C A N A D A
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

No: 500-11-048114-157

SUPERIOR COURT
(Commercial Division)
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. 36, as amended)

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

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

Petitioners

-and-

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, BLOOM LAKE RAILWAY COMPANY LIMITED, WABUSH MINES, ARNAUD RAILWAY COMPANY AND WABUSH LAKE RAILWAY COMPANY, LIMITED

Mises-en-cause

-and-

HER MAJESTY IN RIGHT OF NEWFOUNDLAND & 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

MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON

UNITED STEEL WORKERS, LOCALS 6254 AND 6285

RÉGIE DES RENTES DU QUÉBEC

MORNEAU SHEPELL LTD., IN ITS CAPACITY AS REPLACEMENT PENSION PLAN ADMINISTRATOR

Mis-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

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MONTREAL, May 19, 2017

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In the Matter of a Plan of Compromise or Arrangement of Indalex Limited et al.

[Indexed as: Indalex Ltd. (Re)]

104 O.R. (3d) 641

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Court of Appeal for Ontario,
MacPherson, Gillese and Juriansz JJ.A.
April 7, 2011

Debtors and creditors -- Companies' Creditors Arrangement Act -- Company obtaining order in CCAA proceedings permitting it to borrow funds pursuant to debtor-in-possession credit agreement -- Order creating super-priority charge in favour of debtor-in-possession lenders -- Super-priority charge not having priority over statutory deemed trust under Pension Benefits Act as deemed trust was not identified by court when charge was granted and affidavit evidence suggested such priority was unnecessary -- No finding of paramountcy made -- Valid provincial law continuing to operate -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 -- Pension Benefits Act, R.S.O. 1990, c. P.8.

Fiduciaries -- Pensions -- Employer which acts as administrator of its pension plans having fiduciary duty to plan members -- Company initiating proceedings under Companies' Creditors Arrangement Act and obtaining court order permitting it to borrow funds pursuant to debtor-in-possession credit agreement -- Order creating super-priority charge in favour of debtor-in-possession lenders -- Company aware that its pension plans were underfunded -- Company subject to its fiduciary

duties as administrator as well as its corporate obligations during CCAA proceedings -- Conflict of interest existing between company's duties as administrator and its corporate duties -- Company breaching its common law fiduciary duties and s. 22(4) of Pension Benefits Act -- Appropriate remedy being order for payment from proceeds of sale of company of amounts sufficient to satisfy deficiencies in plans in priority to claim of debtor-in-possession lenders -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 -- Pension Benefits Act, R.S.O. 1990, c. P.8, s. 22.

Pensions -- Winding up -- Deemed trust in s. 57(4) of Pension Benefits Act not limited to payment of amounts contemplated by s. 75(1)(a), but rather applying to all payments required by s. 75(1) -- Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 57(4), 75(1).

A Canadian company was the administrator of two registered pension plans, one for its salaried employees (the "Salaried Plan") and one for its executive employees (the "Executive Plan"). The Company's U.S. parent company sought Chapter 11 protection in the United States, and the Company initiated proceedings under the Companies' Creditors Arrangement Act ("CCAA"). At that time, the Salaried Plan was being wound up and both Plans were underfunded. The Company obtained a court order authorizing it to borrow funds pursuant to a debtor-in-possession ("DIP") credit agreement. The order created a super-priority charge in favour of the DIP lenders. The obligation to repay the DIP lenders was guaranteed by the U.S. parent. The Company moved for approval of the sale of its assets and for the distribution of the proceeds to the DIP lenders, which would result in there being nothing to fund the deficiencies in the Plans. Representatives of the Plans' members objected. The court approved the sale, but the Monitor retained in reserve an amount approximating the deficiencies. The sale [page642] proceeds were insufficient to pay the DIP lenders. The U.S. parent paid the shortfall. The representatives of the Plan members brought motions claiming that the reserve fund was subject to deemed trusts in favour of the Plans' beneficiaries and should be paid into the Plans in priority to the U.S. parent. They also claimed that during the

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CCAA proceedings, the Company breached its fiduciary obligations to the Plans' beneficiaries. The CCAA judge dismissed the Executive Plan motion on the basis that since the wind up of the Executive Plan had not yet taken place, there were no deficiencies in payments on the date of closing of the sale and no basis for a deemed trust. He dismissed the Salaried Plan motion on the basis that, as s. 31 of R.R.O. 1990, Reg. 909 permitted the Company to make up the deficiency in the Plan over a period of years, the amount of the yearly payments did not become due until it was required to be paid. As there was no amount "due" under s. 57(4) of the Pension Benefits Act ("PBA") on the closing date of the sale, no deemed trust arose. The representatives of the Plans' members appealed.

Held, the appeal should be allowed.

The CCAA judge erred in his interpretation of s. 57(4) of the PBA. The words of s. 57(4), given their grammatical and ordinary meaning, contemplate that all amounts owing to the pension plan on wind up are subject to the deemed trust, even if those amounts are not yet due under the plan or regulations. Therefore, the deemed trust in s. 57(4) applies to all employer contributions that are required to be made pursuant to s. 75, and not just to amounts payable under s. 75(1)(a). The deficiency in the Salaried Plan had accrued as of the date of wind up and, pursuant to s. 57(4), was subject to a deemed trust on the closing date of the sale.

The Company breached its fiduciary obligations as administrator of the Plans during the CCAA proceedings. When managing its business, an employer wears its corporate hat. When acting as the administrator of its pension plans, it wears its fiduciary hat and must act in the best interests of the plan's members and beneficiaries. The Company could not ignore its obligations as administrator once it decided to seek CCAA protection. It breached its fiduciary obligations by doing nothing in the CCAA proceedings to fund the deficit in the underfunded Plans and taking active steps which undermined the possibility of additional funding to the Plans. It applied for CCAA protection without notice to the Plans' beneficiaries. It obtained an order that gave priority to the DIP lenders over

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"statutory trusts" without notice to the beneficiaries. It sold assets without making any provision for the Plans. It knew the purchaser was not taking over the Plans. It moved to obtain orders approving the sale and distributing the proceeds to the DIP lenders, knowing that no payment would be made to the underfunded Plans. Further, there was a conflict of interest between the Company's corporate duty and its duty as administrator. Even if the Company was not in breach of its common law fiduciary obligations, its actions amounted to a breach of s. 22(4) of the PBA.

The deemed trust motions were not barred by the collateral attack rule. That rule was not applicable, and even if it were, this was not a case for its strict application.

The CCAA judge's order granting a super-priority charge did not mean that the super-priority charge had the effect of overriding the deemed trust. The deemed trust was not identified by the court at the time the charge was granted, and the affidavit evidence suggested that such a priority was unnecessary. As no finding of paramountcy was made, valid provincial laws continued to operate. The PBA deemed trust and the super-priority charge operated sequentially, with the deemed trust being satisfied first from the reserve fund. [page643]

Even if the conclusion that the deemed trust had priority over the secured credit was wrong, an order for payment from the reserve fund of amounts sufficient to satisfy deficiencies in the Plans was the appropriate remedy for the breaches of fiduciary obligation. That remedy was also appropriate for the Executive Plan, where it was not clear that a statutory deemed trust arose as the Plan had not been wound up at the time of sale.

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Rules and regulations referred to

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APPEAL from order of C. Campbell J., [2010] O.J. No. 974, 2010 ONSC 1114 (S.C.J.) dismissing motions for remedy for breach of deemed trust and breach of fiduciary duty.

Andrew J. Hatnay and Demetrios Yiokaris, for former executives, appellants.

Darrell L. Brown, for United Steelworkers, appellants.

Mark Bailey, for Superintendent of Financial Services.

Hugh O'Reilly and Adam Beatty, for Morneau Sobeco Limited Partnership, intervenor.

Fred Myers and Brian Empey, for Sun Indalex Finance, LLC.

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Ashley Taylor and Lesley Mercer, for monitor, FTI Consulting Canada ULC. [page645]

Harvey Chaiton and George Benchetrit, for George L. Miller, the Chapter 7 trustee of the bankruptcy estates of the US Indalex Debtors.

The judgment of the court was delivered by

[1] GILLESE J.A.: -- A Canadian company is insolvent. Its pension plans are underfunded and in the process of being wound up. The company is the administrator of the pension plans.

[2] The company obtains protection under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended ("CCAA"). A court order enables it to borrow funds pursuant to a debtor-in-possession ("DIP") credit agreement. The order creates a "super-priority" charge in favour of the DIP lenders. The obligation to repay the DIP lenders is guaranteed by the company's U.S. parent company (the "Guarantee").

[3] The company is sold through the CCAA proceedings but the sale proceeds are insufficient to repay the DIP lenders. The U.S. parent company covers the shortfall, in accordance with its obligations under the Guarantee.

[4] The CCAA monitor holds some of the sale proceeds in a reserve fund. The pension plan beneficiaries claim the money based on the deemed trust provisions in the Pension Benefits Act, R.S.O. 1990, c. P.8 ("PBA"). The U.S. parent company claims the money based on its payment under the Guarantee.

[5] Must the money in the reserve fund be used to pay the deficiencies in the pension plans in preference to the secured creditor? What fiduciary obligations, if any, does the company have in respect of its underfunded pension plans during the CCAA proceeding? These appeals wrestle with these difficult questions.

Overview

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[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").

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[7] On March 20, 2009, Indalex's parent company and its U.S.-based affiliates (collectively, "Indalex U.S.") sought Chapter 11 protection in the United States.

[8] On April 3, 2009, Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. ("Indalex" or the "applicants") obtained protection from their creditors under the CCAA. [page646] At that time, the Salaried Plan was in the process of being wound up. Both Plans were underfunded. FTI Consulting Canada ULC (the "Monitor") was appointed as monitor.

[9] On April 8, 2009, the court authorized Indalex to borrow funds pursuant to a DIP credit agreement. The court order gave the DIP lenders a super-priority charge on Indalex's property. Indalex U.S. guaranteed Indalex's obligation to repay the DIP lenders.

[10] On July 20, 2009, Indalex moved for approval of the sale of its assets on a going-concern basis. It also moved for approval to distribute the sale proceeds to the DIP lenders, with the result that there would be nothing to fund the deficiencies in the Plans. Without further payments, the underfunded status of the Plans will translate into significant cuts to the retirees' pension benefits.

[11] At the sale approval hearing, the United Steelworkers appeared on behalf of its members who had been employed by Indalex and are the beneficiaries of the Salaried Plan (the "USW"). In addition, a group of retired executives appeared on behalf of the beneficiaries of the Executive Plan (the "Former Executives").

[12] Both the USW and the Former Executives objected to the

planned distribution of the sale proceeds. They asked that an amount representing the total underfunding of the Plans (the "Deficiencies") be retained by the Monitor as undistributed proceeds, pending further court order. Their position was based on, among other things, the deemed trust provisions in the PBA that apply to unpaid amounts owing to a pension plan by an employer.

[13] The court approved the sale. However, as a result of the USW and Former Executives' reservation of rights, the Monitor retained an additional $6.75 million of the sale proceeds in reserve (the "Reserve Fund"), an amount approximating the Deficiencies. [See Note 1 below]

[14] The sale closed on July 31, 2009. The sale proceeds were insufficient to repay the DIP lenders. Indalex U.S. paid the shortfall of approximately US$10.75 million, pursuant to its obligations under the Guarantee. [page647]

[15] In accordance with a process designed by the CCAA court, the USW and the Former Executives brought motions returnable on August 28, 2009, based on their deemed trust claims. They claimed the Reserve Fund was subject to deemed trusts in favour of the Plans' beneficiaries and should be paid into the Plans in priority to Indalex U.S. They also claimed that during the CCAA proceedings, Indalex breached its fiduciary obligations to the Plans' beneficiaries.

[16] Indalex then brought a motion in which it sought to lift the stay and assign itself into bankruptcy (the "Indalex bankruptcy motion"). This motion was directed to be heard on August 28, 2009, along with the USW and Former Executives' motions.

[17] By orders dated February 18, 2010 (the "Orders under Appeal"), the CCAA judge dismissed the USW and Former Executives' motions on the basis that, at the date of sale, no deemed trust under the PBA had arisen in respect of either plan. He found it unnecessary to decide the Indalex bankruptcy motion.

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[18] The USW and the Former Executives (together, the "appellants") appeal. They ask this court to order the Monitor to pay the Reserve Fund to the Plans.

[19] On November 5, 2009, the Superintendent of Financial Services ("Superintendent") appointed the actuarial firm of Morneau Sobeco Limited Partnership ("Morneau") as administrator of the Plans.

[20] Morneau was granted intervenor status. It supports the appellants.

[21] The Superintendent also appeared. He, too, supports the appellants.

[22] Sun Indalex, as the principal secured creditor of Indalex U.S., asks that the appeals be dismissed and the Reserve Fund be paid to it. As a result of its payment under the Guarantee, Indalex U.S. is subrogated to the rights of the DIP lenders. Its claim to the Reserve Fund is based on the super-priority charge.

[23] The Monitor appeared. It supports Sun Indalex and asks that the appeals be dismissed. The Monitor and Sun Indalex will be referred to collectively as the respondents.

[24] George L. Miller, the trustee of the bankruptcy estates of Indalex U.S., appointed under Chapter 7 of Title 11 of the United States Bankruptcy Code (the "U.S. Trustee"), was given leave to intervene. He joins with the Monitor and Sun Indalex in opposing these appeals.

[25] For the reasons that follow, I would allow the appeals and order the Monitor to pay, from the Reserve Fund, amounts sufficient to satisfy the deficiencies in the Plans. For ease of [page648] reference, the various statutory provisions to which I make reference can be found in the schedules at the end of these reasons.

Background

[26] Indalex Limited is a Canadian corporation. It is the

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entity through which the Indalex group of companies operates in Canada. It is a direct wholly owned subsidiary of its U.S. parent, Indalex Holding Corp., which in turn is a wholly owned subsidiary of Indalex Finance.

[27] Together, the group of companies referred to as Indalex and Indalex U.S. were the second largest manufacturer of aluminum extrusions in the United States and Canada. Aluminum is a durable, light-weight metal that can be strengthened through the extrusion process, which involves pushing aluminum through a die and forming it into strips, which can then be customized for a wide array of end-user markets.

[28] Indalex Limited produced a portion of the raw material used in the extrusion process, called aluminum extrusion billets, through its casting division located in Toronto. It also processed the raw extrusion billets into extruded product at its Canadian extrusion plants, for sale to end-users. In 2008, Indalex Limited accounted for approximately 32 per cent of the Indalex group of companies total sales to third parties.

[29] Indalex Limited provided separate pension plans for its executives and salaried employees. The Plans were designed to pay pension benefits for the lives of the retirees and those of their designated beneficiaries. Indalex Limited was the sponsor and administrator of both Plans. The Plans were registered with the Financial Services Commission of Ontario ("FSCO") and the Canadian Revenue Agency.

The Salaried Plan

[30] The USW has several locals certified as bargaining agents on behalf of members employed with Indalex, including members who are beneficiaries of the Salaried Plan. It was certified to represent certain Indalex employees, seven of whom were members of the Salaried Plan and have deferred vested entitlements under that plan.

[31] The Salaried Plan contains a defined benefit and defined contribution component.

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[32] Unlike the Executive Plan, the Salaried Plan was in the process of being wound up when Indalex began CCAA proceedings. The effective date of wind up is December 31, 2006. Special wind up payments were made in 2007 ($709,013), 2008 ($875,313) [page649] and 2009 ($601,000). As of December 31, 2008, the wind up deficiency was $1,795,600.

[33] All current service contributions have been made to the Salaried Plan.

[34] Article 4.02 of the Salaried Plan obligates Indalex to make sufficient contributions to the Salaried Plan. Article 14.03 of the Salaried Plan requires Indalex to remit "amounts due or that have accrued up to the effective date of the wind-up and which have not been paid into the Fund, as required by the Plan and Applicable Pension Legislation".

The Executive Plan

[35] The Executive Plan is a defined benefit plan. Effective September 1, 2005, Indalex closed the Executive Plan to new members.

[36] As of January 1, 2008, there were 18 members of the Executive Plan, none of whom were active employees.

[37] The Executive Plan is underfunded.

[38] As of January 1, 2008, the Executive Plan had an estimated funding deficiency, on an ongoing basis, of $2,535,100. On a solvency basis, the funding deficiency was $1,102,800 and on a wind up basis, the deficiency was $2,996,400. An actuarial review indicated that as of July 15, 2009, the wind up deficiency had increased to an estimated $3,200,000.

[39] In 2008, Indalex made total special payments of $897,000 to the Executive Plan. No further special payments were due to be made to the Executive Plan until 2011. All current service contributions had been made.

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[40] Due to its underfunded status, the Former Executives' monthly pension benefits have already been cut by 30-40 per cent. Unless money is paid into the Executive Plan, these cuts will become permanent. The Former Executives have also lost their supplemental pension benefits which were unfunded and terminated by Indalex after it obtained CCAA protection. Between the two cuts, the Former Executives have lost between one-half and two-thirds of their pension benefits.

[41] On June 26, 2009, counsel for the Former Executives sent a letter to counsel to Indalex and the Monitor, advising that the Former Executives reserved all rights to the deemed trust under s. 57(4) of the PBA in the CCAA proceedings. There was no response or objection to that letter from Indalex, the Monitor or any other party.

[42] At the time the Orders under Appeal were made, the Executive Plan had not been wound up. However, a letter from [page650] counsel for the Monitor dated July 13, 2009 indicated that it was expected that the Executive Plan would be wound up.

[43] On March 10, 2010, the Superintendent issued a notice of proposal to wind up the Executive Plan effective as of September 30, 2009. The wind up process is currently underway.

Pension and corporate governance during the CCAA proceedings

[44] Keith Cooper, the senior managing director of FTI Consulting Inc., was a key advisor to the Indalex group of companies prior to and during the CCAA proceedings. On March 19, 2009, he was appointed the chief restructuring officer for all of the Indalex U.S.-based companies. However, he was responsible not only for Indalex U.S. but for the entire Indalex group of companies and subsidiaries, including the applicants. Mr. Cooper described his role as being to maximize recovery for Indalex as a whole.

[45] Mr. Cooper was the primary negotiator of the DIP credit agreement on behalf of Indalex. He does not recall discussing Indalex's pension obligations in respect of the Salaried and

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Executive Plans during the negotiation of the DIP credit agreement. He was aware that the Plans were underfunded and that pensions would be reduced if the shortfalls were not met.

[46] FTI Consulting Inc., the company for which Mr. Cooper works, and the Monitor are affiliated entities. The Monitor (FTI Consulting Canada ULC) is a wholly owned subsidiary of FTI Consulting Inc.

[47] On July 31, 2009, all of the directors of Indalex resigned. On that same day, Indalex Holding Corp. (part of Indalex U.S.) became the management of Indalex. Thus, as of July 31, 2009, Indalex and Indalex U.S. formally had the same management.

[48] On August 12, 2009, a Unanimous Shareholder Declaration was executed in which Mr. Cooper was appointed to direct the affairs of all Indalex entities.

[49] On August 13, 2009, Indalex (which was now under the management of Indalex U.S.) announced its intention to bring a motion to bankrupt the Canadian company.

The CCAA Proceedings

The initial order, as amended (April 3 and 8, 2009)

[50] On April 3, 2009, pursuant to the order of Morawetz J., Indalex obtained protection from its creditors under the CCAA (the "Initial Order"). A stay of proceedings against Indalex was ordered. [page651]

[51] On April 8, 2009, the Initial Order was amended to authorize Indalex to borrow funds pursuant to a DIP credit agreement among Indalex, Indalex U.S. and a syndicate of lenders (the "DIP lenders"). JP Morgan Chase Bank, N.A. was the administrative agent (the "DIP Agent"). The DIP credit agreement contemplated that the DIP loan would be repaid from the proceeds derived from a going-concern sale of Indalex's assets on or before August 1, 2009.

[52] Indalex's obligation to repay the DIP borrowings was

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guaranteed by Indalex U.S. The Guarantee was a condition to the extension of credit by the DIP lenders.

[53] Paragraph 45 of the Initial Order, as amended, is the super-priority charge. It provides that the DIP lenders' charge "shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise", other than the administration charge and the directors' charge, as those terms are defined in the Initial Order.

The Initial Order is further amended (June 12, 2009)

[54] On June 12, 2010, Morawetz J. heard and granted a motion by the applicants for approval of an amendment to the DIP credit agreement to increase the borrowings by about $5 million, from US$24.36 million to US$29.5 million. This resulted in an order dated June 12, 2009, further amending the Initial Order (the "June 12, 2009 order").

[55] Counsel for the Former Executives was served with motion material on June 11, 2009, at 8:27 p.m. In response to an e-mail from the Former Executives' counsel questioning the urgency of the motion, the Monitor's counsel responded that the motion was simply directed at obtaining more money under the DIP credit agreement.

[56] At the hearing of the motion on June 12, 2010, the Former Executives initially sought to reserve their rights to confirm that the motion was about an increase to the DIP and nothing more. When that was confirmed, the Former Executives withdrew their reservation and the motion proceeded later that afternoon.

The sale approval order (July 20, 2009)

[57] Indalex brought two motions that were heard on July 20, 2009 by Campbell J. (the "CCAA judge").

[58] First, Indalex sought approval of a sale of its assets, as a going concern, to SAPA Holdings AB ("SAPA"). Total

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consideration for the sale of Indalex and Indalex U.S. was approximately [page652] US$151,183,000. The Canadian sale proceeds were to be paid to the Monitor.

[59] As a term of the sale, SAPA assumed no responsibility or liability for the Plans.

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[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. [page653]

[67] By orders dated February 18, 2010, the CCAA judge dismissed the USW and Former Executives' motions [[2010] O.J. No. 974, 2010 ONSC 1114].

[68] The CCAA judge found it unnecessary to deal with Indalex's bankruptcy motion.

The Reasons of the CCAA Judge

The Former Executives' motion

[69] The CCAA judge dismissed the Former Executives' motion on the basis that since the wind up of the Executive Plan had not yet taken place, there were no deficiencies in payments to that plan as of July 20, 2009. As there were no deficiencies in payments, there was no basis for a deemed trust.

The USW motion

[70] Because the Salaried Plan was in the process of being wound up, the CCAA judge dismissed the USW motion for different reasons.

[71] The CCAA judge saw the issue raised on the USW motion to be whether the PBA required Indalex to pay the wind up deficiency in the Salaried Plan as at the date of closing of the sale and transfer of assets, namely, July 20, 2009. In

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resolving the issue, the CCAA judge considered ss. 57 and 75 of the PBA. He called attention to the words "accrued to the date of the wind up but not yet due" in s. 57(4).

[72] The CCAA judge also considered s. 31(1) and (2) of R.R.O. 1990, Reg. 909 (Pension Benefits Act) (the "Regulations"). He concluded that because s. 31 of the Regulations permitted Indalex to make up the deficiency in the Salaried Plan over a period of years, the amount of the yearly payments did not become due until it was required to be paid. Were it not for s. 31 of the Regulations, the CCAA judge stated that Indalex would have had an obligation under the PBA to pay in any deficiency as of the date of wind up.

[73] The CCAA judge concluded [at paras. 49-51]:

I find that as of the date of closing and transfer of assets there were no amounts that were "due" or "accruing due" on July 20, 2010. On that date, Indalex was not required under the PBA or the Regulations thereunder to pay any amount into the [Salaried] Plan. There was an annual payment that would have become payable as at December 31, 2009 but for the stay provided for in the Initial Order under the CCAA.

Since as of July 20, 2009, there was no amount due or payable, no deemed trust arose in respect of the remaining deficiency arising as at the date of wind-up. [page654]

Since under the initial order priority was given to the DIP Lenders, they are entitled to be repaid the amounts currently held in escrow. Those entitled to windup deficiency remain as of that date unsecured creditors.

The Indalex bankruptcy motion

[74] Having found that the deemed trust claims failed, the CCAA judge considered that the question of Indalex's assignment into bankruptcy might be moot. He went on, in para. 55 of his reasons for decision, to state:

In my view, a voluntary assignment under the BIA should not

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be used to defeat a secured claim under valid Provincial legislation, unless the Provincial legislation is in direct conflict with the provisions of Federal Insolvency Legislation such as the CCAA or the BIA. For that reason I did not entertain the bankruptcy assignment motion first.
(Emphasis added)

[75] He found no conflict between the federal and provincial legislative regimes and allowed the applicants to renew their request for bankruptcy relief in a further motion.

The Issues

[76] The central issue raised on these appeals is whether the CCAA judge erred in his interpretation of s. 57(4) of the PBA and, specifically, in finding that no deemed trust existed with respect to the Deficiencies as at July 20, 2009.

[77] The USW and the Former Executives ask the court to decide a second issue: whether during the CCAA proceedings Indalex breached the fiduciary obligations that it owed to the Plans' beneficiaries by virtue of being the Plans' administrator. [See Note 2 below]

[78] The U.S. Trustee's submission raises two additional issues. Does the collateral attack rule bar the appellants' deemed trust motions? Do the principles of cross-border insolvencies apply to these appeals?

[79] The final issue that arises is that of remedy: how is the Reserve Fund to be distributed?

[80] Given the centrality of the wind up process to these appeals, I will briefly outline the salient aspects of the wind up process before turning to a consideration of each of these issues.

Winding Up a Pension Plan

[81] To understand the wind up process, one must first understand how the pension plan operates while it is ongoing.
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[82] A pension plan to which the employees contribute is called a contributory plan. In the case of contributory plans, the employer is obliged to remit the employee contributions, including payroll deductions, within a specified time frame. This aspect of an employer's obligations does not arise in these appeals.

[83] In addition to remitting the employee contributions, if any, while a defined benefit pension plan is ongoing, the employer must make two types of contributions to ensure that the plan is adequately funded and capable of paying the promised pension benefits.

(1) Current service or "normal cost" contributions -- the employer contributions necessary to pay for current service costs in respect of benefits that are currently accruing to members as a result of their ongoing participation in the plan as active employees. These must be made in monthly instalments within 30 days after the month to which they relate.

(2) Special payments -- a plan administrator must file an actuarial report annually in which the pension plan is valued on two different bases: a "going-concern" basis, where it is assumed the plan will continue to operate indefinitely; and a "solvency" basis, where it is assumed that the employer will discontinue its business and wind up its plan. If the actuarial report discloses a going-concern liability, the employer is required to make monthly special payments over a 15-year period to fund the unfunded liability. If the actuarial report discloses a solvency deficiency, the employer is required to make monthly special payments over a five-year period to fund the deficiency.

[84] It is important to understand that the solvency valuation is not the same thing as a wind up report. To repeat, the solvency valuation is prepared while the pension plan is ongoing. A solvency valuation is required while the plan is ongoing because it is crucial that there be adequate funds with which to pay pensions if the company becomes insolvent and the plan is wound up.

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[85] The wind up of a pension plan is defined in the PBA as "the termination of the pension plan and the distribution of the assets of the pension fund" (s. 1(1)). At the effective date of wind up, the plan members cease to accrue further entitlements under the plan. Naturally, no new members may join the plan after the wind up date. The pension fund of a plan that is wound up continues to be subject to the PBA and the Regulations until all of the assets of the fund have been disbursed (s. 76). [page656]

[86] Winding up a pension plan must be distinguished from closing the plan, which simply means that no new entrants are permitted to join the plan.

[87] Under the PBA, there are two ways that a pension plan can be wound up. First, s. 68(1) recognizes that an employer [See Note 3 below] can voluntarily wind up the pension plan. Second, under s. 69(1), in certain circumstances, the Superintendent may order the wind up of the plan.

[88] The PBA contains a detailed statutory scheme that must be followed when a pension plan is to be wound up. This scheme imposes obligations on the employer and plan administrator, including the following:

-- the administrator has to give written notice of proposal to wind up to various people, including the Superintendent, and the notice must contain specified information (s. 68(2) and (4));

-- a wind up date must be chosen and the administrator must file a wind up report showing, among other things, the plan's assets and liabilities as at that date (s. 70(1));

-- no payments can be made out of the pension fund until the Superintendent has approved the wind up report (s. 70(4));

-- plan members with a certain combination of age and years of service or membership in the plan are entitled to additional benefits on wind up (grow-ins) (s. 74).

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[89] Importantly, s. 75 requires an employer to make two different categories of payment on plan wind up. Sections 75(1)(a) and (b) read as follows:

Liability of employer on wind up

75(1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act [page657] and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39(3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

[90] Section 75(1)(a) requires the employer to make all payments that are due immediately or that have accrued and not been paid into the pension fund. Any unpaid current service costs and unpaid special payments are caught by this subsection. In other words, by virtue of this subsection, any payments that the employer had to make while the plan was ongoing must be paid. It will be recalled that while the plan was ongoing, some special payments could be made over time.

[91] Section 75(1)(b) requires the employer to pay additional amounts into the pension fund if there are insufficient assets

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to cover the value of the pension benefits in the three categories set out in s. 75(1)(b).

[92] It will be apparent that on wind up, an employer will often be faced with having to make significant additional contributions under s. 75(1)(b), in addition to being required to bring all contributions up to date because of s. 75(1)(a). Section 75(2) stipulates that "the employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times". Section 31 of the Regulations prescribes the manner and timing for the s. 75 wind up payments. It provides that the amounts an employer is to contribute under s. 75 shall be by annual special payments, commencing at the effective date of the wind up, over not more than five years.

The PBA Deemed Trust

[93] The central issue in these appeals is whether the CCAA judge erred in his interpretation of s. 57(4) of the PBA. Section 57(4) reads as follows:

> 57(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

(Emphasis added) [page658]

[94] The modern approach to statutory construction dictates that in interpreting s. 57(4), the words must be read

> . . . in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [See Note 4 below]

[95] Section 57(4) deems an employer to hold in trust an amount equal to the contributions "accrued to the date of wind up but not yet due under the plan or regulations". The question is: what employer contributions are caught by s. 57(4) and, thus, are subject to the deemed trust?

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[96] The introductory words of s. 57(4) refer to where a pension plan is "wound up". Therefore, to answer this question, one must refer to the wind up regime created by the PBA and Regulations, a summary of which is set out above.

[97] It will be recalled that when a pension plan is wound up, an actuarial calculation is made of the assets and liabilities, as of the wind up date. Because the plan liabilities relate to service that was provided up to the wind up date and not beyond, it is clear that all plan liabilities are accrued as of the wind up date. Put another way, no additional liability can accrue following the wind up because all events crystallize on the wind up date -- all pension benefit accruals by members cease and all amounts that an employer is required to pay into a pension plan are calculated as of the wind up date. For the same reason, the amounts that s. 75 requires an employer to contribute to the pension fund, on wind up, are accrued to the date of wind up. The required contributions are the amounts that an employer must make to the pension fund so that the accrued pension benefits of the plan members can be paid.

[98] It will be further recalled that s. 31 of the Regulations gives the employer up to five years in which to make all of the required s. 75 contributions. However, the fact that an employer is given time in which to pay the requisite contributions into the pension fund does not change the fact that the liabilities accrued by the wind up date.

[99] This point is reinforced when one distinguishes amounts that are "accrued" from amounts that are "not yet due". In Ontario (Hydro-Electric Power Commission) v. Albright (1922), 64 S.C.R. 306, [1922] S.C.J. No. 40, at para. 23, the Supreme Court of Canada explains that money is "due" when there is a [page659] legal obligation to pay it, whereas payments are "accrued" when the rights or obligations are constituted and the liability to pay exists, even if the payment does not need to be made until a later date (i.e., is not "due" until a later date).

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[100] Thus, just as s. 57(4) contemplates, while the amounts that the employer must contribute to the pension fund pursuant to s. 75 "accrued to the date of wind up", because of s. 31 those contributions are "not yet due under the . . . regulations".

[101] There is nothing in the wording of s. 57(4) to suggest that its scope is confined to the amounts payable under only s. 75(1)(a), as the respondents contend. On the contrary, the words of s. 57(4), given their grammatical and ordinary meaning, contemplate that all amounts owing to the pension plan on wind up are subject to the deemed trust, even if those amounts are not yet due under the plan or regulations. Therefore, the deemed trust in s. 57(4) applies to all employer contributions that are required to be made pursuant to s. 75. In short, the words "employer contributions accrued to the date of wind up but not yet due" in s. 57(4) include all amounts owed by the employer on the wind up of its pension plan.

[102] This interpretation accords with a contextual analysis of s. 57(4).

[103] As these appeals demonstrate, during the five-year "grace" period permitted by s. 31 of the Regulations, the rights of plan beneficiaries are at risk. Section 57(4) and (5) provide some protection to the plan beneficiaries during that period. The employees' interest is in receiving their full pension entitlements. For that to happen, all s. 75 employer contributions must be made into the pension fund. The employer, on the other hand, has an interest in having a reasonable period of time within which to make the requisite s. 75 contributions. Section 31 of the Regulations gives the employer up to five years to make the contributions, during which time the deemed trust in s. 57(4) and the lien and charge in s. 57(5) provide a measure of protection for the employees over the amount of the unpaid employer contributions, contributions that had accrued to the date of wind up but [were] not yet due under the regulations.

[104] Further, this interpretation is consistent with the overall purpose of the PBA, which is to establish minimum

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standards, [See Note 5 below] [page660] safeguard the rights of pension plan beneficiaries [See Note 6 below] and ensure the solvency of pension plans so that pension promises will be fulfilled. [See Note 7 below] As the Supreme Court of Canada said in Monsanto, at para. 38:

> The Act is public policy legislation that recognizes the vital importance of long-term income security. As a legislative intervention in the administration of voluntary pension plans, its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans.

(Citations omitted)

[105] Much reference has been made to the two cases in which s. 57(4) has been discussed: Ivaco Inc. (Re), [2005] O.J. No. 3337, 12 C.B.R. (5th) 213 (S.C.J.), affd (2006), 83 O.R. (3d) 108, [2006] O.J. No. 4152 (C.A.) and Toronto-Dominion Bank v. Usarco, [1991] O.J. No. 1314, 42 E.T.R. 235 (Gen. Div.). In my view, these decisions are of little assistance in deciding this issue.

[106] Factually, Ivaco and Usarco differ from the present case. In Ivaco and Usarco, the prospect of bankruptcy was firmly before the court, whereas in this case, at its highest, there is a motion to lift the stay and file for bankruptcy.

[107] Moreover, there are conflicting statements in Ivaco and Usarco regarding the applicability of the deemed trust to wind up deficiencies. In Usarco, a bankruptcy petition had been filed but no steps had been taken to proceed with the petition. The company was not under CCAA protection. In that context, Farley J., the motion judge, held that the deemed trust provision referred only to the regular contributions together with special contributions that were to have been made but had not been. [See Note 8 below] In Ivaco, the major financers and creditors wished to have the CCAA proceeding, which was functioning as a liquidation, transformed into a bankruptcy proceeding. The case was focused primarily on whether there was a reason to defeat

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the bankruptcy petition. In Ivaco, Farley J. took a different view of the scope of the s. 57(4) deemed trust, stating that in a non-bankruptcy situation, the company's assets were subject to a deemed trust on account of unpaid contributions and wind up liabilities. [See Note 9 below] On appeal, although this court indicated that it thought that Farley J.'s [page661] statement in Usarco was correct, it found it unnecessary to decide the matter. Accordingly, these decisions are not determinative of the scope of the deemed trust created by s. 57(4) of the PBA.

[108] The CCAA judge concluded that because Indalex had made the going-concern and special payments to the Salaried Plan at the date of closing, there were no amounts due to the Salaried Plan. Therefore, there could be no deemed trust. Respectfully, I disagree. As I have explained, the deemed trust in s. 57(4) is not limited to the payment of amounts contemplated by s. 75(1)(a). It applies to all payments required by s. 75(1), including payments mandated by s. 75(1)(b).

[109] Accordingly, the deficiency in the Salaried Plan had accrued as of the date of wind up (December 31, 2006) and, pursuant to s. 57(4) of the PBA, was subject to a deemed trust. The CCAA judge erred in holding that no deemed trust existed with respect to that deficiency as at July 20, 2009. The consequences that flow from this conclusion are explored in the section below on how the Reserve Fund is to be distributed.

[110] Are the unpaid liability payments owing to the Executive Plan also subject to the s. 57(4) deemed trust? The Former Executives, Superintendent and Morneau all contend that they are. On the plain wording of s. 57(4), I find it difficult to accept this argument -- the introductory words of the provision speak to "where a pension plan is wound up". In other words, wind up of the pension plan appears to be a requirement for s. 57(4) to apply. If that is so, no deemed trust could arise unless and until a plan wind up occurred. As has been noted, the Executive Plan had not been wound up at the relevant time.

[111] Having said this, I am troubled by the notion that Indalex can rely on its own inaction to avoid the consequences

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that flow from wind up. In its letter of July 13, 2009, counsel for the Monitor confirmed that the Executive Plan would be wound up. Indeed, the CCAA judge acknowledged that the material filed with the court showed an intention on the part of the applicants to wind up the plan. If the deemed trust does not extend to the Executive Plan, in the circumstances of this case, it appears that the result would be a triumph of form over substance.

[112] In the end, however, the question that drives these appeals is whether the Monitor should be directed to distribute the Reserve Fund to the Plans. As I explain below in the section on how the Reserve Fund should be distributed, in my view, such an order should be made. Consequently, it becomes unnecessary to decide whether the deemed trust applies to the deficiency in the Executive Plan and I decline to do so. It is a question that is best decided in a case where the result depends [page662] on it and a fuller record would enable the court to appreciate the broader implications of such a determination.

Did Indalex Breach its Fiduciary Obligation?

[113] The appellants say that Indalex, as administrator of the Plans, owed a fiduciary duty to the Plans' members and beneficiaries. Both appellants list a number of actions that Indalex took or failed to take during the CCAA proceedings that they say amounted to breaches of its fiduciary obligation. They contend that the appropriate remedy for those breaches is an order requiring the Reserve Fund to be paid into the Plans.

[114] The Monitor acknowledges that pension plan administrators have both a statutory and common law duty to act in the best interests of the plan beneficiaries and to avoid conflicts of interest, and that these duties are "fiduciary in nature". However, the Monitor contends that Indalex took all of the impugned actions in its role as employer and, therefore, could not have breached the fiduciary duties it owed to the Plans' beneficiaries as administrator. In any event, the Monitor adds, the issue is moot because any such breaches would merely give rise to an unsecured claim outside the ambit of the deemed trusts created by the PBA.

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[115] Sun Indalex echoes the Monitor's latter argument and says that the allegations of breach of fiduciary duty are irrelevant in these appeals. Its submission on this issue is summarized in para. 79 of its factum:

> There is no provision in the PBA that creates a deemed trust in respect of any claim for damages based on an alleged breach of fiduciary duty by an employer and there is no basis in the PBA for conferring a priority with respect to such a claim. If a claim for breach of fiduciary duty on the part of Indalex exists, it is merely an unsecured claim outside the ambit of the deemed trusts created by the PBA that does not have priority over Sun's secured claim or the super-priority DIP Lenders Charge.

[116] For the reasons that follow, I accept the appellants' submission that Indalex breached its fiduciary obligations as administrator during the CCAA proceedings. I deal with the question of what flows from that finding when deciding the issue of remedy.

[117] It is clear that the administrator of a pension plan is subject to fiduciary obligations in respect of the plan members and beneficiaries. [See Note 10 below] These obligations arise both at common law and by virtue of s. 22 of the PBA. [page663]

[118] The common law governing fiduciary relationships is well known. A fiduciary relationship will be held to exist where, given all the surrounding circumstances, one person could reasonably have expected that the other person in the relationship would act in the former's best interests. [See Note 11 below] The key factual characteristics of a fiduciary relationship are the scope for the exercise of discretion or power; the ability to exercise that power unilaterally so as to affect the beneficiary's legal or practical interests; and a peculiar vulnerability on the part of the beneficiary to the exercise of that discretion or power. [See Note 12 below]

[119] It is readily apparent that these characteristics exist in the relationship between the pension plan administrator and

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the plan members and beneficiaries. The administrator has the power to unilaterally make decisions that affect the interests of plan members and beneficiaries as a result of its responsibility for the administration of the plan and management of the fund. Those decisions affect the beneficiaries' interests. The plan members and beneficiaries reasonably rely on the administrator to ensure that the plan and fund are properly administered. And, as these appeals demonstrate, they are peculiarly vulnerable to the administrator's exercise of its powers. Thus, at common law, Indalex as the Plans' administrator owed a fiduciary duty to the Plans' members and beneficiaries to act in their best interests.

[120] Section 22 of the PBA also imposes a fiduciary duty on the administrator in the administration of the plan and fund. As well, it expressly prohibits the administrator from knowingly permitting its interest to conflict with its duties in respect of the pension fund. The relevant provisions in s. 22 read as follows:

Care, diligence and skill

22(1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

Special knowledge and skill

(2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess. [page664]

. . . . .

Conflict of interest

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(4) An administrator . . . shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

[121] In Ontario, an employer is expressly permitted to act as the administrator of its pension plan: see ss. 1 and 8 of the PBA. [See Note 13 below] It is self-evident that the two roles can conflict from time to time. In Imperial Oil Ltd. v. Ontario (Superintendent of Pensions) (1995), 18 C.C.P.B. 198 (Ont. Pen. Comm.) ("Imperial Oil"), the Pension Commission of Ontario ("PCO") grappled with this statutorily sanctioned conflict in roles.

[122] In that case, the employer Imperial Oil was the administrator of two employee pension plans. Imperial Oil sought to file amendments to the pension plans with the PCO. Prior to the amendments, a plan member with ten or more years of service with Imperial Oil whose employment was terminated for efficiency reasons was entitled to an enhanced early retirement annuity (the "enhanced benefit"). The effect of the amendments was to deny such an employee the enhanced benefit unless the employee would have been able to retire within five years of termination. Put another way, after the amendments, in addition to the other requirements, an employee had to be 50 years of age or older at the time his or her employment was terminated for efficiency reasons in order to receive the enhanced benefit.

[123] The Superintendent accepted the amendments for registration.

[124] Some six months after the amendments were passed, Imperial Oil terminated the employment of a large number of employees for efficiency reasons. A number of the affected employees had ten or more years of service but, because they had not reached the age of 50, they were denied the enhanced benefit.

[125] A group of former employees (the "Entitlement 55 Group") objected to the registration of the amendments. They brought an application to the PCO, seeking a declaration that

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the amendments were void and an order compelling Imperial Oil to administer the pension plans according to the terms of the plans in place before the amendments were passed. [page665]

[126] Among other things, the Entitlement 55 Group argued that when Imperial Oil amended the plans, it was acting in both its capacity as employer and its capacity as administrator of the plans. Thus, they contended, Imperial Oil placed itself in a conflict of interest situation prohibited by s. 22(4) of the PBA because in its role as employer it wished to reduce pension fund liabilities but in its role as administrator it had a duty to protect the interests of the beneficiaries who had reached the ten-year service qualification and thereby "qualified" for the enhanced benefit.

[127] The PCO dismissed the application. In so doing, it rejected the submission that Imperial Oil had contravened s. 22(4) by passing the amendments. It held that Imperial Oil had acted solely in its capacity as employer when it passed the amendments.

[128] The PCO acknowledged that the PBA allows an employer to wear "two hats" -- one as employer and the other as administrator. However, at para. 33 of its reasons, the PCO explained that an employer plays a role in respect of the pension plan that is distinct from its role as administrator:

> Its role as employer permits it to make the decision to create a pension plan, to amend it and to wind it up. Once the plan and fund are in place, it becomes an administrator for the purposes of management of the fund and administration of the plan. If we were to hold that an employer was an administrator for all purposes once a plan was established, of what use would a power of amendment be? An employer could never use the power to amend the plan in a way that was to its benefit, as opposed to the benefit of the employees. Section 14 presupposes this power is with an employer as it created parameters around the exercise of a power of amendment.

[129] The "two hats" analogy in Imperial Oil assists in

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understanding the parameters of the dual roles of an employer who is also the administrator of its pension plan. The employer, when managing its business, wears its corporate hat. Although the employer qua corporation must treat all stakeholders fairly when their interests conflict, the directors' ultimate duty is to act in the best interests of the corporation: see BCE Inc. v. 1976 Debentureholders, [2008] 3 S.C.R. 560, [2008] S.C.J. No. 37, at paras. 81-84. On the other hand, when acting as the pension plan administrator, the employer wears its fiduciary hat and must act in the best interests of the plan's members and beneficiaries.

[130] The question raised by these appeals is whether, as the respondents contend, Indalex wore only its corporate hat during the CCAA proceedings. In my view, it did not. As I will explain, during the CCAA proceedings, in the unique circumstances of this case, Indalex wore both its corporate and its administrator's hats. [page666]

[131] I begin from the position that Indalex had the right to make the decision to commence CCAA proceedings wearing solely its corporate hat. That decision is not part of the administration of the pension plan or fund nor does it necessarily engage the rights of the beneficiaries of the pension plan. For example, an employer might sell its business under CCAA protection, with the purchaser agreeing to continue the pension plan. In that situation, there should be no effect on the payment of pension benefits. Similarly, if the pension plan were fully funded, CCAA proceedings should have no effect on pension entitlements.

[132] However, just because the initial decision to commence CCAA proceedings is solely a corporate one, that does not mean that all subsequent decisions made during the proceedings are also solely corporate ones. In the circumstances of this case, Indalex could not simply ignore its obligations as the Plans' administrator once it decided to seek CCAA protection. Shortly after initiating CCAA proceedings, Indalex moved to obtain DIP financing, in which it agreed to give the DIP lenders a super-priority charge. At the same time, Indalex knew that the Plans were underfunded and that unless more funds were put into

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the Plans, pensions would have to be reduced. The decisions that Indalex was unilaterally making had the potential to affect the Plans beneficiaries' rights, at a time when they were particularly vulnerable. The peculiar vulnerability of pension plan beneficiaries was even greater than in the ordinary course because they were given no notice of the CCAA proceedings, had no real knowledge of what was transpiring and had no power to ensure that their interests were even considered -- much less protected -- during the DIP negotiations.

[133] In concluding that Indalex was subject to its fiduciary duties as administrator as well as its corporate obligations during the CCAA proceedings, two points need to be made.

[134] First, it is significant that Indalex is unclear as to what it thinks happened to its role as administrator during the CCAA proceedings. When cross-examined on this matter, Mr. Cooper gave various responses as to whom he believed filled that role: Indalex, a combination of him and the Monitor, and a combination of him and his staff. This confusion is understandable, given the number of roles that Mr. Cooper played in these proceedings. It will be recalled that prior to the commencement of the CCAA proceedings, he became the chief restructuring officer for Indalex U.S., a position which included responsibility for the Canadian group of Indalex companies. In this position, he served as Indalex's primary negotiator of the DIP credit agreement. [page667] But, at the same time, he worked for FTI Consulting Inc. The Monitor is a wholly owned subsidiary of FTI Consulting Inc. This blending of roles no doubt contributed to the apparent disregard for the obligations owed by the Plans' administrator.

[135] In any event, it is not apparent to me that Indalex could ignore its role as administrator or divest itself of those obligations without taking formal steps through the Superintendent, plan amendment, the courts, or some combination thereof, to transfer that role to a suitable person. However, I will not consider this particular question further because it was not squarely raised and argued by the parties and, in any event, even if Mr. Cooper became the administrator, through his

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various roles, including as chief restructuring officer for Indalex U.S., he is so clearly allied in interest with Indalex that the following analysis remains applicable.

[136] Second, the respondents' submission that Indalex wore only its corporate hat during the proceedings is implicitly premised on the notion that an employer will wear its corporate hat or its administrator's hat, but never both. I do not accept this premise. Nor do I accept that the reasoning in Imperial Oil, which the respondents rely on, supports this submission.

[137] In Imperial Oil, the PCO had to decide whether certain acts taken in respect of a pension plan were those of the employer or the administrator. Because the provision of pension plans is voluntary in Canada, the employer has the right to decide questions of plan design, including whether to offer a pension plan and, if it does, whether to end it. In part because of the wording of s. 14 of the PBA and in part because the amendments at issue in Imperial Oil were a matter of plan design, the PCO concluded that the employer was found to be acting solely in its corporate role when it passed the amendments. There is nothing in Imperial Oil to suggest that an employer cannot find itself in a position where it is wearing both hats at the same time.

[138] I turn next to the question of breach.

[139] As previously noted, when Indalex commenced CCAA proceedings, it knew that the Plans were underfunded and that unless additional funds were put into the Plans, pensions would be reduced. Indalex did nothing in the CCAA proceedings to fund the deficit in the underfunded Plans. It took no steps to protect the vested rights of the Plans' beneficiaries to continue to receive their full pension entitlements. In fact, Indalex took active steps which undermined the possibility of additional funding to the Plans. It applied for CCAA protection without notice to the Plans' beneficiaries. It obtained a CCAA order that gave priority to the DIP lenders over "statutory trusts" without notice [page668] to the Plans' beneficiaries. It sold its assets without making any provision for the Plans. It knew the purchaser was not taking over the Plans. [See Note 14

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below] It moved to obtain orders approving the sale and distributing the sale proceeds to the DIP lenders, knowing that no payment would be made to the underfunded Plans. And, Indalex U.S. directed Indalex to bring its bankruptcy motion with the intention of defeating the deemed trust claims and ensuring that the Reserve Fund was transferred to it. In short, Indalex did nothing to protect the best interests of the Plans' beneficiaries and, accordingly, was in breach of its fiduciary obligations as administrator.

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[140] Further, in my view, Indalex was in a conflict of interest position. As has been mentioned, Indalex's corporate duty was to treat all stakeholders fairly when their interests conflicted, but its ultimate duty was to act in the best interests of the corporation. Indalex's duty as administrator was to act in the Plans' beneficiaries best interests. It is apparent that in the circumstances of this case, these duties were in conflict.

[141] The common law prohibition against conflict of interest is not confined to situations where the fiduciary's personal interest conflicts with those of the beneficiaries. It also precludes the fiduciary from placing itself in a position where it acts for two parties who are adverse in interest: Davey v. Woolley, Hames, Dale & Dingwall (1982), 35 O.R. (2d) 599, [1982] O.J. No. 3158 (C.A.), at para. 8. In Davey, a solicitor who acted for both sides of a business transaction was found to be in breach of his fiduciary obligations. Wilson J.A., writing for this court, explained that the conflict arose because the solicitor could not fulfill his duties in respect of both clients at the same time. At para. 18, she concluded that the solicitor was bound to refuse to act for the plaintiff in the circumstances.

[142] The prohibition against a fiduciary being in a position of conflicting duties governs the situation in which Indalex found itself in during the CCAA proceedings.

[143] Indalex was not at liberty to resolve the conflict in its duties by simply ignoring its role as administrator. A fiduciary relationship does not end simply because it becomes

impossible of performance. At the point where its duty to the corporation conflicted with its duties as administrator, it was incumbent on Indalex to take steps to address the conflict. [page669]

[144] Even if I am in error in concluding that Indalex was in breach of its common law fiduciary obligations, I would find that its actions amounted to a breach of s. 22(4) of the PBA. Section 22(4) prohibits an administrator from knowingly permitting its interest to conflict with its duties and powers in respect of the pension fund. Under s. 57(5) of the PBA, as administrator, Indalex had a lien and charge on its assets for the amount of the deemed trust. Any steps that it might have taken pursuant to s. 57(5), as administrator, would have been in respect of the pension fund. Thus, if nothing else, Indalex's actions during the CCAA proceedings demonstrate that it permitted its corporate interests to conflict with the administrator's duties and powers that flow from the lien and charge.

[145] Having found that Indalex breached its fiduciary obligations to the Plans' beneficiaries, the question becomes: what flows from such a finding? I address that question below when considering the issue of how to distribute the Reserve Fund. At that time, I will return to the arguments of the Monitor and Sun Indalex to the effect that such a finding is largely irrelevant in these proceedings.

Does the Collateral Attack Rule Bar the Deemed Trust Motions?

[146] The U.S. Trustee submits that even if the PBA creates a deemed trust for any wind up deficiencies in the Plans, the appeals should be dismissed because the underlying motions are an impermissible collateral attack on previous orders made in the CCAA proceedings. His argument runs as follows.

[147] The Initial Order, the June 12, 2009 order and the Sale Approval order (the "Court Orders") are all valid, enforceable court orders. The Court Orders gave super-priority rights to the DIP lenders and Indalex U.S. is subrogated to those rights. None of the Court Orders were appealed and no party sought to have them set aside or varied. As the appellants' motions seek

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to alter the priorities established by the Court Orders, they should be barred because they are an impermissible collateral attack on those orders.

[148] I do not accept this submission for three reasons, the first two of which can be shortly stated.

[149] First, this submission is an attack on the underlying motions. As such, it ought to have been raised below. The Former Executives say that the collateral attack doctrine was raised for the first time on appeal. Certainly, if it was raised below, the CCAA judge makes no reference to it. As a general rule, it is not appropriate to raise an issue for the first time on appeal. The exceptions to this general rule are very limited and [page670] do not apply in this case: see Cusson v. Quan, [2009] 3 S.C.R. 712, [2009] S.C.J. No. 62, at paras. 36-37.

[150] Second, the USW and the Former Executives raised the matter of the deemed trusts in the CCAA proceedings. The CCAA judge designed a process by which their claims would be resolved. They followed that process. The USW and Former Executives can scarcely be faulted for complying with a court-designed process. Further, the Sale Approval order acknowledged the deemed trust issue in that it required the Monitor to hold funds in reserve that were sufficient to satisfy the deemed trust claims. That acknowledgment is inconsistent with a subsequent claim of impermissible collateral attack.

[151] Third, as I will now explain, an appreciation of the CCAA regime makes it apparent that the collateral attack rule does not apply in the circumstances of this case.

[152] The collateral attack rule rests on the need for court orders to be treated as binding and conclusive unless they are set aside on appeal or lawfully quashed. Court orders may not be attacked collaterally. That is, a court order may not be attacked in proceedings other than those whose specific object is the reversal, variation or nullification of the order. See R. v. Wilson, [1983] 2 S.C.R. 594, [1983] S.C.J. No. 88, at

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para. 8.

[153] The fundamental policy behind the rule against collateral attacks is "to maintain the rule of law and to preserve the repute of the administration of justice": see R. v. Litchfield, [1993] 4 S.C.R. 333, [1993] S.C.J. No. 127, at para. 17. If a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it: see Garland v. Consumers' Gas Co., [2004] 1 S.C.R. 629, [2004] S.C.J. No. 21, at para. 72.

[154] The CCAA regime is designed to deal with all matters during an insolvent company's attempt to reorganize. The court-ordered stay of proceedings ensures that there is only one forum where parties can put forth their arguments and claims. By pre-empting other legal proceedings, the stay gives a corporation breathing space, which promotes the opportunity for reorganization.

[155] The CCAA regime is a flexible, judicially supervised reorganization process that allows for creative and effective decisions: see Century Services Inc. v. Canada (Attorney General), [2010] 3 S.C.R. 379, [2010] S.C.J. No. 60, at para. 21. The CCAA judge is accorded broad discretion because the proceedings are a fact-based exercise that requires ongoing monitoring [page671] and because there is often a need for the court to act quickly. There is an underlying assumption, however, that the CCAA proceedings will provide an opportunity for affected persons to participate in the proceedings.

[156] This assumption finds voice in para. 56 of the Initial Order, as amended, which permits any interested party to apply to the CCAA court to vary or amend the Initial Order (the "come-back clause"). That is precisely what the appellants did. As interested parties, they went to the CCAA court to ask that the super-priority charge be varied or amended so that their claims could be properly recognized.

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[157] Moreover, I do not accept that the appellants failed to act promptly in asserting their claims. It was only when Indalex brought a motion for approval of the sale of its assets to SAPA and for a distribution of the sale proceeds to the DIP lenders that it became clear that Indalex intended to abandon the Plans in their underfunded states. The appellants immediately took steps to assert their claims in the very forum in which all of the Court Orders had been made, namely, the CCAA court.

[158] The U.S. Trustee's argument that the Court Orders were never appealed is not persuasive. In Algoma Steel Inc. (Re), [2001] O.J. No. 1943, 147 O.A.C. 291 (C.A.), at paras. 7-9, this court stated that it is premature to grant leave to appeal from an initial order -- brought on an urgent basis to deal with seemingly desperate circumstances -- when the order specifically opens the proceeding to all interested parties and invites dissatisfied parties to bring their concerns to the court on a timely basis using a come-back provision.

[159] As the Former Executives point out, had the appellants sought to advance their deemed trust claims by bringing a motion challenging the paragraph of the Initial Order that established the DIP super-priority charge, it is likely that they would have been met by a response that their motions were premature. Depending on the amount paid for the company and/or the arrangements made in respect of the Plans, the interests of the Plans' beneficiaries might not have been affected by a sale. Indeed, on July 2, 2009, when Indalex brought a motion to have the bidding procedures approved for the asset sale and the Former Executives objected because of concerns that the Plans were underfunded, the CCAA judge endorsed the record as follows: "The issues can be raised by the retirees on any application to approve a transaction -- but that is for another day."

[160] The appellants followed that direction. When Indalex moved to have the sale transaction approved and the jeopardy to [page672] the appellants' interests became apparent, they went to the CCAA court and raised the deemed trust issue. [See Note 15 below]

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[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

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attack [page673] on the severance order did not offend the underlying rationale for the rule.

[165] Similarly, in R. v. Domm (1996), 31 O.R. (3d) 540, [1996] O.J. No. 4300 (C.A.), at para. 31, Doherty J.A., writing for this court, states that if a collateral attack can be taken without harm to the interests of the rule of law and the repute of the administration of justice, the rule should be relaxed. At para. 36 of Domm, he says that the rule must yield where a person has "no other effective means" of challenging the order in question.

[166] I acknowledge that certainty and finality are necessary to the proper functioning of the legal system. And, I recognize that permitting the appellants' motions to proceed has generated some degree of uncertainty as to the priorities established by the Court Orders. However, in the circumstances of this case, there was no other effective means by which the appellants could assert their claims to a deemed trust. As has been mentioned, it was only when Indalex brought a motion for approval of the sale of its assets to SAPA and for a distribution of the sale proceeds to the DIP lenders that it became clear that Indalex intended to abandon the Plans in their underfunded states. The appellants immediately took steps to assert their claims in the very forum in which all of the Court Orders had been made, namely, the CCAA court. By permitting their motions to be heard, the CCAA judge did not damage the repute of the administration of justice. On the contrary, he strengthened it. He enabled the sale to proceed while ensuring that the competing claims to the Reserve Fund would be decided on the merits and expeditiously.

[167] Nor can it be said, for the reasons already given about the nature of CCAA proceedings, that the deemed trust motions jeopardize the rule of law. Given the nature of a CCAA proceeding, the court must often make orders on an urgent and expedited basis, with little or no notice to creditors and other interested parties. Its processes are sufficiently flexible that it can accommodate situations such as the one that arose here. A strict application of the rule would preclude the appellants from having the opportunity to

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meaningfully challenge the super-priority charge in the Initial Order, as amended. In my view, that result would be a fundamental flaw in the CCAA process, one in which procedure triumphed over substance. As Iacobucci J. said in Litchfield, at para. 18, such a result cannot be accepted.

[168] Accordingly, in my view, while the collateral attack rule does not apply, even if it did, there are compelling reasons in this case to relax its strict application. [page674]

Do the Principles of Cross-Border Insolvencies Apply?

[169] The U.S. Trustee also submits that the principles of cross-border insolvencies should be applied when deciding these appeals. He contends that notwithstanding that separate proceedings were commenced in Canada and the U.S., those principles apply because the applicants were direct and indirect subsidiaries of certain of the U.S. debtors, who commenced proceedings under Chapter 11 of Title 11 of the United States Bankruptcy Code in March 2009. Further, the U.S. Trustee contends that if the appellants' claims were to succeed, it would seriously undermine the basic principles underlying cross-border insolvencies and the confidence of foreign creditors and courts in the Canadian insolvency system.

[170] While this argument provides context for the U.S. Trustee's collateral attack submission, I do not see it as disclosing any legal grounds relevant to these appeals. By order dated May 12, 2009, Morawetz J. approved a cross-border protocol in these proceedings that stipulates that the U.S. and Canadian courts retain exclusive jurisdiction over the proceedings in their respective jurisdictions. Furthermore, there is no evidence to support the U.S. Trustee's claim that allowing these appeals would impair future lending practices by U.S. companies. Finally, nothing has been raised which supports the notion that upholding valid provincial law in the circumstances of these appeals will undermine the principles of cross-border insolvencies.

How is the Reserve Fund to be Distributed?

The Salaried Plan

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[171] Having concluded that a deemed trust exists with respect to the deficiency in the Salaried Plan as at July 20, 2009, the question becomes whether the Monitor should be ordered to pay the amount of that deficiency, from the Reserve Fund, into the Salaried Plan.

[172] The USW argues, on behalf of the beneficiaries of the Salaried Plan, that the deemed trust ranks in priority to all secured creditors and, therefore, the order should be made. Its argument rests on s. 30(7) of the PPSA, which reads as follows:

> 30(7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the Employment Standards Act or under the Pension Benefits Act.

(Emphasis added) [page675]

[173] The USW contends that as s. 30(7) gives priority to the PBA deemed trust and no finding of paramountcy was made in these proceedings, it must be given effect.

[174] The respondents argue that the super-priority charge has priority over any deemed trusts and, therefore, the Reserve Fund should be paid to Sun Indalex, as the principal secured creditor of Indalex U.S. They point to well-established law that authorizes the court to grant super-priority to DIP lenders in CCAA proceedings and argue that without such a charge, DIP lenders will no longer provide financing to companies under CCAA protection. Without DIP funding they say, many companies under CCAA protection will be unable to continue in business until a compromise or arrangement has been worked out. Consequently, companies will file for bankruptcy where deemed trusts have no priority. This, they say, will frustrate the very purpose of the CCAA, which is to facilitate the making of compromises or arrangements between insolvent debtor companies and their creditors.

[175] There is a great deal of force to the respondents' submissions. Indeed, in general, I agree with them. It is important that the courts not address the interests of pension plan beneficiaries in a manner that thwarts or even discourages

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DIP funding in future CCAA proceedings. Nonetheless, in the circumstances of this case, it is my view that the Monitor should be ordered to pay the amount of the deficiency, from the Reserve Fund, into the Salaried Plan.

[176] The CCAA court has the authority to grant a super-priority charge to DIP lenders in CCAA proceedings. [See Note 16 below] I fully accept that the CCAA judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation, including the PBA. I also accept that without such a charge, DIP lenders may be unwilling to provide financing to companies under CCAA protection. However, this does not mean that the super-priority charge in question has the effect of overriding the deemed trust. To decide whether it does, one must turn to the doctrine of paramountcy.

[177] Valid provincial laws continue to apply in federally regulated bankruptcy and insolvency proceedings absent an express finding of federal paramountcy. The onus is on the party relying on the doctrine of paramountcy to demonstrate that the federal [page676] and provincial laws are incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law: see Canadian Western Bank v. Alberta, [2007] 2 S.C.R. 3, [2007] S.C.J. No. 22, at para. 75, and Nortel Networks Corp. (Re) (2009), 99 O.R. (3d) 708, [2009] O.J. No. 4967 (C.A.), at para. 38, leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 531.

[178] In this case, there is nothing in the record to suggest that the issue of paramountcy was invoked on April 8, 2009, when Morawetz J. amended the Initial Order to include the super-priority charge. The documents before the court at that time did not alert the court to the issue or suggest that the PBA deemed trust would have to be overridden in order for Indalex to proceed with its DIP financing efforts while under CCAA protection. To the contrary, the affidavit of Timothy Stubbs, the then CEO of Indalex, sworn April 3, 2009, was the primary source of information before the court. In para. 74 of his affidavit, Mr. Stubbs deposes that Indalex intended to

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comply with all applicable laws, including "regulatory deemed trust requirements".

[179] While the super-priority charge provides that it ranks in priority over trusts, "statutory or otherwise", I do not read it as taking priority over the deemed trust in this case because the deemed trust was not identified by the court at the time the charge was granted and the affidavit evidence suggested such a priority was unnecessary. As no finding of paramountcy was made, valid provincial laws continue to operate: the super-priority charge does not override the PBA deemed trust. The two operate sequentially, with the deemed trust being satisfied first from the Reserve Fund.

[180] Does this conclusion thwart the purpose of the CCAA regime, which is to facilitate the restructuring of failing businesses to avoid bankruptcy and liquidation? It does not appear that would have happened in the present case. The granting of a stay in a CCAA proceeding provides a company with breathing space so that it can restructure. In this case, the stay of proceedings gave Indalex the breathing space it needed to effect a sale of its business. Recall that this was a "liquidating CCAA" from the outset. There was no restructuring of the company. There was no plan of compromise or arrangement prepared and presented to creditors. Within days of obtaining CCAA protection, Indalex began a marketing process to sell itself. Very shortly thereafter, it sold its business as a going-concern. There is nothing in the record to suggest that giving the deemed trust [page677] priority would have frustrated Indalex's efforts to sell itself as a going-concern business.

[181] What of the contention that recognition of the deemed trust will cause DIP lenders to be unwilling to advance funds in CCAA proceedings? It is important to recognize that the conclusion I have reached does not mean that a finding of paramountcy will never be made. That determination must be made on a case-by-case basis. There may well be situations in which paramountcy is invoked and the record satisfies the CCAA judge that application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy. But,

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this depends on the applicant clearly raising the issue of paramountcy, which will alert affected parties to the risks to their interests and put them in a position where they can take steps to protect their rights. That, however, is not this case.

[182] Nor am I persuaded by the argument that if the deemed trust is given effect in the unique circumstances of this case, companies will file for bankruptcy instead of moving for CCAA protection. This argument suggests that companies will act based on the desire to avoid their pension obligations. That motivation does not conform with the obligations that directors owe to the corporation. The obligation to act in the best interests of the corporation suggests that companies will choose the route that maximizes recovery for creditors. As the respondents point out, Indalex sought a going-concern sale for exactly that reason. In addition, by selling its business as a going concern, Indalex preserved value for suppliers and customers who can continue to do business with the purchaser and preserved approximately 950 jobs for its former employees. Surely, the desire to maximize recovery for their creditors -- along with those other considerations -- would have prevailed had Indalex known it would have to satisfy the deemed trust when considering whether to pursue bankruptcy or CCAA proceedings. In this regard, it is worth recalling that consideration for the sale exceeded $151 million, all DIP lenders were repaid in full, the Reserve Fund consists of undistributed proceeds and the total deficiencies in the Plans appear to be approximately $6.75 million.

[183] As for the suggestion that Indalex will pursue its bankruptcy motion in order to defeat the deemed trust, I would simply echo the comments of the CCAA judge that a voluntary assignment into bankruptcy should not be used to defeat a secured claim under valid provincial legislation. I would add this additional consideration: it is inappropriate for a CCAA applicant with a fiduciary duty to pension plan beneficiaries to seek to avoid those obligations to the benefit of a related party [page678] by invoking bankruptcy proceedings when no other creditor seeks to do so.

[184] There is also the matter of Indalex U.S.'s apparent

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reliance on the super-priority charge when it gave the Guarantee. As explained more fully above, Indalex U.S. was fully aware of Indalex's obligations to the Plans when it entered into the Guarantee. Again as explained more fully above, there were a number of different steps that Indalex could have taken to deal with these obligations. It chose not to. This is not a case in which the secured creditor is an arm's length third party taken by surprise by the claims of the Plans' beneficiaries.

[185] A final consideration that must be addressed at this stage arises from the recent decision of the Supreme Court of Canada in Century Services, which was released after the oral hearing of the appeals. The parties were invited to make written submissions on the impact of Century Services, if any, on these appeals. I am grateful for the excellence of those submissions, which mirrors the quality of the original submissions.

[186] Century Services deals with conflicting provisions in two pieces of federal legislation: s. 222(3) of the Excise Tax Act, R.S.C. 1985, c. E-15, which gives the federal Crown a deemed trust for unpaid GST, and s. 18.3(1) (now s. 37) of the CCAA, which expressly excludes deemed trusts in favour of the Crown from applying in CCAA proceedings. Deschamps J., for the majority, conducted a comprehensive analysis of the two conflicting sections and held that s. 18.3(1) of the CCAA prevails. In sum, Century Services stands for the proposition that s. 18.3(1) of the CCAA excludes the deemed trust for unpaid GST created by s. 222 of the Excise Tax Act from applying in a CCAA proceeding.

[187] It will be readily apparent that Century Services is distinguishable from the present case in a number of ways. Three significant differences between it and the present appeals are worthy of note.

[188] First, in Century Services, reorganization efforts had failed and the company sought leave to make an assignment into bankruptcy. Liquidation on a piecemeal basis through bankruptcy was inevitable. The CCAA proceedings in the present case, on

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the other hand, were successful -- they resulted in the sale of Indalex's assets and the continuation of the business, albeit through another entity. It is not a situation in which transition to the bankruptcy regime was inevitable because efforts under the CCAA had failed.

[189] Second, Century Services deals with competing provisions in two federal statutes. The conflict between the two provisions was patent: one or the other had to prevail. They could not [page679] be read together. Section 18.3(1) was found to prevail, in part because of its wording, which expressly excludes a deemed trust in favour of the Crown. The present appeals involve a consideration of the doctrine of federal paramountcy and whether a deemed trust under provincial legislation applies to a charge granted in a CCAA proceeding. Significantly, unlike the situation in Century Services, there is nothing in the CCAA that expressly excludes the provincial deemed trust for unpaid pension contributions from applying in CCAA proceedings. In these appeals, exclusion of the provincial deemed trust is dependent on the CCAA judge engaging in a factual examination and a determination that preservation of pension rights through the deemed trust would frustrate the purpose of the CCAA proceeding. Moreover, it is difficult to see how a finding of paramountcy would have been made on the record at the time the super-priority charge was made, given the evidence that Indalex intended to comply with all regulatory deemed trust requirements. [See Note 17 below]

[190] Third, no issue of fiduciary duty arose in Century Services. In the present case, as discussed previously and again below, the impact of fiduciary duties during the CCAA proceeding plays a significant role.

[191] The respondents contend that Century Services is crucial in the disposition of these appeals because it stands for the proposition that federal priorities under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA") apply in CCAA proceedings. If Century Services stood for that proposition, I would agree. In a series of cases, the Supreme Court of Canada has repeatedly said that a province cannot, by legislating a deemed trust, alter the scheme of priorities

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under the BIA: see, for example, British Columbia v. Henfrey Samson Belair Ltd., [1989] 2 S.C.R. 24, [1989] S.C.J. No. 78.

[192] However, in my view, Century Services does not stand for that unqualified proposition. In Century Services, Deschamps J. explains that the CCAA and BIA are to be read in an integrated fashion but she is at pains to say that the BIA scheme of liquidation and distribution is the backdrop for what happens if a CCAA reorganization is unsuccessful. [See Note 18 below] Here, as I have noted, the CCAA proceedings were successful.

[193] Moreover, Deschamps J. repeatedly distinguishes the two regimes on the basis that the BIA is "characterized by a [page680] rules-based approach", [See Note 19 below] whereas the CCAA "offers a more flexible mechanism with greater judicial discretion". [See Note 20 below] Permitting the PBA deemed trust to survive, absent an express finding of paramountcy, is consistent with both those key features of the CCAA proceedings -- greater flexibility and greater judicial discretion on the part of the CCAA court. This flexibility and discretion on the part of the CCAA court enables it to meaningfully assess the baseline considerations of appropriateness, good faith and due diligence, referred to by Deschamps J., at para. 70 of Century Services.

[194] The respondents point to paras. 47, 48 and 76 of Century Services, in which Deschamps J. notes the "strange asymmetry" that would occur if the ETA Crown priority were interpreted differently in CCAA proceedings than in BIA proceedings. She says this would encourage forum shopping in cases where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims. No "strange asymmetry" would occur in cases such as the present appeals. If the CCAA judge found that recognition of the PBA deemed trust would frustrate the purpose of the CCAA proceeding and paramountcy had been invoked, the CCAA judge would be free to make a super-priority charge that overrode the deemed trust. This approach leaves the CCAA court with greater flexibility and the ability to be "cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees". [See Note 21 below]

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[195] In para. 70 of her reasons, Deschamps J. exhorts the CCAA courts to be "mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit" (emphasis added). The Plans' beneficiaries are stakeholders. And, once the deemed trust claims are recognized, they are not to be treated as mere unsecured creditors. If, as the respondents contend based on Century Services, the deemed trusts are automatically overridden, there will be no incentive for companies that are similarly situated to Indalex to attempt to deal with their underfunded pension plans. There will be no incentive to treat pension plan beneficiaries "as advantageously and fairly as the circumstances permit". The incentive will be to do as Indalex did -- go to court [page681] without notice to the affected pension plan beneficiaries and negotiate as if the pension obligations did not exist.

[196] Justice Deschamps also says that no "gap" should exist between the BIA and the CCAA and approves of Laskin J.A.'s reasoning to that effect, at paras. 62-63 of Ivaco. [See Note 22 below] She explains that the gap is a situation "which would allow the enforcement of property interests at the conclusion of CCAA proceedings that would be lost in bankruptcy". When the facts of the present case are considered carefully, it can be seen that a gap of this sort will not occur should the appeals be allowed. As I see it, the deemed trusts continued to exist during the CCAA proceedings although no steps could be taken to enforce them during the proceedings because of the stay. By the time of the Sale Approval order, the CCAA court had become aware of the deemed trust claims. It dealt with the deemed trust claims as part of the CCAA proceedings by deciding whether the undistributed sales proceeds held by the Monitor should go to Indalex U.S. or to the Plans' beneficiaries. Thus, rather than being a situation in which property interests that would be lost in bankruptcy were enforced at the conclusion of the CCAA proceedings, the property interests were dealt with as part of the CCAA proceedings.

[197] However, even if I am wrong in concluding that the

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deemed trust has priority over the secured creditor in this case, I would make the order on the basis that it is the appropriate remedy for the breaches of fiduciary obligation.

[198] It is important to keep in mind that the contest over the Reserve Fund is not a fight between the DIP lenders and the pensioners. The DIP lenders have been paid in full. The dispute is between the pensioners and Sun Indalex, the principal secured creditor of Indalex U.S. It is in that context that the court must consider the competing equities.

[199] The CCAA was not designed to allow a company to avoid its pension obligations. To give effect to Indalex U.S.'s claim would be to sanction Indalex's breaches of fiduciary obligation. In the circumstances of this case, such a result would work an injustice. The equities are not equal. The Plans' beneficiaries were vulnerable to the exercise of power by Indalex. They were not part of the negotiations for the DIP financing nor were they involved in the sale negotiations. They had no opportunity to protect their interests and, as a result of Indalex's actions, there was no one who fulfilled the administrator's role. Indalex, on the other hand, was fully aware of the Plans' underfunding and the [page682] result to the pensioners of a failure to inject additional funds. It was Indalex who advised the CCAA court that it intended to comply with "regulatory deemed trust requirements". To permit Sun Indalex to recover on behalf of Indalex U.S. would be to effectively permit the party who breached its fiduciary obligations to take the benefit of those breaches, to the detriment of those to whom the fiduciary obligations were owed.

[200] I do not accept the respondents' argument that a finding that Indalex breached its fiduciary obligation is irrelevant because it would merely give rise to an unsecured claim and there is no basis for conferring a priority for such a claim. This view fundamentally misunderstands the rights of the pension plan beneficiaries. Even if there is no deemed trust, the Plans' beneficiaries are not mere unsecured creditors. They are unsecured creditors to whom Indalex owed a fiduciary duty by virtue of its role as the Plans' administrator. There is a significant difference, in my view,

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between being a mere unsecured creditor and being an unsecured creditor to whom a fiduciary duty is owed.

[201] Further, the Supreme Court has repeatedly stated that equitable remedies are sufficiently flexible that they can be molded to meet the requirements of fairness and justice: see, for example, Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534, [1991] S.C.J. No. 91, at para. 86, and Soulos v. Korkontzilas, (1997), 32 O.R. (3d) 716, [1997] 2 S.C.R. 217, [1997] S.C.J. No. 52, at para. 34.

[202] In Soulos, at para. 36, McLachlin J. (as she then was), writing for the majority, held that constructive trusts may be imposed where "good conscience requires" it. She went on to identify two different types of cases in which constructive trusts may be ordered: (1) those in which property is obtained by a wrongful act of the defendant, notably breach of fiduciary duty or breach of the duty of loyalty; and (2) those in which there may not have been a wrongful act, but where there has been unjust enrichment. While the second type of case -- one in which there is unjust enrichment -- is not relevant to these appeals, the first is.

[203] At para. 45 of Soulos, McLachin J. sets out four conditions that should "generally be satisfied" if a constructive trust based on wrongful conduct is to be ordered:

(1) the defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his or her hands;

(2) the assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his or her equitable obligation to the plaintiff; [page683]

(3) the plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and

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(4) there must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

[204] As I have already explained, in the circumstances of this case, Indalex's fiduciary obligations as administrator were engaged in relation to the CCAA proceedings and it is those proceedings that gave rise to the asset (i.e., the Reserve Fund) (condition 1). The assets that would flow to Indalex U.S., absent the constructive trust, are directly connected to the process in which Indalex committed its breaches of fiduciary obligation (condition 2). Without the proprietary remedy, the Plans' beneficiaries have no meaningful remedy. Moreover, there must be some incentive to require employers who are also the administrators of their pension plans to remain faithful to their duties (condition 3). And, because Indalex U.S. is not an arm's length innocent third party, imposing a constructive trust in favour of the Plans' beneficiaries is not unjust (condition 4).

The Executive Plan

[205] As I explained above, it is not clear to me that a deemed trust arose in respect of the underfunded amounts in the Executive Plan because it had not been wound up at the time of sale. However, based on the breaches of fiduciary duty, the court is entitled to consider the equities of the parties competing for the Reserve Fund. For the reasons given in respect of the Salaried Plan in respect of those equities, I would make the same order in respect of the Executive Plan, namely, that the Monitor pay the deficiency from the Reserve Fund to the Executive Plan in priority to those entitled under the super-priority charge.

[206] In light of this conclusion, I find it unnecessary to deal with the Former Executives' submission that the doctrine of equitable subordination applies to remedy Indalex's breaches of fiduciary duty. In any event, I would decline to decide that issue as it was not argued below. It offends the general rule

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that appellate courts are not to entertain new issues on appeal.

Disposition

[207] Accordingly, I would allow the appeals and declare that the claims of the USW and the Former Executives take priority over the claim asserted by Indalex U.S./Sun Indalex. I would order the Monitor to pay from the Reserve Fund into each of the Salaried Plan and the Executive Plan an amount sufficient to [page684] satisfy the deficiencies in each plan. I understand that the Reserve Fund is sufficient to satisfy the Deficiencies but if this proves problematic, the parties may return to the court for direction on that matter.

[208] If the parties are unable to agree on costs, they may make brief written submissions on that matter. The appellants, Morneau and the Superintendent shall file their submissions within 15 days of the date of release of these reasons. The respondents shall have a further seven days within which to file their submissions.

Appeal allowed.

Schedule "A"

Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 1(1), 8, 14(1), 22, 57(1)-(5), 70(1), 74(1), 75(1), (2), 76

Definitions

1(1) In this Act, . . .

"administrator" means the person or persons that administer the pension plan;

. . . . .

"wind up" means the termination of a pension plan and the distribution of the assets of the pension fund;

. . . . .

Administrator

Requirement

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8(0.1) A pension plan must be administered by a person or entity described in subsection (1).

Prohibition

(0.2) No person or entity other than a person or entity described in subsection (1) shall administer a pension plan.

Administrator

(1) A pension plan is not eligible for registration unless it is administered by an administrator who is,

- (a) the employer or, if there is more than one employer, one or more of the employers;
- (b) a pension committee composed of one or more representatives of,
  - (i) the employer or employers, or any person, other than the employer or employers, required to make contributions under the pension plan, and
  - (ii) members of the pension plan; [page685]
- (c) a pension committee composed of representatives of members of the pension plan;
- (d) the insurance company that provides the pension benefits under the pension plan, if all the pension benefits under the pension plan are guaranteed by the insurance company;
- (e) if the pension plan is a multi-employer pension plan established pursuant to a collective agreement or a trust agreement, a board of trustees appointed pursuant to the pension plan or a trust agreement establishing the pension plan of whom at least one-half are representatives of members of the multi-employer pension plan, and a majority of such representatives of the members shall be Canadian citizens or landed immigrants;
- (f) a corporation, board, agency or commission made responsible by an Act of the Legislature for the administration of the pension plan;
- (g) a person appointed as administrator by the Superintendent under section 71; or

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(h) such other person or entity as may be prescribed.

. . . . .

Additional members

(2) A pension committee, or a board of trustees, that is the administrator of a pension plan may include a representative or representatives of persons who are receiving pensions under the pension plan.

Interpretation

(3) For the purposes of clause (1)(b), "employer" includes the following persons and entities:

1. Affiliates within the meaning of the Business Corporations Act of the employer.
2. Such other persons or entities, or classes of persons or entities, as may be prescribed.

. . . . .

Reduction of benefits

14(1) An amendment to a pension plan is void if the amendment purports to reduce,

(a) the amount or the commuted value of a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment;

(b) the amount or the commuted value of a pension or a deferred pension accrued under the pension plan; or

(c) the amount or the commuted value of an ancillary benefit for which a member or former member has met all eligibility requirements under the pension plan necessary to exercise the right to receive payment of the benefit. [page686]

. . . . .

Care, diligence and skill

22(1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and

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investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

Special knowledge and skill

(2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.

Member of pension committee, etc.

(3) Subsection (2) applies with necessary modifications to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan.

Conflict of interest

(4) An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

Employment of agent

(5) Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.

Trustee of pension fund

(6) No person other than a prescribed person shall be a

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trustee of a pension fund.

Responsibility for agent

(7) An administrator of a pension plan who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable.

Employee or agent

(8) An employee or agent of an administrator is also subject to the standards that apply to the administrator under subsections (1), (2) and (4).

. . . . .

Trust property

57(1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as [page687] the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

Money withheld

(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employer from the employee.

Accrued contributions

(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

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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

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pension benefit; [page688]

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

. . . . .

Liability of employer on wind up

75(1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39(3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated

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as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

Payment

(2) The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times.

. . . . .

Pension fund continues subject to Act and regulations

76. The pension fund of a pension plan that is wound up continues to be subject to this Act and the regulations until all the assets of the pension fund have been disbursed.
[page689]

Schedule "B"

R.R.O. 1990, Reg. 909 (Pension Benefits Act), s. 31(1), (2) and (3)

31(1) The liability to be funded under section 75 of the Act shall be funded by annual special payments commencing at the effective date of the wind up and made by the employer to the pension fund.

(2) The special payments under subsection (1) for each year shall be at least equal to the greater of,

(a) the amount required in the year to fund the employer's liabilities under section 75 of the Act in equal payments, payable annually in advance, over not more than five years; and

(b) the minimum special payments required for the year in which the plan is wound up, as determined in the reports filed or submitted under sections 3, 4, 5.3, 13 and 14, multiplied by the ratio of the basic Ontario liabilities of the plan to the total of the liabilities and increased liabilities of the plan as determined under clauses 30(2)(b) and (c).

(3) The special payments referred to in subsections (1) and (2) shall continue until the liability is funded.

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Notes

Note 1: The Monitor retained the Reserve Fund as part of the undistributed proceeds. The undistributed proceeds also include amounts for the payment of cure costs, other costs associated with the completion of the SAPA transaction, legal and professional fees and amounts owing under the DIP charge.

Note 2: The appellants had raised this issue below but it had not been dealt with by the CCAA judge.

Note 3: Or, in the case of a multi-employer plan, the administrator.

Note 4: Bell ExpressVu Limited Partnership v. Rex., [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 26.

Note 5: Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services), [2004] 3 S.C.R. 152, [2004] S.C.J. No. 51, at para. 13, relying on Gencorp Canada Inc. v. Ontario (Superintendent of Pensions) (1998), 39 O.R. (3d) 38, [1998] O.J. No. 961, 158 D.L.R. (4th) 497 (C.A.), at p. 503 D.L.R.

Note 6: Ibid.

Note 7: Bourdon v. Stelco Inc., [2005] 3 S.C.R. 279, [2005] S.C.J. No. 35, at para. 24.

Note 8: At para. 26.

Note 9: At para. 11.

Note 10: Burke v. Hudson's Bay Co., [2010] 2 S.C.R. 273, [2010] S.C.J. No. 34, at paras. 39-41.

Note 11: Hodgkinson v. Simms, [1994] 3 S.C.R. 377, [1994] S.C.J. No. 84, at para. 32.

Note 12: Ibid., at para. 30; Lac Minerals Ltd. v.

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International Corona Resources Ltd., [1989] 2 S.C.R. 574, [1989] S.C.J. No. 83, at p. 646 S.C.R.

Note 13: In contrast, Quebec legislation requires that plan administration be entrusted to a pension committee of at least three persons, including a representative of each of the active and inactive members of the plan and an independent member. See Supplemental Pension Plans Act, R.S.Q., c. R-15.1, s. 147.

Note 14: On advice of counsel, Mr. Cooper refused to answer questions about what, if any, steps were taken to have the purchaser take over the Plans.

Note 15: To the extent that the U.S. Trustee suggests that the Former Executives raised the deemed trust issue at the motion heard on June 12, 2010, I reject this submission. As explained in the background portion of these reasons, the Former Executives' reservation of rights on June 12, 2010 was to obtain time to confirm that the motion related solely to an increase in the DIP loan amount.

Note 16: See, for example, InterTAN Canada Ltd. (Re), [2009] O.J. No 293, 49 C.B.R. (5th) 232 (S.C.J.). And, the granting of super-priority charges is referred to with approval in Century Services, at para. 62.

Note 17: See para. 178 of these reasons.

Note 18: See, for example, para. 23.

Note 19: At para. 13, for example.

Note 20: See, for example, para. 14.

Note 21: Century Services, at para. 60.

Note 22: At para. 78.

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CITATION: Re Indalex 2010 ONSC 1114
Court File No. CV-09-8122-00CL
Date: 20100218

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 INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and NOVAR INC. (the "Applicants")

Katherine McEachern, Linc Rogers, J.A. Prestage for the Applicants

Ashley Taylor, Lesley Mercer for the Monitor, FTI Consulting

Andrew Hatnay, Demetrios Yiokaris for various employees

Darrell Brown for the United Steelworkers

Mark Bailey for the Superintendent of Financial Services

Fred Myers, Brian Empey for Sun Indalex Finance, LLC

Heard: July 20 and August 28, 2009

C. CAMPBELL J.:

REASONS FOR DECISION

[1] On July 20, 2009, this Court heard a motion for approval of a sale and for a Vesting Order in a joint cross-border hearing with Justice Walsh of the United States Bankruptcy Court for the District of Delaware.

Background

[2] On March 20, 2009, Indalex US commenced reorganization proceedings under Chapter 11 of Title 11 of the United States Bankruptcy Code before the U.S. Court.

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[3] On April 3, 2009, the Applicants commenced parallel proceedings and filed for and obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended (the "*CCAA*") pursuant to an order of Morawetz J. (the "Initial Order") Pursuant to the Initial Order, FTI Consulting Canada ULC was appointed as Monitor of the Applicants.

[4] On April 8, 2009, the Initial Order was amended and restated to, *inter alia*, authorize the Applicants to exercise certain restructuring powers and authorize Indalex Limited to borrow funds (the "DIP Borrowings") pursuant to a debtor-in-possession credit agreement among Indalex US, the Applicants and a syndicate of lenders (the "DIP Lenders") for which JPMorgan Chase Bank, N.A. is administrative agent (the "DIP Agent.")

[5] The Applicants' obligation to repay the DIP Borrowings was guaranteed by Indalex US. The guarantee by Indalex US was a condition to the extension of credit by the DIP Lenders to the Applicants.

[6] On April 22, 2009, this Court granted an Order which, inter alia, extended the stay of proceedings to June 26, 2009, and approved a marketing process.

[7] By Order dated July 20, 2009 (the "Approval and Vesting Order"), this Court approved the sale of the Applicants' assets as a going concern to SAPA Holding AB (including any assignees, "SAPA"), and ordered that upon closing of the SAPA transaction, the proceeds of sale (the "Canadian Sale Proceeds") were to be paid to the Monitor.

[8] Pursuant to the Approval and Vesting Order, the Monitor was ordered and directed to make a distribution to the DIP Lenders, from the Canadian Sale Proceeds, in satisfaction of the Applicants' obligations to the DIP Lenders, subject to a reserve that the Monitor considered to be appropriate in the circumstances (the "Undistributed Proceeds.")

[9] At the sale approval hearing, both the Former Executives and the United Steel Workers (USW) asserted deemed trust claims over the Canadian Sale Proceeds in respect of underfunded pension liabilities in connection with certain pension plans administered by Indalex Limited, and requested that an amount representing their estimate of the under-funded deficiencies be included in the amount retained by the Monitor as Undistributed Proceeds, pending further order of the Court.

[10] As a result of the Former Executives and USW's reservation of rights, the Monitor has retained the amount of $6.75 million as Undistributed Proceeds, in addition to other amounts reserved by the Monitor.

[11] On July 31, 2009, the sale of Indalex's assets to SAPA closed. A total payment of US$17,041,391.80 was made from the Canadian Sale Proceeds by the Monitor, on behalf of the Applicants, to the DIP Agent. As this resulted in a deficiency of US$10,751,247.22 in respect of the DIP Borrowings, the DIP Agent called on the guarantee granted to the DIP Lenders by Indalex US for the amount of the deficiency (the "Guarantee Payment") and Indalex US has satisfied the obligation of the Applicants.

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[12] The approval motion was either supported or unopposed by all parties except for an issue raised on behalf of certain retirees under pension plans of the Company. Pursuant to paragraph 14 of the Approval and Vesting Order, Indalex US is fully subrogated to the rights of the DIP Lenders under the DIP Lenders' Charge for the amount of the Guarantee Payment.

[13] Counsel for the retirees objected to the sale on the basis that the liquidation values set forth in the 7th Monitor's Report would, it was suggested, provide greater return for unsecured creditors than would the proposed sale. That objection was dismissed 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 of the Applicants' plant employees in Canada.[1]

[14] The second objection by certain retirees and employees involves a claim based on a statutory deemed trust said to be in respect of certain funds held by the Monitor proposed to be reserved from the funds for distribution on closing to the DIP Lenders.

[15] At the July 20, 2009 hearing, the Court expressed concern that the position of the retirees and employees, which was brought only at the time of the approval motion, if it were to be dealt with at all, without an adjournment of the approval hearing, should be dealt with promptly as part of the overall approval process.

[16] Following the submissions of counsel, it was agreed that an expedited hearing process on the retirees' and employees' positions would be undertaken promptly, and that the funds on hand with the Monitor would be sufficient if required to satisfy retirees' alleged trust claims.

[17] The motion in respect of the deemed trust came on for hearing on August 28, 2009. The position of the retirees was opposed by the Applicants and the purchaser. Submissions were also made by counsel for the Superintendent under the Ontario *Pension Benefits Act*, R.S.O. 1990 c. P-8 ("*PBA*.") This decision was then reserved pending the November 26, 2009 ruling of the Court of Appeal rendered in *Sproule v. Nortel Networks Corporation*, reported, 2009 ONCA 833.

[18] There are two groups of retired employees at issue in this matter. Those represented by Mr. Hatnay and his colleagues seek a declaration that the amount of $3.2 million, which represents the wind up liability said to be owing by the Applicants to the Retirement Plan for Executive Employees of Indalex Canada and Associated Companies (the “Executive Plan”) and which is currently held in reserve by the Monitor, is subject to the deemed trust for the benefit of the beneficiaries of the Executive Plan under section 57(4) of the *PBA*. The Pensioners further seek an order that such amounts are not distributable to other creditors of the Applicants and are to be paid into the fund of the Executive Plan and that such orders and declarations survive any subsequent bankruptcy of the Applicants.

[19] There were, as of January 1, 2008, eighteen members of the Executive Plan, none of whom are active employees.

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1 Monitor's 7th Report, July 15, 2009, p. 13, paragraphs 34(c)(d)

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[20] The second group of pension claimants are members of the United Steel Workers, who seek recovery from the sale proceeds based on deemed trust of a pension plan in wind-up of an amount equal to the deficiency in the Retirement Plan for Salaried Employees of Indalex and Associated Companies ("Salaried Plan.") The deficiency in the Salaried Plan is said to be $1,795,600 as of December 31, 2008.

The Issues

1. Do the deemed trust provisions of s. 57 and s. 75 of the *PBA* apply to the funds currently held in reserve by the Monitor in respect of:

    a. The Executive Plan;

    b. The Salaried Plan?

2. Should the stay currently in place under the *CCAA* be lifted to permit the Applicants to file for bankruptcy under the *BIA*?

[21] There are several differences between the Executive Plan and the Salaried Plan. The Salaried Plan contains both a defined benefit and defined contribution component. Indalex and members of the Salaried Plan were required to make joint contributions to the Salaried Plan.

[22] The Salaried Plan is in the process of being fully wound up with an effective wind-up date of December 31, 2006. No pensions have accrued since that date. The wind-up deficiency in the Salaried Plan at December 31, 2008 was $1,795,600, has been subject to special payments to deal with that deficiency, of $709,013 in 2007, $875,313 in 2008 and $601,000 in 2009, all of which have been made. The last special payment was scheduled to be made on December 31, 2009.

The Executive Plan

[23] The Executive Plan has not been wound up. The material filed with the Court exhibits an intention on the part of the Applicants to wind up that Plan. The uncontested evidence of Bob Kavanagh on behalf of the Applicants in his affidavit sworn August 12, 2009 is to the following effect:

> 16. Indalex has made all required contributions to the Executive Plan to date and no amounts are currently due or owing to the Executive Plan, including special payments.
> 17. As at January 1, 2008, the Executive Plan had an estimated deficiency of $2,996,400 determined on a wind-up basis. In 2008, Indalex made total special payments of $897,000 to the Executive Plan. No further special payments are due to be made to the Executive Plan until 2011.
> 18. If the Executive Plan were to be fully wound up, the funded status of the plan as of the wind-up date could only be determined by an actuarial valuation of the plan performed after the wind-up date once the plan's assets and liabilities have been determined. No actuarial valuation of the Executive Plan has been prepared since the valuation performed with an effective date of January 1, 2008.
> 19. Sixteen individuals with benefit entitlements under the Executive Plan were last employed by Indalex in Ontario and two individuals with benefit entitlements under the Executive Plan were last employed by Indalex in Alberta.

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20. There is currently one member of the Executive Plan who is on long term disability and continues to accrue benefits under the plan.
21. Currently, approximately 80% of the assets of the Executive Plan are invested in fixed income securities and approximately 20% of the assets of the Executive Plan are invested in equities.
22. The market value of the assets of the Executive Plan as at June 30, 2009 was $5,022,940. Attached hereto as Exhibit "C" is a copy of the Statement of Net Assets Available for Benefits as of June 30, 2009.

[24] The affidavit of Keith Carruthers exhibits a letter of July 13, 2009 on behalf of the Monitor confirming the intention of the Applicants to wind up the Executive Plan in accordance with the provisions of the *PBA*. There are no deficiencies in payments under the Executive Plan as of July 20, 2009. The Executive Plan is not wound up. Given the analysis that follows in respect of the Salaried Plan, I see no basis for a deemed trust of any amount at this time in respect of the Executive Plan.

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The Salaried Plan

[25] This motion essentially involves one aspect of the Salaried Plan of Indalex, namely the windup deficiency of the said plan. It is the position of the *CCAA* Applicants that prior to the sale of assets approved on July 20, 2009, all pension payments required under obligation to Indalex employees, both statutory and contractual, were met.

[26] What is at issue here is the requirement for an annual deficiency payment that was established to be made when the Salaried Plan was wound up as at December 31, 2006.

[27] The term "wind up" can be a misnomer unless understood in context. When a pension plan is "wound up," at the effective date it means that no new entrants are permitted. An actuarial calculation is then made of the assets to determine whether, based on certain actuarial assumptions, there will be sufficient monies available at the times required to pay the pension entitlement of employees who have and will retire.

[28] If the assets as of the wind-up date are found to be insufficient, that deficiency will be required to be made up under the *PBA*. As in this case, the Plan may be permitted to have the deficiency rectified in a period of up to five years by annual instalments.

[29] The issue for this Court is whether or not under the *PBA* there is a requirement that the deficiency commencing at the wind up date be paid as at the date of closing of the sale and transfer of assets, namely July 20, 2009.

[30] The issue is to be determined by analysis and application of the provisions of the *PBA*. The sections involved are the following:

57.

(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.

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(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. R.S.O. 1990, c. P.8, s. 75 (1); 1997, c. 28, s. 200.

(2) The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times. R.S.O. 1990, c. P.8, s. 75 (2).

[31] Section 75 of the *PBA* is amplified by sections of the regulations under the statute * * (see R.R.O. 1990 Regulation 909.) Section 28 and the following 144 pages of the Regulation deal with wind-up notices. Section 31(1) and (2) are as follows:

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. O. Reg. 712/92, s. 19.

(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). O. Reg. 712/92, s. 19.

[32] The most pertinent of all of these sections are 57(4) and 75(2), as they apply to this windup situation. The submission on behalf of the Superintendent distinguished between the words "due" and "accruing due." The assertion is that the word "accrue" must be given meaning. The meaning suggested is that by virtue of the inclusion of the word "accrue," the remaining deficiency payments become payable since they fall within the deemed trust provisions.

[33] The distinction to be made between amounts that are accruing and amounts that are due is that, in the case of an amount accruing, it is not yet payable, while generally an amount that is due is payable.

[34] The deemed trust provision of s. 57(4) requires the employer to accrue "to the date of the windup but not yet due." The windup in this case is December 31, 2006. In my view the section contemplates the calculation to be made as of the date of wind-up of the amounts required to make up the deficiency. If, as here, the regulator permits that deficiency to be made up over a

period of years, the amount of the yearly payments does not become due until it is required to be paid. It is "payable annually in advance."

[35] In *Re Ganong Estate; Ganong v Belyea*, [1941] S.C.R. 125, it was held:

> …the words 'all dividends accrued due' can surely only mean dividends which have become payable by the corporation to the shareholder, as the words "dividends accruing due" during any stated period can only mean dividends as they become payable by the corporation to the shareholder.

The court went on to say:

> How can these dividends possibly be said to have 'accrued due' or to be 'accruing due' when no profits have been earned to provide for their payment and no declaration has been made by the directors fixing any date therefor? The shareholders acquire no right to payment of any dividends until there are net profits, out of which alone they can be paid and until such time as the directors determine they shall be paid.

[36] The use of the word "accrue" connotes the ability to calculate a precise amount of money. The word "due" connotes that it is payable whether or not the time for payment has arrived. See *Black's Law Dictionary*, 6th ed., The West Group at p. 499, where it is noted that with respect to the word "due," "it imports a fixed and settled obligation or liability but with reference to the time for its payment, there is considerable ambiguity in the use of the term."

[37] In *Toronto Dominion Bank v. Usarco Ltd.*, [1991] 42. E.T.R. 235, Ont. C.J. (Gen. Div.), Farley J. dealt with the deemed trust provisions under what is now section 57(4) of the *PBA* in a context in which a declaration was sought prior to a bankruptcy petition. He said at paragraph 26:

> It therefore appears to me that the deemed trust provisions of subs. 58(3) and (4) only refer to the regular contributions together with those special contributions which were to have been made but were not. In this situation, that would be the regular and special payments that should have been made but were not (as reflected in the report of December 31, 1988), together with any regular or special payments that were scheduled to have been made by the wind-up date, July 13, 1990, but were not made. This is contrasted with the obligation of Usarco to fully fund its pension obligations as of the wind-up date pursuant to s. 76(1). It is recognized in these circumstances, however, that the bank will have a secured position which will prevail against these additional obligations as to the special payments, which have not yet been required to be paid into the fund. Sadly, it is extremely unlikely there will be a surplus after taking care of the bank to allow the pension fund to be fully funded for this (the likelihood being that the wind-up valuation of assets and liabilities of the pension fund will show a deficiency.)

[38] The issue was dealt with again in *Ivaco Inc. Re*. [2006] 25 C.B.R. [5th] 176. (Ont. C.A.), J. Laskin J.A. speaking for the Court of Appeal noted at paragraph 38 that "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 federal statute."

[39] Paragraph 44 of that decision states:

> At para. 11 of his decision, the motions judge said that both unpaid contributions and wind-up liabilities are deemed to be held in trust under s. 57(3). In his earlier decision in *Toronto-Dominion Bank v. Usarco* (1991), 42 E.T.R 235, Farley J. said, at para. 25, that the equivalent legislation then in force under the *Pension Benefits Act*, *1987*, S.O. 1987, c.35 referred only to unpaid contributions, not to wind-up liabilities. I think that the statement in *Usarco* is correct, but I do not need to resolve the issue on this appeal.

[40] In the text "Essentials of Canadian Law-Pension Law" (Toronto: IrwinLaw, 2006) author Ari N. Kaplan at page 396 states:

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> The *PBA* does not expressly state whether a funding deficiency on the wind up of a pension plan is secured by the deemed trust, but it appears that the deemed trust is intended to apply to the deficiency to the extent it relates to employer contributions and remittances due and owing to the pension fund on wind up, but which have not been paid."

[41] The author goes on in the next paragraph:

> The deemed trust does not extend to the obligation of an employer to fund pension obligations that have not yet become due or which "crystallize" only upon the windup of the pension plan.

The *Usarco* decision referred to above is the foundation for that statement.

[42] In his paper given at an Insight Conference, "Pension Management in Insolvency and Restructuring: What Is At Stake?" September 20, 2005, Gregory J. Winfield at page 29 states:

> Of particular note to secured creditors will be the fact that the courts have determined that the deemed trust created under that O*PBA* does not extend to the unfunded pension liability upon the windup of the plan, but is limited to the outstanding unremitted contributions that are past due plus those arising in respect of the stub period. Accordingly while the entirety of the pension fund shortfall remains an obligation of the employer, and an obligation exists under the O*PBA* to fund this deficiency over a period not exceeding five years from the date of wind up, at present this is an unsecured claim on the assets of the debtor." [Reference omitted]

[43] The difficulty in reconciling the requirements of the pension statute with the regime of the *CCAA* is that a company such as Indalex is entitled to carry on business and to make payments in the ordinary course of such business including those that may be required under the initial order which may well, as here, include certain ongoing pension obligations while in *CCAA*.

[44] Were it not for the provisions in s. 31 of the Regulations, Indalex would have had under s. 75 of the *PBA* to pay in as of the date of wind-up any Plan deficiency. Section 31 of the Regulation as anticipated in s. 75 of the Act spreads that into five equal annual instalments.

[45] One obvious purpose behind the provision in s. 31 of the Regulation is to ease the burden on the Company to enable it to have the funds to operate its normal business operations while it earns the revenue to make up the deficiency.

[46] The pension issues that have arisen given the nature of the recent recession, as here, are often complex and pit as adversaries creditors of a corporation who most often having advanced funds under security which creditors assert give them priority as to the repayment, as against employees many of whom are long-term or even retired who have seen the assets supporting their pensions decrease in value, risking the payments to which the employees are otherwise entitled by the terms of the plan of which they are members.

[47] In circumstances such as this, the Court does not have the mandate to exercise the discretion to do what it or any group might consider fair and equitable. The federal insolvency legislation in force (the *CCAA* and *BIA*) provide schemes of priority among creditors commencing with those who have security over the assets of the company. Pitted against those with security are those unsecured creditors who must share in whatever is left over after the secured creditors are paid.

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[48] Employees or retired employees are entitled to pensions in accordance with the contractual terms of their pension plan. In certain circumstances those contractual terms will be augmented by the provisions of the *PBA* to the extent that they do not conflict with federal insolvency legislation. In some of these circumstances, a "deemed trust" will arise.

[49] In this case I have concluded there is no conflict between the federal and provincial legislation. 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 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.

Motion To Lift Stay

[52] The Applicants and Indalex US, in addition to disputing the validity of the deemed trust claim, sought to file a voluntary assignment in bankruptcy to ensure the priority regime they urged as the basis for resisting the deemed trust.

[53] In support of that position, it was urged that since the Applicants no longer carried on business, have no active employees and no tangible assets apart from tax refunds (other than the cash sale proceeds associated with the above motion), and no directors (they having resigned), an assignment in bankruptcy is appropriate. The stay granted under the Initial Order, it is urged, should be lifted for that purpose.

[54] The decision on the voluntary assignment was reserved pending a decision in the main motion above, since to allow the bankruptcy to proceed might have deprived employees of an argument under the *CCAA*.

[55] Given that disposition, the question of bankruptcy assignment might well be moot. 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.

[56] I conclude that it is not necessary to deal with the issue of the voluntary assignment, at least on the basis sought by the Applicants at this time. I did not find conflict between the federal and provincial regimes.

[57] Should the Applicants wish to renew the request for bankruptcy relief, the motion can be scheduled through the Commercial List.

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C. CAMPBELL J.

Released:

2010 ONSC 1114 (CanLII)

CITATION: Re Indalex 2010 ONSC 1114
Court File No. CV-09-8122-00CL
Date: 20100218

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

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. (the "Applicants")

REASONS FOR DECISION

C. CAMPBELL J.

RELEASED: February 18, 2010

2010 ONSC 1114 (CanLII)

Monsanto Canada Inc. *Appellant*

v.

Superintendent of Financial Services *Respondent*

and between

Association of Canadian Pension Management *Appellant*

v.

Superintendent of Financial Services *Respondent*

and

Attorney General of Canada, National Trust Company, Nicole Lacroix, R. M. Smallhorn, D. G. Halsall, S. J. Galbraith, S. W. (Bud) Wesley, Canadian Labour Congress and Ontario Federation of Labour *Interveners*

Indexed as: Monsanto Canada Inc. *v.* Ontario (Superintendent of Financial Services)

Neutral citation: 2004 SCC 54.

File No.: 29586.

2004: February 16; 2004: July 29.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Deschamps and Fish JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Pensions — Pension plans — Partial wind-up — Rights and benefits on partial wind-up — Surplus — Whether pension benefits legislation requiring distribution of proportional share of actuarial surplus when defined benefit pension plan partially wound up — Pension Benefits Act, R.S.O. 1990, c. P.8, s. 70(6).

Monsanto Canada Inc. *Appelante*

c.

Surintendant des services financiers *Intimé*

et entre

Association canadienne des administrateurs de régimes de retraite *Appelante*

c.

Surintendant des services financiers *Intimé*

et

Procureur général du Canada, Compagnie Trust National, Nicole Lacroix, R. M. Smallhorn, D. G. Halsall, S. J. Galbraith, S. W. (Bud) Wesley, Congrès du travail du Canada et Fédération du travail de l'Ontario *Intervenants*

Répertorié : Monsanto Canada Inc. *c.* Ontario (Surintendant des services financiers)

Référence neutre : 2004 CSC 54.

N° du greffe : 29586.

2004 : 16 février; 2004 : 29 juillet.

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

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Pensions — Régimes de retraite — Liquidation partielle — Droits et prestations à la liquidation partielle — Excédent — La législation sur les régimes de retraite exige-t-elle que l'excédent actuariel d'un régime de retraite à prestations déterminées soit réparti au moment de sa liquidation partielle en proportion de la partie liquidée du régime? — Loi sur les régimes de retraite, L.R.O. 1990, ch. P.8, art. 70(6).

2004 SCC 54 (CanLII)

Administrative law — Judicial review — Standard of review — Financial Services Tribunal — Standard of review applicable to Tribunal's interpretation of s. 70(6) of Pension Benefits Act, R.S.O. 1990, c. P.8.

As a result of a reorganization of Monsanto Canada Inc. ("Monsanto"), 146 active members of the pension plan ("Affected Members") received notice that their employment with Monsanto would terminate. The Superintendent of Financial Services refused to approve Monsanto's partial wind-up report, for failing to provide for the distribution of surplus assets related to the part of the pension plan being wound up. A majority of the Financial Services Tribunal disagreed with the Superintendent and ordered her to approve the report, holding that s. 70(6) of the Ontario *Pension Benefits Act* provides no more than a right to participate in surplus distribution when, if ever, the plan fully winds up. The Divisional Court set aside the Tribunal's order and upheld the Superintendent's decision. The Court of Appeal dismissed the appeal.

Held: The appeal should be dismissed.

When the relevant factors of the pragmatic and functional approach are properly considered, the appropriate standard of review applicable to the Financial Services Tribunal's interpretation of s. 70(6) of the *Pension Benefits Act* is that of correctness.

Section 70(6) requires the distribution of a proportional share of actuarial surplus when a defined benefit pension plan is partially wound up. The ordinary and grammatical meaning of s. 70(6) indicates that the assessment of rights and benefits is to be conducted as if the pension plan was winding up in full on the effective date of partial wind-up. The realization of rights and benefits, including the distribution of surplus assets, then occurs for the part of the plan actually being wound up. Therefore, the Affected Members, if entitled, may receive their pro rata share of the surplus existing in the fund on a partial wind-up, as if the plan was being fully wound up on that day. The members affected by a partial wind-up are thus accorded the rights and benefits that are not less than the group would have if there were a full wind-up on the date of partial wind-up.

The scheme of the *Pension Benefits Act* and of the regulations also supports the ordinary and grammatical meaning of s. 70(6). Delaying the distribution would not be consonant with the provisions that make distribution

Droit administratif — Contrôle judiciaire — Norme de contrôle — Tribunal des services financiers — Norme de contrôle applicable à l'interprétation que le Tribunal a donnée de l'art. 70(6) de la Loi sur les régimes de retraite, L.R.O. 1990, ch. P.8.

Par suite d'une restructuration de Monsanto Canada Inc. (« Monsanto »), 146 participants actifs au régime de retraite (les « participants touchés ») ont été avisés que leur emploi chez Monsanto prendrait fin. La surintendante des services financiers a refusé d'approuver le rapport de liquidation partielle établi par Monsanto parce qu'il ne prévoyait pas la répartition de l'excédent d'actif correspondant à la partie du régime de retraite en voie de liquidation. Le Tribunal des services financiers, à la majorité, a rejeté l'avis de la surintendante et a ordonné qu'elle approuve le rapport, déclarant que le par. 70(6) de la *Loi sur les régimes de retraite* de l'Ontario prévoit tout au plus un droit à une part de l'excédent au moment de la liquidation totale du régime, le cas échéant. La Cour divisionnaire a annulé l'ordonnance du Tribunal et confirmé la décision de la surintendante. La Cour d'appel a rejeté l'appel.

Arrêt : Le pourvoi est rejeté.

Si l'on évalue correctement les facteurs pertinents de la méthode pragmatique et fonctionnelle, la norme de contrôle applicable à l'interprétation que le Tribunal des services financiers a donnée du par. 70(6) de la *Loi sur les régimes de retraite* est celle de la décision correcte.

Le paragraphe 70(6) exige que l'excédent actuariel d'un régime de retraite à prestations déterminées soit réparti au moment de sa liquidation partielle en proportion de la partie liquidée du régime. Le sens ordinaire et grammatical du par. 70(6) indique que la détermination des droits et prestations doit être effectuée comme si le régime de retraite était liquidé totalement à la date de prise d'effet de la liquidation partielle. La réalisation des droits et prestations, y compris la distribution de l'excédent d'actif, se produit alors pour la partie du régime effectivement en voie de liquidation. En conséquence, les participants touchés peuvent recevoir, s'ils y ont droit, leur quote-part de l'excédent de la caisse au moment de la liquidation partielle, comme si le régime était liquidé totalement ce jour-là. Les droits et prestations accordés aux participants touchés par la liquidation partielle ne sont pas inférieurs à ceux que le groupe aurait s'il y avait liquidation totale du régime de retraite à la date de la liquidation partielle.

L'économie de la *Loi sur les régimes de retraite* et de ses règlements confirme également le sens ordinaire et grammatical du par. 70(6). Retarder la répartition irait à l'encontre des dispositions qui intègrent la distribution de

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of surplus assets an intended part of the wind-up process, whether the wind-up is in whole or in part. In addition, the statutory scheme makes an important distinction between continuing plans and winding-up plans. The interpretation of s. 70(6) herein proposed is consistent with the logic of this aspect of the statutory scheme and the legislature's choice to treat partial wind-ups in the same manner as full wind-ups.

A purposive interpretation of s. 70(6) should be mindful of the legislative objective in the context of the statutory scheme surrounding surplus and partial wind-up. The *Pension Benefits Act* is public policy legislation that recognizes the vital importance of long-term income security. Its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans. The Act seeks, in some measure, to ensure a balance between employee and employer interests that will be beneficial for both groups. Distribution of surplus on partial wind-up is unlikely to disrupt that balance or to compromise the continuing integrity of the pension fund. Policy and practical reasons also favour an interpretation requiring distribution upon partial wind-up. Since pension plans are theoretically intended to be indeterminate in nature, it is reasonable for Affected Members to be subject to the risks of the plan while they are a part of it, but not after they have been terminated from it. The most equitable solution is thus to distribute the fortunes of favourable markets at the time Affected Members are terminated. In this way, the windfall is related to their actual time and participation in the plan. Moreover, the increasingly mobile nature of labour should be recognized. The Affected Members should be able to know their status at the time of their termination so as to arrange their affairs accordingly and not be indefinitely tied to an employer that laid them off.

Cases Cited

Discussed: *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611; **referred to:** *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, 2001 SCC 36; *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23; *Pushpanathan v. Canada (Minister of*

l'excédent d'actif dans le processus de liquidation, que la liquidation soit totale ou partielle. De plus, le régime législatif établit une distinction importante entre les régimes de retraite qui continuent d'exister et ceux qui sont en cours de liquidation. L'interprétation proposée du par. 70(6) est conforme à la logique de cet aspect du régime législatif et au choix du législateur de traiter les liquidations partielles et les liquidations totales de la même manière.

En donnant une interprétation téléologique du par. 70(6), il ne faut pas perdre de vue l'objectif de la Loi dans le contexte du régime législatif établi à l'égard de l'excédent et de la liquidation partielle. La *Loi sur les régimes de retraite* est une loi d'intérêt public qui reconnaît l'importance cruciale de la sécurité du revenu à long terme. Elle vise à établir des normes minimales et une supervision réglementaire destinées à protéger et à garantir les prestations et les droits des participants, des anciens participants et des autres personnes qui ont droit à des prestations en vertu de régimes de retraite complémentaires. La Loi tend, dans une certaine mesure, à assurer, entre les intérêts des employés et ceux des employeurs, un équilibre qui soit favorable aux deux groupes. La répartition de l'excédent à la liquidation partielle ne perturbera vraisemblablement pas cet équilibre et ne compromettra vraisemblablement pas l'intégrité de la caisse de retraite. Des raisons d'ordre politique et pratique justifient également une interprétation requérant la répartition lors de la liquidation partielle. Comme, en principe, les régimes de retraite sont d'une durée indéterminée, il est logique que les participants touchés soient exposés aux risques inhérents au régime tant qu'ils conservent leur emploi, mais non après l'avoir quitté. La solution la plus équitable consiste donc à distribuer le bénéfice de la conjoncture favorable au moment où les participants touchés perdent leur emploi. De cette manière, ce cadeau du ciel est relié à leur participation réelle au régime. De plus, il convient de reconnaître la mobilité croissante de la main-d'œuvre. Les participants touchés devraient pouvoir connaître leur situation au moment de la cessation de leur emploi afin de pouvoir organiser leurs affaires en conséquence. Ils ne devraient pas être liés indéfiniment à un employeur qui les a mis à pied.

Jurisprudence

Arrêt analysé : *Schmidt c. Air Products Canada Ltd.*, [1994] 2 R.C.S. 611; **arrêts mentionnés :** *Barrie Public Utilities c. Assoc. canadienne de télévision par câble*, [2003] 1 R.C.S. 476, 2003 CSC 28; *Canada (Sous-ministre du Revenu national) c. Mattel Canada Inc.*, [2001] 2 R.C.S. 100, 2001 CSC 36; *Voice Construction Ltd. c. Construction & General Workers' Union, Local 92*, [2004] 1 R.C.S. 609, 2004 CSC 23; *Pushpanathan c.*

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Citizenship and Immigration), [1998] 1 S.C.R. 982; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *GenCorp Canada Inc. v. Ontario (Superintendent, Pensions)* (1998), 158 D.L.R. (4th) 497; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42; *R. v. Campbell*, [1999] 1 S.C.R. 565; *Firestone Canada Inc. v. Ontario (Pension Commission)* (1990), 1 O.R. (3d) 122.

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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.

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.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (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), qui a confirmé une décision de la Cour supérieure de justice (Cour divisionnaire) (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), annulant l'ordonnance du Tribunal des services financiers (2000), 3 B.L.R. (3d) 99, 50 C.C.E.L. (2d) 303, 23 C.C.P.B. 148. Pourvoi rejeté.

Freya Kristjanson et *Markus Kremer*, pour l'appelante Monsanto Canada Inc.

Jeffrey W. Galway et *Randy Bauslaugh*, pour l'appelante l'Association canadienne des administrateurs de régimes de retraite.

Deborah McPhail et *Leslie McIntosh*, pour l'intimé.

Donald J. Rennie and *Kirk Lambrecht*, *Q.C.*, for the intervener the Attorney General of Canada.

J. Brett Ledger and *Lindsay P. Hill*, for the intervener the National Trust Company.

William J. Sammon, for the intervener Nicole Lacroix.

Howard Goldblatt, *Dona Campbell* and *Ethan Poskanzer*, for the interveners the Canadian Labour Congress and the Ontario Federation of Labour.

Mark Zigler and *Ari N. Kaplan*, for the interveners R. M. Smallhorn, D. G. Halsall, S. J. Galbraith and S. W. (Bud) Wesley.

The judgment of the Court was delivered by

DESCHAMPS J. — Pension law is a field which is gaining in importance as more and more people retire and look to their pensions to sustain them during their "golden years". The complex exercise of actuarial accounting that determines how pensions should be funded is rivalled only by the complexity of the law determining the pension rights and obligations of employees and employers, which lies at the intersection of contracts, trust law, and statute law. This appeal is an attempt to bring some clarity to a relatively confined area of pension law, which has been the subject of much debate: when there is a partial wind-up of an Ontario-defined benefit pension plan, must the actuarial surplus be distributed at that time?

In particular, does s. 70(6) of the Ontario *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("Act"), require the distribution of a proportional share of actuarial surplus when a defined benefit pension plan is partially wound up? The Superintendent of Financial Services answered this question in the affirmative. She refused to approve the partial wind-up report of the appellant, Monsanto Canada Inc. ("Monsanto"), for failing to provide for the distribution of surplus assets related to the part of the Pension Plan

Donald J. Rennie et *Kirk Lambrecht*, *c.r.*, pour l'intervenant le procureur général du Canada.

J. Brett Ledger et *Lindsay P. Hill*, pour l'intervenante la Compagnie Trust National.

William J. Sammon, pour l'intervenante Nicole Lacroix.

Howard Goldblatt, *Dona Campbell* et *Ethan Poskanzer*, pour les intervenants le Congrès du travail du Canada et la Fédération du travail de l'Ontario.

Mark Zigler et *Ari N. Kaplan*, pour les intervenants R. M. Smallhorn, D. G. Halsall, S. J. Galbraith et S. W. (Bud) Wesley.

Version française du jugement de la Cour rendu par

1

LA JUGE DESCHAMPS — Le droit des pensions de retraite est un domaine qui a pris de l'importance avec l'augmentation du nombre de retraités qui comptent sur leur pension pour profiter de l'âge d'or. La complexité des calculs actuariels qui permettent de déterminer le financement des prestations de retraite n'a d'égal que celle des règles juridiques régissant les droits à pension ainsi que les obligations des employés et des employeurs à l'égard des régimes de retraite. Ces règles relèvent à la fois du droit des contrats, du droit des fiducies et de lois particulières. Le présent pourvoi est l'occasion de clarifier un aspect relativement restreint du droit des pensions de retraite qui a fait l'objet de nombreux débats : la liquidation partielle d'un régime de retraite à prestations déterminées en Ontario emporte-t-elle obligation de répartir l'excédent actuariel à la date de cette liquidation?

2

Plus particulièrement, en application du par. 70(6) de la *Loi sur les régimes de retraite* de l'Ontario, L.R.O. 1990, ch. P.8 (« Loi »), l'excédent actuariel d'un régime de retraite à prestations déterminées doit-il être réparti au moment de la liquidation partielle en proportion de la partie liquidée du régime? La surintendante des services financiers a répondu affirmativement à cette question. Elle a refusé d'approuver le rapport de liquidation partielle de l'appelante, Monsanto Canada Inc. (« Monsanto »),

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being wound up. A majority of the Financial Services Tribunal ("Tribunal") disagreed with the Superintendent and ordered her to approve the report: (2000), 3 B.L.R (3d) 99. The majority held that s. 70(6) provides no more than a right to participate in surplus distribution when, if ever, the Plan fully winds up. The Ontario Divisional Court overturned the Tribunal on appeal ((2001), 198 D.L.R. (4th) 109) and the Court of Appeal agreed ((2002), 62 O.R. (3d) 305). Monsanto and the Association of Canadian Pension Management now appeal to this Court. The appeal, for the reasons that follow, should be dismissed.

parce que celle-ci n'y avait pas prévu la répartition de l'excédent correspondant à la partie du régime de retraite visée par la liquidation. Le Tribunal des services financiers (« Tribunal »), à la majorité, a rejeté l'avis de la surintendante et a ordonné qu'elle approuve le rapport : (2000), 3 B.L.R. (3d) 99. La majorité a jugé que le par. 70(6) prévoit tout au plus un droit à une part de l'excédent au moment de la liquidation totale du régime, le cas échéant. En appel, la Cour divisionnaire de l'Ontario a annulé la décision du Tribunal ((2001), 198 D.L.R. (4th) 109) et la Cour d'appel a souscrit à ce jugement ((2002), 62 O.R. (3d) 305). Monsanto et l'Association canadienne des administrateurs de régimes de retraite se pourvoient maintenant devant notre Cour. Je suis d'avis de rejeter le pourvoi pour les motifs exposés ci-après.

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I. Facts

3 The factual foundation of the legal question raised in the present appeal can be briefly stated. Monsanto originally maintained three separate pension plans in respect of various operations. Effective January 1, 1996, these plans were consolidated to form the Pension Plan for Employees of Monsanto Canada Inc. ("Plan"). As a result of a subsequent reorganization of Monsanto, involving a staff reduction program and a plant closure, 146 active members of the Plan ("Affected Members") received notice that their employment with Monsanto would terminate between December 31, 1996 and December 31, 1998. Monsanto's report to the Superintendent provided that the partial wind-up was to be effective May 31, 1997. As of that date, the information supplied to the regulator by the actuaries for the Plan showed that there was an actuarial surplus of some $19.1 million, representing the amount by which the estimated asset value exceeded the estimated liabilities. According to the evidence, the pro rata share of the surplus related to the part of the Plan being wound up is approximately $3.1 million.

4 One of the bases for the Superintendent's refusal to approve Monsanto's report was the failure to provide for the distribution of this surplus on partial wind-up, in accordance with s. 70(6) of the Act. This

I. Les faits

Les faits à l'origine de la question de droit soulevée en l'espèce se résument brièvement. Au départ, Monsanto maintenait trois régimes de retraite distincts relatifs à des opérations diverses. Le 1er janvier 1996, ces régimes furent fusionnés pour former le Régime de retraite des employés de Monsanto Canada Inc. (« Régime »). Par suite d'une restructuration de Monsanto, qui entraîna une réduction du personnel et la fermeture d'un établissement, 146 participants actifs au Régime (« participants touchés ») furent avisés que leur emploi chez Monsanto se terminerait entre le 31 décembre 1996 et le 31 décembre 1998. Le rapport de Monsanto à la surintendante prévoyait que la liquidation partielle prendrait effet le 31 mai 1997. Les renseignements fournis à l'autorité de réglementation par les actuaires du Régime faisaient voir, à cette date, un excédent actuariel de quelque 19,1 millions de dollars, représentant l'excédent de la valeur estimative de l'actif par rapport à la valeur estimative du passif. D'après la preuve, la part de l'excédent correspondant à la partie du Régime en voie de liquidation est d'environ 3,1 millions de dollars.

Le refus de la surintendante d'approuver le rapport de Monsanto s'appuyait notamment sur le fait qu'il contrevenait au par. 70(6) de la Loi parce qu'il ne prévoyait pas la distribution de l'excédent lors de

is the only ground still in issue before this Court as the other bases for refusal were not pursued on this appeal. Also noteworthy is the fact that this matter is preliminary to the question of surplus entitlement, which is not affected by this decision and will need to be determined at a later date.

la liquidation partielle. Seul ce motif est contesté devant notre Cour, les autres ne faisant pas l'objet du présent pourvoi. Il faut également noter que cette question doit être réglée avant celle du droit à l'excédent, laquelle n'est pas visée par la présente décision et devra être tranchée ultérieurement.

II. Issue

II. Question en litige

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.

La seule question en litige dans le présent pourvoi est de déterminer si le Tribunal a bien interprété le par. 70(6) de la Loi en concluant qu'il n'exige pas la distribution de l'excédent actuariel lors d'une liquidation partielle d'un régime. L'analyse doit se faire en deux étapes. Il faut d'abord déterminer la norme de contrôle applicable à la décision du Tribunal. Il faut ensuite évaluer l'interprétation que le Tribunal a donnée du par. 70(6) en fonction de cette norme de contrôle. Les dispositions législatives pertinentes figurent en annexe des présents motifs.

III. Standard of Review

III. Norme de contrôle

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.

Les juridictions inférieures ont conclu que la norme de contrôle applicable à la décision du Tribunal était celle de la décision raisonnable. Les appelantes et l'intimé souscrivent à cette décision. La norme de contrôle est toutefois une question de droit et l'accord des parties ne peut être concluant sur ce point. Afin de déterminer le degré de retenue dont la Cour doit faire preuve à l'égard de la décision, il faut évaluer les facteurs de la méthode pragmatique et fonctionnelle.

A. *Privative Clause*

A. *Clause privative*

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).

Le législateur n'a pas édicté de clause privative destinée à soustraire les décisions du Tribunal à l'examen en appel. Au contraire, un droit d'appel devant la Cour divisionnaire est prévu au par. 91(1) de la Loi. Bien que ce facteur ne soit pas déterminant, il met en évidence l'intention du législateur d'imposer une moins grande retenue à l'égard des décisions du Tribunal lors d'un contrôle judiciaire (*Barrie Public Utilities c. Assoc. canadienne de télévision par câble*, [2003] 1 R.C.S. 476, 2003 CSC 28, par. 11; *Canada (Sous-ministre du Revenu national) c. Mattel Canada Inc.*, [2001] 2 R.C.S. 100, 2001 CSC 36, par. 27).

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B. *Nature of the Problem*

8 The issue on appeal is a pure question of law, related to the interpretation of a section that has no specialized technical meaning. Statutory interpretation is an exercise in which the courts are well equipped to engage. The question here concerns the establishment of statutory rights by construing the legislature's intention from the text of s. 70(6), the legislative purpose, and the statutory context in which it is situated. Generally speaking, such legal questions will attract a more searching standard of review as being clearly within the expertise of the judiciary, unless the legal question is "at the core" of the Tribunal's expertise (*Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23, at para. 29; see also *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 34).

C. *Relative Expertise*

9 The expertise of the Tribunal relative to that of the courts must be evaluated in reference to the particular provision being invoked and interpreted and the nature of the Tribunal's expertise (*Barrie*, *supra*, at paras. 12-13; *Pushpanathan*, *supra*, at para. 28). In other words, relative expertise must be evaluated in context and in relation to the specific question under review (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, at para. 30).

10 On the one hand, we have to look at courts' expertise and the subject matter which is, as discussed in the previous sections, the statutory interpretation of s. 70(6). On its face, the provision sets out the rule of parity between situations of partial wind-up and full wind-up. Except perhaps in demonstrating the practical implications of proposed interpretations, the issue is neither factually laden nor highly technical. In this case, as it is generally, statutory interpretation is "a purely legal question . . . 'ultimately within the province of judiciary'" (*Barrie*, *supra*, at para. 16; see also *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 28).

B. *Nature du problème*

En l'espèce, la question en litige est une pure question de droit, liée à l'interprétation d'une disposition législative qui n'a pas de sens technique ou spécialisé. Les tribunaux judiciaires sont bien qualifiés pour procéder à l'interprétation des lois. En l'espèce, il s'agit de définir les droits conférés par la loi en déterminant l'intention du législateur d'après le libellé du par. 70(6), son objet et son contexte. En général, les questions de droit de cette nature commandent une norme de contrôle plus stricte, car elles relèvent clairement de l'expertise des tribunaux judiciaires, sauf s'il s'agit d'une question qui « constitue un aspect central » de l'expertise du Tribunal (*Voice Construction Ltd. c. Construction & General Workers' Union, Local 92*, [2004] 1 R.C.S. 609, 2004 CSC 23, par. 29; voir aussi *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982, par. 34).

C. *Expertise relative*

L'expertise du Tribunal par rapport à celle des tribunaux judiciaires doit être évaluée en fonction de la disposition particulière qui est invoquée et interprétée ainsi que de la nature de son expertise (*Barrie*, précité, par. 12-13; *Pushpanathan*, précité, par. 28). Autrement dit, l'expertise relative doit être appréciée en tenant compte du contexte et par rapport à la question précise examinée (*Barreau du Nouveau-Brunswick c. Ryan*, [2003] 1 R.C.S. 247, 2003 CSC 20, par. 30).

D'une part, il faut examiner l'expertise des tribunaux judiciaires relativement à l'objet du litige, en l'occurrence, l'interprétation du par. 70(6). Il suffit de lire cette disposition pour constater qu'elle établit la règle de la parité entre une liquidation partielle et une liquidation totale. Sauf, peut-être, pour la démonstration des conséquences pratiques des différentes interprétations proposées, l'analyse n'est ni purement factuelle ni hautement technique. En l'espèce, comme en général, l'interprétation d'une loi est « une question purement de droit, qui relève donc, [. . .] "en dernière analyse de la compétence des cours de justice" » (*Barrie*, précité, par. 16; voir aussi *Ross c. Conseil scolaire du district n°15 du Nouveau-Brunswick*, [1996] 1 R.C.S. 825, par. 28).

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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)).

D'autre part, le Tribunal ne possède aucune expertise particulière dans ce domaine. Cet organisme, qui a été créé par la *Loi de 1997 sur la Commission des services financiers de l'Ontario*, L.O. 1997, ch. 28 (« *LCSFO* »), art. 20, afin de remplacer un office spécialisé, soit la Commission des régimes de retraite, détient une compétence générale. Il est chargé de statuer sur les questions touchant divers « secteur[s] réglementé[s] » (*LCSFO*, art. 1), dont les coopératives, les caisses populaires, les assurances, les courtiers en hypothèques, les sociétés de prêt et de fiducie et les régimes de retraite (*LCSFO*, art. 1). De plus, l'expertise du Tribunal est surtout de nature juridictionnelle. Contrairement à l'ancienne Commission des régimes de retraite et à la Commission des services financiers de l'Ontario, le Tribunal n'a pas pour fonction d'élaborer des politiques en matière de régimes de retraite (voir *LCSFO*, art. 22). Comme l'ont précisé les arrêts *Mattel Canada*, précité, et *National Corn Growers Assn. c. Canada (Tribunal des importations)*, [1990] 2 R.C.S. 1324, la participation à l'élaboration de politiques est une considération importante dans l'évaluation de l'expertise du tribunal. Enfin, la loi prévoit que, pour la nomination des membres du Tribunal et pour leur affectation à une formation, il faut, dans la mesure du possible, tenir compte de l'expérience et de la compétence dans les secteurs réglementés (*LCSFO*, par. 6(4) et 7(2)). Il n'est toutefois pas requis que les membres aient une expertise particulière dans le domaine des pensions. En raison du fait que le Tribunal ne comprend que 6 à 12 membres, il est encore moins probable qu'une formation donnée possède une expertise à l'égard de la question à trancher (*LCSFO*, par. 6(3)).

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.

En somme, peu d'éléments laissent croire que le législateur avait l'intention de créer un organisme doté d'une expertise particulière relativement à l'interprétation de la Loi. Le Tribunal ne possède pas une plus grande expertise que les tribunaux judiciaires pour interpréter le par. 70(6). Ce facteur tend donc lui aussi à indiquer qu'un degré de retenue moins élevé est requis à l'égard des décisions du Tribunal portant sur l'interprétation des lois.

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D. *Purposes of the Legislation and the Provision*

13 The purpose of the Act was well stated in *GenCorp Canada Inc. v. Ontario (Superintendent, Pensions)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.), at p. 503:

> [T]he *Pension Benefits Act* is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans, and "evinces a special solicitude for employees affected by plant closures" . . . .

14 On the one hand, the protection of the rights of vulnerable groups is a central and long-standing function of the courts. The protectionist aim of the legislation is especially evident in s. 70(6), which seeks to preserve the equal treatment and benefits between situations of partial wind-up and full wind-up. On the other hand, pension standards legislation is a complex administrative scheme, which seeks to strike a delicate balance between the interests of employers and employees, while advancing the public interest in a thriving private pension system. In this task, the regulatory body usually has a certain advantage in being closer to the dispute and the industry. In part, this factor led the Ontario Court of Appeal in *GenCorp* to conclude that the decisions of the Pension Services Commission should be reviewed on a standard of reasonableness.

15 Here, however, the Tribunal assumes a different role and function in relation to the statutory purpose of the particular provision at issue. The determination of the meaning of s. 70(6) is not "polycentric" in nature. In other words, s. 70(6) does not grant the Tribunal broad discretionary powers nor a range of policy-laden remedial choices that involve the balancing of multiple sets of interests of competing constituencies (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 56; *Pushpanathan*, *supra*, at para. 36; *Dr. Q v. College of Physicians and*

D. *Objets de la Loi et de la disposition*

L'objet de la Loi fut bien énoncé dans l'arrêt *GenCorp Canada Inc. c. Ontario (Superintendent, Pensions)* (1998), 158 D.L.R. (4th) 497 (C.A. Ont.), p. 503 :

> [TRADUCTION] [L]a *Loi sur les régimes de retraite* est manifestement une loi d'intérêt général instaurant un cadre législatif et réglementaire soigneusement conçu qui prescrit des normes minimales applicables à tous les régimes de retraite en Ontario. Elle vise à favoriser et à protéger les intérêts des participants et anciens participants aux régimes de retraite et « démontre une grande sollicitude envers les employés touchés par une fermeture d'entreprise » . . .

D'une part, la protection des droits des groupes vulnérables est une fonction centrale et ancienne des tribunaux judiciaires. L'objectif de protection de la Loi est particulièrement évident au par. 70(6), qui garantit le même traitement et les mêmes bénéfices que la liquidation soit partielle ou totale. D'autre part, la législation sur les normes des régimes de retraite crée un régime administratif complexe qui vise à établir un équilibre délicat entre les intérêts des employeurs et ceux des employés, tout en servant l'intérêt du public dans l'existence d'un système de régimes de retraite complémentaires vigoureux. Étant plus près du litige et du secteur d'activités, l'organisme de réglementation jouit, dans cette tâche, d'un certain avantage. C'est en partie pour cette raison que la Cour d'appel de l'Ontario, dans l'arrêt *GenCorp*, a conclu que les décisions de la Commission des régimes de retraite devaient être révisées en fonction de la norme de la décision raisonnable.

Cependant, en l'espèce, le Tribunal remplit une fonction et un rôle différents à l'égard de l'objet de la disposition législative en cause. L'objet du par. 70(6) n'est pas de nature « polycentrique ». Autrement dit, le par. 70(6) ne confère pas au Tribunal de vastes pouvoirs discrétionnaires et il n'exige pas de ce dernier qu'il choisisse parmi diverses réparations mettant en jeu des questions de politique ou nécessitant la pondération d'intérêts multiples de groupes opposés (voir *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 56;

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Surgeons of British Columbia, [2003] 1 S.C.R. 226, 2003 SCC 19, at paras. 30-31). Moreover, the issues raised in s. 70(6) are legal in nature, rather than economic, broad, specialized, technical or scientific in such a way as to substantially deviate from the normal role of the courts (*Dr. Q*, *supra*, at para. 31; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at paras. 48-49). Therefore, this factor also seems to indicate less deference be accorded to the Tribunal's interpretation.

Pushpanathan, précité, par. 36; *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19, par. 30-31). De plus, les questions soulevées par le par. 70(6) sont de nature juridique. Ni leur ampleur, ni leur caractère spécialisé, ni leur nature économique, technique ou scientifique ne les distinguent de façon importante des questions que les tribunaux judiciaires tranchent habituellement (*Dr Q*, précité, par. 31; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 48-49). Ce facteur semble donc indiquer lui aussi qu'une moins grande retenue s'impose à l'égard de l'interprétation donnée par le Tribunal.

E. *Conclusion on the Standard of Review*

As all four factors point to a lower degree of deference, a standard of review of correctness should be adopted in this case. There are no persuasive grounds for the Court to grant the Tribunal any deference on the pure question of law before us in this case (see also *Barrie*, *supra*, at para. 18, citing *Pushpanathan*, *supra*, at para. 37).

E. *Conclusion sur la norme de contrôle*

16 Puisque les quatre facteurs militent en faveur d'un degré de retenue moins élevé, la norme de contrôle applicable en l'espèce est celle de la décision correcte. Aucun motif convaincant ne justifie notre Cour de faire preuve de retenue à l'égard de la décision du Tribunal sur la question de droit dont elle est saisie (voir aussi *Barrie*, précité, par. 18, citant *Pushpanathan*, précité, par. 37).

IV. Statutory Interpretation of Section 70(6)

I now turn to the essence of this appeal: the question of the interpretation of s. 70(6). The provision reads:

70. . . .

(6) On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.

IV. Interprétation du par. 70(6)

17 J'examine maintenant le fond du pourvoi, soit la question de l'interprétation du par. 70(6). La disposition est ainsi libellée :

70. . . .

(6) À la liquidation partielle d'un régime de retraite, les participants, les anciens participants et les autres personnes qui ont droit à des prestations en vertu du régime de retraite ont des droits et prestations qui ne sont pas inférieurs aux droits et prestations qu'ils auraient à la liquidation totale du régime de retraite à la date de prise d'effet de la liquidation partielle.

The appellants argue that the effect of the provision is to afford Affected Members a vested right, as of the effective date of partial wind-up, to participate in surplus distribution when, if ever, the Plan fully winds up, assuming they are so entitled under the Plan agreement. In contrast, the respondent contends that s. 70(6) requires that the distribution of the surplus actually occurs on the effective date of the partial wind-up. The main area of

18 Les appelantes soutiennent que la disposition a pour effet de reconnaître aux participants touchés, à compter de la date de la liquidation partielle, un droit acquis de recevoir une part de l'excédent lorsque le Régime sera liquidé en totalité, le cas échéant, si le Régime leur accorde un tel droit. À l'inverse, l'intimé prétend qu'en application du par. 70(6) la répartition de l'excédent doit être faite à la date de la prise d'effet de la liquidation

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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

partielle. Le principal point en litige réside donc dans la portée du dernier membre de phrase de la disposition : « à la date de prise d'effet de la liquidation partielle ».

La méthode d'interprétation des lois établie a récemment été réitérée par le juge Iacobucci dans l'arrêt *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42, par. 26, citant E. A. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87 :

> [TRADUCTION] Aujourd'hui, il n'y a qu'un seul principe ou solution : il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

J'examinerai chacun de ces facteurs en débutant par le contexte historique.

A. *Contexte historique*

Les régimes de retraite existent depuis longtemps au Canada, leur origine datant de la fin du 19e siècle. Le développement des régimes de retraite ne prend cependant son essor qu'après la deuxième Guerre mondiale, avec la croissance économique et la prospérité de l'époque (voir le *Report of the Royal Commission on the Status of Pensions in Ontario* (1980), vol. I, p. 35; R. L. Deaton, *The Political Economy of Pensions : Power, Politics and Social Change in Canada, Britain and the United States* (1989), p. 79). Au départ, les pensions étaient généralement considérées comme une récompense gratuite pour de longs et loyaux services. Leur attribution dépendait du bon vouloir et de la santé financière de l'employeur (voir *Report of the Royal Commission on the Status of Pensions in Ontario*, *op. cit.*, p. 2; *Mercer Pension Manual* (éd. feuilles mobiles), p. 1-9). Par ailleurs, lorsque le droit à la pension a commencé à être revendiqué de plus en plus fréquemment à la table de négociation collective, une nouvelle conception s'est développée, suivant laquelle il s'agit d'un droit dont les employés peuvent légitimement se réclamer (voir E. E. Gillese, « Pension Plans and the Law of Trusts » (1996), 75 *R. du B. can.* 221, p. 226-227; Deaton, *op. cit.*, p. 122-123). L'adoption de la législation sur les

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in the matter of pensions" (Gillese, *supra*, at p. 228).

normes minimales du travail en Ontario, d'abord en 1963, puis en 1987 [TRADUCTION] « a considérablement étendu les droits des participants aux régimes. Elle a modifié, une fois de plus, l'équilibre des forces entre les employeurs et les employés dans le domaine des pensions » (Gillese, *loc. cit.*, p. 228).

21

The notion of a pension fund actuarial surplus, by contrast, has had a much shorter history. Surpluses, in any noticeable form, generally did not appear before the early 80s when millions of dollars in actuarial surplus were developing in some funds (see, e.g., J. Dewetering, *Occupational Pension Plans: Selected Policy Issues* (1991), at p. 17; Deaton, *supra*, at p. 134). Surplus can only arise in defined benefit plans, like the one provided by Monsanto, because, in contrast to defined contribution plans, benefits or plan liabilities are not contingent on the level of nor the return on contributions. Members are guaranteed specific benefits at retirement in an amount fixed by a determined formula. Contributions are made each year on the basis of an actuary's estimate of the amount which must be presently invested in order to provide the stipulated benefits at the time the pension is paid out ("current service cost"). These estimates are generally conservative in nature and based on a narrow range of assumptions consistent with actuarial standards and practices. This exercise is inherently somewhat speculative, and in the event of changes in market conditions or other unforeseeable future experience, the present value of the assets of the fund may actually be lower or greater than originally estimated.

En revanche, la notion d'excédent actuariel de la caisse de retraite a un passé beaucoup plus récent. De façon générale, ce n'est qu'au début des années 80 que des excédents significatifs ont été signalés. Certaines caisses ont commencé à afficher des excédents actuariels s'élevant à des millions de dollars (voir, p. ex., J. Dewetering, *Régimes de retraite professionnels : quelques aspects* (1991), p. 21; Deaton, *op. cit.*, p. 134). Seuls les régimes à prestations déterminées, comme celui offert par Monsanto, peuvent accumuler un excédent, parce que, contrairement aux régimes à cotisations déterminées, les prestations, ou le passif du régime, ne varient pas en fonction des fonds provenant des cotisations ni du produit du placement des cotisations. Les participants sont assurés de toucher à leur retraite des prestations établies d'avance, calculées selon une formule définie. Les cotisations sont versées annuellement, selon une évaluation actuarielle de la somme qui doit être investie immédiatement afin que les prestations prévues puissent être payées à l'employé à sa retraite (« coût des services courants »). Ces évaluations, qui sont fondées sur un ensemble limité d'hypothèses établies selon des normes et pratiques actuarielles, sont généralement prudentes. Cet exercice est nécessairement spéculatif. Ainsi, en cas de changements dans la conjoncture du marché ou de modifications imprévisibles de la statistique actuarielle, la valeur actuelle de l'actif de la caisse peut en fait être inférieure ou supérieure à l'évaluation initiale.

22

If, in a given year, the assets of the fund, evaluated as a going concern, are found to be insufficient to cover the current service cost, there is said to be an "unfunded liability" and the employer will be called upon to make up the deficit through contributions (see, generally, s. 4(1) of the *Pension Benefits Act* General Regulations, R.R.O. 1990, Reg. 909). If the plan is underfunded on wind-up, then

Si, pour une année donnée, l'actif de la caisse, selon une évaluation à long terme, est insuffisant pour couvrir le coût des services courants, on dit que le régime a un « passif non capitalisé ». L'employeur est alors tenu de combler le déficit par des cotisations (voir généralement le par. 4(1) du règlement général de la *Loi sur les régimes de retraite*, R.R.O. 1990, règl. 909). Si le régime est insuffisamment

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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.

capitalisé à la liquidation, les prestations sont alors réduites, sous réserve de l'application, en Ontario, du Fonds de garantie des prestations de retraite (art. 77 et par. 84(1) de la Loi). Au contraire, si la valeur de l'actif excède l'évaluation initiale, on dit que la caisse a un excédent, soit « [l']excédent de la valeur de l'actif de la caisse de retraite liée à un régime de retraite par rapport à la valeur du passif relatif au régime de retraite » (art. 1 de la Loi). L'excédent est dit « actuariel », car il n'est pas concrètement réalisé par la liquidation de l'actif et le paiement du passif.

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)).

Dans les années 80, la question des excédents est devenue très controversée. Les employeurs réclamaient l'excédent au motif qu'ils assumaient les risques, alors que les employés affirmaient que la caisse, y compris l'excédent, représentait des salaires différés leur appartenant. C'est dans ce contexte que le législateur a réédicté le par. 70(6) en l'incorporant dans la *Loi de 1987 sur les régimes de retraite*, L.O. 1987, ch. 35, dans une version quasiment identique à celle de 1969 (Règl. de l'Ont. 103/66, art. 11, mod. par Règl. de l'Ont. 91/69, art. 3; voir Assemblée législative de l'Ontario, *Hansard — Official Report of Debates*, 33e lég., 13 janvier 1986 au 25 juin 1987). C'est aussi à cette époque que les définitions des termes « liquidation partielle » et « excédent » ont été incorporées dans la Loi. En même temps, un moratoire fut décrété en 1986 sur les retraits des excédents des régimes en vigueur (R.R.O. 1980, règl. 746, par. 21(2), mod. par Règl. de l'Ont. 31/87). En 1988, il a été étendu aux régimes en liquidation (Règl. de l'Ont. 708/87, art. 7a (ajouté par Règl. de l'Ont. 100/88)). Le règlement visant le partage de l'excédent a remplacé le moratoire (Règl. de l'Ont. 708/87, art. 7c (ajouté par Règl. de l'Ont. 412/90)). Selon ce règlement, aucun paiement ne peut être fait à même l'excédent d'un régime en liquidation totale ou partielle, sauf, selon le cas, a) s'il doit être fait aux participants, aux anciens participants et à d'autres personnes, autres qu'un employeur, qui ont droit à des paiements, ou au profit de ceux-ci; b) s'il doit être fait à un employeur, avec l'accord écrit d'un certain nombre de personnes désignées (R.R.O. 1990, règl. 909, par. 8(1)). Ce règlement, destiné à encourager la conclusion d'accords entre les parties et le partage entre les employeurs et les employés, cesse d'avoir effet après le 31 décembre 2004 (règl. 909, par. 8(3)).

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24

This historical context, though not determinative, may provide some insight into the legislature's intention regarding the effect of s. 70(6). Through its statutory interventions, the legislature has sought to clarify some aspects of the relationship between employers and employees in pension matters. Steps have been taken to improve many employee rights but the importance of maintaining a fair and delicate balance between employer and employee interests, in a way which promotes private pensions, has also been a consistent theme. It is in light of this background that the legal meaning of the provision must be interpreted in accordance with the accepted approach to statutory interpretation.

Ce contexte historique, quoique non décisif, est révélateur de l'intention du législateur à l'égard de l'effet du par. 70(6). Par ses interventions législatives, il visait à clarifier certains aspects de la relation employeur-employés en matière de régimes de retraite. Des mesures furent prises pour améliorer de nombreux droits accordés aux employés, mais l'importance de maintenir un juste et délicat équilibre entre les intérêts de l'employeur et ceux de l'employé de manière à favoriser les régimes de retraite complémentaires fut aussi un thème récurrent. Conformément à la méthode d'interprétation des lois reconnue, c'est à la lumière de ce contexte que le sens de la disposition doit être déterminé.

B. *Grammatical and Ordinary Sense*

B. *Sens grammatical et ordinaire*

25

As noted by the Court of Appeal, s. 70(6) specifies the timing, group and rights to which the section applies. First, the timing is the partial wind-up of a pension plan. Second, the specified group of "members, former members and other persons entitled to benefits under the pension plan" is generally meant to refer to the members affected by a partial wind-up (para. 41). Lastly, the rights accorded are those rights and benefits that are not less than the group would have if there were a full wind-up on the date of partial wind-up (para. 42). The parties agree with these propositions.

Tel que l'a fait remarquer la Cour d'appel, le par. 70(6) précise le moment, le groupe et les droits qu'il vise. Premièrement, le moment est la liquidation partielle du régime de retraite. Deuxièmement, le groupe spécifié, à savoir « les participants, les anciens participants et les autres personnes qui ont droit à des prestations en vertu du régime de retraite » s'entend généralement des participants touchés par la liquidation partielle (par. 41). Enfin, les droits accordés sont les droits et prestations qui ne sont pas inférieurs à ceux que le groupe aurait s'il y avait liquidation totale du régime de retraite à la date de la liquidation partielle (par. 42). Les parties s'entendent sur ces points.

26

Where the disagreement lies is with regard to the timing of distribution following a partial wind-up of a plan in which there is an actuarial surplus. The respondent reasons that, since (i) s. 70(6) requires the rights and benefits on a partial wind-up to not be less than those available on full wind-up, and (ii) all parties agree that surplus distribution would occur on a full wind-up (Court of Appeal judgment, at para. 43; see also s. 79(4)), then (iii) s. 70(6) must require surplus distribution on a partial wind-up. In contrast, the appellants argue that, at most, s. 70(6) requires the vesting of the right to participate in surplus distribution in a potential future full wind-up because it is only on final wind-up that an actual, rather than actuarial, surplus can exist. In my opinion, the former interpretation accords

Là où il y a désaccord, c'est sur le moment de la distribution de l'excédent actuariel, s'il en est, à la suite de la liquidation partielle. D'après la thèse de l'intimé, puisque (i) le par. 70(6) exige que les droits et prestations à la liquidation partielle ne soient pas inférieurs à ceux qu'engendrerait une liquidation totale et que (ii) toutes les parties conviennent qu'il y aurait une distribution de l'excédent à la liquidation totale (jugement de la Cour d'appel, par. 43; voir aussi le par. 79(4)), (iii) le par. 70(6) doit dès lors exiger une distribution de l'excédent à la liquidation partielle. Au contraire, les appelantes soutiennent que le par. 70(6) crée tout au plus le droit de participer dans la distribution de l'excédent lors d'une éventuelle liquidation totale, parce que ce n'est qu'à la liquidation totale que l'excédent devient réel et

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better with the ordinary and grammatical meaning of the section.

non actuariel. À mon avis, la première interprétation est plus conforme au sens ordinaire et grammatical de la disposition.

27 First, the section mandates that the Affected Members "shall have", on the effective date of the partial wind-up, the rights and benefits they "would have" on a full wind-up. This wording transposes the timing of the rights and benefits exigible on full wind-up up to the effective date of partial wind-up. It does not connote any delay until the future date of full wind-up before the exercise of acquired rights.

Premièrement, la disposition prévoit que les participants touchés « ont », à la date de prise d'effet de la liquidation partielle, les droits et les prestations « qu'ils auraient » à la liquidation totale. Ce libellé transpose à la date de prise d'effet de la liquidation partielle le moment où les droits et prestations exigibles à la liquidation totale sont réalisés. Il ne laisse pas entendre qu'il faille attendre jusqu'à la date de la liquidation totale pour exercer les droits acquis.

28 Second, the phrase "on the effective date" (emphasis added) suggests more immediacy than other possible alternatives, such as "as of". If the provision was worded "shall have rights and benefits . . . as of the effective date", this would be more indicative of a situation where rights were being vested presently but paid out in the future. The actual wording of "shall have rights and benefits . . . on the effective date" (emphasis added) indicates a more immediate realization of rights and benefits.

Deuxièmement, la locution « à la date de prise d'effet » (je souligne) suggère une application plus immédiate que d'autres variantes possibles, telles que « à compter de ». Si la disposition précisait « ont des droits et prestations [. . .] à compter de la date de prise d'effet », cela signifierait davantage que des droits sont acquis à ce moment, mais que le paiement ne se fera qu'ultérieurement. Le libellé « ont des droits et prestations [. . .] à la date de prise d'effet » (je souligne) comporte l'idée d'une réalisation immédiate des droits et prestations.

29 Third, the appellants' proposed interpretation, as adopted by the majority of the Tribunal, in effect reads out this last phrase of the provision. In my opinion, without the phrase "on the effective date of the partial wind up", it may have been open to read s. 70(6) as only vesting rights to be exercised on full wind-up. However, the presence of this phrase confirms that rights and benefits are not only measured but also realized on the effective date of partial wind-up.

Troisièmement, l'interprétation proposée par les appelantes et adoptée à la majorité par le Tribunal fait en réalité abstraction des derniers mots de la disposition. À mon avis, sans la mention « à la date de prise d'effet de la liquidation partielle », il aurait été possible d'interpréter le par. 70(6) comme conférant seulement un droit acquis à exercer au moment d'une liquidation totale. Or, la présence de cette mention confirme que les droits et prestations sont non seulement déterminés mais aussi réalisés à la date de prise d'effet de la liquidation partielle.

30 Lastly, s. 70(6) acts as a residual deeming provision rather than being an independent delineation of substantive rights. As a matter of logic, if it equalizes the position of the full and partial wind-up groups, and it is clear that there is surplus distribution on full wind-up, then there should also be surplus distribution on partial wind-up.

Enfin, le par. 70(6) est une disposition résiduelle, qui crée une présomption plutôt qu'une disposition délimitant des droits substantiels. Logiquement, si la disposition a pour effet d'établir l'égalité entre les groupes touchés par une liquidation partielle et ceux touchés par une liquidation totale et s'il est clair qu'il y aura répartition d'un excédent à la liquidation totale, il doit alors y avoir aussi distribution de l'excédent lors de la liquidation partielle.

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31

In sum, the provision indicates that the assessment of rights and benefits is to be conducted as if the Plan was winding up in full on the effective date of partial wind-up. The realization of rights and benefits, including the distribution of surplus assets, then occurs for the part of the Plan actually being wound up. Therefore, the Affected Members, if entitled, may receive their pro rata share of the surplus existing in the fund on a partial wind-up, as if the Plan was being fully wound up on that day.

En résumé, la disposition prévoit que la détermination des droits et prestations doit être effectuée comme si le Régime était liquidé totalement à la date de prise d'effet de la liquidation partielle. La réalisation des droits et prestations, incluant la distribution de l'excédent d'actif, se produit alors pour la partie du Régime qui est effectivement en liquidation. En conséquence, les participants touchés peuvent recevoir, s'ils y ont droit, leur quote-part de l'excédent de la caisse à la liquidation partielle, comme si le Régime était liquidé totalement ce jour-là.

C. *Scheme of the Act*

C. *Économie de la Loi*

32

The statutory scheme further supports this conclusion. First, the definitions of "wind up" and "partial wind up" in s. 1 of the Act closely parallel one another, both requiring a distribution of assets:

"partial wind up" means the termination of part of a pension plan and the distribution of the assets of the pension fund related to that part of the pension plan;

"wind up" means the termination of a pension plan and the distribution of the assets of the pension fund;

It then follows that s. 70(1)(c) requires the administrator to file as part of its full or partial wind-up report, "the methods of allocating and distributing the assets of the pension plan". Similarly, s. 28.1(2) of Reg. 909 requires that the administrator of the Plan give to each person entitled to a pension a statement setting out, among other things: "[t]he method of distributing the surplus assets", "[t]he formula for allocating the surplus among the plan beneficiaries" and "[a]n estimate of the amount allocated to the person." Thus, delaying the distribution would not be consonant with these provisions that make distribution of surplus assets an intended part of the wind-up process, whether the wind-up is in whole or in part.

L'économie de la Loi soutient aussi cette conclusion. D'abord, les définitions de « liquidation » et de « liquidation partielle », de l'article premier de la Loi, sont très similaires, exigeant toutes deux une distribution de l'actif :

« liquidation » Cessation d'un régime de retraite et répartition de l'actif de la caisse de retraite.

« liquidation partielle » Cessation d'une partie d'un régime de retraite et répartition de l'actif de la caisse de retraite qui se rapporte à cette partie du régime de retraite.

De plus, l'al. 70(1)c) oblige l'administrateur à inclure dans le rapport de liquidation totale ou partielle qu'il dépose « les méthodes d'attribution et de répartition de l'actif du régime de retraite ». De même, en application du par. 28.1(2) du règl. 909, l'administrateur du régime doit donner à chaque personne qui a droit à une pension une déclaration indiquant notamment « [l]e mode de distribution de l'excédent d'actif », « [l]a formule de répartition de l'excédent entre les bénéficiaires du régime » et « [l]a somme estimative attribuée à la personne. » Ainsi, retarder la répartition irait à l'encontre de ces dispositions, qui ont pour effet d'intégrer la distribution de l'excédent d'actif dans le processus de liquidation, qu'elle soit totale ou partielle.

33

Second, the statutory scheme makes an important distinction between continuing plans and winding-up plans. The partial wind-up falls, for all purposes, in the latter group, even though there is a remaining

Ensuite, le régime législatif établit une distinction importante entre les régimes de retraite qui continuent d'exister et ceux qui sont en cours de liquidation. La liquidation partielle est incluse, à

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part of the Plan that continues to exist. Under the scheme, in evaluating rights and procedural requirements, partial wind-up is treated the same as a full wind-up, which coincides with the purpose and effect of s. 70(6). For instance, in s. 78(1) the general rule is established that "[n]o money may be paid out of a pension fund to the employer without the prior consent of the Superintendent." Sections 79(1) and 79(3) then provide for exceptions to this rule depending on whether the application for payment is being made with regard to a plan that is continuing or one that is winding up. As with the additional conditions set out in the regulations (Reg. 909, ss. 8 to 10 and 25 to 28.1), it is much more difficult to justify surplus withdrawal from a continuing plan than from a plan winding up in whole or in part. The interpretation of s. 70(6) herein proposed is consistent with the logic of this aspect of the statutory scheme and the legislature's choice to treat partial wind-ups in the same manner as full wind-ups. As a result, a partial wind-up requires a full wind-up to notionally occur for the purposes of evaluating the pro rata share of the assets and liabilities related to the partial wind-up, followed by the continuation of the remainder of the Plan.

toutes fins, dans la deuxième catégorie, même si une partie du régime continue d'exister. Selon le régime législatif, l'évaluation des droits et la procédure de liquidation sont les mêmes, que la liquidation soit partielle ou totale. Cela coïncide avec l'objet et l'effet du par. 70(6). Ainsi, le par. 78(1) établit la règle générale selon laquelle « [a]ucune somme ne peut être prélevée sur une caisse de retraite pour payer un employeur sans le consentement préalable du surintendant. » Des exceptions à cette règle sont prévues aux par. 79(1) et (3), selon que la demande de paiement est présentée à l'égard d'un régime de retraite qui continue d'exister ou d'un régime en liquidation. Comme pour les autres conditions énoncées au règlement (règl. 909, art. 8 à 10 et 25 à 28.1), il est beaucoup plus difficile de justifier le retrait d'un excédent d'un régime qui continue d'exister que d'un régime en liquidation totale ou partielle. L'interprétation du par. 70(6) proposée ici est conforme à la logique de cet aspect du régime législatif et au choix du législateur de traiter les liquidations partielles et les liquidations totales de la même manière. Ainsi, pour l'évaluation de la part de l'actif et du passif qui correspond à la partie du régime en cours de liquidation, il faut présupposer la mise en œuvre d'une liquidation totale fictive. Le reste du régime continue d'exister par la suite.

34 Lastly, in this statutory scheme, the role of s. 70(6) appears to be as a residual deeming provision reflecting the legislature's intent of assuring that rights on partial wind-up are not less than those available on full wind-up, whether granted under the Act or under the terms of the Pension Plan. In almost every section where wind-up is mentioned, the legislature has already clarified that it is referring to wind-up "in whole or in part". This is the case when referring to grow-in rights (s. 74(1)) and immediate vesting rights (s. 73(1)(b)). These are special rights that members affected by a wind-up acquire but that ordinary retirees or individuals leaving employment do not. Provisions regarding the procedural requirements on wind-up similarly specify application on wind-up both "in whole or in part" (see, e.g., ss. 68 to 70). One of the rare instances in the Act where both are not expressly included is with regard to transfer rights on wind-up, which only mentions "wind up" (s. 73(2)). The appellants seem to agree,

Enfin, dans ce régime législatif, le par. 70(6) apparaît comme une disposition résiduelle qui crée une présomption, reflétant ainsi l'intention du législateur de veiller à ce que les droits à la liquidation partielle ne soient pas inférieurs à ceux dévolus lors de la liquidation totale, que ces derniers soient issus de la Loi ou du régime de retraite. Dans presque toutes les dispositions qui renvoient à une liquidation, le législateur a déjà précisé qu'il s'agit d'une « liquidation partielle ou totale ». Tels sont les cas des droits réputés acquis (par. 74(1)) et des droits dévolus immédiatement (al. 73(1)b)). Ces droits spéciaux sont conférés aux participants touchés par une liquidation, mais non aux retraités ordinaires ou aux personnes qui quittent leur emploi. Les dispositions concernant les modalités de la liquidation précisent aussi qu'elles s'appliquent tant aux liquidations totales qu'aux liquidations partielles (voir, p. ex., les art. 68 à 70). L'une des rares dispositions de la Loi où les deux types de liquidation ne

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correctly in my opinion, that those rights would still have effect on partial wind-up even though it is not explicitly mentioned. Presumably, this must result from the application of s. 70(6), and controverts any sort of *expressio unius est exclusio alterius* logic for s. 73(2).

sont pas expressément inclus concerne les droits de transfert à la liquidation, où l'on retrouve seulement le terme « liquidation » (par. 73(2)). Les appelantes semblent concéder, à bon droit selon moi, que ces droits produiraient aussi leurs effets lors d'une liquidation partielle, même si cela n'est pas explicitement prévu. On peut supposer que cela résulte de l'application du par. 70(6) et que toute application de la règle *expressio unius est exclusio alterius* (la mention explicite de l'un signifie l'exclusion de l'autre) est écartée pour le par. 73(2).

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35

As a last point, it is worth commenting on the approach of the majority judgment of the Tribunal in disregarding the regulations in construing the meaning of s. 70(6). While it is true that a statute sits higher in the hierarchy of statutory instruments, it is well recognized that regulations can assist in ascertaining the legislature's intention with regard to a particular matter, especially where the statute and regulations are "closely meshed" (see *R. v. Campbell*, [1999] 1 S.C.R. 565, at para. 26; *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 282). In this case, the statute and the regulations form an integrated scheme on the subject of surplus treatment and the thrust of s. 70(6) can be gleaned in light of this broader context.

En dernière analyse, il est utile de commenter l'approche adoptée par les membres majoritaires du Tribunal, qui n'ont pas tenu compte du règlement lors de l'interprétation du par. 70(6). Même s'il est vrai qu'une loi est supérieure à un règlement dans la hiérarchie des normes, il est bien établi que le recours aux règlements est utile dans la détermination de l'intention du législateur à l'égard d'un aspect particulier, surtout lorsque la loi et le règlement sont [TRADUCTION] « étroitement liés » (voir *R. c. Campbell*, [1999] 1 R.C.S. 565, par. 26; *Sullivan and Driedger on the Construction of Statutes* (4e éd. 2002), p. 282). En l'espèce, la loi et ses règlements forment un tout à l'égard de la question du traitement de l'excédent et le sens général du par. 70(6) peut être dégagé de ce contexte global.

36

In summary, the scheme of the Act and of the regulations supports the ordinary and grammatical meaning of s. 70(6) as requiring distribution of surplus at the time of partial wind-up.

Bref, l'économie de la Loi et de ses règlements mettent en évidence que le sens ordinaire et grammatical du par. 70(6) commande une répartition de l'excédent lors d'une liquidation partielle.

D. *Object of the Act*

D. *Objet de la Loi*

37

A purposive interpretation of s. 70(6) should be mindful of the legislative objective in the context of the statutory scheme surrounding surplus and partial wind-up.

Lors de l'interprétation téléologique du par. 70(6), il est important de ne pas perdre de vue l'objectif de la Loi dans le contexte du régime législatif établi à l'égard de l'excédent et de la liquidation partielle.

38

The Act is public policy legislation that recognizes the vital importance of long-term income security. As a legislative intervention in the administration of voluntary pension plans, its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and

La Loi, qui est d'intérêt public, reconnaît l'importance cruciale de la sécurité du revenu à long terme. Cette intervention législative dans l'administration des régimes de retraite à participation volontaire vise à établir des normes minimales et une supervision réglementaire afin de protéger et de garantir les prestations et les droits des participants, des anciens

others entitled to receive benefits under private pension plans (see *GenCorp*, *supra*; *Firestone Canada Inc. v. Ontario (Pension Commission)* (1990), 1 O.R. (3d) 122 (C.A.), at p. 127). This is especially important when, as recognized by this Court in *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, at p. 646, it is remembered that pensions are now generally given for consideration rather than being merely gratuitous rewards. At the same time, the voluntary nature of the private pension system requires the interventions in this area to be carefully calibrated. This is necessary to avoid discouraging employers from making plan decisions advantageous to their employees. The Act thus seeks, in some measure, to ensure a balance between employee and employer interests that will be beneficial for both groups and for the greater public interest in established pension standards.

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

participants et des autres personnes qui ont droit à des prestations en vertu des régimes de retraite complémentaires (voir *GenCorp*, précité; *Firestone Canada Inc. c. Ontario (Pension Commission)* (1990), 1 O.R. (3d) 122 (C.A.), p. 127). Comme l'a reconnu notre Cour dans l'arrêt *Schmidt c. Air Products Canada Ltd.*, [1994] 2 R.C.S. 611, p. 646, ceci devient particulièrement important dans un contexte où les pensions sont maintenant généralement accordées moyennant une contrepartie et qu'elles ne sont plus de simples récompenses gratuites. Par ailleurs, en raison de la nature volontaire des régimes de retraite complémentaires, il faut équilibrer soigneusement les interventions dans ce domaine. Cette prudence est nécessaire pour éviter de décourager les employeurs de prendre des décisions avantageuses pour leurs employés en ce qui concerne ces régimes. La Loi tend donc, dans une certaine mesure, à assurer, entre les intérêts des employés et ceux des employeurs, un équilibre favorable aux deux groupes et à l'intérêt du grand public à ce que des normes soient établies en matière de pensions.

Il n'est pas rare que les employeurs s'appuient sur le fait qu'ils supportent le risque et la responsabilité du régime de retraite à prestations déterminées pour prétendre qu'ils devraient disposer du contrôle et de la souplesse nécessaires pour gérer le régime à leur manière. On a aussi prétendu qu'exiger la répartition de l'excédent ferait trop pencher la balance en faveur des employés et qu'il en résulterait que les cotisations seraient versées selon des évaluations actuarielles moins prudentes, et qu'il y aurait moins de régimes à prestations déterminées et moins de régimes de retraite complémentaires dans l'ensemble. En dépit de leur intérêt, ces arguments ne sont pas persuasifs. Premièrement, l'obligation de répartition n'est pas liée à la question du droit à l'excédent, qui doit être décidée séparément selon les dispositions du Régime et de la Loi. Deuxièmement, le régime législatif contrôle le niveau du financement en obligeant les employeurs et les administrateurs à suivre les normes actuarielles reconnues pour l'évaluation de la solvabilité du régime (règl. 909, art. 16). Enfin, la mise en place de régimes de retraite remplit certaines fonctions sur le marché du travail au profit des entreprises. Elles permettent

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and a construction of s. 70(6) that is in accordance with the terms of the statute is unlikely to disrupt the balance between employer and employee interests.

notamment d'attirer la main-d'œuvre, de réduire le roulement du personnel, d'améliorer le moral, d'augmenter la productivité et le rendement et de promouvoir la loyauté envers l'entreprise (Deaton, *op. cit.*, p. 119). Bref, les employeurs ont bien des raisons d'offrir des régimes de retraite et une interprétation du par. 70(6) qui correspond au libellé de la Loi ne perturbera vraisemblablement pas l'équilibre entre les intérêts des employeurs et des employés.

40 As between employees, it is difficult to see how this interpretation of s. 70(6) results in any unfairness to the ongoing members, as was argued before us in this appeal. Requiring that the pro rata share of the actuarial surplus be distributed at the time of partial wind-up is unlikely to compromise the continuing integrity of the pension fund. By definition, the fund will still be in surplus after the distribution, except that the amount of surplus will be reduced in proportion to the size and level of entitlement, if any, of the partial wind-up group and subject to the statutory restrictions on withdrawal of surplus by the employer. In this case, approximately $16 million in actuarial surplus would have remained in the fund even if the entire surplus related to the partial wind-up was distributed.

Quant aux effets entre les employés, il est difficile de voir comment cette interprétation du par. 70(6) entraîne un résultat inéquitable pour les participants qui conservent leur emploi, comme ce fut plaidé devant nous en l'espèce. Exiger que la part proportionnelle de l'excédent actuariel soit répartie à la liquidation partielle ne compromettra vraisemblablement pas l'intégrité de la caisse de retraite. Par définition, la caisse aura encore un excédent après la répartition, sauf que le montant de l'excédent sera diminué proportionnellement à l'importance et au niveau des droits à pension, le cas échéant, du groupe visé par la liquidation et sera sujet aux restrictions législatives relatives aux retraits d'un excédent par l'employeur. En l'espèce, environ 16 millions de dollars d'excédent actuariel seraient restés dans la caisse même si la totalité de l'excédent lié à la liquidation partielle avait été distribuée.

41 By contrast, if Affected Members are required to await a full wind-up at some indeterminate future date to share in the distribution of surplus, it would place them in a worse position than continuing employees. Affected Members are placed in a significantly different position from continuing employees because they have just lost their jobs, their level of pensionable earnings are reduced, and they will rarely be able to replicate the same level of benefits elsewhere. Since pension plans are theoretically intended to be indeterminate in nature, Affected Members may no longer be reachable if a full wind-up occurs. It makes sense for the Affected Members to be subject to the risks of the Plan while they are a part of it, but not after they have been terminated from it. This same rationale would equally apply to future Affected Members if another partial

Par contre, si les participants touchés devaient attendre la liquidation totale à une date ultérieure indéterminée pour recevoir leur part de l'excédent, ils se trouveraient dans une moins bonne situation que les employés qui restent. Le sort des employés qui restent est sensiblement différent de celui des participants touchés, car ces derniers viennent de perdre leur emploi, leur niveau de gains ouvrant droit à pension est limité et ils pourront rarement trouver ailleurs un même niveau de prestations. Comme, en principe, les régimes de retraite sont d'une durée indéterminée, les participants touchés lors de la liquidation partielle seront peut-être impossibles à joindre au moment de la liquidation totale. Il est logique que les employés qui conservent leur emploi soient exposés aux risques inhérents au Régime, mais cette logique ne s'applique

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wind-up occurs and to all members at the time of a full wind-up, so that each group would bear the consequences of market forces at the time of their termination from the Plan. This seems to be the fairest distribution of risk and in accordance with the object of the Act.

plus à ceux qui l'ont quitté. Le même raisonnement s'appliquerait également aux futurs participants touchés si une autre liquidation partielle survenait et à tous les participants au moment d'une liquidation totale, de sorte que chaque groupe supporterait les conséquences des forces du marché au moment de sa désaffiliation du Régime. Cela semble constituer la plus juste répartition des risques et être conforme à l'objet de la Loi.

42 There are also policy and practical reasons supporting an interpretation requiring distribution upon partial wind-up. A surplus is, in effect, a windfall because it was not within the expectations of either the employer or the employees when the regime was implemented. The employer contributes to the fund as much as is necessary to match the funding target of the Plan on a going concern basis, taking into consideration actuarial estimates and assumptions. The basic expectation of the employees when joining the Plan is to receive periodic pension benefits on retirement. The fluctuation in the value of the assets is essentially the result of unforeseen market performance or plan experience. As discussed earlier, the most equitable solution is to distribute the fortunes of favourable markets at the time Affected Members are terminated. In this way, the windfall is related to their actual time and participation in the plan rather than being subject to the experience of a plan of which they are no longer a part.

Des raisons d'ordre politique et pratique justifient aussi une interprétation requérant une répartition lors de la liquidation partielle. Un excédent est, en réalité, un cadeau du ciel, auquel ni l'employeur ni les employés ne s'attendent lorsque le régime est mis en place. L'employeur verse à la caisse les cotisations qui sont requises pour réaliser l'objectif de financement à long terme du Régime, selon des évaluations et des hypothèses actuarielles. L'expectative fondamentale des employés qui adhèrent au Régime est de recevoir des prestations de pension périodiques à la retraite. La fluctuation de la valeur de l'actif résulte essentiellement du rendement imprévu du marché ou de l'évolution du régime. Comme je l'ai précisé précédemment, la solution la plus équitable consiste à distribuer les bénéfices d'une conjoncture favorable au moment où les participants touchés perdent leur emploi. De cette manière, ce cadeau du ciel est relié à leur participation réelle au Régime plutôt que de dépendre de l'évolution du régime après le moment où leurs liens avec celui-ci sont rompus.

43 Moreover, the increasingly mobile nature of labour should be recognized. When a group of employees is terminated and that part of the Plan is wound up, those accounts should generally be settled concurrently. The Affected Members should be able to know their status at the time of their termination so as to arrange their affairs accordingly and not be indefinitely tied to an employer that laid them off. On the flip side, if Affected Members only have a right to surplus distribution on full wind-up, assuming they are so entitled to receive it, they may no longer be alive to realize their right when, if ever, a full wind-up occurs. Even if they are, they may be difficult to locate or contact. As a practical matter, it is at the time of termination that

De plus, il convient de reconnaître la mobilité croissante de la main-d'œuvre. Lorsqu'un groupe d'employés perdent leur emploi et qu'une partie du Régime est liquidée, leurs comptes devraient généralement être réglés simultanément. Les participants touchés devraient pouvoir connaître leur situation au moment de la cessation de leur emploi afin d'être en mesure d'organiser leurs affaires en conséquence. Ils ne devraient pas être liés indéfiniment à un employeur qui les a mis à pied. D'ailleurs, si les participants touchés avaient un droit à la répartition de l'excédent seulement au moment de la liquidation totale, en présumant qu'ils y ont droit, il se peut qu'ils ne soient plus vivants pour réaliser leur droit, si une liquidation

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their right to surplus, if any, is most needed, considering they have just lost their jobs and their source of regular income.

totale survient effectivement un jour. Même s'ils vivent toujours, il se peut qu'il soit difficile de les trouver ou de les joindre. En pratique, c'est au moment de la cessation de leur emploi que leur droit à l'excédent, le cas échéant, est le plus utile, étant donné qu'ils viennent de perdre leur emploi et leur source de revenu régulier.

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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.

En outre, l'argument voulant que l'excédent actuariel soit fictif et qu'il ne soit pas possible de s'y fier pour liquider une quelconque partie de l'actif du Régime n'est pas convaincant. Même si l'évaluation d'un excédent actuariel est nécessairement une estimation, il ne s'ensuit pas que sa distribution est mal fondée. Les évaluations actuarielles de la valeur de la pension servent plusieurs fins, telles que la vente ou les divisions d'entreprises, le partage des biens matrimoniaux et les exonérations de cotisations des employeurs. De plus, même si les hypothèses actuarielles en cause peuvent varier, il est possible d'atteindre une certaine uniformité en imposant des méthodes d'évaluation précises dans certains cas. Par exemple, le règlement prescrit qu'une « évaluation à long terme » (définie dans le règl. 909, par. 1(2)) doit être utilisée pour l'évaluation d'un régime <u>qui continue d'exister</u> (voir, p. ex., le règl. 909, par. 13(1) ou l'art. 26). À l'inverse, une « évaluation de solvabilité » ou une « évaluation de liquidation » peut être utilisée en cas de liquidation effective ou fictive. Cela s'explique par les objectifs différents qui sous-tendent la réglementation des régimes qui continuent d'exister par rapport à ceux qui sont en liquidation. Dans le premier cas, la préoccupation majeure est de prévoir des mesures liées à assurer la capitalisation afin d'assurer que les niveaux de cotisations, fixés en fonction de l'estimation des coûts des services courants, soient suffisants pour préserver l'intégrité de la caisse. Dans le deuxième cas, qu'il s'agisse de liquidation totale ou partielle, la préoccupation majeure est de s'assurer que la partie du Régime qui est liquidée est mise à part et que les participants touchés reçoivent ce à quoi ils ont droit, le cas échéant, en tant que bénéficiaires, par la répartition de l'actif lié à la partie du Régime en liquidation.

45

Lastly, distribution upon partial wind up is consistent with the trust principles outlined in *Schmidt*,

Enfin, la répartition à la liquidation partielle se concilie harmonieusement avec les principes du

supra, regarding surplus entitlement and contribution holidays. Although that case dealt with a situation of entitlement to surplus on a full wind-up, which is not in issue here, the appellants placed much weight on the distinction made by Cory J. between actual and actuarial surplus. Cory J. held at pp. 654-55 that:

> Employees can claim no entitlement to surplus in an ongoing plan because it is not definite. The right to any surplus is crystallized only when the surplus becomes ascertainable upon termination of the plan. Therefore, the taking of a contribution holiday represents neither an encroachment upon the trust nor a reduction of accrued benefits.
>
> . . .
>
> When the plan is terminated, the actuarial surplus becomes an actual surplus and vests in the employee beneficiaries. [Emphasis added.]

46 Section 70(6) provides for distribution of surplus only at the time of plan termination, be it partial or full. The definition of "partial wind up" in s. 1 of the Act explicitly refers to the "termination" of "that part of the pension plan". Also, surplus is ascertainable at that time according to current valuation methods. Neither s. 70(6) nor this appeal affects the ability of an employer to take contribution holidays while the Plan is ongoing and the Plan allows for it. Therefore, requiring distribution on partial wind-up is fully compatible with this Court's decision in *Schmidt* and the principles discussed therein. Upon partial wind-up, the pro rata share of the surplus ceases to be notional. It is then actual.

47 Section 70(6) was enacted to ensure that Affected Members on partial wind-up are not in a worse position than a future full wind-up group. This requirement of equity provided by s. 70(6) is in relation to other rights provided for under the Act. As far as the distribution of surplus is concerned, the object of the Act and s. 70(6) strongly promote an interpretation that requires this

droit des fiducies exposés dans l'arrêt *Schmidt*, précité, à l'égard du droit à un surplus de caisse de retraite et de la période d'exonération de cotisations. Bien que cet arrêt porte sur le droit au surplus en cas de liquidation totale, ce qui n'est pas le cas en l'espèce, les appelantes ont beaucoup insisté sur la distinction faite par le juge Cory entre les surplus réel et actuariel. Ce dernier précise (p. 654-655) :

> Les employés ne peuvent revendiquer aucun droit au surplus d'un régime existant puisqu'il n'est pas définitif. Le droit à tout surplus n'est cristallisé que lorsque celui-ci devient vérifiable à la cessation du régime. Par conséquent, le fait de s'accorder une période d'exonération de cotisations ne représente ni un empiétement sur la fiducie, ni une réduction des prestations acquises.
>
> . . .
>
> À la cessation du régime, le surplus actuariel devient un surplus réel et est dévolu aux employés bénéficiaires. [Je souligne.]

Le paragraphe 70(6) prévoit la répartition de l'excédent seulement à la cessation du régime, qu'elle soit partielle ou totale. La définition de « liquidation partielle », à l'article premier de la Loi, renvoie explicitement à la « cessation » de « cette partie du régime de retraite ». De plus, l'excédent est vérifiable à ce moment selon les méthodes d'évaluation alors en vigueur. Ni le paragraphe 70(6) ni le présent pourvoi n'empêchent l'employeur de se prévaloir de périodes d'exonération de cotisations lorsque le Régime continue d'exister et qu'il le permet. Exiger la répartition lors de la liquidation partielle est dès lors compatible avec la décision de notre Cour dans l'arrêt *Schmidt* et les principes qui y sont analysés. À la liquidation partielle, la part proportionnelle de l'excédent cesse d'être fictive. Elle devient réelle.

Le paragraphe 70(6) a été adopté pour assurer aux participants touchés par une liquidation partielle un traitement aussi favorable que celui réservé aux groupes visés par une liquidation totale. Le paragraphe 70(6), qui exprime un souci d'équité, fait écho aux autres dispositions de la Loi. Pour ce qui est de la répartition de l'excédent, l'objet de la Loi et le par. 70(6) militent fortement en faveur d'une

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distribution to occur at the time of the partial wind-up rather than later.

interprétation selon laquelle cette répartition doit avoir lieu lors de la liquidation partielle et non après.

V. Conclusion

V. Conclusion

48 In light of all of the above, I conclude that s. 70(6) requires the distribution of actuarial surplus related to the part of the Plan being wound up, on the effective date of the partial wind-up. As a consequence, I agree with the Court of Appeal's interpretation and find that the Tribunal incorrectly interpreted the provision at first instance.

En raison de ce qui précède, je conclus que le par. 70(6) commande que la répartition de l'excédent actuariel qui se rapporte au groupe touché par la liquidation partielle soit effectuée à la date de la prise d'effet de cette liquidation. En conséquence, je souscris à l'interprétation de la Cour d'appel et conclus que le Tribunal a mal interprété la disposition en première instance.

49 This result is also consistent with the historical context of pension law. Statutory interventions in pension law have sought to clarify and regulate the relationship between employers and employees in order to promote the pension system while adjusting imbalances of power. With regard to surplus and its distribution on wind-up, the legislature has implemented some measures in this regard, be it to improve the position of employees if the Plan fails to provide for distribution (s. 79(4) of the Act) or to require consent of members for the withdrawal of surplus by employers (Reg. 909, s. 8). However, these steps have also been tailored in such a way as to avoid placing too heavy a burden on employers in exercising their rights under the Plan or discouraging them from maintaining pension funds for their workforce. Distribution of surplus on partial wind-up reflects this balance because it does not reduce or remove any entitlements of the employers. In contrast, failure to require distribution could negatively impact the potential entitlements of affected employees of the partial wind-up group. Considering the text, scheme and purpose of the Act against this background discloses an intent of the legislature to require surplus distribution on partial wind-up of a plan.

Ce résultat est aussi conforme avec le contexte historique du droit des pensions. Les interventions du législateur dans le domaine des régimes de retraite visaient à expliquer et à réglementer la relation employeur-employés afin de promouvoir le système des régimes de retraite tout en rééquilibrant les forces en présence. En ce qui a trait aux excédents et à leur répartition lors de la liquidation, le législateur a mis en œuvre des mesures destinées à améliorer la situation des employés lorsqu'un régime ne prévoit pas de répartition (par. 79(4) de la Loi) ou à exiger l'accord des participants pour le retrait d'un excédent par l'employeur (règl. 909, art. 8). Ces mesures ont toutefois été conçues de façon à ne pas imposer un fardeau trop lourd aux employeurs qui exercent leurs droits en vertu du Régime et à ne pas les décourager de maintenir un régime de retraite pour leur personnel. La répartition de l'excédent à la liquidation partielle reflète cet équilibre, parce qu'elle ne réduit ou ne supprime pas les droits des employeurs. À l'inverse, ne pas exiger cette répartition pourrait porter atteinte aux droits que pourraient avoir les employés du groupe touché par la liquidation partielle. Sur cette toile de fond, le libellé, l'esprit et l'objet de la Loi mettent en évidence que le législateur avait l'intention d'exiger la répartition de l'excédent lors de la liquidation partielle du régime de retraite.

50 The vital importance of pension schemes in the modern labour market is evident. Pension funds are a significant asset for employers and an invaluable nest egg for an aging workforce. Legislative schemes that establish minimum standards and

Sur le marché moderne du travail, il est évident que les régimes de retraite revêtent une importance cruciale. Les caisses de retraite représentent un élément d'actif important pour les employeurs et un inestimable coussin de sécurité pour une

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ensure the protection of employee benefits are an element of sound financial and social policy. The facilitation and encouragement of pension plan participation advance the interests of employees, employers, and the public. As part of the legislature's statutory structure that aims to accommodate the interests of ongoing and terminated employees, it enacted s. 70(6) to require actual distribution of the pro rata share of actuarial surplus on plan wind-up, be it full or partial.

main-d'œuvre vieillissante. Les régimes législatifs qui établissent des normes minimales et qui assurent la protection des avantages sociaux des employés s'inscrivent dans une politique financière et sociale saine. Faciliter et encourager la mise en place de régimes de retraite favorisent les intérêts des employés, des employeurs et du public. Dans le cadre d'un aménagement législatif visant à concilier les intérêts des employés qui restent et de ceux qui ont perdu leur emploi, le législateur a édicté le par. 70(6), qui prescrit la répartition effective d'une part proportionnelle de l'excédent actuariel lors de la liquidation du régime, qu'elle soit totale ou partielle.

51 The appeal is dismissed with costs.

Le pourvoi est rejeté avec dépens.

APPENDIX

Statutory Provisions

(1) *Pension Benefits Act*, R.S.O. 1990, c. P.8

1. In this Act,

. . .

"partial wind up" means the termination of part of a pension plan and the distribution of the assets of the pension fund related to that part of the pension plan;

. . .

"surplus" means the excess of the value of the assets of a pension fund related to a pension plan over the value of the liabilities under the pension plan, both calculated in the prescribed manner;

. . .

"wind up" means the termination of a pension plan and the distribution of the assets of the pension fund;

. . .

68. (1) The employer or, in the case of a multi-employer pension plan, the administrator may wind up the pension plan in whole or in part.

(2) The administrator shall give written notice of proposal to wind up the pension plan to,

(a) the Superintendent;

ANNEXE

Dispositions législatives

(1) *Loi sur les régimes de retraite*, L.R.O. 1990, ch. P.8

1 Les définitions qui suivent s'appliquent à la présente loi.

. . .

« excédent » L'excédent de la valeur de l'actif de la caisse de retraite liée à un régime de retraite par rapport à la valeur du passif relatif au régime de retraite, les deux sommes étant calculées de la manière prescrite.

. . .

« liquidation » Cessation d'un régime de retraite et répartition de l'actif de la caisse de retraite.

« liquidation partielle » Cessation d'une partie d'un régime de retraite et répartition de l'actif de la caisse de retraite qui se rapporte à cette partie du régime de retraite.

. . .

68 (1) L'employeur ou, dans le cas d'un régime de retraite interentreprises, l'administrateur peut liquider totalement ou partiellement un régime de retraite.

(2) L'administrateur donne un avis écrit de son intention de liquider le régime de retraite :

a) au surintendant;

(b) each member of the pension plan;

(c) each former member of the pension plan;

(d) each trade union that represents members of the pension plan;

(e) the advisory committee of the pension plan; and

(f) any other person entitled to a payment from the pension fund.

(3) In the case of a proposal to wind up only part of a pension plan, the administrator is not required to give written notice of the proposal to members, former members or other persons entitled to payment from the pension fund if they will not be affected by the proposed partial wind up.

(4) The notice of proposal to wind up shall contain the information prescribed by the regulations.

(5) The effective date of the wind up shall not be earlier than the date member contributions, if any, cease to be deducted, in the case of contributory pension benefits, or, in any other case, on the date notice is given to members.

(6) The Superintendent by order may change the effective date of the wind up if the Superintendent is of the opinion that there are reasonable grounds for the change.

69. (1) The Superintendent by order may require the wind up of a pension plan in whole or in part if,

(a) there is a cessation or suspension of employer contributions to the pension fund;

(b) the employer fails to make contributions to the pension fund as required by this Act or the regulations;

(c) the employer is bankrupt within the meaning of the *Bankruptcy and Insolvency Act* (Canada);

(d) a significant number of members of the pension plan cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer or as a result of the reorganization of the business of the employer;

(e) all or a significant portion of the business carried on by the employer at a specific location is discontinued;

(f) all or part of the employer's business or all or part of the assets of the employer's business are

b) à chaque participant au régime de retraite;

c) à chaque ancien participant au régime de retraite;

d) à chaque syndicat qui représente les participants au régime de retraite;

e) au comité consultatif du régime de retraite;

f) à toute autre personne qui a droit à un paiement sur la caisse de retraite.

(3) Dans le cas de l'intention de liquider seulement en partie un régime de retraite, l'administrateur n'est pas tenu de donner un avis écrit de son intention aux participants, aux anciens participants ou aux autres personnes qui ont droit à un paiement sur la caisse de retraite si la liquidation partielle projetée n'a pas d'incidence sur eux.

(4) L'avis d'intention de liquider contient les renseignements prescrits par les règlements.

(5) La date de prise d'effet de la liquidation n'est pas antérieure à la date où les cotisations des participants, s'il y en a, cessent d'être déduites, dans le cas des prestations de pension contributives, ou, dans tous les autres cas, à la date où l'avis est donné aux participants.

(6) Le surintendant peut, par ordre, changer la date de prise d'effet de la liquidation s'il est d'avis qu'il existe des motifs raisonnables de le faire.

69 (1) Le surintendant peut, par ordre, exiger la liquidation partielle ou totale d'un régime de retraite dans les cas suivants :

a) il y a cessation ou suspension des cotisations de l'employeur à la caisse de retraite;

b) l'employeur ne verse pas de cotisations à la caisse de retraite comme l'exigent la présente loi ou les règlements;

c) l'employeur est en faillite au sens de la *Loi sur la faillite et l'insolvabilité* (Canada);

d) un nombre important de participants au régime de retraite ont vu leur emploi prendre fin par suite de la cessation de la totalité ou d'une partie des affaires de l'employeur ou par suite de la réorganisation des affaires de l'employeur;

e) la totalité ou une partie importante des affaires que l'employeur fait dans un lieu en particulier ont cessé;

f) la totalité ou une partie des affaires de l'employeur, ou la totalité ou une partie de l'actif

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sold, assigned or otherwise disposed of and the person who acquires the business or assets does not provide a pension plan for the members of the employer's pension plan who become employees of the person;

(g) the liability of the Guarantee Fund is likely to be substantially increased unless the pension plan is wound up in whole or in part;

(h) in the case of a multi-employer pension plan,

(i) there is a significant reduction in the number of members, or

(ii) there is a cessation of contributions under the pension plan or a significant reduction in such contributions; or

(i) any other prescribed event or prescribed circumstance occurs.

(2) In an order under subsection (1), the Superintendent shall specify the effective date of the wind up, the persons or class or classes of persons to whom the administrator shall give notice of the order and the information that shall be given in the notice.

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

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

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

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

(d) such other information as is prescribed.

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

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

relatif aux affaires de l'employeur sont vendus, cédés ou autrement aliénés et la personne qui acquiert ces affaires ou cet actif n'offre pas de régime de retraite aux participants au régime de retraite de l'employeur, qui sont devenus des employés de la personne;

g) le passif du Fonds de garantie augmentera vraisemblablement de façon importante si le régime de retraite n'est pas totalement ou partiellement liquidé;

h) dans le cas d'un régime de retraite interentreprises :

(i) ou bien il y a une réduction importante du nombre des participants,

(ii) ou bien il y a cessation des cotisations versées aux termes du régime de retraite ou une réduction importante de ces cotisations;

i) d'autres circonstances ou événements prescrits se produisent.

(2) Dans un ordre prévu au paragraphe (1), le surintendant précise la date de prise d'effet de la liquidation, les personnes, la ou les catégories de personnes auxquelles l'administrateur doit donner avis de l'ordre et les renseignements qui doivent être inclus dans l'avis.

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

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

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

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

d) les autres renseignements prescrits.

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

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

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

(5) The Superintendent may refuse to approve a wind up report that does not meet the requirements of this Act and the regulations or that does not protect the interests of the members and former members of the pension plan.

(6) On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.

73. (1) For the purpose of determining the amounts of pension benefits and any other benefits and entitlements on the winding up of a pension plan, in whole or in part,

(a) the employment of each member of the pension plan affected by the winding up shall be deemed to have been terminated on the effective date of the wind up;

(b) each member's pension benefits as of the effective date of the wind up shall be determined as if the member had satisfied all eligibility conditions for a deferred pension; and

(c) provision shall be made for the rights under section 74.

(2) A person entitled to a pension benefit on the wind up of a pension plan, other than a person who is receiving a pension, is entitled to the rights under subsection 42(1) (transfer) of a member who terminates employment and, for the purpose, subsection 42(3) does not apply.

74. (1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

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

(5) Le surintendant peut refuser d'approuver un rapport de liquidation qui ne répond pas aux exigences de la présente loi et des règlements, ou qui ne protège pas les intérêts des participants et des anciens participants au régime de retraite.

(6) À la liquidation partielle d'un régime de retraite, les participants, les anciens participants et les autres personnes qui ont droit à des prestations en vertu du régime de retraite ont des droits et prestations qui ne sont pas inférieurs aux droits et prestations qu'ils auraient à la liquidation totale du régime de retraite à la date de prise d'effet de la liquidation partielle.

73 (1) Afin de déterminer les montants des prestations de retraite et des autres prestations et droits à la liquidation totale ou partielle d'un régime de retraite :

a) l'emploi de chaque participant au régime de retraite touché par la liquidation est réputé avoir pris fin à la date de prise d'effet de la liquidation;

b) les prestations de retraite de chaque participant à la date de prise d'effet de la liquidation sont déterminées comme si le participant avait rempli toutes les conditions d'admissibilité à une pension différée;

c) il est tenu compte des droits prévus à l'article 74.

(2) Une personne qui a droit à une prestation de retraite à la liquidation d'un régime de retraite, autre qu'une personne qui touche une pension, peut se prévaloir des droits prévus au paragraphe 42(1) (transfert) à l'intention du participant qui met fin à son emploi et, à cette fin, le paragraphe 42(3) ne s'applique pas.

74 (1) En Ontario, un participant à un régime de retraite dont le total de l'âge plus le nombre d'années d'emploi continu ou d'affiliation continue est d'au moins cinquante-cinq, à la date de prise d'effet de la liquidation totale ou partielle, a droit à l'une des pensions suivantes :

a) une pension conforme aux conditions du régime de retraite si, aux termes du régime de retraite, le participant est admissible au paiement immédiat d'une prestation de retraite;

b) une pension conforme aux conditions du régime de retraite, commençant à la plus antérieure des dates suivantes :

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(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

77. Subject to the application of the Guarantee Fund, where the money in a pension fund is not sufficient to pay all the pension benefits and other benefits on the wind up of the pension plan in whole or in part, the pension benefits and other benefits shall be reduced in the prescribed manner.

78. (1) No money may be paid out of a pension fund to the employer without the prior consent of the Superintendent.

79. (1) Subject to section 89 (hearing and appeal), the Superintendent shall not consent to payment of money that is surplus to the employer out of a continuing pension plan unless,

(a) the Superintendent is satisfied, based on reports provided with the application, that the pension plan has a surplus;

(b) the pension plan provides for the withdrawal of surplus by the employer while the pension plan continues in existence, or the applicant satisfies the Superintendent that the applicant is otherwise entitled to withdraw the surplus;

(c) where all pension benefits under the pension plan are guaranteed by an insurance company, an amount equal to at least two years of the employer's current service costs is retained in the pension fund as surplus;

(d) where the members are not required to make contributions under the pension plan, the greater of,

(i) an amount equal to two years of the employer's current service costs, or

(i) la date normale de retraite prévue par le régime de retraite,

(ii) la date à laquelle le participant aurait droit à une pension non réduite aux termes du régime de retraite si celui-ci n'était pas liquidé et que l'affiliation du participant avait continué jusqu'à cette date;

c) une pension réduite dont le montant correspond à celui à verser aux termes du régime de retraite commençant à la date à laquelle le participant aurait droit à la pension réduite en vertu du régime de retraite si celui-ci n'était pas liquidé et que l'affiliation du participant avait continué jusqu'à cette date.

77 Sous réserve de l'application du Fonds de garantie, si les sommes de la caisse de retraite ne suffisent pas à payer toutes les prestations de retraite et autres prestations à la liquidation totale ou partielle du régime de retraite, les prestations de retraite et autres prestations sont réduites de la manière prescrite.

78 (1) Aucune somme ne peut être prélevée sur une caisse de retraite pour payer un employeur sans le consentement préalable du surintendant.

79 (1) Sous réserve de l'article 89 (audience et appel), le surintendant ne consent à effectuer un paiement à un employeur, par prélèvement sur un régime de retraite qui continue d'exister, d'une somme excédentaire qu'aux conditions suivantes :

a) le surintendant est convaincu, d'après les rapports fournis avec la demande, qu'il y a un excédent dans le régime de retraite;

b) le régime de retraite prévoit le retrait d'un excédent par l'employeur pendant que le régime de retraite continue d'exister, ou l'auteur de la demande convainc le surintendant qu'il a, d'une autre façon, le droit de retirer l'excédent;

c) si toutes les prestations de retraite prévues par le régime de retraite sont garanties par une compagnie d'assurance, un montant au moins égal à deux ans de coûts des services courants de l'employeur est retenu dans la caisse de retraite comme excédent;

d) si les participants ne sont pas tenus de cotiser au régime de retraite, est retenu dans la caisse de retraite comme excédent le plus élevé des montants suivants :

(i) soit un montant égal à deux ans de coûts des services courants de l'employeur,

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(ii) an amount equal to 25 per cent of the liabilities of the pension plan calculated as prescribed,

is retained in the pension fund as surplus;

(e) where members are required to make contributions under the pension plan, all surplus attributable to contributions paid by members and the greater of,

(i) an amount equal to two years of the employer's current service costs, or

(ii) an amount equal to 25 per cent of the liabilities of the pension plan calculated as prescribed,

are retained in the pension fund as surplus; and

(f) the applicant and the pension plan comply with all other requirements prescribed under other sections of this Act in respect of the payment of surplus money out of a pension fund.

. . .

(3) Subject to section 89 (hearing and appeal), the Superintendent shall not consent to an application by an employer in respect of surplus in a pension plan that is being wound up in whole or in part unless,

(a) the Superintendent is satisfied, based on reports provided with the application, that the pension plan has a surplus;

(b) the pension plan provides for payment of surplus to the employer on the wind up of the pension plan;

(c) provision has been made for the payment of all liabilities of the pension plan as calculated for purposes of termination of the pension plan; and

(d) the applicant and the pension plan comply with all other requirements prescribed under other sections of this Act in respect of the payment of surplus money out of a pension fund.

(4) A pension plan that does not provide for payment of surplus money on the wind up of the pension plan shall be construed to require that surplus money accrued after the 31st day of December, 1986 shall be distributed proportionately on the wind up of the pension plan among members, former members and any other persons entitled

(ii) soit un montant égal à 25 pour cent du passif du régime de retraite calculé selon ce qui est prescrit;

e) si les participants sont tenus de cotiser au régime de retraite, sont retenus dans la caisse de retraite comme excédent tout l'excédent imputable aux cotisations versées par les participants et le plus élevé des montants suivants :

(i) soit un montant égal à deux ans de coûts des services courants de l'employeur,

(ii) soit un montant égal à 25 pour cent du passif du régime de retraite calculé selon ce qui est prescrit;

f) l'auteur de la demande et le régime de retraite se conforment à toutes les autres exigences prescrites en vertu d'autres articles de la présente loi à l'égard du prélèvement de sommes excédentaires sur la caisse de retraite.

. . .

(3) Sous réserve de l'article 89 (audience et appel), le surintendant ne consent à une demande d'un employeur à l'égard de l'excédent d'un régime de retraite qui est, en totalité ou en partie, en cours de liquidation que si les conditions suivantes sont réunies :

a) le surintendant est convaincu, d'après les rapports fournis avec la demande, qu'il y a un excédent dans le régime de retraite;

b) le régime de retraite prévoit le paiement de l'excédent à l'employeur à la liquidation du régime de retraite;

c) le paiement de l'ensemble du passif du régime de retraite tel qu'il a été calculé aux fins de la cessation du régime de retraite a été prévu;

d) l'auteur de la demande et le régime de retraite se conforment à toutes les autres exigences prescrites en vertu d'autres articles de la présente loi à l'égard du prélèvement de sommes excédentaires sur une caisse de retraite.

(4) Un régime de retraite qui ne prévoit pas le paiement de sommes excédentaires à la liquidation du régime de retraite s'interprète comme exigeant que les sommes excédentaires accumulées après le 31 décembre 1986 soient réparties proportionnellement, à la liquidation du régime de retraite, entre les participants, les anciens

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to payments under the pension plan on the date of the wind up.

84. (1) If the Superintendent by order declares that the Guarantee Fund applies to a pension plan, the following are guaranteed by the Guarantee Fund, subject to the limitations and qualifications as are set out in this Act or are prescribed:

1. Any pension in respect of employment in Ontario.
2. Any deferred pension in respect of employment in Ontario to which a former member is entitled, if the former member's employment or membership was terminated before the 1st day of January, 1988 and the former member was at least forty-five years of age and had at least ten years of continuous employment with the employer, or was a member of the pension plan for a continuous period of at least ten years, at the date of termination of employment.
3. A percentage of any defined pension benefits in respect of employment in Ontario to which a member or former member is entitled under section 36 or 37 (deferred pension), or both, if the member's or former member's employment or membership was terminated on or after the 1st day of January, 1988, equal to 20 per cent if the combination of the member's or former member's age plus years of employment or membership in the pension plan equals fifty, plus an additional 2/3 of 1 per cent for each additional one-twelfth credit of age and employment or membership to a maximum of 100 per cent.
4. All additional voluntary contributions, and the interest thereon, made by members or former members while employed in Ontario.
5. The minimum value of all required contributions made to the pension plan by a member or former member in respect of employment in Ontario plus interest.
6. That part of a deferred pension guaranteed under this subsection to which a former spouse or same-sex partner of a member or of a former member is entitled under a domestic contract or an order under the *Family Law Act*.

participants et les autres personnes qui ont droit à des paiements aux termes du régime de retraite à la date de la liquidation.

84 (1) Si le surintendant déclare par ordre que le Fonds de garantie s'applique à un régime de retraite, le Fonds de garantie, sous réserve des restrictions et des conditions requises qui sont énoncées dans la présente loi ou prescrites, garantit ce qui suit :

1. Les pensions à l'égard de l'emploi en Ontario.
2. Une pension différée à l'égard de l'emploi en Ontario à laquelle un ancien participant a droit, si l'emploi ou l'affiliation de l'ancien participant a pris fin avant le 1er janvier 1988 et que l'ancien participant était âgé d'au moins quarante-cinq ans et avait accumulé au moins dix années d'emploi continu chez l'employeur, ou avait été participant au régime de retraite pendant une période continue d'au moins dix ans, à la date de cessation d'emploi.
3. Un pourcentage de prestations de pension déterminées à l'égard de l'emploi en Ontario auxquelles un participant ou un ancien participant a droit en vertu de l'article 36 ou 37 (pension différée), ou des deux, si l'emploi ou l'affiliation du participant ou de l'ancien participant a pris fin le 1er janvier 1988 ou par la suite, soit 20 pour cent si le total de l'âge du participant ou de l'ancien participant plus ses années d'emploi ou d'affiliation au régime de retraite est de cinquante, plus 2/3 de 1 pour cent pour chaque douzième de crédit additionnel pour l'âge et l'emploi ou l'affiliation, jusqu'à concurrence de 100 pour cent.
4. Toutes les cotisations facultatives supplémentaires, et l'intérêt sur ces cotisations, versées par des participants ou des anciens participants pendant qu'ils travaillent en Ontario.
5. La valeur minimale de toutes les cotisations requises versées au régime de retraite par un participant ou un ancien participant à l'égard de l'emploi en Ontario, et l'intérêt sur ces cotisations.
6. La partie d'une pension différée garantie en vertu du présent article à laquelle l'ancien conjoint ou partenaire de même sexe d'un participant ou d'un ancien participant a droit en vertu d'un contrat familial conclu ou d'une ordonnance rendue en vertu de la *Loi sur le droit de la famille*.

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7. Any pension to which a survivor of a former member is entitled under subsection 48(1) (death before commencement of payment).

91. (1) A party to a proceeding before the Tribunal under section 89 may appeal to the Divisional Court from the decision or order of the Tribunal.

(2) *Pension Benefits Act* General Regulations, R.R.O. 1990, Reg. 909

1. . . .

(2) In this Part,

. . .

"going concern valuation" means a valuation of the assets and liabilities of a pension plan using methods and actuarial assumptions that are consistent with accepted actuarial practice for the valuation of a continuing pension plan;

4. (1) Every pension plan shall set out the obligation of the employer or any person required to make contributions on behalf of an employer, to contribute both in respect of the normal cost and any going concern unfunded actuarial liabilities and solvency deficiencies under the plan.

8. (1) No payment may be made from surplus out of a pension plan that is being wound up in whole or in part unless,

(a) the payment is to be made to or for the benefit of members, former members and other persons, other than an employer, who are entitled to payments under the pension plan on the date of wind up; or

(b) the payment is to be made to an employer with the written agreement of,

(i) the employer,

(ii) the collective bargaining agent of the members of the plan or, if there is no collective bargaining agent, at least two-thirds of the members of the plan, and

(iii) such number of former members and other persons who are entitled to payments under the pension plan on the date of the wind up as the Superintendent considers appropriate in the circumstances.

7. Toute pension à laquelle un survivant d'un ancien participant a droit en vertu du paragraphe 48(1) (décès avant le commencement du paiement).

91 (1) Une partie à une instance tenue devant le Tribunal en vertu de l'article 89 peut interjeter appel de la décision du Tribunal devant la Cour divisionnaire.

(2) *Loi sur les régimes de retraite*, Dispositions générales, R.R.O. 1990, règl. 909

1 . . .

(2) Les définitions qui suivent s'appliquent à la présente partie.

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« évaluation à long terme » Évaluation de l'actif et du passif d'un régime selon des hypothèses actuarielles et des méthodes qui sont compatibles avec les normes actuarielles reconnues pour l'évaluation d'un régime qui continue d'exister.

4 (1) Le régime énonce l'obligation qu'a l'employeur ou toute personne qui est tenue de le faire pour le compte de celui-ci de cotiser à la fois à l'égard du coût normal, du passif actuariel à long terme non capitalisé et du déficit de solvabilité du régime.

8 (1) Aucun paiement ne peut être prélevé sur l'excédent d'un régime qui est en voie d'être liquidé en totalité ou en partie, sauf, selon le cas :

a) si le paiement doit être fait aux participants, aux anciens participants et à d'autres personnes, autres qu'un employeur, qui ont droit à des paiements prévus par le régime à la date de la liquidation, ou au profit de ceux-ci;

b) si le paiement doit être fait à un employeur, avec l'accord écrit des personnes suivantes :

(i) l'employeur,

(ii) l'agent de négociation collective des participants au régime ou, s'il n'y en a pas, au moins les deux tiers des participants au régime,

(iii) le nombre d'anciens participants et d'autres personnes, jugé approprié par le surintendant dans les circonstances, qui ont droit à des paiements prévus par le régime à la date de liquidation.

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(2) Despite subsection (1), a payment may be made from surplus out of a pension plan that is being wound up in whole or in part if,

(a) the payment would have been permitted by this section as it read immediately before the 18th day of December, 1991; and

(b) notice of proposal to wind up the pension plan was given to the Superintendent of Pensions before December 18, 1991.

(3) Subsections (1) and (2) do not apply after December 31, 2004.

9. If an amendment to a pension plan with defined benefits converts the defined benefits to defined contribution benefits, the employer may offset the employer's contributions for normal costs against the amount of surplus, if any, in the pension fund after the conversion.

10. (1) The criteria described in this section must be met before the Superintendent may consent to the payment of money that is surplus out of a continuing pension plan to the employer.

(2) All persons who are entitled to receive benefits under the pension plan and all members must consent to the terms upon which the surplus is to be paid out of the plan.

(3) All persons in respect of whom the administrator has purchased a pension, deferred pension or ancillary benefit, other than those persons who requested that the administrator do so, must consent to the terms upon which the surplus is to be paid out of the pension plan.

(4) The pension plan must provide that a former member's contributions to the plan and the interest on the contributions shall not be used to provide more than 50 per cent of the commuted value of a pension or deferred pension in respect of contributory benefits to which the member is entitled under the plan on termination of membership or employment.

(5) The pension plan must provide that a former member who is entitled to a pension or deferred pension on termination of employment or membership is entitled to payment from the pension fund of a lump sum payment equal to the amount by which the former member's contributions under the plan and the interest on the contributions exceed one-half of the commuted value of the former member's pension or deferred pension in respect of the contributory benefits.

. . .

(2) Malgré le paragraphe (1), un paiement peut être prélevé sur l'excédent d'un régime qui est en voie d'être liquidé en totalité ou en partie, si les conditions suivantes sont remplies :

a) le paiement aurait été autorisé par le présent article tel qu'il existait immédiatement avant le 18 décembre 1991;

b) l'avis de proposition de liquidation du régime a été donné au surintendant des régimes de retraite avant le 18 décembre 1991.

(3) Les paragraphes (1) et (2) ne s'appliquent plus après le 31 décembre 2004.

9 Si la modification d'un régime à prestations déterminées convertit les prestations déterminées en prestations à cotisation déterminée, l'employeur peut compenser ses cotisations au titre des coûts normaux par le montant de l'excédent éventuel du régime après la conversion.

10 (1) Il doit être satisfait aux critères énoncés au présent article avant que le surintendant ne puisse donner son consentement au paiement à l'employeur de sommes excédentaires d'un régime qui continue d'exister.

(2) Les personnes qui ont le droit de recevoir des prestations dans le cadre du régime ainsi que les participants doivent donner leur consentement aux conditions auxquelles l'excédent sera prélevé sur le régime.

(3) Les personnes à l'égard desquelles l'administrateur a constitué une pension, une pension différée ou une prestation accessoire, autres que celles qui ont demandé à l'administrateur de le faire, doivent donner leur consentement aux conditions auxquelles l'excédent sera prélevé sur le régime.

(4) Le régime doit prévoir que les cotisations d'un ancien participant et les intérêts sur celles-ci ne doivent pas être utilisés pour fournir plus de 50 pour cent de la valeur de rachat d'une pension ou d'une pension différée relativement aux prestations contributives auxquelles le participant a droit dans le cadre du régime à la cessation de son affiliation ou de son emploi.

(5) Le régime doit prévoir qu'un ancien participant qui a droit à une pension ou à une pension différée à la cessation de son emploi ou de son affiliation a droit au paiement d'une somme globale sur la caisse de retraite dont le montant est égal au montant de l'excédent des cotisations de l'ancien participant au régime et des intérêts sur celles-ci sur la moitié de la valeur de rachat de la pension ou de la pension différée de l'ancien participant relativement aux prestations contributives.

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(8) If surplus is allocated to a person to increase the person's benefits, the person must be offered the choice of receiving the surplus in the form of inflation adjustments to the existing benefits.

(9) The inflation adjustments that are provided must be made,

(a) by indexing the benefits in accordance with a formula based upon increases in the annual Consumer Price Index;

(b) by providing an annual percentage increase in the amount of the benefits or an annual increase of a specified dollar amount; or

(c) by a combination of the methods described in clauses (a) and (b).

(10) For the purpose of subsection (9), the employer may select the method for providing the inflation adjustments.

(11) The pension plan must state who is entitled, or must provide a mechanism for determining who is entitled, to any surplus in the plan after the payment of surplus to which the Superintendent is being asked to consent.

(12) Subsection (11) applies with respect to applications under section 78 of the Act made after the 31st day of October, 1990.

10.1 (1) This section applies with respect to a payment from surplus out of a pension plan to the employer,

(a) if a court has appointed an individual to represent persons described in subclause 8(1)(b)(iii), persons described in subsection 10(2) (but not members) or persons described in subsection 10(3); and

(b) if the Superintendent is satisfied, on the basis of such information and evidence as he or she may require from the employer or administrator, that,

(i) in the case of a proposed payment to the employer from surplus out of a pension plan that is being wound up in whole or in part, the employer has obtained the written agreement referred to in clause 8(1)(b) of 90 per cent of the former members who are in receipt of a pension payable from the pension fund on the date of the wind up, or

(ii) in the case of a proposed payment of money that is surplus out of a continuing pension

(8) Si un excédent est attribué à une personne afin d'augmenter ses prestations, celle-ci doit se voir offrir le choix de recevoir l'excédent sous forme de rajustement lié à l'inflation, des prestations existantes.

(9) Les rajustements liés à l'inflation qui sont offerts doivent être faits de l'une des façons suivantes :

a) en indexant les prestations conformément à une formule fondée sur les augmentations de l'indice annuel des prix à la consommation;

b) en fournissant une augmentation annuelle du montant des prestations selon un pourcentage ou une somme fixe en dollars;

c) en combinant les méthodes prévues aux alinéas a) et b).

(10) Pour l'application du paragraphe (9), l'employeur peut choisir la méthode applicable aux rajustements liés à l'inflation.

(11) Le régime doit soit préciser qui a droit à un excédent du régime existant après le paiement d'un excédent à l'égard duquel il est demandé au surintendant de donner son consentement, soit prévoir un mécanisme permettant de déterminer qui y a droit.

(12) Le paragraphe (11) s'applique aux demandes faites en vertu de l'article 78 de la Loi après le 31 octobre 1990.

10.1 (1) Le présent article s'applique à l'égard d'un paiement à l'employeur de sommes excédentaires d'un régime si les conditions suivantes sont réunies :

a) un tribunal a nommé un particulier pour représenter des personnes visées au sous-alinéa 8(1)b)(iii), des personnes visées au paragraphe 10(2) (mais non les participants) ou des personnes visées au paragraphe 10(3);

b) le surintendant est convaincu, sur la foi des renseignements et de la preuve qu'il peut exiger de l'employeur ou de l'administrateur, de ce qui suit :

(i) dans le cas d'un paiement projeté à l'employeur de sommes excédentaires d'un régime qui est en voie d'être liquidé en totalité ou en partie, l'employeur a obtenu l'accord écrit visé à l'alinéa 8(1)b) de 90 pour cent des anciens participants qui touchent une pension payable par prélèvement sur la caisse de retraite à la date de liquidation,

(ii) dans le cas d'un paiement projeté à l'employeur de sommes excédentaires d'un

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plan to the employer, the employer has obtained the consent of 90 per cent of the former members who are in receipt of a pension payable from the pension fund, whose consent is required by subsection 10(2).

(2) The court-appointed representative is authorized to give the written agreement referred to in clause 8(1)(b) on behalf of the former members in receipt of a pension payable from the pension fund, who he or she represents. However, the representative is not authorized to give written agreement on behalf of former members who have agreed or have objected to the payment from surplus.

(3) The court-appointed representative is authorized to give the consent required by subsection 10(2) on behalf of the former members in receipt of a pension payable from the pension fund, who he or she represents. However, the representative is not authorized to consent on behalf of former members who have consented or have objected to the terms upon which the surplus is to be paid out of the plan.

13. (1) Within sixty days after the date of establishment of a plan, the administrator shall submit a report on the basis of a going concern valuation that sets out,

(a) the normal cost, in the first year during which the plan is registered and the rule for computing the normal cost in subsequent years up to the date of the next report;

(b) an estimate of the normal cost, in the subsequent years up to the date of the next report;

(c) where applicable, the estimated aggregate employee contributions to the pension plan during each year up to the date of the succeeding report;

(d) the past service unfunded actuarial liability, if any, under the pension plan as at the date on which the plan qualified for registration;

(e) the special payments required to liquidate the past service unfunded actuarial liability in accordance with section 5;

(f) any other going concern unfunded liability;

(g) the special payments required to liquidate any going concern unfunded liability referred to in clause (f);

régime qui continue d'exister, l'employeur a obtenu le consentement de 90 pour cent des anciens participants qui touchent une pension payable par prélèvement sur la caisse de retraite et dont le consentement est exigé par le paragraphe 10(2).

(2) Le représentant nommé par le tribunal est autorisé à donner l'accord écrit visé à l'alinéa 8(1)b) au nom des anciens participants qui touchent une pension payable par prélèvement sur la caisse de retraite et qu'il représente. Toutefois, il n'est pas autorisé à donner cet accord au nom des anciens participants qui ont donné leur accord ou qui se sont opposés au paiement des sommes excédentaires.

(3) Le représentant nommé par le tribunal est autorisé à donner le consentement exigé par le paragraphe 10(2) au nom des personnes qui touchent une pension payable par prélèvement sur la caisse de retraite et qu'il représente. Toutefois, il n'est pas autorisé à donner ce consentement au nom des anciens participants qui ont donné leur consentement ou qui se sont opposés aux conditions auxquelles l'excédent sera prélevé sur le régime.

13 (1) Dans les soixante jours qui suivent la date d'établissement d'un régime, l'administrateur présente un rapport, préparé d'après une évaluation à long terme, qui précise les éléments suivants :

a) le coût normal pour le premier exercice pendant lequel le régime est enregistré et la règle de calcul du coût normal pour les exercices suivants jusqu'à la date du prochain rapport;

b) l'estimation du coût normal pour les exercices suivants jusqu'à la date du prochain rapport;

c) le cas échéant, le montant estimatif total des cotisations des employés qui seront versées au régime pendant chaque exercice jusqu'à la date du rapport suivant;

d) le cas échéant, le passif actuariel pour services antérieurs non capitalisé du régime à la date à laquelle le régime est devenu admissible à l'enregistrement;

e) les paiements spéciaux nécessaires pour acquitter le passif actuariel pour services antérieurs non capitalisé conformément à l'article 5;

f) tout autre passif à long terme non capitalisé;

g) les paiements spéciaux nécessaires pour acquitter le passif à long terme non capitalisé visé à l'alinéa f);

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(j) where the plan provides for an escalated adjustment, whether and to what extent,

(i) liability for the future cost of the adjustment has been included in the determination of any going concern unfunded actuarial liability, or

(ii) the cost for the escalated adjustment is included in the normal cost.

(1.1) The report shall also set out, on the basis of a solvency valuation,

(a) whether there is a solvency deficiency;

(b) if there is a solvency deficiency, the amount of the solvency deficiency and the special payments required to liquidate it in accordance with section 5;

(c) whether the transfer ratio is less than one; and

(d) if the transfer ratio is less than one, the transfer ratio.

16. (1) An actuary preparing a report under section 70 of the Act or under section 3, 5.3, 13 or 14 shall use methods and actuarial assumptions that are consistent with accepted actuarial practice and with the requirements of the Act and this Regulation.

(2) An actuary preparing a report under section 4 shall use his or her best effort to meet the standards set out in subsection (1).

(3) The person preparing a report referred to in subsection (1) or (2) shall certify that it meets the requirements of subsection (1) or (2), as the case may be.

(4) The person preparing a report referred to in subsection (2) shall disclose in the report any respect in which the report does not meet the standards set out in subsection (1).

25. (1) The following information is prescribed for the purposes of a notice respecting an application under subsection 78(2) of the Act:

1. The name of the pension plan and its provincial registration number.

2. The valuation date of the report provided with the application and the amount of surplus in the pension plan.

3. The surplus attributable to employee and employer contributions.

4. The amount of surplus withdrawal requested.

j) lorsque le régime prévoit un rajustement indexé, la question de savoir si et dans quelle mesure :

(i) le passif rattaché au coût futur du rajustement a été inclus dans la détermination d'un passif actuariel à long terme non capitalisé,

(ii) le coût du rajustement a été inclus dans le coût normal.

(1.1) Le rapport précise également, d'après une évaluation de solvabilité, les éléments suivants :

a) la question de savoir s'il existe un déficit de solvabilité;

b) s'il existe un déficit de solvabilité, son montant et celui des paiements spéciaux nécessaires pour l'acquitter conformément à l'article 5;

c) la question de savoir si le ratio de transfert est inférieur à un;

d) le ratio de transfert, s'il est inférieur à un.

16 (1) L'actuaire qui prépare un rapport prévu à l'article 70 de la Loi ou à l'article 3, 5.3, 13 ou 14 utilise des hypothèses actuarielles et des méthodes compatibles avec les normes actuarielles reconnues ainsi qu'avec les exigences de la Loi et du présent règlement.

(2) L'actuaire qui prépare un rapport prévu à l'article 4 s'efforce, au mieux de ses capacités, de satisfaire aux normes énoncées au paragraphe (1).

(3) La personne qui prépare un rapport visé au paragraphe (1) ou (2) certifie qu'il satisfait aux exigences prévues au paragraphe (1) ou (2), selon le cas.

(4) La personne qui prépare un rapport visé au paragraphe (2) y révèle tout élément qui ne satisfait pas aux normes énoncées au paragraphe (1).

25 (1) Les renseignements qui suivent sont des renseignements prescrits aux fins de l'avis de demande prévu au paragraphe 78(2) de la Loi :

1. Le nom du régime et son numéro d'enregistrement provincial.

2. La date d'évaluation du rapport fourni avec la demande et le montant de l'excédent du régime.

3. L'excédent imputable aux cotisations des employés et de l'employeur.

4. La valeur du retrait d'excédent demandé.

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5. A statement that submissions in respect of the application may be made in writing to the Superintendent within thirty days after receipt of the notice.
6. The contractual authority for surplus withdrawals.
7. Notice that copies of the report and certificates filed with the Superintendent in support of the surplus request are available for review at the offices of the employer and information on how copies of the report may be obtained.

(2) The employer shall file a copy of the notice required by subsection 78(2) of the Act before transmitting it to the persons required by that subsection.

. . .

(4) An application by an employer for the consent of the Superintendent to a payment from a continuing pension plan under subsection 78(1) of the Act shall be accompanied by a certified copy of the notice referred to in subsection (1), a statement that subsection 78(2) of the Act has been complied with, details as to the classes of persons who received notice and the date the last notice was distributed.

(5) An application referred to in subsection (1) shall be accompanied by a current report prepared on the basis of a going concern valuation demonstrating that a surplus as determined in accordance with section 26 exists and that there are no special payments required to be made to the pension fund.

26. (1) For purposes of determining surplus in a continuing pension plan,

(a) the value of the assets of the pension plan shall be calculated on the basis of the market value of the investments held by the pension fund plus any cash balances and accrued or receivable items; and

(b) the value of the liabilities of the pension plan shall be the greater of the calculation of,

(i) the going concern liabilities, or

(ii) the solvency liabilities.

(2) For purposes of subclauses 79(1)(d)(ii) and 79(1)(e)(ii) of the Act, the liabilities of the pension plan shall be calculated as the solvency liabilities.

5. Une déclaration selon laquelle des observations écrites peuvent, dans les trente jours qui suivent la date de réception de l'avis, être présentées au surintendant à l'égard de la demande.
6. Les modalités contractuelles qui permettent les retraits d'excédent.
7. Un avis indiquant que des copies du rapport et des certificats déposés auprès du surintendant à l'appui de la demande relative à l'excédent peuvent être consultées aux bureaux de l'employeur, et des renseignements sur la façon d'obtenir des copies du rapport.

(2) L'employeur dépose une copie de l'avis exigé par le paragraphe 78(2) de la Loi avant de le transmettre aux personnes visées à ce paragraphe.

. . .

(4) La demande que présente un employeur en vue d'obtenir, conformément au paragraphe 78(1) de la Loi, le consentement du surintendant pour le prélèvement d'une somme sur un régime qui continue d'exister est accompagnée d'une copie certifiée conforme de l'avis visé au paragraphe (1), d'une déclaration selon laquelle le paragraphe 78(2) de la Loi a été respecté, de détails sur les catégories de personnes qui ont reçu l'avis et de la date à laquelle le dernier avis a été distribué.

(5) La demande visée au paragraphe (1) est accompagnée d'un rapport courant, préparé d'après une évaluation à long terme, qui montre qu'il existe un excédent déterminé conformément à l'article 26 et qu'aucun paiement spécial ne doit être fait à la caisse de retraite.

26 (1) Pour déterminer l'excédent d'un régime qui continue d'exister :

a) la valeur de l'actif du régime est calculée sur la base de la valeur marchande des placements détenus par la caisse de retraite, plus le solde de trésorerie et les revenus accumulés ou à recevoir;

b) la valeur du passif du régime est égale au plus élevé des passifs suivants :

(i) le passif à long terme,

(ii) le passif de solvabilité.

(2) Pour l'application des sous-alinéas 79(1)d)(ii) et e)(ii) de la Loi, le passif du régime est calculé comme s'il s'agissait du passif de solvabilité.

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28. . . .

(5) A notice required under subsection 78(2) of the Act for a plan that is being wound up shall contain,

(a) the name of the pension plan and its provincial registration number;

(b) the valuation date of the report provided with the application and amount of surplus in the pension plan;

(c) the surplus attributable to employee and employer contributions;

(d) the amount of surplus withdrawal requested;

(e) a statement that submissions may be made in writing to the Superintendent within thirty days of receipt of the notice;

(f) the contractual authority for surplus reversion; and

(g) notice that copies of the wind up report filed with the Superintendent in support of the surplus request are available for review at the offices of the employer and information on how copies of the report may be obtained.

(6) An application by an employer for the consent of the Superintendent to a payment from a pension plan that is being wound up shall be accompanied by a certified copy of the notice referred to in subsection (5), a statement that subsection 78(2) of the Act has been complied with, the date the last notice was distributed and details as to the classes of persons who received notice.

28.1 (1) This section applies if there is a surplus on the wind up of a pension plan in whole or in part.

(2) The administrator of the pension plan shall give to each person entitled to a pension, deferred pension or other benefit or to a refund in respect of the pension plan a statement setting out the following information:

1. The name of the pension plan and its provincial registration number.
2. The member's name and date of birth.
3. The method of distributing the surplus assets.
4. The formula for allocating the surplus among the plan beneficiaries.

28 . . .

(5) L'avis exigé par le paragraphe 78(2) de la Loi à l'égard d'un régime qui est en cours de liquidation comprend les éléments suivants :

a) le nom du régime et son numéro d'enregistrement provincial;

b) la date d'évaluation du rapport fourni avec la demande et le montant de l'excédent du régime;

c) l'excédent imputable aux cotisations des employés et de l'employeur;

d) la valeur du retrait d'excédent demandé;

e) une déclaration selon laquelle des observations écrites peuvent, dans les trente jours qui suivent la date de réception de l'avis, être présentées au surintendant;

f) les modalités contractuelles qui permettent le versement de l'excédent;

g) un avis indiquant que des copies du rapport de liquidation déposé auprès du surintendant à l'appui de la demande relative à l'excédent peuvent être consultées aux bureaux de l'employeur, et des renseignements sur la façon d'en obtenir des copies.

(6) La demande que présente un employeur en vue d'obtenir le consentement du surintendant pour le prélèvement d'une somme sur un régime en cours de liquidation est accompagnée d'une copie certifiée conforme de l'avis visé au paragraphe (5), d'une déclaration selon laquelle le paragraphe 78(2) de la Loi a été respecté, de la date à laquelle le dernier avis a été distribué et de détails sur les catégories de personnes qui ont reçu l'avis.

28.1 (1) Le présent article s'applique s'il y a un excédent lors de la liquidation totale ou partielle d'un régime.

(2) L'administrateur du régime donne à chaque personne qui a droit à une pension, à une pension différée ou à une autre prestation, ou encore à un remboursement, à l'égard du régime, une déclaration indiquant les renseignements suivants :

1. Le nom du régime et son numéro d'enregistrement provincial.
2. Le nom du participant et sa date de naissance.
3. Le mode de distribution de l'excédent d'actif.
4. La formule de répartition de l'excédent entre les bénéficiaires du régime.

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5. An estimate of the amount allocated to the person.
6. The options available to the person concerning the method for distributing the amount allocated to the person and the period within which any election respecting the options must be made.
7. The method of distribution that will be used, if an election is not made within the specified period.
8. The name and details of the person to be contacted with respect to any questions arising out of the statement.
9. Notice that the allocation of surplus and the options available for distributing it are subject to the approval of the Superintendent and of the Canada Customs and Revenue Agency, and may be adjusted accordingly.

5. La somme estimative attribuée à la personne.
6. Les options qui s'offrent à la personne quant au mode de distribution de la somme qui lui est attribuée et le délai imparti pour faire un choix à leur égard.
7. Le mode de distribution qui sera utilisé en cas d'omission de faire un choix dans le délai imparti.
8. Le nom et les coordonnées de la personne avec laquelle le destinataire peut communiquer s'il a des questions au sujet de la déclaration.
9. Un avis indiquant que la répartition de l'excédent et les options offertes quant à sa distribution sont assujetties à l'approbation du surintendant et de l'Agence des douanes et du revenu du Canada et qu'elles peuvent être rajustées en conséquence.

(3) *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28

1. In this Act,

. . .

"regulated sector" means a sector that consists of,

(a) all co-operative corporations to which the *Co-operative Corporations Act* applies;

(b) all credit unions, caisses populaires and leagues to which the *Credit Unions and Caisses Populaires Act, 1994* applies;

(c) all persons engaged in the business of insurance and governed by the *Insurance Act*;

(d) all corporations registered or incorporated under the *Loan and Trust Corporations Act*;

(e) all mortgage brokers registered under the *Mortgage Brokers Act*; or

(f) all persons who establish or administer a pension plan within the meaning of the *Pension Benefits Act* and all employers or other persons on their behalf who are required to contribute to any such pension plan;

6. (1) There is hereby established a tribunal to be known in English as the Financial Services Tribunal and in French as Tribunal des services financiers.

. . .

(3) *Loi de 1997 sur la Commission des services financiers de l'Ontario*, L.O. 1997, ch. 28

1. Les définitions qui suivent s'appliquent à la présente loi.

. . .

« secteur réglementé » Secteur comprenant, selon le cas :

a) les sociétés coopératives visées par la *Loi sur les sociétés coopératives*;

b) les caisses et les fédérations visées par la *Loi de 1994 sur les caisses populaires et les credit unions*;

c) les personnes qui effectuent des opérations d'assurance et qui sont régies par la *Loi sur les assurances*;

d) les sociétés constituées ou enregistrées en vertu de la *Loi sur les sociétés de prêt et de fiducie*;

e) les courtiers en hypothèques inscrits aux termes de la *Loi sur les courtiers en hypothèques*;

f) les personnes qui mettent sur pied ou administrent un régime de retraite au sens de la *Loi sur les régimes de retraite* et les employeurs ou d'autres personnes en leur nom qui sont tenus de contribuer à ce régime de retraite.

6. (1) Est créé un tribunal appelé Tribunal des services financiers en français et Financial Services Tribunal en anglais.

. . .

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(3) In addition to the chair and the two vice-chairs, the Lieutenant Governor in Council shall appoint at least six persons, and not more than 12, as members of the Tribunal for the length of time not exceeding three years that the Lieutenant Governor in Council specifies and may reappoint any member to the Tribunal.

(4) In appointing members to the Tribunal, the Lieutenant Governor in Council shall, to the extent practicable, appoint members who have experience and expertise in the regulated sectors.

7. (1) A matter referred to the Tribunal may be heard and determined by a panel consisting of one or more members of the Tribunal, as assigned by the chair of the Tribunal.

(2) In assigning members of the Tribunal to a panel, the chair shall take into consideration the requirements, if any, for experience and expertise to enable the panel to decide the issues raised in any matter before the Tribunal.

20. The Tribunal has exclusive jurisdiction to,

(a) exercise the powers conferred on it under this Act and every other Act that confers powers on or assigns duties to it; and

(b) determine all questions of fact or law that arise in any proceeding before it under any Act mentioned in clause (a).

21. . . .

(4) An order of the Tribunal is final and conclusive for all purposes unless the Act under which the Tribunal made it provides for an appeal.

22. For a proceeding before the Tribunal, the Tribunal may,

(a) make rules for the practice and procedure to be observed;

(b) determine what constitutes adequate public notice;

(c) before or during the proceeding, conduct any inquiry or inspection that the Tribunal considers necessary; or

(d) in determining any matter, consider any relevant information obtained by the Tribunal in addition to evidence given at the proceeding, if the Tribunal first informs the parties to the proceeding of the additional information and gives them an opportunity to explain or refute it.

(3) Outre le président et les deux vice-présidents, le lieutenant-gouverneur en conseil nomme au moins six et au plus 12 personnes, à titre de membres du Tribunal pour un mandat reconductible d'une durée qu'il précise et qui ne peut dépasser trois ans.

(4) Dans toute la mesure du possible, le lieutenant-gouverneur en conseil nomme à titre de membres du Tribunal des personnes qui ont de l'expérience et des compétences dans les secteurs réglementés.

7. (1) Un comité de un ou plusieurs membres du Tribunal, nommés par le président du Tribunal, peut connaître des affaires dont est saisi le Tribunal.

(2) Lorsqu'il affecte des membres du Tribunal à un comité, le président tient compte de l'expérience et des compétences qui sont nécessaires, le cas échéant, au comité pour trancher les questions soulevées dans toute affaire portée devant le Tribunal.

20. Le Tribunal a compétence exclusive pour :

a) exercer les pouvoirs qui lui sont conférés par la présente loi et toute autre loi qui lui confère des pouvoirs ou lui assigne des fonctions;

b) trancher les questions de fait ou de droit soulevées dans les instances introduites devant lui aux termes d'une loi visée à l'alinéa a).

21. . . .

(4) L'ordonnance du Tribunal est définitive à tous égards à moins que la Loi en vertu de laquelle le Tribunal l'a rendue ne prévoie un appel.

22. Le Tribunal peut, à l'égard des instances introduites devant lui :

a) adopter les règles de pratique et de procédure à observer;

b) décider ce qui constitue un avis suffisant au public;

c) avant ou durant l'instance, mener les enquêtes ou les inspections qu'il juge nécessaires;

d) pour prendre sa décision, examiner les renseignements pertinents qu'il a obtenus, en plus des témoignages reçus pendant l'instance, s'il communique d'abord aux parties à l'instance ces autres renseignements et leur donne l'occasion de s'expliquer ou de les contester.

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Appeal dismissed with costs.

Solicitors for the appellant Monsanto Canada Inc.: Borden Ladner Gervais, Toronto.

Solicitors for the appellant the Association of Canadian Pension Management: Blake, Cassels & Graydon, Toronto.

Solicitor for the respondent: Ministry of the Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitors for the intervener the National Trust Company: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the intervener Nicole Lacroix: Barnes, Sammon, Ottawa.

Solicitors for the interveners the Canadian Labour Congress and the Ontario Federation of Labour: Sack Goldblatt Mitchell, Toronto.

Solicitors for the interveners R. M. Smallhorn, D. G. Halsall, S. J. Galbraith and S. W. (Bud) Wesley: Koskie Minsky, Toronto.

Pourvoi rejeté avec dépens.

Procureurs de l'appelante Monsanto Canada Inc. : Borden Ladner Gervais, Toronto.

Procureurs de l'appelante l'Association canadienne des administrateurs de régimes de retraite : Blake, Cassels & Graydon, Toronto.

Procureur de l'intimé : Ministère du Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Ottawa.

Procureurs de l'intervenante la Compagnie Trust National : Osler, Hoskin & Harcourt, Toronto.

Procureurs de l'intervenante Nicole Lacroix : Barnes, Sammon, Ottawa.

Procureurs des intervenants le Congrès du travail du Canada et la Fédération du travail de l'Ontario : Sack Goldblatt Mitchell, Toronto.

Procureurs des intervenants R. M. Smallhorn, D. G. Halsall, S. J. Galbraith et S. W. (Bud) Wesley : Koskie Minsky, Toronto.

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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

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 The Puratone Corporation, Pembina Valley Pigs Ltd. and Niverville Swine Breeders Ltd. (the "Applicants") APPLICATION UNDER: *The Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended	)	Appearances: David Jackson for Puratone Corporation J.J. Burnell for Bank of Montreal Jeffrey Lee and Sandra Zinchuk for Farm Credit Canada Richard Schwartz and Jason Harvey for ITB Claimants Ross McFadyen for Deloitte Touche Inc. David Kroft and Aaron Challis for Directors and Officers

DEWAR J.

[1] On September 12, 2012, an Initial Order was pronounced by me in a proceeding under the ***Companies' Creditors Arrangement Act***, R.S.C., 1985, c. C-36 (the "CCAA") filed on that date by three of the companies within the Puratone umbrella, namely The Puratone Corporation, Pembina Valley Pigs Ltd., and Niverville Swine Breeders Ltd. (hereinafter "Puratone").

[2] The Puratone Group of companies ran a commercial hog production business. Their business included the breeding, farrowing, finishing and marketing of hogs. In order to carry on this business, Puratone needed grain to be used in feed for its hogs.

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[3] This motion involves 17 farming operators who claim priority to some of the proceeds of sale of the assets of the companies covered by the within CCAA proceedings. The lead farming operator, Interlake Turkey Breeders Ltd. claims to be a part of the steering committee for a group of farmers who supplied grain to the Puratone Group of Companies within two weeks of the filing of this CCAA proceeding. I will hereinafter refer to the group of farmers as "the ITB Claimants".

[4] The Initial Order contained many of the usual provisions, including stay provisions as follows:

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

> 18. THIS COURT ORDERS that until and including October 12, 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 Applicants or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants 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 Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or

> proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

> 26. 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 Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants 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 Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

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[5] Although the Initial Order included the stay provisions for only 30 days ending October 12, 2012, the stays have been extended as a result of a series of motions whilst Puratone has been undergoing its "restructuring". The restructuring referred to has essentially involved the sale of substantially all of its assets to Maple Leaf Foods Inc. on a going concern basis. That sale was approved by the court on November 8, 2012 and closed on December 17, 2012. As part of the order approving the sale, I ordered that the proceeds of sale should be paid to the Monitor to be held pending receipt of a Distribution Order. On March 12, 2013, I granted an order authorizing the distribution of most of the net proceeds from the sale of the assets. The creditors who received funds from the Distribution Order were as follows:

a) Bank of Montréal $17,726,173;

b) Farm Credit Corporation $15,817,303

c) Manitoba Agricultural Services Corporation (MASC) $1,041,524

[6] The sworn pre-CCAA claim of Bank of Montréal before receiving this distribution was $43,322,558. The sworn pre-CCAA claim of the Farm Credit Corporation (FCC) before receiving this distribution was $41,025,891.76. The sworn pre-CCAA claim of MASC before receiving the distribution was $5,263,767.

[7] There are therefore significant shortfalls being sustained by each of the major secured creditors.

[8] The Monitor has retained a sum in an amount of $6,753,765 from the net proceeds. Of this amount, $1,573,765 has been withheld to deal with an issue that has arisen with the purchaser out of the sale and to that extent, as against Puratone and its creditors, the purchaser has the first claim against those funds. A further $5,000,000 was also recommended to be held back. These monies, in addition to whatever might be obtained from the relatively small number of assets yet to be liquidated, are intended to serve as a general holdback pending completion of the CCAA proceedings including the continued realization of remaining assets, resolution of the dispute with the purchaser and potential legal actions.

[9] One of the potential legal actions is a claim by the ITB Claimants ("the ITB Claim"). At the time of the application of the Monitor for a Distribution Order, a motion was brought by the ITB Claimants requesting that $903,250.50 be withheld from any distribution to the major secured creditors, and requesting leave to commence an action against Puratone and its directors and/or officers in order to make the said claim. On its initial return date, I adjourned the motion of the ITB Claimants while authorizing the distribution set out above, which contemplated the holdback that had been

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recommended by the Monitor. I set time frames for the parties to provide briefs and any further affidavit material. On April 10, 2013 the ITB Claimants filed a further notice of motion which amplified their requests. The matter came on for hearing on April 11, 2013 at which time, after hearing submissions, I reserved judgment.

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[10] The claim of the ITB claimants is that they supplied grain to Puratone on an individual contract basis on various dates between August 29 and September 11, 2012, a period within two weeks of the filing of the CCAA proceeding. It is alleged that the grain was used by Puratone to feed the hogs that were ultimately sold to Maple Leaf Foods Inc. as part of the going concern sale ultimately approved by the court. The ITB Claimants argue that at the time of the supply transactions, Puratone was gearing up for its CCAA application and must have then known that it would have been unable to pay for the grain once an Initial Order was pronounced. In essence, the claim of the ITB Claimants boils down to allegations that Puratone acquired the grain when it had no intention of paying for it. As a result, the ITB claimants argue that they have causes of action against Puratone entitling them to :

a) damages for fraudulent misrepresentation on the part of Puratone;
b) a claim [an order] under s. 234 of ***The Corporations Act***, C.C.S.M. c. C225, that Puratone's conduct was oppressive as regards the plaintiffs;
c) a declaration that an implied or constructive trust exists in favour of the plaintiffs, and that Puratone and its secured creditors were unjustly enriched by the feed supplied by the plaintiffs;
d) a declaration that the secured creditors claims are subordinate to those of the plaintiffs, and/or that in equity they subordinated their security to the ITB Claimants;
e) a declaration that Puratone and its directors and officers wrongfully and/or fraudulently caused Puratone to obtain feed from the plaintiffs which they knew would not be paid for;

f) a declaration that the secured creditors colluded with Puratone and/or its directors and officers to, in effect, wrongfully obtain feed which they knew would not be paid for; and

g) a declaration that the secured creditors indemnified, in fact or at law, Puratone and/or its directors and officers by supporting and participating in a process that was designed to ensure that the secured creditors received the benefit of the feed without having to pay for it.

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ANALYSIS

[11] A stay of proceedings is normally included in an Initial Order in order to permit an applicant to proceed with its restructuring (including, in some cases, its liquidation) without continually being harassed by creditors who are dissatisfied with the state of their outstanding accounts. The theory behind the stay order is that it will allow the applicant to devote its full time, efforts and resources to presenting and executing a restructuring plan which is in the best interests of the creditors generally, rather than fighting rearguard actions against individual creditors who are trying to collect their individual accounts.

[12] A stay of proceedings however can be lifted in the appropriate case, but those cases will be the subject of judicial consideration which normally involves a balancing of stakeholder interests.

[13] The CCAA does not set out a specific test identifying the circumstances in which the stay of proceedings should be lifted. Rather, it is in the discretion of the supervising CCAA judge whether a proposed action should be allowed to proceed. Apart from giving the judge the authority to grant the stay, the only guidelines expressed in the CCAA respecting such a stay order are found in section 11.02(3) which says:

(3) The court shall not make the order unless

(*a*) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(*b*) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

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[14] In ***ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.***, 2007 SKCA 72, 9 W.W.R. 79, the Saskatchewan Court of the Appeal indicated that there must be "sound reasons", consistent with the scheme of the CCAA, to relieve against the stay. In the search for "sound reasons", the court suggested the following considerations:

a) the balance of convenience;

b) the relative prejudice to the parties; and

c) the merits of the proposed action.

It also indicated that, "The supervising *CCAA* judge should also consider the good faith and due diligence of the debtor company as referenced in s. 11(6)".

[15] In my respectful view, these considerations are all to be viewed together and in the context of the nature and timing of the CCAA process before the court. The same request may very well receive a different reception in the case of an application for the lifting of a stay early in a CCAA proceeding that contemplates a true restructuring than in the case of an application brought late in a CCAA proceeding that involves only the sale of assets. In the former situation, the existence of a contemporaneous action might jeopardize the ability of the company to restructure as intended. In the latter case, the restructuring, such as it is, has been accomplished and the only issue being

left to sort through is who is entitled to the money. In my view, a court would be more receptive to lifting the stay in the latter case than in the former.

The stay respecting claims against Puratone

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[16] The motion of the ITB Claimants was opposed by Bank of Montréal and FCC. They essentially argued that the ITB Claimants had not demonstrated the existence of a cause of action with enough of a reasonable prospect of success to justify a delay in the distribution of the holdback monies to the secured creditors. In short they focused on the third of the considerations described in ***ICR***. They argued that the proposed claim of the ITB Claimants for a constructive trust respecting some of the assets of Puratone would fail for a number of reasons, namely:

a) The sale of grain by the ITB Claimants involved transactions that do not qualify for the application of the doctrines of unjust enrichment, or equitable subordination. These transactions were essentially commercial transactions as between buyer and seller. It was argued that an unpaid seller is simply a debtor of Puratone. Although Puratone has received a benefit, the normal buyer-seller relationship provides a juristic reason for the benefit, and therefore the doctrine of unjust enrichment does not apply. Furthermore the banks argued that the doctrine of equitable subordination has never been recognized in Canada.

b) The secured creditors are to be viewed as *bona fide* third parties with a commercial interest in the assets of Puratone and the ITB Claimants should not be entitled to jump the queue from the status of unsecured

creditors and receive a priority ahead of secured creditors who hold valid and properly registered securities.

c) It is impossible to trace the grain into the hogs that were ultimately sold during the CCAA proceedings. Therefore, the ITB Claimants have no claim to the proceeds of sale of the hogs.

[17] Counsel for the ITB Claimants has argued that this situation is a relatively new phenomenon. Historically, CCAA proceedings involved the restructuring of a company to permit it to carry on its business. CCAA proceedings in days gone by were not intended to be used where there were no future plans for the company. Counsel for the ITB Claimants argued that in this case, the plan was always to liquidate the assets in a controlled way in order to maximize the return to the secured creditors, but with the expectation that a shortfall would invariably occur to the secured creditors. He submitted that it must have been well known to Puratone as well as its secured creditors and directors and officers that at the time that the grain was supplied by the ITB claimants, Puratone was deeply underwater to its secured creditors. He argued that the evidence of knowledge of such insolvent condition can be inferred by the large shortfall suffered by Bank of Montréal and FCC notwithstanding a going concern sale which was negotiated during the CCAA proceedings only two months after the feed was supplied by the ITB Claimants. Counsel submits that CCAA applications of the scale of this proceeding are not prepared overnight, and that at the time of the supply of grain, Puratone would have been preparing its CCAA materials and would have known that the CCAA proceedings would only yield a sale which resulted in large secured creditor

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deficiencies. He argued that at the time of these contracts of supply, there was no likelihood that the ITB claimants would receive any of their money. He argued that by ordering the grain under these circumstances, essentially Puratone was perpetrating a fraud on the ITB claimants.

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[18] It was urged upon me by counsel for the two banks that the case authorities require a judge to scrutinize the claim which a creditor intends to advance before lifting the stay in a CCAA proceeding. It was argued that the authorities suggest that the test to be employed in lifting a CCAA stay is more than the test used in striking out a statement of claim as disclosing no cause of action or being frivolous and vexatious, but does not require prospective plaintiffs to demonstrate a *prima facie* case. The terms "reasonable cause of action" or "tenable case" have sometimes been used.

[19] In the ***ICR*** case, at paragraph 64 and 65, Jackson, JA wrote:

> [64] Koch J. used *prima facie* case, which he equated with tenable cause of action. "Tenable cause of action" is taken from Ground J.'s decision in *Ivaco*, but Ground J. used "reasonable cause of action" or "tenable case," as comparable terms and as only one of four criteria to be considered. The use of "*prima facie* case" defined as "tenable cause of action" is not particularly helpful as the words have been used in different contexts with different purposes in mind. Even in the context of bankruptcy where specific guidelines are given, and the courts have had long experience with the application of the tests, the debate continues as to what is meant by *prima facie* case and whether it is too high of a standard to apply in determining whether an action may be commenced.
>
> [65] Koch J. was clearly correct to hold that the threshold established by s. 173 of *The Queen's Bench Rules* is too low. On the other hand, it is also important not to decide the case. The purpose for passing on the claim is not to determine whether it will or will not succeed, but to determine whether the plan of arrangement should be delayed or further compromised to accommodate a future claim, or some other step need be taken to maintain the integrity of the *CCAA* proceeding.
> (Emphasis added)

[20] When I scrutinize the proposed claim of the ITB Claimants against Puratone, I conclude that its dismissal is not a foregone conclusion. The ITB Claimants raise a point which so far as I am aware has not been addressed by this court. Here, the court is faced with a CCAA proceeding which has had from the outset all of the earmarks of a liquidation proceeding. The affidavit of Raymond Hildebrand, sworn September 12, 2012 underlying the request for the Initial Order as well as the Pre-Filing Monitor's Report outlined the financial difficulties being experienced by Puratone, the reasons for those difficulties, as well as the efforts that had been made by Puratone and its restructuring professionals to deal with them. Some of the efforts had included a Sales and Solicitation Process ("SISP"), a process designed to find people who were willing to inject money into Puratone either through a going concern sale of assets or in equity injection. Those efforts failed.

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[21] In the Pre-Filing Report of Deloitte & Touche Inc., the then Proposed Monitor wrote:

> 46 The Proposed Monitor has been advised that the SISP, as originally proposed, failed to result in a successful investment or sale transaction. Accordingly, the SISP has been terminated and replaced with a short-term, expedited strategy to complete a sale of the business, or parts thereof, which will be undertaken by the Applicants with the assistance of the Proposed Monitor (the "Sales Process").

[22] The Initial Order was granted based on information, *inter alia,* that the major secured creditors were Bank of Montréal and FCC. As indicated earlier, less than three months later, the parties were recommending a sale which would result in large secured creditor shortfalls. The ITB Claimants argue that this result must have been contemplated by Puratone at the time that the ITB Claimants supplied their grain to

Puratone. This raises the interesting question as to whether that expectation was in the mind of Puratone at the time that the grain was supplied, and if so, whether the ITB Claimants are entitled to any relief from Puratone other than a meaningless monetary judgment. It raises the issue whether a company with exposed secured creditors should be incurring credit at a time when it is preparing to make a CCAA application.

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[23] The ITB claimants request a constructive trust over the assets of Puratone that were sold during the CCAA proceeding which, if ordered, would erode the assets over which the banks claim security by the amount of the unpaid accounts of the ITB Claimants. A constructive trust has been recognized as a remedy against a debtor in the event that there has been a fraud. In Peter D. Maddaugh and John D. McCamus, The Law of Restitution, (looseleaf), Volume 1, at paragraph 5:200.30, the following is written:

> Chancery's willingness to impose a constructive trust in circumstances where a fraud has been perpetrated is by no means a modern development. No pre-existing fiduciary relationship need be established for this category of constructive trust and, indeed, a breach of trust or other fiduciary obligation is, in itself, simply one form of equitable fraud. As Lord Westbury explained in McCormick v. Grogan: "it is a jurisdiction by which a Court of Equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud." And, in Westdeutsche Landesbank Girozentrale v. Islington L.B.C., Lord Browne-Wilkinson recognized that "when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity". For example, one who acquires property by theft or fraudulent misrepresentation may be held a constructive trustee of the misappropriated property.

[24] The question arises whether there is any practical reason for permitting the ITB Claimants to make their claim against Puratone at this time. Courts will generally not

impose a constructive trust where the remedy jeopardizes the priority of innocent parties for value. In this regard, see ***Lac Minerals Ltd. v. International Corona Resources Ltd.***, [1989] 2 S.C.R. 574, where LaForest J says:

> 197 …In the vast majority of cases a constructive trust will not be the appropriate remedy. Thus, in Hunter Engineering Co. v. Syncrude Canada Ltd., supra, had the restitutionary claim been made out, there would have been no reason to award a constructive trust, as the plaintiff's claim could have been satisfied simply by a personal monetary award; a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. Among the most important of these will be that it is appropriate that the plaintiff receive the priority accorded to the holder of a right of property in a bankruptcy….

The banks argue that there is no evidence that they are anything but innocent parties in these circumstances. Counsel for the two banks argue that there is no affidavit evidence adduced by the ITB Claimants that indicates that the banks were knowledgeable about any fraudulent intent on the part of Puratone, even if such existed. They argue that the court should not lift the stay simply on the basis that the ITB Claimants make such an unsubstantiated allegation. Rather it is argued that the banks should, for the purpose of this motion, be assumed to have had no knowledge of any bad intent that is alleged to have been possessed on the part of Puratone, and that being the case, there is no prospect, let alone a reasonable prospect, that the ITB Claimants will be successful in obtaining a constructive trust at the end of the day.

[25] The problem which I see with this submission is that evidence of the knowledge of the banks at the material times is a factual matter that is not readily apparent. Evidence such as that would normally only surface during the discovery process in civil litigation. The banks have chosen to file no affidavit material in this motion. It seems too high a threshold to require the ITB Claimants to demonstrate the knowledge of the

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banks at the material times on this motion. For current purposes, it is sufficient to conclude that given the size of the troubled loans, a reasonable inference is that the two banks who appeared to oppose the ITB Claimants motion would have been aware of the pending CCAA proceedings before they were filed, and at the time that the grain was being supplied, bank representatives would have had more than a cursory understanding of the business of Puratone and its financial difficulties. Whether the banks were aware that Puratone was purchasing grain on other than a COD basis after the decision had been made to apply for a CCAA order, and if so, whether the banks were in any position to do anything about it, is currently unknown. I do not say that the ITB Claimants will prevail in demonstrating the necessary knowledge in the fullness of time, but they have a claim which raises interesting issues, and they should be given the opportunity to pursue it sooner rather than later, especially when the existence of the claim will not jeopardize any restructuring.

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[26] What then of the other considerations enumerated by Jackson JA in the ***ICR*** case?

[27] The merits of the claim against Puratone aside for the moment, the ITB Claim essentially translates into a priority claim between competing creditors. There is no restructuring plan which is being put at risk in this case. This proceeding is almost over. There are a few assets left to be liquidated, but that process will not be put at risk by the existence of the proposed claim by the ITB Claimants. Indeed, the Monitor confirms as such when in its latest report, it observed:

> 20. The Monitor understands that the general purpose of a stay of proceedings under the CCAA is to maintain the *status quo* for a period of time in order that a

> debtor company (and its directors and officers) can focus on restructuring efforts without undue interference.
>
> 21. Substantially all of the undertaking, property and assets of the Applicants have been sold and it is not anticipated that any formal restructuring will occur. In these circumstances, subject to the proviso which follows with respect to the role of the Monitor should litigation ensue, the Monitor is of the view that there would be no particular prejudice to the CCAA Proceedings if the stay of proceedings is lifted to enable ITB to initiate and proceed with an action against the Applicants and the directors and/or officers of the Applicants.

[28] The proviso of the Monitor was simply that it not be required to retain any role in the litigation, if it was allowed to proceed.

[29] Accordingly, the balance of convenience favors the ITB Claimants.

[30] What then is the prejudice to be suffered if the claim were permitted to proceed at this time? The real prejudice in this case is that if the ITB Claimants are entitled to commence their action now against Puratone and the secured creditors, there could be a delay in the distribution of the holdback monies to the secured creditors. The banks would essentially be deprived of their use of the monies during the litigation and the return on the monies while sitting in the Monitor's trust account would not match what the banks might earn on those monies were they in hand.

[31] On the other hand, if I do not permit the claim to be made at this time, the ITB Claimants would be forced to await the end of the CCAA proceeding before commencing their claim. By that time, there would be no money left in Puratone. It all will have been paid to the secured creditors, with at least the tacit acknowledgment by the court that those creditors were entitled to those monies ahead of anyone else. A

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result such as this is inconsistent with the notion that in a CCAA proceeding, creditors have resort to the supervising court to adjudicate on priority disputes.

[32] Any prejudice created by the delay in distribution of funds can easily be alleviated by analogy to the Court Rules respecting prejudgment garnishment. In effect, that is the result which is being sought by the ITB Claimants. Although *Queen's Bench Rule* 46.14 (1) permits garnishment before judgment, Rule 46.14 (3) reads as follows:

> 46.14(3) An order under subrule (1) (Form 46D) may include,
> (a) a requirement that the plaintiff post security in a form and amount to be determined by the court; and
> (b) such other terms and conditions as may be just.

[33] There is no doubt that the secured creditors are *prima facie* entitled to the proceeds of these proceedings. They have valid security agreements which have been properly registered. The ITB Claimants seek to challenge their priority not on the basis that the banks are not secured creditors, but on the basis of factual circumstances that would make it equitable to provide the ITB Claimants with a priority over the secured creditors. There are factual impediments to their claim for unjust enrichment and potentially legal impediments to their claim for equitable subordination and tracing. If I give them the right to make those claims, and those claims are not successful, the delays which those claims might cause to the timely receipt of monies by the secured creditors should not go unaddressed. This can be done by requiring the ITB Claimants to each file an undertaking whereby they would be liable to pay either or both of the banks damages arising from the delay in the payment of the holdback monies attributable to their claim. I am therefore ordering that out of the general holdback

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monies the amount of $903,250.50 be dedicated to the ITB Claim and not be paid out without further order of court, which presumably will occur either after the claim has been resolved or upon sufficient evidence being demonstrated that it has not been prosecuted in a timely way. Counsel may try and agree on the form of the undertaking as to damages, but may come back to me should agreement not be reached.

[34] As regards Puratone, I therefore make the following orders:

a) Out of the general holdback monies, the sum of $903,250.50 and any interest accrued thereon since March 12, 2013 shall be segregated in an interest bearing account designated as the ITB Claim Monies.

b) Leave is given to the ITB Claimants to commence the action against Puratone described at Schedule A of their notice of motion dated April 10, 2013, provided:

(1) they issue it within 40 days after the date of signing of the Order that evidences this decision, and

(2) Prior to the issuance of the Statement of Claim, each named plaintiff will file an undertaking as to damages for its pro rata share of any damages sustained by Bank of Montréal and/or FCC arising from any delay after July 31, 2013 in the distribution of its portion of the ITB Claim monies to Bank of Montréal and/or FCC caused by the issuance of the ITB Claim.

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[35] If a claimant does not file the requested undertaking as to damages, I will consider that such claimant has abandoned its claim and the ITB Claim Monies may be reduced by the amount of that claimant's claim.

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The Proposed Claim against the directors and/or officers

[36] The claim of the ITB Claimants against the directors and/or officers similarly finds its roots in the allegations of fraud made against Puratone. Counsel for the directors and officers relies upon the case of ***Peoples Department Stores Inc. (Trustee Of) v Wise***, 2004 SCC 68, [2004] S.C.J. No. 64, drawing from it the principle that deference ought to be given to the decisions that directors make as they fulfill their functions. Notwithstanding that case, there is an argument to be made that where a company has committed a fraud, be it legal or equitable, knowledge on the part of directors of such conduct by officers or employees of the company may make the directors vicariously and/or personally liable.

[37] Again, evidence of the actual knowledge of the directors and/or the officers is not readily apparent without the ability to inquire into the records of the company through the discovery process. For the same reasons that I expressed as regards the two banks, requiring the ITB Claimants to adduce evidence on this motion of the directors' and officers' knowledge is too high a threshold to impose. A reasonable inference is that at least some of the directors and officers would have known that a CCAA proceeding was being prepared within the two week period prior to the CCAA filing, and at least some of the directors and officers would have had intimate knowledge of the financial constraints of the company and the efforts which the

company was employing to solve them during the two week period prior to the filing of the CCAA proceeding. That reasonable inference in my view is sufficient to conclude that the proposed claim against the directors and/or officers is not necessarily doomed to fail. This case, as with many, will depend on facts not currently available to the court.

[38] Additionally, the balance of convenience favors the ITB Claimants, and I see no prejudice to the directors and officers facing the ITB claim sooner rather than later.

[39] In my view there are sound reasons to justify lifting the stay to permit the ITB Claimants to issue the proposed claim against the officers and are directors, providing it is issued within 40 days after the date of signing of the Order that evidences this decision. It will however be necessary for the claimants to name the particular individuals who they propose to sue, recognizing that they may expose themselves to costs, possibly on a solicitor and own client basis, for every person that they unsuccessfully sue.

GOING FORWARD

[40] I have contemplated that the claim should be commenced by one statement of claim, naming at least Puratone and the named officers and directors. The normal Rules of the Court should be followed with the additional requirement that the action will be case managed. A case management conference before me shall be set up within 30 days of the close of pleadings, or earlier upon written request of any party.

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[41] If necessary, the costs of this motion shall be determined by me upon the resolution of the ITB Claims.

_______________________J.

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[1] On September 12, 2012, an Initial Order was pronounced by me in a proceeding under the ***Companies' Creditors Arrangement Act***, R.S.C., 1985, c. C-36 (the "CCAA") filed on that date by three of the companies within the Puratone umbrella, namely The Puratone Corporation, Pembina Valley Pigs Ltd., and Niverville Swine Breeders Ltd. (hereinafter "Puratone").

[2] The Puratone Group of companies ran a commercial hog production business. Their business included the breeding, farrowing, finishing and marketing of hogs. In order to carry on this business, Puratone needed grain to be used in feed for its hogs.

[3] This motion involves 17 farming operators who claim priority to some of the proceeds of sale of the assets of the companies covered by the within CCAA proceedings. The lead farming operator, Interlake Turkey Breeders Ltd. claims to be a part of the steering committee for a group of farmers who supplied grain to the Puratone Group of Companies within two weeks of the filing of this CCAA proceeding. I will hereinafter refer to the group of farmers as "the ITB Claimants".

[4] The Initial Order contained many of the usual provisions, including stay provisions as follows:

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

> 18. THIS COURT ORDERS that until and including October 12, 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 Applicants or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants 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 Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or

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> proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

> 26. 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 Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants 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 Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

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[5] Although the Initial Order included the stay provisions for only 30 days ending October 12, 2012, the stays have been extended as a result of a series of motions whilst Puratone has been undergoing its "restructuring". The restructuring referred to has essentially involved the sale of substantially all of its assets to Maple Leaf Foods Inc. on a going concern basis. That sale was approved by the court on November 8, 2012 and closed on December 17, 2012. As part of the order approving the sale, I ordered that the proceeds of sale should be paid to the Monitor to be held pending receipt of a Distribution Order. On March 12, 2013, I granted an order authorizing the distribution of most of the net proceeds from the sale of the assets. The creditors who received funds from the Distribution Order were as follows:

a) Bank of Montréal $17,726,173;

b) Farm Credit Corporation $15,817,303

c) Manitoba Agricultural Services Corporation (MASC) $1,041,524

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[6] The sworn pre-CCAA claim of Bank of Montréal before receiving this distribution was $43,322,558. The sworn pre-CCAA claim of the Farm Credit Corporation (FCC) before receiving this distribution was $41,025,891.76. The sworn pre-CCAA claim of MASC before receiving the distribution was $5,263,767.

[7] There are therefore significant shortfalls being sustained by each of the major secured creditors.

[8] The Monitor has retained a sum in an amount of $6,753,765 from the net proceeds. Of this amount, $1,573,765 has been withheld to deal with an issue that has arisen with the purchaser out of the sale and to that extent, as against Puratone and its creditors, the purchaser has the first claim against those funds. A further $5,000,000 was also recommended to be held back. These monies, in addition to whatever might be obtained from the relatively small number of assets yet to be liquidated, are intended to serve as a general holdback pending completion of the CCAA proceedings including the continued realization of remaining assets, resolution of the dispute with the purchaser and potential legal actions.

[9] One of the potential legal actions is a claim by the ITB Claimants ("the ITB Claim"). At the time of the application of the Monitor for a Distribution Order, a motion was brought by the ITB Claimants requesting that $903,250.50 be withheld from any distribution to the major secured creditors, and requesting leave to commence an action against Puratone and its directors and/or officers in order to make the said claim. On its initial return date, I adjourned the motion of the ITB Claimants while authorizing the distribution set out above, which contemplated the holdback that had been

recommended by the Monitor. I set time frames for the parties to provide briefs and any further affidavit material. On April 10, 2013 the ITB Claimants filed a further notice of motion which amplified their requests. The matter came on for hearing on April 11, 2013 at which time, after hearing submissions, I reserved judgment.

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[10] The claim of the ITB claimants is that they supplied grain to Puratone on an individual contract basis on various dates between August 29 and September 11, 2012, a period within two weeks of the filing of the CCAA proceeding. It is alleged that the grain was used by Puratone to feed the hogs that were ultimately sold to Maple Leaf Foods Inc. as part of the going concern sale ultimately approved by the court. The ITB Claimants argue that at the time of the supply transactions, Puratone was gearing up for its CCAA application and must have then known that it would have been unable to pay for the grain once an Initial Order was pronounced. In essence, the claim of the ITB Claimants boils down to allegations that Puratone acquired the grain when it had no intention of paying for it. As a result, the ITB claimants argue that they have causes of action against Puratone entitling them to :

a) damages for fraudulent misrepresentation on the part of Puratone;
b) a claim [an order] under s. 234 of ***The Corporations Act***, C.C.S.M. c. C225, that Puratone's conduct was oppressive as regards the plaintiffs;
c) a declaration that an implied or constructive trust exists in favour of the plaintiffs, and that Puratone and its secured creditors were unjustly enriched by the feed supplied by the plaintiffs;
d) a declaration that the secured creditors claims are subordinate to those of the plaintiffs, and/or that in equity they subordinated their security to the ITB Claimants;
e) a declaration that Puratone and its directors and officers wrongfully and/or fraudulently caused Puratone to obtain feed from the plaintiffs which they knew would not be paid for;

f) a declaration that the secured creditors colluded with Puratone and/or its directors and officers to, in effect, wrongfully obtain feed which they knew would not be paid for; and

g) a declaration that the secured creditors indemnified, in fact or at law, Puratone and/or its directors and officers by supporting and participating in a process that was designed to ensure that the secured creditors received the benefit of the feed without having to pay for it.

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ANALYSIS

[11] A stay of proceedings is normally included in an Initial Order in order to permit an applicant to proceed with its restructuring (including, in some cases, its liquidation) without continually being harassed by creditors who are dissatisfied with the state of their outstanding accounts. The theory behind the stay order is that it will allow the applicant to devote its full time, efforts and resources to presenting and executing a restructuring plan which is in the best interests of the creditors generally, rather than fighting rearguard actions against individual creditors who are trying to collect their individual accounts.

[12] A stay of proceedings however can be lifted in the appropriate case, but those cases will be the subject of judicial consideration which normally involves a balancing of stakeholder interests.

[13] The CCAA does not set out a specific test identifying the circumstances in which the stay of proceedings should be lifted. Rather, it is in the discretion of the supervising CCAA judge whether a proposed action should be allowed to proceed. Apart from giving the judge the authority to grant the stay, the only guidelines expressed in the CCAA respecting such a stay order are found in section 11.02(3) which says:

(3) The court shall not make the order unless

(*a*) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(*b*) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

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[14] In ***ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.***, 2007 SKCA 72, 9 W.W.R. 79, the Saskatchewan Court of the Appeal indicated that there must be "sound reasons", consistent with the scheme of the CCAA, to relieve against the stay. In the search for "sound reasons", the court suggested the following considerations:

a) the balance of convenience;

b) the relative prejudice to the parties; and

c) the merits of the proposed action.

It also indicated that, "The supervising *CCAA* judge should also consider the good faith and due diligence of the debtor company as referenced in s. 11(6)".

[15] In my respectful view, these considerations are all to be viewed together and in the context of the nature and timing of the CCAA process before the court. The same request may very well receive a different reception in the case of an application for the lifting of a stay early in a CCAA proceeding that contemplates a true restructuring than in the case of an application brought late in a CCAA proceeding that involves only the sale of assets. In the former situation, the existence of a contemporaneous action might jeopardize the ability of the company to restructure as intended. In the latter case, the restructuring, such as it is, has been accomplished and the only issue being

left to sort through is who is entitled to the money. In my view, a court would be more receptive to lifting the stay in the latter case than in the former.

The stay respecting claims against Puratone

[16] The motion of the ITB Claimants was opposed by Bank of Montréal and FCC. They essentially argued that the ITB Claimants had not demonstrated the existence of a cause of action with enough of a reasonable prospect of success to justify a delay in the distribution of the holdback monies to the secured creditors. In short they focused on the third of the considerations described in ***ICR***. They argued that the proposed claim of the ITB Claimants for a constructive trust respecting some of the assets of Puratone would fail for a number of reasons, namely:

a) The sale of grain by the ITB Claimants involved transactions that do not qualify for the application of the doctrines of unjust enrichment, or equitable subordination. These transactions were essentially commercial transactions as between buyer and seller. It was argued that an unpaid seller is simply a debtor of Puratone. Although Puratone has received a benefit, the normal buyer-seller relationship provides a juristic reason for the benefit, and therefore the doctrine of unjust enrichment does not apply. Furthermore the banks argued that the doctrine of equitable subordination has never been recognized in Canada.

b) The secured creditors are to be viewed as *bona fide* third parties with a commercial interest in the assets of Puratone and the ITB Claimants should not be entitled to jump the queue from the status of unsecured

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creditors and receive a priority ahead of secured creditors who hold valid and properly registered securities.

c) It is impossible to trace the grain into the hogs that were ultimately sold during the CCAA proceedings. Therefore, the ITB Claimants have no claim to the proceeds of sale of the hogs.

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[17] Counsel for the ITB Claimants has argued that this situation is a relatively new phenomenon. Historically, CCAA proceedings involved the restructuring of a company to permit it to carry on its business. CCAA proceedings in days gone by were not intended to be used where there were no future plans for the company. Counsel for the ITB Claimants argued that in this case, the plan was always to liquidate the assets in a controlled way in order to maximize the return to the secured creditors, but with the expectation that a shortfall would invariably occur to the secured creditors. He submitted that it must have been well known to Puratone as well as its secured creditors and directors and officers that at the time that the grain was supplied by the ITB claimants, Puratone was deeply underwater to its secured creditors. He argued that the evidence of knowledge of such insolvent condition can be inferred by the large shortfall suffered by Bank of Montréal and FCC notwithstanding a going concern sale which was negotiated during the CCAA proceedings only two months after the feed was supplied by the ITB Claimants. Counsel submits that CCAA applications of the scale of this proceeding are not prepared overnight, and that at the time of the supply of grain, Puratone would have been preparing its CCAA materials and would have known that the CCAA proceedings would only yield a sale which resulted in large secured creditor

deficiencies. He argued that at the time of these contracts of supply, there was no likelihood that the ITB claimants would receive any of their money. He argued that by ordering the grain under these circumstances, essentially Puratone was perpetrating a fraud on the ITB claimants.

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[18] It was urged upon me by counsel for the two banks that the case authorities require a judge to scrutinize the claim which a creditor intends to advance before lifting the stay in a CCAA proceeding. It was argued that the authorities suggest that the test to be employed in lifting a CCAA stay is more than the test used in striking out a statement of claim as disclosing no cause of action or being frivolous and vexatious, but does not require prospective plaintiffs to demonstrate a *prima facie* case. The terms "reasonable cause of action" or "tenable case" have sometimes been used.

[19] In the ***ICR*** case, at paragraph 64 and 65, Jackson, JA wrote:

> [64] Koch J. used *prima facie* case, which he equated with tenable cause of action. "Tenable cause of action" is taken from Ground J.'s decision in *Ivaco*, but Ground J. used "reasonable cause of action" or "tenable case," as comparable terms and as only one of four criteria to be considered. The use of "*prima facie* case" defined as "tenable cause of action" is not particularly helpful as the words have been used in different contexts with different purposes in mind. Even in the context of bankruptcy where specific guidelines are given, and the courts have had long experience with the application of the tests, the debate continues as to what is meant by *prima facie* case and whether it is too high of a standard to apply in determining whether an action may be commenced.
>
> [65] Koch J. was clearly correct to hold that the threshold established by s. 173 of *The Queen's Bench Rules* is too low. On the other hand, it is also important not to decide the case. The purpose for passing on the claim is not to determine whether it will or will not succeed, but to determine whether the plan of arrangement should be delayed or further compromised to accommodate a future claim, or some other step need be taken to maintain the integrity of the *CCAA* proceeding.
> (Emphasis added)

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[20] When I scrutinize the proposed claim of the ITB Claimants against Puratone, I conclude that its dismissal is not a foregone conclusion. The ITB Claimants raise a point which so far as I am aware has not been addressed by this court. Here, the court is faced with a CCAA proceeding which has had from the outset all of the earmarks of a liquidation proceeding. The affidavit of Raymond Hildebrand, sworn September 12, 2012 underlying the request for the Initial Order as well as the Pre-Filing Monitor's Report outlined the financial difficulties being experienced by Puratone, the reasons for those difficulties, as well as the efforts that had been made by Puratone and its restructuring professionals to deal with them. Some of the efforts had included a Sales and Solicitation Process ("SISP"), a process designed to find people who were willing to inject money into Puratone either through a going concern sale of assets or in equity injection. Those efforts failed.

[21] In the Pre-Filing Report of Deloitte & Touche Inc., the then Proposed Monitor wrote:

> 46 The Proposed Monitor has been advised that the SISP, as originally proposed, failed to result in a successful investment or sale transaction. Accordingly, the SISP has been terminated and replaced with a short-term, expedited strategy to complete a sale of the business, or parts thereof, which will be undertaken by the Applicants with the assistance of the Proposed Monitor (the "Sales Process").

[22] The Initial Order was granted based on information, *inter alia,* that the major secured creditors were Bank of Montréal and FCC. As indicated earlier, less than three months later, the parties were recommending a sale which would result in large secured creditor shortfalls. The ITB Claimants argue that this result must have been contemplated by Puratone at the time that the ITB Claimants supplied their grain to

Puratone. This raises the interesting question as to whether that expectation was in the mind of Puratone at the time that the grain was supplied, and if so, whether the ITB Claimants are entitled to any relief from Puratone other than a meaningless monetary judgment. It raises the issue whether a company with exposed secured creditors should be incurring credit at a time when it is preparing to make a CCAA application.

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[23] The ITB claimants request a constructive trust over the assets of Puratone that were sold during the CCAA proceeding which, if ordered, would erode the assets over which the banks claim security by the amount of the unpaid accounts of the ITB Claimants. A constructive trust has been recognized as a remedy against a debtor in the event that there has been a fraud. In Peter D. Maddaugh and John D. McCamus, The Law of Restitution, (looseleaf), Volume 1, at paragraph 5:200.30, the following is written:

> Chancery's willingness to impose a constructive trust in circumstances where a fraud has been perpetrated is by no means a modern development. No pre-existing fiduciary relationship need be established for this category of constructive trust and, indeed, a breach of trust or other fiduciary obligation is, in itself, simply one form of equitable fraud. As Lord Westbury explained in McCormick v. Grogan: "it is a jurisdiction by which a Court of Equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud." And, in Westdeutsche Landesbank Girozentrale v. Islington L.B.C., Lord Browne-Wilkinson recognized that "when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity". For example, one who acquires property by theft or fraudulent misrepresentation may be held a constructive trustee of the misappropriated property.

[24] The question arises whether there is any practical reason for permitting the ITB Claimants to make their claim against Puratone at this time. Courts will generally not

impose a constructive trust where the remedy jeopardizes the priority of innocent parties for value. In this regard, see ***Lac Minerals Ltd. v. International Corona Resources Ltd.***, [1989] 2 S.C.R. 574, where LaForest J says:

> 197 …In the vast majority of cases a constructive trust will not be the appropriate remedy. Thus, in Hunter Engineering Co. v. Syncrude Canada Ltd., supra, had the restitutionary claim been made out, there would have been no reason to award a constructive trust, as the plaintiff's claim could have been satisfied simply by a personal monetary award; a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. Among the most important of these will be that it is appropriate that the plaintiff receive the priority accorded to the holder of a right of property in a bankruptcy….

The banks argue that there is no evidence that they are anything but innocent parties in these circumstances. Counsel for the two banks argue that there is no affidavit evidence adduced by the ITB Claimants that indicates that the banks were knowledgeable about any fraudulent intent on the part of Puratone, even if such existed. They argue that the court should not lift the stay simply on the basis that the ITB Claimants make such an unsubstantiated allegation. Rather it is argued that the banks should, for the purpose of this motion, be assumed to have had no knowledge of any bad intent that is alleged to have been possessed on the part of Puratone, and that being the case, there is no prospect, let alone a reasonable prospect, that the ITB Claimants will be successful in obtaining a constructive trust at the end of the day.

[25] The problem which I see with this submission is that evidence of the knowledge of the banks at the material times is a factual matter that is not readily apparent. Evidence such as that would normally only surface during the discovery process in civil litigation. The banks have chosen to file no affidavit material in this motion. It seems too high a threshold to require the ITB Claimants to demonstrate the knowledge of the

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banks at the material times on this motion. For current purposes, it is sufficient to conclude that given the size of the troubled loans, a reasonable inference is that the two banks who appeared to oppose the ITB Claimants motion would have been aware of the pending CCAA proceedings before they were filed, and at the time that the grain was being supplied, bank representatives would have had more than a cursory understanding of the business of Puratone and its financial difficulties. Whether the banks were aware that Puratone was purchasing grain on other than a COD basis after the decision had been made to apply for a CCAA order, and if so, whether the banks were in any position to do anything about it, is currently unknown. I do not say that the ITB Claimants will prevail in demonstrating the necessary knowledge in the fullness of time, but they have a claim which raises interesting issues, and they should be given the opportunity to pursue it sooner rather than later, especially when the existence of the claim will not jeopardize any restructuring.

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[26] What then of the other considerations enumerated by Jackson JA in the ***ICR*** case?

[27] The merits of the claim against Puratone aside for the moment, the ITB Claim essentially translates into a priority claim between competing creditors. There is no restructuring plan which is being put at risk in this case. This proceeding is almost over. There are a few assets left to be liquidated, but that process will not be put at risk by the existence of the proposed claim by the ITB Claimants. Indeed, the Monitor confirms as such when in its latest report, it observed:

> 20. The Monitor understands that the general purpose of a stay of proceedings under the CCAA is to maintain the *status quo* for a period of time in order that a

> debtor company (and its directors and officers) can focus on restructuring efforts without undue interference.
>
> 21. Substantially all of the undertaking, property and assets of the Applicants have been sold and it is not anticipated that any formal restructuring will occur. In these circumstances, subject to the proviso which follows with respect to the role of the Monitor should litigation ensue, the Monitor is of the view that there would be no particular prejudice to the CCAA Proceedings if the stay of proceedings is lifted to enable ITB to initiate and proceed with an action against the Applicants and the directors and/or officers of the Applicants.

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[28] The proviso of the Monitor was simply that it not be required to retain any role in the litigation, if it was allowed to proceed.

[29] Accordingly, the balance of convenience favors the ITB Claimants.

[30] What then is the prejudice to be suffered if the claim were permitted to proceed at this time? The real prejudice in this case is that if the ITB Claimants are entitled to commence their action now against Puratone and the secured creditors, there could be a delay in the distribution of the holdback monies to the secured creditors. The banks would essentially be deprived of their use of the monies during the litigation and the return on the monies while sitting in the Monitor's trust account would not match what the banks might earn on those monies were they in hand.

[31] On the other hand, if I do not permit the claim to be made at this time, the ITB Claimants would be forced to await the end of the CCAA proceeding before commencing their claim. By that time, there would be no money left in Puratone. It all will have been paid to the secured creditors, with at least the tacit acknowledgment by the court that those creditors were entitled to those monies ahead of anyone else. A

result such as this is inconsistent with the notion that in a CCAA proceeding, creditors have resort to the supervising court to adjudicate on priority disputes.

[32] Any prejudice created by the delay in distribution of funds can easily be alleviated by analogy to the Court Rules respecting prejudgment garnishment. In effect, that is the result which is being sought by the ITB Claimants. Although *Queen's Bench Rule* 46.14 (1) permits garnishment before judgment, Rule 46.14 (3) reads as follows:

> 46.14(3) An order under subrule (1) (Form 46D) may include,
> (a) a requirement that the plaintiff post security in a form and amount to be determined by the court; and
> (b) such other terms and conditions as may be just.

[33] There is no doubt that the secured creditors are *prima facie* entitled to the proceeds of these proceedings. They have valid security agreements which have been properly registered. The ITB Claimants seek to challenge their priority not on the basis that the banks are not secured creditors, but on the basis of factual circumstances that would make it equitable to provide the ITB Claimants with a priority over the secured creditors. There are factual impediments to their claim for unjust enrichment and potentially legal impediments to their claim for equitable subordination and tracing. If I give them the right to make those claims, and those claims are not successful, the delays which those claims might cause to the timely receipt of monies by the secured creditors should not go unaddressed. This can be done by requiring the ITB Claimants to each file an undertaking whereby they would be liable to pay either or both of the banks damages arising from the delay in the payment of the holdback monies attributable to their claim. I am therefore ordering that out of the general holdback

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monies the amount of $903,250.50 be dedicated to the ITB Claim and not be paid out without further order of court, which presumably will occur either after the claim has been resolved or upon sufficient evidence being demonstrated that it has not been prosecuted in a timely way. Counsel may try and agree on the form of the undertaking as to damages, but may come back to me should agreement not be reached.

[34] As regards Puratone, I therefore make the following orders:

a) Out of the general holdback monies, the sum of $903,250.50 and any interest accrued thereon since March 12, 2013 shall be segregated in an interest bearing account designated as the ITB Claim Monies.

b) Leave is given to the ITB Claimants to commence the action against Puratone described at Schedule A of their notice of motion dated April 10, 2013, provided:

(1) they issue it within 40 days after the date of signing of the Order that evidences this decision, and

(2) Prior to the issuance of the Statement of Claim, each named plaintiff will file an undertaking as to damages for its pro rata share of any damages sustained by Bank of Montréal and/or FCC arising from any delay after July 31, 2013 in the distribution of its portion of the ITB Claim monies to Bank of Montréal and/or FCC caused by the issuance of the ITB Claim.

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[35] If a claimant does not file the requested undertaking as to damages, I will consider that such claimant has abandoned its claim and the ITB Claim Monies may be reduced by the amount of that claimant's claim.

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The Proposed Claim against the directors and/or officers

[36] The claim of the ITB Claimants against the directors and/or officers similarly finds its roots in the allegations of fraud made against Puratone. Counsel for the directors and officers relies upon the case of ***Peoples Department Stores Inc. (Trustee Of) v Wise***, 2004 SCC 68, [2004] S.C.J. No. 64, drawing from it the principle that deference ought to be given to the decisions that directors make as they fulfill their functions. Notwithstanding that case, there is an argument to be made that where a company has committed a fraud, be it legal or equitable, knowledge on the part of directors of such conduct by officers or employees of the company may make the directors vicariously and/or personally liable.

[37] Again, evidence of the actual knowledge of the directors and/or the officers is not readily apparent without the ability to inquire into the records of the company through the discovery process. For the same reasons that I expressed as regards the two banks, requiring the ITB Claimants to adduce evidence on this motion of the directors' and officers' knowledge is too high a threshold to impose. A reasonable inference is that at least some of the directors and officers would have known that a CCAA proceeding was being prepared within the two week period prior to the CCAA filing, and at least some of the directors and officers would have had intimate knowledge of the financial constraints of the company and the efforts which the

company was employing to solve them during the two week period prior to the filing of the CCAA proceeding. That reasonable inference in my view is sufficient to conclude that the proposed claim against the directors and/or officers is not necessarily doomed to fail. This case, as with many, will depend on facts not currently available to the court.

[38] Additionally, the balance of convenience favors the ITB Claimants, and I see no prejudice to the directors and officers facing the ITB claim sooner rather than later.

[39] In my view there are sound reasons to justify lifting the stay to permit the ITB Claimants to issue the proposed claim against the officers and are directors, providing it is issued within 40 days after the date of signing of the Order that evidences this decision. It will however be necessary for the claimants to name the particular individuals who they propose to sue, recognizing that they may expose themselves to costs, possibly on a solicitor and own client basis, for every person that they unsuccessfully sue.

GOING FORWARD

[40] I have contemplated that the claim should be commenced by one statement of claim, naming at least Puratone and the named officers and directors. The normal Rules of the Court should be followed with the additional requirement that the action will be case managed. A case management conference before me shall be set up within 30 days of the close of pleadings, or earlier upon written request of any party.

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[41] If necessary, the costs of this motion shall be determined by me upon the resolution of the ITB Claims.

_______________________J.

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