$ 106,00
08/21/12	Courriels de confirmation de la présentation de la requête en distribution. Charles Mercier	0,40 h	$ 265,00/h	$ 106,00
08/22/12	Review of and comment on revised Reimbursement Agreement. Review of and comment on draft affidavit in support of the Distribution Motion. Rvo and comment on draft Order; Aubrey Kauffman	1,60 h	$ 775,00/h	$ 1 240,00
08/22/12	Courriel de M. Murphy, CRO. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
08/22/12	Courriel de Me Luc Roger - version finale du Disbursement Agreement - étude. Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
08/22/12	Conversation téléphonique avec François Lamothe.			

Re: Silicium Québec s.e.c. / Timminco

Date	Description	Heures	Taux	Montant
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
08/22/12	Révision de la procédure de preuve de réclamation ordonnée par la Cour et des commentaires échangés sur l'affidavit au soutien de la requête pour distribution.			
	Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
08/23/12	Negotiations with counsel re Distribution Motion. E mails and discussions with client and Mtre Charles Mercier;			
	Aubrey Kauffman	1,50 h	$ 775,00/h	$ 1 162,50
08/23/12	Révision du Reimbursement Agreement et de Claims Procedure Order;			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
08/23/12	Courriel du contrôleur, re: projet de jugement; étude des commentaires des différents intervenants sur les délais et la procédure entourant la distribution de la majeure partie de la créance de Investissement Québec.			
	Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
08/23/12	Vérification de l'affidavit au soutien de la requête pour distribution.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
08/23/12	Échanges et commentaires concernant le Distribution Agreement.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
08/23/12	Courriel à François Lamothe.			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
08/23/12	Appel téléphonique à François Lamothe.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
08/23/12	Vérification de possibles changements au Distribution Agreement.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
08/23/12	Correspondance sur la version finale du Distribution Agreement.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
08/23/12	Courriel de Kathryn Esaw: version finale du Distribution Agreement et de l'affidavit du CRO au soutien de la requête.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
08/23/12	Courriel de Kathryn Esaw - Requête pour l'obtention d'une ordonnance de distribution et ses annexes, affidavit et projet d'ordonnance.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
08/23/12	Conversation téléphonique avec M. François Lamothe.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50

Notre Dossier: 275047.00020
Note d'honoraires: 672140

Re: Silicium Québec s.e.c. / Timminco

08/23/12	Version finale du Distribution Agreement; étude.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
08/24/12	Review of various e mails re Distribution Motion and review of revised Agreement and Order;			
	Aubrey Kauffman	1,20 h	$ 775,00/h	$ 930,00
08/24/12	Courriel de Me Luc Roger procureur de Timminco, re: Distribution Agreement - changements.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
08/24/12	Téléphone avec François Lamothe.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
08/24/12	Discussion sur les montants de la créance et la possibilité de mettre l'état de compte à jour.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
08/24/12	Courriel de Me Luc Roger - version finale avec les montants du versement à Investissement Québec; étude.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
08/24/12	Échange de correspondance avec le procureur du contrôleur et du CRO.			
	Charles Mercier	0,40 h	$ 265,00/h	$ 106,00
08/25/12	Telephone call with Blakes re motion issues and review of e mails;			
	Aubrey Kauffman	0,80 h	$ 775,00/h	$ 620,00
08/25/12	Correspondances concernant la retenue sur les montants à verser à Investissement Québec.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
08/25/12	Vérification d'une autre version du Reimbursement Agreement.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
08/25/12	Commentaires du procureur des employés retraités syndiqués et non-syndiqués quant à la requête pour une ordonnance de remboursement.			
	Charles Mercier	0,40 h	$ 265,00/h	$ 106,00
08/27/12	Meeting with Mr. François Lamothe to discuss Distribution Motion issues. Numerous e mails and calls to deal with creditor objections to Distribution motion;			
	Aubrey Kauffman	3,50 h	$ 775,00/h	$ 2 712,50
08/27/12	Téléphone avec François Lamothe (Distribution).			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
08/27/12	Révision du contrat d'achat-vente signé avec QSI, re: clause d'ajustement;			

Date	Description	Heures	Taux	Montant
	vérification de la correspondance quant à une déduction additionnelle de 1$MM. Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
08/27/12	Courriel à François Lamothe. Charles Mercier	0,40 h	$ 265,00/h	$ 106,00
08/27/12	Téléphone à François Lamothe. Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
08/27/12	Courriel de Me Luc Roger. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
08/27/12	Courriel de Katryn Esaw (Timminco). Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
08/27/12	Étude du 13e rapport du contrôleur. Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
08/27/12	Correspondance et commentaires des procureurs du Ministère de l'Environnement et de Mercer (Haley). Charles Mercier	0,70 h	$ 265,00/h	$ 185,50
08/28/12	Prepare for and attendance at Distribution motion. Reporting to client by e mail and conference call; Aubrey Kauffman	5,00 h	$ 775,00/h	$ 3 875,00
08/28/12	Correspondance sur des changements requis des procureurs de Mercer. Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
08/28/12	Discussion avec François Lamothe (position Ministère de l'Environnement). Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
08/28/12	Étude du factum de Timminco (Distribution Agreement). Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
08/28/12	Vérification de l'immeuble couvert par la transaction QSI; étude de l'Index des immeubles. Charles Mercier	1,50 h	$ 265,00/h	$ 397,50
08/28/12	Téléphone avec François Lamothe (position de QSI). Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
08/28/12	Courriel sur la position de QSI et ordonnance du Juge Newbould. Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
08/28/12	Appel conférence sur la procédure émise par la Cour pour trancher sur la position de QSI.			

Re: Silicium Québec s.e.c. / Timminco

Date	Description	Heures	Taux	Montant
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
08/28/12	Courriel à Me Luc Rogers pour le virement bancaire.			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
08/28/12	Courriel du moniteur concernant les retenues du prix de vente remis à Investissement Québec; étude.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
08/29/12	Dictation of memo re Mercer potential claim;			
	Aubrey Kauffman	2,30 h	$ 775,00/h	$ 1 782,50
08/29/12	Correspondance relative au décaissement.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
08/29/12	Corrections au Distribution Agreement.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
08/29/12	Lecture du mémo adressé à Mercer.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
08/29/12	Vérification de l'historique de QSI avant l'achat par Timminco.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
08/30/12	Telephone calls and e mails with client and Monitor re payment. Revision of the Haley memo after discussions with client and Mtre Charles Mercier. E mails and calls re QSI working capital issue;			
	Aubrey Kauffman	2,50 h	$ 775,00/h	$ 1 937,50
08/30/12	Conversation téléphonique avec François Lamothe.			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
08/30/12	Courriel de Toni Vandelaan.			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
08/30/12	Discussion sur le mémo destiné à Mercer.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
08/30/12	Vérifications additionnelles sur l'historique de BSI avant l'achat par Timmincol.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
08/30/12	Travail sur la note à Mercer.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
08/30/12	Correspondance concernant la retenue additionnelle de 2MM$ requise par QSI.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50

Notre Dossier: 275047.00020
Note d'honoraires: 672140

Re: Silicium Québec s.e.c. / Timminco

08/30/12	Courriel de confirmation de Toni Vandelaan.			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
08/30/12	Courriel de QSI - contestation de la remise d'une partie de la retenue par le moniteur.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
08/30/12	Courriel de Linc Rogers - audition du 31 août 2012.			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
08/31/12	Prepare for and attendance at court re QSI working capital issue and obtaining an order for the distribution of an additional $1.2 M. E mail to Monitor re payment. Telephone calls with client and Mtre Charles Mercier;			
	Aubrey Kauffman	2,70 h	$ 775,00/h	$ 2 092,50
08/31/12	Étude de la contestation de QSI et de l'affidavit de Steven Lebowitz (QSI); vérification de la clause d'ajustement.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
08/31/12	Affidavit additionnel de Sean Dunphy, CRO de Timminco; étude et commentaires.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
08/31/12	Confirmation d'un virement supplémentaire dee 1.3MM$ à IQ.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
08/31/12	Conversation téléphonique avec François Lamothe (virement et environnement).			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
08/31/12	Réception du Jugement du Juge Newbould concernant la retenue.			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
08/31/12	Étude des contrats de vente d'actifs conclus entre Timminco et QSI et FA pour identifier les lots impliqués; vérification des correspondances du Ministère de l'Environnement et de Mercer.			
	Charles Mercier	2,50 h	$ 265,00/h	$ 662,50
08/31/12	Téléphone à Me Gervais-Cadrin - Environnement Québec.			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
08/31/12	Téléphone à Me Hobday - Comité de retrait des employés de BSI.			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00

Notre Dossier: 275047.00020
Note d'honoraires: 672140

Re: Silicium Québec s.e.c. / Timminco

Total des honoraires	**$ 46 347,50**	
TPS	2 317,38	
TVQ	4 623,16	
Total des taxes sur les honoraires	$ 6 940,54	
Total des honoraires incluant les taxes		$ 53 288,04
DÉBOURS		
Taxables		
Téléphones	4,44	
Copies	243,50	
Numérisation de document	3,75	
Frais de recherche en ligne	18,65	
Total des débours	270,34	
TPS	13,58	
TVQ	26,95	
Total des taxes sur les débours	$ 40,53	
Total des débours incluant les taxes		$ 310,87
Total de la présente facture		**CAD $ 53 598,91**

Sommaire des taxes

TPS	2 330,96
TVQ	4 650,11
Total des taxes de la présente facture	6 981,07

Fasken Martineau DuMoulin S.E.N.C.R.L., s.r.l.
Avocats
Agents de brevets et marques de commerce

Bureau 800
140, Grande Allée Est
Québec (Québec) Canada G1R 5M8

418 640 2000 Téléphone
418 647 2455 Télécopieur

Date: 6 décembre 2012
Notre Dossier: 275047.00020
Note d'honoraires: 691902
TPS #: 87937 6127 RT0002
TVQ #: 1023151835 TQ0002

Investissement Québec
413, rue Saint-Jacques
Bureau 500
Montréal (Québec) H2Y 1N9

Pour services professionnels rendus au 30 novembre 2012 en relation avec le dossier suivant:

Silicium Québec s.e.c. / Timminco

Total des honoraires	$ 60 031,00
Total des débours	2 050,11
Total des taxes	9 296,40
Montant total dû	**CAD $ 71,377.51**

Payable sur réception. Intérêt au taux de 1.25% par mois (15% par année) ajouté à toute somme en souffrance depuis 30 jours ou plus. Les déboursés non débités à votre compte à la date du présent état vous seront facturés ultérieurement.

Notre Dossier: 275047.00020
Note d'honoraires: 691902

Re: Silicium Québec s.e.c. / Timminco

Date	Description	Heures	Taux	Montant
05/10/12	Obtention de la décision Imperial Oil Ltd. v. Ontario à la demande d'Émilie Truchon.			
	Jacinthe Deschâtelets	0,10 h	$ 180,00/h	$ 18,00
08/28/12	Re: 275047.20: obtention de la fiche d'évaluation et de l'index des immeubles des lots 4702497, 4702498 et 3294055 du cadastre du Québec.			
	Marie Huot	0,50 h	$ 110,00/h	$ 55,00
09/03/12	Recherche et consultation d'autorités quant à l'étendue des droits du Ministère du Développement durable de l'Environnement et des Parcs dans un arrangement avec les créanciers.			
	Aurélie-Zia Gakwaya	2,00 h	$ 135,00/h	$ 270,00
09/04/12	Recherche et consultation d'autorités quant à l'étendue des droits du Ministère du Développement durable de l'Environnement et des Parcs dans un arrangement avec les créanciers.			
	Aurélie-Zia Gakwaya	5,00 h	$ 135,00/h	$ 675,00
09/05/12	Exchange of emails with Me Charles Mercier re Priority Claims			
	Aubrey Kauffman	0,30 h	$ 775,00/h	$ 232,50
09/05/12	Recherche et consultation d'autorités quant à l'étendue des droits du Ministère du Développement durable de l'Environnement et des Parcs dans un arrangement avec les créanciers.			
	Aurélie-Zia Gakwaya	2,30 h	$ 135,00/h	$ 310,50
09/05/12	Courriel de Me Gervais-Cadrin, MDDEP - transmission.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
09/05/12	Révision de l'ordonnance de distribution.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
09/05/12	Travail sur la position d'Investissement Québec			
	Charles Mercier	2,50 h	$ 265,00/h	$ 662,50
09/06/12	Recherche et consultation d'autorités quant à l'étendue des droits du Ministère du Développement durable de l'Environnement et des Parcs dans un arrangement avec les créanciers.			
	Aurélie-Zia Gakwaya	1,00 h	$ 135,00/h	$ 135,00
09/06/12	Conversation téléphonique avec Me Lavigne, Entreprises Arsenault - hypothèque légale de constructeur.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50

Notre Dossier: 275047.00020
Note d'honoraires: 691902

Re: Silicium Québec s.e.c. / Timminco

Date	Description	Heures	Taux	Montant
09/06/12	Travail sur l'argumentaire relatif à la position du Ministère de l'environnement. Charles Mercier	2,00 h	$ 265,00/h	$ 530,00
09/07/12	Exchange of emails re Priority Claim issues Aubrey Kauffman	0,30 h	$ 775,00/h	$ 232,50
09/07/12	Téléphone de Me Gervais-Cadrin (MDDEP). Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
09/07/12	Lecture d'autorités sur les droits du MDDEP. Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
09/07/12	Conversation téléphonique avec Me Emmanuelle Gervais-Cadrin. Charles Mercier	0,40 h	$ 265,00/h	$ 106,00
09/07/12	Courriel de Me Gervais-Cadrin (MDDEP). Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
09/07/12	Conversation téléphonique avec Me Hodbay. Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
09/07/12	Courriel à Mtre François Lamothe. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
09/07/12	Conversation téléphonique avec Me François Lamothe. Charles Mercier	0,40 h	$ 265,00/h	$ 106,00
09/07/12	Avis de réclamation prioritaire du Comité des employés syndiqués et non syndiqués de BSI; étude; Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
09/07/12	Avis de réclamation prioritaire de Mercer, gestionnaire de Haley pension plan; étude. Charles Mercier	0,70 h	$ 265,00/h	$ 185,50
09/09/12	Rédaction d'une note de service portant sur les pouvoirs d'ordonnance du Ministère du Développement durable, de l'Environnement et des Parcs; Aurélie-Zia Gakwaya	2,00 h	$ 135,00/h	$ 270,00
09/10/12	Review of Priority Claims of Mercer, USW and BSI Pensions. Email of comments to client. Telephone call with client. Email to Monitor and CRO re claims Aubrey Kauffman	1,30 h	$ 775,00/h	$ 1 007,50
09/10/12	Correspondance de Mtre François Lamothe (Haley Claim). Charles Mercier	0,20 h	$ 265,00/h	$ 53,00

Notre Dossier: 275047.00020
Note d'honoraires: 691902

Re: Silicium Québec s.e.c. / Timminco

Date	Description	Heures	Taux	Montant
09/10/12	Correspondance de S Dumphy -CRO. Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
09/10/12	Correspondance avec les représentants [caviardé] d'Investissement Québec face aux trois réclamations prioritaires. Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
09/10/12	Révision de l'Avis de réclamation de USW (Haley). Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
09/11/12	Review of CRO email. Telephone call with Me Charles Mercier and Me François Lamothe to discuss [caviardé] Email to CRO and Monitor setting out position re Schedule A and how to proceed. Meeting with Me Scott Rollwagan (research partner) for briefing on legal issues Aubrey Kauffman	1,30 h	$ 775,00/h	$ 1 007,50
09/11/12	Étude du BSI Working capital pour avoir l'évaluation des stocks et créances de la transaction QSI. Charles Mercier	0,40 h	$ 265,00/h	$ 106,00
09/11/12	Appel conférence avec les représentants d'IQ Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
09/11/12	Conversation téléphonique avec Me François Lamothe. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
09/11/12	Meeting with Mtre Aubrey Kaufman re pension claims issues; review memoranda Scott Rollwagen	0,40 h	$ 700,00/h	$ 280,00
09/12/12	Emails re Priority Claims Aubrey Kauffman	0,30 h	$ 775,00/h	$ 232,50
09/12/12	Rédaction d'une note de service portant sur les pouvoirs d'ordonnance du Ministère du Développement durable, de l'Environnement et des Parcs; Aurélie-Zia Gakwaya	1,20 h	$ 135,00/h	$ 162,00
09/12/12	Courriel de Linc Rogers (re: 3 créanciers prétendent avoir des droits prioritaires à Investissement Québec). Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
09/12/12	Courriel de Ashley Taylor, re: procédure à soumettre au juge pour trancher les priorités. Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
09/13/12	Telephone call with Blakes to discuss Priority Claims adjudication process. Drafting memo to all counsels setting out proposed process Aubrey Kauffman	0,70 h	$ 775,00/h	$ 542,50

Re: Silicium Québec s.e.c. / Timminco

Date	Description	Heures	Taux	Montant
09/13/12	Correspondance sur l'échéancier proposé pour trancher les priorités. Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
09/14/12	Telephone call with Blakes re proposed process. Revision of process memo. Emails with Blakes.Tcw Stikemans. Review of email from Mercer Aubrey Kauffman	0,90 h	$ 775,00/h	$ 697,50
09/14/12	Conversation téléphonique avec Me François Lamothe. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
09/14/12	Courriel de Linc Rogers au Comité des retraités de BSI. Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
09/14/12	Validation de l'échéancier proposé. Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
09/14/12	Courriel de Me Hobday (échéancier et audition prochaine pour approuver la procédure visant à décider des priorités (2). Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
09/17/12	Prepare for and Attendance at Conference call with all counsels re scheduling and process concerning Priority Claims Aubrey Kauffman	0,90 h	$ 775,00/h	$ 697,50
09/17/12	Commentaires de Me Hobday sur l'échéancier; révision de l'échéancier et de l'ordonnance de distribution intérimaire. Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
09/17/12	Révision de la position préliminaire du Comité des retraités BSI sur une priorité éventuelle; préparation de la conférence téléphonique entre procureurs pour valider l'échéancier. Charles Mercier	1,50 h	$ 265,00/h	$ 397,50
09/18/12	Review of emails re USW and BSI Priority Claims. Review of Motion record and Monitors report re Stay Extension and approval of fees Aubrey Kauffman	0,70 h	$ 775,00/h	$ 542,50
09/18/12	Courriel de Me Hobday; accord de principe échéancier. Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
09/18/12	Conversation téléphonique avec Me François Lamothe. Charles Mercier	0,40 h	$ 265,00/h	$ 106,00
09/18/12	Requête pour étendre la période de suspension des procédures et autoriser les frais du contrôleur et son avocat. Charles Mercier	0,70 h	$ 265,00/h	$ 185,50

Re: Silicium Québec s.e.c. / Timminco

09/18/12	Étude du 14e rapport du contrôleur - documents amendés relatifs à la prolongation de la suspension des procédures. Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
09/18/12	Review memorandum & Koskie Minskie materials; consider merits of priority argument; email to Mtre Aubrey Kaufman Scott Rollwagen	1,60 h	$ 700,00/h	$ 1 120,00
09/19/12	Telephone call with Mercer counsel re time line. Telephone call with Me Charles Mercier re BSI pension claim procedure Aubrey Kauffman	0,50 h	$ 775,00/h	$ 387,50
09/20/12	Budget estimate and email to Me Charles Mercier Aubrey Kauffman	0,40 h	$ 775,00/h	$ 310,00
09/20/12	Révision des arguments préliminaires du Comité des retraités de BSI; évaluation de certains arguments soulevés. Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
09/21/12	Évaluation de la contestation à venir; délais, arguments, etc. Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
09/21/12	Courriel à Me François Lamothe. Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
09/24/12	Revision of Priority Claims Adjudication memo Aubrey Kauffman	0,20 h	$ 775,00/h	$ 155,00
09/24/12	Courriel de Me Hobday (Retraités BSI). Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
09/24/12	Vérification des corrections aux procédures pour retirer le United Steel Workers Union des créanciers pouvant prétendre à une priorité. Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
09/24/12	Conversation téléphonique avec Me Hobday. Charles Mercier	0,40 h	$ 265,00/h	$ 106,00
09/24/12	Courriels échangés avec Me François Lamothe. Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
09/24/12	Avis au procureur du contrôleur. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00

Notre Dossier: 275047.00020
Note d'honoraires: 691902

Re: Silicium Québec s.e.c. / Timminco

09/25/12	Drafting of Priority Claim Adjudication Protocol and draft Approval Order. Review of Me Charles Mercier email and incorporation of Quebec timetable			
	Aubrey Kauffman	1,60 h	$ 775,00/h	$ 1 240,00
09/25/12	Courriel de Me Hobday.			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
09/25/12	Appel conférence avec Me Hobday.			
	Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
09/25/12	Confirmation du calendrier / échéancier pour disposer de la réclamation des comités BSI pour Me Hobday.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
09/25/12	Facture de Timminco sur la requête en prolongation de l'ordonnance de surseoir, étude.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
09/25/12	Révision de la requête pour approbation du protocole pour adjuger des créances prioritaires et projet d'ordonnance.			
	Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
09/26/12	Commentaires de Linc Rogers sur le projet de protocole d'adjudication des Priority Claims en Ontario et au Québec, révision.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
09/26/12	Commentaires de Nigel Meakin sur le protocole d'adjudication des Priority Claims.			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
09/27/12	Review of Monitor's comments on Protocol. Review of Me Charles Mercier comments. Circulating draft Protocol and Order to counsel			
	Aubrey Kauffman	0,70 h	$ 775,00/h	$ 542,50
09/27/12	Ordonnance approuvant la prolongation de la période de suspension des procédures.			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
09/27/12	Projet de requête final pour approbation du protocole d'adjudication des créances prioritaires.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
09/28/12	Briefing Phoenix re motion to approve Priority Claim Protocol			
	Aubrey Kauffman	0,20 h	$ 775,00/h	$ 155,00
09/28/12	Revue des prétentions de Mercer.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50

Notre Dossier: 275047.00020
Note d'honoraires: 691902

Re: Silicium Québec s.e.c. / Timminco

09/28/12	Rencontre avec Me François Lamothe pour la revue du dossier de crédit d'Investissement Québec concernant BSI.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
09/28/12	Meeting with A. Kauffman re background and required court attendance re claims protocol.			
	R. Graham Phoenix	0,30 h	$ 475,00/h	$ 142,50
10/02/12	Conference call with counsel re Protocol. Revision of documents and email to all counsel			
	Aubrey Kauffman	1,20 h	$ 775,00/h	$ 930,00
10/02/12	Correspondance concernant le protocole d'adjudication des créances prioritaires.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
10/02/12	Révision du protocole en ce qui concernne BSI et IQ et des "claims procedure".			
	Charles Mercier	0,80 h	$ 265,00/h	$ 212,00
10/02/12	Appel conférence avec tous les procureurs, re: protocole d'adjudication.			
	Charles Mercier	0,70 h	$ 265,00/h	$ 185,50
10/02/12	Correspondance, re: texte du protocole.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
10/02/12	Revue des dernières modifications au protocole - commentaires, revue du projet d'ordonnance, validation des renvois dans le Distribution Agreement et Interim Distribution Order.			
	Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
10/02/12	Conference call with intersted parties. Meeting with Mtre Aubrey Kauffman re: the same. Edit and amend draft order and protocol			
	R. Graham Phoenix	1,40 h	$ 475,00/h	$ 665,00
10/03/12	Review of final comments on Protocol and exchange of emails with counsel			
	Aubrey Kauffman	0,20 h	$ 775,00/h	$ 155,00
10/03/12	Correspondance du procureur des Comités BSI concernant le protocole.			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
10/03/12	Confirmation du consentement à faire entériner le protocole par la Cour.			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
10/03/12	Amend consent order for disputed claim protocol. Inquiry to commercial court re: available hearing times			
	R. Graham Phoenix	0,40 h	$ 475,00/h	$ 190,00

Notre Dossier: 275047.00020
Note d'honoraires: 691902

Re: Silicium Québec s.e.c. / Timminco

Date	Description	Heures	Taux	Montant
10/04/12	Telephone call with Rogers re USW email re Priority Claim. Prepare for call with USW. Email to counsel to USW. Attendance at call with USW and Monitor. Email to counsel to BSI pension committees			
	Aubrey Kauffman	0,90 h	$ 775,00/h	$ 697,50
10/04/12	Révision des conventions / protocole pour trancher les créances prioritaires - rencontre préparatoire pour préparer la contestation.			
	Charles Mercier	1,50 h	$ 265,00/h	$ 397,50
10/04/12	Discussion avec Me Charles Mercier concernant la réclamation des employés syndiqués; analyse des divers documents contenus.			
	Émilie Truchon	1,50 h	$ 165,00/h	$ 247,50
10/05/12	Telephone call with Me Charles Mercier re USW. Amendment of Protocol. Telephone call with Hobday and Harnum all re protocol. Email to counsel for USW			
	Aubrey Kauffman	1,10 h	$ 775,00/h	$ 852,50
10/05/12	Discussions sur une possible intervention du United Steel Workers pour appuyer les prétentions de Mercer - validation d'une proposition pour modifier le protocole.			
	Charles Mercier	0,70 h	$ 265,00/h	$ 185,50
10/05/12	Correspondances des procureurs des fonds de pension (2).			
	Charles Mercier	0,40 h	$ 265,00/h	$ 106,00
10/05/12	Requête pour déterminer l'équité de BSI au moment de la transaction avec QSI et pièces; étude.			
	Charles Mercier	1,50 h	$ 265,00/h	$ 397,50
10/05/12	Étude d'autorités (Fonds de pension).			
	Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
10/05/12	Recherche jurisprudentielle concernant la jurisprudence citée dans le cas Indalex Ltd.			
	Émilie Truchon	2,60 h	$ 165,00/h	$ 429,00
10/05/12	Emails with Court office. Finalize commercial list request form and submit the same.			
	R. Graham Phoenix	0,20 h	$ 475,00/h	$ 95,00
10/08/12	Prepare for and attendance at meeting with Me Scott Rollwagan to discuss research re Priority Claims. Emails re court hearing to approve Protocol. Review of USW email and responding. Telephone call with Hobday. Prepare for motion to approve protocol			
	Aubrey Kauffman	1,40 h	$ 775,00/h	$ 1 085,00
10/08/12	Review of motion record re Capital Adjustment motion			
	Aubrey Kauffman	0,40 h	$ 775,00/h	$ 310,00

Notre Dossier: 275047.00020
Note d'honoraires: 691902

Re: Silicium Québec s.e.c. / Timminco

Date	Description	Heures	Taux	Montant
10/09/12	Prepare for and attendance at motion to approve Priority Claim Adjudication Process. Various emails to counsel Aubrey Kauffman	2,20 h	$ 775,00/h	$ 1 705,00
10/09/12	Correspondance concernant USW et le protocole visant à déterminer les créances prioritaires. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
10/09/12	Courriel de Mme Léger - documents [redacted] étude (Mercer claim). Charles Mercier	0,70 h	$ 265,00/h	$ 185,50
10/09/12	Courriel à Me Kauffman, [redacted] Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
10/09/12	Correspondance échangée avec USW (protocole). Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
10/09/12	Analyse de la documentation reçue en ce qui concerne l'éventuel recours de la part des employés non syndiqués du Comité de retraite du Régime de rentes. Émilie Truchon	3,90 h	$ 165,00/h	$ 643,50
10/09/12	Conference with Mtre Aubrey Kauffman re status of order and hearing; finalizing draft order and protocol re priority claims; preparing package for attendance at Chambers motion; emails with court and service list re timing change; additional amendments to alternate order re USW. R. Graham Phoenix	1,40 h	$ 475,00/h	$ 665,00
10/09/12	Prepare for and attend meeting with Mtre Aubrey Kauffman re pension claims. Review Koskie Minsky argument re priority Scott Rollwagen	1,30 h	$ 700,00/h	$ 910,00
10/10/12	Review of Monitor letter to Judge Morawetz re referral to Quebec courts Aubrey Kauffman	0,20 h	$ 775,00/h	$ 155,00
10/10/12	Note à Maryse Léger [redacted] Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
10/10/12	Discussion sur l'ordonnance approuvant le protocole pour trancher des créances prioritaires. Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
10/10/12	Téléphone à Me Hobday. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00

Date	Description	Heures	Taux	Montant
10/10/12	Lettre du contrôleur au juge Morawetz pour le transfert d'un dossier au Québec; étude et réponse. Charles Mercier	0,40 h	$ 265,00/h	$ 106,00
10/10/12	Lettre de Steven Weitz. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
10/10/12	Correspondance au juge Morawetz. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
10/11/12	Review of documents provided by Mtre Charles Mercier re background of Timminco/BSI Aubrey Kauffman	0,80 h	$ 775,00/h	$ 620,00
10/11/12	Étude autorités, re: Comité des retraités. Charles Mercier	2,00 h	$ 265,00/h	$ 530,00
10/12/12	Dictation of memo to Mtre Charles Mercier setting out the requirements for a responding IQ affidavit Aubrey Kauffman	0,60 h	$ 775,00/h	$ 465,00
10/12/12	Courriel à Me François Lamothe. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
10/12/12	Finalisation de l'analyse de l'avis concernant la réclamation prioritaire de la part du Comité de retraite du Régime de rentes pour les employés syndiqués et analyse de la décision White Birch. Émilie Truchon	5,70 h	$ 165,00/h	$ 940,50
10/15/12	Recherche jurisprudentielle et doctrinale en ce qui concerne l'article 49 de la Loi sur les régimes complémentaires de retraite. Émilie Truchon	5,30 h	$ 165,00/h	$ 874,50
10/16/12	Recherche jurisprudentielle et doctrinale en ce qui concerne l'article 49 de la Loi sur les régimes complémentaires de retraite; suivi de la décision White Birch et analyse de la jurisprudence. Émilie Truchon	6,20 h	$ 165,00/h	$ 1 023,00
10/17/12	Recherche jurisprudentielle et doctrinale en ce qui concerne l'article 49 de la Loi sur les régimes complémentaires de retraite. Émilie Truchon	4,80 h	$ 165,00/h	$ 792,00
10/18/12	Rvo of background of Timminco and BSI and financial records on Sedar. Drafting of summary. Email to Mtre Charles Mercier Aubrey Kauffman	3,60 h	$ 775,00/h	$ 2 790,00

10/18/12	Travail à récupérer les informations nécessaires à la contestation des prétentions des fonds de pension Ontariens (Haley Pension Plan).			
	Charles Mercier	1,50 h	$ 265,00/h	$ 397,50
10/18/12	Recherche jurisprudentielle et doctrinale en ce qui concerne l'article 49 de la Loi sur les régimes complémentaires de retraite.			
	Émilie Truchon	1,00 h	$ 165,00/h	$ 165,00
10/19/12	Email to Mtre Charles Mercier re call. Email from Monitor re issuance of process order			
	Aubrey Kauffman	0,20 h	$ 775,00/h	$ 155,00
10/19/12	Motion record de QSI; ajustement.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
10/19/12	Conversation téléphonique avec Me François Lamothe.			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
10/19/12	Analyse doctrinale en ce qui concerne la création de fiducies en vertu de la Loi sur les régimes complémentaires de retraite.			
	Émilie Truchon	1,50 h	$ 165,00/h	$ 247,50
10/22/12	Review of QSI affidavit responding to working capital adjustment dispute			
	Aubrey Kauffman	0,40 h	$ 775,00/h	$ 310,00
10/22/12	Telephone call with Mtre Charles Mercier re contents of responding affidavit			
	Aubrey Kauffman	0,40 h	$ 775,00/h	$ 310,00
10/22/12	Further review of SEDAR filings re history of Timminco and BSI re response to Mercer claim. Review of documents forwarded by Mtre Charles Mercier			
	Aubrey Kauffman	1,10 h	$ 775,00/h	$ 852,50
10/22/12	Travai sur les motifs soulevés par le comité de retraite des employés BSI (CRBSI).			
	Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
10/22/12	Discussions au sujet de l'audition en Ontario.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
10/22/12	Examen du jugement référant le dossier de CRBSI au Québec.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
10/22/12	Recherche jurisprudentielle et doctrinale en ce qui concerne la fiducie réputée.			
	Émilie Truchon	3,50 h	$ 165,00/h	$ 577,50
10/23/12	Telephone call with Monitor re Quebec process			
	Aubrey Kauffman	0,20 h	$ 775,00/h	$ 155,00

Notre Dossier: 275047.00020
Note d'honoraires: 691902

Re: Silicium Québec s.e.c. / Timminco

Date	Description	Heures	Taux	Montant
10/23/12	Téléphone à Me François Lamothe. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
10/23/12	Téléphone à Me Tina Hobday. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
10/23/12	Documents envoyés par Mme Léger; étude. Charles Mercier	0,80 h	$ 265,00/h	$ 212,00
10/23/12	Courriel de Linc Roger et téléphone de Me Alexander Herman (CRBSI). Charles Mercier	0,40 h	$ 265,00/h	$ 106,00
10/23/12	Révision et analyse des procédures et rédaction d'un résumé en ce qui concerne les procédures au dossier. Émilie Truchon	4,60 h	$ 165,00/h	$ 759,00
10/24/12	Telephone call with Harnum re withdrawal of Mercer priority claim and related emails Aubrey Kauffman	0,60 h	$ 775,00/h	$ 465,00
10/24/12	Téléphone avec Me François Lamothe. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
10/24/12	Courriel à Me François Lamothe et Mme Maryse Léger. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
10/24/12	Documents additionnels d'Investissement Québec; étude. Charles Mercier	0,70 h	$ 265,00/h	$ 185,50
10/24/12	Confirmation du retrait de Mercer concernant la priorité du Haley Plan en Ontario. Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
10/24/12	Conversation téléphonique avec Me François Lamothe. Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
10/24/12	Analyse des procédures et rédaction d'un résumé relativement aux procédures. Émilie Truchon	7,00 h	$ 165,00/h	$ 1 155,00
10/25/12	Emails re withdrawal of USW claim Aubrey Kauffman	0,30 h	$ 775,00/h	$ 232,50
10/25/12	Révision des interventions qui ont mené à l'accord sur un protocole d'adjudication. Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
10/25/12	Révision de l'entente de remboursement en faveur d'Investissement Québec. Charles Mercier	0,50 h	$ 265,00/h	$ 132,50

Date	Description / Professionnel	Heures	Taux	Montant
10/25/12	Analyse des procédures et résumé.			
	Émilie Truchon	3,00 h	$ 165,00/h	$ 495,00
10/26/12	Email to Mtre François Lamothe and telephone call with Mtre Lamothe			
	Aubrey Kauffman	0,30 h	$ 775,00/h	$ 232,50
10/26/12	Confirmation du retrait de USW et de sa renonciation à une créance prioritaire.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
10/26/12	Réponse de Timminco à la procédure de QSI concernant le working capital.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
10/26/12	Requête du CRO pour obtenir des pouvoirs additionnels de régler des litiges.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
10/26/12	Préparation du cahier des procédures et pièces.			
	Émilie Truchon	2,90 h	$ 165,00/h	$ 478,50
10/29/12	Étude du "Claims procedure".			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
10/29/12	Préparation du cahier des procédures et pièces; mise à jour de la législation en ce qui concerne les régimes complémentaires de retraite et analyse de doctrine concernant la Loi sur les régimes complémentaires de retraite.			
	Émilie Truchon	5,30 h	$ 165,00/h	$ 874,50
10/30/12	Conversation téléphonique avec Tina Hobday.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
10/30/12	Revue d'autorités sur la terminaison des fonds de pension.			
	Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
10/30/12	Recherche jurisprudentielle et doctrinale concernant la Loi sur les régimes complémentaires de retraite et la fiducie réputée.			
	Émilie Truchon	4,00 h	$ 165,00/h	$ 660,00
10/31/12	Étude d'autorités - Loi sur les régimes complémentaires de rentes du Québec.			
	Charles Mercier	1,50 h	$ 265,00/h	$ 397,50
10/31/12	Recherche jurisprudentielle et doctrinale concernant la Loi sur les régimes complémentaires de retraite.			
	Émilie Truchon	1,00 h	$ 165,00/h	$ 165,00
11/01/12	Courriel de Timminco - affidavit du trésorier, re: ajustements post-clôture.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50

Notre Dossier: 275047.00020
Note d'honoraires: 691902

Re: Silicium Québec s.e.c. / Timminco

11/01/12	Analyse jurisprudentielle de la décision Indalex.			
	Émilie Truchon	2,50 h	$ 165,00/h	$ 412,50
11/02/12	Révision du 15e rapport du contrôleur.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
11/02/12	Révision d'autorités, re: Article 49 LRCP.			
	Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
11/02/12	Recherche jurisprudentielle et doctrinale en ce qui concerne la terminaison des régimes de pension et la liquidation en vertu de la Loi sur les régimes complémentaires de retraite.			
	Émilie Truchon	3,80 h	$ 165,00/h	$ 627,00
11/05/12	Review of motion record re expansion of CRO powers. Review of responding affidavit of CRO re working capital motion. Review of the 15th Report of the Monitor.			
	Aubrey Kauffman	0,90 h	$ 775,00/h	$ 697,50
11/05/12	Recherche jurisprudentielle et doctrinale concernant la terminaison des régimes de retraite et la liquidation en vertu de la Loi sur les régimes complémentaires de retraite.			
	Émilie Truchon	6,10 h	$ 165,00/h	$ 1 006,50
11/06/12	Recherche jurisprudentielle et doctrinale concernant la terminaison des régimes de retraite et la liquidation en vertu de la Loi sur les régimes complémentaires de retraite.			
	Émilie Truchon	2,00 h	$ 165,00/h	$ 330,00
11/07/12	Recherche jurisprudentielle et doctrinale concernant la terminaison des régimes de retraite et la liquidation en vertu de la Loi sur les régimes complémentaires de retraite.			
	Émilie Truchon	3,60 h	$ 165,00/h	$ 594,00
11/08/12	Ordonnance de la Cour sur les nouveaux pouvoirs du CRO.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
11/08/12	Recherche jurisprudentielle et doctrinale concernant la terminaison des régimes de retraite et la liquidation en vertu de la Loi sur les régimes complémentaires de retraite.			
	Émilie Truchon	1,40 h	$ 165,00/h	$ 231,00
11/09/12	Étude de la Loi sur les régimes complémentaires de retraite.			
	Charles Mercier	2,00 h	$ 265,00/h	$ 530,00
11/20/12	Révision de l'échéancier.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50

11/21/12	Révision de la requête pour répudier la vente d'un immeuble de Beauharnois et pièces.			
	Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
11/22/12	Review of motion record in respect of the Timminco motion re Disclaimer of the Beauharnois Sale Agreement.			
	Aubrey Kauffman	0,40 h	$ 775,00/h	$ 310,00
11/23/12	Suivi requête concernant l'immeuble de Beauharnois.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
11/26/12	Emails re mining claims			
	Aubrey Kauffman	0,20 h	$ 775,00/h	$ 155,00
11/26/12	Courriel de Sean Dumphy CRO de Timminco, re: vente d'actifs - réponse.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
11/27/12	Vérification de l'hypothèque Investissement Québec.			
	Charles Mercier	0,40 h	$ 265,00/h	$ 106,00
11/27/12	Courriel à Me François Lamothe.			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
11/27/12	Conversation téléphonique avec Me François Lamothe.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
11/27/12	Vérification du jugement autorisant la vente des biens de QSI et la radiation des droits d'Investissement Québec.			
	Charles Mercier	0,60 h	$ 265,00/h	$ 159,00
11/27/12	Vérification du propriétaire de l'immeuble de Beauharnois.			
	Charles Mercier	0,40 h	$ 265,00/h	$ 106,00
11/27/12	Courriel à M. Sean Dumphy (Mining claims).			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
11/27/12	Réponse de M. Dumphy.			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
11/28/12	Courriel de M. Dumphy.			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
11/28/12	Vérification concernant les actifs vendus à QSI et des autres actifs (propriété de Timminco).			
	Charles Mercier	0,80 h	$ 265,00/h	$ 212,00

Date	Description	Heures	Taux	Montant
11/28/12	Courriel à Me François Lamothe. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
11/28/12	Recherches auprès du Registre minier (Gestim) concernant le bail minier no 674; consultation du registre foncier en ligne et obtention d'une copie de la fiche 12-A-1 du registre des droits réels d'exploitation des ressources de l'état, d'une copie de l'index des immeubles des lots 267, 270 et 271 du cadastre de la paroisse de St-Clément, circonscription foncière de Beauharnois, d'une copie du titre de Timminco y inscrit et d'une copie de l'acte de mainlevée inscrit sous le numéro 17603284. Marie Huot	0,80 h	$ 110,00/h	$ 88,00
11/29/12	Étude du 16e rapport du contrôleur. Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
11/29/12	Conversation téléphonique avec Me François Lamothe. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
11/29/12	Courriel à M. Sean Murphy. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
11/29/12	Lettre de M. Sean Murphy re: working capital et DSLD. Charles Mercier	0,40 h	$ 265,00/h	$ 106,00
11/29/12	Documents du procureur en charge du recours collectif contre Timminco, opposant la prolongation du "stay" order, lecture. Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
11/30/12	Correspondance concernant la requête présentable le 4 décembre sur le working capital. Charles Mercier	0,40 h	$ 265,00/h	$ 106,00
11/30/12	Vérification du compte rendu des actifs de BSI. Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
11/30/12	Courriel à Me François Lamothe. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
11/30/12	Étude des procédures déposées concernant le working capital et concernant l'opposition à la reconduction du "stay" par le recours collectif contre Timminco et als. Charles Mercier	1,50 h	$ 265,00/h	$ 397,50

Notre Dossier: 275047.00020
Note d'honoraires: 691902

Re: Silicium Québec s.e.c. / Timminco

Total des honoraires	**$ 60 031,00**	
TPS	3 001,55	
TVQ	5 988,09	
Total des taxes sur les honoraires	$ 8 989,64	
Total des honoraires incluant les taxes		$ 69 020,64
DÉBOURS		
Non taxables		
Bureau d'enregistrement	3,00	
Taxables		
Téléphones	11,90	
Reliures	3,00	
Copies	689,00	
Numérisation de document	17,00	
Frais de recherche en ligne	261,68	
Recherche de Quicklaw	1 064,53	
Total des débours	2 050,11	
TPS	102,53	
TVQ	204,23	
Total des taxes sur les débours	$ 306,76	
Total des débours incluant les taxes		$ 2 356,87
Total de la présente facture		**CAD $ 71 377,51**

Sommaire des taxes

TPS	3 104,08
TVQ	6 192,32
Total des taxes de la présente facture	9 296,40

Fasken Martineau DuMoulin S.E.N.C.R.L., s.r.l.
Avocats
Agents de brevets et marques de commerce

Bureau 800
140, Grande Allée Est
Québec (Québec) Canada G1R 5M8

418 640 2000 Téléphone
418 647 2455 Télécopieur

Date: 31 janvier 2013
Notre Dossier: 275047.00020
Note d'honoraires: 707234
TPS #: 87937 6127 RT0002
TVQ #: 1023151835 TQ0002

Investissement Québec
413, rue Saint-Jacques
Bureau 500
Montréal (Québec) H2Y 1N9

Pour services professionnels rendus au 31 janvier 2013 en relation avec le dossier suivant:

Silicium Québec s.e.c. / Timminco

Total des honoraires	$ 33 199,50
Total des débours	361,95
Total des taxes	5 025,15
Montant total dû	**CAD $ 38,586.60**

Payable sur réception. Intérêt au taux de 1.25% par mois (15% par année) ajouté à toute somme en souffrance depuis 30 jours ou plus. Les déboursés non débités à votre compte à la date du présent état vous seront facturés ultérieurement.

Notre Dossier: 275047.00020
Note d'honoraires: 707234

Re: Silicium Québec s.e.c. / Timminco

Date	Description	Heures	Taux	Montant
12/03/12	Review of the Sixteenth Report of FTI Consulting Canada Inc., the factum of the Timminco Entities in respect of their motion for an order re: Working Capital Determination and the factum of QSI Partners Ltd. and Brief of Authorities in connection with QSI Partners Ltd.'s responding motion in respect of the working capital determination.			
	Aubrey Kauffman	0,50 h	$ 775,00/h	$ 387,50
12/03/12	Facteur additionnel de Timminco, re: working capital and Extension of Stay.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
12/03/12	Vérifications concernant un site de résidus de sylice dans la région de Montréal déclaré à vendre par le contrôleur.			
	Charles Mercier	0,40 h	$ 265,00/h	$ 106,00
12/05/12	Échanges de courriels suite aux commentaires du juge Morowitz lors de l'audition du 4 décembre 2012.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
12/06/12	Révision d'autorités.			
	Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
12/07/12	Review of reasons re: extension motion.			
	Aubrey Kauffman	0,30 h	$ 775,00/h	$ 232,50
12/07/12	Étude d'autorités (Fonds de pension).			
	Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
12/10/12	Téléphone avec Me Alex Herman.			
	Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
12/10/12	Revue d'autorités (pensions).			
	Charles Mercier	2,00 h	$ 265,00/h	$ 530,00
12/10/12	Révision du projet de listes de pièces conjointes.			
	Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
12/11/12	Revue de documents pour dépôt avec le cahier de pièces conjoint.			
	Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
12/11/12	Téléphone de Me Alex Herman.			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
12/11/12	Courriel de Me Herman.			
	Charles Mercier	0,20 h	$ 265,00/h	$ 53,00

Notre Dossier: 275047.00020
Note d'honoraires: 707234

Re: Silicium Québec s.e.c. / Timminco

Date	Description	Heures	Taux	Montant
12/12/12	Review of the Motion Record of Pavey Ark for the motion (sale of some Timminco assets). Aubrey Kauffman	0,30 h	$ 775,00/h	$ 232,50
12/12/12	Révision des pièces et jugements non inclus dans la liste de pièces proposée par Me Herman. Charles Mercier	3,00 h	$ 265,00/h	$ 795,00
12/13/12	Conversation téléphonique avec M. François Lamothe. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
12/13/12	Requête pour permission de vendre des "mining claims"; étude - correspondance sur la date de présentation. Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
12/14/12	Revue des rapports du contrôleur pour compléter la Liste de pièces. Charles Mercier	1,00 h	$ 265,00/h	$ 265,00
12/14/12	Courriel à M. François Lamothe. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
12/17/12	Téléphone avec Me DeBlois (LKD). Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
12/17/12	Courriel de Me Alexander Herman. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
12/17/12	Projet de lettre à Me Hobday et als et au juge Schreger (Chambre commerciale Montréal). Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
12/17/12	Requête pour directives des comités de retraite BSI, lettre au juge Schrager, lettre de l'avocate des comités de retraite et liste de pièces; étude. Charles Mercier	1,50 h	$ 265,00/h	$ 397,50
12/18/12	Telephone call with Mtre Charles Mercier re: Quebec union pension claims. Aubrey Kauffman	0,30 h	$ 775,00/h	$ 232,50
12/18/12	Téléphones avec M. François Lamothe (2). Charles Mercier	0,60 h	$ 265,00/h	$ 159,00
12/18/12	Courriel à M. François Lamothe. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
12/18/12	Lettre du Juge Schrager. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00

Re: Silicium Québec s.e.c. / Timminco

Date	Description	Heures	Taux	Montant
12/18/12	Étude de la requête et des pièces des comités de retraités BSI; vérification d'autorités sur les fiducies. Charles Mercier	3,50 h	$ 265,00/h	$ 927,50
12/19/12	Review of Monitor's Seventeenth Report to the Court dated December 18, 2012 (mining leases). Aubrey Kauffman	0,20 h	$ 775,00/h	$ 155,00
12/19/12	Révision d'autorités sur la fiducie au Québec; préparation d'un projet de contestation. Charles Mercier	2,00 h	$ 265,00/h	$ 530,00
12/19/12	Révision du 17e rapport du contrôleur. Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
12/19/12	Recherche jurisprudentielle et doctrinale concernant la fiducie réputée et l'affaire White Birch. Émilie Truchon	4,50 h	$ 165,00/h	$ 742,50
12/20/12	Courriel de Me Herman. Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
12/20/12	Téléphone avec Me Herman. Charles Mercier	0,30 h	$ 265,00/h	$ 79,50
12/20/12	Corrections à la contestation. Charles Mercier	0,50 h	$ 265,00/h	$ 132,50
12/20/12	Recherche jurisprudentielle et doctrinale concernant la fiducie réputée. Émilie Truchon	6,80 h	$ 165,00/h	$ 1 122,00
12/21/12	Ordonnance du juge Morawetz sur les "mining claims". Charles Mercier	0,20 h	$ 265,00/h	$ 53,00
12/21/12	Lecture d'autorités sur la fiducie. Charles Mercier	1,50 h	$ 265,00/h	$ 397,50
12/21/12	Recherche jurisprudentielle et doctrinale concernant la fiducie réputée. Émilie Truchon	1,80 h	$ 165,00/h	$ 297,00
12/27/12	Étude d'autorités pour la défense. Charles Mercier	3,00 h	$ 265,00/h	$ 795,00
12/28/12	Étude d'autorités (défense, re: fiducie). Charles Mercier	3,00 h	$ 265,00/h	$ 795,00

Re: Silicium Québec s.e.c. / Timminco

01/03/13	Travail sur la contestation. Charles Mercier	3,00 h	$ 275,00/h	$ 825,00
01/03/13	Préparation du plan d'argumentation. Émilie Truchon	3,80 h	$ 170,00/h	$ 646,00
01/04/13	Travail sur la contestation. Charles Mercier	3,00 h	$ 275,00/h	$ 825,00
01/07/13	Courriel de Me Alexander - échéancier, étude. Charles Mercier	0,30 h	$ 275,00/h	$ 82,50
01/07/13	Travail sur l'échéancier. Charles Mercier	0,30 h	$ 275,00/h	$ 82,50
01/07/13	Travail sur la contestation. Charles Mercier	1,00 h	$ 275,00/h	$ 275,00
01/07/13	Téléphone avec Me Herman. Charles Mercier	0,30 h	$ 275,00/h	$ 82,50
01/07/13	Discussion avec Me Morin concernant le transfert du dossier à Québec lors de la présentation le 10 janvier 2013 et courriels à Me Morin. Charles Mercier	0,50 h	$ 275,00/h	$ 137,50
01/07/13	Courriel de Me Herman. Charles Mercier	0,20 h	$ 275,00/h	$ 55,00
01/07/13	Nouvel avis de présentation de la requête des comités de pension. Charles Mercier	0,20 h	$ 275,00/h	$ 55,00
01/07/13	Préparation du plan d'argumentation. Émilie Truchon	5,60 h	$ 170,00/h	$ 952,00
01/07/13	Discussions et échanges de courriels avec Charles Mercier; instructions à Brandon Farber re: recherche sur les moyens déclinatoires en matière de LACC; revue du dossier. Luc Morin	0,60 h	$ 450,00/h	$ 270,00
01/08/13	Téléphone avec M. François Lamothe. Charles Mercier	0,30 h	$ 275,00/h	$ 82,50
01/08/13	Travail sur la contestation. Charles Mercier	0,50 h	$ 275,00/h	$ 137,50
01/08/13	Préparation du plan d'argumentation. Émilie Truchon	5,40 h	$ 170,00/h	$ 918,00

Date	Description	Heures	Taux	Montant
01/08/13	Révision d'un échange de courriels re: vacation à la Cour pour une requête de transfert de district judiciaire et dépôt de l'échéancier.			
	G. P. Michaud	0,50 h	$ 340,00/h	$ 170,00
01/08/13	Réception, lecture et analyse de documents et procédures entourant le débat avec les Comités de retraite; lecture et analyse de jurisprudence et doctrine; revue du dossier; discussions et échanges de courriels avec Charles Mercier re: stratégie.			
	Luc Morin	1,70 h	$ 450,00/h	$ 765,00
01/09/13	Préparation du plan d'argumentation et analyse jurisprudentielle.			
	Émilie Truchon	5,40 h	$ 170,00/h	$ 918,00
01/09/13	Révision du dossier en vue de la vacation à la Cour du 10 janvier 2013 et discussion avec Luc Morin.			
	G. P. Michaud	0,30 h	$ 340,00/h	$ 102,00
01/10/13	Travail sur la contestation.			
	Charles Mercier	1,50 h	$ 275,00/h	$ 412,50
01/10/13	Préparation du plan d'argumentation; analyse jurisprudentielle et doctrinale; analyse et modification de la contestation.			
	Émilie Truchon	5,80 h	$ 170,00/h	$ 986,00
01/10/13	Vacation à la Cour re: retrait de la requête pour transfert de district et dépôt de l'échéancier; suivi avec Luc Morin.			
	G. P. Michaud	1,50 h	$ 340,00/h	$ 510,00
01/11/13	Travail sur la contestation et transmission à M. François Lamothe.			
	Charles Mercier	0,70 h	$ 275,00/h	$ 192,50
01/11/13	Téléphone avec M. François Lamothe.			
	Charles Mercier	1,00 h	$ 275,00/h	$ 275,00
01/14/13	Courriel et téléphone avec M. François Lamothe.			
	Charles Mercier	0,30 h	$ 275,00/h	$ 82,50
01/14/13	Révision d'autres voies de contestation.			
	Charles Mercier	0,50 h	$ 275,00/h	$ 137,50
01/14/13	Préparation du plan d'argumentation; modification de la contestation et analyse jurisprudentielle et doctrinale.			
	Émilie Truchon	3,90 h	$ 170,00/h	$ 663,00
01/15/13	Travail sur la note concernant les Éléments additionnels de contestation de la requête des Comités de retraite.			
	Charles Mercier	2,50 h	$ 275,00/h	$ 687,50

Re: Silicium Québec s.e.c. / Timminco

Date	Description / Avocat	Heures	Taux	Montant
01/15/13	Courriel à M. François Lamothe. Charles Mercier	0,20 h	$ 275,00/h	$ 55,00
01/15/13	Téléphone avec M. François Lamothe. Charles Mercier	0,30 h	$ 275,00/h	$ 82,50
01/15/13	Rédaction de note à Charles Mercier concernant la contestation additionnelle et recherche et analyse jurisprudentielle. Émilie Truchon	3,40 h	$ 170,00/h	$ 578,00
01/16/13	Review of IQ statement of defence to Quebec union claim. Tcw Mtre Charles Mercier. Aubrey Kauffman	0,30 h	$ 775,00/h	$ 232,50
01/16/13	Finalisation de la contestation et révision de la requête des Comités. Charles Mercier	1,00 h	$ 275,00/h	$ 275,00
01/16/13	Préparation pour la signification. Charles Mercier	0,50 h	$ 275,00/h	$ 137,50
01/16/13	Finalisation de note à Charles Mercier et rédaction du plan d'argumentation. Émilie Truchon	2,80 h	$ 170,00/h	$ 476,00
01/16/13	Discussions et échanges de courriels avec Charles Mercier re: contestation; revue du dossier. Luc Morin	0,30 h	$ 450,00/h	$ 135,00
01/17/13	Rédaction du plan d'argumentation. Émilie Truchon	1,30 h	$ 170,00/h	$ 221,00
01/18/13	Rédaction du plan d'argumentation et analyse jurisprudentielle et doctrinale. Émilie Truchon	3,40 h	$ 170,00/h	$ 578,00
01/21/13	Rédaction du plan d'argumentation et analyse jurisprudentielle et doctrinale. Émilie Truchon	2,40 h	$ 170,00/h	$ 408,00
01/22/13	Travail sur le plan d'argumentation. Charles Mercier	2,50 h	$ 275,00/h	$ 687,50
01/23/13	Travail sur le plan d'argumentation. Charles Mercier	1,50 h	$ 275,00/h	$ 412,50
01/23/13	Lettre de Kathryn Esaw, report au 30 janvier. Charles Mercier	0,20 h	$ 275,00/h	$ 55,00

Notre Dossier: 275047.00020
Note d'honoraires: 707234

Re: Silicium Québec s.e.c. / Timminco

01/23/13	Lettre à Me Hobday.			
	Charles Mercier	0,20 h	$ 275,00/h	$ 55,00
01/24/13	Révision des pièces et des Régimes de rentes.			
	Charles Mercier	3,00 h	$ 275,00/h	$ 825,00
01/25/13	Discussions sur le plan d'argumentation.			
	Charles Mercier	1,00 h	$ 275,00/h	$ 275,00
01/25/13	Rencontre avec Charles Mercier concernant la modification du plan d'argumentation et les recherches complémentaires en vue de l'audition.			
	Émilie Truchon	1,00 h	$ 170,00/h	$ 170,00
01/28/13	Review of the motion record of the Timminco entities in respect of their motion for an order approving the Settlement Agreement and Vesting the Beauharnois Property; review of Motion Record re Stay Extension. Review of Working Capital Settlement issues. Telephone call with Stilkemans and Blakes. E mail to client and Monitor.			
	Aubrey Kauffman	1,80 h	$ 775,00/h	$ 1 395,00
01/28/13	Étude de deux requêtes de Timminco pour prolongation du "Stay" et approbation d'ententes conclues, notamment concernant le "working capital" de QSLP / BSI et des sommes dues par l'acheteur QSI. Validation des montants à recevoir pour IQ.			
	Charles Mercier	1,50 h	$ 275,00/h	$ 412,50
01/28/13	Échanges concernant la retenue de 787 000$; courriel de Tony Vanderloan.			
	Charles Mercier	0,50 h	$ 275,00/h	$ 137,50
01/28/13	Modification du plan d'argumentation.			
	Émilie Truchon	3,00 h	$ 170,00/h	$ 510,00
01/29/13	Review of Statement of Account; telephone call with client. Email to Monitor re account and payment of $787,000.			
	Aubrey Kauffman	0,60 h	$ 775,00/h	$ 465,00
01/29/13	Étude du 18e rapport du contrôleur.			
	Charles Mercier	0,70 h	$ 275,00/h	$ 192,50
01/29/13	Courriel de M. François Lamothe (états de comptes à jour).			
	Charles Mercier	0,20 h	$ 275,00/h	$ 55,00
01/30/13	Review of the Monitor's Eighteenth Report to the Court dated January 29, 2013.			
	Aubrey Kauffman	0,30 h	$ 775,00/h	$ 232,50
01/30/13	E mail to Monitor sending revised statement and payment arrangements.			
	Aubrey Kauffman	0,40 h	$ 775,00/h	$ 310,00

Notre Dossier: 275047.00020
Note d'honoraires: 707234

Re: Silicium Québec s.e.c. / Timminco

01/30/13	Correspondance concernant le paiement du hold back de 787 000 $.			
	Charles Mercier	0,30 h	$ 275,00/h	$ 82,50
01/30/13	Travail sur les éléments du plan d'argumentation.			
	Charles Mercier	1,00 h	$ 275,00/h	$ 275,00
01/31/13	Téléphone de Me Deblois.			
	Charles Mercier	0,20 h	$ 275,00/h	$ 55,00
01/31/13	Téléphone à Me Deblois.			
	Charles Mercier	0,20 h	$ 275,00/h	$ 55,00
01/31/13	Revue de l'échéancier et du dossier re: pas d'interrogatoires.			
	Charles Mercier	1,00 h	$ 275,00/h	$ 275,00
01/31/13	Courriel de Nigel Meakin, re: paiement des sommes dues à IQ.			
	Charles Mercier	0,20 h	$ 275,00/h	$ 55,00
01/31/13	Courriel à M. François Lamothe.			
	Charles Mercier	0,20 h	$ 275,00/h	$ 55,00
01/31/13	Téléphone avec M. François Lamothe.			
	Charles Mercier	0,20 h	$ 275,00/h	$ 55,00
01/31/13	Correspondance concernant les remboursements à IQ.			
	Charles Mercier	0,30 h	$ 275,00/h	$ 82,50
01/31/13	Échanges sur les sommes à venir.			
	Charles Mercier	0,30 h	$ 275,00/h	$ 82,50

Notre Dossier: 275047.00020
Note d'honoraires: 707234

Re: Silicium Québec s.e.c. / Timminco

Total des honoraires	**$ 33 199,50**	
TPS	1 659,98	
TVQ	3 311,65	
Total des taxes sur les honoraires	$ 4 971,63	
Total des honoraires incluant les taxes		$ 38 171,13
DÉBOURS		
Non taxables		
Bureau d'enregistrement	5,00	
Taxables		
Télécopieur	39,00	
Téléphones	1,26	
Déplacement - Voiture/Taxi-Stat.	15,94	
Copies	164,75	
Numérisation de document	19,00	
Frais de recherche en ligne	92,00	
Recherche de Quicklaw	25,00	
Total des débours	361,95	
TPS	17,95	
TVQ	35,57	
Total des taxes sur les débours	$ 53,52	
Total des débours incluant les taxes		$ 415,47
Total de la présente facture		**CAD $ 38 586,60**

Sommaire des taxes

TPS	1 677,93
TVQ	3 347,22
Total des taxes de la présente facture	5 025,15

Fasken Martineau DuMoulin S.E.N.C.R.L., s.r.l.
Avocats
Agents de brevets et marques de commerce

Bureau 800
140, Grande Allée Est
Québec (Québec) Canada G1R 5M8

418 640 2000 Téléphone
418 647 2455 Télécopieur

Date: 14 mai 2013
Notre Dossier: 275047.00020
Note d'honoraires: 728994
TPS #: 87937 6127 RT0002
TVQ #: 1023151835 TQ0002

Investissement Québec
413, rue Saint-Jacques
Bureau 500
Montréal (Québec) H2Y 1N9

Pour services professionnels rendus au 31 mars 2013 en relation avec le dossier suivant:

Silicium Québec s.e.c. / Timminco

Total des honoraires	$ 34 967,00
Total des débours	1 128,83
Total des taxes	5 362,62
Montant total dû	**CAD $ 41,458.45**

Payable sur réception. Intérêt au taux de 1.25% par mois (15% par année) ajouté à toute somme en souffrance depuis 30 jours ou plus. Les déboursés non débités à votre compte à la date du présent état vous seront facturés ultérieurement.

Avis de changement de taxe – À partir du 1er avril 2013, la province de la Colombie-Britannique commencera à imposer sa nouvelle taxe de vente provinciale (TVPBC) (7%) sur certains services juridiques. Nos factures ont été mises à jour pour refléter ce changement dans la loi.

01/21/13	Vacation à la Cour pour déposer une Contestation de l'intimée Investissement Québec de la Requête des Requérants pour directives et jugement déclaratoire touchant les réclamations propriétaires, liste de pièces et Pièce I-1			
	France Richer	0,30 h	$ 135,00/h	$ 40,50
02/01/13	Various emails with Monitor and client re receiving payment of the balance of the IQ debt			
	Aubrey Kauffman	0,50 h	$ 775,00/h	$ 387,50
02/01/13	Courriel de K. Esaw; endossements du juge Morawetz concernant le retrait de la requête pour déterminer le "working capital", concernant le site de Beauharnois et sa vente et la prolongation du "stay" jusqu'au 15 mars 2013; courriel à F. Lamothe, montant reçu (calcul); courriel de Me Herman, réponse (convention collective BSI syndiqués); courriel à F. Lamothe; courriel de F. Lamothe; conversation téléphonique avec F. Lamothe; échange de courriels concernant IQ outstading amounts.			
	Charles Mercier	1,90 h	$ 275,00/h	$ 522,50
02/01/13	Correspondance, revue sommaire du jugement de la Cour Suprême renversant le jugement de la Cour d'Appel de l'Ontario dans Indalex.			
	Charles Mercier	0,50 h	$ 275,00/h	$ 137,50
02/04/13	Étude de la décision de la Cour Suprême dans Indalex, points à utiliser à l'encontre des Comités de retraités BSI.			
	Charles Mercier	3,50 h	$ 275,00/h	$ 962,50
02/13/13	Conversation téléphonique avec F. Lamothe; vérification, statuts des griefs contre QSLP; courriels à F. Lamothe (2); vérification des griefs et convention collective.			
	Charles Mercier	1,70 h	$ 275,00/h	$ 467,50
02/13/13	Recherche des décisions ayant tranché des griefs concernant le régime de retraite.			
	Sébastien Gobeil	0,40 h	$ 245,00/h	$ 98,00
02/14/13	Vérification de certains aspects concernant l'application de la convention collective de BSI aux retraités.			
	Charles Mercier	0,70 h	$ 275,00/h	$ 192,50
02/14/13	Recherche jurisprudentielle et doctrinale concernant la cotisation patronale.			
	Émilie Truchon	3,20 h	$ 170,00/h	$ 544,00
02/14/13	Révision des règles législatives applicables - transfert des droits et obligations reliés à l'accréditation et la convention collective.			
	Sébastien Gobeil	1,20 h	$ 245,00/h	$ 294,00

Notre Dossier: 275047.00020
Note d'honoraires: 728994

Re: Silicium Québec s.e.c. / Timminco

Date	Description	Heures	Taux	Montant
02/15/13	Conversation téléphonique avec Alex Herman, avocat des Comités de fonds de pension; vérification de l'entente sur le déroulement de l'instance et de la lettre du juge Schrager. Charles Mercier	0,70 h	$ 275,00/h	$ 192,50
02/15/13	Vérification, loi sur les régimes complémentaires de retraite; commentaires du ministre et débats à l'assemblée nationale. Charles Mercier	1,00 h	$ 275,00/h	$ 275,00
02/18/13	Téléphones avec Me Alexander Herman, re: mise au rôle du dossier (2). Charles Mercier	0,40 h	$ 275,00/h	$ 110,00
02/19/13	Recherche des commentaires du Ministre et des débats de l'Assemblée nationale quant à l'art. 49 de la Loi sur les régimes complémentaires de retraite. Recherche doctrinale quant à l'esprit général de la Loi. Carole-Ann Griffin	1,20 h	$ 145,00/h	$ 174,00
02/20/13	Consultation with Mtre Charles Mercier re settlement process and disclosure Aubrey Kauffman	0,30 h	$ 775,00/h	$ 232,50
02/20/13	Appels téléphoniques à la bibliothèque de Fasken Montréal et avec Me Mercier relativement aux frais applicables à la demande de documents. Carole-Ann Griffin	0,30 h	$ 145,00/h	$ 43,50
02/20/13	Analyse des débats de l'Assemblée nationale et recherche doctrinale quant à l'art. 49 et à la Loi sur les régimes complémentaires de retraite. Explication des résultats à Me Mercier. Carole-Ann Griffin	1,30 h	$ 145,00/h	$ 188,50
02/20/13	Téléphones avec François Lamothe (2). Charles Mercier	0,80 h	$ 275,00/h	$ 220,00
02/20/13	Téléphone à Me Herman. Charles Mercier	0,30 h	$ 275,00/h	$ 82,50
02/20/13	Courriel de Me Herman. Charles Mercier	0,20 h	$ 275,00/h	$ 55,00
02/20/13	Vérification des conclusions de la requête des Comités de retraite. Charles Mercier	0,30 h	$ 275,00/h	$ 82,50
02/20/13	Téléphone avec François Lamothe. Charles Mercier	0,30 h	$ 275,00/h	$ 82,50
02/20/13	Déclaration conjointe pour mise au rôle des procureurs des Comités de retraite; étude. Charles Mercier	0,40 h	$ 275,00/h	$ 110,00

Notre Dossier: 275047.00020
Note d'honoraires: 728994

Re: Silicium Québec s.e.c. / Timminco

02/20/13	Préparation des ajouts à la Déclaration pour mise au rôle.			
	Charles Mercier	0,50 h	$ 275,00/h	$ 137,50
02/21/13	Travail sur la Déclaration conjointe pour mise au rôle; appel conférence avec Me Hobday et Me Herman; transmission des corrections à la Déclaration conjointe.			
	Charles Mercier	2,00 h	$ 275,00/h	$ 550,00
02/21/13	Réception de la copie signée de la Déclaration conjointe;signature et transmission.			
	Charles Mercier	0,30 h	$ 275,00/h	$ 82,50
02/22/13	Examen de la requête de Timminco pour approuver deux transactions concernant un immeuble et le site de "Silica fumes"			
	Charles Mercier	1,00 h	$ 275,00/h	$ 275,00
02/22/13	Recherche jurisprudentielle et doctrinale concernant les cotisations patronales.			
	Émilie Truchon	4,10 h	$ 170,00/h	$ 697,00
02/25/13	Review of letter from Union to Judge Schrager			
	Aubrey Kauffman	0,20 h	$ 775,00/h	$ 155,00
02/25/13	Correspondance de Me Hobday au juge Schrager, vérification des pièces.			
	Charles Mercier	0,50 h	$ 275,00/h	$ 137,50
02/25/13	Recherche jurisprudentielle et doctrinale concernant la cotisation patronale, les cotisations d'exercice ainsi que les cotisations d'équilibre en regard de la Loi sur les régimes complémentaires de retraite.			
	Émilie Truchon	7,90 h	$ 170,00/h	$ 1 343,00
02/26/13	Lettre du juge Schrager et réponse.			
	Charles Mercier	0,30 h	$ 275,00/h	$ 82,50
02/26/13	Recherche jurisprudentielle et doctrinale concernant la cotisation patronale, les cotisations d'exercice et les cotisations d'équilibre; note à Charles Mercier concernant la recherche; analyse des décisions AbitibiBowater, Collins & Aikman & Further Papers; analyse du règlement prévoyant des mesures d'allègement temporaire relatives au financement de déficits actuariels de solvabilité; modification du plan d'argumentation.			
	Émilie Truchon	6,20 h	$ 170,00/h	$ 1 054,00
02/27/13	Vérification d'autorités sur les cotisations patronales.			
	Charles Mercier	2,50 h	$ 275,00/h	$ 687,50
02/27/13	Recherches jurisprudentielles et doctrinales concernant la clause 11.3 du régime de retraite et l'exonération de responsabilité.			
	Émilie Truchon	6,20 h	$ 170,00/h	$ 1 054,00

Notre Dossier: 275047.00020
Note d'honoraires: 728994

Re: Silicium Québec s.e.c. / Timminco

02/28/13	Recherches jurisprudentielles et doctrinales concernant la clause 11.3 du régime de retraite et l'exonération de responsabilité.			
	Émilie Truchon	5,10 h	$ 170,00/h	$ 867,00
03/01/13	Correspondance de Me Herman re: appel conférence avec le juge Schrager; correspondance du juge Schrager.			
	Charles Mercier	0,50 h	$ 275,00/h	$ 137,50
03/01/13	Examen de la facture de Timminco pour la vente d'actifs immobiliers			
	Charles Mercier	1,00 h	$ 275,00/h	$ 275,00
03/01/13	Recherche jurisprudentielle et doctrinale concernant la clause exonératoire de responsabilité.			
	Émilie Truchon	4,60 h	$ 170,00/h	$ 782,00
03/04/13	Étude du 19e rapport du contrôleur; préparation en vue de l'appel conférence avec le juge Schrager; courriel de Me Herman; courriel de Linc Rogers, réponse; appel conférence avec le juge Schrager; courriel à F. Lamothe; lettre de Me Hobday.			
	Charles Mercier	2,10 h	$ 275,00/h	$ 577,50
03/04/13	Recherche jurisprudentielle et doctrinale concernant la clause d'exonération de responsabilité et recherche jurisprudentielle et doctrinale concernant les présomptions réfragables et irréfragables.			
	Émilie Truchon	3,90 h	$ 170,00/h	$ 663,00
03/05/13	Lettre du juge Schrager.			
	Charles Mercier	0,20 h	$ 275,00/h	$ 55,00
03/05/13	Recherche jurisprudentielle et doctrinale concernant les présomptions et la clause d'exonération de responsabilité et note de service à Me Charles Mercier.			
	Émilie Truchon	6,40 h	$ 170,00/h	$ 1 088,00
03/06/13	Recherche jurisprudentielle et doctrinale concernant les présomptions réfragables et irréfragables et note de service à Me Charles Mercier.			
	Émilie Truchon	2,50 h	$ 170,00/h	$ 425,00
03/07/13	Lettre du juge Mongeon; courriel de Me Hobday.			
	Charles Mercier	0,40 h	$ 275,00/h	$ 110,00
03/07/13	Recherche jurisprudentielle et doctrinale concernant les présomptions réfragables et irréfragables et note de service à Me Charles Mercier.			
	Émilie Truchon	5,80 h	$ 170,00/h	$ 986,00
03/08/13	Telephone call with Mtre Charles Mercier re process issue			
	Aubrey Kauffman	0,20 h	$ 775,00/h	$ 155,00

Notre Dossier: 275047.00020
Note d'honoraires: 728994

Re: Silicium Québec s.e.c. / Timminco

03/08/13	Vérification des pièces à produire pour fixer des admissions et déterminer les pièces additionnelles; conversation téléphonique avec F. Lamothe.			
	Charles Mercier	1,50 h	$ 275,00/h	$ 412,50
03/08/13	Note de service à Me Charles Mercier concernant la clause d'exonération de responsabilité selon la Loi sur les régimes complémentaires de retraite.			
	Émilie Truchon	3,50 h	$ 170,00/h	$ 595,00
03/08/13	Demande d'obtention d'une copie certifiée conforme de l'acte d'hypothèque inscrit au registre foncier sous le numéro 16368865 et d'une copie certifiée conforme de l'index des immeubles de chacun des lots concernés dans la circonscription foncière de Nicolet #2; demande d'obtention de l'état certifié des inscriptions 09-0420851-0001 et 10-0763732-0001 au RDPRM.			
	Marie Huot	1,00 h	$ 115,00/h	$ 115,00
03/11/13	Conversation téléphonique avec Me Hobday, révision des admissions à proposer.			
	Charles Mercier	0,50 h	$ 275,00/h	$ 137,50
03/11/13	Note de service à Me Charles Mercier concernant la clause d'exonération de responsabilité et complément de recherche.			
	Émilie Truchon	5,20 h	$ 170,00/h	$ 884,00
03/12/13	Rédaction d'une note de service à Me Charles Mercier concernant la clause d'exonération et complément de recherche.			
	Émilie Truchon	5,70 h	$ 170,00/h	$ 969,00
03/13/13	Courriel de Tina Hobday, réponse.			
	Charles Mercier	0,40 h	$ 275,00/h	$ 110,00
03/13/13	Conversation téléphonique avec Tina Hobday; courriel de François Lamothe, réponse; conversation téléphonique avec François Lamothe; vérification des versements reçu par IQ.			
	Charles Mercier	1,80 h	$ 275,00/h	$ 495,00
03/14/13	Préparation des pièces; suivi sur les encaissements par IQ; courriel de François Lamothe, état de compte à jour.			
	Charles Mercier	1,60 h	$ 275,00/h	$ 440,00
03/14/13	Vérification des amendements à la lettre d'offre de prêt initial d'IQ; travail sur les admissions; conversation téléphonique avec François Lamothe.			
	Charles Mercier	1,00 h	$ 275,00/h	$ 275,00
03/14/13	Recherche jurisprudentielle concernant la terminaison et la liquidation d'un régime de retraite.			
	Émilie Truchon	6,00 h	$ 170,00/h	$ 1 020,00

03/15/13	Vérification des conditions de financement relativement à l'imputation des sommes reçues en paiement.			
	Charles Mercier	0,70 h	$ 275,00/h	$ 192,50
03/15/13	Lettre de Me Herman re: confirmation au juge Mongeon, réponse; conversation téléphonique avec François Lamothe; lettre de Me Hobday au juge Mongeon.			
	Charles Mercier	0,80 h	$ 275,00/h	$ 220,00
03/15/13	Recherche jurisprudentielle concernant la terminaison et la liquidation du régime de retraite.			
	Émilie Truchon	2,50 h	$ 170,00/h	$ 425,00
03/15/13	Appel au RDPRM; demande d'obtention des états certifiés des hypothèques avant leur radiation.			
	Marie Huot	0,50 h	$ 115,00/h	$ 57,50
03/18/13	Conversation téléphonique avec François Lamothe; courriel de Maryse Léger, vérification.			
	Charles Mercier	0,60 h	$ 275,00/h	$ 165,00
03/18/13	Recherche jurisprudentielle et doctrinale concernant le droit commun en matière de priorités et d'hypothèques; rédaction de note à Me Charles Mercier concernant le gage commun des créanciers et le droit commun concernant les priorités et les hypothèques.			
	Émilie Truchon	6,50 h	$ 170,00/h	$ 1 105,00
03/19/13	Conversation téléphonique avec François Lamothe; travail sur les admissions et pièces, nouvel état de compte.			
	Charles Mercier	1,30 h	$ 275,00/h	$ 357,50
03/19/13	Recherche jurisprudentielle et doctrinale concernant le droit commun en matière de priorités et d'hypothèques.			
	Émilie Truchon	4,60 h	$ 170,00/h	$ 782,00
03/20/13	Travail sur les admissions et les nouvelles pièces.			
	Charles Mercier	1,50 h	$ 275,00/h	$ 412,50
03/20/13	Recherche jurisprudentielle et doctrinale concernant le droit commun en matière de priorités et d'hypothèques et recherche jurisprudentielle et doctrinale concernant la reconnaissance des créances garanties en vertu de la Loi sur les arrangements avec les créanciers des compagnies ainsi que la Loi sur la faillite et l'insolvabilité.			
	Émilie Truchon	6,10 h	$ 170,00/h	$ 1 037,00
03/21/13	Travail sur les admissions; courriel à Me Hobday.			
	Charles Mercier	1,50 h	$ 275,00/h	$ 412,50

03/21/13	Recherche jurisprudentielle et doctrinale concernant la reconnaissance des créances garanties en vertu de la Loi sur les arrangements avec les créanciers et la Loi sur la faillite et l'insolvabilité.			
	Émilie Truchon	4,30 h	$ 170,00/h	$ 731,00
03/22/13	Courriel de Me Hobday.			
	Charles Mercier	0,20 h	$ 275,00/h	$ 55,00
03/22/13	Recherche jurisprudentielle et doctrinale concernant la reconnaissance des créances garanties en vertu de la Loi sur les arrangements avec les créanciers des compagnies et la Loi sur la faillite et l'insolvabilité.			
	Émilie Truchon	3,50 h	$ 170,00/h	$ 595,00
03/25/13	Recherche jurisprudentielle et doctrinale concernant les créances garanties en vertu de la Loi sur les arrangements avec les créanciers des compagnies et la Loi sur la faillite et l'insolvabilité.			
	Émilie Truchon	4,10 h	$ 170,00/h	$ 697,00
03/26/13	Révision d'autorités, fiducies présumées.			
	Charles Mercier	2,00 h	$ 275,00/h	$ 550,00
03/26/13	Rédaction de note à Me Charles Mercier concernant les créances garanties en vertu de la Loi sur les arrangements avec les créanciers des compagnies et de la Loi sur la faillite et l'insolvabilité.			
	Émilie Truchon	5,90 h	$ 170,00/h	$ 1 003,00
03/27/13	Rédaction de note à Me Charles Mercier concernant les créances garanties en vertu de la Loi sur les arrangements avec les créanciers et de la Loi sur la faillite et l'insolvabilité; recherche jurisprudentielle et doctrinale concernant les conflits de lois.			
	Émilie Truchon	5,90 h	$ 170,00/h	$ 1 003,00
03/28/13	Révision d'autorités en prévision de la rédaction du plan d'argumentation.			
	Charles Mercier	2,00 h	$ 275,00/h	$ 550,00
03/28/13	Recherche jurisprudentielle et doctrinale concernant le conflit de lois à l'égard de la Loi sur les arrangements avec les créanciers des compagnies et de la Loi sur les régimes complémentaires de retraite; recherches complémentaires concernant les créances garanties.			
	Émilie Truchon	7,60 h	$ 170,00/h	$ 1 292,00

Notre Dossier: 275047.00020
Note d'honoraires: 728994

Re: Silicium Québec s.e.c. / Timminco

Total des honoraires	**$ 34 967,00**	
TPS	1.748,35	
TVQ	3 487,96	
Total des taxes sur les honoraires	$ 5 236,31	
Total des honoraires incluant les taxes		$ 40 203,31
DÉBOURS		
Non taxables		
Bureau d'enregistrement	276,00	
RDPRM	10,10	
Taxables		
Téléphones	,78	
Copies	230,00	
Numérisation de document	14,00	
Frais de recherche en ligne	534,45	
Recherche de Quicklaw	50,00	
Total des débours	1 128,83	
TPS	42,25	
TVQ	84,06	
Total des taxes sur les débours	$ 126,31	
Total des débours incluant les taxes		$ 1 255,14
Total de la présente facture		**CAD $ 41 444,95**

Sommaire des taxes

TPS	1 790,60
TVQ	3 572,02
Total des taxes de la présente facture	5 362,62

TAB 15

SULLIVAN ON THE CONSTRUCTION OF STATUTES

Sixth Edition

by

Ruth Sullivan

Sullivan on the Construction of Statutes
Sixth Edition by Ruth Sullivan

© LexisNexis Canada Inc. 2014
September 2014

All rights reserved. No part of this publication may be reproduced or stored in any material form (including photocopying or storing it in any medium by electronic means and whether or not transiently or incidentally to some other use of this publication) without the written permission of the copyright holder except in accordance with the provisions of the *Copyright Act*. Applications for the copyright holder's written permission to reproduce any part of this publication should be addressed to the publisher.

Warning: The doing of an unauthorized act in relation to a copyrighted work may result in both a civil claim for damages and criminal prosecution.

The publisher, (Author(s)/General Editor(s)) and every person involved in the creation of this publication shall not be liable for any loss, injury, claim, liability or damage of any kind resulting from the use of or reliance on any information or material contained in this publication. While every effort has been made to ensure the accuracy of the contents of this publication, it is intended for information purposes only. When creating this publication, none of the publisher, the (Author(s)/General Editor(s)) or contributors were engaged in rendering legal or other professional advice. This publication should not be considered or relied upon as if it were providing such advice. If legal advice or expert assistance is required, the services of a competent professional should be sought and retained. The publisher and every person involved in the creation of this publication disclaim all liability in respect of the results of any actions taken in reliance upon information contained in this publication and for any errors or omissions in the work. They expressly disclaim liability to any user of the work. The author is not responsible for the accuracy of pinpoint page numbers in footnotes.

Library and Archives Canada Cataloguing in Publication

Sullivan, Ruth, 1946-
Sullivan on the construction of statutes / Ruth Sullivan. — 6th ed.

Includes index.
Previous ed. published under title: Sullivan and Driedger on the construction of statues.
ISBN 978-0-433-47148-6

1. Law—Canada—Interpretation and construction. I. Title.

KE265.S84S95 2008 349.71 C2008-903901-7
KF425.S95 2008

Published by LexisNexis Canada, a member of the LexisNexis Group
LexisNexis Canada Inc.
123 Commerce Valley Dr. E., Suite 700
Markham, Ontario
L3T 7W8

Customer Service
Telephone: (905) 479-2665 • Fax: (905) 479-2826
Toll-Free Phone: 1-800-668-6481 • Toll-Free Fax: 1-800-461-3275

CHAPTER 10

Consequential Analysis

INTRODUCTION

§10.1 What counts as absurdity and what, if anything, courts should do in response to absurdity are questions that have a lengthy and vexed history in statutory interpretation. This chapter begins by briefly reviewing that history, focusing on the different answers that have been given to these questions and the justification for taking absurdity into account. It sets out a principle that purports to summarize current judicial practice.

§10.2 The chapter next describes certain well-established categories of absurdity — defeating legislative purpose, irrational distinctions, contradictions and anomalies, inconvenience, interference with the administration of justice, and unfair or unreasonable results.

§10.3 The chapter ends by examining the ways avoiding absurdity is used to help resolve interpretation issues.

§10.4 ***Relevance of consequences in interpretation.*** When a court is called on to interpret legislation, it is not engaged in an academic exercise. Interpretation involves the application of legislation to facts in a way that affects the well-being of individuals and communities for better or worse. Not surprisingly, the courts are interested in knowing what the consequences will be and judging whether they are acceptable. Consequences judged to be good are presumed to be intended and generally are regarded as part of the legislative purpose. Consequences judged to be contrary to accepted norms of justice or reasonableness are labelled absurd and are presumed to have been unintended. If adopting an interpretation would lead to absurdity, the courts may reject that interpretation in favour of a plausible alternative that avoids the absurdity. As O'Halloran J.A. explained in *Waugh v. Pedneault*:

> The Legislature cannot be presumed to act unreasonably or unjustly, for that would be acting against the public interest. The members of the Legislature are elected by the people to protect the public interest, and that means acting fairly and justly in all circumstances. Words used in enactments of the Legislature must be construed upon that premise. That is the real 'intent' of the Legislature. [1]

---

[1] [1948] B.C.J. No. 1, [1949] 1 W.W.R. 14, at 15 (B.C.C.A.).

- overlap between provisions enacted by different levels of government within the same jurisdiction
- overlap between provisions enacted by the same legislative body
- overlap between executive legislation and other legislation within the same jurisdiction

There are also distinct ways in which provisions may overlap:

- duplication: provisions establish the same rule or confer powers to deal with the same matter
- contradiction: one provision *permits* what another provision prohibits
- impossibility of dual compliance: one provision *requires* what the other provision prohibits

The test for conflict in the context of overlapping federal and provincial law has received a good deal of judicial attention and that case law has influenced the test for conflict in other contexts. However, considerations governing the definition of conflict in one context may not be appropriate in another.

§11.23 ***Federal-provincial overlaps.*** In cases of federal-provincial overlap, since neither enacting legislature is subordinate to the other and each is entitled to legislate to the full extent of its powers, it is not surprising that the courts have adopted a narrow definition of conflict, often referred to as "operational conflict". It would be a serious violation of rule of law if citizens were subjected to conflicting federal and provincial rules. However, to the extent federal law renders valid provincial law inoperative, the sovereignty of the provincial level of government is impaired. A narrow definition of conflict is needed to reconcile these competing concerns.

§11.24 The operational conflict test as formulated by Dickson J. in *Multiple Access Ltd. v. McCutcheon* sets out the most stringent test for determining conflict — the impossibility of dual compliance. Dickson J. wrote:

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says 'yes' and the other says 'no'; 'the same citizens are being told to do inconsistent things'; compliance with one is defiance of the other.[28]

The overlapping federal and provincial provisions at issue in the *Multiple Access* case were virtually identical prohibitions of insider trading; they duplicated one another. In such a case compliance with one ensures compliance with the other

---

28 [1982] S.C.J. No. 66, [1982] 2 S.C.R. 161, at 191 (S.C.C.). Dickson, J. offers three formulations of actual conflict in this passage; it is arguable that the first (one enactment says yes and the other says no) is significantly broader than the other two.) An enactment authorizing (as opposed to requiring) an activity that is prohibited by another enactment could be captured by the first formulation but not by the other two.

and the possibility of conflict does not arise. However, in *Bank of Montreal v. Hall*[29] the provisions were contradictory: the federal provision permitted immediate seizure of assets in circumstances where the provincial legislation prohibited immediate seizure. In such a case, even though one law says yes and the other says no, a creditor could nonetheless comply with both by postponing seizure in accordance with provincial law. The effect of complying with the provincial law, however, would be to undo the intended effect of the federal one. Given federal paramountcy, this was unacceptable. La Forest J. wrote:

> *Multiple Access Ltd. v. McCutcheon* was a case involving duplicative federal and provincial legislation. This Court rejected the view that such enactments could not operate concurrently simply because resort to the one would preclude resort to the other. ... In the following excerpt Dickson J. provides a cogent and succinct rationale for this view, at pp. 189-90:
>
> > ... there is no true repugnancy in the case of merely duplicative provisions since it does not matter which statute is applied; the legislative purpose of Parliament will be fulfilled regardless of which statute is invoked by a remedy-seeker; application of the provincial law does not displace the legislative purpose of Parliament.
>
> [Emphasis added by La Forest J.]
>
> On the basis of these principles, the question before me is thus reducible to asking whether there is an 'actual conflict in operation' ... in the sense that the legislative purpose of Parliament stands to be displaced in the event that the appellant bank is required to defer to the provincial legislation in order to realize on its security.[30]

Bank of Montreal v. Hall thus introduced a second form of operational conflict, occurring "when application of the provincial statute can fairly be said to frustrate Parliament's legislative purpose."[31]

§11.25 In *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, the Court reformulated the test for federal-provincial conflict, limiting operational conflict to cases where compliance with one provision entails breach of the other and establishing frustrated federal purpose as a separate form of conflict.[32] Commenting on the latter test, McLachlin C.J. wrote:

> ... The party seeking to invoke the doctrine of federal paramountcy bears the burden of proof.... That party must prove that the impugned legislation frustrates the purpose of a federal enactment. To do so, it must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incom-

29 [1990] S.C.J. No. 9, [1990] 1 S.C.R. 121 (S.C.C.).

30 *Ibid.*, at 151-52.

31 *Ibid.*, at 154-55.

32 [2010] S.C.J. No. 39, 2010 SCC 39, [2010] 2 S.C.R. 536, at para. 64 (S.C.C.). Citations omitted. See also *Quebec (Attorney General) v. Canada (Human Resources and Social Development)*, [2011] S.C.J. No. 60, 2011 SCC 60, at paras. 17, 20 (S.C.C.).

patible with this purpose. The standard for invalidating provincial legislation on the basis of frustration of federal purpose is high; permissive federal legislation, without more, will not establish that a federal purpose is frustrated when provincial legislation restricts the scope of the federal permission.[33]

In both the *Pilots Association* case and a companion appeal, *Quebec (Attorney General) v. Lacombe*,[34] the overlap was between federal regulations allowing citizens to construct private aerodromes in any place other than the built-up area of a city or town and provincial legislation prohibiting aerodromes within an agricultural zone in the one appeal and within the municipality in the other. In both, a majority of the Court concluded that neither test for conflict was met. The federal legislation did not require entrepreneurs to construct aerodromes in locations where such a use of land was prohibited. Nor was there evidence that the purpose of the federal regulations was to have aerodromes constructed in those particular locations.[35]

§11.26 The tests for conflict in the context of federal-provincial overlap are well-established and cogent, if not always easy to apply. The issue addressed below is the extent to which they apply, and should apply, in other contexts involving overlapping provisions.

§11.27 ***Superior – inferior levels of government.*** In the second context in which overlap occurs, a hierarchical relationship exists between the two enacting bodies. Unlike the grants of jurisdiction conferred on Parliament and provincial legislatures by the *Constitution Act, 1867*, the jurisdiction conferred by Parliament or a provincial legislature on a territorial or municipal council is a mere delegation and can be withdrawn at any time. The basis for adopting a narrow definition of conflict — the equal sovereignty of Parliament and provincial legislatures — does not apply here. However, other considerations come into play.

§11.28 First, the purpose of delegating legislative authority to a territorial or municipal council is to establish a level of government at the local level to regulate local land use and local commercial activity, raise revenue, build infrastructure and deliver services required by the local population. A similar purpose animates the delegation of authority to band councils under ss. 81 and 83 of the *Indian Act*[36] or under instruments such as the James Bay Agreement.[37] Second,

---

33 *Ibid.*, at para. 66. See also *Marine Services International Ltd. v. Ryan Estate*, [2013] S.C.J. No. 44, 2013 SCC 44, at paras. 68-69 (S.C.C.).

34 [2010] S.C.J. No. 38, 2010 SCC 38, [2010] 2 S.C.R. 453 (S.C.C.).

35 For an example of a case in which the provincial legislation was found to frustrate the purpose of the federal legislation, see *Law Society of British Columbia v. Mangat*, [2001] S.C.J. No. 66, 2001 SCC 67, [2001] 3 S.C.R. 113 (S.C.C.), where federal legislation permitted persons other than members of a provincial bar to charge a fee for representing a client before the Immigration and Refugee Board whereas provincial legislation prohibited such representation.

36 R.S.C. 1985, c. I-5.

tory wording to this effect. This latter principle finds early expression in the judgment in *Peacock v. Bell* (1677), 1 Wms. Saund. 73, 85 E.R. 84, at pp. 87-88:

> And the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged.

This basic principle continues to be applied up to the present day:...[112]

§15.58 Section 646 of the *Canada Shipping Act* conferred jurisdiction on the Admiralty Court for actions arising out of wrongful death. There was nothing in the section purporting to remove jurisdiction from other courts. Thus, Iacobucci and Major JJ. concluded:

> The lack of any express language ... excluding superior court jurisdiction, or vesting sole jurisdiction in the Admiralty Court, is sufficient by itself to justify interpreting s. 646 as conferring on the Admiralty Court only concurrent jurisdiction over fatal accident claims by dependants. This finding accords with the basic principle of statutory construction that a statute should not be interpreted as abrogating the inherent jurisdiction of the superior courts unless it employs clear language to this effect...[113]

Modern courts concede the necessity and desirability of referring some types of dispute to statutory tribunals. However, they are careful to reserve superior courts' jurisdiction to review the decisions of inferior tribunals to ensure compliance with the law. For this reason, and in keeping with s. 96 of the *Constitution Act*, privative clauses are strictly construed.[114]

LIBERAL CONSTRUCTION OF SOCIAL WELFARE LEGISLATION

§15.59 ***Governing principle.*** Social welfare legislation is to be liberally construed so as to advance the benevolent purpose of the legislation. If reasonable doubts or ambiguities arise, they are to be resolved in favour of the claimant. By providing benefits to the community or to groups in the community, social welfare legislature achieves a fairer allocation of social goods and may improve the health, security or dignity of targeted members of the community. The courts' primary concern is ensuring that the intended benefits are received.

§15.60 This "favour the claimant" principle was first asserted by the Supreme Court of Canada in *Abrahams v. Canada (Attorney General)*.[115] The issue in the

---

112 *Ibid.*, at para. 46.

113 *Ibid.*, at para. 61. See also *Canada (Attorney General) v. TeleZone Inc.*, [2010] S.C.J. No. 62, 2010 SCC 62, [2010] 3 S.C.R. 585, at paras. 5-6 (S.C.C.); *Vaughan v. Canada*, [2005] S.C.J. No. 12, [2005] 1 S.C.R. 146, at paras. 27-29, 33 (S.C.C.).

114 See *Crevier v. A.-G. (Quebec)*, [1981] S.C.J. No. 80, [1981] 2 S.C.R. 220, at 236-38 (S.C.C.).

115 [1983] S.C.J. No. 2, [1983] 1 S.C.R. 2, at 7-8 (S.C.C.).

case was whether the appellant was entitled to benefits under the *Unemployment Insurance Act*. Wilson J. wrote:

> Since the overall purpose of the Act is to make benefits available to the unemployed, I would favour a liberal interpretation of the re-entitlement provisions. I think any doubt arising from the difficulties of the language should be resolved in favour of the claimant. ...[116]

Since *Abrahams* was decided, the notion that social welfare legislation is to receive a liberal construction has become firmly established.

§15.61 In *Gray v. Ontario (Disability Support Program, Director)*,[117] for example, the Ontario Court of Appeal had to decide whether the appellant was a "person with a disability" within the meaning of the *Ontario Disability Support Program Act* and therefore eligible for income support under the Act. In determining that she came within the statutory definition of this expression, the Court relied in part on the liberal construction rule. McMurtry C.J.O. wrote:

> As remedial legislation, the ODSPA should be interpreted broadly and liberally and in accordance with its purpose of providing support to persons with disabilities. ...
>
> It is my view that as social welfare legislation, any ambiguity in the interpretation of the ODSPA should be resolved in the claimant's favour. In *Wedekind v. Ontario (Ministry of Community and Social Services)*[118] ... this court stated:
>
>> [T]he principle of construction . . . applicable to social welfare legislation . . . is, where there is ambiguity in the meaning of a statute, the ambiguity should be resolved in favour of the applicant seeking benefits under the legislation.
>
> The rationale for such an approach was set out by the Federal Court of Appeal in *Villani v. Canada (Attorney General)*,[119] as follows:
>
>> The liberal approach to remedial legislation flows from the notion that such legislation has a benevolent purpose which courts should be careful to respect.[120]

---

116 *Ibid.*, at 7-8. See also *Caron v. Canada (Employment & Immigration Commission)*, [1991] S.C.J. No. 2, [1991] 1 S.C.R. 48, at 59 (S.C.C.); *Fournier v. Ontario (Ministry of Community & Social Services)*, [2013] O.J. No. 2761, 2013 ONSC 2891, at paras. 50-51, 63 (Ont. S.C.J.); *P.A.L. v. Alberta (Criminal Injuries Review Board)*, [2012] A.J. No. 613, 2012 ABCA 177, at para. 42 (Alta. C.A.); *Gill v. Canada (Attorney General)*, [2010] F.C.J. No. 896, 2010 FCA 182, at para. 37 (F.C.A.); *Canada (Attorney General) v. Frye*, [2005] F.C.J. No. 1316, 2005 FCA 264, at para. 14 (F.C.A.); *Morrison Estate v. Cape Breton Development Corp.*, [2003] N.S.J. No. 353, 2003 NSCA 103, at para. 36 (N.S.C.A.); *Villani v. Canada (Attorney General)*, [2001] F.C.J. No. 1217, 2001 FCA 248, [2002] 1 F.C. 130, at para. 27 (F.C.A.); *Canada (Attorney General) v. Haberman*, [2000] F.C.J. No. 1215, at paras. 30-31 (F.C.A.).

117 [2002] O.J. No. 1531, 212 D.L.R. (4th) 353 (Ont. C.A.).

118 [1994] O.J. No. 2849, 21 O.R. (3d) 289, at 296-97 (Ont. C.A.), leave to appeal to S.C.C. refused 191 N.R. 397*n*.

119 [2001] F.C.J. No. 1217, at para. 26, 205 D.L.R. (4th) 58 (F.C.A.).

§15.62 The liberal approach to legislation has also been adopted to prevent abuses of power. In *Machtinger v. HOJ Industries Ltd.*, Iacobucci J. wrote:

> ... The objective of the [Employment Standards] Act is to protect the interests of employees by requiring employers to comply with certain minimum standards, ... To quote Conant Co. Ct. J. in Pickup, ... 'the general intention of this legislation ... is the protection of employees, and to that end it institutes reasonable, fair and uniform minimum standards.'[121] The harm which the Act seeks to remedy is that individual employees, and in particular non-unionized employees, are often in an unequal bargaining position in relation to their employers. ...
>
> Accordingly, an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not.[122]

§15.63 In a dissenting judgment in *Finlay v. Canada (Minister of Finance)*,[123] McLachlin J. referred to a related principle, which she called the "adequacy principle". The legislation to be interpreted in *Finlay* was a provision of the Canada Assistance Plan setting out what minimum standards of social assistance to the needy would have to be met by provinces to qualify for federal contribution to the costs. McLachlin J. wrote:

> An interpretation which ensures that at least the basic requirements of the person in need are satisfied complies with the principle that a court, faced with general language or contending interpretations arising from ambiguity in statutory language, should adopt an interpretation which best assures adequacy of assistance.[124]

She pointed out that this principle has been invoked in social welfare cases in both Canada[125] and the United States.[126]

---

120 *Gray v. Ontario (Disability Support Program, Director)*, [2002] O.J. No. 1531, 212 D.L.R. (4th) 353 at paras. 9, 10 and 12 (Ont. C.A.). See also *Mule v. Ontario (Director, Disability Support Program)*, [2007] O.J. No. 5322, at para. 19 (Ont. C.A.); *Morrison (Estate) v. Cape Breton Development Corp.*, [2003] N.S.J. No. 353, at para. 36 (N.S.C.A.); *Kolodziejski v. Electronic Auto Service Ltd.*, [1999] S.J. No. 276, 174 D.L.R. (4th) 525, at paras. 23-27 (Sask. C.A.).

121 *Pickup v. Litton Business Equipment Ltd.*, [1983] O.J. No. 2401, 3 C.C.E.L. 266, at 274 (Ont. Co. Ct.).

122 *Machtinger v. HOJ Industries Ltd.*, [1992] S.C.J. No. 41, [1992] 1 S.C.R. 986, at paras. 31-32 (S.C.C.). See also *Re Rizzo & Rizzo Shoes Ltd.*, [1998] S.C.J. No. 2, [1998] 1 S.C.R. 27, at para. 36 (S.C.C.).

123 [1993] S.C.J. No. 39, [1993] 1 S.C.R. 1080 (S.C.C.).

124 *Ibid.*, at 1113.

125 See, for example, *Hills v. Canada (Attorney General)*, [1988] S.C.J. No. 22, [1988] 1 S.C.R. 513, 48 D.L.R. (4th) 193, at 211 (S.C.C.); *Canada (Canada Employment and Immigration Commission) v. Gagnon*, [1988] S.C.J. No. 65, [1988] 2 S.C.R. 29, at 38, 52 (S.C.C.); *Caron v. Canada (Canada Employment & Immigration Commission)*, [1991] S.C.J. No. 2, [1991] 1 S.C.R. 48, at 59 (S.C.C.).

126 See cases cited by McLachlin J. in *Finlay v. Canada (Minister of Finance)*, [1993] S.C.J. No. 39, [1993] 1 S.C.R. 1080 at 1114 (S.C.C.).

TAB 16

Intitulé de la cause :

Timminco ltée (Arrangement relatif à)

DANS L'AFFAIRE DE LA LOI SUR LES ARRANGEMENTS AVEC LES CRÉANCIERS DES COMPAGNIES, L.R.C. (1985), c. C-36 EN SA VERSION MODIFIÉE
et
DANS L'AFFAIRE D'UN PLAN DE TRANSACTION OU D'ARRANGEMENT DE : TIMMINCO LIMITÉE, BÉCANCOUR SILICON INC., débitrices
et
FTI CONSULTING INC., contrôleur
et
COMITÉ DE RETRAITE DU RÉGIME DE RENTES POUR LES EMPLOYÉS SYNDIQUÉS DE SILICIUM BÉCANCOUR INC., COMITÉ DE RETRAITE DU RÉGIME DE RENTES POUR LES EMPLOYÉS NON-SYNDIQUÉS DE SILICIUM BÉCANCOUR INC., requérants
c.
INVESTISSEMENT QUÉBEC, intimée

[2014] J.Q. no 402

2014 QCCS 174

2014EXP-451

J.E. 2014-233

EYB 2014-232146

9 C.C.P.B. (2d) 100

9 C.B.R. (6th) 173

2014 CarswellQue 384

No : 500-11-043844-121

Cour supérieure du Québec
District de Montréal

L'honorable Robert Mongeon, J.C.S.

Entendu : 27, 28 mai 2013.
Rendu : 24 janvier 2014.

(181 paragr.)

Successions et fiducies -- Fiducie -- Constitution -- Fiducie statutaire -- L'art. 49 de la Loi sur les régimes complémentaires de retraite établit une fiducie réputée touchant les cotisations d'équilibre suspendues et non versées aux comités de retraite -- La fiducie réputée de l'art. 49 de la Loi pouvait donc affecter la portion des liquidités de SBI représentant le total des cotisations d'équilibre dues et non encore versées aux comités de retraite, à cause de l'ordonnance de suspension, sans qu'il soit nécessaire de les séparer du reste des actifs liquides de SBI et, du même fait, les caractères d'incessibilité et d'insaisissabilité de ces mêmes montants aux termes de l'art. 264 de la Loi pouvaient les affecter -- Requête pour directives et jugement déclaratoire accueillie en partie.

Régimes de retraite et pensions -- Régimes privés de retraite -- Administration du régime -- Cotisations -- Suspension -- Législation -- Interprétation -- L'art. 49 de la Loi sur les régimes complémentaires de retraite établit une fiducie réputée touchant les cotisations d'équilibre suspendues et non versées aux comités de retraite -- La fiducie réputée de l'art. 49 de la Loi pouvait donc affecter la portion des liquidités de SBI représentant le total des cotisations d'équilibre dues et non encore versées aux comités de retraite, à cause de l'ordonnance de suspension, sans qu'il soit nécessaire de les séparer du reste des actifs liquides de SBI et, du même fait, les caractères d'incessibilité et d'insaisissabilité de ces mêmes montants aux termes de l'art. 264 de la Loi pouvaient les affecter -- Requête pour directives et jugement déclaratoire accueillie en partie.

Sûretés et publicité des droits -- Hypothèque -- Étendue et objet -- La notion d'incessibilité et d'insaisissabilité des cotisations d'équilibre dues et non versées empêche SBI et ses créanciers d'utiliser ces sommes à des fins autres que celles prévues à la Loi sur les régimes complémentaires de retraite -- Ces sommes ne peuvent donc faire l'objet d'une hypothèque mobilière universelle avec ou sans dépossession -- Requête pour directives et jugement déclaratoire accueillie en partie.

Requête pour directives et jugement déclaratoire présentée par le Comité de retraite du régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. et le Comité de retraite du régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc. (les Comités). Silicium Bécancour Inc. (SBI) est une société filiale de Timminco Inc. Les deux sociétés sont sous la protection de la Loi sur les arrangements avec les créanciers des compagnies. Par ordonnance rendue le 16 janvier 2012, tous les paiements d'équilibre devant être effectués par SBI en faveur de deux régimes de retraite à prestations déterminées au bénéfice de ses employés ont été suspendus. Les deux régimes de retraite sont en situation de terminaison de régime vu qu'ils n'ont, à toutes fins pratiques, plus d'employés participants. De plus, ces régimes de retraite sont en situation de déficit actuariel de solvabilité. Les Comités soutiennent qu'en vertu du droit québécois, les montants

réclamés pour les cotisations d'équilibre et pour les déficits actuariels sont réputés détenus en fiducie par SBI en faveur des Régimes de retraite. En date du 20 juillet 2012, les réclamations des Comités totalisent 10 558 290 $ et 4 296 220 $ respectivement. Les Comités sont d'avis que leurs réclamations constituent des créances prioritaires prenant rang avant celle d'Investissement Québec (IQ), qui détient une hypothèque universelle sans dépossession sur la totalité des biens meubles et immeubles de SBI et en vertu de laquelle elle a reçu un paiement de quelques 29 millions de dollars en remboursement de sa créance. Les Comités prétendent que leurs réclamations prioritaires se doivent d'être reconnues comme telles par le Tribunal.

DISPOSITIF : Requête accueillie. L'art. 49 de la Loi sur les régimes complémentaires de retraite (Loi) établit une fiducie réputée touchant les cotisations d'équilibre suspendues et non versées aux Comités. Pour qu'une fiducie réputée existe en droit québécois, il faut que le législateur intervienne clairement en ce sens, ce qui est le cas en l'espèce. La fiducie réputée de l'art. 49 de la Loi pouvait donc affecter la portion des liquidités de SBI représentant le total des cotisations d'équilibre dues et non encore versées aux Comités, à cause de l'ordonnance de suspension, sans qu'il soit nécessaire de les séparer du reste des actifs liquides de SBI et, du même fait, les caractères d'incessibilité et d'insaisissabilité de ces mêmes montants aux termes de l'art. 264 de la Loi pouvaient les affecter. Le fait que les sommes aient été distribuées à IQ sous réserve des droits des Comités n'a pas eu pour effet de faire perdre à ces actifs leur caractère de biens fiduciaires, incessibles et insaisissables. La notion d'incessibilité et d'insaisissabilité des cotisations dues et non versées empêche SBI et ses créanciers d'utiliser ces sommes à des fins autres que celles prévues à la Loi. Ces sommes ne peuvent donc faire l'objet d'une hypothèque mobilière universelle avec ou sans dépossession. On ne peut cependant étendre l'application de l'art. 49 ou de l'art. 264 de la Loi aux déficits actuariels. Le remboursement de ces soldes est régi par une série de règles particulières.

Législation citée :

Code civil du Bas-Canada

Code civil du Québec, art. 1260 et ss., art. 1260, art. 1261, art. 1262, art. 1263, art. 2644, art. 2645

Code de procédure civile, art. 46, art. 553(7)

Loi de l'impôt sur le revenu, L.R.C. 1985, ch. 1, art. 227, art. 227(5)

Loi modifiant la Loi concernant l'Impôt sur le tabac, la Loi sur le Ministère du Revenu et d'autres dispositions législatives d'ordre fiscal L.Q. 1993, c. 79, art. 39

Loi ontarienne sur les sûretés mobilières, L.R.O. 1990, ch. D-10, art. 30(7)

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3, art. 67, art. 67(1), art. 67(1)(b), art. 67(3), art. 227(4.1)

Loi sur le Ministère du revenu, L.R.Q., c. M-31, art. 20, art. 20, al. 2

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11, art. 17

Loi sur les banques, L.C. 1991, ch. 46, art. 427

Loi sur les régimes complémentaires de retraite, L.R.Q., c. R-15.1, chapitre XIII, art. 6, art. 7, art. 8, art. 9, art. 14-18, art. 37-52, art. 37, art. 38, art. 39, art. 49, art. 138, art. 139, art. 198 et ss., art. 205(3), art. 208 et ss., art. 228-264, art. 228, art. 229-230, art. 230.0.01-230.0.012, art. 264, art. 264(3), al. 2

Pensions Benefit Act, R.S.O. 1990, c. P-8, art. 57, art. 57(3), art. 57(4)

Règlement sur les régimes complémentaires de retraite, (1990) 122 C.O. II-3246, art. 28(3)

Avocats :

Me Tina Hobday, Me Alexander Herman, Langlois Kronström Desjardins, procureurs de la partie demanderesse.

Me Charles Mercier, Me Émilie Truchon, Fasken Martineau, procureurs de la partie défenderesse.

Me Adam Spiro, Me Steven Weisz, Blake, Cassels & Graydon, procureurs de la partie intimée.

JUGEMENT SUR DIRECTIVES ET
JUGEMENT DÉCLARATOIRE TOUCHANT
CERTAINES RÉCLAMATIONS PRIORITAIRES
(Articles 11 et 17 LACC)

INTRODUCTION ET MISE EN SITUATION

1 Bécancour Silicon Inc. ou, dans sa dénomination française, Silicium Bécancour Inc. (SBI) est une société filiale de Timminco Inc. (TI).

2 SBI et TI sont sous la protection de la *Loi sur les arrangements avec les créanciers des compagnies L.R.C. (1985) c. c-36* telle qu'amendée (la LACC) depuis le 3 janvier 2012, suite à l'émission d'une ordonnance initiale prononcée par le juge Geoffrey Morawetz de la Cour supérieure de justice de l'Ontario.

3 Par ordonnance subséquente rendue le 16 janvier 2012 (l'"Ordonnance de Suspension")[1], tous les paiements d'équilibre devant être effectués par SBI en faveur de deux régimes de retraite à

prestations déterminées au bénéfice de ses employés syndiqués[2] et non-syndiqués[3] ont été suspendus.

4 Ces régimes sont régis d'une part par les contrats les constituant (P-1 et P-2) et par la *Loi sur les régimes complémentaires de retraite, LRQ c. R-15.1* telle qu'amendée (la LRCR). Il est admis que les cotisations d'exercice et d'équilibre ont été versées par l'employeur SBI jusqu'au 31 janvier 2012 et que les cotisations d'exercice ont été versées jusqu'à date.

5 Les deux régimes de retraite P-1 et P-2 sont (ou sont sur le point de le devenir) en situation de terminaison de régime vu que ces deux régimes n'ont, à toutes fins pratiques, plus d'employés participants. De plus, ces régimes de retraite sont en situation de déficit actuariel de solvabilité.

6 Au 31 décembre 2011, le déficit actuariel de solvabilité du régime des employés syndiqués était de 9 889 600,00$ (pièce P-3) tandis que celui des employés non-syndiqués était de 3 998 700,00$ (pièce P-4)[4].

7 Pour effacer, du moins en partie, les déficits actuariels précités, SBI devait verser des cotisations d'équilibre de 93 810,00$ et de 41 710,00$ par mois dans les caisses des deux régimes précités (pièces P-3 et P-4). Ces cotisations d'équilibre sont suspendues depuis l'Ordonnance de Suspension précitée.

8 Les Comités de retraite requérants sont d'avis que leurs réclamations précitées constituent des créances prioritaires prenant rang avant celle de l'Intimée Investissement Québec (IQ), qui détient une hypothèque universelle sans dépossession sur la totalité des biens meubles et immeubles de SBI et en vertu de laquelle elle a reçu un paiement de quelques 29 millions de dollars en remboursement de sa créance.

9 L'objet du présent jugement porte sur le statut de ces réclamations prioritaires.

10 Les deux Comités de retraite requérants prétendent que leurs réclamations prioritaires se doivent d'être reconnues comme telles par le Tribunal, prenant rang devant celle de IQ et dudit paiement de plus de 29 millions$ effectué par le Contrôleur en faveur de IQ dans le cadre d'un processus de liquidation des actifs de SBI effectué sous l'empire de la LACC.

11 Les parties sont aussi d'accord pour stipuler que si les réclamations des requérants sont reconnues comme prioritaires en tout ou en partie, IQ devra rembourser lesdites réclamations pouvant aller jusqu'à 14.8 millions$ (sauf à parfaire) aux deux Comités de retraite selon leurs intérêts respectifs. Par contre, si le Tribunal vient à la conclusion que les réclamations en question ne sont pas prioritaires, IQ n'aura rien à rembourser. Un tel scénario ferait en sorte que, puisqu'il n'existe pas (ou très peu) de reliquat disponible pour rembourser les réclamations non-prioritaires, les caisses de retraite seraient privées de sommes importantes qui auront comme conséquence l'amputation des prestations de retraite des retraités pouvant aller jusqu'à hauteur de près de 40%. On réalise donc facilement l'importance de la question pour les retraités.

LA CHRONOLOGIE DES FAITS PERTINENTS

12 Voici la chronologie des faits et des documents pertinents et nécessaires à une bonne compréhension des questions à résoudre et de la solution du présent litige :

a) 3 janvier 2012 : Première ordonnance du juge Morawetz, [2012] O.J. No. 266, visant la suspension de toutes les procédures de réclamation contre TI et sa filiale SBI, avec date effective à 0h01 le 3 janvier 2012;

b) 16 janvier 2012 : Ordonnance de Suspension des cotisations d'équilibre par TI et SBI. Le juge Morawetz était d'avis d'une part que les états financiers de TI et/ou de SBI ne leur permettaient pas d'assumer de telles obligations. De plus, le juge Morawetz a écrit (dans ses motifs déposés le 2 février 2012) :

> **[56] The courts have characterized <u>special</u> (or amortization) <u>payments as pre-filing obligations</u> which are stayed upon an initial order being granted under the CCAA. (See *AbitibiBowater Inc.*, (Re) reflex, (2009) 57 C.B.R. (5th) 285 (Q.S.C.); *Collins & Aikman Automotive Canada Inc.* 2007 CanLII 45908 (ON SC), (2007), 37 C.B.R. (5th) 282 (Ont. S.C.J.) and *Fraser Papers Inc. (Re)* 2009 CanLII 39776 (ON SC), (2009), 55 C.B.R. (5th) 217 (Ont. S.C.J.).**
>
> **[57] I accept the submission of counsel to the Applicants to the effect that <u>courts in Ontario and Quebec have addressed the issue of suspending special (or amortization) payments in the context of a CCAA restructuring and have ordered the suspension of such payments where the failure to stay the obligation would jeopardize the business of the debtor company and the company's ability to restructure.</u>**
>
> **...**
>
> **[60] Counsel to the Timminco Entities submits that where it is necessary to achieve the objective of the CCAA, <u>the court has the jurisdiction to make an order under the CCAA suspending the payment of the pension contributions, even if such order conflicts with, or overrides, the QSPPA or the PBA.</u>**

> **[61] The evidence has established that the Timminco Entities are in a severe liquidity crisis and, if required to make the pension contributions, will not have sufficient funds to continue operating. The Timminco Entities would then be forced to cease operations to the detriment of their stakeholders, including their employees and pensioners.**
>
> **[62] On the facts before me, <u>I am satisfied that the application of the QSPPA and the PBA would frustrate the Timminco Entities ability to restructure and avoid bankruptcy</u>. Indeed, while the Timminco Entities continue to make Normal Cost Contributions to the pension plans, requiring them to pay what they owe in respect of special and amortization payments for those plans would deprive them of sufficient funds to continue operating, forcing them to cease operations to the detriment of their stakeholders, including their employees and pensioners.**
>
> (soulignements ajoutés)

c) 13-14 juin 2012 : Vente de la quasi-totalité des actifs importants appartenant à SBI et à TI. Ces ventes avaient été préalablement approuvées par le juge Morawetz (pièce P-10). Les ventes d'actifs ont généré des liquidités de 30.8 millions$[5];

d) 17 août 2012 : Nomination d'un CRO ("Chief Restructuring Officer");

e) 28 août 2012 : Remboursement du prêt (garanti par hypothèque sur l'universalité des biens de SBI) au montant de 25 millions$ plus certains intérêts accumulés (voir pièces P-11 et P-16). Ce paiement a été fait sous réserve des droits des Comités de retraite requérants;

f) 7 septembre 2012 : Demandes de priorité des Comités de retraite requérants couvrant a) les deux déficits actuariels de solvabilité des deux régimes (9 889 600,00$ et 3 998 700,00$) sauf à parfaire et b) le solde des cotisations d'équilibre non versées pour les mois de décembre 2011 à juin 2012 (668 690,00$ et 297 520,00$), le tout selon la pièce P-17.

g) 18 octobre 2012 : Ordonnance du juge Morawetz, suite à une demande des parties (pièce P-19) visant à référer la requête des Comités de retraite à la Cour supérieure du Québec (pièce P-20). Les parties ont aussi convenu que la requête serait scindée, le tribunal québécois devant d'abord se prononcer

sur les questions de droit avant de se prononcer dans un deuxième temps sur le quantum des réclamations, le cas échéant.

13 Plus spécifiquement, la pièce P-20 reproduit l'ordonnance du juge Morawetz approuvant un "Priority Claim Adjudication Protocol" ("le Protocole") aux termes duquel la Cour supérieure de l'Ontario demande à la Cour supérieure du Québec de déterminer si les réclamations des Comités de retraite requérants jouissent d'une priorité notamment sur la réclamation de IQ[6].

14 Le Protocole stipule ce qui suit :

A. OVERVIEW

1. In accordance with the Reimbursement Agreement (the "Reimbursement Agreement") among Investissement Québec ("IQ"), FTI Consulting Canada Inc., as court-appointed Monitor, and Bécancour Silicon Inc., dated August 28, 2012 and the August 28, 2012 Interim Distribution Order (the "Interim Distribution Order"), two (2) sets of claims have been designated as Reimbursement Claims, namely:

...

(ii) a claim by Le Comté de retraite du Régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc. and a claim by Le Comité de retraite du Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (collectively the "BSI Pension Committees") (the "BSI Pension Reimbursement Claims").

2. IQ disputes that the above Reimbursement Claims have priority over the IQ Security and the parties do not anticipate the dispute will be resolved through the consented resolution process provided for in the Interim Distribution Order. Accordingly, an adjudication is required to determine whether such Reimbursement Claims constitute Priority Claims.

The following is the protocol for the adjudication of

> **whether the Reimbursement Claims constitute Priority Claims.**

...

15 La Requête des Comités de retraite pour directives et jugement déclaratoire touchant les réclamations prioritaires a donc été déposée le 17 décembre 2012. A la demande des parties, l'échéancier a été modifié et l'audition des questions de droit a été débattue les 27 et 28 mai 2013 devant le soussigné.

16 Voici comment les Comités de retraite formulent les questions de droit :

> **49.** **La question en litige est de déterminer si les réclamations des Comités de retraite ont priorité sur la créance d'Investissement Québec. La question du statut des réclamations des Comités de retraite vis-à-vis les DIP Charges n'est pas une question en litige et a déjà été tranchée par le juge Morawetz (voir l'Ordonnance du 8 février 2012, [2012] O.J. No. 596, Pièce P-9).**
>
> **50.** **SBI a cessé de verser les cotisations d'équilibre suite à l'Ordonnance du 16 janvier 2012 qui les a suspendues. Au 23 juillet 2012, les cotisations d'équilibre (avec intérêts) accumulés mais non-versées pour les deux Régimes de retraite totalisaient environ 1 million de dollars (voir lettres du 20 juillet 2012, Pièce P-3 et Pièce P-4).**
>
> **51.** **Les déficits de solvabilité (qui incluraient les cotisations d'équilibre non-versées) pour les deux Régimes de retraite au 31 décembre 2011 totalisaient environ 14 millions de dollars (voir lettres du 20 juillet 2012, Pièce P-3 et Pièce P-4) et seront cristallisés si la terminaison des Régimes de retraite par la Régie des rentes du Québec est complétée.**
>
> **52.** **En vertu du droit québécois applicable à la question en litige, les montants réclamés par les Comités de retraite pour les cotisations d'équilibre et pour les déficits actuariels, sont réputés détenus en fiducie par l'employeur SBI en faveur des Régimes de retraite.**
>
> **53.** **Il est évident que de telles fiducies réputées ont un rang prioritaire sur la réclamation garantie d'Investissement Québec.**

(soulignements ajoutés)

17 Une fois que le Tribunal aura statué sur l'existence ou non d'une fiducie réputée affectant les créances des Comités de retraite, une seconde étape devra déterminer l'effet d'une telle fiducie réputée sur la créance hypothécaire de IQ.

18 Les Comités requérants demandent donc au Tribunal de :

> **DÉCLARER comme étant des Réclamations prioritaires [Priority Claims] en vertu de la Convention de remboursement entérinée par l'Ordonnance du 28 août 2012 de la Cour supérieure de justice (Rôle commercial) de l'Ontario, les réclamations suivantes :**

1. **les cotisations d'équilibre non versées à la Caisse de retraite du Régime de rentes des employés syndiqués de Silicium Bécancour Inc.;**
2. **les cotisations d'équilibre non versées à la Caisse de retraite du Régime de rentes des employés non syndiqués de Silicium Bécancour Inc.;**
3. **le déficit actuariel de solvabilité du Régime de rentes des employés syndiqués de Silicium Bécancour Inc.; et**
4. **le déficit actuariel de solvabilité du Régime de rentes des employés non-syndiqués de Silicium Bécancour Inc.**

> **PRENDRE ACTE du paragraphe C.2. du Protocole d'adjudication afin que les quantums des Réclamations prioritaires [Priority Claims] soient déterminés une fois que cette honorable Cour aura décidé sur la nature des réclamations, et soient déterminés selon l'Ordonnance du Processus de réclamation [Claims Procedure Order] ou selon une ordonnance de cette Cour.**

> **PRENDRE ACTE du paragraphe 9 de l'Ordonnance du 28 août 2012 de la Cour supérieure de justice (Rôle commercial) de l'Ontario et de la Convention de remboursement à l'annexe "A" de celle-ci, en vertu de laquelle Investissement Québec remboursera les sommes déclarées par cette Cour comme étant prioritaires, le cas échéant, à Silicium Bécancour Inc. par l'entremise du Contrôleur, FTI Consulting Inc., afin que Silicium Bécancour Inc. transmette ces sommes aux Requérants.**

19 Subsidiairement et à défaut de reconnaître que la LRCR crée une telle fiducie, les Comités de retraite demandent au Tribunal d'utiliser ses pouvoirs inhérents et/ou découlant de l'article 46 du Code de Procédure Civile du Québec pour conclure à l'existence d'une créance prioritaire en leur faveur.

20 La question de savoir si l'article 49 LRCR crée une telle fiducie a déjà été abordée dans l'affaire *White Birch*[7] alors que le soussigné a répondu négativement à la question. Au surplus, ce

jugement énonce que si elle existe, la fiducie réputée de l'article 49 LRC est affectée par l'application de la doctrine de la préséance des lois fédérales sur les lois provinciales lorsqu'il y a conflit entre ces deux régimes législatifs. Dans *White Birch*, il s'agissait de déterminer si la fiducie réputée de l'article 49 LRCR aurait eu priorité sur la créance super-prioritaire du prêteur "DIP" autorisée sous l'empire de la LACC.

21 Les Comités de retraite requérants contestent cette analyse. Ils prétendent que la conclusion voulant que l'article 49 LRCR ne crée pas de fiducie réputée est mal fondée en droit. Ils reviennent donc à la charge mais avec certains arguments additionnels et reformulés qui méritent d'être examinés.

22 Quant à la position de l'Intimée IQ, ses arguments suivent en tous points l'affaire White Birch précitée. Forte de cette décision, IQ prétend que la Requête des Comités de retraite n'a donc aucun fondement légal et doit être rejetée.

23 Voyons, dans un premier temps et plus en détail la situation telle qu'elle se présentait dans l'affaire *White Birch* : alors que l'une des plus importantes papetières au Canada, est sous la protection de la LACC et qu'une ordonnance initiale suspend les cotisations d'équilibre payables par l'employeur à l'endroit de plusieurs régimes de retraite à prestations déterminées, une requête est déposée visant à ordonner à la débitrice de continuer à verser lesdites cotisations d'équilibre. Nous sommes au lendemain de la décision de la Cour d'appel de l'Ontario dans l'affaire *Indalex*[8], qui vient de reconnaître que ce genre d'obligation doit être honoré par les employeurs malgré la protection de la LACC, et ce, notamment, parce que ces sommes sont réputées être détenues en fiducie par les employeurs au bénéfice des Régimes de retraite concernés et que cette fiducie n'est pas affectée par le processus de restructuration de la LACC.

24 Dans l'affaire *White Birch*, les syndicats, comtés de retraite et regroupements de retraités requérants ont notamment plaidé que l'article 49 LRCR créait, en droit québécois, le même genre de fiducie que celle qui était créée aux termes de l'article 57 du *Pensions Benefit Act*[9] de l'Ontario. L'essentiel du jugement *White Birch* décide que l'article 49 LRCR ne crée pas de fiducie légale réputée selon le droit québécois. Partant de là, les cotisations d'équilibre ou encore les soldes des déficits actuariels des régimes de retraite ne jouissent d'aucune priorité par rapport aux autres dettes de l'employeur et ne constituent que des dettes chirographaires.

25 Le présent recours, basé sur une trame factuelle quasi-identique, devrait donc à première vue suivre le même sort : en l'absence d'une fiducie opposable à IQ, la requête des Comités de retraite devrait donc être rejetée. Par contre, comme nous le verrons plus loin, les faits du présent dossier ne sont pas exactement les mêmes et certains arguments juridiques plaidés en l'instance ou soulevés par le Tribunal n'ont pas été abordés dans l'affaire *White Birch*.

<u>LES ARGUMENTS DES PARTIES</u>

26 Les Comités de retraite soutiennent que même si la décision dans *White Birch* énonce et

répond négativement à la question de savoir si l'article 49 LRCR crée une fiducie en droit québécois, il y a lieu de revoir l'ensemble de la question.

27 Dans un premier temps, les Comités de retraite recherchent l'intervention du soussigné comme juge agissant sous l'autorité de la LACC afin que sa décision soit prise dans l'objectif général de cette loi et ... "de permettre au débiteur de continuer d'exercer ses activités et, dans le cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif."[10]

28 Toutefois, une question préliminaire se pose visant à déterminer si le soussigné agit à titre de juge superviseur du processus en vertu de la LACC ou s'il agit à titre de décideur délégué par le juge superviseur pour entendre et régler un différend entre deux créanciers qui prétendent avoir un droit prioritaire sur la créance de l'autre, à la lumière du contexte législatif du Québec.

29 Le soussigné est d'avis qu'il n'agit pas à titre de juge superviseur mais à titre de décideur délégué, (analogue à un "Claims Officer") désigné comme tel en vertu d'un Protocole de détermination de réclamations établi sous l'empire de la LACC.

30 Les Comités de retraite plaident, dans un premier temps, que la LRCR est une loi d'intérêt public. Cela n'est pas contredit. Les principes énoncés en ce sens, notamment par le juge Pierre Dalphond dans l'arrêt *Hydro-Québec*[11] rendu par la Cour d'appel en 2005, sont tout à fait justes. Il en va de même pour ceux que l'on retrouve dans les affaires *Monsanto*[12] et *Buschau*.[13]

31 Les Comités de retraite font aussi état du fait que, contrairement aux affaires *White Birch*[14] et *Indalex*,[15] le litige ne se situe pas entre un créancier de la débitrice et un prêteur "DIP" jouissant d'une super-priorité en vertu de la LACC. Ils ont raison et le soussigné n'entend pas faire bénéficier IQ d'une quelconque super-priorité découlant de la LACC. D'ailleurs, IQ n'en réclame aucune. IQ n'invoque que son statut de créancière garantie aux termes de son hypothèque universelle.

POSITION DES REQUÉRANTS SUR LA FIDUCIE RÉPUTÉE DE L'ARTICLE 49 LRCR

32 L'existence d'une fiducie réputée créée par l'article 49 LRCR demeure le principal argument des Comités de retraite.

33 Leur raisonnement est le suivant :

a) Tout d'abord, l'article 49 LRCR se lit comme suit :

> **"Jusqu'à leur versement à la caisse de retraite ou à l'assureur, <u>les cotisations et les intérêts accumulés sont réputés détenus en fiducie</u> par l'employeur, <u>que ce dernier les ait ou non gardés séparément de ses biens."</u>**

(soulignements ajoutés)

b) Cet article doit se lire avec l'article 1262 C.c.Q. qui se lit ainsi :

"La fiducie est établie par contrat, à titre onéreux ou gratuit, par testament ou, dans certains cas, par la loi. Elle peut aussi, lorsque la loi l'autorise, être établie par jugement."

(soulignements ajoutés)

Donc, pour les requérants, le constituant de la fiducie de l'article 49 LRCR est l'employeur, le patrimoine fiduciaire est constitué des cotisations à être versées, le fiduciaire est la caisse de retraite concernée et le transfert des biens (ou les séparation des biens) est réputé exister selon les termes de l'article 49.

c) Étant donné que le Code civil du Québec prévoit à son article 1262 qu'une fiducie peut être établie, notamment par la loi, il s'ensuit toujours, selon les Comités requérants, que le simple texte de l'article 49 LRCR est suffisant pour constituer une véritable fiducie opposable aux créanciers de BSI, prioritaires ou non.

d) La thèse des Comités de retraite exclut l'application de l'article 1260 C.c.Q. à la fiducie créée par la loi. Voici ce qu'ils plaident dans leur plan d'argumentation aux paragraphes 54, 55 et 56 :

54. Il y a plusieurs formes de fiducies qui sont créées par différents moyens, tel qu'énoncé à l'article 1262 CCQ.

1262. La fiducie est établie par contrat, à titre onéreux ou gratuit, par testament ou, dans certains cas, par la loi. Elle peut aussi, lorsque la loi l'autorise, être établie par jugement.

55. Si une fiducie est établie par contrat, l'article 1260 CCQ stipule que cette fiducie doit rencontrer certaines conditions formelles.

1260. La fiducie résulte d'un acte par lequel une personne, le constituant, transfère de son patrimoine à un autre patrimoine qu'il constitue, des biens qu'il affecte à une fin particulière et qu'un fiduciaire s'oblige, par le fait de son acceptation, à détenir et à administrer.

56. L'article 1262 CCQ reconnaît aussi la fiducie établie par la loi. Afin que le législateur crée une telle fiducie, il le fait par législation <u>sans que cette création n'ait à rencontrer les conditions formelles prévues à l'article 1260 CCQ</u>. Le législateur a donc le pouvoir de créer des fiducies par voie d'une disposition statutaire de fiducies réputées. C'est exactement l'effet du texte de l'article 49 Loi RCR : cet article énonce que peu importe si les montants ont été gardés séparément ou non des biens de l'employeur, ils sont néanmoins réputés être détenus en fiducie dans un patrimoine d'affectation distinct pour le bénéfice des Comités de retraite de SBI.

(soulignements ajoutés)

e) Ainsi, pour les Requérants, l'article 1262 C.c.Q. permet la création d'une fiducie par le seul effet de la loi et la loi peut alors prévoir l'existence d'une fiducie valide même si les quatre conditions d'existence de la fiducie du *Code civil* prévues à l'article 1260 C.c.Q. ne sont pas remplies. Il suffit alors que la loi écarte spécifiquement l'une de ces conditions. Selon eux, c'est exactement ce que fait l'article 49 LRCR en éliminant la condition de l'article 1260 C.c.Q. exigeant que les biens mis en fiducie soient séparés du patrimoine du constituant.

f) Plus encore, les Comités requérants prétendent que leur raisonnement correspond aux exigences de l'article 1261 C.c.Q. Ils plaident au paragraphe 57 de leur plan d'argumentation :

57. L'article 1261 s'applique à toutes formes de fiducies, incluant celles établies par la loi.

1261. Le patrimoine fiduciaire, formé des biens transférés en fiducie, constitue un patrimoine d'affectation autonome et distinct de celui du constituant, du fiduciaire ou du bénéficiaire sur lequel aucun d'entre

eux n'a de droit réel.

g) Ainsi, les Comités requérants prétendent que les montants des cotisations d'équilibre, dues mais non versées, constituent un patrimoine d'affectation autonome et distinct de celui du constituant, sous le contrôle juridique d'un fiduciaire et réputé séparé des biens du constituant (l'employeur), même si ce patrimoine n'a pas été séparé des autres biens de ce même constituant.[16]

h) Ainsi, le concept de fiducie réputée suffit pour que les actifs de SBI soient grevés d'une charge fiduciaire prioritaire qui les soustrait des biens de l'employeur et du gage commun des créanciers de ce dernier.[17]

i) Pour conclure, les Comités requérants suggèrent que s'il fallait que l'article 49 LRCR se conforme aux conditions essentielles de l'article 1260 C.c.Q., l'article 49 LRCR n'aurait aucun effet, ce qui serait contraire au principe de base d'interprétation des lois voulant que le législateur ne parle pas pour ne rien dire et qu'il faut nécessairement donner un sens à un texte législatif clair. De plus, la LRCR étant une loi d'application spécifique, elle doit être interprétée comme ayant préséance sur une loi d'application générale telle que le Code civil du Québec.

POSITION DE IQ SUR LA FIDUCIE RÉPUTÉE DE L'ARTICLE 49 LRCR

34 IQ reprend à son crédit les principes déjà énoncés dans les dossiers *AbitibiBowater*[18] et *White Birch*[19].

35 IQ insiste plus particulièrement sur le fait que toute fiducie établie par la loi, tel que le prévoit l'article 1262 C.c.Q., doit se conformer à toutes les exigences de l'article 1260 C.c.Q. Citant notamment l'auteur Jacques Beaulne[20], IQ souligne que les quatre éléments de l'article 1260 C.c.Q. doivent être rencontrés, soit :

a) le transfert d'un bien du patrimoine du constituant
b) à un autre patrimoine;
c) dont les biens sont affectés à une fin particulière;
d) qu'un fiduciaire s'oblige à détenir et à administrer.

36 Citant les affaires *Banque de Nouvelle-Écosse c. Thibault*[21] et *White Birch*[22], IQ rappelle que (par la juge Deschamps dans *Thibault*) :

... "le modèle de la fiducie ne peut être travesti pour incorporer des contrats

où le constituant conserve tous les droits sur le patrimoine. Je conclus donc que le Régime n'a pas les caractéristiques d'une fiducie."

et que (par le soussigné dans White Birch) :

"La comparaison dans la situation qui nous occupe est flagrante : ici, White Birch ne se départit de rien. Elle garde l'entier contrôle sur les biens censés faire partie d'une fiducie et ne crée aucun patrimoine d'affectation."

37 IQ soutient donc que, SBI ne s'étant jamais départie de certains actifs en vue de constituer un patrimoine distinct, il ne peut y avoir de fiducie réelle applicable en l'espèce[23].

38 Avant de poursuivre plus loin, il est nécessaire d'établir ce sur quoi porte l'article 49 LRCR.

39 L'article 49 LRCR date de la promulgation de la loi, soit depuis 1989.

40 A l'époque, les nouvelles dispositions du *Code civil du Québec* n'existaient pas. La notion de fiducie telle qu'elle se retrouvait au *Code civil du Bas-Canada* n'avait rien d'équivalent ni de comparable au droit actuel.

41 Par contre, le genre de disposition que l'on retrouve à l'article 49 LRCR se retrouvait déjà dans plusieurs lois fiscales québécoises. La notion de "fiducie présumée" "ou de fiducie réputée" n'était pas inconnue.

42 Mais d'abord, il faut déterminer ce sur quoi porterait cette fiducie réputée, pour autant qu'elle existe et qu'elle soit opposable à IQ.

43 Voyons, dans un premier temps, les dispositions pertinentes de la LRCR, reprises par les parties dans leurs positions respectives. Au fur et à mesure de leur citation, certains commentaires liminaires s'avéreront nécessaires.

<u>LES DISPOSITIONS LÉGISLATIVES PERTINENTES DE LA LRCR</u>

44 La notion de régime de retraite est énoncée à l'article 6 LRCR :

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

À moins qu'il ne soit garanti, tout régime de retraite doit avoir une caisse de

> **retraite où sont notamment versés les cotisations ainsi que les revenus qui en résultent. Cette caisse constitue un patrimoine fiduciaire affecté principalement au versement des remboursements et prestations auxquels ont droit les participants et bénéficiaires.**

45 Voici, selon IQ, une fiducie parfaite et complète, créée par la loi et qui respecte en tous points les dispositions de l'article 1260 C.c.Q. Cette fiducie légale est d'ailleurs citée en exemple comme un modèle du genre.

46 Cet article crée une caisse de retraite, donc un patrimoine fiduciaire séparé des actifs de l'employeur (le constituant), un apport fiduciaire (les cotisations), sous la responsabilité de fiduciaires (les dirigeants de la caisse)[24].

47 Les articles 7, 8 et 9 LRCR[25] distinguent entre les régimes à prestation déterminée, à cotisations déterminées, garantis ou non-garantis.

48 Dans le cas qui nous occupe, les régimes sont non-garantis et à prestations déterminées.

49 Les articles 37 à 52 LRCR établissent la nature des diverses cotisations, l'obligation de les verser à la caisse de retraite ainsi que les modalités de perception et de versement de ces mêmes cotisations aux régimes de retraite concernés. Il n'y a pas lieu de reproduire ces articles, toutes les parties s'entendent pour reconnaître que :

a) la *cotisation salariale* est la quote-part du participant alors que la *cotisation patronale* est constituée de la quote-part de l'employeur (article 37 LRCR);

b) la *cotisation d'exercice* est la somme que l'employeur doit verser au régime et qui représente la totalité des prestations prévues aux régimes de retraite au titre des services effectués. Il s'agit normalement de la totalité des cotisations salariales et patronales couvrant une période donnée (article 38 LRCR)[26].

Précisons tout de suite que ces trois types de cotisatons ne sont pas ici en litige. Elles ont toutes été perçues et versées aux caisses de retraite requérants.

c) L'article 39 LRCR établit un autre type de cotisation : c'est la *cotisation d'équilibre*. Cette cotisation vise à compenser, selon certaines modalités déterminées par les actuaires du régime, les déficits actuariels de capitalisation et/ou de solvabilité du régime, rendues nécessaires par la fluctuation de l'actif de la caisse de retraite et l'ensemble des obligations de

cette même caisse face à ses participants et retraités.

50 Ce sont les cotisations d'équilibre de l'employeur SBI qui sont ici en jeu.

51 Tel qu'indiqué ci-haut, tous s'entendent pour soutenir que les "cotisations" versées ou à être versées par l'employeur regroupent l'ensemble des cotisations salariales qu'il a perçues de ses employés participants, de sa cotisation patronale, ces deux éléments constituant la cotisation d'exercice, à laquelle la cotisation d'équilibre vient s'ajouter lorsque celle-ci est nécessaire.

52 Vient alors l'article 49 LRCR qui stipule que les "cotisations" sont réputées détenues en fiducie par l'employeur que ce dernier les ait gardées ou non séparément de ses biens.

53 Il est donc acquis que les cotisations d'équilibre sont touchées par l'application de l'article 49 LRCR. On ne saurait conclure que seules les cotisations perçues ou déduites par l'employeur sont visées par cet article.

54 Si l'article 49 LRCR crée une véritable fiducie opposable à IQ, il faut donc conclure que les cotisations d'équilibre non versées depuis l'ordonnance du juge Morawetz les suspendant seront visées par cette fiducie.

LES ARGUMENTS ADDITIONNELS DES CAISSES DE RETRAITE

55 Les Comités de retraite ajoutent que les autres dispositions de la LRCR pouvant trouver application sont les articles 228 et 264 LRCR.

56 Les Comités de retraite plaident en effet que non seulement les cotisations d'équilibre sont couvertes par la fiducie réputée de l'article 49 LRCR mais aussi que les soldes des déficits actuariels sont aussi couverts. Or, cet argument additionnel ne peut résister longuement à l'analyse. L'article 228 LRCR affirme plutôt que :

> **228. Constitue une dette de l'employeur le manque d'actif nécessaire à l'acquittement des droits des participants ou bénéficiaires visés par le retrait d'un employeur partie à un régime interentreprises ou par la terminaison d'un régime de retraite. Ce manque d'actif doit être établi à la date de la terminaison.**
>
> **Si l'employeur a, à la date de la terminaison, omis de verser des cotisations à la caisse de retraite ou, selon le cas, à l'assureur, cette dette est l'excédent du manque d'actif sur ces cotisations.**
>
> **Dans le cas d'un régime interentreprises, le présent article s'applique à chaque employeur partie au régime et auquel se rapporte un groupe de**

> **droits formé en application de la sous-section 3 et composé des droits de participants ou bénéficiaires visé par le retrait ou la terminaison.**
>
> (soulignements ajoutés)

57 Cet article fait partie du chapitre XIII de la LRCR qui traite de la liquidation des droits des participants et des bénéficiaires[27]. Ce chapitre traite aussi de la terminaison d'un régime lorsqu'il n'y a plus de participant actif[28].

58 Un processus de liquidation est alors mis en branle[29] et lorsque l'actif du régime s'avère insuffisant, l'article 228 s'applique : l'employeur est donc endetté envers le régime. Cette dette ne constitue pas une cotisation. D'ailleurs, nulle part dans les dispositions de la LRCR définissant ce qu'est une cotisation ne peut-on trouver une quelconque référence permettant de conclure que les soldes des déficits actuariels sont visés par l'article 49 LRCR.

59 Il semble donc clair que la fiducie réputée de l'article 49 LRCR ne peut s'appliquer qu'aux "*cotisations*" visées par cet article et non aux soldes des déficits actuariels. D'ailleurs, le remboursement de ces soldes est régi par une série de règles particulières.[30]

60 Finalement, les Comités de retraite requérants invoquent l'article 264 LRCR qui se lit ainsi :

> **264. Sauf dispositions contraires de la loi, est incessible et insaisissable :**
>
> **1. toute cotisation versée ou qui doit être versée à la caisse de retraite ou à l'assureur, ainsi que les intérêts accumulés;**
>
> **2. toute somme remboursée ou toute prestation versée en vertu d'un régime de retraite ou de la présente loi;**
>
> **3. toute somme attribuée au conjoint du participant à la suite d'un partage ou d'une autre cession de droits visés au chapitre VIII, avec les intérêts accumulés, ainsi que les prestations constituées avec ces sommes.**
>
> **Sauf dans la mesure où elles proviennent de cotisations volontaires ou représentent une part d'excédent d'actif attribuée après la terminaison d'un régime de retraite, l'incessibilité et l'insaisissabilité valent également à l'égard des sommes susmentionnées qui ont fait l'objet d'un transfert dans un régime de retraite visé à l'article 98, avec les intérêts accumulés, de tout**

> **remboursement de ces sommes et de toute prestation en résultant, ainsi qu'à l'égard de la rente ou du paiement ayant remplacé une rente en application de l'article 92.**
>
> (soulignements ajoutés)

61 Les Comités requérants plaident que la notion d'incessibilité et d'insaisissabilité des "*cotisations versées ou à être versées à la caisse de retraite"* vient renforcer leur argument que ces mêmes *cotisations* sont assujetties à la fiducie réputée de l'article 49 LRCR. Inversement, si les cotisations dues mais non versées font l'objet d'une fiducie réputée, l'article 264 LRCR doit alors s'appliquer à celles-ci et les rendre incessibles et insaisissables. Ainsi, il serait impossible pour l'employeur et ses créanciers d'avoir un quelconque accès aux sommes représentant ou pouvant représenter une cotisation "*à être versée*" à la caisse de retraite. Par l'effet combiné des articles 49 et 264 LRCR, les cotisations d'équilibre non versées et les intérêts y afférant constitueraient des créances prioritaires à celle de IQ.

62 La position de IQ est de soutenir que cet article ne peut s'adresser qu'aux sommes qui ont été clairement identifiées comme des cotisations et qui ont été clairement séparées du reste du patrimoine de l'employeur. Par exemple, si l'employeur ouvre un compte séparé dans lequel il dépose les cotisations qui seront versées à la caisse de retraite, ces sommes sont alors insaisissables et incessibles. Pour IQ, l'article 264 LRCR ne peut s'appliquer que s'il y a séparation de patrimoines.

63 Sinon, sur le plan pratique, à chaque fois qu'un employeur paie une somme d'argent à un créancier, ce dernier devrait alors s'assurer (ou l'employeur devrait être en mesure de lui démontrer) que toutes les cotisations à être versées à la caisse de retraite sont payées, et que le déficit actuariel est adéquatement couvert sous peine de voir ces montants réclamés par le Comité de retraite concerné, comme c'est le cas en l'espèce.

64 Cela ne ferait, selon IQ, aucun sens.

65 Il s'ensuivrait que tout employeur ne pourrait jamais être certain qu'il a payé valablement une dette à un tiers, lorsqu'il serait, par exemple, en retard de paiement sur l'une ou l'autre de ses cotisations ou encore que le ou les régimes de retraite de ses employés soient adéquatement pourvus de manière à éviter tout risque de déficit.

66 Pour IQ, la portée de cet article serait donc de rendre incessible ou insaisissable toute cotisation identifiée comme telle qui aura fait l'objet d'une séparation physique du patrimoine de l'employeur en vue d'effectuer un paiement à une caisse de retraite.

LES DISPOSITIONS DU *CODE CIVIL DU QUÉBEC* EN MATIÈRE DE FIDUCIES

67 Depuis 1994, le droit des fiducies au Québec a subi une transformation complète.

68 Toutes les fiducies de droit québécois sont dorénavant assujetties aux règles édictées par les articles 1260 et suivants C.c.Q.

69 Il n'est définitivement plus question au Québec de reconnaître autre chose que la fiducie du Code civil. Les fiducies de droit anglo-saxon ou dérivant de la Common Law en vigueur dans les autres provinces canadiennes n'ont donc pas d'existence légale.

70 Le Code civil est une loi d'application générale de par son importance, de la multitude des sujets qu'elle couvre et du fait que l'on y retrouve l'ensemble des dispositions gouvernant notre droit civil et notre droit privé. Par contre, les Régimes de retraite requérants soutiennent que la LRCR est une loi spécifique dont les dispositions doivent l'emporter sur une loi d'application générale.

71 La question se pose différemment lorsqu'un chapitre entier consacré à un concept comme la fiducie est inséré au Code civil. On ne peut, selon IQ, du simple fait que ce chapitre est inséré au *Code civil*, conclure que les dispositions particulières en matière de fiducie perdent leur statut de loi particulière au point de prétendre que les dispositions de la LRCR, elles, auraient préséance sur les articles 1260 et suivants du *Code civil*.

72 Les articles pertinents du *Code civil* sont les suivants :

> **1260. La fiducie résulte d'un acte par lequel une personne, le constituant, transfère de son patrimoine à un autre patrimoine qu'il constitue, des biens qu'il affecte à une fin particulière et qu'un fiduciaire s'oblige, par le fait de son acceptation, à détenir et à administrer.**
>
> (soulignements ajoutés)

73 Cet article, comme nous l'avons vu, détermine les composantes essentielles d'une fiducie de droit québécois :

- l'existence d'un constituant;
- la nécessité d'un transfert de son patrimoine à un autre patrimoine;
- des biens spécifiques;
- affectés à une fin particulière.

74 L'article 1261 édicte ce qui suit :

> **1261. Le patrimoine fiduciaire, formé des biens transférés en fiducie, constitue un patrimoine d'affectation autonome et distinct de celui du constituant, du fiduciaire ou du bénéficiaire, sur lequel aucun d'entre eux n'a de droit réel.**

(soulignements ajoutés)

75 Il faut donc, selon cette façon de voir, qu'il y ait transfert complet des sommes ou des biens pour constituer un patrimoine autonome et distinct de celui du constituant, du fiduciaire et du bénéficiaire et que ni l'un ni l'autre d'entre eux ne puisse y faire valoir un quelconque droit réel.

76 L'article 1262 C.c.Q. énonce les modes d'établissement d'une fiducie :

> **1262. La fiducie est établie par contrat, à titre onéreux ou gratuit, par testament ou, dans certains cas, par la loi. Elle peut aussi, lorsque la loi l'autorise, être établie par jugement.**
>
> (soulignements ajoutés)

77 Si la loi permet la création d'une fiducie selon l'article 1262 C.c.Q., la loi peut-elle déroger aux critères de l'article 1260 C.c.Q.?

78 L'article 1263 C.c.Q. se lit ainsi :

> **1263. La fiducie établie par contrat à titre onéreux peut avoir pour objet de garantir l'exécution d'une obligation. En ce cas, la fiducie doit, pour être opposable aux tiers, être publiée au registre des droits personnels et réels mobiliers ou au registre foncier, selon la nature mobilière ou immobilière des biens transférés en fiducie.**
>
> **Le fiduciaire est, en cas de défaut du constituant, assujetti aux règles relatives à l'exercice des droits hypothécaires énoncées au livre Des priorités et des hypothèques**.

79 Il est intéressant de noter ici que pour être opposable aux tiers (ici, IQ est un tiers), la fiducie contractuelle doit être publiée au RDPRM ou au registre foncier. Une fiducie créée par la loi opposable au tiers ne semble pas requérir un tel élément même si la fiducie a pour objet de garantir le paiement d'une cotisation par l'employeur à un régime de retraite.

80 De ce qui précède, le Tribunal conclut que si l'article 49 LRCR crée une véritable fiducie réputée opposable à IQ :

a) cette fiducie réputée s'appliquera à toutes les cotisations non versées aux Comités de retraite requérants;
b) plus spécifiquement, elle s'appliquera aux cotisations d'équilibre ayant fait l'objet de l'Ordonnance de Suspension émise par le juge Morawetz;
c) par contre, cette fiducie réputée ne s'appliquera qu'aux cotisations et non

aux soldes déficits actuariels qui, eux, sont des dettes de l'employeur conformément aux dispositions de l'article 228 LRCR.

d) l'article 264 LRCR pourra s'appliquer aussi aux cotisations non versées aux Comités de retraite et non aux soldes des déficits actuariels.

81 Il reste à déterminer

a) si l'article 49 LRCR crée une fiducie réputée opposable à IQ; et

b) si oui, les biens visés par une telle fiducie réputée sont incessibles et insaisissables et, partant de là, s'ils sont exclus de la garantie hypothécaire dont bénéficie IQ.

ANALYSE

a) **La fiducie réputée de l'article 49 LRCR**

82 Pour les motifs qui suivent et malgré l'analyse du soussigné dans l'affaire *White Birch*, force est de conclure que l'article 49 LRCR crée une fiducie réputée opposable à la créance de IQ. Toutefois, le présent dossier touche une question différente des affaires *White Birch* et *Indalex*. Dans ces deux dossiers, il s'agissait de décider si les contributions d'équilibre ou les soldes des déficits actuariels des régimes de retraite avaient préséance sur la créance du prêteur "DIP", elle-même protégée par une super-priorité en vertu de la LACC, et ce, alors que la loi provinciale entrevoyait l'existence d'une fiducie réputée applicable aux cotisations ou soldes actuariels en question, selon le cas.

83 La présente instance porte sur la priorité des créances de deux créanciers qui ne bénéficient pas de super-priorités alors que la débitrice SBI est au stade de rembourser ses créanciers selon leur priorités respectives établies par le droit québécois. Il s'agit donc de décider si, aux termes du droit québécois, l'ordre de priorité attaché à chacune de ces créances fait en sorte que les Comités de retraite peuvent se réclamer d'un rang prioritaire à celui de IQ.

84 Ainsi, même si l'on doit conclure à l'existence d'une fiducie créée par la loi en vertu de l'article 49 LRCR, une telle conclusion, si elle avait été retenue dans *White Birch* n'aurait pas eu d'impact sur la finalité de ce débat car la question était toute autre.

85 En effet, la conclusion finale retenue dans *White Birch* demeure la même car la doctrine de la préséance du droit fédéral fait en sorte que la fiducie de l'article 49 LRCR, si elle avait été retenue, ne lui aurait pas donné priorité de rang sur la créance super-prioritaire du prêteur DIP.[31]

86 La question des fiducies réputées en droit québécois a donné lieu à plusieurs décisions au cours des quelques 20 dernières années, surtout en matière fiscale et presqu'exclusivement dans un contexte de faillite. Cependant, même si la fiducie réputée de l'article 49 LRCR s'inscrit dans un contexte fort différent, la façon dont nos tribunaux ont analysé la fiducie réputée en matière fiscale

nous permet de comprendre comment l'on doit s'y prendre pour analyser celle que nous suggère l'article 49 LRCR.

87 Il faut remonter à l'affaire *Nolisair*[32] alors que la Cour d'appel renversait un jugement du juge Roland Durand du 16 octobre 1994[33]. Le fond du litige portait sur la fiducie présumée dont se réclamait alors le Ministère du revenu et qui avait déposé une preuve de réclamation prioritaire couvrant l'ensemble des actifs de la débitrice. Le syndic a rejeté cette réclamation, alléguant l'absence d'une telle fiducie au motif que *Nolisair* n'avait pas gardé les retenues à la source perçues de ses employés dans un compte séparé de son patrimoine. Le SMRQ objectait que l'article 20 de la *Loi sur le Ministère du revenu*[34] (la LMRQ) créait une telle fiducie présumée.

88 Le juge Durand a décidé en première instance que l'article 20 LMRQ ne créait pas de fiducie au sens de l'article 67(3) de la *Loi sur la faillite et l'insolvabilité*.

89 Parallèlement à l'affaire *Nolisair* le juge Roger Banford décidait dans l'affaire *Sécurité Saglac (1992) Inc. c. Sous-ministre du revenu du Québec*[35] que ce même article 20 créait une fiducie présumée.

90 Les deux dossiers ont été entendus en même temps par la Cour d'appel et ont fait l'objet de deux jugements séparés, l'un accueillant l'appel formé à l'endroit du jugement du juge Durand[36] et l'autre rejetant l'appel formé à l'endroit de celui du juge Banford[37].

91 La Cour d'appel, à deux juges contre un, a alors reconnu l'existence d'une fiducie réputée créée par l'article 20 LMRQ qui se lisait alors ainsi :

> **20. Toute personne qui <u>déduit, retient ou perçoit</u> un montant quelconque en vertu d'une loi fiscale est réputée le détenir en fiducie pour Sa Majesté aux droits du Québec.**
>
> **<u>Un tel montant doit être tenu</u>, par la personne qui l'a déduit, retenu ou perçu, <u>distinctement et séparément de ses propres fonds</u> et dans les cas d'une liquidation, cession ou faillite, un montant égal au montant ainsi déduit, retenu ou perçu <u>doit être considéré comme formant un fonds séparé ne faisant pas partie des biens</u> sujets à la liquidation, cession ou faillite.**
>
> **Toutefois, cette personne peut, lors de la production au ministre d'une déclaration en vertu des articles 468 ou 470 de la *Loi sur la taxe de vente au Québec* et modifiant certaines dispositions législatives d'ordre fiscal (*1991 c. 67*) retirer du total des fonds tenus séparément et distinctement de ses propres fonds, les montants qu'elle a droit de déduire et qu'elle a effectivement déduits dans le calcul de son montant à remettre.**

92 On aura remarqué, et c'est là l'intérêt de la chose, que ce texte vise des montants "déduits, retenus ou perçus" par une personne à des fins fiscales et non des montants dus par cette même personne. Somme toute, les sommes ici visées sont des sommes qui n'appartiennent pas et qui n'ont jamais appartenu à la personne en question.

93 On aura aussi remarqué que l'article 20 LMRQ, tel qu'il existait alors, ne contenait pas les mots qui y seront ajoutés quelques mois plus tard et qui se liront, après l'amendement en question[38] :

> **"... que ce montant ait été ou non, dans les faits tenu séparé des éléments du patrimoine de cette personne ou de ses propres fonds."**

94 C'est d'ailleurs à cause de l'absence de ces mots que le juge Durand refusera de reconnaître la fiducie réputée de l'article 20 LMRQ. On remarquera, cependant, la présence de ces mêmes mots dans l'article 49 LRCR.

95 Malgré le bénéfice de cet amendement, les juges Bamford (dans l'affaire *Sécurité Saglac*) en première instance et Chamberland en Cour d'appel, se basant sur une analyse des mots ... "*un montant égal au montant ainsi déduit, retenu ou perçu doit être considéré comme formant un fonds séparé*"... du deuxième alinéa de l'article 20 LMRQ ont décidé que le texte était suffisant pour que cet article puisse créer une fiducie réputée créée par la loi. Le juge Chamberlalnd conclut en ces termes[39] :

> **La fiducie réputée**
>
> **Aux fins de cette opinion, j'entends par "fiducie réputée" la fiducie qui n'existe que parce que le législateur, provincial ou fédéral, dit qu'elle existe, alors que, dans les faits, elle ne revêt pas tous les attributs d'une fiducie. L'existence de la fiducie dépend de la présence conjuguée de trois certitudes: 1) certitude quant à l'intention du constituant de créer une fiducie, 2) certitude quant à l'identité du bénéficiaire de la fiducie, et enfin, 3) certitude quant aux biens assujettis à la fiducie, en ce sens que ces biens doivent être conservés par le fiduciaire de façon autonome et distincte de son patrimoine (L.W. HOULDEN et C.H. MORAWETZ, Bankruptcy and Insolvency Law of Canada, 3rd Ed., mis à jour 1996 (No 7), aux pages 3-17 à 3-30, chapitre intitulé "Trust Property").**
>
> **...**
>
> **La fiducie réputée est l'un "des moyens auxquels les législateurs ont souvent recours pour recouvrer des sommes qui auraient dû leur être versées, mais**

qui ont été illégalement détournées par un débiteur qui a, par la suite, éprouvé des difficultés financières et s'est vu forcé de liquider son entreprise" (Banque Royale c. Sparrow Electric Corp., 1997 CanLII 377 (CSC), [1997] 1 R.C.S. 411, le juge Gonthier, à la page 435).

Revenant à la première question soulevée par ce litige, il s'agit donc de décider si l'article 20 de la LMRevenu Québec crée une fiducie réputée.

L'appelant plaide que non parce que certains mots, à son avis essentiels à la création d'une fiducie réputée - et que l'on retrouve, par exemple, au paragraphe 5 de l'article 227 de la LIR fédérale - ne s'y trouvent pas. En somme, en l'absence des mots "que ce montant ait été ou non, en fait, tenu séparé des propres fonds de la personne ou des éléments du patrimoine", l'article 20 de la LMRevenu Québec ne créerait pas de fiducie réputée; il ne ferait que confirmer l'existence d'une fiducie réelle, opposable à la masse des créanciers que dans la mesure où les sommes déduites ont été réellement détenues à part par le débiteur, ce qui n'est pas le cas en l'espèce.

Je ne partage pas ce point de vue.

...

De fait, le texte de l'article 20 est bien différent de celui que la Cour supérieure étudiait, en 1977, dans l'affaire Joe's Steak House, [1977] C.S. 374, précitée. Le législateur y a ajouté des mots -"un montant égal au montant ainsi déduit, retenu ou perçu" - qui ont, à mon avis, le même effet - la création d'une fiducie réputée - même si les mots "que ce montant ait été ou non, en fait, tenu séparé des propres fonds de la personne ou des éléments du patrimoine", utilisés au paragraphe 227(5) de la LIR fédérale ne s'y trouvent pas.

Comparons les textes de l'article 20 à l'époque de l'affaire Joe's Steak House, précitée, (en 1979) et durant la période en litige (en 1992) :

Toute personne qui déduit, retient ou perçoit un montant quelconque en vertu d'une loi fiscale est réputée le détenir en fiducie pour Sa Majesté aux

droits du Québec.

Un tel montant doit être tenu par la personne qui l'a déduit, retenu ou perçu distinctement et séparément de ses propres fonds et dans les cas d'une liquidation, cession ou faillite, doit être considéré comme formant un fonds séparé ne faisant pas partie des biens sujets à la liquidation, cession ou faillite. Toute personne qui déduit, retient ou perçoit un montant quelconque en vertu d'une loi fiscale est réputée le détenir en fiducie pour Sa Majesté aux droits du Québec.

Un tel montant doit être tenu, par la personne qui l'a déduit, retenu ou perçu, distinctement et séparément de ses propres fonds et dans les cas d'une liquidation, cession ou faillite, un montant égal au montant ainsi déduit, retenu ou perçu doit être considéré comme formant un fonds séparé ne faisant pas partie des biens sujets à la liquidation, cession ou faillite.

[...]

(soulignements ajoutés)

Le premier paragraphe est identique; le législateur y prévoit expressément, en utilisant les mots "est réputée", qu'une personne qui a déduit, retenu ou perçu un montant en vertu d'une loi fiscale détient ce montant en fiducie et que Sa Majesté aux droits du Québec est la bénéficiaire de cette fiducie. Le début du deuxième paragraphe est également identique; le législateur y crée l'obligation pour la personne visée de tenir le montant ainsi déduit, retenu ou perçu "distinctement et séparément de ses propres fonds". Si tel est le cas, il y a fiducie réelle et, advenant faillite, ces montants constituent des "biens détenus par le failli en fiducie pour toute autre personne", au sens de l'alinéa 67(1)(a) de la Loi FI, et ils ne sont pas compris dans les biens du failli.

La seconde partie du deuxième paragraphe a été modifiée par l'ajout des mots "un montant égal au montant ainsi déduit, retenu ou perçu [...]". L'ajout de ces mots ne s'explique, à mon avis, que par la volonté du législateur de créer une fiducie réputée et de la distinguer de la fiducie réelle en éliminant expressément la nécessité de respecter la troisième des

> **conditions essentielles à l'existence d'une fiducie, soit le fait pour le fiduciaire de conserver les biens affectés à la fiducie séparément et distinctement de son patrimoine. En effet, les mots "un montant égal au montant ainsi déduit, retenu ou perçu" sont inutiles dans le contexte où le failli tient un compte distinct et séparé de ses propres fonds pour les montants déduits, retenus ou perçus; les mots n'ont de sens que si le failli ne tient pas un tel compte distinct et séparé. Dans le contexte, ces mots suffisaient pour conclure à la création d'une fiducie réputée; le premier paragraphe de l'article 20 et le début du second visaient la fiducie réelle alors que le premier paragraphe et la fin du second visaient la fiducie réputée.**
>
> **D'où, à mon avis, la conclusion que le législateur a ainsi créé une fiducie réputée même s'il n'a pas repris tous les mots du législateur fédéral au paragraphe 5 de l'article 227. L'utilisation des mots "un montant égal au montant ainsi déduit, retenu ou perçu" rendait, à mon avis, inutile l'utilisation des mots "que ce montant ait été ou non, en fait, tenu séparé des propres fonds de la personne".**
>
> (soulignements ajoutés)

96 Cette longue citation indique la manière retenue alors par la Cour d'appel pour conclure à l'existence d'une fiducie réputée en se basant sur les mots retenus par le législateur. En appliquant ce genre d'analyse à l'article 49 LRCR, on doit d'abord se poser la question à savoir si le texte de cet article est suffisamment clair et complet pour conclure à l'existence d'une fiducie réputée. Un tel exercice convainc le Tribunal que l'on doit répondre affirmativement à cette question surtout lorsque l'on constate que l'article 49 LRCR reprend les mots alors présumés manquants à l'article 20 LMRQ et qui, plus tard, feront en sorte que l'article 20 LMRQ crée effectivement une fiducie réputée.

97 Ainsi, pour le juge Chamberland, les mots utilisés par le Législateur dans l'ancien article 20 LMR étaient suffisamment clairs pour établir une fiducie réputée, faisant des déductions déduites, retenues ou perçues par la partie débitrice un patrimoine fiduciaire suffisamment bien défini, "...comme formant un fonds séparé ne faisant pas partie des biens..." de ladite débitrice dans le contexte d'une cession ou d'une faillite.

98 Malgré l'intérêt et la logique du raisonnement, la Cour suprême ne verra pas les choses de la même façon.

99 Tant dans *Nolisair* que dans *Sécurité Saglac*, le juge Fish, siégeant alors à la Cour d'appel, était dissident. Pour lui, en l'absence des mots ajoutés à l'article 20 LMRQ par l'amendement de

1993, ledit article ne créait pas de fiducie réputée[40]. Il écrira :

> **"In fact and in effect, these deductions simply consisted in book keeping entries: no moneys were actually retained by the employer in an identifiable form, separate from the employer's own funds."**

100 Pour le juge Fish, l'amendement de 1993 vient corriger le problème pour le futur mais non pour les deux cas dont la Cour est saisie, dont les faits remontent à une date antérieure à la prise d'effet dudit amendement. Il se dit d'accord avec le raisonnement du juge Durand dans *Nolisair* et en désaccord avec celui du juge Banford dans *Sécurité Saglac*.

101 Par contre, une lecture attentive de l'opinion du juge Fish fait ressortir que l'amendement de 1993 n'a pour effet que de rendre l'article 20 LMRQ compatible avec l'article 67 de la *Loi sur la faillite et l'insolvabilité* et l'article 227 de la *Loi sur les impôts fédérale*.

102 Le juge Fish écrira donc, et c'est là où il est en désaccord avec le raisonnement du juge Chamberland :

> **As I have already mentioned, the Minister of Revenue seeks to recover, from an estate in bankruptcy, income tax and pension contributions that were deducted at source by the debtor, but not separated from the rest of the debtor's patrimony, and never remitted to the government.**
>
> **To succeed on this claim, <u>the Minister must establish that s. 20 MRA, prior to its amendment in 1993, created a deemed trust "substantially similar to subs. 227(4) of the Income Tax Act"</u>, within the meaning of s. 67(3)(a). The Minister must demonstrate as well that the Crown's beneficial interest under the trust attached to unremitted deductions at source <u>whether or not the amounts deducted were held separately from the patrimony of the bankrupt debtor.</u>**
>
> **Deductions at source under the ITA are in law the property of the employee. The employer, at the point of withholding, therefore holds the amounts deducted as trustee of a fund belonging to the employees, not to the Crown. It is subs. 227(4) ITA that has the effect of making Her Majesty the beneficiary under that trust.**
>
> **When the employer fails to retain the deductions in a separate fund, however, <u>Her Majesty's beneficial interest becomes intermingled with the employer's general assets and "Her Majesty's claim ... then becomes that of</u>**

<u>a beneficiary under a non-existent trust".</u>

Here, the employer failed to separate the source deductions from his own property. Accordingly, the deemed trust created by s. 20 MRA, <u>if it were "substantially similar" to the deemed trust of subs. 227(4) ITA, would likewise make the Minister of Revenue "a beneficiary under a non-existent trust"</u>.

In considering whether a provincial deemed trust is substantially similar to the federal standard created by subs. 227(4), however, one cannot insulate the text of subs. 227(4) from its context. Subsection 227(5) is linked by reference to subs. 227(4) and, together, the two subsections may be said to create a coherent whole in the context of a bankruptcy.

For the purposes of disposing of the appeal, we should therefore, I believe, take into account the impact of subs. 227(5) ITA on the kind of deemed trust that will meet the requirements of subs. 67(3) BIA. In my view, we are also bound to read subs. 67(3) in a manner that respects the evident intent of Parliament to place deemed trusts, provincial and federal, on the same footing with respect to priority in the event of a bankruptcy.

<u>To benefit from the full protection afforded by subs. 67(3), the deemed trust referred to in subs. 227(4) ITA must also conform to subs. 227(5)</u>. And to be eligible for that same protection, a provincial provision creating a deemed trust must be "substantially similar", having essentially the same reach and complying with the same basic requirements.

In particular, the provincial deemed trust must, to achieve the result of its federal counterpart under subs. 227(5), <u>explicitly impress upon the amount of the unremitted deductions at source whether or not that amount has in fact been kept separate and apart from the debtor's own moneys or from the assets of the estate</u>.

<u>Prior to its amendment in 1993, s. 20 MRA did not, in my respectful view, meet this test</u>.

> **Accordingly, even on the assumption that subs. 67(3) BIA authorized the creation by Quebec of a deemed trust substantially similar to the type contemplated either by subs. 227(4) ITA read alone, or by subss. 227(4) and (5) read together, I would feel bound to dismiss the appeal.**
>
> (soulignements ajoutés)

103 Rappelant par la suite les affaires Re: *Deslauriers Construction Productions Ltd.* [1970] 3 O.R. 599 (C.A.), *Dauphin Plains Credit Union Ltd c. Xyloid Industries Ltd.* [1980] 1 R.C.S. 1182, *British Columbia c. Henfrey Samson Bélair Ltd.* [l989] 2 R.C.S. 24 et *Royal Bank of Canada c. Sparrow Electric Corp.* [1997] 1 S.C.R. 411, le juge Fish conclut que le texte de l'article 20 LMRQ, tel qu'il existait antérieurement à l'amendement de 1993, ne rencontrait pas les exigences des articles 67 LFI et 227(5) de la *Loi fédérale sur les impôts*. Le texte de l'amendement de 1993 a eu pour effet de régler le problème de la fiducie présumée de l'article 20 LMRQ mais force est de constater que le texte de l'article 49 LRCR contient les mots "sacramentels" confirmant l'existence d'une fiducie réputée, même si l'employeur n'a pas gardé les cotisations qu'il doit verser aux Comités de retraite requérants séparées ou non de ses autres biens.

104 Les affaires *Saglac* et *Nolisair* ont été portées en appel devant la Cour suprême du Canada[41] et dans un jugement aussi court qu'unanime, les jugements de la Cour d'appel ont été renversés au profit de la dissidence du juge Fish, sans rien y ajouter.

105 L'opinion combinée des juges Chamberland et Fish démontre en fait une seule chose : pour qu'une fiducie réputée existe, il faut que le langage qui la constitue soit sans équivoque et qu'il démontre que les sommes ou biens réputés être détenus en fiducie le sont, même sans séparation desdits biens ou sommes du reste des actifs de la partie débitrice.

106 C'est ce qui semble exister en l'espèce, à la lecture de l'article 49 LRCR.

107 Pourtant, plusieurs années plus tard, dans *Québec (Sous-ministre du Revenu) c. De Courval*, 2009 QCCA 409[42], la Cour d'appel avait à décider des conditions d'existence ou non d'une fiducie au sens de l'article 20 de la *Loi sur le Ministère du Revenu*. La juge Dutil a écrit ceci :

> **[10] S'appuyant sur un jugement de la Cour supérieure, dans l'affaire de la faillite de *Chibou-Vrac inc. (Syndic de)* et *Groupe Thibault Van Houtte & Associés ltée*, [2003] J.Q. no 11364, le juge de première instance conclut que la TVQ peut être détenue dans une fiducie présumée au sens de l'article 20 *LMR*. Toutefois, pour que ces sommes d'argent ne soient pas considérées comme des biens du failli, par l'application de l'alinéa 67(1) a) de la *Loi sur la faillite et l'insolvabilité* (*LFI*), il doit s'agir d'une fiducie réelle, ce qui n'est pas le cas en l'espèce.**

> **[11] Le juge de première instance estime également que l'*obiter dictum* du juge Letarte, dans l'arrêt *Giguère (Syndic de)* c. *Lloyd Woodfine*, [2001] J.Q. no 4825 [*Giguère*], concernant des sommes détenues en fiducie, "ne peut servir de base juridique qui aurait pour effet de modifier profondément tout le courant jurisprudentiel antérieur sur la question de l'application des articles 15.3.1 et 20 de la Loi."**

108 Après avoir cité les dispositions pertinentes de la *Loi sur le Ministère du Revenu* et de la *Loi sur la faillite et l'insolvabilité*, la juge Dutil pose le problème en ces termes :

> **[19] Le syndic soutient que l'article 20 *LMR* ne confère aucun droit de propriété aux autorités fiscales en ce qui a trait aux montants dus à titre de TVQ. Prenant appui sur un arrêt récent de notre Cour, dans *9083-4185 Québec inc. (Syndic de) et Caisse populaire Desjardins de Montmagny*, [2007] J.Q. no 14712 [*9083-4185 Québec inc.*], le syndic plaide que le paragraphe 67(2) *LFI* fait en sorte que des biens détenus dans une fiducie pour Sa Majesté, par le biais d'une disposition législative, demeurent des biens du failli. Seuls ceux détenus par un failli dans une fiducie réelle, pour une autre personne, sont exclus de la faillite. En outre, puisque les sommes détenues en fiducie sont entremêlées avec d'autres fonds, elles ne sont plus identifiables. En conséquence, le ministre ne peut en être propriétaire.**
>
> **...**
>
> **[28] L'article 20 *LMR* édicte qu'une personne qui perçoit un montant dû en vertu d'une loi fiscale est réputée le détenir pour l'État, séparé de son patrimoine et de ses propres fonds. Il précise qu'en cas de non-versement à l'État dans le délai et selon les modalités prescrites, ce montant est réputé former un fonds séparé ne faisant pas partie des biens de cette personne.**
>
> **[29] En vertu de cet article, il y avait donc une présomption que les montants détenus par la Banque en date du 10 juillet 2006 l'étaient en fiducie pour l'État. Toutefois, ces montants perçus par la débitrice avaient été déposés dans un compte où elle en détenait également d'autres provenant de différentes sources. Il ne s'agissait donc que d'une fiducie créée par l'effet de la *LMR* et non d'une fiducie réelle.**
>
> **[30] Dans l'arrêt *Colombie-Britannique c. Henfrey*, *Samson, Belair Ltd.* [*Colombie-Britannique*], la Cour suprême explique que dès que le montant**

> **de la taxe est confondu avec d'autres sommes, il n'existe plus de fiducie de common law :**
>
> **[...] Au moment de la perception de la taxe, il y a fiducie légale réputée. À ce moment-là, le bien en fiducie est identifiable et la fiducie répond aux exigences d'une fiducie établie en vertu des principes généraux du droit. La difficulté que présente l'espèce, qui est la même que dans la plupart des cas, vient de ce que le bien en fiducie cesse bientôt d'être identifiable. Le montant de la taxe est confondu avec d'autres sommes que détient le marchand et immédiatement affecté à l'acquisition d'autres biens de sorte qu'il est impossible de le retracer. Dès lors, il n'existe plus de fiducie de *common law*. Pour obvier à ce problème, l'al. 18(1)b) prévoit que la taxe perçue sera réputée être détenue de manière séparée et distincte des deniers, de l'actif ou du patrimoine de celui qui l'a perçue. Mais, comme l'existence de la disposition déterminative le reconnaît tacitement, en réalité, après l'affectation de la somme, la fiducie légale ressemble peu à une fiducie véritable. [...]**
>
> **[31] Je conclus donc que l'avis expédié en vertu de l'article 15 *LMR* n'a pas transformé cette fiducie présumée en fiducie réelle, ce qui aurait pu, effectivement, faire en sorte que ces biens ne soient pas compris dans le patrimoine de la débitrice faillie en vertu de l'alinéa 67(1) a) *LFI*.**
>
> **[32] En effet, le paragraphe 67(2) *LFI* édicte que, sous réserve de certaines exceptions (dont entre autres les retenues à la source), un bien n'est pas considéré être détenu en fiducie aux fins de la *LFI* si, en l'absence d'une disposition législative, il ne le serait pas. Or, c'est exactement le cas dans la présente affaire : les montants étaient réputés être détenus en fiducie en vertu de l'article 20 *LMR*, mais il n'existait aucune fiducie réelle.**

109 Cette décision suivait alors la logique de l'arrêt Sparrow Electric[43] en Cour suprême, où il fut établi que la garantie bancaire consentie à la Banque Royale du Canada en vertu de l'article 427 de la *Loi sur les banques* (LB)[44] avait priorité sur la fiducie réputée que l'on retrouve à l'article 227(5) de la *Loi sur l'impôt sur le revenu* (LIR)[45].

110 Pour conclure ainsi dans *Sparrow*, la Cour suprême a dû constater que la garantie de l'article 427 de la *Loi sur les banques* avait été mise en place avant que la débitrice soit en défaut de remettre à l'État les retenues fiscales prévues à l'article 227(5) LIR. Donc, en l'absence d'une autre disposition donnant priorité de rang à la fiducie réputée, les termes de la garantie bancaire n'étaient

pas affectés par le défaut subséquent de la débitrice à l'égard de la Couronne fédérale.

111 Voici comment le juge Gonthier (dissident sur le fond) pose le problème :

> **23 Il est malheureux que, jusqu'à maintenant, la jurisprudence n'ait pas su susciter la certitude qui est si manifestement souhaitable dans ce domaine du droit commercial. En fait, la jurisprudence a été qualifiée de [TRADUCTION] "secteur trouble du droit" (*Manitoba (Minister of Labour) c. Omega Autobody Ltd. (Receiver of)* 1989 CanLII 178 (MB CA), (1989), 59 D.L.R. (4th) 34 (C.A. Man.), à la p. 36), et elle a fait l'objet, à certains moments, de critiques acerbes de la part d'auteurs de doctrine (Roderick J. Wood, "Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*" (1995), 10 *B.F.L.R.* 429, ainsi que Roderick J. Wood et Michael I. Wylie, "Non-Consensual Security Interests in Personal Property" (1992), 30 *Alta. L. Rev*. 1055). L'opinion générale a, je crois, été résumée par le professeur Wood dans son commentaire de décision fort utile, "Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*", *loc. cit.*, à la p. 430: [TRADUCTION] "[i]l est quelque peu embarrassant de constater qu'après plus de deux décennies, nous ne pouvons toujours pas prédire en toute confiance le résultat d'un litige quant à la priorité de rang entre une fiducie réputée et une garantie". Les commentaires ci-dessus tirés de la jurisprudence et de la doctrine invitent, je crois, notre Cour à s'orienter résolument vers une énonciation de principes clairs qui permettront de déterminer la priorité de rang entre les fiducies légales et les garanties consensuelles.**

112 Contrairement à ce que soutiendra la majorité, le juge Gonthier retrouvera dans les éléments de l'affaire *Sparrow Electric* les principes lui permettant de conclure à l'existence d'une priorité de rang de la fiducie réputée de la Couronne sur la garantie conventionnelle de la banque. Malgré la longueur du texte qui suit, il y a lieu de le reproduire :

> **30 Notre Cour a récemment eu l'occasion d'examiner les principes de droit qui doivent être appliqués à l'interprétation des lois fiscales. Dans *Alberta (Treasury Branches) c. M.R.N.; Banque Toronto-Dominion c. M.R.N.*, 1996 CanLII 244 (CSC), [1996] 1 R.C.S. 963, aux pp. 975 et 976, le juge Cory cite l'arrêt de notre Cour *Friesen c. Canada*, 1995 CanLII 62 (CSC), [1995] 3 R.C.S. 103, où les principes pertinents sont résumés ainsi, aux pp. 112 à 114 :**
>
> **Pour interpréter les dispositions de la Loi de l'impôt sur le revenu, il**

convient, comme l'affirme le juge Estey dans l'arrêt Stubart Investments Ltd. c. La Reine, 1984 CanLII 20 (CSC), [1984] 1 R.C.S. 536, <u>d'appliquer la règle du sens ordinaire</u>. À la page 578, le juge Estey se fonde sur le passage suivant de l'ouvrage de E. A. Driedger, intitulé Construction of Statutes (2e éd. 1983), à la p. 87 :

[TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

Le principe voulant que <u>le sens ordinaire des dispositions pertinentes de la Loi de l'impôt sur le revenu prévale, à moins d'être en présence d'une opération simulée</u>, a récemment été approuvé par notre Cour dans l'arrêt Canada c. Antosko, 1994 CanLII 88 (CSC), [1994] 2 R.C.S. 312. Le juge Iacobucci affirme, au nom de la Cour, aux pp. 326 et 327 :

Même si les tribunaux doivent examiner un article de la *Loi de l'impôt sur le revenu* à la lumière des autres dispositions de la Loi et de son objet, et qu'ils doivent analyser une opération donnée en fonction de la réalité économique et commerciale, ces techniques ne sauraient altérer le résultat lorsque les termes de la Loi sont clairs et nets et que l'effet juridique et pratique de l'opération est incontesté : *Mattabi Mines Ltd. c. Ontario (Ministre du Revenu)*, 1988 CanLII 58 (CSC), [1988] 2 R.C.S. 175, à la p. 194; voir également *Symes c. Canada*, 1993 CanLII 55 (CSC), [1993] 4 R.C.S. 695.

J'accepte les commentaires suivants qui ont été faits à l'égard de l'arrêt *Antosko* dans l'ouvrage de P. W. Hogg et J. E. Magee, intitulé *Principles of Canadian Income Tax Law* (1995), dans la section 22.3c) [TRADUCTION] "Interprétation stricte et fondée sur l'objet visé", aux pp. 453 et 454 :

[TRADUCTION] La Loi de l'impôt sur le revenu serait empreinte d'une incertitude intolérable si le libellé clair d'une disposition détaillée de la Loi était nuancé par des exceptions tacites tirées de la conception qu'un tribunal a de l'objet de la disposition. (...) (L'arrêt *Antosko*) ne fait que reconnaître que "l'objet" ne peut jouer qu'un rôle limité dans l'interprétation d'une loi aussi précise et détaillée que la Loi de l'impôt sur le revenu. Lorsqu'une

disposition est rédigée dans des termes précis qui n'engendrent aucun doute ni aucune ambiguïté quant à son application aux faits, elle doit être appliquée nonobstant son objet. Ce n'est que lorsque le libellé de la loi engendre un certain doute ou une certaine ambiguïté, quant à son application aux faits, qu'il est utile de recourir à l'objet de la disposition.

Aux pages 976 et 977 de l'arrêt *Alberta (Treasury Branches)*, précité, le juge Cory conclut :

En conséquence, lorsqu'il n'y a aucun doute quant au sens d'une mesure législative ni aucune ambiguïté quant à son application aux faits, elle doit être appliquée indépendamment de son objet. Je reconnais que des juristes habiles pourraient probablement déceler une ambiguïté dans une demande aussi simple que "fermez la porte, s'il vous plaît", et très certainement même dans le plus court et le plus clair des dix commandements. Cependant, l'historique même de la présente affaire, conjugué aux divergences évidentes d'opinions entre les juges de première instance et la Cour d'appel de l'Alberta, révèle que, pour des juristes doués et expérimentés, ni le sens de la mesure législative ni son application aux faits ne sont clairs. Il semblerait donc convenir d'examiner l'objet de la mesure législative. Même si l'ambiguïté n'était pas apparente, il importe de signaler qu'il convient toujours d'examiner "l'esprit de la loi, l'objet de la loi et l'intention du législateur" pour déterminer le sens manifeste et ordinaire de la loi en cause.

31 En l'espèce, j'estime que le texte du par. 227(5) est clair et sans ambiguïté, compte tenu, particulièrement, du fait que cette disposition suit immédiatement le par. 227(4), qui prévoit que les sommes non versées sont conservées en fiducie pour Sa Majesté. À mon avis, ce paragraphe vise, en cas de liquidation, cession, mise sous séquestre ou faillite, à rattacher le droit que Sa Majesté détient à titre bénéficiaire aux biens que le débiteur possède alors. À vrai dire, la fiducie n'est pas réelle, étant donné que son objet ne peut être identifié à compter de la date de création de la fiducie: D. W. M. Waters, *Law of Trusts in Canada* (2e éd. 1984), à la p. 117. Cependant, le par. 227(5) a pour effet de revitaliser la fiducie dont l'objet a perdu toute identité. L'identification de l'objet de la fiducie est donc faite après coup. À cet égard, je suis d'accord avec la conclusion que le juge Twaddle tire dans l'arrêt *Roynat*, [1992] M.J. No. 105, précité, lorsqu'il affirme, à la p. 647, au sujet de l'effet du par. 227(5), que [TRADUCTION] "la Loi confère à Sa Majesté un droit d'accès à tous les éléments d'actif, quels qu'ils soient, que

l'employeur possède alors, au moyen desquels elle peut réaliser la fiducie initiale dont elle est bénéficiaire".

32 J'ajoute que, dans l'arrêt *Re Deslauriers Construction Products Ltd.*, précité, à la p. 601, le juge en chef Gale a adopté ce point de vue relativement à une disposition semblable au par. 227(5), et que notre Cour a confirmé la validité de son raisonnement dans l'arrêt *Dauphin Plains*, précité. Dans l'affaire *Deslauriers*, précitée, un syndic de faillite et le bénéficiaire d'une fiducie légale réputée créée par le *Régime de pensions du Canada*, S.C. 1964-65, ch. 51, se faisaient la lutte pour obtenir la priorité de rang. Les paragraphes 24(3) et (4) de cette loi prévoyaient ceci :

24. ...

(3) L'employeur qui a déduit de la rémunération d'un employé un montant au titre de la cotisation que ce dernier est tenu de verser, ou à valoir sur celle-ci, mais ne l'a pas remis au receveur général du Canada, doit garder ce montant à part, en un compte distinct du sien et il est réputé détenir le montant ainsi déduit en fiducie pour Sa Majesté.

(4) En cas de liquidation, de cession ou de faillite d'un employeur, un montant égal à celui qui, selon le paragraphe (3), est réputé détenu en fiducie pour Sa Majesté doit être considéré comme étant séparé et ne formant pas partie des biens en liquidation, cession ou faillite, que ce montant ait été ou non, en fait, conservé distinct et séparé des propres fonds de l'employeur ou de la masse des biens.

À la page 1198 de l'arrêt *Dauphin Plains*, précité, notre Cour approuve la conclusion du juge en chef Gale (à la p. 601 de l'arrêt *Deslauriers*, précité) quant à l'interprétation du par. 24(4) :

[TRADUCTION] Il nous semble que le par. (4), en particulier les six derniers mots, a été inséré dans la Loi dans le but spécifique de soustraire de la masse des biens du failli, par la création d'une fiducie, un montant équivalent aux déductions et d'en faire la propriété du ministre.

33 Cette interprétation du par. 227(5) a aussi l'avantage d'être compatible avec le régime de répartition établi par la *Loi sur la faillite et l'insolvabilité*, L.R.C. (1985), ch. B-3. L'article 67 de cette loi retire expressément de la masse des biens du failli les créances relatives à des retenues sur la paye non versées et conservées en fiducie (notamment) en vertu de l'art. 227 *LIR* :

67. (1) Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants :

***a*) les biens détenus par le failli en fiducie pour toute autre personne;**

...

(2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) Le paragraphe (2) ne s'applique pas à l'égard des paragraphes 227(4) et (5) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) et (4) du *Régime de pensions du Canada* ou des paragraphes 57(2) et (3) de la *Loi sur l'assurance-chômage*...

Il faut remarquer qu'en plus de rattacher le droit de Sa Majesté aux biens du débiteur lorsque survient l'un des événements précisés au par. 227(5), la fiducie réputée profite encore à Sa Majesté d'une manière accessoire, en ce sens que le par. 227(5) permet de rattacher le droit de Sa Majesté à un bien donné en garantie qui est grevé d'un privilège fixe, si les déductions à l'origine de la demande de Sa Majesté ont été faites avant que le privilège ne soit rattaché au bien donné en garantie. Cette proposition découle de l'arrêt de notre Cour *Dauphin Plains*, précité, où il était question de déterminer l'ordre de priorité quant au produit d'une vente de liquidation d'un administrateur-séquestre. Dans cette affaire, les créances de Sa Majesté (notamment) résultaient du non-versement de retenues sur la paye liées à l'application du *Régime de pensions du Canada*, S.R.C. 1970, ch. C-5, et de la

Loi de 1971 sur l'assurance-chômage, S.C. 1970-71-72, ch. 48. Ces lois rendaient Sa Majesté bénéficiaire de créances conformément à des fiducies réputées créées en vertu de dispositions dont le texte était fort semblable à celui des par. 227(4) et (5) dont il est question en l'espèce. En concluant que ces créances avaient priorité sur un privilège flottant qui s'était cristallisé après que les retenues en cause eurent été faites, le juge Pigeon a affirmé à la p. 1199 :

Il faut d'abord faire remarquer que, pour des raisons analogues à celles qui motivent l'arrêt *Avco*, [1979] 2 R.C.S. 699, précité, la réclamation des déductions au titre du Régime de pensions et de l'assurance-chômage ne peut affecter le produit de la réalisation de biens grevés d'un privilège fixe et spécifique. À partir de la création de cette charge, l'actif qui en est grevé n'est plus la propriété du débiteur qu'à charge de ce privilège. La réclamation des déductions est née plus tard et ne peut donc primer ce privilège en l'absence d'une loi le prescrivant spécifiquement. Cependant, le privilège général ne s'est pas cristallisé avant la délivrance du bref d'assignation et la nomination du séquestre. En l'espèce, que l'on choisisse l'une ou l'autre date n'a pas d'importance, les deux étant postérieures aux déductions. [Je souligne]

Ainsi, le par. 227(5) permet subsidiairement de rattacher rétroactivement le droit de Sa Majesté au bien en litige donné en garantie, si la garantie concurrente s'est concrétisée après que les déductions à l'origine de la créance de Sa Majesté eurent été faites. Sur le plan conceptuel, la fiducie réputée, visée au par. 227(5), permet à la créance de Sa Majesté de s'appliquer rétroactivement et de rattacher le droit qu'elle possède en vertu du par. 227(4) au bien donné en garantie avant qu'il devienne grevé d'un privilège fixe. La même chose se produit lorsqu'un privilège légal s'applique avant la constitution d'une hypothèque sur un bien en litige donné en garantie. Dans l'arrêt *Avco*, précité, le juge Martland, s'exprimant au nom de notre Cour, fait le commentaire suivant au sujet d'un tel scénario (à la p. 706) :

À compter de ce jour, le privilège s'applique aux biens de l'employeur et, comme le prévoit le par. (1), il prévaut sur toute autre créance, y compris une cession ou une hypothèque. En d'autres termes, lorsque le privilège s'applique, l'ordre de préférence n'est pas modifié par une disposition du bien par l'employeur. L'hypothèque consentie avant la création du privilège

> **n'est pas touchée. Le privilège s'applique uniquement au droit de l'employeur dans ce bien. [Je souligne.]**

113 Le juge Gonthier reconnaît donc dans ces énoncés que les dispositions de la LIR créent une fiducie réputée mais que ces dispositions ne sont pas nécessairement suffisantes pour donner priorité de rang à la créance de la Couronne. Pour ce faire, il faut que l'article 227(5) LIR (tel qu'il existait alors) accorde cette priorité.

114 Le juge Gonthier ajoute :

> **76 En l'espèce, la CGG accordait expressément à Sparrow la permission de vendre les biens de l'inventaire dans le cours de ses affaires et d'utiliser le produit dont elle disposerait; <u>la GLB comportait</u> implicitement la même permission. Bien qu'il soit vrai que la CGG comportait une clause de produit en fiducie, je considère que cela ne peut pas avoir pour effet de limiter la portée de la permission alors que l'arrangement réel intervenu entre les parties voulait, comme cela a été précisé, que Sparrow puisse utiliser le produit de la vente des biens de l'inventaire dans le cours de ses affaires. Dans cette affaire, la banque n'était pas un petit financier de biens d'inventaire, qui exigeait que Sparrow lui verse immédiatement le produit de la vente des biens de l'inventaire. Au contraire, la banque était un gros bailleur de fonds qui permettait à Sparrow d'utiliser le produit de la vente des biens de l'inventaire pour maintenir la viabilité de son entreprise. Pour ces motifs, appliquant le critère du professeur Wood, je conclus que, en vertu de la permission de "vendre [. . .] les biens figurant dans l'inventaire" "dans le cours normal de[s] affaires" et d'"utiliser les sommes d'argent dont [elle] dispose[rait]", la banque permettait à Sparrow de vendre les biens de l'inventaire pour payer des salaires et, nécessairement, pour verser des retenues sur la paye.**
>
> **77 Pour tous ces motifs, en application de la thèse de la permission, je conclus que la fiducie réputée dont bénéficie l'appelante en vertu du par. 227(5) doit avoir priorité de rang sur les garanties que la banque détient sur les biens en litige donnés en garantie. Le fonds en fiducie constitué des retenues effectuées, bien que sans objet identifié au moment de sa constitution, est capable de viser après coup les biens faisant l'objet de cette fiducie. Encore une fois, la banque a consenti à la diminution de sa garantie sur les biens de l'inventaire pour payer les retenues sur la paye au moment où elles ont été effectuées, et le par. 227(5) *LIR* a pour effet de reporter ce consentement jusqu'au moment de la mise sous séquestre. En consentant à ce que Sparrow paie les salaires au moyen du produit de la vente des biens**

de l'inventaire dans le cours de ses affaires, la banque consentait par le fait même au régime légal de recouvrement des retenues sur la paye non versées, établi par la *LIR*. Bref, en l'espèce, la permission d'aliéner le produit de la vente des biens figurant dans l'inventaire, conjuguée au régime légal des par. 227(4) et (5) *LIR*, accorde priorité de rang aux demandes de Sa Majesté relatives aux retenues légales sur la paye. Cela vaut tant à l'égard de la CGG de la banque que de sa GLB.

115 Le juge Gonthier finira par conclure ainsi :

87 Il est possible de résumer mes conclusions en l'espèce au moyen des cinq propositions suivantes :

1. On résout la question de la priorité de rang entre des fiducies légales et des garanties consensuelles en déterminant quel droit grève les biens en litige donnés en garantie, au moment où la fiducie légale devient opérante.

2. La fiducie réputée du par. 227(5) *LIR* grève tous les biens du débiteur qui existent au moment de la liquidation, cession, faillite ou mise sous séquestre.

3. Par exemple, si des retenues sont effectuées avant qu'un privilège fixe grève les biens donnés en garantie, la fiducie réputée du par. 227(5) fera en sorte que le droit que Sa Majesté possède à titre bénéficiaire grèvera rétroactivement ces biens. Le privilège fixe applicable à ces biens sera, par la suite, assujetti aux créances préexistantes de Sa Majesté relatives aux retenues sur la paye non versées.

4. Sous cette réserve, si une garantie tient d'un privilège fixe et spécifique, elle confère à son détenteur le droit de propriété sur les biens donnés en garantie, de sorte qu'une fiducie légale concurrente subséquente ne pourra pas s'y appliquer. Dans ce cas, tout ce que la fiducie légale peut grever est le droit de rachat que l'*equity* reconnaît relativement aux biens donnés en garantie.

5. Cependant, à titre d'exception aux deuxième et quatrième propositions, si le détenteur d'une garantie fixe permet au débiteur de vendre les biens donnés en garantie, cela peut donner ouverture à l'application de la fiducie légale. Cette éventualité dépend entièrement des faits de chaque affaire. Le

> **critère applicable consiste à déterminer si, au moment où les retenues ont été effectuées, le débiteur avait le droit de vendre les biens donnés en garantie et d'utiliser le produit de cette vente pour exécuter l'obligation liée à la fiducie légale.**

116 Les juges majoritaires se rallieront cependant à l'opinion du juge Iacobucci qui refuse de voir dans les dispositions de la LIR, les mots sacramentels permettant de confirmer la priorité de la fiducie réputée de la Couronne sur les garanties antérieures de la Banque Royale.

117 Le juge Iacobucci énonce plutôt ce qui suit :

> **11 La présomption n'est donc pas un moyen de supprimer une garantie existante. Elle permet plutôt de retourner en arrière pour chercher un élément d'actif qui, au moment où l'impôt est devenu exigible, n'était pas assujetti à une garantie opposée. Bref, la disposition en matière de fiducie réputée ne peut s'appliquer que s'il est préalablement déterminé qu'il existe des éléments d'actifs libres de toute charge qui peuvent faire l'objet d'une fiducie réputée. La présomption suit la réponse à la question de la garantie mobilière; elle ne détermine pas cette réponse.**
>
> **12 En fait, le juge Gonthier considère que la nature particulière de la fiducie réputée peut justifier l'établissement d'une distinction entre le droit de Sa Majesté et les droits opposés. Toutefois, son argument diffère de celui que j'ai exposé dans la mesure où il met l'accent sur l'exécution réputée de l'obligation qui existe envers Sa Majesté. Mon collègue semble considérer que la permission de vendre ne contribue à réduire la valeur de la garantie qu'à l'égard des obligations exécutées et non à l'égard des obligations inexécutées. À son avis, cela représente un obstacle suffisant à la thèse de la permission. Je conviens que, si la distinction entre les obligations exécutées et les obligations inexécutées pouvait être maintenue, la probabilité que la permission anéantisse la garantie serait alors considérablement réduite. J'estime cependant que cette distinction ne saurait être maintenue. Comme le juge Gonthier l'affirme à plus d'une reprise dans ses motifs, la thèse de la permission repose sur le consentement des parties. Toutefois, les parties en l'espèce ont consenti à ce que les biens figurant dans l'inventaire soient vendus [TRADUCTION] "dans le cours normal de[s] affaires [du débiteur]". Les termes utilisés sont formels. Aucune distinction n'est établie entre les obligations exécutées et les obligations inexécutées. La seule exécution prévue par la permission est la vente réelle des biens figurant dans l'inventaire et l'utilisation du produit de cette vente pour rembourser une dette. Comme je l'ai déjà affirmé, le mécanisme de la présomption ne**

> **satisfait pas à l'exigence de vente réelle. Je conclus donc que si l'on veut rendre justice au libellé de la permission en tant qu'indice de l'intention des parties, il ne saurait y avoir de distinction entre les obligations exécutées et les obligations inexécutées.**
>
> **13 Mon collègue attache beaucoup d'importance au fait que le débiteur s'est engagé, dans la convention de garantie générale, à [TRADUCTION] "payer tous les impôts, tarifs, redevances, cotisations et autres sommes de toute nature qui peuvent être légalement perçues, cotisées ou imposées à l'égard du débiteur ou d'un bien donné en garantie, lorsque ces sommes sont dues et exigibles". Toutefois, cet engagement qui, du reste, n'est qu'un engagement à respecter la loi, ne fait pas partie de la permission donnée. Il n'ajoute rien au par. 153(1) *LIR*. Il ne prescrit pas non plus l'issue d'une lutte pour obtenir la priorité de rang. Qui plus est, l'engagement à payer des impôts n'est qu'un seul parmi plusieurs engagements contenus dans la convention. Un autre engagement veut que le débiteur [TRADUCTION] "exploite [son] entreprise [. . .] d'une manière appropriée et efficiente". Le débiteur pourrait vraisemblablement contracter des dettes subséquentes en exploitant son entreprise. Le juge Gonthier n'énonce aucun principe qui pourrait permettre de régler les luttes que Sa Majesté et des prêteurs subséquents se feraient pour obtenir la priorité de rang. En cas de conflit, chacun d'eux bénéficierait de la permission de vendre les biens figurant dans l'inventaire ainsi que d'engagements explicites, de sorte qu'il faudrait trouver un autre critère pour déterminer qui a priorité. Ici, comme auparavant, la perspective d'un renversement des règles ordinaires en matière de priorité est immédiate et inquiétante.**

118 Et plus loin, il ajoute :

> **23 De plus, pour les raisons que j'ai déjà exposées, il est fort probable qu'une interprétation large de la thèse de la permission contreviendrait à la *PPSA*. La Loi prévoit clairement que le financement des biens figurant dans un inventaire est un outil commercial important. Toutefois, permettre que la simple mise à exécution potentielle d'une permission de vendre fasse obstacle à une garantie sur les biens figurant dans un inventaire dépouillerait cette garantie de toute efficacité. Ce ne serait plus une garantie contre des obligations subséquentes.**
>
> **24 <u>Finalement, je tiens à souligner qu'il est loisible au législateur d'intervenir et d'accorder la priorité absolue à la fiducie réputée. Le</u>**

paragraphe 224(1.2) *LIR* illustre clairement comment cela pourrait se faire. Cette disposition attribue à Sa Majesté certaines sommes "malgré toute autre garantie au titre de ce[s] somme[s]", et prévoit qu'elles "doi[vent] être payée[s] au receveur général par priorité sur toute autre garantie au titre de ce[s] somme[s]". Pour obtenir le résultat souhaité, il suffit d'utiliser des termes aussi clairs. En l'absence de pareils termes, l'innovation judiciaire n'est pas souhaitable parce qu'il s'agit d'une question qui regorge de considérations de principe et parce qu'une prescription du législateur est plus susceptible d'être claire qu'une règle dont les limites précises ne seront établies que par suite d'une longue et coûteuse série de poursuites.

(soulignements ajoutés)

119 On sait donc comment éviter l'impact de l'arrêt *Sparrow Electric*. Il suffit que la LRCR comporte un texte produisant le même effet juridique que l'amendement apporté à la LIR pour assurer la préséance de la fiducie réputée de la LIR sur les hypothèques mobilières sans dépossession. Il faudra voir si l'article 264 LRCR rencontre cet objectif.

120 Donc, en 2009, après l'affaire *SMRQ c. De Courval*, force est de constater que la Cour d'appel n'est pas enclin à lire dans l'article 20 LMRQ l'existence d'une fiducie réputée, alors que les jugements dans les affaires *Nolisair* et *Sécurité Saglac* proposent une lecture fort différente du texte de loi (avec ou sans les mots qui y furent ajoutés par l'amendement de 1993).

121 D'ailleurs, l'opinion du soussigné dans *White Birch* a été, entre autres choses, basée sur l'interprétation de la Cour d'appel dans *De Courval*.

122 Par ailleurs, la décision de la Cour d'appel dans *SMRQ c. De Courval* a été critiquée et non suivie par la Cour d'appel fédérale dans une affaire de la *Banque Toronto Dominion c. S.M. la Reine* rapportée à 2010 CAF 174.

123 Vient alors l'affaire *Banque nationale du Canada c. Agence du revenu du Québec*, 2011 QCCA 1943 en appel d'un jugement de la Cour du Québec, 2009 QCCQ 8079[46]. Cette affaire est une autre illustration de la difficulté d'interprétation de la notion de fiducie réputée (dans l'article 20 LMRQ). Dans cette instance, le juge Gilson Lachance de la Cour du Québec a conclu que l'article 20 LMRQ créait une fiducie réputée mais sans considérer ni l'arrêt de la Cour d'appel dans *Québec (SMRQ) c. De Courval* précitée[47] et sans non plus analyser les dispositions du *Code civil du Québec* en matière de fiducies.

124 Le juge Lachance analyse cependant la portée de l'article 20 LMRQ sur les créances de créanciers garants, à la lumière de *R. c. First Vancouver Finance* et *Great West Transport Ltd* 2002 CSC 49; [2002] 2 R.C.S. 720, qui a apparenté la fiducie réputée de l'article 227 (4.1) LFI à une "charge flottante[48] grevant la totalité des biens du débiteur fiscal au profit de Sa Majesté"[49].

125 La décision du juge Lachance a fait l'objet d'un appel[50] et le juge Dalphond accepte le raisonnement du juge de première instance sauf en ce qui a trait à une correction de chiffres.

126 Voici comment le juge Dalphond aborde la question :

> **[16] Le premier juge conclut que Revenu Québec bénéficie d'une fiducie présumée en vertu de l'article 20 de la *Loi sur le ministère du Revenu*, L.R.Q., c. M-31 (LMR), sur les sommes retenues à la source par Canouxa. Cette fiducie s'applique, selon lui, sur l'ensemble des biens de la débitrice fiscale, sauf sur les biens vendus dans le cours normal des activités de l'entreprise, où la fiducie se transporte sur le produit de cette vente ou sur le bien de remplacement. La BNC, créancière de Canouxa, n'est pas un tiers acquéreur et est assujettie à la fiducie, comme la Cour suprême l'a établi dans l'arrêt *FirstVancouverFinance c. M.R.N.*, 2002 CSC 49 (CanLII), [2002] 2 R.C.S. 720, 2002 CSC 49. De plus, cette situation n'est pas modifiée par la faillite de Canouxa selon l'article 67(1) a) de la *Loi sur la faillite et l'insolvabilité*, L.R.C. (1985), ch. B-3 (LFI). L'intention du législateur est d'assujettir les créanciers garantis au respect de la fiducie présumée en cas de faillite, ce qui emporte une obligation de remettre à l'autorité fiscale le produit de la vente des biens assujettis à cette fiducie.**

127 Il ajoute cependant ce qui suit :

> **[29] Je n'ai pas d'hésitation à conclure que les sommes réclamées de la débitrice fiscale en vertu de l'art. 1015 de la *Loi sur les impôts*, L.R.Q., c. I-3 (retenues à la source sur salaire) sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu* et que la loi provinciale prévoit un impôt semblable à celle de la loi fédérale. Il en va de même pour les contributions au RRQ par rapport à celles au RPC.**
>
> **[30] Quant à la nature et l'étendue de l'assiette de la fiducie invoquée, elles sont précisées à l'article 20 LMR :**
>
> > **20. Toute personne qui déduit, retient ou perçoit un montant quelconque en vertu d'une loi fiscale est réputée le détenir en fiducie pour l'État, séparé de son patrimoine et de ses propres fonds, et en vue de le verser à l'État selon les modalités et dans le délai prévus par une loi fiscale.**
> >
> > **En cas de non-versement à l'État, selon les modalités et dans le délai**

> **prévus par une loi fiscale, d'un montant qu'une personne est réputée par le premier alinéa détenir en fiducie pour l'État, un montant égal au montant ainsi déduit, retenu ou perçu est réputé, à compter du moment où le montant est déduit, retenu ou perçu, être détenu en fiducie pour l'État, séparé de son patrimoine et de ses propres fonds, et former un fonds séparé ne faisant pas partie des biens de cette personne, que ce montant ait été ou non, dans les faits, tenu séparé du patrimoine de cette personne ou de ses propres fonds.**
>
> **Toutefois, cette personne peut, lors de la production au ministre d'une déclaration en vertu des articles 468 ou 470 de la Loi sur la taxe de vente du Québec (chapitre T-0.1), retirer du montant total qu'elle est réputée par le premier alinéa détenir en fiducie pour l'État, les montants qu'elle a droit de déduire et qu'elle a effectivement déduits dans le calcul de son montant à remettre. [je souligne]**

[31] La fiducie présumée porte donc sur les montants perçus et, en cas de non-remise, sur des montants équivalents appartenant au débiteur fiscal. La situation est donc équivalente à ce que prévoit l'art. 227 (4) de la *Loi de l'impôt sur le revenu*, L.R.C. (1985), c. 1 (5e suppl.), mais ne s'étend pas aux biens autres du débiteur, comme le prévoit l'art. 227 (4.1) de la loi fédérale :

> **227(4) Montant détenu en fiducie**
>
> **Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l'absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi.**

(4.1) Non-versement

> **Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement**

à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne, et les biens détenus par son créancier garanti au sens du paragraphe 224(1.3) qui, en l'absence d'une garantie au sens du même paragraphe, seraient ceux de la personne, d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu, séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est déduit ou retenu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à une telle garantie.

Ces biens sont des biens dans lesquels Sa Majesté a un droit de bénéficiaire malgré toute autre garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie. [je souligne]

[32] Commentant l'art. 227 de la loi fédérale, M. le juge Iacobucci écrit dans *First Vancouver Finance* :

27 Le législateur a donné suite à l'arrêt *Sparrow Electric* en modifiant les dispositions relatives à la fiducie réputée en 1998 (avec effet rétroactif en 1994) pour adopter leur libellé actuel. Plus particulièrement, les mots "malgré toute autre garantie [...] le concernant" ont été ajoutés au par. 227(4). De même, le par. 227(4.1) (l'ancien par. 227(5)) a accru la portée de la fiducie réputée de façon qu'elle englobe les "biens détenus par son créancier garanti [...] qui, en l'absence d'une garantie [...] seraient ceux de la personne". Le paragraphe 227(4.1) a également été modifié par la suppression du renvoi aux événements déclencheurs (liquidation, faillite, etc.), le législateur établissant plutôt une présomption selon laquelle les biens du débiteur fiscal et de ses créanciers garantis sont détenus en fiducie "en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est

> **réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté". Enfin, le par. 227(4.1) précise désormais que les biens sont réputés être détenus en fiducie "à compter du moment où le montant est déduit ou retenu".**
>
> **28 Ces modifications démontrent que le législateur a voulu que les par. 227(4) et (4.1) accordent la priorité de rang à la fiducie réputée lorsque les biens sont par ailleurs grevés d'une garantie, que celle-ci ait pris effet avant ou après les retenues à la source ou l'application de la fiducie réputée. C'est ce qui ressort clairement de l'expression "malgré toute autre garantie" employée aux par. 227(4) et (4.1). En d'autres termes, vu la manière dont les dispositions relatives à la fiducie réputée avaient été interprétées dans l'affaire *Sparrow Electric*, le législateur les a modifiées de façon à accorder la priorité de rang à la fiducie réputée lorsque le ministre et des créanciers garantis font valoir concurremment un droit sur les biens du débiteur fiscal.**
>
> **29 Comme je l'indique précédemment, le législateur a également modifié le moment auquel la fiducie se matérialise. Tout renvoi à un événement déclencheur emportant l'application de la fiducie, comme la liquidation ou la faillite, a été supprimé. Le paragraphe 227(4.1) dispose désormais qu'une fiducie réputée s'applique "en cas de non-versement [de retenues à la source] à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi" (je souligne). Ainsi, l'application de la fiducie réputée est désormais enclenchée dès qu'il y a manquement à l'obligation de verser les retenues à la source. En outre, suivant l'al. 227(4.1) a), les biens sont réputés être détenus en fiducie "à compter du moment où le montant est déduit ou retenu" Par conséquent, bien que l'omission de verser les retenues à la source enclenche l'application de la fiducie, cette dernière est réputée prendre effet rétroactivement au moment où les retenues à la source ont été faites. Ces modifications révèlent que le législateur a manifestement voulu consolider la fiducie réputée et en accroître la portée afin de faciliter les opérations de recouvrement du ministre. [je souligne]**

128 Ainsi, la fiducie réputée de l'article 20 LMRQ est donc reconnue sans équivoque. Plus encore, l'interprétation que nous donne le juge Dalphond dissipe les doutes et, une fois cette interprétation appliquée au texte de l'article 49 LRCR, le soussigné doit conclure que cette disposition établit une fiducie réputée touchant les cotisations suspendues et non versées aux Comités de retraite requérants.

129 Plusieurs auteurs supportent une telle conclusion.

130 Louis Payette dans son texte "*Les sûretés réelles dans le Code civil du Québec*", 2010, EYB2010SUR3, indique au paragraphe 63, pages 19 et 20, que le législateur peut prévoir qu'une fiducie légale réputée peut exister dans la mesure où les biens visés par la fiducie sont simplement réputés détenus en fiducie (i.e. sans séparation physique du patrimoine du débiteur). Au paragraphe 1821 du même texte, page 104, Me Payette ajoute :

> **Certaines lois créent une fiction aux termes de laquelle les biens d'un contribuable sont "réputés" être détenus en fiducie au profit des pouvoirs publics dont il est le débiteur. L'existence d'une hypothèque sur un bien n'empêche pas la naissance de telles fiducies sur ce bien et une prise en paiement n'entraîne pas leur extinction; le preneur en paiement doit par conséquent rendre compte des sommes dues au bénéficiaire de la fiducie présumée, à hauteur de la valeur du bien ou du prix de sa revente.**

131 Voir aussi John Claxton "*Studies on the Quebec Law of Trust*", Thomson Carswell 2005, pages 84 et suivantes, nos. 4.2 et suivants, viz : "*Trust Constituted by Operation of Law"*; Roger P. Simard dans *Juris Classeur Québec - sûreté* viz : "*Fiducies réputées*".

132 Cette revue de la jurisprudence pertinente en matière de fiducies réputées permet donc de conclure ainsi :

a) Pour qu'une fiducie réputée existe en droit québécois, il faut que le législateur intervienne clairement en ce sens. C'est le cas en l'espèce.

b) La fiducie réputée de l'article 49 LRCR stipule que celle-ci produit ses effets, qu'il y ait ou qu'il n'y ait pas séparation physique des biens visés par la fiducie du patrimoine de l'employeur. Ces mots, une fois qu'ils furent ajoutés aux dispositions de l'article 20 de la LIR, ont permis à cette dernière fiducie réputée de produire les effets visés par le législateur. Après réflexion, il apparaît évident que les mêmes mots utilisés dans l'article 49 LRCR doivent produire les mêmes effets;

c) Contrairement à ce que le soussigné a conclu dans *Whilte Birch* précitée, l'article 49 LRCR crée une véritable fiducie légale au sens de l'article 1262 C.c.Q. et fait en sorte que les cotisations d'équilibre dues et non payées à cause de l'effet suspensif de l'ordonnance du juge Morawetz sont visées par ladite fiducie réputée, laquelle doit donc produire ses effets;

d) Cependant, cela n'est pas suffisant pour conclure que cette fiducie prend rang avant l'hypothèque mobilière sur l'universalité des biens de SBI en faveur de IQ;

e) En effet, contrairement aux "Personal Property Security Acts" de certaines autres provinces, le Québec ne possède aucune disposition législative

faisant en sorte qu'une fiducie réputée puisse avoir préséance sur les sûretés légales ou conventionnelles que l'on retrouve au Code civil du Québec;

f) Donc, à moins que la LRCR ne contienne d'autres dispositions faisant en sorte que les biens visés par la fiducie réputée de l'article 49 LRCR échappent à l'hypothèque universelle de IQ, cette dernière devra donc recevoir son plein effet à l'égard de la totalité des biens de SBI, défaisant en cela toute possibilité de récupération par les Comités de retraite requérants;

g) Il faut donc décider si l'article 264 LRCR permet de remédier à la question et faire en sorte que les biens faisant l'objet de la fiducie réputée de l'article 49 LRCR ne soient pas touchés par l'hypothèque universelle de IQ. Voilà la question que l'on doit maintenant débattre.

b) **L'effet de l'article 264 LRCR sur la créance de IQ**

133 Les Comités de retraite plaident que l'article 264 LRCR vient renforcer leur thèse selon laquelle les cotisations d'équilibre sont affectées d'une fiducie réputée et ne font pas partie du gage commun des créanciers de SBI.

134 Rappelons ici la disposition pertinente de l'article 264 LRCR :

> **264. Sauf dispositions contraires de la loi, est incessible et insaisissable :**
>
> **1. toute cotisation versée ou qui doit être versée à la caisse de retraite ou à l'assureur, ainsi que les intérêts accumulés;**

135 Serait donc insaisissable ou incessible toute cotisation versée ou qui doit être versée à la caisse de retraite des employés syndiqués on non-syndiqués de SBI. S'il faut donner un sens à cet article, il faut conclure que les cotisations ... "à être versées"... sont littéralement hors de la portée des autres créanciers de SBI, que ces derniers soient garantis ou non, qu'ils bénéficient d'une garantie antérieure à la date d'exigibilité des cotisations payées ou non.

136 Le mot "cotisation" utilisé à l'article 264 LRCR se doit d'avoir le même sens que celui qu'on lui donne à l'article 49 LRCR. Il inclut donc la cotisation d'équilibre "qui doit être versée" mais qui fait l'objet d'une suspension depuis l'émission de l'ordonnance initiale.

137 Les Comités de retraite plaident aussi que l'article 264 LRCR n'est pas la seule disposition qui rendrait insaisissables les cotisations non versées à la caisse de retraite. L'article 553(7) du *Code de procédure civile* stipule en effet que sont insaisissables :

7. Les prestations accordées au titre d'un régime complémentaire de retraite auquel cotise un employeur pour le compte des employés, les autres sommes déclarées insaisissables par une loi régissant ces régimes ainsi que les cotisations qui sont ou qui doivent être versées à ces régimes.

(soulignement ajouté)

138 En conséquence, ces montants ne tomberaient pas dans le gage commun des créanciers de SBI et ne pourraient faire l'objet ni d'une hypothèque ou d'une autre forme d'affectation en faveur d'un tiers.

139 Les articles 2644 et 2645 C.c.Q. viennent renforcer cette approche :

Art. 2644. Les biens du débiteur sont affectés à l'exécution de ses obligations et constituent le gage commun de ses créanciers.

Art. 2645. Quiconque est obligé personnellement est tenu de remplir son engagement sur tous ses biens meubles et immeubles, présents et à venir, à l'exception de ceux qui sont insaisissables et de ceux qui font l'objet d'une division de patrimoine permise par la loi.

Toutefois, le débiteur peut convenir avec son créancier qu'il ne sera tenu de remplir son engagement que sur les bines qu'ils désignent.

(soulignement ajouté)

140 Il s'ensuit donc, selon les Comités requérants que les cotisations d'équilibre suspendues par l'ordonnance initiale sont incessibles et insaisissables en vertu de l'article 264 LRCR en plus de faire l'objet d'une fiducie réputée selon l'article 49 LRCR. L'effet combiné de ces deux dispositions fait donc en sorte que les sommes non versées aux régimes de retraite sont exclues du patrimoine de SBI et ne peuvent être utilisées pour rembourser la créance hypothécaire de IQ.

141 Dans *Marché Bernard Lemay c. Beljaars*, 2003 CanLII 30892, la Cour supérieure a décidé ce qui suit :

[40] Les dispositions de cette loi particulière [la LRCR] devraient primer sur les articles généraux du Code civil ou de la Loi sur les sociétés de fiducie... et sont très claires.

> **[41] Il semble évident que l'article 264 de la LRCR, jumelé à l'article 553, 7 C.p.c. qui traite aussi de l'insaisissabilité, conférant ce caractère aux droits accordés au titre d'un régime de retraite, doivent primer sur toutes autres dispositions moins pertinentes ou moins spécifiques parce que plus générales, comme les articles du Code civil sur le sujet et dont nous avons traité.**

142 Voir aussi : *Loi sur les régimes complémentaires de retraite - Annotations et Commentaires* par la Régie des rentes du Québec, Bibliothèque nationale du Québec 1998, paragraphe 264.3.[51]

143 Qui plus est, dans un contexte de faillite, ces sommes n'entreraient pas, non plus, dans les "biens du failli" et ne feraient pas partie de la saisine d'un syndic, vu le libellé de l'article 67(1)(b) LFI qui édicte que :

> **67(1) Les biens d'un failli constituant le patrimoine attribué à ses créanciers ne comprennent pas les biens suivants :**
>
> **a)** **les biens détenus par le failli en fiducie pour toute autre personne;**
>
> **b)** **les biens qui, selon le droit applicable dans la province dans laquelle ils sont situé et où réside le failli, ne peuvent faire l'objet d'une mesure d'exécution ou de saisie contre celui-ci;**

(soulignements ajoutés)

144 Force est de reconnaître que ces arguments sont, à première vue, convaincants.

145 IQ prétend, à l'encontre de ce qui précède, que pour que l'article 264 LRCR puisse recevoir application, il faut qu'il y ait eu séparation physique des cotisations qui doivent être versées pour que leur qualité d'incessibilité et d'insaisissabilité puisse recevoir pleine application. IQ ajoute que ces cotisations font l'objet d'une ordonnance de suspension de paiement suite à l'ordonnance initiale prononcée par le juge Morawetz. Ces cotisations ne seraient donc pas "dues et exigibles".

146 Le soussigné n'est pas d'accord avec une telle proposition.

147 Le soussigné est d'avis qu'effectivement, les articles 49 et 264 LRCR doivent être lus et interprétés dans le même contexte.

148 Si l'article 49 LRCR crée une fiducie réputée opposable à IQ, cela veut dire que les biens visés par la fiducie réputée sont non seulement facilement identifiables et que les montants qu'ils représentent sont disponibles mais qu'effectivement, ils se trouvent clairement "identifiés" par l'effet même de l'article 49. De même, l'article 264 LRCR peut s'appliquer aux montants auxquels l'article

49 LRCR s'applique.

149 Il ne sera donc pas plus nécessaire dans ce contexte particulier de procéder à une séparation physique des cotisations d'équilibre à être versées du reste des actifs de SBI pour que le produit desdites cotisations jouissent du caractère d'incessibilité et d'insaisissabilité que leur procure l'article 264 LRCR, qu'il n'est nécessaire de le faire pour que la fiducie réputée de l'article 49 LRCR ne produise ses effets.

150 En ce sens, l'article 264 LRCR vient compléter la logique de l'article 49 LRCR et, autrement, ces deux mêmes articles deviennent complètement dénudés de leur sens de leur portée et de leur effet.

151 Lorsque la requête des Comités de retraite requérants est formulée, les seuls actifs de SBI sont constitués d'une somme liquide de quelques 30 millions$. Les parties ont convenu que ce montant devait être versé à IQ pour atténuer l'impact des intérêts courant sur la créance de cette dernière.

152 La fiducie réputée de l'article 49 LRCR pouvait donc affecter cette portion des liquidités de SBI représentant le total des cotisations d'équilibre dues et non encore versées aux Comités de retraite requérants, à cause de l'ordonnance du suspension, sans qu'il soit nécessaire de les séparer du reste des actifs liquides de SBI et, du même fait, les caractères d'incessibilité et d'insaisissabilité de ces mêmes montants aux termes de l'article 264 LRCR pouvaient les affecter.

153 Finalement, le fait que les sommes aient été distribuées à IQ sous réserve des droits des Comités de retraite requérants n'ont pas eu pour effet de faire perdre à ces actifs leur caractère de biens fiduciaires, incessibles et insaisissables.

154 Quant à l'argument de IQ à l'effet que lors de la suspension des paiements des cotisations d'équilibre par l'émission de l'ordonnance initiale rendue par le juge Morawetz, aucune cotisation d'équilibre n'était due et non encore versée (et, partant, aucune somme ne pouvait être assujettie ni à l'article 49 LRCR, ni à l'article 264 LRCR), cet argument doit aussi être rejeté. En effet, il faut distinguer entre l'effet suspensif de l'obligation de payer ces sommes et leur assujettissement aux l'articles 49 et 264 LRCR. Ces articles couvrent toute somme non encore versée. Il faut distinguer entre l'exigibilité d'une dette et une suspension (temporaire) de l'obligation d'en effectuer le paiement. Les cotisations demeurent donc dues et exigibles mais seule l'exécution du paiement de ces sommes est suspendue.

155 La notion d'incessibilité et d'insaisissabilité des cotisations dues et non versées empêche l'employeur et ses créanciers d'utiliser ces sommes à des fins autres que celles prévues à la LRCR. Ces sommes ne peuvent donc faire l'objet d'une hypothèque mobilière universelle avec ou sans dépossession.

156 La conséquence de ce qui précède est que le raisonnement de l'arrêt Sparrow Electric ne peut

s'appliquer en l'espèce.

157 IQ plaide aussi l'application de l'affaire *Poulin c. Morency*[52], où il s'agissait de déterminer si les sommes cotisées par un employé dans un régime de retraite insaisissable avait perdu son caractère d'insaisissabilité suite au transfert des biens du régime à un REER. La Cour d'appel du Québec avait décidé que la totalité du REER de l'appelant Poulin était saisissable, ce qui fut confirmé par la Cour suprême, et que la disposition d'insaisissabilité ne protégeait pas les sommes transférées à la demande de l'appelant aux fins d'investissement dans un REER.

158 En l'instance, sont incessibles et insaisissables les cotisations dues par l'employeur et qui ne sont pas encore versées aux Comités de retraite requérants. La vente des actifs de SBI et leur transformation en actifs liquides n'enlève donc rien au caractère d'incessibilité et d'insaisissabilité desdites cotisations.

159 Dans *Poulin c. Morency* (précitée) ce qui a fait perdre le caractère d'insaisissabilité et d'incessibilité aux sommes en litige, c'est leur transfert dans un REER car alors les sommes en question devaient nécessairement passer sous le contrôle de l'appelant avant qu'elles aboutissent dans un REER. D'ailleurs, comme l'expose le juge Gonthier[53] lorsque le législateur québécois veut étendre l'insaisissabilité de certaines sommes visées par l'article 264 LRCR, il le fait expressément[54].

160 Finalement, force est de constater que l'article 264 LRCR a, par analogie, sensiblement le même effet que l'article 30(7) de la *Loi ontarienne sur les sûretés mobilières* (LRO 1990, ch. D-10) que l'on appelle communément le "PPSA" et qui subordonne les sûretés mobilières à l'intérêt du bénéficiaire d'une fiducie réputée créée par une loi portant sur les régimes de retraite. Comme le confirme la Cour suprême dans *Indalex,* n'eût été de l'application de la doctrine de la prépondérance du droit fédéral, une telle fiducie réputée aurait eu priorité sur une créance garantie en vertu d'une sûreté consentie par une débitrice.

161 L'exécution d'une garantie en faveur de IQ de la nature d'une hypothèque immobilière et mobilière sans dépossession, même dûment enregistrée au RDPRM, n'a pas pour effet d'anéantir ce caractère. Si c'était le cas, l'article 264 LRCR n'aurait aucun effet pratique. De fait, les cotisations à être versées et qui ne l'ont pas été n'appartenant pas à SBI à cause notamment de l'effet de la fiducie réputée de l'article 49 LRCR portant sur les mêmes actifs, ne font ni partie des biens de SBI ni du gage commun des créanciers de cette dernière.

162 En conclusion, le Tribunal est d'avis que :

1) les cotisations d'équilibre objet du présent litige, font l'objet d'une fiducie réputée créée par la loi;
2) lesdites cotisations sont incessibles et insaisissables;
3) elles ne sont pas affectées par l'hypothèque universelle dont bénéficie IQ, et ce, même si lesdites cotisations d'équilibre sont devenues payables aux

Comités de retraite requérants après la mise ne place de ladite hypothèque universelle.

<u>Conclusion générale</u>

163 Nous sommes à la fin d'un processus de réorganisation sous l'empire de la LACC qui a pris la forme d'une vente des actifs de SBI à une nouvelle entité (qui continuera les activités de cette dernière). Il s'agit maintenant de distribuer le produit de cette vente d'actifs aux créanciers de SBI. Ces créanciers ne détiennent aucune super-priorité qui aurait pu leur être accordée sous l'empire de la LACC. La priorité accordée aux créances des Comités de retraite, d'une part, et de IQ, d'autre part, doit donc être analysée à la seule lumière du droit québécois. Il n'est nullement question de l'application de la doctrine de la préséance du droit fédéral sur le droit provincial.

164 S'opposent ici deux obstacles à l'exercice du droit de IQ sur la totalité des actifs de SBI : certains de ces actifs sont incessibles et insaisissables en plus de faire l'objet d'une fiducie réputée.

165 Sont donc hors de la portée de IQ, les cotisations d'équilibre non versées depuis l'ordonnance de suspension du 16 janvier 2012. Les déficits actuariels des régimes de retraite existant à la date de terminaison de ces derniers ne sont visés ni par l'article 49 ni par l'article 264 LRCR.

166 Les articles 49 et 264 LRCR doivent être lus et appliqués restrictivement compte tenu du fait qu'ils créent un régime exceptionnel. Une fiducie réputée ne peut faire l'objet d'une interprétation large et libérale, et ce, même si la LRCR, dans son ensemble, doit être interprétée de façon généreuse. On ne peut donc étendre l'application de l'article 49 ou de l'article 264 LRCR aux déficits actuariels.

167 L'article 49 LRCR ne s'applique qu'aux cotisations et aux intérêts accumulés sur ces cotisations.

168 C'est l'effet combiné des articles 49 et 264 LRCR qui viennent soustraire les actifs de SBI représentant le montant des cotisations d'équilibre non versées aux Comités de retraite (plus les intérêts y afférant) à la créance hypothécaire de IQ. Ces deux dispositions ont pour effet de sortir littéralement ces actifs du gage commun des créanciers de SBI.

169 Dans *Indalex* en Cour suprême, la juge Deschamps écrit :

> **[51] ... <u>Les priorités dont bénéficient les créanciers sont définies par la législation provinciale, à moins que ces droits soient écartés par une loi fédérale</u>. Le législateur fédéral n'a pas expressément édicté que toutes les priorités établies en matière de faillite s'appliquent aux instances relevant de la LACC ou aux propositions régies par la LFI. Bien que les créanciers d'une société tentant de se réorganiser puissent, dans leurs négociations, tenir compte des droits qu'ils pourraient exercer en cas de faillite, ces droits**

> **ne constituent rien de plus qu'une considération tant que la faillite n'est pas survenue. Au début des procédures en matière d'insolvabilité, Indalex a choisi un processus régi par la LACC, ne laissant aucun doute sur le fait que, bien qu'elle cherchât à protéger les emplois, elle ne demeurerait pas leur employeur. Nous ne sommes pas en présence d'un cas où l'échec d'un arrangement a entraîné la liquidation d'une société sous le régime de la LFI. Indalex a atteint l'objectif qu'elle poursuivait. Elle a choisi de vendre son actif sous le régime de la LACC, et non sous celui de la LFI.**
>
> **[52] La fiducie réputée créée par la LRR continue de s'appliquer dans les instances relevant de la LACC, sous réserve de la doctrine de la prépondérance fédérale (Crystalline Investments Ltd. c. Domgroup Ltd., 2004 CSC 3 (CanLII), 2004 CSC 3, [2004] 1 R.C.S. 60, par. 43). La Cour d'appel a donc jugé à bon droit que, à l'issue d'un processus de liquidation relevant de la LACC, les priorités peuvent être établies selon le régime prévu dans la LSM, plutôt que selon le régime fédéral établi dans la LFI.**
>
> (soulignements ajoutés)

170 Il en va de même pour la fiducie réputée de l'article 49 LRCR et de la protection que l'article 264 LRCR accorde à ces actifs.

171 En l'absence de l'application de la doctrine de la prépondérance fédérale, force est de conclure que ces dispositions doivent recevoir leur plein effet.

172 Supposons le scénario suivant : au lieu de se retrouver dans un contexte de réorganisation sous l'empire de la LACC, SBI aurait tout simplement décidé de vendre ses actifs à une nouvelle société avant de payer ses créanciers à même le produit de cette vente, sans pour autant faire honneur à son obligation de verser aux Comités de retraite requérants les cotisations d'équilibre qui leur sont dues. Le raisonnement qui précède aurait été applicable sans que l'on s'interroge plus loin. Le Tribunal est d'avis que dans le contexte du présent débat, ce raisonnement doit être appliqué.

173 Avec égards pour l'opinion contraire, le soussigné est d'avis que les questions en litige ne se résolvent ni par une référence à l'affaire *Sparrow Electric* ni par une référence à l'article 37 LACC. Dans *Sparrow* il n'était pas question d'insaisissabilité ou d'incessibilité des sommes devant revenir à la Couronne fédérale mais uniquement de la non-application prioritaire des sommes visées par la fiducie réputée contenue à la LIR, problème qui a été corrigé par un amendement subséquent à la *Loi de l'impôt*. Ici, les biens constituant l'assiette de la fiducie réputée sont littéralement exclus de l'application de la garantie dont bénéficie IQ. Pour IQ, ces biens sont inaccessibles car ils ne peuvent faire partie d'une quelconque cession ou transfert par SBI.

174 Il n'est, non plus, ni utile, ni possible d'en référer aux pouvoirs inhérents de la Cour supérieure sous l'empire de l'article 46 C.p.c. pour faire en sorte que les cotisations d'équilibre soient versées aux Comités de retraite, car elles le sont de toutes façons. Il n'est pas approprié d'appliquer ce concept afin de permettre à ces mêmes requérants de récupérer les soldes des déficits actuariels réclamés, ces déficits étant clairement identifiés comme des dettes de l'employeur (article 228 LR R) et clairement exclus de la portée de l'article 49 LRCR. En présence de dispositions législatives aussi claires, il n'y a aucune justification de recourir aux pouvoirs inhérents de la Cour, le législateur ayant déjà pris position sur la question.

175 Ce débat a été fort bien préparé et plaidé par les procureurs impliqués. Même après l'audition des 27 et 28 mai 2013, les procureurs ont pu soumettre plusieurs textes additionnels au soussigné, clarifiant certaines de leurs positions ou répondant aux questions du soussigné. Le Tribunal leur en sait gré et les remercie. Les échanges entre les procureurs se sont échelonnés de juin à octobre 2013, ce qui explique en partie la longueur du délibéré.

POUR L'ENSEMBLE DE CES MOTIFS, le Tribunal

176 **ACCUEILLE** en partie la requête des Comités de retraite requérants;

177 **DÉCLARE** que les cotisations d'équilibre ainsi que les intérêts y afférant et non versés aux Comités de retraite requérants font l'objet d'une fiducie réputée opposable à l'Intimée Investissement Québec Inc. aux termes de l'article 49 LRCR.

178 **DÉCLARE** que ces cotisations et intérêts y afférant sont incessibles et insaisissables, sont exclus de l'application de l'hypothèque mobilière et immobilière sans dépossession dont bénéficie Investissement Québec Inc. et ont priorité sur la créance de cette dernière, par l'effet combiné des articles 49 et 264 LRCR.

179 **REJETTE** la requête des Comités de retraite requérants quant à leur prétention que les déficits actuariels desdits régimes de retraite jouissent du même avantage que les cotisations d'équilibre et des intérêts y afférant.

180 **CONTINUE** la requête pour directives à une date à être déterminée pour fins de fixation du quantum des sommes devant être remboursées aux Comités de retraite requérants par Investissement Québec Inc.

181 **LE TOUT**, sans frais.

ROBERT MONGEON, J.C.S.

1 [2012] O.J. No. 472, Motifs écrits déposés le 2 février 2012.

2 Pièce P-1.

3 Pièce P-2.

4 En date du 20 juillet 2012, les réclamations prioritaires des Comités de retraite totalisent 10 558 290,00$ et 4 296 220,00$ respectivement (pièces P-3, P-4, P-13 et P-14).

5 Rapport no. 13 du Contrôleur, pièce P-5, paragraphe 7.

6 Voir paragraphes 1 à 3 de l'ordonnance : **1. THIS COURT ORDERS that the Priority claim Adjudication Protocol, attached hereto as Schedule "A", be and the same is hereby authorized and approved. 2. THIS COURT ORDERS that the adjudication of whether the BSI Pension Reimbursement Claims are Priority Claims, all as defined in the attached Priority Claim Adjudication Protocol, be and the same is hereby referred exclusively to the Superior Court of Québec (Commercial Division) <u>to be determined in accordance with the Priority Claim Adjudication Protocol.</u> 3. THIS COURT HEREBY REQUESTS the aid and recognition of the Superior Court of Québec (Commercial Division) to give effect to this order and to adjudicate whether the BSI Pension Reimbursement Claims constitute Priority Claims in accordance with the terms of the Priority Claims Adjudication Protocol.**

7 White Birch Paper Holding Co. (Arrangement relatif à) 2012 QCCS 1679.

8 La décision de la Cour d'appel de l'Ontario est rapportée à 2011 ONCA 265.

9 RSO 1990 c. P-8. A noter, cependant, qu'en Ontario, ce sont les déficits actuariels qui sont touchés par l'article 57(4) de ladite loi, tandis qu'au Québec, ce sont les cotisations qui sont visées par l'article 49 LRCR.

10 *Century Services Inc. c. Canada* (Procureur Général) [2010] 3 R.C.S. 379, paragraphe [15].

11 *APRHQ c. Hydro-Québec*, 2005 QCCA 304, paragraphe 32.

12 *Monsanto c. Surintendant des services financiers* [2004] 3 R.C.S. 152, paragraphe 38.

13 *Buschau c. Rogers Communications Inc.* [2006] 1 R.C.S. 973, paragraphe 19.

14 2012 QCCS 1679, paragraphes 216 et 217.

15 2013 CSC 6, paragraphes 58 et 59.

16 Voir paragraphe 58, Plan d'Argumentation des Requérants.

17 Voir : "*Loi sur les régimes complémentaires de retraite, Annotations et Commentaires*", Régie des rentes du Québec, Bibliothèque Nationale du Québec, 1998, p. 49-3 : "Par une fiction juridique ou présomption légale, le législateur considère que les cotisations à verser et les intérêts accumulés sont détenus en fiducie. Comme la fiducie constitue un patrimoine d'affectation distinct de celui de l'employeur, les biens réputés détenus en fiducie se trouvent donc soustraits des biens de l'employeur, lesquels constituent le gage commun de ses créanciers, conformément à l'article 2645 du *Code civil du Québec*. [...] Ainsi le présent article pourrait être invoqué à l'encontre du créancier de l'employeur qui prend possession du compte bancaire ou des créances de ce dernier en vertu par exemple des articles 2721 ou 2773 du Code civil du Québec, [...] Voir aussi Lyne Duhaime : "*Les aspects juridiques des régimes de retraite*", Publications CCH Ltée, Brossard, 2011, p. 138 : "Jusqu'à leur versement à la caisse de retraite, les cotisations et les intérêts accumulés sont réputés détenus en fiducie par l'employeur, que ce dernier les ait ou non gardés séparément de ses biens. Ceci signifie que dans une situation d'insolvabilité ou de faillite, les cotisations et intérêts ainsi accumulés ne feraient pas partie du patrimoine de l'employeur et seraient donc à l'abri des réclamations des créanciers." (soulignements ajoutés)

18 *AbitibiBowater (Arrangement relatif à)*, 2009 QCCS 2028, juge Danièle Mayrand, j.c.s. qui écrit : [34] (...) D'ailleurs, la Cour d'appel de l'Ontario, dans l'affaire *Ivaco*, [2006] O.J. No. 4152, alors qu'elle décide de la portée de l'article 57(3) du *Pension Benefit Act* (dont les termes sont au même effet que ceux de l'article 49 LRCR), mentionne ce qui suit à l'égard des fiducies présumées (Deemed Trust); (...) "This Legislative designation by itself does not create a true trust. If the province wants to require an employer to keep its unpaid contributions to a pension plan in a separate account, it must legislate that separation. It has not done so.""

19 *White Birch Paper Holding Company (Arrangement relatif à)* 2012 QCCS 1679, pages 43 et 44.

20 Beaulne, Jacques, *Droit des fiducies*, 2e édition. Collection Bleue, Montréal, 2005, page 129. Voir aussi au même effet : Commentaires du Ministre de la justice, tome 1, le Code civil du Québec, art. 1260, page 748; Duhaime Lyne, op.cit. page 15; Claxton, John B. *Langage du droit de la fiducie*, Revue du Barreau EYB2002, RDB64, pages 6 à 8.

21 [2004] 1 R.C.S. 758, page 22, paragraphe 41. Il faut spécifier ici qu'il ne s'agissait pas d'une fiducie présumée ou créée par une loi mais d'un régime contractuel d'épargne enregistré de retraite.

22 2012 QCCS 1679, page 56, paragraphe 169.

23 Voir notamment *White Birch Paper Holding Company (Arrangement relatif à)* 2012

QCCS 1679, aux paragraphes 173, 174, 189 et 191 cités par QI dans son Plan d'Argumentation, pages 11 et 12, paragraphes 67 et 68.

24 Voir aussi les articles 14 à 18 LRCR qui détaillent toutes les composantes d'un régime de retraite.

25 7. Le régime de retraite est à cotisation déterminée s'il détermine à l'avance les cotisations patronales et, le cas échéant, les cotisations salariales, ou la méthode pour les calculer, et si la rente normale est fonction des sommes portées au compte du participant. Il est à prestations déterminées si la rente normale est soit un montant déterminé, indépendant de la rémunération du participant, soit un montant qui correspond à un pourcentage de cette rémunération. Il est à cotisation et prestations déterminées s'il détermine à l'avance les cotisations patronales et, le cas échéant, les cotisations salariales, ainsi que la rente normale, ou la méthode pour les calculer. 8. Le régime de retraite est contributif si le participant y verse des cotisations salariales. 9. Est garanti le régime de retraite dont les remboursements et prestations sont à tout moment garantis par un assureur.

26 Voir aussi les articles 138 et 139 LRCR qui déterminent le calcul de la cotisation d'exercice.

27 Articles 198 ss. LRCR.

28 Article 205(3e) LRCR.

29 Articles 208 ss. LRCR.

30 Articles 229-230 et 230.0.01 à 230.0.012.

31 Voir *Century Services* précité.

32 Re : Faillite de *Nolisair International Inc. c. Le Sous-ministre du revenu du Québec*, [1997] J.Q. no 2972, (1997) AZ 97011738 (C.A.).

33 [1994] J.Q. no 1201, 700-11-000069-932 (C.S. St-Jérôme) AZ-94021150.

34 *LRQ c. M-31*.

35 C.S. Chicoutimi, no. 150-11-000012-930.

36 1997 CanLII 10022 (QC.CA) 1.

37 1997 CanLII 10026 (QC.CA).

38 Article 39, *Loi* modifiant la *Loi concernant l'Impôt sur le tabac*, la *Loi sur le Ministère du*

Revenu et d'autres dispositions législatives d'ordre fiscal L.Q. *1993 c. 79* sanctionnée le 17 décembre 1993 et applicable à toute faillite, liquidation ou cession survenue après le 23 avril 1993.

39 Opinion du juge Chamberland dans *Sécurité Saglac*.

40 Opinion du juge Fish dans *Nolisair* en Cour d'appel.

41 [1999] 1 R.C.S. 759.

42 En appel du jugement du soussigné dans Services Sécurité Québec, [2007] J.Q. no 6702.

43 Royal Bank of Canada c. Sparrow Electric Corp. [1997] 1 RCS 411.

44 LC (1991) ch. 46.

45 LRC (1985) ch. 1.

46 La décision de la Cour du Québec date du 16 juillet 2009.

47 L'arrêt de la Cour d'appel est du 3 mars 2009.

48 Cette notion de "charge flottante" a été écartée dans *White Birch aux paragraphes [203] à [207]*.

49 Paragraphe 18, 2009 QCCQ 8079. Voir aussi paragraphe [25] de la même décision.

50 Banque Natinale du Canada c. Agence du Revenu du Québec, 2011 QCCA 1943.

51 Un bien incessible est un bien qui ne peut faire l'objet d'une transmission entre vifs, que ce soit à titre onéreux ou à titre gratuit. La cession de droit pourrait se concrétiser par la vente du bien cédé, par sa donation, par sa mise en garantie ou tout simplement au moyen d'une renonciation à un droit dans le bien. Le bien insaisissable, quant à lui, ne peut faire l'objet d'une saisie, qui est une procédure en vertu de laquelle un créancier met sous le contrôle de la justice des biens qui appartiennent à son débiteur dans le but d'assurer la conservation de ses droits. Soulignons qu'il existe deux types de saisies : la saisie-arrêt, qui consiste à ordonner au détenteur d'un bien de ne pas s'en départir, et la saisie-exécution, qui consiste à ordonner au détenteur d'un bien de le remettre afin de payer la créance de son propriétaire ... L'article 2465 du *Code civil du Québec* prévoit qu'une personne qui est obligée personnellement est tenue de remplir son engagement sur tous ses biens meubles et immeubles, présents et à venir, à moins qu'ils ne soient insaisissables. Ainsi, en règle générale, les biens d'une personne sont saisissables; ce n'est qu'exceptionnellement qu'ils sont insaisissables. L'article 264 constitue donc une exception à la règle générale... (soulignements ajoutés)

52 1999 3 RCS 351; 1999 CanLii 662.

53 Voir les paragraphes 37 et suivants de son opinion.

54 Voir article 264(3), second alinéa. Voir aussi l'article 28(3) du Règlement sur les régimes complémentaires de retraite (1990) 122 C.O. II-3246.

TAB 17

2017 SCC 33, 2017 CSC 33
Supreme Court of Canada

Douez v. Facebook, Inc.

2017 CarswellBC 1663, 2017 CarswellBC 1664, 2017 SCC 33,
2017 CSC 33, [2017] B.C.W.L.D. 4054, 279 A.C.W.S. (3d) 522

Deborah Louise Douez (Appellant) and Facebook, Inc. (Respondent) and Canadian Civil Liberties Association, Samuelson-Glushko Canadian InternetPolicy and Public Interest Clinic, Information Technology Association of Canada and Interactive Advertising Bureau of Canada (Interveners)

McLachlin C.J.C., Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté JJ.

Heard: November 4, 2016
Judgment: June 23, 2017
Docket: 36616

Proceedings: reversing *Douez v. Facebook, Inc.* (2015), 73 C.P.C. (7th) 87, 2015 CarswellBC 1671, 2015 BCCA 279, [2016] 1 W.W.R. 287, 77 B.C.L.R. (5th) 116, [2015] B.C.J. No. 1270, 642 W.A.C. 56, 374 B.C.A.C. 56, 387 D.L.R. (4th) 360, Bauman C.J.B.C., Goepel J.A., Lowry J.A. (B.C. C.A.); reversing *Douez v. Facebook, Inc.* (2014), 53 C.P.C. (7th) 302, 2014 BCSC 953, 2014 CarswellBC 1487, [2014] B.C.J. No. 1051, 313 C.R.R. (2d) 254, Susan A. Griffin J. (B.C. S.C.)

Counsel: Ward K. Branch, Q.C., Christopher Rhone, Michael Sobkin for Appellant
Mark A. Gelowitz, W. David Rankin for Respondent
Cynthia Kuehl, Meredith E. Jones for Intervener, Canadian Civil Liberties Association
Paul J. Bates, Marina Pavlovic, Jeremy de Beer for Intervener, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic
Matthew P. Gottlieb, Paul Michell, Ian C. Matthews for Intervener, Information Technology Association of Canada
Derek J. Bell, Jason M. Berall for Intervener, Interactive Advertising Bureau of Canada

Subject: Civil Practice and Procedure; Contracts; International; Torts

APPEAL by plaintiff from judgment reported at *Douez v. Facebook, Inc.* (2015), 2015 BCCA 279, 2015 CarswellBC 1671, 387 D.L.R. (4th) 360, 73 C.P.C. (7th) 87, 374 B.C.A.C. 56, 642 W.A.C. 56, [2015] B.C.J. No. 1270, 77 B.C.L.R. (5th) 116, [2016] 1 W.W.R. 287 (B.C. C.A.), finding that forum selection clause was enforceable and that plaintiff failed to show strong cause not to enforce it.

POURVOI formé par la demanderesse à l'encontre d'une décision publiée à *Douez v. Facebook, Inc.* (2015), 2015 BCCA 279, 2015 CarswellBC 1671, 387 D.L.R. (4th) 360, 73 C.P.C. (7th) 87, 374 B.C.A.C. 56, 642 W.A.C. 56, [2015] B.C.J. No. 1270, 77 B.C.L.R. (5th) 116, [2016] 1 W.W.R. 287 (B.C. C.A.), ayant conclu qu'une clause de sélection de for était exécutoire et que la demanderesse n'avait pas démontré l'existence de motifs sérieux pour ne pas l'appliquer.

***Karakatsanis, Wagner, Gascon JJ.*:**

I. Overview

1 Forum selection clauses purport to oust the jurisdiction of otherwise competent courts in favour of a foreign jurisdiction. To balance contractual freedom with the public good in having local courts adjudicate certain claims, courts have developed a test to determine whether such clauses should be enforced. This test has mostly been applied in

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

commercial contexts, where forum selection clauses are generally enforced to hold sophisticated parties to their bargain, absent exceptional circumstances. This appeal requires the Court to apply this test in a consumer context.

2 Deborah Douez is a resident of British Columbia and a member of the social network Facebook.com. She claims that Facebook, Inc. infringed her privacy rights and those of more than 1.8 million British Columbians, contrary to the *Privacy Act* of that province. Facebook is seeking to have the action stayed on the basis of the forum selection clause contained in its terms of use, which every user must click to accept in order to use its social network.

3 The chambers judge refused to stay the action, concluding that the *Privacy Act* overrides the clause, and that it provides strong reasons not to enforce it. The Court of Appeal reversed her decision, concluding instead that the clause was enforceable and that Ms. Douez had failed to show strong cause not to enforce it.

4 Like our colleague Abella J., although for different reasons, we would allow the appeal. In our view, while s. 4 of the *Privacy Act* does not override forum selection clauses, Ms. Douez has established strong reasons not to enforce the clause at issue here. The grossly uneven bargaining power between the parties and the importance of adjudicating quasi-constitutional privacy rights in the province are reasons of public policy that are compelling, and when considered together, are decisive in this case. In addition, the interests of justice, and the comparative convenience and expense of litigating in California, all support a finding of strong cause in the present case.

II. Background

5 The respondent, Facebook, Inc., is an American corporation headquartered in California. It operates Facebook.com, one of the world's leading social networks, and generates most of its revenues from advertising. The appellant, Ms. Douez, is a resident of British Columbia and has been a member of Facebook since 2007.

6 In 2011, Facebook created a new advertising product called "Sponsored Stories". This product used the name and picture of Facebook members, allegedly without their knowledge, to advertise companies and products to other members on the site and externally.

7 Ms. Douez brought an action against Facebook when she noticed that her name and profile picture had been used in Sponsored Stories. She alleges that Facebook used her name and likeness without consent for the purposes of advertising, in contravention to s. 3(2) of the *Privacy Act*, R.S.B.C. 1996, c. 373:

> (2) It is a tort, actionable without proof of damage, for a person to use the name or portrait of another for the purpose of advertising or promoting the sale of, or other trading in, property or services, unless that other, or a person entitled to consent on his or her behalf, consents to the use for that purpose.

Ms. Douez also seeks certification of her action as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. The proposed class includes all British Columbia residents who had their name or picture used in Sponsored Stories. The estimated size of the class is 1.8 million people.

8 Facebook is free to join and use, but all potential users — including Ms. Douez — must agree to its terms of use as part of the registration process. These terms include a forum selection and choice of law clause requiring that disputes be resolved in California according to California law:

> You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for purpose of litigating all such claims. [A.R., vol. II, p. 138]

9 Facebook brought a preliminary motion to stay Ms. Douez's action on the basis of this forum selection clause. Alternatively, it argued that the action should be stayed because British Columbia is *forum non conveniens* under s. 11

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 ("*CJPTA*"). In our Court, however, Facebook focused its submissions exclusively on the forum selection clause and did not argue that British Columbia is *forum non conveniens*.

III. Decisions Below

A. Supreme Court of British Columbia (Griffin J.), 2014 BCSC 953, 313 C.R.R. (2d) 254 (B.C. S.C.)

10 The chambers judge declined to enforce the forum selection clause. Although she found it to be *prima facie* valid, clear and enforceable, she held that s. 4 of the *Privacy Act* overrides forum selection clauses and provides a strong public policy not to enforce them. In her view, the British Columbia Supreme Court has exclusive jurisdiction under s. 4 to hear actions under the Act. As a result, she concluded that the plaintiff would be unable to bring her claim elsewhere if the claim was stayed.

11 While the chambers judge's findings on s. 4 were sufficient to resolve the motion, she also found that there was strong cause not to enforce the forum selection clause. Enforcing it would, in her view, exclude Facebook from liability because only the British Columbia Supreme Court had jurisdiction over the matter. Ms. Douez did not need to prove California courts would refuse to hear her claim. In addition, she found that the jurisdiction clause and purposes of the *Privacy Act* provide strong public policy reasons supporting a finding of strong cause.

12 Lastly, the chambers judge concluded on the basis of the factors in s. 11 of the *CJPTA* that the courts of California would not be more appropriate than the courts of British Columbia to hear the action. She found that it would be more convenient to hear the matter in British Columbia than in California. Thus, the chambers judge refused Facebook's request to stay the proceeding.

B. Court of Appeal for British Columbia (Bauman C.J. and Lowry and Goepel JJ.A.), 2015 BCCA 279, 77 B.C.L.R. (5th) 116 (B.C. C.A.)

13 The Court of Appeal reversed the decision of the chambers judge and ordered that the action be stayed on the basis of Facebook's forum selection clause. It confirmed that the analysis of forum selection clauses is distinct from the analysis of the appropriate forum under s. 11 of the *CJPTA*.

14 The Court of Appeal concluded that the chambers judge erred in her interpretation of s. 4 of the *Privacy Act*. In its view, the chambers judge failed to give effect to the principle of territoriality, under which provincial legislation cannot regulate civil rights in another jurisdiction. Section 4 concerns subject-matter competence, not territorial competence, and therefore it only confers jurisdiction to the Supreme Court of British Columbia to the exclusion of other courts in British Columbia. Had the legislature wanted to override forum selection clauses, it would have done so explicitly.

15 The Court of Appeal held that the forum selection clause was enforceable, and that Ms. Douez had failed to show strong cause. In finding strong cause, the chambers judge's analysis was tainted by her erroneous interpretation of s. 4 of the *Privacy Act*. The fact that a stay would extinguish a claim might provide strong cause, but Ms. Douez failed to provide evidence establishing that this would be the case here. Since the clause should be enforced, the Court of Appeal did not consider s. 11 of the *CJPTA*.

IV. Issues

16 Facebook does not dispute that British Columbia courts have territorial jurisdiction. The main issue is whether Ms. Douez's action should be stayed on the basis of the forum selection clause contained in its terms of use. The parties also disagree on whether the analysis of forum selection clauses should be subsumed under s. 11 of the *CJPTA*, or whether they are distinct concepts.

V. Analysis

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

17 As we shall explain, the *forum non conveniens* test adopted in the *CJPTA* was not intended to replace the common law test for forum selection clauses. In our view, this case should be resolved under the strong cause analysis established by this Court in *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450 (S.C.C.).

A. The Interaction Between Forum Selection Clauses and the CJPTA

18 At common law, forum selection clauses and the *forum non conveniens* doctrine command different analyses: "Each class of case has its own onus, test and rationale" (*Momentous.ca Corp. v. Canadian American Assn. of Professional Baseball Ltd.*, 2010 ONCA 722, 103 O.R. (3d) 767 (Ont. C.A.), at para. 37, aff'd 2012 SCC 9, [2012] 1 S.C.R. 359 (S.C.C.)). Our Court has confirmed that "the presence of a forum selection clause" is "sufficiently important to warrant a different test", and that "a unified approach to *forum non conveniens*, where a choice of jurisdiction clause constitutes but one factor to be considered" may not be preferable (*Pompey*, at para. 21).

19 Ms. Douez argues that the *CJPTA* provides a complete framework to determine the court's jurisdiction, and that forum selection clauses should be considered as another factor within the *forum non conveniens* analysis under s. 11.

20 In our view, the courts below rightly rejected Ms. Douez's proposed approach. Section 11 of the *CJPTA* "constitutes a complete codification of the common law test *for forum non conveniens* [that] admits of no exceptions" (*Lloyd's Underwriters v. Cominco Ltd.*, 2009 SCC 11, [2009] 1 S.C.R. 321 (S.C.C.), at para. 22 (emphasis added)). It was never intended to codify the test for forum selection clauses. Not only does s. 11 make no mention of contractual stipulations, the comments on the uniform act that served as a basis for the *CJPTA* are also silent on this point (Uniform Law Conference of Canada, *Uniform Court Jurisdiction and Proceedings Transfer Act* (online)). The analysis of forum selection clauses thus remains separate, despite the enactment of the *CJPTA*.

21 Several Canadian provinces have adopted their own *CJPTA*, with identical or similar provisions. Their appellate courts have consistently held that the analysis of forum selection clauses remains distinct (see e.g. *Viroforce Systems Inc. v. R & D Capital Inc.*, 2011 BCCA 260, 336 D.L.R. (4th) 570 (B.C. C.A.), at para. 14; *Armoyan v. Armoyan*, 2013 NSCA 99, 334 N.S.R. (2d) 204 (N.S. C.A.), at para. 218). Even the Court of Appeal of Saskatchewan, which held that forum selection clauses should be considered as part of the *CJPTA* analysis, held that "*Pompey* continues to apply notwithstanding [its] enactment" (*Hudye Farms Inc. v. Canadian Wheat Board*, 2011 SKCA 137, 377 Sask. R. 146 (Sask. C.A.), at para. 10; see also *Frey v. Bell Mobility Inc.*, 2011 SKCA 136, 377 Sask. R. 156 (Sask. C.A.), at paras. 112-14).

22 In short, the *CJPTA* was never intended to replace the common law test for forum selection clauses. In the absence of legislation to the contrary, the common law test continues to apply and provides the analytical framework for this case.

B. The Forum Selection Clause at Common Law: Pompey

23 We turn next to the common law test for forum selection clauses adopted by this Court in *Pompey*, and to how we propose to apply it in a consumer context.

24 Forum selection clauses serve a valuable purpose. This Court has recognized that they "are generally to be encouraged by the courts as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law" (*Pompey*, at para. 20). Forum selection clauses are commonly used and regularly enforced.

25 That said, forum selection clauses divert public adjudication of matters out of the provinces, and court adjudication in each province is a public good. Courts are not merely "law-making and applying venues"; they are institutions of "public norm generation and legitimation, which guide the formation and understanding of relationships in pluralistic and democratic societies" (T.C.W. Farrow, *Civil Justice, Privatization, and Democracy* (2014), at p. 41). Everyone has a right to bring claims before the courts, and these courts have an obligation to hear and determine these matters.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

26 Thus, forum selection clauses do not just affect the parties to the contract. They implicate the court as well, and with it, the court's obligation to hear matters that are properly before it. In this way, forum selection clauses are a "unique category of contracts" (M. Pavlovi?, "Contracting Out of Access to Justice: Enforcement of Forum-Selection Clauses in Consumer Contracts" (2016), 62 *McGill L.J.* 389, at p. 396).

27 Of course, parties are generally held to their bargain and are bound by the enforceable terms of their contract. However, because forum selection clauses encroach on the public sphere of adjudication, Canadian courts do not simply enforce them like any other clause. In common law provinces, a forum selection clause cannot bind a court or interfere with a court's jurisdiction. As the English Court of Appeal recognized long ago, "no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them" ("*Fehmarn*" *(The)* (1957), [1958] 1 All E.R. 333 (Eng. C.A.), at p. 335).

28 Instead, where no legislation overrides the clause, courts apply a two-step approach to determine whether to enforce a forum selection clause and stay an action brought contrary to it (*Pompey*, at para. 39). At the first step, the party seeking a stay based on the forum selection clause must establish that the clause is "valid, clear and enforceable and that it applies to the cause of action before the court" (*Preymann v. Ayus Technology Corp.*, 2012 BCCA 30, 32 B.C.L.R. (5th) 391 (B.C. C.A.), at para. 43; see also *Hudye Farms Inc.*, at para. 12 and *Pompey*, at para. 39). At this step of the analysis, the court applies the principles of contract law to determine the validity of the forum selection clause. As with any contract claim, the plaintiff may resist the enforceability of the contract by raising defences such as, for example, unconscionability, undue influence, and fraud.

29 Once the party seeking the stay establishes the validity of the forum selection clause, the onus shifts to the plaintiff. At this second step of the test, the plaintiff must show strong reasons why the court should not enforce the forum selection clause and stay the action. In *Pompey*, this Court adopted the "strong cause" test from the English court's decision in "*Eleftheria*" *(The) (Cargo Owners) v.* "*Eleftheria*" *(The)*, [1969] 1 Lloyd's Rep. 237 (Eng. P.D.A.). In exercising its discretion at this step of the analysis, a court must consider "all the circumstances", including the "convenience of the parties, fairness between the parties and the interests of justice" (*Pompey*, at paras. 19, 30 and 31). Public policy may also be a relevant factor at this step (*Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustee of)*, 2001 SCC 90, [2001] 3 S.C.R. 907 (S.C.C.), at para. 91, referred to in *Pompey*, at para. 39; *Frey*, at para. 115).

30 The strong cause factors were meant to provide some flexibility. Importantly, *Pompey* did not set out a closed list of factors governing the court's discretion to decline to enforce a forum selection clause. Both *Pompey* and *The* "*Eleftheria*" acknowledged that courts should consider "al the circumstances" of the particular case (*Pompey*, at para. 30; *The* "*Eleftheria*", at p. 242). And the leading authority in England continues to recognize that the court in "*Eleftheria*" did not intend its list of factors to be comprehensive (*Donohue v. Armco Inc.*, [2001] UKHL 64, [2002] 1 All E.R. 749 (U.K. H.L.), at para. 24).

31 That said, the strong cause factors have been interpreted and applied restrictively in the commercial context. In commercial interactions, it will usually be desirable for parties to determine at the outset of a business relationship where disputes will be settled. Sophisticated parties are justifiably "... deemed to have informed themselves about the risks of foreign legal systems and are deemed to have accepted those risks in agreeing to a forum selection clause" (*Aldo Group Inc. v. Moneris Solutions Corp.*, 2013 ONCA 725, 118 O.R. (3d) 81 (Ont. C.A.), at para. 47). In this setting, our Court recognized that forum selection clauses are generally enforced and to be encouraged "because they provide international commercial relations with the stability and foreseeability required for purposes of the critical components of private international law, namely order and fairness" (*Scierie Thomas-Louis Tremblay inc. c. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401 (S.C.C.) [hereinafter GreCon Dimter], at para. 22).

32 In *Pompey*, for example, our Court enforced a forum selection clause contained in a bill of lading concluded between two sophisticated shipping companies. The parties were of similar bargaining power and sophistication, since they were "corporations with significant experience in international maritime commerce ... [that] were aware of industry

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

practices" (para. 29). The Court held that the "forum selection clause could very wel have been negotiated" between the parties (*ibid.*). This context manifestly informed the Court's application of the strong cause test.

33 But commercial and consumer relationships are very different. Irrespective of the formal validity of the contract, the consumer context may provide strong reasons not to enforce forum selection clauses. For example, the unequal bargaining power of the parties and the rights that a consumer relinquishes under the contract, without any opportunity to negotiate, may provide compelling reasons for a court to exercise its discretion to deny a stay of proceedings, depending on the other circumstances of the case (see e.g. *Straus v. Decaire*, 2007 ONCA 854 (Ont. C.A.), at para. 5 (CanLII)). And as one of the interveners argues, instead of supporting certainty and security, forum selection clauses in consumer contracts may do "the opposite for the millions of ordinary people who would not foresee or expect its implications and cannot be deemed to have undertaken sophisticated analysis of foreign legal systems prior to opening an online account" (Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic Factum, at para. 7).

34 Canadian courts have recognized that the test may apply differently, depending on the contractual context (see *Expedition Helicopters Inc. v. Honeywell Inc.*, 2010 ONCA 351, 100 O.R. (3d) 241 (Ont. C.A.), at para. 24; *Stubbs v. ATS Applied Tech Systems Inc.*, 2010 ONCA 879, 272 O.A.C. 386 (Ont. C.A.), at para. 58). The English courts have also recognized that not all forum selection clauses are created equally. The underpinning of the transaction is relevant to the exercise of discretion under the strong cause test: "... a defendant who cynically flouts a jurisdiction clause which he has freely negotiated is more likely to be enjoined than one who has had the clause imposed upon him ..." (*Sweet & Maxwell Ltd. v. Rosa Maritime Ltd.*, [2003] EWCA Civ 938, [2003] 2 Lloyd's Rep. 509 (Eng. C.A.), at para. 48; see also "*Bergen*" *(The)*, [1997] 2 Lloyd's Rep. 710 (Eng. Adm. Ct.), at p. 715); D. Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (2nd ed. 2010), at para. 10.13). Similarly, Australian courts have found "that in a consumer situation [courts] should not place as much weight on an exclusive jurisdiction clause in determining a stay application as would be placed on such a clause where there was negotiation between business people" (*Quinlan v. Safe International Försäkrings AB*, [2005] FCA 1362 (Australia Fed. Ct.), at para. 46 (AustLII); see also *Incitec Ltd. v. Alkimos Shipping Corp.*, [2004] FCA 698, 206 A.L.R. 558 (Australia Fed. Ct.), at para. 50).

35 As these cases recognize, different concerns animate the consumer context than those that this Court considered in *Pompey*, where a sophisticated commercial transaction was at issue. Because of these concerns, we agree with Ms. Douez and several interveners that the strong cause test must account for the different considerations relevant to this context.

36 In our view, recognizing the importance of factors beyond those specifically listed in "*Eleftheria*" is an appropriate incremental response of the common law to a different context (*Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494 (S.C.C.), at paras. 33-34 and 40). Such a development is especially important since online consumer contracts are ubiquitous, and the global reach of the Internet allows for instantaneous cross-border consumer transactions. It is necessary to keep private international law "in step with the dynamic and evolving fabric of our society" (*R. v. Salituro*, [1991] 3 S.C.R. 654 (S.C.C.), at p. 670).

37 After all, the strong cause test must ensure that a court's plenary jurisdiction only yields to private contracts where appropriate. A superior court's general jurisdiction includes "all the powers that are necessary to do justice between the parties" (*80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*, [1972] 2 O.R. 280 (Ont. C.A.), at p. 282; *TCR Holding Corp. v. Ontario*, 2010 ONCA 233, 69 B.L.R. (4th) 175 (Ont. C.A.), at para. 26; *Kelly v. Prince Edward Island (Human Rights Commission)*, 2008 PESCAD 9, 276 Nfld. & P.E.I.R. 336 (P.E.I. C.A.), at para. 8).

38 Therefore, we would modify the *Pompey* strong cause factors in the consumer context. When considering whether it is reasonable and just to enforce an otherwise binding forum selection clause in a consumer contract, courts should take account of all the circumstances of the particular case, including public policy considerations relating to the gross inequality of bargaining power between the parties and the nature of the rights at stake. The burden remains on the party wishing to avoid the clause to establish strong cause.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

39 Although the steps are distinct, some considerations may be relevant to both steps of the test. For example, a court may consider gross inequality of bargaining power at the second step of the analysis, even if the circumstances of the bargain do not render the contract unconscionable at the first step. Taking into account the fact that the parties did not negotiate on an even playing field recognizes that the reasons for holding parties to their bargain carry less weight when there is no opportunity to negotiate a forum selection clause. This is not to say that the gross inequality of bargaining power will be sufficient, on its own, to show strong cause. However, it is a relevant circumstance that may be taken into account in the analysis.

40 The two steps governing the enforcement of forum selection clauses ultimately play conceptually distinct roles. Professor Pavlovi? explains that at the first step, where the court determines the validity of the forum selection clause, "[c]ontract rules provide a core legal basis for the enforcement of jurisdiction agreements" (p. 402). On the other hand, the strong cause test at the second step "limits contractual autonomy in order to protect the authority (jurisdiction) of otherwise competent courts" (*ibid.*). This second step recognizes that there may be strong reasons to retain jurisdiction over a matter in the province.

C. Application

(1) Section 4 of the Privacy Act

41 As this Court recognized in *Pompey*, legislative provisions can override forum selection clauses. In the present case, the chambers judge found that s. 4 of the *Privacy Act* had overtaken the forum selection clause in conferring exclusive jurisdiction to the Supreme Court of British Columbia. We disagree.

42 Section 4 reads as follows:

> **4** Despite anything contained in another Act, an action under this Act must be heard and determined by the Supreme Court [of British Columbia].

43 Section 4 lacks the clear and specific language that legislatures normally use to override forum selection clauses. This Court referred to such overrides on at least two occasions. First, it found an override in s. 46(1) of the *Marine Liability Act*, S.C. 2001, c. 6, which specifically mentions and sets aside contracts that purport to provide for the adjudication of claims in another forum (*Pompey*, at paras. 37-38). Second, it found that the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, was intended to override arbitration clauses (*Seidel v. Telus Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531 (S.C.C.), at paras. 5-7 and 31). Section 3 of that enactment specifically prevents consumers from contractually waiving their rights under the statute.

44 In contrast, although s. 4 of the *Privacy Act* expressly provides that it applies "[d]espite anything contained in another Act", it is silent on contractual provisions. If the legislature had intended to override forum selection clauses, it would have done so explicitly. While the legislature intended s. 4 of the *Privacy Act* to confer jurisdiction to the British Columbia Supreme Court to resolve matters brought under the Act, nothing suggests that it was also intended to override forum selection clauses.

(2) The Pompey test

45 As discussed above, the *Pompey* test involves a two-step analysis. At the first step, the court must be satisfied that the contract is otherwise enforceable, having regard to general principles of contract law.

46 In this regard, Ms. Douez argues that the clause is unenforceable primarily because it was made unclear by Facebook's statement that it "strive[s] to respect local laws". We disagree. This general statement, which is also contained in the terms of use, does not prevail over the clear and specific language of the forum selection clause. Indeed, "where there is apparent conflict between a general term and a specific term, the terms may be reconciled by taking the parties to have intended the scope of the general term to not extend to the subject-matter of the specific term" (*BG Checo*

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

International Ltd. v. British Columbia Hydro & Power Authority, [1993] 1 S.C.R. 12 (S.C.C.), at p. 24; see also G.R. Hall, *Canadian Contractual Interpretation Law* (3rd ed. 2016), at p. 19). And as Facebook rightly notes, s. 15(1) of the *Electronic Transactions Act*, S.B.C. 2001, c. 10, permits offer and acceptance to occur in an electronic form through "clicking" online.

47 Our colleague Abella J. concludes that the clause is not enforceable at this first step based upon other considerations. We prefer to address these considerations at the "strong cause" step of the test.

48 At the second step of *Pompey* — the strong cause test — Facebook argues that Ms. Douez has failed to meet her burden because she did not provide any evidence that her contract with Facebook is the result of grossly uneven bargaining power or that a California court would be unable to hear her claim. For her part, Ms. Douez emphasizes the distinctions between a commercial contract amongst sophisticated parties and the consumer context. She also stresses the importance of privacy rights and the public policy underpinning the British Columbia legislature's decision to enact a statutory cause of action to allow for vindication of these rights.

49 As we note above, in exercising its discretion at this step of the analysis, a court must consider "all the circumstances", including the "convenience of the parties, fairness between the parties and the interests of justice" (*Pompey*, at paras. 19, 30 and 31). As we have said, public policy may also be an important factor at this step (*Holt Cargo Systems Inc.*, at para. 91, referred to in *Pompey*, at para. 39; *Frey*, at para. 115).

50 We conclude that Ms. Douez has met her burden of establishing that there is strong cause not to enforce the forum selection clause. A number of different factors, when considered cumulatively, support the chambers judge's finding of strong cause. Most importantly, the claim involves a consumer contract of adhesion and a statutory cause of action implicating the quasi-constitutional privacy rights of British Columbians. We begin with these compelling factors, which are decisive in this case when considered together.

(a) Public Policy

51 There are strong public policy considerations which favour a finding of strong cause. As we have mentioned, this Court has emphasized party autonomy and commercial certainty in the context of contracts involving sophisticated parties. This usually justifies enforcement of forum selection clauses in the commercial context (*Pompey*, at para. 20; *GreCon Dimter*, at para. 22). Facebook argues that there is no reason to depart from this balance in the consumer context. We disagree.

52 There are generally strong public policy reasons to hold parties to their bargain and it is clear that forum selection clauses are not inherently contrary to public policy. But freedom of contract is not unfettered. A court has discretion under the strong cause test to deny the enforcement of a contract for reasons of public policy in appropriate circumstances. Generally, such limitations fall into two broad categories: those intended to protect a weaker party or those intended to protect "the social, economic, or political policies of the enacting state in the collective interest" (C. Walsh, "The Uses and Abuses of Party Autonomy in International Contracts" (2010), 60 *U.N.B.L.J.* 12, at p. 15). In this case, both of these categories are implicated. It raises both the reality of unequal bargaining power in consumer contracts of adhesion and the local court's interest in adjudicating claims involving constitutional or quasi-constitutional rights.

53 First, the forum selection clause is included in a contract of adhesion formed between an individual consumer and a large corporation. As we discussed above, even if a contract is not unconscionable, gross inequality of bargaining power is still a relevant factor at the strong cause step of the analysis in this context.

54 Despite Facebook's claim otherwise, it is clear from the evidence that there was gross inequality of bargaining power between the parties. Ms. Douez's claim involves an online contract of adhesion formed between an individual and a multi-billion dollar corporation. The evidence on the record is that Facebook reported almost $4.28 billion in revenue in 2012 through advertising on its social media platform. It is in contractual relationships with 1.8 million British Columbian residents, approximately forty percent of the province's population. Ms. Douez is one of these individuals.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

55 Relatedly, individual consumers in this context are faced with little choice but to accept Facebook's terms of use. Facebook asserts that Ms. Douez could have simply rejected Facebook's terms. But as the academic commentary makes clear, in today's digital marketplace, transactions between businesses and consumers are generally covered by non-negotiable standard form contracts presented to consumers on a "take-it-or-leave-it" basis (Pavlovi?, at p. 392).

56 In particular, unlike a standard retail transaction, there are few comparable alternatives to Facebook, a social networking platform with extensive reach. British Columbians who wish to participate in the many online communities that interact through Facebook must accept that company's terms or choose not to participate in its ubiquitous social network. As the intervener the Canadian Civil Liberties Association emphasizes, "access to Facebook and social media platforms, including the online communities they make possible, has become increasingly important for the exercise of free speech, freedom of association and for full participation in democracy" (I.F., at para. 16). Having the choice to remain "offline" may not be a real choice in the Internet era.

57 Given this context, it is clear that the difference in bargaining power between the parties is large. This distinguishes the situation from *Pompey*, where the Court emphasized that the respondent in that case could have chosen to negotiate the forum selection clause in the bill of lading (para. 29). Nothing suggests in this case that Ms. Douez could have similarly negotiated the terms of use.

58 Secondly, Canadian courts have a greater interest in adjudicating cases impinging on constitutional and quasi-constitutional rights because these rights play an essential role in a free and democratic society and embody key Canadian values. There is an inherent public good in Canadian courts deciding these types of claims. Through adjudication, courts establish norms and interpret the rights enjoyed by all Canadians.

59 At issue in this case is Ms. Douez's statutory privacy right. Privacy legislation has been accorded quasi-constitutional status (*Lavigne v. Canada (Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773 (S.C.C.), at paras. 24-25). This Court has emphasized the importance of privacy — and its role in protecting one's physical and moral autonomy — on multiple occasions (see *Lavigne*, at para. 25; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 (S.C.C.), at paras. 65-66; *R. v. Dyment*, [1988] 2 S.C.R. 417 (S.C.C.), at p. 427). As the chambers judge noted, the growth of the Internet, virtually timeless with pervasive reach, has exacerbated the potential harm that may flow from incursions to a person's privacy interests. In this context, it is especially important that such harms do not go without remedy. And since Ms. Douez's matter requires an interpretation of a statutory privacy tort, only a local court's interpretation of privacy rights under the *Privacy Act* will provide clarity and certainty about the scope of the rights to others in the province.

60 Moreover, the British Columbia legislature's creation of a statutory cause of action evidences an intention to create local rights and protections for the privacy rights of British Columbia residents. As the chambers judge noted, local courts are better placed to adjudicate these sorts of claims:

> ... local courts may be more sensitive to the social and cultural context and background relevant to privacy interests of British Columbians, as compared to courts in a foreign jurisdiction. This could be important in determining the degree to which privacy interests have been violated and any damages that flow from this. [para. 75]

61 Similarly, the legislature's creation of a statutory privacy tort that can be established without proof of damages reflects the legislature's intention to encourage access to justice for such claims. As well, British Columbia's *Class Proceedings Act* provides important procedural tools designed to improve access to justice (*Endean v. British Columbia*, 2016 SCC 42, [2016] 2 S.C.R. 162 (S.C.C.), at para. 1).

62 Yet commentators recognize the practical reality that forum selection clauses often operate to defeat consumer claims (E.A. Purcell, "Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court" (1992), 40 *UCLA L. Rev.* 423, at pp. 446-49). Given the importance of constitutional and quasi-constitutional

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

rights, it is even more important that reverence to freedom of contract and party autonomy does not mean that such rights routinely go without remedy.

63 Overall, the public policy concerns weigh heavily in favour of strong cause.

(b) Secondary Factors

64 In addition to the strong public policy reasons favouring strong cause, two other secondary factors also suggest that the forum selection clause should not be enforced. These factors are the interests of justice and the comparative convenience and expense of litigating in the alternate forum.

(i) Interests of Justice

65 The interests of justice (*Pompey*, at para. 31), support adjudication of Ms. Douez's claim in British Columbia. This factor is concerned not only with whether enforcement of the forum selection clause would unfairly cause the loss of a procedural advantage, but also with which forum is best positioned to hear the case on its merits. Of course, unlike in the *forum non conveniens* analysis, the burden is on the party resisting enforcement of the clause to show good reason why the parties should not be held to their bargain.

66 The lack of evidence concerning whether a California court would hear Ms. Douez's claim was a significant focus of the hearing before us. In front of the chambers judge, Facebook argued that the substantive law of California would defeat the application of the *Privacy Act*. Before this Court, Facebook emphasizes the lack of any expert evidence on whether this would in fact be the case if the claim proceeded in California. According to Facebook, the fact that Ms. Douez has not provided expert evidence establishing that a California court would not apply the British Columbia *Privacy Act* is decisive. Similarly, the British Columbia Court of Appeal placed significant weight on this lack of expert evidence.

67 Yet, none of the leading authorities on the strong cause test, *Pompey* included, make proof that the claim would fail in the foreign jurisdiction a mandatory element of strong cause (see e.g. "*Eleftheria*", *Momentous.ca Corp.* and *Pompey*). A plaintiff may choose to rely on expert evidence to establish that the selected forum would be unable or unwilling to litigate his or her claim. Similarly, the defendant may provide his or her own expert evidence to show that the selected forum would be willing and able to litigate the claim. However, while such evidence may be helpful, its absence is not determinative. Under the *Pompey* analysis, there is no separate requirement for the party trying to avoid the forum selection clause to prove that her claim would necessarily fail in the foreign jurisdiction.

68 In addition, Ms. Douez's claim is premised on a British Columbia cause of action. Yet, her contract with Facebook includes a choice of law clause in favour of California:

> The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions.

69 We disagree with Facebook that the choice of law question is irrelevant. Although we do not decide which body of law will apply, and how the choice of law clause might interact with the *Privacy Act*, in our view, the interests of justice are best served if this question is adjudicated in British Columbia.

70 Generally, common law courts will give effect to choice of law clauses as long as they are *bona fide*, legal and not contrary to public policy (*Vita Food Products Inc. v. Unus Shipping Co.*, [1939] A.C. 277 (Jud. Com. of Privy Coun.), at p. 290). Furthermore, even if a choice of law clause is generally enforceable, local laws may still apply to a dispute if the local forum intends such laws to be mandatory and not avoidable through a choice of law clause (S. G. A. Pitel and N. S. Rafferty, *Conflict of Laws* (2nd ed. 2016), at p. 299).

71 Usually, courts consider laws of the *local* forum when determining whether the legislature intended there to be mandatory rules that supersede the parties' choice of law (G. Saumier, "What's in a Name? Lloyd's, International Comity

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

and Public Policy" (2002), 37 *Can. Bus. L.J.* 388, at pp. 395-97; J. Walker, *Castel & Walker: Canadian Conflict of Laws*, (6th ed. (loose-leaf)), at p. 31-2). Whether courts in common law legal systems may similarly consider the intention of *foreign* legislatures, as set out in statutes like the *Privacy Act*, is uncertain (*ibid.*). In *Avenue Properties Ltd. v. First City Development Corp.* (1986), 7 B.C.L.R. (2d) 45 (B.C. C.A.), at pp. 57-58, McLachlin J.A. (as she then was) recognized the likelihood that a foreign court would be unable to consider the public policy evidenced in the local statute as a reason why the local court should refuse a *forum non conveniens* application.

72 But even assuming that a California court could or would apply the *Privacy Act*, the interests of justice (*Pompey*, at para. 31) support having the action adjudicated by the British Columbia Supreme Court. This court, as compared to a California one, is better placed to assess the purpose and intent of the legislation and to decide whether public policy or legislative intent prevents parties from opting out of rights created by the *Privacy Act* through a choice of law clause in favour of a foreign jurisdiction.

(ii) Comparative Convenience and Expense of Litigating in the Alternate Forum

73 Another consideration in the strong cause analysis is the comparative expense and convenience of litigating in the alternate forum (*Pompey*, at para. 31; "*Eleftheria*", at p. 242). Therefore, related to the concerns about fairness and access to justice discussed above, the expense and inconvenience of requiring British Columbian individuals to litigate in California, compared to the comparative expense and inconvenience to Facebook, further supports a finding of strong cause.

74 Although Facebook argued its relevant books and records were located in California, the chambers judge found it would be more convenient to have Facebook's books and records made available for inspection in British Columbia than requiring the plaintiff to travel to California to advance her claim. There is no reason to disturb this finding.

75 While these secondary factors might not have justified a finding of strong cause on their own, they nonetheless support our conclusion that Ms. Douez has established sufficiently strong reasons why the forum selection clause should not be enforced and the action should proceed in British Columbia.

VI. Conclusion

76 We would allow the appeal with costs to the appellant. Ms. Douez provided strong reasons to resist the enforcement of the clause: most importantly, the gross inequality of bargaining power between her and Facebook and the quasi-constitutional privacy rights engaged by her claim. The forum selection clause is unenforceable.

77 As a result, the chambers judge's order dismissing Facebook's application to have the British Columbia Supreme Court decline jurisdiction is restored.

***Abella J.*:**

78 Anyone who wants to use Facebook's service must register as a member and accept Facebook's terms of use. The issue in this appeal is the enforceability of the forum selection clause in Facebook's terms of use, whereby all disputes are required to be litigated in Santa Clara County in California.

79 In *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450 (S.C.C.), this Court held that a party relying on a forum selection clause must first show that it is enforceable applying a contractual approach. If it is, the onus shifts to the other party to show that there is "strong cause" for the court to decline to apply the forum selection clause based on considerations grounded in *forum non conveniens* principles.

80 In my view, Facebook's forum selection clause is not enforceable under the first step of the *Pompey* test.

Background

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

81 When a Facebook user "liked" a post associated with a business, Facebook occasionally displayed the user's name and portrait in an advertisement on the newsfeeds of the user's friends. These advertisements were referred to as "Sponsored Stories". One of those users whose name and portrait were used in a Sponsored Story was Deborah Louise Douez.

82 Ms. Douez claims that she gave no consent to having her name or portrait used in Sponsored Stories. As a result, she brought proceedings in the Supreme Court of British Columbia alleging that Facebook violated her rights contrary to s. 3(2) of the British Columbia *Privacy Act*, R.S.B.C. 1996, c. 373 ("*Act*"):

> **3**
>
> . . . . .
>
> (2) It is a tort, actionable without proof of damage, for a person to use the name or portrait of another for the purpose of advertising or promoting the sale of, or other trading in, property or services, unless that other, or a person entitled to consent on his or her behalf, consents to the use for that purpose.

83 Under s. 4, actions under the *Privacy Act* must be heard in the Supreme Court of British Columbia:

> **4** Despite anything contained in another Act, an action under this Act must be heard and determined by the Supreme Court.

84 Ms. Douez also brought a class action proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. The proposed class consisted of approximately 1.8 million British Columbia residents whose names or portraits had been used by Facebook in a Sponsored Story.

85 Facebook applied for a stay of the proceedings based on the forum selection clause in its terms of use, which states in part:

> *You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County*. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for purpose of litigating all such claims.
>
> [Emphasis added.]

86 In the Supreme Court of British Columbia, Griffin J. declined to enforce the forum selection clause and certified the class action. She found that s. 4 of the *Privacy Act* grants exclusive jurisdiction to the Supreme Court of British Columbia to hear claims under that *Act*, overriding any forum selection clause. As such, it was unnecessary for Ms. Douez to show "strong cause" why the forum selection clause should not be applied.

87 The Court of Appeal for British Columbia allowed the appeal and granted Facebook's request for a stay of proceedings based on the forum selection clause.

Analysis

88 *Pompey* involved a bill of lading between sophisticated commercial entities. This is the first time the Court has been asked to consider how *Pompey* applies to a forum selection clause in an online consumer contract of adhesion.

89 In concluding that the forum selection clause in *Pompey* should be enforced, Bastarache J. set out the following test, based on the 1969 decision in "*Eleftheria*" *(The) (Cargo Owners) v.* "*Eleftheria*" *(The)*, [1969] 1 Lloyd's Rep. 237 (Eng. P.D.A.):

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> *Once the court is satisfied that a validly concluded bill of lading otherwise binds the parties*, the court must grant the stay unless the plaintiff can show sufficiently strong reasons to support the conclusion that it would not be reasonable or just in the circumstances to require the plaintiff to adhere to the terms of the clause. In exercising its discretion, the court should take into account all of the circumstances of the particular case.
>
> [Emphasis added; para. 39.]

90 He also framed it as follows:

> ... once it is determined that the bill of lading otherwise binds the parties (*for instance, that the bill of lading as it relates to jurisdiction does not offend public policy, was not the product of fraud or of grossly uneven bargaining positions*), [the "strong cause" test] constitutes an inquiry into questions such as the convenience of the parties, fairness between the parties and the interests of justice ...
>
> [Emphasis added; para. 31.]

91 The Court found that the forum selection clause in the bill of lading was enforceable at the first step because the parties were experienced commercial entities who were aware of industry practices and were also, notably, in a position to negotiate the forum selection clause. As a result, there was no "grossly uneven bargaining power":

> Bills of lading are typically entered into by *sophisticated parties familiar with the negotiation of maritime shipping transactions* who should, in normal circumstances, be held to their bargain. ... The parties in this appeal are corporations with significant experience in international maritime commerce. The respondents were aware of industry practices and could have reasonably expected that the bill of lading would contain a forum selection clause. A forum selection clause *could very well have been negotiated* with the appellant ... *There is no evidence that this bill of lading is the result of grossly uneven bargaining power that would invalidate the forum selection clause contained therein.*
>
> [Emphasis added; para. 29.]

92 The Court went on to conclude that strong cause had not been shown and that a stay should therefore be granted.

93 It is clear that the *Pompey* test engages two distinct inquiries. The first is into whether the clause is enforceable under contractual doctrines like public policy, duress, fraud, unconscionability or grossly uneven bargaining positions, tools for examining the enforceability of contracts. If the clause is enforceable, the onus shifts to the consumer to show "strong cause" why the clause should not be enforced because of factors typically considered under the *forum non conveniens* doctrine. Those factors were set out in "*Eleftheria*" as including:

> (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts.
>
> (b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects.
>
> (c) With what country either party is connected, and how closely.
>
> (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.
>
> (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would
>
> (i) be deprived of security for that claim;
>
> (ii) be unable to enforce any judgment obtained;

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(iii) be faced with a time-bar not applicable in England; or

(iv) for political, racial, religious or other reasons be unlikely to get a fair trial. [p. 242]

94 Unlike my colleagues in dissent, I think, with respect, that a compelling argument can be made for modifying the strong cause test to include a wider range of factors than the *forum non conveniens* kind of considerations that have been traditionally applied, but I am also of the view that keeping the *Pompey* steps distinct means that before the onus shifts to the consumer, the focus starts where it should, namely on whether the contract or clause itself satisfies basic contractual principles. A contractual approach for determining the enforceability of forum selection clauses in consumer contracts of adhesion finds significant academic support (William J. Woodward Jr., "Finding the Contract in Contracts for Law, Forum and Arbitration" (2006), 2 *Hastings Bus. L.J.* 1, at p. 46; M. P. Ellinghaus, "In Defense of Unconscionability" (1969), 78 *Yale L.J.* 757; Linda S. Mullenix, "Another Easy Case, Some More Bad Law: *Carnival Cruise Lines* and Contractual Personal Jurisdiction" (1992), 27 *Tex. Int'l L. J.* 323; Stephen Waddams, "Review Essay: The Problem of Standard Form Contracts: A Retreat to Formalism" (2012), 53 *Can. Bus. L.J.* 475; Peter Benson, "Radin on Consent and Fairness in Consumer Boilerplate: A Brief Comment" (2013), 54 *Can. Bus. L.J.* 282).

95 Starting with a contractual analysis also permits the necessary contextual scope to explore enforceability depending on what the nature of the contract or clause is and what contractual rights are at stake. Only if the clause is found to be enforceable do we move to the second step, where the consumer must demonstrate that there is strong cause why, even though the forum selection clause is enforceable, it should nonetheless be disregarded.

96 Our first task in this case, as a result, is to determine whether the clause is enforceable using contractual principles. In my respectful view, the clause is not enforceable under the principles set out in the first step of *Pompey*.

97 In deciding whether a clause is unenforceable for reasons of public policy, the court decides "when the values favouring enforceability are outweighed by values that society holds to be more important" (Stephen Waddams, *The Law of Contracts* (6th ed. 2010), at para. 560). As Prof. McCamus notes, "[a]greements contrary to public policy at common law rest on a judicial determination that the type of agreement in question is sufficiently inconsistent with public policy that it should be treated as unenforceable" (John D. McCamus, *The Law of Contracts* (2nd ed. 2012), at p. 453).

98 I accept that certainty and predictability generally favour the enforcement at common law of contractual terms, but it is important to put this forum selection clause in its contractual context. We are dealing here with an online *consumer* contract of adhesion. Unlike *Pompey*, there is virtually no opportunity on the part of the consumer to negotiate the terms of the clause. To become a member of Facebook, one must accept all the terms stipulated in the terms of use. No bargaining, no choice, no adjustments.

99 Online contracts such as the one in this case put traditional contract principles to the test. What does "consent" mean when the agreement is said to be made by pressing a computer key? Can it realistically be said that the consumer turned his or her mind to all the terms and gave meaningful consent? In other words, it seems to me that some legal acknowledgment should be given to the automatic nature of the commitments made with this kind of contract, not for the purpose of invalidating the contract itself, but at the very least to intensify the scrutiny for clauses that have the effect of impairing a consumer's access to possible remedies.

100 As Prof. Waddams has pointed out:

> ... there may be scope for application of the concept of public policy in respect of unfair clauses that oust the jurisdiction of the court. It would be open to a court to say that, although arbitration and choice of forum clauses are acceptable if freely agreed by parties of equal bargaining power, *there is reason for the court to scrutinize the reality of the agreement with special care in the context of consumer transactions and standard forms*, since these are clauses that, on their face, offend against one of the traditional heads of public policy.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

[Emphasis added.]

(Waddams (2012), at p. 483. See also Judith Resnik, "Procedure as Contract" (2005), 80 *Notre Dame L. Rev.* 593; Woodward, at p. 46.)

101 Much has been written about the burden of forum selection clauses on consumers and their ability to access the court system. They were described by Prof. Edward Purcell as creating "an egregious disproportionality" (Edward A. Purcell, Jr., "Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court" (1992), 40 *U.C.L.A. L. Rev.* 423, at p. 514). They range from added costs, logistical impediments and delays, to deterrent psychological effects. Prof. Purcell refers to these constraints as "burdens of distance" or "burdens of geography":

> The deterrent effects of geography are numerous and weighty. The threshold task of merely retaining counsel in a distant location, which may seem routine to attorneys and judges, is profoundly daunting to ordinary people. The very decision to retain an attorney is so troublesome, in fact, that most claimants are content to accept a settlement without one. The result of that commonplace decision, as numerous studies have repeatedly shown, is that such claimants almost invariably obtain much less from their adversaries than they otherwise would. If claimants learn, perhaps from company representatives they contact, that they must retain an attorney in a distant contractual forum in order to initiate a legal action on their claims, that information alone may dissuade a significant number from proceeding and lead them to accept whatever offer, if any, the company might make.
>
> . . . . .
>
> Once litigation begins, the process quickly piles on additional burdens. One is the obvious need to travel and communicate over long distances, which makes the suit more costly as well as more inconvenient in terms of both litigation planning and client-attorney consultation. Another is the compounded costs and risks created by the attorney's need to communicate with the client's witnesses and to prepare them for depositions and trial testimony. The party may either have to pay additional travel costs for in-person meetings or risk the creation of potentially discoverable documents that could spur additional and costly motion practice and, if disclosed, weaken the party's position in negotiations and at trial. A third burden is the likely additional delays involved in prosecuting the case, as distance and inconvenience combine to complicate various pretrial events and to remove from the attorney the spur of a human client who can or does present himself in person at his attorney's office. A fourth burden is the added cost of participating in a distant trial, including the costs and risks involved in securing the attendance of witnesses at such a location. *All of these burdens will be especially heavy if the plaintiff's claim arises from events in his home state and many or all of his witnesses reside there*.
>
> . . . . .
>
> A final burden is the risk that the cumulative effect of some or all of the preceding complications may combine to so hamper the party's trial preparations that he will ultimately feel compelled to "cave" on the courthouse steps or end up putting on a materially weaker case than he otherwise would have. If settlement comes after full pretrial discovery and motion practice, costs will consume a larger proportion of any settlement payment.... The risks of geography increase the likelihood of such unfavorable outcomes, and that ultimate concern further compounds the pressures that push non-resident claimants toward earlier and less favorable settlements.
>
> The burdens of geography are thus numerous and heavy. They are emotional as well as financial. Some are readily apparent, while others are subtle and surely unmeasurable. When placed on individuals who lack relevant interstate connections and experience or who lack extraordinary personal or financial resources, however, their *de facto* impact as a general matter is severe and certain. They impose sharp discounts on the value of the claims involved and discourage large numbers of plaintiffs from attempting to enforce their legal rights.
>
> [Emphasis added; pp. 446-49.]

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(See also Catherine Walsh, "The Uses and Abuses of Party Autonomy in International Contracts" (2010), 60 *U.N.B.L.J.* 12, at p. 20.)

102 As Prof. William Woodward has observed:

> ... unless the case is a large one or the "chosen" forum convenient, a choice-of-forum clause can eliminate a customer's legal claim entirely. Only in theory can a customer make a cross-country trip to pursue a $100 warranty claim. [p. 17]

103 These concerns are what motivated the statutory protections found in art. 3149 of the *Civil Code of Québec*, which render forum selection clauses in consumer or employment contracts unenforceable:

> **3149.** Québec authorities also have jurisdiction to hear an action based on a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.

104 In general, then, when online consumer contracts of adhesion contain terms that unduly impede the ability of consumers to vindicate their rights in domestic courts, particularly their quasi-constitutional or constitutional rights, in my view, public policy concerns outweigh those favouring enforceability of a forum selection clause.

105 Public policy concerns relating to access to domestic courts are especially significant in this case given that we are dealing with a fundamental right like privacy. In *UFCW, Local 401 v. Alberta (Information and Privacy Commissioner)*, [2013] 3 S.C.R. 733 (S.C.C.), this Court acknowledged the quasi-constitutional status of legislation relating to privacy protection:

> The ability of individuals to control their personal information is intimately connected to their individual autonomy, dignity and privacy. These are fundamental values that lie at the heart of a democracy. As this Court has previously recognized, legislation which aims to protect control over personal information should be characterized as "quasi-constitutional" because of the fundamental role privacy plays in the preservation of a free and democratic society .... [para. 19]

106 The *Privacy Act* in British Columbia sought to protect individuals from invasions of privacy by introducing two new torts:

> (1) Using the name or portrait of another person for the purpose of advertising property or services, or promoting their sale or other trading in them, without that person's consent; [s. 3(2)]
>
> (2) Wilfully violating the privacy of another person. [s. 1(1)]

107 Section 4 of the *Privacy Act* states that these torts "must be heard and determined by the Supreme Court" despite anything contained in another *Act*. Section 4 is a statutory recognition that privacy rights under the British Columbia *Privacy Act* are entitled to protection in British Columbia by judges of the British Columbia Supreme Court. I do not, with respect, accept Facebook's argument that s. 4 gives the Supreme Court of British Columbia exclusive jurisdiction only vis-à-vis other courts *within* the province of British Columbia. What s. 4 grants is exclusive jurisdiction to the Supreme Court of British Columbia to the exclusion not only of other courts in British Columbia, but to the exclusion of all other courts, within and outside British Columbia. That is what exclusive jurisdiction means.

108 Where a legislature grants exclusive jurisdiction to the courts of its own province, it overrides forum selection clauses that may direct the parties to another forum (see *Scierie Thomas-Louis Tremblay inc. c. J.R. Normand inc.*, [2005] 2 S.C.R. 401 (S.C.C.), at para. 25). It would, in my respectful view, be contrary to public policy to enforce a forum selection clause in a consumer contract that has the effect of depriving a party of access to a statutorily mandated court. To decide otherwise means that a clear legislative intention can be overridden by a forum selection clause. This flies in the face of *Pompey*'s acknowledgment that legislation takes precedence over a forum selection clause (*Pompey*, at para 39).

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

109 The approach used by Wittmann A.C.J.Q.B. in *Zi Corp. v. Steinberg* (2006), 396 A.R. 157 (Alta. Q.B.) is apposite. The Alberta Court of Queen's Bench declined to enforce a forum selection clause mandating proceedings in Florida, because s. 180(1) [1] of the Alberta *Securities Act*, R.S.A. 2000, c. S-4, granted jurisdiction to the Court of Queen's Bench for applications under that provision. Wittmann A.C.J.Q.B. concluded that the effect of giving jurisdiction to the Court of Queen's Bench meant that it had exclusive jurisdiction *both within and outside Alberta*. In reaching his conclusion, Wittmann A.C.J.Q.B. relied on years of jurisprudence interpreting similar provisions as granting exclusive jurisdiction to the courts of a particular province to hear claims for oppression remedies (see also *Gould v. Western Coal Corp.* (2012), 7 B.L.R. (5th) 19 (Ont. S.C.J.), at paras. 319-39; *Ironrod Investments Inc. v. Enquest Energy Services Corp.*, 2011 ONSC 308 (Ont. S.C.J. [Commercial List]); *Inc. Broadcasters Ltd. v. Canwest Global Communications Corp.* (2001), 20 B.L.R. (3d) 289 (Ont. S.C.J. [Commercial List]), at paras. 112-17, aff'd (2003), 63 O.R. (3d) 431 (Ont. C.A.); *Takefman v. Golden Hope Mines Ltd.*, 2015 QCCS 4947 (C.S. Que.); *Nord Resources Corp. v. Nord Pacific Ltd.* (2003), 37 B.L.R. (3d) 115 (N.B. Q.B.)).

110 Any uncertainty about the legislature's intention that privacy rights under the British Columbia *Privacy Act* be heard by the Supreme Court in British Columbia is dispelled by the introductory words in s. 4: "Despite anything contained in another Act ..." That reflects a clear statutory intention that exclusive jurisdiction over the enforcement of the *Act* be retained by the Supreme Court despite what any other legislation states. It would defy logic to think that the legislature sought to protect the British Columbia Supreme Court's exclusivity from the reach of other statutes, but not from the reach of forum selection clauses in private contracts.

111 Tied to these public policy concerns is the "grossly uneven bargaining power" of the parties. Facebook is a multinational corporation which operates in dozens of countries. Ms. Douez, a videographer, is a private citizen. She had no input into the terms of the contract and, in reality, no meaningful choice as to whether to accept them given Facebook's undisputed indispensability to online conversations. As Prof. Cheryl Preston noted: "... if one's family, friends, and business associates are on Facebook ... using a competitor's service is not a reasonable choice" (Cheryl B. Preston, "'Please Note: You Have Waived Everything': Can Notice Redeem Online Contracts?" (2015), 64 *Am. U. L. Rev.* 535, at p. 554).

112 The doctrine of unconscionability, a close jurisprudential cousin to both public policy and gross bargaining disparity, also applies to render the forum selection clause unenforceable in this case.

113 This Court confirmed in *Tercon* that unconscionability can be used to invalidate a single clause within an otherwise enforceable contract (*Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, [2010] 1 S.C.R. 69 (S.C.C.), at para. 122).

114 As Prof. McCamus notes, the doctrine of unconscionability is a useful tool for addressing the enforceability of some clauses in consumer contracts of adhesion:

> ... the doctrine of the unconscionable term may provide a common law device, long awaited by some, that can ameliorate the harsh impact of unfair terms in boilerplate or "adhesion" contracts, offered particularly in the context of consumer transactions on a take-it-or-leave-it basis. [Footnote omitted; p. 444.]
>
> (See also Jean Braucher, "Unconscionability in the Age of Sophisticated Mass-Market Framing Strategies and the Modern Administrative State" (2007), 45 *Can. Bus. L.J.* 382.)

115 Two elements are required for the doctrine of unconscionability to apply: inequality of bargaining powers and unfairness. Prof. McCamus describes them as follows:

> ... one must establish both inequality of bargaining power in the sense that one party is incapable of adequately protecting his or her interests *and* undue advantage or benefit secured as a result of that inequality by the stronger party.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

[Emphasis added; pp. 426-27.]

116 In my view, both elements are met here. The inequality of bargaining power between Facebook and Ms. Douez in an online contract of adhesion gave Facebook the unilateral ability to require that any legal grievances Ms. Douez had, could not be vindicated in British Columbia where the contract was made, but only in California where Facebook has its head office. This gave Facebook an unfair and overwhelming procedural — and potentially substantive — benefit. This, to me, is a classic case of unconscionability.

117 For all these reasons, the forum selection clause is unenforceable under the first step of the *Pompey* test.

118 I would allow the appeal with costs throughout and dismiss Facebook's application for a stay of proceedings.

McLachlin C.J.C., Côté J. **(Moldaver J. concurring):**

119 The respondent, Facebook, Inc. is a successful global corporation based in California. It operates a social media website (www.facebook.com) used by millions of users throughout the world. Facebook's website allows users to establish their own "facebook", through which they communicate with "friends", with whom they share news, information, opinions, photos and videos.

120 To become a Facebook user, a person must enter into a contract with Facebook. The appellant, Deborah Louise Douez wanted to become a Facebook user. When Ms. Douez chose to sign up as a user of Facebook, she agreed to Facebook's terms of use, which included a forum selection clause. A version of the clause provides:

> You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for purpose of litigating all such claims. [A.R., vol. II, at p. 138]

121 Ms. Douez wants to start a class action against Facebook. She says that Facebook used her name and face in an advertising product called "Sponsored Stories", without her consent, contrary to s. 3(2) of the *Privacy Act*, R.S.B.C. 1996, c. 373, which creates a statutory tort of invasion of privacy. Facebook, for its part, says it obtained Ms. Douez's consent through the "terms of use" to which she consented in her contract with Facebook.

122 The question on this appeal concerns the place where the lawsuit should be heard. Facebook argues that the dispute must be tried before a state or federal court in Santa Clara County, California, as Ms. Douez agreed to in her contract with Facebook. Ms. Douez, on the other hand, argues that the lawsuit should be tried in British Columbia. She does not dispute that she agreed by contract to have all disputes with Facebook tried in California. However, she argues that the clause should not be enforced against her.

123 The issue assumes great importance in a world where millions of people routinely enter into online contracts with corporations, large and small, located in other countries. Often these contracts contain a forum selection clause, specifying that any disputes must be resolved by the corporation's choice of court. In this way, global corporations, be they American, Canadian or from some other country, seek to ensure that they are not dragged into litigation in foreign countries.

124 The principles of private international law support the enforcement of forum selection clauses, while recognizing that in exceptional cases courts may decline to enforce them. Forum selection clauses provide certainty and predictability in cross-border transactions. When parties agree to a jurisdiction for the resolution of disputes, courts will give effect to that agreement, unless the claimant establishes "strong cause" for not doing so.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

125 We see no need to depart from the settled principles of private international law on forum selection clauses — principles repeatedly confirmed by courts around the world, including the Supreme Court of Canada. The simple question in this case, as we see it, is whether Ms. Douez has shown "strong cause" for not enforcing the forum selection clause to which she agreed. We agree with the Court of Appeal of British Columbia that strong cause has not been shown, and that the action must be tried in California, as the contract requires. A stay of the underlying claim should be entered.

I. Forum Selection Clauses and Forum Non Conveniens

126 The test for the enforcement of forum selection clauses in contracts was settled by this Court fourteen years ago in *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450 (S.C.C.). The inquiry proceeds in two steps. First, the court must determine whether the forum selection clause is enforceable and applies to the circumstances: *Pompey*, at para. 39; *Preymann v. Ayus Technology Corp.*, 2012 BCCA 30, 32 B.C.L.R. (5th) 391 (B.C. C.A.), at para. 43. Second, the court must assess whether there is strong cause in favour of denying a stay, despite the enforceable forum selection clause: *Pompey*, at paras. 19 and 39.

127 Ms. Douez argues that the courts should not apply the settled *Pompey* test to her case. Instead, she argues, they should consider the forum selection clause within the context of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 ("*CJPTA*"). We disagree.

128 Section 11 of the *CJPTA* outlines the circumstances in which a court may decline jurisdiction where there is a more appropriate forum. It deals with the situation where two different courts have jurisdiction, and provides instructions to settle which of the two courts should take jurisdiction. It provides:

> **11** (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
>
> (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
>
> > (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
> >
> > (b) the law to be applied to issues in the proceeding,
> >
> > (c) the desirability of avoiding multiplicity of legal proceedings,
> >
> > (d) the desirability of avoiding conflicting decisions in different courts,
> >
> > (e) the enforcement of an eventual judgment, and
> >
> > (f) the fair and efficient working of the Canadian legal system as a whole.

As this Court noted in *Lloyd's Underwriters v. Cominco Ltd.*, 2009 SCC 11, [2009] 1 S.C.R. 321 (S.C.C.), at para. 22, "[s.] 11 of the *CJPTA* ... constitutes a complete codification of the common law test for *forum non conveniens*. It admits of no exceptions".

129 This code for deciding which of two available jurisdictions should, as a matter of convenience, take jurisdiction, does not apply to oust forum selection clauses. Where the parties have agreed in advance to a choice of forum, there is no need to inquire into which of two forums is the more convenient; the parties have settled the matter by their contract, unless the contractual clause is invalid or inapplicable (the first step of the *Pompey* test) or should not be applied because

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

the plaintiff has shown strong cause not to do so (the second step of the *Pompey* test). In such cases, the duty of the court is to enforce the contractual agreement, unless the plaintiff shows strong cause otherwise.

130 What Ms. Douez suggests, in effect, is that the two-part *Pompey* test be changed for a unified test that would apply forum selection clauses as an element of the *forum non conveniens* test. This Court rejected this very contention in *Pompey*. Justice Bastarache stated that he was "not convinced that a unified approach to *forum non conveniens*, where a choice of jurisdiction clause constitutes but one factor to be considered, is preferable" (para. 21). He shared the concerns expressed by author, Edwin Peel that such an approach would not give full weight to forum selection clauses because other factors weigh in the balance — factors that the parties must be deemed already to have considered when they agreed to a forum selection clause: E. Peel, "Exclusive jurisdiction agreements: purity and pragmatism in the conflict of laws" [1998] *L.M.C.L.Q.* 182.

131 We therefore agree with the British Columbia and Saskatchewan Courts of Appeal that *Pompey* continues to apply when the courts consider forum selection clauses: see *Viroforce Systems Inc. v. R & D Capital Inc.*, 2011 BCCA 260, 336 D.L.R. (4th) 570 (B.C. C.A.), at para. 14; *Preymann*, at para. 39; *Frey v. Bell Mobility Inc.*, 2011 SKCA 136, 377 Sask. R. 156 (Sask. C.A.), at paras. 112-14; *Hudye Farms Inc. v. Canadian Wheat Board*, 2011 SKCA 137, 377 Sask. R. 146 (Sask. C.A.), at para. 10. While the *CJPTA* is a complete codification of the common law related to *forum non conveniens*, it does not supplant the common law principles underlying the enforcement of forum selection clauses. Where the parties have agreed to a forum selection clause, the court must apply that clause unless the test in *Pompey* is satisfied. If the test is satisfied and the forum selection clause is inapplicable, the result is a situation where there are two competing possibilities for forum. At this point, the *CJPTA* which codifies the common law provisions for *forum non conveniens* applies.

132 *Pompey* is considered first. Since we conclude that the test in *Pompey* is not satisfied, s. 11 of the *CJPTA* does not assist Ms. Douez.

II. Step One: Is the Forum Selection Clause Enforceable?

133 Having rejected Ms. Douez's contention that the *Pompey* test should be rolled into the codified provisions for *forum non conveniens*, the next step is to apply the two-part *Pompey* framework.

134 The first step in the *Pompey* test asks whether the forum selection clause is enforceable and applies in the circumstances. Facebook bears the burden of establishing this. In our opinion, Facebook has discharged this burden. On its face, the answer is affirmative. The language of the clause is clear and appears to cover all disputes, including this one.

135 Ms. Douez suggests three reasons why the forum selection clause is invalid or inapplicable to her situation. None of them withstand scrutiny. First, she argues that the forum selection clause was not brought to her attention. Second, she argues that the terms of use are unclear. Third, she argues that s. 4 of the *Privacy Act* renders the forum selection clause unenforceable. Abella J. adds a fourth; that the forum selection clause offends public policy. In our view, these arguments are not persuasive.

136 The first argument is that the forum selection clause is unenforceable because Ms. Douez was simply invited to give her consent to the clause by clicking on it, without her attention being drawn to its specific language. In other words, she is not bound because electronic clicking without more does not indicate her agreement to the forum selection clause.

137 We cannot accede to this submission. In British Columbia, s. 15(1) of the *Electronic Transactions Act*, S.B.C. 2001, c. 10, codifies the common law rule set out in *Rudder v. Microsoft Corp.* (1999), 2 C.P.R. (4th) 474 (Ont. S.C.J.), and establishes that an enforceable contract may be formed by clicking an appropriately designated online icon:

> **15** (1) Unless the parties agree otherwise, an offer or the acceptance of an offer, or any other matter that is material to the formation or operation of a contract, may be expressed

. . . . .

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(b) by an activity in electronic form, including touching or clicking on an appropriately designated icon or place on a computer screen or otherwise communicating electronically in a manner that is intended to express the offer, acceptance or other matter.

138 Ms. Douez relies on *Berkson v. Gogo LLC*, 97 F.Supp.3d 359 (U.S. Dist. Ct. E.D. N.Y. 2015), at para. 22, where a U.S. district court, in the absence of legislation on electronic formation of contract, adopted a four-step procedure to determine whether a contract was formed by accepting terms of use online. In British Columbia, s. 15(1) of the *Electronic Transactions Act* answers the question, providing that clicking on a screen suffices to indicate acceptance.

139 Ms. Douez's second contention is that the terms of use contradict the forum selection clause, rendering it unclear. She points to the provision that Facebook will "strive to respect local laws", and suggests that this requires Facebook to defer to s. 4 of the British Columbia *Privacy Act*, which grants the Supreme Court of British Columbia subject matter jurisdiction over *Privacy Act* claims, to the exclusion of other tribunals. The tension between the strict terms of the forum selection clause in the contract, and the provision that Facebook will "strive to respect local laws", introduces an ambiguity, rendering the forum selection clause unenforceable, Ms. Douez contends.

140 This argument cannot succeed. The contract on its face is clear. There is no inconsistency between a commitment to "strive" to apply local laws and an agreement that disputes will be tried in California. A forum selection clause does not disrespect the laws of British Columbia.

141 This brings us to Ms. Douez's third argument — that s. 4 of the *Privacy Act* invalidates forum selection clauses for actions under this Act. Section 4 provides that "an action under [the *Privacy Act*] must be heard and determined by the Supreme Court [of British Columbia]". Ms. Douez argues that this clause amounts to a stipulation that all actions under this Act must be heard in British Columbia, with the result that forum selection clauses providing other jurisdictions are invalid.

142 We do not agree. Section 4 of the *Privacy Act* grants the Supreme Court of British Columbia subject matter jurisdiction over *Privacy Act* claims to the exclusion of other British Columbia courts. Nothing in the language of s. 4 suggests that it can render an otherwise valid contractual term unenforceable.

143 We do not dispute that legislation can limit the scope of forum selection clauses or render them altogether unenforceable: see *Pompey*, at para. 38. Nor do we dispute that some jurisdictions have adopted a "protective model" limiting the impact of forum selection clauses in consumer contracts: Z. S. Tang, *Electronic Consumer Contracts in the Conflict of Laws* (2nd ed. 2015), at p. 357. However, when they have done so, they have used clear language. For example, *Regulation (E.U.) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)*, [2012] O.J. L351/1, provides consumers with a positive right to bring proceedings in his or her home state (art. 18), unless the clause was agreed to after a dispute had arisen, provides additional forum options to the consumer, or concerns parties resident in the same state (art. 19). The *Civil Code of Québec* is more absolute: art. 3149 provides that Québec courts have jurisdiction to hear actions based on consumer contracts, and that "the waiver of such jurisdiction by the consumer or worker may not be set up against him".

144 The British Columbia legislature has not adopted the "protective model" approach. It has not legislated an absolute or limited right to bring an action in British Columbia, in the face of a forum selection clause stipulating a different jurisdiction. It has focussed not on where the action can be brought, but on the protection of consumer rights in the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("*BPCPA*"). The choice to focus on rights rather than forum was made after this Court's decision in *Pompey*. Section 3 of the *BPCPA* provides that "[a]ny waiver or release by a person of the person's rights, benefits or protections under this Act is void except to the extent that the waiver or release is expressly permitted by this Act." If the legislature had intended to render forum selection clauses inoperable

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

for claims made under the *Privacy Act*, it would have said so expressly: see *Scierie Thomas-Louis Tremblay inc. c. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401 (S.C.C.), at para. 25. Courts are obliged to respect this choice.

145 Ms. Douez does not argue that the forum selection clause is unconscionable. Such an argument would have to be based on evidence (see *Pompey*, at para. 29); none was adduced in this case. Inequality of bargaining power, even if it were established here, does not, on its own, give the court reason to interfere with the freedom to contract. As noted by Angela Swan and Jakub Adamski in *Canadian Contract Law* (3rd ed. 2012), at § 9.114:

> The mere fact that, as might happen in very many transactions, the parties are not equally competent in looking after their own interests or equally informed is not a basis for relief. There has to be, as has been suggested, some relation of dependence or likelihood of undue influence, *i.e.*, some element of procedural unconscionability, inequality or unfairness, *and* a bad bargain, *i.e.*, some element of substantive unfairness.
>
> [Italics in original.]

146 Finally, we come to the argument that forum selection clauses violate public policy and should therefore be treated as invalid and inapplicable. This contention, too, cannot prevail.

147 It is unclear to us how a court can invalidate a contractual provision simply because the court finds it is contrary to public policy in the abstract. While the court can refuse to enforce otherwise valid contractual provisions that offend public policy, the party seeking to avoid enforcement of the clause must prove "the existence of an overriding public policy ... that outweighs the very strong public interest in the enforcement of contracts": *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.), at para. 123 (per Binnie J., in dissent, but not on this point). In our view, no such overriding public policy is found on the facts of this case.

148 Forum selection clauses, far from being unconscionable or contrary to public policy, are supported by strong policy considerations. Forum selection clauses are well-established and routinely enforced around the world: see e.g. *Donohue v. Armco Inc.*, [2001] UKHL 64, [2002] 1 All E.R. 749 (U.K. H.L.), at para. 24; *Atlantic Marine Const. Co. Inc. v. U.S. Dist. Court for Western Dist. of Texas*, 134 S.Ct. 568 (U.S. Sup. Ct. 2013), at pp. 581-82, citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (U.S. Sup. Ct. 1972) (1972), at pp. 17-18; *Akai Pty Ltd. v People's Insurance Co.* (1996) 188 C.L.R. 418, at pp. 441-42 (H.C.A.); *Advanced Cardiovascular Systems Inc. v. Universal Specialties Ltd.*, [1997] 1 N.Z.L.R. 186 (New Zealand C.A.). Forum selection clauses serve an important role of increasing certainty and predictability in transactions that take place across borders. The fact that a contract is in standard form does not affect the validity of such a clause: *Pompey*, at para. 28; *Carnival Cruise Lines Inc. v. Shute*, 499 U.S. 585 (U.S. Sup. Ct. 1991), at pp. 593-94.

149 That is not to say that forum selection clauses will always be given effect by the courts. As Abella J. notes, "burdens of distance" and "burdens of geography" may render the application of a forum selection clause unfair in the circumstances. However, those considerations are relevant at the second step of *Pompey*, not the first. As we discuss below, a court in assessing strong cause can consider the relative convenience and expense of local and foreign courts, as well as any prejudice a plaintiff might suffer in being forced to bring their claim in a foreign court: see "*Eleftheria*" *(The) (Cargo Owners) v.* "*Eleftheria*" *(The)*, [1969] 1 Lloyd's Rep. 237 (Eng. P.D.A.), at p. 242. But these considerations play no role at the first step of the *Pompey* test.

150 We conclude that the forum selection clause is valid and applicable and that the first step of the *Pompey* test has been met. It remains to determine whether Ms. Douez has shown strong cause why it should not be given effect.

III. Step Two: Has Ms. Douez Shown Strong Cause?

151 We have concluded that step one of the *Pompey* test has been met: Facebook has established that the forum selection clause is enforceable and applies to these circumstances. It remains to ascertain whether Ms. Douez has established strong cause why the clause should not be enforced in this case.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

152 The strong cause exception to the enforceability of forum selection clauses confers a discretion on the judge, to be exercised in accordance with settled factors, to decline to enforce the clause. The strong cause test means that forum selection clauses are enforced, upholding predictability and certainty, unless the plaintiff shows that enforcement of the clause would unfairly deny her an opportunity to seek justice.

153 The party seeking to displace the forum selection clause bears the burden of establishing strong cause. There are good reasons for this. First, enforceability of forum selection clauses is the rule, setting them aside the exception. Generally, parties seeking an exceptional exemption must show grounds for what they seek. Second, it is the party seeking the exception who is in the best position to argue why it should be granted, not for the party seeking to rely on the rule to show why the rule should not be vacated; generally, burdens fall on the party asserting a proposition and in the best position to prove it. Reversing the burden would require a defendant to prove a negative — that "strong cause" does not exist. This would ask a defendant to anticipate and counter all the arguments a plaintiff might raise in support of there being strong cause. Finally, to reverse the burden would undermine the general rule that forum selection clauses apply and introduce uncertainty and expense into commercial transactions that span international borders. It would detract from the "certainty and security in transaction" that is critical to private international law (*Pompey*, at paras. 20 and 25). For many businesses, having to prove in a foreign country why there is not strong cause would render the contract costly and in many cases, practically unenforceable. Businesses, small suppliers as well as giants like Facebook, would be required to amass proof of a negative in a host of foreign countries. Accordingly, the law in Canada and elsewhere has consistently held that it is the plaintiff — the party seeking to set aside the forum selection clause — who bears the burden of showing strong cause for not giving effect to the enforceable forum selection clause by entering a stay of proceedings: *Pompey*, at para. 25; "*Eleftheria*", at p. 242.

154 In *Pompey*, Bastarache J. explained the reasons for embracing the strong cause test and the burden on the plaintiff to prove strong cause (para. 20):

> These clauses are generally to be encouraged by the courts as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law .... In the context of international commerce, order and fairness have been achieved at least in part by application of the "strong cause" test. This test rightly imposes the burden on the plaintiff to satisfy the court that there is good reason it should not be bound by the forum selection clause. It is essential that courts give full weight to the desirability of holding contracting parties to their agreements. There is no reason to consider forum selection clauses to be non-responsibility clauses in disguise. In any event, the "strong cause" test provides sufficient leeway for judges to take improper motives into consideration in relevant cases and prevent defendants from relying on forum selection clauses to gain an unfair procedural advantage.

155 This brings us to what the plaintiff must show to establish strong cause why a forum selection clause should not be enforced. The factors that govern the judge's exercise of his discretion were set out in "*Eleftheria*", at p. 242, and were adopted in *Pompey*, at para. 19, per Bastarache J.:

> (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.
>
> (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.
>
> (3) The burden of proving such strong cause is on the plaintiffs.
>
> (4) In exercising its discretion the Court should take into account all the circumstances of the particular case.
>
> (5) In particular, but without prejudice to (4), the following matters, where they arise, may be properly regarded:

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts.
>
> (b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects.
>
> (c) With what country either party is connected, and how closely.
>
> (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.
>
> (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would
>
> > (i) be deprived of security for that claim;
> >
> > (ii) be unable to enforce any judgment obtained;
> >
> > (iii) be faced with a time-bar not applicable in England; or
> >
> > (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

156 Applying these factors to the case at bar, it is clear that the motions judge should not have found strong cause for not enforcing the forum selection clause to which Ms. Douez agreed. The court must consider all the circumstances of the case. None of the circumstances relied on by Ms. Douez show strong cause why the forum selection clause should not be enforced.

157 The analysis starts with the proposition that the discretion should be exercised by enforcing the forum selection clause unless the plaintiff shows strong cause for not doing so. Strong cause means what it says — it is not any cause, but strong cause. The default position is that forum selection clauses should be enforced.

158 There is good reason for this. By offering services across borders, online companies risk uncertainty and unpredictability of the possible jurisdictions in which they may face legal claims. Professor Geist (M. A. Geist, "Is There a There There? Toward Greater Certainty for Internet Jurisdiction" (2001), 16 *B.T.L.J.* 1345 describes this risk:

> Since websites are instantly accessible worldwide, the prospect that a website owner might be haled into a courtroom in a far-off jurisdiction is much more than a mere academic exercise; it is a very real possibility. [p. 1347]

159 Other commentators point out that since online companies do not know in advance where their customers are located, it is difficult for them to proactively determine jurisdiction issues in advance: Z. Tang, "Exclusive Choice of Forum Clauses and Consumer Contracts in E-Commerce" (2005), 1 *J. Priv. Int. L.* 237. In our view, these risks are best addressed through adherence to the existing system of private international law that has been carefully developed over decades to provide a measure of certainty, order, and predictability. Requiring the plaintiff to demonstrate strong cause is essential for upholding certainty, order, and predictability in private international law, especially in light of the proliferation of online services provided across borders. Holding otherwise would ask the court to ignore valid and enforceable, contractual terms.

160 It is not only large multi-national corporations like Facebook that benefit from emphasizing the need for order in private international law. The intervener, Information Technology Association of Canada, points out that small and medium-sized businesses benefit from the certainty that flows from enforcing forum selection clauses, and that by reducing litigation risk they can generate savings that can be passed on to consumers. Facebook adds that the certainty which comes with enforcement of forum selection clauses allows foreign companies to offer online access to Canadians. In our view, these benefits accrue to online businesses of all sizes, and in all locations.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

161 We cannot help but note our profound disagreement with the suggestion in the reasons of Karakatsanis, Wagner and Gascon JJ., that forum selection clauses are inherently contrary to public policy. They state: "... forum selection clauses divert public adjudication of matters out of the provinces, and court adjudication in each province is a public good" (para. 25). The overwhelming weight of international jurisprudence shows that, far from being a subterfuge to deny access to justice, forum selection clauses are vital to international order, fairness and comity.

162 We turn now to the specific factors that *Pompey* directs the court to consider in determining whether the plaintiff has established strong cause for not enforcing the forum selection clause.

163 First, Ms. Douez has not shown that the facts in the case and the evidence to be adduced shifts the balance of convenience from the contracted state of California to British Columbia. The evidence in the case may be expected to revolve around Facebook's use of Ms. Douez's photo and name in its advertisement without her consent. This involves Facebook's conduct from its headquarters in California. Facebook's defence is that Ms. Douez consented, not by her actions in British Columbia, but by agreeing to the terms of use. The issue is a legal matter of construing the contract. There is no basis for suggesting this factor shows strong cause to oust the forum selection clause.

164 Our colleague Abella J. makes reference to the "burdens of distance" and the "burdens of geography" that a plaintiff may carry when faced with a forum selection clause. Similarly, Ms. Douez argued that setting aside the forum selection clause would increase consumers' access to justice. During oral argument, her counsel called it "a very important principle" (Transcript, at p. 33), and in her factum she said that "no rational British Columbia resident would travel to California to litigate nominal damages claims" (A.F., at para. 90). Yet, there is no evidence regarding the "relative convenience and expense of trial" in California as compared to British Columbia. Strong cause cannot be established in absence of a sufficient evidentiary basis.

165 Nor does the applicable law show strong cause to override the forum selection clause, in our view. It is true that the law giving rise to the tort is a British Columbia statute. However, the British Columbia tort created by the *Privacy Act* does not require special expertise. The courts of California have not been shown to be disadvantaged in interpreting the Act as compared with the Supreme Court of British Columbia. The most the motions judge could say on this factor was that

> local courts may be more sensitive to the social and cultural context and background relevant to privacy interests of British Columbians, as compared to courts in a foreign jurisdiction. This could be important in determining the degree to which privacy interests have been violated and any damages that flow from this.
>
> (Trial reasons, 2014 BCSC 953, 313 C.R.R. (2d) 254, at para. 75)

If possible sensitivity to local context is sufficient to show strong cause, forum selection clauses will never be upheld where a tort occurs in a different country. What this factor contemplates is evidence that the local court will be better placed to interpret the legal provisions at issue than the court stipulated in the forum selection clause. Ms. Douez presented no such evidence.

166 Ms. Douez did not adduce any evidence of California law or California procedure related to either private international law or the adjudication of privacy claims. She did not provide evidence of California law related to territorial jurisdiction. Bauman C.J.B.C. described the vacuum thus (para. 77):

> In my opinion, Ms. Douez failed to provide the Court with any reason to conclude that this proceeding could not be heard in the courts of Santa Clara. There is no evidence in the record as to California private international law. This Court cannot conduct its own research and take judicial notice (see *Duchess di Sora v. Phillipps* (1863), 10 H.L. Cas. 624, (U.K.H.L.) at 640; *Bumper Development Corp. v. Commissioner of Police of the Metropolis*, [1991] 1 W.L.R. 1362 (Eng. C.A.), at 1369).

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

A court should not be put in the position of having to speculate as to whether a California court would exercise its discretion to assume jurisdiction over a matter, whether that court would apply the laws of British Columbia, whether privacy laws in California are analogous to those in British Columbia, whether the procedural rules in California parallel those in British Columbia, or whether the remedies available in California would be capable of providing Ms. Douez with comparable remedies to what she might obtain in British Columbia. Without evidence, there is respectfully no basis for our colleagues Karakatsanis, Wagner and Gascon JJ. to raise the spectre of harms going "without remedy" (paras. 59 and 62).

167 The country with which the parties are connected does not establish strong cause. Facebook has its headquarters in California. Ms. Douez, while resident in British Columbia, was content to contract with Facebook at that location. Nothing in her situation suggests that the class action she wishes to commence could not be conducted in California just as easily as in British Columbia. To show strong cause to oust a foreign selection clause on the basis of residence, the plaintiff must point to more than the mere fact that she lives in the jurisdiction where she seeks to have the action tried. If this sufficed, forum selection clauses would be routinely held inoperative.

168 The next factor to consider is whether the defendant is merely seeking procedural advantages. If Ms. Douez could show that Facebook does not genuinely desire the trial to take place in California, but wants the trial there simply to gain procedural advantages over her, this might support her case that strong cause lies to oust the forum selection clause. However, she has not shown this. There is no suggestion that Facebook does not genuinely wish all litigation with users to take place in California. Indeed, it is clear it does so, for reasons of substance and convenience. The purpose of the forum selection clause is to avoid costly and uncertain litigation in foreign countries, which in turn would increase its costs and divert its energy.

169 Finally, Ms. Douez has not shown that application of the forum selection clause would deprive her of a fair trial because she would be deprived of security for the claim; be unable to enforce any judgment obtained; be faced with a time-bar not applicable in British Columbia; or because of political, racial, religious or other reasons. She does not and cannot take issue with the fact that the state of California has a highly developed and fair legal system, nor with the fact that she will get a fair trial there.

170 It is thus apparent that all the factors endorsed by this Court in *Pompey* point to enforcing the forum selection clause to which Ms. Douez agreed. None of them establish strong cause.

171 For this reason, Ms. Douez asks this Court to modify the strong cause test endorsed by this Court in *Pompey*. She urges two modifications. First, she suggests that "the strong cause test should be applied in a nuanced manner, accounting for parties' inherent inequality or consumers' lack of bargaining power" (A.F., at para. 71). Alternatively, she says that the test "should be modified to place the burden on the defendant in the context of consumer contracts of adhesion" (A.F., at para. 72). We cannot accept either of these proposals. They would amount to inappropriately overturning this Court's decision in *Pompey* and substituting new and different principles, and would introduce unnecessary and unprincipled uncertainty into the strong cause test.

172 Ms. Douez's first submission is that instead of considering the factors set out in "*Eleftheria*" and *Pompey* in determining whether strong cause not to enforce the forum selection clause has been established, the court should consider a different factor — the consumer's lack of bargaining power. Our colleagues Karakatsanis, Wagner and Gascon JJ. accept this argument. With respect, we disagree.

173 This argument conflates the first step of the test set out in *Pompey* with the second step, in a way that profoundly alters the law endorsed by this Court in *Pompey*. Consideration of "all the circumstances of the particular case" at the second step is not an invitation to blend the first step into the second. As discussed above, the party seeking to rely on the forum selection clause must first demonstrate that it is enforceable. It is at this stage that inequality of bargaining power is relevant. Inequality of bargaining power may lead to a clause being declared unconscionable — something not

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

argued in the case at bar. Short of unconscionability, the stronger party relying on a standard form contract faces the *contra proferentem* rule under which any ambiguity is resolved against them: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23 (S.C.C.), at para. 51. As we have said, concerns about inequality of bargaining power may inspire legislators to intervene by making forum selection clauses unenforceable — but the British Columbia legislature has chosen not to do so. There is no reason here to second guess this choice by conflating or modifying the *Pompey* analysis. In this case, Facebook has demonstrated that the forum selection clause is enforceable. We note parenthetically that the strength of the contention of unequal bargaining power seems tenuous, when one realizes that Ms. Douez received the Facebook services she wanted, for free and without any compulsion, practical or otherwise. Even if remaining "'offline' may not be a real choice in the internet era", as suggested by our colleagues Karakatsanis, Wagner and Gascon JJ. (at para. 56), there is no evidence that foregoing Facebook equates with being "offline". In any case, enforcement of the forum selection clause does not deprive Ms. Douez, or anyone else, of access to Facebook.

174 Ms. Douez's alternative suggestion of reversing the burden of proof is inconsistent with the principles underlying the strong cause test: certainty, security, and fairness (*Pompey*, at para. 20). These principles remain as relevant in the 21st century domain of global online social media as they were in the 20th century climate of international commercial shipping. The principles of order and fairness underpin private international law and "ensure security of transactions with justice": *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.), at p. 1097. The twin goals of justice and fairness in private international law are only achievable by enforcing rules that ensure security and predictability: *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17, [2012] 1 S.C.R. 572 (S.C.C.), at paras. 73 and 75; see also *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 (S.C.C.), at p. 1058. As already discussed, there are good reasons why this Court, like the courts in the United Kingdom and elsewhere, places the burden of showing strong cause for not enforcing a forum selection clause on the plaintiff seeking to avoid the clause.

175 Ms. Douez's submissions that we "nuance" *Pompey* or shift the burden of showing strong cause contrary to *Pompey*, are not supported by principle or policy. They would undermine certainty in private international law. And they amount to overruling this Court's decision in *Pompey*. This Court has established stringent criteria for departing from a previous decision of recent vintage: see e.g. *Fraser v. Ontario (Attorney General)*, 2011 SCC 20, [2011] 2 S.C.R. 3 (S.C.C.), at paras. 129-39; *R. v. Bernard*, [1988] 2 S.C.R. 833 (S.C.C.), at pp. 850-61; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609 (S.C.C.), at paras. 45-46. Those conditions are not met here.

176 We conclude that Ms. Douez has failed to establish strong cause why the forum selection clause she agreed to should not be enforced.

IV. Disposition

177 The forum selection clause is valid and enforceable, and Ms. Douez has not shown strong cause to not enforce it. We would dismiss her appeal.

Appeal allowed.

Pourvoi accueilli.

Footnotes

1 Section 180(1) of the *Securities Act*, R.S.A. 2000, c. S-4, stated:

180(1) On the application of an interested person, the Court of Queen's Bench, where it is satisfied that a person or company has not complied with this Part or the regulations made in respect of this Part, may make an interim or final order

(a) compensating any interested person who is a party to the application for damages suffered as a result of a contravention of this Part or the regulations made in respect of this Part;

(b) rescinding a transaction with any interested person, including the issue of a security or a purchase and sale of a security;

(c) requiring any person or company to dispose of any securities acquired pursuant to or in connection with a bid;

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(d) prohibiting any person or company from exercising any or all of the voting rights attaching to any securities;

(e) requiring the trial of an issue;

(f) respecting any matter not referred to in clauses (a) to (e) that the Court considers proper.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 18

Canadian Contractual Interpretation Law

SECOND EDITION

Geoff R. Hall
B.A. (McGill), M.A., LL.B. (Toronto), LL.M. (Harvard)

Partner, McCarthy Tétrault LLP

Canadian Contractual Interpretation Law, Second Edition
© LexisNexis Canada 2012
February 2012

All rights reserved. No part of this publication may be reproduced or stored in any material form (including photocopying or storing it in any medium by electronic means and whether or not transiently or incidentally to some other use of this publication) without the written permission of the copyright holder except in accordance with the provisions of the *Copyright Act*. Applications for the copyright holder's written permission to reproduce any part of this publication should be addressed to the publisher.

Warning: The doing of an unauthorized act in relation to a copyrighted work may result in both a civil claim for damages and criminal prosecution.

Library and Archives Canada Cataloguing in Publication

Hall, Geoff R. (Geoffrey Robert), 1966-
Canadian contractual interpretation Law / Geoff R. Hall.

Includes index.
ISBN 978-0-433-46512-6

1. Contracts—Canada—Interpretation and construction. 2. Law—Language. I. Title.

KE850.H34 2007 346.7102 C2007-903709-7
KF801.H34 2007

Published by LexisNexis Canada, a member of the LexisNexis Group
LexisNexis Canada Inc.
123 Commerce Valley Dr. E., Suite 700
Markham, Ontario
L3T 7W8

Customer Service
Telephone: (905) 479-2665 • Fax: (905) 479-2826
Toll-Free Phone: 1-800-668-6481 • Toll-Free Fax: 1-800-461-3275
Email: customerservice@lexisnexis.ca
Web Site: www.lexisnexis.ca

Printed and bound in Canada.

policy which dealt with pre-existing conditions and concluded that medical expenses relating to the deceased's cirrhosis of the liver would be covered by the policy as a pre-existing condition. Once again, application of the *ejusdem generis* doctrine amounted to nothing more than good contextual analysis, interpreting a specific phrase not in isolation but in light of the contract as a whole.

The *ejusdem generis* rule merely represents a specific application of the general rule that contracts are construed as a whole. If such construction suggests that general words should be interpreted narrowly so as to create consistency with the rest of the document, then such an interpretation ought to be adopted. The rule adds nothing to this analysis, and as such is unhelpful to the exercise of contractual interpretation.

3.12.6 The *ejusdem generis* rule in Québec

The *ejusdem generis* rule has been applied in numerous occasions by Québec courts in a contractual setting.[170] Indeed, the leading Supreme Court of Canada case on the rule is a civil law case from Québec.[171]

3.13 *EXPRESSIO UNIUS*

3.13.1 The principle

Expressio unius est exclusio alterius is "a maxim of interpretation meaning that the expression of one thing is the exclusion of the other".[172] Thus according to the maxim, an express enumeration of certain items in a document is taken to mean that non-enumerated items are excluded. The maxim has long been applied to the interpretation of documents. While often thought of as a precept of statutory interpretation, it has historically applied to all written documents. A Canadian appellate court has reaffirmed that it applies as much to contractual interpretation as it does to statutory interpretation. However, its role in modern contractual interpretation is extremely restricted.

Courts have long recognized that the maxim is of limited usefulness. Omitting reference to something can indicate an intention to exclude it, but it can also result from a host of other factors and may indicate nothing at all about whether the parties really intended to exclude the omitted item. As a result, courts have always been cautious about applying the maxim, and over time have become increasingly more so. Indeed, as contractual interpretation has become more contextual and less literal, application of the maxim has become increasingly rare. In modern contractual interpretation the maxim is approached

---

170 *L'Excellence, compagnie d'assurance vie v. Desjardins*, [2005] J.Q. no 16067 at para. 32 (Qué. C.A.) and *St-Luc-de-Vincenne (Municipalité de) v. Compostage Mauricie inc.*, [2008] J.Q. no 672 (Qué. C.A.), leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 141 (S.C.C.).

171 *National Bank of Greece (Canada) v. Katsikonouris*, [1990] S.C.J. No. 95, [1990] 2 S.C.R. 1029 (S.C.C.)

172 *Rodaro v. Royal Bank of Canada*, [2000] O.J. No. 272 at para. 856 (Ont. S.C.J.), revd on other grounds [2002] O.J. No. 1365, 59 O.R. (3d) 74 (Ont. C.A.).

with great caution, because the courts are well aware that it has the potential to subvert the parties' intentions by holding something to be excluded from an agreement when the omission resulted from something other than an intention to exclude. Therefore its use is limited to that of a guide to interpretation rather than an invariable rule. It will be applied when it aids the interpretive project of discerning the parties' intentions as expressed in the words they have selected — in other words, when an omission truly is indicative of an intention to exclude. Otherwise, it will be disregarded.

3.13.2 The maxim applies to contractual interpretation

The *expressio unius* maxim is often thought of as a principle of statutory interpretation, but it clearly also applies to contractual interpretation. In 2000, the Newfoundland Court of Appeal expressly rejected an argument that the maxim applies only to statutory interpretation and not to contractual interpretation, finding no authority in support of the contention.[173] In cases within the last 20 years it has been considered (although in most cases not applied) in a variety of contractual contexts, including cases involving guarantees,[174] insurance contracts,[175] contracts for the sale of goods,[176] employment contracts,[177] an assignment clause[178] and settlement agreements.[179]

3.13.3 The maxim is one of limited usefulness

While the maxim *expressio unius* clearly applies to contractual interpretation, its usefulness is limited. Indeed, this has long been recognized to be the case. Express inclusion of one thing in a contract may not be at all probative of an intention to exclude other things, as a missing reference may be no more than an accidental omission.[180] Caution in the application of *expressio unius* was expressed as early as 1888 in a statutory interpretation case which noted that omitting reference to something can be for a variety of reasons other than an intention to exclude it:

---

173 *Eco-Zone Engineering Ltd. v. Grand Falls — Windsor (Town)*, [2000] N.J. No. 377, 5 C.L.R. (3d) 55 at para. 49 (Nfld. C.A.).

174 *George Smith Trucking Co. v. Golden Seven Enterprises Inc.*, [1989] B.C.J. No. 52, 34 B.C.L.R. (2d) 43 at 48 (B.C.C.A.).

175 *Rosenberg v. Co-Operators General Insurance Co.*, [1990] B.C.J. No. 2483, 48 C.C.L.I. 46 at 51-52 (B.C.S.C.).

176 *Snarpen Contracting Ltd. v. Arbutus Bay Estates Ltd.*, [1996] B.C.J. No. 830, 75 B.C.A.C. 161 at paras. 34-35 (B.C.C.A.).

177 *McIntosh v. Equitable Life Insurance Co.*, [2000] O.J. No. 3071, 26 C.C.P.B. 140 at para. 14 (Ont. S.C.J.).

178 *Rodaro v. Royal Bank of Canada*, [2000] O.J. No. 272 at para. 856 (Ont. S.C.J.), revd on other grounds [2002] O.J. No. 1365, 59 O.R. (3d) 74 (Ont. C.A.).

179 *Fraser v. Houston*, [2005] B.C.J. No. 1089 at paras. 29-30 (B.C.S.C.), vard [2006] B.C.J. No. 290, 51 B.C.L.R. (4th) 82 (B.C.C.A.), leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 133 (S.C.C.).

180 *473807 Ontario Ltd. v. TDL Group Ltd.*, [2006] O.J. No. 3050, 271 D.L.R. (4th) 636 at para. 37 (Ont. C.A.).

TAB 19

2009 SCC 39
Supreme Court of Canada

Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)

2009 CarswellOnt 4494, 2009 CarswellOnt 4495, 2009 SCC 39, [2009] 2 S.C.R. 678, [2009] S.C.J. No. 39, 102 O.R. (3d) 319, 103 O.R. (3d) 319 (note), 179 A.C.W.S. (3d) 1202, 253 O.A.C. 256, 309 D.L.R. (4th) 513, 391 N.R. 234, 49 E.T.R. (3d) 159, 76 C.C.P.B. 1, 76 C.C.E.L. (3d) 55, 92 Admin. L.R. (4th) 203, J.E. 2009-1510

Elaine Nolan, George Phillips, Elisabeth Ruccia, Paul Carter, R.A. Varney and Bill Fitz, being members of the DCA Employees Pension Committee representing certain of the members and former members of the Pension Plan for the Employees of Kerry (Canada) Inc. (Appellants) v. Kerry (Canada) Inc. and Superintendent of Financial Services (Respondents) and Association of Canadian Pension Management and Canadian Labour Congress (Interveners)

Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein JJ.

Heard: November 18, 2008
Judgment: August 7, 2009 [*]
Docket: 32205

Proceedings: affirming *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)* (2007), (sub nom. *Kerry (Canada) Inc. v. DCA Employees Pension Committee)* 2007 C.E.B. & P.G.R. 8249, 60 C.C.P.B. 67, (sub nom. *DCA Employees Pension Committee v. Ontario (Superintendent of Financial Services))* 282 D.L.R. (4th) 227, (sub nom. *Nolan v. Superintendent of Financial Services (Ont.))* 225 O.A.C. 163, (sub nom. *Kerry (Canada) Inc. v. DCA Employees Pension Committee)* 86 O.R. (3d) 1, 2007 CarswellOnt 3493, 2007 ONCA 416, 32 E.T.R. (3d) 161 (Ont. C.A.); reversing *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)* (2006), 2006 CarswellOnt 1503, 52 C.C.P.B. 1, (sub nom. *Nolan v. Superintendent of Financial Services & Kerry (Canada) Inc.)* 2006 C.E.B. & P.G.R. 8190, (sub nom. *Nolan v. Superintendent of Financial Services (Ontario))* 209 O.A.C. 21 (Ont. Div. Ct.); reversingin part *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)* (2004), 2004 CarswellOnt 1536, 41 C.C.P.B. 65, 2004 CarswellOnt 8896 (F.S. Trib.); reversingin part *Nolan v. Ontario (Superintendent of Financial Services)* (2004), 42 C.C.P.B. 119, 2004 CarswellOnt 8903, 2004 CarswellOnt 4226 (F.S. Trib.); reversingin part *Nolan v. Ontario (Superintendent of Financial Services)* (2004), 2004 CarswellOnt 8904, 2004 CarswellOnt 5477, 44 C.C.P.B. 156 (F.S. Trib.); additional reasons to *Nolan v. Ontario (Superintendent of Financial Services)* (2004), 42 C.C.P.B. 119, 2004 CarswellOnt 8903, 2004 CarswellOnt 4226 (F.S. Trib.); reversing *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)* (2006), 2006 CarswellOnt 3284, 54 C.C.P.B. 112, (sub nom. *Nolan v. Superintendent of Financial Services (Ontario))* 213 O.A.C. 271 (Ont. Div. Ct.); additional reasons to *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)* (2006), 2006 CarswellOnt 1503, 52 C.C.P.B. 1, (sub nom. *Nolan v. Superintendent of Financial Services & Kerry (Canada) Inc.)* 2006 C.E.B. & P.G.R. 8190, (sub nom. *Nolan v. Superintendent of Financial Services (Ontario))* 209 O.A.C. 21 (Ont. Div. Ct.)

Counsel: Ari N. Kaplan, Kirk M. Baert, David Rosenfeld for Appellants
Ronald J. Walker, Christine P. Tabbert, Peggy A. McCallum for Respondent, Kerry (Canada) Inc.
Deborah McPhail for Respondent, Superintendent of Financial Services
Jeff W. Galway, Kathryn M. Bush for Intervener, Association of Canadian Pension Management
Steven Barrett for Intervener, Canadian Labour Congress

Subject: Corporate and Commercial; Estates and Trusts; Public; Civil Practice and Procedure

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

APPEAL by pension plan committee from judgment reported at *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)* (2007), (sub nom. *Kerry (Canada) Inc. v. DCA Employees Pension Committee)* 2007 C.E.B. & P.G.R. 8249, 60 C.C.P.B. 67, (sub nom. *DCA Employees Pension Committee v. Ontario (Superintendent of Financial Services))* 282 D.L.R. (4th) 227, (sub nom. *Nolan v. Superintendent of Financial Services (Ont.))* 225 O.A.C. 163, (sub nom. *Kerry (Canada) Inc. v. DCA Employees Pension Committee)* 86 O.R. (3d) 1, 2007 CarswellOnt 3493, 2007 ONCA 416, 32 E.T.R. (3d) 161 (Ont. C.A.), holding that employer was entitled to take contribution holidays in respect of pension plan members.

POURVOI par le comité de retraite à l'encontre d'un jugement publié à *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)* (2007), (sub nom. *Kerry (Canada) Inc. v. DCA Employees Pension Committee)* 2007 C.E.B. & P.G.R. 8249, 60 C.C.P.B. 67, (sub nom. *DCA Employees Pension Committee v. Ontario (Superintendent of Financial Services))* 282 D.L.R. (4th) 227, (sub nom. *Nolan v. Superintendent of Financial Services (Ont.))* 225 O.A.C. 163, (sub nom. *Kerry (Canada) Inc. v. DCA Employees Pension Committee)* 86 O.R. (3d) 1, 2007 CarswellOnt 3493, 2007 ONCA 416, 32 E.T.R. (3d) 161 (Ont. C.A.), ayant conclu que l'employeur avait le droit de s'accorder des périodes d'exonération de contributions relativement aux participants du régime de retraite.

***Rothstein J.*:**

I. Introduction

1 This appeal raises issues related to the obligations of an employer under a pension plan for its employees. In particular, the appeal concerns (1) whether the employer was responsible for paying plan expenses or whether such expenses were properly payable from the pension trust fund; (2) whether the employer could use actuarially determined surplus pension funds to satisfy its contribution obligations in respect of both defined benefit ("DB") and defined contribution ("DC") components of the pension plan. In addition, the appeal raises two issues with respect to costs: first, whether the Financial Services Tribunal (the "Tribunal") had the authority to award costs to the appellants out of the pension trust fund; second, when on judicial review of a pension decision, a court should exercise its discretion to award costs out of the pension trust fund.

2 The Ontario Court of Appeal found in favour of the respondents on all issues before this Court (2007 ONCA 416, 86 O.R. (3d) 1 (Ont. C.A.), and 2007 ONCA 605, 282 D.L.R. (4th) 625 (Ont. C.A.)). I am in agreement and I would dismiss this appeal.

II. Facts

3 The respondent employer (the "Company") is presently named Kerry (Canada) Inc.; its predecessors include DCA Canada Inc. It has administered a pension plan (the "Plan") for its employees since 1954. The terms of the Plan were set out in a pension plan text dated December 31, 1954. The Plan text required contributions from both the employees and the Company. A predecessor of the Company and the National Trust Company Limited entered into a separate trust agreement, also dated December 31, 1954. Contributions were paid into a trust (the "Trust") created under the trust agreement and held in a trust fund (the "Trust Fund" or the "Fund").

4 The Plan has about 80 members. By 2001, the Fund had been in an actuarially determined surplus position for a number of years.

5 The Plan text and the Trust Agreement have been amended a number of times. Until 1984, the Company paid the Plan expenses directly. In 1985, following amendments to the Plan documents, third-party Plan expenses for actuarial, investment management and audit services were paid from the Fund. Between 1985 and 2002, approximately $850,000 was paid from the Fund to cover these expenses.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

6 As of 1985, the Company also started taking contribution holidays from its funding obligations, that by 2001 were worth approximately $1.5 million.

7 Prior to 2000, the Plan existed solely as a DB pension plan. In 2000, the Plan text was amended again in order to introduce a DC component. The DB pension component continued for existing employees, but was closed to new employees; thereafter, all newly hired employees would join the DC component. Employees who were DB members had the option of converting to the DC component. As a result of these amendments, employees were divided into Part 1 Members, who participated in the Plan's DB provisions and Part 2 members who, after January 1, 2000, participated in the DC part of the Plan. The Trust Fund was constituted in two separate funding vehicles with two separate trustees. The Company announced its intention to take contribution holidays from its obligations to DC members by using the surplus accumulated in the Fund from the DB component, which still covered DB members, to satisfy the premiums owing to the DC component.

8 The appellants are members of the DCA Employees Pension Committee and former employees of the Company who participated in the Plan (the "Committee"). The Committee was created by employees of the Company and is distinct from the Retirement Committee created under the Plan documents. After the Company introduced the 2000 amendments, the Committee asked the Superintendent of Financial Services (the "Superintendent"), the other respondent in this case, to make a number of orders under the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "PBA"), relating to the payment of Plan expenses from the Fund and the Company's contribution holidays.

9 The Superintendent issued two Notices of Proposal. Under the first Notice of Proposal, the Superintendent proposed to order that the Company reimburse the Fund for expenses that had not been incurred for the exclusive benefit of Plan members. Under the second, the Superintendent proposed to refuse, among other things, to order the Company to reimburse the Fund for the contribution holidays it had taken. The Company requested a hearing before the Tribunal to challenge the Notice of Proposal regarding expenses. The Committee challenged the second Notice of Proposal concerning contribution holidays before the Tribunal. The Superintendent was a party to both hearings.

10 On the issues relevant in this appeal, the Tribunal generally ruled in favour of the Company. At the first hearing, it held that all of the Plan expenses at issue could be paid from the Fund except for $6,455 in consulting fees related to the introduction of the DC part of the Plan ((F.S. Trib.)).

11 In the second hearing, the Tribunal held that the Company was entitled to take contribution holidays while the Fund was in a surplus position ((F.S. Trib.)). The Tribunal did recognize that the Plan documents as amended in 2000 did not permit DC contribution holidays. However, it held that the Company could retroactively amend the Plan provisions to designate the DC members as beneficiaries of the Trust Fund, thereby allowing the Company to fund its DC contributions from the DB surplus.

12 The Tribunal also refused to award costs ((F.S. Trib.) and (F.S. Trib.)). With respect to costs in the second hearing, a majority of the Tribunal held it did not have the authority to order costs from the Fund and that regardless it did not think a costs award against either party was justified.

13 The Committee appealed these decisions to the Divisional Court.

III. Lower Court Rulings

14 The Divisional Court ruled that the payment of Plan expenses out of the Trust Fund constituted a partial revocation of the Trust, noting that this Court's decision in *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611 (S.C.C.), forbids revoking a trust unless a specific power to do so was reserved at the time the trust was constituted. The Divisional Court upheld the Tribunal's ruling that DB contribution holidays were permitted as nothing in the Plan texts precluded them.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

15 However, it ruled that the surplus in the Fund accumulated under the DB arrangement could not be used to fund the employer's contribution obligations to the DC arrangement. It ruled that the 2000 Plan text created two separate funds — one for the DB arrangement and one for the DC arrangement. It concluded that there were "in law" two plans and two pension funds, which could not be joined.

16 The Divisional Court held that the Tribunal was correct that it did not have jurisdiction to award costs out of the Fund ((2006), 209 O.A.C. 21 (Ont. Div. Ct.)). However, it held that the court could award costs from the Fund. It ordered the Company to pay the Committee's costs on a partial indemnity basis ((2006), 213 O.A.C. 271 (Ont. Div. Ct.)). It also ordered that the difference between these costs and the Committee's solicitor-client costs be paid to them out of the Fund.

17 Gillese J.A., writing for a unanimous Ontario Court of Appeal, allowed the Company's appeal, dismissed the Committee's cross-appeal and upheld the Tribunal's rulings on the issues before this Court.

IV. Issues

1. Did the Tribunal err in concluding that the Company did not have the obligation to pay the expenses at issue?

2. Did the Tribunal err in concluding that the Company was entitled to take contribution holidays with respect to the DB arrangement?

3. Did the Tribunal err in concluding that the Company was entitled to take contribution holidays with respect to the DC arrangement?

4a. Did the Tribunal err in holding that it could not award costs from a pension trust fund?

4b. Did the Court of Appeal err in declining to award costs to the Committee from the Trust Fund?

18 An issue surrounding the notice given by the Company in relation to its 2000 amendments was raised before the Tribunal and the courts below. It was not argued before this Court.

V. Preliminary Matters

A) Pension Terminology

19 There are two main categories of pension plans. Defined Benefit plans ("DB" plans) guarantee the employees specific benefits on retirement. The employer is usually responsible to make contributions which ensure the plan's trust fund can cover the expected future benefits that it will pay out to retiring employees. Actuaries are generally retained to estimate the contributions needed. Should the actuary determine that the funds in the trust are greater than the amount needed to cover future benefits, the plan is said to be in surplus. If the legislation and plan documentation permits, the employer may take a contribution holiday, whereby the surplus funds are used to cover the employer's contribution obligations. Should the actuary determine that the trust has less money than is needed to cover future benefits, the plan is in deficit and the employer is required to make the necessary contributions to ensure the benefit obligations can be met.

20 In Defined Contribution plans ("DC" plans), the employer guarantees the amount of contribution it will make for each employee. The benefits on retirement are determined by these contributions and any earnings from their investment. Since no benefits are guaranteed, DC plans do not have surpluses or deficits.

21 A further distinction exists between terminating, winding up, and closing a pension plan. Termination and wind-up are part of the process of discontinuing a pension plan, whereby contributions cease being made, benefits cease being paid out and assets are distributed. Generally earned employee benefits are paid into a new retirement vehicle for the employees: see Ari N. Kaplan, *Pension Law* (2006), at pp. 502 ff. and Susan G. Seller, *Ontario Pension Law Handbook*

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(2nd ed. 2006), at pp. 61 ff. Closing a plan's membership, by contrast, does not imply discontinuing it or liquidating its assets. A closed plan will continue to pay benefits to its members and may continue to require contributions. However, it will no longer accept new members.

B) Standard of Review

22 On the issues before this Court, the Divisional Court reviewed the Tribunal's decision on a correctness standard. The Court of Appeal reviewed the issues of Plan expenses, DB contribution holidays and DC contribution holidays on a reasonableness standard, though it would have upheld the Tribunal's rulings on a correctness review as well. It reviewed the issue of the Tribunal's authority to award costs from the Fund on a correctness standard.

23 Since the Court of Appeal released its decision in this case, this Court has revisited the analytical framework for determining standard of review in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.). That decision established a two-step process for determining the applicable standard of review (para. 62).

24 Under the first step of the process, the court must "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question" (para. 62). In *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152 (S.C.C.), this Court applied a standard of correctness to the Tribunal's ruling involving the interpretation of the PBA. This case does not involve the interpretation of the PBA. It is, therefore, necessary to consider the second step of the *Dunsmuir* process.

25 The second step involves applying the "standard of review analysis", which Bastarache and LeBel JJ. explained this way in *Dunsmuir*, at para. 64:

> The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

26 In this case, there is no privative clause.

27 Under the PBA, the purpose of the Tribunal is to review decisions of the Superintendent of Financial Institutions in the context of the regulation of the pension sector. Where it is of the opinion that the PBA is not being followed, the Superintendent "may require an administrator or any other person to take or to refrain from taking any action in respect of a pension plan or a pension fund" (s. 87(1) and (2)). The PBA provides a right of appeal to the Tribunal for many of these orders at the proposal stage. At s. 89(9), it grants the Tribunal the power to

> direct the Superintendent to carry out or to refrain from carrying out the proposal and to take such action as the Tribunal considers the Superintendent ought to take in accordance with this Act and the regulations, and for such purposes, the Tribunal may substitute its opinion for that of the Superintendent.

The Tribunal, therefore, serves an adjudicative function within Ontario's pension regulation scheme.

28 The purpose of the PBA was explained at para. 13 of *Monsanto*, citing *GenCorp Canada Inc. v. Ontario (Superintendent of Pensions)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.), at para. 16:

> [T]he *Pension Benefits Act* is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans, and "evinces a special solicitude for employees affected by plant closures".

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

In *Monsanto*, Deschamps J. noted that this objective of protecting employees is balanced against the fact that pension legislation is a complex administrative scheme in which the regulator has a certain advantage because it is closer to the industry (para. 14). The Tribunal plays a role in the administration of this complex scheme when reviewing decisions of the Superintendent taken under the PBA.

29 The questions at issue in this appeal are largely questions of law, in that they involve the interpretation of pension plans and related texts, as noted above. However, the Tribunal does have expertise in the interpretation of such texts, being both close to the industry and more familiar with the administrative scheme of pension law.

30 Having regard to the purpose of the Tribunal, the nature of the questions and the expertise of the Tribunal, the appropriate standard of review is reasonableness for the issues of Plan expenses, DB contribution holidays and DC contribution holidays.

31 The issue of the Tribunal's authority to order costs from the Fund requires the interpretation of the Tribunal's enabling statute, the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28. As noted in *Dunsmuir*, at para. 54, "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity."

32 On the other hand, para. 59 of *Dunsmuir* states that "administrative bodies must also be correct in their determinations of true questions of jurisdiction or vires". However, para. 59 goes on to note that it is important "to take a robust view of jurisdiction" and that true questions of jurisdiction "will be narrow".

33 Administrative tribunals are creatures of statute and questions that arise over a tribunal's authority that engage the interpretation of a tribunal's constating statute might in one sense be characterized as jurisdictional. However, the admonition of para. 59 of *Dunsmuir* is that courts should be cautious in doing so for fear of returning "to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years".

34 The inference to be drawn from paras. 54 and 59 of *Dunsmuir* is that courts should usually defer when the tribunal is interpreting its own statute and will only exceptionally apply a correctness of standard when interpretation of that statute raises a broad question of the tribunal's authority.

35 Here there is no question that the Tribunal has the statutory authority to enquire into the matter of costs; the issue involves the Tribunal interpreting its constating statute to determine the parameters of the costs order it may make. The question of costs is one that is incidental to the broad power of the Tribunal to review decisions of the Superintendent in the context of the regulation of pensions. It is one over which the Court should adopt a deferential standard of review to the Tribunal's decision.

36 I have arrived at the same conclusion as the Court of Appeal with respect to the standard of review that is applicable to the issues before this Court except on the issue of the Tribunal's jurisdiction to award costs from the Fund. As mentioned above, Gillese J.A. also found that the Tribunal's decisions on these issues withstood a correctness review. She came to this conclusion through an analysis that was more detailed than is necessary for a review on a standard of reasonableness. However, her analysis is cogent and proves that the Tribunal's decisions would clearly satisfy a review on a reasonableness standard. These reasons adopt large portions of her analysis.

VI. Issue 1 — Plan Expenses

A) Background

37 Since 1985, Plan expenses had been paid from the Fund, rather than by the Company. These include expenses relating to accounting, actuarial, investment and trustee services. In 1994, the Company accepted that it was responsible for certain trustee fees and administrative expenses. As a result, it reimbursed approximately $235,000 to the Fund. The remaining expenses, totalling approximately $850,000 through 2002 remain in dispute.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

38 The Tribunal ruled that expenses were payable from the Trust Fund, with the exception of $6,455 in consulting fees relating to a study of the possibility of introducing a DC component to the Plan ((F.S. Trib.), at para. 38). The Divisional Court held that the Tribunal's decision was incorrect. The expenses could not be paid out of the Trust Fund as they were not for the exclusive benefit of the employees. Moreover, the Divisional Court ruled that the paying of expenses out of the Fund constituted a partial revocation of the Trust.

39 Gillese J.A. approached the question of the responsibility for payment of Plan expenses by looking first to the PBA, as amended, and then to the common law to determine whether any statutory provisions or common law rules place such an obligation on the employer. She found nothing in the PBA or the common law that would impose such a requirement on the employer. She then focussed on the Plan documents and found nothing in them that would require the employer to pay Plan expenses.

40 I am in substantial agreement with her analysis and conclusion. The Committee cites no statutory or common law authority that would oblige an employer to pay the expenses of a pension plan. Rather, the obligations of the employer will be determined by the text and context of the Plan documents.

B) Textual Analysis

41 The Committee's position is that because the original Plan documents did not expressly permit Plan expenses to be paid from the Trust Fund, expenses must be paid by the employer. It argues that paying Plan expenses from the Fund would not be for the exclusive benefit of the employees and would partially revoke the Trust.

42 The Company replies that the Plan documents do not create an express obligation for the employer to pay Plan expenses. This is because the documents do not address the Plan expenses at issue in this appeal.

43 The Committee rightly insists that it is necessary to consider the context in which the Plan documents deal with the obligation to pay expenses to determine whether by necessary implication the Company undertook to pay Plan expenses.

44 Sections 5 and 19 of the 1958 Trust Agreement provide that the employer undertook to pay Trustee fees and Trustee expenses.

> 5. The expenses incurred by the Trustee in the performance of its duties, including fees for expert assistants employed by the Trustee with the consent of the Company and fees of legal counsel, and such compensation to the Trustee as may be agreed upon in writing from time to time between the Company and the Trustee, and all other proper charges and disbursements of the Trustee shall be paid by the Company, and until paid shall constitute a charge upon the Fund.
>
> . . . . .
>
> 19. The Trustee shall be entitled to compensation in accordance with the Schedule of Fees on pension and profit-sharing trusts of National Trust Company, Limited now in effect, which compensation may be adjusted from time to time based upon experience hereunder, as and when agreeable to the Company and the Trustee. Compensation payable to any successor trustee shall be agreed to by the Company and such successor trustee at the time of its designation. Such compensation shall constitute a charge upon the Fund unless it shall be paid by the Company. The Company expressly agrees to pay all expenses incurred by it or by any Trustee in the execution of this Trust and to pay all compensation which may become due to any Trustee under the provisions of this Agreement.
>
> [Emphasis added.]

As between the Company and Trustee, these provisions only cover expenses incurred "in the performance of [the Trustee's] duties" and "in the execution of this Trust". They do not refer to expenses otherwise incurred in the administration of the Plan. As Gillese J.A. correctly pointed out, silence does not create an obligation on the employer to pay Plan expenses.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

45 The Committee argues that "in the execution of this Trust" means operating a pension plan. They point to this Court's decision in *Buschau v. Rogers Communications Inc.*, 2006 SCC 28, [2006] 1 S.C.R. 973 (S.C.C.), in which Deschamps J. wrote, at para. 2: "[A] pension trust is not a stand-alone instrument. The Trust is explicitly made part of the Plan."

46 The Trust is indeed part of the Plan, but it is not all of the Plan; rather, it plays a role in the working of the Plan. The two are distinguished in the Plan documents.

47 The 1954 Plan text defined the Trust Fund as the "Retirement Trust Fund established, under the terms of the Retirement Plan and the undermentioned Trust Agreement, for the accumulation of contributions as herein described and for the payment of certain benefits to Members" (s. 1). It defined the "Trustee" as the company appointed to administer the Fund (s. 1). The Trustee is responsible for the administration of the Fund from which benefits are paid in accordance with the terms of the Plan. The preamble to the 1954 Trust Agreement also makes clear that the Trust exists as a part of the Plan for the purpose of holding funds irrevocably contributed for the payment of benefits. The Trust is therefore an element of the Plan that holds the contributions and from which the benefits are paid out. The Plan itself is a broader document which sets out such things as eligibility criteria, contribution requirements, the form of benefits and what happens upon termination.

48 Sections 5 and 19 of the 1958 Trust Agreement make clear that they apply to expenses incurred in the execution of the Trust. They do not, therefore, refer to the administration of the Plan outside the execution of the Trust.

49 As Gillese J.A. explained, at para. 59, a properly administered pension plan requires other services than those of the trustee, such as actuarial, accounting and investment services. In this case, the responsibility for such services rested not with the trustee, but with the "Retirement Committee", as part of its responsibility for the administration of the Plan. Section 4 of the original Plan text provides:

> **ADMINISTRATION OF THE PLAN**
>
> The Plan shall be administered by a Retirement Committee consisting of at least three members appointed by the Company.
>
> . . . . .
>
> The Committee shall have the right and power, among other rights and powers,
>
> . . . . .
>
> (c) to employ or appoint Actuaries, Accountants, Counsel (who may be Counsel for the Company) and such other services as it may require from time to time in the administration of the Plan.

50 Obviously, there are expenses associated with the employment of actuaries, accountants, counsel and other services required for the administration of the Plan. These are expenses of the Plan, but they are not fees and expenses incurred in the execution of the Trust. I think it is a fair inference that where the employer undertook to pay amounts associated with the Plan, its obligations were expressly stated. The expenses it undertook to pay were those incurred in the execution of the Trust and not others.

51 The Committee says that because the 1958 amendments to the Trust Agreement provided that taxes, interest and penalties were to be paid from the Fund, by implication all other expenses are the responsibility of the employer. However, s. 11 of the 1958 amendments also provided that:

> 11. This Agreement may be amended in whole or in part or be terminated any time and from time to time by an instrument in writing executed by the Company and the then Trustee; provided however that unless approved by the Minister of National Revenue no such amendment shall authorize or permit any part of the Fund to be used for, or diverted to, purposes other than for the exclusive benefit of such employees, or their beneficiaries or personal

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> representatives as from time to time may be included under the Plan, and for the payment of taxes assessments or other charges as provided in Section 5 and Section 19 herein, provided, it being understood that this proviso is not to be construed to enlarge the obligations of the Company beyond those assumed by it under the Plan.
>
> [Emphasis added.]

The last part of this section specifies that the amendments do not increase the employer's original obligations with respect to the expenses for which it was responsible. The original documentation was silent as to the obligation to pay Plan expenses other than those associated with the Trust. The 1958 amendments could not impose any additional obligations on the Company because s. 11 expressly provided that the Trust Agreement was not to be construed as enlarging the Company's obligations.

C) "Exclusive Benefit"

52 Nor could the language in s. 11 forbidding trust funds from being used for any purpose other than the exclusive benefit of the employees impose an obligation on the Company to pay the Plan expenses. The "exclusive benefit" language in s. 11 is subject to the limitation that it will not enlarge the Company's obligations. While it is true that the employer did pay the expenses at issue for a number of years, it was never under any obligation to do so. In light of there being no obligation on the Company and of the expenses at issue being essential to the administration of the Plan, subsequent amendments allowing the expenses to be paid out of the Trust Fund do not infringe the exclusive benefit language.

53 Nor can the term "exclusive benefit" be construed to mean that no one but the employees can benefit from a use of the trust funds. Many persons will benefit indirectly from a use of pension funds. Notably, the employee's family would benefit from the employee's long-term financial security.

54 An employer might also benefit in a number of ways. The U.S. Supreme Court, in dealing with an employer's introduction of an early retirement plan, recognized that an employer can legitimately receive a number of incidental benefits from a pension plan even though the plan is subject to legislation containing exclusive benefit language. These incidental benefits include "attracting and retaining employees, paying deferred compensation, settling or avoiding strikes, providing increased compensation without increasing wages, increasing employee turnover, and reducing the likelihood of lawsuits by encouraging employees who would otherwise have been laid off to depart voluntarily": *Lockheed Corp. v. Spink*, 517 U.S. 882 (U.S. Sup. Ct. 1986), at pp. 893-94. Such indirect or incidental benefits from the use of pension funds do not mean that the funds are being used for a purpose other than the exclusive benefit of the trust beneficiaries.

55 Here the existence of the Plan is a benefit to the employees. The payment of Plan expenses is necessary to ensure the Plan's continued integrity and existence. It is therefore to the exclusive benefit of the employees, within the meaning of s. 11, that expenses for the continued existence of the Plan are paid out of the Fund.

56 The Committee has sought to rely on *Hockin v. Bank of British Columbia* (1995), 123 D.L.R. (4th) 538 (B.C. C.A.). The British Columbia Court of Appeal was called upon to rule on the propriety of the employer charging expenses to the pension trust fund. The Court of Appeal wrote, at para. 59:

> The bank not only charged the costs of its internal staff but also the costs of the actuaries involved in the plan conversion and the cost of producing the video and other publicity material designed to persuade the employees to participate in the new plan. These costs were, in our view, incurred by the bank rather more for its own benefit than for the benefit of the employees and were collateral to the purposes of the pension fund.

This conclusion is not unlike the Tribunal's conclusion in this case; the Tribunal held that consulting fees related to studying the possibility of adding a DC part to the Company's Pension Plan were not for the employees' exclusive benefit and could not be charged to the Plan. Rather than considering all the expenses at issue together and coming to a global

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

judgement on whom they benefited more, the Tribunal in this case considered the various expenses separately and decided whether each one was for the benefit of the employees. Such an approach is eminently reasonable.

D) Partial Revocation and Markle

57 I reject the Committee's contention that allowing for the Plan expenses to be paid out of the Trust constitutes a partial revocation of the Trust.

58 This Court ruled in *Schmidt* that an employer cannot remove pension funds it has placed in a trust unless it expressly reserved the power of revocation at the time the trust was created. Cory J. wrote, at p. 643: "Generally, however, the transfer of the trust property to the trustee is absolute. Any power of control of that property will be lost unless the transfer is expressly made subject to it."

59 Paying plan expenses out of the trust fund is not a matter of the settlor (the Company in this case) exercising a power of control on a part of the property it has transferred to the trust. So long as nothing in the plan texts requires the paying of expenses by the employer, funds in the pension trust can be used to pay reasonable and *bona fide* expenses. In the absence of an obligation on the employer to pay the plan expenses, to the extent that the funds are paying legitimate expenses necessary to the integrity and existence of the plan, the employer is not purporting to control the use of funds in the trust.

60 In this case, Plan expenses were incurred for services of third parties and not those of the employer. However, in my view whether the services are provided by third parties or the employer itself is immaterial as long as the expenses charged are reasonable and the services necessary. The Committee cited *Metropolitan Toronto Pension Plan (Trustees of) v. Toronto (City)* (2003), 63 O.R. (3d) 321 (Ont. C.A.) [*Markle*], in which the Ontario Court of Appeal disallowed the City of Toronto's attempt to charge its employee pension fund for expenses it incurred itself in providing services necessary to the administration of the pension plan. The by-law which set out the terms of the plan had previously made the City responsible for those expenses. The City attempted to amend these terms such that it would be entitled to recover the costs of administrative services it provided to the plan. The Ontario Court of Appeal ruled that the City of Toronto's actions constituted a partial revocation of the trust.

61 *Markle*, however, is distinguishable from the present case. In *Markle*, the City had a previous obligation to pay plan expenses, which it attempted to amend both retroactively and prospectively. The retroactive amendment allowing the City to recover for expenses it had been required to pay before the amending legislation was passed was inconsistent with the terms of the trust, which required the City to pay plan expenses over the period that the amendment covered. The amendment sought to charge the trust for services already performed and for which the City was to bear the expense; it was not an amendment to reflect the true intention of the earlier plan text.

62 The prospective amendment would have required the trustees to pay from the trust fund expenses for services the City had previously agreed to cover. This was considered to fetter the discretion of the trustees, and in so doing, return control over funds in the plan trust fund to the City, thereby resulting in an impermissible partial revocation of the trust. The wording of previous amendments relating to expenses made them payable from the trust fund "subject to the approval of the Board of Trustees". By conferring control on the Board of Trustees, the City was not purporting to control use of trust funds or to fetter the trustee's discretion. Unlike the impugned amendments, these earlier amendments did not constitute a revocation of the trust.

63 The situation in the present case is different because the Trust Agreement had never imposed an obligation on the Company to pay Plan expenses. The Company did not purport to control the use of funds it had placed in trust by forcibly shifting its own obligation onto the Trust Fund.

64 Each case will turn on its own facts and the terms of the plan and trust at issue. Unlike *Markle* where the employer attempted to cancel its own obligation to pay plan expenses by obliging the trustees to pay them from the fund, here there was no obligation to pay Plan expenses, nor any action that was inconsistent with the Company's power of amendment.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

65 Where trust funds may be used for the payment of plan expenses for services required by the plan, the distinction between whether the services are provided by the settlor or a third party is artificial. The only consideration is whether funds can be used to pay expenses and the legitimacy and reasonableness of the costs incurred. To the extent that the expenses at issue are *bona fide* expenses necessary to the administration of the pension plan, it should not matter whether the expenses are owed to a third party or to the employer itself. There is no reason in principle why the employer should be obliged to contract out such services.

66 For these reasons, I would not disturb the findings of the Tribunal with respect to Plan expenses.

VII. Issue 2 — DB Contribution Holidays

67 Since 1985, the employer has taken contribution holidays from its funding obligations to the employees covered by the DB part of the Plan. The Committee argues that the Plan forbids DB contribution holidays in this case because it provides a specific formula for calculating the Company's contributions. That is, the Company's contributions to the DB arrangement are not properly determined by the exercise of actuarial discretion.

68 In *Schmidt*, this Court held that "unless the terms of the plan specifically preclude it, an employer is entitled to take a contribution holiday" (p. 638). Cory J. explained the criteria for determining whether a plan permitted contribution holidays, at p. 653, where he wrote:

> I can see no objection in principle to employers' taking contribution holidays when they are permitted to do so by the terms of the pension plan. When permission is not explicitly given in the plan, it may be implied from the wording of the employer's contribution obligation. Any provision which places the responsibility for the calculation of the amount needed to fund promised benefits in the hands of an actuary should be taken to incorporate accepted actuarial practice as to how that calculation will be made. That practice currently includes the application of calculated surplus funds to the determination of overall current service cost.

Cory J. went on to further clarify this point, at p. 656, writing:

> An employer's right to take a contribution holiday must also be determined on a case-by-case basis. The right to take a contribution holiday can be excluded either explicitly or implicitly in circumstances where a plan mandates a formula for calculating employer contributions which removes actuarial discretion. Contribution holidays may also be permitted by the terms of the plan. When the plan is silent on the issue, the right to take a contribution holiday is not objectionable so long as actuaries continue to accept the application of existing surplus to current service costs as standard practice.... Because no money is withdrawn from the fund by the employer, the taking of a contribution holiday represents neither an encroachment upon the trust nor a reduction of accrued benefits.
>
> [Emphasis added.]

69 When plan documents provide that funding requirements will be determined by actuarial practice, the employer may take a contribution holiday unless other wording or legislation prohibits it.

70 The Tribunal held that under the 1965 Plan amendments, DB contribution holidays are permitted. Section 14(b) of the Plan text was amended to read:

> The Company shall contribute from time to time but not less frequently than annually such amounts as are not less than those certified by the Actuary as necessary to provide the retirement income accruing to Members during the current year pursuant to the Plan and to make provision for the proper amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued as required by the Pension Benefits Act, after taking into account the assets of the Trust Fund, the contributions of Members during the year and such other factors as may be deemed relevant.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> [Emphasis added.]

Contribution holidays are permitted under this clause, because the Company's contributions are determined by actuarial calculations. Nothing in the clause prevents the Company from taking a contribution holiday where the actuary certifies that no contributions are necessary to provide the required retirement income to members.

71 However, the Committee argues that the original 1954 Plan text prohibits contribution holidays and that subsequent amendments — including the 1965 amendments cited above — are invalid. The Tribunal disagreed. It noted that s. 22 of the 1954 Plan text granted the Company a broad power of amendment of the Plan, subject to the limitation that amendments to the Plan could not affect accrued rights of Plan members. Contribution holidays did not affect the benefits of Plan members under the Plan at the time of the 1965 amendment. As Cory J. wrote in *Schmidt*, at p. 654:

> The entitlement of the trust beneficiaries is not affected by a contribution holiday. That entitlement is to receive the defined benefits provided in the pension plan from the trust and, depending upon the terms of the trust to receive a share of any surplus remaining upon termination of the plan.

The Tribunal held that the 1965 amendment was valid. Since the Company did not begin taking contribution holidays until 1985, the Tribunal held that it therefore did not need to examine whether contribution holidays were permitted in the 1954 Plan text.

72 Gillese J.A. did examine the 1954 Plan text provisions and concluded that they also allowed contribution holidays. I agree.

73 The text of the 1954 Plan addresses employer contributions at s. 14(b):

> **(b) Contributions by the Company**
>
> In addition to contributing the full cost of providing the Past Service retirement incomes referred to in Section 13 (a) of this Plan, the Company shall also contribute, in respect of Future Service benefits, such amounts as will provide, when added to the Member's own required contributions, the Future Service retirement incomes referred to in Section 13 (b) of the Plan.

74 In its factum, the Committee stressed the fact that s. 14(b) did not refer to an actuary (para. 92), though at the hearing the Committee's counsel conceded that the legitimacy of contribution holidays under the Plan did not turn on the use of the word "actuary". The Committee argues that s. 14(b) is analogous to clauses in previous cases which required specific annual contributions: *C.U.P.E., Local 1000 v. Ontario Hydro* (1989), 68 O.R. (2d) 620 (Ont. C.A.); *Trent University v. T.U.F.A.* (1997), 35 O.R. (3d) 375 (Ont. C.A.); *Hockin* and *Châteauneuf c. TSCO of Canada Ltd.* (1995), 124 D.L.R. (4th) 308 (Que. C.A.). In those cases, they argue, requirements for annual contributions prevented the employer from taking contribution holidays.

75 However, nothing in s. 14(b) provides a formula that would eliminate actuarial discretion. The clause requires the Company to contribute "such amounts as will provide" for the employees' retirement incomes. Actuarial discretion is clearly called for, as the clause does not specify how these amounts will be determined — nor does it preclude the amounts from being zero.

76 As noted by Gillese J.A., the cases cited by the Committee concerned clauses that provided for contributions that would cover the difference between employee contributions and the benefits accrued or paid out in a given year (para. 122). This can be calculated without the exercise of an actuary's discretion. Section 14(b) provides for contributions that will cover the members' future retirement benefits. It requires the exercise of actuarial discretion, as it does not fix annual contributions and therefore does not preclude contribution holidays.

77 Again, I would find that the Tribunal's decision was reasonable.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

VIII. Issue 3 — DC Contribution Holidays

A) Background

78 In 2000, the Company amended the Plan text in order to introduce a DC component. The amendment closed the DB component to new employees; new employees would thereafter become DC members on being hired. Existing employees who were DB members had the option of converting to the DC component. As a result of these amendments, employees were divided into Part 1 Members, who are governed by the Plan's DB provisions and Part 2 Members who, after January 1, 2000, are governed by the DC part of the Plan. The Plan was constituted in two separate funding vehicles with two separate custodians — by January 2000, CIBC Mellon Trust held the original DB Fund; Standard Life Assurance Company held the DC funds. However, both parts of the Plan would be registered as a single plan (the Company's counsel acknowledged at the hearing that the Plan had yet to be registered).

79 The Company expressed its intention to take contribution holidays from its obligations to DC members, by using the surplus from the original DB component to satisfy the premiums owing to the DC component.

80 The Tribunal ruled that the 2000 amendments which purported to allow DC contribution holidays were contrary to s. 1 of the 1954 Trust Agreement, which provides:

> No part of the corpus or income of the Fund shall ever revert to the Company or be used for or diverted to purposes other than for the exclusive benefit of such persons or their beneficiaries or personal representatives as from time to time may be designated in the Plan except as therein provided.

The Tribunal reasoned:

> Any holiday taken by the Company in respect of Part 2 contributions in this fashion can only be realized by actually moving money out of the Fund and transferring it to the insurer that is the funding agency for Part 2, for credit to the individual accounts of the Part 2 members. This action is inconsistent with section 1 of the 1954 Trust Agreement, recited above under the heading "FACTS" (section 1 of the 1958 Trust Agreement is in similar terms).
>
> There are two ways in which this inconsistency could be resolved. The 2000 Plan could be amended to eliminate the authority of the Company to apply the surplus in the Fund to satisfy its contribution obligation in respect of Part 2 members or the Part 2 members could be made beneficiaries of the trust in respect of the Fund (in which case it would seem to follow that the insurance policy that is the funding vehicle for Part 2 should be held by the trustee). [paras. 32-33]

81 The Committee contests the permissibility of the retroactive amendment envisaged by the Tribunal. They question whether the Company could, as the Tribunal concluded, introduce a new DC pension component that was part of the same pension plan as the existing DB component and whose members were also beneficiaries of the same Trust Fund as the DB members.

82 It is on this point that LeBel J. and I join issue. While he acknowledges that s. 13(2) of the PBA permits retroactive amendments, he finds that the DB and DC arrangements constitute distinct plans and that the DB and DC members cannot be beneficiaries of the same trust.

83 LeBel J. says that the contribution holidays for DC members violate the exclusive benefit provisions of the Trust. He also says that the contribution holidays constitute a partial revocation of the Trust. His position is premised on there being two separate trusts and two separate plans, one for the DB members and one for the DC members.

84 However, with one trust in which all DB and DC members are beneficiaries, the use of trust funds for either the DB or DC members would not infringe the exclusive benefit provision. Surplus funds applied to DC accounts would simply move funds within the Trust. And if there is one trust, there is no partial revocation when the actuarial surplus is used

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

for contribution holidays with respect to the DC part of the Plan. In my view, having regard to the Plan documentation, it was reasonable for the Tribunal to find that there was one plan and that, with a retroactive amendment, there could be one trust and that contribution holidays with respect to either or both of the DB and DC components of the Plan did not violate the exclusive benefit provision or constitute a partial revocation of the Trust.

85 LeBel J. says that it is wrong to presume "a single plan with two (or more) components, simply to be displaced by prohibitive language in the documentation or the legislation" (para. 162). However, pension plans are private arrangements subject to government regulation. Absent regulation prohibiting the combining of DB and DC components in a single plan or prohibiting the taking of contribution holidays in respect of either component of the plan, whether such actions are permitted will be determined with reference to the plan documentation and contract and trust law. In this case, there is no government regulation that prevents the retroactive amendment, a single plan and trust and the DC contribution holidays.

86 LeBel J. expresses concern that the use of a DB surplus for DC purposes disrupts the careful balance between providing incentives for employers to provide pension schemes and the need to protect pensioners' rights (para. 149). In my respectful view, it is not the role of the courts to find the appropriate balance between the interests of employers and employees. That is a task for the legislature. Indeed, as Deschamps J. noted, at para. 14 of *Monsanto*: "[P]ension standards legislation is a complex administrative scheme, which seeks to strike a delicate balance between the interests of employers and employees, while advancing the public interest in a thriving private pension system". The role of the courts is to ascertain and uphold the rights of the parties in accordance with the applicable statutory and common law and the terms of the relevant documentation. In my view, the applicable law and Plan documentation does permit and provide for DC contribution holidays.

B) Can the DC and DB Arrangements Be Included in a Single Plan and Single Trust?

87 The Committee relies on the Divisional Court's finding that the creation of a DC arrangement alongside the existing DB arrangement created "in law, two (2) pension plans, two (2) pension funds and two (2) classes of members" (para. 72). Generally, it does not necessarily follow that the creation of two differently funded pension arrangements results in two distinct pension plans and two distinct trusts. In this case, I do not think it was unreasonable for the Tribunal to conclude that the DB and DC arrangements could be components of a single Plan and that the 2000 Plan could be retroactively amended to create a single trust.

88 The 2000 amendments to the Plan text can reasonably be interpreted as intending a single plan. Section 1.07 of the foreword says:

> The Plan is hereby amended and restated ... to:
>
> . . . . .
>
> (c) change the Plan from one having defined benefit provisions only to a pension plan with a defined benefit component and a defined contribution component, effective January 1, 2000.

Section II defines "Plan" as "the Pension Plan for Employees of Kerry (Canada) Inc., as Revised and Restated at January 1, 2000, the terms of which are as set forth in this document, and as it may be amended from time to time". Members of the Plan are defined as employees who meet the applicable eligibility requirements and continue to be entitled to benefits under either section of the Plan. Section 18.08 specifically provides that actuarial surplus can be used for "either Part 1 or Part 2 [members]". These provisions demonstrate that the 2000 amendments to the Plan text evince the intention that there be a single plan.

89 The support for a single plan found in the Plan text distinguishes this case from *Kemble v. Hicks (No.2)*, [1999] EWHC 301, [1999] O.P.L.R. 1 (Eng. Ch. Div.). In *Kemble*, the plan sponsor ran a DB plan and decided to create a new DC arrangement by a temporary deed (plan text) that it intended to incorporate into the main plan deed. However, it never did amend the main deed governing the original plan to reflect the new DC arrangement. The two pension

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

arrangements existed under separate deeds and the one governing the DB plan made no mention of incorporating the one governing the DC arrangement.

90 Here there is an amendment to the overall plan indicating that the intention is to create a single plan and expressly allowing for contribution holidays in respect of each component of the Plan. Nothing in the relevant statutory or common law prohibits the creation of combined DB and DC plans. Therefore it was not unreasonable for the Tribunal to conclude that this would be a single plan.

91 Similarly, it was not unreasonable that DC members could be designated beneficiaries of the Trust. Trusts may have different classes of beneficiaries or numerous accounts; the fact that DB and DC funds will be held by different custodians does not prevent them from belonging to the same trust. Section 6(b) of the *Trustee Act*, R.S.O. 1990, c. T.23, for instance, allows different trustees to be appointed over different parts of the trust property. Section 27(3) of the same Act allows trustees to invest in mutual funds, which will themselves often be administered by their own trustees. There is no reason why a single plan could not have DB and DC components whose members were beneficiaries of the same trust, provided the plan documents and legislation do not prohibit this.

92 The Committee argues that *Schmidt* forecloses this possibility. They cite the statement of McLachlin J. (as she then was), dissenting in part on a different point, that "[a] defined contribution plan can never have a surplus" (p. 697). They also cite the following passage, at p. 653, of Cory J.'s majority judgment as supporting their position:

> An employer's right to take a contribution holiday can also be excluded by the terms of the pension plan or the trust created under it. An explicit prohibition against applying an existing fund surplus to the calculation of the current service cost, or other provisions which in effect convert the nature of the plan from a defined benefit to a defined contribution plan, will preclude the contribution holiday. For example, the presence of a specific formula for calculating the contribution obligation, such as those considered in the *Ontario Hydro* and *Trent University* cases, prevents employers from taking a contribution holiday. However, whenever the contribution requirement simply refers to actuarial calculations, the presumption will normally be that it also authorizes the use of standard actuarial practices.
>
> [Emphasis added.]

In this passage, Cory J. was concerned with explaining the criteria by which the previous case law determined a right to contribution holidays in existing plan provisions. Where the employer's existing contribution requirements are fixed by a specific formula, such that contributions are not determined by an exercise of actuarial discretion, there can be no contribution holidays. Speaking generally, a single stand-alone DC plan will not allow contribution holidays, because its contributions are fixed and not determined by actuarial discretion.

93 However, the Plan at issue in this case is different. A new component is being added to the existing Plan. After the retroactive amendments, the Plan would consist of DB and DC components. So long as it is a single plan and all employees are beneficiaries of the same trust, the Plan will not have been converted to a stand-alone DC plan. The point made in *Schmidt* does not apply to this situation.

94 The Committee points to the fact that *Schmidt* concerned the amalgamation of two plans into a single plan. Despite the amalgamation, this Court considered the contribution holidays issue separately for each of the formerly existing plans. The Ontario Court of Appeal's decision in *Aegon Canada Inc. v. ING Canada Inc.* (2003), 179 O.A.C. 196 (Ont. C.A.), similarly concerned the merger of pension plans, in which each merging plan's surplus was considered separately. The Committee says that, "except where the trust permits the activity, an employer may not amend the trust to 'co-mingle' or 'cross-subsidize' its obligations to employees in one part of a pension plan by using assets of the fund held exclusively for members in the other part of the same plan" (A.F., at para. 103).

95 However, both *Schmidt* and *Aegon* involved mergers of pre-existing plans. The plans and trusts had different beneficiaries to which different employers had undertaken different obligations. In this case, the obligations have always

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

been to the same set of employees — the Company's employees — and, after the retroactive amendment, always from the same trust. Neither *Schmidt* nor *Aegon* blocks the retroactive amendment at issue here.

96 This is because there is nothing inherently wrong with a pension plan being structured in the way the Company proposes — provided the plan documents or legislation do not forbid it. This was Gillese J.A.'s conclusion (para. 111). Siegel J. came to this same conclusion in a decision released shortly after Gillese J.A.'s judgment (though he seemingly reached this conclusion independently — see para. 236): *Sutherland v. Hudson's Bay Co.* (2007), 60 C.C.E.L. (3d) 64 (Ont. S.C.J.). Siegel J. concluded, at para. 219, that

> (1) there is no support in the case law for the plaintiffs' proposition that the assets of an "exclusive benefit trust" may not be used for the benefit of members of a defined contribution section added to a pension plan previously structured solely as a defined benefit plan, and (2) more generally, there is judicial support for, and no legal principle prohibiting, amendments to a pension plan that establish a defined contribution section that exists together with a defined benefit section, with the same trust fund supporting the payment of benefits under each section of the plan.

97 The case law supporting the permissibility of a single plan involving DC and DB components includes the English Chancery decision in *Barclays Bank Plc v. Holmes*, [2000] EWHC 457, [2001] O.P.L.R. 37 (Eng. Ch. Div.). In *Barclays*, Neuberger J. ruled that there is no reason in law that an employer could not set up a single plan under which some beneficiaries receive DB benefits and some receive DC benefits. At para. 54, he wrote the following, referring to amendments in a 41st deed which granted the employer the right to use a surplus in a DB component to take contribution holidays in respect of a DC component that was part of the same plan:

> There is no intrinsic reason, as a matter of general law, why an employer or any other person could not set up a Pension Scheme expressly on that basis, in the way that, for instance, the Bank has undoubtedly purported to do, in the present case, in the 41st Deed. Such a view is supported by consideration of the multifarious types of private trusts which are created from time to time, which often involve many differing classes of beneficiary but a single fund.

It is true that in *Barclays*, the same trust Company controlled all accounts. However, as stated above, I do not think there is any difficulty with a single trust having numerous accounts at different institutions.

98 *Barclays* is not, of course, determinative of this appeal. The legislative context and plan texts are different. However, it does support the proposition that there is nothing repugnant in principle to the existence of a single plan whose members receive different benefits, funded in different ways, depending on which of the various parts of the plan they participate in.

C) Do the Plan Documents or Legislation Prohibit the Plan from Having DB and DC Components or Prohibit Contribution Holidays for either of These Components?

99 Combining DB and DC components or contribution holidays for one or both components can be prohibited by the plan documents or by legislation. Therefore, for the Committee's argument to succeed, it must establish that there is a legislative or contractual impediment to the Company taking contribution holidays in the DC part of the Plan. It has not succeeded in this task.

100 First, the legislation does not prevent the retroactive amendment making the DC members beneficiaries of the existing Trust and entitling the employer to apply the actuarial surplus to its DC contribution obligations. To the contrary, as noted by the Court of Appeal, at para. 103, s. 9 of the *Pension Benefits Act* General Regulations, R.R.O. 1990, Reg. 909 (the "*Regulations*"), provides that on conversion of a DB plan to a DC plan, a surplus can be used to offset contributions to the DC plan. While this case is not a conversion and s. 9 does not apply, it does suggest that a surplus accumulated under a DB component of a plan can be applied to a DC component of a plan.

101 Section 7(3) of the *Regulations* allows the following:

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> In any year for which no special payments are required to be made for a pension plan under section 5, an actuarial gain may be applied to reduce contributions for normal costs required to be made by the employer, by a person or entity required to make contributions on behalf of the employer, by the members of the pension plan or by any of them.

So long as the DC component is part of the same Plan as the DB component, s. 7(3) supports the principle that any surplus in the Plan can be applied to DC contribution obligations. The retroactive amendments aim to ensure that the DB and DC components are part of the same Plan.

102 The Committee pointed to no parts of the legislation that would prevent making the two components parts of a single Plan.

103 LeBel J. rightly points out that nothing in the legislation permits contribution holidays where a DC component is added to a DB plan. He highlights the difference between the full conversion from a DB to a DC plan contemplated by s. 9 of the *Regulations* and the situation in which a DC component is added to an existing DB plan. However, I do not think it follows from this difference that the legislation prohibits contribution holidays in the circumstances of this case. Here the legislation is silent on the specific point at issue. Absent legislative restriction, the permissibility of contribution holidays must be determined with reference to contractual and trust law. In my view, nothing in the Plan documents prevents combining the two components in one plan or prohibits contribution holidays in respect of either component.

104 The Committee argues that retroactively permitting the funding of the DC component from the DB surplus is not for the exclusive benefit of any of the members. The Committee analogizes the situation in this case to the one this Court dealt with in *Buschau*. In *Buschau*, an ongoing plan with a substantial surplus was closed to new members. The employer had previously withdrawn surplus funds in breach of the trust. It subsequently acknowledged that it had no right to recover the surplus funds and repaid them, but still sought to benefit from the surplus by other means. It attempted to re-open the membership of the closed plan to access its surplus by taking contribution holidays in respect of its obligations to the new plan members. The Committee seeks to rely on Deschamps J.'s statement at para. 41 of *Buschau* that re-opening the plan in that case would be problematic.

105 I do not find the Committee's use of *Buschau* convincing, because the circumstances here are quite different. *Buschau* involved a DB plan in surplus that had been closed for a number of years and was still paying benefits to its existing members. The employer attempted to re-open the plan to new members in order to gain access to its surplus by way of contribution holidays to these new members — thereby using the surplus in the plan to cover its contribution obligations to the new members. The employer had previously attempted to use the surplus to cover its contribution obligations by merging the closed plan with other plans in order to use the closed plan's surplus to take contribution holidays with respect to the other plans. A previous judgment prevented a merger from achieving such a result — despite the merger, the fund remained separate. The Court of Appeal in *Buschau* had stated that by re-opening the plan the employer would rightly be viewed as trying to do what it could not do by merger, i.e. benefit from the surplus by taking contribution holidays [2004 CarswellBC 325 (B.C. C.A.)]. The Court of Appeal stated that, as with the merger, because of the employer's previous breach of trust, an attempt to re-open the plan would result in the employer being forced to account for its trust obligations to the original plan members as if the plan had not been re-opened. Deschamps J.'s remark about re-opening the plan being problematic was made in this context.

106 What the Tribunal contemplated here was a retroactive amendment expressly permitted by the PBA. The legal effect of the retroactive amendment would not amount to re-opening a closed plan, but to establishing that DC members were beneficiaries of the Trust from the moment the DC component was created and the DB component closed to new members. Because the amendment is retroactive, there would be no re-opening of a closed plan in law and no attempt to merge two independent trusts. This case is not analogous to *Buschau*; what was problematic in *Buschau* does not arise here.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

107 Another factor distinguishing this case from *Buschau* is the significant difference between a terminated plan and an ongoing plan. In *Schmidt*, Cory J. distinguished between an ongoing plan's *actuarial* surplus and a terminated plan's *actual* surplus. At pp. 654-55, he wrote:

> While a plan which takes the form of a trust is in operation, the surplus is an actuarial surplus. Neither the employer nor the employees have a specific interest in this amount, since it only exists on paper, although the employee beneficiaries have an equitable interest in the total assets of the fund while it is in existence. When the plan is terminated, the actuarial surplus becomes an actual surplus and vests in the employee beneficiaries. The distinction between actual and actuarial surplus means that there is no inconsistency between the entitlement of the employer to contribution holidays and the disentitlement of the employer to recovery of the surplus on termination. The former relies on actuarial surplus, the latter on actual surplus.

In this case, as stated, the Plan and Trust have not been terminated. Only a part of the Plan has been closed to new employees. There is, therefore, no actual surplus that has vested with the employees. The DB surplus remains actuarial and the DB members retain their right to the defined benefits provided for under the Plan. Their interest in the surplus is only to the extent that it cannot be withdrawn or misused. Retroactively amending the Plan takes no vested property right away from the DB members.

108 Moreover, Deschamps J. wrote at para. 34 of *Buschau*:

> A plan is also seen as being, if not a permanent instrument, at least a long-term one. However, the participation of any individual member is ephemeral: members come and go, while plans are expected to survive the flow of employees and corporate reorganizations. In an ongoing plan, a single group of employees should not be able to deprive future employees of the benefit of a pension plan.

Here, the Plan was intended to be ongoing and cover all employees of the Company. As Gillese J.A. noted, at para. 110, it was intended that all employees would be members of the Plan and the Trust.

109 This intention is demonstrated in the Plan documents. Section 1 of the 1954 Trust Agreement provided that the Trust Fund would not be diverted or used for "purposes other than for the exclusive benefit of such persons or their beneficiaries or personal representatives as from time to time may be designated in the Plan except as therein provided". The 1958 Trust Agreement, in force at the time of the 2000 amendments, similarly provided that beneficiaries would be "such persons as from time to time may be designated in the Plan" (s. 1). Section 22 of the Plan text designates existing and retired employees as the persons to benefit from the Plan. The Plan was always meant to apply to all employees. It continues to do so with this retroactive amendment. It is therefore not inconsistent with the Plan to designate the DC members as beneficiaries of the original Trust.

110 After the retroactive amendments, members of both parts of the Plan will be beneficiaries of the Trust; use of funds in the Trust to benefit either part is allowed because the Trust explicitly provides that the funds can be used for the benefit of the beneficiaries.

111 LeBel J. finds that the Trust only ever contemplated DB plan members being its beneficiaries. He notes that certain provisions in the 1954 Trust Agreement contemplate the possibility of the amount of the Fund either being inadequate to meet its liabilities (ss. 2 and 6) or exceeding its liabilities (s. 11), scenarios that could not arise in a DC plan.

112 In my opinion, the Trust contemplated a broader category of beneficiaries. As stated above, the language governing the designation of the beneficiaries of the Trust is general and it has always applied to the employees of the Company. I do not think it was unreasonable for the Tribunal to conclude that the Plan allowed for the designation of DC members, who are Company employees, as beneficiaries of the Trust.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

113 LeBel J. says that an amendment that purports to make DC employees beneficiaries of the same single trust as DB employees and to allow the employer to take contribution holidays in respect of the DC employees affects the benefits of the DB employees in the sense that assets in the pension fund are being reduced. DB members may well prefer higher actuarial surpluses in the pension fund. Indeed, the Committee argued against the use of the actuarial surplus for the payment of Plan expenses and the taking of DB contribution holidays, as well as for the taking of DC contribution holidays. However, absent legislation stating otherwise, DB members have no right to require surplus funding of the Plan in order to increase their security. In *National Grid Co. Plc v. Mayes*, [2001] UKHL 20, [2001] 2 All E.R. 417 (U.K. H.L.), Lord Hoffmann stated: "Caution is a matter for the actuary in certifying the surplus and certifying the arrangements as reasonable" (para. 17). It is the plan documents and trust law that govern. Nothing in the Plan documents or trust law gives the DB members a vested interest in the actuarial surplus of the Trust Fund or prevents the use of the actuarial surplus for Plan expenses or DB or DC contribution holidays.

114 In my respectful opinion, the Tribunal's decision to allow contribution holidays in respect of the DC component of the pension Plan, once appropriate retroactive amendments are made, was not unreasonable.

IX. Issue 4 — Costs

115 There are two issues with respect to costs. First, did the Tribunal have the authority to order that costs be paid out of the Trust Fund? Second, the Court of Appeal reversed the decision of the Divisional Court and was therefore entitled to make its own costs ruling: 2007 ONCA 605, 282 D.L.R. (4th) 625 (Ont. C.A.). It declined to award costs to the Committee from the Fund. The issue is whether this Court should interfere with that exercise of discretion by the Court of Appeal.

A) Tribunal's Authority to Award Costs

116 On the first issue, s. 24 of the *Financial Services Commission of Ontario Act, 1997* provides: "The Tribunal may order that a party to a proceeding before it pay the costs of another party or the Tribunal's costs of the proceeding." The Tribunal held that since the Fund was not a party to the proceedings before it, it did not have the authority to order costs payable from the Fund.

117 The language of s. 24 is unambiguous on this point. The Tribunal cannot order costs from the Trust Fund if the Fund is not a party. Here, the Fund was not a party. In these circumstances, the Court should defer to the Tribunal.

B) Awarding Costs from the Fund

118 On the second issue, I would not interfere with Gillese J.A.'s decision not to order costs payable to the Committee form the Fund.

119 Gillese J.A. identified two authorities setting out the proper approach to follow in deciding when to award an unsuccessful litigant its costs from a trust fund. The English case *Buckton, Re*, [1907] 2 Ch. 406 (Eng. Ch. Div.), notes three categories of cases in the wills and estate context. The first category is comprised of cases in which the trustees apply to a court to construe the terms of the trust deed so that they may determine the proper administration of the trust. The second category is comprised of similar cases seeking to determine the proper administration of the trust, but brought by the beneficiaries of the trust rather than the trustees. In both these cases, costs may rightfully be paid from the trust fund. However, costs will not be paid from the fund in cases that fall under the third category, that is, where a beneficiary makes a claim which is adverse to other beneficiaries of the trust.

120 In *Sutherland v. Hudson's Bay Co.* (2006), 53 C.C.P.B. 154 (Ont. S.C.J.) ("*Sutherland (2006)*"), Cullity J. set out the situations where he finds that costs may be payable from a trust fund. His approach appears similar to the first two categories of *Buckton*. At para. 11, he writes:

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> Orders for the payment of costs out of trust funds are most commonly made in either of two cases. One is where the rights of the unsuccessful parties to funds held in trust are not clearly and unambiguously dealt with in the terms of the trust instrument. In such cases, the order is sometimes justified by describing the problem as one created by the testator or settlor who transferred the funds to the trust. The other case is where the claim of the unsuccessful party may reasonably be considered to have been advanced for the benefit of all of the persons beneficially interested in the trust fund.

121 I think these cases helpfully define the circumstances in which costs should be awarded from a pension trust fund. The rules in both *Buckton* and *Sutherland (2006)* would allow a court to award its costs out of the fund where there is a legitimate uncertainty as to how to properly administer the trust and where the dispute is not adversarial.

122 In *Patrick v. Telus Communications Inc.*, 2008 BCCA 246, 294 D.L.R. (4th) 506 (B.C. C.A.), the British Columbia Court of Appeal has recently criticized the application of *Buckton* to a number of cases, including one it had previously decided. It expressed the view that in British Columbia *Buckton* should only apply to proceedings dealt with in chambers (originating applications under the British Columbia *Rules of Court*) and not to more complex trial litigation. It nevertheless acknowledged that in pension litigation, costs may be awarded on the basis set out in *Sutherland (2006)*. I think this ruling points to some difficulties in applying *Buckton* in the context of pension litigation.

123 Pension litigation is frequently more complex than estate litigation. In the context of pension litigation, the court must not just be sensitive to the litigation being adversarial between beneficiaries of the trust, as *Buckton* might be taken to suggest, but also between the beneficiaries and the settlor (in this case the Company), the trustees or the administrators (in this case the Retirement Committee). Unlike the wills and estate context, the employer that settles a pension trust is likely under an ongoing obligation to contribute to the trust fund. As a result, awarding costs out of a pension trust fund may have an impact on the employer. This is especially true in cases such as this involving issues of expenses payable by a trust fund and of contribution holidays. In these cases, a costs award from the fund will reduce the actuarial surplus in the fund and hasten the date when the employer must satisfy expense requirements or must begin making contributions again.

124 In *Smith v. Michelin North America (Canada) Inc.*, 2008 NSCA 107, 271 N.S.R. (2d) 274 (N.S. C.A.), the Nova Scotia Court of Appeal addressed the question of costs with the benefit of the Ontario Court of Appeal's decision in this case. It agreed with Gillese J.A.'s finding that the key question is whether the litigation is adversarial rather than aimed at the due administration of the pension trust fund. Claims that are adversarial amongst beneficiaries will not qualify for a costs award from the fund. However, not even every claim in which the beneficiaries have a common interest in the litigation will entitle them to their costs from the fund. A claim might still be adversarial, even if it is not adversarial amongst beneficiaries. Costs will only be awarded from the fund where the proceedings are necessary for the due administration of the trust.

125 Where litigation involves issues, such as in the present case, of a dispute between a settlor of a trust fund and some or all of its beneficiaries, the ordering of costs payable from the fund to the unsuccessful party may ultimately have to be paid by the successful party. In these types of cases, a court will be more likely to approach costs as in an ordinary lawsuit, i.e., payable by the unsuccessful party to the successful party.

126 In the end, of course, costs awards are quintessentially discretionary. Courts have considered a number of factors in finding that litigation was concerned with due administration of the trust. Courts have noted that the litigation was primarily about the construction of the plan documents (*Huang v. Telus Corp. Pension Plan (Trustees of)*, 2005 ABQB 40, 41 Alta. L.R. (4th) 107 (Alta. Q.B.), *Patrick v. Telus Communications Inc.*, 2005 BCCA 592, 49 B.C.L.R. (4th) 74 (B.C. C.A.), and *Burke v. Hudson's Bay Co.*, 2008 ONCA 690, 299 D.L.R. (4th) 277 (Ont. C.A.)), clarified a problematic area of the law (*Ontario Teachers' Pension Plan Board v. Ontario (Superintendent of Financial Services)* (2003), 36 C.C.P.B. 154 (Ont. Div. Ct.), and *Burke*), was the only means of clarifying the parties' rights (*Burke*), alleged maladministration (*MacKinnon v. Ontario (Municipal Employees Retirement Board)*, 2007 ONCA 874, 288 D.L.R. (4th) 688 (Ont. C.A.)),

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

and had no effect on other beneficiaries of the trust fund (*C.A.S.A.W., Local 1 v. Alcan Smelters & Chemicals Ltd.*, 2001 BCCA 303, 198 D.L.R. (4th) 504 (B.C. C.A.), and *Bentall Corp. v. Canada Trust Co.* (1996), 26 B.C.L.R. (3d) 181 (B.C. S.C.)).

127 Courts have refused to award costs when they considered litigation ultimately adversarial. In reaching this conclusion, they have noted the following factors: the litigation included allegations by the unsuccessful party of breach of fiduciary duty (*White v. Halifax (Regional Municipality) Pension Committee*, 2007 NSCA 22, 252 N.S.R. (2d) 39 (N.S. C.A.)); the litigation only benefited a class of members and it would impose costs on other members should the plaintiff be successful (*Smith*, *Lennon v. Ontario (Superintendent of Financial Services)* (2007), 87 O.R. (3d) 736 (Ont. Div. Ct.), and *Turner v. Andrews*, 2001 BCCA 76, 85 B.C.L.R. (3d) 53 (B.C. C.A.)); the litigation had little merit (*Smith*, *White* and *Lennon*).

128 In this case, the Company was successful, i.e., it does not have to pay into the Fund to cover expenses at issue and may take contribution holidays. There is no reason to penalize it by reducing the Fund surplus and thereby reducing its opportunity for contribution holidays.

129 Moreover, Gillese J.A. held that the litigation was adversarial in nature because it was ultimately about the propriety of the Company's actions and because the Committee sought to have funds paid into the Fund to the benefit of the DB members only. The litigation seems particularly unusual in light of several Committee members having played a part in the taking of the decisions the Committee is now challenging.

130 I agree with Gillese J.A. that this case is adversarial in nature.

131 Gillese J.A. also concluded that the Committee was not bringing this litigation on behalf of all beneficiaries. She rested this conclusion on the fact that the benefits the Committee claimed were only for the DB members of the Plan. She also took into account a conclusion reached by a concurring Tribunal member (see *Nolan v. Ontario (Superintendent of Financial Services)*, [2004] O.F.S.C.D. No. 191 (F.S. Trib.), at para. 27, Mr. McNairn), that the Committee had not demonstrated its precise level of support among Plan members.

132 For these reasons, there would be no justification to interfere with the costs ruling of Gillese J.A that costs should be payable by the Committee in favour of the Company.

X. Disposition

133 The appeal should be dismissed with costs in favour of the Company against the appellants.

***LeBel J.* (dissenting in part):**

I. Introduction

134 The issues raised in this appeal affect the millions of Canadians who are members of occupational pension plans. Several of these issues are the subjects of frequent litigation in the pension field, such as an employer's use of pension funds to pay plan expenses, the taking of "contribution holidays" in a defined benefit pension plan ("DB plan"), and the proper test for determining whether the costs of litigation can be awarded from a pension fund. I agree with my colleague's conclusions on these issues and will not address them in the reasons below.

135 However, one question raised in this appeal is novel, and more contentious: it asks whether an employer can use the surplus of a DB pension plan to fund its contribution obligations toward a defined contribution pension plan ("DC plan"). It is on this issue that my colleague and I part ways. I believe that the employer's use of DB surplus to fund its obligations toward the DC plan is not supported by the legislative regime and constitutes a breach of the plan provisions, the trust agreement, and the relevant principles of trust law. When the DC plan was created in 2000, the company's employees ceased to be members of a single plan. The employees in the DC plan ("DC members") are not beneficiaries of the DB trust and any amendment that would purport to designate them as such would contravene these

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

same provisions and principles. As a result, the decision of the Financial Services Tribunal (the "Tribunal") that approved such an amendment was unreasonable and must be quashed.

II. Overview

136 I will not attempt to duplicate my colleague's thorough review of the facts. However, a brief sketch of the parameters of this appeal and of some particular facts is necessary. The pension plan in this case provided benefits on a DB basis until January 1, 2000, when the respondent company closed the DB plan to new members and opened a DC plan. Existing employees could choose whether to join the DC plan or to remain in the DB plan, whereas new employees were only entitled to join the DC plan. The appellants, a group of former employees of Kerry (Canada) Inc. and its predecessor companies ("Kerry"), essentially contend that their employer misused the funds in their pension trust. The appellants claim that the company did not ever have the right to pay certain expenses related to the management of the plan from the pension fund, and that it was not entitled to use the fund's surplus to offset its required contributions (i.e. to take a "contribution holiday") with respect to both the DB and the DC plans. This case arose as a result of the appellants' decision to challenge these alleged irregularities before the Superintendent of Financial Services (the "Superintendent"). The Superintendent, who is the other respondent in this appeal, ordered Kerry to reimburse the pension fund for some of the third-party expenses, but refused to order reimbursement for the contribution holidays Kerry had taken with respect to the DB and DC plans.

137 The Tribunal heard the appeal against the Superintendent's Notices of Proposal. The Tribunal released several sets of reasons, only one of which is relevant to this discussion: (F.S. Trib.). In those reasons, the Tribunal held that Kerry was entitled to take contribution holidays from the DB plan. Moreover, it held that Kerry could continue to fund its contributions toward the DC plan from the DB surplus, but on the condition that it retroactively amend the 2000 pension plan (the "Plan") to designate the DC members as beneficiaries of the pension trust fund (the "retroactive designation" remedy).

138 The Ontario Superior Court of Justice, Divisional Court (the "Divisional Court") reviewed the Tribunal's contribution holiday decision on the standard of correctness because, in its opinion, the issue required the interpretation of pension plan documents and trust agreements, and therefore engaged a question of law. The Divisional Court concluded that the Tribunal did not correctly address the contribution holiday issue and reversed the Tribunal on this point: (2006), 209 O.A.C. 21 (Ont. Div. Ct.). It viewed the DB and DC plans as two separate and distinct pension plans, and held that the contribution holidays taken with respect to the DC plan constituted unlawful cross-subsidization between pension funds that could not be remedied by a retroactive designation of DC members as fund beneficiaries.

139 The Ontario Court of Appeal applied the standard of reasonableness to the Tribunal's contribution holiday decision, as the issue engaged the Tribunal's relative expertise in interpreting pension plan documents and was not a pure question of law. Gillese J.A., for the court, held that the Tribunal's decision was reasonable and reinstated its proposed remedy, adding that she would have reached the same conclusion even on the correctness standard: 2007 ONCA 416, 86 O.R. (3d) 1 (Ont. C.A.). Although her reasoning was not the same as that of the Tribunal, Gillese J.A. agreed that a retroactive amendment designating the DC members as trust beneficiaries would permit the employer to use the surplus in the fund to pay its contributions toward the DC plan. The appellants sought and obtained leave to appeal to this Court: [2008] 1 S.C.R. xi (note) (S.C.C.).

140 I agree that the appropriate standard of review for the contribution holiday issue is reasonableness. As my colleague has aptly explained, at paras. 26-30 of his reasons, the four factors underlying the standard of review analysis clearly point to the conclusion that the Tribunal's decision concerning the DC contribution holidays must only be interfered with if it is unreasonable. In *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), this Court explained that reasonableness is a deferential standard that requires the reviewing court to determine whether the administrative decision falls within a range of defensible outcomes. A decision is unreasonable if, for instance, it fails to adhere to the principles of "justification, transparency and intelligibility" (*Dunsmuir*, at para. 47) or if the outcome cannot be supported on a reasoned analysis of the facts and the law underpinning the issue in question. Respect for

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

the rule of law requires that a court not uphold an administrative decision that is irrational, arbitrary, or untenable. A decision is irrational when it is devoid of a basis in law in respect of its core legal issues.

141 In this case, the Tribunal's decision with respect to the DC contribution holidays fell outside the range of reasonable outcomes available to it. The Tribunal did acknowledge that the employer's amendments to the Plan seeking to permit contribution holidays in the DC plan violated the terms of the original Trust Agreement entered into in 1954 (the "Trust Agreement") and constituted an encroachment on irrevocable trust funds. However, it failed to take these very principles into consideration when ordering its remedy of retroactively designating DC members as beneficiaries of the fund. The retroactive amendment would breach the same terms of the Trust Agreement and the Plan's text that prohibited the DC contribution holidays in the first place. The Tribunal's failure to take this into account when crafting the remedy cannot be justified and the remedy is therefore unreasonable.

142 The Court of Appeal therefore erred in concluding that the Tribunal's contribution holiday decision was reasonable and in reinstating the retroactive designation remedy. Indeed, I believe that the court's conclusion that Kerry would be entitled to take contribution holidays in the DC plan following the retroactive amendment was predicated on a number of errors. First, the court failed to consider the lack of support for this type of contribution holiday in the governing legislation and regulations. The *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "*PBA*"), and the *Pension Benefits Act* General Regulations, R.R.O. 1990, Reg. 909 (the "*Regulations*"), do not authorize the use of surplus in a DB fund to offset an employer's contribution obligations toward a DC plan except in the event of a full conversion from a DB to a DC plan. All parties to this appeal agree that full conversion has not occurred. As such, the legislation is of no assistance to the respondents.

143 Second, the court adopted an unduly formalistic view of the pension plan. Gillese J.A. held that Kerry's creation of a DC plan did not result in a new plan, since "[c]ontrol, management and administration of the Plan remained with the Retirement Committee and the company" (para. 111). It is true that the Plan falls to be registered as a single plan and that the same committee administers both parts of the Plan. However, this appeal demands a much closer examination of the arrangement that has been in place since the creation of the DC plan in 2000. The DB and DC contributions are completely segregated and belong to entirely different funding regimes. Members who switched to the DC plan removed all their accrued benefits from the DB fund and placed them in separate annuity accounts that have no real, factual connection to the fund. Gillese J.A. failed to appreciate the separate and distinct nature of the DB and DC plans in this case and instead focused on the formal existence of a single plan. In so doing, she failed to acknowledge that Kerry's use of the DB surplus to eliminate its contribution obligations to the DC plan resulted in a violation of the provisions in the Plan and Trust Agreement that prohibit the use of trust funds for other than the exclusive benefit of fund beneficiaries. Moreover, she overlooked the serious problems with the Tribunal's remedy of ordering the retroactive designation of DC members as beneficiaries of the fund.

144 Third, the court ought to have considered the trust ramifications of the employer's DC contribution holidays. In *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611 (S.C.C.), this Court held that pension funds impressed with a trust are governed primarily by the equitable principles of trust law. Cory J. wrote that a pension trust "is governed by equity, and, to the extent that applicable equitable principles conflict with plan provisions, equity must prevail" (p. 655). Thus, even if there were no legislative or contractual impediment to the DC contribution holidays, it would still be necessary to determine whether the holidays are barred by trust principles. In this case, the DC contribution holidays could only be realized by the withdrawal of funds from the pension trust, which holds the contributions and accrued benefits of the employees of the DB plan ("DB members"), and the subsequent deposit of those same funds into the DC members' annuity accounts. This is a clear example of the employer's controlling and encroaching on funds that are irrevocably held in trust for the benefit of DB members. This action violates the general trust principle against revocation as well as the provisions in the Plan's documentation that expressly prohibit the employer's revocation of trust funds.

145 In sum, Kerry's contribution holidays in the DC plan cannot be supported under any reasonable interpretation of the Plan's documentation or of relevant trust law principles. I will address each of these points in turn in the following reasons.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

III. Analysis

A. Background: Contribution Holidays

146 As explained by Rothstein J., an employer can lawfully use the surplus of a pension fund to take contribution holidays with respect to a DB pension plan, provided that it is permitted by the legislation and plan documentation: *Schmidt*. A plan might expressly authorize or prohibit contribution holidays. When a plan is silent on the matter, implicit authorization for contribution holidays might be found in the plan's formula for calculating employer contributions. If the formula requires the discretion of an actuary to determine the amount of each contribution, then the actuary's discretion enables him or her to follow the accepted actuarial practice of using fund surplus to offset employer contributions. A fixed formula for employer contributions, however, would implicitly prohibit the taking of contribution holidays since it obliges the employer to contribute to the fund regardless of whether the contributions are actually required to provide the members with their guaranteed benefits (*Schmidt*, at p. 653).

147 While it is settled law that an employer may take contribution holidays in these circumstances, that does not mean that the issue has not attracted some controversy or that contribution holidays might not be, at times, imprudent. Many employees believe that surplus should be maintained to serve as a "cushion" against future market failings or employer insolvency (A. N. Kaplan, *Pension Law* (2006), at p. 404). Indeed, there is a very real risk that contribution holidays could affect the stability of pension plans. According to the report of the Ontario Expert Commission on Pensions, some employers have taken contribution holidays when the results of their last triennial valuation permitted them, despite the fact that the plans were under-funded at the time the holidays were taken. Research conducted on federally regulated pension plans and cited in the Commission report revealed that "45% of under-funded plans would not have been under-funded had they [the employers] not taken contribution holidays" (Government of Ontario, *A Fine Balance: Safe Pensions, Affordable Plans, Fair Rules* (2008), at p. 78).

148 On the other hand, many employers maintain that the ability to take contribution holidays provides them with the incentive to fund DB pension plans generously, since any contributions over the amount required to meet the plan's liabilities can serve to reduce their future contributions. Moreover, the possibility of taking contribution holidays might entice employers to provide pension benefits on a DB basis in the first place, in spite of the often greater demands on employers in such plans. Employees typically prefer DB plans because they provide guaranteed benefits with less attendant risk. Given the current trend among Canadian employers to create DC rather than DB plans, some employees might welcome measures (such as contribution holidays) that encourage employers to adopt DB plans.

149 This debate demonstrates the tension between providing incentive for employers to establish pension schemes that do not carry with them prohibitive financial burdens, and the need to protect pensioners' rights and ensure the vitality of those plans, especially at times of economic instability. While it might be said that allowing employers to take contribution holidays with respect to DB plans strikes the appropriate balance between these competing demands, I believe that the use of surplus from a DB plan to fund an employer's obligations with respect to a separate DC plan disrupts this careful balance, to the detriment of plan members.

150 The question of contribution holidays in the context of DC plans has rarely been examined by Canadian courts. The reason for this stems from the nature of a DC plan: the contribution amount is guaranteed. The employer (and possibly the employee, depending on the type of plan) makes regular contributions of a fixed amount to the member's account. The final benefit that the member receives consists of the total sum that has been contributed, plus any return on the investment. Thus, unlike the members of a DB plan, the members of a DC plan recoup *all* the money that has accumulated in their personal account, whatever the amount. For this reason, DC plans themselves do not accumulate a surplus. Since employers cannot lawfully take a contribution holiday unless the plan is in a state of actuarial surplus, there is no opportunity for contribution holidays in a pure DC plan. In this case, the employer's addition of a DC plan to an ongoing DB plan means that a surplus arises, unusually, in the context of a DC plan.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

151 As I will explain in these reasons, no support for this type of contribution holiday can be found in the legislative framework or in the provisions of the Plan and Trust Agreement. Rather, the Plan documentation and the principles of trust law effectively forbid the taking of a contribution holiday in the DC plan that is funded from the surplus in the DB plan. The Tribunal's remedy of retroactively designating the DC members as fund beneficiaries cannot cure this defect in the Plan amendments that seek to permit contribution holidays with respect to the DC plan.

B. The Legislative Framework

152 Pension law is governed first and foremost by provincial legislation. In Ontario, all pension plans must be administered in accordance with the *PBA* and the *Regulations* (see *PBA*, s. 19). The legislation clearly permits an employer to take contribution holidays when a pension fund is in a state of actuarial surplus. Section 7(3) of the *Regulations* reads:

> In any year for which no special payments are required to be made for a pension plan under section 5, an actuarial gain may be applied to reduce contributions for normal costs required to be made by the employer, by a person or entity required to make contributions on behalf of the employer, by the members of the pension plan or by any of them.

As I noted above, a DC plan on its own can never be in a state of surplus. Presumptively, then, s. 7(3) of the *Regulations* is limited in scope to DB plans that are capable of accumulating a surplus (or an "actuarial gain").

153 There is, however, one instance in which a DC plan might be said to enjoy some benefit of a surplus, and that is following a full conversion from a DB plan. This is made clear by s. 9 of the *Regulations*:

> If an amendment to a pension plan with defined benefits converts the defined benefits to defined contribution benefits, the employer may offset the employer's contributions for normal costs against the amount of surplus, if any, in the pension fund after the conversion.

My colleague and I agree that the DB plan in this case was not fully converted to a DC plan, since the DB plan continued to operate after it was closed to new members in 2000. As such, s. 9 of the *Regulations* does not apply to the case at bar. There is therefore no legislative provision that permits the allocation of surplus from a DB plan to a DC plan when a full conversion has not occurred. The circumstances in which a surplus might lawfully be used to fund contribution holidays under s. 7(3), then, is limited to either a DB plan standing alone or a DC plan that has been fully converted from a DB plan.

154 My colleague, however, contends that the legislation, while it does not expressly permit the use of surplus in a DB plan to fund contribution holidays in a DC plan, suggests that there is nothing inherently wrong with using the surplus in this way, provided the DC members are designated as beneficiaries of the pension fund.

155 However, the circumstances of a full conversion from a DB to a DC plan differ significantly from those of the current appeal, which involves (for lack of a better phrase) only a partial conversion to a DC plan. Upon total conversion to a DC plan, the pension benefits would still be held by the same members whose contributions made up the original DB fund, albeit in a different form. It would be a vertical transformation: full conversion would turn a single DB plan into a single DC plan. The beneficiaries would not change and the plan would simply continue in a different form. This picture is consistent with s. 81(1) of the *PBA*:

> **81** (1) Where a pension plan is established by an employer to be a successor to an existing pension plan and the employer ceases to make contributions to the original pension plan, the original pension plan shall be deemed not to be wound up and the new pension plan shall be deemed to be a continuation of the original pension plan.

Benefits from the original plan are also deemed to belong to the new plan after total conversion (*PBA*, s. 81(2)). When a DB plan completely changes to a DC plan, the issue of cross-subsidization simply does not arise as there are not two separate plans or separate funding arrangements between which funds are transferred.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

156 For these reasons, the legislation and its regulations do not permit Kerry to use the surplus from the DB fund to finance its contributions toward the DC plan. If Kerry had simply converted the Plan into a DC plan for all members, then s. 9 of the *Regulations* might permit this use of surplus. Fortunately for existing employees, however, they were given the option to remain in the ongoing DB plan. The resulting arrangement thus does not fall into any of the categories addressed by the legislation.

C. Two Separate Plans

157 This appeal also requires the resolution of a preliminary question: did Kerry's creation of a DC plan in 2000 maintain a single pension plan for all employees, or did it effectively result in two separate plans, one DB and one DC? The Divisional Court held that Kerry had created two separate plans:

> The 2000 Plan text, no matter what language is employed, clearly creates two (2) funds. The Appellants, who elected to stay in Plan 1, as they were entitled to do, are or have contributed to the DBP and have a beneficial interest in all of the funds in the Plan. The DCP, Part 2, fund is completely separate and funded separately. The Part 2 DCP employees have no connection to the Part 1 DBP plan and cannot legitimately be given a beneficial interest in the fund on the DBP side. Here, there are in law, two (2) pension plans, two (2) pension funds and two (2) classes of members. [para. 72]

The Court of Appeal, however, held that there was in essence a single pension plan with two components and two classes of members. Since the plan was originally designed to benefit all full-time employees, the creation of a DC scheme for some of those employees could not have resulted in an entirely new plan.

158 Though I disagree with much of the Divisional Court's reasoning, I agree with its conclusion that Kerry effectively created a second pension plan whose members are not beneficiaries of the original fund. It is true that there is only one plan in a formal sense. The Plan falls to be registered as a single plan that provides benefits to all of the company's eligible employees, and it is managed by a single administrator. However, its characterization as a single plan cannot be sustained in light of the high degree of segregation in the Plan documentation between the DB and DC components. I believe that, for all intents and purposes, the DB and DC plans exist as separate entities and should not be treated in this appeal as two components of a single plan.

159 To start, DB and DC pension plans are not cut from the same cloth. DB and DC plans provide different types of benefits to their members, and carry a different set of risks and rewards. In a DB plan, the members' final pension benefits are guaranteed and the employer bears primary responsibility for making up any shortfall if the plan is underfunded. While members of a DB plan still bear some risk, such as in the event of employer insolvency, that risk is spread across the membership. Individuals in a DC plan, however, are more vulnerable to market forces. They stand to benefit greatly if the return on their investments is high, but if the return is low, then their overall pension benefits are also low and the employer bears no liability for the plan's poor performance. DB plans are also much more heavily regulated than DC plans. For instance, the reporting requirements under Ontario's *PBA Regulations* are more stringent for DB plans than for DC plans (see e.g. ss. 3, 13 and 14). In light of these fundamental differences between the two types of plans, it should not be presumed that when an employer creates a DC plan for some employees and retains a DB plan for others, he or she has created a single plan.

160 In this case, the structure of the Plan reflects these differences by treating the two groups of employees differently. The Plan is divided into Part 1, some provisions of which apply exclusively to DB members, and Part 2, which applies exclusively to DC members. Different provisions govern each group of members on matters such as member contributions and their entitlement to benefits, both while the plan is ongoing and upon plan termination. For instance, s. 16.03 reads:

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> On termination or discontinuance, each Part 1 Member shall have recourse only to the assets in the Pension Fund attributable to Part 1 Members for the provision of the benefits outlined in the Plan for Part 1 Members and each Part 2 Member shall have recourse only to the amounts in his Member's Account.

The Part 2 provisions do not establish any link between Part 2 DC members and the pension fund, aside from the amendment that purports to allow the company to take contribution holidays from the surplus of the fund.

161 The Plan delineates the funding arrangements for the DB and DC plans and the means by which employees converted to the DC plan in 2000. The assets of DB members continue to be held in the original trust fund, which is administered by CIBC Mellon Trust Company according to the terms of the Trust Agreement entered into between those parties in 2000. For those employees who decided to convert to the DC plan, however, the company ascertained the value of their benefits that had accrued in the fund on a DB basis up to that time and transferred trust assets equal to that amount to the employees' new DC accounts. Thus, the DC members no longer have any contributions in the fund. Their assets are held in individual accounts and are invested by the Standard Life Assurance Company pursuant to the terms of its contract with Kerry. According to this contract, Standard Life has undertaken to manage the DC members' contributions and to invest them in pooled funds, the value of which fluctuates with the investments' market value, and in guaranteed funds. Upon retirement, the benefits would be paid out as an annuity from those funds in accordance with the terms of the Plan and the statutory framework. Unlike the DB fund benefits, the value of the DC benefits upon retirement is not guaranteed as it is contingent on the success (or otherwise) of the investments. I believe that from the moment the DC members' accrued benefits were moved out of the fund into these separate investment accounts, the DC members ceased to belong to the DB plan and were no longer beneficiaries of the fund.

162 My colleague asserts that there is no reason in law why a pension plan might not have a single fund for both DB and DC members, provided that the plan documentation and legislation do not prohibit it. To some extent, I agree. There is certainly nothing repugnant in having several components of a single pension plan with a shared fund, as is clear from the growing number of "hybrid plans". But to the extent that my colleague's reasons suggest a *presumption* that the employer's provision of DB and DC plans for a single group of employees results in a single plan, I cannot agree. The starting point should not be the presumption of a single plan with two (or more) components, simply to be displaced by prohibitive language in the documentation or the legislation. Rather, it is necessary to examine the plan's particular arrangement, which will differ from case to case, to determine whether there is in fact a single plan in existence. The plan documentation must clearly evince an intention to maintain a single plan and, most importantly, the plan structure must actually reflect and follow from this intention. In the few cases in which courts have allowed contribution holidays in a DC plan by resort to surplus in a DB fund, the courts have emphasized the need to examine the plan documentation for evidence of a single plan with a single fund for all members.

163 In one of these cases, *Sutherland v. Hudson's Bay Co.* (2007), 60 C.C.E.L. (3d) 64 (Ont. S.C.J.), the Ontario Superior Court of Justice examined a DB pension trust to which two DC components were added at different times. Siegel J. concluded that the employees were all members of the same plan and beneficiaries of the same trust fund. In arriving at this conclusion, he acknowledged that "the issue as to whether a single trust fund was accomplished in any given situation is fact specific, depending entirely on the text of the relevant documentation" (para. 218). The documentation in *Sutherland* showed that when the DC members were added to the plan, their assets were transferred to the DB trust fund and the pooled assets were ultimately administered by a single trustee, Royal Trust Corporation of Canada ("Royal Trust"). Although the DC members had accounts to which their pension contributions were credited, Siegel J. noted that there was "no evidence that such accounts were segregated in some manner" (para. 71). Indeed, all of the assets were invested on a collective basis.

164 The structure of the plan changed somewhat in 2001 when Royal Trust appointed an agent, The Standard Life Assurance Company of Canada ("Standard Life"), to invest the contributions that attached to the DC section of the plan. The Standard Life policy explicitly recognized Royal Trust as the trustee of those assets, and invested the funds only under the direction of Royal Trust, rather than the plan members. Siegel J. held that this new arrangement did not

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

alter the legal relationship between the plan members and the trustee. Apart from Standard Life's physical possession of those funds, there was no legal separation between the assets held by Standard Life and those contained in the Fund (para. 298).

165 Siegel J. contrasted the arrangement in *Sutherland* with that in the case at bar. After pointing to some degree of similarity between the DC investment arrangements in the two cases, he held that the plan documentation in the case at bar contemplated a greater separation between the DB and DC schemes:

> The pension plan document in *Kerry* evidences an intention to separate the assets in the trust fund that are referable to the defined benefit section of the plan from those that are referable to the defined contribution section of the plan. [para. 269]

Siegel J. was right to make this distinction. In the current appeal, there is no evidence that the contributions of the DB and DC plan members were ever pooled in a single fund; nor is there any suggestion that the insurance company that invests the DC members' assets has an agency relationship (or any relationship at all) with CIBC Mellon Trust, the fund's trustee. To the contrary, Standard Life invests the DC members' assets according to the terms of its contract with Kerry, which refers neither to CIBC Mellon Trust nor to the assets held for DB members in the original trust (A.R., at p. 731). The plan documentation thus contemplates a far greater level of differentiation between DB and DC members than the arrangements in *Sutherland*.

166 My colleague also cites *Barclays Bank Plc v. Holmes*, [2000] EWHC 457, [2001] O.P.L.R. 37 (Eng. Ch. Div.), for the proposition that a pension plan might be structured as a single plan with both DB and DC members as beneficiaries of the fund. The conclusion in *Barclays* again turned largely on the court's interpretation of the relevant plan documentation. Neuberger J. held that the documentation and the plan structure clearly showed the employer's intention to create a single plan impressed with a trust. For instance, the definition of "Member" in the plan text specifically entitled DC members to benefits under the fund and, as noted by Rothstein J., the same trustee administered all the accounts. Furthermore, the court was influenced by the particular legislative context, which contemplated that a pension plan might have a single fund that supports both DB and DC schemes.

167 The outcome in *Barclays* can be contrasted with that of another English case, *Kemble v. Hicks (No.2)*, [1999] EWHC 301, [1999] O.P.L.R. 1 (Eng. Ch. Div.), which involved a DB pension plan to which a DC component was added. As in the current case, the DC members' contributions were held in individual investment accounts under a contract with an insurance company that was not the trustee of the DB fund. The court held that the employer was not entitled to use the DB surplus to fund its contributions toward DC members. Rimer J. acknowledged that the DB and DC plans were "part of the same overall scheme", but held that

> the establishment of the money-purchase [DC] scheme involved the setting up of what was, within that overall scheme, a scheme quite separate from the final-salary scheme and to which different considerations applied. Those who joined the money-purchase scheme severed their connection with the final-salary scheme, transferred to a new scheme and enjoyed the benefit of a payment to it of a sum representing the actuarial value of their benefits in the final-salary scheme accrued until 31 March 1989. Those who elected not to transfer retained their interest in the assets which remained subject to the final-salary [DB] scheme. [p. 7]

168 I believe that the arrangement in *Kemble* more closely mirrors the arrangement in the case at bar and, as such, similar considerations apply. These cases demonstrate that while it may not be impermissible for an employer to create two divisions of a single plan, it is also not impermissible for an employer to create what are in fact two separate plans for a single group of employees. Indeed, this possibility is contemplated by s. 34 of the *PBA*, which enables an employer to set up separate pension plans for full-time and part-time employees. One must examine the plan documentation and the actual arrangements to determine which structure is adopted in a particular case. As I outlined above, the Plan documentation in this case reveals a degree of segregation between the DB and DC plans that confirms that the 2000 amendments effectively created a second pension plan.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

D. The "Exclusive Benefit" Provisions

169 Why does it matter in this case whether the employees belong to a single plan or to two separate plans? The answer to this question lies in the provisions of the Plan and Trust Agreement that forbid the use of trust assets for other than the exclusive benefit of plan members.

170 The relevant provisions can be found in the original plan documentation. Section 22 of the 1954 Plan Text provides that

> all contributions made by the Company are irrevocable, and, together with all contributions made by Members, may only be used exclusively for the benefit of Members, retired Members, their beneficiaries or estates, and their contingent annuitants.
>
> [Emphasis added.]

Section 1 of the 1954 Trust Agreement contains a similar restriction on the use of trust assets:

> No part of the corpus or income of the Fund shall ever revert to the Company or be used for or diverted to purposes other than for the exclusive benefit of such persons or their beneficiaries or personal representatives as from time to time may be designated in the Plan except as therein provided.
>
> [Emphasis added.]

For ease of reference, I will refer to both of these provisions as the "exclusive benefit" provisions, though it is the Trust Agreement that is of paramount importance here. As noted above, the Tribunal acknowledged that the amendments purporting to authorize contribution holidays in the DC plan from the DB surplus would violate these provisions, as they would

> allow the Company to use or divert some part of the Fund, i.e. the surplus, "to purposes other than for the exclusive benefit of" the beneficiaries of the trust in respect of the Fund who, by virtue of the 2000 Plan, are now the Part 1 members. Any holiday taken by the Company in respect of Part 2 contributions in this fashion can only be realized by actually moving money out of the Fund and transferring it to the insurer that is the funding agency for Part 2, for credit to the individual accounts of the Part 2 members. This action is inconsistent with section 1 of the 1954 Trust Agreement .... [para. 32]

171 It is important at the outset to be clear about who is protected by these provisions and whom the Trust Agreement is meant to serve. I agree with the Tribunal's conclusion that "such persons ... as from time to time may be designated in the Plan" referred to in the Trust Agreement are the DB members only, for two reasons. First, as I have explained above, the assets in the fund consist solely of the contributions made by or on behalf of the DB members alone. Any assets previously held in the name of current DC members were removed at the time of the conversion. Second, the terms of the Trust Agreement clearly contemplate that member beneficiaries would belong to a DB plan. For instance, the Agreement contains provisions concerning the possibility of fund liabilities, which do not arise in a DC plan (ss. 2, 6 and 11). Indeed, the very nature of a trust fund is inconsistent with the structure of the DC accounts in this case. I will address this issue once again in my discussion of the Tribunal's retroactive designation remedy. For the time being, however, I simply conclude that the exclusive benefit provisions serve to protect DB members from any use of trust assets that is not for their exclusive benefit, such as cross-subsidization between separate plans.

172 The issue of cross-subsidization has received significant judicial attention in cases concerning the merger of two or more pension plans. The question of how the merger affects the members' entitlement to assets under their original plan is typically resolved with reference to the terms of the plan documentation and trust agreements in each case. Thus, in some cases, the co-mingling of funds in a merged plan has been found to be lawful: e.g. *Lennon v. Ontario (Superintendent of Financial Services)* (2007), 87 O.R. (3d) 736 (Ont. Div. Ct.); *Baxter v. Ontario (Superintendent of Financial Services)*

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(2004), 43 C.C.P.B. 1 (Ont. Div. Ct.). In others, the particular facts of the case militated against the co-mingling of funds after a merger: *Aegon Canada Inc. v. ING Canada Inc.* (2003), 179 O.A.C. 196 (Ont. C.A.); *Sulpetro Ltd. Retirement Plan Fund (Trustee of) v. Sulpetro Ltd. (Receiver of)* (1990), 66 D.L.R. (4th) 271 (Alta. C.A.).

173 While the merger cases engage a host of issues that are not relevant to this appeal, the cases are instructive in terms of the broader principle against cross-subsidization between plans that are effectively distinct from one another. In *Aegon*, for instance, the trust assets of two funds were segregated after a merger in accordance with the terms of the trust agreement and the employer's undertaking to the then Pension Commission of Ontario. The employer, however, diverted the assets from one fund to the other in order to take contribution holidays with respect to the second fund. The Court of Appeal held that this action violated the trust agreement because it used trust assets for other than the exclusive benefit of the plan members who were beneficiaries of the fund.

174 This general principle was affirmed in *Sutherland*, when Siegel J. noted:

> Where it is found that two separate funds exist, there is no principle that can support "cross-subsidization" in the form of payment of the pension benefits of one group of beneficiaries by using assets in a trust fund intended to fund the pension benefits of a separate group of beneficiaries. [para. 260]

Indeed, the results in *Sutherland* and *Barclays* were predicated on the courts' conclusion that the employees were members of a single plan and beneficiaries of the same fund. As such, there was no use of trust assets for other than the exclusive benefit of the members. In *Kemble*, however, the existence of two separate plans meant that the employer's use of surplus from a DB fund to reduce its contributions toward a DC plan was an unjust subsidization of the DC members at the DB members' expense. The same result enures in this case: the use of fund surplus to provide contribution holidays with respect to the DC plan violates the exclusive benefit provisions in the Plan documentation as it benefits all but the DB members.

175 This brings us to the Tribunal's remedy, also approved by my colleague in his reasons, of retroactively amending the Plan to designate the DC members as beneficiaries of the DB trust fund in order to legitimize the DC contribution holidays. I believe that this remedy is unreasonable and cannot be adopted as it would breach the terms of the Trust Agreement, and would not solve the problem of the DC contribution holidays constituting a violation of the exclusive benefit provisions.

176 The company has the right to amend the Plan unilaterally and can, by virtue of s. 13(2) of the *PBA*, make retroactive amendments. However, plan amendments are still subject to the terms of the original Trust Agreement that prohibit the use of funds for other than the exclusive benefit of the trust beneficiaries, who in this case are DB members. Therefore, an amendment to the Plan that seeks to change the beneficiaries of the fund must not contravene the same exclusive benefit provisions that precipitated the need for the remedy in the first place.

177 The designation, which aims to provide formal legitimation for DC contribution holidays, would not be for the exclusive or even primary benefit of the DB members. It would not benefit them at all. The company certainly stands to benefit from this designation, by being relieved of its contribution obligations to DC members for as long as the DB fund experiences a surplus. It might even be argued that DC members could benefit from the arrangement, by sharing the same entitlement to surplus upon termination that the DB members might be found to have. Indeed, Gillese J.A. concluded that the designation would have the effect of granting the DC members a right to enjoy the surplus with the DB members upon termination of the plan (paras. 107-8). However, the respondents have not pointed to any benefit that might accrue to the DB members from this designation, and none can be established. Rather, the DB members stand only to lose from the retroactive designation of DC members as beneficiaries of the trust.

178 It is true, as Gillese J.A. at the Court of Appeal and Rothstein J. in his reasons have pointed out, that the plan contemplated an expanding class of members and that new employees would continually have been added to the DB

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

scheme as trust beneficiaries prior to 2000. Deschamps J. acknowledged the fluidity of pension plans in *Buschau v. Rogers Communications Inc.*, 2006 SCC 28, [2006] 1 S.C.R. 973 (S.C.C.), when she wrote:

> A plan is also seen as being, if not a permanent instrument, at least a long-term one. However, the participation of any individual member is ephemeral: members come and go, while plans are expected to survive the flow of employees and corporate reorganizations. [para. 34]

Along these lines, the respondent Kerry argues that the designation of DC members as beneficiaries of the trust is simply an extension of the employer's general power to continually add new members to an existing plan, such as by merger:

> The introduction of new members into a pension plan does not breach any underlying trust and is not objectionable as a matter of contract law so long as members continue to receive their benefits. If a plan merger is permissible, it is difficult to see how it cannot be permissible to amend plan language so as to treat all members of a single plan having two parts as members of the Plan for the purposes of being able to receive benefits from the Fund. [R.F., at para. 83]

One might argue, then, that the regular addition of new employees, or the introduction of an entirely new class of employees (e.g. part-time employees), into an existing plan is so commonplace that there is no need to even inquire into whether the addition of new members would violate the exclusive benefit provisions of the plan documentation.

179 However, the proposed arrangement in this case raises significant concerns that are not engaged by the addition of new employees to an ongoing plan. Prior to 2000, new employees who joined the Plan made regular contributions to the fund or had contributions made in their name, thus increasing the *corpus* (or body) of the fund. Those financial contributions to the fund can be seen as providing some sort of benefit, however indirectly, to the existing plan members. More assets mean a stronger and more resilient pension fund, and higher returns on the investments. The same benefit does not arise from the retroactive designation of DC members as beneficiaries of the fund. After 2000, new employees (and existing employees who switched into the DC plan) no longer contribute anything to the fund. Their contributions are directed into their separate annuity accounts, and any prior contributions made by employees who switched to the DC plan were removed at the time of the conversion. The DC members have no more entitlement to the trust fund. It would make a mockery of the significant protections afforded to trust funds if such entitlement could be granted by the mere stroke of a pen.

180 Why is it that the DC members cannot claim any entitlement to the fund? As noted above, when employees opted to convert their DB benefits to the DC plan in 2000, assets equal to the amount of benefits that had accrued to date were taken from the fund and placed in individual accounts. The Plan stipulates that, after this conversion, the new DC members would "henceforth be governed by the defined contribution provisions of the Plan and will not be permitted to resume participation in the Plan under the defined benefit provisions" (2000 Plan Text Foreword, s. 1.07). By the terms of this arrangement, then, the DC members can be seen to have relinquished their interest in the remaining assets of the DB Fund. All of their previous contributions and all employer contributions made in their name were removed from the fund and placed in individual accounts, and they cannot revert to the DB plan. They are not beneficiaries of the fund because they do not and cannot derive any benefit from the assets held in that fund. An amendment that would serve to designate them as such is simply an artificial and incomplete response to the problem.

181 This is quite unlike the situation contemplated by the Ontario Superior Court of Justice in *Sutherland*, when Siegel J. held that there is no reason in law why a pension plan might not be structured with two sections, one DB and one DC, "with the same trust fund supporting the payment of benefits under each section of the plan" (para. 219). In the current appeal, only DB members would have their benefits paid from the trust fund. The DC members' benefits are held separately in annuity accounts that have no connection to the original trust fund that was set up to provide pension benefits on a DB basis to Kerry's employees in 1954.

182 Indeed, because the company started taking contribution holidays from the DB plan in 1985, everything that has been contributed to the fund since that time has been amassed penny by penny by the DB members alone. The

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Tribunal's remedy would permit the company to remove assets from the fund and to place those assets in the accounts held by DC members, simply to relieve itself of the obligation to contribute toward the DC plan. As a result, the DB members would see the same amount of money going into the fund as before 2000, but a greater amount coming out of it. The intuitive unfairness of this arrangement should be apparent to even the greatest cynic. More importantly, the arrangement is not only unfair on a principled basis but is also unlawful, as it would result in the use of trust funds for other than the exclusive benefit of the current DB members.

183 The unlawfulness of the DC contribution holidays would not be remedied *even if* the DC members could be declared beneficiaries of the fund. The withdrawal of funds to enable the employer's DC contribution holidays would continue to violate the exclusive benefit provisions regardless of whether the DC members were technically beneficiaries of the fund. There is no evidence before this Court that the structure of the fund would change as a result of this designation. The employer would continue to take DC contribution holidays by withdrawing assets from the fund and placing them in the DC members' accounts. As I noted above, this movement of funds is not for the exclusive benefit of any of the beneficiaries, whether DB or DC members. To the contrary, it harms the DB members, who see the *corpus* of their fund decreasing at a steady rate. And while the initial designation of the DC members as beneficiaries might provide them with some future benefit with respect to potential entitlement to surplus, the use of the fund surplus to finance the contribution holidays would simply deplete the overall surplus to which they might one day claim entitlement.

184 It is hard to see how the DC contribution holidays benefit anyone but Kerry, who is relieved of its contribution obligations to the DC plan. Of what use are the exclusive benefit provisions if they could permit the withdrawal of trust funds for the primary or even exclusive benefit of the company? Indeed, it is not necessary to find that the members have a vested interest in the surplus to appreciate that the present arrangement violates the exclusive benefit provisions and would continue to do so even if the Tribunal's remedy were adopted. Every DC contribution holiday leaves the *corpus* of the trust smaller, whereas a contribution holiday in respect of a regular DB plan simply leaves the trust alone.

185 For these reasons, I believe that the Tribunal's order to amend the Plan to make the DC members beneficiaries of the trust in respect of the Fund is unreasonable and that the amendment purporting to allow DC contribution holidays from the DB surplus remains invalid for contravening the exclusive benefit provisions in the Plan documentation.

E. The Law of Trusts

186 The original pension plan in this case was impressed with a trust in 1954. As such, it is subject not only to the requirements imposed by statute and the law of contract, but also to the strictures of trust law. The law of trusts is notoriously difficult to define because, like a child with sticky fingers, it leaves its imprint on a number of different areas ranging from wills and estates to divorce proceedings and pension schemes. What must be remembered, however, is that the law of trusts is primarily oriented toward the protection of beneficiaries, who are entitled to have the trust property administered in their best interest.

187 This Court held in *Schmidt* that a pension trust is akin to a classic trust, as it is created in order to provide a benefit to employees (p. 640). In a classic trust, the trustee and the beneficiaries share ownership of the trust assets: the beneficiaries have an equitable interest in the trust assets while the trustee holds legal title to them. The trustee has a fiduciary duty to hold the assets exclusively in the interest of the beneficiaries (D.W.M. Waters, M.R. Gillen and L.D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 38). Indeed, the beneficiaries of a trust are given legal protection of the highest order.

188 Despite their status as classic trusts, however, pension trusts engage somewhat different considerations due to the existing legal relationship between the settlor (usually the employer) and the trust beneficiaries (the employees). Browne-Wilkinson V.-C.'s comments in *Imperial Group Pension Trust Ltd. v. Imperial Tobacco Ltd.* (1990), [1991] 2 All E.R. 597 (Eng. Ch. Div.), are apt:

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> Pension scheme trusts are of quite a different nature to traditional trusts. The traditional trust is one under which the settlor, by way of bounty, transfers property to trustees to be administered for the beneficiaries as objects of his bounty. Normally, there is no legal relationship between the parties apart from the trust. The beneficiaries have given no consideration for what they receive. The settlor, as donor, can impose such limits on his bounty as he chooses, including imposing a requirement that the consent of himself or some other person shall be required to the exercise of the powers.
>
> As the Court of Appeal has pointed out ... a pension scheme is quite different. Pension benefits are part of the consideration which an employee receives in return for the rendering of his services. In many cases, ... membership of the pension scheme is a requirement of employment. In contributory schemes, ... the employee is himself bound to pay his or her contributions. Beneficiaries of the scheme, the members, far from being volunteers have given valuable consideration. The company employer is not conferring a bounty. In my judgment, the scheme is established against the background of such employment and falls to be interpreted against that background [pp. 605-6]

189 U.K. courts are not alone in noting the distinction between traditional and pension trusts. In *Bathgate v. National Hockey League Pension Society* (1992), 98 D.L.R. (4th) 326 (Ont. Gen. Div.)), at pp. 385-88, aff'd (1994), 110 D.L.R. (4th) 609 (Ont. C.A.), Adams J. wrote:

> Trust law responds to the long gestation of pension arrangements and accommodates the welfare of former employees who often lack any other effective means to protect their interests. ... Trust law, in this modern context, must accommodate and be responsive to key differences between the traditional settling of a trust and the ongoing administration of a pension plan in a changing economic environment. But employers, trade unions and trustees must also appreciate the central importance of pension arrangements to all employees and be vigilant of the dependent interests engrained in these plans.

The beneficiaries of a pension trust depend on the fund's assets to sustain them during retirement. In the unionized workplace, employees will have often traded other benefits for a strong pension regime for themselves and their families. Pension schemes are frequently used by employers to attract the most qualified employees and to encourage long-term commitment to the job. In this context, it is important to call upon the flexibility of trust law in assessing the legitimacy of the employer's actions carried out with respect to the trust. It is not enough simply to look to the propriety of the trustee's administration of the trust to determine whether the rights of the beneficiaries have been unjustly interfered with. The employer's actions are also implicated.

190 Newbury J.A. recognized the special role of the employer in the pension trust context in *Buschau v. Rogers Communications Inc.*, 2001 BCCA 16, 195 D.L.R. (4th) 257 (B.C. C.A.), at para. 1 (rev'd in 2006 SCC 28, [2006] 1 S.C.R. 973 (S.C.C.), but not on this point):

> In Canada at least, pension trusts and plans also usually contemplate that the settlor, or employer, will play a role akin to that of the trustee in a traditional trust, even though a trust company is appointed as formal trustee. Indeed, employers often retain the authority to direct the trustee as to many matters relating to the administration of the trust, and even to amend or modify the class of beneficiaries under the trust, change the benefits to which they will be entitled, and on occasion, revoke or terminate the trust unilaterally.

Lane J. came to a similar conclusion in *Aegon Canada Inc. v. ING Canada Inc.* (2003), 34 C.C.P.B. 1 (Ont. S.C.J. [Commercial List]) at para. 38, aff'd (2003), 179 O.A.C. 196 (Ont. C.A.):

> These cases illustrate the importance of the trust aspect of the pension scheme before me. It is not simply a payment scheme or other appurtenance to the pension, but an important legal relationship created by the employer with its employees, not subject to unilateral alteration.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

191 In this case, the law of trusts provides the appellants with an added layer of protection. The employer's attempt to use the DB surplus to fund its contribution obligations toward the DC plan not only breaches the "exclusive benefit" provisions, but also violates one of the hallmarks of trust law: the prohibition against the revocation of trust assets.

192 In *Schmidt*, this Court ruled that an employer may not remove pension contributions held in trust unless a power of revocation was expressly included in the trust at the time of its inception. A general power of amendment does not amount to a power of revocation (pp. 643-46).

193 The classic explanation of revocation comes from *Waters' Law of Trusts in Canada*:

> A settlor cannot revoke his trust unless he has expressly reserved the power to do so. This is a cardinal rule, and it involves two important concepts. The first is that the trust is a mode of disposition, and once the instrument of creation of the trust has taken effect ... the settlor has alienated the property as much as if he had given it to the beneficiaries by an out-and-out gift. [p. 353]

Generally speaking, revocation consists in the settlor's exercising some control over the trust assets. Once assets have been placed in the trust fund, the settlor cannot interfere with them and cannot withdraw them for his or her own use without the express power to do so in the trust agreement. In *Schmidt*, Cory J. wrote:

> Generally, however, the transfer of the trust property to the trustee is absolute. Any power of control of that property will be lost unless the transfer is expressly made subject to it. [p. 643]

194 This principle extends not only to the *corpus* of the trust fund but also to any surplus in the fund, unless there is specific wording in the plan documentation that would oust the surplus from the trust's ambit (*Schmidt*, at pp. 641-42). Thus, once placed in the fund, *all* assets must be administered in accordance with the principles of trust law and should therefore be safe from the interference and control of the settlor.

195 Within a classic DB plan, a contribution holiday would not result in an encroachment on the trust because no money need actually be withdrawn from the fund to enable the holiday (*Schmidt*, at p. 654). Trust principles do not attach to pension contributions until they are actually paid into the fund. In other words, the *failure* to put money in a fund does not generally amount to a breach of trust principles unless that contribution is required by the terms of the trust.

196 Against this background, it is necessary to determine whether Kerry's contribution holidays in the DC plan from the DB surplus amounted to a partial revocation of the trust. I believe that it did.

197 No power of revocation is contained in the Trust Agreement in this case. And yet, the contribution holidays in the DC plan were accomplished by means of a withdrawal of assets from the DB fund and a deposit of those assets into the DC members' accounts. The actual transfer of funds is necessary because Kerry is required by the terms of the Plan to make a regular contribution to the DC plan. Thus, the "holidays" still involve the deposit of funds into the account, but the source of the employer's contribution has changed: rather than coming from the employer's own pocket, the value of each contribution is withdrawn from the DB fund and placed in the members' annuity accounts. This shifting of funds is a clear example of the employer's exercising control over trust assets. It is not comparable to the employer's legitimate use of assets from the fund to cover reasonable and *bona fide* plan expenses. The transfer of trust assets to enable a contribution holiday can hardly be described as necessary to ensure the integrity and proper maintenance of the plan.

198 Nor is it comparable to the circumstances in *Sutherland*, where the court held that there was no impediment to the employer's contribution holidays in the DC part of the plan from the DB surplus because the employees were all members of the same plan and beneficiaries of the same trust (paras. 284-89). Recall that until 2001, the DB and DC assets were held in a single fund. The contribution holidays did not require the removal of assets from the fund and, therefore, did not constitute an encroachment on the trust. Even after the arrangement changed in 2001, such that the DC funds were invested separately by the trustee's agent, the court's finding that the contributions were effectively held in a single fund led

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

to the conclusion that contribution holidays did not entail an encroachment on the trust (paras. 290-303). No withdrawal of assets from the trust fund was required to effect a contribution holiday, and hence no encroachment occurred. The employer simply refrained from making contributions to the fund. In this case, however, the DC contribution holidays required the removal of assets from the trust fund and the deposit of those assets in the DC members' annuity accounts. This is not a case of the employer's simply failing to contribute to the fund. Thus, the reasoning in *Sutherland* does not assist the respondents.

199 Similarly, in *Police Retirees of Ontario Inc. v. Ontario (Municipal Employees' Retirement Board)* (1999), 22 C.C.P.B. 49 (Ont. S.C.J.), the Ontario Superior Court of Justice dismissed the retirees' argument that the employer's contribution holidays resulted in an encroachment on the trust. The employer had taken contribution holidays after additional funds that arose through a Supplementary Benefits Agreement were added to the pension fund. The court held that the establishment of the Supplementary Benefits Agreement did not create a separate pension plan and that, as a result, the supplementary funds were part of the regular fund (paras. 61-70). Therefore, no money was actually paid out of the fund in order for the employer to take contribution holidays (para. 76). Again, this conclusion was premised on the finding that there was a single plan in existence, which meant that the Police Board could take contribution holidays by merely ceasing its contributions to the fund. The failure to pay into the fund did not amount to an encroachment on the trust assets. In the current appeal, every DC contribution holiday leaves the DB trust fund smaller than before, without any justification in law. This clearly constitutes an encroachment on and a revocation of the trust.

200 It should be noted that I would reach the same conclusion *even if* the DC members could legitimately be designated as beneficiaries of the trust fund. The rationale in *Schmidt* for upholding an employer's right to take contribution holidays is limited to those situations in which no assets are withdrawn from the trust fund. In an ordinary DB plan, the employer is simply required to ensure that the assets in the fund are sufficient to meet its expected liabilities. If the plan documentation and legislation permit them, then contribution holidays can be taken for as long as the plan is in a state of actuarial surplus. Nothing in *Schmidt* suggests that an employer should be permitted to remove trust assets in the manner contemplated by Kerry, even if the ultimate recipients of those assets are among the trust beneficiaries. This would not only constitute an unlawful interference with the trust assets (revocation) but also would pit one group of beneficiaries against the other, with the ultimate reward falling to the employer.

201 The principles of trust law are as relevant in the context of an ongoing pension trust as they are in the context of a terminated or wound-up plan impressed with a trust. In this case, the trust beneficiaries are protected by the specific language in the Plan documentation that prohibits the use of trust funds for other than their own benefit. Moreover, the law of trusts forbids the employer's attempts to control or withdraw irrevocable assets within the fund in order to take contribution holidays with respect to its obligations toward a different group of plan members.

F. Conclusion

202 For the reasons above, I must disagree with my colleague's conclusion that the respondent Kerry was entitled to withdraw assets from the DB surplus and deposit them in the DC members' accounts. I believe that the amendments to the Plan purporting to authorize these payments are not permitted by the legislation and are in breach of the "exclusive benefit" provisions of the Plan documentation and the relevant principles of trust law. The Tribunal's conclusion that these defects could be cured by a retroactive designation of DC members as fund beneficiaries was unreasonable, and the Court of Appeal erred in upholding the Tribunal's conclusion on this point.

203 I would thus allow the appeal in part, quash the Tribunal's decision on contribution holidays, and direct the Superintendent to refuse registration of the amendments that purport to permit the employer's use of fund surplus under Part 1 of the Plan to offset or eliminate its contribution obligations under Part 2 of the Plan.

204 On the matter of costs, I do not need to take issue with my colleague's determination that costs could not be awarded from the fund in this case. Since I would allow the appeal in part, the appellants would be entitled to full costs throughout from the respondent Kerry.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

* A corrigendum issued by the Court on August 7, 2009 has been incorporated herein.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 20

Indexed as:

Rizzo & Rizzo Shoes Ltd. (Re)

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited, appellants;
v.
Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited, respondent, and The Ministry of Labour for the Province of Ontario, Employment Standards Branch, party.

[1998] 1 S.C.R. 27

[1998] 1 R.C.S. 27

[1998] S.C.J. No. 2

[1998] A.C.S. no 2

File No.: 24711.

Supreme Court of Canada

1997: October 16 / 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Employment law -- Bankruptcy -- Termination pay and severance available when employment terminated by the employer -- Whether bankruptcy can be said to be termination by the employer -- Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a -- Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) -- Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) -- Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the Employment Standards Act ("ESA") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to severance, termination or vacation pay under the ESA. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the ESA.

Held: The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40a of the ESA suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Moreover, s. 10 of Ontario's Interpretation Act provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the ESA and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40a to be inapplicable in bankruptcy situations is incompatible with both the object of the ESA and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbitrarily deprive some of a means to cope with economic dislocation.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the Employment Standards Amendment Act, 1981 exempted from severance pay obligations employers who became bankrupt and lost control of their assets

between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the ESA is benefits-conferring legislation, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

When the express words of ss. 40 and 40a are examined in their entire context, the words "terminated by an employer" must be interpreted to include termination resulting from the bankruptcy of the employer. The impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the ESA, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the ESA. Termination as a result of an employer's bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the Bankruptcy Act for termination and severance pay in accordance with ss. 40 and 40a of the ESA. It was not necessary to address the applicability of s. 7(5) of the ESA.

Cases Cited

Distinguished: Re Malone Lynch Securities Ltd., [1972] 3 O.R. 725; Re Kemp Products Ltd. (1978), 27 C.B.R. (N.S.) 1; Mills-Hughes v. Raynor (1988), 63 O.R. (2d) 343; referred to: U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of) (1989), 76 C.B.R. (N.S.) 86; R. v. Hydro-Québec, [1997] 1 S.C.R. 213; Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; Verdun v. Toronto-Dominion Bank, [1996] 3 S.C.R. 550; Friesen v. Canada, [1995] 3 S.C.R. 103; Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986; Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701; R. v. TNT Canada Inc. (1996), 27 O.R. (3d) 546; Re Telegram Publishing Co. v. Zwelling (1972), 1 L.A.C. (2d) 1; R. v. Vasil, [1981] 1 S.C.R. 469; Paul v. The Queen, [1982] 1 S.C.R. 621; R. v. Morgentaler, [1993] 3 S.C.R. 463; Abrahams v. Attorney General of Canada, [1983] 1 S.C.R. 2; Hills v. Canada (Attorney General), [1988] 1 S.C.R. 513; British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of) (1996), 40 C.B.R. (3d) 25; R. v. Z. (D.A.), [1992] 2 S.C.R. 1025.

Statutes and Regulations Cited

Bankruptcy Act, R.S.C., 1985, c. B-3 [now the Bankruptcy and Insolvency Act], s. 121(1).
Employment Standards Act, R.S.O. 1970, c. 147, s. 13(2).
Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5) [rep. & sub. 1986, c. 51, s. 2], 40(1) [rep. & sub. 1987, c. 30, s. 4(1)], (7), 40a(1) [rep. & sub. ibid., s. 5(1)].
Employment Standards Act, 1974, S.O. 1974, c. 112, s. 40(7).

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2.
Interpretation Act, R.S.O. 1980, c. 219 [now R.S.O. 1990, c. I.11], ss. 10, 17.
Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, ss. 74(1), 75(1).

Authors Cited

Christie, Innis, Geoffrey England and Brent Cotter. Employment Law in Canada, 2nd ed. Toronto: Butterworths, 1993.
Côté, Pierre-André. The Interpretation of Legislation in Canada, 2nd ed. Cowansville, Que.: Yvon Blais, 1991.
Driedger, Elmer A. Construction of Statutes, 2nd ed. Toronto: Butterworths, 1983.
Ontario. Legislature of Ontario Debates, 1st sess., 32nd Parl., June 4, 1981, pp. 1236-37.
Ontario. Legislature of Ontario Debates, 1st sess., 32nd Parl., June 16, 1981, p. 1699.
Sullivan, Ruth. Driedger on the Construction of Statutes, 3rd ed. Toronto: Butterworths, 1994.
Sullivan, Ruth. Statutory Interpretation. Concord, Ont.: Irwin Law, 1997.

APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. par. 210-020, [1995] O.J. No. 586 (QL), reversing a judgment of the Ontario Court (General Division) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. par. 14,013, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.

Steven M. Barrett and Kathleen Martin, for the appellants. Raymond M. Slattery, for the respondent. David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

Solicitors for the appellants: Sack, Goldblatt, Mitchell, Toronto. Solicitors for the respondent: Minden, Gross, Grafstein & Greenstein, Toronto. Solicitor for the Ministry of Labour for the Province of Ontario, Employment Standards Branch: The Attorney General for Ontario, Toronto.

The judgment of the Court was delivered by

1 IACOBUCCI J.:-- This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled

to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

2 Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

3 Pursuant to the receiving order, the respondent, Zittrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

4 In November 1989, the Ministry of Labour for the Province of Ontario, Employment Standards Branch (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the Employment Standards Act, R.S.O. 1980, c. 137, as amended (the "ESA"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately $2.6 million and for severance pay totalling $14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the ESA.

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

6 The relevant versions of the Bankruptcy Act (now the Bankruptcy and Insolvency Act) and the

Employment Standards Act for the purposes of this appeal are R.S.C., 1985, c. B-3 (the "BA"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "ESA") respectively.

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7. --

(5) Every contract of employment shall be deemed to include the following provision:

> All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the Employment Standards Act.

40. -- (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

(a) one weeks notice in writing to the employee if his or her period of employment is less than one year;
(b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;
(c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;
(d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;
(e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;
(f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;
(g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;
(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

. . .

(7) Where the employment of an employee is terminated contrary to this section,

(a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . .

40a . . .

(1a) Where,

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2.--(1) Part XII of the said Act is amended by adding thereto the following section:

. . .

(3) Section 40a of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the Bankruptcy Act (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the Bankruptcy Act (Canada) has been accepted by his

creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

Bankruptcy Act, R.S.C., 1985, c. B-3

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, R.S.O. 1990, c. I.11

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

. . .

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. Ontario Court (General Division) (1991), 6 O.R. (3d) 441

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the BA. Relying on U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of) (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C. in Bankruptcy), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the ESA such that liability for such payments would arise on bankruptcy as well.

8 In addressing this question, Farley J. began by noting that the object and intent of the ESA is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the ESA is remedial legislation and as such it should be interpreted in a

fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the ESA.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the BA. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the BA.

11 Even if bankruptcy does not terminate the employment relationship so as to trigger the ESA termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the ESA. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

12 Farley J. also considered s. 2(3) of the Employment Standards Amendment Act, 1981, S.O. 1981, c. 22 (the "ESAA"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the ESA. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

B. Ontario Court of Appeal (1995), 22 O.R. (3d) 385

13 Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the ESA. He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or who proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40a(1)(a) (at p. 391) which includes the phrase "employees have their employment terminated by an

employer". Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the ESA, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited Re Malone Lynch Securities Ltd., [1972] 3 O.R. 725 (S.C. in bankruptcy), wherein Houlden J. (as he then was) concluded that the ESA termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon Re Kemp Products Ltd. (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C. in bankruptcy), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

> The plain language of ss. 40 and 40a does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a petition by one of its creditors. No entitlement to either termination or severance pay ever arose.

15 Regarding s. 7(5) of the ESA, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the ESAA. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40a.

16 Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

17 This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the ESA?

5. Analysis

18 The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40a of the ESA, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are:

"No employer shall terminate the employment of an employee. . . ." Similarly, s. 40a(1a) begins with the words, "Where . . . fifty or more employees have their employment terminated by an employer. . . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by an employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the ESA termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by an employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by an employer" for the purpose of triggering entitlement to termination and severance pay under the ESA.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, Statutory Interpretation (1997); Ruth Sullivan, Driedger on the Construction of Statutes (3rd ed. 1994) (hereinafter "Construction of Statutes"); Pierre-André Côté, The Interpretation of Legislation in Canada (2nd ed. 1991)), Elmer Driedger in Construction of Statutes (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: R. v. Hydro-Québec, [1997] 1 S.C.R. 213; Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; Verdun v. Toronto-Dominion Bank, [1996] 3 S.C.R. 550; Friesen v. Canada, [1995] 3 S.C.R. 103.

22 I also rely upon s. 10 of the Interpretation Act, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act

according to its true intent, meaning and spirit".

23 Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the ESA, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

24 In Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701). It was in this context that the majority in Machtinger described, at p. 1003, the object of the ESA as being the protection of ". . . the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination". Accordingly, the majority concluded, at p. 1003, that, ". . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not".

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the ESA requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, Employment Law in Canada (2nd ed. 1993), at pp. 572-81.)

26 Similarly, s. 40a, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In R. v. TNT Canada Inc. (1996), 27 O.R. (3d) 546, Robins J.A. quoted with approval at pp. 556-57 from the words of D. D. Carter in the course of an employment standards determination in Re Telegram Publishing Co. v. Zwelling (1972), 1 L.A.C. (2d) 1 (Ont.), at p. 19, wherein he described the role of severance pay as follows:

> Severance pay recognizes that an employee does make an investment in his employer's business -- the extent of this investment being directly related to the length of the employee's service. This investment is the seniority that the employee builds up during his years of service. . . . Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

27 In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40a of the ESA are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, supra, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, Construction of Statutes, supra, at p. 88).

28 The trial judge properly noted that, if the ESA termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the ESA would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the ESA to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the ESAA introduced s. 40a, the severance pay provision, to the ESA. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

> 2. . . .
>
> (3) Section 40a of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the Bankruptcy Act (Canada) and whose assets have been distributed

> among his creditors or to an employer whose proposal within the meaning of the Bankruptcy Act (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40a was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the ESA. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., R. v. Vasil, [1981] 1 S.C.R. 469, at p. 487; Paul v. The Queen, [1982] 1 S.C.R. 621, at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

32 In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

33 I find support for my conclusion in the decision of Saunders J. in Royal Dressed Meats Inc., supra. Having reviewed s. 2(3) of the ESAA, he commented as follows (at p. 89):

> . . . any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the E.S.A. . . . it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

34 This interpretation is also consistent with statements made by the Minister of Labour at the time he introduced the 1981 amendments to the ESA. With regard to the new severance pay provision he stated:

> The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.

. . .

> . . . the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached.
>
> (Legislature of Ontario Debates, 1st sess., 32nd Parl., June 4, 1981, at pp. 1236-37.)

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

> For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions.
>
> (Legislature of Ontario Debates, 1st sess., 32nd Parl., June 16, 1981, at p. 1699.)

35 Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in R. v. Morgentaler, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:

> . . . until recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

36 Finally, with regard to the scheme of the legislation, since the ESA is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., Abrahams v. Attorney General of Canada, [1983] 1 S.C.R. 2, at p. 10; Hills v. Canada (Attorney General), [1988] 1 S.C.R. 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40a of the ESA, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

37 The Court of Appeal's reasons relied heavily upon the decision in Malone Lynch, supra. In Malone Lynch, Houlden J. held that s. 13, the group termination provision of the former ESA, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the ESA then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect". Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

38 Two years after Malone Lynch was decided, the 1970 ESA termination pay provisions were amended by The Employment Standards Act, 1974, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 ESA eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the Malone Lynch decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 ESA have no application to a bankrupt employer. For this reason, I do not accept the Malone Lynch decision as persuasive authority for the Court of Appeal's findings. I note that the courts in Royal Dressed Meats, supra, and British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of) (1996), 40 C.B.R. (3d) 25 (B.C.S.C.), declined to rely upon Malone Lynch based upon similar reasoning.

39 The Court of Appeal also relied upon Re Kemp Products Ltd., supra, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the ESA. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on Mills-Hughes v. Raynor (1988), 63 O.R. (2d) 343 (C.A.), which cited the decision in Malone Lynch, supra, with approval.

40 As I see the matter, when the express words of ss. 40 and 40a of the ESA are examined in their entire context, there is ample support for the conclusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see R. v. Z. (D.A.), [1992] 2 S.C.R. 1025). I also note that the intention of the Legislature as evidenced in s. 2(3) of the ESAA, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim ESA termination and severance pay where their termination has

resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the ESA, namely, to protect the interests of as many employees as possible.

41 In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the ESA, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the ESA. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the BA for termination and severance pay in accordance with ss. 40 and 40a of the ESA. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the ESA.

42 I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the ESA underwent another amendment. Sections 74(1) and 75(1) of the Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the Interpretation Act directs that, "[t]he repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law". As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

6. Disposition and Costs

43 I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

TAB 21

Superior Court of Justice, Divisional Court

Citation: Regie des rentes du Quebec v. Commission des regimes de retraite de l'Ontario
Court File No.: 98-DV-183
Date: 2000-07-26

Charbonneau, Sedgwick and Aitken JJ.

Counsel:
Charles Gibson and *Thomas Wallis,* for applicant, la Régie des rentes du Québec.
Alex Turko and *Stan Sokol,* for respondent, la Commission des régimes de retraite de l'Ontario.
Lawrence E. Ritchie and *Christopher P. Naudie,* for intervener, McColl-Frontenac Petroleum Inc.
Anne Sheppard, for intervener, Léo Deschamps.

The judgment of the court was delivered by

CHARBONNEAU J.:—

THE NATURE OF THIS PROCEEDING

[1] In March 1997, the intervener McColl-Frontenac Petroleum Inc. ("McColl-Frontenac") made an application to the Respondent Pension Commission of Ontario ("Commission") under the *Pension Benefits Act,* R.S.O. 1990, c. P.8 (the "Ontario Act"), to obtain the Commission's consent to the withdrawal of the surplus remaining in the Revised Pension Plan (the "Plan") of Leco Inc., a predecessor corporation to McColl-Frontenac. In its decision rendered on June 26, 1997, the Commission approved the payment of the surplus to McColl-Frontenac in accordance with the procedural framework of the Ontario Act and pursuant to its powers as the designated "major authority" under the terms of the Memorandum of Reciprocal Agreement entered into by the Commission, the Applicant and other provincial pension authorities in 1968 (the "Reciprocal Agreement").

[2] The Applicant, the Régie des rentes du Québec (the "Régie"), brings this application for judicial review of the Commission's decision. The Régie says that the Commission ought to have applied Québec pension legislation to Québec members of the Plan and that its decision should be quashed and the matter remitted to the Commission for reconsideration.

GENERAL BACKGROUND TO THE APPLICATION

[3] In March 1997, McColl-Frontenac, as plan sponsor, filed its surplus application with the Commission to obtain its consent to the withdrawal of the surplus. At all material times, the Plan included members in Ontario and Québec, but the majority of members reported to work in Ontario. Accordingly, under the terms of the Reciprocal Agreement, the Plan was registered solely with the Commission in Ontario and the Commission acted as the "major authority" in relation to the Plan.

2000 CanLII 30139 (ON SCDC)

[4] The Reciprocal Agreement exists to give effect to the mutual delegation of authority between provincial pension authorities where a pension plan covers employees in more than one province. It includes the following provisions:

> AND WHEREAS the said signatories have deemed it desirable that statutory functions and powers in respect of any one pension plan be exercised by one signatory only, acting both on its own behalf and on behalf of any other signatory having statutory functions and powers in respect of such plan;
>
> 1.
>
> • • • • •
>
> d) "major authority" means, with respect to a plan, the participating authority of the province where the plurality of the plan members are employed (save that members employed in a province not having a participating authority shall not be counted);
>
> e) "minor authority" means, with respect to a plan, the participating authority of any province where one or more plan members are employed, but does not include the major authority.
>
> 2. The major authority for each plan shall exercise both its own statutory functions and powers and the statutory functions and powers of each minor authority for such plan.
>
> 3. Any authority may except itself from the operation of section 2 in respect of a specific plan by giving written notice to that effect to the major authority (or, if the major authority is the excepting authority, then to all the minor authorities) for such plan; and in such event the excepting authority shall be deemed not to be a participating authority in respect of the such plan.
>
> • • • • •
>
> 8. A major authority acting pursuant to section 2 shall fully inform each minor authority as to the exercise of any functions and powers exercised on behalf of such minor authority.
>
> 9. Where a major authority is rulable to exercise a particular power of enforcement available to one of the minor authorities, it shall so advise that minor authority.
>
> 10. Participation by any authority in the foregoing Administrative Arrangement commences upon the date it becomes a signatory to this Memorandum ...

[5] The Régie is a statutory body established under the laws of Québec, and exercises responsibilities for the administration and regulation of pension plans within the Province of Québec. The Régie exercises its functions and powers pursuant to the *Supplemental Pension Plans Act,* R.S.Q., c. R-15.1 (the "Québec Act"). At all material times, since 1981, when the plan's registration was transferred from Québec to Ontario, up to the Commission's decision,

2000 CanLII 30139 (ON SCDC)

the Commission has acted as the major authority and the Régie has acted as the minor authority in relation to the Plan under the Reciprocal Agreement.

[6] Pursuant to its delegated powers as major authority, at its meeting on June 26, 1997, the Commission approved the payment of the surplus to McColl-Frontenac. It did so in accordance with the provisions of the Ontario Act.

[7] The Plan specifically provided as follows:

> 13.6. The Plan shall be construed and administered in accordance with the laws of the Province of Québec, the Province of Ontario and the rules of the Department of National Revenue.
>
> • • • • •
>
> 14.2 ... in the event of the termination of the Plan, the Employer shall not be obligated to make any further contributions to the Plan and, if there be any excess to the Plan after the benefits accrued under the Plan have been purchased from an Insurance Company, such excess amount shall be paid to the Employer. It is provided, however, that the provisions of any *Pension Benefits Act* to which the Plan is subject will be applied on termination of the Plan.

[8] The Plan was terminated and wound up as of June 16, 1987. The wind-up report for the Plan indicated the existence of the surplus. On July 22, 1988, the Superintendent of Pensions of Ontario approved the payment of basic benefits to employees in accordance with the wind-up report. The Superintendent communicated to McColl-Frontenac that it might apply to the Commission for withdrawal of the surplus under the terms of the Ontario Act.

[9] The wind-up was effected under the terms of the Ontario Act. From 1987 until the Commission's decision on June 26, 1997, McColl-Frontenac had no dealings or communications with the Régie in relation to the administration and termination of the Plan.

[10] In June 1993, McColl-Frontenac advised the Superintendent that it was proceeding with an application to withdraw the surplus. Pursuant to the procedures established under the Ontario Act, McColl-Frontenac was required to pursue two separate and independent steps:

> (1) An application to the Commission to obtain its consent to the withdrawal of the surplus; and
>
> (2) An application to the Ontario Court (General Division) (now the Superior Court of Justice) to obtain its authorization to the withdrawal of the surplus.

[11] On January 8, 1997, McColl-Frontenac filed a formal notice of the surplus application under step (1) with the Commission. In accordance with the requirements of the Ontario Act, a copy of the Notice was forwarded to members and former members of the Plan in Québec (including Mr. Deschamps). As well, a newspaper notice was published in the Québec press. The Notice disclosed that McColl-Frontenac would be making the surplus application to the

2000 CanLII 30139 (ON SCDC)

Commission, and indicated that interested persons could make written submissions within 44 days to the Commission at an indicated address.

[12] In February 1997, a number of members (including Mr. Deschamps) wrote the Commission and objected to the distribution of the surplus to McColl-Frontenac. At that time, none of these members disputed the Commission's jurisdiction to apply the Ontario Act procedures to the surplus application or raised the issue of the arbitration procedure provided by the Québec Act for withdrawal of surplus applications.

[13] In March 1997, McColl-Frontenac filed its surplus application. The surplus application specifically disclosed that there were former members of the Plan located in Québec.

[14] On April 23, 1997, Mr. Taillon, an actuarial consultant for Le Syndicat national des employes de Leco Inc. (CSN) ("Union") wrote the Commission on behalf of the Québec members of the Plan and identified a number of objections to the proposed distribution of the surplus to McColl-Frontenac. One of these objections was that, as to the Québec members, the surplus application ought to be determined on the basis of the arbitration procedure under the Québec Act. Mr. Taillon states:

> 1. — The Union represents Québec members and the issue must be settled on the basis of the provisions of the Québec *Supplemental Pension Plans Act* (the SPPA). This law specifically provides that a member may request arbitration if no agreement is reached on surplus distribution. *Please note that it is effectively the intention of the Union to request arbitration to decide who will be entitled to the surplus and what share of that surplus will revert to the* Québec *members* (*see sections 230.1 and following of the SPPA*). [Translation.]

[15] The Régie received a copy of Mr. Taillon's letter from him. Its staff had a number of prior telephone discussions with Mr. Taillon regarding the surplus application in March and April 1997.

[16] The Registrar of the Commission responded to Mr. Taillon's letter on April 24, 1997, stating that the Commission would consider Mr. Taillon's representations, and invited him to submit further documentation. The Registrar did not indicate whether the Commission would apply the arbitration procedure under the Québec Act to the surplus application.

[17] On June 10, 1997, the Registrar of the Commission wrote Messrs. Taillon and Deschamps separately to advise them of the upcoming hearing, and that they were both entitled to make written submissions with respect to the surplus application, and could attend the Commission's meeting on June 26, 1997. These separate letters specifically enclosed a copy of the report prepared by the Superintendent's Staff in relation to the surplus application, dated June 6, 1997. The report expressly noted that Mr. Taillon had previously objected to the surplus application on the ground that "the provisions regarding arbitration under the [Québec Act] were applicable".

[18] On June 26, 1997, the Commission convened its scheduled meeting to consider the surplus application. At the meeting, the Commission rendered its decision, consenting to the

2000 CanLII 30139 (ON SCDC)

payment of the surplus to McColl-Frontenac.

[19] On that date, Mr. Deschamps wrote the solicitors for McColl-Frontenac to request arbitration under the Québec Act. The letter was copied to the Commission, but it was not received by the Commission until 1:35 RM. on June 27, 1997. The solicitors for McColl-Frontenac only replied to Mr. Deschamps on October 17, 1997.

[20] On July 9, 1997, the Commission transmitted its decision in writing to McColl-Frontenac indicating that it had consented under the Ontario Act to the withdrawal of the surplus by McColl-Frontenac. The letter was copied to Mr. Taillon, Mr. Deschamps and other members of the Plan but not to the Régie, which up to that point had not communicated with the Commission about the surplus application. The Commission did not give written reasons for its decision.

[21] On July 14, 1997, the Régie communicated directly with the Commission by telephone for the first time about this surplus application. The Commission advised the Régie that it had consented to the withdrawal of the surplus over the opposition of the Québec members. The representative of the Régie reported these communications to her supervisor.

[22] On July 17, 1997, the Régie wrote Mr. Deschamps, indicating that it had already been informed of the decision by the Commission, and that the Régie was aware that the members contemplated an appeal. The next day, the Régie wrote the Commission requesting additional information with respect to the Plan and a copy of its decision. The Commission never replied to this letter although the letter raised questions about the applicability to Québec members of the Québec Act and its arbitration procedure to McColl-Frontenac's surplus application

[23] In October 1997, Mr. Deschamps wrote the Régie and requested the intervention of the Régie on the ground that the employer had refused to apply the arbitration procedure. In response to this request, on November 12, 1997, the Régie wrote the Commission. The Régie advised the Commission that it objected to the decision on the ground that the arbitration procedure should have been applied. On or about November 26, 1997, the Régie rendered a decision whereby it purported under section 3 to except itself from the operation of the Reciprocal Agreement in relation to the Plan.

[24] On December 2nd, 1997, the Régie issued a further order rescinding the consent to the distribution of the surplus granted by the Commission earlier as it affected the Québec members of the plan. The Régie wrote to the solicitors for McColl-Frontenac requiring that the surplus application be submitted to arbitration as required by the Québec Act. On December 22nd, McColl-Frontenac brought an application for judicial review in Québec Superior Court challenging this decision by the Régie. This application was dismissed by Madam Justice Julien on November 26, 1998. [See *McColl-Frontenac Petroleum Inc. v.* Québec (Régie *des rentes*) (1998), 20 C.C.P.B. 18.] That dismissal is presently under appeal to the Québec Court of Appeal.

[25] The Ontario Act allows for an appeal to this court within 30 days of the Commission's decision. An appeal was begun in March 1998 in Ontario by Mr. Deschamps and the Union for judicial review of the Commission's decision. This appeal was abandoned in August 1998.

2000 CanLII 30139 (ON SCDC)

McColl-Frontenac began an application in the Superior Court of Justice for Ontario on November 19, 1997, for the court's authorization to the withdrawal of the surplus in accordance with the requirements of the Ontario Act. On February 10, 1998, the Régie commenced this application in the Divisional Court for judicial review of the Commission's decision dated June 27, 1997. At the request of the parties, McColl-Frontenac's application to the Superior Court of Justice, dated November 19, 1997, was adjourned *sine die* pending the decision of this court on the present application.

2000 CanLII 30139 (ON SCDC)

THE POSITION OF THE RÉGIE

[26] The position of the Régie may be summarized as follows.

[27] The Ontario Act can only apply to employees in Ontario. The provincial legislature cannot extend its effect beyond its own borders. Only the Québec legislature could pass a law that the legislative regime of another province would apply to employees in Québec. In the particular circumstances of this case, Québec has not done so.

[28] The Reciprocal Agreement only has the effect of delegating the administrative functions and powers of the Régie to the Commission. When deciding the merits of the surplus application, the Commission had to apply Québec law to that portion of the application which affected Québec employees. The standard of review in such a case should be correctness. As to Québec members, the Québec Act only provides for referral of such application to arbitration. The Commission could not make a decision which the Régie itself was not empowered to render under Québec law. Therefore, the decision is clearly incorrect.

[29] Even if the standard of review is patent unreasonableness, by not considering and applying Québec law, the Commission's decision, insofar as it affected the Québec members of the Plan, was patently unreasonable.

[30] Further, the Commission breached the Reciprocal Agreement by not properly informing the Régie of its actions, contrary to section 8.

THE POSITION OF MR. DESCHAMPS

[31] In addition to supporting the position of the Régie, Mr. Deschamps submits that the Commission's decision is patently unreasonable because the Commission failed to transmit written reasons for its decision which it is strictly required to do by section 79(5) of the Ontario Act.

THE POSITION OF MCCOLL-FRONTENAC

[32] McColl-Frontenac first submitted that the application should be dismissed on the following preliminary grounds:

1. The Régie has no statutory or constitutional authority to bring this application;

2. The Régie has no private or public standing to seek judicial review of the decision;

3. The Régie failed to exhaust its alternative remedies prior to seeking judicial review of the decision;

4. The Régie has acted with unreasonable delay in seeking judicial review;

5. The Régie is effectively seeking to circumvent the expired appeal period; and

6. The Régie and Mr. Deschamps have, by their conduct, waived their rights to object to the Commission's procedure.

[33] McColl-Frontenac further submits that the application should be dismissed on its merits on the following grounds:

1. The Commission is a specialized administrative tribunal, and its decisions should be subject to a high level of curial deference. This decision should only be subject to judicial intervention if it is patently unreasonable, which it is not.

2. There is no evidence that the Commission failed to consider the potential application of Québec law.

3. The Commission's decision was reasonable. The decision was consistent with the established understanding and practice within the pension industry, recognized and fostered by provincial pension authorities under the Reciprocal Agreement.

4. In any event, the Commission's decision was correct. The signatories to the Reciprocal Agreement delegated to the major authority by section 2, their "statutory functions and powers", to apply a single uniform procedural framework for the registration, regulation and termination of an inter-provincial pension plan. In this instance, the Commission properly exercised its delegated powers as major authority and determined the surplus application in accordance with the procedural framework of the Ontario Act.

5. In any event, the Commission's decision was correct as a matter of Québec law, since the Québec arbitration procedure did not apply in this particular case because:

(a) The Régie and the intervener Leo Deschamps failed to deliver a formal application for arbitration prior to the decision;

(b) The legal rules governing the determination and allocation of surplus assets of a terminated pension plan constitute "solvency standards" which are subject to a specific exemption under the Québec Act;

(c) The arbitration procedure under the Québec Act can only be applied to surplus assets of a plan that, at termination, covers employees located exclusively in Québec. Under Québec law, a pension surplus cannot be legally apportioned after termination

2000 CanLII 30139 (ON SCDC)

into discrete amounts of surplus attributable to employees in different provinces.

THE COMMISSION'S POSITION

2000 CanLII 30139 (ON SCDC)

[34] The Commission takes no formal position on the merits of the application by the Régie nor did it file any additional evidence or material. However, counsel did make the following submissions:

1. The Commission proceeded conscientiously and in good faith on what it understood was the proper practice at that time;

2. Section 79(5) of the Ontario Act should be interpreted to mean that written reasons are only transmitted when written reasons are actually given. Reasons are as a matter of practice only given when the nature of the procedure requires them. There is no positive duty to give reasons in every case;

3. Section 8 of the Reciprocal Agreement does not set out any specific manner how or when a major authority is to "inform" a minor authority as to an exercise of the functions and powers of the minor authority. Section 8 is, however, expressed in the past tense so that it should be interpreted to mean after the function or power has been exercised.

4. In previous cases where the surplus attributable to Québec employees was severed by the Commission and dealt with by arbitration in Québec, for example in The Great-West Life Assurance Company Canadian Agents Pension Plan, a decision made by the Commission on March 26, 1998 (Applicant's Record Vol. I, Tab 4(K), pp. 153-4), the Commission was not asked to adjudicate this issue. Rather the matter proceeded in that fashion because of previous agreement or accommodation between the parties to the plan.

5. A new procedural framework for surplus applications involving employees in more than one province was put in place by the Commission only after this case, at the request of the Régie.

6. The standard of review should be the one established by the Ontario Court of Appeal in *GenCorp Canada Inc.* v. *Ontario* (*Superintendent, Pensions*) (1998), 158 D.L.R. (4th) 497, 503, that the reviewing court will only intervene if the Commission's decision is not reasonable *simpliciter.*

ANALYSIS

THE PRELIMINARY OBJECTIONS

1. Absence of statutory or constitutional authority

[35] Mr. Ritchie correctly points out that a provincial legislature has no constitutional jurisdiction to promulgate legislation intended to operate beyond the territorial limits of the

province. As an extension of this constitutional principle, no provincial court or administrative tribunal established by provincial legislation may operate or extend its process or exercise its statutory functions or powers beyond the territorial limits of the province.

[36] In support of the above principles McColl-Frontenac relies on the cases of *McGuire v. McGuire and Desordi,* [1953] O.R. 328, [1953] 2 D.L.R. 394 (C.A.), and *Ewachniuk* v. *Law Society of British Columbia* (1998), 156 D.L.R. (4th) 1 (B.C.C.A.). In both cases the provincial tribunal was attempting to exercise its functions and powers beyond the provincial territory for which it was created. The question becomes whether in bringing this application the Régie is exercising its regulatory functions and powers?

[37] The functions and powers of the Régie are to regulate pension plans covering Québec employees. By virtue of section 249 of the Québec Act, the Régie may enter into agreements with another provincial pension agency to, among other things, delegate its powers to that agency. When it brings an application in Ontario to have the Commission comply with the terms of the agreement the Régie is not carrying on its regulatory functions. At no time is the jurisdiction of the Commission to hear McColl-Frontenac's application being challenged. The Régie is not trying to substitute itself for the Commission in this matter. In fact it is simply asking that the matter be referred back to the Commission so that the Commission may deal with it in accordance with the Reciprocal Agreement. The Régie is attempting to enforce the terms of the Agreement. Such an action can only be brought against the Commission in Ontario. The right of the Régie to take such action must be necessarily implied from the Agreement itself, and the Commission must be deemed to have accepted this right when it entered into the Agreement.

[38] McColl-Frontenac argues that in any event the Régie has not been given the specific statutory power to bring this action and that without such express authority it lacks legal capacity to do so. McColl-Frontenac relies on the decision of the Supreme Court of Canada in *Director of Investigation and Research* v. *Newfoundland Telephone Co.,* [1987] 2 S.C.R. 466, 45 D.L.R. (4th) 570 *sub nom. Newfoundland Telephone Co. Ltd. v. TAS Communications Systems Ltd.* That case makes it clear that while statutory authority to be a party to legal proceedings is required, that authority may be either expressed or implied. The Québec Act gives the Régie all the powers and capacities of a natural person. Coupled with that it gives the Régie the power to enter into the Reciprocal Agreement. It is a reasonable interpretation of the statute to conclude that the Québec Act at the very least grants the Régie the implied authority to bring this application in order to enforce the Agreement.

2. *Absence of private or public standing*

[39] McColl-Frontenac contends that the Régie is not an aggrieved person nor has it suffered an injury to an identifiable personal interest. As a result thereof it does not have private standing to bring this application. McColl-Frontenac further submits that the Régie does not have public standing because it does not have a genuine interest in the Commission's proceeding and there are other reasonable and effective means by which this particular issue could have been brought before the courts.

[40] As a party to the Reciprocal Agreement, the Régie alleges that the Commission

2000 CanLII 30139 (ON SCDC)

breached that Agreement. If the Régie were right in its position it would certainly qualify as an aggrieved party. The question raised is certainly a serious and justiciable issue which can only be addressed in the context of an application for judicial review. The Régie was not a party to the surplus application and therefore could not appeal from the Commission's decision. The only way of correcting this particular decision of the Commission, if need be, is by bringing the present application for judicial review. Moreover, counsel for all parties have submitted that the present application is of utmost importance to the pension industry. We are all of the view that the Régie has public standing to bring this application.

3. Alternative remedies, unreasonable delay and waiver

[41] We are all of the view that the evidence does not warrant a dismissal of this application on any of these grounds.

[42] The Régie was aware in general terms that a surplus application was being made and that the plan in question included Québec employees. Moreover it knew as a result of Mr. Taillon's letter, dated April 24, 1997, that the Québec members were asking that the Québec Act apply and that the matter be referred to arbitration. Under the terms of the Reciprocal Agreement, the Régie had delegated to the Commission its functions and powers to deal with this application.

[43] McColl-Frontenac argues that on the basis of the facts of this case, the Régie ought to have excepted itself under paragraph 3 of the Reciprocal Agreement in respect of this particular Plan, before the Commission made its decision, This is not a reasonable position unless it is established that the Régie could have known in advance what the Commission's decision would be. This is not an inference that can be made from the evidence before the court. The Commission did not inform the Régie in advance how it intended to rule on this issue. The Commission did not provide any information about its decision to the Régie until an officer of the Régie called the Commission on July 14th, some 18 days after the hearing.

[44] The notes of that conversation and the subsequent letter of July 18th clearly establishes that there was, to say the least, a breakdown in communication between the two agencies. The two officials would appear to be talking about two different things.

[45] Furthermore, the Commission never replied to the letter of the Régie dated July 18, 1997, although the Régie was asking for relevant information on the very issue before this court. Subsequently, the Régie took steps to except itself under the Reciprocal Agreement and rescinded the order of the Commission. It was not unreasonable for the Régie to then attempt to solicit the co-operation of McColl-Frontenac in an effort to settle the matter without recourse to the courts. In the circumstances there is neither unreasonable delay nor waiver of rights by the Régie.

THE STANDARD OF REVIEW

[46] The Ontario Court of Appeal has recently held that the Commission is an expert and specialized tribunal and that its decisions are generally subject to a "considerable degree of curial deference." A decision by the Commission within its specialized mandate is subject to

2000 CanLII 30139 (ON SCDC)

review according to a standard of "reasonableness *simpliciter".* Even more recently, the Divisional Court has held that procedural rulings of the Commission in respect of a surplus application are within the tribunal's "particular expertise" and are therefore subject to "considerable deference" on review.

> *GenCorp Canada Inc.* v. *Ontario* (*Superintendent, Pensions*) (1998), 158 D.L.R. (4th) 497 (Ont. C.A.), at pp. 502-505 *C.U.P.E. Local 185* v. *Etobicoke* (*City*) (1998), 17 C.C.P.B. 278 (Ont. Div. Ct.), at pp. 279-80

[47] There is no reason to depart from the application of this standard of review in this case. The Régie does not challenge the jurisdiction of the Commission to deal with the surplus application. Notwithstanding Mr. Ritchie's able argument to the contrary, the evidence overwhelmingly establishes that the Commission made a deliberate choice to apply the Ontario Act to all members of the Plan including Québec members, to the complete exclusion of the procedure provided under the Québec Act. The real issue in this case is whether the Commission's interpretation of the Reciprocal Agreement and hence its decision to apply the provisions of the Ontario Act exclusively was reasonable in all the circumstances.

WAS THE COMMISSION'S DECISION REASONABLE?

[48] McColl-Frontenac makes three submissions on this point.

> 1. The decision is reasonable because it was consistent with the established understanding and practice within the pension industry, recognized and fostered by provincial pension authorities.
>
> 2. The decision is not only reasonable but it is correct. The purpose of the Agreement was to facilitate and harmonize the regulation of inter-provincial pension plans. In order to achieve this aim file parties to the Agreement delegated to the major authority the power to apply a single uniform procedural framework to all aspects of pension regulation including surplus application. The Commission's decision is therefore in accordance with the fundamental purpose and intent of the Reciprocal Agreement.
>
> 3. The decision was not only reasonable but correct since the Québec arbitration procedure did not apply even as a matter of Québec law.

[49] Dealing with the last point first, the submission that a formal request was not made and, therefore, that the arbitration procedure was not triggered is not supported by the evidence. Mr. Taillon's letter clearly indicates that arbitration was being requested. Moreover, under Québec law the evidence does not establish that a specific formal application is required to trigger the arbitration procedure. In any event, in the absence of an agreement between the employer and a requisite number of plan members, arbitration appears to have been the only available procedure under Québec law.

[50] Further, McColl-Frontenac contends the Québec Act specifically exempts the surplus application from arbitration by virtue of the specific exemption for "solvency standards". A reasonable interpretation of the words "solvency standards" cannot be said to include surplus

2000 CanLII 30139 (ON SCDC)

applications. Regulation of solvency standards mainly arises while a pension plan is ongoing. Surplus applications arise only after a plan has been terminated and wound up.

[51] Finally, McColl-Frontenac submitted expert evidence to the effect that under Québec law a pension surplus cannot be legally apportioned after termination of a plan. That evidence is far from convincing. The evidence of the Régie to the contrary is much more convincing. In addition, this court cannot overlook the decision of Madam Justice Julien who clearly indicates she sees no difficulty with such an apportionment. The evidence reveals that other surpluses have been apportioned after termination, for example The Great-West Life pension plan surplus. See item 4 in paragraph [34] above.

[52] In order to properly deal with the other two grounds raised by McColl-Frontenac, it is necessary to refer more extensively to the sections of the Québec Act and the Ontario Act which grant power to their respective pension authorities to enter into reciprocal agreements. I will also refer to other sections of the Québec Act which specifically exempt certain aspects of interprovincial plans from Québec law and also relevant interpretation bulletins issued by both pension authorities.

[53] Section 249 of the Québec Act states:

> 249. The Régie may enter into agreements according to law with any government, government department, international body or agency of a government or international body for the purposes of this Act.
>
> The *agreements may,* in particular,
>
> (1) where a pension plan is governed both by this Act and by an Act of a legislative body other than the Parliament of Québec, *determine on what conditions and to what extent each Act applies to the plan in respect of the employees referred to in section 1 who are parties to the plan* and prescribe any other rule applicable to the plan;
>
> (2) *determine on what conditions and to what extent this Act applies to benefits or assets transferred from a pension plan governed by this Act to a pension plan governed by an Act of a legislative body other than the Parliament of* Québec*,*
>
> (3) *provide for the delegation of powers* that this Act confers on the Régie or that an Act of a legislative body other than the Parliament of Québec confers *on a similar* agency.
>
> Every agreement bearing on a matter referred to in the second paragraph must be tabled in the National Assembly within 15 days after the date on which it is entered into if the Assembly is in session or, if not, within 15 days after the opening of the next session or resumption. *The agreement acquires force of law from the time it is tabled in the National Assembly.* [Emphasis added.]

[54] Section 95 of the Ontario Act states:

> 95(1) The Commission may, subject to the approval of the Lieutenant Governor in

2000 CanLII 30139 (ON SCDC)

Council,

(*a*) *enter into agreements* with the authorized representatives of another province or the Government of Canada to provide *for the reciprocal application and enforcement of pension benefits legislation,* the reciprocal registration, audit and inspection of pension plans and for the inspection of pension plans and for the establishment of a Canadian association of pension supervisory authorities;

(*b*) authorize a Canadian association of pension supervisory authorities to carry out such duties on behalf of the Commission as the Commission may require; and

(*c*) *delegate to a pension supervisory authority or the government of a designated province such functions and powers under this Act as the Commission may determine* and the Commission may accept similar delegations of functions and powers from a pension supervisory authority or the government of a designated province.

(2) Where a pension plan required to be registered in Ontario is registered in a designated jurisdiction, *the Commission by order may limit the application of this Act and the regulations to the pension plan and authorize the application of the law of the designated jurisdiction in respect of the pension plan. 1987, c. 35, s. 96.* [Emphasis added.]

[55] The statutory provisions of the Québec Act and the Ontario Act are broad enough to authorize the Régie and the Commission to enter into an express agreement as to when one or the other, as major authority, will recognize and apply the law of the minor authority. They did not do so in the Reciprocal Agreement. According to the record before the Court, they did not do so prior to the Commission's decision on June 26, 1997. The reasonableness of the Commission's decision on that date, therefore, does not depend on the provisions of the Reciprocal Agreement.

[56] What is also of importance is that sections 21, 53 and 92 of the regulations enacted pursuant to the Québec Act specifically exempts inter-provincial plans from the provisions of the Québec Act dealing with registration, inspection, solvency requirements and investment rules. [See *General Regulation respecting Supplemental Pension Plans,* R.R.Q. 1981, c. R-17, r. 1.] It is reasonable to conclude that only the items specifically mentioned were intended to be exempted.

[57] In a publication providing annotations and comments on the Québec Act, August 1996, the Régie had this to say about reciprocal agreements:

Pursuant to these agreements it is provided that, in Québec, the law which applies to the pension plan will be applied to the individual rights of workers (*for example, the individual rights of Ontario workers are governed by the law of Ontario*) *while the "collective" aspects of the plan such as registration, inspection, solvency and investments which are subject to sections 21, 53 and 92 of the General Regulation respecting Supplemental Pension Plans* (*these sections are still in effect pursuant to Section 69 of the Regulation*) *— are governed by the law of the place where the greatest number of members work.* To

2000 CanLII 30139 (ON SCDC)

> give effect to these arrangements, *the other provinces who are parties thereto* (as well as the Northwest Territories and Yukon Territory) *have adopted rules similar to those in effect in Québec.* It is therefore incumbent upon the authority responsible for the supervision of pension plans in each province *to apply the appropriate law to each of the members ...* [Translation; emphasis added.]

[58] In its June 1992 information bulletin, the Commission had this to say about reciprocal agreements:

> Currently, the pension benefits legislation of a particular province or territory of Canada applies to members employed in that province or territory. Plans which have employees in various provinces *must therefore apply the laws of more than one jurisdiction to the same plan. The existing Reciprocal Agreement among pension regulators, signed in 1968, requires pension regulators to administer the pension laws of other jurisdictions in relation to those plan members employed in such other jurisdictions.*
>
> Sponsors of multi-jurisdictional plans face the administrative burden and added expense of applying a patchwork of differing (and sometimes contradictory) legislative requirements to various members of the same plan. As a result, *a practice has been established whereby the rules of the jurisdiction of a member's employment are applied to benefit entitlement issues,* (*e.g. vesting*) *but the jurisdiction of registration of the plan are applied to administrative issues* (*such as payment of fees, filing, disclosure, accounting and auditing, etc.*).
>
> The practice of distinguishing entitlement issues from administrative issues has helped to reduce the administrative burden on multi-jurisdictional plans. However, the informal agreement has proved to be inadequate in accounting for differing approaches to benefit and *surplus entitlement* taken by the various provinces. [Emphasis added.]

[59] McColl-Frontenac submits that there was a practice adhered to by both the Régie and the Commission which allowed the Commission to deal with the surplus application solely under the Ontario Act. First of all there is nothing in the interpretation bulletins to support this position. In fact the interpretation bulletin of the Commission is to the contrary since it raises the fact that "the informal agreement has proved to be inadequate in accounting for differing approaches to benefit and *surplus entitlement* taken by the various provinces". In other words, the administrative practice may work when the rules of both provinces are the same but not when they differ. In this particular case the rules differed substantially. In fact, the Régie did not have the power to decide surplus allocation. The Commission could not even rely on the powers delegated to it by the Régie.

[60] McColl-Frontenac placed reliance on an article published in February 1999 by Mr. Martin Rochette the expert who testified on behalf of the Régie on this application. In that article, Mr. Rochette indicates that a general understanding had developed in the industry over the last 30 years to the effect that certain aspects of the administration of a plan, including surplus distribution, would be dealt according to the law of the major authority. However, this statement is qualified by his further statements in the same article that (1) as the law stands "the major authority must apply the law of the minor authority" and (2) "the Régie and the

2000 CanLII 30139 (ON SCDC)

Commission have more or less endorsed" this practice. It is also noteworthy that in his affidavit and during his cross-examination, Mr. Rochette has steadfastly testified to the effect that the Régie never officially endorsed this practice.

[61] The decision of the Commission is not correct nor is it reasonable. We conclude that the Commission's decision was not reasonable as a result of the cumulative effect of the following:

1. In the absence of specific provisions stating otherwise, either in the reciprocal agreement or in the Québec Act, the Commission knew or ought to have known as a matter of constitutional law that the law of Québec applied to McColl-Frontenac's surplus application in so far as it affected the Québec members.

2. The Plan itself, which was part of the material filed before the Commission, provides that it will be construed and administered in accordance with the laws of Québec and Ontario. It is a reasonable inference from this provision that the rights of Québec members of the Plan would be governed by Québec law.

3. The Reciprocal Agreement clearly does not expressly provide to what extent each Act applies, as could have been provided for in accordance with subsection 249(1) of the Québec Act and subsection 95(1)(*a*) of the Ontario Act.

4. The Commission's own information bulletin of June 1992 calls in question the "administrative practice" of applying only Ontario law as it is said to relate to surplus entitlement, when the laws of the provinces differ.

5. The Commission was advised several months before its decision that the Québec members were requesting that the Québec Act, including the arbitration procedure, apply to the surplus application. Since no written reasons were given by the Commission for its decision, there is no way for the court to know whether this request was considered or was considered and denied.

6. The Commission did not give written reasons for its decision. Courts have said in the past that the existence of" clear and articulate reasons" militates in favour of a finding that a decision is reasonable (see *Gencorp Canada, supra,* at p. 505). In this case, the Commission failed to give any reasons whatsoever for its decision. This fact clearly militates against the reasonableness of the decision. This is so even if the words of section 79(5) may not justify imposing a positive duty on the Commission to provide reasons in every case.

7. In view of the express choice of law provisions of the Plan and the absence of any statutory provision exempting McColl-Frontenac's surplus application from Québec law, the Commission's decision was unreasonable and contrary to law.

2000 CanLII 30139 (ON SCDC)

CONCLUSION

[62] Accordingly, for all of the above reasons, we allow the application, quash the decision of the Commission of June 26th, 1997, insofar as it affects the Québec members of the Plan and remit the matter to the Commission for reconsideration. We also direct the Commission to provide written reasons for any further decision in this matter.

[63] Order accordingly.

[64] Application granted.

2000 CanLII 30139 (ON SCDC)

TAB 22

2009 ABCA 240
Alberta Court of Appeal

Kerr Interior Systems Ltd., Re

2009 CarswellAlta 942, 2009 ABCA 240, [2009] 8 W.W.R. 1, [2009] A.W.L.D. 2853, [2009] A.W.L.D. 2854, [2009] A.W.L.D. 2855, [2009] A.J. No. 675, 178 A.C.W.S. (3d) 527, 457 A.R. 274, 457 W.A.C. 274, 54 C.B.R. (5th) 173, 6 Alta. L.R. (5th) 279, 80 C.L.R. (3d) 169

Kerr Interior Systems Ltd. and Composite Building Systems Inc. (Respondents / Debtors) and Kenroc Building Materials Co. Ltd. (Appellant / Creditor)

Kerr Interior Systems Ltd. and Composite Building Systems Inc. (Respondents / Debtors) and Superior Plus LP, and Winroc, a division of Superior Plus LP (Appellant / Creditor)

R. Berger, C. O'Brien, J. Watson JJ.A.

Heard: April 1, 2009
Judgment: June 25, 2009
Docket: Edmonton Appeal 0803-0135-AC, 0803-0136-AC

Proceedings: reversing *Kerr Interior Systems Ltd., Re* (2008), 91 Alta. L.R. (4th) 202, 70 C.L.R. (3d) 46, 449 A.R. 185, [2008] 12 W.W.R. 355, 2008 ABQB 286, 2008 CarswellAlta 661, 42 C.B.R. (5th) 293 (Alta. Q.B.)

Counsel: J.S. Ehmann, Q.C. for Appellant, Kenroc Building Materials Co. Ltd.
J.G. Hanley for Appellant, Superior Plus LP
D.R. Bieganek for Respondents, Kerr Interior Systems Ltd., Composite Building Systems Inc.
J.H. Hockin for Monitor of the Respondent (not a party to the appeal)

Subject: Insolvency; Civil Practice and Procedure; Contracts; Corporate and Commercial

APPEAL by opposing creditors from judgment reported at *Kerr Interior Systems Ltd., Re* (2008), 91 Alta. L.R. (4th) 202, 70 C.L.R. (3d) 46, 449 A.R. 185, [2008] 12 W.W.R. 355, 2008 ABQB 286, 2008 CarswellAlta 661, 42 C.B.R. (5th) 293 (Alta. Q.B.), sanctioning Plan of Arrangement.

***C. O'Brien J.A.*:**

Introduction

1 I have had the advantage of reading a draft of the judgment prepared by Watson J.A., which fairly sets out the factual context, and identifies the issues in this appeal. I agree that the appeal of Winroc should be allowed for the reasons given by him. However, I would also allow the appeal of Kenroc, on the ground that it also was a beneficiary of the statutory trust created by the Saskatchewan legislation.

Facts

2 Briefly, the background of these two related appeals is as follows: Kenroc Building Materials Co. Ltd. (Kenroc) and Superior Plus LP and Winroc, a division of Superior Plus LP (collectively, Winroc) appeal the chambers judge's decision sanctioning a Plan of Arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA), proposed by the respondents, Kerr Interior Systems Ltd. (Kerr) and Composite Building Systems Inc. (Composite).

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

3 Kenroc and Winroc both supplied building materials to Kerr for a construction project in Saskatoon owned by 101051911 Saskatchewan Ltd. (101). Kerr and Composite encountered financial difficulties and initiated proceedings under the CCAA. On November 7, 2007, they were granted a Protection Order under the CCAA. At the time of that order, 101 owed Kerr money, while Kerr owed money to both Winroc and Kenroc for building materials, all in relation to Second Avenue Lofts, the Saskatoon construction project (the project).

4 On November 6, 2007, the day before the Protection Order was granted, Winroc filed a builder's lien against the property owned by 101 in the amount of $46,425.26. On November 14, 2007, Kenroc filed a builder's lien against the property owned by 101 in the amount of $103,236.95. No other creditors filed liens. On January 18, 2008, 101 paid $150,000.00 into court in Saskatchewan as security for the builder's liens, which were discharged from title without prejudice to Kerr's legal position. The funds paid into court by 101 came out of the amount owing by 101 to Kerr for work performed on the project.

5 The proposed Plan of Arrangement listed Kenroc and Winroc in the class of unsecured creditors with all other creditors.

6 Kenroc and Winroc opposed court approval of the Plan on the basis that they were secured creditors based on their status as holders of valid builders' liens or trust claims. The chambers judge sanctioned the Plan, concluding that Kenroc and Winroc were not secured creditors under the CCAA because that status is only created when there is a lien against the debtor's property, and the liens filed by Kenroc and Winroc were against 101's property. Nor did Kenroc and Winroc's trust claims fall within the definition of secured creditor under the CCAA as they were merely statutory or "deemed" trusts that did not attach to a traceable or existing asset belonging to the debtors at the time the original stay was granted.

Legislation

7 The definition of a secured creditor under section 2 of the CCAA includes the beneficiary of a trust in respect of all or any property of the debtor companies, in this case Kerr and Composite. Section 2 provides:

> "secured creditor" means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds

8 The governing provisions of the Saskatchewan *Builders' Lien Act*, S.S. 1984-85, c. B-7.1 (S.B.L.A.), are as follows:

> 6(1) All amounts received by an owner, other than the Crown, that are to be used in the financing of an improvement, including the purchase price of the land and the payment of prior encumbrances, constitute, subject to the payment of the purchase price of the land and prior encumbrances, a trust fund for the benefit of the contractor.
>
> (2) Where the owner provides his own capital or where the owner is the Crown, and where amounts become payable under a contract to a contractor, the moneys in the hands of the owner or received by him for payment under the contract at any time thereafter constitute a trust fund for the benefit of the contractor.
>
> (3) Where the owner's interest in an improvement is sold by the owner, an amount equal to the positive difference between:
>
> > (a) the value of the consideration received by the owner as a result of the sale; and

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(b) the reasonable expenses arising from the sale and the amount, if any, paid by the vendor to discharge any encumbrances which are entitled to priority under this Act;

constitutes a trust fund for the benefit of the contractor.

(4) The owner is the trustee of the trust fund created by subsections (1) to (3), and he shall not appropriate or convert any part of the trust fund to his own use or to any use inconsistent with the trust until the contractor is paid all amounts related to the improvement owed to him by the owner.

. . . . .

7(1) All amounts:

(a) owing to a contractor, whether or not due or payable; or

(b) received by a contractor;

on account of the contract price of an improvement constitute a trust fund for the benefit of:

(c) subcontractors who have subcontracted with the contractor and other persons who have provided materials or services to the contractor for the purpose of performing a contract; and

(d) labourers who have been employed by the contractor for the purpose of performing the contract.

. . . . .

33 Every lien is a charge on the holdback required to be retained by section 34, and subject to subsection 28(3), is a charge upon any additional amount owed in relation to the improvement by a payer to the contractor or to any subcontractor whose contract or subcontract was in whole or in part performed by the provision of services or materials giving rise to the lien.

Analysis

9 Kenroc's position must be assessed, of course, at the date of the stay, namely, November 7, 2007. Neither the subsequent filing of its lien, nor the payment into court, can improve its entitlement.

10 As at November 7, 2007, 101 owed Kerr the amount of $302,922.09 for materials and services provided to the project. As of that date, Kerr owed Kenroc $103,236.95 for materials supplied to the project.

11 I interpret section 6(2) of the S.B.L.A. to impose a trust for the benefit of Kerr, with respect to the amount of $302,022.09 owed by 101 to Kerr. Thus, Kerr had an equitable interest in this trust fund.

12 I further interpret section 7(1) of the S.B.L.A. to mean that the amount of $302,022.09 owed to Kerr was impressed with a trust for the benefit of Kenroc, among others, as a subcontractor.

13 Accordingly, there was what may be called a double trust. Kerr had a trust interest in the monies owed by 101, and Kenroc had a trust interest in the monies owed to it by Kerr, which interest was secured by the first trust.

14 These trust interests were not dependent upon the filing of a lien and, survived, even if a lien was not registered within the appropriate time frame: *Arthur Andersen Inc. v. Merit Energy Ltd.*, 2004 SKCA 124, [2005] 4 W.W.R. 603 (Sask. C.A.), paras. 32-34. In that case, the Saskatchewan court concluded at para. 34:

Section 20 codifies the law contained in *Minneapolis-Honeywell Regulator Co. Ltd. v. Empire Brass Manufacturing Co.* [[1995] S.C.R. 694]. In that case, it was argued that a potential lien claimant lost not only the right of lien but the

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

rights conferred upon him under the trust provisions, if he or she failed to register. The Supreme Court of Canada rejected this idea and held that the rights of the trust beneficiary are unimpaired by the lapse of the right to claim a lien.

15 I do not think it necessary to rely in this case upon section 33 of the S.B.L.A., which creates a charge on the holdback; however, that section confirms the intent of the legislation to grant lien claimants a secured position.

16 In short, Kenroc's equitable interest in the monies owed to it by Kerr constituted a trust in respect of the property of Kerr, being the latter's equitable interest in the monies owed to it by 101, such as to constitute Kenroc a secured creditor within the meaning of section 2 of the CCAA. The trust attached to the contractor's receivable, which is property of the contractor, and thereby falls within the CCAA definition of secured creditor.

17 The filing of the lien was not necessary to perfect the trust obligation, which was independent of the lien. The amount owed to Kenroc was ascertainable as at November 7, 2007. It was the amount of $103,236.98, and that is the extent of the trust interest (subject to adjustments). The determination of the exact amount owing under a secured instrument on a given date is commonplace and does not create any uncertainty.

18 The trust fund obligation was "reasonably ascertainable" at the material date. In *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 (S.C.C.), McLachlin J., as she then was, speaking for the majority, stated at para. 19 that whether a statute created a trust depends on the facts of the particular case. She added that if the money collected is "identifiable or traceable", then a trust within the ordinary meaning of that term should be given effect. Here, pursuant to the Saskatchewan statute, the monies owed by 101 to Kerr, and in turn owed by Kerr to Kenroc, are impressed with a trust. All of these amounts were readily ascertainable or identifiable as at November 7, 2007.

19 My colleague refers in his judgment to other subcontractors of Kerr who might have filed liens but did not so do. I question the relevance of this concern. In the first place, there was no evidence of any trusts with respect to the monies owed by 101 to Kerr, relative to the subject project, except for the claims of Kenroc and Winroc. While the Monitor had envisaged other potential liens against Kerr, he could not say whether those potential claims arose with respect to the subject Saskatchewan project, or other projects being supplied by Kerr. In any event, no other creditor advanced a trust claim. If another creditor could establish a trust claim, then it should have filed proof in accordance with the applicable Claims Procedure.

20 I am reluctant to construe the CCAA to defeat the trust obligations imposed by the Saskatchewan legislation in favour of subcontractors. Nor is there any reason to interpret the Saskatchewan statute in a narrow and strict manner. This is not colorable legislation. The legislation gives these trusts a broad and early scope.

21 The purpose of the Saskatchewan legislation is to ensure that subcontractors are secured, at least to a minimal extent, and that they obtain payment to that extent before general creditors. I resist any attempt to carve up the statute into little parts - it is all one scheme designed to protect subcontractors. As pointed out by Winroc, the suppliers rely upon the protections provided by the statute in their assessment of credit risk. While the definition of secured creditor in the federal statute must prevail, there is no need here to construe it in a fashion that strips the protections at a time when the suppliers most need it; i.e., in dealing with the insolvent contractors, such as Kerr.

Conclusion

22 The appeals both of Winroc and Kenroc are allowed. Their secured claims are both directed to be dealt with in the manner outlined by Watson J.A., respecting the Winroc trust claim.

***R. Berger J.A.*:**

I concur.

***J. Watson J.A.* (dissenting in part):**

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Introduction

23 These appeals relate to the same essential question, namely whether a chambers judge erred in sanctioning a Plan of Arrangement under the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") respecting the respondents ("Kerr" and "Composite"). That Plan did not (a) recognize a secured creditor status that the appellants ("Winroc" and "Kenroc") asserted for themselves, nor (b) give Winroc and Kenroc a separate voting class on the Plan, nor (c) give Winroc and Kenroc a priority claim to the money paid into court.

24 The Plan put Winroc and Kenroc into a class with other unsecured creditors of Kerr and Composite. As such, they would receive less than 100% on their claims, like others in that creditor class. The chambers judge approved the Plan: (2008), 91 Alta. L.R. (4th) 202, [2008] A.J. No. 547, 2008 ABQB 286 (Alta. Q.B.) (the "Reasons").

25 Winroc and Kenroc say they had valid and effective builders' liens and / or trust claims against money which had been paid into court. That money had been paid into court by a third party, 101051911 Saskatchewan Ltd. ("10105"), in order to vacate builders' liens filed by Winroc and Kenroc against 10105's land improvement project in Saskatoon. Winroc and Kenroc had supplied materials to Kerr and Composite, which had in turn worked on 10105's project. Winroc and Kenroc read the Saskatchewan *Builders' Lien Act*, S.S. 1984-85-86, c. B- 7.1 ("SBLA") to say they had a secured claim against Kerr upon that money being paid into court.

26 In addition to claiming priority to the money in court (which would only cover part of their claims against Kerr), Winroc and Kenroc also say that their special position put them into their own special creditor class and thus entitled them to separate voting rights under the Plan of Arrangement pursuant to sections 4, 5 and 6 of the CCAA. As their own special creditor class, Kenroc and Winroc could influence the Plan because the chambers judge held that, under s. 6 of the CCAA, she could only sanction the Plan with majority support from every class. The chambers judge did not find them entitled in priority to either the funds paid into court or as a separate creditor class. She agreed with Kerr, Composite and their CCAA Monitor that they belonged in the unsecured creditors' class where they were outvoted such that the Plan of Arrangement was accepted.

27 Winroc and Kenroc alternatively submit that, even if they were not entitled to be in a special class, the Plan of Arrangement was not fair and reasonable as it did not ensure that they got paid 100% of their lien claims out of the money deposited in court. The chambers judge did not agree. Although I agree with aspects of the chambers judge's reasoning, I also agree in part with Winroc's position, and would allow the appeal but only to that extent. My colleagues go further and, for well expressed reasons, allow Kenroc's appeal also.

Context

28 Kenroc and Winroc supplied building materials to Kerr which were said to be part of Kerr's contribution to 10105's construction project called "2nd Avenue Lofts" in Saskatoon. Composite pre-fabricated special walls, while Kerr installed special walls, ceilings, floors and partitions. Composite and Kerr found themselves in financial difficulty in 2007 in part by having given fixed price bids on projects in an era of rapidly escalating labour and material costs. Realizing their predicament, Composite and Kerr sought support of their banker, the Royal Bank of Canada, and their major secured creditor, Co-operators Investment Counselling Ltd., in arranging a compromise of their debts so that they could complete their contracts (including that with 10105) and stay in business.

29 On November 6, 2007, Winroc filed a builders' lien under the SBLA against 10105's Saskatoon project claiming $46,425.26. Winroc says that Kerr owed approximately $170,000.00 more to Winroc than was covered by the lien.

30 On November 7, 2007, the chambers judge granted an order under the terms of the CCAA staying any "proceeding or enforcement process in any court or tribunal" as well as "the taking of any self-help or enforcement process in any court or tribunal" and "the taking of any self-help or seizure remedies" except with leave of the Court.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

31 On November 9, 2007, Winroc also sued Composite in Alberta Court of Queen's Bench for $138,749.27. On November 14, 2007, Kenroc filed a builders' lien against the 10105 project for $103,236.95. On January 28, 2008, 10105, which owed Kerr $302,022.09 at the time, paid $150,000.00 into the Saskatchewan Queen's Bench to discharge the liens filed by Winroc and Kenroc but without prejudice to Kerr's legal position.

32 Kerr continued to work on their contracts on a cash flow basis that not expand their debts and indeed, reduced their debt. Kenroc continued to supply materials to Kerr for the 10105 project and had been paid $223,000.00 by Kerr since the stay order.

33 The Plan of Arrangement placed before the chambers judge in April, 2008, would have seen 34 unsecured creditors receive 52% of the debt owed to them by Kerr and / or Composite, thus to settle approximately $5,000,000.00 of debt for about $2,600,000.00. Kenroc and Winroc were put in the unsecured creditors class under the Plan. The Monitor opined that six other members of that class also potentially had similar lien or trust claims. It calculated the total claims of eight such parties (including Winroc and Kenroc) was $574,536.51. Of the eight creditors the Monitor felt might be better off under a lien fund, six of them voted for the Plan. Of the unsecured creditors class, 92% in number and 91% in value voted in favour of the Plan of Arrangement.

Legislation

34 The chambers judge found it unnecessary to determine whether there was any conflict between the CCAA and SBLA in this case: Reasons, paras. 26 to 31. No party served a notice to challenge the reach of either statute on grounds of paramountcy or of inter-jurisdictional immunity. None of the Attorneys General of Canada, Saskatchewan or Alberta participated in the submissions before her nor before us. The CCAA has been recognized as an exercise of the federal insolvency power for decades: *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513, [2008] O.J. No. 3164, 2008 ONCA 587 (Ont. C.A.) at paras 102 - 104. The CCAA is not oblivious to provincial legislation but, as pointed out in *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, [1989] S.C.J. No. 78 (S.C.C.) at para 21: "[t]he provinces may define "trust" as they choose for matters within their own legislative competence, but they cannot dictate to Parliament how it should be defined for purposes of the *Bankruptcy Act*: *Deloitte, Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board)*" ([1985] 1 S.C.R. 785, [1985] S.C.J. No. 35 (S.C.C.)). We need not decide if there is any conflict between CCAA and SBLA.

35 Kenroc and Winroc submit that the SBLA helps them claim the status of either a secured creditor or another special class of creditor through s. 2 of the CCAA. Kenroc and Winroc offer an alliance of the SBLA and CCAA, not an opposition. The CCAA definitions are at the heart of the case, since the court is evaluating a Plan of Arrangement involving corporations under the CCAA. The chambers judge did not read down the relevant terms of the SBLA when deciding that they did not put Kenroc and Winroc into a special class under s. 2 of the CCAA, nor will we.

36 Section 2 of the CCAA defines a secured creditor as follows:

> "secured creditor" *means a holder of a* mortgage, hypothec, pledge, *charge, lien* or privilege on or against, or any assignment, cession or transfer of, all or *any property of a debtor company as security for indebtedness of the debtor company*, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, *or a trust in respect of, all or any property of the debtor company*, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds;
>
> [emphasis added]

37 Kenroc and Winroc assert that they are either lien holders or trust beneficiaries under this definition by operation of the SBLA. Section 7 of the SBLA provides:

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

7(1) All amounts

(a) owing to a contractor, whether or not due or payable; or

(b) received by a contractor; on account of the contract price of an improvement constitute a trust fund for the benefit of:

(c) subcontractors who have subcontracted with the contractor and other persons who have provided materials or services to the contractor for the purpose of performing a contract; and

(d) labours who have been employed by the contractor for the purpose of performing the contract.

(2) The contractor is the trustee of the trust fund created by subsection (1) and he shall not appropriate or convert any part of the trust fund to his own use or to any use inconsistent with the trust until all persons for whose benefit the trust is constituted are paid all amounts related to the improvement owed to them by the contractor.

38 Section 15 of the SBLA sets out a priority for the trust in the context of the SBLA. Section 20 of the SBLA says the trust exists even if a lien registration deadline is missed. Sections 22(1) and 33 of the SBLA also provide:

22(1) A person who provides services or materials on or in respect of an improvement for an owner, contractor or subcontractor, has, except as otherwise provided in this Act, a lien on the estate or interest of the owner in the land occupied by the improvement, or enjoyed therewith, and on the materials provided to the improvement for as much of the price of the services or materials as remains owing to him.

...

33 Every lien is a charge on the holdback required to be retained by section 34, and subject to section 28(3), is a charge upon any additional amount owed in relation to the improvement by a payer to the contractor or to any subcontractor whose contract or subcontract was in whole or in part performed by the provision of services or materials giving rise to the lien.

39 Various procedures respecting assertion of a lien are set out in the SBLA. Section 56(1) of the SBLA provides for payment into court by "any person" of the "full amount" owing "in any registered claim of lien" to vacate the lien.

40 Kenroc and Winroc say the foregoing provisions establish their rights both as lien holders and as beneficiaries of a trust. Kenroc and Winroc also suggest the reference to a "charge" under s. 33 also applies to assist them.

41 A claimant who is not a secured creditor is an "unsecured creditor" under s. 2 of the CCAA: Reasons, para. 36. Kenroc and Winroc's alternative position is that, even if they fell into an unsecured creditor class, they would still be distinct from the other unsecured creditors having regard to the factors set out in *Canadian Airlines Corp., Re* (2000), 265 A.R. 201, [2000] A.J. No. 771, 2000 ABQB 442 (Alta. Q.B.), at para. 96 and *Canadian Airlines Corp., Re* (2000), 261 A.R. 120, [2000] A.J. No. 610, 2000 ABCA 149 (Alta. C.A. [In Chambers]) at para. 27; see also *Sovereign Life Assurance Co. v. Dodd*, [1892] 2 Q.B. 573 (Eng. C.A.) and *Stelco Inc., Re* (2005), 15 C.B.R. (5th) 307, [2005] O.J. No. 4883 (Ont. C.A.), at paras. 23 - 36.

Standard of Review

42 There are no material facts in dispute. Extricable questions of law as to interpretation of the CCAA and SBLA are reviewed for correctness. If correct on statutory construction principles, the chambers judge exercised judgment in deciding if Winroc and Kenroc be recognized as a special class in order to make the plan "fair and reasonable" or to reflect differences between them and other unsecured creditors in light of the factors in *Canadian Airlines*, *Resurgence* and *Stelco Inc*. On those latter questions, judgment and discretion is involved and a reasonableness standard should

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

apply: see *BCE Inc., Re*, [2008] 3 S.C.R. 560, [2008] S.C.J. No. 37, 2008 SCC 69 (S.C.C.) at para. 161; *ATB Financial*, *supra* at paras. 106 - 120; *New Skeena Forest Products Inc., Re* (2005), 39 B.C.L.R. (4th) 338, [2005] B.C.J. No. 671, 2005 BCCA 192 (B.C. C.A.) at para. 20; *Smoky River Coal Ltd., Re* (1999), 237 A.R. 326, [1999] A.J. No. 676, 1999 ABCA 179 (Alta. C.A.) at paras. 61 - 72; *Keddy Motor Inns Ltd., Re* (1992), 90 D.L.R. (4th) 175, [1992] N.S.J. No. 98 (N.S. C.A.), at para. 44. As noted in *BCE*, there is no such thing as a perfect Plan of Arrangement: para. 155.

Reasons of the Trial Judge

43 The chambers judge was aware that compliance with the CCAA was necessary to justify approval of a Plan of Arrangement.

44 As to the lien claims, she held that Kenroc's and Winroc's builders' liens were filed against 10105's project, and thus did not constitute a lien against Kerr's property. Kenroc and Winroc contest this finding by saying that inasmuch as 10105 paid $150,000.00 into court to get their liens discharged, the $150,000.00 paid into court was effectively paid by 10105 to Kerr (as money in excess of that was owed to Kerr). Since it was paid to discharge Kenroc's and Winroc's liens on 10105's project, they suggest that the lien fund was property which was controlled by Kerr as money owed to Kerr. They say it was therefore transfixed by their lien claims or by their trust claims for the purposes of giving them secured creditor status over it even if the amounts specified in the lien documents covered only what was paid into court and was only part of their overall claims against Kerr and Composite.

45 The chambers judge held that before the money was paid into court by 10105, it was 10105's property, albeit that 10105 owed money to Kerr. She noted that the money was paid into court under a Saskatchewan Court of Queen's Bench order dated January 18, 2008 that said Kerr's consent "shall not prejudice the legal position of Kerr" respecting the liens, their propriety or amounts owing. The order recited that those issues are "properly dealt with under Kerr's *Companies Creditors Arrangement Act* proceedings in Alberta": Reasons, para. 45.

46 In other words, she held that the Saskatchewan order did not purport to recognize or grant any special attachment to the money paid into court merely because the order was to vacate builders' liens affecting 10105's project. Moreover, the money was paid in after the chambers judge's stay order was in place, so it could not be said that the Alberta Court of Queen's Bench had purported to approve an attachment of that money favouring any specific creditor. Further still, Kenroc's builders' lien was also filed after the stay order. Such "self-help" by Kenroc was, in her view, barred by the stay order and was conduct itself inconsistent with the philosophy and purposes of the CCAA: Reasons, paras. 50 - 53, citing *Alternative Fuel Systems Inc., Re* (2004), 346 A.R. 28, [2004] A.J. No. 60, 2004 ABCA 31 (Alta. C.A.), at paras. 54 - 55; *Scaffold Connection Corp., Re*, [2000] 7 W.W.R. 516, [2000] A.J. No. 69, 2000 ABQB 33 (Alta. Q.B.) at para. 22.

47 Orders aside, the chambers judge was satisfied that the CCAA process would have to decide how to dispose of that money in court. While in court and subject to court proceedings, she was not persuaded that the money was Kerr's property or had it been unconditionally transferred or paid to Kerr: *D & K Horizontal Drilling (1998) Ltd. (Trustee of) v. Alliance Pipeline Ltd.* (2002), 216 Sask. R. 199, [2002] S.J. No. 152, 2002 SKQB 86 (Sask. Q.B.) at para. 19; *Climenhaga v. Alberta (Office of the Superintendent of Bankruptcy)*, [2008] A.J. No. 1180, 2008 ABQB 340 (Alta. Q.B.) at para. 215; see also *Stone Sapphire Ltd. v. Transglobal Communications Group Inc.*, [2009] A.J. No. 341, 2009 ABCA 125 (Alta. C.A.) from (2008), 96 Alta. L.R. (4th) 187, [2008] A.J. No. 1036, 2008 ABQB 575 (Alta. Q.B.) (see paras. 11 - 39). The money was not paid into court by Kerr, nor were the original liens filed against Kerr's real property as in *Arthur Andersen Inc. v. Merit Energy Ltd.* (2004), 254 Sask. R. 161, [2004] S.J. No. 585, 2004 SKCA 124 (Sask. C.A.).

48 The chambers judge rejected a companion contention that s. 22(1) of the SBLA created a lien right against the money in court, because, by its terms, the lien only applied to "the estate or interest of the owner in the land". There was evidence before the chambers judge that 10105 was "the owner" of the land for this purpose at the time the liens were filed: Reasons, para. 54 to 55.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

49 The chambers judge held, in light of the order of January 18, 2008, that the statutory trust created by s. 7 of the SBLA was effective as of November 7, 2007: Reasons, para. 58. As of November 7, 2007, 10105 owed money to Kerr in excess of $150,000.00. Kenroc and Winroc say Kerr was a "contractor" within the meaning of s. 7(1)(a) of the SBLA as of November 7, 2007. As such, they say that Kerr was trustee of a trust fund that arose under s. 7(1) whether or not the liens had yet been filed and that Kerr was not entitled to "appropriate or convert any part of the trust fund to his own use or to any use inconsistent with the trust". The chambers judge, however, found that Kerr never received the $150,000.00 into its possession, nor did Kerr do anything with respect to its account receivable claim against 10105 or the $150,000.00 which was an appropriation or conversion of the trust fund. Kerr consented, without prejudice, to a Queen's Bench order whereby 10105 paid into court $150,000.00, recognizing that it, 10105, owed money to Kerr. By paying in, 10105 would obtain release of the liens and leave it to Kerr and the lienholders to deal with the validity of the lien claims.

50 The chambers judge was apparently not persuaded that paying the money into court by 10105 constituted wrongful interference with the "goods of another" such as to constitute a "conversion" by Kerr of the $150,000.00: see *373409 Alberta Ltd. (Receiver of) v. Bank of Montreal*, [2002] 4 S.C.R. 312, [2002] S.C.J. No. 82, 2002 SCC 81 (S.C.C.) at para. 8; *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727, [1996] S.C.J. No. 111 (S.C.C.) at para. 31. She did not mention the term "appropriation" but, under her reasoning, Kerr did not appropriate since Kerr never received the money. I read her decision to be that Kerr did not take, use or destroy the $150,000.00 in a manner inconsistent with the "owner's right of possession" because Kerr did not receive the money and, once paid into court, Kerr did not control the money. The chambers judge found that no trust was impressed on that money: Reasons, para. 65.

51 The chambers judge opined that in order for the statutory trust under s. 7(1) of the SBLA to function as a trust under s. 2 of the CCAA at the time of the Court's CCAA intervention, there had to be an "identifiable asset which forms the subject matter of the trust" relying *inter alia* on *Henfrey Samson Belair*: Reasons, para. 65(b). In her view, by the time the specific fund of money arrived in court, it was not subject to an identifiable trust in favour of Winroc and Kenroc even if it was akin to a partial payment of a quantity of accounts receivable held by Kerr against 10105.

52 Finally, the chambers judge rejected the submission that Winroc and Kenroc deserved their own special class even if not secured creditors: Reasons, para. 56 and paras. 80 - 88.

Analysis

53 I would separate the topic of liens from the topic of statutory trusts and deal with trusts first.

Trust Claims

54 On the premise accepted by the parties that Kerr was a contractor and that 10105 owed Kerr money within the meaning of s. 7(1) of the SBLA for work to which the appellants contributed as sub-contractors, the statutory trust under s. 7(1) of the SBLA might be impressed on the receivables to which Kerr is entitled "on account of the contract price of an improvement" whether or not the amount owing was "due and payable". By the terms of s. 7(1) of the SBLA, a court would have to decide if 10105 owed Kerr for work on the improvement and if what 10105 owed Kerr was for a contract price inclusive of "materials or services to the contractor" by the sub-contractor claiming the trust. The policy behind this seems clear enough: it would encourage companies in the position of Kerr to be scrupulous about their accounts receivable and not to appropriate or convert them to the disadvantage of the sub-contractors with whom they have privity of contract for work on the specific contract.

55 Winroc and Kenroc seek a finding that Kerr's receivables from 10105 were impressed with a trust in their favour in the amount of their liens, and that this trust continued to be attached to the $150,000.00 paid into court. Winroc and Kenroc would have to do more than identify what 10105 owed Kerr respecting the Saskatoon project in order to eventually prove that they were beneficiaries even of the statutory trust against Kerr's receivables from 10105. Winroc and Kenroc would have to quantify their contribution to Kerr's efforts on the Saskatoon project in order to identify a "trust fund" out of what Kerr was entitled to be paid by 10105 on that project. The SBLA facilitates this quantification

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

of the trust fund by allowing sub-contractors to specify amounts owing by way of lien claims. This does not mean that the trust or lien does not exist in a legal sense prior to the specification of the quantum by the filing of the lien. However, the trust fund contemplated by s. 7(1) of the SBLA becomes identifiable for the purposes of s. 2 of the CCAA in favour of a specific claimant sub-contractor from out of the general world of receivables held by a contractor only when it has been particularized sufficiently to fit the language of s. 7(1) of the SBLA and the proper reading of s. 2 of the CCAA.

56 If the Legislature of Saskatchewan intended that the statutory trust not require, for the purposes of an effective marriage with s. 2 of the CCAA, at least some measures of certainty contemplated by Donovan Waters, in *Waters' Law of Trusts in Canada*, 3rd Ed., [Toronto: Thomson Carswell, 2005] at p. 149, it did not say so expressly by the terms of s. 7 of the SBLA. On the other hand, the Legislature appears clearly to have intended to assist and protect sub-contractors by imposing a generalized trust obligation upon the general cash flow of contractors to prevent contractor mischief and to help guard the sub-contractors ability to recover their earnings in the relevant industrial context.

57 For this appeal, however, the crucial enactment is s. 2 of the CCAA. I agree with the chambers judge that in order to constitute a "trust" for the purposes of s. 2 of the CCAA, the "trust fund" had to rise beyond a generalized statutory trust as defined in s. 7(1) of the SBLA. It had to reach the position of a trust at law, hence requiring it to be reasonably ascertainable as of the date the legal effect of the trust must exist: *Henfrey Samson Belair*, *supra* at paras. 17 to 19. I also agree with the chambers judge that the effective date for the determination of the trust over property of Kerr in this case was November 7, 2007. That is the date that the CCAA proceedings were established and the stay by court order issued. However, I respectfully disagree with her in part. I find that, in Winroc's case, a trust framed by the amount of $46,425.26 was sufficiently ascertainable as of November 7, 2007, so as to make it effective for the purposes of s. 2 of the CCAA as of that date. Moreover, that trust carried forward its legal effect by the establishment of the lien fund in court out of Kerr's receivables which had been impressed with the trust as of that date.

58 By comparison, the Kenroc lien had not been filed by November 7, 2007. Accordingly, while Kenroc might have had a generalized trust for the purposes contemplated by s. 7 of the SBLA over Kerr's receivables from 10105, Kenroc's trust claim was not specific as of that date in the same way that Winroc's was for the purposes of s. 2 of the CCAA. Moreover, as pointed out by the chambers judge, it would conflict with the policy of the CCAA for claimants to be able to ignore stay orders and take steps to *improve* their creditor positions after the orders come into effect. Kenroc suggests, however, that it did not need to "improve" its position as beneficiary of a sufficiently ascertainable trust effective as of November 7, 2007.

59 Article 14 of the stay order of November 7, 2007 expressly suspended the running of any time limitation period that might otherwise run as to the ability to file a builders' lien against property "belonging to any customers of the Applicants for whom the Applicants are doing work" so the stay order itself did not erase the potential value of a lien. Moreover, Kenroc contends that this Court should find that its claim was as ascertainable under the CCAA process as was Winroc's claim as of November 7, 2007, even if not particularized by a filed lien. Accordingly, Kenroc says that because the CCAA contemplates a method for court ascertainment by a summary process of the nature of claims made, its statutory trust still must be found to have existed as of November 7, 2007. It follows that we must still consider Kenroc's position under this heading of trust. I would deal with Winroc first.

60 The specific amount of Winroc's trust claim was identified by Winroc through its lien claim documents which had been filed before November 7, 2007. The possibility that Winroc may have had a larger but more ambiguous trust claim against Kerr's other receivables does not destroy the particularity of the specific claim set out in the lien documents. Moreover, in my view, the degree of precision of that specific claim against Kerr's receivables met the test in *Henfrey Samson Belair* even if Winroc might be called upon to substantiate its lien claim in court and even if Winroc faced the possibility of set off under s. 18.1 of the CCAA or faced some other potential diminution of the quantum of its entitlement. I say so for several reasons.

61 First, by the specifics of the lien form, the trust property was identifiable not only in quantum and claimant but also identifiable as against specific property, namely a specified indebtedness owed by 10105 to Kerr. With the boost,

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

as it were, of the statutory trust, that trust met the requirements under *Henfrey Samson Belair*. Unlike the situation in *Henfrey Samson Belair*, the trust funds did not become "commingled" or untraceable. Rather, they were eventually dis-aggregated from the indebtedness of 10105 to Kerr and were paid into court specifically to discharge Winroc's lien, albeit subject perhaps to adjustment later. Second, s. 12(2) of the CCAA does contemplate a process whereby a claim, whether secured or unsecured, may be resolved by the court on summary application by the company or by the creditor. It follows that the degree of precision of the Winroc claim as of November 7, 2007, was not destroyed by the existence of a possibility that a court may, on summary application, adjust the amount Winroc had claimed in a timely manner. Third, the original order of November 7, 2007 and the procedure order of January 24, 2008, predicted and then set out such a claims procedure under the CCAA. It is apparent from both orders that the court provided for a process for acceptance or adjustment of trust claims that were sufficiently precise at common law as of November 7, 2007 within the meaning of *Henfrey Samson Belair*. In light of these circumstances, the Winroc trust claim met the criteria of s. 2 of the CCAA as of November 7, 2007 at least to the extent of the amount set out in the filed lien documents, namely a trust framed by the amount of $46,425.26. The expression "framed by the amount" is stated to reflect the fact that the actual effective quantum of the Winroc claim may be subject to adjustment.

62 Before leaving Winroc's situation, I would add that we were treated by Kerr to an ingenious suggestion that Winroc's statutory trust prevented Kerr from having a property interest in the money paid into court. The suggestion is that because of the statutory trust, Kerr never had a legal right or control of the money paid into court, and hence it was not, after being paid into court, the "property of the debtor" to be subject of a trust under s. 2 of the CCAA. This argument is too clever by half. It amounts to saying that because the 10105 funds were impressed with a trust under s. 7 of the SBLA before being paid into court, they could not become Kerr's such as to further become property of Kerr impressed with a trust under s. 2 of the CCAA. This argument promotes a practical conflict between the application of the two statutes. General principles of statutory construction encourage courts to make co-ordinated legislation work together (if it is possible to do so consistently with proper interpretation principles) by assuming a harmony, coherence and consistency: see e.g. *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56 (S.C.C.), at para. 52; *NAV Canada c. Wilmington Trust Co.*, [2006] 1 S.C.R. 865, [2006] S.C.J. No. 24, 2006 SCC 24 (S.C.C.) at para. 54; *Pointe-Claire (Ville) c. Syndicat des employées & employés professionnels-les & de bureau, local 57*, [1997] 1 S.C.R. 1015, [1997] S.C.J. No. 41 (S.C.C.), at para. 61; *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (U.S. Sup. Ct. 2000) per O'Connor J at p. 128. *A fortiori* we would do this when s. 2 of the CCAA clearly envisions trusts, liens and charges emanating from other statutes or law. As stated in *Ontario (Attorney General) v. Chatterjee*, [2009] S.C.J. No. 19, 2009 SCC 19 (S.C.C.) at para. 2: "It was held in *Canadian Western Bank* that, "a court should favour, where possible, the ordinary operation of statutes enacted by both levels of government" (para. 37; emphasis in original)." Accordingly, I would not convolute the concept of trust to find that the existence of a trust for one purpose defeats its existence for another purpose in otherwise companionable legislation.

63 By comparison with Winroc, Kenroc's claim was not identified by way of a precise lien having been filed as of November 7, 2007. Kenroc, accordingly, bases its status as a trust claimant in the more generalized argument that Kerr's receivables in the amount of $302,022.00 owed by 10105 as of November 7, 2007, qualified as Kerr's property that was impressed with a trust in favour of Kenroc for whatever contribution Kenroc had made to the 10105 project by then.

64 Kenroc, moreover, would distinguish itself for the purposes of the Plan of Arrangement from being inserted to a class with any other of Kerr's subcontractors who might conceivably also have filed builders' liens against the 10105 project in Saskatoon but did not do so. Kenroc would dismiss the idea that those other potential claimants are in the same creditor class with Kenroc on the basis that (a) the existence of such potential builders' lien claimants was still speculative at the time of the Plan of Arrangement hearing below, and (b) those claimants, if any, should be taken to have elected to fall into the general unsecured creditor category under the Plan of Arrangement. Kenroc says it never made any concession that it was an unsecured creditor. Kenroc says that it pressed with specificity its trust claim prior to the Plan of Arrangement. Kenroc suggests that its ability to rope into court a specific sum of money out of Kerr's receivables by the lien against 10105 merely gave it a practical ability to enforce its existing trust rights, and did not improve its position in legal terms. Accordingly, Kenroc says that it should like Winroc be able to assert that it was a

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

beneficiary of an enforceable trust at the time of the Plan of Arrangement at least in the specific amount that constituted its aliquot share of the $150,000 paid into court, namely $103,236.95.

65 Kenroc further suggests there would be no unfairness to other creditor classes for lack of specificity of Kenroc's quantum as of November 7, 2007. Kenroc says that the quantum of other claims, secured or unsecured, would not have been known to other creditors as of that date. Kenroc says all creditors would be subject to the adjustment plans under the Claims Procedure Order of January 24, 2008, which itself did not exist until after the money was paid into court. Accordingly, Kenroc suggests that all creditors would have known by the date of the Plan of Arrangement precisely what the various claim classes were, including Kenroc's position. The purpose of the Plan was to organize division of the available assets. The other classes would be able to decide whether to vote to support the Plan or not under those circumstances.

66 The difficulty with Kenroc's argument is that the parties here effectively conceded that, as a matter of law, the crucial date for distinguishing claims as secured or unsecured under s. 2 of the CCAA was November 7, 2007, not the later date when money was paid into court nor the further later date of the hearing on the Plan of Arrangement. To repeat, the crucial date for defining claims as secured was November 7, 2007. It may be that some existing secured claims might be identified after November 7, 2007, but their nature and quantum would have to have existed as of November 7, 2007, and not be created later. If Kenroc met the definition of a secured creditor on November 7, 2007 by its argument, then so were other potential builders' lien claimants, a potential circumstance noted by the Monitor. It would not matter for the larger purpose of the CCAA proceedings that other builders' lien claimants might have had trust claims against other projects than 10105 with which Kerr was involved. If they chose to claim secured status, they might, indeed, be collated into a secured creditor class of analogous secured creditors. Arguably, they would be candidates for a class that would be differentiated from the unsecured creditors' class.

67 Kenroc seeks to fortify its position by a policy position that would answer the respondent's claims as to the legislative policy behind the CCAA. The respondent's submission which found considerable favour with the chambers judge was that the CCAA was a process intended to keep businesses in operation for the benefit of commerce and industry generally, and for the better recovery of creditors who might otherwise be left begging if bankruptcy occurred. The respondent and the chambers judge suggested that it was important, as a matter of policy, that there be a predictable and reliable system in place that would allow rapid distillation of creditor classes, swift available asset compilation and fair and equitable, though partial, distribution. The respondent and chambers judge did not appear to favour a system whereby late blooming trust claims could legally materialize well after the crucial stay order date, not only to the disadvantage of the debtor but also of other creditors. Against this policy of predictability and reliability, Kenroc says that one should not forget that the CCAA process empowers the debtor over creditors, in that the debtor decides when to seek the stay order, and the debtor already can discriminate amongst its creditors by the nature of specific trusts or liens or charges that it arranges with creditors.

68 Kenroc's submission that it possessed an effective and ascertainable trust claim against Kerr's assets as of November 7, 2007, advances Kenroc beyond being the holder of a generalized statutory trust on an unspecified segment of Kerr's receivables. Recognition of a trust in the manner proposed by Kenroc could create through s. 2 of the CCAA something of a checkerboard of otherwise analogous rights and claimants in relation to CCAA proceedings because different provinces or jurisdictions might enact as to similar types of lien claims - e.g. builders' liens - differently. It might even encourage a competition amongst provinces to fortify their own versions of statutory trusts in an effort to priorize them against other province's statutory trusts for CCAA situations. Further, for some companies every significant creditor of the company could, by virtue of the company's business, claim a statutory trust of some sort. If all such trusts qualify under the CCAA regardless of the circumstances, there would be competition between statutory trusts, and feasibility problems as to achieving a consensus Plan of Arrangement.

69 Kenroc was not the holder of a cognizable common law trust under *Henfrey Samson Belair*. As the chambers judge noted, Kenroc was banned by Article 11 of the stay order from improving its position against Kerr's property. Indeed, that sort of preservation of a debtor's property is a key element of the aims of the CCAA. What Kenroc did was take

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

action with a view to selecting out a portion of Kerr's receivables, i.e. effectively seizing a portion of Kerr's unsecured property subject at the time to supervision of the court, in order to install it in a special legal box where Kenroc could claim to be the only party entitled to have access to it. I am not persuaded that, in doing so, Kenroc's position can be characterized as an alliance of the SBLA and the CCAA which would have the effect of retroactively declaring Kenroc's general statutory trust against receivables to be a sufficiently precise trust at law as of November 7, 2007 against the fund paid into court later. Kenroc's trust simply did not reach the level required by s. 2 of the CCAA on November 7, 2007.

70 I also am not persuaded that there was conversion of trust property by Kerr under s. 7(2) of the SBLA to the disadvantage of Kenroc by what happened after November 7, 2007. Conversion of trust property can occur in various ways: *373409 Alberta Ltd.*; see also *Ambrozic v. Burcevski* (2008), 433 A.R. 25, [2008] A.J. No. 552, 2008 ABCA 194 (Alta. C.A.) at para. 48 - 56, leave denied (S.C.C.). I am not persuaded that the sort of conversion discussed in those cases was done by Kerr when 10105 paid $150,000.00 into court and the liens were vacated. Accordingly, s. 7(2) of the SBLA would not assist Kenroc's position in the sense of retroactively providing precision to Kenroc's claim at the date of the payment in, and thereby to impress part of the $150,000.00 with a sufficiently specific trust in favour of Kenroc as of the date of the payment in and then also as to the date of hearing on the Plan of Arrangement.

71 It follows that while I agree with Winroc that as of November 7, 2007, it had an identifiable and effective trust claim for the amount of its lien and for the purposes of s. 2 of the CCAA, I do not agree that the same situation applies to Kenroc.

Lien Claims

72 It is not necessary to discuss extensively the questions relating to the rights of lien holders under the SBLA, a task more suitable to the Courts of Saskatchewan when the Saskatchewan statute differs in significant manners from the Alberta statute. In *Merit Energy Ltd.*, the Saskatchewan Court of Appeal held that lien claimants have a lien as soon as materials are first provided to the debtor even if not yet registered, and that a judicial order as to payment into court merely substitutes the lien fund for the property against which the lien was filed. That case, however, was one where the debtor owned the land so it does not reach the present situation.

73 In Winroc's case, as of November 7, 2007, the lien had been placed against 10105's land respecting a debt owed by 10105 to Kerr, which was not then under CCAA protection. In light of the view I have taken above as to Winroc's trust claim, it is not necessary for me to decide whether Winroc's timely lien attached to property of the debtor for the purposes of s. 2 of the CCAA. It would appear arguable that if *Merit Energy Ltd.* is adapted to the present situation, the payment in by 10105 converted the land interest of 10105 as attached by the lien into a moneys' worth attached by a substitute security favouring Winroc. I need not decide this question as there may be implications of doing so not presently before this Court. I can safely leave that task of statutory interpretation of the SBLA to the Saskatchewan courts.

74 As to Kenroc's position, however, it is clear that its lien was not filed against Kerr's property such as to qualify under s. 2 of the CCAA as of November 7, 2007. Section 22 of the SBLA provides for a lien against "an estate or interest of the owner in the land". Section 33 of the SBLA assists the lien by also saying that the lien is a charge on the holdback funds and "additional amounts" as defined. On the face of those provisions, the charge is nourished by the lien.

75 In that sense, the lien did not exist in a physical sense manifested by a lien document. Kenroc says, however, that ss. 22 and 33 of the SBLA recognize a lien and a charge on the identified property independent of the filing of the physical lien document. Kenroc says that, under Saskatchewan law, the lien document (and its filing deadline) may have some practical effect in the event of intervening interests, but the lien itself starts with the provision of work or supplies and continues thereafter until the work or supplies are paid for or some adjudication happens. Whether or not that is so, Kerr was not an owner of an estate or interest in the land against which the Kenroc lien was filed *after* November 7, 2007. Even assuming that, at the time of the liens, Kerr had a valid receivables claim against 10105, that was not a land property interest caught by the SBLA statutory lien. Accordingly, the s. 22 statutory lien was not then a lien against "property of the debtor" within the meaning of the statutes read together on November 7, 2007. What happened by

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

reason of the payment into court did not change Kerr into an owner of land covered by the lien backwards to November 7, 2007. Once again, the terms of s. 2 of the CCAA are crucial here.

76 The January 18, 2008 Saskatchewan order did not convert 10105's "land" interest, which Kenroc says was captured by its lien, into a security covered fund of money that was retroactively "property of the debtor" Kerr as of November 7, 2007. The situation is arguably different for Winroc as noted above. The Saskatchewan courts will decide what to make of the legal meaning and effect of the lien fund in court. It is arguable that Kerr had an interest in the lien fund. Kerr would presumably favour the lien fund being available to distribute to its creditors as per the Plan of Arrangement. Kerr would also presumably be able to make submissions in the summary process contemplated by the CCAA as against the validity or quantum of the lien or as to claim set-offs and defences to the lien claim. Those capacities, however, are not the same thing as Kerr being the owner of land on November 7, 2007.

77 Kenroc invokes s. 33 of the SBLA to stretch the "lien" defined under s. 22 to include a "charge upon any additional amount owed in relation to the improvement by a payer to the contractor or any subcontractor". Kenroc cite no direct authority for the proposition that this "charge" should be treated as a charge on "property of the debtor company" for the purposes of s. 2 of the CCAA in relation to Kenroc's putative share of the $150,000.00 put into court. Whether the lien, when it existed and before it was vacated by the court order of January 18, 2008, was capable of constituting a "charge" upon a receivable of Kerr by reason of being a valid "lien" on land of 10105, is a moot point. It is also a complex one not discussed below. $150,000.00 was paid into court by 10105 but that did not happen until after November 7, 2007. It was not even required to happen on November 7, 2007, because Kenroc's lien had not been filed.

78 Accordingly, as of November 7, 2007, there was no lien fund existing against which Kenroc had a legal claim as a lien holder. I repeat that I say nothing about Winroc in this respect. As of November 7, 2007, Kerr arguably had a receivables claim against 10105. By the SBLA, Kenroc and Winroc arguably had a lien as of November 7, 2007, but against land property of 10105. By s. 56 of the SBLA, the land owner can choose to pay the money claimed under liens into court so it can get out of the litigation. Indeed, an owner might conceivably pay into court even if it disputed the claim. Once the money is paid in, the lien is vacated, and, grammatically, so is the "charge". What is created in their place is something we can leave to the Saskatchewan courts to define. Kenroc did not challenge the order paying into court nor the discharge of their filed lien. If Kenroc would ordinarily have acquired a replacement interest in Kerr's property through the payment in process - a point the chambers judge disputed in light of the stay - it did not acquire that interest until the money was paid into court. That was well after November 7, 2007.

79 The notional Kenroc share of the lien fund of $150,000 was treated as part of the Kerr assets for the Plan of Arrangement, but Kerr could not after November 7, 2007, just go to the Saskatchewan Court of Queen's Bench and take the money out as if it were Kerr's property. By then, Kerr's receivables, whether they were still owing to it by third parties or they were cobbled together in the Monitor's hands or elsewhere, were subject to court disposition in service of the aims of the CCAA. In my view, Kenroc's position boils down to a claim that it was entitled to create, after the vital date of November 7, 2007, a substitute claim against Kerr's property to replace a statutory lien against 10105's property. One can imagine various scenarios whereby creditors, notwithstanding a CCAA stay, engage in a scramble to convert their claims into something more effective, retroactively. In my view allowing creditors to do so would affront the objectives and terms of the CCAA. In the result, I reject Kenroc's position as to the lien claims.

Approval of the Plan

80 Winroc and Kenroc submit that even if their claims were found to not meet the test for classification as a secured creditor class either by way of lien or trust, the policy indicated by the SBLA and the nature of their relationship with Kerr and Composite is such that the only fair and reasonable approach to the situation would have been to recognize them as a special class entitled to vote as a separate group. Further, they submit that it would only be fair and reasonable to give them full access to the money paid into court, as it was by their actions that the funds were paid in by 10105. To do otherwise, they say, would undermine the benefits and purposes of builders' lien legislation by (a) taking funds which are collected pursuant to such special legislation and making that money available for the benefit of others who

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

are unsecured creditors with no special rights grounded in such legislation, and (b) using those funds ultimately to the benefit of the debtor company, whose overall arrangement offer for others would be improved by inclusion of funds which ought to have been earmarked for Winroc and Kenroc.

81 In saying this, Winroc and Kenroc submit that the potential existence of lien claims (similar or not) by other parties who did not or could not take steps to particularize and enforce any such lien claims is irrelevant. Similarly they effectively say that the existence of any legislative limitations on lien claims under Alberta legislation is also irrelevant. Further, they effectively say that the process for referring arrangements to creditors for votes under the CCAA is irrelevant insofar as it relates to the type of special claim that they are making here. In their submission, this Court should amend the Plan of Arrangement to require that the $150,000.00 be used to pay their lien claims with interest in priority to any other distributions.

82 Insofar as Kenroc is concerned, I cannot say that the chambers judge acted unreasonably in defining the classes and in approving the Plan of Arrangement as she did. Her decision was within the range of reasonable options that were available to her under the circumstances: see by analogy, *Khosa v. Canada (Minister of Citizenship & Immigration)*, [2009] S.C.J. No. 12, 2009 SCC 12 (S.C.C.) at para. 59. Her decision on those questions deserves deference: *Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93, [1999] A.J. No. 675, 1999 ABCA 178 (Alta. C.A.) at paras. 3 - 4; *Gauntlet Energy Corp., Re* (2004), 32 C.L.R. (3d) 68, [2004] A.J. No. 31, 2004 ABCA 20 (Alta. C.A.), at para. 12. In my view, she reasonably weighed the factors in *Canadian Airlines*, *Resurgence* and *Stelco*.

83 She put Kenroc in a category of unsecured creditors which arguably included claimants of a similar nature who did not run rough-shod over the stay order of November 7, 2007. I reject Kenroc's suggestion that it ought to have been distinguished from other potentially similar creditors on the basis that those others had failed to be as proactive and self-identifying as Kenroc was. In light of the stay order, it was within the chambers judge's discretion, acting - as the CCAA contemplates - in a "summary" fashion, to decide if there were others in a situation similar to Kenroc. In light of the standard of review, I am unable to say that the chambers judge acted unfairly in putting Kenroc with other unsecured creditors. Had Kenroc been with the other six creditors in a class separate from other unsecured creditors, Kenroc would have been in the same position it is now, viz., with others who voted in favour of the Plan of Arrangement.

84 Finally, I am not persuaded that the chambers judge ought to have, in service of fairness, amended the Plan to at least give Kenroc the money paid into court by 10105 to vacate its lien. To do so would have been a distortion of the Plan as an overall balanced effort to reflect the interests of unsecured creditors of which Kenroc was one. It might be said that there is some similarity between this aspect of Kenroc's argument and that of the dissatisfied claimants in *BCE*, in that Kenroc points to legislation which it says at least identifies them in a special manner. However, unlike Winroc, Kenroc did not deploy the SBLA in a timely way as regards the CCAA proceedings. The chambers judge did not act unreasonably or contrary to the CCAA in how it dealt with Kenroc.

85 Winroc's position is separate from Kenroc. I would not regard the situation as one where it would be appropriate or just to upset the entire Plan of Arrangement in order to reflect the effective trust status of Winroc. On my reasoning, the chambers judge would have designated Winroc in a class of secured creditors for the purposes of the Plan, albeit framed by Winroc's lien-identified claim for $46,425.26. Winroc's other claims would fall into the general unsecured category and that situation is not affected by this judgment. I need not speculate whether the chambers judge might still have put Winroc in with other comparable secured creditors if at the time of the hearing as to the Plan she found others of that sort. I proceed on our present record.

Conclusion

86 Winroc's appeal is allowed to the following extent. I would declare that Winroc's trust claim is a secured claim under s. 2 of the CCAA as framed by the amount of $46,425.26 out of the $150,000.00 paid into court. Upon proof satisfactory to the chambers judge that Winroc is, indeed, entitled to the $46,425.26 or some lesser figure as against Kerr for supplies to Kerr related to the 10105 project, that amount thus determined by the chambers judge can be disbursed

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

to Winroc by court authority in a manner suitable to a secured claimant. The chambers judge can deal with that issue summarily under the CCAA. We would encourage the parties to settle the point by consent.

87 Kenroc's appeal should in my view be dismissed.

Appeals allowed.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 23

1983 CarswellOnt 672
Ontario Employment Standards Branch: Office of Adjudication

National Bank of Canada v. Ontario (Director of Employment Standards)

1983 CarswellOnt 672, 3 P.P.S.A.C. 119

NATIONAL BANK OF CANADA et al. v. DIRECTOR OF EMPLOYMENT STANDARDS

Referee Swan

Subject: Property; Corporate and Commercial; Insolvency

***Referee Swan*:**

1 By letter dated February 22, 1983, the undersigned was appointed as a referee pursuant to s. 50(3) of the Employment Standards Act, R.S.O. 1980, c. 137, to hear the application for review of order to pay No. 21866 dated November 10, 1982, in the amount of $711,673.35.

2 By the time of the hearings in this matter, which were held in Toronto on April 21 and 22, 1983, the issues between the parties had been refined somewhat. As a consequence, it was agreed that my jurisdiction should cover orders to pay No. 21865 and 21866, dated November 2, 1982 and November 10, 1982 respectively, but that the only amount in dispute is the sum of $137,624.33, which represents the total of accrued but unpaid vacation pay up to September 22, 1982, owing to a number of former employees at Windsor Packing Company Limited in Windsor, Ontario. Windsor Packing is no longer carrying on business, and the present application for review is brought by the National Bank of Canada as creditor under a debenture and a general security agreement, and by Price Waterhouse Limited as receiver and manager of Windsor Packing appointed by the National Bank pursuant to those documents.

3 Counsel were able to provide me with an agreed statement of facts, which was augmented somewhat by the testimony of Mr. K.B. Liddle, who had been at all material times the manager of the main branch of the National Bank of Canada in Windsor, Ontario. The statement of agreed facts is as follows:

> 2. On August 10, 1945 Windsor Packing Company, Limited (Windsor Packing) was incorporated. From about this date until September, 1982 it carried on the business of slaughtering animals and of dressing, packing, and selling meat.
>
> 3. Of the amounts hereinafter referred to in Orders to Pay 21865 and 21866, the only amount being dealt with and in dispute in this application is the sum of $137,624.33. Payment of this amount was demanded by the Director of Employment Standards from Price Waterhouse Limited (Price Waterhouse), the receiver and manager of Windsor Packing appointed by the National Bank of Canada (National Bank).
>
> 4. On April 3, 1980 Windsor Packing executed a debenture in favour of The Bank of Nova Scotia. The debenture was registered under the *Corporation Securities Registration Act* (the CSRA) on April 18, 1980 as No. 47443 and under the *Personal Property Security Act* (PPSA) on April 10, 1980 as No. 800410 1258 47 7468.
>
> 5. On April 30, 1980 the Bank of Nova Scotia assigned its rights under the said debenture to the National Bank. The assignment was registered under the CSRA on April 30, 1980, as No. 37443 and under the PPSA as No. 810429 1020 47 3922.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

6. On April 2, 1981 Windsor Packing executed a General Security Agreement (GSA) in favour of the National Bank. The GSA was registered under the PPSA on April 13, 1981 as No. 810413 1533 47 3152.

7. From in or about September, 1981, the Federal Business Development Bank (the FBDB) from time to time advanced monies to Windsor Packing. These loans ultimately totalled approximately $4.5 million. As security for the loans from the FBDB, Windsor Packing executed, *inter alia*, the following securities:

(a) Two Personal Property Security Agreements registered under the PPSA on September 18, 1981 as No. 810918 1544 472976 and No. 810918 1544 472978; and,

(b) Two Land Titles Charges securing the FBDB as first mortgagee against the lands and buildings in Windsor, Ontario constituting the business premises of Windsor Packing.

8. Over the period from September, 1981 to September, 1982, in addition to advancing loans to Windsor Packing on the securities aforesaid, both banks advanced additional loans to Windsor Packing on the security of several other specific security interests registered under the PPSA to assist Windsor Packing in financing the purchases of specific chattels, including equipment and motor vehicles.

9. On September 21, 1982 the National Bank made written demand upon Windsor Packing for payment of all monies owed to the National Bank. Windsor Packing acknowledged in writing that it could not pay these monies, being the principal sums of CDN$6,100,000.00 and US$3,350,000.00 together with interest on both these sums.

10. On September 21, 1982 the National Bank named Price Waterhouse its receiver and manager pursuant to the terms of both its debenture and GSA. Windsor Packing consented in writing on the same date to the appointment.

11. On September 22, 1982 Price Waterhouse took possession of the Windsor Packing premises in Windsor, being an office and a production plant for killing animals and for dressing, packing and selling meat.

12. On September 24, 1982 the FBDB appointed Touche, Ross Limited (Touche, Ross) its receiver-manager under certain of its securities with instructions to Touche, Ross to take all necessary action to seize, protect and realize on the collateral of Windsor Packing secured in favour of the FBDB.

13. Following the appointment of Touche, Ross, Price Waterhouse continued in possession of the Windsor Packing office and production plant premises with the consent of Touche, Ross.

14. Following its appointment, Touche, Ross was also in possession of the Windsor Packing lands and premises. It hired personnel to secure the lands and buildings, inspected and inventoried the vehicles and equipment covered by the FBDB securities, arranged to maintain the utility services to the buildings, and made arrangements to offer for sale the lands, premises and chattels of Windsor Packing.

15. An agreement was reached between Price Waterhouse and Touche, Ross whereby each agreed with the other that they would not remove any chattels from the Windsor Packing premises until the priorities as between the National Bank and the FBDB could be identified.

16. Price Waterhouse recommended to and was subsequently instructed by the National Bank to close down the business undertaking of Windsor Packing.

17. On September 22, 1982 Price Waterhouse informed the employees that Windsor Packing was being liquidated and that Price Waterhouse intended to hire only sufficient employees to assist it in the liquidation.

18. After September 22, 1982, with the assistance of 23 of the 85 employees working at Windsor Packing immediately before the receivership appointment, Price Waterhouse, *inter alia*, took inventory of the fresh meat products, sold

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

them, and began collecting the outstanding accounts receivable of Windsor Packing, without objection by the Director of Employment Standards. The Director took no steps to take possession of the inventory or to collect the accounts receivable.

19. On November 10, 1982 Officer James H. McArthur issued Order to Pay 21866 to Windsor Packing in the amount of $646,975.77 plus penalty, for wages, vacation pay and termination pay pursuant to the *Employment Standards Act.* On the same day a copy of this Order was sent to Price Waterhouse by registered mail, and was received by it.

20. On December 15, 1982 the Director of Employment Standards made further demand by letter upon Price Waterhouse of $137,624.33 (excluding penalty) for payment of vacation pay pursuant to section 15 of the *Employment Standards Act.* This sum forms part of the $646,975.77 calculation contained in Order to Pay 21866 dated November 10, 1982.

21. Price Waterhouse realized a gross amount on its sale of Windsor Packing inventory of $597,861.32. The costs incurred in this realization included disbursements of $59,741.36 and the receivermanager's fees of $40,812.50, for total costs of $100,553.86. The net realization by Price Waterhouse from the inventory was $497,307.46.

22. The gross amount realized by Price Waterhouse on the collection of Windsor Packing accounts receivable to date is $598,645.92. The costs of this realization include disbursements of $3,095.23, receiver-manager fees of $40,812.50, for total costs of $43,907.73. The net realization by Price Waterhouse from accounts receivable was $554,738.19.

23. Out of the combined said net realization from inventory and accounts receivable remitted by Price Waterhouse to the National Bank, the National Bank in response to the Director of Employment Standards' letter of demand dated December 15, 1982, paid the sum of $137,624.33 and sought an application for review pursuant to the provisions of Section 50 of the *Employment Standards Act.*

24. All of the inventory of meat products of Windsor Packing sold by Price Waterhouse became inventory of Windsor Packing after April 13, 1981, the date of registration of the National Bank GSA. The majority of the Windsor Packing inventory of meat products 'turned over' at least monthly.

25. All of the accounts receivable collected by Price Waterhouse became receivables of Windsor Packing after April 13, 1981 and the majority of the accounts receivable collected by Price Waterhouse became receivables of Windsor Packing during the period April 1, 1982 to September 21, 1982.

26. The total unpaid vacation pay which had accrued due as of December 31, 1981 was $30,718.20. The total vacation pay which had accrued in 1982 up to September 22, 1982 was $105,037.13. The amount of the vacation pay calculation of $137,624.33 representing unpaid vacation pay for periods after September 22, 1982 is $NIL.

27. On October 18, 1982, Windsor Packing was petitioned into bankruptcy by Burns Meats Ltd., an unsecured creditor. On November 23, 1982 a receiving order was made in the bankruptcy proceedings providing, *inter alia*, that Thorne, Riddell Inc. be appointed Trustee.

28. The balance owing to the National Bank by Windsor Packing on account of both the debenture and the GSA calculated to April 15, 1983, inclusive of interest and after giving credit for the $900,000.00 which the National Bank has recovered from the receivership of Windsor Packing to date is $8,790,498.05.

4 The grounds for review as stated in the original application had been modified somewhat by the time of the hearing, and the grounds on which counsel proceeded were as follows:

1. Orders were not properly directed to the applicants or either of them and, in law, there is no obligation on the applicants, or either of them, to pay.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> 2. These Orders to Pay dated November 2, 1982 and November 10, 1982 were not in fact orders to the applicants or to either of them. They were orders to Windsor Packing Company, Limited (Windsor Packing) and as such do not affect or bind the applicants, or either of them, in law. The Director's letter to Price Waterhouse Ltd. dated December 15, 1982 does nothing to change the status of these orders.
>
> 3. [This ground has been settled between the parties].
>
> 4. All amounts realized by Price Waterhouse Ltd. to date were realized from assets against which National Bank of Canada held specific or fixed charges (and not just a floating charge). These assets include accounts receivable, motor vehicles, and inventory. The specific and fixed charges in question were duly in place and attached in law to the assets of Windsor Packing before the unpaid vacation pay in question began to accrue, before any statutory trust was created by the operation of Section 15, and before any Section 15 lien attached to any assets of Windsor Packing. The result is that any Section 15 trust lien amount is not in law payable out of the proceeds of realizations on assets that have been liquidated by the applicants, or either of them to date.
>
> 5. By way of a ground in the alternative to number 4 immediately aforesaid, even if the realizations, or some of them, made by the applicants to date on the sale of the inventory or on the collection of accounts receivable is construed as a realization arising from a floating charge which was crystallized on September 21, 1982, the uncrystallized floating charge was still in place against the assets of Windsor Packing before the unpaid vacation pay accrued. Accordingly, and on the working of Section 15, in law, the National Bank of Canada has a first secured charge against the assets in question and Section 15 does not give the Director or the employees priority over the National Bank of Canada's first secured charge.
>
> 6. If there is any amount payable by the applicants, or either of them, out of the proceeds of any realizations to date, any such amount should be reduced by the amount of the receivership and legal expenses incurred by the National Bank of Canada in effecting the realization of the funds paid to the Director.
>
> 7. The Federal Parliament intended by enacting Section 107 of the Bankruptcy Act that claims for vacation pay would be subordinate to the rights of secured creditors when a bankruptcy occurs. Provincial statutes, including the Employment Standards Act, cannot confer a higher status for a claim for vacation pay. The Section 15 Employment Standards Act lien, to the extent that it purports to be a lien ranking ahead of secured claims in a bankruptcy, conflicts with Section 107 of the Bankruptcy Act and should be rejected, or, alternatively, treated as a lien which is subject to and subordinate to the claims of the National Bank of Canada as a secured creditor of the bankrupt, Windsor Packing Company Ltd.
>
> 8. [This ground in the original application was the reservation of a right to advance other grounds; no other grounds of review were advanced at the hearing].

As will be obvious from the above particulars, this review involves an issue of considerable importance to the present parties, and also of considerable importance to employees, employers and the creditors and receivers of employers all across Ontario. The central issue before me is the relative priority of the statutory right of employees to amounts of vacation pay accruing due but unpaid, and the rights of creditors secured under certain forms of security instruments, when the employer is forced into receivership. In these troubled economic times, unfortunately, this has become a very important issue.

5 The claim advanced on behalf of the employees by the Director of Employment Standards is based on s. 15 of the Employment Standards Act, which is as follows:

> 15. Every employer shall be deemed to hold vacation pay accruing due to an employee in trust for the employee whether or not the amount therefor has in fact been kept separate and apart by the employer and the vacation pay

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

becomes a lien and charge upon the assets of the employer that in the ordinary course of business would be entered in books of account whether so entered or not.

6 As will be seen from the grounds of review set out above, one of the grounds advanced by the applicants is that s. 15 is ultra vires of the Legislature of Ontario by reason of its conflict with the Bankruptcy Act, R.S.C. 1970, c. B-3, enacted by the Parliament of Canada pursuant to the federal legislative authority over bankruptcy. While that argument was much more open for discussion at the time when that ground of appeal was first advanced, subsequent judicial events have, in my view, resolved the constitutionality issue at least for the purposes of the appeal before me.

7 In *Re Phoenix Paper Products Ltd.* a decision of Gray J. of the Supreme Court of Ontario sitting as a Judge in bankruptcy, dated February 7, 1983, [reported 40 O.R. (2d) 321, 44 C.B.R. (N.S.) 274, affirmed (1983), 48 C.B.R. (N.S.) 113 (Ont. C.A.)] the learned Judge dealt with an identical argument and found, in a thorough and closely-reasoned decision, that the provisions of s. 15 of the Employment Standards Act are intra vires of the Legislature of Ontario, and that the statutory trust established by s. 15 operates notwithstanding the priorities and limitations of the Bankruptcy Act. Neither counsel suggested that this determination was not binding upon me, and indeed both of them were content to let that ground of appeal rest on the basis of *Re Phoenix Paper Products Ltd.*, I therefore shall proceed on the basis that there is no issue before me as to the constitutionality of s. 15.

8 The remaining grounds for appeal may conveniently be grouped, and indeed were grouped by counsel, under three main questions:

1. Are the National Bank and/or Price Waterhouse bound by the provisions of the Employment Standards Act or any Orders to Pay made under the purported authority of that Act, having regard to the definition of "employer" set out in the legislation?

2. What is the priority of the statutory claim for vacation pay under s. 15 as against the claims made under the security instruments upon which the applicants rely?

3. If the applicants are indeed bound by the Order to Pay, are they entitled to the costs of realizing on the security, by way of a contribution deducted from the amount of vacation pay realized, on the basis of a pro rata share of the costs of realization on the assets?

First Question:

9 This issue arises because the provisions of s. 47 [am. 1981, c. 22, s. 3] of the Employment Standards Act which authorize an Employment Standards Officer to issue an order to pay, the provisions of s. 48 which deal with the payment of the proceeds of such an order to the director in trust, and my jurisdiction under s. 50 of the Act to review any such order, all contemplate that the order, the requirement for payment into trust, and the authority which I derive to confirm or vary the order are aimed at an "employer". The Act defines "employer" in s. 1(*d*) as follows:

(*d*) 'employer' includes any person who as the owner, proprietor, manager, superintendent or overseer of any activity, business, work, trade, occupation or profession, has control or direction of, or is directly or indirectly responsible for, the employment of a person therein, and includes a person who was an employer;

10 The question is whether this definition is sufficiently broad to authorize the Director or an Employment Standards Officer to make an order to pay against the present applicants. Because of the way in which this case arises, it should be clear that the order is made against the applicants, or more specifically against Price Waterhouse as receiver and manager, only in respect of the proceeds of the receivership of Windsor Packing. There is no suggestion that the order is intended to attach to any of the assets of either of the applicants apart from the assets realized from the present liquidation.

11 In this regard, it is useful to look at the precise nature of the relationship among Windsor Packing, the National Bank, and Price Waterhouse. In the first of the two security instruments relied upon by the applicants, the debenture

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

given by Windsor Packing to the Bank of Nova Scotia and subsequently assigned to the National Bank, the holder may, if the security becomes enforceable, appoint a receiver. Paragraph 10 of the debenture describes a receiver as including a "receiver and manager", and says that the receiver shall be "deemed the agent of the Company and in no event the agent of the Holder". The receiver is given the power to "take possession of the mortgaged premises or any part thereof, to carry on or concur in carrying on the business of the Company and for such purpose to raise money on the mortgaged premises...and to sell or concur in selling all or any part of the mortgaged premises". Any funds received from such actions by the receiver are described as "held in trust for" the holder.

12 The second security instrument, the general security agreement given by Windsor Packing to the National Bank on April 2, 1981, permits the National Bank to take possession of the collateral, a term which is defined in para. 2 of the general security agreement as including accounts receivable, inventory, equipment, intangibles, leaseholds, real and immovable property, proceeds and, under a "floating charge" provision "all [Windsor Packing's] undertaking, business, property and assets". The general security agreement also permits the bank to appoint "any person to be a receiver, manager, receiver-manager, or a receiver and manager" of the collateral. The instrument of appointment of Price Waterhouse Limited dated September 21, 1982, in respect of the collateral appoints Price Waterhouse as "receiver and manager of the charged property". The applicants argue that the expression "receiver and manager" is a term of art, and has a meaning separate from the meaning of the word "manager" in s. 1(*d*). Had the statutory definition been intended to catch a "receiver and manager" it would have been possible to use that form of words in the statute; the failure to do so, in the applicant's submission, leads to the inference that it was not intended to catch these applicants within the provision.

13 Moreover, the applicants argue that whatever may have been the terms of its appointment, Price Waterhouse never did manage the business, acting instead only as a receiver. Because Price Waterhouse made no attempt to run the business as a going concern, but merely liquidated its assets, the applicants argue that it cannot be viewed as a manager of the business for the purpose of the statutory definition.

14 Referees have had occasion in the past to deal with the ambit of s. 1(*d*). In *Re Nathan Hennick & Co.*, Determination No. 550, September 25, 1978, the referee (Davis) dealt with the operation of a business by a Court-appointed "manager-receiver". In that case, the manager-receiver continued to operate the business after taking possession ofit, and continued to employ the employees in the business. Thus the provisions of s. 13 of the Employment Standards Act, which deal with the sale of a business, were invoked on behalf of the employees. That case does not really advert to the issue before me, since here there was no attempt to run the business under receivership. The comments of the referee are, however, of some interest:

> The status of a Court-appointed receiver is akin to that of a trustee who has a fiduciary relationship to persons of disparate interests to deal with such interests, subject to the approval of the Court, in an even-handed disinterested manner, and in respect of the running of the business he exercises a totality of control equivalent to that of ownership. While the receiver-manager cannot be looked upon solely as the 'alter-ego' of Marvel because of the other disparate interests to which he has a responsibility, he is, nonetheless, amongst other things, the 'alter-ego' of Marvel in the running and disposing of the business.

In *Regent Park Community Improvement Assoc.*, Determination No. 790, May 26, 1980, the referee (Ellis) dealt with the possibility that two entities might both be characterized as the employer of a group of employees for the purposes of s. 1(*d*). Once again, the facts are not easily related to the facts before me, but the referee's comments about the nature of the statutory definition are of interest:

> The statutory definition of 'employer' clearly contemplates the possibility that there will be more than one employer with respect to any particular employee or employees. For example, consider the typical industrial setting where a limited company owns a manufacturing plant. It is apparent that the application of the definition to that type of situation will identify a number of employers. First of all, there will be the company which as the 'owner or proprietor' of the 'activity or business' is clearly at least 'indirectly responsible' for the 'employment' of people working in the

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

plant and, therefore, an 'employer' within the meaning of the definition. The plant manager would presumably also fall within the definition of employer, being a 'manager' who has 'control or direction of, or is directly or indirectly responsible for' the 'employment' of the people on his assembly lines. The Production Department Superintendent would also be an employer within the definition because of his status as a 'superintendent or overseer' with 'control or direction' of the 'employment' of the production workers. So, presumably would the employees' foreman.

The concept that in any one employment situation there may be more than one employer, is not one that fits very comfortably with many aspects of the substantive provisions of the Act. It does not seem reasonable, for instance, to suggest that a foreman is committing an offence when the company fails to provide an employee with a statement of wages as required by s. 10, or that even a plant manager was intended by the Legislature to be *personally* liable (in the event, say, of the company becoming insolvent) to manufacturing employees for wages for work performed (s. 23), or for holiday pay (s. 26(5)), or vacation pay (s. 29) or termination pay (s. 47). But the fact that the wording of the definition does indeed contemplate the existence of a multiplicity of employers is too clear to be ignored and one is therefore left to consider how the definition should be interpreted in the light of that fact and the incongruities to which it appears to lead.

In my view, the definition of 'employer' is workable if it is interpreted as referring in a particular case to 'control or direction of', or 'direct or indirect responsibility for' *the particular aspect* of the 'employment' put in issue by the complaint. Thus a person who was a manager, superintendent or overseer would be an employer for purposes of the Act only if he did indeed have control or direction of or was in fact directly or indirectly responsible for the aspect of the employment about which the employee is complaining. For example, while it may not be reasonable to fix a foreman with the obligations of an employer under this Act with respect to a failure of an employee to receive wages, the Legislature might well have intended that the foreman should be treated as an employer in connection with a complaint concerning hours of work if the foreman is in fact the person who controlled the hours to be worked by the complainant. And while a plant manager might not have been intended by the Legislature to assume personally the obligations of an employer under the Act for unpaid wages, the Legislature might well have intended that a plant manager should be liable as an employer with respect to making statements of wages available to an employee at the time of termination, where it is clear that the plant manager was in fact directly or indirectly responsible for that aspect of the 'employment' of the person in question.

In effect, on that view, the area of obligation imposed by the Act on a particular person as an 'employer' will be determined by the aspect of the employment for which that person is or was in fact responsible directly or indirectly or over which he did indeed have control or direction.

It will also be noted that this interpretation requires an understanding of the word 'employment' which contemplates not simply what an employee does — i.e. his or her duties — but the total package of rights and obligations arising out of an employer-employee relationship, as in, 'my *employment* entitles me to vacation pay' or 'your *employment* requires you to come to work on time'.

The foregoing is admittedly a complicated reading of the Act, but it is a complication that seems inescapable once it is recognized that the definition of employer is one which clearly contemplates each employee having a number of different 'employers' at any one time. Previous cases have not had to deal with the multiple nature of the employer definition because without exception they have all been concerned about the 'employee' status of the person doing the work. This case requires me to choose between two competing candidates for the role of 'employer' and when the definition is read in that context it becomes impossible to ignore the fact that the definition clearly contemplates the possibility that both candidates might well fit the definition; to see that the Act could not have intended all persons who fit the definition to have the same obligations under the Act, and to consider how the Act intended to distribute its several obligations amongst the various employers.

15 In my view, the relationship of Price Waterhouse and the National Bank to Windsor Packing must be viewed, both legally and factually, in its entirety, and then compared with the statutory definition, in order to determine whether one or

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

both of the present applicants may be treated as an employer for the purposes of this matter. Legally, Price Waterhouse is not an interloper. The National Bank derived all of its legal authority to put Windsor Packing into receivership by contract, from the security instruments executed in its favour by Windsor Packing. Price Waterhouse, similarly, derives its status as receiver from the decision of the National Bank to exercise its contractual authority in that way, and further from the contractual appointment of Price Waterhouse as receiver and manager. The effect of the entirety of the contractual relationship is to make Price Waterhouse the agent of Windsor Packing, and to arm Price Waterhouse with the authority to take over and operate the business of Windsor Packing pursuant to that agency status, albeit as fiduciary for the National Bank as well.

16 Factually, it appears from the agreed facts that Price Waterhouse was appointed receiver and manager on September 21, 1982, and took possession on the following day. On that day, while it was certainly open to Price Waterhouse to continue to operate the business of Windsor Packing, the competing security interests of the Federal Business Development Bank, including the first mortgages against the real property, made this, to say the least, an unlikely outcome. For this reason, and undoubtedly for others as well, Price Waterhouse recommended to the National Bank, and the National Bank agreed, that the business should be wound up.

17 Neither the legal nor the factual circumstances of this case make it possible to come to any other conclusion than that Price Waterhouse acted as agent, or as other referees have described it, as alter ego of the employer. When it took possession of the collateral covered by the general security agreement, there was nothing left of the business of Windsor Packing in the hands of the owners of that corporation; all assets of the business, tangible and intangible, were in the hands of Price Waterhouse and at its disposal.

18 As a matter of fair, wide and liberal interpretation of a remedial statute, it would seem an unlikely result if the Legislature were to create a statutory trust under s. 15 of the Act, and then so restrict the definition of "employer" in s. 1(*d*) to render it impossible to reach the assets against which that trust is to be charged. Nevertheless, when one reads s. 1(*d*), there do indeed appear to be circumstances possible where funds against which a s. 15 trust has been impressed may not be traceable through the procedure set out in the Employment Standards Act. In the present case, however, I think that the definition is broad enough to cover the situation in which Price Waterhouse found itself at the time of the order to pay here at issue. While ownership or proprietorship of the business at Windsor Packing might have been a matter of some considerable doubt, there is no doubt that to the extent that any person could fit the description of "manager, superintendent or overseer" of Windsor Packing's business, that person was clearly Price Waterhouse. I therefore find that the Order to Pay was properly directed to Price Waterhouse as an "employer" under the legislation. To whatever extent this proposition may be doubtful, it seems to me that there is an alternative characterization of the service of the order to pay which puts the propriety of the service thereof beyond any doubt. By the terms of the general security agreement and of its appointment, Price Waterhouse was the agent of Windsor Packing for all purposes relating to its assets and its business. As a matter of the law of agency, service on the agent in such circumstances must constitute effective service on the employer.

Second Question

19 The fundamental problem in this case is to determine the relative priorities between the statutory trust and the security interest of the National Bank under the general security agreement. Both counsel took the view that whatever priority could be given to the general security agreement would be of a better and more extensive kind than the interests under the debenture, since the latter constituted only a floating charge on certain of the assets, in particular the inventory and the accounts receivable while, in the applicant's submission, the security interest established by the general security agreement constituted at least a form of a fixed charge on those assets. I shall therefore deal with the priority issue on the basis that the applicants' real claim to priority over the statutory trust arises from the terms of the general security agreement.

20 What gives the general security agreement its particular vitality is, of course, its registration under the Personal Property Security Act, R.S.O. 1980, c. 375. That legislation was designed to recognize a broad range of security interests

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

in a broad range of property, including inventory, accounts receivable and other intangibles. By s. 2 of the Act, it is made applicable to "every transaction...that in substance creates a security interest". The only exceptions to this deliberately broad applicability section are found in s. 3, and the provision thereof which is of interest in the present matter is cl. 3(1)(*a*). That clause is as follows:

> 3. — (1) This Act does not apply,
>
> (*a*) to a lien given by statute or rule of law, except as provided in section 32, clause 36(3)(*b*) and clause 37(2)(*b*);

21 The only one of the exceptions to cl. 3(1)(*a*) which is material to the present matter is s. 32, which provides:

> 32. Where a person in the ordinary course of business furnishes materials or services with respect to goods in his possession that are subject to a security interest, any lien that he has in respect of such materials or services has priority over a perfected security interest unless the lien is given by an Act that does not provide that the lien has such priority.

22 There is no argument that this exception for an artisan's lien, which is possessory in nature, applies to the present case. On the other hand, the applicants argue that the fact that the Legislature has included this exception to the general priority provisions of the Personal Property Security Act indicates that s. 3(1)(*a*) ought to be read as not intending any particular priority, of the sort which is set out in s. 32, for statutory liens otherwise not covered by the Act, by reason of having been thus excepted.

23 Section 32, for a number of reasons, is fraught with difficulties. Important among these difficulties is the fact that, by reason of its wording in some considerable difference both from the United States Uniform Commercial Code and the report of the Ontario Law Reform Commission from which the present legislation was derived, the section appears to be essentially nugatory: see Richard H. McLaren, Secured Transactions in Personal Property in Canada, vol. 1, §6.03[2][a]. Nevertheless, the applicants argue that this provision should be viewed as an example of a legislative intention to grant a priority for statutory liens over all Personal Property Security Act interests. Such an intention having been displayed in this form, the applicants argue that the Legislature should be considered not to have intended any other statutory liens to have priority.

24 While this argument has some apparent validity, I do not think that it can be accepted. Clause 3(1)(*a*) makes it clear that the Act simply does not apply to a lien created under s. 15 of the Employment Standards Act. To interpret that expression of non-application, in conjunction with the exceptions from non-application set out in other provisions of the Act, as a legislative expression of an intention to subordinate other statutory liens to the interests protected by the Act, goes too far in applying the maxim that that which is expressly stated excludes other possibilities.

25 In my view, the correct interpretation of s. 3(1)(*a*) is described in McLaren, supra, in §1.02[2]:

> The Act generally applies to consensual transactions. Therefore, security interests arising by operation of law are not regulated by it, save with respect to [the exceptions set out in s. 3(1)(*a*)].

In short, as both counsel were prepared to concede at the hearing, the effect of s. 3(1)(*a*) is that the exclusion means that neither the registration requirements of the Personal Property Security Act, nor the priority provisions thereof, have any effect in determining the rules of priorities of interests protected by the Act and "a lien given by statute".

26 This situation is described by McLaren, supra, in §6.03[2][a][i] as follows:

> When a lien is created under the Employment Standards Act by the foregoing provision, it may come into conflict with a preexisting security interest created under the Act. Unfortunately, the exclusion of the lien created by the Employment Standards Act from the Act by s. 3(1)(*a*) leaves one in a position of having no statutory priority rules to apply to determine which interest is to take priority. Such conflicts will, therefore, likely be resolved by reference to the pre-Act law. Under the pre-Act law, the statutorily created lien would have taken priority over a chattel

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> security interest. The theory behind such a conclusion may be found in the case of *Re Dairy Maid Chocolates* [[1973] 1 O.R. 603 (Ont. S.C.)] where it was held that the vacation pay being held in trust by the employer never became part of the employer's assets. If this reasoning is applied to interests under the Act the debtor (employer) would never have had rights in the collateral (the vacation pay) under s. 12(1)(*c*) by the theory of the case, such as to enable the security interest to attach to vacation pay. Therefore, the effect of such reasoning would be to give priority to the statutory lien because the after acquired property clause could not attach to create a security interest capable of being in conflict with the statutory lien.

While accepting this as a statement of general principle, the applicants note that both in the *Re Dairy Maid Chocolates Ltd.* case, [1973] 1 O.R. 603, 17 C.B.R. (N.S.) 270, 31 D.L.R. (3d) 699 (H.C.), and in the case of *C.I.B.C. v. Brooker Trade Bindery Ltd.* (1975), 20 C.B.R. (N.S.) (2d) 280 (Ont. S.C.), the security interest involved was clearly a floating charge rather than a charge of the sort which the applicants now argue was created by the general security agreement in the present case.

27 To evaluate the argument that the general security agreement creates a better interest than a floating charge, the provisions of the security interest itself and the provisions of the Personal Property Security Act from which it draws its vitality must be considered. First, I do not think that the mere fact that a security interest is registered under the Personal Property Security Act is conclusive of the question of whether or not it nevertheless constitutes only a floating charge. There has been much discussion in the academic literature of whether the Personal Property Security Act, based as it is on the United States Uniform Commercial Code, art. 9, could even contemplate the concept of a floating charge since that notion is unknown to United States commercial law: see McLaren, supra, s. 2.02[4]. Whatever may be the merits of this academic discussion, s. 2(*a*)(i) of the Personal Property Security Act makes the legislation applicable to transactions that in substance create a security interest, including, among others, a "floating charge".

28 I was provided by the parties with a number of definitions of what is a floating charge. For my purposes, I think that of Lord Justice Buckley in *Evans v. Rival Granite Quarries Ltd.*, [1910] 2 K.B. 979 at 999 (C.A.), is as useful as any:

> A floating security is not a future security; it is a present security, which presently affects all the assets of the company expressed to be included in it. On the other hand, it is not a specific security; the holder cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. A floating security is not a specific mortgage of the assets, plus a license to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fixed security ... This crystallization may be brought about in various ways. A receiver may be appointed, or the company may go into liquidation and a liquidator be appointed, or any event may happen which is defined as bringing to an end the license to the company to carry on business ...:

It is that distinction between a non-specific floating security that does not specifically affect any item until some crystallization occurs, and a specific mortgage of the assets plus a license to the mortgagor to dispose of them in the course of his business, which characterizes the positions of the present parties as to what effect the general security agreement will have. The applicants argue that the security interest in all of the assets of Windsor Packing, including inventory and accounts receivable, was a fixed and specific charge attaching to individual assets at the moment they were created. Counsel for the Director of Employment Standards argues that at best the general security agreement creates a sophisticated form of floating charge, which cannot attach to any specific assets until some crystallizing event occurs, in this case the appointment of the receiver.

29 The Personal Property Security Act makes it clear in s. 13(1) that a security agreement may cover after-acquired property. With certain exceptions set out in s. 13(2) which are not here applicable for attachment under an after-acquired property clause, the time of the attachment of the security interest is provided for in s. 12(1):

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> 12. — (1) A security interest attaches when,
>
> (*a*) the parties intend it to attach;
>
> (*b*) value is given; and
>
> (*c*) the debtor has rights in the collateral.

Essentially, therefore, the time of the attachment of the security interest, in the present matter, to the inventory and accounts receivable against which the applicants now seek to enforce it is a matter of contractual intention based on the provisions of the general security agreement. I therefore turn to those provisions in greater detail.

30 Paragraph 2 of the general security agreement describes the collateral to which the security interest is to be attached, and lists, and describes in great detail, accounts receivable and inventory among a comprehensive list of other real and personal property. Moreover, in para. 2(g), the collateral is also described as including a "first floating charge" on certain other assets, including, as relevant for our purposes, "inventories, revenue, incomes, sources of income, money ... book debts, accounts receivable ..." All of these assets are described as including both present and after-acquired property, and the general security agreement, in the operative part of para. 1, says:

> The Debtor hereby grants to the Bank a continuing security interest in the following described property (hereinafter collectively called the 'Collateral').

31 Paragraph 3 of the general security agreement refers to the attachment of the security interest:

> The Parties hereby acknowledge that value has been given by the Bank to the Debtor and no further value need be given for the security interest to attach to the Collateral and that it is the intent of the Parties hereto that attachment of the security interest herein shall take place at the time Debtor acquires rights in the Collateral and thereafter shall be a fixed and specific charge on the Collateral.

In para. 7(b) of the general security agreement, which is otherwise a specific restriction on alienation of any part of the collateral or creation of any interest in it without the written consent of the bank, the following exception is made:

32 The debtor may:

> (i) lease or sell items of inventory in the ordinary course of its business so that the purchaser thereof takes title clear of the security interest created by the security agreement but if such sale or lease results in an account receivable, such account receivable is subject to the charge created by this security agreement;

Moreover, pursuant to para. 8, the debtor is forbidden from creating any charge on the collateral ranking or purporting to rank prior to the charge created by the general security agreement, except for certain permitted encumbrances set out in para. 30. Paragraph 30 mentions certain statutory liens, but does not appear to be broad enough to cover the statutory lien for vacation pay under the Employment Standards Act.

33 Paragraph 11 of the general security agreement sets out a number of "events of default" in case of which "the security hereby constituted shall become enforceable". Among these, in para. 11(e), is a provision that the security will become enforceable "if the Debtor ceases, or threatens to cease, to carry on its business..."

34 Finally, para. 4 of the general security agreement provides:

> If title to the Collateral has not passed to the Debtor as of the date hereof, it is hereby acknowledged by the Debtor that this Agreement under the Personal Property Security Act creates a Purchase-Money Security Interest.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

A "purchase-money security interest" is defined by the Personal Property Security Act in s. 1(*s*)(ii), for the purposes of this decision, as:

> ... a security interest that is ... taken by a person who gives value that enables the debtor to acquire rights in or the use of the collateral, if such value is applied to acquire such rights;

A purchase-money security interest has specific priorities over other kinds of security interests set out in the Personal Property Security Act, none of which appear to be of any value in determining the present dispute, except for the weight lent by these provisions to the applicants' submission that the interest created in after-acquired inventory was a fixed and specific interest.

35 All of these provisions, in the submission of the applicants, create a security interest which is fixed and specific, which attaches as soon as the debtor creates or acquires rights in any specific aspect of the collateral, and which is subject only to a specific and limited license to the debtor to deal with the assets included in the collateral in the ordinary course of its business. The applicants warn that, in attempting to characterize this kind of security interest, I should not be tempted to analogize it to the fixed charge/floating charge dichotomy created by the common law prior to the enactment of the Personal Property Security Act, which dichotomy depends for the most part upon the existence of separate legal and equitable property interests. Instead, the applicants urge me to consider the general security agreement in light of the specific statutory provisions which make it possible to create new kinds of security interests uncontrolled by the limitations of the law and equity.

36 The operation of the general security agreement may be better understood by reference, briefly, to the evidence of Mr. K.B. Liddle, manager of the branch of the National Bank which provided credit to Windsor Packing under the general security agreement. Mr. Liddle testified that, despite the breadth of the definition of collateral set out in the general security agreement, the main purpose of the line of credit provided to Windsor Packing was to support the inventory and receivables. The inventory consisted largely of live cattle and hogs, and fresh meat products in various stages of processing and packing, as well as processing and packing materials required to carry on Windsor Packing's operation. The accounts receivable were, of course, generated almost entirely through sales of processed meats. There were, in addition, loans in the neighbourhood of $250,000 on a non-revolving basis to be used for capital purchases of machinery and equipment, but in respect of that credit the security interests were created by specific chattel mortgages or liens on the items as purchased, as described in para. 8 of the statement of agreed facts.

37 The National Bank operated three accounts for Windsor Packing in order to administer this line of credit: a Canadian dollar account, a U.S. dollar account and a payroll account. The two general accounts were operated on a daily basis, so that at the end of each day's business all cheques cashed against these accounts and receivables paid in would be totalled, and the account would be kept in funds by drawing down against the line of credit in multiples of $50,000 against a supply of signed promissory notes held by the bank for discounting as needed. When the accounts were in funds, the indebtedness would be paid down in multiples of the same sum. Although the line of credit was expressly related to the inventory and receivables, the entire business of Windsor Packing was processed through these accounts. In order to satisfy accruing obligations to pay wages to its employees, Windsor Packing would write a cheque on a weekly basis on the Canadian dollar account to the credit of the payroll account, from which weekly wages would be then paid out. Overdrafts in the Canadian dollar account caused by these weekly drawings would be supported from the line of credit in the same way as described above.

38 In addition to the daily monitoring of the business of Windsor Packing through the accounts, the bank had access to the previous year's annual audited statement at the time of entering into the general security agreement, and subsequently received monthly unaudited financial statements from Windsor Packing. Periodic lists of receivables and of inventory were also supplied from time to time. All of this documentation would be used by the National Bank to monitor the margins established at the time of the original credit agreement which is secured by the general security agreement.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

39 While there is no specific evidence before me, I think it is an irresistible inference from the statement of agreed facts and from the evidence of Mr. Liddle, and in particular his statements on crossexamination, that it was accepted by the National Bank that Windsor Packing would pay its wages on a weekly basis out of the Canadian dollar account supported by the line of credit, and there were undoubtedly occasions during the period of operation of that line of credit when vacation pay was paid out through that account. It does not appear that there was ever any objection to this; indeed, the irresistible conclusion is that it was fully intended by the parties that all of the costs of doing business, including those costs related to the employment of employees, would constitute legitimate charges against the Canadian dollar account. Mr. Liddle admitted that at no time did he ever inquire into the amount of vacation pay which might be accrued and owing, and that it never occurred to him to do so. He agreed, however, that it would have been open to the National Bank at any time to make such a calculation based upon the financial information provided by Windsor Packing.

40 Having looked at the general security agreement, the legislation from which it draws its vitality and the method of operation of the line of credit, I turn now to the nature of the statutory trust and lien for vacation pay set out in s. 15. In *MacMillan v. Frizzell Plumbing & Heating Ltd.* (1975), 23 N.S.R. (2d) 684, 32 A.P.R. 684, 56 D.L.R. (3d) 415, Morrison J. dealt with the meaning of what was then s. 34 of the Nova Scotia Labour Standards Code, S.N.S. 1972, c. 10. While there are differences later in the section, the declaration of trust in that provision is identical to that in s. 15 of the Employment Standards Act, i.e.: "Every employer is deemed to hold vacation pay accruing due to an employee in trust..."

41 At p. 429, the learned Judge construed this provision as follows:

> A careful reading of these sections in conjunction with s. 34 leads me to the conclusion that the right to receive the vacation pay and the obligation placed upon the employer arises as the work is performed by the employee. The vacation pay accrues due as it is earned by the employee, and at that time a trust is created and the employer holds the vacation pay owing to the employee in trust under the provisions of s. 34. Although an employer is given 10 days in which to pay the vacation pay when employment is terminated, nevertheless the right arose at the time the vacation pay was earned.

With respect, I think that this is a correct view of the way in which the statutory trust for vacation pay accrues, leaving aside for the moment how an accrual of this sort will affect the central question of the priority of such a trust.

42 The Employment Standards Act in its present form was passed in 1974, to replace the Employment Standards Act, R.S.O. 1970, c. 147. The provisions of that legislation relating to the status of the claims of employees and their priority to claims of other creditors were set out in s. 8:

> 8(1) Notwithstanding the provisions of any other Act, a person to whom unpaid wages is due and owing by an employer shall have first priority over the claims or rights, including the claims or rights of the Crown, of all preferred, ordinary or general creditors of the employer to the extent of $2,000.
>
> (2) Every employer shall be deemed to hold vacation pay accruing due to an employee in trust for the employee and for payment of the vacation over in the manner at the time provided under this Act and the regulations, and the amount shall be a charge upon the assets of the employer or his estate in his hands or the hands of a trustee and shall have priority over all other claims.

Those provisions were replaced in 1974 [c. 112] by the following sections of the current legislation:

> 14. Notwithstanding the provisions of any other Act and except upon a distribution made by a trustee under the Bankruptcy Act (Canada), wages shall have priority to the claims or rights and be paid in priority to the claims or rights, including the claims or rights of the Crown, of all preferred, ordinary or general creditors of the employer to the extent of $2,000 for each employee.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> 15. Every employer shall be deemed to hold vacation pay accruing due to an employee in trust for the employee whether or not the amount therefor has in fact been kept separate and apart by the employer and the vacation pay becomes a lien and charge upon the assets of the employer that in the ordinary course of business would be entered in books of account whether so entered or not.

43 Some of the differences between the former s. 8(1) and the present s. 14 may undoubtedly be explained by the constitutional issues involved when a provincial Legislature attempts to enact statutory provisions on a matter expressly covered by valid federal legislation. The Bankruptcy Act, R.S.C. 1970, c. B-3, provides in s. 107(1)(*d*) for a priority on the bankruptcy in certain cases for "wages, salaries, commissions or compensation". Pursuant to the doctrine of paramountcy, enactments of provincial Legislatures covering the same subject-matter have been found to be unconstitutional in a number of cases, including *W.C.B. v. Kinross Mtge. Corp.*, [1982] 1 W.W.R. 87, 31 B.C.L.R. 382, 42 C.B.R. (N.S.) 1, 127 D.L.R. (3d) 740 (C.A.). These cases, and that particular British Columbia decision, were considered in the *Re Phoenix Paper Products Ltd.* case, to which I have made reference earlier, and were found not to be applicable to the words of s. 15. Since s. 14 appears, however, to deal much more directly with the same subject-matter as s. 107 of the Bankruptcy Act, it appears likely that the Legislature intended, by the insertion of the exception for cases of bankruptcy, to avoid any inconsistency with the federal enactments.

44 The provisions of the former s. 8(1) were considered by the Ontario Divisional Court in *Re Campeau Corp. and Prov. Bank of Can.* (1975), 7 O.R. (2d) 73, 20 C.B.R. (N.S.) 99, 54 D.L.R. (3d) 329. While there are other observations made in this case to which I shall return later, it appears that the ratio of the case is that s. 8(1) could not give a priority to wage-earners over a secured creditor, the expression "preferred creditors" being interpreted by the Court as referring only to unsecured creditors who have some common law or statutory priority over other unsecured creditors. At p. 331, immediately following this conclusion, the Court deals with the contention that s. 8(1) creates a statutory lien in the following terms:

> Counsel for the employees contended next that the wage-earners were given a statutory lien by s. 8(1) and thus, the wage-earners were secured creditors. A statutory charge or lien against property must be created in clear and precise terms: *Dinning v. Workmen's Compensation Board*, [1932] 1 D.L.R. 373, 13 C.B.R. 256, [1932] 1 W.W.R. 136. For an example of the type of wording which can be used to create a charge or lien, reference can be made to the wording of the British Columbia Workmen's Compensation Act as set out in *Re Clemenshaw; Workmen's Compensation Board v. Canadian Credit Men's Trust Ass'n. Ltd.* (1962), 36 D.L.R. (2d) 245 at pp. 246-7, 4 C.B.R. (N.S.) 238 at p. 240, 40 W.W.R. 199. On the plain reading of s. 8(1), it does not, in my opinion, create a charge or lien on the property of the employer for unpaid wages; rather, it merely provides for priority of payment of such claims over certain classes of creditors and those classes of creditors do not, in my view, include secured creditors.

Remarkably, the Court sought an example of a statutory charge or lien in a British Columbia statute, and did not refer to the wording of s. 8(2) for the purposes of interpreting the meaning of s. 8(1). I do not therefore have the benefit of any Court's views on the nature of the statutory trust created either by the former s. 8(2) or the present s. 15.

45 The only cases dealing with the effect of s. 8(2) are *Re Dairy Maid Chocolates Ltd., supra*, and *C.I.B.C. v. Brooker Trade Bindery Ltd., supra. Re Dairy Maid Chocolates*, however, deals for the most part with the status of a claim under s. 8(2) on bankruptcy, and therefore deals largely with the constitutional issue which was also dealt with in *Re Phoenix Paper Products Ltd.*, supra. Houlden J., however, treats s. 8(2) as creating a trust, as vacation pay is deemed to accrue due, on the assets of the employer in the hands of the employer, and therefore traceable into the hands of the trustee in bankruptcy. Indeed, it is because the trust is enforceable only in respect of the assets of the employer that the learned Judge is able to avoid the implications of certain previous cases, including *Re Deslauriers Const. Products Ltd.; A.G. Can. v. Perlmutter*, [1970] 3 O.R. 599, 14 C.B.R. (N.S.) 197, 13 D.L.R. (3d) 551 (C.A.). In *C.I.B.C. v. Brooker Trade Bindery Ltd.* Master Saunders follows the *Dairy Maid Chocolates* case, but in circumstances which are not directly relevant to the present decision.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

46 In the context of the constitutional issue, s. 15 of the Employment Standards Act has been considered by Judges of the Ontario Supreme Court sitting in bankruptcy in *Re Alduco Mechanical Contrs. Ltd.* (1982), 35 O.R. (2d) 445, 40 C.B.R. 239, 134 D.L.R. (3d) 104, and in *Re Phoenix Paper Products Ltd.* In *Re Alduco Mechanical Contrs.*, Steele J. dealt with s. 15 as if the differences in wording from the former s. 8(2) made no real difference to the matter before him. He found that s. 15 created a trust on the assets of the employer in favour of the individual employees, and that constituted a valid trust claim within the meaning of s. 47(*a*) of the Bankruptcy Act, which finding had the effect of avoiding the possibility of any conflict with s. 107 of the Bankruptcy Act. In *Re Phoenix Paper Products Ltd.*, Gray J. dealt with the identical issue and came to the same conclusion. Beyond a holding that s. 15 creates, by statute, a trust in favour of the individual employees, and that the trust is impressed upon the assets of the employer, neither of these cases engage in any analysis of the nature of the statutory trust which is of any assistance in resolving the matter before me.

47 Unfortunately, there seems to exist no authoritative statement of the effect of the change in the language of the former s. 8(2) relating to the nature of the trust and lien. For ease of reference, the former s. 8(2) provided:

> ... the amount shall be a charge upon the assets of the employer or his estate in his hands or the hands of a trustee and shall have priority over all other claims.

The present s. 15 uses, in replacement of those words, the following:

> ... in trust for the employee whether or not the amount therefor has in fact been kept separate and apart by the employer and the vacation pay becomes a lien and charge upon the assets of the employer that in the ordinary course of business would be entered in books of account whether so entered or not.

48 Some explanation for the abandonment of the language in former s. 8(2) that appears to attempt to charge the estate of the employer in the hands of a trustee may be intended to avoid any possibility of a conflict with the Bankruptcy Act. Section 47 of that Act has the effect of separating "property held by the bankrupt in trust for any other person" from the property of the bankrupt which is divisible among his creditors. It may have been considered that the effect of trying to create a charge upon the employer's estate in the hands of a trustee would fall outside s. 47 and perhaps be in conflict with the provisions of s. 107 of the same legislation.

49 There is also no explanation for the omission of the words "and shall have priority over all other claims" in the former s. 8(2). This deletion of language connoting priority is advanced by the applicants as a clear indication of the legislative intention that s. 15 would not have the effect of granting a priority for a vacation pay trust over any other interests. It is certainly true that the language of priority "over any other claim" is no longer available, but I do not think that I can give the change in language the absolute meaning for which the applicants contend. The Legislature has not simply deleted the priority language of former s. 8(1); instead, it has replaced it with new language which creates the trust whether or not an actual separate trust fund has been created, and enforces the trust as a "lien and charge" upon the employer's assets whether or not the employer has entered that lien and charge upon the books of account. It is my construction of this language that the former priority over all claims has simply been replaced by a new priority extensively described in the words of s. 15. Thus the deletion of the general priority language of the former s. 8(2) has now been replaced by specific priority language, and the deletion is of no direct assistance in resolving the present dispute.

50 The applicants also point to a number of provisions in other Ontario statutes which establish, in language which the applicants urge is stronger than in s. 15, priority for statutory trusts. For example, the Corporations Tax Act, R.S.O. 1980, c. 97, s. 92, uses the expression "a first lien and charge upon the property in Ontario of the corporation"; the Municipal Act, R.S.O. 1980, c. 302, provides in s. 369 for "a special lien upon the land in priority to every claim, privilege, lien or encumbrance of every person except the Crown, and the lien and its priority are not lost or impaired by any neglect, omission or error of the municipality or of any agent or officer, or by want of registration."; the Retail Sales Tax Act, R.S.O. 1980, c. 453, provides in s. 18(2) for a "first lien and charge upon its property in Ontario (which) has priority over all other claims of any person." Once again, while this language and a comparison of it with the provisions

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

of the Employment Standards Act is of some interest, it does not appear to take the present case any farther than does the omission of the priority language which was contained in the former s. 8(2). While it is clear that the Legislature has not used the same language in s. 15 as is used in these provisions, it is still the case that s. 15 was enacted in 1974, after all of the statutory trust provisions referred to, and that the Legislature has substituted one kind of priority language for another. I conclude that the deletion of the general language of priority from the former s. 8(2), and the similarity of that general language to language used in other statutory trust provisions, does not relieve me of the obligation to construe the language of s. 15 as creating some specific priority for the statutory trust, and to relate that specific priority to the priorities of the interests created by the general security agreement.

51 I turn, therefore, to that task. The first way in which the statutory trust under s. 15 may be characterized, as is urged upon me by counsel for the Director of Employment Standards, is as an absolute creation of a trust in favour of the employees, which prevails over all other possible claims against the amounts of money impressed by the trust. The effect of such characterization of s. 15 would be that amounts accruing due as vacation pay could never be the subject of any security interest however created, and would be traceable into the hands of any subsequent holders of the employer's assets, including the present applicants. An argument along these lines was upheld by the Ontario Court of Appeal in *Re Deslauriers Const. Products Ltd.; A. G. Can. v. Perlmutter*, supra. In that case, the Court was dealing with amounts deducted as employees' contributions under the Canada Pension Plan. The relevant provisions of the plan are found in the Canada Pension Plan Act, R.S.C. 1970, c. C-5, s. 24. Subsections (3) and (4) of that section, which create a statutory trust, are as follows:

> (3) Where an employer has deducted an amount from the remuneration of an employee as or on account of any contribution required to be made by the employee but has not remitted such amount to the Receiver General, the employer shall keep such amount separate and apart from his own moneys and shall be deemed to hold the amount so deducted in trust for Her Majesty.
>
> (4) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (3) is deemed to be held in trust for Her Majesty shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.

In the *Deslauriers Const.* case, the Court found that the effect of the legislation was to create a trust that was effective to preserve the amounts deducted in favour of the Crown regardless of the fact that the employer had not kept the moneys separate and apart as a separate trust fund, and regardless of difficulties in tracing those moneys into the estate in bankruptcy. The applicants here argue that the provisions of the Canada Pension Plan Act, quoted above, are an example of an express legislative intention to permit the tracing of a trust into liquidation, and that the absence of such language in the present case indicates that there was no legislative intention that the statutory trust created by s. 15 should follow the assets into the hands of Price Waterhouse.

52 A reading of s. 15 against subs. (3) and (4) of s. 24 of the Canada Pension Plan Act does not, with respect, necessarily lead to the conclusion argued for by the applicants. It is clear that the Ontario Court of Appeal in the *Deslauriers Const.* case relied upon what were referred to as "the concluding words of subs. (4)" in the Canada Pension Plan Act to establish a trust traceable even into bankruptcy, and it also appears that the very words which created such a trust "whether or not the amount of the trust fund has in fact been kept separate and apart" appear in s. 15. In *Dauphin Plains Credit Union Ltd. v. Xyloid Industs. Ltd.*, [1980] 1 S.C.R. 1182, [1980] 3 W.W.R. 513, 3 Man. R. (2d) 283, 33 C.B.R. (N.S.) 107, [1980] C.T.C. 247, 108 D.L.R. (3d) 257, (sub nom. *Dauphin Plains Credit Union Ltd. v. R.)* 80 D.T.C. 6123, 31 N.R. 301, the Supreme Court of Canada reviewed the rationale of the *Deslauriers Const.* case, and in particular the reliance in that case upon the concluding words of subs. (4) of s. 24 of the Canada Pension Plan Act. At p. 119 [C.B.R.] in the majority judgment, Pigeon J. observed that he found the reasoning in the *Deslauriers Const.* case "fully persuasive". The only issue is therefore whether there is any material difference between the expression "an amount ... is deemed to be held in trust ... and shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart ..." in the Canada Pension Plan Act

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

and the expression "... deemed to hold vacation pay ... in trust for the employee whether or not the amount therefor has in fact been kept separate and apart ..." in s. 15 of the Employment Standards Act.

53 Despite a careful scrutiny of the language in both of the statutory provisions, I am unable to see that the addition of language that expressly provides for tracing into the hands of a receiver or trustee in bankruptcy in the Canada Pension Plan Act makes any real difference to the provision earlier in the same subsection that the amounts are deemed to be held in trust. It would appear to be the very essence of the trust fund that it can in fact be traced into the hands of any subsequent holder, and I am of the opinion, as was the Ontario Court of Appeal in *Deslauriers Const.*, that the critical words in the Canada Pension Plan subsection are those which permit those funds to be traced whether or not they have been kept separate and apart from the other assets of the employer.

54 If I am correct in this conclusion, it would appear that the necessary result of *Deslauriers Const.* and *Dauphin Plains Credit Union* is that the effect of s. 15 is to create a statutory trust which is prior to all other claims which may be asserted under the Bankruptcy Act. This finding is, of course, not entirely conclusive as to the question of priority, prior to bankruptcy, between interests created under the Personal Property Security Act and the statutory trust created by s. 15. Nor do the two cases just cited, despite their high authority, have any real bearing upon the meaning of the subsequent expressions in s. 15 which purport to create a "lien and charge" upon the assets of the employer. I turn, therefore, to the meaning of those words and their application to the present dispute.

55 The expression "lien and charge" is a term of art in the law of trusts. D.W.M. Waters, Law of Trusts in Canada (1974), describes the concept in the following terms at p. 883:

> In Canada the terms lien and charge have sometimes been used interchangably in relation to the equitable tracing remedy. As *Snell* explains, the equitable lien arises out of the relationship of the parties, such as solicitor and client, while the charge arises out of the act of the parties, such as the misappropriation by the defendant of trust property. But the function of the two is essentially the same. In *Smith v. Faulkner* it was said by Townshend J. that the beneficiary has a lien when the trust funds of the sole source of the consideration for newly purchased property, and a charge on the newly purchased property when trust funds together with other funds are used to make the purchase. Obviously a charge can be for any amount. It is available as a means of restoring to the trust the capital loss, the capital loss plus interest, or the capital loss plus the profit actually made with the wrongfully employed capital.

The result of the statutory provision for a lien and charge is therefore, in my opinion, to establish a remedy of a statutory nature, but assimilated to the legal and equitable remedies of a beneficiary under a trust created otherwise than by statute. The remedy is to create a property interest in favour of the employees in the assets of the employer, and to provide the machinery for tracing that interest into the hands of subsequent holders of those assets, even when the assets become intermingled with other assets before the trust interest is enforced.

56 Moreover, the lien and charge created by s. 15 is more specifically described in the section as one which "in the ordinary course of business would be entered in books of account"; this description is a deeming provision, since it applies whether or not there was an actual entry created in books of account for the lien and charge. This provision also appears to be aimed at the difficulty encountered, in the general law of trusts, in dealing with tracing funds into the hands of third parties. Just as the words earlier in the section which create a trust for the employee "whether or not the amount therefor has in fact been kept separate and apart" appear to be aimed at situations where the courts have refused a tracing remedy where the trustee has not kept the funds separate, so the description of the lien and charge as one that "in the ordinary course of business would be entered in books of account" appear to avoid the problems of trust funds being mixed with other funds and becoming difficult to trace. The kinds of considerations which appear to be addressed by this language are described in Waters, supra, at pp. 884-889.

57 I would therefore characterize s. 15 of the Employment Standards Act as creating a statutory trust for vacation pay accruing due to each employee which is secured by a lien and charge upon the assets of the employer, and is impressed upon those assets as the amounts accrue due. As a statutory trust, this trust has some of the characteristics of both law

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

and equity, and the security interest created by the lien and charge also has both legal and equitable aspects in respect of tracing the trust funds into the hands of a third party. Finally, the trust is deemed to exist and to be secured by the statute, and the validity of the trust is not in any way destroyed by the failure of the employer expressly to establish a separate trust fund, and the tracing remedy is available as if such a fund had been established and entered into the books of account in the ordinary course of business, whether or not in fact that was actually done, There can be no argument that the Legislature has, within its constitutional legislative authority, the power to create a trust of such a nature, however artificial it may seem by comparison with trusts created by contract and by the conduct of the trustee. In my view, even having regard to the various other formulations found in other statutes to create statutory trusts, the wording used by the Legislature is apt to satisfy all of the conceptual difficulties inherent in creating a statutory trust of this nature.

58 All of this characterization, of course, does not finally resolve the specific issue of priorities here to be determined. It does, however, make it possible to describe the nature of the security interests which are competing for priority in the present case and I have therefore taken a somewhat discursive approach in order to set the stage for the arguments presented by the parties about the priority issue.

59 The kind of security interest which, in the applicants' submission, is created by the general security agreement is one in which a fixed and specific charge attached to every part of the collateral as of the date of perfecting the general security agreement under the Personal Property Security Act, and new fixed and specific charges were attached to each new asset, or to each part of any converted asset in its new form, as soon as Windsor Packing acquired any rights in the asset or the asset was converted. Put graphically, the applicants' argument envisions a security interest which attaches to a live animal as soon as it is purchased for inventory, subdivides and reattaches to each individual piece of fresh meat or by-product when the animal is slaughtered and butchered, and is transferred from the specific products as they are sold to the account receivable generated by the sale. Finally, when the account receivable is paid, the security interest attaches to the funds received in the nature of a trust in favour of the bank. While the Director of Employment Standards argues that a series of fixed charges of this sort simply constitutes, in the aggregate, a floating charge over the assets of the employer, I am not convinced that very much is gained by continuing to analyze the present problem by reference to concepts which existed prior to the Personal Property Security Act. The Personal Property Security Act created new kinds of security interests, whose priority depends upon registration rather than upon any concepts of title or possession, and the legislation clearly invites parties to security agreements to use their ingenuity in devising new kinds of security interests to deal with new kinds of situations.

60 In my view, the present case should be answered, at the most fundamental level, by asking whether the intention of the Legislature in enacting the Personal Property Security Act, from the effect of which statutory trusts were excluded, was nevertheless to permit the parties to a general security agreement to contract out of the provisions of s. 15 of the Employment Standards Act to the detriment of third party employees who have no opportunity to intervene in the contracting process to preserve their own rights. Upon careful consideration, I think that the result of the exception in s. 3(1)(*a*) of the Personal Property Security Act must be viewed as a clear legislative refusal to allow the remedial provisions of the Personal Property Security Act to enable such contracting out of the provisions of the statute. As a matter of public policy, there is a general presumption that no one may contract out of the provisions of a statute; in the Employment Standards Act, an express statement of that presumption is found in s. 3. If the Legislature was not prepared to allow individual employees to contract with their employers to avoid the provisions of the legislation, it would take very strong language indeed to permit the employer to contract with a stranger to the employment relationship so as to defeat those same statutory rights of the employees. In my view, not only is there no such language, but s. 3(1)(*a*) of the Personal Property Security Act must clearly indicate a legislative intention not to permit such contracting out to take place.

61 That is not to say that certain kinds of security arrangements may not be possible by which the interests of a creditor take priority over the statutory trust provided in s. 15. My finding in this case is limited to circumstances where, as here, the parties to the general security agreement have purported to confer a security interest in favour of the National Bank in respect of every single identifiable and definable asset of Windsor Packing, yet have also provided not only that Windsor Packing is permitted to continue to carry on its business and engage employees to perform operations in respect of that

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

business, but have also expressly required Windsor Packing so to do; by para. 11(e) it constitutes an event of default, and the security constituted by the general security agreement shall become enforceable, if the debtor ceases or threatens to cease to carry on its business. Counsel for the applicants suggests that the effect of this arrangement is that none of assets used in carrying on the business are any longer assets of Windsor Packing, since they are all subject to a perfected security interest in favour of the National Bank by the general security agreement. Such an interpretation of the relevant legislation would, in my view, be wholly inconsistent with the presumption that parties may not contract out of statutory obligations, the more so as, in this case, the contracting out is not between the principals to the employment relationship but between one of them and a stranger to that relationship. It is therefore my determination that, at a conceptual level, the general security agreement is at best an unsuccessful attempt to avoid the clear provisions of s. 15 of the Employment Standards Act by purporting to arrange for the carrying on of the business by one corporation with assets that, in effect, belong to another. Even were this to be done clearly and unequivocally, as for example when a management corporation with no assets of its own is established to run a business and to hire employees to work in that business, the Employment Standards Act provides in s. 12 for the owner of the assets and the management company to be treated as associated employers, both of which are liable for the obligations of an employer under the legislation. If the general security agreement in this case really did what the applicants now say it does, namely to divest Windsor Packing of all of its assets in favour of the National Bank and other specifically secured creditors so that there are no "assets of the employer" to which the s. 15 statutory trust can attach, I would think that the Employment Standards Officer in this case would have been justified in treating the National Bank and Windsor Packing as associated employers for all practical purposes. It is my opinion, however, as stated above, that the Personal Property Security Act and the Employment Standards Act simply cannot be interpreted as permitting such a result to the extent that s. 15 of the Employment Standards Act is rendered nugatory.

62 Alternatively, on a more mechanical level, it seems to me that the claim for the amount of vacation pay must prevail over the interests under the general security agreement. The statement of agreed facts and the oral evidence make it clear that the business of Windsor Packing operated as usual at all material times, and that it was contemplated by the National Bank that employees would be engaged and would be employed in processing the inventory, selling it and realizing on the accounts receivable generated thereby. In economic terms, these employees were engaged in adding value to the inventory purchased by Windsor Packing against the line of credit provided by the National Bank of Canada. It was from that added value, of course, that Windsor Packing hoped ultimately to repay the line of credit, to meet the interest load on sums outstanding and eventually to generate a profit. The employees engaged in adding that value were entitled to be paid for work performed. Moreover, there is no doubt that it was in the contemplation of both the National Bank and Windsor Packing that such payment should be made, since sums were transferred weekly from the Canadian dollar account to the payroll account to meet current payroll obligations, and the draws on the Canadian dollar account, to whatever extent they could not be met from other deposits, were supported by the line of credit authorized by the National Bank.

63 This characterization of the facts becomes particularly relevant when one considers the nature of the trust in s. 15, which is created to hold vacation pay accruing due in trust whether or not that amount has been kept separate and apart, and is secured by a lien and charge that is deemed by the statute to be the kind of lien and charge that in the ordinary course of business would be entered in books of account. In other words, whatever might be the position of a creditor less intimately involved with the day to day affairs of a debtor than was the National Bank with those of Windsor Packing, there appears to be no reason not to regard the National Bank as having express notice on a weekly basis of the accrual of amounts of vacation pay and the establishment of a trust fund which was deemed to be a separate trust fund, secured by a lien and charge which is deemed to be a separate entry in the books of account. In other words, to have permitted the administration of the business of Windsor Packing, not in spite of the general security agreement but in express compliance with it, in such a way as to give rise to the statutory trust, Windsor Packing must be deemed to have had express notice of the circumstances from which the liability for and the amounts of the trust fund could be readily ascertained. As to notice of the requirement that a statutory trust be created, it is trite to say that everyone is deemed to know the law, and that ignorance of the law is no excuse.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

64 The notion that adding value to assets in the hands of a debtor but subject to a security interest gives some interest in the goods to the debtor is not novel. The idea was considered, but reiected on the facts, in *Rogerson Lumber Co. v. Four Seasons Chalet Ltd.* (1980), 29 O.R. (2d) 193, 1 P.P.S.A.C. 160, 12 B.L.R. 93, 36 C.B.R. (N.S.) 141, 113 D.L.R. (3d) 671 (C.A.). Both majority judgments, in dealing with a case of lumber purchased on a conditional sales contract in respect of which no value in money had been given by the debtor at any material time, appear to suggest that had value been added by the debtor, the debtor might thereby acquire some interest in the goods to which the security interest of a third party, in this case the bank, might have attached. The inference is, admittedly, to be drawn from the negative conclusions reached by the Courts; I am of the opinion, however, that it has considerable logical appeal. To analogize the *Rogerson Lumber* situation to the present case, Windsor Packing, by adding value to the animals purchased for inventory, created an interest in those assets to which the statutory trust for vacation pay could affix. Having regard to the facts set out above, it seems reasonable that such a result must have been within the contemplation of both Windsor Packing and the National Bank as weekly wages payments were made and as vacation pay accrued.

65 Finally, while I have found above that either at a conceptual or at a mechanical level the entirety of the statutory trust for vacation pay ought to be given priority over the entirety of the security interest perfected under the general security agreement, it seems to me that a somewhat more specific analysis also leads to the result that the present application must be rejected. Even if one were to conclude that the security interest created under the general security agreement in the circumstances of the present case, where the business is operated as a condition of that very agreement, might be apt to take priority over the statutory trust for vacation pay, it would still be necessary to assess in respect of each particular part of the collateral whether the security interest set out in the general security agreement had attached prior to the establishment of the statutory trust. As I have found above, the statutory trust accrues from day to day, or at least from week to week where wages are paid weekly, and therefore at any given time there would have been a substantial amount of accrued but unpaid vacation pay. The amount of the trust fund would fluctuate as vacation pay accrued and as amounts were paid out to employees, but the actual amount of the trust would fluctuate between two fairly easily determined limits.

66 Whatever one may say about the relative priorities of the security interest created by the general security agreement in inventory, when that inventory is purchased in the form of live animals for slaughter from funds provided by the line of credit secured by the general security agreement (in which case the security interest is really in the form of a purchase-money security interest) the argument in favour of such priorities is weakened as processing is done to the inventory and value is added. At the point, however, when the inventories are sold and replaced by accounts receivable, no security interest could attach to those accounts receivable until they came into existence, and it would therefore be reasonable to assume that any new accounts receivable being created would be impressed with the statutory trust for vacation pay accumulated up to that time. In other words, if the effect of s. 15 is to create a trust over all of the assets of the employer, the priority of that trust may be assessed against each particular asset, and the later in time that that asset is purchased or created, the more likely it is that accrued vacation pay trust will take priority over it.

67 I do not have sufficient evidence on which I could conclude that the dates of creation of the particular accounts receivable which were realized to produce the sum of some $500,000 set out in the statement of agreed facts were sufficiently late in time in order to provide an adequate fund against which the statutory trust could be impressed in its entirety. Because of the finding I have made above on the more general issues, I do not think that this is necessary. I have set out this final bit of analysis only for the purposes of demonstrating that even if one accepts the entire characterization of the security interests offered by the applicants, it does not necessarily follow that the security interest in each of the assets of the employer will have an identical priority to be measured against the statutory trust. The security interest only attaches when Windsor Packing acquired an interest in the assets, and in the particular case of the accounts receivable, that did not occur until the accounts receivable were actually created by the sale of assets from inventory. It is therefore not possible to treat the security interest created by the general security agreement as monolithic even when the applicants' characterization of that document is used; rather, unless one reads the Personal Property Security Act as entirely foreclosing any priority for s. 15 of the Employment Standards Act, a position which is in my view totally

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

untenable given the analysis set out above, a priority must be assigned to the security interest in each part of the collateral based upon when Windsor Packing acquired an interest in that part, and that priority must be compared with the priority of a steadily accruing trust fund established by s. 15.

68 Throughout the above analysis, I have proceeded on the basis that the applicants' characterization of the general security agreement is correct, namely that it creates a fixed and specific security interest in all parts of the collateral from the moment that the debtor acquires rights in the collateral. Counsel for the Director of Employment Standards, however, argued that whatever might be the language chosen by the parties in the general security agreement and whatever relative priorities that language might give inside the four corners of the Personal Property Security Act, the general security agreement should be viewed as creating only a floating charge for purposes of assessing any priorities not covered by the Personal Property Security Act, such as the relative priorities here involved. There is some force to this argument, since the effect of the general security agreement is to create a charge on a broad range of assets, but to leave the debtor the full right, and indeed obligation, to carry on its business and to deal with the assets, particularly inventory and accounts receivable, in the course of carrying on that business. The general security [agreement] also provides for events of default which are directly analogous to the crystallizing factors which one normally expects to find related to a floating charge. If, as counsel for the Director of Employment Standards asserts, the contra proferentem maxim is available to require that the general security agreement be strictly construed against the National Bank, whose standard form agreement it is, then the argument is given greater force still; while I know of no case where the maxim has been applied this way, a strong argument may be made that if the maxim is available to a contracting party faced with a standard form document, it should certainly be made available to a third party stranger to the contract whose rights are purported to be ousted by the standard form agreement.

69 In addition, there is no clear and unambiguous judicial determination that the effect of the Personal Property Security Act is to authorize the creation of fixed and specific charges against after-acquired property, or assets not yet in existence at the time of the creation of the security interest. For example, in *Re Campeau Corp. and Prov. Bank of Can.*, supra, Houlden J. appears to conclude that the Assignment of Book Debts Act, R.S.O. 1970, c. 33, makes possible a fixed and specific charge over all debts present and future, by the registration of a general assignment of book debts under the Act. On the other hand, when the time comes to characterize the nature of the charge on future debts, the learned Judge used the following language, at p. 334:

> I agree with counsel for the Bank that the assignment in this case was not a floating charge in respect of the book debts of Cafco; rather, it was an immediate absolute transfer to the Bank of all debts, present and future owing to Cafco: ...If the Bank did not see fit to enforce its rights, it was not required to realize on the book debts, but this did not make the assignment a floating charge; ...From the moment the assignment was executed, the Bank acquired an equitable charge on all book debts of Cafco that were then in existence. And as regards future book debts, as soon as they became due and owing to Cafco, the Bank had an equitable charge in respect of them.

70 What is interesting about this language is that the learned Judge refers to the interest as an equitable one, while the law in effect prior to the Personal Property Security Act would appear to be formulated on the basis that an equitable interest in the assets for the time being of a going concern is in fact a floating charge or security, and not a fixed and specific security; the latter kind of security is usually characterized as a legal security interest, and that status is not gained by a floating charge until there is some crystallization: see McLaren, supra, §2.04[4]. As I have pointed out before, of course, the *Campeau* case deals with the relative priorities of an interest perfected under the Assignment of Book Debts Act and the rights of employees to wages under the former s. 8(1) of the Employment Standards Act; it can of necessity have no application to the considerably more robust protection provided by the statutory trust in the present s. 15. Indeed, it is part of the reasoning for the decision in the *Campeau* case that no statutory lien is created by the former s. 8(1); it appears from the reasoning entirely likely that a different result would have been possible had the competition been between the registered general assignment of book debts and a statutory trust for vacation pay supported by a lien and charge.

71 One further argument raised by the applicants must also be considered. This argument is based upon the so-called "entity" theory developed by the American Courts under the Uniform Commercial Code, and expounded in *Grain*

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Merchants of Indiana Inc. v. Union Bank & Savings Co. Bellevue, Ohio (1969), 405 F. 2d 209, a decision of the United States Court of Appeals, 7th Circuit. In that case, the Court determined at p. 216 that:

> ... the creditor's security interest was in the entity of the accounts receivable as a whole, and not in the individual components, so that the transfer of property occurred here when the interest in the accounts receivable as an entity was created and the financing statements were duly filed in September 1965. This recognizes business realities, for the business community has depended upon a revolving or flow-type of accounts receivable financing for many years.

Analogizing from this theory, the applicants argue that in the present case I should consider the collateral at the time of the execution and registration of the general security agreement to be an "entity", and that the value of that entity in dollars should be the basis on which the value of the security interest created by the general security agreement should be measured.

72 Leaving aside the accounting aspects of this approach, and the fact that counsel were unable to point to any Canadian case where this theory had been adopted, I do not think that I can apply the theory in this matter. The *Grain Merchants* case, and *Herr v. Philadelphia Nat. Bank* (1941), 122 F. 2d 606, also referred to by the applicants, are both cases involving an attempt to avoid an unfair preference on bankruptcy, namely a preference entered into within four months of the date of bankruptcy. The cases merely say that a security interest created in a certain asset of the business under the Uniform Commercial Code continues to apply on a revolving basis even though the particular elements of that asset may be completely different at a time within the four-month limit from what they were at the time of entering into the security arrangement. In addition, it appears from the cases that the competing interests were simply rights of unsecured creditors on bankruptcy; there is no suggestion that the American Courts would apply such a theory to defeat a statutory trust secured by a statutory lien and charge. Finally, I observe that in both cases what appears to have been given is only an assignment of book debts, a revolving charge on accounts receivable. Neither case appears to apply to an attempt by a creditor to impose a security interest on all of the assets of a debtor at the same time, and then to argue that the entity to which the security interest is to apply is the entirety of those assets, present and future. While the theory appears to be sound for the purposes for which it was invented, I am not convinced that it has any application either to the special kind of security interest created by the general security agreement or to the case of a statutory trust like that created by s. 15 of the Employment Standards Act.

73 In conclusion therefore it is my opinion that the statutory trust established under s. 15 takes precedence over the interests created by the general security agreement, and that the present application must therefore be denied. I have come to this conclusion on three levels, and the reasoning on all three of those levels requires that the order to pay be affirmed in the amount calculated for vacation pay.

Third Question

74 The final matter to be addressed is whether or not the applicants, and in particular Price Waterhouse, are entitled to have the costs of realization on liquidation paid out of the assets of Windsor Packing in priority to the interests of the creditors. In this case, Price Waterhouse alleges that some $16,000 constitutes the pro rata share of the liquidation costs which can be attributed to the sum of money paid to the Director of Employment Standards in trust. In support of this argument, a number of cases were cited including *Braid Bldrs. Supply & Fuel Ltd. v. Genevieve Mtge. Corp* (1972), 17 C.B.R. (N.S.) 305, 29 D.L.R. (3d) 373 (Man. C.A.); *Robert F. Kowal Invts. Ltd. v. Deeder Elec. Ltd.* (1976), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492 (C.A.); and *Oberman v. Mannahugh Hotels Ltd.; Mannahugh Hotels Ltd. v. Oberman; Assiniboine Credit Union Ltd. v. Mannahugh Hotels Ltd.*, [1980] 5 W.W.R. 487, 4 Man. R. 312, 34 C.B.R. (N.S.) 181 (Q.B.).

75 Leaving aside for the moment the problem that the Employment Standards Act appears to provide no jurisdiction whatsoever which I might invoke to satisfy the applicants' submissions, I do not think that any of these cases stand for the proposition which is being advanced. All of them appear to provide only that a liquidator, or a person in a similar position, has a first claim against the assets of the estate being liquidated for the costs of realization on those assets. That

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

appears to have occurred here, since the statement of agreed facts gives both gross and net figures for the realization of the assets of Windsor Packing. It would therefore appear that Price Waterhouse has treated its costs of liquidation as a first charge against the assets, and those costs have all been paid.

76 What the cases do not authorize is a pro rata attribution of those costs to the various creditors benefited by the liquidation. To the contrary, it appears that the law is that the receiver is to be reimbursed out the entirety of the estate, and that the rights of the creditors to the residue are to be determined in accordance with the priorities applicable. In other words, to give the relief being sought here would not be to benefit Price Waterhouse, but rather to benefit the National Bank; Price Waterhouse has already received its full payment out of the funds realized, and any deduction from the amount paid to the Director of Employment Standards in trust would simply go to the National Bank rather than to the individual employees on behalf of whom the funds were paid to the Director. Nothing in the cases cited would appear to authorize such a result, and even were I to have jurisdiction to make such an adjustment, I would not do so in circumstances where, as I have found above, the statutory trust for vacation pay takes priority over the interests of the National Bank.

Conclusion

77 I have studied with interest all of the authorities cited to me by counsel, although I have not found it necessary to cite all of them here. For the most part, the cases which are not cited here were not directly relevant to the issues here outstanding, but were of great value in providing a context in which this matter was to be decided.

78 I regard myself as particularly fortunate in having had the benefit of the assistance of all counsel in this matter. Their extensive written submissions, the collections of authorities which they supplied to me and the careful and courteous oral arguments which they made at the hearing have been of enormous value to me in resolving this particularly difficult issue in a largely uncharted area of the law. I wish to extend to them my special thanks.

79 By agreement, I shall remain seized of this matter to the extent necessary to resolve any difficulties in calculation or implementation of this determination.

Order accordingly.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.