CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-048114-157

SUPERIOR COURT

(Commercial Division)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, 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, WABUSH RESOURCES INC.

Petitioners

-and-

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

Mises-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

-and-

MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON

Objecting Parties-Mises-en-cause

Book of Authorities of the Representatives of the Salaried Employees and Retirees in response to the Motion by the Monitor for Directions with respect to Pension Claims and the transfer of certain questions to the Newfoundland Court

(Sections 11, 17, and 23(k) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36)

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TAB 1

IBM Canada Limited *Appellant*

v.

Richard Waterman *Respondent*

Indexed as: IBM Canada Limited *v.* Waterman

2013 SCC 70

File No.: 34472.

2012: December 14; 2013: December 13.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

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

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

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

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

IBM Canada Limitée *Appelante*

c.

Richard Waterman *Intimé*

Répertorié : IBM Canada Limitée *c.* Waterman

2013 CSC 70

Nº du greffe : 34472.

2012 : 14 décembre; 2013 : 13 décembre.

Présents : La juge en chef McLachlin et les juges LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit de l'emploi — Congédiement injustifié — Dommages-intérêts — Avantage compensatoire — Employé congédié touchant des prestations de retraite à compter de son congédiement — Juge de première instance estimant approprié un préavis de 20 mois sans déduction des prestations de retraite reçues — Les prestations de retraite constituent-elles un avantage compensatoire? — Les prestations de retraite devraient-elles être déduites des dommages-intérêts accordés pour congédiement injustifié?

IBM a congédié W sans motif valable en lui donnant un préavis de deux mois. W était alors âgé de 65 ans, comptait 42 années de service et avait un intérêt acquis dans le régime de retraite à prestations déterminées d'IBM. Aux termes du régime, IBM versait au nom de W un pourcentage de son salaire à la caisse de retraite. Au moment de son congédiement, W était admissible à une pension maximale et son congédiement n'avait aucune incidence sur le montant de ses prestations de retraite.

W a intenté une action en justice en vue de faire reconnaître son droit contractuel à un préavis raisonnable. Le juge de première instance a conclu qu'un préavis de 20 mois aurait dû être donné et a refusé, dans son calcul des dommages-intérêts, de déduire les prestations de retraite versées à W au cours de la période de préavis. La Cour d'appel a rejeté l'appel.

Arrêt (la juge en chef McLachlin et le juge Rothstein sont dissidents) : Le pourvoi est rejeté.

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

Les juges LeBel, Fish, Abella, Cromwell, Moldaver, Karakatsanis et Wagner : La règle selon laquelle les dommages-intérêts sont calculés en fonction de la perte réelle du demandeur ne s'applique pas dans toutes les situations. Il est depuis longtemps reconnu en droit que l'application stricte et rigide de la règle générale des dommages-intérêts — le principe de l'indemnisation — donne parfois lieu à des résultats insatisfaisants. Les prestations de retraite versées aux employés, y compris les sommes versées au titre d'un régime à prestations déterminées, ne devraient généralement pas réduire le montant des dommages-intérêts autrement payables pour congédiement injustifié. Les prestations de retraite sont une forme de rémunération différée pour les services rendus par l'employé et constituent un type d'épargne-retraite. Elles ne sont pas censées représenter une indemnité pour la perte de salaire découlant d'une perte d'emploi.

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

Il y a avantage compensatoire si un revenu d'une source autre que les dommages-intérêts payables par le défendeur atténue la perte causée au demandeur par le manquement du défendeur à une obligation légale. Les prestations qu'un demandeur peut toucher ne soulèvent toutefois pas toutes un problème d'avantages compensatoires. Un tel problème ne se pose que lorsque l'avantage est a) une prestation que le demandeur n'aurait pas reçue, n'eût été le manquement, ou b) une prestation qui visait à indemniser le demandeur pour la perte découlant du manquement.

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

Il faut se demander s'il convient d'appliquer de manière stricte le principe d'indemnisation et de déduire l'avantage compensatoire. L'application du principe d'indemnisation repose sur des facteurs autres que l'importance de la perte réelle du demandeur. La déductibilité des avantages compensatoires dépend aussi de la justice, de la raisonnabilité et de l'intérêt public.

Benefits received by a plaintiff through private insurance are generally not deductible from damages awards. While there is no single marker to sort which benefits fall within the private insurance exception, the more closely the benefit is, in nature and purpose, an indemnity against the type of loss caused by the defendant's breach, the stronger the case for deduction. Whether the plaintiff has contributed to the benefit also remains a relevant consideration, although the basis for this is debatable. In general, a benefit will not be deducted if it is not an indemnity for the loss caused by the breach and the plaintiff has contributed in order to obtain entitlement to it. Finally, there is room in the analysis of the deduction issue for broader policy

Les prestations que reçoit un demandeur en application d'un régime d'assurance privée ne sont habituellement pas déductibles des dommages-intérêts. Bien qu'aucun facteur unique ne permette de déterminer les prestations qui sont visées par l'exception relative à l'assurance privée, plus la prestation s'apparente, de par sa nature et son objet, à un dédommagement du type de perte causée par le manquement du défendeur, plus les circonstances militent en faveur de la déduction. La question de savoir si le demandeur a contribué à la prestation demeure aussi pertinente, bien que son fondement soit discutable. En général, une prestation ne sera pas déduite s'il ne s'agit pas d'une indemnité pour la perte causée par le manquement du défendeur et que le

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considerations such as the desirability of equal treatment of those in similar situations, the possibility of providing incentives for socially desirable conduct, and the need for clear rules that are easy to apply. While this exception is called the private insurance exception, it has been applied by analogy to a variety of payments that do not originate in a contract of insurance.

demandeur a contribué dans le but d'y avoir droit. Enfin, l'analyse de la question de la déduction permet l'examen de considérations de principe plus générales, comme le fait qu'il soit souhaitable que toutes les personnes dans des situations semblables reçoivent un traitement équivalent, la possibilité d'offrir des incitations pour une conduite sociale souhaitable et la nécessité que des règles claires puissent facilement s'appliquer. Cette exception dite relative à l'assurance privée a été appliquée par analogie à diverses prestations qui ne découlent pas d'un contrat d'assurance.

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

Bien que les tribunaux n'aient invoqué aucune règle générale du « contrat unique », les modalités du contrat et les rapports entre les parties guideront l'analyse lorsqu'une cause d'action et une prestation découlent du contrat de travail.

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

Une question d'avantage compensatoire se pose en l'espèce : W a touché le plein montant des prestations de retraite et le salaire qu'il aurait gagné s'il avait travaillé pendant la période de préavis raisonnable; si IBM lui avait donné un préavis, il n'aurait touché que son salaire pendant cette période. Cependant, l'exception relative à l'assurance privée s'applique à des prestations comme les prestations de retraite auxquelles un employé a contribué et qui n'étaient pas censées constituer une indemnité pour le type de perte subie en raison de la rupture du contrat de travail par le défendeur. Le principe d'indemnisation ne devrait donc pas être appliqué strictement en l'espèce.

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

Les facteurs de la présente affaire militent clairement en faveur de la non-déduction des prestations de retraite des dommages-intérêts pour congédiement injustifié. Le contrat de travail de W ne précise rien sur ce point, mais n'interdit pas qu'une personne touche la pension maximale et le revenu d'emploi. Les prestations de retraite de W ne constituent pas une indemnité pour perte de revenus mais plutôt une forme d'épargne-retraite. Bien qu'IBM ait fait toutes les cotisations au régime, W a acquis pendant ses années de service le droit de recevoir des prestations, parce que le régime vise principalement à assurer le versement périodique des prestations aux employés admissibles après la retraite pour les services qu'ils ont rendus à titre d'employés. Par conséquent, la présente espèce entre dans la catégorie des situations auxquelles l'exception relative à l'assurance s'est toujours appliquée : la prestation n'est pas une indemnité et W a cotisé au régime.

Although *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315, is distinguishable on the facts, the factors it sets out support the conclusion that W's benefits should

Même s'il faut distinguer la présente affaire de l'arrêt *Sylvester c. Colombie-Britannique*, [1997] 2 R.C.S. 315, les facteurs qu'il énonce appuient la conclusion selon

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not be deducted from his wrongful dismissal damages. The pension benefits were clearly not an indemnity benefit for loss of salary due to inability to work, and W's interest in the pension bears many of the hallmarks of a property right. Looking at the contract as a whole, it is not a fair implication that the parties agreed that pension entitlements should be deducted from wrongful dismissal damages.

laquelle les prestations de W ne devraient pas être déduites des dommages-intérêts pour congédiement injustifié. Les prestations de retraite n'étaient manifestement pas des prestations indemnitaires pour perte de salaire en raison d'une incapacité à travailler, et l'intérêt de W dans les prestations de retraite revêt plusieurs des caractéristiques d'un droit de propriété. Lorsqu'on examine le contrat dans son ensemble, il n'est pas juste d'en inférer que les parties ont convenu que les droits à la pension devraient être déduits des dommages-intérêts pour congédiement injustifié.

Finally, the broader policy concerns in this case support not deducting the pension benefits. The law should not provide an economic incentive to dismiss pensionable employees rather than other employees. The other policy concerns raised by Justice Rothstein or present in *Sylvester* either do not arise here or are highly speculative.

Enfin, les préoccupations de principe plus générales en l'espèce appuient la non-déduction des prestations de retraite. La loi ne devrait pas avoir pour effet d'inciter les employeurs à congédier, pour des raisons économiques, les employés admissibles à la pension plutôt que les autres. Les autres considérations de principe soulevées par le juge Rothstein ou présentes dans *Sylvester* n'entrent pas en ligne de compte en l'espèce ou sont éminemment conjecturales.

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

La juge en chef McLachlin et le juge Rothstein (dissidents) : Dans la présente affaire, il faut déterminer la perte subie par W selon les modalités d'un seul contrat qui a donné le droit à un préavis raisonnable et le droit de toucher des prestations de retraite. L'exception relative à l'assurance privée ne s'applique pas à un tel cas. Lorsqu'un tribunal est appelé à déterminer une perte aux termes d'un seul contrat, le droit du demandeur repose sur le principe ordinaire applicable suivant lequel celui-ci doit être rétabli dans la situation dans laquelle il se serait trouvé si le contrat avait été respecté. Cela signifie en l'espèce que les prestations de retraite que W a touchées doivent être déduites lors du calcul de ses dommages-intérêts pour congédiement injustifié; la non-déduction aurait pour effet de lui accorder davantage que ce qu'il a négocié et d'obliger IBM à verser une somme plus élevée que celle qu'elle a convenu de verser.

The governing principle for damages upon breach of contract is that the non-breaching party should be provided with the financial equivalent of performance. Employer-provided benefits are integral components of the employment contract, so deductibility turns on the terms of the employment contract and the intention of the parties. Under the terms of W's employment contract, he would have been eligible to receive pension benefits only upon being terminated or retiring. Therefore, as in *Sylvester*, W's contractual right to wrongful dismissal damages and his contractual right to his pension are based on opposite assumptions about his availability to

Selon le principe applicable en matière de dommages-intérêts pour violation de contrat, la partie non fautive devrait recevoir l'équivalent matériel de la prestation qu'elle aurait obtenue si le contrat avait été respecté. Les prestations versées par l'employeur sont des éléments faisant partie intégrante du contrat de travail. Ainsi, la déductibilité repose sur les modalités du contrat de travail et sur l'intention des parties. Suivant les modalités de son contrat de travail, W aurait été admissible à des prestations de retraite uniquement à compter de son congédiement ou de sa retraite. Par conséquent, tout comme dans l'affaire *Sylvester*, le droit contractuel de

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work. Damages cannot be paid on the assumption that he could have earned both.

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

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

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

Furthermore, the private insurance exception is not applicable to cases that involve a single contract that is the source of both the plaintiff's cause of action and his right to a particular benefit. In such circumstances, there is no justification for resorting to the private insurance exception because the plaintiff's entitlement to the benefits is established based on the terms of his contract. If the plaintiff is entitled to the benefits under his contract, he will receive the benefits based on the ordinary governing principle that he should be placed in the position he would have been in had the contract been performed. There will be no need to reach the collateral

W à des dommages-intérêts pour congédiement injustifié et son droit contractuel à des prestations de retraite reposent sur des hypothèses opposées en ce qui concerne la possibilité qu'il puisse travailler. On ne peut lui verser des dommages-intérêts en supposant qu'il aurait pu recevoir les deux montants.

Cette conclusion découle du fait que le régime de retraite en litige dans la présente affaire est un régime à prestations déterminées. Contrairement à un régime à cotisations déterminées, le régime à prestations déterminées garantit à l'employé des paiements prédéterminés fixes à compter de sa retraite, et ce, sa vie durant. Déduire les prestations permettrait à l'employé congédié injustement de recevoir exactement ce qu'il aurait reçu si le contrat de travail avait été respecté, soit un montant égal à son salaire au cours de la période de préavis raisonnable et, par la suite, des prestations déterminées sa vie durant.

Un tel régime se distingue sensiblement d'un régime à cotisations déterminées, qui permet à l'employé de recevoir en prestations de retraite un montant total ou un montant forfaitaire déterminé. Déduire les prestations que l'employé congédié injustement a retirées d'un régime de retraite à cotisations déterminées placerait l'employé dans une situation pire que celle dans laquelle il se serait trouvé si son contrat de travail avait été respecté.

En l'espèce, le congédiement injustifié de W n'a eu aucune incidence sur son droit aux prestations de retraite; W n'aurait pas pu toucher à la fois son salaire et ses prestations de retraite s'il avait continué à travailler pour IBM au cours de la période de préavis raisonnable. La nature non indemnitaire ou contributive des prestations n'offre pas de réponse à la question de savoir si le demandeur recevra l'équivalent matériel de la prestation qu'il aurait obtenue si le contrat avait été respecté ou s'il recevra une indemnisation excédentaire, suivant le principe applicable en matière de dommages-intérêts contractuels.

De plus, l'exception relative à l'assurance privée ne s'applique pas aux affaires portant sur un contrat unique à l'origine de la cause d'action du demandeur et de son droit à des prestations particulières. Dans ces circonstances, rien ne justifie le recours à l'exception relative à l'assurance privée parce que le droit du demandeur aux prestations est établi aux termes de son contrat. Si son contrat lui donne droit aux prestations, le demandeur touchera celles-ci en raison du principe ordinaire applicable suivant lequel il devrait être rétabli dans la situation dans laquelle il se serait trouvé si le contrat avait été respecté. Il ne sera pas nécessaire

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benefit exception. A straightforward reading of *Sylvester* demonstrates that it is a fully applicable authority supporting the proposition that, under a single contract of employment, barring contractual provisions to the contrary, an individual cannot receive salary as if he is working and pension benefits as if he is retired. These are opposite, incompatible assumptions. Thus, applying *Sylvester* to this case, salary and pension income are not payable at the same time.

d'invoquer l'exception relative à la prestation parallèle. Une interprétation simple de *Sylvester* montre que cet arrêt est tout à fait favorable à la thèse voulant qu'aux termes d'un contrat de travail unique, sous réserve de dispositions contraires du contrat, une personne ne peut toucher un salaire comme si elle travaillait ainsi que des prestations de retraite comme si elle avait pris sa retraite. Il s'agit là d'hypothèses opposées et incompatibles. Ainsi, si l'on applique l'arrêt *Sylvester* en l'espèce, le salaire et le revenu de pension ne sont pas payables en même temps.

Cases Cited

By Cromwell J.

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

Jurisprudence

Citée par le juge Cromwell

Distinction d'avec les arrêts : *Sylvester c. Colombie-Britannique*, [1997] 2 R.C.S. 315; *Ratych c. Bloomer*, [1990] 1 R.C.S. 940; **arrêt analysé :** *Cunningham c. Wheeler*, [1994] 1 R.C.S. 359; **arrêts mentionnés :** *Phillips c. Western Company of North America*, 953 F.2d 923 (1992); *United States c. Price*, 288 F.2d 448 (1961); *Sloas c. CSX Transportation, Inc.*, 616 F.3d 380 (2010); *Parry c. Cleaver*, [1970] A.C. 1; *Attorney General c. Blake*, [2001] 1 A.C. 268; *Banque d'Amérique du Canada c. Société de Fiducie Mutuelle*, 2002 CSC 43, [2002] 2 R.C.S. 601; *Redpath c. Belfast and County Down Railway* (1947), N.I. 167; *Jack Cewe Ltd. c. Jorgenson*, [1980] 1 R.C.S. 812; *Canadien Pacifique Ltée c. Gill*, [1973] R.C.S. 654; *Grand Trunk Railway c. Beckett* (1887), 16 R.C.S. 713; *Commission des Accidents du Travail de Québec c. Lachance*, [1973] R.C.S. 428; *Guy c. Trizec Equities Ltd.*, [1979] 2 R.C.S. 756; *Chandler c. Ball Packaging Products Canada Ltd.* (1992), 2 C.C.P.B. 101, conf. par (1993), 2 C.C.P.B. 99; *Emery c. Royal Oak Mines Inc.* (1995), 24 O.R. (3d) 302; *Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, 2003 CAF 86 (CanLII); *Bradburn c. Great Western Railway Co.* (1874), L.R. 10 Ex. 1; *National Insurance Co. of New Zealand Ltd. c. Espagne* (1961), 105 C.L.R. 569; *Graham c. Baker* (1961), 106 C.L.R. 340; *Smoker c. London Fire and Civil Defence Authority*, [1991] 2 A.C. 502; *Hopkins c. Norcross plc*, [1993] 1 All E.R. 565; *Knapton c. ECC Card Clothing Ltd.*, [2006] I.C.R. 1084; *Gilbert c. Attorney-General*, [2010] NZCA 421, 8 N.Z.E.L.R. 72.

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CLLC ¶210-021, [2010] B.C.J. No. 510 (QL), 2010 CarswellBC 679. Appeal dismissed, McLachlin C.J. and Rothstein J. dissenting.

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

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

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

Cromwell J. —

I. Introduction

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

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

376, 2010 CLLC ¶210-021, [2010] B.C.J. No. 510 (QL), 2010 CarswellBC 679. Pourvoi rejeté, la juge en chef McLachlin et le juge Rothstein sont dissidents.

D. Geoffrey Cowper, c.r., et *Lorene A. Novakowski*, pour l'appelante.

Christopher J. Watson et *Matthew G. Siren*, pour l'intimé.

Version française du jugement des juges LeBel, Fish, Abella, Cromwell, Moldaver, Karakatsanis et Wagner rendu par

Le juge Cromwell —

I. Introduction

[1] Quand IBM Canada Ltée a congédié injustement son employé de longue date, Richard Waterman, ce dernier a dû commencer à toucher sa pension. La Cour doit déterminer si la réception de ces prestations de retraite a pour effet de réduire les dommages-intérêts pour congédiement injustifié qu'IBM doit par ailleurs payer. Les tribunaux de la Colombie-Britannique ont décidé de ne pas déduire les prestations de retraite et IBM se pourvoit devant notre Cour.

[2] La question semble assez simple à première vue. Selon la règle générale, les dommages-intérêts contractuels devraient placer le demandeur dans la situation financière où il se serait trouvé si le défendeur avait respecté le contrat. IBM était tenue de donner à M. Waterman un avis de congédiement raisonnable ou une indemnité de préavis. Si elle lui avait donné un préavis raisonnable, M. Waterman n'aurait reçu pendant cette période que son salaire et ses avantages réguliers. En l'espèce, il a en fait touché son salaire régulier ainsi que ses prestations de retraite pendant cette période. Il semble donc clair, selon la règle générale applicable aux dommages-intérêts en matière contractuelle, que les prestations de retraite devraient être déduites. Sinon, M. Waterman se trouve dans une meilleure situation financière qu'il ne l'aurait été s'il n'y avait pas eu violation du contrat.

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

[3] Cependant, lorsqu'on l'examine de plus près, la question soulevée en appel n'est pas aussi simple. La présente affaire soulève en fait l'un des sujets les plus complexes du droit des dommages-intérêts, à savoir quand une « prestation parallèle » ou un « avantage compensatoire » qu'a reçu un demandeur devrait avoir pour effet de réduire les dommages-intérêts autrement payables par un défendeur. Il est depuis longtemps reconnu en droit que l'application stricte et rigide de la règle générale des dommages-intérêts donne parfois lieu à des résultats insatisfaisants. Il s'agit donc de déterminer comment identifier les situations où un tel résultat survient.

[4] In my view, employee pension payments, including payments from a defined benefit plan as in this case, are a type of benefit that should generally not reduce the damages otherwise payable for wrongful dismissal. Both the nature of the benefit and the intention of the parties support this conclusion. Pension benefits are a form of deferred compensation for the employee's service and constitute a type of retirement savings. They are not intended to be an indemnity for wage loss due to unemployment. The parties could not have intended that the employee's retirement savings would be used to subsidize his or her wrongful dismissal. There is no decision of this Court in which a non-indemnity benefit to which the plaintiff has contributed, such as the pension benefits in issue here, has ever been deducted from a damages award.

[4] À mon avis, les prestations de retraite versées aux employés, y compris les sommes versées au titre d'un régime de retraite à prestations déterminées comme en l'espèce, constituent un type de prestations qui ne devraient généralement pas réduire le montant des dommages-intérêts autrement payables pour congédiement injustifié. Cette conclusion repose tant sur la nature de la prestation que sur l'intention des parties. Les prestations de retraite sont une forme de rémunération différée pour les services rendus par l'employé et constituent un type d'épargne-retraite. Elles ne sont pas censées représenter une indemnité pour la perte de salaire découlant d'une perte d'emploi. Les parties n'auraient pu vouloir que l'épargne-retraite de l'employé soit utilisée pour financer son congédiement injustifié. Notre Cour n'a jamais rendu de décision dans laquelle une prestation non indemnitaire à laquelle le demandeur a contribué, comme les prestations de retraite en l'espèce, a été déduite des dommages-intérêts accordés.

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

[5] Je suis d'avis de rejeter le pourvoi d'IBM et de confirmer le résultat auquel sont arrivés les tribunaux de la Colombie-Britannique.

II. Overview of Facts and Proceedings

II. Aperçu des faits et procédures

[6] When IBM dismissed Mr. Waterman without cause on March 23, 2009, he was 65 years old and had 42 years of service. He was a long-standing member of IBM's defined benefit pension plan,

[6] Lorsque IBM a congédié M. Waterman sans motif valable le 23 mars 2009, celui-ci était alors âgé de 65 ans et comptait 42 années de service. Il cotisait depuis longtemps au régime de retraite à

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which I will refer to simply as "the plan". IBM contributed a percentage of his salary to the plan on his behalf and the plan guaranteed specific benefits, which became vested over time, upon retirement.

prestations déterminées d'IBM, que j'appellerai simplement « le régime ». IBM versait au régime un pourcentage de son salaire en son nom et le régime lui garantissait, dès qu'il prenait sa retraite, le versement de prestations déterminées, acquises au fil du temps.

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

[7] Au moment du congédiement de M. Waterman, les employés d'IBM n'étaient plus assujettis à une politique de retraite obligatoire. M. Waterman était toutefois admissible à une pension maximale en vertu du régime, et son congédiement n'avait aucune incidence sur le montant de ses prestations de retraite. IBM a informé M. Waterman qu'au moment de la cessation de son emploi il *serait* traité comme un retraité et qu'il *devait* commencer à toucher ses prestations mensuelles de retraite à cette date.

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

[8] Un employé comme M. Waterman, qui est en droit de prendre sa retraite et de toucher la pension maximale, mais qui n'a pas atteint l'âge de 71 ans, ne peut pas toucher en même temps des prestations de retraite et un revenu d'emploi d'IBM. Cependant, à l'âge de 71 ans, l'employé doit commencer à toucher ses prestations et peut continuer à travailler et à recevoir un revenu d'emploi d'IBM. On n'a porté à notre attention aucune disposition du régime qui empêcherait un retraité, peu importe son âge, de recevoir les prestations prévues au régime et un revenu d'emploi d'un autre employeur.

[9] Mr. Waterman sued for wrongful dismissal and the matter proceeded to summary trial in the Supreme Court of British Columbia. The trial judge, Goepel J., found that the appropriate period of notice was 20 months. IBM's position was (and is) that Mr. Waterman's pension benefits (approximately $2,124 per month starting June 1, 2009) should be deducted from the salary and benefits otherwise payable during this period. The trial judge rejected this position: 2010 BCSC 376, 2010 CLLC ¶210-021.

[9] M. Waterman a intenté une action pour congédiement injustifié et l'affaire a été instruite sommairement par la Cour suprême de la Colombie-Britannique. En première instance, le juge Goepel a conclu que M. Waterman aurait dû recevoir un préavis de 20 mois. Selon IBM, les prestations de retraite de M. Waterman (environ 2 124 $ par mois à compter du 1er juin 2009) devraient être déduites du salaire et des prestations autrement payables durant cette période. Le juge de première instance a rejeté cette prétention : 2010 BCSC 376, 2010 CLLC ¶210-021.

[10] IBM's appeal from this decision was dismissed by the British Columbia Court of Appeal. Writing for the court, Prowse J.A. relied on this Court's judgment in *Sylvester v. British Columbia*,

[10] La Cour d'appel de la Colombie-Britannique a rejeté l'appel de cette décision interjeté par IBM. S'exprimant au nom de la cour, la juge Prowse s'est fondée sur l'arrêt de notre Cour *Sylvester c.*

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[1997] 2 S.C.R. 315. However, she concluded that the distinctions between the benefits and the intentions of the parties in the two cases led to a different conclusion in this case: 2011 BCCA 337, 20 B.C.L.R. (5th) 241.

Colombie-Britannique, [1997] 2 R.C.S. 315. Elle a toutefois conclu que les distinctions entre les prestations et les intentions des parties dans les deux affaires justifiaient une conclusion différente dans la présente affaire : 2011 BCCA 337, 20 B.C.L.R. (5th) 241.

III. Positions of the Parties

III. Positions des parties

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

[11] En appel devant notre Cour, IBM fait valoir deux arguments principaux. Premièrement, elle plaide que le résultat auquel sont arrivées les cours de la Colombie-Britannique va à l'encontre de l'objectif d'indemnisation que vise l'attribution de dommages-intérêts pour congédiement injustifié. IBM souligne que, même si elle avait donné à M. Waterman un préavis de cessation d'emploi suffisant, ce dernier n'aurait pas touché son salaire en plus de ses prestations de retraite durant la période visée par le préavis. En lui accordant des dommages-intérêts pour la totalité de la période de préavis sans déduction des prestations de retraite reçues pendant cette période, les cours de la Colombie-Britannique l'ont placé dans une situation financière meilleure qu'il ne l'aurait été si IBM avait respecté le contrat. Deuxièmement, IBM soutient que, dans l'arrêt *Sylvester*, la Cour a conclu que ce type de prestations s'inscrit dans une relation d'emploi intégrée et, à moins que les prestations ne soient déduites, l'employé qui les touche recevrait une indemnité plus élevée que l'employé qui serait légalement congédié avec un préavis.

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

[12] M. Waterman nous demande instamment de rejeter la thèse d'IBM. Il plaide que les prestations de retraite appartiennent à l'employé. Elles sont acquises dans le cadre du travail et constituent un avantage prévu par le programme de rémunération de l'employé. La pension est comparable à un « bas de laine », à un REÉR ou à un compte d'épargne, et IBM ne peut s'en prévaloir pour compenser les dommages-intérêts accordés. M. Waterman aurait pu transférer la valeur de ses prestations de retraite dans un autre instrument d'épargne s'il avait quitté son emploi chez IBM avant l'âge de 65 ans et son épargne-retraite aurait donc été à l'abri. Pour ce qui est de l'intention des parties, aucune disposition

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salary and pension benefits. It was therefore up to the courts to determine the parties' intention, which the Court of Appeal correctly did in its decision.

du régime de retraite n'interdit expressément que soient versés concurremment un salaire et des prestations de retraite. Il appartenait donc aux tribunaux de déterminer l'intention des parties, ce que la Cour d'appel a correctement fait dans sa décision.

IV. Analysis

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

IV. Analyse

[13] À mon humble avis, les deux principaux arguments d'IBM doivent être rejetés. Le principe général de l'indemnisation ne constitue pas une réponse complète à la question en litige. Il s'agit de savoir si une exception à ce principe s'applique à la présente affaire, et j'estime que c'est le cas. Il faut distinguer la présente affaire de la décision rendue par la Cour dans *Sylvester* et, en fait, le raisonnement qu'on y trouve étaye la conclusion selon laquelle les prestations de retraite ne devraient pas être déduites.

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

[14] Trois points déterminants doivent être examinés afin de répondre à la question soulevée dans ce pourvoi. Je les exposerai ici avec un résumé de mes conclusions.

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

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

A. Pourquoi la « prestation parallèle » pose-t-elle problème en l'espèce?

[15] Une prestation parallèle est un gain ou un avantage qu'obtient le demandeur et qui est lié à la violation commise par le défendeur. Ce lien peut exister soit du fait de l'existence d'une relation causale entre la violation et l'obtention de la prestation, soit du fait que la prestation visait à indemniser le demandeur pour le type de perte causée par la violation. Le problème que soulèvent les prestations parallèles est qu'on ne sait pas si elles devraient ou non être déduites des dommages-intérêts autrement payables par le défendeur en raison de la violation. La présente affaire soulève un problème de prestation parallèle parce qu'il existe une cause déterminante entre la rupture de contrat de la part d'IBM et l'obtention des prestations par M. Waterman. N'eût été le congédiement, ce dernier n'aurait pas touché les prestations de retraite et son plein salaire à titre d'indemnité de préavis.

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

B. Le principe d'indemnisation offre-t-il une solution au problème?

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

[16] Le principe voulant que le défendeur devrait indemniser le demandeur seulement pour la perte réellement subie n'offre pas, en soi, une solution au problème. Il existe des exceptions à l'application rigide de ce principe, la plus importante étant l'exception relative à l'assurance privée et aux autres avantages qui, pour l'application de l'exception, sont considérés comme analogues à l'assurance privée. Cette exception s'applique non seulement aux prestations d'assurance au sens strict, mais aussi à d'autres prestations comme les prestations de retraite auxquelles un employé a contribué et qui n'étaient pas censées constituer une indemnité pour le type de perte subie en raison de la rupture du contrat de travail par le défendeur.

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

C. L'arrêt Sylvester de notre Cour appuie-t-il la thèse d'IBM selon laquelle les prestations de retraite doivent être déduites?

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

[17] Je ne crois pas que ce soit le cas. L'arrêt *Sylvester* peut être distingué de l'affaire qui nous occupe. En fait, le raisonnement exposé dans *Sylvester* étaye la conclusion selon laquelle les prestations de retraite de M. Waterman *ne* devraient *pas* être déduites des dommages-intérêts pour congédiement injustifié autrement payables par IBM.

[18] My more detailed analysis follows.

[18] Voici mon analyse plus détaillée.

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

A. *Pourquoi la prestation parallèle pose-t-elle problème en l'espèce?*

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

[19] Il est utile d'expliquer tout d'abord ce qu'est un problème de prestation parallèle et pourquoi ce problème se pose en l'espèce.

(1) What Is a Collateral Benefit Problem?

(1) Qu'est-ce qu'un problème de prestation parallèle?

[20] In general terms, there is a collateral benefit when a source other than the damages payable by the defendant ameliorates the loss suffered by the plaintiffs as a result of the defendant's breach of

[20] De façon générale, il y a prestation parallèle quand un revenu d'une source autre que les dommages-intérêts payables par le défendeur atténue la perte causée au demandeur par le manquement

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legal duty: J. Cassels and E. Adjin-Tettey, *Remedies: The Law of Damages* (2nd ed. 2008), at p. 416. For example, if an employee is wrongfully dismissed, but receives employment insurance benefits, those benefits are a collateral benefit. The problem is whether they should be deducted from the damages the defendant will pay for wrongful dismissal.

du défendeur à son obligation légale : J. Cassels et E. Adjin-Tettey, *Remedies : The Law of Damages* (2e éd. 2008), p. 416. Prenons l'exemple d'un employé congédié injustement qui reçoit des prestations d'assurance-emploi. Ces prestations constituent des prestations parallèles. Le problème est de savoir si elles devraient être déduites des dommages-intérêts que le défendeur versera pour congédiement injustifié.

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

[21] Si nous appliquons simplement le principe d'indemnisation — à savoir que le demandeur devrait recouvrer la perte économique qu'il a réellement subie, mais rien de plus — la réponse est simple. Si nous ne déduisons pas la prestation parallèle, le demandeur se trouvera dans une situation financière meilleure qu'elle ne l'aurait été si le contrat d'emploi avait été respecté. Pour appliquer le principe d'indemnisation, nous devons examiner non seulement les pertes du demandeur, mais aussi les gains découlant du manquement par le défendeur. Le problème des prestations parallèles consiste à se demander si nous devrions appliquer le principe d'indemnisation et déduire les prestations parallèles, ou si nous devrions nous écarter de ce principe et ne pas les déduire.

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

[22] Il existe un recoupement important entre le problème de la prestation parallèle et celui de la limitation du préjudice. La principale distinction est la suivante : la limitation du préjudice s'intéresse à la question de savoir si, après que le défendeur a manqué à son obligation, le demandeur a agi raisonnablement afin d'atténuer sa perte. Par contre, la question de la prestation parallèle consiste à se demander si un avantage compensatoire reçu par le demandeur, la plupart du temps à la suite de mesures prises avant le manquement, devrait être pris en compte dans l'évaluation des dommages-intérêts dus au demandeur : voir A. I. Ogus, *The Law of Damages* (1973), p. 87-88.

(2) When Does a Collateral Benefit Problem Arise?

(2) Dans quelles circonstances la prestation parallèle pose-t-elle problème?

[23] Not all benefits received by a plaintiff raise a collateral benefit problem. Before there is any question of deduction, the receipt of the benefit

[23] Les prestations qu'un demandeur peut toucher ne soulèvent pas toutes un problème de prestation parallèle. La question de la déduction ne

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must constitute some form of excess recovery for the plaintiff's loss and it must be sufficiently connected to the defendant's breach of legal duty.

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

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

[26] Before turning to the nature of the required link, I note that scholars have objected to the term "collateral benefit" because it assumes the answer to the question. The word "collateral" suggests that the benefit should not be taken into account. But of course the legal problem is whether or not the benefit should be deducted. Scholars have suggested that the term "compensating advantages" is

se pose que si la prestation reçue par le demandeur constitue une sorte d'indemnisation excédentaire pour la perte qu'il a subie, et il doit exister un lien suffisant entre cette prestation et le manquement du défendeur à son obligation légale.

[24] Par exemple, une indemnisation n'est pas excédentaire si la partie qui verse la prestation est subrogée dans les droits du demandeur — c'est-à-dire qu'elle se substitue au demandeur — et recouvre la valeur de la prestation. Dans de telles circonstances, le défendeur répare le préjudice qu'il a causé, la partie qui a versé les prestations est remboursée à même les dommages-intérêts et le demandeur ne conserve que cette partie de l'indemnité qui couvre la perte réellement subie : voir, p. ex., *Cunningham c. Wheeler*, [1994] 1 R.C.S. 359, p. 386-388, la juge McLachlin, maintenant Juge en chef, dissidente en partie. (Dans l'exemple de l'assurance-emploi déjà évoqué, la loi prévoit maintenant cette solution : voir plus loin au par. 44.)

[25] Toutefois, même en présence d'une certaine forme d'indemnisation excédentaire, le problème de la prestation parallèle ne se pose que s'il existe un lien suffisant entre les prestations et le manquement du défendeur. Cette exigence d'un lien suffisant est utile quant à la question des prestations parallèles de la même façon que les règles de la causalité et de l'éloignement sont utiles en matière de dommages-intérêts. Tout comme le demandeur ne peut pas recouvrer en totalité sa perte, peu importe qu'il n'y ait qu'un lien ténu entre la perte et le manquement du défendeur ou que la perte dépasse largement ce que les parties pouvaient raisonnablement envisager, le défendeur ne peut profiter de tous les avantages dont bénéficie le demandeur, peu importe qu'il n'y ait qu'un lien ténu entre les avantages et le comportement fautif du défendeur.

[26] Avant de traiter de la nature du lien requis, je tiens à signaler que des auteurs se sont opposés à l'expression « prestation parallèle » parce qu'elle suggère la réponse à la question. Le mot « parallèle » donne à penser que la prestation ne devrait pas être prise en compte. Se pose évidemment le problème juridique de savoir si la prestation devrait être déduite. Selon certains

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a better one and that is the term I will use in my reasons: see, e.g., Ogus, at pp. 93-94; A. Burrows, *Remedies for Torts and Breach of Contract* (3rd ed. 2004), at p. 156; S. M. Waddams, *The Law of Damages* (5th ed. 2012), at para. 15.700.

[27] Another problem with the terms "collateral benefit" or "collateral source" is that they suggest that the test for whether a benefit is deductible is whether it is "collateral", that is, independent of the relation between the plaintiff and the defendant. Some of the American jurisprudence, for example, has recognized that this "independence" test is an oversimplification which does not explain the treatment of benefit in the cases: see, e.g., *Phillips v. Western Company of North America*, 953 F.2d 923 (5th Cir. 1992), at pp. 931-33. Moreover, it can lead to fruitless semantic debates about whether a benefit is or is not "collateral" or "independent" rather than furthering principled analysis. As one court put it, that a benefit "comes from the defendant tortfeasor does not itself preclude the possibility that it is from a collateral source. The plaintiff may receive benefits from the defendant himself which, because of their nature, are not considered double compensation": *United States v. Price*, 288 F.2d 448 (4th Cir. 1961), at p. 450; *Sloas v. CSX Transportation, Inc.*, 616 F.3d 380 (4th Cir. 2010), at p. 389. As we shall see, several factors other than the source of the benefit may be considered in order to determine whether it should be deducted.

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

auteurs, l'expression [TRADUCTION] « avantages compensatoires » conviendrait mieux, et c'est l'expression que j'utiliserai dans mes motifs : voir, p. ex., Ogus, p. 93-94; A. Burrows, *Remedies for Torts and Breach of Contract* (3e éd. 2004), p. 156; S. M. Waddams, *The Law of Damages* (5e éd. 2012), par. 15.700.

[27] Les expressions « prestation parallèle » ou « source parallèle » posent un autre problème : elles laissent entendre que le critère pour déterminer si une prestation est déductible consiste à savoir si elle est « parallèle », c'est-à-dire indépendante de la relation entre le demandeur et le défendeur. Une partie de la jurisprudence américaine, par exemple, reconnaît que ce critère d'« indépendance » constitue une simplification excessive qui n'explique pas la façon dont les prestations sont traitées dans la jurisprudence : voir, p. ex., *Phillips c. Western Company of North America*, 953 F.2d 923 (5th Cir. 1992), p. 931-933. Qui plus est, ce critère risque de susciter des débats sémantiques inutiles quant à savoir si une prestation est ou n'est pas « parallèle » ou « indépendante », plutôt que de faire avancer une analyse raisonnée. Pour reprendre les termes employés par un tribunal, le fait qu'une prestation [TRADUCTION] « provienne du défendeur auteur du délit n'écarte pas la possibilité qu'elle provienne d'une source parallèle. Le demandeur peut recevoir du défendeur des prestations qui, vu leur nature, ne sont pas considérées comme une double indemnisation » : *United States c. Price*, 288 F.2d 448 (4th Cir. 1961), p. 449-450; *Sloas c. CSX Transportation, Inc.*, 616 F.3d 380 (4th Cir. 2010), p. 389. Comme nous le verrons, pour déterminer si la prestation devrait être déduite, plusieurs facteurs autres que sa source peuvent être pris en compte.

[28] Pour revenir à la question du lien entre la prestation et le manquement, il faut se demander quel genre de lien est requis avant que ne se pose la question de la déduction. La jurisprudence suggère deux réponses. La prestation doit être soit a) une prestation que le demandeur n'aurait pas reçue, n'eût été le manquement du défendeur, *ou* b) une prestation qui visait à indemniser le demandeur pour la perte découlant du manquement. Si aucune

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issue about deduction. If either of these conditions is present, there is.

de ces conditions n'est présente, la question de la déduction ne se pose pas. Mais elle se pose si l'une ou l'autre de ces conditions est présente.

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

[29] En ce qui a trait au lien déterminant entre le manquement et l'avantage, prenons l'exemple du demandeur qui a subi un préjudice à cause de la négligence d'un défendeur, qui achète un billet de loterie, comme il en a l'habitude, et qui gagne une somme d'argent importante. Personne ne dirait que les gains devraient être déduits des dommages-intérêts payables par le défendeur. Il n'existe aucun lien déterminant entre la négligence du défendeur et l'achat du billet gagnant par le demandeur : voir Burrows, p. 156.

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

[30] Même s'il n'y a aucun lien déterminant entre une prestation et le manquement, la question de savoir si une prestation devrait être déduite peut tout de même se poser. Ce sera le cas lorsqu'il existe un lien entre la prestation et le manquement en ce sens que la prestation vise à indemniser le type de perte causée par le manquement — comme c'était le cas dans *Sylvester*. M. Sylvester était incapable de travailler et recevait des prestations d'invalidité en vertu de son contrat de travail lorsqu'il a été congédié injustement. De toute évidence, il n'existait aucun lien de causalité entre le fait que l'employeur n'ait pas donné un préavis raisonnable de cessation d'emploi (ou une indemnité tenant lieu de préavis) et le fait que M. Sylvester recevait des prestations d'invalidité. Néanmoins, la Cour a conclu que la question des avantages compensatoires posait problème. Comme l'a souligné le juge Major, les prestations d'invalidité visaient à remplacer le salaire versé ordinairement à M. Sylvester : par. 14. Autrement dit, la prestation visait à l'indemniser pour la perte de son salaire régulier, précisément le type de perte résultant de la rupture du contrat de travail par le défendeur.

[31] The existence of these sorts of links between the breach and the benefit identifies whether there is a compensating advantage problem. But the existence of such a link is not a reliable marker of whether a particular benefit should be deducted. Relying on strict principles of causation, for example, often conceals unarticulated policy concerns: see, e.g., *Parry v. Cleaver*, [1970] A.C. 1 (H.L.),

[31] L'existence de liens de ce genre entre le manquement et la prestation permet de savoir s'il existe un problème d'avantage compensatoire. Cependant, l'existence d'un tel lien n'indique pas nettement qu'une prestation donnée devrait être déduite. Le fait de se fonder sur les principes rigoureux de la causalité, par exemple, cache souvent des préoccupations de principe non exprimées : voir, p. ex.,

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at pp. 34-35, *per* Lord Pearce; Ogus, at pp. 225-26; *Ratych v. Bloomer*, [1990] 1 S.C.R. 940, at pp. 965-66. Similarly, the indemnity factor is not a reliable marker of which benefits are or are not deductible. This is clear, for example, from the Court's decision in *Cunningham*. In issue were disability benefits provided for under collective agreements. They were clearly intended to provide an indemnity for wage loss arising from an inability to work. Nonetheless, the Court held that the benefits should *not* be deducted.

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

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

[33] A compensating advantage issue arises in this case. First, there is an element of excess compensation. Mr. Waterman has received his full pension benefits and, in addition, the salary he would have earned had he worked during the period of reasonable notice (less an allowance for his earnings from other employment). Had IBM not breached the contract of employment and instead given him working notice, he would have received only his salary during that period and not his pension. Second, there is a "but for" causal relationship between IBM's breach of contract and Mr. Waterman's receipt of the pension benefits. One could say that it was the pension plan rather than IBM's breach of contract that gave rise to the benefit, but it is artificial to suggest that there is no "but for" causal link between IBM's breach of contract and Mr. Waterman's receipt of his pension

Parry c. Cleaver, [1970] A.C. 1 (H.L.), p. 34-35, lord Pearce; Ogus, p. 225-226; *Ratych c. Bloomer*, [1990] 1 R.C.S. 940, p. 965-966. De même, le facteur de l'indemnité n'indique pas nettement les prestations qui sont ou ne sont pas déductibles. Cela ressort clairement, par exemple, de l'arrêt de notre Cour dans l'affaire *Cunningham* où il était question des prestations d'invalidité prévues dans les conventions collectives. Ces prestations visaient clairement à indemniser les pertes de salaire résultant de l'incapacité de travailler. Malgré tout, la Cour a conclu que les prestations *ne* devraient *pas* être déduites.

[32] En résumé, un problème en matière d'avantages compensatoires peut survenir si, en recevant une prestation, le demandeur est indemnisé au-delà de la perte réelle qu'il a subie et *s'il s'avère* a) qu'il n'aurait pas reçu cette prestation n'eût été du manquement du défendeur, *ou* b) que la prestation devait servir d'indemnité pour le type de perte découlant du manquement du défendeur. Ces facteurs permettent de déceler un problème potentiel d'avantage compensatoire, mais n'indiquent pas la façon de le régler.

(3) Pourquoi la déduction pose-t-elle un problème en l'espèce?

[33] Une question d'avantage compensatoire se pose en l'espèce. Premièrement, il existe un élément d'indemnisation excédentaire. M. Waterman a touché le plein montant des prestations de retraite, en plus du salaire qu'il aurait gagné s'il avait travaillé pendant la période de préavis raisonnable (déduction faite de son revenu tiré d'un autre emploi). Si IBM avait respecté le contrat d'emploi et lui avait donné un préavis, il n'aurait touché que son salaire pendant cette période; il n'aurait pas touché les prestations de retraite. Deuxièmement, il existe un lien de causalité déterminant entre la rupture du contrat par IBM et le fait que M. Waterman ait touché des prestations de retraite. On pourrait dire que c'est le régime de retraite, plutôt que la rupture de contrat par IBM, qui l'a rendu admissible aux prestations, mais il est factice de prétendre qu'il n'existe aucun lien déterminant entre la rupture

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benefits: "but for" the breach, there would have been no termination and, "but for" the termination, Mr. Waterman would not have started to collect his pension. Given that there was double recovery and that the benefit would not have arisen but for IBM's breach, we must decide whether the benefit should or should not be deducted from damages otherwise payable by IBM.

de contrat par IBM et le fait que M. Waterman ait touché ses prestations de retraite. N'eût été la rupture du contrat, M. Waterman n'aurait pas été congédié, et n'eût été le congédiement, M. Waterman n'aurait pas commencé à toucher ses prestations de retraite. Comme il y a eu double indemnisation et qu'il n'y aurait eu aucun avantage n'eût été la rupture de contrat par IBM, nous devons décider si les prestations devraient ou non être déduites des dommages-intérêts autrement payables par IBM.

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

B. *Le principe d'indemnisation offre-t-il une solution au problème?*

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

[34] Selon le premier argument principal avancé par IBM, le principe d'indemnisation exige la déduction des prestations de retraite. Comme des dommages-intérêts lui ont été accordés, la situation de M. Waterman est plus avantageuse qu'elle ne l'aurait été si IBM lui avait donné un préavis raisonnable. IBM prétend donc que les prestations de retraite doivent être déduites, de sorte qu'après avoir reçu son indemnité M. Waterman se trouvera dans la situation financière où il se serait trouvé si IBM lui avait donné un préavis raisonnable. C'est essentiellement le point de vue de mon collègue le juge Rothstein.

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

[35] Bien que je convienne que l'octroi de dommages-intérêts représente une dérogation au principe d'indemnisation, ce n'est pas, en soi, une solution au problème soulevé en appel. Comme je l'expliquerai plus loin, le principe d'indemnisation ne peut pas être appliqué, et n'est pas appliqué, d'une manière stricte ou rigide sans tenir compte d'autres considérations. Il faut se demander si le principe d'indemnisation devrait être appliqué de manière stricte en l'espèce. Selon moi, il ne doit pas l'être. Avant d'expliquer pourquoi, il convient d'examiner les raisons pour lesquelles le principe d'indemnisation n'est pas appliqué de manière stricte, voire pas du tout appliqué, dans différentes situations.

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

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

[37] Finally, there are well-recognized exceptions in which benefits flowing to plaintiffs are not taken into account even though the result is that they are better off, economically speaking, after the breach than they would have been had there been no breach. These exceptions are ultimately based on factors other than strict compensatory considerations. As Lord Reid put it in *Parry*, "[t]he

(1) Dans quels cas le principe d'indemnisation ne s'applique-t-il pas de manière stricte?

[36] L'application du principe d'indemnisation repose sur des facteurs autres que l'importance de la perte réelle du demandeur et comporte des exceptions bien établies. Par exemple, la règle selon laquelle les dommages-intérêts en matière contractuelle n'indemnisent le demandeur que pour la perte qu'il a réellement subie n'est pas la seule règle qui s'applique à la détermination des dommages-intérêts. Comme il est expliqué dans un arrêt de principe rendu en Angleterre, [TRADUCTION] « [l]es dommages-intérêts sont fixés en fonction de la perte du demandeur plutôt que du gain du défendeur. Cependant, la common law, toujours aussi pragmatique, reconnaît depuis longtemps que, dans plusieurs situations courantes, une application stricte de ce principe n'assurerait pas la justice entre les parties. L'indemnité pour le tort causé au demandeur est alors calculée en fonction de critères différents » : *Attorney General c. Blake*, [2001] 1 A.C. 268 (H.L.), p. 278. Dans certains cas, par exemple, les dommages-intérêts en matière contractuelle peuvent être calculés en fonction de l'avantage que le défendeur tire de l'inexécution du contrat plutôt qu'en fonction de la perte subie par le demandeur : voir, p. ex., *Banque d'Amérique du Canada c. Société de Fiducie Mutuelle*, 2002 CSC 43, [2002] 2 R.C.S. 601, par. 25. La règle selon laquelle les dommages-intérêts sont calculés en fonction de la perte réelle du demandeur, bien qu'il s'agisse d'une règle générale, ne s'applique pas dans toutes les situations. En outre, par application des principes de l'éloignement et de la limitation du préjudice, le principe d'indemnisation cède le pas à des critères de raisonnabilité, à savoir si les attentes du demandeur quant au contrat et sa réaction suite à la rupture du contrat étaient raisonnables.

[37] Enfin, il y a des exceptions bien connues où les avantages reçus par le demandeur ne sont pas pris en considération même si ce dernier se trouve dans une situation financière meilleure après le manquement qu'elle ne l'aurait été s'il n'y avait pas eu manquement. Ces exceptions sont en définitive fondées sur des facteurs autres que les considérations strictes de l'indemnisation. Comme

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common law has treated [the deductibility of compensating advantages] as one depending on justice, reasonableness and public policy": p. 13. Or, as McLachlin J. wrote, this issue raises a question of "basic policy": *Ratych*, at p. 959.

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

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

(a) *Charitable Gifts*

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

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

lord Reid l'a expliqué dans *Parry* [TRADUCTION] « [e]n common law, [la déductibilité des avantages compensatoires] dépend de la justice, de la raisonnabilité et de l'intérêt public » : p. 13. Ou, selon le propos de la juge McLachlin, cette question en soulève une autre de « politique générale fondamentale » : *Ratych*, p. 959.

(2) Quels facteurs aident à déterminer les circonstances dans lesquelles les avantages compensatoires ne sont pas déduits?

[38] Quelles sont ces considérations de justice, de raisonnabilité et d'intérêt public? On peut trouver une réponse en examinant les deux cas bien connus où les avantages compensatoires ne sont pas déduits : les dons de bienfaisance et l'assurance privée.

a) *Dons de bienfaisance*

[39] Le premier cas est le moins controversé. La règle veut que les dons de bienfaisance faits au demandeur ne soient habituellement pas déductibles des dommages-intérêts auxquels il a droit, même s'ils lui ont été faits en raison du préjudice ou de la perte attribuable à la faute du défendeur : voir, p. ex., Waddams, par. 3.1550-3.1560; Cassels et Adjin-Tettey, p. 420-421. Il y a deux raisons à cette exception : premièrement, si ces dons de bienfaisance étaient déduits, [TRADUCTION] « les sources de charité privée seraient largement, voire entièrement, taries » et, deuxièmement, il est rarement sensé, sur le plan pratique, de consacrer le temps et les efforts nécessaires pour tenir compte des dons de cette sorte : *Redpath c. Belfast and County Down Railway* (1947), N.I. 167 (K.B.), p. 170. Voir également Ogus, p. 223; Waddams, par. 3.1550; Cassels et Adjin-Tettey, p. 420-421; *Cunningham*, p. 370.

[40] Les raisons de cette exception laissent croire que nous pouvons tenir compte des facteurs d'incitation plus généraux qu'offrent la déduction ou la non-déduction d'un avantage ainsi que des considérations pragmatiques touchant la question de savoir si la règle applicable est claire, cohérente et d'application facile : *Cunningham*, p. 388, la juge McLachlin.

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(b) *Private Insurance*

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

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

[43] In *Canadian Pacific Ltd. v. Gill*, [1973] S.C.R. 654, the Court applied the insurance exception to prevent deduction of the present value of Canada Pension Plan benefits available to surviving dependents from the damages awarded in a fatal injuries claim. Spence J., for the Court, held that the payments were "so much of the same nature as contracts of insurance that they also should be excluded from consideration when

b) *L'assurance privée*

[41] Il existe une deuxième exception plus controversée qui se rapporte aux prestations reçues aux termes de la police d'assurance privée du demandeur. L'essence même de l'exception est bien établie : les prestations que reçoit un demandeur en application d'un régime d'assurance privée ne sont pas déductibles des dommages-intérêts. Cependant, la portée précise et le fondement de l'exception ont fait couler beaucoup d'encre dans la jurisprudence et dans la doctrine. Son importance pratique est limitée compte tenu du fait qu'on a généralement recours à la subrogation, ce qui a pour effet d'éviter la question de l'avantage compensatoire. Bien que l'exception s'applique habituellement en matière de responsabilité délictuelle, elle a également été appliquée en matière contractuelle, y compris dans le cadre d'actions pour congédiement injustifié : *Jack Cewe Ltd. c. Jorgenson*, [1980] 1 R.C.S. 812. Dans ces deux domaines du droit, le raisonnement est le même en principe, bien que les modalités du contrat et les rapports entre les parties guideront l'analyse en matière contractuelle.

[42] Un point controversé a trait aux types de prestations que vise l'exception relative à l'assurance privée. L'exception s'applique-t-elle aux assurances à caractère indemnitaire et à caractère non indemnitaire? S'applique-t-elle aux prestations d'invalidité, aux prestations d'assurance-emploi ou aux prestations de retraite? La Cour a répondu par l'affirmative à toutes ces questions, mais non, comme nous le verrons, sans une dissidence bien motivée. Bref, l'exception dite relative à l'assurance privée a été appliquée par analogie à diverses prestations qui ne découlent pas d'un contrat d'assurance.

[43] Dans l'arrêt *Canadien Pacifique Ltée c. Gill*, [1973] R.C.S. 654, la Cour a appliqué l'exception de l'assurance de façon à ce que la valeur actuelle des prestations payables aux personnes à charge survivantes en vertu du Régime de pensions du Canada ne soit pas déduite des dommages-intérêts accordés dans le cadre d'une action pour blessures mortelles. S'exprimant au nom de la Cour, le juge Spence a conclu que les prestations

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assessing damages under the provisions of that statute": p. 670; see also *Grand Trunk Railway v. Beckett* (1887), 16 S.C.R. 713, at p. 714, and *Quebec Workmen's Compensation Commission v. Lachance*, [1973] S.C.R. 428, at pp. 433-34.

« présentent un caractère tellement semblable aux contrats d'assurance ordinaires qu'elles doivent également ne pas entrer en ligne de compte dans l'évaluation des dommages effectuée en vertu des dispositions du *Families' Compensation Act* » : p. 670; voir aussi *Grand Trunk Railway c. Beckett* (1887), 16 R.C.S. 713, p. 714, et *Commission des Accidents du Travail de Québec c. Lachance*, [1973] R.C.S. 428, p. 433-434.

[44] In *Guy v. Trizec Equities Ltd.*, [1979] 2 S.C.R. 756, Mr. Guy's injury led to his retirement and receipt of pension benefits. They were not deducted from damages for loss of earnings. Ritchie J., for the Court, viewed pensions, whether contributory or non-contributory, as flowing from the employee's work and part of what the employer was prepared to pay for the employee's services. He agreed with Lord Reid's conclusion, in *Parry*, as quoted by Spence J., in *Gill*, that "[t]he fact that they flow from past work equates them to rights which flow from an insurance privately effected by [the employee]": *Guy*, at p. 763. Similarly, in *Jack Cewe*, the Court did not deduct a dismissed employee's unemployment insurance benefits from his wrongful dismissal damages. The benefits, wrote Pigeon J., for the Court, were a consequence of the contract of employment making them similar to contributory pension benefits: p. 818. (The collateral benefit issue that arose in *Jack Cewe* is now addressed by s. 45 of the *Employment Insurance Act*, S.C. 1996, c. 23, which states that a claimant who receives benefits and is subsequently awarded damages for the same period, "shall pay to the Receiver General as repayment of an overpayment of benefits an amount equal to the benefits that would not have been paid if the earnings had been paid or payable at the time the benefits were paid".)

[44] Dans *Guy c. Trizec Equities Ltd.*, [1979] 2 R.C.S. 756, M. Guy a pris sa retraite et a commencé à toucher ses prestations de retraite après avoir subi une blessure. Les prestations n'ont pas été déduites des dommages-intérêts pour perte de gains. Le juge Ritchie, au nom de la Cour, a considéré que les pensions, qu'elles soient contributives ou non, provenaient du travail de l'employé et faisaient partie de ce que l'employeur était disposé à payer pour ses services. Il a accepté la conclusion tirée par lord Reid dans *Parry*, et citée par le juge Spence dans *Gill*, selon laquelle « [l]e fait qu'elles proviennent d'un travail passé les assimile à des droits qui dérivent d'une assurance privée contractée par l'employé » : *Guy*, p. 763. De même, dans *Jack Cewe*, la Cour n'a pas déduit les prestations d'assurance-emploi touchées par l'employé des dommages-intérêts qui lui avaient été accordés pour congédiement injustifié. Le juge Pigeon a écrit au nom de la Cour que les prestations étaient une conséquence du contrat de louage de service et que la situation était la même que pour les prestations de pension contributive : p. 818. (La question de la prestation parallèle soulevée dans cet arrêt est maintenant traitée à l'art. 45 de la *Loi sur l'assurance-emploi*, L.C. 1996, ch. 23, lequel prévoit qu'un prestataire qui reçoit des prestations et qui se voit par la suite accorder des dommages-intérêts au titre de la même période « est tenu de rembourser au receveur général à titre de remboursement d'un versement excédentaire de prestations les prestations qui n'auraient pas été payées si, au moment où elles l'ont été, la rémunération avait été ou devait être versée ».)

[45] In *Ratych*, the Court found that sick leave benefits should be deducted from damages otherwise payable for loss of earning by the party whose

[45] Dans *Ratych*, la Cour a conclu que l'indemnité de congé de maladie devrait être déduite des dommages-intérêts payables au titre de la perte de

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

revenus par la partie dont la négligence a entraîné des blessures. S'exprimant au nom des juges majoritaires, la juge McLachlin a écrit qu'il peut être approprié de ne pas déduire les prestations lorsque l'employé peut établir qu'il a payé des cotisations équivalant aux primes d'une police d'assurance. Autrement dit, il est possible que les prestations ne soient pas déductibles parce que le demandeur a souscrit et payé par mesure de prudence une assurance personnelle. Cependant, ce n'était pas le cas dans *Ratych*, qui présente une situation différente de celle où les prestations découlent de la relation employeur-employé : p. 973-974. Dans *Cunningham*, les prestations d'invalidité payables aux termes des conventions collectives ont été jugées non déductibles parce qu'il avait été démontré que les demandeurs avaient contribué au régime en acceptant une diminution de salaire. La Cour a établi à cet égard une distinction d'avec l'arrêt antérieur *Ratych*.

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

[46] Enfin, dans *Sylvester*, les prestations d'invalidité non contributives reçues pendant la période de préavis ont été déduites des dommages-intérêts par ailleurs payables pour congédiement injustifié. Les prestations étaient versées à titre d'indemnité pour perte de salaire pendant que le demandeur était incapable de travailler, le demandeur n'avait pas cotisé au régime et des considérations de principe favorisaient la déduction.

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

[47] Dans les deux cas où l'exception relative à l'assurance privée *n'a pas* été appliquée (*Ratych* et *Sylvester*), il était question de prestations auxquelles le demandeur n'avait pas contribué et qui devaient servir à indemniser ce dernier pour la perte causée par le manquement du défendeur. Les tribunaux, y compris notre Cour, ont jugé que les prestations de retraite, qui ne constituent pas une indemnité pour perte de salaire découlant d'une incapacité à travailler et auxquelles l'employé contribue directement ou indirectement, étaient visées par l'exception relative à l'assurance privée : *Guy*; *Gill*; *Chandler c. Ball Packaging Products Canada Ltd.* (1992), 2 C.C.P.B. 101 (C.J. Ont. (Div. gén.)), conf. par (1993), 2 C.C.P.B. 99 (C.J. Ont. (C. div.)); *Emery c. Royal Oak Mines Inc.* (1995), 24 O.R. (3d) 302 (Div. gén.); *Parry*.

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[48] IBM relies on *Canadian Human Rights Commission v. Canada (Attorney General)*, 2003 FCA 86, 301 N.R. 321, but, in my view, this reliance is misplaced. The human rights complainant in that case, Master Corporal (retired) Carter, complained that his release from the Canadian Forces by virtue of his age constituted discrimination; in other words, his claim was not that his employer had failed to give him reasonable notice of termination, but that it could not lawfully terminate him. Following his release from service, a proper legislative basis for compulsory retirement was put in place, thus ending the discrimination. The question was whether the compensation awarded by the Human Rights Tribunal for lost wages during the period of discrimination should be reduced by the amount of pension benefits received during that period. The Federal Court of Appeal held that they should. However, it specifically declined to decide the case on the basis of the private insurance exception: para. 20. Instead, it reasoned that Master Corporal Carter should be treated as a member of the regular force during the period of discrimination. But, by virtue of the applicable provisions of the *Canadian Forces Superannuation Act*, R.S.C. 1985, c. C-17, a person may *either* be a member of the regular armed forces contributing to the superannuation account *or* a person who has ceased to be a member and entitled to benefits, but not both at the same time. On that basis, his claim for both pension benefits and his full salary was inconsistent with the nature of his claim and the governing legislation. This reasoning cannot apply to this case, however. The private insurance exception applies to wrongful dismissal actions: *Jack Cewe*. In addition, the contractual provisions here, unlike the statute that governed Master Corporal Carter's case, do not have any general bar against receiving full pension entitlement and employment income.

[48] IBM se fonde sur l'arrêt *Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, 2003 CAF 86 (CanLII), mais elle le fait à tort, selon moi. Le caporal-chef Carter, le plaignant dans cette affaire de droits de la personne, affirmait que sa mise à la retraite par les Forces canadiennes, constituait de la discrimination en raison de l'âge; en d'autres mots, il ne prétendait pas que son employeur ne lui avait pas donné un préavis raisonnable, mais que l'employeur ne pouvait pas légalement le mettre à la retraite. Après cette mise à la retraite, des mesures législatives valides relatives à la retraite obligatoire ont été mises en place, ce qui a mis fin à la discrimination. La question était de savoir si l'indemnité accordée par le Tribunal des droits de la personne pour perte de salaire pendant la période au cours de laquelle le plaignant avait été victime de discrimination devait être réduite du montant des prestations de retraite versées au cours de cette période. La Cour d'appel fédérale a conclu que les prestations de retraite devaient être déduites. Cependant, elle a expressément refusé de trancher l'affaire sur le fondement de l'exception relative à l'assurance privée : par. 20. La cour a plutôt estimé que le caporal-chef Carter devait être traité comme un membre de la force régulière pendant la période au cours de laquelle il a été victime de discrimination. Toutefois, en vertu des dispositions applicables de la *Loi sur la pension de retraite des Forces canadiennes*, L.R.C. 1985, ch. C-17, une personne est *soit* un membre de la force régulière qui contribue au compte de pension de retraite, *soit* un ancien membre qui a droit à des prestations, mais non les deux à la fois. Pour cette raison, M. Carter ne pouvait réclamer à la fois des prestations de retraite et son plein salaire, cela étant incompatible avec la nature de sa demande et les dispositions législatives applicables. Ce raisonnement ne peut toutefois pas s'appliquer en l'espèce. L'exception relative à l'assurance privée s'applique aux actions pour congédiement injustifié : *Jack Cewe*. De plus, les dispositions contractuelles en l'espèce, contrairement à la loi régissant le cas du caporal-chef Carter, n'interdisent pas qu'une personne touche la pension maximale et le revenu d'emploi.

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

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

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

[52] The *Sylvester* case, from this Court, does not lay down any such broad "single contract" rule. If that had been the Court's view, it would have provided a much simpler solution to the issue in *Sylvester* than the one it unanimously adopted. Of course, in *Sylvester*, the sick leave benefits and the claim for wrongful dismissal damages both arose

[49] Le deuxième point controversé concerne le fondement de l'exception relative à l'assurance privée. Pour expliquer cette exception, diverses raisons ont été avancées et peuvent être regroupées sous trois rubriques principales. La première a trait à l'importance du lien de causalité entre l'obtention de la prestation et le manquement du défendeur. La deuxième se rapporte à la nature de la prestation et la troisième touche aux différents objectifs de politique générale pouvant être atteints selon que la prestation est ou n'est pas déduite.

[50] Cependant, avant d'aborder ces questions, je dois traiter d'une prétention de mon collègue le juge Rothstein. À son avis, il ne convient pas d'appliquer l'exception relative à la prestation parallèle ou à l'assurance privée lorsque la cause d'action du demandeur et son droit à une prestation donnée découlent du même contrat. Soit dit en toute déférence, je n'accepte pas l'idée qu'il existe ou qu'il devrait exister une règle aussi catégorique du « contrat unique » applicable aux avantages compensatoires. Cette thèse n'est pas conforme à la jurisprudence de notre Cour.

[51] Dans *Jack Cewe*, les prestations d'assurance-emploi n'ont pas été déduites des dommages-intérêts accordés pour congédiement injustifié. La Cour a conclu que les prestations étaient « une conséquence du contrat de louage de service », les assimilant aux prestations de pension contributive : p. 818. Ainsi, même si la Cour estimait que les prestations et la réclamation de dommages-intérêts découlaient du même contrat, les prestations *n*'ont *pas* été déduites des dommages-intérêts pour congédiement injustifié. La thèse de mon collègue est donc contredite par un arrêt de principe de notre Cour relatif à la déduction des prestations des dommages-intérêts accordés pour congédiement injustifié.

[52] Notre Cour n'établit aucune règle du « contrat unique » aussi générale dans son arrêt *Sylvester*. Si elle avait vu les choses de cette façon, la Cour aurait trouvé une solution beaucoup plus simple à la question en litige dans l'arrêt *Sylvester* que celle qu'elle a unanimement adoptée. Certes, dans *Sylvester*, les prestations pour congé de maladie

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from the contract of employment, but the Court did not rely on, or even mention, the broad "single contract" rule advanced by my colleague. On the contrary, Major J., writing for the Court, was careful *not* to articulate any broad "single contract" rule in relation to compensating advantages. He stated that

> [t]here may be cases where an employee will seek benefits in addition to damages for wrongful dismissal on the basis that the disability benefits are akin to benefits from a private insurance plan for which the employee has provided consideration. This is not the case here. . . . The issue whether disability benefits should be deducted from damages for wrongful dismissal where the employee has contributed to the disability benefits plan was not before the Court. [Emphasis added; para. 22.]

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

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

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

[54] The strength-of-connection factor has often been referred to in the cases. The argument is that private insurance benefits (and benefits considered analogous to them) should not be deducted because they result from the plaintiff's contract of

et la réclamation de dommages-intérêts pour congédiement injustifié découlaient toutes deux du contrat de travail, mais la Cour n'a pas invoqué, ni même mentionné, la règle générale du « contrat unique » posée par mon collègue. Au contraire, le juge Major, s'exprimant au nom de la Cour, a pris soin de ne formuler *aucune* règle générale du « contrat unique » applicable aux avantages compensatoires. Il a affirmé ce qui suit :

> Il est possible qu'il se présente des cas où l'employé demandera des prestations en sus des dommages-intérêts pour congédiement injustifié, pour le motif que les prestations d'invalidité s'apparentent aux prestations d'un régime privé d'assurance auquel il a cotisé. Ce n'est pas le cas en l'espèce. [. . .] Notre Cour n'était pas saisie de la question de savoir si les prestations d'invalidité devraient être déduites des dommages-intérêts pour congédiement injustifié lorsque l'employé a cotisé au régime de prestations d'invalidité. [Je souligne; par. 22.]

Bien sûr, les prestations découlent du contrat de travail, que l'employé cotise ou non au régime d'assurance. Le fait que la Cour ait explicitement laissé cette question en suspens est incompatible avec l'idée qu'elle ait voulu adopter la règle générale du « contrat unique » proposée par le juge Rothstein. L'arrêt *Sylvester* nous enseigne que, lorsqu'une cause d'action et une prestation découlent du contrat de travail, il nous faut d'abord examiner ce contrat pour déterminer si une prestation d'emploi doit être déduite des dommages-intérêts pour congédiement injustifié. Tout comme dans l'affaire *Sylvester*, le contrat de travail de M. Waterman ne précise rien sur ce point, et il nous faut donc tenter de dégager l'intention des parties à partir des termes exprès de ce contrat.

[53] Je reviens aux trois points controversés relativement au fondement de l'exception relative à l'assurance privée.

(i) L'importance du lien de causalité avec le manquement du défendeur

[54] La jurisprudence a souvent fait état de l'importance du lien de causalité. On prétend que les prestations d'assurance privée (et les prestations jugées analogues) ne devraient pas été déduites parce qu'elles découlent du contrat d'assurance du

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

demandeur, non de l'acte fautif du défendeur. C'est là en partie le raisonnement suivi dans *Bradburn c. Great Western Railway Co.* (1874), L.R. 10 Ex. 1, mais 140 ans plus tard, cette analyse semble artificielle. De plus, des auteurs ont souligné que les décisions portant sur la causalité juridique plutôt que factuelle cachent souvent les vraies raisons de principe sous-jacentes aux décisions : voir, p. ex., Ogus, p. 94; Burrows, p. 162. Dans *Parry*, l'arrêt de principe anglais qui portait sur l'exception relative à l'assurance privée, lord Pearce a fait remarquer que les principes stricts de la causalité ne permettent pas d'établir une [TRADUCTION] « ligne de démarcation satisfaisante » entre les prestations qui sont déductibles et celles qui ne le sont pas : p. 34. Comme nous l'avons vu, si l'examen du lien entre le manquement et la prestation contribue à déterminer que la question de la déductibilité de la prestation pose problème, les principes de la causalité n'offrent aucun indicateur fiable permettant de décider si une prestation devrait ou non être déduite.

(ii) The Nature and Purpose of the Benefit

(ii) La nature et l'objet de la prestation

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

[55] Par contre, la nature et l'objet de la prestation expliquent souvent mieux les raisons pour lesquelles des prestations d'assurance privée devraient ou non être déduites. Deux facteurs relatifs à la nature de la prestation se sont avérés particulièrement importants : la question de savoir si la prestation constitue une indemnité pour la perte causée par le manquement du défendeur, et la question de savoir si le demandeur a directement ou indirectement payé pour obtenir la prestation.

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

- Benefits have *not* been deducted if (a) they *are not* intended to be an indemnity for the sort of loss caused by the breach *and* (b) the plaintiff has contributed to the entitlement to the benefit: *Gill*; *Guy*.

[56] Je n'essaierai pas d'énoncer des principes généraux applicables à tous les types de prestations possibles. Cependant, comme nous le verrons plus loin, un examen de la jurisprudence de la Cour étaye les propositions générales suivantes (sous réserve, bien sûr, de dispositions législatives ou contractuelles à l'effet contraire) :

- Les prestations *n'ont pas* été déduites si a) elles *n'étaient pas* destinées à dédommager le demandeur de la perte causée par le manquement *et* b) le demandeur a payé pour avoir droit aux prestations : *Gill*; *Guy*.

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- Benefits have *not* been deducted where the plaintiff has contributed to an indemnity benefit: *Jack Cewe*; *Cunningham*.

- Benefits *have* been deducted when they *are* intended to be an indemnity for the sort of loss caused by the breach but the plaintiff has not contributed in order to obtain entitlement to the benefit: *Sylvester*; *Ratych*.

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

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

- Les prestations *n'ont pas* été déduites dans les cas où le demandeur a contribué à une prestation indemnitaire : *Jack Cewe*; *Cunningham*.

- Les prestations *ont* été déduites dans les cas où elles *étaient* destinées à dédommager le demandeur de la perte causée par le manquement, mais le demandeur n'a pas payé pour avoir droit aux prestations : *Sylvester*; *Ratych*.

[57] Les prestations de retraite en l'espèce n'étaient pas destinées à dédommager M. Waterman d'une perte de salaire et ce dernier a contribué à l'acquisition de sa pension pendant ses années de service. C'est certainement la raison pour laquelle il n'a jamais été allégué que les prestations devraient être déduites suivant le principe de la limitation du préjudice. La prestation de pension est donc du genre de celles qui ne devraient pas être déduites. Voici le raisonnement qui m'amène à cette conclusion.

[58] J'examine d'abord la décision rendue par la Chambre des lords dans *Parry*, qui constitue l'assise d'une grande partie de la jurisprudence canadienne. Lord Reid a en définitive basé sa conclusion selon laquelle la prestation (une pension) ne devrait pas être déduite sur le fait de sa [TRADUCTION] « nature intrinsèque » : « De par sa nature, une pension est différente d'un salaire. [. . .] Le salaire est la rétribution immédiate d'un travail [. . .] tandis qu'une pension représente le fruit, produit par l'assurance, de la totalité des fonds mis de côté dans le passé relativement à son travail. Leur nature est différente » : p. 16. Lord Pearce a aussi tenu compte de la nature et de l'objet de la prestation lorsqu'il s'est posé la question suivante : « Existe-t-il, dans la nature de ces droits à pension découlant d'un travail, un autre élément qui les place dans une catégorie différente des droits à pension découlant d'une assurance privée? Leur "caractère" est le même » : p. 37. Lord Wilberforce a aussi insisté sur la nature de la prestation de retraite, soulignant qu'elle n'empêchait pas l'agent blessé d'accepter un autre travail rémunéré, que le salaire soit inférieur, égal ou supérieur à son salaire d'agent de police : p. 42.

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

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

[60] Importantly, the minority judges accepted that the dominant tide of the jurisprudence in the common law world is that non-indemnity pension benefits should not be deducted: *Cunningham*, at p. 376. Although they mostly do not rely on the private insurance exception, Commonwealth decisions conclude that pension benefits should not be deducted from a damages award because pension benefits are not meant to compensate the plaintiff for the injury or breach of contract or to act as wage replacement. See for example: *National Insurance Co. of New Zealand Ltd. v. Espagne* (1961), 105 C.L.R. 569; *Graham v. Baker* (1961), 106 C.L.R. 340; *Parry*; *Smoker v. London Fire and Civil Defence Authority*, [1991] 2 A.C. 502 (H.L.). In *Hopkins v. Norcross plc*, [1993] 1 All E.R. 565 (Q.B.), the High Court applied this reasoning to the deductibility of pension benefits in a wrongful dismissal suit. The reasoning is also consistent with the decision of the U.K. Employment Appeal Tribunal in *Knapton v. ECC Card Clothing Ltd.*, [2006] I.C.R. 1084. The non-deductibility of pension benefits was affirmed by the New Zealand Court of Appeal in *Gilbert v. Attorney-General*, [2010] NZCA 421, 8 N.Z.E.L.R. 72. This is consistent with the approach in *Guy*, discussed earlier, which concerned pension benefits that were clearly not intended to be an indemnity for loss of earnings

[59] Dans *Cunningham*, les juges minoritaires ont axé leur raisonnement sur la nature et l'objet de la prestation. Les juges majoritaires s'intéressaient aux précédents, à l'équité et à la dissuasion, mais les juges minoritaires ont réorienté l'analyse sur la nature de la prestation, en établissant une distinction entre l'assurance à caractère « indemnitaire » et l'assurance à caractère « non indemnitaire ». La première devrait être déduite alors que la seconde ne devrait pas l'être :

> Cette distinction est cruciale pour toute analyse des prestations parallèles. Si le montant de l'assurance n'est pas versé pour dédommager le demandeur d'une perte pécuniaire mais qu'il est simplement payé dans le cadre d'un contrat relatif à un événement aléatoire, le demandeur n'a pas été indemnisé d'une perte. Il peut donc réclamer la totalité de sa perte au défendeur négligent sans violer la règle interdisant la double indemnisation. [p. 371-372]

[60] Fait important, les juges minoritaires ont reconnu que, suivant la tendance dominante de la jurisprudence des pays de common law, les prestations de retraite non indemnitaires ne devraient pas être déduites : *Cunningham*, p. 376. Même si la plupart des décisions du Commonwealth ne sont pas fondées sur l'exception relative à l'assurance privée, on y conclut que les prestations de retraite ne devraient pas être déduites des dommages-intérêts parce qu'elles ne sont pas destinées à dédommager le demandeur d'un préjudice ou d'une rupture de contrat, pas plus qu'elles ne visent à remplacer le revenu. Voir par exemple : *National Insurance Co. of New Zealand Ltd. c. Espagne* (1961), 105 C.L.R. 569; *Graham c. Baker* (1961), 106 C.L.R. 340; *Parry*; *Smoker c. London Fire and Civil Defence Authority*, [1991] 2 A.C. 502 (H.L.). Dans *Hopkins c. Norcross plc*, [1993] 1 All E.R. 565 (B.R.), la Haute Cour a appliqué ce raisonnement à la déductibilité des prestations de retraite dans le cadre d'une action pour congédiement injustifié. Ce précédent a été suivi par le Tribunal d'appel du travail du R.-U. dans *Knapton c. ECC Card Clothing Ltd.*, [2006] I.C.R. 1084. La non-déductibilité des prestations de retraite a été confirmée par la Cour d'appel de la Nouvelle-Zélande dans *Gilbert c. Attorney-General*, [2010] NZCA 421, 8 N.Z.E.L.R. 72.

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due to an inability to work. They were held not to be deductible from damages for loss of earnings payable by those responsible for the plaintiff's inability to work.

Cette démarche est conforme à celle suivie dans l'arrêt *Guy*, dont il est question précédemment, lequel traitait de prestations de retraite qui n'étaient manifestement pas destinées à dédommager d'une perte de gains attribuable à une incapacité à travailler. Selon cet arrêt, les prestations n'étaient pas déductibles des dommages-intérêts au titre de la perte de gains que devaient payer les personnes responsables de l'incapacité à travailler du demandeur.

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

[61] Dans *Sylvester*, la nature de la prestation a également été un facteur important dans la décision de la Cour de déduire des dommages-intérêts payables pour congédiement injustifié les prestations d'invalidité financées par l'employeur. Dans son analyse, la Cour a d'abord examiné la nature et l'objet de la prestation et, plus particulièrement, la question de savoir si la prestation constituait une indemnité pour le type de perte causée par la rupture du contrat par le défendeur. Le fait que la prestation était destinée à dédommager d'une perte de revenus figure parmi les raisons qui ont amené la Cour à conclure que la prestation devrait être déduite.

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

[62] Il est justifié sur le plan des principes de se fonder sur la distinction entre les prestations indemnitaires et non indemnitaires. Comme l'a signalé la juge McLachlin dans les motifs dissidents qu'elle a rédigés dans l'arrêt *Cunningham*, si la prestation « n'est pas versé[e] pour dédommager le demandeur d'une perte pécuniaire, mais qu'[elle] est simplement payé[e] dans le cadre d'un contrat relatif à un événement aléatoire », on ne peut considérer qu'elle a dédommagé le demandeur de cette perte pécuniaire : p. 372. Si c'est le cas, les arguments invoqués en faveur de la déductibilité de la prestation sont plus faibles en ce sens que IBM demande que des pommes soient déduites des oranges.

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

[63] Le fait que la pension de M. Waterman provient d'un régime à prestations déterminées n'en change pas la nature, soit qu'il s'agit d'une prestation non indemnitaire.

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

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

> . . . this contributory pension is derived from the appellant's contract with his employer and . . . the payments made pursuant to it are akin to payments under an insurance policy. This view is in accord with the judgment of the House of Lords in *Parry v. Cleaver*, which was expressly approved in this Court in the reasons for judgment of Mr. Justice Spence in *Canadian Pacific Ltd. v. Gill* . . . . [p. 762]

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

[67] While the cases from this Court have referred to whether the plaintiff has directly or indirectly contributed to the benefit, there are strong arguments against giving this consideration much weight as an explanation of why particular benefits

[64] Dans *Sylvester*, la Cour a aussi tenu compte d'un autre facteur — soit que le demandeur n'avait pas cotisé en vue d'obtenir la prestation en la payant directement ou indirectement — pour étayer sa conclusion selon laquelle la prestation devait être déduite des dommages-intérêts. Ce facteur a souvent été évoqué et retenu dans la jurisprudence.

[65] Par exemple, la Cour a d'abord appliqué le raisonnement adopté dans *Parry* dans l'arrêt *Gill* rendu à 1973 et l'a confirmé dans *Guy*. Dans ces deux arrêts, la Cour a souligné le fait que le demandeur avait payé directement ou indirectement afin d'obtenir la prestation en question. Comme l'a dit au nom de la Cour le juge Ritchie dans *Guy* :

> . . . cette pension contributive provient du contrat de l'appelant avec son employeur et [. . .] les paiements faits en vertu de celle-ci sont de même nature que les paiements faits aux termes d'une police d'assurance. Cette opinion concorde avec le jugement de la Chambre des lords dans *Parry v. Cleaver*, que cette Cour a expressément approuvé dans les motifs de jugement du juge Spence dans l'arrêt *Canadien Pacifique Ltée c. Gill* . . . [p. 762]

[66] Ce raisonnement a été repris dans l'arrêt *Jack Cewe*, où la Cour a conclu que les prestations d'assurance-emploi contributives n'étaient pas déductibles des dommages-intérêts pour congédiement injustifié. Ce facteur a aussi joué un rôle important dans *Cunningham*. Comme l'a indiqué le juge Cory au nom des juges majoritaires : « L'exception visant les assurances ne devrait pas s'appliquer aux avantages conférés en vertu d'un contrat de travail seulement lorsque le demandeur est syndiqué et négocie collectivement. Les prestations reçues par un employé non syndiqué en vertu de son contrat de travail seront également non déductibles s'il est démontré que l'employé a d'une certaine manière payé les avantages conférés » : p. 408 (je souligne). Les juges majoritaires ont conclu que cette contribution avait été établie et que la prestation ne devait pas être déduite.

[67] Bien que les arrêts de notre Cour posent la question de savoir si le demandeur a directement ou indirectement contribué à la prestation, des arguments solides militent contre l'idée d'accorder beaucoup d'importance à ce facteur pour justifier

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should or should not be deducted. As McLachlin J. pointed out in her partial dissent in *Cunningham*, reliance on this factor may be seen as inconsistent with legal principle and logic. With respect to legal principle, the defendant takes the plaintiff as he or she is and the plaintiff is compensated for his or her actual loss and no more. As a matter of logic, it does not seem right to say that deducting the benefits deprives the plaintiff of the contributions made to gain entitlement to those benefits — whether deducted from damages or not, the plaintiff receives the benefits: *Cunningham*, at pp. 381-83; for a critique of reliance on this factor, see also Ogus, at pp. 226-27.

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

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

la déductibilité ou la non-déductibilité de certaines prestations. Comme l'a signalé la juge McLachlin dans ses motifs dissidents de l'arrêt *Cunningham*, le fait de s'appuyer sur ce facteur peut sembler incompatible avec les principes juridiques et la logique. En ce qui concerne les principes juridiques, le défendeur prend le demandeur dans la situation dans laquelle ce dernier se trouve et le demandeur est dédommagé de la perte qu'il a réellement subie, sans plus. En toute logique, il semble incorrect de dire que la déduction des prestations prive le demandeur des contributions qu'il a versées pour être admissible à ces prestations — qu'elles soient ou non déduites des dommages-intérêts, le demandeur reçoit les prestations : *Cunningham*, p. 381-383; pour une critique de l'importance accordée à ce facteur, voir aussi Ogus, p. 226-227.

[68] Les prestations de retraite en l'espèce ne constituent pas une indemnité pour perte de revenus et, comme nous le verrons, les prestations de retraite accumulées au fil des années de service sont invariablement jugées contributives. Le fait que le régime de retraite en l'espèce soit un régime à prestations déterminées ne change rien à cette conclusion. Par conséquent, le problème qui ressort de ce qui oppose l'opinion majoritaire et la dissidence dans *Cunningham*, c.-à-d. la façon dont il convient de traiter les prestations indemnitaires auxquelles le demandeur a contribué, ne se pose pas en l'espèce.

[69] Je conclus de cet examen que les questions de savoir si la prestation est de la nature d'une indemnité pour la perte attribuable au manquement du défendeur, et si le demandeur a contribué directement ou indirectement à la prestation, ont joué un rôle important lorsqu'il s'agit d'expliquer pourquoi certaines prestations sont ou ne sont pas visées par l'exception relative à l'assurance privée. Les opinions exprimées par la Cour ont été nettement et étroitement partagées sur la question de la déduction d'une prestation indemnitaire à laquelle le demandeur a contribué. Cependant, à ma connaissance, aucune décision de la Cour n'a exigé la déduction d'une prestation non indemnitaire à laquelle le demandeur a contribué, comme les prestations de retraite en l'espèce.

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(iii) Broader Policy Considerations

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

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

(iii) Considérations de principe plus générales

[70] Trois considérations de principe principales ont souvent été invoquées pour expliquer pourquoi une prestation devrait ou ne devrait pas être déduite : la punition, la dissuasion ainsi que des facteurs d'incitation en vue de l'adoption d'une conduite socialement responsable.

[71] L'exception relative à l'assurance privée a souvent été justifiée par le fait que la déduction de la prestation réduit la valeur punitive et dissuasive des dommages-intérêts. Cependant, la notion que cette exception devait avoir une valeur punitive et dissuasive a été largement critiquée, à bon droit à mon avis. Les auteurs s'entendent pour dire qu'il ne faut pas se fonder sur ces facteurs pour expliquer pourquoi une prestation est ou n'est pas déduite : voir J. G. Fleming, « The Collateral Source Rule and Contract Damages » (1983), 71 *Cal. L .Rev.* 56, p. 58-59; J. Marks, « Symmetrical Use of Universal Damages Principles — Such as the Principles Underlying the Doctrine of Proximate Cause — to Distinguish Breach-Induced Benefits That Offset Liability From Those That Do Not » (2009), 55 *Wayne L. Rev.* 1387, p. 1420; J. M. Perillo, « The Collateral Source Rule in Contract Cases » (2009), 46 *San Diego L. Rev.* 705, p. 716; Ogus, p. 225; Burrows, p. 162-163. Ce point de vue a été retenu tant par la Haute Cour d'Australie que par la Chambre des lords : voir *National Insurance Co.*, p. 571, le juge en chef Dixon, et *Parry*, p. 33. Dans *Parry*, lord Pearce s'est exprimé comme suit à la p. 33 : [TRADUCTION] « Le mot "punitif" n'est d'aucune utilité. Il s'agit simplement d'un mot utilisé quand un tribunal estime injuste qu'un défendeur soit tenu au paiement de dommages-intérêts relativement à un article donné. » J'ajouterais qu'il est difficile d'invoquer la punition et la dissuasion pour écarter la critique incisive faite par la juge McLachlin dans les motifs dissidents qu'elle a rédigés dans *Cunningham*, p. 383-384. Je conclus qu'il ne convient pas d'invoquer la punition ou la dissuasion pour justifier l'exception relative à l'assurance privée, surtout dans les cas de rupture de contrat où la notion de faute ne s'applique pas.

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

[72] Cela ne veut toutefois pas dire que l'approche applicable à l'égard des dommages-intérêts ne tient pas compte, ou ne devrait pas tenir compte, des objets sous-jacents aux obligations substantielles non respectées auxquelles on veut remédier par l'attribution de dommages-intérêts. Si, par exemple, la protection des attentes raisonnables des parties à un contrat constitue l'un des objectifs importants du droit contractuel, il convient alors d'examiner dans quelle mesure l'attribution de dommages-intérêts favorise cet objectif dans une affaire donnée : voir, p. ex., A. Swan et J. Adamski, *Canadian Contract Law* (3e éd. 2012), §1.27. Ce facteur peut être pris en considération, ainsi que les autres principes du droit afférent aux dommages-intérêts, pour faire en sorte que la réparation soit bien adaptée au manquement à l'obligation.

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

[73] L'exception relative à l'assurance privée a aussi été justifiée par les facteurs d'incitation qu'elle peut offrir. Par exemple, déduire les prestations que les demandeurs se sont procurées est susceptible de décourager les demandeurs d'agir prudemment lorsqu'ils prennent une mesure de protection de ce genre. Cette explication suscite toutefois une certaine controverse. Les juges majoritaires se sont fondés sur cette explication dans *Cunningham*, mais les juges dissidents, ainsi que certains auteurs, l'ont vigoureusement critiquée : voir, p. ex., Ogus, p. 226-227.

[74] In my view, we should be cautious about relying too heavily on the incentives that may result from deducting or not deducting. There will sometimes be little basis in fact for supposing that either deducting or not deducting certain benefits will have any impact on people's behaviour. For example, do we think it likely that deducting insurance benefits will discourage people from buying insurance? The coverage is not limited to situations in which there will be legal recourse against a defendant. Even when legal recourse is available, it will likely require a longer and more expensive process, as compared to making an insurance claim. Nor is it likely that people will be less ready to buy insurance if they are not doubly compensated in cases in which fault can be established. It seems to me that we should generally rely on these broader

[74] À mon avis, nous devons nous garder d'accorder trop de poids aux facteurs d'incitation qui peuvent résulter de la déduction ou la non-déduction. Parfois, peu d'éléments nous permettront de croire que la déduction ou la non-déduction de certaines prestations aura une incidence sur le comportement des gens. Par exemple, croyons-nous qu'il soit probable que la déduction des prestations d'assurance aura pour effet de décourager les gens à souscrire une assurance? Le contrat d'assurance ne couvre pas seulement les situations qui se prêteront à un recours judiciaire contre un défendeur. Même lorsqu'un recours est possible, le processus peut s'avérer plus long et plus coûteux que le dépôt d'une réclamation d'assurance. Il n'est pas non plus vraisemblable de penser que les gens seront réticents à souscrire une assurance

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policy concerns only when they are directly related to the particular benefit in issue and when there is some reasonable basis in fact or experience to suppose that deducting or not deducting will actually serve the policy objective.

s'ils ne reçoivent pas une double indemnité dans les cas où une faute peut être établie. Il me semble qu'en général nous devrions nous fonder sur ces considérations de principe plus générales seulement lorsqu'elles sont directement liées à la prestation en question et qu'un fondement factuel raisonnable ou l'expérience nous permettent de penser que la déduction ou la non-déduction favoriseront effectivement l'objectif recherché.

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

[75] L'arrêt *Sylvester* offre un exemple où l'on a fondé les considérations de principes sur les faits en cause. La décision rendue dans cette affaire s'appuyait sur le fait que la déduction des prestations d'invalidité des dommages-intérêts accordés pour congédiement injustifié garantissait que tous les employés touchés recevraient des dommages-intérêts équivalents. Si les prestations n'étaient pas déduites, un employé congédié pendant qu'il touche des prestations d'invalidité obtiendrait une indemnité plus élevée que l'employé congédié pendant qu'il travaille (par. 21). Dans ce même paragraphe, la Cour a examiné les facteurs d'incitation résultant de la déduction ou la non-déduction des prestations d'invalidité — le fait de ne pas déduire les prestations pourrait constituer, pour les employeurs qui établissent des régimes de prestations d'invalidité, un facteur de dissuasion qui n'est pas souhaitable. Ces préoccupations sont directement liées aux prestations en question et ont un fondement factuel raisonnable.

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

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

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

[76] Cet examen de la jurisprudence et de la doctrine me permet de tirer les conclusions suivantes.

a) Aucun facteur unique ne permet de déterminer les prestations qui sont visées par l'exception relative à l'assurance privée.

b) Un facteur largement reconnu a trait à la nature et à l'objet de la prestation. Plus la prestation s'apparente, de par sa nature et son objet, à un dédommagement du type de perte causée par le manquement du défendeur, plus les circonstances militent en faveur de la déduction. L'inverse est aussi vrai.

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

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

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

c) La question de savoir si le demandeur a contribué à la prestation demeure pertinente, bien que son fondement soit discutable.

d) En général, une prestation ne sera pas déduite s'il *ne* s'agit *pas d'une indemnité* pour la perte causée par le manquement du défendeur et le demandeur *a contribué* dans le but d'y avoir droit.

e) L'analyse de la question de la déduction permet l'examen de considérations de principe plus générales, comme le fait qu'il soit souhaitable que toutes les personnes dans des situations semblables reçoivent un traitement équivalent, la possibilité d'offrir des incitations pour une conduite sociale souhaitable et la nécessité que des règles claires puissent facilement s'appliquer.

(3) Application to This Case

[77] Where would these factors lead us in this case? In my view, they clearly support not deducting the retirement pension benefits from wrongful dismissal damages. The retirement pension is not an indemnity for wage loss, but rather a form of retirement savings. While the employer made all of the contributions to fund the plan, Mr. Waterman earned his entitlement to benefits through his years of service. As the plan states, its primary purpose is "to provide periodic pension payments to eligible employees . . . after retirement . . . in respect of their service as employees": art. 1.01, A.R., at p. 117. Thus, it seems to me that this case falls into the category of cases in which the insurance exception has always been applied: the benefit is not an indemnity and the employee contributed to the benefit. This result is consistent with the dominant view in the case law and among legal scholars: *Guy*; *Gill*; *Chandler*; *Emery*; *Parry*; Ogus, at p. 223.

(3) Application à la présente affaire

[77] À quelle conclusion ces facteurs nous mènent-ils en l'espèce? À mon avis, ils militent clairement en faveur de la non-déduction des prestations de retraite des dommages-intérêts pour congédiement injustifié. Les prestations de retraite ne constituent pas une indemnité pour perte de revenus, mais plutôt une forme d'épargne-retraite. Bien que l'employeur ait fait toutes les cotisations au régime, M. Waterman a acquis pendant ses années de service le droit de recevoir des prestations. Comme il est énoncé dans le régime, le principal objet consiste à [TRADUCTION] « assurer le versement périodique des prestations aux employés admissibles [. . .] après la retraite [. . .] pour les services qu'ils ont rendus à titre d'employés » : art. 1.01, d.a., p. 117. Par conséquent, il me semble que la présente espèce entre dans la catégorie des situations auxquelles l'exception relative à l'assurance s'est toujours appliquée : la prestation n'est pas une indemnité et l'employé a cotisé au régime. Cette conclusion concorde avec l'opinion la plus généralement admise dans la jurisprudence et la doctrine : *Guy*; *Gill*; *Chandler*; *Emery*; *Parry;* Ogus, p. 223.

[78] To conclude, the compensation principle should not be applied strictly in this case because the pension benefits fall within the private

[78] En conclusion, le principe d'indemnisation ne devrait pas être appliqué strictement en l'espèce parce que les prestations de retraite sont visées

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insurance exception and should not be deducted from the wrongful dismissal damages.

par l'exception relative à l'assurance privée et ne devraient pas être déduites des dommages-intérêts pour congédiement injustifié.

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

C. *L'arrêt Sylvester de notre Cour appuie-t-il la thèse d'IBM selon laquelle les prestations de retraite doivent être déduites?*

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

[79] J'aborde maintenant le deuxième argument principal soulevé par IBM, soit que l'arrêt *Sylvester* rendu par la Cour appuie sa thèse voulant que les prestations de retraite doivent être déduites en l'espèce. À mon avis, *Sylvester* n'appuie pas cette conclusion.

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

[80] La question en litige dans *Sylvester* était de savoir si les dommages-intérêts pour congédiement injustifié devaient être réduits du montant des prestations d'invalidité payées, pendant la période visée par le préavis, au titre d'un régime financé par l'employeur. L'analyse de la Cour portait sur trois facteurs : la nature de la prestation, les intentions des parties exprimées au contrat de travail, et quelques considérations de principe plus générales. L'examen de ces facteurs à la lumière des faits de l'affaire qui nous occupe mène à la conclusion contraire à celle tirée par la Cour dans *Sylvester*.

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

[81] Dans *Sylvester*, la Cour a d'abord examiné la nature de la prestation. Se voulait-elle une solution de rechange (c.-à-d. une indemnité) au salaire payable pendant la période de préavis raisonnable? La Cour a jugé que c'était le cas, et ce, pour deux raisons. Premièrement, les prestations d'invalidité remplaçaient le salaire. Il ressortait clairement des modalités des régimes en cause que les prestations visaient à maintenir le paiement de la rémunération de l'employé dans l'éventualité où celui-ci serait incapable de travailler pour cause de maladie ou de blessure. Deuxièmement, les prestations d'invalidité étaient réduites des autres revenus de l'employé, y compris les autres revenus d'invalidité, les prestations reçues au titre d'un régime de continuation de la rémunération, les prestations de pension, les indemnités d'accident du travail et le salaire tiré d'un autre emploi : par. 14. Elles ne constituaient donc pas un droit indépendant — elles étaient liées à la perte de salaire réelle et

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contributed money or money's worth in order to obtain the benefit. The Court specifically left open the question of whether "disability benefits should be deducted from damages for wrongful dismissal where the employee has contributed to the disability benefits plan": para. 22.)

définies par cette perte. (Comme je l'ai déjà signalé, la Cour a aussi pris soin de ne pas se prononcer sur la question de savoir si la conclusion serait la même si l'employé avait cotisé, en argent ou autrement, dans le but d'obtenir les prestations. La Cour a explicitement indiqué qu'elle ne se prononçait pas sur la question de savoir si les « prestations d'invalidité devraient être déduites des dommages-intérêts pour congédiement injustifié lorsque l'employé a cotisé au régime de prestations d'invalidité » : par. 22.)

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

[82] Les prestations en l'espèce sont de nature complètement différente. Contrairement aux prestations d'invalidité en cause dans *Sylvester*, les prestations de retraite ne sont manifestement pas des prestations indemnitaires pour perte de salaire en raison d'une incapacité à travailler. Selon ce qu'indiquent les documents relatifs au régime, les prestations de retraite visent à [TRADUCTION] « assurer le versement périodique des prestations aux employés admissibles [. . .] après leur retraite et jusqu'à leur décès pour les services qu'ils ont rendus à titre d'employés » : art. 1.01, d.a., p. 117. Le régime de retraite est essentiellement un outil d'épargne-retraite sur lequel l'employé acquiert un droit absolu au fil du temps. Les prestations sont fonction des années de service et du niveau de salaire. L'employé qui quitte son emploi après 10 ans ou plus de service touche des prestations de retraite différées ou obtient le transfert de la valeur de rachat globale admissible de sa pension dans un compte de retraite immobilisé. Les gains ouvrant droit à pension sont calculés en fonction du plein salaire pendant un congé sans solde autorisé ou un congé d'invalidité de courte durée. De plus, contrairement aux prestations d'invalidité dans *Sylvester*, les autres sources de revenus ou prestations reçues par le bénéficiaire ne sont généralement pas déduites des prestations de retraite ou des droits à pension. M. Waterman aurait pu prendre sa retraite, toucher sa pleine pension et recevoir un plein salaire d'un autre employeur. Les prestations de retraite n'ont manifestement pas pour objet de compenser une perte de revenus.

[83] There is an even more fundamental difference. As Prowse J.A. points out in her reasons in

[83] Il existe une différence encore plus fondamentale. Comme la juge Prowse l'a souligné

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the Court of Appeal, pension benefits like those in issue here bear many of the hallmarks of a property right. They, as she put it, are regarded as belonging to the employee:

> . . . although the payments under the [Defined Benefit Pension] Plan are made wholly by IBM, they are made "on behalf of" the employee. This is also reflected in IBM's [Defined Contribution] Plan, where employer contributions are attributed to a fund in the name of the employee. In both instances, the pension benefits are regarded as belonging to the employee. They have the right to designate beneficiaries of the benefit; they can elect to transfer their pension account to another locked-in RRSP or to another employer after 10 years of service upon leaving IBM; there is a provision for a lump-sum pay-out on retirement in the case of "small pensions" (of lesser magnitude than that enjoyed by Mr. Waterman (Article 10.08)); and, in many jurisdictions, their pension rights are divisible between spouses on marriage breakdown. [Emphasis added; para. 60.]

[84] This view is supported by basic principles of pension law. Mr. Waterman's pension was vested. As A. Kaplan and M. Frazer explain in *Pension Law* (2nd ed. 2013), at p. 203:

> Vesting is the "foundation stone" of employee protections upon which pension regulation is based . . . . An employee who is vested has an enforceable statutory right to the accrued value of his or her pension benefit earned to date, even if the employee terminates employment and plan membership prior to retirement age. It is the vesting of pension benefits that shift our perception of pensions from purely contractual entitlements to quasi-proprietary interests.

[85] Pension benefits have consistently been viewed as an entitlement earned by the employee. As Lord Reid put it in *Parry*, at p. 16: "The products of the sums paid into the pension fund are in fact delayed remuneration for [the employee's] current work. That is why pensions are regarded

dans ses motifs en Cour d'appel, les prestations de retraite telles celles en cause dans la présente affaire revêtent plusieurs des caractéristiques d'un droit de propriété. Pour reprendre ses propos, ces prestations sont considérées comme appartenant à l'employé :

> [TRADUCTION] . . . bien que les paiements prévus au régime [de retraite à prestations déterminées] soient entièrement versés par IBM, ils le sont « pour le compte de » l'employé. C'est également ce qui appert du régime [à cotisations déterminées] d'IBM, où les cotisations de l'employeur sont versées dans une caisse au nom de l'employé. Dans les deux cas, les prestations de retraite sont considérées comme appartenant à l'employé. Ce dernier peut désigner les bénéficiaires des prestations et décider de transférer son compte de pension dans un autre REÉR immobilisé ou chez un autre employeur après 10 ans de service au moment où il cesse de travailler pour IBM; une disposition prévoit le versement d'une indemnité de départ forfaitaire à l'employé qui prend sa retraite et qui a droit à une « petite pension » (inférieure à celle dont jouit M. Waterman (article 10.08)); et, dans plusieurs ressorts, la valeur de ses droits à pension peut être partagée entre les conjoints en cas de rupture du mariage. [Je souligne; par. 60.]

[84] Ce point de vue s'appuie sur les principes de base du droit des pensions. La pension de M. Waterman était acquise. Comme l'expliquent A. Kaplan et M. Frazer dans *Pension Law* (2e éd. 2013), p. 203 :

> [TRADUCTION] L'acquisition est la « pierre d'assise » des mesures de protection offertes à l'employé sur laquelle repose la réglementation des régimes de retraite [. . .] L'employé ayant acquis une pension se voit conférer par la loi un droit exécutoire à la valeur accumulée des prestations de retraite qu'il a déjà gagnées, même s'il met fin à son emploi et cesse de participer au régime de retraite avant d'avoir atteint l'âge de la retraite. C'est l'acquisition des prestations de retraite qui nous amène à voir les pensions non plus comme des droits de nature purement contractuelle, mais comme des intérêts quasi propriétaux.

[85] Les prestations de retraite ont toujours été perçues comme un droit acquis par l'employé. Comme l'a expliqué lord Reid à la p. 16 de l'arrêt *Parry* : [TRADUCTION] « Le produit des sommes versées dans la caisse de retraite constitue, en fait, une rémunération différée du travail actuel [de

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as earned income." The pension is therefore a form of retirement savings earned over the years of employment to which the employee acquires specific and enforceable rights. This is no less the case because the pension benefits were not reduced by the wrongful dismissal; had they been, there would be no collateral benefit problem and no question of deduction. It is useful to ask this question: In light of the contract of employment, would the parties have intended to use an employee's vested pension entitlements to subsidize his or her wrongful dismissal? In my view, the answer must be no. As Joseph M. Perillo writes:

> Suppose an employer fires an employee without justification, breaching a contract of employment, and the employee turns to his or her savings account for living expenses. No one would argue that the employee's recovery against the employer should be diminished by the employee's withdrawals from savings. The savings account is a collateral source. To the extent that another collateral source resembles a savings account, the plaintiff should be able to recover damages without a deduction for the amount received from the collateral source. [Emphasis added; p. 706.]

[86] My colleague Rothstein J. does not accept that the different nature of the benefits in issue here and in *Sylvester* is a relevant distinction between the two cases. However, Major J., writing for a unanimous Court in *Sylvester*, clearly thought it was. His first reason for deciding that the benefits ought to be deducted was that "the disability benefits were intended to be a substitute for the respondent's regular salary": para. 14. In other words, it was a key aspect of the Court's reasoning in *Sylvester* that the benefit in issue was intended to be an indemnity for wage loss. I find it impossible to dismiss the first reason the Court in *Sylvester* gave for its decision as irrelevant.

l'employé]. C'est la raison pour laquelle on considère les prestations de retraite comme un revenu gagné. » Il s'agit donc d'une forme d'épargne-retraite gagnée au fil des années de service sur laquelle l'employé acquiert des droits spécifiques et exécutoires. Il n'en est pas moins ainsi du fait que le congédiement injustifié n'a pas entraîné une réduction des prestations de retraite; si elles avaient été réduites du fait du congédiement injustifié, il n'y aurait aucun problème de prestation parallèle et la question de la déduction ne se poserait pas. Il convient de poser la question suivante : compte tenu du contrat d'emploi, les parties auraient-elles eu l'intention d'utiliser les droits à pension acquis à l'employé pour financer son congédiement injustifié? À mon avis, il faut répondre par la négative. Joseph M. Perillo a écrit ce qui suit :

> [TRADUCTION] Supposons qu'un employeur congédie un employé sans justification, qu'il rompt le contrat d'emploi, et que l'employé utilise ses épargnes pour couvrir ses frais de subsistance. Personne n'irait prétendre que les montants retirés du compte d'épargne de l'employé devraient être déduits de la réparation payée à l'employé par l'employeur. Le compte d'épargne est une source parallèle. Dans la mesure où une autre source parallèle ressemble à un compte d'épargne, le demandeur devrait pouvoir recouvrer des dommages-intérêts sans que le montant provenant de la source parallèle ne soit déduit. [Je souligne; p. 706.]

[86] Mon collègue le juge Rothstein n'accepte pas que la nature différente des prestations en l'espèce par rapport à celles dont il est question dans *Sylvester* puisse constituer une distinction pertinente entre les deux affaires. Cependant, le juge Major, qui a rédigé la décision unanime de la Cour dans *Sylvester*, croyait manifestement que c'était le cas. La première raison pour laquelle il était d'avis que les prestations devaient être déduites était que « les prestations d'invalidité visaient à remplacer le salaire reçu ordinairement par l'intimé » : par. 14. Autrement dit, le fait que les prestations en cause devaient être une indemnité pour perte de salaire constituait un aspect essentiel du raisonnement adopté par la Cour dans *Sylvester*. J'estime qu'il est impossible de rejeter la première raison donnée par la Cour à l'appui de sa décision dans *Sylvester* au motif qu'elle n'est pas pertinente.

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[87] The Court in *Sylvester* then turned to the contract of employment. The goal was to see if it shed any light on the parties' intentions with respect to the receipt of both damages for wrongful dismissal and disability benefits. Contrary to the view of my colleague Rothstein J., the relevant question was *not* what Mr. Sylvester was entitled to under his contract in the event that his employer had not breached it. The question was whether the contract expressly or impliedly provided for him to receive both disability benefits and damages for wrongful dismissal: para. 13. Although the employment contract in *Sylvester* (as in this case) did not expressly address that question, it did so by implication. The receipt of both disability benefits and wages was not possible in any circumstances under the contract of employment. Moreover, other income of any nature had to be deducted from the amount of the disability payments. This suggested that the parties did not intend Mr. Sylvester to receive both disability benefits and damages representing lost wages during the notice period. As Major J. put it:

> The respondent's contractual right to damages for wrongful dismissal and his contractual right to disability benefits are based on opposite assumptions about his ability to work and it is incompatible with the employment contract for the respondent to receive both amounts. The damages are based on the premise that he would have worked during the notice period. The disability payments are only payable because he could not work. It makes no sense to pay damages based on the assumption that he would have worked in addition to disability benefits which arose solely because he could not work. This suggests that the parties did not intend the respondent to receive both damages and disability benefits. [Emphasis added; para. 17.]

[88] As I read *Sylvester*, this analysis does not suggest that we should focus narrowly on the precise provisions of the employment contract,

[87] Dans *Sylvester*, la Cour a ensuite examiné le contrat d'emploi dans le but de mieux comprendre les intentions des parties en ce qui concerne l'obtention de dommages-intérêts pour congédiement injustifié et de prestations d'invalidité. Contrairement à l'avis exprimé par mon collègue le juge Rothstein, la question pertinente *n*'était *pas* de savoir à quoi M. Sylvester avait droit aux termes de son contrat d'emploi si son employeur ne l'avait pas violé. La question était de savoir si le contrat prévoyait, expressément ou implicitement, qu'il reçoive à la fois des prestations d'invalidité et des dommages-intérêts pour congédiement injustifié : par. 13. Le contrat d'emploi dont il était question dans *Sylvester* (comme en l'espèce) ne traitait pas expressément de cette question, mais il le faisait implicitement. Quelles que soient les circonstances, il était impossible que M. Sylvester touche à la fois, en vertu du contrat d'emploi, des prestations d'invalidité et un salaire. De plus, les autres revenus, de quelque nature que ce soit, devaient être déduits du montant des prestations d'invalidité. Cela signifiait que les parties n'avaient pas l'intention que M. Sylvester touche à la fois les prestations d'invalidité et les dommages-intérêts pour perte de salaire pendant la période de préavis. Le juge Major l'a expliqué comme suit :

> Le droit contractuel de l'intimé de recevoir des dommages-intérêts pour congédiement injustifié et son droit contractuel à des prestations d'invalidité reposent sur des hypothèses opposées en ce qui concerne sa capacité de travailler, et il est incompatible avec le contrat de travail que l'intimé puisse toucher ces deux sommes d'argent. Les dommages-intérêts sont fondés sur la prémisse qu'il aurait travaillé pendant la période visée par le préavis. Les prestations d'invalidité ne sont payables que parce qu'il ne pouvait pas travailler. Il serait illogique de verser des dommages-intérêts en supposant que l'employé aurait travaillé, en sus de prestations d'invalidité découlant d'un droit qui n'a pris naissance que parce qu'il ne pouvait pas travailler. Cela tend à indiquer que les parties n'entendaient pas que l'intimé reçoive à la fois des dommages-intérêts et des prestations d'invalidité. [Je souligne; par. 17.]

[88] Selon mon interprétation de l'arrêt *Sylvester*, cette analyse ne signifie pas qu'il faille s'intéresser exclusivement aux dispositions précises du contrat

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unless of course they deal expressly with the issue of whether pension benefits should be deducted from wrongful dismissal damages. In the absence of such an explicit provision — and, as in *Sylvester*, there is no explicit provision in this case — we must look at the contract in an attempt to determine what the parties intended with respect to the receipt of both wrongful dismissal damages and pension benefits.

[89] When we examine the employment contract in this case, the picture is much less clear than it was in *Sylvester*. It is true that because Mr. Waterman was between the ages of 65 and 71 at the time of his dismissal and qualified for his full pension, he could not in fact receive both employment income from IBM and pension benefits. However, looking at the contract as a whole, it is not a fair implication that the parties agreed that pension entitlements should be deducted from wrongful dismissal damages.

[90] First, an employee who is dismissed before his date of retirement would receive, without deduction, wrongful dismissal damages and all of his or her entitlements under the plan (for example, a deferred pension or its commuted value transferred to a locked-in savings vehicle). No one has suggested that these amounts would in any way affect wrongful dismissal damages. In fact, the value of any pension entitlements lost during the notice period would be a compensable loss in a wrongful dismissal action: see, e.g., J. R. Sproat, *Wrongful Dismissal Handbook* (6th ed. 2012), at pp. 6-51 to 6-52.6. Second, a retired employee would receive, in full, both his pension benefits and any employment income earned from another employer. There is nothing before us to suggest that a retired IBM employee could not obtain employment with another employer and keep both his or her pension income and the new employment income. Third, once an employee reaches age 71, he or she could receive in full both employment income *from IBM* and pension benefits: plan description, at p. 2 (A.R., at p. 103); plan art. 9.02 (A.R., at p. 132). In *Sylvester*, not only was it impossible *in all*

de travail, à moins bien sûr qu'elles portent expressément sur la question de la déductibilité des prestations de retraite des dommages-intérêts pour congédiement injustifié. En l'absence d'une telle disposition expresse — et, tout comme dans *Sylvester*, il n'y en a aucune en l'espèce — nous devons examiner le contrat afin de déterminer quelle était l'intention des parties en ce qui concerne l'obtention de dommages-intérêts pour congédiement injustifié et de prestations de retraite.

[89] Lorsque nous examinons le contrat de travail en l'espèce, le tableau est beaucoup moins clair qu'il ne l'était dans *Sylvester*. Il est vrai que, parce que M. Waterman avait entre 65 et 71 ans au moment de son congédiement et qu'il était admissible à la pension maximale, il ne pouvait pas en fait toucher à la fois un revenu d'emploi d'IBM et des prestations de retraite. Cependant, lorsqu'on examine le contrat dans son ensemble, il n'est pas juste d'en inférer que les parties ont convenu que les droits à la pension devraient être déduits des dommages-intérêts pour congédiement injustifié.

[90] Premièrement, l'employé qui est congédié avant la date de sa retraite recevrait, sans déduction, des dommages-intérêts pour congédiement injustifié et tous les droits prévus par le régime (par exemple, une pension différée ou le transfert de la valeur de rachat dans un compte de retraite immobilisé). Nul n'a laissé entendre que ces montants auraient une incidence quelconque sur les dommages-intérêts pour congédiement injustifié. En fait, la valeur des droits à la pension perdue pendant la période visée par le préavis serait indemnisable dans le cadre d'une action pour congédiement injustifié : voir, p. ex., J. R. Sproat, *Wrongful Dismissal Handbook* (6e éd. 2012), p. 6-51 à 6-52.6. Deuxièmement, l'employé retraité toucherait la pension maximale et tout revenu d'emploi d'un autre employeur. Rien ne nous permet de penser qu'un employé retraité d'IBM ne pourrait pas obtenir un emploi ailleurs et conserver son revenu de pension ainsi que le nouveau revenu d'emploi. Troisièmement, à l'âge de 71 ans, l'employé pourrait toucher le plein salaire *versé par IBM* et la pension maximale : description du régime, p. 2 (d.a., p. 103); régime, art. 9.02 (d.a., p. 132). Dans *Sylvester*, non seulement était-il

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circumstances to receive salary and disability benefits, it was clear that the amount of disability benefits would be reduced by any other income, whatever its source, received by the employee: para. 14. Unlike *Sylvester*, it cannot be said here that the rights to damages for wrongful dismissal and to pension benefits are based on opposite or incompatible assumptions. This conclusion is also consistent with the understanding of vested pension entitlements as being akin to property rights which accrue over time for the employee's benefit.

[91] I conclude that, unlike the situation in *Sylvester*, Mr. Waterman's receipt of pension benefits and wrongful dismissal damages is not based on opposite assumptions about his ability to work and it is not incompatible with the employment contract that he could receive both pension benefits and employment income.

[92] Finally, the Court in *Sylvester* turned to the broader policy concerns, notably that dismissed employees should be treated alike and that the incentives should encourage rather than discourage employers from setting up disability plans. As Major J. put it, at para. 21:

> If disability benefits are paid in addition to damages for wrongful dismissal, the employee collecting disability benefits receives more compensation than the employee who is dismissed while working. Deducting disability benefits ensures that all affected employees receive equal damages . . . . If disability benefits are not deductible, employers who set up disability benefits plans will be required to pay more to employees upon termination than employers who do not set up plans. This deterrent to establishing disability benefits plans is not desirable. [Emphasis added.]

[93] These factors are also relevant here, although, in this case, they support not deducting rather than

impossible pour l'employé, *en toutes circonstances*, de toucher un salaire et des prestations d'invalidité, mais il était clair que le montant de ces prestations serait réduit de tout autre revenu reçu par l'employé, peu importe la source : par. 14. Contrairement à l'affaire *Sylvester*, on ne peut affirmer en l'espèce que le droit à des dommages-intérêts pour congédiement injustifié et le droit aux prestations de retraite reposent sur des hypothèses opposées ou incompatibles. Cette conclusion s'accorde aussi avec l'idée que les droits acquis à la pension sont analogues aux droits de propriété qui s'accumulent avec le temps au profit de l'employé.

[91] Je conclus que, contrairement à la situation dans l'arrêt *Sylvester*, le fait que M. Waterman ait reçu des prestations de retraite et des dommages-intérêts pour congédiement injustifié ne repose pas sur des hypothèses opposées à propos de sa capacité à travailler et n'est pas incompatible avec le contrat d'emploi selon lequel il peut toucher à la fois des prestations de retraite et un revenu d'emploi.

[92] Enfin, dans l'arrêt *Sylvester*, la Cour a examiné des préoccupations de principe plus générales, notamment le fait que les employés congédiés devraient être traités de la même façon et que les mesures incitatives devraient encourager, et non dissuader, les employeurs à établir des régimes d'invalidité. Comme l'a expliqué le juge Major au par. 21 :

> Si des prestations d'invalidité sont payées en sus de dommages-intérêts pour congédiement injustifié, l'employé qui reçoit des prestations d'invalidité reçoit une indemnité plus élevée que l'employé qui est congédié pendant qu'il travaille. Le fait de déduire les prestations d'invalidité garantit que tous les employés touchés reçoivent des dommages-intérêts équivalents [. . .] Si les prestations d'invalidité ne sont pas déductibles, les employeurs qui établissent des régimes de prestations d'invalidité devront, en cas de cessation d'emploi, payer davantage aux employés touchés que les employeurs qui n'établissent pas de tels régimes. Ce facteur de dissuasion à l'établissement de régimes de prestations d'invalidité n'est pas souhaitable. [Je souligne.]

[93] Ces facteurs sont également pertinents en l'espèce, bien que dans ce cas là, ils appuyaient

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deducting the benefits. Unlike in *Sylvester*, non-deduction in this case promotes equal treatment of employees. If deduction is permitted, an employee who is eligible to receive his or her pension but has not reached 71 years of age can, by means of wrongful dismissal, be forced to retire and draw on his or her pension benefits. By contrast, an employee who is not entitled to his or her pension receives either a deferred pension or the commuted value of it plus full damages for wrongful dismissal and an employee over the age of 71 receives both pension and employment income. Deducting the benefits only in the case of employees in Mr. Waterman's situation would constitute unequal treatment of pensionable employees. Moreover, deductibility seems to me to provide an incentive for employers to dismiss pensionable employees rather than other employees because it will be cheaper to do so. This is not an incentive the law should provide. While this is a broader policy consideration, it is directly related to the benefit in question and has a reasonable basis in fact.

la non-déduction des prestations plutôt que leur déduction. Contrairement à la situation rencontrée dans *Sylvester*, la non-déduction en l'espèce favorise le traitement égal de tous les employés. Si la déduction est permise, l'employé admissible à la pension qui n'a pas atteint l'âge de 71 ans peut, s'il est congédié injustement, être obligé de prendre sa retraite et de toucher ses prestations de retraite. Par contre, l'employé non admissible à la pension touche des prestations de retraite différées ou la valeur de rachat de sa pension en sus de tous les dommages-intérêts pour congédiement injustifié, et l'employé âgé de plus de 71 ans touche à la fois ses prestations de retraite et son revenu d'emploi. Déduire les prestations seulement pour les employés qui se trouvent dans la même situation que M. Waterman constituerait une inégalité de traitement pour les employés admissibles à la pension. De plus, la déductibilité me semble avoir pour effet d'inciter les employeurs à congédier, pour des raisons économiques, les employés admissibles à la pension plutôt que les autres. Il ne s'agit pas là d'un facteur d'incitation que la loi devrait favoriser. Bien qu'il s'agisse d'une préoccupation de principe plus générale, elle est directement liée à la prestation en question et elle repose sur un fondement factuel raisonnable.

[94] My colleague Rothstein J. is of the view that there is no such incentive because "with respect to the cost of dismissing pensionable and non-pensionable employees, there is a difference only in form, not substance": para. 134. Respectfully, I cannot agree. The suggestion implicit in this is that there is a dollar for dollar correlation between the amount of the pension benefits that IBM claims should be deducted and the amount IBM contributed over time in order to fund those benefits such that it is not cheaper to dismiss a pensionable employee than one who is not eligible to collect a full pension. This proposition, however, is based on a considerable oversimplification of how pension benefits are funded and, in my respectful view, is not accurate.

[94] Mon collègue le juge Rothstein estime qu'il n'existe aucun facteur d'incitation de ce genre parce que « la différence entre le coût lié au congédiement des employés admissibles à la pension et le coût lié au congédiement des employés non admissibles est une question de forme seulement et non de fond » : par. 134. En toute déférence, je ne puis souscrire à cette opinion. Il laisse entendre implicitement par là qu'il existe un rapport d'équivalence entre le montant des prestations de retraite qui, selon IBM, devrait être déduit et la somme qu'elle a cotisée au fil du temps pour financer ces prestations, de sorte qu'il n'est pas plus économique de congédier un employé admissible à la pension que de congédier un employé non admissible à une pleine pension. Cette proposition repose toutefois sur une simplification fort excessive, et inexacte à mon humble avis, du financement des prestations de retraite.

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[95] My colleague Rothstein J. suggests that failure to deduct earned pension benefits from wrongful dismissal damages may disadvantage other employees in the future because it may "incentivize" employers to require an employee to work through the duration of the reasonable notice period to the potential disadvantage of employees. However, the risk of such an incentive seems to me to be highly speculative. There are pluses and minuses for both the employer and employee of giving (and receiving) working notice. From the employer's perspective, it may not be advantageous to have the employee remain on the employer's premises during the period of working notice. In addition, the employer loses the benefit of the employee's efforts to mitigate damages by finding alternate employment, a benefit that is often unpredictable at the time of termination. The employer is always able to negotiate before firing an employee rather than firing without first negotiating. In light of these considerations, among others, it seems to me to be highly speculative to say that refusal to deduct pension benefits will encourage employers to give working notice rather than offer severance.

[95] Selon mon collègue le juge Rothstein, l'omission de déduire les prestations de retraite acquises des dommages-intérêts pour congédiement injustifié peut défavoriser d'autres employés à l'avenir en « incitant » les employeurs à exiger de l'employé qu'il travaille jusqu'à la fin de la période de préavis raisonnable, ce qui pourrait défavoriser les employés. Cependant, le risque associé à ce facteur d'incitation me semble éminemment conjectural. Le fait de donner (et de recevoir) un préavis comporte des avantages et des inconvénients tant pour l'employeur que pour l'employé. Du point de vue de l'employeur, il n'est peut-être pas avantageux que l'employé reste sur les lieux de travail pendant la période de préavis. De plus, l'employeur ne bénéficie pas des efforts que pourrait déployer l'employé pour trouver un autre emploi et, ainsi, limiter le préjudice, un avantage imprévisible dans bien des cas au moment du congédiement. L'employeur peut toujours négocier avant de congédier un employé au lieu de le congédier sans avoir d'abord négocié. Vu ces considérations, entre autres, il me semble très conjectural de dire que le refus de déduire les prestations de retraite encouragera les employeurs à donner un préavis plutôt qu'à offrir une indemnité de départ.

[96] Finally, there is no parallel, from a policy analysis perspective, between this case and *Sylvester*. The Court in *Sylvester* was concerned that failure to deduct the non-contributory wage replacement benefits in issue there might make employers reluctant to fund wage replacement benefits. This concern does not arise here, given that the pension benefit is not intended to be an indemnity for wage loss and that the employees contribute to the cost of the pension benefits. Moreover, any employer who has this concern (and it must be said that the scarcity of reported cases on the point suggest that it arises very uncommonly) can address it by adding appropriate language to the pension plan text.

[96] Enfin, il n'existe aucun parallèle, du point de vue des considérations de politique générale, entre l'affaire *Sylvester* et la présente affaire. Dans *Sylvester*, la Cour craignait que si les prestations de remplacement du salaire non contributives n'étaient pas déduites, les employeurs pourraient se montrer réticents à financer ces prestations. Cette préoccupation n'est pas présente en l'espèce vu que la prestation de retraite n'est pas censée constituer une indemnité pour perte de salaire et que les employés contribuent au coût des prestations de retraite. De plus, un employeur en proie à cette crainte (il convient cependant de préciser que le peu de cas signalés donne à penser que ce problème survient très rarement) peut la dissiper en ajoutant une disposition appropriée au texte du régime de retraite.

[97] To conclude: in this case, the pension benefits are markedly different in nature than the disability benefits in issue in *Sylvester*, the intention

[97] Pour conclure, j'estime qu'en l'espèce, les prestations de retraite sont de nature très différente des prestations d'invalidité en cause dans l'affaire

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of the parties in relation to the issue of deduction is much more uncertain in this case than in *Sylvester* and the broader policy considerations point in the opposite direction. Unlike the disability benefits in *Sylvester*, the pension benefits are not an indemnity for loss of earnings, they are not reduced by other benefits or income received and the employee over time receives a legal entitlement to the commuted value of the benefits. Unlike the situation respecting disability benefits in *Sylvester*, there is no general bar against an employee receiving both pension income and employment income, and receipt of the benefits and income is not based on opposite or incompatible assumptions. Pension benefits are not reduced by other income. Not deducting the pension benefits serves the goal of equal treatment of employees and provides better incentives for just treatment of all employees.

Sylvester, que l'intention des parties en ce qui concerne la déductibilité est bien plus ambivalente que dans *Sylvester*, et que les préoccupations de principe plus générales vont dans le sens contraire de cet arrêt. Contrairement aux prestations d'invalidité en cause dans *Sylvester*, les prestations de retraite ne constituent pas une indemnité pour perte de revenus, elles ne sont pas réduites par le versement d'autres prestations ou par un revenu et l'employé acquiert au fil du temps le droit de toucher la valeur de rachat des prestations. Contrairement à la situation relative aux prestations d'invalidité dans *Sylvester*, rien n'interdit à un employé de toucher à la fois ses prestations de retraite et un revenu d'emploi, et l'obtention de ces prestations et de ce revenu n'est pas fondée sur des hypothèses opposées ou incompatibles. Les prestations de retraite ne sont pas réduites par d'autres revenus. La non-déduction des prestations de retraite permet d'offrir aux employés un traitement égal et d'inciter plus efficacement les employeurs à traiter tous leurs employés de façon équitable.

[98] I conclude, therefore, that *Sylvester* does not support IBM's position in this case, and that it, in fact, supports the conclusion that the pension benefits should not be deducted from the wrongful dismissal damages.

[98] Je conclus par conséquent que l'arrêt *Sylvester* n'étaye pas la thèse d'IBM en l'espèce, mais qu'il appuie plutôt la conclusion selon laquelle les prestations de retraite ne devraient pas être déduites des dommages-intérêts pour congédiement injustifié.

V. Disposition

[99] I would dismiss the appeal with costs throughout.

V. Dispositif

[99] Je suis d'avis de rejeter le pourvoi avec dépens devant toutes les cours.

The reasons of McLachlin C.J. and Rothstein J. were delivered by

Version française des motifs de la juge en chef McLachlin et du juge Rothstein rendus par

ROTHSTEIN J. (dissenting) —

LE JUGE ROTHSTEIN (dissident) —

I. Introduction

[100] Richard Waterman brought this suit alleging that his employer, IBM Canada Ltd., breached his employment contract by failing to provide him with reasonable notice of his termination. The trial judge found, and it is now undisputed, that Mr. Waterman was entitled to 18 months more notice than he

I. Introduction

[100] Richard Waterman a intenté la présente action dans laquelle il allègue que son employeur, IBM Canada Ltée, a violé son contrat de travail en ne lui donnant pas un préavis de congédiement raisonnable. Le juge de première instance a conclu, ce que nul ne conteste maintenant, que

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was given, and that he is accordingly entitled to the salary he would have earned if he continued to work during that period. During the 18-month period, IBM paid Mr. Waterman monthly pension benefits under the assumption that he was retired. The sole issue in this case is whether the pension benefits that IBM paid to Mr. Waterman during the 18-month notice period must be deducted in calculating the appropriate damages award.

M. Waterman avait droit à un préavis de 18 mois en plus de celui qu'on lui avait donné, et qu'il a par conséquent droit au salaire qu'il aurait gagné s'il avait continué à travailler pendant cette période. Au cours de la période de 18 mois, IBM a versé à M. Waterman des prestations de retraite mensuelles en tenant pour acquis que celui-ci avait pris sa retraite. La seule question en litige dans la présente affaire est de savoir si les prestations de retraite qu'IBM a versées à M. Waterman au cours de la période de préavis de 18 mois doivent être déduites lors du calcul de la somme qui doit lui être versée à titre de dommages-intérêts.

[101] I agree with the majority that a straightforward application of the governing principle of contract damages — that the non-breaching party be placed in the position he would have been in had the contract been performed — leads to the conclusion that deduction is required (see para. 2). The parties agree that, had Mr. Waterman been given reasonable notice and worked through the reasonable notice period, he would have received his salary, but not his pension, until the notice period elapsed. Deducting the pension benefits IBM paid him during the reasonable notice period thus puts him in the position he would have been in had the contract been performed and failure to deduct gives him a windfall.

[101] Je conviens avec les juges majoritaires que, si l'on applique simplement le principe qui régit les dommages-intérêts contractuels — suivant lequel la partie innocente doit être rétablie dans la situation dans laquelle elle se serait trouvée si le contrat avait été respecté — les prestations de retraite doivent être déduites (voir par. 2). Les parties s'entendent pour dire que, s'il avait reçu un préavis raisonnable et s'il avait travaillé pendant toute la période du préavis raisonnable, M. Waterman n'aurait touché que son salaire, mais pas ses prestations de retraite, jusqu'à la fin de la période de préavis. La déduction des prestations de retraite qu'IBM lui a versées au cours de la période de préavis raisonnable permet donc de remettre M. Waterman dans la même situation que celle dans laquelle il se serait trouvé si le contrat avait été respecté. En ne déduisant pas les prestations de retraite, on permettrait à M. Waterman de réaliser un gain fortuit.

[102] However, the majority accepts Mr. Waterman's argument that he should be allowed a windfall because his pension benefits are subject to the "private insurance" exception. I would reject that argument. This case requires the Court to assess Mr. Waterman's loss under the terms of a single contract which gave rise to both Mr. Waterman's right to reasonable notice and his right to pension benefits. The private insurance exception has no application to such a case. Where the Court is called upon to assess loss under a single contract, the plaintiff's entitlement turns on the ordinary governing principle that he should be put in the

[102] Or, les juges majoritaires acceptent l'argument de M. Waterman selon lequel il faudrait lui laisser ce gain fortuit parce que ses prestations de retraite sont visées par l'exception relative à l'« assurance privée ». Je suis d'avis de rejeter cet argument. En l'espèce, la Cour doit déterminer la perte subie par M. Waterman selon les modalités d'un seul contrat qui a donné à M. Waterman le droit à un préavis raisonnable et le droit de toucher des prestations de retraite. L'exception relative à l'assurance privée ne s'applique pas à un tel cas. Lorsque la Cour est appelée à déterminer une perte aux termes d'un seul contrat, le droit du demandeur

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position he would have been in had the contract been performed.

repose sur le principe ordinaire applicable suivant lequel celui-ci doit être rétabli dans la situation dans laquelle il se serait trouvé si le contrat avait été respecté.

[103] It is important to note that not all pension plans are alike. Mr. Waterman's pension plan is a defined benefit plan, under which IBM undertook to provide Mr. Waterman with pension benefits from the time of his retirement until the time of his death, based on a predetermined formula. That is to say that, from Mr. Waterman's perspective, upon retirement, he would receive his defined benefits from an unlimited fund for the rest of his life. For this reason, Mr. Waterman's receipt of pension benefits during the reasonable notice period did not affect his future entitlement to pension benefits and deducting the benefits does not have the effect of taking anything away from Mr. Waterman. Rather, not deducting has the effect of giving Mr. Waterman more than he bargained for and charging IBM more than it agreed to pay.

[103] Il importe de signaler que les régimes de retraite ne sont pas tous semblables. M. Waterman bénéficie d'un régime de retraite à prestations déterminées, aux termes duquel IBM s'est engagée à lui verser des prestations selon une formule prédéterminée, et ce, à compter de sa retraite et, par la suite, jusqu'à son décès. Autrement dit, du point de vue de M. Waterman, celui-ci devait toucher, sa vie durant à compter de sa retraite, des prestations déterminées à même un fonds illimité. C'est pourquoi les prestations de retraite reçues par M. Waterman au cours de la période de préavis raisonnable n'ont pas eu d'incidence, pour l'avenir, sur son droit aux prestations de retraite, et la déduction de ces prestations n'enlève rien à M. Waterman. Au contraire, la non-déduction a pour effet de lui accorder davantage que ce qu'il a négocié et d'obliger IBM à verser une somme plus élevée que celle convenue.

II. Factual Background

II. Contexte factuel

[104] Mr. Waterman was an employee of IBM for approximately 42 years. At the time he was terminated, he was 65 years old.

[104] M. Waterman a travaillé pour IBM pendant environ 42 ans. Au moment de son congédiement, il était âgé de 65 ans.

[105] As an employee of IBM, Mr. Waterman became a member of the company's defined benefit pension plan. Under the terms of the plan, IBM was required to make contributions to the pension plan on behalf of its employees and, upon an employee's eligibility to receive benefits, IBM would provide the employee with monthly benefits according to a predetermined formula until the employee's death. An employee became eligible to receive his monthly benefits upon retiring after reaching the age of 65. An employee whose employment was terminated prior to the age of 65 could receive his pension benefits upon turning 65 or could elect to transfer the actuarial equivalent of his accrued pension to a new employer. An employee also became eligible to receive his benefits upon reaching the age of 71, independent of whether he had been terminated

[105] En tant qu'employé d'IBM, M. Waterman a adhéré au régime de retraite à prestations déterminées de la compagnie. Aux termes du régime, IBM devait cotiser au régime pour le compte de ses employés et, dès qu'un employé devenait admissible à toucher des prestations, IBM versait à cet employé des prestations mensuelles selon une formule prédéterminée, et ce, jusqu'à son décès. Le régime prévoyait qu'un employé devenait admissible à des prestations mensuelles au moment de sa retraite, après avoir atteint l'âge de 65 ans. L'employé dont l'emploi prenait fin avant l'âge de 65 ans pouvait toucher ses prestations de retraite après avoir atteint l'âge de 65 ans ou choisir de transférer à un nouvel employeur l'équivalent actuariel de ses prestations de retraite accumulées. L'employé devenait également admissible

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or retired, which, according to the parties, was necessary for the plan to comply with income tax regulations. At the time Mr. Waterman was terminated by IBM, the monthly payment he would receive upon becoming eligible had already been determined for several years.

à recevoir ses prestations à l'âge de 71 ans, peu importe qu'il ait été congédié ou qu'il ait pris sa retraite, ce qui, selon les parties, était nécessaire pour que le régime soit conforme aux règlements de l'impôt sur le revenu. Au moment où IBM a congédié M. Waterman, la somme que ce dernier devait recevoir chaque mois à partir du moment où il devenait admissible était déjà calculée depuis de nombreuses années.

[106] IBM terminated Mr. Waterman in March 2009. It provided him with two months' working notice, after which it would consider him retired and begin paying him his pension benefits. The trial judge found, and it is now undisputed, that IBM was required to give Mr. Waterman an additional 18 months of notice.

[106] IBM a congédié M. Waterman au mois de mars 2009. Elle lui a donné un préavis de deux mois, après quoi elle le considérerait à la retraite et commencerait à lui verser des prestations de retraite. Le juge de première instance a conclu, et personne ne le conteste maintenant, qu'IBM avait l'obligation de donner à M. Waterman un préavis supplémentaire de 18 mois.

[107] The termination letter also offered Mr. Waterman a separation payment in exchange for a general release from liability. As explained later, the separation offer would have provided Mr. Waterman with more than he would have earned had he been given the full 20-month notice period and worked through the notice period. Mr. Waterman declined IBM's separation offer. He continued to work for IBM during the two-month notice period that he was given, and thereafter began collecting monthly pension benefits from IBM. On June 11, 2009, Mr. Waterman initiated this action to enforce his contractual right to be provided with reasonable notice of his termination.

[107] La lettre de congédiement offrait également à M. Waterman une indemnité de cessation d'emploi en échange d'une décharge de toute responsabilité. Comme je l'explique plus loin, l'offre de cessation d'emploi aurait accordé à M. Waterman davantage que ce qu'il aurait reçu si on lui avait donné un préavis complet de 20 mois et s'il avait travaillé pendant toute la durée du préavis. M. Waterman a refusé l'offre de cessation d'emploi d'IBM. Il a continué à travailler pour IBM pendant la période de préavis de deux mois qu'il avait reçu et il a commencé par la suite à toucher des prestations de retraite mensuelles d'IBM. Le 11 juin 2009, M. Waterman a introduit la présente action en vue de faire reconnaître son droit contractuel à un préavis de congédiement raisonnable.

[108] In September 2009, Mr. Waterman obtained alternative employment as a part-time insurance salesman.

[108] En septembre 2009, M. Waterman a obtenu un autre emploi comme vendeur d'assurance à temps partiel.

III. Procedural History

III. Historique procédural

A. *Supreme Court of British Columbia, 2010 BCSC 376, 2010 CLLC ¶210-021*

A. *Cour suprême de la Colombie-Britannique, 2010 BCSC 376, 2010 CLLC ¶210-021*

[109] After a summary trial, Goepel J. found that IBM breached Mr. Waterman's employment contract by failing to provide him with reasonable

[109] Au terme d'un procès sommaire, le juge Goepel a conclu qu'IBM avait violé le contrat de travail de M. Waterman en ne lui donnant pas

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notice. Goepel J. held that IBM was required to provide Mr. Waterman with an additional 18 months of notice beyond the two months that had been provided. As a result, Mr. Waterman was entitled to the salary he would have earned and benefits he would have accrued if he had continued to work for IBM during that time.

un préavis raisonnable. Le juge Goepel a estimé qu'IBM avait l'obligation de donner à M. Waterman un préavis de 18 mois en plus de celui qu'il avait reçu. M. Waterman avait par conséquent droit au salaire qu'il aurait gagné et aux prestations qu'il aurait accumulées s'il avait continué à travailler pour IBM pendant cette période.

[110] Goepel J. did not deduct the pension benefits that IBM paid to Mr. Waterman during the notice period in calculating his damages. Goepel J. expressed the view that he was bound by the Court of Appeal for British Columbia's decision in *Girling v. Crown Cork & Seal Canada Inc.* (1995), 9 B.C.L.R. (3d) 1, in which it was held that pension benefits should not be deducted from wrongful dismissal damages. He acknowledged the possibility that *Girling* was no longer an accurate statement of the law in light of this Court's decision in *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315, but found it incumbent upon him to follow *Girling* for reasons of judicial comity.

[110] Dans son calcul des dommages-intérêts, le juge Goepel n'a pas déduit les prestations de retraite qu'IBM avait versées à M. Waterman au cours de la période de préavis. Le juge Goepel s'est dit d'avis qu'il était lié par la décision rendue par la Cour d'appel de la Colombie-Britannique dans l'affaire *Girling c. Crown Cork & Seal Canada Inc.* (1995), 9 B.C.L.R. (3d) 1, dans laquelle il avait été jugé que les prestations de retraite ne devaient pas être déduites des dommages-intérêts pour congédiement injustifié. Le juge a admis la possibilité que l'arrêt *Girling* ne représente plus un énoncé exact de l'état du droit, compte tenu de l'arrêt *Sylvester c. Colombie-Britannique*, [1997] 2 R.C.S. 315, de notre Cour, mais a conclu que, pour des raisons de courtoisie judiciaire, il se devait d'appliquer l'arrêt *Girling*.

[111] Based on this reasoning, Goepel J. awarded Mr. Waterman $93,305 in damages, which reflected the salary and benefits he would have earned if he had worked through the additional 18 months of notice, less the income earned from his new employment during that period.

[111] S'appuyant sur ce raisonnement, le juge Goepel a accordé à M. Waterman 93 305 $ en dommages-intérêts, ce qui correspondait au salaire et aux prestations que M. Waterman aurait reçus s'il avait travaillé pendant toute la période du préavis de 18 mois supplémentaires, déduction faite du revenu tiré de son nouvel emploi au cours de la même période.

B. *Court of Appeal for British Columbia, 2011 BCCA 337, 20 B.C.L.R. (5th) 241*

B. *Cour d'appel de la Colombie-Britannique, 2011 BCCA 337, 20 B.C.L.R. (5th) 241*

[112] Writing for a unanimous panel, Prowse J.A. dismissed IBM's appeal.

[112] S'exprimant au nom d'une formation unanime, la juge Prowse a rejeté l'appel interjeté par IBM.

[113] Prowse J.A. observed that the approach the Court of Appeal had previously taken in *Girling* was rejected by this Court's decision in *Sylvester*. In particular, *Sylvester* rejected the Court of Appeal for British Columbia's approach of treating agreements for employee benefits as contracts distinct from the

[113] La juge Prowse a fait observer que la démarche suivie par la Cour d'appel dans l'arrêt *Girling* avait été écartée par notre Cour dans l'arrêt *Sylvester*. En particulier, cet arrêt avait rejeté la méthode de la Cour d'appel de la Colombie-Britannique consistant à considérer les ententes

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employment contract. According to Prowse J.A., under *Sylvester*, Mr. Waterman's entitlement to both salary and payment of his pension benefits during the notice period turned on the construction of the contractual arrangement between the parties.

portant sur les prestations d'employé comme des contrats distincts du contrat de travail. La juge Prowse s'est dite d'avis que, selon l'arrêt *Sylvester*, le droit de M. Waterman à son salaire et au versement de prestations de retraite pendant la période de préavis dépendait de l'interprétation que l'on faisait de l'entente contractuelle intervenue entre les parties.

[114] After reviewing the terms of Mr. Waterman's employment contract and IBM's defined benefit plan, Prowse J.A. found that there was no express provision addressing Mr. Waterman's rights in the event of wrongful dismissal. Prowse J.A. turned to consider what the parties would have intended had they put their minds to that circumstance. She concluded that, although there was no evidence regarding the parties' intention, had they considered the issue, they would not have intended for Mr. Waterman's pension benefits to be deducted from wrongful dismissal damages.

[114] Après avoir examiné les modalités du contrat de travail et du régime de retraite à prestations déterminées de M. Waterman, la juge Prowse a conclu que les droits de M. Waterman en cas de congédiement injustifié n'y étaient pas expressément définis. La juge Prowse a ensuite examiné l'intention qu'auraient eue les parties si elles s'étaient arrêtées à la situation. Elle a conclu que, malgré l'absence d'éléments de preuve concernant l'intention des parties, ces dernières n'auraient pas voulu, si elles s'étaient penchées sur la question, que les prestations de retraite de M. Waterman soient déduites des dommages-intérêts pour congédiement injustifié.

[115] Prowse J.A. also concluded, at para. 62, that "the pension benefits in issue are also properly characterized as a form of non-deductible, non-indemnity insurance", as described by McLachlin J., as she then was, in *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359.

[115] La juge Prowse a également conclu, au par. 62, que [TRADUCTION] « les prestations de retraite en litige sont également qualifiées à juste titre de prestations d'assurance non déductibles et non indemnitaires », pour reprendre les qualificatifs employés par la juge McLachlin, maintenant Juge en chef, dans l'arrêt *Cunningham c. Wheeler*, [1994] 1 R.C.S. 359.

IV. Issue

IV. Question en litige

[116] The only issue before this Court is whether the pension benefits IBM paid to Mr. Waterman during the reasonable notice period should have been deducted in calculating his damages.

[116] La seule question en litige devant notre Cour est de savoir si les prestations de retraite qu'IBM a versées à M. Waterman au cours de la période de préavis raisonnable auraient dû être déduites lors du calcul de ses dommages-intérêts.

V. Analysis

V. Analyse

[117] My analysis proceeds in two stages. First, I consider whether it is necessary to deduct the pension benefits Mr. Waterman received during the reasonable notice period in order to put him in the position he would have been in had the contract

[117] Mon analyse comporte deux étapes. Premièrement, je détermine s'il est nécessaire de déduire les prestations de retraite que M. Waterman a touchées au cours de la période de préavis raisonnable afin de remettre M. Waterman dans

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been performed — i.e. had he been given reasonable notice and worked through the end of the reasonable notice period. Second, I consider whether there is a basis for applying the private insurance exception, which allows a plaintiff to receive excess compensation in certain circumstances. I conclude that, to put Mr. Waterman in the position he would have been in had the contract been performed, the pension benefits he received must be deducted. The private insurance exception is not applicable to this case.

la situation dans laquelle il se serait trouvé si le contrat avait été respecté — c.-à-d. s'il avait reçu un préavis raisonnable et s'il avait travaillé pendant toute la durée de la période du préavis raisonnable. Deuxièmement, je détermine s'il y a lieu d'appliquer l'exception relative à l'assurance privée, laquelle permet au demandeur de recevoir une indemnisation excédentaire dans certaines circonstances. Je conclus qu'il faut déduire les prestations de retraite que M. Waterman a touchées afin de remettre celui-ci dans la situation dans laquelle il se serait trouvé si le contrat avait été respecté. L'exception relative à l'assurance privée ne s'applique pas en l'espèce.

A. *Contract Damages for Wrongful Dismissal*

A. *Dommages-intérêts contractuels pour congédiement injustifié*

[118] The governing principle for damages upon breach of contract is that the non-breaching party should be provided with the financial equivalent of performance (J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at p. 871). With respect to wrongful dismissal, damages should "represent the salary the employee would have earned had the employee worked during the notice period, less any amounts credited to mitigation" (*Sylvester*, at para. 1). I agree with the majority that applying this rule leads to the deduction of the pension benefits in this case.

[118] Selon le principe applicable en matière de dommages-intérêts pour violation de contrat, la partie non fautive devrait recevoir l'équivalent matériel de la prestation qu'elle aurait obtenue si le contrat avait été respecté (J. D. McCamus, *The Law of Contracts* (2e éd. 2012), p. 871). Les dommages-intérêts pour congédiement injustifié devraient « représente[r] le salaire que l'employé aurait gagné s'il avait travaillé au cours de la période visée par le préavis, déduction faite de toute somme devant être affectée à la limitation des dommages » (*Sylvester*, par. 1). Je conviens avec les juges majoritaires que l'application de cette règle mène en l'espèce à la déduction des prestations de retraite.

[119] In *Sylvester*, this Court considered whether disability benefits received by a wrongfully terminated employee during his reasonable notice period should be deducted from damages for wrongful dismissal. Major J., writing for a unanimous Court, held that deduction was required. He explained that employer-provided benefits should not be considered as "distinct from the employment contract, but rather as integral components of it" (para. 13). As such, "[t]he question of deductibility . . . turn[ed] on the terms of the employment contract and the intention of the parties" (para. 12).

[119] Dans *Sylvester*, notre Cour a examiné la question de savoir si les prestations d'invalidité qu'un employé congédié injustement avait reçues pendant la période visée par le préavis raisonnable devaient être déduites des dommages-intérêts accordés pour congédiement injustifié. S'exprimant au nom d'une Cour unanime, le juge Major a estimé qu'il fallait déduire ce montant. Il a expliqué que les prestations versées par l'employeur ne devaient pas être considérées comme des contrats « distincts du contrat de travail, mais plutôt comme des éléments faisant partie intégrante de celui-ci » (par. 13). Ainsi, « [l]a question de la déductibilité repos[ait] [. . .] sur les modalités du contrat de travail et sur l'intention des parties » (par. 12).

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[120] Major J. went on to explain that damages for wrongful dismissal were "based on the premise that the employee would have worked during the notice period" (para. 15). The employee's "contractual right to damages for wrongful dismissal and his contractual right to disability benefits [were] based on opposite assumptions about his ability to work and it [was] incompatible with the employment contract for the respondent to receive both amounts" (para. 17). Based on this analysis, Major J. concluded: "It makes no sense to pay damages based on the assumption that [the plaintiff] would have worked in addition to disability benefits which arose solely because he could not work" (para. 17).

[120] Le juge Major a ensuite expliqué que les dommages-intérêts pour congédiement injustifié étaient « fondés sur la prémisse que l'employé aurait travaillé pendant la période visée par le préavis » (par. 15). « Le droit contractuel de [l'employé] de recevoir des dommages-intérêts pour congédiement injustifié et son droit contractuel à des prestations d'invalidité [reposaient] sur des hypothèses opposées en ce qui concerne sa capacité de travailler, et il [était] incompatible avec le contrat de travail que l'intimé puisse toucher ces deux sommes d'argent » (par. 17). S'appuyant sur cette analyse, le juge Major a conclu : « Il serait illogique de verser des dommages-intérêts en supposant que [le demandeur] aurait travaillé, en sus de prestations d'invalidité découlant d'un droit qui n'a pris naissance que parce qu'il ne pouvait pas travailler » (par. 17).

[121] It follows from a straightforward application of *Sylvester* that deduction is required in this case. In particular, Mr. Waterman's wrongful dismissal damages must be "based on the premise that the employee would have worked during the notice period" (*Sylvester*, at para. 15). Under the terms of Mr. Waterman's employment contract, he would have been eligible to receive pension benefits *only* upon being terminated or retiring. Therefore, as in *Sylvester*, Mr. Waterman's contractual right to wrongful dismissal damages and his contractual right to his pension are based on "opposite assumptions" about his availability to work (para. 17). It thus "makes no sense" to pay damages on the assumption that he could have earned both (*ibid.*).

[121] Une simple application de l'arrêt *Sylvester* permet d'affirmer que la déduction s'impose en l'espèce. En particulier, les dommages-intérêts accordés à M. Waterman pour congédiement injustifié doivent être « fondés sur la prémisse que l'employé aurait travaillé pendant la période visée par le préavis » (*Sylvester*, par. 15). Selon les modalités de son contrat de travail, M. Waterman aurait été admissible à des prestations de retraite *uniquement* à la suite de son congédiement ou de sa retraite. Par conséquent, tout comme dans l'affaire *Sylvester*, le droit contractuel de M. Waterman à des dommages-intérêts pour congédiement injustifié et son droit contractuel à des prestations de retraite reposent sur « des hypothèses opposées » en ce qui concerne la possibilité qu'il puisse travailler (par. 17). Il serait donc « illogique » de lui verser des dommages-intérêts en supposant qu'il aurait pu recevoir les deux montants (*ibid.*).

[122] This conclusion is necessitated by the nature of the pension plan at issue in this case — a defined benefit plan. This plan is materially different from a defined *contribution* plan, and the distinction between these two types of pension plans is at the heart of my disagreement with the majority.

[122] Cette conclusion découle de la nature du régime de retraite en litige dans la présente affaire — un régime à prestations déterminées. Ce régime se distingue sensiblement d'un régime à *cotisations* déterminées, et la distinction entre ces deux types de régimes de retraite se situe au cœur de mon désaccord avec la majorité.

[123] A defined contribution plan "operates in much the same way as group registered retirement savings plans", in that it provides an employee with

[123] Un régime de retraite à cotisations déterminées [TRADUCTION] « ressemble beaucoup à un régime enregistré d'épargne-retraite collectif », en

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a finite total amount or lump sum of retirement benefits (A. Kaplan and M. Frazer, *Pension Law* (2nd ed. 2013), at p. 89). It would be inappropriate to deduct pension benefits that a wrongfully terminated employee receives from a defined contribution plan because deduction would leave the employee in a worse position that he would have been in had his employment contract not been breached.

[124] In particular, in the case of a defined contribution plan, if the employee's employment contract is performed (i.e. he is given reasonable working notice of his termination and he continues to work through the notice period), he would expect to receive his salary through the notice period and the full lump sum he would have accrued in his savings account or defined contribution plan by the end of the reasonable notice period, including whatever additions should have been made to the plan during that notice period. If, instead, the employee is wrongfully dismissed and draws benefits from his finite lump sum during the reasonable notice period, deducting the pension benefits would leave the employee with an amount equal to his salary through the notice period and the lump sum, less the amount he had withdrawn during the notice period. He would thus be awarded *less* than he was entitled to under his employment contract.

[125] Throughout Mr. Waterman's argument before this Court, he has made submissions that his pension operates like a savings account. He is not alone in this respect. The Court of Appeal, at para. 48, quoted with approval language from Kent J. in *Chandler v. Ball Packaging Products Canada Ltd.* (1992), 2 C.C.P.B. 101 (Ont. Ct. J. (Gen. Div.)), that pension payments should be viewed "as akin to a registered Retirement Savings Plan" (para. 4).

[126] The majority too accepts the analogy. It holds that "[p]ension benefits . . . constitute a type of retirement savings" (para. 4; see also para. 85).

ce qu'il permet à l'employé de recevoir en prestations de retraite un montant total ou un « montant forfaitaire » déterminé (A. Kaplan et M. Frazer, *Pension Law* (2e éd. 2013), p. 89). Il ne conviendrait pas que l'on déduise les prestations de retraite que l'employé congédié injustement a retirées d'un régime de retraite à cotisations déterminées parce que la déduction placerait l'employé dans une situation pire que celle dans laquelle il se serait trouvé si son contrat de travail avait été respecté.

[124] En particulier, dans le cas d'un régime de retraite à cotisations déterminées, si le contrat de travail de l'employé est respecté (c.-à-d. qu'il a reçu un préavis de congédiement raisonnable et continue de travailler pendant toute la période du préavis), l'employé s'attendrait à toucher son salaire pendant toute la durée du préavis ainsi que le plein montant forfaitaire qu'il aurait accumulé dans son compte d'épargne ou dans son régime de retraite à cotisations déterminées à l'expiration de la période de préavis raisonnable, y compris toute cotisation versée au régime pendant la période de préavis. Par contre, si, pendant la période de préavis raisonnable, l'employé congédié injustement retire des prestations de ce montant forfaitaire déterminé, la déduction des prestations de pension ferait en sorte qu'il se retrouverait avec un montant égal au salaire gagné au cours de la période de préavis et le montant forfaitaire, diminué de la somme qu'il aurait retirée au cours de la période du préavis. Il obtiendrait ainsi *moins* que ce à quoi il avait droit en vertu de son contrat de travail.

[125] Tout au long de son argumentation devant notre Cour, M. Waterman a plaidé que son régime de retraite s'apparente à un compte d'épargne. Il n'est pas le seul à l'affirmer. La Cour d'appel a cité et approuvé, au par. 48, les propos tenus par le juge Kent dans *Chandler c. Ball Packaging Products Canada Ltd.* (1992), 2 C.C.P.B. 101 (C.J. Ont. (Div. gén.)), selon lesquels les prestations de retraite devraient être considérées comme [TRADUCTION] « semblables à un régime enregistré d'épargne-retraite » (par. 4).

[126] Les juges majoritaires acceptent également l'analogie. Ils affirment que « [l]es prestations de retraite [. . .] constituent un type d'épargne-retraite »

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It quotes, with emphasis, the following language from J. M. Perillo, "The Collateral Source Rule in Contract Cases" (2009), 46 *San Diego L. Rev.* 705, at p. 706:

> Suppose an employer fires an employee without justification, breaching a contract of employment, and the employee turns to his or her savings account for living expenses. No one would argue that the employee's recovery against the employer should be diminished by the employee's withdrawals from savings. The savings account is a collateral source. To the extent that another collateral source resembles a savings account, the plaintiff should be able to recover damages without a deduction for the amount received from the collateral source. [Emphasis added by Cromwell J.; para. 85.]

These references may wrongly suggest that Mr. Waterman's pension benefits came from a finite account and thus came at a cost to him. If Mr. Waterman had needed to draw from his own savings due to his wrongful dismissal, the amount he withdrew would have to be reflected in the damages award in order to put him in the position he would have been in had the contract been performed. However, analogizing Mr. Waterman's pension to a savings account misconceives the nature of the defined benefit pension plan at issue in this case.

[127] Unlike a defined contribution plan, the defined benefit plan at issue in this case is fundamentally different from a savings account. The defined benefit plan did not provide Mr. Waterman with a finite lump sum that was partially depleted by the pension funds he received during his reasonable notice period. Rather, the plan guaranteed him fixed predetermined payments upon retirement for as long as he would live. For that reason, deducting Mr. Waterman's pension benefits in this case does not have the effect of "taking away" benefits that he would have been entitled to had IBM not breached the contract. On the contrary, deducting provides him with exactly what he would have received had the employment contract been performed: an amount equal to his salary during the reasonable

(par. 4; voir aussi par. 85). Ils citent l'extrait suivant de l'article de J. M. Perillo, « The Collateral Source Rule in Contract Cases » (2009), 46 *San Diego L. Rev.* 705, p. 706, dont ils soulignent un passage :

> [TRADUCTION] Supposons qu'un employeur congédie un employé sans justification, qu'il rompt le contrat d'emploi, et que l'employé utilise ses épargnes pour couvrir ses frais de subsistance. Personne n'irait prétendre que les montants retirés du compte d'épargne de l'employé devraient être déduits de la réparation payée à l'employé par l'employeur. Le compte d'épargne est une source parallèle. Dans la mesure où une autre source parallèle ressemble à un compte d'épargne, le demandeur devrait pouvoir recouvrer des dommages-intérêts sans que le montant provenant de la source parallèle ne soit déduit. [Souligné par le juge Cromwell; par. 85.]

Ces mentions peuvent laisser croire à tort que M. Waterman a touché des prestations de retraite à même un compte déterminé, et ce, à ses propres frais. Si M. Waterman avait dû puiser dans son propre compte d'épargne à la suite de son congédiement injustifié, la somme retirée aurait dû être incluse dans les dommages-intérêts accordés afin que celui-ci soit rétabli dans la situation dans laquelle il se serait trouvé si le contrat avait été respecté. Toutefois, cette analogie entre la pension de M. Waterman et un compte d'épargne néglige la nature du régime de retraite à prestations déterminées en cause dans la présente affaire.

[127] Contrairement à un régime de retraite à cotisations déterminées, le régime de retraite à prestations déterminées en cause diffère fondamentalement d'un compte d'épargne. Le régime de retraite à prestations déterminées n'assurait pas à M. Waterman un montant forfaitaire déterminé qui était partiellement entamé par les prestations de retraite qu'il a reçues au cours de la période de préavis raisonnable. Le régime de retraite lui garantissait plutôt des paiements prédéterminés fixes à compter de sa retraite, et ce, sa vie durant. Pour cette raison, le fait de déduire les prestations de retraite de M. Waterman dans le cas qui nous occupe n'a pas pour effet de le « priver » des prestations auxquelles il aurait eu droit si IBM n'avait pas violé le contrat. Au contraire, la déduction de ces sommes

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notice period and thereafter defined benefits for the rest of his life.

lui permet de recevoir exactement ce qu'il aurait reçu si le contrat de travail avait été respecté, soit un montant égal à son salaire au cours de la période de préavis raisonnable et, par la suite, des prestations déterminées sa vie durant.

[128] The different outcome in the cases of defined benefit and defined contribution plans turns on a straightforward application of the governing principle of contract damages — that the non-breaching party should be placed in the same position he would have been in had the contract been performed. It has nothing to do with the collateral benefit, compensating advantages or private insurance exception. As my colleague correctly observes, those exceptions are relevant only where the plaintiff experiences "excess recovery" (para. 23). However, as the analysis above demonstrates, there is no excess recovery when pension benefits received from a *defined contribution plan are not* deducted or where benefits received from a *defined benefit plan are* deducted. In each case, the result is to put the employee in the position he would have been in had the contract been performed.

[128] L'issue est différente selon que les affaires concernent un régime de retraite à prestations déterminées ou un régime de retraite à cotisations déterminées en raison de la simple application du principe qui régit les dommages-intérêts contractuels — la partie non fautive doit être rétablie dans la situation dans laquelle elle se serait trouvée si le contrat avait été respecté. Cela n'a rien à voir avec la prestation parallèle, avec l'avantage compensatoire ni avec l'exception relative à l'assurance privée. Comme le souligne à juste titre mon collègue, ces exceptions ne sont pertinentes que dans le cas d'une « indemnisation excédentaire » (par. 23). Or, comme le montre l'analyse qui précède, la question d'une indemnisation excédentaire ne se pose pas *en l'absence* d'une déduction des prestations de retraite reçues d'un *régime à cotisations déterminées* ou *en présence* d'une déduction des prestations reçues d'un *régime à prestations déterminées*. Dans les deux cas, l'employé est rétabli dans la situation dans laquelle il se serait trouvé si le contrat avait été respecté.

[129] At the time Mr. Waterman was wrongfully dismissed, the amount of pension benefits he was to receive upon retirement had already been determined for some time and could not have gone up if he had continued to work for IBM. If Mr. Waterman's pension benefits could have increased during the notice period, his wrongful dismissal damages would have compensated for this loss. However, in this case, Mr. Waterman's wrongful dismissal had no impact on his pension entitlement and, as the parties agree, there is no need to make adjustments to his damage awards based on pension entitlements that would have accrued had he worked through the reasonable notice period.

[129] Au moment du congédiement injustifié, le montant des prestations de retraite que M. Waterman devait toucher en prenant sa retraite était déjà calculé depuis un certain temps et n'aurait pas augmenté si celui-ci avait continué à travailler pour IBM. Si les prestations de retraite de M. Waterman avaient pu augmenter pendant la période de préavis, les dommages-intérêts accordés pour congédiement injustifié auraient indemnisé celui-ci de la perte subie. Or, en l'espèce, le congédiement injustifié de M. Waterman n'a eu aucune incidence sur son droit aux prestations de retraite. Comme les parties l'ont reconnu, il n'est pas nécessaire de rajuster le montant des dommages-intérêts accordés pour tenir compte d'une augmentation des prestations de retraite si M. Waterman avait travaillé pendant la période de préavis raisonnable.

[130] The majority states that the fact that Mr. Waterman's pension comes from a defined

[130] Les juges majoritaires affirment que le fait que les prestations de retraite de M. Waterman

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benefit plan does not change its nature as a contributory, non-indemnity benefit (paras. 63 and 68). However, the nature of the benefit as non-indemnity or contributory does not answer the question of whether the plaintiff will be provided with the financial equivalence of performance or will receive excess recovery. With respect, the majority reasons conflate the analysis of contract damages for wrongful dismissal with what considerations should apply with respect to the private insurance exception to contract damages. Under the governing principle of contract damages, the fact that the pension plan at issue is a defined benefit plan leads to the conclusion that the benefits must be deducted from Mr. Waterman's wrongful dismissal damages.

proviennent d'un régime à prestations déterminées ne change rien à leur nature contributive et non indemnitaire (par. 63 et 68). La nature des prestations n'offre cependant pas de réponse à la question de savoir si le demandeur recevra l'équivalent matériel de la prestation qu'il aurait obtenue si le contrat avait été respecté ou s'il recevra une indemnisation excédentaire. Avec égards, les motifs de la majorité confondent l'analyse relative aux dommages-intérêts contractuels accordés pour congédiement injustifié et les considérations devant s'appliquer à l'égard de l'exception relative à l'assurance privée dans les cas de dommages-intérêts contractuels. Suivant le principe applicable en matière de dommages-intérêts contractuels, le fait que le régime de retraite en litige soit un régime à prestations déterminées permet de conclure que les prestations de retraite reçues doivent être déduites des dommages-intérêts accordés à M. Waterman pour congédiement injustifié.

[131] As an aside, not distinguishing between defined benefit and defined contribution plans may also be why the majority's policy concern about making pensionable employees cheaper to dismiss is incorrect. The majority suggests that deducting the benefits IBM paid to Mr. Waterman during the reasonable notice period would "provide an incentive for employers to dismiss pensionable employees rather than other employees because it will be cheaper to do so". The majority states that "[t]his is not an incentive the law should provide" (para. 93).

[131] En passant, l'absence de distinction entre le régime à prestations déterminées et le régime à cotisations déterminées peut aussi expliquer le caractère erroné de la préoccupation de principe évoquée par les juges majoritaires au sujet des employeurs qui seraient incités à congédier, pour des raisons économiques, les employés admissibles à la pension. Selon les juges majoritaires, la déduction des prestations payées par IBM à M. Waterman au cours de la période de préavis raisonnable aurait pour effet « d'inciter les employeurs à congédier, pour des raisons économiques, les employés admissibles à la pension plutôt que les autres ». Les juges majoritaires affirment : « Il ne s'agit pas là d'un facteur d'incitation que la loi devrait favoriser » (par. 93).

[132] This incentive argument is based on a false premise: that deducting pension benefits from reasonable notice damages would make it cheaper to dismiss a pensionable employee than a non-pensionable employee. That is not the case. The pension benefits that Mr. Waterman received during the notice period did not come out of thin air. With a defined benefit pension plan, the employer is solely responsible for providing the employee with the guaranteed defined benefits. In the event

[132] Cet argument relatif au facteur d'incitation repose sur une fausse prémisse, à savoir que la déduction des prestations de retraite des dommages-intérêts accordés relativement à la période de préavis raisonnable ferait en sorte qu'il serait moins onéreux, pour les employeurs, de congédier les employés admissibles à la pension plutôt que les autres. Tel n'est pas le cas. Les prestations de retraite que M. Waterman a touchées pendant la période de préavis ne sont pas

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the payment of the defined benefits results in an actuarial deficit in the pension fund, the employer will be required to top up the fund to meet its statutory obligation to keep it fully funded. Alternatively, if the fund is operating at an actuarial surplus despite payment of the benefits, the contribution holiday that the employer may otherwise be able to take — i.e. the break from its regular contributions to the pension fund — would be reduced. In this way, withdrawal of the benefits from the pension fund, like any other payment, affects the employer's bottom line.

sorties de nulle part. Dans le cadre d'un régime de retraite à prestations déterminées, l'employeur a l'entière responsabilité de verser aux employés les prestations déterminées garanties. Advenant que le versement des prestations déterminées donne lieu à un déficit actuariel de la caisse de retraite, l'employeur sera tenu de renflouer la caisse afin de remplir son obligation légale de la maintenir intégralement capitalisée. Par contre, si la caisse de retraite présente un excédent actuariel malgré le versement des prestations, la période d'exonération de cotisations dont l'employeur peut par ailleurs bénéficier — c.-à-d. la période durant laquelle il n'a pas à verser régulièrement des cotisations à la caisse de retraite — sera réduite. Ainsi, le retrait des prestations de la caisse de retraite, comme tout autre paiement, a une incidence sur le résultat net de l'employeur.

[133] The majority alleges that this analysis is an oversimplification and is inaccurate (para. 94). This assertion seems to misunderstand the impact of IBM having paid pension benefits to Mr. Waterman. The analysis has nothing to do with funding the benefits over time. Rather, the analysis is simply how the pension benefits paid by IBM impacted IBM's obligation to ensure the actuarial solvency of the pension fund, such that it would be necessary to either top up the pension fund or to refrain from taking a contribution holiday to the extent of those pension benefit payments.

[133] Selon les juges majoritaires, cette analyse repose sur une simplification fort excessive et inexacte (par. 94). Ils semblent avoir mal compris l'incidence du versement, par IBM, des prestations de retraite à M. Waterman. L'analyse n'a rien à voir avec le financement des prestations au fil du temps. Elle porte plutôt simplement sur l'incidence du versement des prestations de retraite sur l'obligation d'IBM de garantir la solvabilité actuarielle de la caisse de retraite, de sorte qu'il serait nécessaire de renflouer la caisse de retraite ou de renoncer à bénéficier d'une exonération de contributions correspondant aux prestations de retraite versées.

[134] It follows that, with respect to the cost of dismissing pensionable and non-pensionable employees, there is a difference only in form, not substance. That is to say, in the case of an employee who is not eligible to receive his defined pension benefits, the employer compensates a dismissed employee by paying him damages equal to the salary he would have earned during the reasonable notice period. In the case of an employee who is eligible to receive his defined pension benefits, the employer pays: (1) pension benefits from the employer's pension fund, which it is responsible for maintaining, and (2) damages equal to the salary the employee would have earned during the notice period less what it has already paid from the pension

[134] Il s'ensuit que la différence entre le coût lié au congédiement des employés admissibles à la pension et le coût lié au congédiement des employés non admissibles est une question de forme seulement et non de fond. Autrement dit, dans le cas de l'employé qui n'est pas admissible aux prestations de retraite déterminées, l'employeur indemnise l'employé congédié en lui versant des dommages-intérêts équivalents au salaire qu'il aurait gagné au cours de la période de préavis raisonnable. Dans le cas de l'employé admissible à toucher ses prestations de retraite déterminées, l'employeur paie à la fois : (1) les prestations de retraite provenant de la caisse de retraite de l'employeur, une caisse qu'il a l'obligation de

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fund. In both cases, the cost to the employer is the same: an amount equal to the salary the employee would have earned had he worked through the reasonable notice period. There is thus no incentive to terminate pensionable employees.

maintenir, et (2) les dommages-intérêts équivalents au salaire que l'employé aurait gagné au cours de la période de préavis, déduction faite de ce qu'il a déjà payé à même la caisse de retraite. Dans les deux cas, le coût supporté par l'employeur est le même : le montant équivaut au salaire que l'employé aurait gagné s'il avait travaillé pendant toute la période de préavis raisonnable. Il n'y a ainsi rien qui incite l'employeur à congédier les employés admissibles à la pension.

[135] The majority emphasizes Mr. Waterman's "specific and enforceable rights" in relation to his pension (para. 85). It is not disputed that Mr. Waterman's pension benefits are vested and that this gives him specific and enforceable rights. However, his specific and enforceable rights remain subject to the provisions of the plan text which govern the conditions under which benefits will be paid. As a result, even though Mr. Waterman's pension plan had vested, he could not have demanded to receive both his salary and his pension benefits had he continued to work for IBM through the reasonable notice period.

[135] Les juges majoritaires mettent l'accent sur l'existence des « droits spécifiques et exécutoires » de M. Waterman relativement à sa pension (par. 85). Il n'est pas contesté que M. Waterman a acquis le droit aux prestations de retraite, ce qui lui confère des droits spécifiques et exécutoires. Toutefois, ses droits spécifiques et exécutoires demeurent assujettis aux dispositions du régime qui régissent les conditions auxquelles les prestations sont versées. Par conséquent, même s'il avait acquis des droits à son régime de retraite, M. Waterman n'aurait pas pu demander de toucher à la fois son salaire et ses prestations de retraite s'il avait continué à travailler pour IBM au cours de la période de préavis raisonnable.

B. *Applicability of the Private Insurance Exception*

B. *Applicabilité de l'exception relative à l'assurance privée*

[136] The majority agrees that putting Mr. Waterman in the position he would have been in had the contract been performed would lead to the conclusion that the pension benefits must be deducted (para. 2). According to the majority, however, the pension benefits that IBM paid to Mr. Waterman under his employment contract on the assumption that he was retired may be treated as a "private insurance" and, thus, need not be deducted under the private insurance exception. I disagree with that conclusion. In my view, the private insurance exception has no applicability to this case.

[136] Les juges majoritaires acceptent que le fait de remettre M. Waterman dans la situation dans laquelle il se serait trouvé si le contrat avait été respecté permettrait de conclure que les prestations de retraite doivent être déduites (par. 2). Toutefois, ils affirment que les prestations de retraite qu'IBM a versées à M. Waterman aux termes de son contrat de travail, en tenant pour acquis que celui-ci avait pris sa retraite, peuvent être considérées comme des prestations d'« assurance privée » et qu'il n'est donc pas nécessaire de déduire ces prestations en vertu de l'exception relative à l'assurance privée. Je ne suis pas d'accord avec cette conclusion. J'estime que l'exception relative à l'assurance privée ne s'applique pas en l'espèce.

[137] This case involves the interpretation of a single employment contract that gives rise to

[137] La présente affaire porte sur l'interprétation d'un seul contrat de travail qui donne lieu au

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Mr. Waterman's right to wrongful dismissal damages and his right to pension benefits. This Court has determined that employer-provided benefits "should not be considered contracts which are distinct from the employment contract, but rather as integral components of it" (*Sylvester*, at para. 13). The majority is correct that the words "'single contract' rule" do not literally appear in *Sylvester*, but the reasoning in *Sylvester* can lead to no other conclusion (para. 52).

droit de M. Waterman à des dommages-intérêts pour congédiement injustifié et à son droit à des prestations de retraite. Notre Cour a statué que les prestations versées par l'employeur « ne devraient pas être considéré[e]s comme des contrats distincts du contrat de travail, mais plutôt comme des éléments faisant partie intégrante de celui-ci » (*Sylvester*, par. 13). Les juges majoritaires affirment avec justesse que l'expression « règle [. . .] du "contrat unique" » ne figure pas littéralement dans *Sylvester*, mais le raisonnement formulé dans cet arrêt ne peut mener qu'à cette conclusion (par. 52).

[138] As I will explain, in the context of a single contract, the collateral benefit or private insurance exception has no application. The reason is straightforward: where the plaintiff's cause of action and his right to a particular benefit arise from the same contract and the plaintiff is indeed entitled to the benefits — i.e. he has "insured" himself in a manner that requires the defendant to pay the benefits — then the plaintiff will receive the benefits based on the ordinary governing principle that he should be placed in the position he would have been in had the contract been performed. There will be no need to reach the collateral benefit exception.

[138] Comme je l'expliquerai plus loin, dans le contexte d'un contrat unique, la prestation parallèle ou l'exception relative à l'assurance privée ne s'applique pas. La raison est simple : si la cause d'action du demandeur et son droit à des prestations particulières découlent du même contrat et que le demandeur a effectivement droit à ces prestations — c.-à-d. il avait « souscrit une assurance » de sorte que le défendeur est tenu de verser les prestations — le demandeur touchera alors ces prestations en raison du principe ordinaire applicable suivant lequel il devrait être rétabli dans la situation dans laquelle il se serait trouvé si le contrat avait été respecté. Il ne sera pas nécessaire d'invoquer l'exception relative à la prestation parallèle.

[139] Said another way, given that Mr. Waterman's pension flows from the same contract under which the court must assess his loss, the need to reach the private insurance exception is itself a concession that Mr. Waterman's pension was not "private insurance" that covered the breach in the first place. If he had "insured" the breach, he would get the benefits under the governing principle that he should be provided with what he would have expected to receive under the terms of the contract.

[139] En d'autres mots, vu que la pension de M. Waterman découle du même contrat aux termes duquel la cour doit évaluer la perte que celui-ci a subie, la nécessité d'invoquer l'exception relative à l'assurance privée revient à admettre que la pension de M. Waterman ne constituait pas une « assurance privée » qui couvrait au départ la violation de contrat. S'il avait « souscrit une assurance » couvrant la violation, M. Waterman obtiendrait les prestations afférentes suivant le principe général applicable voulant qu'il obtienne ce à quoi il se serait attendu à recevoir aux termes du contrat.

[140] For this reason, the majority's approach to this case contains an inherent inconsistency: the majority concludes that Mr. Waterman had "private insurance" that allows him to keep his pension benefits in addition to his salary. To the extent Mr. Waterman had such "private insurance", it must

[140] C'est pourquoi l'approche adoptée par les juges majoritaires en l'espèce comporte une contradiction inhérente : ils concluent que M. Waterman bénéficiait d'une « assurance privée » qui lui permet de garder les prestations de retraite en plus de son salaire. Si M. Waterman

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have come from his employment contract. However, if Mr. Waterman's employment contract indeed allowed him to have pension benefits in addition to his salary, there would be no need to reach any exception: he would get the benefits based on what he would have expected under the terms of the contract.

[141] In addition to this troubling inconsistency, applying the private insurance exception to this case would not be consistent with the justification for the exception. The rationale for the private insurance exception is that it would be "unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should enure to the benefit of the tortfeasor" (*Parry v. Cleaver*, [1970] A.C. 1 (H.L.), *per* Lord Reid, at p. 14). Accepting the assumption that Mr. Waterman's work for IBM over the years is analogous to paying premiums to obtain his pension plan, it remains that the contractual terms of the pension or "insurance" he paid for allowed him to receive salary or pension benefits, but not both at the same time. In other words, this is not a case where deduction would lead to some benefit that the plaintiff paid for enuring to the benefit of the defendant. Quite to the contrary, as explained above, deducting is necessary to provide the plaintiff with the pension or "insurance" he paid for. Not deducting has the effect of the plaintiff receiving more than he expected to receive under the terms of his contract and requiring the defendant to pay more than it agreed to pay.

[142] This distinguishes the case before the court from all other cases in which the private insurance exception has been applied. Each of *Guy v. Trizec Equities Ltd.*, [1979] 2 S.C.R. 756, *Canadian Pacific Ltd. v. Gill*, [1973] S.C.R. 654, and *Cunningham* involved a plaintiff who was personally injured by the defendant and, upon being sued, the defendant sought to pay *less* than what it owed under ordinary principles of compensatory damages based on a distinct contractual or statutory benefit that the plaintiff received from a third party.

bénéficiait d'une telle « assurance privée », celle-ci devait découler de son contrat de travail. Toutefois, si le contrat de travail de M. Waterman lui permettait effectivement de toucher à la fois des prestations de retraite et son salaire, il ne serait pas nécessaire d'invoquer une exception. M. Waterman toucherait les prestations visées simplement en obtenant ce à quoi il se serait attendu aux termes du contrat.

[141] Outre cette contradiction troublante, l'application de l'exception relative à l'assurance privée en l'espèce serait contraire à sa raison d'être, à savoir qu'il serait [TRADUCTION] « injuste et abusif de statuer que les sommes qu'il a prudemment consacrées au paiement des primes et des avantages qui en découlent profitent à l'auteur du délit » (*Parry c. Cleaver*, [1970] A.C. 1 (H.L.), lord Reid, p. 14). Si l'on accepte l'hypothèse qu'en travaillant pour IBM au fil des ans, M. Waterman a payé des primes pour obtenir son régime de retraite, il n'en demeure pas moins que les termes du contrat relatif à la pension ou à l'« assurance » qu'il a payée lui a permis de toucher un salaire ou des prestations de retraite, mais pas les deux à la fois. En d'autres mots, il ne s'agit pas d'un cas où la déduction donne lieu à un certain avantage pour lequel le demandeur a payé et qui profite au défendeur. Bien au contraire, comme je l'ai déjà expliqué, la déduction est nécessaire afin que le demandeur bénéficie de la pension ou de l'« assurance » pour laquelle il a payé. La non-déduction fait en sorte que le demandeur obtient plus que ce qu'il s'attendait à recevoir aux termes de son contrat et que le défendeur paye plus que ce qu'il avait accepté de payer.

[142] C'est ce qui distingue l'affaire qui nous occupe de toutes les autres affaires dans lesquelles l'exception relative à l'assurance privée a été appliquée. Dans les affaires *Guy c. Trizec Equities Ltd.*, [1979] 2 R.C.S. 756, *Canadien Pacifique Ltée c. Gill*, [1973] R.C.S. 654, et *Cunningham*, les défendeurs qui avaient causé un préjudice aux demandeurs et qui étaient poursuivis cherchaient à payer *moins* que ce qu'ils devaient suivant les principes ordinaires en matière de dommages-intérêts compensatoires, parce que les demandeurs avaient reçu de tiers des prestations distinctes aux termes d'un contrat ou de la loi.

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[143] Similarly, *Jack Cewe Ltd. v. Jorgenson*, [1980] 1 S.C.R. 812, involved a wrongful dismissal suit, in which the employer sought to have its damages reduced based on the employee's distinct statutory entitlement to unemployment benefits. Contrary to the majority's assertion that the benefits were derived from the employment contract, the source of the benefits was a *third party* — the government. As with *Guy*, *Gill*, and *Cunningham*, *Jack Cewe* was not a case in which the plaintiff's cause of action and the benefit he received came from a single contract whose terms did not allow the plaintiff to receive both salary and benefits at the same time.

[143] De même, l'arrêt *Jack Cewe Ltd. c. Jorgenson*, [1980] 1 R.C.S. 812, portait sur une poursuite pour congédiement injustifié dans laquelle l'employeur tentait de faire réduire les dommages-intérêts parce que, aux termes de la loi, l'employé était admissible à des prestations d'assurance-chômage. Contrairement à l'affirmation des juges majoritaires selon laquelle les prestations découlaient du contrat de travail, la source des prestations dans cette affaire était un *tiers*, en l'occurrence le gouvernement. Comme dans les affaires *Guy*, *Gill* et *Cunningham*, il ne s'agissait pas dans l'affaire *Jack Cewe* d'un cas où la cause d'action du demandeur et les prestations qu'il avait reçues découlaient d'un seul contrat dont les modalités ne permettaient pas à celui-ci de toucher à la fois un salaire et des prestations.

[144] Considered in terms of the justification for the private insurance exception, in each of *Guy*, *Gill*, *Cunningham* and *Jack Cewe*, the Court was faced with two choices: (1) not deduct the benefits and thus require the defendant to pay the amount equal to the plaintiff's loss determined by ordinary principles of tort or (in the case of *Jack Cewe*) contract damages, even though the plaintiff would receive more than his actual loss as a result of the benefits he received; or (2) allow the defendant to pay nothing or some amount less than the plaintiff's loss, such that the plaintiff does not get the benefit resulting from the premiums he paid to the third party. The Court decided, consistent with the rationale for the private insurance exception, that the plaintiff — not the defendant — should receive the benefits associated with the premiums he paid.

[144] Eu égard à la raison d'être de l'exception relative à l'assurance privée, dans chacune des affaires *Guy*, *Gill*, *Cunningham* et *Jack Cewe*, la Cour devait choisir entre deux solutions : (1) ne pas déduire les prestations et obliger ainsi le défendeur à payer au demandeur la somme correspondant à la perte subie, suivant les principes ordinaires en matière de responsabilité délictuelle ou (comme dans l'affaire *Jack Cewe*) en matière de dommages-intérêts contractuels, même si le demandeur toucherait davantage que l'équivalent matériel de la perte subie en raison des prestations reçues; ou (2) permettre au défendeur de ne verser aucune indemnité ou de verser une somme moindre que l'équivalent matériel de la perte subie par le demandeur, de sorte que celui-ci ne bénéficie pas des prestations découlant des primes versées à un tiers. La Cour a décidé, conformément à la raison d'être de l'exception relative à l'assurance privée, que le demandeur — et non le défendeur — devrait toucher les prestations découlant des primes qu'il avait payées.

[145] The choice in this case is very different. The options are to (1) not deduct, requiring the defendant to pay more than it agreed to pay the plaintiff under the terms of the employment contract and awarding the plaintiff more than he bargained for; or (2) deduct, requiring the defendant to pay an amount equal to the plaintiff's loss (i.e. the

[145] En l'espèce, le choix est tout à fait différent. Les solutions offertes sont (1) ne pas déduire, obligeant ainsi le défendeur à verser une somme plus élevée que celle qu'il avait convenu de verser au demandeur aux termes du contrat de travail, et accordant à ce dernier davantage que ce qu'il a négocié; ou (2) déduire, obligeant ainsi le défendeur

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amount required to put the plaintiff in the position he would have been in had the contract been performed) and awarding the plaintiff an amount equal to his loss. In neither case do benefits that the plaintiff actually paid for enure to the defendant. The issue is whether the defendant should be required to pay twice, such that the plaintiff receives more than he bargained for under his contract, or pay once, such that the plaintiff receives exactly what he bargained for under his contract. In my view, the latter is appropriate.

[146] The fact that this case involves a single contract also distinguishes the cases the majority cites, such as *United States v. Price*, 288 F.2d 448 (4th Cir. 1961), and *Phillips v. Western Company of North America*, 953 F.2d 923 (5th Cir. 1992), in which employees sued their employers in tort for personal injuries caused by the employer. In each of those cases, the employer sought to pay less than the plaintiff's loss from the injury, according to ordinary tort principles, based on benefits that flowed to the plaintiff from his employment contract. In neither case did the facts before the court establish that it would be inconsistent with the terms of the employment contract for the plaintiff to receive both tort damages and his employment benefits. That is in contrast to this case, where, as described above, Mr. Waterman's contract provided that he could receive salary or pension benefits, but not both.

[147] Further, the choice before the courts in *Price* and *Phillips* was whether to (1) require the defendant to honour both of its legal duties (the legal duty to take reasonable care under tort and the legal duty to pay the plaintiff the amount promised under his employment contract) such that

à verser une somme correspondant à la perte subie par le demandeur (c.-à-d. le montant nécessaire pour que le demandeur soit rétabli dans la situation dans laquelle il se serait trouvé si le contrat avait été respecté), et accordant au demandeur une somme équivalente à la perte subie. Dans les deux cas, les prestations pour lesquelles le demandeur a effectivement payé ne profitent pas au défendeur. Il s'agit de déterminer si le défendeur doit être tenu de payer deux fois, de sorte que le demandeur obtienne davantage que ce qu'il a négocié aux termes de son contrat, ou de payer une seule fois, de sorte que le demandeur obtienne exactement ce qu'il a négocié aux termes de son contrat. J'estime que cette dernière solution est la bonne.

[146] L'existence d'un seul contrat en l'espèce permet également d'établir une distinction entre la présente affaire et les décisions citées par les juges majoritaires, notamment, *United States c. Price*, 288 F.2d 448 (4th Cir. 1961), et *Phillips c. Western Company of North America*, 953 F.2d 923 (5th Cir. 1992). Dans ces affaires, des employés victimes de blessures causées par les employeurs ont poursuivi ces derniers en responsabilité délictuelle. Dans chacun de ces cas, l'employeur cherchait à payer moins que la valeur de la perte que la blessure avait causée au demandeur, suivant les principes ordinaires en matière de responsabilité délictuelle, du fait des prestations que ce dernier avait reçues aux termes de son contrat de travail. Dans les deux cas, les faits présentés à la cour n'établissaient pas qu'il serait contraire aux termes du contrat de travail que le demandeur obtienne à la fois des dommages-intérêts en matière de responsabilité délictuelle et ses prestations d'emploi. D'où la distinction d'avec la présente affaire où, comme il est indiqué ci-dessus, le contrat de M. Waterman prévoyait qu'il pouvait toucher son salaire ou des prestations de retraite, mais pas les deux.

[147] En outre, le choix qui s'offrait aux tribunaux saisis des affaires *Price* et *Phillips* consistait (1) soit à exiger du défendeur qu'il respecte ses deux obligations légales (l'obligation d'agir avec diligence raisonnable en matière de responsabilité délictuelle et l'obligation de verser au demandeur

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the plaintiff would receive compensation for his loss and the benefits he was entitled to under his employment contract; or (2) allow the defendant to offset the damages for breaching its duty of care using the benefits that it had separately promised the plaintiff in his employment contract, such that those benefits would enure to the defendant. Again, there is no parallel here. This case involves a single legal duty to honour the terms of an employment contract. The terms of that contract provided that Mr. Waterman would receive only his salary during his reasonable notice period.

le montant promis dans le cadre de son contrat de travail) de sorte que le demandeur obtienne une indemnisation pour la perte subie ainsi que les prestations auxquelles il avait droit aux termes de son contrat de travail; (2) soit à permettre au défendeur de compenser les dommages-intérêts pour manquement à son obligation de diligence à même les prestations qu'il avait promises au demandeur dans le cadre de son contrat de travail, de sorte que ces prestations profitent au défendeur. Là encore, la situation est différente de celle en l'espèce. L'affaire qui nous occupe porte sur la seule obligation juridique de respecter un contrat de travail aux termes duquel M. Waterman ne toucherait que son salaire au cours de la période de préavis raisonnable.

[148] In sum, I would reject the idea that the private insurance exception is applicable to cases that involve a single contract that is the source of both the plaintiff's cause of action and other benefits. In such circumstances, there is no justification for resorting to the private insurance exception because the plaintiff's entitlement to the benefits is established based on the terms of his contract.

[148] En somme, je rejetterais la thèse selon laquelle l'exception relative à l'assurance privée s'applique aux affaires portant sur un contrat unique à l'origine de la cause d'action du demandeur et d'autres prestations. Dans ces circonstances, rien ne justifie le recours à l'exception relative à l'assurance privée parce que le droit du demandeur aux prestations est établi aux termes de son contrat.

C. *The Majority's Treatment of Sylvester*

C. *L'interprétation de l'arrêt Sylvester donnée par les juges majoritaires*

[149] The majority has devoted an extensive portion of its reasons in attempting to distinguish this case from *Sylvester* and at the same time attempting to rely on *Sylvester* (paras. 80-98). As I read the majority's reasons with respect to *Sylvester*, they say that, under the ordinary principles of contract damages, *Sylvester* would support the proposition that Mr. Waterman is entitled to both his salary and his pension benefits at the same time (paras. 88-91). Indeed, if *Sylvester* was authority for such a result, it is difficult to understand the majority's resort to the private insurance exception. With respect, the majority's analysis of *Sylvester* is strained. In my respectful opinion, a straightforward reading of *Sylvester* demonstrates that it is a fully applicable authority supporting the proposition that under a single contract of employment, barring contract terminology to the contrary, an individual cannot

[149] Dans une grande partie de leurs motifs, les juges majoritaires ont tenté d'établir une distinction entre l'affaire qui nous occupe et l'arrêt *Sylvester* tout en cherchant à s'appuyer sur cet arrêt (par. 80-98). D'après ce que je comprends de leurs motifs à ce sujet, ils affirment que, selon les principes ordinaires en matière de dommages-intérêts contractuels, l'arrêt *Sylvester* confirmerait la thèse voulant que M. Waterman ait droit à la fois à son salaire et à ses prestations de retraite (par. 88-91). Si l'arrêt *Sylvester* appuie effectivement cette thèse, il est difficile de comprendre pourquoi les juges majoritaires ont recours à l'exception relative à l'assurance privée. En toute déférence, l'analyse que font les juges majoritaires de l'arrêt *Sylvester* est forcée. À mon avis, une interprétation simple de *Sylvester* montre que cet arrêt est tout à fait favorable à la thèse voulant qu'aux termes

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receive salary as if he is working and pension benefits as if he is retired. These are opposite, incompatible assumptions. Thus, salary and pension income are not payable at the same time.

D. *Efficient Breach*

[150] My colleague appropriately cautions against speculation about "policy" and the future impact of deduction rules. I would not resolve this case based on policy or speculation. In my view, the case should be resolved based on the terms of the parties' contract.

[151] Only in response to the majority's concerns about policy, I point out that while the majority's conclusion would operate to Mr. Waterman's benefit in this case, it would do so at the cost of other employees in the future. It is often advantageous for both employers *and* employees to agree to an amount for reasonable notice, rather than having the employee work through the notice period. For instance, in the case of an employer who must terminate an employee, it may be advantageous for the employer to offer the employee at least the amount he would have earned throughout the notice period in order to end the employment relationship immediately. In those circumstances, it will generally also be economically favourable for the employee to accept the offer because he will receive the full salary he would have earned if he worked through the notice period without having to work through the period. He would then be free to earn additional income from alternate employment.

[152] In fact, the record reveals that this was precisely the case here: IBM offered Mr. Waterman a separation agreement that would have provided

d'un contrat de travail unique, sous réserve de dispositions contraires du contrat, une personne ne peut toucher un salaire comme si elle travaillait ainsi que des prestations de retraite comme si elle avait pris sa retraite. Il s'agit là d'hypothèses opposées et incompatibles. Ainsi, le salaire et le revenu de pension ne sont pas payables en même temps.

D. *Inexécution rentable*

[150] Mon collègue fait à juste titre une mise en garde à propos des conjectures relatives aux considérations de « principe » et aux répercussions futures des règles en matière de déduction. Je ne trancherais pas la présente affaire en fonction de considérations de principe ou de conjectures. J'estime qu'il convient de trancher la présente affaire en fonction des modalités du contrat conclu entre les parties.

[151] En réponse seulement aux préoccupations des juges majoritaires relatives aux considérations de principe, je signale que si leur conclusion favorisait M. Waterman en l'espèce, ce serait au détriment d'autres employés à l'avenir. Il est souvent avantageux *autant* pour l'employeur *que* pour l'employé, de s'entendre sur une somme correspondant à la période de préavis raisonnable au lieu de maintenir ce dernier en fonctions pendant cette même période. Par exemple, dans le cas de l'employeur qui doit congédier un employé, il peut être avantageux pour cet employeur d'offrir à l'employé à tout le moins la somme qu'il aurait gagnée pendant toute la période du préavis pour mettre fin à la relation d'emploi immédiatement. Dans ces circonstances, il sera en règle générale également avantageux sur le plan économique pour l'employé d'accepter l'offre de l'employeur, parce qu'il touchera alors le plein salaire qu'il aurait gagné s'il avait travaillé pendant toute la période du préavis, sans avoir pour autant à travailler. L'employé sera alors libre de tirer un revenu supplémentaire d'un autre emploi.

[152] En fait, il ressort du dossier que c'est précisément ce qui s'est produit en l'espèce : IBM a offert à M. Waterman une entente de cessation

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him with even more than he would have earned if he had worked through the reasonable notice period. If IBM had provided Mr. Waterman with the additional 18 months of notice to which he was entitled and Mr. Waterman had worked through the entire notice period, he would have earned approximately $112,000 in salary and accrued benefits. Under the separation offer Mr. Waterman turned down, he would have received an $80,000 separation payment, plus an additional $38,000 in pension payments during the 18-month period. He thus would have received approximately $118,000. In addition, he would have been free to obtain income from alternative employment.

[153] This is an example of efficient breach. This Court has previously described efficient breach and cautioned courts from discouraging such a breach:

> Efficient breach is what economists describe as a Pareto optimal outcome where one party may be better off but no one is worse off, or expressed differently, nobody loses. Efficient breach should not be discouraged by the courts. This lack of disapproval emphasizes that a court will usually award money damages for breach of contract equal to the value of the bargain to the plaintiff.

(*Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601, at para. 31)

[154] The majority's approach discourages efficient breach in the context of an employer with a defined benefit pension plan who wishes to terminate an employee. This is because, all things equal, the majority approach incentivizes the employer to require the employee to work through the notice period (and avoid paying out the pension benefits) instead of offering the employee a separation package that would be economically superior for the employee. While there are always a number of competing factors that govern whether an employer makes a separation offer and what that offer contains, the majority's approach encourages,

d'emploi qui lui aurait permis d'obtenir davantage que ce qu'il aurait gagné s'il avait travaillé pendant toute la période visée par le préavis raisonnable. Si IBM avait accordé à M. Waterman le préavis supplémentaire de 18 mois auquel ce dernier avait droit, et si M. Waterman avait travaillé pendant tout ce temps, il aurait gagné environ 112 000 $ en salaire et en prestations accumulées. Aux termes de l'offre de cessation d'emploi qu'il a refusée, M. Waterman aurait reçu une indemnité de cessation d'emploi de 80 000 $, ainsi que 38 000 $ en prestations de retraite pour la période de préavis de 18 mois. Il aurait donc reçu environ 118 000 $. De plus, il lui aurait été loisible d'obtenir un revenu d'un autre emploi.

[153] Il s'agit là d'un exemple d'inexécution rentable. Notre Cour a déjà décrit l'inexécution rentable et mis en garde les tribunaux de ne pas décourager une telle inexécution :

> L'inexécution rentable correspond à ce que les économistes décrivent comme l'optimum de Pareto : une partie peut être avantagée sans qu'aucune autre ne soit désavantagée; en d'autres termes, personne n'y perd. Les tribunaux ne devraient pas décourager l'inexécution rentable. Cette absence de désapprobation rappelle que les dommages-intérêts pour inexécution contractuelle accordés par les tribunaux équivalent habituellement à la valeur du marché pour le demandeur.

(*Banque d'Amérique du Canada c. Société de Fiducie Mutuelle*, 2002 CSC 43, [2002] 2 R.C.S. 601, par. 31)

[154] L'approche retenue par les juges majoritaires décourage l'inexécution rentable dans le contexte d'un employeur qui offre un régime de retraite à prestations déterminées et qui souhaite congédier un employé. En effet, toutes proportions gardées, cette approche incite l'employeur à obliger l'employé à travailler jusqu'à la fin de la période de préavis raisonnable (et lui évite ainsi de verser à l'employé des prestations de retraite) au lieu de présenter une offre de cessation d'emploi financièrement plus avantageuse pour l'employé. Bien que de multiples facteurs opposés régissent souvent la décision de l'employeur de faire une offre

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at least to some extent, giving working notice rather than severance.

de cessation d'emploi ainsi que le contenu de cette offre, l'approche des juges majoritaires encourage l'employeur, du moins dans une certaine mesure, à donner un préavis plutôt qu'une indemnité de cessation d'emploi.

VI. Conclusion

[155] The pension benefits IBM paid to Mr. Waterman during the reasonable notice period should be deducted in assessing Mr. Waterman's damages for wrongful dismissal. I would allow the appeal with costs throughout.

Appeal dismissed with costs throughout, McLachlin C.J. *and* Rothstein J. *dissenting.*

Solicitors for the appellant: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the respondent: MacKenzie Fujisawa, Vancouver.

VI. Conclusion

[155] Les prestations de retraite qu'IBM a versées à M. Waterman au cours de la période de préavis raisonnable devraient être déduites lors du calcul des dommages-intérêts pour congédiement injustifié de M. Waterman. Je suis d'avis d'accueillir le pourvoi avec dépens devant toutes les cours.

Pourvoi rejeté avec dépens devant toutes les cours, la juge en chef McLachlin *et le juge* Rothstein *sont dissidents.*

Procureurs de l'appelante : Fasken Martineau DuMoulin, Vancouver.

Procureurs de l'intimé : MacKenzie Fujisawa, Vancouver.

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TAB 2

Indexed as:
Schmidt v. Air Products Canada Ltd.

Air Products Canada Ltd., William M. Mercer Limited, Confederation Life Insurance Company and T. J. Westley, appellants;
v.
Gunter Schmidt in his personal capacity and on behalf of the Beneficiaries of the Stearns Catalytic Ltd. Pension Plans, respondents.
And between
Gunter Schmidt in his personal capacity and on behalf of the Beneficiaries of the Stearns Catalytic Ltd. Pension Plans, appellants;
v.
Air Products Canada Ltd., William M. Mercer Limited, Confederation Life Insurance Company and T. J. Westley, respondents.

[1994] 2 S.C.R. 611

[1994] 2 R.C.S. 611

[1994] S.C.J. No. 48

[1994] A.C.S. no 48

File Nos.: 23047, 23057.

Supreme Court of Canada

1993: December 1; 1994: June 9.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Pensions -- Trusts -- Contracts -- Pension fund -- Surplus -- Entitlement to surplus in defined benefit pension plans -- One plan incorporating a trust fund and not contemplating the reversion of surplus assets to the company -- Second plan originally defined contribution plan but converted to defined benefit plan -- Second plan making no reference to the existence of a trust and specifically contemplating the reversion of surplus assets to the company -- Whether employer entitled to surplus -- Whether employer entitled to contribution holiday in situation where pension fund in surplus -- Employment Pension Plans Act, S.A. 1986, c. E-10.05, ss. 42(2), 58(a), (b), (c) -- Regulations to the Employment Pension Plans Act, Alta. Reg. 364/86, s. 34(9)(b)(i), (ii), (iii), (iv).

Stearns-Roger Canada Ltd. (Stearns) and Catalytic Enterprises Ltd. (Catalytic) merged and eventually became Air Products Canada Ltd. Both companies had defined benefit pension plans for their employees, and both plans were in surplus. Their pension plans and funds were amalgamated and evolved into two virtually identical Air Products Plans, one of which forms the subject of the appeal and cross-appeal; the senior management plan will be affected by the result.

In 1959, Catalytic instituted a contributory money-purchase plan incorporating a trust fund administered by a trustee. By 1966, the plan had been amended to become a contributory defined benefits plan. No provision existed as to the treatment of surplus funds until the plan was further amended in 1978 to give the employer a purported discretion as to the distribution of any surplus which might remain upon the termination of the pension plan.

The first Stearns plan, created in 1970, was a contributory defined benefits plan until 1977, when it was amended to provide that employee contributions were to be of a voluntary nature only. All relevant versions of the Stearns plan gave the employer a discretion as to the distribution of any surplus which might remain upon the termination of the pension plan.

The amalgamated plan was a contributory defined benefits plan. The plan gave the company a discretion as to the distribution of surplus upon termination and provided for the automatic reversion to the company of any surplus remaining once benefits paid to a member had reached the maximum level specified in the plan. For several years the company transferred no assets to the fund but rather met its contributions from the actuarially determined surplus existing in the pension fund.

The Air Products pension plan was terminated following the sale of most of the company's assets. Actuarial calculations established that a substantial surplus would remain in the plan after all benefits had been paid. Both Air Products, and Gunter Schmidt, on behalf of the Air Products employees, applied to the Alberta Court of Queen's Bench for a declaration of entitlement to the surplus funds. Schmidt also sought a declaration that Air Products be required to repay the amount of fund surplus it had used to take a contribution holiday. The Court of Queen's Bench found that the portion of the surplus derived from the Catalytic fund was to be paid out to the employees, and that Air Products was not entitled to take a contribution holiday utilising any part of the Catalytic surplus. The surplus traceable to the Stearns fund was found to belong to Air Products. An appeal

by the company to the Alberta Court of Appeal in respect of the Catalytic surplus and the contribution holiday and a cross-appeal by the former Stearns employees in respect of the Stearns surplus were both dismissed.

At issue here is the question of entitlement to surplus monies remaining in an employee pension fund once the fund has been wound up and all benefits either paid or provision made for their payment. There is a further related issue as to whether or when employers may refrain from contributing to ongoing pension plans which are in "surplus". Both the appeal and cross-appeal are the same as before the Court of Appeal. The former Catalytic employees are the respondents on the appeal and the former Stearns employees are the appellants on the cross-appeal.

Held (Sopinka and McLachlin JJ. dissenting in part): The appeal by Air Products Canada Ltd. (File No. 23047) with respect to entitlement to any surplus traceable to the Catalytic fund should be dismissed and its appeal with respect to its entitlement to take a contribution holiday is allowed.

Held: The cross-appeal by Gunter Schmidt in his personal capacity and on behalf of the beneficiaries of the Stearns pension plans (File No. 23057) should be dismissed with respect to the entitlement of Air Products Canada Ltd. to all surplus remaining in the pension fund derived from the Stearns plan and to its entitlement to take a contribution holiday.

Per La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ.: Absent legislation to the contrary, a court must determine competing claims to pension surplus by a careful analysis of the pension plan and the funding structures created under it. First it must determine, using ordinary principles of trust law, if the pension fund is impressed with a trust. A trust will exist whenever there has been an express or implied declaration of trust and an alienation of trust property to a trustee to be held for specified beneficiaries. If the pension fund, or any part of it, is not subject to a trust, then any issues relating to outstanding pension benefits or to surplus entitlement must be resolved by applying principles which pertain to the interpretation of contracts.

Different considerations apply if the fund is impressed with a trust. The trust is not a trust for a purpose, but a classic trust governed by equity, and, to the extent that applicable equitable principles conflict with plan provisions, equity must prevail. The trust will in most cases extend to an ongoing or actual surplus as well as to that part of the pension fund needed to provide employee benefits. An employer may explicitly limit the operation of the trust so that it does not apply to surplus and, as a settlor of the trust, may reserve a power to revoke the trust. In order to be effective, the latter power must be clearly reserved at the time the trust is created. A power to revoke the trust or any part of it cannot be implied from a general, unlimited power of amendment.

Funds remaining in a pension trust following termination and payment of all defined benefits may be subject to a resulting trust. Before a resulting trust can arise, all of the trust's objectives must have been fully satisfied. Even when this is the case, the employer cannot claim the benefit of a resulting trust when the terms of the plan demonstrate an intention to part outright with all money contributed to the pension fund. In contributory plans, it is not only the employer's, but also the

employees', intentions which must be considered. Both are settlors of the trust.

An employer's right to take a contribution holiday must also be determined on a case-by-case basis. It can be excluded either explicitly or implicitly in circumstances where a plan mandates a formula for calculating employer contributions which removes actuarial discretion. Contribution holidays may also be permitted by the terms of the plan. When the plan is silent on the issue, the right to take a contribution holiday is not objectionable so long as actuaries continue to accept the application of existing surplus to current service costs as standard practice. These principles apply whether or not the pension fund is subject to a trust. Because no money is withdrawn from the fund by the employer, the taking of a contribution holiday represents neither an encroachment upon the trust nor a reduction of accrued benefits. These general considerations are, of course, subject to applicable legislation.

The Catalytic plan and the trust agreement constituted a clear declaration of an intention to create a trust. The subject matter of the trust was defined and the beneficiaries were identified in the trust agreement by reference back to the plan. This classic trust established for the benefit of a defined group of persons was never terminated and so continues to exist. The parties contemplated that the trust would continue if a different trustee were named. The trust therefore was not terminated when, in 1974, the company transferred control of its pension fund to Confederation Life Insurance Company. Further, the fact that the 1978 version of the Catalytic plan removed all reference to a trust could not have the effect of terminating the trust. Nor could any of the provisions of the 1984 investment contract entered into by Stearns Catalytic and Confederation Life have that effect.

The trust fund was comprised of all contributions made by both the company and the employees, together with any earnings of those monies. The fact that the 1959 plan was a defined contribution plan under which no surplus could arise does not affect this definition of the trust fund. The company could only claim the surplus remaining on termination by virtue of a resulting trust, or by validly revoking the trust. The purposes of the trust were not fully satisfied by the payment of all defined benefits. One of the objects of the trust was to use any money contained in the fund for the benefit of the employees. The benefits to which employees were entitled under the 1959 plan were not restricted to only those contributions made by the company on their behalf. Therefore, the trust objects could never be exhausted so long as some money remained in the fund and some eligible employees could be found. A resulting trust could not arise here. Air Products was only entitled to the surplus if it could have revoked the trust upon termination of the pension plan in 1988.

Both the trust agreement and all versions of the plan make some provision for what was to occur on termination of the plan. Although the company reserved a general amending power subject to the provisos that no amendments could reduce accrued benefits or allow the trust fund to be used in any way other than for the employees' exclusive benefit, the company did not clearly reserve a power to revoke the trust. Such a power could not be implied under the broad general amendment power. Therefore, the 1978 amendment purporting to give the company the power to distribute surplus to itself, as well as the reversion clause of the 1983 plan, were invalid. Both represented attempts to

revoke partially the 1959 trust in favour of the employees. Neither was within the scope of the control which the company reserved to itself at that time.

The relevant plan provisions which governed the taking of a contribution holiday were those contained in the 1983 Air Products plan. The wording of the plan implicitly authorized an actuary to consider the surplus when calculating the company's annual funding obligation. Since the plan allowed the company to take contribution holidays, it did not need to repay the actuarial surplus taken into account in the years when it made no contributions into the plan.

The first Stearns plan differed in two significant ways from the original Catalytic plan: it made no reference to the existence of a trust and it specifically contemplated the reversion of surplus assets to the company. A trust was never created notwithstanding the facts that the alleged subject matter of the trust, the pension fund, was defined under the two Stearns plans, that the employees were identified as those entitled to receive the fund monies and that the exclusive benefit and non-diversion clauses relied upon by the employees were consistent with the existence of a trust. Several other clauses were equally consistent with the non-existence of trust and clearly identified the plan as a contract to receive defined benefits. No intention to create a trust was apparent on the face of the documents.

A brochure distributed by the company to its employees in 1972 did not form a binding part of the pension plan documents and its influence on entitlement of plan surplus in 1988 was doubtful since it specifically stated that the plan would be subject to amendment from time to time. The statement contained in the brochure to the effect that the company intended to pay any remaining surplus to the employees could not in the circumstances of this case form the basis for an estoppel preventing the company from now claiming the surplus for itself. Documents not normally considered to have legal effect may nonetheless form part of the legal matrix within which the rights of employers and employees participating in a pension plan must be determined. Whether they do so depends on the wording of the documents, the circumstances in which they were produced, and the effect which they had on the parties, particularly the employees.

Since no trust was ever created under the Stearns plan and since the 1972 brochure was without legal effect, the issue of entitlement to the plan surplus had to be decided on the basis of an interpretation of the plan's provisions. The 1983 amendment of the pension plan was within the limits of the power of amendment because it did not reduce any "then existing" interest of the employees as the employees had no interest in the surplus remaining upon termination until the company exercised its discretion to give them an interest. The amendment did not violate the restriction that no amendments were to have the effect of diverting any part of the fund to purposes other than for the exclusive benefit of the participants, former participants, joint annuitants, beneficiaries, or estates. Although the 1970 plan did not deal with the issue, the reversion of surplus to the company was not inconsistent with the non-diversion and exclusive benefit clauses. The prohibition on diversion of funds and the exclusive benefit clause applied from the outset only in respect of the defined benefits to which the employees were contractually entitled. They did not

apply to the distribution of a plan surplus.

The company is entitled according to the plan's terms to any surplus remaining in the pension fund which can be traced to the former Stearns plans. It was also entitled to take a contribution holiday. The application of an actuarial surplus to current service funding obligations was permitted under the terms of the Air Products plan, and did not have the effect of reducing any benefits which had accrued to the employees.

The results in these appeals demonstrate the need for legislation. It is unfair that there should be a different result for these two groups of employees based only on a finding that a trust exists in one case but not the other. A legislative scheme should be set up to provide for the equitable distribution of surplus between employees and employers when pension plans are terminated.

Per Sopinka J. (dissenting in part on the appeal (File No. 23047)): The surplus in the Catalytic plan reverts to the employer. The imposition of a trust on all the monies in that plan, did not prevent the trust's being amended. The nature of the rights of amendment depends upon the terms of the plan and of the trust agreement, if any. Nothing in the Catalytic plan precluded the company's exercising the express power of amendment in the plan so as to provide for the return of surplus funds on termination of the plan.

The company from the outset reserved the power to amend the Catalytic plan so as to permit any surplus to be distributed to itself. The trust agreement's amending clause was subject to the plan and both the 1959 and the 1966 versions of the plan reserved broader powers of amendment to the company than did the trust agreement. Both plans provided that the company's power to amend the plan was limited only by the condition that accrued benefits could not be reduced. The right to receive surplus monies in the pension fund was not a benefit which had accrued to the members of the plan when the company amended the plan to permit the surplus to be distributed to itself. Moreover, even if such a right could be said to have accrued at the time of amendment, it is not a benefit contemplated by that provision.

A power of amendment, limited in that it cannot reduce accrued benefits, is not inconsistent with the fundamental purpose of a defined benefits pension trust. It should be given effect if sufficiently explicit to permit a change amounting to a partial revocation in law.

No magic exists in the use of the specific word "revocation". Both the creation of a trust and a limitation on the nature of a trust can be determined from the clear intention of the settlor. The power of amendment can be sufficiently explicit to include a power of revocation and the absence of the word "revocation" does not mean that a settlor's changes clearly having the effect of revocation would be fatally flawed. A formulaic approach should not be allowed to dislodge the clear intention of the parties.

Neither the company nor the employees foresaw the existence of a surplus when the plan was created and the employees had no reason to expect to receive more than their defined benefits.

There was nothing inequitable in allowing the employer to take advantage of the broad amending power to distribute the surplus to itself, so long as it did nothing to reduce the level of benefits provided to the employees.

The tax motivations of the parties to pension plans, while generally of limited relevance in interpreting those plans, here supported a broad interpretation of the amending power. It was reasonable to infer that the Catalytic plan's broad amending power, in 1959 and subsequent versions, was retained in part to deal with changes in income tax legislation, given the plan's express direction that the company's contributions be tax deductible.

Per McLachlin J. (dissenting in part on the appeal (File No. 23047)): The surplus in defined benefit plans (as distinguished from defined contribution plans) should revert to the employer. Apart from the reference in the 1978 restatement which provided that surplus should go to the employer, the documents were silent on the question of surplus. The 1978 stipulation was a valid "amendment" to the original trust documents and ought to stand. Even if the 1978 stipulation were disregarded, however, the surplus would devolve on the employer under the doctrine of resulting trust.

Where a new situation arises and falls within an existing term of the contractual document, the courts must look at the factual context in which the term was drafted and consider whether the new situation can reasonably be said to fall within this clause. If it does not, the court may nevertheless consider if a term covering the new situation can be implied, whether as a matter of fact, law or custom. The courts will not make a new contract or trust to which the parties have not agreed.

Article V in the 1959 trust agreement, which dealt with modification and termination, provided that no part of the fund be diverted to purposes other than for the exclusive benefits of those intended to benefit from it. This article was drafted in the context of a defined contribution plan under which no surplus could arise and should therefore not be read as applying to the surplus which arose under the later defined benefit plan. The 1978 provision stipulating that the surplus should go to the employer is valid and determines the issue.

Payment of the surplus to the employer does not constitute revocation of a trust. A trust cannot be revoked without express wording so permitting. The surplus was an unanticipated development never contemplated by the original trust and not addressed by any changes to the trust until 1978. The 1959 trust provisions do not apply to a surplus.

The trust did not require that the surplus in question be paid to the employees. In 1966, when the possibility of a surplus first arose because of the plan's conversion to a defined benefit plan, the trust provided no guidance as to where a surplus would go in the event of termination. The 1978 amendment made it clear that it was payable to the employer. Therefore, under the terms of the trust, the employer is entitled to the surplus.

Alternatively, if the 1978 amendment as to surplus is invalid, the doctrine of resulting trust requires that the surplus be available to the employer. The employer was responsible for ensuring a fund

sufficient to meet all defined benefits owing to employees. Since the employer paid more than required for the purpose of the trust, the residual sum should return to the employer.

Even where employees contribute to a defined benefit plan, that contribution is taken to be fully satisfied by receipt of the defined benefits. The employee accepts this fixed amount in lieu of the greater or lesser amounts he or she might obtain on a defined contribution plan and in doing so exhausts his or her rights under the plan.

Cases Cited

By Cory J.

Considered: Re Reevie and Montreal Trust Co. of Canada (1986), 53 O.R. (2d) 595; Hockin v. Bank of British Columbia (1990), 71 D.L.R. (4th) 11; Re Campbell-Renton & Cayley, [1960] O.R. 550; Re Canada Trust Co. and Cantol Ltd. (1979), 103 D.L.R. (3d) 109; distinguished: Re Collins and Pension Commission of Ontario (1986), 56 O.R. (2d) 274; disapproved: Davis v. Richards & Wallington Industries Ltd., [1991] 2 All E.R. 563; referred to: C.A.W., Local 458 v. White Farm Manufacturing Canada Ltd. (1989), 66 O.R. (2d) 535, aff'd (1990), 39 E.T.R. 1; King Seagrave Ltd. v. Canada Permanent Trust (1986), 13 O.A.C. 305 (C.A.), aff'g (1985), 51 O.R. (2d) 667 (H.C.); Arrowhead Metals Ltd. v. Royal Trust Co., Pension Commission of Ontario, March 26, 1992, unreported; Bathgate v. National Hockey League Pension Society (1992), 11 O.R. (3d) 449; Martin & Robertson Administration Ltd. v. Pension Commission of Manitoba (1980), 2 A.C.W.S. (2d) 249; C.U.P.E.-C.L.C., Local 1000 v. Ontario Hydro (1989), 68 O.R. (2d) 620; Askin v. Ontario Hospital Association (1991), 2 O.R. (3d) 641; Maurer v. McMaster University (1991), 4 O.R. (3d) 139; Trent University Faculty Assn. v. Trent University (1992), 99 D.L.R. (4th) 451; Harris v. Robert Simpson Co., [1985] 1 W.W.R. 319.

By Sopinka J. (dissenting in part on the appeal (File No. 23047))

Re Reevie and Montreal Trust Co. of Canada (1986), 53 O.R. (2d) 595; Re Campbell-Renton & Cayley, [1960] O.R. 550; Hockin v. Bank of British Columbia (1990), 71 D.L.R. (4th) 11.

By McLachlin J. (dissenting in part on the appeal (File No. 23047))

Davis v. Richards & Wallington Industries Ltd., [1991] 2 All E.R. 563; In re Courage Group's Pension Schemes, [1987] 1 W.L.R. 495; Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co., 555 F.Supp. 257 (1983); In re C. D. Moyer Co. Trust Fund, 441 F.Supp. 1128 (1977); Pollock v. Castrovinci, 476 F.Supp. 606 (1979); Wilson v. Bluefield Supply Co., 819 F.2d 457 (1987); Bryant v. International Fruit Products Co., 793 F.2d 118 (1986); Audio Fidelity Corp. v. Pension Benefit Guaranty Corp., 624 F.2d 513 (1980); Maurer v. McMaster University (1991), 4 O.R. (3d) 139; Askin v. Ontario Hospital Association (1991), 2 O.R. (3d) 641; Re Reevie and Montreal Trust Co. of Canada (1986), 53 O.R. (2d) 595; Murphy v. McSorley, [1929] S.C.R. 542; Re Canada Trust Co. and Cantol Ltd. (1979), 103 D.L.R. (3d) 109.

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Pension Benefits Act, R.S.A. 1980, c. P-3.
Pension Benefits Act, R.S.M. 1987, c. P32, s. 26(2).
Pension Benefits Act, R.S.O. 1990, c. P.8.
Pension Benefits Standards Act, S.B.C. 1991, c. 15.
Power Corporation Act, R.S.O. 1980, c. 384, s. 20(4).
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APPEALS from a judgment of the Alberta Court of Appeal (1992), 125 A.R. 224, 14 W.A.C. 224, 89 D.L.R. (4th) 762, 46 E.T.R. 21, dismissing an appeal and cross-appeal from an order of Moore C.J.Q.B. in Chambers (1990), 104 A.R. 190, 66 D.L.R. (4th) 230, 37 E.T.R. 64. The appeal by Air Products Canada Ltd. (File No. 23047) with respect to entitlement to any surplus traceable to the Catalytic fund should be dismissed and its appeal with respect to its entitlement to take a contribution holiday is allowed, Sopinka and McLachlin JJ. dissenting in part. The cross-appeal by Gunter Schmidt in his personal capacity and on behalf of the beneficiaries of the Stearns plans (File No. 23057) should be dismissed with respect to the entitlement of Air Products Canada Ltd. to all surplus remaining in the pension fund derived from the Stearns plan and to its entitlement to take a contribution holiday.

Dennis R. O'Connor, Q.C., Anne Corbett and Barry L. Glaspell, for the appellants Air Products Canada Ltd., William M. Mercer Limited, Confederation Life Insurance Company and T. J. Westley. Neil C. Wittman, Q.C., and Kenneth J. Warren, for the respondents Gunter Schmidt in his personal capacity and on behalf of the Beneficiaries of the Stearns Catalytic Ltd. Pension Plans. Aleck H. Trawick and Leslie O'Donoghue, for the appellants on the cross-appeal Gunter Schmidt in his personal capacity and on behalf of the Beneficiaries of the Stearns Catalytic Ltd. Pension Plans. Dennis R. O'Connor, Q.C., for the respondents on the cross-appeal Air Products Canada Ltd., William M. Mercer Limited, Confederation Life Insurance Company and T. J. Westley.

Solicitors for Air Products Canada Ltd., William M. Mercer Limited, Confederation Life Insurance Company and T. J. Westley: Borden & Elliott, Toronto. Solicitors for the Beneficiaries of the Stearns Catalytic Ltd. Pension Plans: Code, Hunter, Calgary. Solicitors for Gunter Schmidt in his personal capacity and on behalf of the Beneficiaries of the Stearns Catalytic Ltd. Pension Plans: Blake, Cassels & Graydon, Calgary.

The judgment of La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ. was delivered by

1 **CORY J.**:-- These two cases raise the issue of entitlement to surplus monies remaining in an employee pension fund once the fund has been wound up and all benefits either paid or provision made for their payment. There is a further related issue as to whether or when employers may refrain from contributing to ongoing pension plans which are in "surplus".

Some Definitions

2 At the outset it may be helpful to review briefly some of the technical terms which often appear in pension surplus cases. For a detailed explanation reference may be made to: G. Nachshen, "Access to Pension Fund Surpluses: The Great Debate", in New Developments in Employment Law (Meredith Memorial Lectures, 1988), 1989; Deborah K. Hanscom, "A Surplus of Uncertainty: The Question of Entitlement After Hockin" (1991), 10 Est. & Tr. J. 258, and the articles contained in vol. 2 of the Task Force on Inflation Protection for Employment Pension Plans, Research Studies (1988).

3 Pension surpluses can only arise in "defined benefit" pension plans. In those plans, each employee belonging to the plan is guaranteed specific benefits upon retirement.

4 An ongoing pension fund is said to have an "existing" or "actuarial" surplus when the estimated value of the assets in the fund exceeds the estimated value of all of the liabilities (i.e., pension benefits owed employees) of the fund. When the calculated fund liabilities exceed the calculated

fund assets, the plan is said to be in a state of "unfunded liability". Once the plan is wound up, assets and liabilities can be precisely determined. The fund will then be in a state of "actual" or "real" surplus or liability.

5 Contribution to a defined benefit plan is made each year on the basis of an actuary's estimate of the amount which must be presently invested in order to provide the stipulated benefits at the time the pension is paid out. The actuary's estimate of the present value of future benefits to members of the plan is known as the "current service cost". The obvious difficulties involved in predicting factors such as inflation rates, investment returns and the future employee levels of the company mean that the actuary's task is difficult and to a certain extent speculative. The assumptions made by actuaries in respect of these and other factors will have a significant impact upon the determination of current service costs and the calculation of present levels of fund surplus or liability.

6 Defined benefit plans are to be distinguished from defined contribution (or "money purchase") plans, where set amounts are paid into the pension fund, and the benefits eventually paid equal the amount of the initial contributions plus any return which was obtained on the investment of those funds.

7 Either type of pension plan may be "contributory" (contributions by both employer and employee are mandatory) or "non-contributory" (only the employer's contributions are mandatory). In a non-contributory defined benefit plan, only the employer is obligated to contribute to the pension fund, although employees may have the option of making voluntary contributions in order to increase the benefits they will receive. In a contributory defined benefit plan, the employees must contribute a set amount, which may vary according to factors such as each employee's length of service and earnings, but is usually a defined percentage of salary. The employer's contribution to the fund is the amount over and above the employee contributions which the actuary determines is needed to cover the current service costs of the plan.

8 In the 1980s, a unique combination of conservative actuarial estimates and various economic factors caused many pension funds to accumulate large actuarial surpluses. Many employers sought to recapture this surplus by withdrawing excess monies from pension funds as an alternate source of capital, by applying surplus funds to any required contribution to the pension plan (i.e., taking a "contribution holiday"), or by claiming a proprietary right in any excess remaining upon the termination of the plan once all the employee benefits had been provided for. Employee groups have resisted such actions, claiming that the pension plans were established for their benefit, that the employers never intended or expected to recover any contributions made to the fund, and that any surplus accruing because of fortuitous economic circumstances should be paid to them when the plans are terminated.

Factual Background

9 In 1983, two companies, Stearns-Roger Canada Ltd. ("Stearns") and Catalytic Enterprises Ltd. ("Catalytic") merged to form Stearns Catalytic, which subsequently became Air Products Canada

Ltd. At the time of the merger, both Stearns and Catalytic had defined benefit pension plans for their employees, and both plans were in surplus. The pension plans and funds of Stearns and of Catalytic were amalgamated and evolved into two virtually identical Air Products Plans, one for employees of the Construction Division, and one for members of senior management. It is the employees' pension plan (the "Air Products plan") which forms the subject of the appeal and cross-appeal, although the results of the appeals will also affect the senior management plan.

10 Catalytic first instituted a pension plan for its employees in 1959. This plan was a contributory money-purchase plan which incorporated a trust fund administered by a trustee. By 1966, the plan had been amended to become a contributory defined benefits plan. The Catalytic plan was further amended in 1978.

11 The first Stearns pension plan relevant to these appeals was created in 1970. It repealed and replaced an earlier defined contribution plan. The 1970 plan was a contributory defined benefits plan until 1977, when it was amended to provide that employee contributions were to be of a voluntary nature only. Pursuant to the plan, Stearns entered into a Group Annuity Policy with the Mutual Life Assurance Company. All relevant versions of the Stearns plan gave the employer a discretion as to the distribution of any surplus which might remain upon the termination of the pension plan. By contrast, no provision was made for the treatment of surplus in the Catalytic plans until the 1978 amendment to the plan purported to give the company a similar discretion.

12 The amalgamated Stearns Catalytic (later Air Products) plan was a contributory defined benefits plan. It was funded by means of an Investment Contract with the Confederation Life Insurance Company. The terms of the plan gave the company a discretion as to the distribution of surplus upon termination and also provided for the automatic reversion to the company of any surplus remaining once benefits paid to a member had reached a maximum level specified in the plan. For the years ending September 30, 1985, September 30, 1986, September 30, 1987 and January 31, 1988, the company transferred no assets to the Confederation Life fund. Rather, the company's contributions to the pension fund were paid from the actuarially determined surplus existing in the pension fund.

13 On January 31, 1988, following the sale of most of the company assets, the Air Products pension plan was terminated. Actuarial calculations established that once provision had been made for payment to the employees of Air Products Canada Ltd. of all benefits to which they were entitled under the terms of their plans, a surplus of $9,179,130 would remain in the employee pension plan.

14 In February, 1988, first Air Products, and then Gunter Schmidt on behalf of the employees of Air Products, applied to the Alberta Court of Queen's Bench for a declaration of entitlement to the surplus funds. Schmidt, on behalf of himself and the employees, also sought a declaration that Air Products be required to pay $1,465,400 into the pension fund. This sum represented the amount of fund surplus applied by Air Products to its contribution requirements from 1985 to 1988.

15 The Chief Justice of the Alberta Court of Queen's Bench (Stearns Catalytic Pension Plans (Re) (1990), 104 A.R. 190) found that the portion of the surplus which had been derived from the Catalytic fund was to be paid out to the employees, and that Air Products was not entitled to take a contribution holiday utilising any part of the Catalytic surplus. He therefore ordered the company to return $1,465,400 to the pension fund. In respect of the surplus which was traceable to the Stearns fund, the chambers judge held that it belonged to Air Products.

16 An appeal by the company to the Alberta Court of Appeal in respect of the Catalytic surplus and the contribution holiday and a cross-appeal by the former Stearns employees in respect of the Stearns surplus were both dismissed.

17 The appeal and the cross-appeal before this Court are the same as before the Court of Appeal. The facts and the plans at issue in the appeal and the cross-appeal are sufficiently different that they must be dealt with separately. In order to avoid confusion, I will not refer to the parties as appellants or respondents but to either "Air Products" or "the company" (appellants on the appeal and respondents on the cross-appeal); and to "the employees" or "the plan members". The former Catalytic employees are the respondents on the appeal and the former Stearns employees are the appellants on the cross-appeal.

I. Judgments Below

Alberta Court of Queen's Bench (1990), 104 A.R. 190

18 The chambers judge noted that two provisions in the 1983 amalgamated pension plan were of particular importance. Under Section 18.05, any surplus remaining in the amalgamated fund following termination of the plan and distribution of all defined benefits was to revert to the company. Section 1 of the plan provided that the benefits provided by the plan were in lieu of any benefits to which employees may have been entitled under any of the previous plans and also that the benefits paid under the 1983 plan "in no event shall be less than the benefits to which they were entitled under these Prior Plans" (at p. 201). It was this phrase which required the court to review the Stearns and the Catalytic plans which had existed prior to 1983.

19 Following a careful examination of the history and terms of all the relevant pension plans, Moore C.J. decided that Air Products was entitled to the surplus funds under the Stearns Plan and that the employees were entitled to the surplus funds under the Catalytic plan. He further held that the company was not entitled to apply any actuarial surplus from the Catalytic fund towards its contributions to the pension fund in the period 1985-88, but that the relevant plan provisions did permit the company to use the existing surplus in the Stearns fund to pay its contribution to the pension fund.

20 The Chief Justice first considered the Stearns plans. He noted, at pp. 206-207, that Article 14.1 of the 1970 Stearns pension plan, incorporated as Article 14.3 in the 1977 plan, provided:

> Notwithstanding any surplus remaining after all benefits referred to in this Sub-section 14.1(c) have been provided, such surplus may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions at the time, be returned to the Company or may be used for the benefit of Participants, former Participants, beneficiaries or estates in such equitable manner as the Company may in its discretion determine. [Emphasis of the Chief Justice.]

21 In his view the concluding words of this section gave the company a discretion as to the distribution of the surplus. He rejected the employees' suggestion that the 1977 plan was amended to remove this discretion, holding instead that the alleged "1982 amendments" to the plan were never more than a draft version which was not adopted and never registered. The Chief Justice considered that Article 14.3, when read together with Article 13.4 of the 1977 Plan, which permitted funds to be returned to the company with the consent of the Minister of National Revenue and the Superintendent of Pensions, modified a more general clause which prohibited any amendment, termination, or diversion of the fund other than for the exclusive benefit of the employees.

22 Therefore, on a construction of the plan provisions as a whole, Moore C.J. concluded at p. 208:

> From the moment the prior Stearns Plan was terminated in 1969, the company had the right to any surplus as it had from the outset reserved out to itself any surplus. The plan had ended and the company could reserve out the surplus. The company at this point did not enter into a trust agreement but purchased an annuity contract. Insofar as the Stearns Plan is concerned, we are dealing with a defined benefits plan and once all the defined benefits have been satisfied or provided for (as is the case), the balance or any surplus is to be disposed of at the discretion of the company. The plan was not established to create a fund to be divided up among the employees, but rather to provide them with specific pensions on retirement.

He concluded that the Stearns fund was never impressed with a trust, nor could one be implied to any part of the Air Products fund which evolved from the prior Stearns plans. The company's right to control the allocation of surplus was determined in 1970, and the amalgamation of the Stearns and the Catalytic plans did not create any employee entitlement to such surplus.

23 The Chief Justice next considered the Catalytic plans. The first began in 1959 as a defined contribution plan. Unlike the original Stearns plan, this plan was never terminated. Rather it was amended several times over the following twenty-five years. The 1959 plan included a Trust Agreement entered into between Catalytic and the Canada Trust Company for the administration of the pension fund. It contained a provision prohibiting the company from recovering any sums paid into the fund, and an amendment provision which prohibited any amendment which had the effect

of reducing members' benefits. These three features were also present in the 1966 restatement of the Catalytic Plan, although by then the plan had been changed from a money purchase plan to a defined benefits plan.

24 Moore C.J. noted that although in 1974 the agreement between Canada Trust and Catalytic was terminated and replaced by an investment contract with Confederation Life, there was no evidence that the trust itself had terminated. He was therefore of the opinion that the trust was still in place in 1978 when Catalytic purported to amend the plan in order to give itself the right to any surplus remaining upon termination.

25 Moore C.J., at p. 210, felt that in 1959 Catalytic had created a trust,

> [t]he sole object of . . . which . . . was to provide retirement benefits for the employees, not the company. . . . The fund became a trust fund for the benefit of the Catalytic employees.

He was particularly struck, at p. 210, by the wording of the 1959 Trust Agreement:

> It states in clear terms that no amendment shall authorize or permit any part of the Fund to be used for or diverted to purposes other than for the exclusive benefit of such persons or their estates. This wording cannot be ignored and in my view it overrides any attempt to amend the trust to give the surplus to the company.

26 Moore C.J. therefore held that the 1978 amendment was invalid. He further relied upon Re Reevie and Montreal Trust Co. of Canada (1986), 53 O.R. (2d) 595, and C.A.W., Local 458 v. White Farm Manufacturing Canada Ltd. (1989), 66 O.R. (2d) 535, aff'd (1990), 39 E.T.R. 1, in support of his conclusion that, by virtue of the trust in their favour, the former employees of Catalytic were entitled to their portion of the surplus remaining in the Air Products Fund.

27 Moore C.J. dealt lastly with the issue of the contribution holidays taken by the company. He observed that, under the provisions of the amalgamated plan, Air Products reserved the right to pay its annual contribution to the fund out of existing surplus. He therefore held that the company could validly use this surplus for its contribution obligations in the years 1985-88, but that, as a result of the existence of the trust in favour of the Catalytic employees, the contribution could not have been taken from the Catalytic share of the actuarial surplus.

Alberta Court of Appeal (1992), 125 A.R. 224 (McClung, Foisy and Major JJ.A.)

28 The Court of Appeal affirmed the judgment of Moore C.J., adding only two brief comments. The former Stearns employees argued again that the Stearns plan had been amended in 1982 so as to give them title to the surplus. The court noted that the chambers judge held that the draft provision the employees relied upon never became part of the plan and found no evidence to

suggest that he was wrong in this conclusion.

29 Secondly, the Court of Appeal dealt with the employees' argument that the company was bound by the terms of an employee benefits brochure issued in 1982 to give the surplus to the employees. Under the heading "Future of the Plan" that brochure provided (p. 227):

> In the event there is a surplus in the fund after all benefits have been paid, it is the Company's intention the surplus will be distributed in an equitable manner to the employees active in the Plan at the date of termination.

The chambers judge had noted the existence of this brochure, but did not comment on its legal effect in his judgment.

30 The Court of Appeal held that the evidence surrounding the brochure was insufficient to alter the plan provisions giving Stearns a discretion as to use of the surplus. The facts were distinguishable from the case of Re Collins and Pension Commission of Ontario (1986), 56 O.R. (2d) 274. In Re Collins the company had given "repeated assurances" to the employees concerning the surplus in the course of collective bargaining, and it knew that the employees were aware of the surplus and expected to receive it. In this case there was no evidence that any employees knew of or relied upon the Stearns brochure. Finally, the court held that the Stearns employees had failed to demonstrate that the brochure estopped the company from appropriating the surplus, or that the company acted unfairly in the exercise of its discretion to distribute the excess funds.

II. Issues on Appeal

A. The Appeal (The Catalytic Plan)

31

1. Whether the Court of Appeal erred in finding that Air Products was not entitled to the monies deriving from the Catalytic Plan which remained in its employee pension fund following termination of the pension plan and provision of all benefits.
2. Whether the Court of Appeal erred in finding that Air Products was not entitled to take existing actuarial surplus deriving from the Catalytic Plan into account in determining the amount of its annual funding obligation.

B. The Cross-Appeal (The Stearns Plan)

32

1. Whether the Court of Appeal erred in holding that Air Products was entitled to take the surplus remaining in its employee pension fund which was derived from the Stearns plan following termination of the plan and provision of all benefits.

2. Whether the Court of Appeal erred in finding that Air Products was entitled to use existing actuarial surplus not derived from the Catalytic plan in order to fund its required annual contribution to the Air Products plan during the years 1985-88.

III. The Legislative Framework

33 Two separate regimes affect Canadian employer pension plans in surplus. Each province now has in place some form of pension benefits legislation designed to protect member benefits by ensuring that employers meet their funding obligations and that pension funds remain solvent. The federal income tax authorities have also attempted to regulate employer pension plans in order to limit the tax relief which employers and employees can obtain for their contributions to pension funds. Some of the provincial statutes have recently begun to deal with the issue of surplus upon plan termination or of contribution holidays. The tax regulation pertaining to surplus has to date taken the form of non-binding Information Circulars rather than legislation.

A. The Income Tax Act

34 Under the Income Tax Act, S.C. 1970-71-72, c. 63, certain tax benefits are granted to those contributing to registered pension plans. Contributions by employers and employees to a registered pension plan are tax deductible; plan earnings are exempt from taxation, and the taxation of employee benefits is deferred until they are received by the employee. The Act also contains two ceilings, one on the amount which an employer can deduct from income in respect of current service contributions to an employee pension plan, and the other on the maximum benefit which each employee can derive from the employer's deductible contributions.

35 In addition, on December 31, 1981, Revenue Canada issued Information Circular No. 72-13R7. This circular contains two significant requirements for the registration of pension plans. First, s. 39 of the circular requires that all plans provide that any existing actuarial plan surplus in excess of the employer's normal current service costs over a two-year period must either be refunded to the employer or used to take a contribution holiday. The circular also sets a maximum limit on the benefits which an employee can recover under a plan, and in s. 13.1 stipulates that all pension plans must contain a provision permitting actual surplus to be refunded to employers upon termination of the plan. However, these requirements were never incorporated into the Income Tax Act or its Regulations during the lifetime of the Air Products plan or its predecessors.

36 One of the results of the Information Circular has been that many pension plans which originally were silent on the issue of surplus or which stated that employer contributions to a plan were "irrevocable" have been amended to provide that any surplus should be refunded to employers upon termination of the plan. Air Products cites the Information Circular in support of its position, presumably as evidence that Revenue Canada supports employer ownership of a surplus. The employees in turn emphasize the non-binding effect of the circular and contend that the employer's motivation for amending the plan is not a relevant consideration in determining its legal effect.

37 Several years ago I agreed with Zuber J.A. of the Ontario Court of Appeal that the Information Circular is of limited legal significance: King Seagrave Ltd. v. Canada Permanent Trust (1986), 13 O.A.C. 305 (C.A.), aff'g (1985), 51 O.R. (2d) 667 (H.C.). I am still of that opinion. At the time the pension plans which are the subject of these appeals were wound up, the requirements contained in the circular did not have binding legal force. The circular did not purport to clarify any provisions of the Income Tax Act, and the fact that some pension plans may have been amended to comply with its provisions does not alter my approach to the surplus entitlement issue.

B. Provincial Legislation

38 No Canadian province has yet dealt directly with the issue of ownership of or entitlement to pension surplus by legislation. The preferred approach in most jurisdictions has been to provide that the withdrawal or transfer of actuarial surplus can only be accomplished when certain specified conditions have been met. See, for example, the Ontario Pension Benefits Act, R.S.O. 1990, c. P.8. The British Columbia Pension Benefits Standards Act, S.B.C. 1991, c. 15, requires that all pension plans must contain clauses providing for the arbitration of disputes concerning entitlement to surplus or contribution holidays. Manitoba has also enacted an interesting variation on the treatment of surplus funds. Section 26(2) of its Pension Benefits Act, R.S.M. 1987, c. P32, provides that no existing surplus may be withdrawn from a pension fund unless the Pension Commission "believes it equitable to do so".

39 The B.C. and Manitoba provisions represent welcome legislative steps. Regrettably, a comprehensive approach to the issues arising from pension surplus has yet to be enacted in any part of this country. The courts have on a number of occasions been required to determine the allocation of pension surplus. Yet the courts are limited in their approach by the necessity of applying the sometimes inflexible principles of contract and trust law. The question of entitlement to surplus raises issues involving both social policy and taxation policy. The broad policy issues which are raised by surplus disputes would be better resolved by legislation than by a case-by-case consideration of individual plans. Yet that is what now must be undertaken.

40 The pension plans under consideration are governed by the Alberta Employment Pension Plans Act, S.A. 1986, c. E-10.05 (proclaimed into force January 1, 1987). Section 42(2) of the Act requires that all plans provide for the allocation of surplus on termination to either the employer, the employees, or both. Section 58 prohibits employer withdrawal of surplus from an ongoing fund unless such withdrawal is specifically permitted in the plan and the permission of the Superintendent of Pensions is obtained.

41 Withdrawal, together with the issue of contribution holidays, is also referred to in s. 34(9) of the Regulations to the Act (Alta. Reg. 364/86) which provides:

34 . . .

(9) Where the actuarial valuation report . . . reveals that the plan has surplus assets,

. . .

(b) when the unfunded liabilities have been amortized or where no unfunded liability exists, the surplus assets may be

(i) used to increase benefits,
(ii) left in the plan,
(iii) if the plan does not so prohibit, applied to reduce the employer contributions referred to in subsection (3)(a), or
(iv) where no solvency deficiency exists and subject to section 58 of the Act and section 39 of this Regulation, paid or transferred to the employer.

42 The Employment Pension Plans Act and its regulations do no more than establish that surplus entitlement must be determined by the wording of the plan. Contribution holidays are permitted provided they are not prohibited by the plan. The previous legislation governing pensions in Alberta, the Pension Benefits Act, R.S.A. 1980, c. P-3, did not deal with either surplus remaining on termination or with contribution holidays. As a result, the primacy of the wording of individual pension plans has never been displaced by legislation, and it is therefore those specific provisions which must be considered.

IV. Relevant Pension Plan Provisions

43 The parties most helpfully compiled a summary of the history and relevant provisions of all the pension plans and related documents pertinent to these appeals. An abbreviated version of this summary, taken from the Agreed Statement of Facts, is attached as an appendix to these reasons.

V. Analysis
A. Surplus Entitlement

44 An employer who creates an employee pension plan agrees to provide pension benefits to retiring employees. At first, employers undertaking this obligation paid retired employees directly from company income. Gradually, the practice of creating separate pension funds emerged following the passage of regulations designed to protect employees from the bankruptcy or termination of the company, coupled with the realization of employers that the cost of providing pensions is reduced if money is put aside on behalf of present employees for their future benefit.

45 Pension funds thus began to be structured in several different ways. Investment contracts and trust funds eventually proved to be the most popular forms of pension plan funding for employers

since they provided the requisite degree of "irrevocability" of contribution to entitle an employer to obtain tax relief on its pension contributions. The relatively recent phenomenon of pension plan surplus has created an inevitable tension between employers who claim that they never lose their entitlement to monies which they contribute to the fund but which are not needed to provide agreed benefits, and employees who assert that all pension fund monies belong to them. It is suggested that if employers are not able to retrieve surpluses, they will be tempted to fund existing plans less generously. I cannot agree. First, unless the terms of the plan specifically preclude it, an employer is entitled to take a contribution holiday. Second, most pension plans require the level of employer contribution to be determined by an actuary. The employer will not be able to reduce the level of contribution unilaterally below that required according to standard actuarial practice. Third, employers are required by legislation to make up any unfunded liability. Finally, the fact that some employers cannot recoup surplus on termination is unlikely to influence the conduct of employers as a whole. In order to obtain registration, plans created since 1981 must make provision for distribution of surplus on termination. It is generally only in pre-existing plans that the problem of ownership of surplus arises and, as the results of these appeals demonstrate, even then employee entitlement to the surplus is not automatic.

46 Entitlement to the surplus will often turn upon a determination as to whether the pension fund is impressed with a trust. Accordingly, the first question to be decided in a pension surplus case is whether or not a trust exists.

1. Trust or Contract?

47 Employer-funded defined benefit plans usually consist of an agreement whereby an employer promises to pay each employee upon retirement a pension which is defined by a formula contained in the plan. A pension fund is created pursuant to the plan, either by way of contract or by way of trust. Whether or not any given fund is subject to a trust is determined by the principles of trust law. If there has been some express or implied declaration of trust, and an alienation of trust property to a trustee for the benefit of the employees, then the pension fund will be a trust fund.

48 If no trust is created, then the administration and distribution of the pension fund and any surplus will be governed solely by the terms of the plan. However, when a trust is created, the funds which form the corpus are subjected to the requirements of trust law. The terms of the pension plan are relevant to distribution issues only to the extent that those terms are incorporated by reference in the instrument which creates the trust. The contract or pension plan may influence the payment of trust funds but its terms cannot compel a result which is at odds with the existence of the trust.

49 Typically, when a pension fund is subject to a trust, several issues arise: Are such trusts for a purpose or are they "classic" trusts? What part of the pension fund is subject to the trust? To what extent can a settlor-employer alter the terms of a trust in order to appropriate the fund surplus for itself? Is the surplus subject to a resulting trust? Let us consider the nature of the trust in this case.

2. Purpose or 'True' Trust?

50 Air Products has suggested that the Catalytic pension fund was not subject to an express trust but instead to a trust for a purpose. Relying on dicta of the British Columbia Court of Appeal in Hockin v. Bank of British Columbia (1990), 71 D.L.R. (4th) 11, the company argues that a trust set up as part of a pension plan constitutes a trust whose sole purpose is to provide defined benefits to members. Once those benefits have been provided the purpose is fulfilled, the trust expires and the terms of the pension plan alone determine entitlement to any remaining fund surplus. I cannot accept this proposition.

51 Trusts for a purpose are a rare species. They constitute an exception to the general rule that trusts for a purpose are void. (See D. W. M. Waters, Law of Trusts in Canada (2nd ed. 1984), at pp. 127-28.) The pension trust is much more akin to the classic trust than to the trust for a purpose. I agree with the following comments of the Pension Commission of Ontario in Arrowhead Metals Ltd. v. Royal Trust Co. (March 26, 1992), unreported, at pp. 13-15, cited by Adams J. in Bathgate v. National Hockey League Pension Society (1992), 11 O.R. (3d) 449, at p. 510:

> Purpose trusts are trusts for which there is no beneficiary; that is, they are trusts where no person has an equitable entitlement to the trust funds. Funds are deposited in trust in order to see that a particular purpose is filled; people may benefit, but only indirectly. . . .
>
> People are clearly direct beneficiaries of pension trusts. Pension trusts are established not to effect some purpose, such building [sic] a recreation centre, but to provide money on a regular basis to retired employees. It misconceives both the nature of a purpose trust and of a pension trust to suggest that pensions are for purposes, not persons. It is important to recognize that the characterization of pension trusts as purpose trusts results in the pension text, a contract, taking precedence over the trust agreement. That is, in making common law principles of contract paramount to the equitable principles of trust law. It is trade [sic] law that where common law and equity conflict, equity is to prevail. In light of that rule, it seems inappropriate to do indirectly that which could not be done directly.

52 To repeat, the first step is to determine whether or not the pension fund is in fact a pension trust. This will most often be revealed by the wording of the pension plan itself, but may also be implied from the plan and from the way in which the pension fund is set up. A pension trust is a "classic" or "true" trust and not a mere trust for a purpose. If there is no trust created under the pension plan, the wording of the pension plan alone will govern the allocation of any surplus remaining on termination. However, if the fund is subject to a trust, different considerations may govern.

3. The Definition of the Trust Fund

53 Before proceeding to an examination of the actual effect of the trust, one more brief

investigation must be undertaken. That is the determination of whether all of the monies contained in a given pension fund are subject to the trust, or whether the surplus remaining after termination is separate from the remainder of the fund and thus not subject to the trust. In creating a pension plan and accompanying trust, an employer may be able to define the subject matter of the trust so as to include only the amount necessary to cover the employee benefits owed. However, very specific wording will be necessary before an ongoing surplus will be excluded from the operation of the pension trust.

54 The definition of the trust fund in the pension plan and in the trust agreement will usually establish that any surplus monies form part of the trust. In Re Reevie and Montreal Trust Co. of Canada, supra, for example, part of Canada Dry's pension plan, cited at p. 596 of the judgement of Zuber J.A., provided:

10.1

> A Trustee shall be appointed by the Board of Directors from time to time and a Trust Agreement executed between the Board of Directors and such trustee, under the terms of which a Trust Fund shall be established to receive and hold all Contributions payable by the Members and the Company, interest and other income, and to pay the benefits provided by the Plan and any of its expenses not paid directly by the Company. [Emphasis added.]

55 In the absence of any more specific definition of the content of the trust fund in either the plan or the trust agreement such a phrase establishes that all money in the care of the trustee is subject to the trust in favour of the employees. The wording of the plan in Hockin, supra, at p. 13, was even more explicit:

> (h) "Fund" means the trust consisting of all sums of money and other property as shall from time to time be paid or delivered to the Trustee in accordance with the provisions hereof, all investments and proceeds thereof and all earnings, profits and other accretions thereto, less all payments and deductions that are made therefrom as herein provided.

56 I would have thought that the wording of this clause would make it clear that any existing surplus formed a part of the trust and was subject to the provisions of the trust.

57 The definition of the trust fund should not be confused with the issue of the definition of the benefits to which the employee/beneficiaries are entitled according to the terms of the pension plan. As the examples demonstrate, the trust fund will normally include all monies contributed to the pension fund, including both any ongoing actuarial surplus and any surplus on termination.

4. Amendment of the Trust

58 When a pension fund is impressed with a trust, that trust is subject to all applicable trust law principles. The significance of this for the present appeals is twofold. Firstly, the employer will not

be able to claim entitlement to funds subject to a trust unless the terms of the trust make the employer a beneficiary, or unless the employer reserved a power of revocation of the trust at the time the trust was originally created. Secondly, if the objects of the trust have been satisfied but assets remain in the trust, those funds may be subject to a resulting trust.

59 The settlor of a trust can reserve any power to itself that it wishes provided the reservation is made at the time the trust is created. A settlor may choose to maintain the right to appoint trustees, to change the beneficiaries of the trust, or to withdraw the trust property. Generally, however, the transfer of the trust property to the trustee is absolute. Any power of control of that property will be lost unless the transfer is expressly made subject to it.

60 Employers seeking to obtain a pension surplus have frequently made the argument that they reserved a power to revoke, or to revoke partially the pension trust fund they set up for the benefit of their employees. This approach has had mixed results. The inconsistency of the decisions on the revocation of pension trusts exists on two levels. At one level, the different decisions can be explained on the basis of the wording of the particular amending clause and the limitations put upon it in each case. However, the decisions also reveal a more fundamental difference of opinion as to whether the revocation of trusts is possible when a settlor has reserved a broad power of amendment. This difference must be resolved in this case.

61 The differing approaches to revocation of the trust are perhaps most starkly illustrated by the cases of Reevie, supra, and Hockin, supra. In both of these cases, a trust fund was established pursuant to a pension plan which contained a broad power of amendment. Each amending power was subject only to the proviso that no amendment could reduce members' entitlement to accrued benefits.

62 The court in Reevie relied upon a passage from Waters to the effect that it is a cardinal rule of trust law that a settlor can only revoke his or her trust when the settlor has expressly reserved the power to do so and found that the broad amendment power reserved by Canada Dry did not amount to an express reservation. The Court in Hockin, on the other hand, preferred the approach of McLennan J. in Re Campbell-Renton & Cayley, [1960] O.R. 550 (H.C.).

63 In Re Campbell-Renton & Cayley, the settlors of a private trust sought to revoke the trust in order to set up a more tax-beneficial trust in England. After considering the unlimited power of amendment contained in the trust agreement, McLennan J. stated at pp. 552-53:

> I am advised that there is no decision either in England or in this country as to whether or not a power to alter and amend includes the power to revoke or perhaps it would be better to say includes a power to amend in such a way as to permit the revocation of the trust instrument but there is American law on the subject and statements in 3 Scott's Law of Trust, 2nd ed., pp. 2393, 2402-3, 2413, 2395 and 2416 and at the latter citation it is stated that an unrestricted power to amend is equivalent to a power to revoke.

McLennan J. elected to follow the American jurisprudence on this point, as did the court in Hockin at p. 19 which relied upon the following more recent excerpt from Scott (The Law of Trusts (4th ed. 1989), vol. 4, at pp. 346-48):

> 330.1. Where the creation of a trust is evidenced by a written instrument that purports to include the terms of the trust, and there is no provision in the instrument expressly or impliedly reserving to the settlor power to revoke the trust, the trust is irrevocable. The intention to reserve a power of revocation need not be manifested by an express provision to that effect; it can be indicated by the use of language from which it may be inferred.

64 Based upon this authority, the B.C. Court of Appeal concluded at p. 19 that "[a] power to amend includes the power to revoke unless revocation is precluded by specific wording of the power to amend". With respect, I cannot agree with this position.

65 In my view the nature and purpose of the trust as it has evolved in Canada is consistent with a more restrictive interpretation as to when the trust instrument will permit a unilateral revocation of the trust. One of the most fundamental characteristics of a trust is that it involves a transfer of property. In the words of D. W. M. Waters, Law of Trusts in Canada, supra, at p. 291:

> . . . the trust is a mode of disposition, and once the instrument of creation of the trust has taken effect or a verbal declaration has been made of immediate disposition on trust, the settlor has alienated the property as much as if he had given it to the beneficiaries by an out-and-out gift. This almost self-evident proposition has to be reiterated because it is sometimes said that the trust is a mode of "restricted transfer." So indeed it is, but the restriction does not mean that by employing the trust the settlor inherently retains a right or power to intervene once the trust has taken effect, whether to set the trust aside, change the beneficiaries, name other beneficiaries, take back part of the trust property, or do anything else to amend or change the trust. By restriction is meant that he has transferred the property but subject to restrictions upon who is to enjoy and to what degree. The mode of future enjoyment is regulated in the act of transferring, but the transfer remains a true transfer.

66 The judgment of the B.C. Court of Appeal in Hockin, if followed to its logical conclusion, would mean that the presence of an unlimited power of amendment in a trust agreement entitles a settlor to maintain complete control over the administration of the trust and the trust property. That result is inconsistent with the fundamental concept of a trust, and cannot, in my opinion, be sustained without extremely clear and explicit language. A general amending power should not endow a settlor with the ability to revoke the trust. This is especially so when it is remembered that consideration was given by the employee beneficiaries in exchange for the creation of the trust. In the case of pension plans, employees not only contribute to the fund, in addition they almost

invariably agree to accept lower wages and fewer employment benefits in exchange for the employer's agreeing to set up the pension trust in their favour. The wording of the pension plan and trust instrument are usually drawn up by the employer. The employees as a rule must rely upon the good faith of the employer to ensure that the terms of the specific trust arrangement will be fair. It would, I think, be inequitable to accept the proposition that a broad amending power inserted unilaterally by the employer carries with it the right to revoke the trust. The employer who wishes to undertake a restricted transfer of assets must make those restrictions explicit. Moreover, amendment means change not cancellation which the word revocation connotes.

67 Furthermore, prior to the 1981 circular, the amendment power in most trust arrangements was specifically made broad and ambiguous at the behest of the employer, who was entitled to tax relief on funds designated for employee pensions only if those funds were committed irrevocably to a trust or some other funding arrangement. The tax motivations of the respective parties to pension plans are not particularly relevant to a judicial interpretation of the trust. However a court should not be eager to sanction a result which would allow an employer to represent to the Minister of National Revenue that it has irrevocably committed funds to an employee pension plan, only to later purport to revoke the pension trust in order to recoup surplus funds.

68 As a result I find that, at least in the context of pension trusts, the reservation by the settlor of an unlimited power of amendment does not include a power to revoke the trust. A revocation power must be explicitly reserved in order to be valid.

5. The Resulting Trust

69 A resulting trust may arise if the objects of the trust have been fully satisfied and money still remains in the trust fund. In such situations, the remaining trust funds will ordinarily revert by operation of law to the settlor of the fund. However, a resulting trust will not arise if, at the time of settlement, the settlor demonstrates an intention to part with his or her money outright. This is to say the settlor indicates that he or she will not retain any interest in any remaining funds.

70 Several Canadian cases have dealt with the resulting trust in relation to pension surplus cases. In Re Canada Trust Co. and Cantol Ltd. (1979), 103 D.L.R. (3d) 109 (B.C.S.C.), the pension plan had been terminated. The plan provided that upon termination, assets were to be applied to four listed categories of beneficiaries. All the beneficiaries were paid in accordance with this provision, and a surplus remained in the fund. The trustee of the fund, Canada Trust, sought directions from the court as to how to deal with the surplus.

71 Gould J. held, at p. 111, that the "purposes of this trust simply did not exhaust the fund and the outcome here, i.e., a surplus balance of $31, 163.38, was not foreseen by the respondent. . . . The situation appears to be one where a resulting trust arises by operation of the law." This conclusion could well be questioned in light of another provision in the plan (at p. 110) which provided that "no alteration, amendment or termination of the Plan or any part thereof shall permit any part of the trust fund to revert to or to be recoverable by the Company or to be used for or diverted to purposes

other than the exclusive benefits of members . . .". Perhaps the decision can be explained on the basis that the employees were not parties before the court and did not contribute to the plan which was funded solely by the employer.

72 In most cases, the existence of a non-reversion clause will be evidence of a permanent intention to part with the trust property and it will preclude the operation of the resulting trust. The trust agreement in C.A.W., Local 458 v. White Farm Manufacturing Canada Ltd., supra, contained the following clause, at p. 538:

> No part of the capital or income of the fund shall ever revert to the Company or be used for or diverted to purposes other than for the exclusive benefit of the employees and former employees under the plan except as therein and herein provided.

I agree with Montgomery J.'s conclusion, at p. 540, that these provisions "effectively dispose of the respondents' arguments that the surplus is subject to the doctrine of resulting trust". The employer had absolutely and irrevocably waived its interest in any surplus that might arise upon the termination of the pension fund despite the contributions it had made to that fund.

73 The exigencies of tax law are such that preferential tax treatment will only be afforded to registered pension plans. Registration, originally contingent upon clear evidence that the employer's contribution would be irrevocable, now requires a plan to provide that, following termination of the plan, any remaining surplus in excess of the statutory maximum level of employee benefits must revert to the employer. Therefore, the provisions of most registered pension plans will normally themselves exclude the possibility of a resulting trust's arising. That is not to say that the resulting trust will never have a place in the context of pension funds. Yet the practical reality is that the factual circumstances which could trigger the operation of a resulting trust will rarely occur in pension surplus cases.

74 The relevant documents in this case are such that it is not necessary to examine all of the difficult issues which can arise in relation to resulting trusts. Nonetheless, when a resulting trust arises in respect of a contributory plan, I would be inclined to prefer the view of Nitikman J. in Martin & Robertson Administration Ltd. v. Pension Commission of Manitoba (1980), 2 A.C.W.S. (2d) 249, to that of Scott J. in Davis v. Richards & Wallington Industries Ltd., [1991] 2 All E.R. 563 (Ch.Div.). Nitikman J. held that where employers and employees are (by virtue of their contributions) settlors of the trust, surplus funds remaining on termination can revert on a resulting trust to both employers and employees in proportion to their respective contributions. Scott J., on the other hand, held that employees cannot benefit from a resulting trust since, by the mere act of contributing to the fund, they manifest an intention to part irrevocably with their money.

75 I do not think that any general rule can be laid down as to the intentions of employees contributing to a pension trust. Where the circumstances of a particular case do not indicate any particular intention to part outright with money contributed to a pension fund, equity and fairness

would seem to require that all parties who contributed to the fund should be entitled to recoup a proportionate share of any surplus subject to a resulting trust. However, this issue should be left to be resolved when it arises.

76 In most pension trust cases the resulting trust will never arise. This may be because the objects of the trust can never be said to be fully satisfied so long as funds which could benefit the employees remain in the pension trust, or because the settlor has manifested a clear intention to part outright with its contributions. The operation of the resulting trust may also be precluded by the presence of specific provisions dealing with the disposition of surplus on plan termination.

B. Contribution Holiday

77 Two issues arise in respect of the contribution holiday. The first is whether or not, in the calculation of an employer's required annual contribution to a pension plan, consideration of actuarial surplus in an ongoing pension fund is permitted by law. The second is whether a consideration of that surplus is permitted or prohibited under the terms of a specific plan.

78 Both parties to the appeals accept that, subject to the plan provisions, the application of an existing surplus to contribution obligations was at all relevant times permitted by Alberta law. This proposition seems incontrovertible in light of the provisions of the Employment Pension Plans Act and Pension Benefits Act referred to earlier. It also accords with the provisions of Information Circular No. 72-13R7, supra. Therefore the provisions of the plan must determine the issue.

79 Before turning to the Air Products plan, it may be helpful to review the cases which have dealt with contribution holidays. The Ontario Court of Appeal held in C.U.P.E.-C.L.C., Local 1000 v. Ontario Hydro (1989), 68 O.R. (2d) 620, that Ontario Hydro could not take a contribution holiday when its employee pension plan was in surplus. The pension plan for Hydro employees was unusual in that it was established pursuant to a statute which enacted the employer's obligation to contribute. Section 20(4) of the Power Corporation Act, R.S.O. 1980, c. 384 (as cited by Robins J.A. at p. 623), provided:

> 20. . . .
>
> (4) The Corporation shall contribute towards the cost of the benefits mentioned in subsection (1) the amount of the difference between the amount of the contributions of the employees and the amount of the cost of the benefits as determined by actuarial valuations. [Emphasis of Robins J.A.]

Robins J.A. held that this clause was unequivocal and required Hydro to contribute each year the difference between the cost of the benefits for that year as determined by an actuary and the contributions of the employees. The existence of an ongoing fund surplus was irrelevant to this obligation. Robins J.A. explicitly added at p. 630 that s. 20(4) should not be treated:

> . . . as tantamount to stating that "the corporation shall make contributions to the plan on such basis as may be determined by the actuary from time to time" or "the corporation shall contribute to the plan an amount determined by an actuary in accordance with generally accepted actuarial principles". While clauses of that kind may not be uncommon, particularly in private pension plans, the statutory provisions regulating this plan and under which it operates are not to that effect. Under the formula mandated by the Act, an actuarial valuation is required only for the purpose of ascertaining the cost of the benefits. The actuary is not empowered to set the over-all level of corporation contributions on such basis as he may determine, notwithstanding that his determination may be by reference to generally accepted actuarial principles.

80 Subsequent cases have limited the application of Ontario Hydro. In Askin v. Ontario Hospital Association (1991), 2 O.R. (3d) 641, the Ontario Court of Appeal considered a plan (at p. 644) which required that "[e]ach Contributing Member Hospital shall make contributions to the Plan on a basis determined by the Actuary from time to time". Carthy J.A. held that this provision allowed the employers to take a contribution holiday. He distinguished Ontario Hydro in this way, at p. 651:

> To repeat for clarity, the ratio I take from the Ontario Hydro case is that, if a specific calculated contribution is mandated by statute or by the plan itself, it is an indirect use of trust funds to apply surplus to meet that obligation. The intended ratio of the present case is that, where the specific method of calculation is not mandated, it is inoffensive and in accordance with statutory authorization and normal actuarial practice to consider a surplus as one factor in the calculation of the contribution.

81 A contribution holiday was also permitted in Maurer v. McMaster University (1991), 4 O.R. (3d) 139 (Gen. Div.). The relevant plan provision there (at p. 144) provided that "[t]he University shall pay into the Fund each year the amount required to fund fully the current service cost of the Plan, as determined by the Actuary, after allowing for the Members' required contributions". Haley J. considered that the words "as determined by the Actuary" modified the phrase "the amount required to fund fully the current service cost of the Plan", and therefore held that the provision enabled the University to use the actuarial surplus to offset current contributions.

82 Most recently, the Ontario Divisional Court applied Ontario Hydro and held that the specific contribution requirements contained in its pension plan prohibited Trent University from taking a holiday from its contributions to its employee pension plan (Trent University Faculty Assn. v. Trent University (1992), 99 D.L.R. (4th) 451).

83 Finally, I note that the taking of a contribution holiday was contemplated by the court in Reevie, supra, even though in that case employees were held to be entitled to the fund surplus upon termination. The thought was expressed in this manner at pp. 600-601:

> While the plan continues to operate, a surplus will simply afford a cushion against years during which the fund performs poorly, or, it may lead to the reduction of future contributions. If the plan is discontinued, other considerations will arise.

84 All of these cases are perfectly consistent with one another. Together they demonstrate only that whether or not a contribution holiday is permissible must be decided on the basis of the applicable plan provisions. I can see no objection in principle to employers' taking contribution holidays when they are permitted to do so by the terms of the pension plan. When permission is not explicitly given in the plan, it may be implied from the wording of the employer's contribution obligation. Any provision which places the responsibility for the calculation of the amount needed to fund promised benefits in the hands of an actuary should be taken to incorporate accepted actuarial practice as to how that calculation will be made. That practice currently includes the application of calculated surplus funds to the determination of overall current service cost. It is a practice that is in keeping with the nature of a defined benefits plan, and one which is encouraged by the tax authorities.

85 An employer's right to take a contribution holiday can also be excluded by the terms of the pension plan or the trust created under it. An explicit prohibition against applying an existing fund surplus to the calculation of the current service cost, or other provisions which in effect convert the nature of the plan from a defined benefit to a defined contribution plan, will preclude the contribution holiday. For example, the presence of a specific formula for calculating the contribution obligation, such as those considered in the Ontario Hydro and Trent University cases, prevents employers from taking a contribution holiday. However, whenever the contribution requirement simply refers to actuarial calculations, the presumption will normally be that it also authorizes the use of standard actuarial practices.

86 The former Catalytic employees successfully argued before the chambers judge that to permit a contribution holiday is to permit an encroachment upon the trust fund of which they are the beneficiaries. I do not agree. As noted earlier, the trust property usually consists of all the monies contributed to the pension fund. To permit a contribution holiday does not reduce the corpus of the fund nor does it amount to applying the monies contained in it to something other than the exclusive benefit of the employees. The entitlement of the trust beneficiaries is not affected by a contribution holiday. That entitlement is to receive the defined benefits provided in the pension plan from the trust and, depending upon the terms of the trust to receive a share of any surplus remaining upon termination of the plan.

87 Once funds are contributed to the pension plan they are "accrued benefits" of the employees. However, the benefits are of two distinct types. Employees are first entitled to the defined benefits provided under the plan. This is an amount fixed according to a formula. The other benefit to which the employees may be entitled is the surplus remaining upon termination. This amount is never certain during the continuation of the plan. Rather, the surplus exists only on paper. It results from

actuarial calculations and is a function of the assumptions used by the actuary. Employees can claim no entitlement to surplus in an ongoing plan because it is not definite. The right to any surplus is crystallized only when the surplus becomes ascertainable upon termination of the plan. Therefore, the taking of a contribution holiday represents neither an encroachment upon the trust nor a reduction of accrued benefits.

88 Similar reasoning explains why I cannot accept the proposition that an employer entitled to take a contribution holiday must also be entitled to recover surplus on termination.

89 While a plan which takes the form of a trust is in operation, the surplus is an actuarial surplus. Neither the employer nor the employees have a specific interest in this amount, since it only exists on paper, although the employee beneficiaries have an equitable interest in the total assets of the fund while it is in existence. When the plan is terminated, the actuarial surplus becomes an actual surplus and vests in the employee beneficiaries. The distinction between actual and actuarial surplus means that there is no inconsistency between the entitlement of the employer to contribution holidays and the disentitlement of the employer to recovery of the surplus on termination. The former relies on actuarial surplus, the latter on actual surplus.

C. Summary

90 In the absence of provincial legislation providing otherwise, the courts must determine competing claims to pension surplus by a careful analysis of the pension plan and the funding structures created under it. The first step is to determine whether the pension fund is impressed with a trust. This is a determination which must be made according to ordinary principles of trust law. A trust will exist whenever there has been an express or implied declaration of trust and an alienation of trust property to a trustee to be held for specified beneficiaries.

91 If the pension fund, or any part of it, is not subject to a trust, then any issues relating to outstanding pension benefits or to surplus entitlement must be resolved by applying the principles which pertain to the interpretation of contracts to the pension plan.

92 If, however, the fund is impressed with a trust, different considerations apply. The trust is not a trust for a purpose, but a classic trust. It is governed by equity, and, to the extent that applicable equitable principles conflict with plan provisions, equity must prevail. The trust will in most cases extend to an ongoing or actual surplus as well as to that part of the pension fund needed to provide employee benefits. However, an employer may explicitly limit the operation of the trust so that it does not apply to surplus.

93 The employer, as a settlor of the trust, may reserve a power to revoke the trust. In order to be effective, that power must be clearly reserved at the time the trust is created. A power to revoke the trust or any part of it cannot be implied from a general unlimited power of amendment.

94 Funds remaining in a pension trust following termination and payment of all defined benefits

may be subject to a resulting trust. Before a resulting trust can arise, it must be clear that all of the objectives of the trust have been fully satisfied. Even when this is the case, the employer cannot claim the benefit of a resulting trust when the terms of the plan demonstrate an intention to part outright with all money contributed to the pension fund. In contributory plans, it is not only the employer's but also the employees' intentions which must be considered. Both are settlors of the trust. Both are entitled to benefit from a reversion of trust property.

95 An employer's right to take a contribution holiday must also be determined on a case-by-case basis. The right to take a contribution holiday can be excluded either explicitly or implicitly in circumstances where a plan mandates a formula for calculating employer contributions which removes actuarial discretion. Contribution holidays may also be permitted by the terms of the plan. When the plan is silent on the issue, the right to take a contribution holiday is not objectionable so long as actuaries continue to accept the application of existing surplus to current service costs as standard practice. These principles apply whether or not the pension fund is subject to a trust. Because no money is withdrawn from the fund by the employer, the taking of a contribution holiday represents neither an encroachment upon the trust nor a reduction of accrued benefits. These general considerations are, of course, subject to applicable legislation.

96 Let us see how these principles should be applied to the agreements presented in this case.

VI. Application to the Facts

A. Surplus Entitlement

1. The Catalytic Plan

97 The plan provided under Article V that all contributions would be paid to a trustee to be held and administered in accordance with a trust agreement which formed part of the plan. The plan also contained the following definitions in Section II:

> 12. "Trust Agreement" means the agreement entered into between the Company and the Trustee establishing the Trust Fund;
> 13. "Trustee" means the Canada Trust Company, or such other successor trust company, if any, as the Board may appoint;
> 14. "Trust Fund" means the pension fund established pursuant to the Trust Agreement and to which contributions are made after January 1, 1959, by the Company and by contributing members and from which pensions and other benefits under this Plan are to be paid.

98 A trust agreement was executed between the company and Canada Trust, which contained the following:

> AND WHEREAS under the PLAN contributions will be made to the Trustee which when received by the Trustee shall constitute a Pension Trust

Fund (hereinafter called the "FUND") to be held and administered for the benefit of such persons or their estates as may from time to time be designated in or pursuant to the PLAN;

. . .

ARTICLE I

ESTABLISHMENT OF TRUST

1. This Agreement is hereby made a part of the PLAN.
2. The Company may pay or cause to be paid from time to time to the Trustee upon the trusts of this Agreement money or property acceptable to the Trustee for the purpose of the PLAN, all of which together with the earnings, profit and increments thereon and property from time to time substituted therefore shall constitute the FUND hereby created and established. [Emphasis added.]

99 These provisions establish that a trust was created in 1959. The plan and the agreement constitute a clear declaration of an intention to create a trust. The subject matter of the trust is defined as all contributions made by the company and by employees together with all the earnings of those contributions; the beneficiaries are defined in the Trust Agreement by reference back to the Plan. This is a classic trust established for the benefit of a defined group of persons.

100 As Moore C.J. noted, there is no evidence that this trust was ever terminated. I agree with that finding. It must then be assumed that the trust continues to exist. This conclusion is strengthened by the definition of "Trustee" in the original plan, which accepts that Canada Trust might not always be in charge of the fund. Thus it can be seen that the parties contemplated that the trust would continue if a different trustee was named. It follows that the trust was not terminated when, in 1974, the company transferred control of its pension fund to Confederation Life Insurance Company pursuant to the terms of an investment contract which is not included in the evidence. Further, the fact that the 1978 version of the Catalytic plan removed all reference to a trust could not have the effect of terminating the trust. Nor could any of the provisions of the 1984 investment contract entered into by Stearns Catalytic and Confederation Life have that effect.

101 What then is the effect of this trust? The preamble to the Trust Agreement, the underlined portion of Article 1.2 of that agreement, and the definition of "Trust Fund" contained in the 1959 Plan, taken together, make it clear that the trust fund was comprised of all contributions made by both the company and the employees, together with any earnings of those monies. The fact that the 1959 plan was a defined contribution plan under which no surplus could arise does not affect this definition of the trust fund. These provisions in themselves refute the company's argument that only that portion of the fund necessary to cover the benefits defined in the plan was subject to the trust.

102 All monies in the Catalytic pension fund were impressed with a trust. It follows that the

company could only claim the surplus remaining on termination by virtue of a resulting trust, or according to the terms of the trust itself. No resulting trust arises in this case. In my opinion, the purposes of the trust were not fully satisfied by the payment of all defined benefits. One of the objects of the trust was to use any money contained in the fund for the benefit of the employees.

103 This objective can be implied from the "exclusive benefit" and "non-diversion" clauses contained in the original trust agreement. Furthermore, Section XI of the plan provided that all contributions on behalf of employees who left the company prior to the vesting of their rights as members should be forfeited to the fund and "allocated among the Company Accounts of the remaining Members at that date".

104 Section XV of the plan governed an employee's pension entitlement. It reads:

SECTION XV AMOUNT OF PENSION

> When a Member retires, the proceeds of his Member's Account, if any, and of his Company Account . . . shall be used in their entirety to purchase for the Member an Annuity from an insurance company . . . . [Emphasis added.]

These clauses demonstrate that all money in the fund was to be used for the benefit of employees. Even though originally the plan was one of "defined contribution", the entitlement of each employee was never limited to the contributions made on his behalf. Collectively, the entitlement of all eligible employees was to all monies contained in the fund, whether the money resulted from contributions made on their behalf or "windfall" funds resulting from the withdrawal of employees from the plan prior to the vesting of their rights.

105 These provisions, specifically incorporated by reference into the 1959 Trust Agreement, clearly indicate that one of the objectives of the trust was to divide all monies in the fund among eligible members. The corollary to this is that the trust objects are not exhausted so long as some money remains in the fund and some eligible employees can be found. Therefore, a resulting trust cannot arise in this case.

106 Air Products is only entitled to the surplus, if at all, under the terms of the trust. In this case both the trust agreement and all versions of the plan make some provision for what was to occur on termination of the plan. The question is which of the different provisions dealing with termination governed in 1988? The answer depends upon the validity of the amendments purportedly made by the employer since 1959.

> Section XXII of the 1959 plan provided:

> 3. In the event of termination of the Plan, the Company cannot recover any sums paid to the date thereof and each Member of the Plan shall receive the proceeds of his Member's Account and his Company Account as of the date of such termination. . . .

107 This section was reproduced in nearly identical form in the 1966 plan. The issue of entitlement to surplus was not specifically addressed until the plan was amended again in 1978. Section 17.05 of the 1978 plan provided that any surplus remaining on termination was to be distributed according to the directions of the company. The 1983 Air Products Plan contained the same stipulation (renumbered to become Section 18.05), and added an additional clause imposing a maximum level of benefits recoverable by an employee and stating that any surplus remaining once that maximum level had been reached was to revert to the company.

108 The validity of these amended provisions depends upon the original 1959 documents. Section XXII.2 of the pension plan prohibited any amendment which would operate to reduce the benefits which had accrued to the employees prior to the date of the amendment. The Trust Agreement contained the following provision:

> ARTICLE V
>
> MODIFICATION AND TERMINATION
>
> 1. Subject as herein and in the PLAN provided, the Company reserves the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the PLAN (including this Agreement) provided . . . that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the FUND to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the PLAN as amended from time to time. . . .

109 The company therefore reserved a general amending power subject to the provisos that no amendments could reduce accrued benefits or allow the trust fund to be used in any way other than for the employees' exclusive benefit. The company did not expressly reserve for itself the power to revoke the trust. Such a power cannot be implied under the broad general amendment power.

110 I cannot accept that when the Catalytic Plan became a defined benefit plan in 1966, the parties did not intend Article V of the Trust Agreement to apply to any surplus which might arise. Although the Trust Agreement was not altered, several provisions contained in the 1959 plan were modified in the 1966 version of the plan. The nature of the modifications indicates that the parties considered the effect of changing to a defined benefit plan and made the necessary amendments to the 1966 plan. In these circumstances, the parties must be taken to have intended that the unaltered provisions of the plan and the Trust Agreement should continue to apply to the new arrangement. Article V therefore continued to apply to all monies in the pension fund after 1966.

111 In the result, the 1978 amendment purporting to give the company the power to distribute surplus to itself, as well as the reversion clause of the 1983 plan, are invalid. Both represent attempts to revoke partially a trust in favour of the employees which was established in 1959. Neither is within the scope of the control which the company reserved to itself at that time.

112 I agree with the Chambers Judge and the Court of Appeal that, by virtue of a continuing trust in their favour, the employees are entitled to those surplus funds which are derived from the Catalytic plans.

B. Contribution Holiday

113 The relevant plan provisions which govern the taking of a contribution holiday are those contained in the 1983 Air Products Plan. As the employees point out, the Chambers Judge, when considering this issue, mistakenly quoted the contribution provisions from the 1977 Stearns plan. The Stearns plan expressly reserved to the company the right to pay its contributions from surplus. It is therefore necessary to consider whether the actual provisions of the 1983 plan would affect the result he reached.

114 Section 4.03 of the Air Products plan (which is identical to s. 4.03 of the 1978 Catalytic plan) provides that:

> 4.03 Company Contributions
>
> The Company shall contribute from time to time, but not less frequently than annually, such amounts as are not less than those certified by the Actuary as necessary to provide the retirement benefits accruing to Members during the current year pursuant to the Plan and to make provision for the proper amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued, in accordance with the requirements of the Pension Benefits Act, after taking into account the assets of the Pension Fund and all other relevant factors.

115 The employees submit that this section, like the contribution clause in the Ontario Hydro case, provides a fixed formula according to which the annual contribution obligation must be calculated. On this approach, the standard actuarial practice of applying surplus to current service funding obligations is excluded. Instead, Section 4.03 requires the company to contribute an amount equal to not less than the sum of:

(i) the amount necessary to provide the retirement benefits accruing to members during the current year, and
(ii) the amount required to make provision for the proper amortization of any

> initial unfunded liability or experience deficiency with respect to benefits previously accrued, in accordance with the requirements of the Pension Benefits Act, after taking into account the assets of the Pension Fund and all other relevant factors.

Where no amount is required under (ii), the employees submit that the Company's minimum annual contribution is the amount determined under (i).

116 In my view, the words "after taking into account the assets of the Pension Fund and all other relevant factors" must qualify all of the preceding phrase beginning with "as necessary. . .". Such an interpretation is consistent with the natural grammatical construction of Section 4.03. The absence of a comma between the phrases "to provide the retirement benefits accruing to Members during the current year pursuant to the Plan" and "to make provision for the proper amortization of any initial unfunded liability or experience deficiency" supports this position. Further, to agree to the interpretation suggested by the employees would be to accept that the company either overlooked or decided not to take advantage of the chance to take into account a surplus in the ongoing plan in determining its contributions. This seems to me unlikely since elsewhere in the amended provisions specific reference is made to a potential surplus on termination. There is as well the Revenue Canada circular which requires employers to take contribution holidays when the actuarial surplus exceeds certain levels. It is more likely that in 1983 the company simply assumed that the wording of Section 4.03 permitted the consideration of an actuarial surplus in the calculation of the current service cost.

117 The Air Products Plan, like those considered in Askin and Maurer, supra, is not one which specifically mandates regular contribution on a specified basis which would leave an actuary no discretion to employ the standard actuarial practice of considering existing surplus. The wording of the plan itself implicitly authorizes an actuary to consider an actuarial surplus when calculating the company's annual funding obligation.

118 As a result, I am of the opinion that the plan did allow the company to take contribution holidays. The appeal should be allowed in respect of the order made by the courts below requiring Air Products to pay $1,465,400 (which represents the actuarial surplus applied to the current service costs in the years when the company made no contributions) into the plan.

2. The Stearns Plan

119 The Stearns employees also claim entitlement to the surplus remaining in the pension fund. They argue that the original Stearns fund was subject to a trust in their favour. Even if no trust existed, the employees say that the company is obligated by the provisions of a 1972 employee pension brochure and by the existence of a fiduciary duty to exercise its discretion to distribute the surplus in favour of the employees.

120 The 1970 Stearns plan differs in two significant ways from the original Catalytic plan. Firstly

the Stearns plan makes no reference to the existence of a trust; secondly, it specifically contemplates the reversion of surplus assets to the company in these words:

ARTICLE XIV

Amendment or Termination of the Plan

14.1 . . .

c) . . .

Notwithstanding any surplus remaining after all benefits referred to in this Sub-section 14.1 (c) have been provided, such surplus may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions at the time, be returned to the Company or may be used for the benefit of Participants, former Participants, beneficiaries or estates in such equitable manner as the Company may in its discretion determine.

121 This provision remained in the 1977 version of the Stearns plan and was then replaced in 1983 by Section 18.05 of the Air Products plan which, as observed earlier, provided for the automatic reversion of surplus to the company. The employees seek to establish the existence of a trust in order to make the further argument that the 1983 amendment to the plan was invalid as an unauthorized partial revocation of the trust.

(a) Was the Stearns Fund Impressed with a Trust?

122 Neither the 1970 nor the 1977 Stearns plans make any reference to a trust nor provide for the creation of a trust agreement. The plan was funded by means of a Group Annuity Policy entered into between the company and the Mutual Life Assurance Group. The employees contend that the terms of the pension plan clearly implied a trust onto this fund. In particular, the employees rely upon the following provisions of the plan:

13.2

No part of the Fund shall be used for or diverted to purposes other than for the exclusive benefit of Participants and their beneficiaries. . . .

14.1 . . .

> b) No amendment shall have the effect of diverting any part of the Fund to purposes other than for the exclusive benefit of the Participants . . .

123 This plan, together with the 1972 Brochure and the 1977 Stearns plan, are said to constitute the trust documents.

124 It is true that the alleged subject matter of the trust, the pension fund, was defined under the two Stearns plans, and that the employees were identified as those entitled to receive the fund monies. Furthermore, the exclusive benefit and non-diversion clauses relied upon by the employees above are consistent with the existence of a trust. Nonetheless, I am not convinced that a trust was ever created. Certain phrases, such as the exclusive benefit and non-diversion clauses identified above, are commonly found in plans which do create pension trusts. They may point to the existence of a trust but of themselves they cannot be taken as demonstrating an intention by the employer to create a trust.

125 The company identifies several other clauses which it claims are equally consistent with the non-existence of trust, and clearly identify the plan as a contract to receive defined benefits. These individual clauses are of little assistance in determining whether a trust came into existence. Rather, all of the documents relied upon by the employees must be construed in their entirety in order to see whether an intention to create a trust can be imputed to the company. I do not see any such intention apparent on the face of these documents.

126 Unlike the Catalytic plan, the Stearns plan makes no mention of any trust, trust fund or trustee. The Stearns fund was not created pursuant to a trust agreement but pursuant to a contract. This is so even though by 1970 the use of the trust in the creation of private employer pension plans had become a well-established practice. The absence of any reference to a trust in these circumstances indicates that there was a deliberate decision to avoid the use of a trust. Any argument that the employer merely "omitted" to state explicitly its intention to create a trust is difficult to accept.

127 At the time of the 1970 plan, the employer tax benefits to be gained from the creation of a "trusted" pension fund were equally available to employers who preferred to purchase a group insurance policy.

128 Finally, the employees contend that three documents -- the 1970 and the 1977 plans and the 1972 employee brochure -- made up the trust deed. On this approach, it would seem that the employer's intention to create a trust was not perfected until seven years after the creation of the fund. There was no significant change in circumstances between 1970 and 1977 which warrants a finding that a trust which did not exist at the inception of the plan suddenly came into existence in 1977.

129 I do not think that the Stearns pension fund was ever subject to a trust.

(b) The Pension Brochure

130 The Stearns employees relied upon the effect of a pension brochure which was distributed to employees in 1972. They urged us to accept that clauses contained in that document must be taken to have fixed the employer with an equitable obligation to distribute any surplus remaining on termination to the employees.

131 The brochure is entitled "Stearns-Roger Canada Ltd. -- Employee Benefits". In his supplementary affidavit, Gunter Schmidt stated that he received the brochure, which is dated June 1, 1972, when he joined the company in 1973. It consists of eight pages of text in which the operation of the pension plan is explained in some detail. The brochure contains the following relevant provisions:

> Future of the Plan
>
> It is the intention of the Company that the plan will continue indefinitely but of necessity they reserve the right to amend, modify or terminate the plan at any time. . . . In the event that there is a surplus in the fund after all benefits have been paid it is the Company's intention that the surplus will be distributed in an equitable manner to the employees active in the plan at the date of termination.
>
> General
>
> This outline has been prepared to acquaint you with the provisions of your plan. Please read it carefully.
>
> The precise terms of the plan are contained in the official plan text and Insurance company contract which may be read by any employee on request at the Calgary Office of the Company.
>
> . . .
>
> The company reserves the right to revise or discontinue any of the benefit plans at any time.
>
> The above are transcripts from the various insurance policies and contracts. If more detailed information is desired our insurance group will be pleased to

answer questions.

132 The employees assert that this brochure formed a binding part of the pension plan documents and that the statement contained in it to the effect that the company intends to pay any remaining surplus to the employees estops the company from now claiming the surplus for itself.

133 Documents not normally considered to have legal effect may nonetheless form part of the legal matrix within which the rights of employers and employees participating in a pension plan must be determined. Whether they do so will depend upon the wording of the documents, the circumstances in which they were produced, and the effect which they had on the parties, particularly the employees.

134 Foisy J. explained why courts will in specified circumstances bind an employer to the terms of a pension brochure in Harris v. Robert Simpson Co., [1985] 1 W.W.R. 319, at p. 327:

> If it were otherwise then an employer could provide the employee with a brochure claiming to represent the significant and material terms in the company's pension plan. Yet the "true" plan could vary significantly from this representation without the employee's knowledge. In such a case it cannot be said that the "true" agreement prevails, as to do so would leave the door open to mischief.

135 In other words it would be unfair or unacceptable if an employer were to attract and retain employees by making representations as to the pension benefits available upon which the employees could be expected to rely and then resile from those representations as being contrary to the actual pension terms.

136 The 1972 brochure does not purport to have any contractual effect. It does, however, contain a detailed outline of an employee's entitlements under the plan, although it states that it is merely a "transcript" of the various policies and that the benefits can be amended by the company. The brochure is worded in a way that is declarative of the rights of individual employees under the plan. For example, the plan states "The Life Insurance is payable in the event of your death from any cause. . . . If you should become totally and permanently disabled while insured and prior to age sixty your life insurance will remain in force as long as you remain so disabled but you must furnish proof of disability . . . ."

137 The only notable exception to this didactic style is contained in the clause concerning the future of the plan. The brochure there sets out the "intention" of the company. This is a declaration of intention as to a future act, but it does not in any way indicate that the company is undertaking an obligation to allocate surplus to the employees.

138 The brochure is potentially misleading. Yet there is no evidence as to the effect that this brochure had on the employees of the company. All that is known is that the brochure was

distributed to the employees of the company in June, 1972, and that Mr. Schmidt received a copy in 1973 when he joined the company. There is no indication that Mr. Schmidt was induced to join the company on the basis of the terms of the brochure, or that he even read it. There is no evidence that either the employees or their union relied upon the brochure in such a way as to affect their position during collective bargaining sessions. This may be contrasted to the situation in Re Collins and Pension Commission of Ontario, supra, where the Ontario Divisional Court found, at p. 277, that a booklet describing the terms of the pension plan, together with the plan itself, led to a belief amongst plan members that the company had no right to claim any part of the fund.

139 Finally, I have some doubts as to the extent to which a brochure issued in 1972 can influence entitlement to plan surplus in 1988 particularly since it specifically states that the plan will be subject to amendment from time to time. As a brochure describing pension benefits becomes outdated, it becomes increasingly difficult for employees to rely upon it as the source of a supplementary obligation undertaken by the employer.

140 I agree with the Court of Appeal that the brochure provisions concerning the treatment of surplus did not, on the evidence adduced in this case, amount to a promise intended to affect the legal relationship between the parties. It cannot form the basis for an estoppel as there is no evidence of inducement or reliance upon it by the employees.

(c) Interpretation of the Plan Provisions

141 Since no trust was ever created under the Stearns plan and the 1972 brochure did not have any legal effect, the issue of entitlement to the plan surplus must be decided on the basis of an interpretation of the plan's provisions.

142 The position of the employees is that Section 18.05 of the Air Products Plan was an invalid amendment. Therefore, they argue that Article 14.1(c) of the 1970 plan (Article 14.3 of the 1977 plan) still applies, that that section gives the company a discretion as to whether distribute surplus to employees or to itself, and that the employer owes a fiduciary duty to the employees which compels it to exercise that distribution discretion in favour of the employees.

143 Moore C.J. did not explicitly deal with the validity of the 1983 amendment. He decided that, even under the 1977 version of the plan, the employer was entitled to take the surplus. The issue of fiduciary duty was not raised before him.

144 It may be helpful to begin by examining the 1983 amendment. Whether or not the surplus reversion clause contained in Section 18.05 of the Air Products plan is valid must be determined by reference to the amendment clause contained in both the 1970 and the 1977 plans:

14.1

> The Company retains the right to amend or modify or terminate the Plan in whole or in part, at any time and from time to time, and in such manner and to such extent as it may

deem advisable, subject to the following provisions:

> a) No amendment shall have the effect of reducing any Participant's, former Participant's, joint annuitant's, beneficiary's, or estate's then existing interest in the Fund;
> b) No amendment shall have the effect of diverting any part of the Fund to purposes other than for the exclusive benefit of the Participants, former Participants, joint annuitants, beneficiaries, or estates;

145 In my opinion, the 1983 amendment of the pension plan was within the limits of this power of amendment. The amendment does not violate Article 14.1(a) because at the time it was enacted it did not reduce any "then existing" interest of the employees. Under the prior plans, the employees had no interest in the surplus remaining upon termination until such time as the company exercised its discretion to give them an interest. The removal of a mere potential interest in the funds was within the company's amending power.

146 Nor do I think that the amendment violated the limitation on the amending power contained in Article 14.1(b). I agree with Moore C.J. that this restriction on amendment was in the nature of a general protection of the benefits and rights of the plan participants and that it must be read in the light of other provisions dealing with specific rights including the treatment of surplus. He considered that two particular provisions in the 1977 plan overrode any conflict with the more general terms of the amendment power. I agree. This was also true of the corresponding provisions in the 1970 plan. The relevant 1970 clauses are that part of s. 14.1(c) which gives the employer a discretion as to the allocation of surplus, and:

13.2

> No part of the Fund shall be used for or diverted to purposes other than for the exclusive benefit of Participants and their beneficiaries. No Participant, retired Participant, survivor or beneficiary under the Plan, or any other person, shall have any interest in or right to any part of the earnings of the Fund, or any rights in or to or under such Fund or any part of the assets thereof, except and to the extent expressly provided in this Plan.

147 The amending power contained in Article 14.1(b) must therefore be read in light of the fact that the employee rights under the plan are limited by s. 13.2 (and indeed throughout the plan) to the benefits defined in the plan, as well as by the stipulation that the company has the right to distribute surplus as it chooses. The 1970 plan does not deal with the issue of whether the reversion of surplus to the company is inconsistent with the non-diversion and exclusive benefit clauses contained in Article 13.2. I do not think it is. The prohibition on diversion of funds and the exclusive benefit clause applied from the outset only in respect of the defined benefits to which the employees were contractually entitled. They did not apply to the distribution of a plan surplus. The revamped version of Article 13.2, which appeared as Article 13.4 in the 1977 plan, and upon which Moore

C.J. based his conclusion, clarified this point but did not change the substance of the original provisions.

13.4

> No part of the Fund shall be used for, or diverted to, purposes other than for the exclusive benefit of Participants, their designated Beneficiaries, or estates, except to the extent that surpluses, as certified by the Actuary, may be returned to the Company with the approval of the Minister of National Revenue and the Superintendent of Pensions. . . . No Participant, retired Participant, survivor, or designated Beneficiary under this Plan, or any other person, shall have any interest in or right to any part of the Fund except and to the extent expressly provided in this Plan. [Emphasis added.]

148 Whether measured against the 1970 or the 1977 plan provisions, Section 18.05 of the Air Products Plan was a valid amendment. The company is entitled according to its terms to any surplus remaining in the pension fund which can be traced to the former Stearns plans. This is the conclusion which must be reached on an interpretation of the contract. The issue of a fiduciary duty does not arise.

(d) The Contribution Holiday

149 For the reasons given on the appeal, Air Products was entitled to take a contribution holiday. The application of an actuarial surplus to current service funding obligations was permitted under the terms of the Air Products Plan, and did not have the effect of reducing any benefits which had accrued to the employees.

(e) The Need for Legislation

150 The results in these appeals demonstrate the need for legislation. In both appeals the pension fund was created to benefit the employees. During the contribution holiday enjoyed by the employer they continued to pay into the pension fund. They had a real stake in the fund which was created for their benefit and funded in part by their contributions. It seems unfair that there should be a different result for these two groups of employees based only upon a finding that a trust was created in one case but not in the other. In my opinion there should be a legislative scheme set up for determining the proportion of the surplus which should be awarded to the employer and the employees. It could be based at least in part upon their contributions to the creation of the surplus. Principles of equity and fairness should encourage legislators to draft a scheme to provide for the equitable distribution of any surplus in pension plans that are terminated.

VII. Disposition

151 In the result, I would dispose of these appeals as follows:

The Appeal

152

1. The former Catalytic Employees are entitled to any surplus remaining in the pension fund which derives from former Catalytic plans. The appeal is dismissed on this ground and the order of the Court of Appeal varied accordingly.
2. Air Products was entitled under the terms of its pension plan to take a contribution holiday. The appeal is allowed on this ground.

The Cross-Appeal

153

1. Air Products is entitled to all surplus remaining in the pension fund which derives from the former Stearns plan.
2. Air Products was entitled to take a contribution holiday.

154 The cross-appeal is dismissed on both grounds. In light of the potentially misleading provisions contained in the brochure prepared and circulated by the employer, there should be no costs against the employees.

155 The costs of all parties on the appeal should be paid out of the Catalytic pension fund on a solicitor and client basis.

156 Similarly the costs of all parties on the cross-appeal should be paid out of the Stearns pension fund on a solicitor and client basis.

APPENDIX A

The following is an edited version of the Agreed Statement of Facts provided by the parties. The full text of the document is incorporated in the reasons of the Chief Justice of the Alberta Court of Queen's Bench.

I. HISTORY OF CATALYTIC PLANS
A. THE 1959 CATALYTIC PLAN

The 1959 Catalytic Plan was a money purchase plan which contained the following provisions:

SECTION V TRUST FUND

All contributions made by the members and the Company will be paid to the Trustee to be administered subject to the provisions of the Act governing the

investment of Pension funds, and in accordance with the terms of the Trust Agreement which forms part of this plan and of which this plan is Exhibit "A".

All benefits on the death or break of service of a Member shall be payable from the Trust Fund. All benefits on the retirement of a Member shall be payable as set forth in Section XV.

Expenses of the Trust Fund shall be paid out of the Fund unless paid by the Company.

SECTION VIII MEMBERS' ACCOUNTS

The Pension Committee shall keep for each Member of the Plan two accounts as follows:

1. Member's Account

   Here will be kept a cumulative record of any contributions made by the Member and the interest income and capital gains and losses realized and unrealized allocated thereon in accordance with Section X.

2. The Company Account

   Here will be kept a cumulative record of the amounts allocated to the Member as follows:

   (a) the Company's contribution allocated in accordance with Section IX.
   (b) The interest income and capital gains and losses realized and unrealized allocated in accordance with Section X.
   (c) The forfeitures allocated in accordance with Section XI.

SECTION XXII FUTURE OF THE PLAN

1. The Company hopes and expects to continue the Plan and the payment of contributions hereunder indefinitely but such continuance is not assumed as a contractual obligation. The Company expressly reserves the right, by action of its Board, to amend or terminate the Plan in whole or in part, if in the opinion of the Company future conditions warrant such action.
2. No amendment to the Plan shall operate to reduce the benefits which have occrued (sic) to the Members of the Plan prior to the date of amendment.
3. In the event of termination of the Plan, the Company cannot recover any sums paid to the date thereof and each Member of the Plan shall receive the proceeds of his Member's Account and his Company Account as of the date of such termination. No other employees will become eligible to become Members and no further contributions will be made by the Company.

. . .

B. TRUST AGREEMENT

As contemplated by the 1959 Catalytic Plan, Catalytic entered into an agreement dated September 8, 1959 (the "Trust Agreement") with Canada Trust Company whereby Canada Trust, as trustee, was to hold, invest and administer the fund. The Trust Agreement provided:

ARTICLE I

ESTABLISHMENT OF TRUST

1. This Agreement is hereby made a part of the PLAN.
2. The Company may pay or cause to be paid from time to time to the Trustee upon the trusts of this Agreement money or property acceptable to the Trustee for the purpose of the PLAN, all of which together with the earnings, profit and increments thereon and property from time to time substituted therefore shall constitute the FUND hereby created and established.
3. The Trustee hereby accepts the trusts herein set out and agrees to hold, invest, distribute and administer the FUND in accordance with the provisions of this Agreement.

ARTICLE V

MODIFICATION AND TERMINATION

1. Subject as herein and in the PLAN provided, the Company reserves the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the PLAN (including this Agreement) provided that no such amendment which affects the rights, duties, compensation, or responsibilities of the Trustee shall be made without its consent, and provided further that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the FUND to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the PLAN as amended from time to time, and for the payment of taxes or other assessments as provided in paragraph 2 of Article II hereof, and the expenses and compensation of the Trustee as provided in paragraph 4 of Article IV hereof.
2. This Agreement may be terminated at any time by the Company upon at least sixty (60) days' prior written notice to the Trustee, and with its termination, or upon the dissolution or liquidation of the Company, the FUND shall be paid out by the Trustee as directed by the Company.

C. THE 1966 CATALYTIC PLAN

The 1966 Catalytic Plan changed the benefit formula from a money purchase formula to a defined benefit formula. . . . [E]ffective October 1, 1966 the plan provided that:

> . . . the Company shall not less frequently than annually make such contributions as are necessary to provide the benefits accruing to Members during the current year and to amortize any initial unfunded liability or experience deficiency in accordance with the provisions of The Pension Benefits Act of Ontario. (Section VI)

The provisions regarding the future of the plan remained unchanged from Section XXII of the 1959 Catalytic Plan.

The money purchase portion of the Catalytic 1959 and 1966 Plans was segregated and is administered separately from the funds generated in the defined benefit plans. No surplus was or could be generated from the money purchase portion of the 1959 and 1966 Catalytic Plans.

D. THE 1978 CATALYTIC PLAN

This plan was a defined benefit plan. . . . [It] provided . . .:

. . .

SECTION 2 -- DEFINITIONS

2.12

"Funding Agency" means the trustees, trust company or insurance company that the Company may appoint to hold and invest the Pension Fund or the Pooled Pension Trust Fund or such successor trustees, trust company or insurance company as the Company may appoint from time to time to hold and invest the Pension Fund or the Pooled Pension Trust Fund.

2.13 "Funding Agreement" means the agreement entered into between the Company and the Funding Agency establishing and maintaining the Pension Fund.

2.18 "Pension Fund" means the fund established pursuant to the Funding Agreement to which contributions are made by the Members and Company and from which retirement and other benefits under the Plan are to be provided.

SECTION 4 -- CONTRIBUTIONS

4.03

The Company shall contribute from time to time, but not less frequently than annually, such amounts as are not less than those certified by the Actuary as necessary to provide the retirement benefits accruing to Members during the current year pursuant to the Plan and to make provision for the proper amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued, in accordance with the requirements of the Pension Benefits Act, after taking into account the assets of the Pension Fund and all other relevant factors.

. . .

SECTION 17 -- AMENDMENT TO OR TERMINATION OF THE PLAN

17.01

Continuation of Plan

The Company expects and intends to maintain this Plan in force indefinitely but necessarily reserves the right to amend or discontinue the Plan either in whole or in part, if, in the opinion of the Company, future conditions warrant such action, subject always to the requirements of the Department of National Revenue and the provisions of the Pension Benefits Act.

17.02

Amendment of Plan

No amendment to the Plan shall operate to reduce the pension benefits which have accrued to Members thereunder prior to the date of such amendment.

17.03

Discontinuance of Plan

Should the Plan be wholly terminated, the Company shall not be obligated to make any further contributions to the Plan and the assets held under the Pension Fund shall be allocated for the provisions of the accrued benefits to which the Members, their Beneficiaries and their joint annuitants are entitled in such equitable manner as may be determined by the Company in consultation with the Actuary until all liabilities under the Plan have been met. Such benefits may be provided through the purchase of annuity contracts from insurance companies licensed to transact business in Canada, in the form elected by the Members, or through the continuation of the Funding Agreement for this purpose. If the assets of the Pension Fund are not sufficient to provide the aforementioned accrued benefits, the Pension Fund shall be allocated in a manner approved under the Pension Benefits Act.

. . .

17.05

Distribution of Benefits

If, after full provision has been made for the accrued benefits payable to the Members, their Beneficiaries and their joint annuitants, there should remain any excess assets in the Pension Fund, such excess shall be used as the Company or liquidator or trustee in bankruptcy, if appropriate, may direct. Any distribution of the Pension Fund resulting from termination of the Plan shall be in accordance with the applicable provisions of the Pension Benefits Act and the Income Tax Act, and with the rules and regulations of the

Department of National Revenue with respect to registered pension plans.

. . .

II. A HISTORY OF THE STERNS PLANS

A. THE 1962 STEARNS PLAN

On January 1, 1962, Stearns obtained a Group Annuity Policy (GA577) from the Mutual Life Assurance Company for the purpose of providing retirement benefits to its employees. No surplus was or could have been derived pursuant to this plan.

B. THE 1970 STEARNS PLAN

Stearns established a pension plan effective January 1, 1970 for the retirement of and payment of pensions to its employees.

. . .

As required by Article 13.1 of this plan, the Company entered into a Group Annuity Policy (GA1328) with the Mutual Life Assurance Company and a fund was established by transfer of the assets from the 1962 Stearns Plan and by contributions from the employees and the Company.

The 1970 Stearns Plan provided that:

ARTICLE I

DEFINITIONS

Fund shall mean the Fund to be established under the Deposit Administration Policy issued by the Insurer by transfer of assets from the Prior Plan and by contributions by the Participants and the Company from which the benefits of the Plan are to be provided.

ARTICLE II

ESTABLISHMENT OF THE PLAN

. . .

2.2

Prior to the Effective Date, certain Employees of the Company had accumulated retirement benefits under the Prior Plan. The Prior Plan shall be terminated 31 December 1969 and all benefits earned thereunder shall be transferred to the Plan. All benefits accrued under the

Prior Plan transferred to the Plan shall become a liability of the Plan and shall be paid in accordance with the provisions of the Plan. Future contributions by such Employees and Employees who become eligible on and after the Effective Date shall be made under the Plan.

ARTICLE IV

CONTRIBUTIONS

4.3

(a) The Company will contribute each year to the Fund such amounts as determined by the Actuary, which, when added to the Participant's contributions made under Section 4.1 will provide the regular benefits described in the Plan and will provide for funding in accordance with the tests for solvency prescribed by the regulations under the Pension Benefits Act.

(b) It is expressly stipulated that the Company will not make any additional contributions corresponding to or in respect of the additional voluntary contributions made by a Participant as provided for in Section 4.2 or 4.4.

ARTICLE XIII

RETIREMENT FUND

13.2

No part of the Fund shall be used for or diverted to purposes other than for the exclusive benefit of Participants and their beneficiaries. No Participant, retired Participant, survivor or beneficiary under the Plan, or any other person, shall have any interest in or right to any part of the earnings of the Fund, or any rights in or to or under such Fund or any part of the assets thereof, except and to the extent expressly provided in this Plan.

ARTICLE XIV

Amendment or Termination of the Plan

14.1

The Company retains the right to amend or modify or terminate the Plan in whole or in part, at any time and from time to time, and in such manner and to such extent as it may deem advisable, subject to the following provisions:

a) No amendment shall have the effect of reducing any Participant's, former Participant's, joint annuitant's,

beneficiary's, or estate's then existing interest in the Fund;

b) No amendment shall have the effect of diverting any part of the Fund to purposes other than for the exclusive benefit of the Participants, former Participants, joint annuitants, beneficiaries, or estates;

Article 14.1(c) set out the following scheme of distribution to be instituted upon termination of the plan:

> c) If it should become necessary to discontinue the Plan, the assets of the Fund shall be used, to the extent adequate, for the following purposes:
>
> . . .
>
> Notwithstanding any surplus remaining after all benefits referred to in this Sub-section 14.1 (c) have been provided, such surplus may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions at the time, be returned to the Company or may be used for the benefit of Participants, former Participants, beneficiaries or estates in such equitable manner as the Company may in its discretion determine.

C. BROCHURE . . .

On June 1, 1972, Stearns issued to its employees a brochure entitled 'Employee Benefits' which provided that:

> Future of the Plan
>
> It is the intention of the Company that the plan will continue indefinitely but of necessity they reserve the right to amend, modify or terminate the plan at any time. If it becomes necessary to terminate the plan at some future date, all employees would be granted 100% vesting, regardless of their service. No part of the assets of the fund will be available to the Company until all benefits earned under the plan to the date of termination have been paid. In the event there is a surplus in the fund after all benefits have been paid it is the Company's intention the surplus will be distributed in an equitable manner to the employees active in the plan at the date of termination.

D. THE 1977 STEARNS PLAN . . .

By an amendment dated January 1, 1977, Stearns amended the 1970 plan. . . .

The 1977 Stearns Plan contained . . . the following provisions:

ARTICLE I

DEFINITIONS

1.14 Fund means the corpus and all earnings, appreciations, or additions thereon and thereto held by the Funding Agency under the Funding Agreement.

1.15 Funding Agency means the Trust Company, Trustees, Insurance Company or successors thereof as the Company may appoint to hold the Fund pursuant to the Funding Agreement.

1.16 Funding Agreement means the agreement or contract entered into between the Company and the Funding Agency establishing the Fund.

ARTICLE IV

CONTRIBUTIONS

4.1 The Company will contribute to the Fund, not less frequently than annually, such amounts which are not less than those certified by the Actuary as being necessary to provide benefits accruing during each Plan Year and to make provision in accordance with the Pension Benefits Act for the amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued after taking into account the assets of the Fund and such other factors as may be deemed relevant. The Company reserves the right, however, subject to the provisions of Article XIII, to pay its contributions from such surpluses as may accumulate and shall be determined in a valuation of the Funds' assets and liabilities certified by an Actuary.

4.2 Participants shall not be required to contribute to the Plan.

ARTICLE XIII

ESTABLISHMENT OF THE FUND

13.4

No part of the Fund shall be used for, or diverted to, purposes other than for the exclusive benefit of Participants, their designated Beneficiaries, or estates, except to the extent that surpluses, as certified by the Actuary, may be returned to the Company with the approval of the Minister of National Revenue and the Superintendent of Pensions and except as provided in Sub-section 14.2 (d) of Article XIV. No Participant, retired Participant, survivor, or designated Beneficiary under this Plan, or any other person, shall have any interest in or right to any part of the Fund except and to the extent expressly provided in this Plan.

ARTICLE XIV

AMENDMENT OR TERMINATION OF THE PLAN

14.1

The Company retains the right to amend or modify or terminate the Plan in whole or in part, at any time and from time to time, and in such manner and to such extent as it may deem advisable, subject to the following provisions:

(a) no amendment, modification or termination shall have the effect of reducing any Participant's, former Participant's, joint annuitant's, Beneficiary's or estate's then existing interest in the Fund.

(b) no amendment, modification or termination shall have the effect of diverting any part of the Fund to purposes other than for the exclusive benefit of the Participants, former Participants, joint annuitants, Beneficiaries or estates.

The scheme of distribution upon termination was . . . contained in Article 14.2 . . .:

14.2

Should the Plan be terminated, whether by the Company or as a result of wind-up or bankruptcy of the Company, the assets of the Fund shall be used, to the extent adequate, and subject to the provisions of the Pension Benefits Act, for the following purposes:

. . .

14.3

Any balance remaining in the Fund after distributions have been made in accordance with the foregoing Section 14.2 after satisfying all other liabilities of the Plan may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions, be returned to the Company or may be used for the benefit of Participants, former Participants, designated Beneficiaries, or estates, in such equitable manner as the Company may at its discretion determine.

E. THE 1982 STEARNS PLAN CONSOLIDATION . . .

The 1982 Stearns Plan Consolidation is virtually identical to the 1977 Stearns Plan with one important exception. Article 14.3 of the 1982 Sterns Plan Consolidation provides that:

14.3

> Any balance remaining in the Fund after distributions have been made in accordance with the foregoing Section 14.2 after satisfying all other liabilities of the Plan may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions, be returned to the former Participants, designated Beneficiaries, or estates, in such equitable manner as the Company may at its discretion determine, so long as the surplus is distributed in such manner as to observe the maximum benefit allowed by the Department of National Revenue.

This consolidation was not registered with the Employment Pension Plans Branch and there is no Directors' Resolution authorizing it.

III. THE STEARNS CATALYTIC PENSION PLANS

[I]n 1983 with the amalgamation of Stearns and Catalytic, the Company instituted the two Stearns Catalytic Pension Plans. . . .

These plans contained, . . . the following terms:

> SECTION 1 -- ESTABLISHMENT OF THE PLAN
>
> The benefits provided by this Plan, in respect of service prior to October 1, 1983, are in lieu of all and any benefits to which any person, active or retired, may have been entitled under either of these Prior Plans, and in no event shall be less than the benefits to which they were entitled under these Prior Plans.
>
> Effective October 1, 1983, the respective pension funds of the Catalytic Enterprises Plan and the Stearns-Roger Plan shall be merged and held as one fund to the benefit of members of this Pension Plan for Employees (Senior Members of Management) of Stearns Catalytic Ltd. - Construction Division.
>
> SECTION 2 -- DEFINITIONS

2.19

"Pension Fund" means the fund established pursuant to the Trust Agreement to which contributions are made by the Members and the Company and from which retirement and other benefits under the Plan are to be provided.

2.24 "Trustee" means the trustees, trust company or insurance company that the Company may appoint from time to time, to hold and invest the Pension Fund.

2.25 "Trust Agreement" means the agreement entered into between the Company and the Trustee establishing and maintaining the Pension Fund.

. . .

SECTION 4 -- CONTRIBUTIONS

4.03

The Company shall contribute from time to time, but not less frequently than annually, such amounts as are not less than those certified by the Actuary as necessary to provide the retirement benefits accruing to Members during the current year pursuant to the Plan and to make provision for the proper amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued, in accordance with the requirements of the Pension Benefits Act, after taking into account the assets of the Pension Fund and all other relevant factors.

. . .

6.05 Statutory Maximum Retirement Benefit

In no event shall the annual retirement benefit payable under the Plan in respect of the retirement or termination of service of a Member or termination of the Plan exceed the lesser of:

a) $1,715 for each year of the Member's Credited Service to a maximum of 35 years; and
b) 2% of the Member's average best three (3) consecutive years' Earnings multiplied by his years of Credited Service, to a maximum of 35 years.

. . .

SECTION 18 -- AMENDMENT TO OR TERMINATION OF THE PLAN

18.01

Continuation of Plan

The Company expects and intends to maintain this Plan in force indefinitely but necessarily reserves the right to amend or discontinue the Plan either in whole or in part, if, in the opinion of the Company, future conditions warrant such action, subject always to the requirements of the Department of National Revenue and the provisions of the Pension Benefits Act.

18.02 Amendment of Plan

No amendment to the Plan shall operate to reduce the pension benefits which have accrued to Members thereunder prior to the date of such amendment.

18.03 Discontinuance of Plan

Should the Plan be wholly terminated, the Company shall not be obligated to make any further contributions to the Plan and the assets held under the Pension Fund shall be allocated for the provisions of the accrued benefits to which the Members, their Beneficiaries and their joint annuitants are entitled in such equitable manner as may be determined by the Company in consultation with the Actuary until all liabilities under the Plan have been met. Such benefits may be provided through the purchase of annuity contracts from insurance companies licensed to transact annuities business in Canada, in the form elected by the Members, or through the continuation of the Trust Agreement for this purpose. If the assets of the Pension Fund are not sufficient to provide the aforementioned accrued benefits, the Pension Fund shall be allocated in a manner approved under the Pension Benefits Act.

. . .

18.05

Distribution of Benefits

If, after full provision has been made for the accrued benefits payable to the Members, their Beneficiaries and their joint annuitants, there should remain any excess assets in the Pension Fund, such excess shall be used as the Company or liquidator or trustee in bankruptcy, if appropriate, may direct.

Any distribution of the Pension Fund resulting from termination of the Plan shall be in accordance with the applicable provisions of the Pension Benefits Act and the Income Tax Act, and with the rules and regulations of the Department of National Revenue with respect to registered pension plans.

The distribution of the assets of the fund must not result in a Member's retirement benefits exceeding the maximum indicated in Section 6.05 hereof. If any surplus remains in the Fund after all allocations have been made, such surplus shall be refunded to the Company.

The contributions made to the Stearns Catalytic Pension Plans [were] provided to Confederation Life Insurance Company under the terms of an Investment Contract dated October 29, 1984. . . .

[This contract] provided . . . that:

PROVISION 6 -- WITHDRAWALS

6.1

Confederation Life shall make withdrawals from the Accounts in order to make payments as designated in writing by the Contractholder provided that any such withdrawal shall be for the sole purpose of making payments in accordance with one of the following conditions:

(c) Payments to the Contractholder of any certified actuarial surplus as may be approved by any provincial or federal government body having jurisdiction in the matter.

The following are the reasons delivered by

157 SOPINKA J. (dissenting in part on the appeal (File No. 23047)):-- I have read the reasons of Justices Cory and McLachlin. Like McLachlin J. I agree with most of Cory J.'s conclusions but disagree with him on the question of entitlement to the surplus in the Catalytic plan. In my view, the surplus in the Catalytic plan reverts to the employer. However, I have arrived at this conclusion by a somewhat different route from McLachlin J.

158 While I agree with Cory J. that all monies in the Catalytic pension fund, including the surplus, were impressed with a trust, this does not foreclose amendment of that trust. In the case of a pension plan, the nature of the rights of amendment will continue to depend upon the terms of the plan and the trust agreement, if any. In my view, nothing in the Catalytic plan precluded the company from exercising the express power of amendment in the plan so as to provide that any surplus funds would revert to it upon termination of the plan.

159 I should state at the outset that I agree with Cory J.'s conclusion that the parties intended Article V of the Trust Agreement to apply to all monies in the pension fund after 1966, including the surplus funds. Article V purports to restrict the company's right to make amendments which divert parts of the "FUND" and reads as follows:

ARTICLE V
MODIFICATION AND TERMINATION

> 1. Subject as herein and in the PLAN provided, the Company reserves the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the PLAN (including this Agreement) provided that no such amendment which affects the rights, duties, compensation, or responsibilities of the Trustee shall be made without its consent, and provided further that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the FUND to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the PLAN as amended from time to time, and for the payment of taxes or other assessments as provided in paragraph 2 of Article II hereof, and the expenses and compensation of the Trustee as provided in paragraph 4 of Article IV hereof. [Emphasis added.]

160 Under the 1959 Catalytic Plan, the Trust Agreement was made part of the plan. It was clear that the terms upon which the monies contributed to that plan were to be held and administered were contained in both the plan and the Trust Agreement. The 1966 Catalytic Plan amended the 1959 Plan but retained a provision stating that all contributions to the plan were to be administered in accordance with the terms of the Trust Agreement. Thus it is clear that when the Catalytic Plan

became a defined benefit plan in 1966, the parties intended the provisions of the Trust Agreement to continue to apply to monies contributed to the plan. Furthermore, at all relevant times the Trust Agreement provided that the "FUND" referred to in that Agreement included all the monies paid to the Trustee by the Company for the purpose of the plan, as well as the earnings, profit and increments therefrom. The Catalytic surplus is derived from monies contributed to the plan after 1966 and thus is obviously part of the Fund. Therefore, it follows that Article V applies to amendments concerning the use of the surplus.

161 This, however, does not end the matter. By its terms Article V is subject to the terms of the plan. Both the 1959 and the 1966 versions of the plan reserved broader powers of amendment to the company than those contained in Article V of the Trust Agreement. The relevant provisions of the 1959 Catalytic Plan are as follows:

SECTION XXII FUTURE OF THE PLAN

1. The Company hopes and expects to continue the Plan and the payment of contributions hereunder indefinitely but such continuance is not assumed as a contractual obligation. The Company expressly reserves the right, by action of its Board, to amend or terminate the Plan in whole or in part, if in the opinion of the Company future conditions warrant such action.
2. No amendment to the Plan shall operate to reduce the benefits which have occrued [sic] to the Members of the Plan prior to the date of amendment.
3. In the event of termination of the Plan, the Company cannot recover any sums paid to the date thereof and each Member of the Plan shall receive the proceeds of his Member's Account and his Company Account as of the date of such termination. No other employees will become eligible to become Members and no further contributions will be made by the Company.

162 These provisions were carried over into the 1966 version of the Catalytic plan, renumbered as Section XXI. By virtue of those provisions, the only limitation upon the company's power to amend the plan was that no amendment could reduce accrued benefits. The right to receive surplus monies in the pension fund was not a benefit which had accrued to the members of the plan at the time that the company amended the plan to permit the surplus to be distributed to itself. Under the terms of the 1959 and 1966 plan the employees may have obtained a right to the surplus upon termination of the plan, but no such right had accrued to them prior to termination. Even if such a right could be said to have accrued at the time of amendment, it is not a benefit contemplated by that provision. The benefits contemplated by the plan are those to which the members were entitled pursuant to other Articles of the plan. The right to the surplus is not one of those benefits. Indeed,

when Article XXII.2 was drafted, it could not have referred to a surplus because no surplus was possible under a defined contribution plan. For both these reasons I conclude that from the outset the company reserved the power to amend the Catalytic plan so as to permit any surplus to be distributed to itself.

163 Assuming that a provision disposing of the surplus in favour of the employer is a partial revocation, I see no magic in the use of those specific words. If the powers of amendment are sufficiently explicit to permit a change which is in law a partial revocation, they should be given effect. After all, a trust can be created by the use of apt words without express reference to a trust. Words are apt to create a trust if the intention of the settlor is clear. Conversely, limitations on the nature of the trust must surely be determined on the same basis.

164 It is the contention of the respondents that the right to the surplus is an accrued benefit and a reduction of accrued benefits is a revocation or partial revocation of the trust. The fact that reduction in accrued benefits was made an express exception from the power of amendment shows that when the trust was created the parties considered that in the absence of this exception the power of amendment would extend to reduce accrued benefits. It follows that the power of amendment included the power to make changes having the effect of revocation or partial revocation. The real issue, therefore, is whether the right to the surplus comes within the exception. For the reason I have given above, it does not.

165 As Cory J. points out, there is a fundamental disagreement in the authorities as to whether a power of amendment can be sufficiently explicit to include a power of revocation. This disagreement is said to derive from the conflicting views expressed in Waters, Law of Trusts in Canada (2nd ed. 1984) and Scott, The Law of Trusts (4th ed. 1989), vol. 4. As I understand my colleague's reasons, he would apply a statement in Waters as requiring nothing short of the use of the actual words "power of revocation" in order to permit the settlor to effect a change which would amount to a revocation or partial revocation. With respect, I am of the opinion that Waters does not go that far. In the passage to which my colleague refers and which was quoted by Zuber J.A. in Re Reevie and Montreal Trust Co. of Canada (1986), 53 O.R. (2d) 595, at p. 600, the learned author states: "A settlor cannot revoke his trust unless he has expressly reserved the power to do so." I do not read this to mean that if the settlor uses language that, when interpreted by reference to the usual canons of construction, clearly establishes an intention to include changes having the effect of revocation, the absence of the magic words is fatal. Nor do I believe that Zuber J.A. was of the opinion that no power of amendment could authorize a change having the effect of revocation. It is clear that he was of the opinion that, in applying the statement in Waters, the appropriate inquiry was whether the wording of the relevant documents could be interpreted to authorize a change having the effect of revocation. At page 600, he stated:

> The appellant does not take issue with these general principles [stated in Waters] but asserts that it has reserved a power of amendment which is wide enough to entitle him to recover surplus funds. In my opinion, this proposition is

> simply untenable. The language of the trust agreement and the pension plan do not support such an argument. The section in the pension plan (prior to the 1981 amendment) dealing with the powers of amendment specifically affirms the irrevocability of the contributions and the fact that the members of the plan are the sole beneficiaries.

166 The terms of the trust agreement and plan in Reevie, supra, were not identical to the wording of the agreements in this case.

167 But even if Waters stands for the proposition advanced by Cory J., the logic of the contrary position, which is stated in Scott, The Law of Trusts, supra, and adopted by McLennan J. in Re Campbell-Renton & Cayley, [1960] O.R. 550 (H.C.), and the British Columbia Court of Appeal in Hockin v. Bank of British Columbia (1990), 71 D.L.R. (4th) 11, appeals to me in preference to a formulaic approach that would disregard the clear intention of the parties. Nor am I persuaded that we should adopt a rule of interpretation that ignores the clear intention of the parties in order to maintain the fundamental character of a trust. Trusts can be revocable or irrevocable. Neither is more fundamental than the other. All we are debating is the means by which we distinguish one from the other. Moreover, the true nature of a trust established as part of a pension plan is to provide funds needed to pay the benefits which accrue to employees under the plan. A power of amendment which is qualified by the requirement that it cannot be used to reduce accrued benefits is not inconsistent with the fundamental purpose of a defined benefits pension trust.

168 Cory J. also reasons that the circumstances which prevailed when the plans in question were created support his interpretation of the breadth of the power of amendment. In my view, however, the most relevant of those circumstances is the fact that neither the company nor the employees appear to have foreseen the existence of a surplus when the plan was created. In fact, there was no reason for the employees to expect to receive anything more than the defined benefits set out in the plan. Therefore, I see nothing inequitable in allowing the employer to take advantage of the broad amending power to distribute the surplus to itself, so long as it did nothing to reduce the level of benefits provided to the employees.

169 As far as the tax legislation in force when the plans were created is concerned, I agree with Cory J.'s observation that the tax motivations of the parties to pension plans are of limited relevance in interpreting those plans. I note however that the Catalytic plan expressly stated that the plan was structured so as to ensure that the company's contributions were deductible under the Income Tax Act, S.C. 1970-71-72, c. 63, and any amendments thereto. It is not unreasonable to infer that the broad amending power retained in the 1959 Catalytic plan and subsequent versions of the plan was retained in part to deal with changes in income tax legislation. The amendment of the 1983 Air Products Plan to include Section 18.05 was required by Revenue Canada in order to comply with the pension plan registration requirements under the Income Tax Act. Therefore, if anything, consideration of the parties' tax motivations supports a broad interpretation of the power of amendment.

170 Moreover, the approach which Cory J. adopts may make it difficult for the numerous pension plans that had an existence prior to 1981, which do not have an express power of revocation, to conform with the new registration requirements. Both Information Circulars Nos. 72-13R7 (1981) and No. 72-13R8 (1988) provide that the plan must contain a provision permitting an actuarial surplus to be refunded to the employer on termination of the plan. This requirement has apparently been incorporated in ss. 8502(c) and 8503(4)(c) of the Income Tax Regulations. The Minister has indicated that these regulations may be amended; for the time being, however, they have the force of law.

171 For the above reasons I conclude that Section 17.05 of the 1978 plan was a valid amendment to the Catalytic plan, as was Section 18.05 of the 1983 Air Products plan. Pursuant to those provisions the surplus in the Catalytic plan should revert to the company. In light of the result which I have reached by interpreting the terms of the plan it is not necessary for me to consider whether the funds could revert to the employer by the operation of a resulting trust.

172 In the result I would dispose of the appeals as proposed by Cory J., except with regards to the distribution of the surplus in the Catalytic plan. In this respect, I would allow the appeals with costs.

The following are the reasons delivered by

173 McLACHLIN J. (dissenting in part on the appeal (File No. 23047)):-- I have read the reasons of Justice Cory. I agree with his conclusions except on the question of the right to surplus on the Catalytic plan. In my view, the surplus on the Catalytic Plan reverts to the employer, either on the terms of the plan or on the basis of the doctrine of resulting trust.

Background:

Situating the Problem

174 Modern private pension plans date to the late 19th century. Fundamental and pervasive societal changes -- large scale industrialization coupled with the breakdown of family, village and church assistance networks -- produced a need to devise methods of caring for those past working age. Employer-sponsored private pension plans, supplemented later by government plans, were the response. Today, together with personal savings, private and public pension plans provide the primary source of income for retired Canadians.

175 There are two main types of pension plans. In the first type, the "defined contribution" plan, the amount paid in by the contributors to the fund is set. The eventual size of the employee's annuity is determined by the rate of return on the invested contributions. It follows that a low rate of return on investment will result in a smaller pension than if the rate of return is high. While the employer contributes to the plan, the employer does not guarantee the amount of the annuity. The employee is not assured of any particular benefit. The 1959 Catalytic plan was this sort of plan.

176 In the other type of pension plan, the "defined benefit" or "money purchase" plan, the employee, who may or may not contribute to the fund, is assured of a certain monetary benefit upon retirement. An actuary is employed to determine the amount of contribution which the employer must make in order to ensure that the plan can meet its present and future obligations. The market risk, assumed by the employee in a defined contribution plan, falls on the employer in a defined benefit plan. If, at any time, the plan is unable to meet its obligations, the employer is liable to make up any shortfall. For these two reasons -- the guarantee of a certain benefit and the assumption by the employer of the market risk -- a defined benefit plan is regarded as more advantageous to employees than a defined contribution plan.

177 The defined benefit plan possesses a feature which the defined contribution plan does not -- a feature which is at the heart of this appeal, the actuarial surplus. A defined contribution plan can never have a surplus; everything, after deduction of taxes and expenses, must be paid out to the pensioners. However a surplus may accumulate in a defined benefit plan when the amount in the fund exceeds the amount required to meet the defined benefits as calculated by the actuary.

178 In valuing the assets of a pension plan, the actuary must take into account a number of factors and make assumptions about each of them. These factors include the rate of investment return, the rate of price inflation, salary increases, rates of mortality for active and retired members, rates of employee turnover, incidence of disability and utilization of early retirement options. As might be expected, actuaries advising employers tend to err on the side of caution to produce what is called an "experience gain" rather than an "experience deficiency", since the latter would deprive pensioners of the benefits guaranteed to them.

179 In the early 1980s this actuarial conservatism combined with a particular set of economic factors to produce massive surpluses in many pension funds. These factors included the level of interest rates -- as high as 20 percent at one point -- which gave returns on investments in fixed value securities far in excess of those predicted. The stock market boom from 1982 to 1987 also resulted in much higher capital gains than were anticipated. Furthermore, the recession of 1981-82 caused widespread layoffs of employees who had no vested right to pension benefits. Money contributed on their account remained in the plan and either reduced unfunded liability for other employees or fell into surplus. At the same time, employers, uncertain as to whether they could use surplus for ongoing funding, often continued to contribute to over-funded plans in years when investment returns were at their highest, increasing existing surpluses: Gary Nachshen, "Access to Pension Fund Surpluses: The Great Debate", in New Developments in Employment Law (Meredith Memorial Lectures, 1988), 1989. The result of these events was to increase pension surpluses in Canada which, by 1982, had already been estimated to be between $4 billion and $8 billion: D. Don Ezra, The Struggle for Pension Fund Wealth (1983).

180 So long as a pension plan remains operational, hefty surpluses pose no problem except perhaps to employers wondering whether they can use the surplus for current funding needs, taking a "contribution holiday". When a plan terminates, however, the question arises of who is entitled to

the surplus. That is the problem that faces us on this appeal. It is not, we are told, an isolated one. Many plans such as this were set up in the 1960s and the decades that followed. Few contained express provisions as to distribution of surplus.

181 The Catalytic plan in this appeal was set up in 1959 as a defined contribution plan. As one would expect in that type of plan, all funds would ultimately be paid out to the pensioners or beneficiaries. There could be no surplus.

182 In 1966, however, the plan was changed to a defined benefit plan and the possibility of a surplus arose. In 1978, the Plan Agreement was redrafted. This restatement raised for the first time the issue of what should be done with any surplus. It empowered the company to use the surplus as it saw fit after making full provision for the accrued benefits payable to members and beneficiaries. When the plan was terminated in 1988, a large surplus was revealed. The issue was who should have it -- the employees and their beneficiaries or the employer?

Implications Flowing from the Nature of the Defined Benefit Plan

183 As noted, the employer is legally obliged under a defined benefits plan to ensure that all pension benefits owing are paid when they fall due. The employer thus bears the risk that contributions may be insufficient or that investments may not perform as well as predicted. The converse of this proposition is that the employer should be permitted to take advantage of the excess when investments do better than predicted.

184 From an economic policy perspective, if employers cannot retrieve surpluses, they may be inclined to request that their actuaries take a more optimistic view of the future of their investments and fund existing pensions less generously. Alternatively, they may refuse to enter into new pension regimes or, in some cases, terminate those which already exist. Inability to retrieve surpluses may also lead employers, unwilling to assume the risk of providing guaranteed benefits without the possibility of recovering surplus funding, to choose defined contribution plans rather than defined benefit plans. Employees, no longer assured of a specific pension and required to assume the risk of insufficient funding themselves, would be the losers.

185 On the other side of the coin, permitting employers to recover surplus in a defined benefit plan is not unfair to employees. It is argued that employees should have the surplus because they have paid for it through direct contributions or by accepting lower wages and fewer fringe benefits. This argument overlooks the nature of the employees' legitimate expectations under a defined benefit plan. The employees, having bargained for specific benefits, will receive precisely what they bargained for. The benefits, as defined by the plan, are the quid pro quo for their services and contributions. Indeed, the intention of the parties -- and the very purpose of the plan -- is that they receive these benefits. To give the employees the surplus, however, is to give them more than they bargained for. It is a windfall to the employees and a denial of the equitable interest which the employer holds in the surplus.

186 This practical view of things is supported by the policy of the Minister of National Revenue. Information Circular No. 72-13R7, December 31, 1981, is based on the assumption that surplus is normally returnable to the employer. In order to comply with registration requirements, surplus in excess of the employer's current service funding obligations in the following 24-month period must be either refunded to the employer or applied against the employer's obligations for contributions on account of current or past service in the current and subsequent years. Furthermore, all pension plans are to contain a provision permitting an actuarial surplus to be refunded to contributing employers of the plan. This requirement, it may be noted, may prevent problems such as the one presented on this appeal from arising in plans set up after the Circular.

The Position in Other Jurisdictions

187 The problem of surplus in defined benefit pension plans is a recent one. The matter has, however, been considered by courts in England and the United States. It is fair to say that they have generally come down on the side of returning the surplus to the employers.

188 Courts in Great Britain have relied primarily upon principles of trust law when attempting to resolve the question of pension surplus. In Davis v. Richards & Wallington Industries Ltd., [1991] 2 All E.R. 563 (Ch. D.), for example, Scott J. applied the doctrine of resulting trust and concluded that a surplus in a contributory defined benefits pension fund should be paid to the employer. He held that the result could be otherwise only if the plan contained a provision expressly excluding return of the funds to the employer. He rejected the argument that a resulting trust operated in favour of the employees in view of their contributions mainly on the ground that what the employees had paid for was the specific benefit received from the fund. See also, In re Courage Group's Pension Schemes, [1987] 1 W.L.R. 495 (Ch.D.).

189 In the United States, the courts look to the terms of the plan documents and the intent of the parties. They also tend to the view that the surplus would represent an unintended windfall profit if it were retained by the employees: Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co., 555 F.Supp. 257 (D.C. 1983). Provisions to the effect that amendments to the plan or trust documents may not enable an employer to divert or recover any portion of the trust funds are treated as prohibiting diversion prior to satisfaction of the plan's liabilities, but not thereafter. Once the pensioners are assured of their benefits, the surplus is recoverable by the employer: In re C. D. Moyer Co. Trust Fund, 441 F.Supp. 1128 (E.D. Pa. 1977); Pollock v. Castrovinci, 476 F.Supp. 606 (S.D.N.Y. 1979); Washington-Baltimore Newspaper Guild; Wilson v. Bluefield Supply Co., 819 F.2d 457 (4th Cir. 1987). Where courts in the United States have found that a surplus could not be recovered by the employer, they have done so on the basis that the wording of the plan documents unequivocally precluded such recovery: Bryant v. International Fruit Products Co., 793 F.2d 118 (6th Cir. 1986); Audio Fidelity Corp. v. Pension Benefit Guaranty Corp., 624 F.2d 513 (4th Cir. 1980).

Consistency with the Right to Use Surplus for a "Contribution Holiday"

190 It has repeatedly been held that employers are entitled to use the surplus in defined benefit plans for purposes of funding their actuarially determined contributions: Maurer v. McMaster University (1991), 4 O.R. (3d) 139; Askin v. Ontario Hospital Association (1991), 2 O.R. (3d) 641; Re Reevie and Montreal Trust Co. of Canada (1986), 53 O.R. (2d) 595. Cory J. arrives at the same conclusion in this case.

191 The obvious question immediately presents itself. If the employer is entitled to use the surplus to fund future contributions, why should the employer be denied the ability to recoup the surplus from previous funding? If, on the other hand, the fund in equity belongs to the employees in some notional sense, how can the employer usurp that interest by using the surplus to discharge its ongoing funding responsibility? Consistency suggests that both past and present funding and entitlement should be treated in the same way.

192 Some commentators, while recognizing the anomaly of allowing the employer to use the surplus for a contribution holiday but not to recoup past over-contributions from the surplus, argue that, from a "practical and symbolic" point of view, the two questions may be different since "all funds paid into the pension stay there, at least notionally": Bernard Adell, "Pension Plan Surpluses and the Law: Finding a Path for Reform", Task Force on Inflation Protection for Employment Pension Plans, Research Studies, vol. 2 (1988), at p. 242. Cory J. makes a similar point. So, it is suggested, an employer's entitlement to a contribution holiday may "not automatically entitle him to ownership of the actuarial surplus, as well": Nachshen, supra, at p. 77.

193 Nevertheless, it remains true that as a matter of principle, there appears to be no reason why an employer permitted to use surplus for ongoing contributions should not be allowed to reclaim the result of past over-contributions from the same surplus.

Summary

194 Consideration of the nature of defined benefit plans leads to the conclusion that the normal and just result is that surplus in such plans (as distinguished from defined contribution plans) should revert to the employer. Against this background, I turn to the documents which govern this case and the principles of law applicable to them.

Analysis

The Private Regime

195 Pension plans such as those at issue here are private arrangements bestowed by an employer on employees as a benefit of employment or set up pursuant to agreement between employer and employees. The employees may contribute (contributory plans), or the employer may bear the entire cost (non-contributory plans). The plan may be funded through insurance purchased by the employer for payment of the benefits (an insured plan), or the monies may be placed in a trust (a "trusteed" plan). Whatever form they take, as private contractual or as trust arrangements, the law of

contract or trust determines how the funds are distributed. This may be varied by legislation, but in this case that did not occur. We must look to the principles of private law for a solution to the problem of distribution of surpluses. In so far as we are concerned with an agreement, we look to the law of contract; in so far as a trust arises, we look to the law of trusts. We are not concerned with making some new law peculiar to pension surpluses.

196 The primary rule in construing an agreement or defining the terms of a trust is respect for the intention of the parties or, in the case of a trust, the intention of the settlor. The task of the court is to examine the language of the documents to ascertain what, on a fair reading, the parties intended. Unless there is a legal reason preventing it, the courts will seek to give effect to that intention. The search for an answer to the problem before us must therefore focus primarily on the documents relating to the plans and the intention of the parties, if any, with respect to a surplus arising under a defined benefits plan.

The Documents

197 It is my conclusion, after studying the documents and applying them to the plan as it stood at all relevant times, that apart from the reference in the 1978 restatement which provided that surplus should go to the employer, the documents are silent on the question of surplus. There is a dispute about whether the 1978 stipulation was a valid "amendment" to the original trust documents. As I see it, and for the reasons discussed below, it was a valid amendment and, as such, ought to stand. Alternatively, even if the 1978 stipulation were disregarded, the surplus would devolve on the employer under the doctrine of resulting trust.

198 The crux of the debate is Article V of the 1959 Trust Agreement:

ARTICLE V

MODIFICATION AND TERMINATION

1. Subject as herein and in the PLAN provided, the Company reserves the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the PLAN (including this Agreement) provided that no such amendment which affects the rights, duties, compensation, or responsibilities of the Trustee shall be made without its consent, and provided further that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the FUND to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the PLAN as amended from time to time, and for the payment of taxes or other assessments as provided in paragraph 2 of Article II hereof, and the expenses and compensation of the Trustee as provided in paragraph 4 of Article IV hereof. [Emphasis added.]

199 Moore C.J. upheld in the Court of Appeal, interpreted the underlined portion of Article V as precluding any amendment of the plan which would have the effect of conferring money in the plan to anyone other than the beneficiaries. Reasoning that the surplus here in issue constituted funds under the plan, he concluded that the 1978 amendment was ineffective and that, consequently, the surplus must go to the employees. Cory J., as I understand his reasons, adopts the same approach.

200 The problematic step in this logical process is the assumption that the surplus arising after conversion to a defined benefit plan in 1966 forms part of the fund to which Article V is addressed. For the reasons outlined earlier, at the time Article V was drafted, there could never be a surplus. It was simply impossible to have a surplus under the defined contribution plan then in place. The surplus was a new entity, created years later as a consequence of converting the plan to a defined benefits plan. The "FUND" referred to in Article V cannot therefore refer to the surplus with which we are concerned. Rather, it refers to the fund in place under the defined contributions scheme. This is apparent from the latter part of Article V, which permits deductions for only those things which would be deductible under a defined contribution policy: "taxes or other assessments as provided in paragraph 2 of Article II hereof, and the expenses and compensation of the Trustee as provided in paragraph 4 of Article IV hereof".

201 With respect, I think Moore C.J. gave a broader scope to Article V of the 1959 Trust Agreement than it can reasonably be made to bear. In effect, he read "FUND", which at the time of drafting could not by definition have included any surplus, as extending to the surplus which later arises under quite a different arrangement.

202 The problem is a common one. A contract or trust deed is drafted. Later, a new, unanticipated situation arises. The first question is whether the new situation falls within an existing term of the document. Courts facing this question look at the factual context in which it was drafted. They consider the wording against this background to determine whether the new situation can reasonably be said to fall within this clause. If the answer to this question is negative, the court may go on to ask itself whether a term covering the new situation can be implied, whether as a matter of fact, law or custom: see Treitel, The Law of Contract (4th ed. 1975), at p. 128. The limiting principle is that the courts will not make a new contract or trust to which the parties have not agreed: Murphy v. McSorley, [1929] S.C.R. 542.

203 In the case at bar, there is nothing in the evidence that suggests that the parties who signed Article V intended it to apply to a surplus which might arise under a conversion of the plan to a defined benefit plan. There is no suggestion that conversion of the plan was foreseen, much less that a surplus might arise under such a scheme. Article V by its terms clearly applies to the specific defined contribution plan which the parties were putting in place in 1959. It refers to a specific "PLAN", the 1959 plan, and, consistent with a defined contribution plan, it treats all funds as falling into one of two categories -- benefits payable to the employees and expenses. Finally, to apply Article V to a surplus under the unforeseen defined benefit plan would, for the reasons enunciated earlier, produce a result which, if not anomalous, is out of step with the characteristics of a defined

benefits plan and the approach which has been taken to this problem in other jurisdictions. It is not reasonable, in my opinion, to conclude that Article V applies to the surplus that could only develop after conversion of the plan years later to a defined benefit plan.

204 The same considerations negate the possibility of implying a term that the provisions of Article V apply to the unforeseen surplus. An attempt to imply a term to cover an unforeseen factual situation will generally fail if it is not clear that the parties would have agreed to the term, or where one or both of the parties is shown not to have known of the new situation at the time of contracting: Treitel, supra, at pp. 129-130. There is no suggestion that the parties who signed Article V in 1959 knew about the possibility of a surplus; nor can it be said that they would have agreed that it should go to the employees had they foreseen it. Indeed, the inference from the 1978 provision that surplus go to the employer suggests the contrary.

205 I am thus led to conclude that Article V, drafted in the context of a defined contribution plan, should not be read as applying to the surplus which arose under the later defined benefit plan. It follows that the 1978 provision stipulating that the surplus should go to the employer is valid and determines the issue.

Express Trust

206 It is argued that the surplus here in question is impressed with an express trust in favour of the employees which prevents the employer from claiming it.

207 I note initially that this argument must be distinguished from the argument based on the doctrine of resulting trust. The doctrine of resulting trust does not deal with the classic express trust, but is rather an equitable doctrine permitting those who have an interest in funds held in the name of another to recover them. In the first case we are concerned with the interpretation of terms of an express trust document; in the latter about the application of a legal (equitable) doctrine to a given situation.

208 The 1959 plan created a trust. All contributions were made subject to the trust. This did not mean, however, that all contributions were payable to the employees. Under the 1959 plan, expenses and administrative fees were payable to those who earned them, and the balance was payable to the beneficiaries. Consistent with a defined contribution plan, these were the only two classes of disbursements.

209 When the plan was changed in 1966 to a defined benefits plan, the nature of the trust necessarily changed. For one thing, the two accounts which the trustee was obliged to hold under the 1959 plan, the Employee's Account and the Company Account, no longer made sense and were necessarily collapsed. For another, the benefits payable to the employees were redefined. The trustee's former obligation to pay out the balance in the member's share of the two accounts after expenses, was replaced with a new and different obligation to pay out the defined benefits. And finally, as the fund continued to operate in its new form, there appeared a new element; the surplus

which accumulated from year to year.

210 It appears that when the change was first made from a defined contribution to a defined benefit plan, no thought was given to the question of surplus. Certainly the 1966 plan made no reference to surplus. In theory, the actuarial projections should be so perfect that a surplus does not arise. But in reality, as the years passed, it became evident that a surplus was being generated. This new situation needed to be addressed. The response was the 1978 stipulation that any surplus which existed after all defined benefits and expenses had been met, was payable to the employer.

211 Against this background, we return to the obligations on the trustee. The situation, as I see it, was this. Under the 1966 plan the trustee was obliged to pay defined benefits to each entitled employee. The trustee was further required to pay all administrative expenses of the trust. In addition to these two obligations, however, the trustee, as the years passed, found itself holding a third fund which was attached neither by the obligation to pay out benefits nor the obligation to pay expenses -- the accumulating surplus. The original trust documents did not contemplate this fund and gave no guidance as to what to do with it.

212 The trustee was left with the following options with respect to the surplus. Prior to the 1978 stipulation, the trustee's only option, had the question of distribution of surplus arisen, would have been to apply to the court for a ruling. Had this occurred, the appropriate ruling would have been that it go to the employer on the principles of resulting trust, for the reasons discussed below. As it happened, however, a stipulation that the surplus go to the employer was made before the question of surplus distribution arose. For the reasons discussed earlier, that stipulation was valid. It follows that the surplus goes to the employer pursuant to the 1978 amendment.

213 It is contended that payment of the surplus to the employer constitutes revocation of a trust and that a trust cannot be revoked without express wording so permitting. This argument, however, fails because the surplus was an unanticipated development which was never contemplated by the original trust and was not addressed by any changes to the trust until 1978. The error in the respondents' submissions, as I see it, lies in assuming that the 1959 trust provisions apply to a surplus. In fact, they do not. All contributions fell into the trust, but to stop the analysis there is to beg the critical question: what was the trustee to do with the portion of the fund which became surplus after conversion of the plan to a defined benefit plan? The answer to that question does not amount to revocation of a trust, as the respondents suggest. Rather, it amounts to fulfilling the trust.

214 I conclude that the terms of the trust did not require that the surplus in question be paid to the employees. In 1966, when the possibility of a surplus first arose, the trust provided no guidance as to where a surplus would go in the event of termination. The 1978 amendment made it clear that it was payable to the employer. Therefore, under the terms of the trust, the employer is entitled to the surplus.

Resulting Trust

215 I have argued that under the terms of the governing documentation, and in particular the 1978 amendment which I consider valid, surplus contributions are returnable to the employer. If I were wrong in concluding that the documentation requires this result, the same conclusion would nevertheless flow from application of the doctrine of resulting trust.

216 Waters, Law of Trusts in Canada (2nd ed. 1984), at p. 299, describes the concept of resulting trust as follows:

> . . . a resulting trust arises whenever legal or equitable title to property is in one party's name, but that party, because he is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner, or to the person who did give value for it. [Emphasis in original.]

217 The concept of resulting trust does not depend on there being an express trust in existence. However, one of its applications is in the case where residual monies not designated to a particular person or purposes arise in an express trust. Where this happens in a charitable trust, the courts will order the residual sum cy-près, among all the creditors. Where the trust is non-charitable, the sum generally reverts to the settlor: see Waters, supra, at p. 322.

218 If the 1978 amendment as to surplus is invalid, these principles suggest that the doctrine of resulting trust requires that the surplus be available to the employer. The employer was responsible for ensuring a fund sufficient to meet all defined benefits owing to employees. As it turns out, the employer paid more than required for the purpose of the trust, the provision of benefits to all eligible employees. The residual sum should therefore return to the employer.

219 As noted earlier, the doctrine of resulting trust has been applied to this situation in Great Britain, with the result that surplus funds in defined benefit pension plans have been ordered paid to the employer. It has also been applied in Canada. The case of Re Canada Trust Co. and Cantol Ltd. (1979), 103 D.L.R. (3d) 109 (B.C.S.C.), raised similar issues as those before us. The first question was the validity of an amendment directing that surplus should revert to the employer. Gould J. found that the attempted amendment in that case was invalid. However, he went on to hold that the surplus reverted to the employer under the doctrine of resulting trust. He stated, at p. 111:

> The method which the board has employed [directors' resolution to allow reversion] does not accomplish the purpose for which it was intended. If this method is ineffectual, how then must the money remaining in the fund be distributed?
>
> . . .
>
> The purposes of this trust simply did not exhaust the fund and the outcome here, i.e., a surplus balance of $31,163.38, was not foreseen by the respondent Dependable. The situation appears to be one where a resulting trust arises by

operation of the law. [Emphasis added.]

220 My colleague seeks to distinguish this case on two grounds. He questions Gould J.'s conclusion that there could be a resulting trust in favour of the employer because of a clause in the plan providing that no amendment "shall permit any part of the trust fund to revert to or to be recoverable by the Company" (p. 110). But Gould J. was not talking about reversion under an amendment (having found the attempt to amend had failed), but rather about reversion by operation of law. My colleague also points to the fact that unlike the plan at bar, the plan in Cantol was non-contributory. But as we have seen, even where employees contribute to a defined benefit plan, that contribution is taken to be fully satisfied by receipt of the defined benefits: Davis v. Richards & Wallington Industries Ltd., supra. Once the defined obligations to the employees have been paid, it is difficult to argue that the employees have an interest in the surplus on the basis of a resulting trust in their favour. It is in the nature of a defined benefit that it represents a fixed amount to which the employee is entitled from the plan. The employee accepts this fixed amount in lieu of the greater or lesser amounts he or she might obtain on a defined contribution plan. Generally, this is thought to be in the employee's interest.

221 To put it another way, once the stipulated benefit is paid, the employee is no longer a beneficiary -- he or she has exhausted his or her rights under the plan. As Gould J. put it in Cantol, at p. 111, "[a]ll of the beneficiaries have been paid off in accordance with [the trust] provisions, and no beneficiaries remain in any of the categories". Moreover, the complications of holding otherwise appear significant. As Scott J. points out in Davis, supra, at p. 595, different employees contribute different amounts, and often receive benefits disproportionate to their contributions, depending on when they started working, how long they have been working, and other factors. The task of restoring to each employee his or her fair share of any surplus would be impossible. I can do no better than echo the query of Scott J.: "How can a resulting trust work as between the various employees inter se? I do not think it can and I do not see why equity should impute to them an intention that would lead to an unworkable result."

Conclusion

222 I conclude that the surplus in the Catalytic plan should revert to the employer. It is not touched by Article V of the 1959 agreement, with the result that the 1978 provision for its disposition is determinative. There is nothing in the Trust Agreement which requires its return to the beneficiaries, once their stipulated entitlement under the agreement has been fully met. If, in the alternative, the 1978 provision does not settle the matter, the doctrine of resulting trust would require that the surplus revert to the employer.

223 I would dispose of the appeals as proposed by Cory J., except on the question of the distribution of surplus in the Catalytic fund, where I would allow the appeal with costs.

TAB 3

Case Name:

Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)

Monsanto Canada Inc., appellant;
v.
Superintendent of Financial Services, respondent.
And between
Association of Canadian Pension Management, appellant;
v.
Superintendent of Financial Services, respondent, and Attorney General of Canada, National Trust Company, Nicole Lacroix, R. M. Smallhorn, D. G. Halsall, S. J. Galbraith, S. W. (Bud) Wesley, Canadian Labour Congress and Ontario Federation of Labour, interveners.

[2004] S.C.J. No. 51

[2004] A.C.S. no 51

2004 SCC 54

2004 CSC 54

[2004] 3 S.C.R. 152

[2004] 3 R.C.S. 152

242 D.L.R. (4th) 193

324 N.R. 259

J.E. 2004-1546

189 O.A.C. 201

17 Admin. L.R. (4th) 1

45 B.L.R. (3d) 161

41 C.C.P.B. 106

2004 CarswellOnt 3172

132 A.C.W.S. (3d) 579

File No.: 29586.

Supreme Court of Canada

Heard: February 16, 2004;
Judgment: July 29, 2004.

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

(51 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Catchwords:

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

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

Summary:

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

Superintendent's decision. The Court of Appeal dismissed the appeal.

Held: The appeal should be dismissed.

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

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

The scheme of the *Pension Benefits Act* and of the regulations also supports the ordinary and grammatical meaning of s. 70(6). Delaying the distribution would not be consonant with the provisions that make distribution of surplus assets an intended part of the wind-up process, whether the wind-up is in whole or in part. In addition, the statutory scheme makes an important distinction between continuing plans and winding-up plans. The interpretation of s. 70(6) herein proposed is consistent with the logic of this aspect of the statutory scheme and the legislature's choice to treat partial wind-ups in the same manner as full wind-ups.

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

indefinitely tied to an employer that laid them off.

Cases Cited

Discussed: Schmidt v. Air Products Canada Ltd., [1994] 2 S.C.R. 611; referred to: Barrie Public Utilities v. Canadian Cable Television Assn., [2003] 1 S.C.R. 476, 2003 SCC 28; Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc., [2001] 2 S.C.R. 100, 2001 SCC 36; Voice Construction Ltd. v. Construction & General Workers' Union, Local 92, [2004] 1 S.C.R. 609, 2004 SCC 23; Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982 ; Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247, 2003 SCC 20; Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825; National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324; GenCorp Canada Inc. v. Ontario (Superintendent, Pensions) (1998), 158 D.L.R. (4th) 497; Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817; Dr. Q v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226, 2003 SCC 19; Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748; Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, 2002 SCC 42; R. v. Campbell, [1999] 1 S.C.R. 565; Firestone Canada Inc. v. Ontario (Pension Commission) (1990), 1 O.R. (3d) 122.

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O. Reg. 103/66, s. 11 [am. O. Reg. 91/69, s. 3].

O. Reg. 708/87, ss. 7a [ad. O. Reg. 100/88, s. 1], 7c [ad. O. Reg. 412/90, s. 1].

R.R.O. 1980, Reg. 746, s. 21(2) [rep. & sub. O. Reg. 31/87, s. 1].

R.R.O. 1990, Reg. 909, ss. 1(2) "going concern valuation" [rep. & sub. O. Reg. 144/00, s. 1(2)], 4(1), 8 [am. O. Reg. 743/91, s. 1; am. O. Reg. 307/98, s. 4; am. O. Reg. 444/03, s. 1], 9 [rep. & sub. O. Reg. 665/94, s. 1], 10 [am. idem, s. 2; am. O. Reg. 307/98, s. 5], 10.1 [ad. O. Reg. 286/97, s. 1; am. O. Reg. 307/98, s. 6], 13(1) [am. O. Reg. 712/92, s. 9], (1.1) [ad. idem; am. O. Reg. 144/00, s. 8(1)], 16 [am. O. Reg. 712/92, s. 11; am. O. Reg. 144/00, s. 11], 25 [am. O. Reg. 629/92, s. 3; am. O. Reg. 712/92, s. 15; am. O. Reg. 307/98, s. 10], 26, 28(5) [am. O. Reg. 712/92, s. 16; am. O. Reg. 307/98, s. 12], (6) [am. O. Reg. 307/98, s. 12], 28.1 [ad. O. Reg. 144/00, s. 22].

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History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (2002), 62 O.R. (3d) 305, 220 D.L.R. (4th) 385, 166 O.A.C. 131, 29 B.L.R. (3d) 18, 21 C.C.E.L. (3d) 11, 32 C.C.P.B. 248, [2002] O.J. No. 4407 (QL), affirming a decision of the Superior Court of Justice (Divisional Court) (2001), 198 D.L.R. (4th) 109, 144 O.A.C. 204, 10 C.C.E.L. (3d) 257, 27 C.C.P.B. 82, [2001] O.J. No. 963 (QL), setting aside the order of the Financial Services Tribunal (2000), 3 B.L.R. (3d) 99, 50 C.C.E.L. (2d) 303, 23 C.C.P.B. 148. Appeal dismissed.

Counsel:

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The judgment of the Court was delivered by

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

2 In particular, does s. 70(6) of the Ontario *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("Act"), require the distribution of a proportional share of actuarial surplus when a defined benefit pension plan is partially wound up? The Superintendent of Financial Services answered this question in the affirmative. She refused to approve the partial wind-up report of the appellant, Monsanto Canada Inc. ("Monsanto"), for failing to provide for the distribution of surplus assets related to the part of the Pension Plan being wound up. A majority of the Financial Services Tribunal ("Tribunal") disagreed with the Superintendent and ordered her to approve the report: (2000), 3 B.L.R (3d) 99. The majority held that s. 70(6) provides no more than a right to participate in surplus distribution when, if ever, the Plan fully winds up. The Ontario Divisional Court overturned the Tribunal on appeal ((2001), 198 D.L.R. (4th) 109) and the Court of Appeal agreed ((2002), 62 O.R. (3d) 305). Monsanto and the Association of Canadian Pension Management now appeal to this Court. The

appeal, for the reasons that follow, should be dismissed.

I. Facts

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

4 One of the bases for the Superintendent's refusal to approve Monsanto's report was the failure to provide for the distribution of this surplus on partial wind-up, in accordance with s. 70(6) of the Act. This is the only ground still in issue before this Court as the other bases for refusal were not pursued on this appeal. Also noteworthy is the fact that this matter is preliminary to the question of surplus entitlement, which is not affected by this decision and will need to be determined at a later date.

II. Issue

5 The only issue in this appeal is whether the Tribunal properly interpreted s. 70(6) of the Act as not requiring distribution of the actuarial surplus on a partial plan wind-up. Thus, the analysis must proceed in two stages. First, the appropriate standard of review of the Tribunal's decision must be determined. Second, the Tribunal's interpretation of s. 70(6) must be measured against this standard. All of the relevant legislative provisions are annexed at the end of these reasons.

III. Standard of Review

6 The courts below found, and the appellants and respondent agreed, that the appropriate standard of review of the Tribunal's decision was reasonableness. However, the standard of review is a question of law, and agreement between the parties cannot be determinative of the matter. An evaluation of the four factors comprising the pragmatic and functional approach is required to decide the appropriate level of deference this Court should grant in reviewing the decision.

A. *Privative Clause*

7 The legislature did not enact a privative clause to insulate the Tribunal's jurisdiction. To the

contrary, s. 91(1) of the Act provides for a statutory right of appeal to the Divisional Court. While not determinative, this factor suggests that the legislature intended less deference to be afforded to the Tribunal on judicial review (*Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28, at para. 11; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, 2001 SCC 36, at para. 27).

B. *Nature of the Problem*

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

C. *Relative Expertise*

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

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

11 On the other hand, the Tribunal does not have specific expertise in this area. The Tribunal is a general body that was created under the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28 ("*FSCOA*"), s. 20, to replace the specialized Pension Services Commission. It is responsible for adjudication in a variety of "regulated sector[s]" (*FSCOA*, s. 1), including co-operatives, credit unions, insurance, mortgage brokers, loans and trusts, and pensions (*FSCOA*, s. 1). In addition, the nature of the Tribunal's expertise is primarily adjudicative. Unlike the former Pension Services Commission or the current Financial Services Commission, the Tribunal has no policy functions as part of its pensions mandate (see *FSCOA*, s. 22). As noted in *Mattel Canada, supra*, and in *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324,

involvement in policy development will be an important consideration in evaluating a tribunal's expertise. Lastly, in appointing members to the Tribunal and assigning panels for hearings, the statute advises that, to the extent practicable, expertise and experience in the regulated sectors should be taken into account (*FSCOA*, ss. 6(4) and 7(2)). However, there is no requirement that members necessarily have special expertise in the subject matter of pensions. The Tribunal is a small entity of 6 to 12 members which further reduces the likelihood that any particular panel would have expertise in the matter being adjudicated (*FSCOA*, s. 6(3)).

12 Overall, there is little to indicate that the legislature intended to create a body with particular expertise over the statutory interpretation of the Act. The Tribunal would not have any greater expertise than the courts in construing s. 70(6). Thus, this factor also suggests a lower amount of deference is required to be given to the Tribunal's decisions on the issue of statutory interpretation.

D. *Purposes of the Legislation and the Provision*

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

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

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

15 Here, however, the Tribunal assumes a different role and function in relation to the statutory purpose of the particular provision at issue. The determination of the meaning of s. 70(6) is not "polycentric" in nature. In other words, s. 70(6) does not grant the Tribunal broad discretionary powers nor a range of policy-laden remedial choices that involve the balancing of multiple sets of interests of competing constituencies (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 56; *Pushpanathan, supra*, at para. 36; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at paras. 30-31). Moreover, the issues raised in s. 70(6) are legal in nature, rather than economic, broad, specialized, technical or scientific in such a way as to substantially deviate from the normal role of

the courts (*Dr. Q, supra*, at para. 31; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at paras. 48-49). Therefore, this factor also seems to indicate less deference be accorded to the Tribunal's interpretation.

E. *Conclusion on the Standard of Review*

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

IV. Statutory Interpretation of Section 70(6)

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

> **70.**...
>
> (6) On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.

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

19 The established approach to statutory interpretation was recently reiterated by Iacobucci J. in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

I will examine each of these factors in turn, beginning first with the background context.

A. *Historical Context*

20 Pension plans have a long history in Canada, first appearing in the late 19th century. However, it was not until after the Second World War that the development of pension plans flourished in tandem with the economic growth and prosperity of the era (see *Report of the Royal Commission on the Status of Pensions in Ontario* (1980), vol. I, at p. 35; R. L. Deaton, *The Political Economy of Pensions: Power, Politics and Social Change in Canada, Britain and the United States* (1989), at p. 79). In the early days, pensions were commonly regarded as gratuitous rewards for long and faithful service, subject to the discretion and financial health of the employer (see *Report of the Royal Commission on the Status of Pensions in Ontario, supra*, at p. 2; *Mercer Pension Manual* (loose-leaf ed.), at p. 1-9). However, particularly as pensions became a more familiar sight at the collective bargaining table, a competing conception as an enforceable employee right developed (see E. E. Gillese, "Pension Plans and the Law of Trusts" (1996), 75 *Can. Bar Rev.* 221, at pp. 226-27; Deaton, *supra*, at pp. 122-23). The enactment of minimum standards legislation in Ontario, first in 1963 and again in 1987, "considerably expanded the rights of plan members. It altered, again, the power balance between employers and employees in the matter of pensions" (Gillese, *supra*, at p. 228).

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

22 If, in a given year, the assets of the fund, evaluated as a going concern, are found to be insufficient to cover the current service cost, there is said to be an "unfunded liability" and the employer will be called upon to make up the deficit through contributions (see, generally, s. 4(1) of the *Pension Benefits Act* General Regulations, R.R.O. 1990, Reg. 909). If the plan is underfunded on wind-up, then benefits will be reduced, subject to the application in Ontario of the Pension Benefits Guarantee Fund (ss. 77 and 84(1) of the Act). In contrast, if the value of the assets are greater than originally estimated, the fund is said to have a surplus, being "the excess of the value of the assets of a pension fund related to a pension plan over the value of the liabilities under the pension plan" (s. 1 of the Act). The surplus is considered "actuarial" because it has not yet been concretely realized through the liquidation of assets and the payment of liabilities.

23 Consequently, in the 80s, the surplus issue became a hotly contested one. Employers claimed the surplus as the result of their assumption of risk, while employees maintained that the fund, including the surplus, represented deferred wages belonging to them. It was in this context that the legislature re-enacted s. 70(6) as part of the *Pension Benefits Act, 1987*, S.O. 1987, c. 35, virtually unchanged from the previous version introduced in 1969 (O. Reg. 103/66, s. 11, as am. by O. Reg. 91/69, s. 3; see Legislative Assembly of Ontario, *Hansard -- Official Report of Debates*, 33rd Parl., January 13, 1986 to June 25, 1987). Also at this time, definitions of "partial wind up" and "surplus" were included in the scheme. Concurrently, a moratorium was placed on surplus withdrawals from ongoing plans in 1986 (R.R.O. 1980, Reg. 746, s. 21(2), as am. by O. Reg. 31/87), which was extended to plans on wind-up in 1988 (O. Reg. 708/87, s. 7a (added by O. Reg. 100/88)). The surplus sharing regulation was enacted to replace the moratorium (O. Reg. 708/87, s. 7c (added by O. Reg. 412/90)), requiring that no payments be made from the surplus of a pension plan that is being wound up in whole or in part unless it is (a) made to or for the benefit of members, former members or persons other than the employer who are entitled to payments; or (b) made to the employer with the written agreement of a prescribed number of members (R.R.O. 1990, Reg. 909, s. 8(1)). This regulation, designed to encourage agreement and sharing between employers and employees, ceases to have effect after December 31, 2004 (Reg. 909, s. 8(3)).

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

B. *Grammatical and Ordinary Sense*

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

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

the right to participate in surplus distribution in a potential future full wind-up because it is only on final wind-up that an actual, rather than actuarial, surplus can exist. In my opinion, the former interpretation accords better with the ordinary and grammatical meaning of the section.

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

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

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

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

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

C. *Scheme of the Act*

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

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

the pension plan;

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

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

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

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

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

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

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

D. *Object of the Act*

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

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

39 Employers often argue that the risk and responsibility of a defined benefit plan are borne by the employer and, thus, it should be allowed the control and flexibility to manage the plan as it sees fit. It is contended that requiring distribution of surplus weighs the balance too heavily in favour of the employees and will result in funds being contributed to according to less cautious actuarial estimates, fewer defined benefit plans, and fewer private pension plans overall. While important considerations, these arguments are unpersuasive. First, the requirement of distribution is value-neutral to the question of entitlement, which must be determined separately under the provisions of the Plan and the Act. Second, the statutory scheme protects against underfunding by

requiring employers and administrators to follow accepted actuarial practice in their valuations (Reg. 909, s. 16). Lastly, the provision of pensions serves a number of labour market functions which benefit the corporate sector, including attracting a labour supply, reducing turnover, improving morale, increasing productivity and efficiency, promoting loyalty to the corporation, and so on (Deaton, *supra*, at p. 119). In short, there are many reasons for employers to maintain pension plans and a construction of s. 70(6) that is in accordance with the terms of the statute is unlikely to disrupt the balance between employer and employee interests.

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

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

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

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

44 Furthermore, the argument that actuarial surplus is notional and thus too unreliable to justify the liquidation of any Plan assets is unconvincing. Although the assessment of an actuarial surplus is of necessity an estimate, it does not follow that the distribution of surplus would be unsound. Actuarial estimates of pension values are used for many purposes, including the sale of corporations or divisions of corporations, the division of matrimonial property, and the taking of contribution holidays by employers. Further, while the actuarial assumptions at play can vary, some uniformity can be found by requiring particular methods of valuation for certain purposes. For instance, the regulations prescribe that a "going concern valuation" (defined in Reg. 909, s. 1(2)) be used for valuing continuing pension plans (see, e.g., Reg. 909, s. 13(1) or 26). In contrast, a "solvency valuation" or "wind-up valuation" can be used when plans are actually or notionally wound up. This is in line with the different purposes underlying the regulation of continuing as opposed to winding up plans. In the former, the main concern is capital regulation to ensure adequate contribution levels based on estimates of current service costs to maintain fund integrity. In the latter, for wind-ups in whole or in part, the main concern is severing the terminated part of the Plan and ensuring Affected Members receive their legal entitlements, if any, as beneficiaries through the distribution of assets related to the part of the Plan being wound up.

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

> Employees can claim no entitlement to surplus in an ongoing plan because it is not definite. The right to any surplus is crystallized only when the surplus becomes ascertainable upon termination of the plan. Therefore, the taking of a contribution holiday represents neither an encroachment upon the trust nor a reduction of accrued benefits.
>
> ...
>
> 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 distribution to occur at the time of the partial wind-up rather than later.

V. Conclusion

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

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

50 The vital importance of pension schemes in the modern labour market is evident. Pension funds are a significant asset for employers and an invaluable nest egg for an aging workforce. Legislative schemes that establish minimum standards and ensure the protection of employee benefits are an element of sound financial and social policy. The facilitation and encouragement of

pension plan participation advance the interests of employees, employers, and the public. As part of the legislature's statutory structure that aims to accommodate the interests of ongoing and terminated employees, it enacted s. 70(6) to require actual distribution of the pro rata share of actuarial surplus on plan wind-up, be it full or partial.

51 The appeal is dismissed with costs.

APPENDIX

Statutory Provisions

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

1. In this Act,

...

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

...

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

...

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

...

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

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

(a) the Superintendent;

(b) each member of the pension plan;
(c) each former member of the pension plan;
(d) each trade union that represents members of the pension plan;
(e) the advisory committee of the pension plan; and
(f) any other person entitled to a payment from the pension fund.

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

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

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

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

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

(a) there is a cessation or suspension of employer contributions to the pension fund;
(b) the employer fails to make contributions to the pension fund as required by this Act or the regulations;
(c) the employer is bankrupt within the meaning of the *Bankruptcy and Insolvency Act* (Canada);
(d) a significant number of members of the pension plan cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer or as a result of the reorganization of the business of the employer;
(e) all or a significant portion of the business carried on by the employer at a specific location is discontinued;

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

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

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

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

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

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

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

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

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

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

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

(d) such other information as is prescribed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) the Superintendent is satisfied, based on reports provided with the

application, that the pension plan has a surplus;

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

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

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

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

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

is retained in the pension fund as surplus;

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

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

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

are retained in the pension fund as surplus; and

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

...

(3) Subject to section 89 (hearing and appeal), the Superintendent shall not

consent to an application by an employer in respect of surplus in a pension plan that is being wound up in whole or in part unless,

(a) the Superintendent is satisfied, based on reports provided with the application, that the pension plan has a surplus;
(b) the pension plan provides for payment of surplus to the employer on the wind up of the pension plan;
(c) provision has been made for the payment of all liabilities of the pension plan as calculated for purposes of termination of the pension plan; and
(d) the applicant and the pension plan comply with all other requirements prescribed under other sections of this Act in respect of the payment of surplus money out of a pension fund.

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

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

1. Any pension in respect of employment in Ontario.
2. Any deferred pension in respect of employment in Ontario to which a former member is entitled, if the former member's employment or membership was terminated before the 1st day of January, 1988 and the former member was at least forty-five years of age and had at least ten years of continuous employment with the employer, or was a member of the pension plan for a continuous period of at least ten years, at the date of termination of employment.
3. A percentage of any defined pension benefits in respect of employment in Ontario to which a member or former member is entitled under section 36 or 37 (deferred pension), or both, if the member's or former member's employment or membership was terminated on or after the 1st day of January, 1988, equal to 20 per

cent if the combination of the member's or former member's age plus years of employment or membership in the pension plan equals fifty, plus an additional 2/3 of 1 per cent for each additional one-twelfth credit of age and employment or membership to a maximum of 100 per cent.

4. All additional voluntary contributions, and the interest thereon, made by members or former members while employed in Ontario.
5. The minimum value of all required contributions made to the pension plan by a member or former member in respect of employment in Ontario plus interest.
6. That part of a deferred pension guaranteed under this subsection to which a former spouse or same-sex partner of a member or of a former member is entitled under a domestic contract or an order under the *Family Law Act*.
7. Any pension to which a survivor of a former member is entitled under subsection 48(1) (death before commencement of payment).

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

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

1....

(2) In this Part,

...

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

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

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

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

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

(i) the employer,

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

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

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

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

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

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

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

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

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

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

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

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

...

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

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

(a) by indexing the benefits in accordance with a formula based upon increases in the annual Consumer Price Index;
(b) by providing an annual percentage increase in the amount of the benefits or an annual increase of a specified dollar amount; or
(c) by a combination of the methods described in clauses (a) and (b).

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

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

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

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

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

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

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

(ii) in the case of a proposed payment of money that is surplus out of a continuing pension plan to the employer, the employer has obtained the consent of 90 per cent of the former members who are in receipt of a pension payable from the pension fund, whose consent is required by subsection 10(2).

(2) The court-appointed representative is authorized to give the written agreement referred to in clause 8(1)(b) on behalf of the former members in receipt of a pension payable from the pension fund, who he or she represents.

However, the representative is not authorized to give written agreement on behalf of former members who have agreed or have objected to the payment from surplus.

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

13. (1) Within sixty days after the date of establishment of a plan, the administrator shall submit a report on the basis of a going concern valuation that sets out,

(a) the normal cost, in the first year during which the plan is registered and the rule for computing the normal cost in subsequent years up to the date of the next report;
(b) an estimate of the normal cost, in the subsequent years up to the date of the next report;
(c) where applicable, the estimated aggregate employee contributions to the pension plan during each year up to the date of the succeeding report;
(d) the past service unfunded actuarial liability, if any, under the pension plan as at the date on which the plan qualified for registration;
(e) the special payments required to liquidate the past service unfunded actuarial liability in accordance with section 5;
(f) any other going concern unfunded liability;
(g) the special payments required to liquidate any going concern unfunded liability referred to in clause (f);
(j) where the plan provides for an escalated adjustment, whether and to what extent,

(i) liability for the future cost of the adjustment has been included in the determination of any going concern unfunded actuarial liability, or
(ii) the cost for the escalated adjustment is included in the

normal cost.

(1.1) The report shall also set out, on the basis of a solvency valuation,

(a) whether there is a solvency deficiency;

(b) if there is a solvency deficiency, the amount of the solvency deficiency and the special payments required to liquidate it in accordance with section 5;
(c) whether the transfer ratio is less than one; and
(d) if the transfer ratio is less than one, the transfer ratio.

16. (1) An actuary preparing a report under section 70 of the Act or under section 3, 5.3, 13 or 14 shall use methods and actuarial assumptions that are consistent with accepted actuarial practice and with the requirements of the Act and this Regulation.

(2) An actuary preparing a report under section 4 shall use his or her best effort to meet the standards set out in subsection (1).

(3) The person preparing a report referred to in subsection (1) or (2) shall certify that it meets the requirements of subsection (1) or (2), as the case may be.

(4) The person preparing a report referred to in subsection (2) shall disclose in the report any respect in which the report does not meet the standards set out in subsection (1).

25. (1) The following information is prescribed for the purposes of a notice respecting an application under subsection 78(2) of the Act:

1. The name of the pension plan and its provincial registration number.
2. The valuation date of the report provided with the application and the amount of surplus in the pension plan.
3. The surplus attributable to employee and employer contributions.
4. The amount of surplus withdrawal requested.

5. A statement that submissions in respect of the application may be made in writing to the Superintendent within thirty days after receipt of the notice.
6. The contractual authority for surplus withdrawals.
7. Notice that copies of the report and certificates filed with the Superintendent in support of the surplus request are available for review at the offices of the employer and information on how copies of the report may be obtained.

(2) The employer shall file a copy of the notice required by subsection 78(2) of the Act before transmitting it to the persons required by that subsection.

...

(4) An application by an employer for the consent of the Superintendent to a payment from a continuing pension plan under subsection 78(1) of the Act shall be accompanied by a certified copy of the notice referred to in subsection (1), a statement that subsection 78(2) of the Act has been complied with, details as to the classes of persons who received notice and the date the last notice was distributed.

(5) An application referred to in subsection (1) shall be accompanied by a current report prepared on the basis of a going concern valuation demonstrating that a surplus as determined in accordance with section 26 exists and that there are no special payments required to be made to the pension fund.

26. (1) For purposes of determining surplus in a continuing pension plan,

(a) the value of the assets of the pension plan shall be calculated on the basis of the market value of the investments held by the pension fund plus any cash balances and accrued or receivable items; and
(b) the value of the liabilities of the pension plan shall be the greater of the calculation of,

(i) the going concern liabilities, or
(ii) the solvency liabilities.

(2) For purposes of subclauses 79(1)(d)(ii) and 79(1)(e)(ii) of the Act, the liabilities of the pension plan shall be calculated as the solvency liabilities.

28.. . .

(5) A notice required under subsection 78(2) of the Act for a plan that is being wound up shall contain,

(a) the name of the pension plan and its provincial registration number;
(b) the valuation date of the report provided with the application and amount of surplus in the pension plan;
(c) the surplus attributable to employee and employer contributions;
(d) the amount of surplus withdrawal requested;
(e) a statement that submissions may be made in writing to the Superintendent within thirty days of receipt of the notice;
(f) the contractual authority for surplus reversion; and
(g) notice that copies of the wind up report filed with the Superintendent in support of the surplus request are available for review at the offices of the employer and information on how copies of the report may be obtained.

(6) An application by an employer for the consent of the Superintendent to a payment from a pension plan that is being wound up shall be accompanied by a certified copy of the notice referred to in subsection (5), a statement that subsection 78(2) of the Act has been complied with, the date the last notice was distributed and details as to the classes of persons who received notice.

28.1 (1) This section applies if there is a surplus on the wind up of a pension plan in whole or in part.

(2) The administrator of the pension plan shall give to each person entitled to a pension, deferred pension or other benefit or to a refund in respect of the pension plan a statement setting out the following information:

1. The name of the pension plan and its provincial registration number.
2. The member's name and date of birth.

3. The method of distributing the surplus assets.
4. The formula for allocating the surplus among the plan beneficiaries.
5. An estimate of the amount allocated to the person.
6. The options available to the person concerning the method for distributing the amount allocated to the person and the period within which any election respecting the options must be made.
7. The method of distribution that will be used, if an election is not made within the specified period.
8. The name and details of the person to be contacted with respect to any questions arising out of the statement.
9. Notice that the allocation of surplus and the options available for distributing it are subject to the approval of the Superintendent and of the Canada Customs and Revenue Agency, and may be adjusted accordingly.

(3) *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28

1. In this Act,

...

"regulated sector" means a sector that consists of,

(a) all co-operative corporations to which the *Co-operative Corporations Act* applies;
(b) all credit unions, caisses populaires and leagues to which the *Credit Unions and Caisses Populaires Act, 1994* applies;
(c) all persons engaged in the business of insurance and governed by the *Insurance Act*;
(d) all corporations registered or incorporated under the *Loan and Trust Corporations Act*;
(e) all mortgage brokers registered under the *Mortgage Brokers Act*; or
(f) all persons who establish or administer a pension plan within the meaning of the *Pension Benefits Act* and all employers or other persons on their behalf who are required to contribute to any such pension plan;

6. (1) There is hereby established a tribunal to be known in English as the Financial Services Tribunal and in French as Tribunal des services financiers.

...

(3) In addition to the chair and the two vice-chairs, the Lieutenant Governor in Council shall appoint at least six persons, and not more than 12, as members of the Tribunal for the length of time not exceeding three years that the Lieutenant Governor in Council specifies and may reappoint any member to the Tribunal.

(4) In appointing members to the Tribunal, the Lieutenant Governor in Council shall, to the extent practicable, appoint members who have experience and expertise in the regulated sectors.

7. (1) A matter referred to the Tribunal may be heard and determined by a panel consisting of one or more members of the Tribunal, as assigned by the chair of the Tribunal.

(2) In assigning members of the Tribunal to a panel, the chair shall take into consideration the requirements, if any, for experience and expertise to enable the panel to decide the issues raised in any matter before the Tribunal.

20. The Tribunal has exclusive jurisdiction to,

(a) exercise the powers conferred on it under this Act and every other Act that confers powers on or assigns duties to it; and
(b) determine all questions of fact or law that arise in any proceeding before it under any Act mentioned in clause (a).

21.... .

(4) An order of the Tribunal is final and conclusive for all purposes unless the Act under which the Tribunal made it provides for an appeal.

22. For a proceeding before the Tribunal, the Tribunal may,

(a) make rules for the practice and procedure to be observed;
(b) determine what constitutes adequate public notice;
(c) before or during the proceeding, conduct any inquiry or inspection that the Tribunal considers necessary; or
(d) in determining any matter, consider any relevant information obtained by the Tribunal in addition to evidence given at the proceeding, if the Tribunal first informs the parties to the proceeding of the additional information and gives them an opportunity to explain or refute it.

Solicitors:

Solicitors for the appellant Monsanto Canada Inc.: Borden Ladner Gervais, Toronto.

Solicitors for the appellant the Association of Canadian Pension Management: Blake, Cassels & Graydon, Toronto.

Solicitor for the respondent: Ministry of the Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitors for the intervener the National Trust Company: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the intervener Nicole Lacroix: Barnes, Sammon, Ottawa.

Solicitors for the interveners the Canadian Labour Congress and the Ontario Federation of Labour: Sack Goldblatt Mitchell, Toronto.

Solicitors for the interveners R. M. Smallhorn, D. G. Halsall, S. J. Galbraith and S. W. (Bud) Wesley: Koskie Minsky, Toronto.

---- End of Request ----
Download Request: Current Document: 1
Time Of Request: Thursday, December 15, 2016 10:43:12

TAB 4

December 17, 1996 HOUSE OF ASSEMBLY PROCEEDINGS Vol. XLIII No. 55

The House met at 2:00 p.m.

MR. SPEAKER (Snow): Order, please!

The members will have noted by now that there has been placed on each member's desk a personalized copy of the Bible, and this is presented by Gideons International, along with a letter which outlines the work that the Gideons International have been doing throughout the world.

In that regard the Chair would like to welcome a delegation to the Speaker's Gallery today, led by Mr. Laurie Chaulk, who is the field representative from Atlantic Canada, and Hazel Chaulk, the national president of the Ladies Auxiliary, and a number of representatives from the St. John's and Mount Pearl chapters of Gideon International.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: The hon. the Minister of Health.

MR. MATTHEWS: Thank you, Mr. Speaker.

I am delighted today to be joined in the Speaker's Gallery by a number of friends and colleagues from the Gideon organization, an organization with which I have had some association, and continue to, for the past twenty years.

For those of you who may not be familiar, in the unlikelihood that there is anybody who is not familiar with the organization known as Gideons International, I might just refresh your memory and mind by saying that it is an interdenominational group of business people and lay people who over the past seventy odd years have worked together across denominational lines to provide Scriptures to people in at least 172 countries of the world.

Mr. Speaker, the aim and objective of the organization is to ensure that individuals, to the greatest extent possible, have access to the Holy Scriptures for their personal use, and to that extent the Gideons have a long and historic record of programming that sees that happen in Grade V classes in all of our schools in the country where access is available, and that includes most of the schools of this Province.

In addition to that, of course, you will be familiar with the Gideon Bible as being something that is readily seen in hotel rooms, and in prisons and hospitals and other areas.

I am delighted as being one of the Gideon brethren that is here today to say on behalf of all members, I believe, of this Legislature, thank you to them for their consideration, for their diligence in not only ensuring that we have available to us in this Chamber and this House, as legislators, a copy of the Holy Scriptures, but also in the broader endeavour in which they work, and that is providing Scriptures generally around the world.

Thank you very much, Mr. Speaker, and thank you to the Gideons.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: The hon. the Opposition House Leader.

MR. H. HODDER: Thank you, Mr. Speaker.

I wish to join with my colleague, the Minister of Health, to share his comments relative to the work of the Gideons not just in Newfoundland and Labrador and throughout the country, indeed, throughout the world.

MR. SPEAKER: If the hon. the Minister speaks now, he will close the debate.

The hon. the Minister of Government Services and Lands.

MR. McLEAN: Thank you, Mr. Speaker.

Just a few notes to close off second reading of this bill.

Mr. Speaker, some of the points that have been made on the bill itself and the areas I think of importance are - certainly the portability of pensions is one of the key issues that we need to deal with. A number of other issues that have been brought forward, compared to the last pension benefits act, are the areas of eligibility for memberships, early retirement, spousal benefits and the division of benefits upon marriage break downs, as some of the hon. members have mentioned. The portability of pension benefits and the surplus distribution are all new items for this particular act and certainly such reform issues have served to encourage employee participation in pension plans.

Mr. Speaker, I would also say that the difference between the publicly funded pension plans and this private one, is that the private sector pension plans are required to operate on a fully funded basis. If unfunded liabilities occur, the public benefits bill provides strick payment procedures to eliminate any unfunded liabilities. As a result, a new bill will not impose financial difficulties to private plans since the plans are and have always been required to continually maintain assets in the fund to cover any incurred liabilities.

Mr. Speaker, this act certainly secures the future for people in the Province who are looking to obtain funds from a pension. This act provides enhanced pension benefit coverage for the people of the Province through the increased payments, procedures and conditions, as well as improved investment regulations and monitoring requirements, and the act promotes increased security of pension benefits promised.

Mr. Speaker, in response to the Member for Cape St. Francis, the previous act required that employees pay 9 per cent and the employer pay 1 per cent. In this new bill, it is 50/50. It is a 50 per cent rule.

Mr. Speaker, I would now move second reading of this bill.

On motion, a bill, "An Act Respecting Pension Benefits," read a second time, ordered referred to a Committee of the Whole House on tomorrow. (Bill No. 46)

TAB 5

Sun Indalex Finance, LLC *Appellant*

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville *Respondents*

- and -

George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors *Appellant*

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville *Respondents*

- and -

FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited *Appellant*

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville *Respondents*

- and -

United Steelworkers *Appellant*

Sun Indalex Finance, LLC *Appelante*

c.

Syndicat des Métallos, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie et Fred Granville *Intimés*

- et -

George L. Miller, syndic de faillite des débitrices Indalex É.-U., nommé en vertu du chapitre 7 *Appelant*

c.

Syndicat des Métallos, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie et Fred Granville *Intimés*

- et -

FTI Consulting Canada ULC, en sa qualité de contrôleur d'Indalex Limited désigné par le tribunal, au nom d'Indalex Limited *Appelante*

c.

Syndicat des Métallos, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie et Fred Granville *Intimés*

- et -

Syndicat des Métallos *Appelant*

2013 SCC 6 (CanLII)

v.

Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership) and Superintendent of Financial Services *Respondents*

and

Superintendent of Financial Services, Insolvency Institute of Canada, Canadian Labour Congress, Canadian Federation of Pensioners, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers Association *Interveners*

INDEXED AS: SUN INDALEX FINANCE, LLC *v.* UNITED STEELWORKERS

2013 SCC 6

File No.: 34308.

2012: June 5; 2013: February 1.

Present: McLachlin C.J. and LeBel, Deschamps, Abella, Rothstein, Cromwell and Moldaver JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Pensions — Bankruptcy and Insolvency — Priorities — Company who was both employer and administrator of pension plans seeking protection from creditors under Companies' Creditors Arrangement Act ("CCAA") — Pension funds not having sufficient assets to fulfill pension promises made to plan members — Company entering into debtor in possession ("DIP") financing allowing it to continue to operate — CCAA court granting priority to DIP lenders — Proceeds of sale of business insufficient to pay back DIP lenders — Whether pension wind-up deficiencies subject to deemed trust — If so, whether deemed trust superseded by CCAA priority by virtue of doctrine of federal paramountcy — Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 57(3), (4), 75(1)(a), (b) — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

c.

Morneau Shepell Ltd. (anciennement connue sous le nom de Morneau Sobeco, société en commandite) et Surintendant des services financiers *Intimés*

et

Surintendant des services financiers, Institut d'insolvabilité du Canada, Congrès du travail du Canada, Fédération canadienne des retraités, Association canadienne des professionnels de l'insolvabilité et de la réorganisation et Association des banquiers canadiens *Intervenants*

RÉPERTORIÉ : SUN INDALEX FINANCE, LLC *c.* SYNDICAT DES MÉTALLOS

2013 CSC 6

N° du greffe : 34308.

2012 : 5 juin; 2013 : 1er février.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Abella, Rothstein, Cromwell et Moldaver.

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

Pensions — Faillite et insolvabilité — Priorités — Société à la fois employeur et administrateur de régimes de retraite ayant demandé la protection contre ses créanciers en application de la Loi sur les arrangements avec les créanciers des compagnies (« LACC ») — Actif des caisses de retraite insuffisant pour verser les prestations promises aux participants des régimes — Financement obtenu par la société à titre de débiteur-exploitant (« DE ») lui ayant permis de poursuivre ses activités — Tribunal chargé d'appliquer la LACC ayant accordé priorité aux prêteurs DE — Insuffisance du produit de la vente pour rembourser les prêteurs DE — Les déficits de liquidation des régimes de retraite sont-ils visés par la fiducie réputée? — Dans l'affirmative, la prépondérance fédérale fait-elle en sorte que la priorité issue de l'application de la LACC a préséance sur la fiducie réputée? — Loi sur les régimes de retraite, L.R.O. 1990, ch. P.8, art. 57(3), (4), 75(1)a), b) — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36.

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Pensions — Trusts — Company who was both employer and administrator of pension plans seeking protection from creditors under CCAA — Pension funds not having sufficient assets to fulfill pension promises made to plan members — Whether pension wind-up deficiencies subject to deemed trust — Whether company as plan administrator breached fiduciary duties — Whether pension plan members are entitled to constructive trust.

Pensions — Fiducies — Société à la fois employeur et administrateur de régimes de retraite ayant demandé la protection contre ses créanciers en application de la LACC — Actif des caisses de retraite insuffisant pour verser les prestations promises aux participants des régimes — Les déficits de liquidation des régimes de retraite sont-ils visés par la fiducie réputée? — La société a-t-elle manqué à ses obligations fiduciaires d'administrateur des régimes? — Les participants des régimes de retraite ont-ils droit à une fiducie par interprétation?

Civil Procedure — Costs — Appeals — Standard of review — Whether Court of Appeal erred in costs endorsement concerning one party.

Procédure civile — Dépens — Appels — Norme de contrôle — La décision de la Cour d'appel sur les dépens d'une partie est-elle erronée?

Indalex Limited ("Indalex"), the sponsor and administrator of two employee pension plans, one for salaried employees and the other for executive employees, became insolvent. Indalex sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The salaried plan was being wound up when the *CCAA* proceedings began. The executive plan had been closed but not wound up. Both plans had wind-up deficiencies.

Indalex Limited (« Indalex »), le promoteur et l'administrateur de deux régimes de retraite, l'un pour les salariés, l'autre pour les cadres, est devenue insolvable. Elle a demandé la protection contre ses créanciers sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). Le régime des salariés était en cours de liquidation lorsque la procédure fondée sur la *LACC* a été engagée. Le régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé. Les deux régimes accusaient un déficit de liquidation.

In a series of court-sanctioned steps, the company was authorized to enter into debtor in possession ("DIP") financing in order to allow it to continue to operate. The *CCAA* court granted the DIP lenders, a syndicate of pre-filing senior secured creditors, priority over the claims of all other creditors. Repayment of these amounts was guaranteed by Indalex U.S.

Une série de mesures avalisées par le tribunal a permis à la société d'obtenir un financement de débiteur-exploitant (« DE ») et de poursuivre ses activités. Le tribunal chargé de l'application de la *LACC* a accordé aux prêteurs DE, un consortium composé de créanciers qui bénéficiaient d'une garantie de premier rang avant le début de la procédure, une priorité sur tous les autres créanciers. Le remboursement des sommes empruntées était garanti par Indalex É.-U.

Ultimately, with the approval of the *CCAA* court, Indalex sold its business but the purchaser did not assume pension liabilities. The proceeds of the sale were not sufficient to pay back the DIP lenders and so Indalex U.S., as guarantor, paid the shortfall and stepped into the shoes of the DIP lenders in terms of priority. The *CCAA* court authorized a payment in accordance with the priority but ordered an amount be held in reserve, leaving the plan members' arguments on their rights to the proceeds of the sale open for determination later.

Finalement, sur approbation du tribunal appliquant la *LACC*, Indalex a vendu son entreprise, mais l'acquéreur n'a pas repris à son compte les engagements de retraite. Le produit de la vente n'étant pas suffisant pour rembourser les prêteurs DE, Indalex É.-U., à titre de caution, a payé la différence et a acquis de ce fait la créance prioritaire des prêteurs DE. Le tribunal a autorisé le paiement conformément à l'ordre de priorité, mais il a également ordonné la retenue de fonds en réserve, remettant à plus tard l'examen de l'argumentation des participants relative à leur droit au produit de la vente.

The plan members challenged the priority granted in the *CCAA* proceedings. They claimed that they had priority in the amount of the wind-up deficiency by virtue of a statutory deemed trust under s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and a constructive trust arising from Indalex's alleged breaches

Les participants des régimes ont contesté la priorité accordée dans le cadre de la procédure fondée sur la *LACC*. Ils ont fait valoir qu'ils avaient priorité pour le montant du déficit de liquidation en raison de la fiducie réputée créée par le par. 57(4) de la *Loi sur les régimes de retraite*, L.R.O. 1990, ch. P.8 (« *LRR* »), et de la fiducie

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of fiduciary duty as administrator of the pension funds. The judge at first instance dismissed the plan members' motions concluding that the deemed trust did not apply to wind up deficiencies. He held that, with respect to the wind-up deficiency, the plan members were unsecured creditors. The Court of Appeal reversed this ruling and held that the pension plan wind-up deficiencies were subject to deemed and constructive trusts which had priority over the DIP financing priority and over other secured creditors. In addition, the Court of Appeal rejected a claim brought by the United Steelworkers, which represented some members of the salaried plan, seeking payment of its costs from the latter's pension fund.

Held (LeBel and Abella JJ. dissenting): The Sun Indalex Finance, George L. Miller and FTI Consulting appeals should be allowed.

Held: The United Steelworkers appeal should be dismissed.

(1) *Statutory Deemed Trust*

Per Deschamps and Moldaver JJ.: It is common ground that the contributions provided for in s. 75(1)(a) of the *PBA* are covered by the deemed trust contemplated by s. 57(4) of the *PBA*. The only question is whether this statutory deemed trust also applies to the wind-up deficiency payments required by s. 75(1)(b). The response to this question as it relates to the salaried employees is affirmative in view of the provision's wording, context and purpose. The situation is different with respect to the executive plan as s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up.

The wind-up deemed trust provision (s. 57(4) *PBA*) does not place an express limit on the "employer contributions accrued to the date of the wind up but not yet due". Section 75(1)(a) explicitly refers to "an amount equal to the total of all payments" that have *accrued*, even those that were not yet due as of the date of the wind up, whereas s. 75(1)(b) contemplates an "amount" that is calculated on the basis of the value of assets and of liabilities that have *accrued* when the plan is wound up. Since both the amount with respect to payments (s. 75(1)(a)) and the one ascertained by subtracting the assets from the liabilities accrued as of the date of the wind up (s. 75(1)(b)) are to be paid upon wind up as employer contributions, they are both included in the ordinary meaning of the words of

par interprétation résultant de manquements allégués d'Indalex à son obligation fiduciaire d'administrateur des régimes. En première instance, le juge a rejeté les motions des participants, concluant que la fiducie réputée ne s'appliquait pas aux déficits de liquidation. Il a conclu que, pour ce qui était du déficit de liquidation, les participants étaient des créanciers chirographaires. La Cour d'appel a infirmé la décision et statué que les déficits de liquidation des régimes de retraite faisaient l'objet d'une fiducie réputée et d'une fiducie par interprétation qui prenaient rang avant la créance des prêteurs DE bénéficiant d'une priorité et celles des autres créanciers garantis. En outre, elle a rejeté la prétention du Syndicat des Métallos, qui représentait quelques-uns des participants du régime des salariés, à savoir qu'il avait droit au paiement de ses dépens par prélèvement sur la caisse de retraite des salariés.

Arrêt (les juges LeBel et Abella sont dissidents) : Les pourvois interjetés par Sun Indalex Finance, George L. Miller et FTI Consulting sont accueillis.

Arrêt : Le pourvoi interjeté par le Syndicat des Métallos est rejeté.

(1) *La fiducie réputée d'origine législative*

Les juges Deschamps et Moldaver : Il est bien établi que la fiducie réputée créée par le par. 57(4) de la *LRR* s'applique aux cotisations visées à l'al. 75(1)a) de la *LRR*. La seule question est de savoir si cette fiducie réputée d'origine législative s'applique aussi aux paiements au titre du déficit de liquidation exigés par l'al. 75(1)b). Dans le cas des salariés, la réponse est oui, compte tenu du texte, du contexte et de l'objet par. 57(4). Il n'en va pas de même pour le régime des cadres étant donné que cette disposition prévoit que la fiducie réputée en cas de liquidation ne prend naissance qu'à la liquidation du régime.

Le paragraphe 57(4) de la *LRR*, qui crée la fiducie réputée en cas de liquidation, ne comporte aucune limite expresse aux « cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues ». L'alinéa 75(1)a) prévoit expressément que l'employeur verse « un montant égal au total de tous les paiements » *accumulés*, même s'ils ne sont pas encore dus à la date de la liquidation, tandis que l'al. 75(1)b) parle d'un « montant » calculé à partir de la valeur de l'actif et du passif *accumulés*, lorsque le régime est liquidé. Puisque le montant des paiements (al. 75(1)a)) et le montant établi en soustrayant l'actif du passif accumulé à la date de la liquidation (al. 75(1)b)) doivent tous les deux être versés à la liquidation à titre de cotisations de l'employeur, ils entrent tous les deux dans le sens ordinaire des mots

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s. 57(4) of the *PBA*: "amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations".

The time when the calculation is actually made is not relevant as long as the liabilities are assessed as of the date of the wind up. The fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes. As a result, the words "contributions accrued" can encompass the contributions mandated by s. 75(1)(b) of the *PBA*.

It can be seen from the legislative history that the protection has expanded from (1) only the service contributions that were due, to (2) amounts payable calculated as if the plan had been wound up, to (3) amounts that were due and had accrued upon wind up but excluding the wind-up deficiency payments, to (4) all amounts due and accrued upon wind up. Therefore, the legislative history leads to the conclusion that adopting a narrow interpretation that would dissociate the employer's payment provided for in s. 75(1)(b) of the *PBA* from the one provided for in s. 75(1)(a) would be contrary to the Ontario legislature's trend toward broadening the protection.

The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. The remedial purpose favours an approach that includes all wind-up payments in the value of the deemed trust. In this case, the Court of Appeal correctly held with respect to the salaried plan, that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

Per LeBel and Abella JJ.: There is agreement with the reasons of Deschamps J. on the statutory deemed trust issue.

Per McLachlin C.J. and Rothstein and Cromwell JJ.: Given that there can be no deemed trust for the executive plan because that plan had not been wound up at the relevant date, the main issue in connection with the salaried plan boils down to the narrow statutory interpretative question of whether the wind-up deficiency provided for in s. 75(1)(b) is "accrued to the date of the wind up" as required by s. 57(4) of the *PBA*.

When the term "accrued" is used in relation to a sum of money, it will generally refer to an amount that is at the present time either quantified or exactly quantifiable

employés au par. 57(4) de la *LRR* : « montant égal aux cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements ».

La date où s'effectue le calcul est sans importance du moment que le passif est évalué à la date de la liquidation. Le fait que le montant précis des cotisations n'est pas établi au moment de la liquidation ne confère pas aux cotisations un caractère éventuel qui ferait en sorte qu'elles ne seraient pas accumulées d'un point de vue comptable. On peut donc considérer que le passif « accumulé » englobe les cotisations exigées à l'al. 75(1)b) de la *LRR*.

L'historique législatif montre que la protection, qui couvrait d'abord (1) uniquement les cotisations dues, s'est étendue (2) aux montants payables calculés comme s'il y avait liquidation du régime, (3) puis aux montants dus ou accumulés à la liquidation, à l'exclusion des paiements au titre du déficit de liquidation (4) et, enfin, à tous les montants dus ou accumulés à la liquidation. L'historique législatif mène donc à la conclusion qu'une interprétation étroite qui dissocierait le paiement requis de l'employeur par l'al. 75(1)b) de la *LRR* de celui exigé à l'al. 75(1)a) irait à l'encontre de la tendance du législateur ontarien à offrir une protection de plus en plus étendue.

La disposition qui crée une fiducie réputée a une vocation réparatrice. Elle vise à protéger les intérêts des participants. Cette fin réparatrice favorise une interprétation qui inclut tous les paiements à la liquidation dans la valeur de la fiducie réputée. En l'espèce, c'est à bon droit que la Cour d'appel a jugé qu'Indalex était réputée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation du régime des salariés.

Les juges LeBel et Abella : Il y a accord avec les motifs de la juge Deschamps sur la question de la fiducie réputée d'origine législative.

La juge en chef McLachlin et les juges Rothstein et Cromwell : Étant donné qu'il ne peut y avoir de fiducie réputée au bénéfice du régime des cadres, celui-ci n'ayant pas été liquidé à la date considérée, il s'agit donc essentiellement — pour ce qui concerne le régime des salariés — d'interpréter une disposition de la loi et de déterminer si le déficit de liquidation décrit à l'al. 75(1)b) est « accumul[é] à la date de la liquidation » comme l'exige le par. 57(4) de la *LRR*.

Lorsque le terme « accumulé » [et plus encore son équivalent anglais « *accrued* »] est employé de pair avec une somme, il renvoie généralement à un élément

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but which may or may not be due. In the present case, s. 57(4) uses the word "accrued" in contrast to the word "due". Given the ordinary meaning of the word "accrued", the wind-up deficiency cannot be said to have "accrued" to the date of wind up. The extent of the wind-up deficiency depends on employee rights that arise only upon wind up and with respect to which employees make elections only after wind up. The wind-up deficiency therefore is neither ascertained nor ascertainable on the date fixed for wind up.

The broader statutory context reinforces the view according to which the most plausible grammatical and ordinary sense of the words "accrued to the date of wind up" is that the amounts referred to are precisely ascertained immediately before the effective date of the plan's wind up. Moreover, the legislative evolution and history of the provisions at issue show that the legislature never intended to include the wind-up deficiency in a statutory deemed trust. Rather, they reinforce the legislative intent to *exclude* from the deemed trust liabilities that arise only *on* the date of wind up.

The legislation differentiates between two types of employer liability relevant to this case. The first is the contributions required to cover current service costs and any other payments that are either due or have accrued on a daily basis up to the relevant time. These are the payments referred to in the current s. 75(1)(a), that is, payments due or accrued but not paid. The second relates to additional contributions required when a plan is wound up which I have referred to as the wind-up deficiency. These payments are addressed in s. 75(1)(b). The legislative history and evolution show that the deemed trusts under s. 57(3) and (4) were intended to apply only to the former amounts and that it was never the intention that there should be a deemed trust or a lien with respect to an employer's potential future liabilities that arise once the plan is wound up.

In this case, the s. 57(4) deemed trust does not apply to the wind-up deficiency. This conclusion to exclude the wind-up deficiency from the deemed trust is consistent with the broader purposes of the legislation. The legislature has created trusts over contributions that were due or accrued to the date of the wind up in order to protect, to some degree, the rights of pension plan beneficiaries and employees from the claims of the employer's other creditors. However, there is also good reason to think that the legislature had in mind other competing objectives in not extending the deemed

dont la valeur est actuellement mesurée ou mesurable, mais qui peut ou non être dû. Dans la présente affaire, au par. 57(4), le terme « accumulées » [« *accrued* »] est utilisé par opposition à « dues ». Suivant le sens ordinaire du mot « accumulé », on ne peut considérer que le déficit l'était à la date de la liquidation. Le montant du déficit de liquidation dépend de droits qui ne prennent naissance qu'à la liquidation et à l'égard desquels les employés ne font des choix qu'après la liquidation. Le déficit de liquidation n'est donc ni déterminé ni déterminable à la date de liquidation prévue.

Le contexte législatif général appuie la thèse que, suivant leur sens ordinaire et grammatical le plus plausible, les mots « accumulées à la date de la liquidation » renvoient aux sommes déterminées de façon précise immédiatement avant la date de prise d'effet de la liquidation du régime. Qui plus est, il appert de l'évolution et de l'historique des dispositions en cause que le législateur n'a jamais voulu que le déficit de liquidation fasse l'objet d'une fiducie réputée d'origine législative. Ils confirment en fait l'intention du législateur d'*exclure* du champ d'application de la fiducie réputée les obligations qui naissent seulement *à la* date même de la liquidation.

La loi établit une distinction entre deux types d'obligation de l'employeur qui sont pertinents en l'espèce. Il y a d'une part les cotisations requises pour acquitter le coût du service courant et d'autres paiements qui sont dus ou qui sont accumulés sur une base quotidienne jusqu'à la date considérée. Il s'agit des paiements prévus à l'actuel al. 75(1)a), à savoir ceux qui sont dus ou accumulés, mais qui n'ont pas été versés. D'autre part, il y a les cotisations supplémentaires exigées lorsque le régime est liquidé (le déficit de liquidation). Ces paiements font l'objet de l'al. 75(1)b). Il appert de l'évolution et de l'historique législatifs que les fiducies réputées des par. 57(3) et (4) devaient seulement englober les cotisations du premier type et que le législateur n'a jamais voulu que les obligations ultérieures éventuelles de l'employeur qui naissent une fois le régime liquidé fassent l'objet d'une fiducie réputée ou d'un privilège.

En l'espèce, la fiducie réputée du par. 57(4) ne vise pas le déficit de liquidation. Pareille exclusion est conforme aux objectifs généraux de la loi. Le législateur a créé des fiducies à l'égard des cotisations qui étaient dues ou accumulées à la date de la liquidation afin de protéger, dans une certaine mesure, les droits des bénéficiaires d'un régime de retraite et ceux des employés contre les réclamations des autres créanciers de l'employeur. Or, il y a de bonnes raisons de penser que c'est en raison d'autres objectifs concurrents que le législateur s'est abstenu d'accroître la portée de la fiducie réputée et d'y

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trust to the wind-up deficiency. While the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. The decision as to the level of protection that should be provided to pension beneficiaries under the *PBA* is one to be left to the Ontario legislature.

(2) *Priority Ranking*

Per Deschamps and Moldaver JJ.: A statutory deemed trust under provincial legislation such as the *PBA* continues to apply in federally-regulated *CCAA* proceedings, subject to the doctrine of federal paramountcy. In this case, granting priority to the DIP lenders subordinates the claims of other stakeholders, including the plan members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

Per McLachlin C.J. and Rothstein and Cromwell JJ.: Although there is disagreement with Deschamps J. in connection with the scope of the s. 57(4) deemed trust, it is agreed that if there was a deemed trust in this case, it would be superseded by the DIP loan because of the operation of the doctrine of federal paramountcy.

Per LeBel and Abella JJ.: There is agreement with the reasons of Deschamps J. on the priority ranking issue as determined by operation of the doctrine of federal paramountcy.

(3) *Constructive Trust as a Remedy for Breach of Fiduciary Duties*

Per McLachlin C.J. and Rothstein and Cromwell JJ.: It cannot be the case that a conflict of interests arises simply because an employer, exercising its management powers in the best interests of the corporation, does something that has the potential to affect the beneficiaries of the corporation's pension plan. This conclusion flows inevitably from the statutory context. The existence of apparent conflicts that are inherent in the two roles of employer and pension plan administrator being performed by the same party cannot be a breach of fiduciary duty because those conflicts are specifically authorized by the statute which permits one party to play both roles. Rather, a situation of conflict of interest occurs

inclure le déficit de liquidation. La protection des régimes de retraite constitue certes un objectif important, mais il n'appartient pas à la Cour de décider de la mesure dans laquelle cet objectif sera poursuivi ou d'autres intérêts en souffriront. Il appartient à l'Assemblée législative de l'Ontario de décider du degré de protection qu'il convient d'accorder aux bénéficiaires d'un régime de retraite sous le régime de la *LRR*.

(2) *Priorité de rang*

Les juges Deschamps et Moldaver : Une fiducie réputée établie par une loi provinciale comme la *LRR* continue de s'appliquer dans les instances régies par la *LACC*, relevant de la compétence fédérale, sous réserve de la doctrine de la prépondérance fédérale. En l'espèce, accorder priorité aux prêteurs DE relègue à un rang inférieur les créances des autres intéressés, notamment les participants. Cette priorité d'origine judiciaire fondée sur la *LACC* a le même effet qu'une priorité d'origine législative. Les dispositions fédérales et provinciales sont inconciliables, car elles produisent des ordres de priorité différents et conflictuels. L'application de la doctrine de la prépondérance fédérale donne à la charge DE priorité sur la fiducie réputée.

La juge en chef McLachlin et les juges Rothstein et Cromwell : Malgré le désaccord avec la juge Deschamps sur la portée de la fiducie réputée du par. 57(4), si une fiducie est réputée exister en l'espèce, la créance DE prend rang avant elle en application de la doctrine de la prépondérance fédérale.

Les juges LeBel et Abella : Il y a accord avec les motifs de la juge Deschamps sur la priorité de rang déterminée par application du principe de la prépondérance fédérale.

(3) *La fiducie par interprétation comme réparation du manquement à l'obligation fiduciaire*

La juge en chef McLachlin et les juges Rothstein et Cromwell : Il ne saurait y avoir conflit d'intérêts uniquement parce que l'employeur, dans l'exercice de son pouvoir de gérer la société au mieux des intérêts de celle-ci, prend une mesure susceptible d'avoir une incidence sur les bénéficiaires du régime de retraite qu'il administre. Telle est la conclusion qui découle nécessairement du contexte législatif. L'existence de conflits apparents qui sont inhérents à la double fonction d'employeur et d'administrateur de régime exercée par une même personne ne peut constituer un manquement à l'obligation fiduciaire, car ces conflits sont expressément autorisés par la loi, laquelle permet à une personne

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when there is a substantial risk that the employer-administrator's representation of the plan beneficiaries would be materially and adversely affected by the employer-administrator's duties to the corporation.

d'exercer les deux fonctions. Il y a en fait conflit d'intérêts lorsqu'il existe un risque important que les obligations de l'employeur-administrateur envers la société nuisent de façon appréciable à la défense des intérêts des bénéficiaires d'un régime.

Seeking an initial order protecting the corporation from actions by its creditors did not, on its own, give rise to any conflict of interest or duty on the part of Indalex. Likewise, failure to give notice of the initial *CCAA* proceedings was not a breach of fiduciary duty to avoid conflicts of interest in this case. Indalex's decision to act as an employer-administrator cannot give the plan members any greater benefit than they would have if their plan was managed by a third party administrator.

À elle seule, la demande initiale de protection de la société contre ses créanciers ne plaçait pas Indalex en situation de conflit d'intérêts ou d'obligations. De même, l'omission de donner avis de la demande initiale présentée sur le fondement de la *LACC* ne constituait pas un manquement à l'obligation fiduciaire d'éviter tout conflit d'intérêts. La décision d'Indalex d'agir à titre d'employeur-administrateur ne peut conférer aux participants plus d'avantages que si l'administration de leurs régimes avait été confiée à un tiers indépendant.

It was at the point of seeking and obtaining the DIP orders without notice to the plan beneficiaries and seeking and obtaining the sale approval order that Indalex's interests as a corporation came into conflict with its duties as a pension plan administrator. However, the difficulty that arose here was not the existence of the conflict itself, but Indalex's failure to take steps so that the plans' beneficiaries would have the opportunity to have their interests protected in the *CCAA* proceedings as if the plans were administered by an independent administrator. In short, the difficulty was not the existence of the conflict, but the failure to address it.

C'est lors de la demande et de l'obtention des ordonnances DE sans préavis aux bénéficiaires des régimes, ainsi que de la demande et de l'obtention de l'approbation de la vente que les intérêts commerciaux d'Indalex sont entrés en conflit avec ses obligations d'administrateur des régimes de retraite. Cependant, la difficulté résidait en l'espèce non pas dans l'existence du conflit, mais bien dans l'omission d'Indalex de prendre quelque mesure afin que les bénéficiaires des régimes aient la possibilité de veiller à la protection de leurs intérêts dans le cadre de la procédure fondée sur la *LACC* comme si l'administrateur des régimes avait été indépendant. En résumé, le manquement ne tenait pas à l'existence du conflit, mais plutôt à l'omission de prendre les mesures qu'elle commandait.

An employer-administrator who finds itself in a conflict must bring the conflict to the attention of the *CCAA* judge. It is not enough to include the beneficiaries in the list of creditors; the judge must be made aware that the debtor, as an administrator of the plan is, or may be, in a conflict of interest. Accordingly, Indalex breached its fiduciary duty by failing to take steps to ensure that the pension plans had the opportunity to be as fully represented in those proceedings as if there had been an independent plan administrator, particularly when it sought the DIP financing approval, the sale approval and a motion to voluntarily enter into bankruptcy.

L'employeur-administrateur qui se trouve en situation de conflit doit en informer le juge saisi sur le fondement de la *LACC*. Il ne suffit pas d'inscrire les bénéficiaires sur la liste des créanciers; le juge doit être informé que le débiteur, en sa qualité d'administrateur de régime, est en conflit d'intérêts ou susceptible de l'être. En conséquence, Indalex a manqué à son obligation fiduciaire en omettant de faire ce qu'il fallait pour que les bénéficiaires des régimes puissent être dûment représentés dans le cadre de cette procédure comme si l'administrateur des régimes avait été indépendant, en particulier lorsqu'elle a demandé l'approbation du financement DE et de la vente, puis présenté une motion en vue de faire faillite.

Regardless of this breach, a remedial constructive trust is only appropriate if the wrongdoer's acts give rise to an identifiable asset which it would be unjust for the wrongdoer (or sometimes a third party) to retain. There is no evidence to support the contention that Indalex's failure to meaningfully address conflicts of interest that arose during the *CCAA* proceedings resulted in any such asset. Furthermore, to impose a constructive trust in

Indépendamment de ce manquement, l'imposition d'une fiducie par interprétation ne constitue une réparation appropriée que si un actif déterminable résulte des actes de l'auteur du manquement et qu'il serait injuste que ce dernier ou, parfois, un tiers, conserve cet actif. Aucun élément de preuve n'appuie la prétention qu'un tel actif a résulté de l'omission d'Indalex de pallier véritablement les conflits d'intérêts auxquels a donné lieu

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response to a breach of fiduciary duty to ensure for the pension plans some procedural protections that they in fact took advantage of in any case is an unjust response in all of the circumstances.

la procédure fondée sur la *LACC*. Qui plus est, imposer une fiducie par interprétation par suite du manquement à l'obligation fiduciaire de veiller à ce que les bénéficiaires des régimes jouissent de garanties procédurales, alors qu'ils en ont joui dans les faits, se révèle inéquitable au vu de l'ensemble des circonstances.

Per Deschamps and Moldaver JJ.: A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the corporate employer must be prepared to resolve conflicts where they arise. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.

Les juges Deschamps et Moldaver : L'employeur constitué en société qui décide d'agir en qualité d'administrateur d'un régime accepte les obligations fiduciaires inhérentes à cette fonction. Puisque les administrateurs d'une société ont aussi une obligation fiduciaire envers la société, l'employeur doit être prêt à résoudre les conflits lorsqu'ils surgissent. L'employeur qui administre un régime de retraite n'est pas autorisé à négliger ses obligations fiduciaires envers les participants au régime et à favoriser les intérêts concurrents de la société sous prétexte qu'il porte le « chapeau » de dirigeant de la société. Ce sont les conséquences d'une décision, et non sa nature qui doivent être prises en compte.

In the instant case, Indalex's fiduciary obligations as plan administrator did in fact conflict with management decisions that needed to be taken in the best interests of the corporation. Specifically, in seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the *CCAA* court to override the plan members' priority. The corporation's interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator's duty to the plan members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator's duty to the plan members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the plan members.

En l'espèce, il y avait bien conflit entre les obligations fiduciaires qui incombaient à Indalex en sa qualité d'administratrice des régimes et les décisions de gestion qu'elle devait prendre dans le meilleur intérêt de la société. Plus précisément, en demandant au tribunal d'autoriser une forme de financement selon laquelle un créancier se verrait accorder priorité sur tous les autres, Indalex demandait au tribunal chargé d'appliquer la *LACC* de faire échec à la priorité dont bénéficiaient les participants. L'intérêt de la société consistait à rechercher la meilleure façon de survivre dans un contexte d'insolvabilité. La poursuite de cet intérêt était incompatible avec le devoir de l'administrateur des régimes envers les participants de veiller à ce que toutes les cotisations soient versées aux caisses de retraite. En l'occurrence, ce devoir de l'administrateur des régimes impliquait, plus particulièrement, qu'il donne à tout le moins aux participants la possibilité d'exposer leurs arguments. Cela signifiait, au minimum, que les participants avaient droit à un avis raisonnable de la motion en autorisation du financement DE. La teneur de cette motion, présentée sans avis convenable, allait à l'encontre des intérêts des participants.

As for the constructive trust remedy, it is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property. There is agreement with Cromwell J. that this condition was not met in the case at bar and his reasoning on this issue is adopted. Moreover, it was unreasonable for the Court of Appeal to reorder the priorities in this case.

En ce qui concerne la fiducie par interprétation, il est bien établi en droit qu'une réparation de la nature d'un droit de propriété n'est généralement accordée qu'à l'égard d'un bien ayant un lien direct avec un acte fautif ou d'un bien qui peut être rattaché à un tel bien. Il y a accord avec le juge Cromwell sur le fait que cette condition n'était pas remplie en l'espèce et il a été souscrit à ses motifs sur cette question. En outre, il était déraisonnable pour la Cour d'appel de modifier l'ordre de priorité.

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Per LeBel and Abella JJ. (dissenting): A fiduciary relationship is a relationship, grounded in fact and law, between a vulnerable beneficiary and a fiduciary who holds and may exercise power over the beneficiary in situations recognized by law. It follows that before entering into an analysis of the fiduciary duties of an employer as administrator of a pension plan under the *PBA*, it is necessary to consider the position and characteristics of the pension beneficiaries. In the present case, the beneficiaries were in a very vulnerable position relative to Indalex.

Nothing in the *PBA* allows that the employer *qua* administrator will be held to a lower standard or will be subject to duties and obligations that are less stringent than those of an independent administrator. The employer is under no obligation to assume the burdens of administering the pension plans that it has agreed to set up or that are the legacy of previous decisions. However, if it decides to do so, a fiduciary relationship is created with the expectation that the employer will be able to avoid or resolve the conflicts of interest that might arise.

Indalex was in a conflict of interest from the moment it started to contemplate putting itself under the protection of the *CCAA* and proposing an arrangement to its creditors. From the corporate perspective, one could hardly find fault with such a decision. It was a business decision. But the trouble is that at the same time, Indalex was a fiduciary in relation to the members and retirees of its pension plans. The solution was not to place its function as administrator and its associated fiduciary duties in abeyance. Rather, it had to abandon this role and diligently transfer its function as manager to an independent administrator.

In the present case, the employer not only neglected its obligations towards the beneficiaries, but actually took a course of action that was actively inimical to their interests. The seriousness of these breaches amply justified the decision of the Court of Appeal to impose a constructive trust.

(4) *Costs in United Steelworkers Appeal*

Per McLachlin C.J. and Rothstein and Cromwell JJ.: There is no basis to interfere with the Court of Appeal's costs endorsement as it relates to United Steelworkers in this case. The litigation undertaken here raised novel points of law with all of the uncertainty and risk inherent in such an undertaking. The Court of Appeal in essence decided that the United Steelworkers, representing only 7 of 169 members of the salaried plan, should not without consultation be

Les juges LeBel et Abella (dissidents) : Une relation fiduciaire s'entend de la relation factuelle et juridique entre un bénéficiaire vulnérable et un fiduciaire qui détient et peut exercer un pouvoir sur le bénéficiaire dans les situations prévues par la loi. Par conséquent, avant d'analyser les obligations fiduciaires de l'employeur à titre d'administrateur d'un régime de retraite visé par la *LRR*, il faut examiner la situation et les caractéristiques des bénéficiaires du régime. En l'espèce, les bénéficiaires se trouvaient dans une position de grande vulnérabilité par rapport à Indalex.

Rien dans la *LRR* ne permet de conclure que l'employeur, en sa qualité d'administrateur, serait assujetti à une norme moindre ou assumerait des fonctions et des obligations moins strictes qu'un administrateur indépendant. L'employeur n'est pas tenu d'assumer le fardeau de l'administration des régimes de retraite qu'il a convenu d'établir ou qui sont le fruit de décisions antérieures. Par contre, s'il choisit de l'assumer, une relation fiduciaire prend naissance et l'on s'attend à ce que l'employeur soit capable d'éviter ou de régler les conflits d'intérêts susceptibles d'intervenir.

Indalex se trouvait en situation de conflit d'intérêts dès qu'elle a envisagé de demander la protection de la *LACC* et de proposer un arrangement à ses créanciers. Du point de vue de l'entreprise, on ne pourrait guère trouver à redire à cette décision. Il s'agissait d'une décision d'affaires. Cependant, Indalex jouait en même temps le rôle de fiduciaire à l'égard des participants aux régimes et des retraités, et c'est là où le bât blesse. La solution consistait non pas à mettre en veilleuse sa fonction d'administrateur avec les obligations fiduciaires en découlant, mais à y renoncer et à la transférer avec diligence à un administrateur indépendant.

En l'occurrence, l'employeur a non seulement manqué à ses obligations envers les bénéficiaires, mais adopté en fait une démarche qui allait à l'encontre de leurs intérêts. La gravité de ces manquements justifiait amplement la décision de la Cour d'appel d'imposer une fiducie par interprétation.

(4) *Dépens dans le pourvoi du Syndicat des Métallos*

La juge en chef McLachlin et les juges Rothstein et Cromwell : Il n'y a en l'espèce aucune raison de revenir sur la décision de la Cour d'appel relative aux dépens en ce qui concerne le Syndicat des Métallos. L'instance engagée portait sur des points de droit nouveaux, son issue était incertaine et les demandeurs couraient le risque d'être déboutés. La Cour d'appel a opiné essentiellement que, représentant seulement 7 des 169 participants du régime des salariés, le syndicat ne devait pas être en

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able to in effect impose the risks of that litigation on all of the plan members, the vast majority of whom were not union members. There is no error in principle in the Court of Appeal's refusal to order the United Steelworkers costs to be paid out of the pension fund, particularly in light of the disposition of the appeal to this Court.

Per Deschamps and Moldaver JJ.: There is agreement with the reasons of Cromwell J. on the issue of costs in the United Steelworkers appeal.

Per LeBel and Abella JJ.: There is agreement with the reasons of Cromwell J. on the issue of costs in the United Steelworkers appeal.

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mesure, dans les faits, d'imposer à tous les participants du régime, dont la plupart n'en étaient pas membres, les risques inhérents au litige sans les consulter. Il n'y a aucune erreur de principe dans le refus de la Cour d'appel d'ordonner que les dépens du syndicat soient payés à partir de la caisse de retraite, étant donné surtout l'issue du pourvoi devant notre Cour.

Les juges Deschamps et Moldaver : Il y a accord avec les motifs du juge Cromwell sur la question des dépens dans l'appel interjeté par le Syndicat des Métallos.

Les juges LeBel et Abella : Il y a accord avec les motifs du juge Cromwell sur la question des dépens dans l'appel interjeté par le Syndicat des Métallos.

Jurisprudence

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v. Perez, 2009 SCC 48, [2009] 3 S.C.R. 247; *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403; *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177; *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560; *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631; *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282; *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194; *Marine Drive Properties Ltd., Re*, 2009 BCSC 145, 52 C.B.R. (5th) 47; *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169; *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6459 (CanLII); *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299 (CanLII); *Nortel Networks Corp., Re* (2009), 75 C.C.P.B. 206; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314; *Donkin v. Bugoy*, [1985] 2 S.C.R. 85; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217; *Peter v. Beblow*, [1993] 1 S.C.R. 980; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678; *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303.

By LeBel J. (dissenting)

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Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, S.C. 2005, c. 47, s. 128.

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APPEAL from a judgment of the Ontario Court of Appeal (MacPherson, Gillese and Juriansz JJ.A.), 2011 ONCA 578, 81 C.B.R. (5th) 165, 92 C.C.P.B. 277, [2011] O.J. No. 3959 (QL), 2011 CarswellOnt 9077. Appeal dismissed.

Benjamin Zarnett, *Frederick L. Myers*, *Brian F. Empey* and *Peter Kolla*, for the appellant Sun Indalex Finance, LLC.

Harvey G. Chaiton and *George Benchetrit*, for the appellant George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors.

David R. Byers, *Ashley John Taylor* and *Nicholas Peter McHaffie*, for the appellant FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited.

Darrell L. Brown, for the appellant/respondent the United Steelworkers.

Andrew J. Hatnay and *Demetrios Yiokaris*, for the respondents Keith Carruthers, et al.

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POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges MacPherson, Gillese et Juriansz), 2011 ONCA 578, 81 C.B.R. (5th) 165, 92 C.C.P.B. 277, [2011] O.J. No. 3959 (QL), 2011 CarswellOnt 9077. Pourvoi rejeté.

Benjamin Zarnett, *Frederick L. Myers*, *Brian F. Empey* et *Peter Kolla*, pour l'appelante Sun Indalex Finance, LLC.

Harvey G. Chaiton et *George Benchetrit*, pour l'appelant George L. Miller, syndic de faillite des débitrices Indalex É.-U., nommé en vertu du chapitre 7.

David R. Byers, *Ashley John Taylor* et *Nicholas Peter McHaffie*, pour l'appelante FTI Consulting Canada ULC, en sa qualité de contrôleur d'Indalex Limited désigné par le tribunal, au nom d'Indalex Limited.

Darrell L. Brown, pour l'appelant/intimé le Syndicat des Métallos.

Andrew J. Hatnay et *Demetrios Yiokaris*, pour les intimés Keith Carruthers, et autres.

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Hugh O'Reilly and *Amanda Darrach*, for the respondent Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership).

Hugh O'Reilly et *Amanda Darrach*, pour l'intimée Morneau Shepell Ltd. (anciennement connue sous le nom de Morneau Sobeco, société en commandite).

Mark Bailey, *Leonard Marsello* and *William MacLarkey*, for the respondent/intervener the Superintendent of Financial Services.

Mark Bailey, *Leonard Marsello* et *William MacLarkey*, pour l'intimé/intervenant le Surintendant des services financiers.

Robert I. Thornton and *D. J. Miller*, for the intervener the Insolvency Institute of Canada.

Robert I. Thornton et *D. J. Miller*, pour l'intervenant l'Institut d'insolvabilité du Canada.

Steven Barrett and *Ethan Poskanzer*, for the intervener the Canadian Labour Congress.

Steven Barrett et *Ethan Poskanzer*, pour l'intervenant le Congrès du travail du Canada.

Kenneth T. Rosenberg, *Andrew K. Lokan* and *Massimo Starnino*, for the intervener the Canadian Federation of Pensioners.

Kenneth T. Rosenberg, *Andrew K. Lokan* et *Massimo Starnino*, pour l'intervenante la Fédération canadienne des retraités.

Éric Vallières, *Alexandre Forest* and *Yoine Goldstein*, for the intervener the Canadian Association of Insolvency and Restructuring Professionals.

Éric Vallières, *Alexandre Forest* et *Yoine Goldstein*, pour l'intervenante l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation.

Mahmud Jamal, *Jeremy Dacks* and *Tony Devir*, for the intervener the Canadian Bankers Association.

Mahmud Jamal, *Jeremy Dacks* et *Tony Devir*, pour l'intervenante l'Association des banquiers canadiens.

The judgment of Deschamps and Moldaver JJ. was delivered by

Version française du jugement des juges Deschamps et Moldaver rendu par

[1] DESCHAMPS J. — Insolvency can trigger catastrophic consequences. Often, large claims of ordinary creditors are left unpaid. In insolvency situations, the promise of defined benefits made to employees during their employment is put at risk. These appeals illustrate the materialization of such a risk. Although the employer in this case breached a fiduciary duty, the harm suffered by the pension plans' beneficiaries results not from that breach, but from the employer's insolvency. For the following reasons, I would allow the appeals of the appellants Sun Indalex Finance, LLC; George L. Miller, Indalex U.S.'s trustee in bankruptcy; and FTI Consulting Canada ULC.

[1] LA JUGE DESCHAMPS — L'insolvabilité peut entraîner des conséquences catastrophiques. Les créanciers ordinaires sont souvent laissés impayés. En situation d'insolvabilité, les prestations déterminées promises aux employés pendant leur emploi sont mises en péril. Les présents pourvois illustrent ce qui peut se produire lorsque ce péril se matérialise. Bien que l'employeur en l'espèce ait manqué à son obligation fiduciaire envers les participants aux régimes de retraite, le préjudice qu'ils subissent ne résulte pas de son manquement, mais de son insolvabilité. Pour les motifs qui suivent, je suis d'avis d'accueillir les appels de Sun Indalex Finance, LLC; George L. Miller, syndic de faillite d'Indalex É.-U.; et FTI Consulting Canada ULC.

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[2] To improve the prospect of pensioners receiving their full benefits after a pension plan is wound up, the Ontario legislature has protected contributions to the pension fund that have accrued but are not yet due at the time of the wind up by providing for a deemed trust that supersedes all other provincial priorities over certain assets of the plan sponsor (s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and s. 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*")). The parties disagree on the scope of the deemed trust. In my view, the relevant provisions and the context lead to the conclusion that it extends to contributions the employer must make to ensure that the pension fund is sufficient to cover liabilities upon wind up. In the instant case, however, the deemed trust is superseded by the security granted to the creditor that loaned money to the employer, Indalex Limited ("Indalex"), during the insolvency proceedings. In addition, although the employer, as plan administrator, may have put itself in a position of conflict of interest by failing to give the plan's members proper notice of a motion requesting financing of its operations during a restructuring process, there was no realistic possibility that, had the members received notice and had the *CCAA* court found that they were secured creditors, it would have ordered the priorities differently. Consequently, it would not be appropriate to order an equitable remedy such as the constructive trust ordered by the Court of Appeal.

[2] Pour améliorer les chances des retraités de recevoir toutes les prestations auxquelles ils ont droit après la liquidation d'un régime de retraite, le législateur ontarien a pourvu à la protection des cotisations accumulées, mais qui ne sont pas encore dues, à la date de la liquidation, au moyen d'une fiducie réputée grevant certains biens des promoteurs des régimes et qui a préséance sur toutes les autres priorités établies par une loi provinciale (par. 57(4) de la *Loi sur les régimes de retraite*, L.R.O. 1990, ch. P.8 (« *LRR* »), et par. 30(7) de la *Loi sur les sûretés mobilières*, L.R.O. 1990, ch. P.10 (« *LSM* »)). Les parties ne s'entendent pas sur la portée de la fiducie réputée. Les dispositions pertinentes et le contexte mènent selon moi à la conclusion qu'elle englobe les cotisations que doit verser l'employeur afin que la caisse de retraite puisse couvrir le passif du régime à la liquidation. En l'espèce, toutefois, la sûreté accordée au créancier ayant prêté des fonds à l'employeur, Indalex Limited (« Indalex »), pendant l'instance en matière d'insolvabilité a priorité sur la fiducie réputée. En outre, bien que l'employeur ait pu se placer en conflit d'intérêts en tant qu'administrateur du régime, en ne donnant pas dûment avis aux participants d'une motion en vue de financer l'exploitation de l'entreprise pendant la restructuration, il n'est pas réaliste de penser que le tribunal chargé d'appliquer la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »), aurait établi un ordre de priorité différent si les participants avaient été avisés et si le tribunal avait conclu qu'ils étaient des créanciers garantis. Par conséquent, il n'y a pas lieu d'accorder une réparation en equity, telle que la fiducie par interprétation imposée par la Cour d'appel.

I. Facts

[3] Indalex is a wholly owned Canadian subsidiary of a U.S. company, Indalex Holding Corp. ("Indalex U.S."). Indalex and its related companies formed a corporate group (the "Indalex Group") that manufactured aluminum extrusions. The U.S. and Canadian operations were closely linked.

I. Les faits

[3] Indalex est une filiale canadienne en propriété exclusive de la société américaine Indalex Holding Corp. (« Indalex É.-U. »). Indalex et ses sociétés affiliées formaient un groupe (le « Groupe Indalex ») qui fabriquait des extrusions d'aluminium. Les activités des sociétés aux États-Unis et au Canada étaient étroitement liées.

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[4] In 2009, a combination of high commodity prices and the economic recession's impact on the end-user market for aluminum extrusions plunged the Indalex Group into insolvency. On March 20, 2009, Indalex U.S. filed for Chapter 11 bankruptcy protection in Delaware. On April 3, 2009, Indalex applied for a stay under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), and Morawetz J. granted the stay in an initial order. He also appointed FTI Consulting Canada ULC (the "Monitor") to act as monitor.

[5] At that time, Indalex was the administrator of two registered pension plans. One was for its salaried employees (the "Salaried Plan"), the other for its executives (the "Executive Plan"). Members of the Salaried Plan included seven employees for whom the United Steelworkers ("USW") acted as bargaining agent. The Salaried Plan was in the process of being wound up when the *CCAA* proceedings began. The effective date of the wind up was December 31, 2006. The Executive Plan had been closed but not wound up. Overall, the deficiencies of the pension plans' funds concern 49 persons (members of the Salaried Plan and the Executive Plan are referred to collectively as the "Plan Members").

[6] Pursuant to the initial order made by Morawetz J. on April 3, 2009, Indalex obtained protection under the *CCAA*. Both plans faced funding deficiencies when Indalex filed for the *CCAA* stay. The wind-up deficiency of the Salaried Plan was estimated at $1.8 million as of December 31, 2008. The funding deficiency of the Executive Plan was estimated at $3.0 million on a wind-up basis as of January 1, 2008.

[7] From the beginning of the insolvency proceedings, the Indalex Group's reorganization strategy was to sell both Indalex and Indalex U.S. as a going concern while they were under *CCAA* and Chapter 11 protection. To this end, Indalex and Indalex U.S. sought to enter into a common agreement for debtor-in-possession ("DIP") financing under which the two companies

[4] En 2009, le prix élevé des produits de base et les effets de la récession sur le marché des utilisateurs finaux des extrusions d'aluminium ont entraîné l'insolvabilité du Groupe Indalex. Le 20 mars 2009, Indalex É.-U. s'est placée sous la protection du chapitre 11, au Delaware. Le 3 avril 2009, Indalex a demandé une suspension sous le régime de la *LACC*. Le même jour, le juge Morawetz a rendu une ordonnance initiale lui accordant cette suspension et il a désigné FTI Consulting Canada ULC (le « contrôleur ») comme contrôleur.

[5] Indalex administrait alors deux régimes de retraite enregistrés, l'un à l'intention des salariés (le « régime des salariés »), et l'autre à l'intention des cadres (le « régime des cadres »). Le régime des salariés comptait sept participants dont l'agent négociateur était le Syndicat des Métallos (le « Syndicat »). Ce régime était en cours de liquidation lorsque les procédures sous le régime de la *LACC* ont été engagées. La date de prise d'effet de la liquidation était le 31 décembre 2006. Le régime des cadres n'acceptait plus de participant, mais il n'était pas liquidé. En tout, les déficits des caisses de retraite touchent 49 personnes (les participants au régime des salariés et au régime des cadres sont collectivement appelés les « participants »).

[6] L'ordonnance initiale prononcée par le juge Morawetz, le 3 avril 2009, a accordé à Indalex la protection de la *LACC*. Les deux régimes de retraite accusaient un déficit de capitalisation au moment où Indalex a demandé la suspension des procédures en vertu de la *LACC*. Le déficit de liquidation du régime des salariés, au 31 décembre 2008, était estimé à 1,8 million de dollars. Quant au régime des cadres, sa sous-capitalisation suivant une approche de liquidation était estimée à 3 millions de dollars au 1er janvier 2008.

[7] Dès le début de la procédure d'insolvabilité, la stratégie de réorganisation poursuivie par le Groupe Indalex consistait à vendre Indalex et Indalex É.-U. comme entreprises en exploitation pendant qu'elles jouissaient de la protection de la *LACC* et du chapitre 11. À cette fin, Indalex et Indalex É.-U. voulaient conclure un accord de financement de débiteur-exploitant (« DE »)

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could draw from joint credit facilities and would guarantee each other's liabilities.

conjoint aux termes duquel elles pourraient bénéficier de facilités de crédit communes et chaque société garantirait les obligations de l'autre.

[8] Indalex's financial distress threatened the interests of all the Plan Members. If the reorganization failed and Indalex were liquidated under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), they would not have recovered any of their claims against Indalex for the underfunded pension liabilities, because the priority created by the provincial statute would not be recognized under the federal legislation: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453. Although the priority was not rendered ineffective by the *CCAA*, the Plan Members' position was uncertain.

[8] Les problèmes financiers d'Indalex menaçaient les intérêts de tous les participants. Si la réorganisation échouait et si Indalex était liquidée en application de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »), ils ne recouvreraient aucune de leurs créances sur Indalex au titre de la sous-capitalisation des régimes de retraite, parce que la législation fédérale ne permettrait pas que la priorité de rang établie par la loi provinciale soit reconnue : *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453. La *LACC* ne rendait pas la priorité de rang des participants inopérante, mais leur position était incertaine.

[9] The Indalex Group solicited terms from a variety of possible DIP lenders. In the end, it negotiated an agreement with a syndicate consisting of the pre-filing senior secured creditors. On April 8, 2009, the *CCAA* court issued an Amended and Restated Initial Order ("Amended Initial Order") authorizing Indalex to borrow US$24.4 million from the DIP lenders and grant them priority over all other creditors ("DIP charge") in that amount. In his endorsement of the order, Morawetz J. made a finding that Indalex would be unable to achieve a going-concern solution without DIP financing. Such financing was necessary to support Indalex's business until the sale could be completed.

[9] Le Groupe Indalex a demandé des offres à divers prêteurs DE et a fini par conclure une entente avec un consortium composé des créanciers qui bénéficiaient d'une garantie de premier rang avant le début de la procédure. Le 8 avril 2009, le tribunal chargé d'appliquer la *LACC* a rendu une ordonnance modifiée et reformulée (l'« ordonnance initiale modifiée ») autorisant Indalex à emprunter 24,4 millions de dollars américains aux prêteurs DE et à leur octroyer une priorité pour le même montant sur tous les autres créanciers (la « charge DE »). Dans les motifs qu'il a déposés au soutien de l'ordonnance, le juge Morawetz a conclu qu'Indalex n'aurait pas pu trouver de solution qui assurait la continuité de l'exploitation sans ce financement DE. Celui-ci était nécessaire pour financer les activités de l'entreprise jusqu'à sa vente.

[10] The Plan Members did not participate in the initial proceedings. The initial stay had been granted *ex parte*. The *CCAA* judge ordered Indalex to serve a copy of the stay order on every creditor owed $5,000 or more within 10 days of the initial order of April 3. As of April 8, when the motion to amend the initial order was heard, none of the Executive Plan's members had been served with that order; nor did any of them receive notice of the motion to amend it. The USW did receive short notice, but chose not to attend. Morawetz J. authorized Indalex to proceed on the basis of an abridged time for

[10] Les participants n'étaient pas parties à la procédure initiale. La suspension initiale avait été accordée *ex parte*. Le juge chargé de l'application de la *LACC* avait ordonné à Indalex de faire signifier une copie de l'ordonnance de suspension à chaque créancier ayant une créance minimale de 5 000 $ dans les 10 jours suivant l'ordonnance initiale du 3 avril. Le 8 avril, lors de l'audition de la motion visant la modification de l'ordonnance initiale, aucun des participants au régime des cadres n'avait reçu signification de cette ordonnance ni de l'avis de motion visant sa modification. Le Syndicat

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service. The Plan Members were given notice of all subsequent proceedings. None of the Plan Members appealed the Amended Initial Order to contest the DIP charge.

a reçu un préavis écourté, mais a décidé de ne pas se présenter. Le juge Morawetz a autorisé Indalex à procéder même si le délai de signification avait été écourté. Les participants ont reçu avis de toutes les procédures subséquentes. Aucun des participants n'a interjeté appel de l'ordonnance initiale modifiée pour contester la charge DE.

[11] On June 12, 2009, Indalex applied for authorization to increase the DIP loan amount to US$29.5 million. At the hearing, the Executive Plan's members initially opposed the motion, seeking to reserve their rights. After it was confirmed that the motion was merely to increase the amount of the DIP charge (without changing the terms of the loan), they withdrew their opposition and the court granted the motion.

[11] Le 12 juin 2009, Indalex a demandé l'autorisation de porter l'emprunt DE à 29,5 millions de dollars américains. À l'audience, les participants au régime des cadres se sont d'abord opposés à la motion en demandant que leurs droits soient réservés. Après confirmation que la motion avait pour unique but d'augmenter le montant de la charge DE (sans modifier les modalités du prêt), ils ont retiré leur opposition et le tribunal a accueilli la motion.

[12] On April 22, 2009, the court extended the stay of proceedings and approved a marketing process for the sale of Indalex's assets. The Plan Members did not oppose the application to approve the marketing process. Under the approved bidding procedure, the Indalex Group solicited a wide variety of potential buyers.

[12] Le 22 avril 2009, le tribunal a prorogé la suspension et approuvé un processus de mise en vente de l'actif d'Indalex. Les participants ne se sont pas opposés à la demande d'approbation du processus de mise en vente. Conformément au processus approuvé de vente par soumission, le Groupe Indalex a sollicité un vaste éventail d'acheteurs potentiels.

[13] Indalex received a bid from SAPA Holding AB ("SAPA"). It was for approximately US$30 million, and SAPA did not assume responsibility for the pension plans' wind-up deficiencies. According to the Monitor's estimate, the liquidation value of Indalex's assets was US$44.7 million. Indalex brought an application for an order approving a bidding procedure for a competitive auction and deeming SAPA's bid to be a qualifying bid. The Executive Plan's members opposed the application, expressing concern that the pension liabilities would not be assumed. Morawetz J. nevertheless issued the order on July 2, 2009; in it, he approved the bidding procedure for sale, noting that the Executive Plan's members could raise their objections at the time of approval of the final bid.

[13] Indalex a reçu une soumission de SAPA Holding AB (« SAPA »). Cette soumission s'élevait à environ 30 millions de dollars américains et SAPA ne prenait pas en charge les déficits de liquidation des régimes de retraite. Le contrôleur estimait la valeur de liquidation de l'actif d'Indalex à 44,7 millions de dollars américains. Indalex a demandé une ordonnance approuvant un processus de soumission pour adjudication sur offres concurrentes et déclarant que la soumission de SAPA était réputée acceptable. Les participants au régime des cadres ont contesté cette demande parce qu'ils s'inquiétaient du fait que le passif du régime de retraite ne serait pas pris en charge. Le 2 juillet 2009, le juge Morawetz a néanmoins rendu une ordonnance approuvant le processus de mise en vente par soumission, en soulignant que les participants au régime des cadres pourraient faire valoir leurs objections au moment de l'homologation de la soumission définitive.

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[14] The bidding procedure did not trigger any competing bids. On July 20, 2009, Indalex and Indalex U.S. brought motions before their respective courts to approve the sale of substantially all their assets under the terms of SAPA's bid. Indalex also moved for approval of an interim distribution of the sale proceeds to the DIP lenders. The Plan Members opposed Indalex's motion. First, they argued that it was estimated that a forced liquidation would produce greater proceeds than SAPA's bid. Second, they contended that their claims had priority over that of the DIP lenders because the unfunded pension liabilities were subject to a statutory deemed trust under the *PBA*. They also contended that Indalex had breached its fiduciary obligations by failing to meet its obligations as a plan administrator throughout the insolvency proceedings.

[14] Le processus de mise en vente par soumission n'a pas permis d'obtenir des soumissions concurrentes. Le 20 juillet 2009, Indalex et Indalex É.-U. ont chacune demandé au tribunal dont elles relevaient d'approuver la vente d'essentiellement tous leurs éléments d'actif aux conditions stipulées dans l'offre de SAPA. Indalex a également demandé l'approbation d'une distribution provisoire du produit de la vente aux prêteurs DE. Les participants ont contesté la motion d'Indalex. Ils ont fait valoir, premièrement, que le produit estimatif d'une liquidation forcée serait supérieur à l'offre de SAPA et, deuxièmement, que leur créance avait priorité sur celles des prêteurs DE, parce que le passif non capitalisé au titre des pensions était protégé par une fiducie réputée en vertu de la *LRR*. Ils ont aussi soutenu qu'Indalex avait manqué à ses obligations fiduciaires en ne s'acquittant pas des obligations qui lui incombaient en qualité d'administrateur des régimes de retraite du début à la fin des procédures en matière d'insolvabilité.

[15] The court dismissed the Plan Members' first objection, holding that there was no evidence supporting the argument that a forced liquidation would be more beneficial to suppliers, customers and the 950 employees. It approved the sale on July 20, 2009. The order in which it did so directed the Monitor to make a distribution to the DIP lenders. With respect to the second objection, however, Campbell J. ordered the Monitor to hold a reserve in an amount to be determined by the Monitor, leaving the Plan Members' arguments based on their right to the proceeds of the sale open for determination at a later date.

[15] Le tribunal a écarté la première objection des participants, estimant qu'aucun élément de preuve n'étayait leur prétention que la liquidation forcée serait plus avantageuse pour les fournisseurs, les clients et les 950 employés. Il a approuvé la vente le 20 juillet 2009. Cette ordonnance donnait instruction au contrôleur de procéder à une distribution aux prêteurs DE. Au sujet de la deuxième objection, toutefois, le juge Campbell a ordonné au contrôleur de retenir un fonds de réserve dont le contrôleur déterminerait lui-même le montant, réservant pour plus tard l'examen de l'argumentation des participants fondée sur leur droit au produit de la vente.

[16] The sale to SAPA closed on July 31, 2009. The Monitor collected $30.9 million in proceeds. It distributed US$17 million to the DIP lenders, paid certain fees, withheld a portion to cover various costs and retained $6.75 million in reserve pending determination of the Plan Members' rights. At the closing, Indalex owed US$27 million to the DIP lenders. The payment of US$17 million left a US$10 million shortfall in the amount owed to these lenders. The DIP lenders called on Indalex U.S. to cover this shortfall under the guarantee

[16] La vente à SAPA s'est conclue le 31 juillet 2009, et le contrôleur a recueilli 30,9 millions de dollars comme produit de la vente. Il a distribué 17 millions de dollars américains aux prêteurs DE, acquitté certains frais, retenu des fonds pour couvrir diverses dépenses et réservé 6,75 millions de dollars en attendant la décision relative aux droits des participants. À la date de la vente, Indalex devait 27 millions de dollars américains aux prêteurs DE, de sorte qu'une créance de 10 millions de dollars américains subsistait après le versement des

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contained in the DIP lending agreement. Indalex U.S. paid the amount of the shortfall. Since Indalex U.S. was, as a term of the guarantee, subrogated to the DIP lenders' priority, it became the highest ranking creditor of Indalex, with a claim for US$10 million.

17 millions. Se prévalant de la garantie consentie dans l'accord de financement DE, les prêteurs DE ont demandé à Indalex É.-U. de payer la différence, ce qu'elle a fait. Comme la garantie prévoyait la subrogation d'Indalex É.-U. aux droits de priorité des prêteurs DE, Indalex É.-U. est devenue créancière de premier rang d'Indalex pour la somme de 10 millions de dollars américains.

[17] Following the sale of Indalex's assets, its directors resigned. Indalex U.S., a part of Indalex Group, took over the management of Indalex, whose assets were limited to the sale proceeds held by the Monitor. A Unanimous Shareholder Declaration was executed on August 12, 2009; in it, Mr. Keith Cooper was appointed to manage Indalex's affairs. Mr. Cooper was an employee of FTI Consulting Inc.

[17] Le conseil d'administration d'Indalex a démissionné après la vente de l'actif de la société. Indalex É.-U., qui faisait partie du Groupe Indalex, a repris la gestion d'Indalex, dont l'actif se limitait au produit de la vente détenu par le contrôleur. Une convention unanime d'actionnaires nommant M. Keith Cooper comme gestionnaire des affaires d'Indalex a été signée le 12 août 2009. M. Cooper était un employé de FTI Consulting Inc.

[18] In accordance with the right reserved by the court on July 20, 2009, the Plan Members brought motions on August 28, 2009 for a declaration that a deemed trust equal in amount to the unfunded pension liability was enforceable against the proceeds of the sale. They contended that they had priority over the secured creditors pursuant to s. 57(4) of the *PBA* and s. 30(7) of the *PPSA*. Indalex, in turn, brought a motion for an assignment in bankruptcy to secure the priority regime it argued for in opposing the Plan Members' motions.

[18] Les participants ont exercé le droit que leur avait réservé le tribunal le 20 juillet 2009 et ont présenté des motions, le 28 août 2009, en vue d'obtenir un jugement déclaratoire portant que le produit de la vente était grevé d'une fiducie réputée d'un montant équivalent au passif non capitalisé au titre des pensions. Ils ont soutenu que les par. 57(4) de la *LRR* et 30(7) de la *LSM* leur donnaient préséance sur les créanciers garantis. Indalex a présenté une motion pour faire cession de ses biens en faillite afin de bénéficier de la priorité de rang qu'elle invoquait pour contester les motions des participants.

[19] On October 14, 2009, while judgment was pending, Indalex U.S. converted the Chapter 11 restructuring proceeding in the U.S. into a Chapter 7 liquidation proceeding. On November 5, 2009, the Superintendent of Financial Services ("Superintendent") appointed the actuarial firm of Morneau Sobeco Limited Partnership ("Morneau") to replace Indalex as administrator of the plans.

[19] Le 14 octobre 2009, avant le prononcé du jugement, Indalex É.-U. a transformé l'instance en réorganisation fondée sur le chapitre 11 en instance en liquidation fondée sur le chapitre 7. Le 5 novembre 2009, le surintendant des services financiers (le « surintendant ») a nommé le cabinet d'actuaires Morneau Sobeco, société en commandite (« Morneau »), pour remplacer Indalex comme administrateur des régimes.

[20] On February 18, 2010, Campbell J. dismissed the Plan Members' motions, concluding that the deemed trust did not apply to the wind-up deficiencies, because the associated payments were not "due" or "accruing due" as of the date of the wind up. He found that the Executive Plan did

[20] Le 18 février 2010, le juge Campbell a rejeté les motions des participants, concluant que la fiducie réputée ne s'appliquait pas aux déficits de liquidation parce que les paiements afférents n'étaient pas [TRADUCTION] « échus » ou « à échoir » à la date de la liquidation. Selon lui, le régime de

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not have a wind-up deficiency, since it had not yet been wound up. He thus found it unnecessary to rule on Indalex's motion for an assignment in bankruptcy (2010 ONSC 1114, 79 C.C.P.B. 301). The Plan Members appealed the dismissal of their motions.

[21] The Ontario Court of Appeal allowed the Plan Members' appeals. It found that the deemed trust created by s. 57(4) of the *PBA* applies to all amounts due with respect to plan wind-up deficiencies. Although the court noted that it was likely that no deemed trust existed for the Executive Plan on the plain meaning of the provision, it declined to address this question, because it found that the Executive Plan's members had a claim arising from Indalex's breach of its fiduciary obligations in failing to adequately protect the Plan Members' interests (2011 ONCA 265, 104 O.R. (3d) 641).

[22] The Court of Appeal concluded that a constructive trust was an appropriate remedy for Indalex's breach of its fiduciary obligations. The court was of the view that this remedy did not harm the DIP lenders, but affected only Indalex U.S. It imposed a constructive trust over the reserved fund in favour of the Plan Members. Turning to the question of distribution, it also found that the deemed trust had priority over the DIP charge because the issue of federal paramountcy had not been raised when the Amended Initial Order was issued, and that Indalex had stated that it intended to comply with any deemed trust requirements. The Court of Appeal found that there was nothing in the record to suggest that not applying the paramountcy doctrine would frustrate Indalex's ability to restructure.

[23] The Court of Appeal ordered the Monitor to make a distribution from the reserve fund in order to pay the amount of each plan's deficiency. It also issued a costs endorsement that approved payment of the costs of the Executive Plan's members from that plan's fund, but declined to order the payment of costs to the USW from the fund of the Salaried Plan (2011 ONCA 578, 81 C.B.R. (5th) 165).

retraite des cadres n'étant pas encore liquidé, on ne pouvait parler de déficit de liquidation. Il était donc inutile de statuer sur la motion d'Indalex visant à faire cession de ses biens (2010 ONSC 1114, 79 C.C.P.B. 301). Les participants ont interjeté appel du rejet de leurs motions.

[21] La Cour d'appel de l'Ontario a accueilli les appels des participants, estimant que la fiducie réputée créée au par. 57(4) de la *LRR* s'appliquait à toutes les sommes dues au titre des déficits de liquidation des régimes. Signalant que, selon le sens ordinaire de cette disposition, aucune fiducie réputée ne s'appliquerait au régime des cadres, elle a néanmoins refusé de trancher la question parce que les participants à ce régime pouvaient faire valoir une réclamation contre Indalex pour manquement à son obligation fiduciaire de protéger adéquatement leurs intérêts (2011 ONCA 265, 104 O.R. (3d) 641).

[22] La Cour d'appel a jugé qu'une fiducie par interprétation était une réparation appropriée pour le manquement d'Indalex à ses obligations fiduciaires. Selon elle, cette réparation ne causait pas préjudice aux prêteurs DE et n'avait d'effet que sur Indalex É.-U. Elle a donc imposé une fiducie par interprétation grevant le fonds de réserve au profit des participants. Au sujet de la distribution, elle a aussi jugé que la fiducie réputée avait priorité sur la charge DE parce que la question de la prépondérance fédérale n'avait pas été invoquée lorsque l'ordonnance initiale modifiée avait été rendue et qu'Indalex avait déclaré qu'elle allait se conformer à toutes les exigences d'une fiducie réputée. Elle a conclu que rien au dossier n'indiquait que le fait de ne pas appliquer la doctrine de la prépondérance fédérale compromettrait la capacité de restructuration d'Indalex.

[23] La Cour d'appel a ordonné au contrôleur de combler le déficit de chacun des deux régimes par prélèvement sur le fonds de réserve. Dans sa décision relative à l'adjudication des dépens, elle a également approuvé le paiement des dépens des participants au régime des cadres sur leur caisse de retraite, mais elle a refusé d'ordonner que les dépens du Syndicat soient acquittés sur la caisse de retraite du régime des salariés (2011 ONCA 578, 81 C.B.R. (5th) 165).

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[24] The Monitor, together with Sun Indalex, a secured creditor of Indalex U.S., and George L. Miller, Indalex U.S.'s trustee in bankruptcy, appeals the Court of Appeal's order. Both the Superintendent and Morneau support the Plan Members' position as respondents. A number of stakeholders are also participating in the appeals to this Court. In addition, USW appeals the costs endorsement. As I agree with my colleague Cromwell J. on the appeal from the costs endorsement, I will not deal with it in these reasons.

[24] Le contrôleur, ainsi que Sun Indalex, créancière garantie d'Indalex É.-U., et George L. Miller, syndic de faillite d'Indalex É.-U., interjettent tous trois appel de l'ordonnance de la Cour d'appel. Le surintendant et Morneau appuient la position des participants en tant qu'intimés au pourvoi. D'autres intéressés prennent également part aux pourvois devant notre Cour. Le Syndicat se pourvoit en outre contre l'adjudication des dépens, mais je n'aborderai pas cette question, car je partage l'opinion du juge Cromwell à ce sujet.

II. Issues

II. Les questions en litige

[25] The appeals raise four issues:

1. Does the deemed trust provided for in s. 57(4) of the *PBA* apply to wind-up deficiencies?

2. If so, does the deemed trust supersede the DIP charge?

3. Did Indalex have any fiduciary obligations to the Plan Members when making decisions in the context of the insolvency proceedings?

4. Did the Court of Appeal properly exercise its discretion in imposing a constructive trust to remedy the breaches of fiduciary duties?

[25] Les pourvois soulèvent quatre questions :

1. La fiducie réputée établie par le par. 57(4) de la *LRR* s'applique-t-elle aux déficits de liquidation?

2. Le cas échéant, cette fiducie réputée a-t-elle préséance sur la charge DE?

3. Indalex avait-elle des obligations fiduciaires envers les participants en ce qui concerne les décisions prises dans le contexte des procédures en matière d'insolvabilité?

4. La Cour d'appel a-t-elle exercé son pouvoir discrétionnaire correctement en imposant une fiducie par interprétation à titre de réparation pour les manquements aux obligations fiduciaires?

III. Analysis

III. Analyse

A. *Does the Deemed Trust Provided for in Section 57(4) of the PBA Apply to Wind-up Deficiencies?*

A. *La fiducie réputée établie par le par. 57(4) de la LRR s'applique-t-elle aux déficits de liquidation?*

[26] The first issue is whether the statutory deemed trust provided for in s. 57(4) of the *PBA* extends to wind-up deficiencies. This question is one of statutory interpretation, which requires examination of both the wording and context of the relevant provisions of the *PBA*. Section 57(4) of the *PBA* affords protection to members of a pension plan with respect to their employer's contributions upon wind up of the plan. The provision reads:

[26] Il faut d'abord déterminer si la fiducie réputée établie au par. 57(4) de la *LRR* s'applique aux déficits de liquidation. Il s'agit d'une question d'interprétation législative qui exige l'examen du texte et du contexte des dispositions pertinentes de la *LRR*. Le paragraphe 57(4) de la *LRR* accorde aux participants à un régime de retraite une protection applicable aux cotisations de leur employeur en cas de liquidation du régime :

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57. . . .

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

[27] The most obvious interpretation is that where a plan is wound up, this provision protects all contributions that have accrued but are not yet due. The words used appear to include the contribution the employer is to make where a plan being wound up is in a deficit position. This quite straightforward interpretation, which is consistent with both the historical broadening of the protection and the remedial purpose of the provision, is being challenged on the basis of a narrow definition of the word "accrued". I do not find that this argument justifies limiting the protection afforded to plan members by the Ontario legislature.

[28] The *PBA* sets out the rules for the operation of funded contributory defined benefit pension plans in Ontario. In an ongoing plan, an employer must pay into a fund all contributions it withholds from its employees' salaries. In addition, while the plan is ongoing, the employer must make two kinds of payments. One relates to current service contributions — the employer's own regular contributions to the pension fund as required by the plan. The other ensures that the fund is sufficient to meet the plan's liabilities. The employees' interest in having the contributions made while the plan is ongoing is protected by a deemed trust provided for in s. 57(3) of the *PBA*.

[29] The *PBA* also establishes a comprehensive scheme for winding up a pension plan. Section 75(1)(a) imposes on the employer the obligation to "pay" an amount equal to the total of all "payments" that are due or that have accrued and have not been paid into the fund. In addition, s. 75(1)(b) sets out a formula for calculating the amount that must be

57. . . .

(4) Si un régime de retraite est liquidé en totalité ou en partie, l'employeur qui est tenu de cotiser à la caisse de retraite est réputé détenir en fiducie pour le compte des bénéficiaires du régime de retraite un montant égal aux cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements.

[27] Selon l'interprétation la plus évidente, toutes les cotisations accumulées, mais non encore dues, lorsqu'un régime est liquidé sont protégées. Ce libellé semble inclure les cotisations qu'un employeur est tenu de verser lorsque la caisse de retraite est déficitaire au moment de la liquidation. Pour contester cette interprétation plutôt simple, qui concorde à la fois avec l'élargissement constant de la protection accordée au fil du temps et avec l'objectif réparateur de cette disposition, on invoque une définition étroite du mot « accumulé ». À mon avis, cet argument ne justifie pas la restriction de la protection accordée aux participants par le législateur ontarien.

[28] La *LRR* énonce les règles de fonctionnement des régimes de retraite contributifs capitalisés à prestations déterminées en Ontario. Pendant toute la durée d'un régime, l'employeur doit verser à la caisse de retraite toutes les cotisations qu'il retient sur la rémunération des employés. Tant que le régime demeure en vigueur, il est en outre tenu à deux types de paiements. L'un se rapporte aux cotisations pour service courant — les cotisations que l'employeur doit verser régulièrement à la caisse de retraite suivant les modalités du régime — et l'autre, au maintien d'une caisse de retraite suffisante pour couvrir le passif au titre des pensions. Le droit des employés au versement des cotisations pendant que le régime est en vigueur est protégé par la fiducie réputée instituée au par. 57(3) de la *LRR*.

[29] La *LRR* établit également un régime complet régissant la liquidation d'un régime de retraite. L'alinéa 75(1)a) oblige l'employeur à « verse[r] » un montant égal au total de tous les « paiements » dus ou accumulés qui n'ont pas été versés dans la caisse de retraite, et l'al. 75(1)b) établit la formule servant à calculer le montant du paiement

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paid to ensure that the fund is sufficient to cover all liabilities upon wind up. Within six months after the effective date of the wind up, the plan administrator must file a wind-up report that lists the plan's assets and liabilities as of the date of the wind up. If the wind-up report shows an actuarial deficit, the employer must make wind-up deficiency payments. Consequently, s. 75(1)(a) and (b) jointly determine the amount of the contributions owed when a plan is wound up.

[30] It is common ground that the contributions provided for in s. 75(1)(a) are covered by the wind-up deemed trust. The only question is whether it also applies to the deficiency payments required by s. 75(1)(b). I would answer this question in the affirmative in view of the provision's wording, context and purpose.

[31] It is readily apparent that the wind-up deemed trust provision (s. 57(4) *PBA*) does not place an express limit on the "employer contributions accrued to the date of the wind up but not yet due", and I find no reason to exclude contributions paid under s. 75(1)(b). Section 75(1)(a) explicitly refers to "an amount equal to the total of all payments" that have *accrued*, even those that were not yet due as of the date of the wind up, whereas s. 75(1)(b) contemplates an "amount" that is calculated on the basis of the value of assets and of liabilities that have *accrued* when the plan is wound up. Section 75(1) reads as follows:

> **75.** (1) Where a pension plan is wound up, the employer shall pay into the pension fund,
>
> (a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and
>
> (b) an amount equal to the amount by which,
>
> (i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares

à effectuer pour que la caisse de retraite puisse couvrir la totalité du passif à la liquidation. Dans les six mois suivant la date de prise d'effet de la liquidation, l'administrateur du régime doit déposer un rapport de liquidation faisant état de l'actif et du passif du régime à la date de la liquidation. Si le rapport révèle l'existence d'un déficit actuariel, l'employeur doit effectuer des paiements au titre du déficit de liquidation. Par conséquent, les al. 75(1)a) et b) établissent le montant des cotisations dues lors de la liquidation d'un régime.

[30] Il est bien établi que la fiducie réputée en cas de liquidation s'applique aux cotisations visées à l'al. 75(1)a). La seule question à trancher est de savoir si elle s'applique aussi aux paiements au titre du déficit exigés par l'al. 75(1)b). J'y répondrais par l'affirmative, compte tenu du texte, du contexte et de l'objet de cette disposition.

[31] Il est évident que le par. 57(4) de la *LRR* qui crée la fiducie réputée en cas de liquidation ne comporte aucune limite expresse aux « cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues » et je ne vois rien qui justifie d'exclure les cotisations prévues à l'al. 75(1)b). L'alinéa 75(1)a) prévoit expressément que l'employeur verse « un montant égal au total de tous les paiements » *accumulés*, même s'ils ne sont pas encore dus à la date de la liquidation, tandis que l'al. 75(1)b) parle d'un « montant » calculé à partir de la valeur de l'actif et du passif *accumulés*, lorsque le régime est liquidé. Voici le texte du par. 75(1) :

> **75.** (1) Si un régime de retraite est liquidé, l'employeur verse à la caisse de retraite :
>
> a) d'une part, un montant égal au total de tous les paiements qui, en vertu de la présente loi, des règlements et du régime de retraite, sont dus ou accumulés, et qui n'ont pas été versés à la caisse de retraite;
>
> b) d'autre part, un montant égal au montant dont :
>
> (i) la valeur des prestations de retraite aux termes du régime de retraite qui seraient garanties par le Fonds de garantie en vertu de la présente loi et des règlements si le

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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.

surintendant déclare que le Fonds de garantie s'applique au régime de retraite,

(ii) la valeur des prestations de retraite accumulées à l'égard de l'emploi en Ontario et acquises aux termes du régime de retraite,

(iii) la valeur des prestations accumulées à l'égard de l'emploi en Ontario et qui résultent de l'application du paragraphe 39 (3) (règle des 50 pour cent) et de l'article 74,

dépassent la valeur de l'actif de la caisse de retraite attribué, comme cela est prescrit, pour le paiement de prestations de retraite accumulées à l'égard de l'emploi en Ontario.

[32] Since both the amount with respect to payments (s. 75(1)(a)) and the one ascertained by subtracting the assets from the liabilities accrued as of the date of the wind up (s. 75(1)(b)) are to be paid upon wind up as employer contributions, they are both included in the ordinary meaning of the words of s. 57(4) of the *PBA*: ". . . amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". As I mentioned above, this reasoning is challenged in respect of s. 75(1)(b), not of s. 75(1)(a).

[32] Puisque le montant des paiements (al. 75(1)a)) et le montant établi en soustrayant l'actif du passif accumulé à la date de la liquidation (al. 75(1)b)) doivent tous les deux être versés à la liquidation à titre de cotisations de l'employeur, ils entrent tous les deux dans le sens ordinaire des mots employés au par. 57(4) de la *LRR* : « . . . montant égal aux cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements ». Comme je l'ai mentionné, ce raisonnement est contesté en ce qui concerne l'al. 75(1)b), mais non l'al. 75(1)a).

[33] The appellant Sun Indalex argues that since the deficiency is not finally quantified until well after the effective date of the wind up, the liability of the employer cannot be said to have accrued. The Monitor adds that the payments the employer must make to satisfy its wind-up obligations may change over the five-year period within which s. 31 of the *PBA* Regulations, R.R.O. 1990, Reg. 909, requires that they be made. These parties illustrate their argument by referring to what occurred to the Salaried Plan's fund in the case at bar. In 2007-8, Indalex paid down the vast majority of the $1.6 million wind-up deficiency associated with the Salaried Plan as estimated in 2006. By the end of 2008, however, this deficiency had risen back up to $1.8 million as a result of a decline in the fund's asset value. According to this argument, the amount could not have accrued as of the date of the wind up, because it could not be calculated with certainty.

[33] L'appelante Sun Indalex avance que, puisque le montant définitif du déficit n'est établi que longtemps après la date de prise d'effet de la liquidation, on ne peut parler de passif accumulé relativement à cette obligation de l'employeur. Le contrôleur souligne en outre que les paiements qu'un employeur doit effectuer pour honorer ses obligations à la liquidation peuvent changer au cours des cinq ans sur lesquels ils peuvent s'échelonner aux termes de l'art. 31 du règlement général pris en application de la *LRR*, R.R.O. 1990, règl. 909. Pour illustrer leur argument, ces parties donnent l'exemple de ce qui s'est produit dans le cas du régime des salariés. En 2007-8, Indalex a comblé la majeure partie du déficit du régime des salariés, qui était estimé à 1,6 million de dollars en 2006. Toutefois, à la fin de 2008, la diminution de la valeur de l'actif de la caisse de retraite avait fait remonter le déficit de liquidation à 1,8 million de dollars. Selon cet argument, il ne peut s'agir d'un montant accumulé à la date de la liquidation, parce qu'il ne pouvait pas être établi avec certitude.

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[34] Unlike my colleague Cromwell J., I find this argument unconvincing. I instead agree with the Court of Appeal on this point. The wind-up deemed trust concerns "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". Since the employees cease to accumulate entitlements when the plan is wound up, the entitlements that are used to calculate the contributions have all been accumulated before the wind-up date. Thus the liabilities of the employer are complete — have accrued — before the wind up. The distinction between my approach and the one Cromwell J. takes is that he requires that it be possible to perform the calculation before the date of the wind up, whereas I am of the view that the time when the calculation is actually made is not relevant as long as the liabilities are assessed as of the date of the wind up. The date at which the liabilities are *reported* or the employer's *option* to spread its contributions as allowed by the regulations does not change the legal nature of the contributions.

[35] In *Hydro-Electric Power Commission of Ontario v. Albright* (1922), 64 S.C.R. 306, Duff J. considered the meaning of the word "accrued" in interpreting the scope of a covenant. He found that

> the word "accrued" according to well recognized usage has, as applied to rights or liabilities the meaning simply of completely constituted — and it may have this meaning although it appears from the context that the right completely constituted or the liability completely constituted is one which is only exercisable or enforceable *in futuro* — a debt for example which is *debitum in praesenti solvendum in futuro*. [Emphasis added; pp. 312-13.]

[36] Thus, a contribution has "accrued" when the liabilities are completely constituted, even if the payment itself will not fall due until a later date. If this principle is applied to the facts of this case, the liabilities related to contributions to the fund allocated for payment of the pension benefits contemplated in s. 75(1)(b) are completely

[34] Contrairement à mon collègue le juge Cromwell, j'estime que cet argument n'est pas convaincant. Je souscris plutôt à l'opinion de la Cour d'appel sur ce point. La fiducie réputée s'applique aux « cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements ». Puisque les employés cessent d'accumuler des droits lorsque le régime est liquidé, les droits qui servent au calcul des cotisations ont tous été accumulés avant la date de la liquidation. Par conséquent, le passif correspondant aux obligations de l'employeur existe en entier — est accumulé — avant la liquidation. La différence entre le raisonnement que j'applique et celui du juge Cromwell réside dans le fait que le sien exige que le calcul puisse s'établir avant la date de la liquidation, tandis que je suis d'avis que la date où s'effectue le calcul est sans importance du moment que le passif est évalué à la date de la liquidation. Ni la date à laquelle le passif est *déclaré* ni l'*option* de l'employeur d'étaler ses cotisations comme le permet le règlement ne changent la nature juridique des cotisations.

[35] Dans *Hydro-Electric Power Commission of Ontario c. Albright* (1922), 64 R.C.S. 306, le juge Duff a examiné le sens du mot « *accrued* », l'équivalent anglais du mot « accumulé », pour interpréter la portée d'un covenant et il a tiré la conclusion suivante :

> [TRADUCTION] . . . suivant l'usage établi, le mot « accumulé », appliqué à un droit ou une obligation, signifie simplement entièrement constitué — et il peut avoir ce sens bien que le contexte indique que l'exercice de ce droit entièrement constitué ou l'exécution forcée de cette obligation entièrement constituée ne seront possibles que dans l'avenir — une dette, par exemple, qui est *debitum in praesenti solvendum in futuro*. [Je souligne; p. 312-313.]

[36] Ainsi, une cotisation est « accumulée » lorsque le passif est entièrement constitué, même si le paiement lui-même ne devient exigible que plus tard. Cela signifie en l'espèce que le passif au titre des cotisations à la caisse destinée au paiement des prestations de retraite visées à l'al. 75(1)b) est entièrement constitué lorsque la liquidation

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constituted at the time of the wind up, because no pension entitlements arise after that date. In other words, no new liabilities accrue at the time of or after the wind up. Even the portion of the contributions that is related to the elections plan members may make upon wind up has "accrued to the date of the wind up", because it is based on rights employees earned before the wind-up date.

a lieu, parce qu'aucun droit au titre de la pension ne prend naissance après cette date. Autrement dit, aucun passif ne s'accumule pendant ni après la liquidation. Même la portion des cotisations afférente aux options que les participants peuvent exercer lorsqu'il y a liquidation est « accumulé[e] à la date de la liquidation » parce qu'elle est fondée sur des droits que les employés ont acquis avant la date de la liquidation.

[37] The fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes (*Canadian Pacific Ltd. v. M.N.R.* (1998), 41 O.R. (3d) 606 (C.A.), at p. 621). The use of the word "accrued" does not limit liabilities to amounts that can be determined with precision. As a result, the words "contributions accrued" can encompass the contributions mandated by s. 75(1)(b) of the *PBA*.

[37] Le fait que le montant précis des cotisations n'est pas établi au moment de la liquidation ne confère pas aux cotisations un caractère éventuel qui ferait en sorte qu'elles ne seraient pas accumulées d'un point de vue comptable (*Canadian Pacific Ltd. c. M.N.R.* (1998), 41 O.R. (3d) 606 (C.A.), p. 621). L'emploi du mot « accumulé » ne limite pas le passif aux seuls montants qui peuvent être établis avec précision. On peut donc considérer que le passif « accumulé » englobe les cotisations exigées à l'al. 75(1)b) de la *LRR*.

[38] The legislative history supports my conclusion that wind-up deficiency contributions are protected by the deemed trust provision. The Ontario legislature has consistently expanded the protection afforded in respect of pension plan contributions. I cannot therefore accept an interpretation that would represent a drawback from the protection extended to employees. I will not reproduce the relevant provisions, since my colleague Cromwell J. quotes them.

[38] L'historique législatif étaye ma conclusion que la disposition établissant une fiducie réputée en cas de liquidation s'applique aux cotisations au titre du déficit de liquidation. Le législateur ontarien a systématiquement élargi la protection applicable aux cotisations aux régimes de retraite. Je ne puis donc retenir une interprétation qui ferait régresser la protection accordée aux employés. Mon collègue le juge Cromwell ayant cité les dispositions législatives pertinentes, je ne les reproduirai pas ici.

[39] The original statute provided solely for the employer's obligation to pay all amounts required to be paid to meet the test for solvency (*The Pension Benefits Act, 1965*, S.O. 1965, c. 96, s. 22(2)), but the legislature subsequently afforded employees the protection of a deemed trust on the employer's assets in an amount equal to the sums withheld from employees as contributions and sums due from the employer as service contributions (s. 23*a*, added by *The Pension Benefits Amendment Act, 1973*, S.O. 1973, c. 113, s. 6). In a later version, it protected not only contributions that were due, but also those that had accrued, with the amounts being calculated as if the plan had been wound up (*The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80).

[39] La loi initiale obligeait seulement l'employeur à effectuer les paiements nécessaires pour établir la solvabilité selon la norme applicable (*The Pension Benefits Act, 1965*, S.O. 1965, ch. 96, par. 22(2)), mais le législateur a par la suite protégé les employés au moyen d'une fiducie réputée grevant les biens de l'employeur d'un montant égal aux sommes retenues en tant que cotisations des employés et aux sommes dues par l'employeur (al. 23*a*, ajouté par *The Pension Benefits Amendment Act, 1973*, S.O. 1973, ch. 113, art. 6). Dans une version subséquente, ce ne furent pas que les cotisations exigibles, mais également celles qui étaient accumulées qui ont été protégées, et le calcul s'en effectuait comme s'il y avait liquidation (*The Pension Benefits Amendment Act, 1980*, S.O. 1980, ch. 80).

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[40] Whereas *all* employer contributions were originally covered by a single provision, the legislature crafted a separate provision in 1980 that specifically imposed on the employer the obligation to fund the wind-up deficiency. At the time, it was clear from the words used in the provision that the amount related to the wind-up deficiency was excluded from the deemed trust protection (*The Pension Benefits Amendment Act, 1980*). In 1983, the legislature made a distinction between the deemed trust for ongoing employer contributions and the one for certain payments to be made upon wind up (ss. 23(4)(a) and 23(4)(b), added by *Pension Benefits Amendment Act, 1983*, S.O. 1983, c. 2, s. 3). In that version, the wind-up deficiency payments were still excluded from the deemed trust. However, the legislature once again made changes to the protection in 1987. The 1987 version is, in substance, the one that applies in the case at bar. In the *Pension Benefits Act, 1987*, S.O. 1987, c. 35, a specific wind-up deemed trust was maintained, but the wind-up deficiency payments were no longer excluded from it, because the limitation that had been imposed until then with respect to payments that were due or had accrued while the plan was ongoing had been eliminated. My comments to the effect that the previous versions excluded the wind-up deficiency payments do not therefore apply to the 1987 statute, since it was materially different.

[40] Alors que *toutes* les cotisations de l'employeur étaient au départ régies par une seule disposition, le législateur a édicté, en 1980, une disposition distincte imposant expressément à l'employeur une obligation de capitalisation du déficit de liquidation. Il ressortait alors du libellé employé que le montant relatif au déficit à la liquidation était exclu de la protection conférée par la fiducie réputée (*The Pension Benefits Amendment Act, 1980*). En 1983, le législateur a établi une distinction entre la fiducie réputée applicable aux cotisations de l'employeur lorsque le régime est en vigueur et celle applicable à certains paiements en cas de liquidation du régime (al. 23(4)a) et 23(4)b), ajoutés par la *Pension Benefits Amendment Act, 1983*, S.O. 1983, ch. 2, art. 3). Dans cette version, les paiements au titre du déficit de liquidation étaient toujours exclus de la fiducie réputée. En 1987, toutefois, le législateur a modifié encore une fois la protection, et c'est cette version qui régit, pour l'essentiel, la présente espèce. La *Loi de 1987 sur les régimes de retraite*, L.O. 1987, ch. 35, crée toujours une fiducie réputée distincte en cas de liquidation, mais cette fiducie n'exclut plus les paiements au titre du déficit parce que la limitation imposée jusqu'alors concernant les paiements dus ou accumulés pendant l'existence du régime a été abolie. Mes commentaires selon lesquels le libellé des anciennes versions excluait les paiements au titre du déficit de liquidation ne s'appliquent donc pas à la loi de 1987, parce que celle-ci est substantiellement différente.

[41] Whereas it is clear from the 1983 amendments that the deemed trust provided for in s. 23(4)(b) was intended to include only current service costs and special payments, this is less clear from the subsequent versions of the *PBA*. To give meaning to the 1987 amendment, I have to conclude that the words refer to a deemed trust in respect of *all* "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations".

[41] Alors qu'il ressort clairement des modifications faites en 1983 que la fiducie réputée créée par l'al. 23(4)b) ne visait que les coûts afférents au service courant et les paiements spéciaux, cela n'est pas aussi clair dans les versions subséquentes de la *LRR*. Pour donner un sens aux modifications apportées en 1987, il faut conclure que leur libellé renvoie à une fiducie réputée couvrant *toutes* les « cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements ».

[42] The employer's liability upon wind up is now set out in a single section which elegantly parallels the wind-up deemed trust provision. It can be seen from the legislative history that the protection has expanded from (1) only the service contributions

[42] La responsabilité de l'employeur à la liquidation est maintenant établie dans un article unique qui fait élégamment écho à celui qui crée la fiducie réputée à la liquidation. L'historique législatif montre que la protection, qui couvrait d'abord (1)

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that were due, to (2) amounts payable calculated as if the plan had been wound up, to (3) amounts that were due and had accrued upon wind up but excluding the wind-up deficiency payments, to (4) all amounts due and accrued upon wind up.

uniquement les cotisations dues, s'est étendue (2) aux montants payables calculés comme s'il y avait liquidation du régime, (3) puis aux montants dus ou accumulés à la liquidation, à l'exclusion des paiements au titre du déficit de liquidation (4) et, enfin, à tous les montants dus ou accumulés à la liquidation.

[43] Therefore, in my view, the legislative history leads to the conclusion that adopting a narrow interpretation that would dissociate the employer's payment provided for in s. 75(1)(b) of the *PBA* from the one provided for in s. 75(1)(a) would be contrary to the Ontario legislature's trend toward broadening the protection. Since the provision respecting wind-up payments sets out the amounts that are owed upon wind up, I see no historical, legal or logical reason to conclude that the wind-up deemed trust provision does not encompass all of them.

[43] Selon moi, l'historique législatif mène donc à la conclusion qu'une interprétation étroite qui dissocierait le paiement requis de l'employeur par l'al. 75(1)b) de la *LRR* de celui exigé à l'al. 75(1)a) irait à l'encontre de la tendance du législateur ontarien à offrir une protection de plus en plus étendue. Puisque la disposition régissant les paiements à la liquidation décrit les montants qui sont alors dus, je ne vois aucune raison historique, juridique ou logique de conclure que la disposition établissant une fiducie réputée en cas de liquidation ne les englobe pas tous.

[44] Thus, I am of the view that the words and context of s. 57(4) lend themselves easily to an interpretation that includes the wind-up deficiency payments, and I find additional support for this in the purpose of the provision. The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. This purpose militates against adopting the limited scope proposed by Indalex and some of the interveners. In the case of competing priorities between creditors, the remedial purpose favours an approach that includes all wind-up payments in the value of the deemed trust in order to achieve a broad protection.

[44] J'estime donc que le texte et le contexte du par. 57(4) se prêtent facilement à une interprétation qui englobe les paiements au titre du déficit de liquidation, et l'objet de cette disposition me conforte dans cette opinion. La disposition qui crée une fiducie réputée a une vocation réparatrice. Elle vise à protéger les intérêts des participants. Cet objet milite contre l'adoption de la portée limitée que proposent Indalex et certains des intervenants. En présence de priorités concurrentes entre créanciers, cette fin réparatrice favorise une interprétation qui inclut tous les paiements à la liquidation dans la valeur de la fiducie réputée pour que les participants bénéficient d'une vaste protection.

[45] In sum, the relevant provisions, the legislative history and the purpose are all consistent with inclusion of the wind-up deficiency in the protection afforded to members with respect to employer contributions upon the wind up of their pension plan. I therefore find that the Court of Appeal correctly held with respect to the Salaried Plan, which had been wound up as of December 31, 2006, that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

[45] En résumé, le texte, l'historique législatif et l'objet des dispositions pertinentes concordent tous avec l'inclusion du déficit de liquidation dans la protection offerte aux participants à l'égard des cotisations de l'employeur à la liquidation des régimes. Je suis donc d'avis que la Cour d'appel a jugé à bon droit qu'Indalex était réputée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation du régime des salariés dont la liquidation avait pris effet le 31 décembre 2006.

[46] The situation is different with respect to the Executive Plan. Unlike s. 57(3), which provides that

[46] Il n'en va pas de même pour le régime des cadres. Contrairement au par. 57(3), selon lequel

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the deemed trust protecting employer contributions exists while a plan is ongoing, s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up. This is a choice made by the Ontario legislature. I would not interfere with it. Thus, the deemed trust entitlement arises only once the condition precedent of the plan being wound up has been fulfilled. This is true even if it is certain that the plan will be wound up in the future. At the time of the sale, the Executive Plan was in the process of being, but had not yet been, wound up. Consequently, the deemed trust provision does not apply to the employer's wind-up deficiency payments in respect of that plan.

la fiducie réputée protégeant les cotisations de l'employeur existe pendant que le régime est en vigueur, le par. 57(4) prévoit que la fiducie réputée en cas de liquidation ne prend naissance qu'à la liquidation du régime. C'est ce que le législateur ontarien a décidé, et je n'interviendrai pas dans cette décision. Les droits résultant de la fiducie réputée ne prennent donc naissance que lorsque se réalise la condition préalable, c'est-à-dire lors de la liquidation du régime, et cela, même s'il est certain que le régime sera liquidé plus tard. Au moment de la vente, le régime des cadres était en voie de liquidation, mais non liquidé. La disposition relative à la fiducie réputée ne s'applique donc pas aux cotisations de l'employeur au titre du déficit de liquidation de ce régime.

[47] The Court of Appeal declined to decide whether a deemed trust arose in relation to the Executive Plan, stating that it was unnecessary to decide this issue. However, the court expressed concern that a reasoning that deprived the Executive Plan's members of the benefit of a deemed trust would mean that a company under *CCAA* protection could avoid the priority of the *PBA* deemed trust simply by not winding up an underfunded pension plan. The fear was that Indalex could have relied on its own inaction to avoid the consequences that flow from a wind up. I am not convinced that the Court of Appeal's concern has any impact on the question whether a deemed trust exists, and I doubt that an employer could avoid the consequences of such a security interest simply by refusing to wind up a pension plan. The Superintendent may take a number of steps, including ordering the wind up of a pension plan under s. 69(1) of the *PBA* in a variety of circumstances (see s. 69(1)(d) *PBA*). The Superintendent did not choose to order that the plan be wound up in this case.

[47] La Cour d'appel, ne s'est pas prononcée sur l'existence d'une fiducie réputée à l'égard du régime des cadres, affirmant qu'il n'était pas nécessaire de trancher cette question. Elle a cependant exprimé des réserves au sujet d'un raisonnement qui empêcherait les participants au régime des cadres de bénéficier d'une fiducie réputée, ce qui ferait en sorte qu'une société placée sous la protection de la *LACC* pourrait éviter la priorité établie par la *LRR* à l'égard de la fiducie réputée en s'abstenant simplement de liquider un régime de retraite sous-capitalisé. Indalex aurait ainsi pu tabler sur sa propre inaction pour échapper aux conséquences d'une liquidation. Je ne suis pas convaincue que la crainte exprimée par la Cour d'appel ait une incidence sur la question de savoir si une fiducie réputée existe, et je doute que le simple refus de liquider un régime de retraite puisse permettre à un employeur d'échapper aux conséquences d'une telle sûreté. Le surintendant peut intervenir de diverses façons, notamment en ordonnant la liquidation du régime en application du par. 69(1) de la *LRR* dans diverses circonstances (voir l'al. 69(1)d) de la *LRR*). Le surintendant n'a pas choisi, en l'espèce, d'ordonner la liquidation.

B. *Does the Deemed Trust Supersede the DIP Charge?*

B. *La fiducie réputée a-t-elle préséance sur la charge DE?*

[48] The finding that the interests of the Salaried Plan's members in all the employer's wind-up contributions to the Salaried Plan are protected by a

[48] La conclusion qu'une fiducie réputée protège les droits des participants au régime des salariés à l'égard de toutes les cotisations que l'employeur

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deemed trust does not mean that part of the money reserved by the Monitor from the sale proceeds must be remitted to the Salaried Plan's fund. This will be the case only if the provincial priorities provided for in s. 30(7) of the *PPSA* ensure that the claim of the Salaried Plan's members has priority over the DIP charge. Section 30(7) reads as follows:

doit verser au régime de retraite des salariés à la liquidation ne signifie pas qu'une partie des sommes retenues par le contrôleur sur le produit de la vente doit être versée à la caisse de retraite des salariés. Ce sera le cas seulement si la priorité de rang accordée par la province aux participants au régime des salariés, au par. 30(7) de la *LSM*, fait en sorte que leur réclamation a préséance sur la charge DE. Le paragraphe 30(7) prévoit ce qui suit :

30. . . .

(7) 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*.

30. . . .

(7) La sûreté sur un compte ou un stock et le produit de ceux-ci est subordonnée à l'intérêt du bénéficiaire d'une fiducie réputée telle aux termes de la *Loi sur les normes d'emploi* ou de la *Loi sur les régimes de retraite*.

The effect of s. 30(7) is to enable the Salaried Plan's members to recover from the reserve fund, insofar as it relates to an account or inventory and its proceeds in Ontario, ahead of all other secured creditors.

Le paragraphe 30(7) a pour effet de permettre aux participants au régime des salariés de recouvrer leur créance sur le fonds de réserve, dans la mesure où il se rapporte à un compte ou un stock ou au produit de ceux-ci en Ontario, par préséance sur tous les autres créanciers garantis.

[49] The Appellants argue that any provincial deemed trust is subordinate to the DIP charge authorized by the *CCAA* order. They put forward two central arguments to support their contention. First, they submit that the *PBA* deemed trust does not apply in *CCAA* proceedings because the relevant priorities are those of the federal insolvency scheme, which do not include provincial deemed trusts. Second, they argue that by virtue of the doctrine of federal paramountcy the DIP charge supersedes the *PBA* deemed trust.

[49] Les appelants avancent que toute fiducie réputée d'origine provinciale est subordonnée à la charge DE autorisée par l'ordonnance fondée sur la *LACC*. Ils invoquent deux arguments principaux à cet égard. Premièrement, la fiducie réputée créée par la *LRR* ne s'appliquerait pas dans une instance relevant de la *LACC* parce que les priorités applicables sont celles qui sont établies par le régime fédéral en matière d'insolvabilité et que les fiducies réputées d'origine provinciale n'en font pas partie. Deuxièmement, ils plaident que, selon la doctrine de la prépondérance fédérale, la charge DE a préséance sur la fiducie réputée créée par la *LRR*.

[50] The Appellants' first argument would expand the holding of *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, so as to apply federal bankruptcy priorities to *CCAA* proceedings, with the effect that claims would be treated similarly under the *CCAA* and the *BIA*. In *Century Services*, the Court noted that there are points at which the two schemes converge:

[50] Le premier argument des appelants élargirait la portée de l'arrêt *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, de façon que les priorités fédérales en matière de faillite s'appliquent aux instances fondées sur la *LACC*, ce qui ferait que les créances seraient traitées de façon identique sous le régime de la *LACC* et de la *LFI*. Dans *Century Services*, la Cour a indiqué qu'il existe des points de convergence entre les deux régimes :

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Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. [para. 23]

Un autre point de convergence entre la *LACC* et la *LFI* concerne les priorités. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence pour ce qui se produira dans une telle situation. [par. 23]

[51] In order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements. Yet this does not mean that courts may read bankruptcy priorities into the *CCAA* at will. Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to *CCAA* proceedings or to proposals under the *BIA*. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the *CCAA*, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation under the *BIA*. Indalex achieved the goal it was pursuing. It chose to sell its assets under the *CCAA*, not the *BIA*.

[51] Pour éviter de précipiter une liquidation sous le régime de la *LFI*, les tribunaux privilégieront une interprétation de la *LACC* qui confère des droits analogues aux créanciers. Il ne s'ensuit toutefois pas pour autant que les tribunaux peuvent à leur gré inclure par interprétation dans la *LACC* les priorités applicables en matière de faillite. Les priorités dont bénéficient les créanciers sont définies par la législation provinciale, à moins que ces droits soient écartés par une loi fédérale. Le législateur fédéral n'a pas expressément édicté que toutes les priorités établies en matière de faillite s'appliquent aux instances relevant de la *LACC* ou aux propositions régies par la *LFI*. Bien que les créanciers d'une société tentant de se réorganiser puissent, dans leurs négociations, tenir compte des droits qu'ils pourraient exercer en cas de faillite, ces droits ne constituent rien de plus qu'une considération tant que la faillite n'est pas survenue. Au début des procédures en matière d'insolvabilité, Indalex a choisi un processus régi par la *LACC*, ne laissant aucun doute sur le fait que, bien qu'elle cherchât à protéger les emplois, elle ne demeurerait pas leur employeur. Nous ne sommes pas en présence d'un cas où l'échec d'un arrangement a entraîné la liquidation d'une société sous le régime de la *LFI*. Indalex a atteint l'objectif qu'elle poursuivait. Elle a choisi de vendre son actif sous le régime de la *LACC*, et non sous celui de la *LFI*.

[52] The provincial deemed trust under the *PBA* continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy (*Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60, at para. 43). The Court of Appeal therefore did not err in finding that at the end of a *CCAA* liquidation proceeding, priorities may be determined by the *PPSA*'s scheme rather than the federal scheme set out in the *BIA*.

[52] La fiducie réputée créée par la *LRR* continue de s'appliquer dans les instances relevant de la *LACC*, sous réserve de la doctrine de la prépondérance fédérale (*Crystalline Investments Ltd. c. Domgroup Ltd.*, 2004 CSC 3, [2004] 1 R.C.S. 60, par. 43). La Cour d'appel a donc jugé à bon droit que, à l'issue d'un processus de liquidation relevant de la *LACC*, les priorités peuvent être établies selon le régime prévu dans la *LSM*, plutôt que selon le régime fédéral établi dans la *LFI*.

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[53] The Appellants' second argument is that an order granting priority to the plan's members on the basis of the deemed trust provided for by the Ontario legislature would be unconstitutional in that it would conflict with the order granting priority to the DIP lenders that was made under the *CCAA*. They argue that the doctrine of paramountcy resolves this conflict, as it would render the provincial law inoperative to the extent that it is incompatible with the federal law.

[54] There is a preliminary question that must be addressed before determining whether the doctrine of paramountcy applies in this context. This question arises because the Court of Appeal found that although the *CCAA* court had the power to authorize a DIP charge that would supersede the deemed trust, the order in this case did not have such an effect because paramountcy had not been invoked. As a result, the priority of the deemed trust over secured creditors by virtue of s. 30(7) of the *PPSA* remained in effect, and the Plan Members' claim ranked in priority to the claim of the DIP lenders established in the *CCAA* order.

[55] With respect, I cannot accept this approach to the doctrine of federal paramountcy. This doctrine resolves conflicts in the application of overlapping valid provincial and federal legislation (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at paras. 32 and 69). Paramountcy is a question of law. As a result, subject to the application of the rules on the admissibility of new evidence, it can be raised even if it was not invoked in an initial proceeding.

[56] A party relying on paramountcy must "demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law" (*Canadian Western Bank*, at para. 75). This Court has in fact applied the doctrine of paramountcy in the area of bankruptcy and insolvency to come to the conclusion that a

[53] Selon le deuxième argument des appelants, une ordonnance accordant priorité aux participants en raison de la fiducie réputée créée par le législateur ontarien serait inconstitutionnelle, parce qu'elle entrerait en conflit avec l'ordonnance fondée sur la *LACC* qui donne priorité à la charge DE. La doctrine de la prépondérance fédérale résoudrait ce conflit, en rendant la loi provinciale inopérante dans la mesure de son incompatibilité avec la loi fédérale.

[54] Pour statuer sur l'applicabilité de la doctrine de la prépondérance fédérale dans le présent contexte, il faut d'abord trancher une question préliminaire. Cette question découle de la conclusion de la Cour d'appel selon laquelle, bien que le tribunal fût habilité à autoriser une charge DE ayant priorité de rang sur la fiducie réputée, l'ordonnance du tribunal en l'espèce n'avait pas eu cet effet parce que la doctrine de la prépondérance fédérale n'avait pas été invoquée. Il s'ensuivait que la priorité de rang de la fiducie réputée sur les créanciers garantis établie au par. 30(7) de la *LSM* demeurait applicable et que la créance des participants avait préséance sur celle des prêteurs DE découlant de l'ordonnance rendue sous le régime de la *LACC*.

[55] Avec égards, je ne puis souscrire à cette conception de la doctrine de la prépondérance fédérale. Cette doctrine résout les conflits d'application entre des lois provinciales et fédérales validement adoptées qui empiètent l'une sur l'autre (*Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3, par. 32 et 69). La prépondérance est une question de droit, si bien que, sous réserve de l'application des règles régissant l'admissibilité de nouveaux éléments de preuve, elle peut être soulevée même si elle n'a pas été invoquée dans une procédure initiale.

[56] La partie qui invoque la prépondérance fédérale doit « démontrer une incompatibilité réelle entre les législations provinciale et fédérale, en établissant, soit qu'il est impossible de se conformer aux deux législations, soit que l'application de la loi provinciale empêcherait la réalisation du but de la législation fédérale » (*Banque canadienne de l'Ouest*, par. 75). Notre Cour a déjà appliqué la doctrine de la prépondérance au domaine de la

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provincial legislature cannot, through measures such as a deemed trust, affect priorities granted under federal legislation (*Husky Oil*).

faillite et de l'insolvabilité, et elle a conclu que des mesures législatives provinciales, comme la création d'une fiducie réputée, ne peuvent porter atteinte à des priorités établies par le législateur fédéral (*Husky Oil*).

[57] None of the parties question the validity of either the federal provision that enables a *CCAA* court to make an order authorizing a DIP charge or the provincial provision that establishes the priority of the deemed trust. However, in considering whether the *CCAA* court has, in exercising its discretion to assess a claim, validly affected a provincial priority, the reviewing court should remind itself of the rule of interpretation stated in *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 (at p. 356), and reproduced in *Canadian Western Bank* (at para. 75):

> When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

[57] Ni la validité de la disposition fédérale habilitant le tribunal chargé d'appliquer la *LACC* à rendre une ordonnance autorisant une charge DE, ni celle de la disposition provinciale créant la priorité de rang de la fiducie réputée ne sont contestées. Toutefois, lorsqu'elle examine la validité de l'atteinte portée à une priorité d'origine provinciale par le tribunal chargé d'appliquer la *LACC* dans l'exercice de son pouvoir discrétionnaire d'évaluer une réclamation, la cour siégeant en révision ne doit pas perdre de vue la règle d'interprétation formulée dans *Procureur général du Canada c. Law Society of British Columbia*, [1982] 2 R.C.S. 307 (p. 356), et reproduite dans *Banque canadienne de l'Ouest* (par. 75) :

> Chaque fois qu'on peut légitimement interpréter une loi fédérale de manière qu'elle n'entre pas en conflit avec une loi provinciale, il faut appliquer cette interprétation de préférence à toute autre qui entraînerait un conflit.

[58] In the instant case, the *CCAA* judge, in authorizing the DIP charge, did not consider the fact that the Salaried Plan's members had a claim that was protected by a deemed trust, nor did he explicitly note that ordinary creditors, such as the Executive Plan's members, had not received notice of the DIP loan motion. However, he did consider factors that were relevant to the remedial objective of the *CCAA* and found that Indalex had in fact demonstrated that the *CCAA*'s purpose would be frustrated without the DIP charge. It will be helpful to quote the reasons he gave on April 17, 2009 in authorizing the DIP charge ((2009), 52 C.B.R. (5th) 61):

> (a) the Applicants are in need of the additional financing in order to support operations during the period of a going concern restructuring;

[58] En l'espèce, le juge qui a autorisé la charge DE sous le régime de la *LACC* n'a pas pris en compte le fait que les participants au régime des salariés avaient une créance protégée par une fiducie réputée, et il n'a pas non plus mentionné expressément que les créanciers ordinaires, tels les participants au régime des cadres, n'avaient pas reçu avis de la motion en autorisation du prêt DE. Il a toutefois examiné des facteurs se rapportant à la fin réparatrice de la *LACC* et conclu qu'Indalex avait effectivement démontré que la réalisation des objets de la *LACC* serait compromise en l'absence de la charge DE. Je crois utile de citer les motifs qu'il a exprimés à l'appui de sa décision d'autoriser la charge DE le 17 avril 2009 ((2009), 52 C.B.R. (5th) 61) :

> [TRADUCTION]
>
> a) les requérantes ont besoin de fonds supplémentaires pour soutenir l'exploitation pendant leur période de restructuration sur la base de la continuité;

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(b) there is a benefit to the breathing space that would be afforded by the DIP Financing that will permit the Applicants to identify a going concern solution;

(c) there is no other alternative available to the Applicants for a going concern solution;

(d) a stand-alone solution is impractical given the integrated nature of the business of Indalex Canada and Indalex U.S.;

(e) given the collateral base of Indalex U.S., the Monitor is satisfied that it is unlikely that the Post-Filing Guarantee with respect to the U.S. Additional Advances will ever be called and the Monitor is also satisfied that the benefits to stakeholders far outweighs the risk associated with this aspect of the Post-Filing Guarantee;

(f) the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing against the assets of the Applicants;

(g) the Pre-Filing Security has been reviewed by counsel to the Monitor and it appears that the unsecured creditors of the Canadian debtors will be in no worse position as a result of the Post-Filing Guarantee than they were otherwise, prior to the CCAA filing, as a result of the limitation of the Canadian guarantee set forth in the draft Amended and Restated Initial Order . . . ; and

(h) the balancing of the prejudice weighs in favour of the approval of the DIP Financing. [para. 9]

[59] Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the *CCAA* judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the

b) la marge de manœuvre que le financement DE procurerait aux requérantes aurait l'avantage de leur permettre de trouver une solution préservant la continuité de leur exploitation;

c) les requérantes ne disposent d'aucune autre solution permettant la continuité de l'exploitation;

d) vu le degré d'intégration de l'exploitation d'Indalex Canada et d'Indalex É.-U., une solution indépendante est irréaliste;

e) vu les biens fournis en garantie par Indalex É.-U., le contrôleur juge peu probable qu'il faille réaliser la garantie postérieure au début de l'instance consentie à l'égard des avances supplémentaires aux É.-U. et il est convaincu que les avantages pour les intéressés dépassent de beaucoup le risque associé à cet aspect de la garantie;

f) les avantages du financement DE pour les intéressés et les créanciers l'emportent sur tout préjudice que pourrait causer aux créanciers non garantis l'octroi d'un financement garanti par une superpriorité grevant l'actif des requérantes;

g) l'avocat du contrôleur a examiné la garantie antérieure au début de l'instance, et il appert que la garantie postérieure au début de l'instance ne placera pas les créanciers non garantis des débiteurs canadiens dans une situation pire que celle où ils se trouvaient avant l'introduction de l'instance fondée sur la *LACC*, en raison des restrictions applicables à la garantie canadienne établies dans le projet d'ordonnance initiale modifiée et reformulée . . .

h) la prépondérance des inconvénients favorise l'approbation du financement DE. [par. 9]

[59] Étant donné qu'il n'existait aucune autre solution pour préserver la continuité de l'exploitation, il est difficile d'accepter l'insinuation sans nuance de la Cour d'appel que les prêteurs DE auraient accepté que leur réclamation soit subordonnée à celles fondées sur la fiducie réputée. Rien dans la preuve présentée n'accrédite un tel scénario. Non seulement les conclusions de fait du juge chargé d'appliquer la *LACC* le contredisent, mais il a été démontré maintes et maintes fois que [TRADUCTION] « la priorité accordée au financement DE constitue un élément clé de la capacité du débiteur de tenter de conclure un arrangement » (J. P. Sarra, *Rescue! The Companies' Creditors*

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lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate" (2009 CanLII 37906, at paras. 7-8).

Arrangement Act (2007), p. 97). La dure réalité est que l'octroi de prêts est régi par les impératifs commerciaux des prêteurs, et non par les intérêts des participants ou par les considérations de politique générale qui ont incité les législateurs provinciaux à protéger les bénéficiaires de caisses de retraite. Les motifs exposés par le juge Morawetz lorsque, le 12 juin 2009, les participants au régime des cadres ont demandé pour la première fois que leurs droits soient réservés sont révélateurs. Selon lui, toute incertitude quant à savoir si les prêteurs refuseraient de consentir des avances ou s'ils auraient priorité dans le cas où des avances seraient consenties [TRADUCTION] « n'améliorerait pas la situation ». Il a conclu qu'en l'absence de solution de rechange la réparation demandée était « nécessaire et appropriée » (2009 CanLII 37906, par. 7-8).

[60] In this case, compliance with the provincial law necessarily entails defiance of the order made under federal law. On the one hand, s. 30(7) of the *PPSA* required a part of the proceeds from the sale related to assets described in the provincial statute to be paid to the plan's administrator before other secured creditors were paid. On the other hand, the Amended Initial Order provided that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" (para. 45). Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the Plan Members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

[60] En l'occurrence, le respect du droit provincial implique nécessairement le non-respect de l'ordonnance rendue en vertu du droit fédéral. D'un côté, le par. 30(7) de la *LSM* exige qu'une partie du produit de la vente lié aux biens décrits dans la loi provinciale soit versée à l'administrateur du régime de retraite par priorité sur les paiements aux autres créanciers garantis. D'un autre côté, l'ordonnance initiale modifiée accorde à la charge DE priorité sur [TRADUCTION] « toutes les autres sûretés, y compris les fiducies, privilèges, charges et grèvements, d'origine législative ou autre » (par. 45). Accorder priorité aux prêteurs DE relègue à un rang inférieur les créances des autres intéressés, notamment les participants. Cette priorité d'origine judiciaire fondée sur la *LACC* a le même effet qu'une priorité d'origine législative. Les dispositions fédérales et provinciales sont inconciliables, car elles produisent des ordres de priorité différents et conflictuels. L'application de la doctrine de la prépondérance fédérale donne à la charge DE priorité sur la fiducie réputée.

C. *Did Indalex Have Fiduciary Obligations to the Plan Members?*

C. *Indalex avait-elle des obligations fiduciaires envers les participants?*

[61] The fact that the DIP financing charge supersedes the deemed trust or that the interests of the Executive Plan's members are not protected by the deemed trust does not mean that Plan Members have no right to receive money out of the reserve

[61] Le fait que la charge DE ait préséance sur la fiducie réputée ou que les intérêts des participants au régime des cadres ne soient pas protégés par la fiducie réputée ne signifient pas que les participants n'ont pas le droit de recevoir un montant prélevé

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fund. What remains to be considered is whether an equitable remedy, which could override all priorities, can and should be granted for a breach by Indalex of a fiduciary duty.

[62] The first stage of a fiduciary duty analysis is to determine whether and when fiduciary obligations arise. The Court has recognized that there are circumstances in which a pension plan administrator has fiduciary obligations to plan members both at common law and under statute (*Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273, at para. 41). It is clear that the indicia of a fiduciary relationship attach in this case between the Plan Members and Indalex as plan administrator. Sun Indalex and the Monitor do not dispute this proposition.

[63] However, Sun Indalex and the Monitor argue that the employer has a fiduciary duty only when it acts as plan administrator — when it is wearing its administrator's "hat". They contend that, outside the plan administration context, when directors make decisions in the best interests of the corporation, the employer is wearing solely its "corporate hat". On this view, decisions made by the employer in its corporate capacity are not burdened by the corporation's fiduciary obligations to its pension plan members and, consequently, cannot be found to conflict with plan members' interests. This is not the correct approach to take in determining the scope of the fiduciary obligations of an employer acting as plan administrator.

[64] Only persons or entities authorized by the *PBA* can act as plan administrators (ss. 1(1) and 8(1)(a)). The employer is one of them. A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the fact that the corporate employer can act as administrator

sur le fonds de réserve. Il faut encore examiner s'il est possible et s'il y a lieu d'imposer une réparation en equity — pouvant avoir préséance sur toutes les priorités — pour manquement par Indalex à une obligation fiduciaire.

[62] La première étape de l'analyse relative à une obligation fiduciaire consiste à déterminer si de telles obligations existent et dans quel contexte elles s'appliquent. La Cour a reconnu que, dans certaines circonstances, l'administrateur d'un régime de retraite a des obligations fiduciaires envers les participants en vertu tant de la common law que de la législation (*Burke c. Cie de la Baie d'Hudson*, 2010 CSC 34, [2010] 2 R.C.S. 273, par. 41). Il est clair que la relation entre les participants et Indalex, en sa qualité d'administrateur des régimes, présente les caractéristiques d'une relation fiduciaire. Ni Sun Indalex ni le contrôleur ne le contestent.

[63] Sun Indalex et le contrôleur font cependant valoir que l'employeur n'est tenu à une obligation fiduciaire que lorsqu'il agit en qualité d'administrateur des régimes — lorsqu'il porte son « chapeau » d'administrateur des régimes. Hors du contexte de l'administration des régimes, lorsque le conseil d'administration prend des décisions dans l'intérêt supérieur de la société, il porte uniquement son « chapeau » de gestionnaire de la société. Selon cette optique, les décisions de l'employeur concernant la gestion de l'entreprise ne sont pas assujetties aux obligations fiduciaires de la société envers les participants à son régime de retraite et, par conséquent, ne peuvent entrer en conflit avec les intérêts des participants. Je ne puis accepter cette interprétation lorsqu'il s'agit de déterminer la portée des obligations fiduciaires qui incombent à un employeur en sa qualité d'administrateur d'un régime de retraite.

[64] Seules peuvent administrer un régime de retraite les personnes ou entités qui y sont autorisées par la *LRR* (par. 1(1) et al. 8(1)a)). L'employeur fait partie de ces personnes ou entités. L'employeur constitué en société qui décide d'agir en qualité d'administrateur d'un régime accepte les obligations fiduciaires inhérentes à cette fonction. Puisque les administrateurs d'une société ont aussi une

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of a pension plan means that s. 8(1)(a) of the *PBA* is based on the assumption that not all decisions taken by directors in managing a corporation will result in conflict with the corporation's duties to the plan's members. However, the corporate employer must be prepared to resolve conflicts where they arise. Reorganization proceedings place considerable burdens on any debtor, but these burdens do not release an employer that acts as plan administrator from its fiduciary obligations.

obligation fiduciaire envers la société, le fait que l'employeur puisse agir en qualité d'administrateur d'un régime de retraite signifie que l'al. 8(1)a) de la *LRR* repose sur la prémisse que les décisions de gestion de l'entreprise prises par les administrateurs n'engendreront pas toujours un conflit avec les obligations de la société envers les participants au régime de retraite. L'employeur doit toutefois être prêt à résoudre les conflits lorsqu'ils surgissent. Une procédure de réorganisation impose inévitablement un poids à un débiteur, mais ce fardeau ne libère pas l'employeur qui agit en qualité d'administrateur d'un régime de retraite de ses obligations fiduciaires.

[65] Section 22(4) of the *PBA* explicitly provides that a plan administrator must not permit its own interest to conflict with its duties in respect of the pension fund. Thus, where an employer's own interests do not converge with those of the plan's members, it must ask itself whether there is a potential conflict and, if so, what can be done to resolve the conflict. Where interests do conflict, I do not find the two hats metaphor helpful. The solution is not to determine whether a given decision can be classified as being related to either the management of the corporation or the administration of the pension plan. The employer may well take a sound management decision, and yet do something that harms the interests of the plan's members. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.

[65] Le paragraphe 22(4) de la *LRR* interdit expressément à l'administrateur d'un régime de permettre que son intérêt entre en conflit avec ses obligations à l'égard du régime de retraite. Par conséquent, l'employeur dont le propre intérêt ne coïncide pas avec celui des participants au régime doit se demander si cette divergence d'intérêts peut susciter un conflit et, le cas échéant, ce qu'il faut faire pour le résoudre. Lorsqu'il y a effectivement conflit, la métaphore des deux « chapeaux » n'est selon moi d'aucun secours. La solution ne consiste pas à déterminer si une décision peut être classifiée comme se rattachant à la gestion de la société ou à l'administration du régime de retraite. L'employeur peut très bien prendre une décision judicieuse concernant la gestion de la société et, néanmoins, porter préjudice aux intérêts des participants au régime. L'employeur qui administre un régime de retraite n'est pas autorisé à négliger ses obligations fiduciaires envers les participants au régime et à favoriser les intérêts concurrents de la société sous prétexte qu'il porte le « chapeau » de dirigeant de la société. Ce sont les conséquences d'une décision, et non sa nature qui doivent être prises en compte.

[66] When the interests the employer seeks to advance on behalf of the corporation conflict with interests the employer has a duty to preserve as plan administrator, a solution must be found to ensure that the plan members' interests are taken care of. This may mean that the corporation puts the members on notice, or that it finds a replacement administrator, appoints representative counsel or

[66] Lorsque les intérêts de la société que l'employeur tente de servir se heurtent à ceux que l'employeur a le devoir de protéger en qualité d'administrateur du régime, il faut trouver une façon de veiller sur les intérêts des participants. Cela peut vouloir dire que la société les tiendra informés, qu'elle trouvera un administrateur substitut pour le régime, qu'elle nommera un avocat

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finds some other means to resolve the conflict. The solution has to fit the problem, and the same solution may not be appropriate in every case.

pour représenter les participants ou qu'elle résoudra le conflit par un autre moyen. La solution doit être adaptée au problème, et une solution donnée ne vaudra pas nécessairement pour tous les cas.

[67] In the instant case, Indalex's fiduciary obligations as plan administrator did in fact conflict with management decisions that needed to be taken in the best interests of the corporation. Indalex had a number of responsibilities as plan administrator. For example, s. 56(1) of the *PBA* required it to ensure that contributions were paid when due. Section 56(2) required that it notify the Superintendent if contributions were not paid when due. It was also up to Indalex under s. 59 to commence proceedings to obtain payment of contributions that were due but not paid. Indalex, as an employer, paid all the contributions that were due. However, its insolvency put contributions that had accrued to the date of the wind up at risk. In an insolvency context, the administrator's claim for contributions that have accrued is a provable claim.

[67] En l'espèce, il y avait bien conflit entre les obligations fiduciaires qui incombaient à Indalex en sa qualité d'administrateur des régimes et les décisions de gestion qu'elle devait prendre dans le meilleur intérêt de la société. Indalex avait certaines responsabilités en sa qualité d'administrateur des régimes. Par exemple, le par. 56(1) de la *LRR* l'obligeait à veiller à ce que les cotisations soient payées à leur date d'exigibilité et, si elles ne l'étaient pas, le par. 56(2) exigeait qu'elle en avise le surintendant. Il incombait également à Indalex, aux termes de l'art. 59, d'introduire une instance devant un tribunal compétent pour obtenir le paiement des cotisations dues, mais impayées. Indalex, en tant qu'employeur, a acquitté toutes les cotisations dues. Son insolvabilité compromettait toutefois le paiement des cotisations accumulées à la date de la liquidation. En cas d'insolvabilité, la créance de l'administrateur d'un régime à l'égard des cotisations accumulées constitue une réclamation prouvable.

[68] In the context of this case, the fact that Indalex, as plan administrator, might have to claim accrued contributions from itself means that it would have to simultaneously adopt conflicting positions on whether contributions had accrued as of the date of liquidation and whether a deemed trust had arisen in respect of wind-up deficiencies. This is indicative of a clear conflict between Indalex's interests and those of the Plan Members. As soon as it saw, or ought to have seen, a potential for conflict, Indalex should have taken steps to ensure that the interests of the Plan Members were protected. It did not do so. On the contrary, it contested the position the Plan Members advanced. At the very least, Indalex breached its duty to avoid conflicts of interest (s. 22(4) *PBA*).

[68] Dans le contexte de la présente affaire, le fait qu'Indalex pouvait, en sa qualité d'administrateur des régimes de retraite, avoir à se réclamer à elle-même les cotisations accumulées l'amènerait à devoir adopter simultanément des positions opposées quant à savoir si des cotisations s'étaient accumulées à la date de la liquidation et si les déficits de capitalisation étaient protégés par une fiducie réputée. Cet exemple démontre qu'il existait manifestement un conflit entre les intérêts d'Indalex et ceux des participants. Indalex aurait dû prendre des mesures pour assurer la protection des intérêts des participants dès qu'elle a constaté, ou qu'elle aurait dû constater, l'existence d'un conflit potentiel. Elle ne l'a pas fait. Elle a, au contraire, contesté la position défendue par les participants. Elle a donc, à tout le moins, manqué à son obligation d'éviter les conflits d'intérêts (par. 22(4) *LRR*).

[69] Since the Plan Members seek an equitable remedy, it is important to identify the point at

[69] Comme les participants demandent une réparation en equity, il importe d'établir à quel moment

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which Indalex should have moved to ensure that their interests were safeguarded. Before doing so, I would stress that factual contexts are needed to analyse conflicts between interests, and that it is neither necessary nor useful to attempt to map out all the situations in which conflicts may arise.

Indalex aurait dû prendre des mesures pour veiller à ce que leurs intérêts soient protégés. Soulignons au préalable que l'analyse d'un conflit d'intérêts doit s'appuyer sur un contexte factuel et qu'il n'est ni nécessaire ni utile de tenter de décrire toutes les situations dans lesquelles un conflit est susceptible de surgir.

[70] As I mentioned above, insolvency puts the employer's contributions at risk. This does not mean that the decision to commence insolvency proceedings entails on its own a breach of a fiduciary obligation. The commencement of insolvency proceedings in this case on April 3, 2009 in an emergency situation was explained by Timothy R. J. Stubbs, the then-president of Indalex. The company was in default to its lender, it faced legal proceedings for unpaid bills, it had received a termination notice effective April 6 from its insurers, and suppliers had stopped supplying on credit. These circumstances called for urgent action by Indalex lest a creditor start bankruptcy proceedings and in so doing jeopardize ongoing operations and jobs. Several facts lead me to conclude that the stay sought in this case did not, in and of itself, put Indalex in a conflict of interest.

[70] L'insolvabilité, comme je l'ai déjà mentionné, met en péril les cotisations de l'employeur. Cela ne signifie pas pour autant que la seule décision d'engager une procédure en matière d'insolvabilité constitue un manquement à une obligation fiduciaire. Le président d'Indalex à l'époque, M. Timothy R. J. Stubbs, a expliqué pourquoi une procédure en matière d'insolvabilité avait été engagée, le 3 avril 2009, dans une situation d'urgence. La dette d'Indalex envers son prêteur était en souffrance, la société s'exposait à des poursuites pour factures impayées, elle avait reçu un avis de résiliation de son assureur qui prenait effet le 6 avril et ses fournisseurs ne lui faisaient plus crédit. Indalex devait donc agir de toute urgence, avant qu'un créancier n'entame une procédure de mise en faillite, ce qui aurait compromis la poursuite de l'exploitation de l'entreprise et le maintien des emplois. Plusieurs raisons m'amènent à conclure que la suspension demandée en l'espèce n'a pas en elle-même placé Indalex en conflit d'intérêts.

[71] First, a stay operates only to freeze the parties' rights. In most cases, stays are obtained *ex parte*. One of the reasons for refraining from giving notice of the initial stay motion is to avert a situation in which creditors race to court to secure benefits that they would not enjoy in insolvency. Subjecting as many creditors as possible to a single process is seen as a way to treat all of them more equitably. In this context, plan members are placed on the same footing as the other creditors and have no special entitlement to notice. Second, one of the conclusions of the order Indalex sought was that it was to be served on all creditors, with a few exceptions, within 10 days. The notice allowed any interested party to apply to vary the order. Third, Indalex was permitted to pay all pension benefits. Although the order excluded special solvency payments, no ruling was made at that point on the

[71] Premièrement, la suspension ne fait que figer les droits des parties. La plupart du temps, elle s'obtient *ex parte*. C'est notamment pour éviter que les créanciers se ruent devant les tribunaux pour tenter d'obtenir des avantages que les procédures en matière d'insolvabilité ne leur procureraient pas qu'on s'abstient de donner avis de la motion initiale en suspension. Il semble plus équitable d'appliquer un processus unique au plus grand nombre possible de créanciers. Dans ce contexte, les participants sont sur le même pied que les autres créanciers, et ils ne bénéficient d'aucun droit spécial de recevoir un avis. Deuxièmement, l'une des conclusions de l'ordonnance demandée par Indalex exigeait que, sous réserve de quelques exceptions, tous les créanciers reçoivent signification de l'ordonnance dans un délai de 10 jours. L'avis permettait à tout intéressé de demander une modification de l'ordonnance.

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merits of the creditors' competing claims, and a stay gave the Plan Members the possibility of presenting their arguments on the deemed trust rather than losing it altogether as a result of a bankruptcy proceeding, which was the alternative.

Troisièmement, Indalex était autorisée à verser toutes les prestations de retraite. Même si l'ordonnance excluait les paiements spéciaux de solvabilité, elle ne réglait pas les droits concurrents des créanciers, et la suspension permettait aux participants de présenter leurs arguments au sujet de la fiducie réputée, alors qu'ils en auraient tout simplement perdu le bénéfice dans le contexte d'une faillite, qui était la solution de rechange.

[72] Whereas the stay itself did not put Indalex in a conflict of interest, the proceedings that followed had adverse consequences. On April 8, 2009, Indalex brought a motion to amend and restate the initial order in order to apply for DIP financing. This motion had been foreseen. Mr. Stubbs had mentioned in the affidavit he signed in support of the initial order that the lenders had agreed to extend their financing, but that Indalex would be in need of authorization in order to secure financing to continue its operations. However, the initial order had not yet been served on the Plan Members as of April 8. Short notice of the motion was given to the USW rather than to all the individual Plan Members, but the USW did not appear. The Plan Members were quite simply not represented on the motion to amend the initial stay order requesting authorization to grant the DIP charge.

[72] Bien que la suspension en elle-même n'ait pas placé Indalex en situation de conflit d'intérêts, les procédures qui ont suivi ont eu des conséquences négatives. Le 8 avril 2009, Indalex a déposé une motion en modification et reformulation de l'ordonnance initiale pour demander un financement DE. Cette motion avait été prévue. M. Stubbs avait mentionné dans son affidavit à l'appui de la demande d'ordonnance initiale que les prêteurs avaient consenti au financement, mais qu'Indalex devrait être autorisée à obtenir le financement pour poursuivre ses activités. Toutefois, le 8 avril, l'ordonnance initiale n'avait pas encore été signifiée aux participants. Un court préavis avait été donné au Syndicat, plutôt qu'à chacun des participants, mais le Syndicat n'a pas comparu. Les participants n'étaient tout simplement pas représentés lors de l'examen de la motion en modification de l'ordonnance initiale de suspension et en autorisation d'accorder la charge DE.

[73] In seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the *CCAA* court to override the Plan Members' priority. This was a case in which Indalex's directors permitted the corporation's best interests to be put ahead of those of the Plan Members. The directors may have fulfilled their fiduciary duty to Indalex, but they placed Indalex in the position of failing to fulfil its obligations as plan administrator. The corporation's interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator's duty to the Plan Members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator's duty to the Plan Members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty

[73] En demandant au tribunal d'autoriser une forme de financement selon laquelle un créancier se verrait accorder priorité sur tous les autres, Indalex demandait au tribunal chargé d'appliquer la *LACC* de faire échec à la priorité dont bénéficiaient les participants. Il s'agit d'un cas où les administrateurs d'Indalex ont permis que les intérêts de la société l'emportent sur ceux des participants. Ce faisant, ils ont peut-être rempli leurs obligations fiduciaires envers Indalex, mais ils ont fait en sorte qu'Indalex a manqué à ses obligations en tant qu'administrateur des régimes. L'intérêt de la société consistait à rechercher la meilleure façon de survivre dans un contexte d'insolvabilité. La poursuite de cet intérêt était incompatible avec le devoir de l'administrateur des régimes envers les participants de veiller à ce que toutes les cotisations soient versées aux caisses de retraite. En l'occurrence, ce devoir de l'administrateur des régimes impliquait, plus

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meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the Plan Members. Because Indalex supported the motion asking that a priority be granted to its lender, it could not at the same time argue for a priority based on the deemed trust.

particulièrement, qu'il donne à tout le moins aux participants la possibilité d'exposer leurs arguments. Cela signifiait, au minimum, que les participants avaient droit à un avis raisonnable de la motion en autorisation du financement DE. La teneur de cette motion, présentée sans avis convenable, allait à l'encontre des intérêts des participants. Étant donné qu'Indalex soutenait la motion visant l'octroi d'une priorité à son prêteur, elle ne pouvait pas simultanément défendre l'existence d'une priorité fondée sur la fiducie réputée.

[74] The Court of Appeal found a number of other breaches. I agree with Cromwell J. that none of the subsequent proceedings had a negative impact on the Plan Members' rights. The events that occurred, in particular the second DIP financing motion and the sale process, were predictable and, in a way, typical of reorganizations. Notice was given in all cases. The Plan Members were represented by able counsel. More importantly, the court ordered that funds be reserved and that a full hearing be held to argue the issues.

[74] La Cour d'appel a constaté d'autres manquements. Je partage l'opinion du juge Cromwell qu'aucune des procédures subséquentes n'a porté atteinte aux droits des participants. La suite des événements, notamment la deuxième motion en approbation du financement DE et le processus de vente, était prévisible et, à cet égard, typique des réorganisations. Dans tous les cas, des avis ont été donnés. Les participants ont été représentés par des avocats compétents. Fait plus important, le tribunal a ordonné que des fonds soient réservés et qu'une audience soit tenue pour que les questions en litige soient pleinement débattues.

[75] The Monitor and George L. Miller, Indalex U.S.'s trustee in bankruptcy, argue that the Plan Members should have appealed the Amended Initial Order authorizing the DIP charge, and were precluded from subsequently arguing that their claim ranked in priority to that of the DIP lenders. They take the position that the collateral attack doctrine bars the Plan Members from challenging the DIP financing order. This argument is not convincing. The Plan Members did not receive notice of the motion to approve the DIP financing. Counsel for the Executive Plan's members presented the argument of that plan's members at the first opportunity and repeated it each time he had an occasion to do so. The only time he withdrew their opposition was at the hearing of the motion for authorization to increase the DIP loan amount after being told that the only purpose of the motion was to increase the amount of the authorized loan. The *CCAA* judge set a hearing date for the very purpose of presenting the arguments that Indalex, as plan administrator, could have presented when it requested the amendment to the initial order.

[75] Le contrôleur et George L. Miller, le syndic de faillite d'Indalex É.-U., soutiennent que les participants auraient dû interjeter appel de l'ordonnance initiale modifiée autorisant la charge DE et qu'ils ne devaient pas être admis à prétendre plus tard que leur créance avait priorité sur celle des prêteurs DE. Ils plaident que la règle interdisant les contestations indirectes empêche les participants de contester l'ordonnance autorisant le financement DE. Cet argument n'est pas convaincant. Les participants n'ont pas reçu avis de la motion demandant au tribunal d'autoriser le financement DE. L'avocat des participants au régime des cadres a défendu leur position dès qu'il a pu le faire et l'a réitérée chaque fois qu'il en a eu l'occasion. À l'audition de la motion visant l'augmentation du prêt DE, il n'a retiré leur opposition que lorsqu'on lui a dit que son seul objet était d'augmenter le montant du prêt autorisé. Le juge chargé d'appliquer la *LACC* a fixé une date d'audience expressément pour la présentation des arguments qu'Indalex aurait pu faire valoir, en qualité d'administrateur des régimes, lorsqu'elle a demandé la modification de l'ordonnance initiale.

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It cannot now be argued, therefore, that the Plan Members are barred from defending their interests by the collateral attack doctrine.

D. *Would an Equitable Remedy Be Appropriate in the Circumstances?*

[76] The definition of "secured creditor" in s. 2 of the *CCAA* includes a trust in respect of the debtor's property. The Amended Initial Order (at para. 45) provided that the DIP lenders' claims ranked in priority to all trusts, "statutory or otherwise". Indalex U.S. was subrogated to the DIP lenders' claim by operation of the guarantee in the DIP lending agreement.

[77] Counsel for the Executive Plan's members argues that the doctrine of equitable subordination should apply to subordinate Indalex U.S.'s subrogated claim to those of the Plan Members. This Court discussed the doctrine of equitable subordination in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558, but did not endorse it, leaving it for future determination (p. 609). I do not need to endorse it here either. Suffice to say that there is no evidence that the lenders committed a wrong or that they engaged in inequitable conduct, and no party has contested the validity of Indalex U.S.'s payment of the US$10 million shortfall.

[78] This leaves the constructive trust remedy ordered by the Court of Appeal. It is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property. I agree with my colleague Cromwell J. that this condition is not met in the case at bar. I adopt his reasoning on this issue.

[79] Moreover, I am of the view that it was unreasonable for the Court of Appeal to reorder the priorities in this case. The breach of fiduciary duty identified in this case is, in substance, the lack of notice. Since the Plan Members were allowed to fully argue their case at a hearing specifically held

La règle interdisant les contestations indirectes ne peut donc être invoquée maintenant pour empêcher les participants de défendre leurs intérêts.

D. *Y a-t-il lieu d'accorder une réparation en equity en l'espèce?*

[76] La définition d'un « créancier garanti » à l'art. 2 de la *LACC* inclut la fiducie relative aux biens du débiteur. L'ordonnance initiale modifiée donne à la créance des prêteurs DE priorité sur toute fiducie [TRADUCTION] « d'origine législative ou autre » (par. 45). Indalex É.-U. a été subrogée aux prêteurs DE en conséquence de la garantie consentie dans la convention de prêt DE.

[77] L'avocat des participants au régime des cadres soutient que, selon le principe de la subordination reconnue en equity, la créance d'Indalex É.-U. fondée sur la subrogation est subordonnée à celle des participants. Dans *Société d'assurance-dépôt du Canada c. Banque Commerciale du Canada*, [1992] 3 R.C.S. 558, notre Cour a examiné le principe de la subordination reconnue en equity. Elle ne l'a toutefois pas entériné, reportant l'examen de cette question à un autre moment (p. 609). Je n'ai pas non plus besoin de l'entériner ici. Il suffit de mentionner que la preuve ne révèle aucune inconduite ni injustice de la part des prêteurs, et qu'aucune partie ne conteste la validité du paiement, par Indalex É.-U., des 10 millions de dollars américains manquants.

[78] Reste donc la fiducie par interprétation imposée par la Cour d'appel. Il est bien établi en droit qu'une réparation de la nature d'un droit de propriété n'est généralement accordée qu'à l'égard d'un bien ayant un lien direct avec un acte fautif ou d'un bien qui peut être rattaché à un tel bien. Je partage l'avis de mon collègue le juge Cromwell que cette condition n'est pas remplie en l'espèce et je souscris à ses motifs sur ce point.

[79] En outre, je considère qu'il était déraisonnable pour la Cour d'appel de modifier l'ordre de priorité. Le manquement à l'obligation fiduciaire constaté en l'espèce consiste essentiellement en l'absence d'avis. Puisque les participants ont été autorisés à présenter leurs arguments lors d'une

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to adjudicate their rights, the *CCAA* court was in a position to fully appreciate the parties' positions.

[80] It is difficult to see what gains the Plan Members would have secured had they received notice of the motion that resulted in the Amended Initial Order. The *CCAA* judge made it clear, and his finding is supported by logic, that there was no alternative to the DIP loan that would allow for the sale of the assets on a going-concern basis. The Plan Members presented no evidence to the contrary. They rely on conjecture alone. The Plan Members invoke other cases in which notice was given to plan members and in which the members were able to fully argue their positions. However, in none of those cases were plan members able to secure any additional benefits. Furthermore, the Plan Members were allowed to fully argue their case. As a result, even though Indalex breached its fiduciary duty to notify the Plan Members of the motion that resulted in the Amended Initial Order, their claim remains subordinate to that of Indalex U.S.

IV. Conclusion

[81] There are good reasons for giving special protection to members of pension plans in insolvency proceedings. Parliament considered doing so before enacting the most recent amendments to the *CCAA*, but chose not to (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, in force September 18, 2009, SI/2009-68; see also Bill C-501, *An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection)*, 3rd Sess., 40th Parl., March 24, 2010 (subsequently amended by the Standing Committee on Industry, Science and Technology, March 1, 2011)). A report of the Standing Senate Committee on Banking, Trade and Commerce gave the following reasons for this choice:

audience spécialement tenue pour statuer sur leurs droits, le tribunal chargé d'appliquer la *LACC* était pleinement en mesure d'évaluer la position des parties.

[80] De plus, je vois difficilement comment les participants auraient pu améliorer leur position même s'ils avaient reçu avis de la motion en modification de l'ordonnance initiale. Le juge chargé d'appliquer la *LACC* a clairement indiqué que la seule solution permettant la vente de l'actif en tant qu'entreprise en exploitation était le financement DE — et la logique appuie cette conclusion. Les participants n'ont présenté aucune preuve contraire. Leur argumentation est uniquement fondée sur des conjectures. Ils invoquent d'autres affaires où des participants à des régimes ont reçu un avis et ont pu défendre pleinement leur position. Or, dans aucun des exemples qu'ils citent, les intéressés n'ont pu obtenir d'avantages additionnels. Qui plus est, les participants en l'espèce ont pu faire valoir pleinement leur position. Par conséquent, bien qu'Indalex ait manqué à son obligation fiduciaire d'informer les participants de la motion en modification de l'ordonnance initiale, leur créance demeure subordonnée à celle d'Indalex É.-U.

IV. Conclusion

[81] Il existe des raisons valables d'accorder une protection spéciale aux participants à un régime de retraite lors de procédures en matière d'insolvabilité. Le législateur a envisagé la possibilité de leur accorder cette protection lorsqu'il a édicté les modifications les plus récentes à la *LACC*, mais il a décidé de s'en abstenir (*Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies, la Loi sur le Programme de protection des salariés et le chapitre 47 des Lois du Canada (2005)*, L.C. 2007, ch. 36, entrée en vigueur le 18 septembre 2009, TR/2009-68; voir aussi le projet de loi C-501, *Loi modifiant la Loi sur la faillite et l'insolvabilité et d'autres lois (protection des prestations)*, 3e sess., 40e lég., 24 mars 2010 (modifié par la suite par le Comité permanent de l'industrie, des sciences et de la technologie, 1er mars 2011)). Un rapport du Comité sénatorial permanent des banques et du commerce a expliqué ainsi le choix fait par le législateur :

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Although the Committee recognizes the vulnerability of current pensioners, we do not believe that changes to the BIA regarding pension claims should be made at this time. Current pensioners can also access retirement benefits from the Canada/Quebec Pension Plan, and the Old Age Security and Guaranteed Income Supplement programs, and may have private savings and Registered Retirement Savings Plans that can provide income for them in retirement. The desire expressed by some of our witnesses for greater protection for pensioners and for employees currently participating in an occupational pension plan must be balanced against the interests of others. As we noted earlier, insolvency – at its essence – is characterized by insufficient assets to satisfy everyone, and choices must be made.

The Committee believes that granting the pension protection sought by some of the witnesses would be sufficiently unfair to other stakeholders that we cannot recommend the changes requested. For example, we feel that super priority status could unnecessarily reduce the moneys available for distribution to creditors. In turn, credit availability and the cost of credit could be negatively affected, and all those seeking credit in Canada would be disadvantaged.

(*Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at p. 98; see also p. 88.)

[82] In an insolvency process, a *CCAA* court must consider the employer's fiduciary obligations to plan members as their plan administrator. It must grant a remedy where appropriate. However, courts should not use equity to do what they wish Parliament had done through legislation.

[83] In view of the fact that the Plan Members were successful on the deemed trust and fiduciary duty issues, I would not order costs against them either in the Court of Appeal or in this Court.

[84] I would therefore allow the main appeals without costs in this Court, set aside the orders

Conscients de la vulnérabilité des actuels retraités, nous n'estimons toutefois pas qu'il faudrait modifier pour le moment les dispositions de la LFI concernant les créances liées à des retraites. Actuellement les retraités peuvent recevoir des prestations des Régimes de pensions du Canada et de rentes du Québec, de la Sécurité de la vieillesse et du Supplément de revenu garanti et disposent souvent d'économies personnelles et de REER pouvant leur assurer un revenu à la retraite. Il faut trouver un juste équilibre entre, d'une part, le souhait exprimé par certains de nos témoins de mieux protéger les retraités et les actuels cotisants à un régime de retraite professionnel et, d'autre part, les intérêts des autres. Nous le répétons, l'insolvabilité se caractérise de par sa nature même par des actifs insuffisants pour répondre aux besoins de chacun, et il faut faire des choix.

Le Comité estime que, si l'on accordait la protection qu'ont demandée certains témoins, cela serait tellement injuste pour les autres intervenants qu'il ne peut le recommander. Par exemple, nous estimons qu'une superpriorité ou un fonds pourraient indûment réduire les fonds à répartir entre les créanciers. La disponibilité et le coût du crédit pourraient être touchés, de même que, par ricochet, tous les demandeurs de crédit au Canada.

(*Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2003), p. 109-110; voir aussi p. 98.)

[82] Dans une procédure en matière d'insolvabilité, le tribunal chargé d'appliquer la *LACC* doit prendre en compte les obligations fiduciaires de l'employeur envers les participants en sa qualité d'administrateur de leurs régimes de retraite. Il doit accorder une réparation lorsque cette mesure est indiquée. Cependant, le tribunal ne doit pas utiliser l'equity pour accomplir ce qu'il aurait souhaité que le législateur fît.

[83] Les participants ayant obtenu gain de cause sur les questions de la fiducie réputée et des obligations fiduciaires, je suis d'avis de ne les condamner aux dépens ni devant la Cour d'appel, ni devant notre Cour.

[84] Je suis donc d'avis d'accueillir les pourvois principaux sans dépens devant notre Cour, d'annuler

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made by the Court of Appeal, except with respect to orders contained in paras. 9 and 10 of the judgment of the Court of Appeal in the former executive members' appeal and restore the orders of Campbell J. dated February 18, 2010. I would dismiss USW's costs appeal without costs.

les ordonnances rendues par la Cour d'appel, à l'exception de celles figurant aux par. 9 et 10 du jugement de la Cour d'appel concernant l'appel des anciens cadres, et de rétablir les ordonnances du juge Campbell datées du 18 février 2010. Je suis d'avis de rejeter sans dépens le pourvoi du Syndicat des Métallos sur la question des dépens.

The reasons of McLachlin C.J. and Rothstein and Cromwell JJ. were delivered by

Version française des motifs de la juge en chef McLachlin et des juges Rothstein et Cromwell rendus par

Cromwell J. —

Le juge Cromwell —

I. Introduction

I. Introduction

[85] When a business becomes insolvent, many interests are at risk. Creditors may not be able to recover their debts, investors may lose their investments and employees may lose their jobs. If the business is the sponsor of an employee pension plan, the benefits promised by the plan are not immune from that risk. The circumstances leading to these appeals show how that risk can materialize. Pension plans and creditors find themselves in a zero-sum game with not enough money to go around. At a very general level, this case raises the issue of how the law balances the interests of pension plan beneficiaries with those of other creditors.

[85] L'insolvabilité d'une entreprise met en péril de nombreux intérêts. Le créancier pourrait ne pas recouvrer sont dû, l'investisseur, perdre la somme investie et l'employé, se retrouver sans emploi. Lorsque l'entreprise est le promoteur du régime de retraite de ses employés, les prestations promises par le régime ne sont pas à l'abri du risque couru. Les faits à l'origine des présents pourvois illustrent la concrétisation de ce risque. Régimes de retraite et créanciers se retrouvent dans une situation où, à cause de l'insuffisance de l'actif, les uns sauvent leur mise, les autres non. De manière très générale, le présent pourvoi soulève la question de savoir de quelle manière le droit pondère les intérêts des bénéficiaires d'un régime de retraite et ceux d'autres créanciers.

[86] Indalex Limited, the sponsor and administrator of employee pension plans, became insolvent and sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Although all current contributions were up to date, the company's pension plans did not have sufficient assets to fulfill the pension promises made to their members. In a series of court-sanctioned steps, which were judged to be in the best interests of all stakeholders, the company borrowed a great deal of money to allow it to continue to operate. The parties injecting the operating money were given a super priority over the claims by other creditors. When the business was sold, thereby preserving hundreds of

[86] Devenue insolvable, Indalex Limited, le promoteur et l'administrateur des régimes de retraite des salariés, a demandé la protection contre ses créanciers en application de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). Toutes les cotisations pour service courant avaient alors été perçues, mais l'actif des régimes de retraite de la société ne permettait pas de verser aux participants les prestations de retraite promises. La société a pris une série de mesures, avalisées par le tribunal et jugées servir au mieux les intérêts de tous les intéressés, dont l'emprunt d'importantes sommes pour la poursuite de ses activités. Les personnes qui ont alors injecté les sommes nécessaires ont

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jobs, there was a shortfall between the sale proceeds and the debt. The pension plan beneficiaries thus found themselves in a dispute about the priority of their claims. The appellant, Sun Indalex Finance, LLC, claimed it had priority by virtue of the super priority granted in the *CCAA* proceedings. The trustee in bankruptcy of the U.S. Debtors (George L. Miller) and the Monitor (FTI Consulting) joined in the appeal. The plan beneficiaries claimed that they had priority by virtue of a statutory deemed trust under the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and a constructive trust arising from the company's alleged breaches of fiduciary duty.

[87] The Ontario Court of Appeal sided with the plan beneficiaries and Sun Indalex, the trustee in bankruptcy and the Monitor all appeal. The specific legal points in issue are:

A. Did the Court of Appeal err in finding that the statutory deemed trust provided for in s. 57(4) of the *PBA* applied to the salaried plan's wind-up deficiency?

B. Did the Court of Appeal err in finding that Indalex breached the fiduciary duties it owed to the pension plan beneficiaries as the plans' administrator and in imposing a constructive trust as a remedy?

C. Did the Court of Appeal err in concluding that the super priority granted in the *CCAA* proceedings did not have priority by virtue of the doctrine of federal paramountcy?

D. Did the Court of Appeal err in its cost endorsement respecting the United Steelworkers ("USW")?

[88] My view is that the deemed trust does not apply to the disputed funds, and even if it did, the super priority would override it. I conclude that

obtenu une superpriorité sur toutes les réclamations des autres créanciers. La vente de l'entreprise a permis la préservation de centaines d'emplois, mais le produit touché était inférieur à la dette. Le rang des réclamations des bénéficiaires des régimes de retraite a dès lors fait l'objet d'un litige. L'appelante, Sun Indalex Finance, LLC, a soutenu que sa créance avait préséance sur toutes les autres du fait de la superpriorité obtenue dans le cadre de la procédure fondée sur la *LACC*. Le syndic de faillite des débitrices américaines (George L. Miller) et le contrôleur (FTI Consulting) se sont constitués parties appelantes. Les bénéficiaires des régimes de retraite ont fait valoir qu'ils avaient priorité en raison de la fiducie qui est réputée exister suivant la *Loi sur les régimes de retraite*, L.R.O. 1990, ch. P.8 (« *LRR* ») et de la fiducie par interprétation qui résultait des manquements allégués de la société à ses obligations fiduciaires.

[87] La Cour d'appel de l'Ontario a donné raison aux bénéficiaires des régimes de retraite, et Sun Indalex, le syndic de faillite et le contrôleur se pourvoient aujourd'hui devant notre Cour. Voici les points de droit précis qui sont en litige :

A. La Cour d'appel a-t-elle eu tort de conclure que la fiducie réputée du par. 57(4) de la *LRR* s'appliquait au déficit de liquidation du régime des salariés?

B. A-t-elle eu tort de conclure qu'Indalex avait manqué à ses obligations fiduciaires envers les bénéficiaires en tant qu'administrateur des régimes de retraite et d'imposer une fiducie par interprétation à titre de réparation?

C. A-t-elle eu tort de conclure que la superpriorité accordée dans le cadre de la procédure fondée sur la *LACC* ne conférait pas de préséance par application de la prépondérance fédérale?

D. Sa décision sur les dépens du Syndicat des Métallos (le « Syndicat ») est-elle entachée d'une erreur?

[88] J'estime que la fiducie réputée ne vise pas les fonds en cause et, même si elle les visait, la superpriorité l'emporterait sur elle. Je conclus que la

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the corporation failed in its duty to the plan beneficiaries as their administrator and that the beneficiaries ought to have been afforded more procedural protections in the *CCAA* proceedings. However, I also conclude that the Court of Appeal erred in using the equitable remedy of a constructive trust to defeat the super priority ordered by the *CCAA* judge. I would therefore allow the main appeals.

société a manqué à ses obligations d'administrateur des régimes et que les bénéficiaires auraient dû obtenir de meilleures garanties procédurales dans le cadre de la procédure fondée sur la *LACC*. Cependant, j'estime que la Cour d'appel a tort de recourir à la fiducie par interprétation — une réparation en equity — pour écarter la superpriorité accordée par le tribunal saisi sur le fondement de la *LACC*. Je suis donc d'avis d'accueillir les principaux pourvois.

II. Facts and Proceedings Below

II. Faits et jugements dont appel

A. *Overview*

A. *Aperçu*

[89] These appeals concern claims by pension fund members for amounts owed to them by the plans' sponsor and administrator which became insolvent.

[89] Les présents pourvois ont pour objet les sommes que les participants des régimes de retraite réclament au promoteur et administrateur des régimes, lequel est devenu insolvable.

[90] Indalex Limited is the parent company of three non-operating Canadian companies. I will refer to both Indalex Limited individually and to the group of companies collectively as "Indalex", unless the context requires further clarity. Indalex Limited is the wholly owned subsidiary of its U.S. parent, Indalex Holding Corp. which owned and conducted related operations in the U.S. through its U.S. subsidiaries which I will refer to as the "U.S. debtors".

[90] Indalex Limited est la société mère de trois sociétés canadiennes inactives. Dans les présents motifs, Indalex Limited s'entend de la société à titre individuel, et « Indalex » du groupe de sociétés collectivement, sauf lorsque le contexte commande plus de précision. Indalex Limited est la filiale à cent pour cent de sa société mère américaine, Indalex Holding Corp., qui possédait et exploitait des entreprises connexes aux États-Unis par l'intermédiaire de ses filiales américaines (ci-après, les « débitrices américaines »).

[91] In late March and early April of 2009, Indalex and the U.S. debtors were insolvent and sought protection from their creditors, the former under the Canadian *CCAA*, and the latter under the United States Bankruptcy Code, 11 U.S.C., Chapter 11. The dispute giving rise to these appeals concern the priority granted to lenders in the *CCAA* process for funds advanced to Indalex and whether that priority overrides the claims of two of Indalex's pension plans for funds owed to them.

[91] Fin mars et début avril 2009, Indalex et les débitrices américaines sont devenues insolvables et ont demandé la protection contre leurs créanciers en application de la *LACC*, dans le cas d'Indalex, et du *United States Bankruptcy Code*, 11 U.S.C., chap. 11, dans le cas des débitrices américaines. Le litige à l'origine des pourvois porte sur la priorité accordée aux prêteurs dans le cadre de la procédure fondée sur la *LACC* en contrepartie des fonds avancés à Indalex et sur la question de savoir si cette priorité vaut à l'égard des réclamations de deux des régimes de retraite d'Indalex quant aux sommes qui leur sont dues.

[92] Indalex was the sponsor and administrator of two registered pension plans relevant to these proceedings, one for salaried employees and

[92] Indalex était le promoteur et l'administrateur de deux régimes enregistrés de retraite touchés par cette procédure, l'un pour les salariés, l'autre pour

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the other for executive employees. At the time of seeking *CCAA* protection, the salaried plan was being wound up (with a wind-up date of December 31, 2006) and was estimated to have a wind-up deficiency (as of the end of 2007) of roughly $2.252 million. The executive plan, while it was not being wound up, had been closed to new members since 2005. It was estimated to have a deficiency of roughly $2.996 million on wind up. At the time the *CCAA* proceedings were started, all regular current service contributions had been made to both plans.

les cadres. Au moment où la protection a été demandée sous le régime de la *LACC*, le régime des salariés était en cours de liquidation — celle-ci devant avoir lieu le 31 décembre 2006 —, et on estimait qu'il en résulterait un déficit (fin 2007) d'environ 2,252 millions de dollars. Le régime des cadres, qui n'était pas en voie de liquidation, n'admettait plus de nouveaux participants depuis 2005. On estimait que son déficit de liquidation s'élèverait à environ 2,996 millions de dollars. Au moment d'engager la procédure fondée sur la *LACC*, toutes les cotisations normales pour service courant avaient été versées aux deux régimes.

[93] Shortly after Indalex received *CCAA* protection, the *CCAA* judge authorized the company to enter into debtor in possession ("DIP") financing in order to allow it to continue to operate. The court granted the DIP lenders, a syndicate of banks, a "super priority" over "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise": initial order, at para. 35 (Joint A.R., vol. I, at pp. 123-24). Repayment of these amounts was guaranteed by the U.S. debtors.

[93] Peu de temps après qu'Indalex eut obtenu la protection prévue par la *LACC*, le juge saisi l'a autorisée à obtenir un financement à titre de débiteur-exploitant (« DE ») afin qu'elle puisse poursuivre ses activités. Le tribunal a alors accordé aux prêteurs DE, un groupe de banques, une sûreté ayant priorité sur [TRADUCTION] « toutes les autres sûretés, y compris les fiducies, privilèges, charges et grèvements, d'origine législative ou autre » (ordonnance initiale, par. 35 (d.a. conjoint, vol. I, p. 123-124)). Les débitrices américaines garantissaient le remboursement de ces sommes.

[94] Ultimately, with the approval of the *CCAA* court, Indalex sold its business; the purchaser did not assume pension liabilities. A reserve fund was established by the *CCAA* Monitor to answer any outstanding claims. The proceeds of the sale were not sufficient to pay back the DIP lenders and so the U.S. debtors, as guarantors, paid the shortfall and stepped into the shoes of the DIP lenders in terms of priority.

[94] Finalement, sur approbation du tribunal saisi sur le fondement de la *LACC*, Indalex a vendu son entreprise, mais l'acquéreur n'a pas repris à son compte les engagements de retraite. Le contrôleur nommé en vertu de la *LACC* a établi un fonds de réserve pour donner suite aux réclamations formulées dans l'éventualité où il y serait fait droit. Le produit de la vente n'étant pas suffisant pour rembourser les prêteurs DE, les débitrices américaines, qui s'étaient portées cautions, ont payé la différence et acquis de ce fait la créance prioritaire des prêteurs DE.

[95] The appellant Sun Indalex is a pre-*CCAA* secured creditor of both Indalex and the U.S. debtors. It claims the reserve fund on the basis that the US$10.75 million paid by the guarantors would otherwise have been available to Sun Indalex as a secured creditor of the U.S. debtors in the U.S. bankruptcy proceedings. The respondent plan beneficiaries claim the reserve fund on the basis that

[95] L'appelante, Sun Indalex, était un créancier garanti d'Indalex et des débitrices américaines avant l'entrée en jeu de la *LACC*. Elle prétend avoir droit à l'attribution du fonds de réserve au motif que, à titre de créancier garanti des débitrices américaines dans le cadre de la procédure de faillite engagée aux États-Unis, n'eût été leur versement, elle aurait pu toucher les 10,75 millions de dollars

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they have a wind-up deficiency which is covered by a deemed trust created by s. 57(4) of the *PBA*. This deemed trust includes "an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations" (s. 57(4)). They also claim the reserve fund on the basis of a constructive trust arising from Indalex's failure to live up to its fiduciary duties as plan administrator.

américains payés par elles à titre de cautions. Les bénéficiaires des régimes de retraite intimés prétendent que le fonds de réserve leur revient puisque leur déficit de liquidation est protégé par la fiducie réputée du par. 57(4) de la *LRR*. Cette fiducie réputée est constituée d'« un montant égal aux cotisations de l'employeur qui sont accumulées [en anglais, « *accrued* »] à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements » (par. 57(4)). Ils invoquent également à l'appui de leur prétention l'existence d'une fiducie par interprétation découlant de l'omission d'Indalex de s'acquitter de ses obligations fiduciaires en tant qu'administrateur des régimes.

[96] The reserve fund is not sufficient to pay back both Sun Indalex and the pension plans and so the main question on the main appeals is which of the creditors is entitled to priority for their respective claims.

[96] Les sommes contenues dans le fonds de réserve ne permettent pas de rembourser à la fois Sun Indalex et les régimes de retraite. La principale question que soulèvent les principaux pourvois est donc celle de savoir quel créancier a priorité.

[97] The judge at first instance rejected the plan beneficiaries' deemed trust arguments and held that, with respect to the wind-up deficiency, the plan beneficiaries were unsecured creditors, ranking behind those benefitting from the "super priority" and secured creditors (2010 ONSC 1114, 79 C.C.P.B. 301). The Court of Appeal reversed this ruling and held that pension plan deficiencies were subject to deemed and constructive trusts which had priority over the DIP financing and over other secured creditors (2011 ONCA 265, 104 O.R. (3d) 641). Sun Indalex, the trustee in bankruptcy and the Monitor appeal.

[97] Le juge de première instance a rejeté la thèse de la fiducie réputée avancée par les bénéficiaires des régimes et conclu que, pour ce qui concerne le déficit de liquidation, les bénéficiaires des régimes de retraite sont des créanciers chirographaires prenant rang après les créanciers bénéficiant d'une superpriorité et les créanciers garantis (2010 ONSC 1114, 79 C.C.P.B. 301). La Cour d'appel de l'Ontario a infirmé cette décision et conclu que les déficits des régimes de retraite faisaient l'objet d'une fiducie réputée et d'une fiducie par interprétation qui prenaient rang avant les prêteurs DE et les autres créanciers garantis (2011 ONCA 265, 104 O.R. (3d) 641). Sun Indalex, le syndic de faillite et le contrôleur se pourvoient aujourd'hui en appel.

B. *Indalex's CCAA Proceedings*

B. *La procédure engagée par Indalex sous le régime de la LACC*

(1) The Initial Order (Joint A.R., vol. I, at p. 112)

(1) L'ordonnance initiale (d.a. conjoint, vol. I, p. 112)

[98] As noted earlier, Indalex was in financial trouble and, on April 3, 2009, sought and obtained protection from its creditors under the *CCAA*. The order (which I will refer to as the initial order) also contained directions for service on creditors and

[98] Comme je l'indique précédemment, Indalex connaissait des difficultés financières et, le 3 avril 2009, elle a obtenu d'être protégée contre ses créanciers en application de la *LACC*. L'ordonnance (appelée ci-après « ordonnance initiale »)

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others: paras. 39-41. The order also contained a so-called "comeback clause" allowing any interested party to apply for a variation of the order, provided that that party served notice on any other party likely to be affected by any such variation: para. 46. It is common ground that the plan beneficiaries did not receive notice of the application for the initial order but the *CCAA* court nevertheless approved the method of and time for service. Full particulars of the deficiencies in the pension plans were before the court in the motion material and the initial order addressed payment of the employer's current service pension contributions.

(2) The DIP Order (Joint A.R., vol. I, at p. 129)

[99] On April 8, 2009, in what I will refer to as the DIP order, the *CCAA* judge, Morawetz J., authorized Indalex to borrow funds pursuant to a DIP credit agreement. The judge ordered among many other things, the following:

- He approved abridged notice: para. 1;
- He allowed Indalex to continue making current service contributions to the pension plans, but not special payments: paras. 7(a) and 9(b);
- He barred all proceedings against Indalex, except by consent of Indalex and the Monitor or leave of the court, until May 1, 2009: para. 15;
- He granted the DIP lenders a so-called super priority:

THIS COURT ORDERS that each of the Administration Charge, the Directors' Charge and the DIP Lenders Charge (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise

comportait entre autres des directives pour la signification aux créanciers et aux autres parties (par. 39-41). Elle prévoyait également que toute partie intéressée pouvait demander sa modification, à condition de signifier un avis à toute autre partie susceptible d'être touchée par la mesure (par. 46). Les parties reconnaissent que l'avis relatif à la demande présentée en vue d'obtenir l'ordonnance initiale n'a pas été signifié aux bénéficiaires des régimes de retraite, mais le tribunal saisi sous le régime de la *LACC* a néanmoins approuvé le mode et le délai de signification. Toutes les données sur les déficits des régimes de retraite figuraient dans les documents présentés au tribunal à l'appui de la demande, et l'ordonnance initiale faisait mention du paiement aux régimes des cotisations pour service courant de l'employeur.

(2) L'ordonnance relative au financement DE (d.a. conjoint, vol. I, p. 129)

[99] Le 8 avril 2009, dans cette ordonnance appelée ci-après « ordonnance DE », le juge saisi en application de la *LACC* — le juge Morawetz — a autorisé Indalex à obtenir un financement DE. Il a notamment ordonné ce qui suit :

- l'abrègement du délai d'avis (par. 1);
- la faculté d'Indalex de continuer de verser aux régimes de retraite les cotisations pour service courant, à l'exclusion de tout paiement spécial (al. 7a) et 9b));
- la mise à l'abri d'Indalex contre toute procédure, sauf consentement d'Indalex ou du contrôleur ou autorisation du tribunal, jusqu'au 1er mai 2009 (par. 15);
- l'octroi aux prêteurs DE de ce qu'on appelle une superpriorité :

[TRADUCTION] LA COUR ORDONNE que chacune des charges relatives à l'administration, aux administrateurs et aux prêteurs DE (constituées et définies aux présentes) grève les biens, et que toutes aient priorité sur toutes les autres sûretés, y compris les fiducies, privilèges, charges et grèvements, d'origine législative

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(collectively, "Encumbrances") in favour of any Person. [Emphasis added; para. 45.]

– He required Indalex to send notice of the order to all known creditors, other than employees and creditors to which Indalex owed less than $5,000 and stated that Indalex and the Monitor were "at liberty" to serve the Initial Order to interested parties: paras. 49-50.

[100] In his endorsement for the DIP order, Morawetz J. found that "there is no other alternative available to the Applicants [Indalex] for a going concern solution" and that DIP financing was necessary: (2009), 52 C.B.R. (5th) 61 (Ont. S.C.J.), at para. 9(c). He noted that the Monitor in its report was of the view that approval of the DIP agreement was both necessary and in the best interests of Indalex and its stakeholders, including its creditors, employees, suppliers and customers: paras. 14-16.

[101] The USW, which represented some of the members of the salaried plan, was served with notice of the motion that led to the DIP order, but did not appear. Morawetz J. specifically ordered as follows with regard to service:

> THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged so that this Application is properly returnable today and hereby dispenses with further service thereof. [DIP order, at para. 1]

(3) The DIP Extension Order (Joint A.R., vol. I, at p. 156)

[102] On June 12, 2009, Morawetz J. heard and granted an application by Indalex to allow them to borrow approximately $5 million more from the DIP lenders, thus raising the allowed total to US$29.5 million.

[103] Counsel for the former executives received the motion material the night before. Counsel for

ou autre (collectivement les « grèvements »), détenus par quiconque. [Je souligne; par. 45.]

– l'obligation d'Indalex de donner avis de l'ordonnance initiale à tous les créanciers connus, autres que les employés et les créanciers auxquels Indalex devait moins de 5 000 $, et la « faculté » qu'ont Indalex et le contrôleur de signifier l'ordonnance initiale aux parties intéressées (par. 49-50).

[100] Dans ses motifs à l'appui de l'ordonnance DE, le juge Morawetz conclut que [TRADUCTION] « les requérantes [Indalex] ne disposent d'aucune autre solution permettant la continuité de l'exploitation » et que le financement DE s'impose ((2009), 52 C.B.R. (5th) 61 (C.S.J. Ont.), al. 9c)). Il signale que, dans son rapport, le contrôleur tient l'approbation de l'accord de financement pour nécessaire et conforme à l'intérêt supérieur d'Indalex et des intéressés, dont ses créanciers, ses employés, ses fournisseurs et ses clients (par. 14-16).

[101] Un avis de la motion qui a mené à l'ordonnance DE a été signifié au Syndicat représentant certains des participants des régimes des salariés, mais celui-ci n'a pas comparu. Le juge Morawetz ordonne expressément ce qui suit au sujet de la signification :

> [TRADUCTION] LA COUR ORDONNE l'abrègement du délai imparti pour signifier l'avis et le dossier de demande, de sorte que la demande puisse être régulièrement entendue ce jour même, et elle dispense la demanderesse de la signification de tout autre document s'y rapportant. [Ordonnance DE, par. 1]

(3) L'ordonnance modifiant l'ordonnance DE (d.a. conjoint, vol. I, p. 156)

[102] Le 12 juin 2009, le juge Morawetz a accueilli après audition la demande présentée par Indalex en vue d'être autorisée à emprunter une nouvelle tranche d'environ 5 000 000 $ aux prêteurs DE, ce qui portait l'emprunt total approuvé à 29 500 000 $ US.

[103] L'avocat des anciens cadres a reçu les documents relatifs à l'instance la veille de l'audience.

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USW was also served with notice. At the motion, the former executives (along with second priority secured noteholders) sought to "reserve their rights with respect to the relief sought": 2009 CanLII 37906 (Ont. S.C.J.), at para. 4. Morawetz J. wrote that any "reservation of rights" would create uncertainty for the DIP lenders with regard to priority, and may prevent them from extending further advances. Moreover, the parties had presented no alternative to increased DIP financing, which was both "necessary and appropriate" and would, it was to be hoped, "improve the position of the stakeholders": paras. 5-9.

(4) The Bidding Order ((2009), 79 C.C.P.B. 101 (Ont. S.C.J.))

[104] On July 2, 2009, Indalex brought a motion for approval of proposed bidding procedures for Indalex's assets. Morawetz J. decided that a stalking horse bid by SAPA Holding AB ("SAPA") for Indalex's assets could count as a qualifying bid. Counsel on behalf of the members of the executive plan appeared, with the concern that "their position and views have not been considered in this process": para. 8. In his decision, Morawetz J. decided that these arguments could be dealt with later, at a sale approval motion: para. 10. The judge said:

> The position facing the retirees is unfortunate. The retirees are currently not receiving what they bargained for. However, reality cannot be ignored and the nature of the Applicants' insolvency is such that there are insufficient assets to meet its liabilities. The retirees are not alone in this respect. The objective of these proceedings is to achieve the best possible outcome for the stakeholders. [Emphasis added; para. 9.]

L'avocat du Syndicat a également reçu signification d'un avis. À l'audition de la demande, les anciens cadres (ainsi que les détenteurs de billets garantis de deuxième rang) ont demandé que [TRADUCTION] « leurs droits soient réservés quant à la réparation demandée » (2009 CanLII 37906 (C.S.J. Ont.), par. 4). Le juge Morawetz a opiné que toute [TRADUCTION] « réserve de droits » créerait de l'incertitude chez les prêteurs relativement au rang prioritaire de leur créance et pourrait inciter ces derniers à refuser d'avancer des fonds supplémentaires. En outre, les parties n'avaient proposé aucun autre mode d'accroissement du financement DE, lequel était à la fois [TRADUCTION] « nécessaire et opportun » et devait permettre, du moins l'espérait-on, « d'améliorer la situation des intéressés » (par. 5-9).

(4) L'ordonnance relative à la vente par soumission ((2009), 79 C.C.P.B. 101 (C.S.J. Ont.))

[104] Le 2 juillet 2009, Indalex a demandé l'approbation de la procédure projetée de vente par soumission de l'actif d'Indalex. Le juge Morawetz a jugé que l'offre-paravent de SAPA Holding AB (« SAPA ») pouvait être tenue pour valable. L'avocat des participants du régime des cadres a fait valoir que [TRADUCTION] « ni la situation ni le point de vue de ses clients n'avaient été pris en compte dans le cadre de la procédure » (par. 8). Le juge Morawetz a statué que ces éléments pourraient être examinés ultérieurement, lorsque l'approbation de la vente serait demandée (par. 10). Voici ce qu'il dit :

> [TRADUCTION] La situation des retraités est malheureuse. À l'heure actuelle, ils ne touchent pas ce qu'ils ont obtenu à l'issue de négociations. Or, la réalité demeure incontournable et la nature de l'insolvabilité des demanderesses fait en sorte que l'actif ne permet pas d'acquitter le passif. Les retraités ne sont pas les seuls à subir un préjudice. La présente instance vise à obtenir le meilleur résultat possible pour les intéressés. [Je souligne; par. 9.]

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(5) The Sale Approval Order (Joint A.R., vol. I, at p. 166)

[105] On July 20, 2009, Indalex brought two motions before Campbell J.

[106] The first motion sought approval for the sale of Indalex's assets as a going concern to SAPA. SAPA was not to assume any pension liabilities. Campbell J. granted an order approving this sale.

[107] The second motion sought approval for an interim distribution of the sale proceeds to the DIP lenders. Counsel on behalf of the executive plan members and the USW, representing some of the salaried employees, objected to the planned distribution of the sale proceeds on grounds that a statutory deemed trust applied to the deficiencies in their plans and that Indalex had breached fiduciary duties that it owed to them. Campbell J. ordered the Monitor to pay the DIP agent from the sale proceeds, but also ordered the Monitor to set up a reserve fund in an amount sufficient to answer, among other things, the claims of the plan beneficiaries pending resolution of those matters. Campbell J. ordered that the U.S. debtors be subrogated to the DIP lenders to the extent that the U.S. debtors were required under the guarantee to satisfy the DIP lenders' claims: para. 14.

(6) The Sale and Distribution of Funds

[108] SAPA bought Indalex's assets on July 31, 2009. Taking the reserve fund into account, the sale did not produce sufficient funds to repay the DIP lenders in full and so the U.S. debtors paid US$10,751,247 as guarantor to the DIP lenders: C.A. reasons, at para. 65.

(7) The Order Under Appeal

[109] On August 28, 2009, Campbell J. heard claims by the USW (appearing on behalf of some members of the salaried plan) and counsel appearing on behalf of the executive plan members that the

(5) L'ordonnance d'approbation de la vente (d.a. conjoint, vol. I, p. 166)

[105] Le 20 juillet 2009, Indalex a saisi le juge Campbell de deux motions.

[106] Dans la première, Indalex demandait au tribunal d'approuver la vente à SAPA de son actif d'entreprise en exploitation, l'acquéreur ne reprenant à son compte aucun des engagements de retraite. Le juge Campbell a approuvé la vente.

[107] Dans la deuxième motion, Indalex a demandé au tribunal d'approuver la distribution provisoire du produit de la vente aux prêteurs DE. L'avocat des participants du régime des cadres et le Syndicat, qui représentait certains des salariés, se sont opposés à cette distribution au motif qu'une fiducie d'origine législative protégeait les déficits de leurs régimes et qu'Indalex avait manqué à ses obligations fiduciaires envers eux. Le juge Campbell a ordonné au contrôleur de payer l'agent administratif des prêteurs DE par prélèvement sur le produit de la vente, mais également d'établir un fonds de réserve suffisant pour donner suite, entre autres choses, aux réclamations des bénéficiaires des régimes dans l'éventualité où il y serait fait droit. Il a ordonné que les débitrices américaines soient subrogées dans les droits des prêteurs DE jusqu'à concurrence du montant qu'elles avaient dû leur verser aux termes de la garantie (par. 14).

(6) La vente et la distribution des fonds

[108] SAPA a acheté l'actif d'Indalex le 31 juillet 2009. Compte tenu du fonds de réserve, la vente n'a pas généré de fonds suffisants pour rembourser intégralement les prêteurs DE, de sorte que les débitrices américaines ont versé à titre de cautions 10 751 247 $ US à ces derniers (motifs de la C.A., par. 65).

(7) L'ordonnance visée par l'appel

[109] Le 28 août 2009, le juge Campbell a entendu la thèse du Syndicat (qui représentait certains des participants du régime des salariés) et de l'avocat des participants du régime des cadres, à savoir que

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wind-up deficiency was subject to a deemed trust. He rejected these claims in a written decision on February 18, 2010. He decided that the s. 57(4) *PBA* deemed trust did not apply to wind-up deficiencies. The executive plan had not been wound up, and therefore there was no wind-up deficiency to be the subject of the deemed trust. As for the salaried plan, Campbell J. held that the wind-up deficiency was not an obligation that had "accrued to the date of the wind up" and as a result did not fall within the terms of the s. 57(4) deemed trust.

[110] Indalex had asked for the stay granted under the initial order to be lifted so that it could assign itself into bankruptcy. Because he did not find a deemed trust, Campbell J. did not feel that he needed to decide on the motion to lift the stay.

(8) The Decision of the Ontario Court of Appeal

[111] The Ontario Court of Appeal allowed an appeal from the decision of Campbell J.

[112] Writing for a unanimous panel, Gillese J.A. decided that the s. 57(4) deemed trust is applicable to wind-up deficiencies. She took the view that s. 57(4)'s reference to "employer contributions accrued to the date of the wind up but not yet due" included all amounts that the employer owed on the wind-up of its pension plan: para. 101. In particular, she concluded that the deemed trust applied to the wind-up deficiency in the salaried plan. Gillese J.A. declined, however, to decide whether the deemed trust also applied to deficiencies in the executive plan, which had not been wound up by the relevant date: paras. 110-12. A decision on this latter point was unnecessary given her finding on the applicability of a constructive trust in this case.

[113] Gillese J.A. found that the super priority provided for in the DIP order did not trump the

le déficit de liquidation était réputé détenu en fiducie. Dans une décision motivée par écrit datée du 18 février 2010, il rejette cette prétention et conclut que la fiducie réputée du par. 57(4) de la *LRR* ne vise pas le déficit de liquidation. Le régime des cadres n'ayant pas été liquidé, il n'y avait donc pas de déficit de liquidation susceptible de faire l'objet d'une fiducie réputée. S'agissant du régime des salariés, le juge Campbell conclut que le déficit de liquidation n'équivaut pas à des cotisations qui sont « accumulées à la date de la liquidation », de sorte qu'il n'est pas réputé détenu en fiducie suivant le par. 57(4).

[110] Indalex a demandé la levée de la suspension accordée dans l'ordonnance initiale afin de pouvoir faire cession de ses biens. Ne concluant pas à l'existence d'une fiducie réputée, le juge Campbell ne juge pas nécessaire de statuer sur la demande visant à faire lever la suspension.

(8) L'arrêt de la Cour d'appel de l'Ontario

[111] La Cour d'appel de l'Ontario accueille l'appel interjeté contre la décision du juge Campbell.

[112] Au nom d'une formation unanime, la juge Gillese estime que la fiducie réputée du par. 57(4) s'applique au déficit de liquidation. Les « cotisations de l'employeur qui sont accumulées [en anglais, « *accrued* »] à la date de la liquidation, mais qui ne sont pas encore dues » dont fait mention cette disposition englobent selon elle toutes les sommes que l'employeur devait au moment de la liquidation de son régime de retraite (par. 101). Plus particulièrement, elle conclut que la fiducie réputée du par. 57(4) s'applique au déficit de liquidation du régime des salariés. Elle refuse cependant de se prononcer sur l'application de la fiducie réputée au déficit du régime des cadres, lequel n'était pas liquidé à la date considérée (par. 110-112), ce qui n'était pas nécessaire puisqu'elle conclut à l'applicabilité de la fiducie par interprétation dans ce cas.

[113] La juge Gillese conclut que la superpriorité accordée dans l'ordonnance DE ne prime pas la

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deemed trust over the salaried plan's wind-up deficiency. Morawetz J. had not "invoked" the issue of paramountcy or made an explicit finding that the requirements of federal law required that the provincially created deemed trust must be overridden: paras. 178-79. Gillese J.A. also took the view that this Court's decision in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, did not mean that provincially created priorities that would be ineffective under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), were also ineffective under the *CCAA*: paras. 185-96. The deemed trust therefore ranked ahead of the DIP security.

fiducie qui est réputée exister à l'égard du déficit de liquidation du régime des salariés. Le juge Morawetz n'a pas [TRADUCTION] « invoqué » la prépondérance fédérale ni conclu expressément que le droit fédéral écartait la fiducie réputée de droit provincial (par. 178-179). La juge Gillese opine également que, dans l'arrêt *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, notre Cour ne statue pas que l'ordre de priorité établi par la province qui est sans effet aux fins de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »), ne s'applique pas non plus pour les besoins de la *LACC* (par. 185-196). La fiducie réputée prend donc rang avant la sûreté DE.

[114] In addition to her findings regarding deemed trusts, Gillese J.A. granted the plan beneficiaries a constructive trust over the amount of the reserve fund on the ground that Indalex, as pension plan administrator, had breached fiduciary duties that it owed to the plan beneficiaries during the *CCAA* proceedings.

[114] Outre ses conclusions sur la fiducie réputée, la juge Gillese tranche que le fonds de réserve fait l'objet d'une fiducie par interprétation car, dans son rôle d'administrateur des régimes de retraite, Indalex a manqué à ses obligations fiduciaires envers les bénéficiaires dans le cadre de la procédure fondée sur la *LACC*.

[115] She held that as a plan administrator who was also an employer, Indalex had fiduciary duties both to the plan beneficiaries and to the corporation: para. 129. In her view, Indalex was subject to both sets of duties throughout the *CCAA* proceedings and it had breached its duties to the plan beneficiaries in several ways. While Indalex had the right to initiate *CCAA* proceedings, this action made the plan beneficiaries vulnerable and therefore triggered its fiduciary obligations as plan administrator: paras. 132-33. Gillese J.A. enumerated the many ways in which she thought Indalex subsequently failed as plan administrator: it did nothing in the *CCAA* proceedings to fund the deficit in the underfunded plans; it applied for *CCAA* protection without notice to the beneficiaries; it obtained DIP financing on the condition that DIP lenders be granted a super priority over "statutory trusts"; it obtained this financing without notice to the plan beneficiaries; it sold its assets knowing the purchaser was not taking over the plans; and it attempted to enter into voluntary bankruptcy, which would defeat any deemed trust claims the beneficiaries might have asserted:

[115] Elle conclut qu'à titre d'administrateur de régime qui était également employeur, Indalex avait des obligations fiduciaires tant envers les bénéficiaires des régimes qu'envers la société (par. 129). À son avis, Indalex était tenue de respecter ses obligations envers les premiers et la seconde tout au long de la procédure fondée sur la *LACC* et elle a manqué à ses obligations envers les bénéficiaires des régimes de différentes manières. Indalex avait certes le droit d'engager une procédure sous le régime de la *LACC*, mais une telle mesure rendait les bénéficiaires des régimes vulnérables, ce qui lui imposait donc des obligations fiduciaires en tant qu'administrateur des régimes (par. 132-133). La juge Gillese impute à Indalex de nombreuses erreurs subséquentes commises dans l'administration des régimes : Indalex n'a pris aucune mesure dans le cadre de la procédure fondée sur la *LACC* pour renflouer les régimes sous-capitalisés; elle a demandé la protection de la *LACC* sans en informer les bénéficiaires au préalable; elle a obtenu du financement DE en accordant à la créance des prêteurs une superpriorité sur toute « fiducie d'origine législative »; elle a obtenu ce financement sans en

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para. 139. Gillese J.A. also noted that throughout the *CCAA* proceedings Indalex was in a conflict of interest because it was acting for both the corporation and the beneficiaries.

[116] Indalex's failure to live up to its fiduciary duties meant that the plan beneficiaries were entitled to a constructive trust over the amount of the reserve fund: para. 204. Since the beneficiaries had been wronged by Indalex, and the U.S. debtors were not, with respect to Indalex, an "arm's length innocent third party" the appropriate response was to grant the beneficiaries a constructive trust: para. 204. Her conclusion on this point applied equally to the salaried and executive plans.

III. Analysis

A. *First Issue: Did the Court of Appeal Err in Finding That the Deemed Statutory Trust Provided for in Section 57(4) of the PBA Applied to the Salaried Plan's Wind-up Deficiency?*

(1) Introduction

[117] The main issue addressed here concerns whether the statutory deemed trust provided for in s. 57(4) of the *PBA* applies to wind-up deficiencies, the payment of which is provided for in s. 75(1)(b).

[118] The deemed trust created by s. 57(4) applies to "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". Thus, to be subject to the deemed trust, the pension plan must be wound up and the amounts in question must meet three requirements. They must be (1) "employer contributions", (2) "accrued to the date of the wind up" and (3) "not yet due". A wind-up deficiency arises "[w]here a pension plan is wound up": s. 75(1). I agree with my colleagues that there can be no deemed trust

informer au préalable les bénéficiaires des régimes; elle a vendu son actif tout en sachant que l'acquéreur ne reprendrait à son compte aucun de ses engagements de retraite; elle a tenté de faire cession volontaire de ses biens, ce qui aurait fait échec aux prétentions des bénéficiaires relatives à la fiducie réputée (par. 139). La juge Gillese relève également que tout au long de la procédure fondée sur la *LACC*, Indalex était en conflit d'intérêts, car elle représentait à la fois la société et les bénéficiaires.

[116] Vu l'omission d'Indalex de s'acquitter de ses obligations fiduciaires, le fonds de réserve fait l'objet d'une fiducie par interprétation (par. 204). De plus, comme les bénéficiaires ont été lésés par Indalex, et que les débitrices américaines ne sont pas des [TRADUCTION] « tiers sans lien de dépendance » avec Indalex, la solution qui s'impose est de reconnaître l'existence d'une fiducie par interprétation en faveur des bénéficiaires (par. 204). Sa conclusion sur ce point vaut à la fois pour le régime des salariés et pour celui des cadres.

III. Analyse

A. *Première question en litige : La Cour d'appel a-t-elle tort de conclure que la fiducie réputée du par. 57(4) de la LRR s'applique au déficit de liquidation du régime des salariés?*

(1) Introduction

[117] Le principal point considéré en l'espèce est l'application ou l'inapplication de la fiducie réputée du par. 57(4) de la *LRR* au déficit de liquidation, dont l'al. 75(1)b) prévoit le paiement.

[118] La fiducie réputée du par. 57(4) vise les « cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements ». Pour qu'il y ait fiducie réputée, le régime de retraite doit donc être liquidé et les sommes en question doivent remplir trois conditions. Il doit s'agir de (1) « cotisations de l'employeur », (2) « qui sont accumulées à la date de liquidation », (3) « mais qui ne sont pas encore dues ». Il y a déficit de liquidation « [lorsqu']un régime de retraite est liquidé »

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for the executive plan, because that plan had not been wound up at the relevant date. What follows, therefore, is relevant only to the salaried plan.

(par. 75(1)). Je conviens avec mes collègues qu'il ne peut y avoir de fiducie réputée au bénéfice du régime des cadres, car celui-ci n'avait pas encore été liquidé à la date considérée. Par conséquent, les motifs qui suivent ne valent que pour le régime des salariés.

[119] The wind-up deficiency payments are "employer contributions" which are "not yet due" as of the date of wind up within the meaning of the *PBA*. The main issue before us, therefore, boils down to the narrow interpretative question of whether the wind-up deficiency described in s. 75(1)(b) is "accrued to the date of the wind up".

[119] Les versements effectués pour combler le déficit de liquidation constituent des « cotisations de l'employeur [. . .] qui ne sont pas encore dues » au moment de la liquidation au sens de la *LRR*. Il s'agit donc essentiellement d'interpréter une disposition de la loi et de déterminer seulement si le déficit de liquidation décrit à l'al. 75(1)b) est « accumul[é] à la date de la liquidation ».

[120] Campbell J. at first instance found that it was not, while the Court of Appeal reached the opposite conclusion. In essence, the Court of Appeal reasoned that the deemed trust in s. 57(4) "applies to all employer contributions that are required to be made pursuant to s. 75", that is, to "all amounts owed by the employer on the wind-up of its pension plan": para. 101.

[120] En première instance, le juge Campbell conclut qu'il ne l'est pas, alors que la Cour d'appel arrive à la conclusion contraire. La Cour d'appel estime essentiellement que la fiducie réputée du par. 57(4) [TRADUCTION] « vise toutes les cotisations de l'employeur qui sont exigibles suivant l'art. 75 », à savoir « toute somme due par l'employeur à la liquidation de son régime de retraite » (par. 101).

[121] I respectfully disagree with the Court of Appeal's conclusion for three main reasons. First, the most plausible grammatical and ordinary sense of the words "accrued to the date of the wind up" is that the amounts referred to are precisely ascertained immediately before the effective date of the plan's wind up. The wind up deficiency only arises upon wind up and it is neither ascertained nor ascertainable on the date fixed for wind up. Second, the broader statutory context reinforces this view: the language of the deemed trusts in s. 57(3) and (4) is virtually exactly repeated in s. 75(1)(a), suggesting that both deemed trusts refer to the liability on wind up referred to in s. 75(1)(a) and not to the further and distinct wind-up deficiency liability created under s. 75(1)(b). Finally, the legislative evolution and history of these provisions show, in my view, that the legislature never intended to include the wind-up deficiency in a statutory deemed trust.

[121] Sauf le respect qui lui est dû, je suis en désaccord avec la Cour d'appel pour trois raisons principales. Premièrement, suivant son sens ordinaire et grammatical le plus plausible, l'expression « accumulées à la date de la liquidation » renvoie aux sommes déterminées de façon précise immédiatement avant la date de prise d'effet de la liquidation du régime. Le déficit de liquidation n'est constaté qu'à l'issue de la liquidation, et il n'est ni déterminé ni déterminable à la date de liquidation prévue. Deuxièmement, le contexte législatif général me conforte dans ce point de vue. Le texte des par. 57(3) et (4) qui dispose qu'il y a fiducie réputée est repris presque en tous points à l'al. 75(1)a), ce qui permet de conclure que, dans les deux cas de fiducie réputée, le législateur renvoie à l'obligation qui existe à la liquidation suivant l'al. 75(1)a) et non à celle, supplémentaire et distincte, qui est liée au déficit de liquidation et qui découle de l'al. 75(1)b). Enfin, il appert à mon sens de l'évolution et de l'historique de ces dispositions que le législateur n'a jamais voulu que le déficit de liquidation fasse l'objet d'une fiducie réputée d'origine législative.

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[122] Before turning to the precise interpretative issue, it will be helpful to provide some context about the employer's wind-up obligations and the deemed trust provisions that are the subject of this dispute.

(2) Employer Obligations on Wind Up

[123] A "wind up" means that the plan is terminated and the plan assets are distributed: see *PBA*, s. 1(1), definition of "wind up". The employer's liability on wind-up consists of two main components. The first is provided for in s. 75(1)(a) and includes "an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund". This liability applies to contributions that were due as at the wind-up date but does *not* include payments required by s. 75(1)(b) that arise as a result of the wind up: A. N. Kaplan, *Pension Law* (2006), at pp. 541-42. This second liability is known as the wind-up deficiency amount. The employer must pay all additional sums to the extent that the assets of the pension fund are insufficient to cover the value of all immediately vested and accelerated benefits and grow-in benefits: Kaplan, at p. 542. Without going into detail, there are certain statutory benefits that may arise only on wind up, such as certain benefit enhancements and the potential for acceleration of pension entitlements. Thus, wind up will usually result in additional employer liabilities over and above those arising from the obligation to pay all benefits provided for in the plan itself: see, e.g., ss. 73-74; Kaplan, at p. 542. As the Court of Appeal concluded, the payments provided for under s. 75(1)(a) are those which the employer had to make while the plan was ongoing, while s. 75(1)(b) refers to the employer's obligation to make up for any wind-up deficiency: paras. 90-91.

[124] For convenience, the provision as it then stood is set out here.

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

[122] Avant d'interpréter le libellé en cause, il vaut la peine de situer dans leur contexte les obligations de l'employeur en cas de liquidation, ainsi que les dispositions sur la fiducie réputée qui font l'objet du présent litige.

(2) Les obligations de l'employeur à la liquidation

[123] La « liquidation » s'entend de la cessation d'un régime et de la répartition de son actif (voir la définition de « liquidation » au par. 1(1) de la *LRR*). L'obligation de l'employeur comporte alors deux volets principaux. Premièrement, suivant l'al. 75(1)a), son obligation correspond au versement d'« un montant égal au total de tous les paiements qui, en vertu de la présente loi, des règlements et du régime de retraite, sont dus ou accumulés et qui n'ont pas été versés à la caisse de retraite ». Sont visées les cotisations dues à la date de la liquidation, mais *non* les paiements exigés à l'al. 75(1)b) par suite de la liquidation (A. N. Kaplan, *Pension Law* (2006), p. 541-542). La seconde obligation vise le déficit de liquidation. L'employeur est tenu de verser toute somme supplémentaire requise du fait que la valeur de l'actif du régime de retraite est inférieure à celle de la totalité des droits à pension acquis de manière immédiate, accélérée ou réputée (Kaplan, p. 542). Sans entrer dans le détail, certains droits d'origine législative ne naissent qu'en cas de liquidation, tels certains enrichissements des prestations et la possibilité d'accélérer l'acquisition du droit à pension. La liquidation fait donc à l'employeur d'autres obligations en sus de celle de verser toutes les prestations prévues par le régime lui-même (voir, p. ex., art. 73-74; Kaplan, p. 542). Ainsi que le conclut la Cour d'appel, les paiements visés à l'al. 75(1)a) sont ceux que l'employeur devait verser pendant l'application du régime, tandis que l'al. 75(1)b) renvoie à son obligation de combler tout déficit de liquidation (par. 90-91).

[124] Pour faciliter sa consultation, voici le libellé qui s'appliquait au moment considéré :

75. (1) Si un régime de retraite est liquidé en totalité ou en partie, l'employeur verse à la caisse de retraite :

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

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

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

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

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

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

a) d'une part, un montant égal au total de tous les paiements qui, en vertu de la présente loi, des règlements et du régime de retraite, sont dus ou accumulés, et qui n'ont pas été versés à la caisse de retraite;

b) d'autre part, un montant égal au montant dont :

(i) la valeur des prestations de retraite aux termes du régime de retraite qui seraient garanties par le Fonds de garantie en vertu de la présente loi et des règlements si le surintendant déclare que le Fonds de garantie s'applique au régime de retraite,

(ii) la valeur des prestations de retraite accumulées à l'égard de l'emploi en Ontario et acquises aux termes du régime de retraite,

(iii) la valeur des prestations accumulées [en anglais, « *accrued* »] à l'égard de l'emploi en Ontario et qui résultent de l'application du paragraphe 39 (3) (règle des 50 pour cent) et de l'article 74,

dépassent la valeur de l'actif de la caisse de retraite attribué, comme cela est prescrit, pour le paiement de prestations de retraite accumulées à l'égard de l'emploi en Ontario.

[125] While a wind up is effective as of a fixed date, a wind up is nonetheless best thought of not simply as a moment or a single event, but as a process. It begins by a triggering event and continues until all of the plan assets have been distributed. To oversimplify somewhat, the wind-up process involves the following components.

[126] The assets and liabilities of the plan as of the wind-up date must be determined. As noted earlier, the precise extent of the liability, while *fixed as of that date*, will not be ascertained or ascertainable *on that date*. The extent of the liability may depend on choices open to plan beneficiaries under the plan and on the exercise by them of certain statutory rights beyond the options that would otherwise have been available under the plan itself. The plan members must be notified of the wind-up and have their entitlements and options set out for them and given an opportunity to make their choices. The plan administrator must file a wind-up report which includes a statement of the plan's assets and liabilities, the benefits payable under the

[125] Bien que la liquidation prenne effet à une date déterminée, il s'agit d'un processus, et non d'un moment ou d'une étape en particulier. Un événement la déclenche et elle se poursuit jusqu'à la répartition de la totalité de l'actif du régime. Au risque de trop simplifier, voici quelles sont les étapes du processus de liquidation.

[126] L'actif et le passif du régime existant à la date de la liquidation doivent être établis. Rappelons que la valeur exacte du passif, bien que *circonscrite à cette date*, n'est ni déterminée ni déterminable *cette date-là*. La valeur du passif peut dépendre des choix qui s'offrent aux bénéficiaires dans le cadre du régime, ainsi que de l'exercice par ces derniers de certains droits légaux et de la levée des options que prévoit le régime. Les participants du régime doivent être avisés de la liquidation, ainsi que de leurs droits et de leurs options, et ils doivent avoir la possibilité d'effectuer leurs choix. L'administrateur du régime doit déposer un rapport de liquidation qui fait état de l'actif et du passif du régime, des prestations payables en application du régime et du

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terms of the plan, and the method of allocating and distributing the assets including the priorities for the payment of benefits: *PBA*, s. 70(1), and R.R.O. 1990, Reg. 909, s. 29 (the "*PBA* Regulations").

mode d'attribution et de répartition de l'actif, y compris les priorités de paiement des prestations (*LRR*, par. 70(1), et R.R.O. 1990, règl. 909, art. 29 (le « règlement de la *LRR* »)).

[127] Benefits to members may take the form of "cash refunds, immediate or deferred annuities, transfers to registered retirement saving plans, ... In principle, the value of these benefits is the present value of the benefits accrued to the date of plan termination": *The Mercer Pension Manual* (loose-leaf), vol. 1, at p. 10-41. That present value is an actuarial calculation performed on the basis of various assumptions including assumptions about investment return, mortality and so forth.

[127] Les prestations versées aux participants peuvent revêtir la forme de [TRADUCTION] « remboursements en espèces, de rentes immédiates ou différées, de transferts dans un régime enregistré d'épargne-retraite [. . .] La valeur de ces prestations correspond en principe à la valeur actuelle des prestations accumulées à la date de cessation du régime » (*The Mercer Pension Manual* (feuilles mobiles), vol. 1, p. 10-41). La valeur actuelle est obtenue au moyen d'un calcul actuariel qui tient compte de différentes hypothèses, notamment quant au rendement et à l'espérance de vie.

[128] If, when the assets and liabilities are calculated, the assets are insufficient to satisfy the liabilities, the employer (i.e. the plan sponsor) must make up for any wind-up deficiency: *PBA*, s. 75(1)(b). An employer can elect to space these payments out over the course of five years: *PBA* Regulations, s. 31(2). Because these payments are based on the extent to which there is a deficit between assets in the pension plan and the benefits owed to beneficiaries, their amount varies with the market and other assumed elements of the calculation over the course of the permitted five years.

[128] Lorsque, après avoir calculé l'actif et le passif, le premier est inférieur au second, l'employeur (à savoir le promoteur du régime) comble le déficit de liquidation (*LRR*, al. 75(1)b)). Il peut étaler les versements sur une période de cinq ans (règlement de la *LRR*, par. 31(2)). Puisque le montant de ces versements tient à la différence entre l'actif du régime de retraite et les prestations dues aux bénéficiaires, il varie en fonction du marché et d'autres variables considérées dans le calcul sur la période autorisée de cinq ans.

[129] To take the salaried plan as an example, at the time of wind-up, all regular current service contributions had been made: C.A. reasons, at para. 33. The wind-up deficiency was initially estimated to be $1,655,200. Indalex made special wind-up payments of $709,013 in 2007 and $875,313 in 2008, but as of December 31, 2008, the wind-up deficiency was $1,795,600 — i.e. higher than it had been two years before, notwithstanding that payments of roughly $1.6 million had been made: C.A. reasons, at para. 32. Indalex made another payment of $601,000 in April 2009: C.A. reasons, at para. 32.

[129] Dans le cas du régime des salariés, par exemple, toutes les cotisations normales pour service courant avaient été versées au moment de la liquidation (motifs de la C.A., par. 33). Le déficit de liquidation a été estimé au départ à 1 655 200 $. Indalex a effectué des paiements spéciaux de 709 013 $ en 2007, puis de 875 313 $ en 2008. Or, le 31 décembre 2008, le déficit de liquidation s'établissait à 1 795 600 $, de sorte qu'il s'était accru au cours des deux ans écoulés, malgré les quelque 1,6 million de dollars versés (motifs de la C.A., par. 32). Indalex a versé en sus 601 000 $ en avril 2009 (motifs de la C.A., par. 32).

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(3) The Deemed Trust Provisions

[130] The *PBA* contains provisions whose purpose is to exempt money owing to a pension plan, and which is held or owing by the employer, from being seized or attached by the employer's other creditors: Kaplan, at p. 395. This is accomplished by creating a "deemed trust" with respect to certain pension contributions such that these amounts are held by the employer in trust for the employees or pension beneficiaries.

[131] There are two deemed trusts that we must examine here, one relating to employer contributions that are *due but have not been paid* and another relating to employer contributions *accrued but not due*. This second deemed trust is the one in issue here, but it is important to understand how the two fit together.

[132] The deemed trust relating to employer contributions "due and not paid" is found in s. 57(3). The *PBA* and *PBA* Regulations contain many provisions relating to contributions required by employers, the due dates for which are specified. Briefly, the required contributions are these.

[133] When a pension is ongoing, employers need to make regular current service cost contributions. These are made monthly, within 30 days after the month to which they relate: *PBA* Regulations, s. 4(4)3. There are also special payments, which relate to deficiencies between a pension plan's assets and liabilities. There are "going-concern" deficiencies and "solvency" deficiencies, the distinction between which is unimportant for the purposes of these appeals. A plan administrator must regularly file actuarial reports, which may disclose deficiencies: *PBA* Regulations, s. 14. Where there is a going-concern deficiency the employer must make equal monthly payments over a 15-year period to rectify it: *PBA* Regulations, s. 5(1)(b). Where there is a solvency deficiency, the employer must make equal monthly payments over a five-year period to rectify it: *PBA* Regulations,

(3) Les dispositions relatives à la fiducie réputée

[130] La *LRR* renferme des dispositions visant à soustraire à la saisie par les autres créanciers de l'employeur les sommes dues à un régime de retraite que détient ou que doit l'employeur (Kaplan, p. 395). Ainsi, certaines cotisations au régime de retraite sont dont « réputées » détenues « en fiducie » par l'employeur pour le compte des employés ou des bénéficiaires du régime de retraite.

[131] Deux fiducies réputées doivent être examinées en l'espèce, l'une visant les cotisations de l'employeur qui sont *dues, mais impayées*, l'autre les cotisations de l'employeur qui sont *accumulées, mais qui ne sont pas dues*. Cette seconde fiducie réputée est celle qui nous intéresse dans le présent pourvoi, mais il importe de comprendre la complémentarité des deux fiducies réputées.

[132] La fiducie dont sont réputées faire l'objet les cotisations de l'employeur qui sont « dues et impayées » est créé au par. 57(3). La *LRR* et le règlement de la *LRR* renferment de nombreuses dispositions sur les cotisations de l'employeur et le moment de leur exigibilité. Voici quelles sont, en résumé, les cotisations exigées.

[133] Pendant la durée du régime de retraite, l'employeur verse chaque mois les cotisations normales pour service courant dans les 30 jours qui suivent le mois pour lequel elles sont exigibles (règlement de la *LRR*, par. 4(4)3). Des paiements spéciaux sont également effectués pour combler un déficit entre l'actif et le passif du régime. Il peut y avoir « déficit à long terme » et « déficit de solvabilité », mais la distinction entre les deux n'importe pas pour les besoins des présents pourvois. L'administrateur du régime dépose périodiquement un rapport actuariel, lequel est susceptible de révéler un déficit (règlement de la *LRR*, art. 14). Pour combler un déficit à long terme, l'employeur effectue des versements mensuels égaux sur une période de 15 ans (règlement de la *LRR*, al. 5(1)b)). Dans le cas d'un déficit de solvabilité, l'employeur effectue des versements

s. 5(1)(e). Once these regular or special payments become due but have not been paid, they are subject to the s. 57(3) deemed trust.

[134] I turn next to the s. 57(4) deemed trust, which gives rise to the question before us. The subsection provides that "[w]here a pension plan is wound up . . ., an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan 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".

[135] When a pension plan is wound up there will be an interrupted monthly payment period, which is sometimes referred to as the stub period. During this stub period regular and special liabilities will have accrued but not yet become due. Section 58(1) provides that money that an employer is required to pay "accrues on a daily basis". Because the amounts referred to in s. 57(4) are not yet due, they are not covered by the s. 57(3) deemed trust, which applies only to payments that are *due*. The two provisions, then, operate in tandem to create a trust over an employer's unfulfilled obligations, which are "due and not paid" as well as those which have "accrued to the date of the wind up but [are] not yet due".

(4) The Interpretative Approach

[136] The issue we confront is one of statutory interpretation and the well-settled approach is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26. Taking this approach it is clear to me that the

mensuels égaux pendant cinq ans (règlement de la *LRR*, al. 5(1)e)). Dès que ces versements normaux ou spéciaux sont dus, mais impayés, ils sont réputés faire l'objet de la fiducie créée au par. 57(3).

[134] Je passe maintenant à la fiducie réputée du par. 57(4), celle sur laquelle nous sommes appelés à nous prononcer en l'espèce. Suivant cette disposition, « [s]i un régime de retraite est liquidé [. . .] l'employeur qui est tenu de cotiser à la caisse de retraite est réputé détenir en fiducie pour le compte des bénéficiaires du régime de retraite un montant égal aux cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements ».

[135] Lorsqu'un régime de retraite est liquidé, il y a interruption des versements mensuels (intervalle appelé parfois « période tampon »). Au cours de cette période, des dettes ordinaires ou spéciales ont été contractées sans qu'elles soient immédiatement payables. Le paragraphe 58(1) dispose que l'argent qu'un employeur est tenu de verser « s'accumule sur une base quotidienne ». Puisque les sommes mentionnées au par. 57(4) ne sont pas encore dues, elles ne font pas l'objet de la fiducie dont l'existence est réputée au par. 57(3), laquelle ne vise que les paiements qui sont *dus*. Les deux dispositions s'appliquent donc de concert pour créer une fiducie à l'égard des obligations non exécutées de l'employeur qui sont « dues et impayées », ainsi qu'à l'égard des obligations qui ont pour objet des cotisations « accumulées à la date de la liquidation, mais qui ne sont pas encore dues ».

(4) La méthode d'interprétation

[136] Nous sommes aux prises avec l'interprétation de dispositions législatives et, suivant le principe bien établi, [TRADUCTION] « il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur » (E. A. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87; *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559, par. 26). Dès lors, il ne fait aucun

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sponsor's obligation to pay a wind-up deficiency is not covered by the statutory deemed trust provided for in s. 57(4) of the *PBA*. In my view, the deficiency neither "accrued", nor did it arise within the period referred to by the words "to the date of the wind up".

(a) *Grammatical and Ordinary Sense of the Words "Accrued" and "to the Date of the Wind Up"*

[137] The Court of Appeal failed to take sufficient account of the ordinary and grammatical meaning of the text of the provisions. It held that "the deemed trust in s. 57(4) applies to all employer contributions that are required to be made pursuant to s. 75": para. 101 (emphasis added). However, the plain words of the section show that this conclusion is erroneous. Section 75(1)(a) refers to liability for employer contributions that "are due . . . and that have not been paid". These amounts are thus *not* included in the s. 57(4) deemed trust, because it addresses only amounts that have "accrued to the date of the wind up but [are] not yet due". Amounts "due" are covered by the s. 57(3) deemed trust and not, as the Court of Appeal concluded by the deemed trust created by s. 57(4). The Court of Appeal therefore erred in finding, in effect, that amounts which "are due" could be included in a deemed trust covering amounts "not yet due".

[138] In my view, the most plausible grammatical and ordinary sense of the phrase "accrued to the date of the wind up" in s. 57(4) is that it refers to the sums that are ascertained immediately before the effective wind-up date of the plan.

[139] In the context of s. 57(4), the grammatical and ordinary sense of the term "accrued" is that the amount of the obligation is "fully constituted" and "ascertained" although it may not yet be payable. The amount of the wind-up deficiency is not fully constituted or ascertained (or even ascertainable) before or even on the date fixed for wind up and therefore cannot fall under s. 57(4).

doute que l'obligation du promoteur de combler un déficit de liquidation échappe à la fiducie réputée du par. 57(4) de la *LRR*. À mon avis, le déficit n'est pas « accumulé » [« *accrued* », en anglais] et n'est pas survenu pendant la période à laquelle renvoie l'expression « à la date de la liquidation ».

a) *Le sens ordinaire et grammatical des termes « accumulées » [« accrued », en anglais] et « à la date de la liquidation »*

[137] La Cour d'appel ne tient pas suffisamment compte du sens ordinaire et grammatical du libellé des dispositions en cause. Elle conclut que [TRADUCTION] « la fiducie réputée du par. 57(4) vise toutes les cotisations que l'employeur est tenu de verser suivant l'art. 75 » (par. 101 (je souligne)). Or, il ressort du libellé explicite de cette dernière disposition qu'il s'agit d'une conclusion erronée. L'alinéa 75(1)a) établit l'obligation de l'employeur à l'égard des paiements qui « sont dus [. . .] et qui n'ont pas été versés ». Ces paiements *ne* font donc *pas* l'objet de la fiducie réputée du par. 57(4), car celle-ci ne vise que les cotisations qui sont « accumulées à la date de la liquidation, mais qui ne sont pas encore dues ». Les cotisations « dues » sont réputées détenues en fiducie suivant le par. 57(3), et non le par. 57(4) comme le conclut la Cour d'appel. Cette dernière estime en effet à tort que les cotisations qui « sont dues » peuvent être réputées détenues en fiducie comme celles qui « ne sont pas encore dues ».

[138] À mon avis, suivant son sens ordinaire et grammatical le plus plausible, l'expression « accumulées à la date de la liquidation » employée au par. 57(4) renvoie aux sommes déterminées immédiatement avant la date de prise d'effet de la liquidation du régime.

[139] Dans le contexte du par. 57(4), le sens ordinaire et grammatical d'« accumulées » veut que l'obligation soit « entièrement constituée » et que son montant soit « déterminé», même si elle peut ne pas être encore payable. Le déficit de liquidation n'est pas entièrement constitué ni son montant déterminé (ou déterminable) avant la date prévue pour la liquidation, ou le jour même, et ne peut donc pas être visé au par. 57(4).

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[140] Of course, the meaning of the word "accrued" may vary with context. In general, when the term "accrued" is used in relation to legal rights, its common meaning is that the right has become fully constituted even though the monetary implications of its enforcement are not yet known or knowable. Thus, we speak of the "accrual" of a cause of action in tort when all of the elements of the cause of action come into existence, even though the extent of the damage may well not be known or knowable at that time: see, e.g., *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53. However, when the term is used in relation to a sum of money, it will generally refer to an amount that is at the present time either quantified or exactly quantifiable but which may or may not be due.

[141] In some contexts, a liability is said to accrue when it becomes due. An accrued liability is said to be "properly chargeable" or "owing on a given day" or "completely constituted": see, e.g., *Black's Law Dictionary* (9th ed. 2009), at p. 997, "accrued liability"; D. A. Dukelow, *The Dictionary of Canadian Law* (4th ed. 2011), at p. 13, "accrued liability"; *Hydro-Electric Power Commission of Ontario v. Albright* (1922), 64 S.C.R. 306, at p. 312.

[142] In other contexts, an amount which has accrued may not yet be due. For example, we speak of "accrued interest" meaning a precise, quantified amount of interest that has been earned but may not yet be payable. The term "accrual" is used in the same way in "accrual accounting". In accrual method accounting, "transactions that give rise to revenue or costs are recognized in the accounts when they are earned and incurred respectively": B. J. Arnold, *Timing and Income Taxation: The Principles of Income Measurement for Tax Purposes* (1983), at p. 44. Revenue is earned when the recipient "substantially completes performance of everything he or she is required to do as long as the amount due is ascertainable and there is no uncertainty about its collection": P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (7th ed. 2010), at s. 6.5(b); see

[140] Certes, le sens du terme « accumulées » [et plus encore celui de son équivalent anglais « *accrued* »] peut varier selon le contexte. En général, lorsque ce terme est employé de pair avec des droits légaux, son sens courant veut que le droit soit entièrement constitué, même si les répercussions financières de son exécution ne sont pas encore connues et ne peuvent l'être. Ainsi, en responsabilité délictuelle, on parle d'accumulation (au sens d'acquisition ou de naissance) de la cause d'action lorsque tous ses éléments sont réunis, même lorsque l'étendue du préjudice n'est pas encore connue ou ne peut l'être (voir, p. ex., *Ryan c. Moore*, 2005 CSC 38, [2005] 2 R.C.S. 53). Toutefois, lorsque le terme qualifie une somme, il renvoie généralement à un élément dont la valeur est actuellement mesurée ou mesurable, mais qui peut ou non être dû.

[141] Dans certains contextes, il y a accumulation [en anglais, « *accrual* »] lorsque l'obligation vient à échéance. On dit du passif accumulé qu'il est [TRADUCTION] « dûment imputable » ou « exigible à une date prévue », ou encore, « entièrement constitué » (voir, p. ex., la définition d'« *accrued liability* » [passif accumulé] dans le *Black's Law Dictionary* (9e éd. 2009), p. 997; D. A. Dukelow, *The Dictionary of Canadian Law* (4e éd. 2011), p. 13; *Hydro-Electric Power Commission of Ontario c. Albright* (1922), 64 R.C.S. 306, p. 312).

[142] Dans d'autres cas, la somme qui s'est accumulée [en anglais, « *accrued* »] peut ne pas être encore exigible. Par exemple, on parle d'« intérêts accumulés » [« *accrued interest* »] au sens du montant précis des intérêts qui sont courus, mais qui ne sont pas encore exigibles. En anglais, *accrual* est utilisé dans le même sens dans l'expression « *accrual accounting* » (en français, « comptabilité d'exercice »). Suivant cette méthode, les [TRADUCTION] « opérations qui génèrent des revenus ou occasionnent des dépenses sont comptabilisées lorsque les revenus sont gagnés ou que les dépenses sont engagées » (B. J. Arnold, *Timing and Income Taxation : The Principles of Income Measurement for Tax Purposes* (1983), p. 44). Le revenu est gagné lorsque le bénéficiaire [TRADUCTION] « a essentiellement accompli tout ce qu'il devait accomplir, à condition que la somme

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also Canadian Institute of Chartered Accountants, *CICA Handbook — Accounting*, Part II, s. 1000, at paras. 41-44. In this context, the amount must be ascertained at the time of accrual.

due puisse être déterminée et que sa perception ne fasse l'objet d'aucune incertitude » (P. W. Hogg, J. E. Magee et J. Li, *Principles of Canadian Income Tax Law* (7e éd. 2010), al. 6.5b); voir également le manuel de l'Institut canadien des comptables agréés, *Manuel de l'ICCA — Comptabilité*, partie II, ch. 1000, par. 41-44). La somme en cause doit alors être déterminée au moment où le droit de la toucher est acquis [« *accrued* »].

[143] The *Hydro-Electric Power Commission* case offers a helpful definition of the word "accrued" in this sense. On a sale of shares, the vendor undertook to provide on completion "a sum estimated by him to be equal to sinking fund payments [on the bonds and debentures] which shall have accrued but shall not be due at the time for completion": p. 344 (emphasis added). The bonds and debentures required the company to pay on July 1 of each year a fixed sum for each electrical horsepower sold and paid for during the preceding calendar year. A dispute arose as to what amounts were payable in this respect on completion. Duff J. held that in this context accrued meant "completely constituted", referring to this as a "well recognized usage": p. 312. He went on:

> Where . . . a lump sum is made payable on a specified date and where, having regard to the purposes of the payment or to the terms of the instrument, this sum must be considered to be made up of an accumulation of sums in respect of which the right to receive payment is completely constituted before the date fixed for payment, then it is quite within the settled usage of lawyers to describe each of such accumulated parts as a sum accrued or accrued due before the date of payment. [p. 316]

Thus, at every point at which a liability to pay a fixed sum arose under the terms of the contract, that liability accrued. It was fully constituted even though not yet due because the obligation to make the payment was in the future. In reaching this conclusion, Duff J. noted that the bonds and debentures used the word "accrued" in contrast to

[143] Dans l'arrêt *Hydro-Electric Power Commission*, la Cour, qui se prononçait uniquement sur le terme anglais « *accrued* », opine opportunément que ce terme se définit ainsi. Lors de la vente d'actions, le vendeur s'était engagé à remettre, une fois l'opération conclue, [TRADUCTION] « une somme équivalant selon lui aux sommes versées au fonds d'amortissement [des obligations et des débentures] qui sont alors accumulées [*accrued*], mais qui ne sont pas exigibles » (p. 344 (je souligne)). Suivant les conditions des obligations et des débentures, la société était tenue de payer, le 1er juillet de chaque année, un montant déterminé pour chacun des chevaux-vapeur électriques vendus et payés au cours de l'année civile précédente. Le litige portait sur le montant des sommes payables à ce titre une fois la vente conclue. Le juge Duff statue que, dans ce contexte, et selon un [TRADUCTION] « usage largement reconnu », le mot « *accrued* » renvoie au droit ou à l'obligation « entièrement constitué » (p. 312). Il ajoute :

> [TRADUCTION] Lorsqu'une somme forfaitaire doit être versée à une date déterminée et que, vu l'objet du paiement ou les clauses du contrat, la somme en question doit être considérée comme résultant de l'accumulation de sommes pour lesquelles le droit au paiement est entièrement constitué avant la date de paiement convenue, il est tout à fait conforme à l'usage des avocats qui consiste à voir dans chacun de ces éléments accumulés une somme « *accrued* » ou devenue exigible avant la date du paiement. [p. 316]

Par conséquent, chaque fois que naissait, suivant le contrat, l'obligation de verser une somme précise, le droit à l'exécution de cette obligation était acquis (ou « *accrued* »). Le droit était entièrement constitué, même s'il n'y avait pas encore exigibilité, car l'obligation d'effectuer le versement naissait ultérieurement. Pour arriver à cette conclusion, le

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"due" and that this strengthened the interpretation of "accrued" as an obligation fully constituted but not yet payable. Similarly in s. 57(4), the word "accrued" is used in contrast to the word "due".

juge Duff fait remarquer que le terme « *accrued* » (par opposition à « *due* ») est employé dans les obligations et les débentures, ce qui confirme l'interprétation selon laquelle « *accrued* » renvoie à une obligation entièrement constituée, mais dont l'exécution n'est pas encore exigible. De même, au par. 57(4), le terme « accumulées » [« *accrued* »] est utilisé par opposition à « dues ».

[144] Given my understanding of the ordinary meaning of the word "accrued", I must respectfully disagree with my colleague, Justice Deschamps' position that the wind-up deficiency can be said to have "accrued" to the date of wind up. In her view, "[s]ince the employees cease to accumulate entitlements when the plan is wound up, the entitlements that are used to calculate the contributions have all been accumulated before the wind-up date" (para. 34) and "no new liabilities accrue at the time of or after the wind up" (para. 36). My colleague maintains that "[t]he fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes" (para. 37, referring to *Canadian Pacific Ltd. v. M.N.R.* (1998), 41 O.R. (3d) 606 (C.A.)).

[144] Selon ce que j'estime être le sens ordinaire du mot « accumulé » (en anglais, « *accrued* ») et sauf le respect que je porte à la juge Deschamps, je ne crois pas que l'on puisse considérer que le déficit de liquidation était « accumulé » à la date de la liquidation. De l'avis de ma collègue, « [p]uisque les employés cessent d'accumuler des droits lorsque le régime est liquidé, les droits qui servent au calcul des cotisations ont tous été accumulés avant la date de la liquidation » (par. 34) et « aucun passif ne s'accumule pendant ni après la liquidation » (par. 36). Pour elle, « [l]e fait que le montant précis des cotisations n'est pas établi au moment de la liquidation ne confère pas aux cotisations un caractère éventuel qui ferait en sorte qu'elles ne seraient pas accumulées d'un point de vue comptable » (par. 37, citant *Canadian Pacific Ltd. c. M.N.R.* (1998), 41 O.R. (3d) 606 (C.A.)).

[145] I cannot agree that no new liability accrues on or after the wind up. As discussed in more detail earlier, the wind-up deficiency in s. 75(1)(b) is made up of the difference between the plan's assets and liabilities calculated as of the date of wind up. On wind up, the *PBA* accords statutory entitlements and protections to employees that would not otherwise be available: Kaplan, at p. 532. Wind up therefore gives rise to new liabilities. In particular, on wind up, and only on wind up, plan beneficiaries are entitled, under s. 74, to make elections regarding the payment of their benefits. The plan's liabilities cannot be determined until those elections are made. Contrary to what my colleague Justice Deschamps suggests, the extent of the wind-up deficiency depends on employee rights that arise only upon wind up and with respect to which employees make elections only after wind up.

[145] Je ne saurais convenir qu'aucune obligation ne s'accumule pendant ou après la liquidation. Comme je le précise précédemment, le déficit de liquidation s'entend à l'al. 75(1)b) de la différence entre l'actif du régime et son passif calculé à la date de la liquidation. En cas de liquidation, la *LRR* confère aux employés des droits et des garanties dont ils ne bénéficieraient pas en d'autres circonstances (Kaplan, p. 532). La liquidation impose donc des obligations nouvelles à l'employeur. Plus particulièrement, en cas de liquidation, et seulement dans ce cas, l'art. 74 permet aux bénéficiaires de faire des choix quant au paiement de leurs prestations. Le passif du régime ne peut être établi avant ces choix. Contrairement à ce que laisse entendre ma collègue la juge Deschamps, le montant du déficit de liquidation dépend de droits qui ne prennent naissance qu'à la liquidation et à l'égard desquels les employés ne font des choix qu'après la liquidation.

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[146] Moreover, the wind-up deficiency will vary after wind up because the amount of money necessary to provide for the payment of the plan sponsor's liabilities will vary with the market. Section 31 of the *PBA* Regulations allows s. 75 payments to be spaced out over the course of five years. As we have seen, the amount of the wind-up deficiency will fluctuate over this period (I set out earlier how this amount in fact fluctuated markedly in the case of the salaried plan in issue here). Thus, while estimates are periodically made and reported after the wind up to determine how much the employer needs to pay, the precise amount of the wind-up deficiency is not ascertained or ascertainable on the date of the wind up.

[146] En outre, le déficit de liquidation diffère après la liquidation puisque la somme à verser pour acquitter les obligations du promoteur du régime dépend du marché. L'article 31 du règlement de la *LRR* permet de répartir sur cinq ans les versements exigés à l'art. 75. Rappelons que le montant du déficit de liquidation fluctuera au cours de cette période (j'ai déjà fait état de la manière dont il a considérablement varié dans le cas du régime des salariés visé en l'espèce). C'est pourquoi, malgré les estimations effectuées périodiquement après la liquidation pour déterminer le montant que l'employeur doit verser, le montant du déficit de liquidation n'est ni déterminé ni déterminable à la date de la liquidation.

[147] I turn next to the ordinary and grammatical sense of the words "to the date of the wind up" in s. 57(4). In my view, these words indicate that only those contributions that accrue before the date of wind up, and not those amounts the liability for which arises only on the day of wind up — that is, the wind-up deficiency — are included.

[147] J'examine maintenant le sens ordinaire et grammatical des mots « à la date de la liquidation » (en anglais, « *to the date of the wind up* ») employés au par. 57(4). À mon avis, cette expression fait en sorte que seules sont visées les cotisations accumulées avant la date de la liquidation, et non les sommes qui font l'objet d'une obligation qui ne prend naissance que le jour de la liquidation (en anglais, « *on the date of the wind up* ») et qui correspondent au déficit de liquidation.

[148] Where the legislature intends to include the date of wind up, it has used suitable language to effect that purpose. For example, the English version of a provision amending the *PBA* in 2010 (c. 24, s. 21(2)), s. 68(2)(c), indicates which trade unions are entitled to notice of the wind up:

> **68.** . . .
>
> (2) If the employer or the administrator, as the case may be, intends to wind up the pension plan, the administrator shall give written notice of the intended wind up to,
>
> . . .
>
> (c) each trade union that represents members of the pension plan or that, on the date of the wind up, represented the members, former members or retired members of the pension plan;

[148] Si l'intention du législateur avait été d'englober la date de la liquidation, il aurait employé le libellé voulu. Par exemple, l'al. 68(2)c) de la *LRR*, modifié en 2010 (ch. 24, par. 21(2)), précise dans sa version anglaise quels syndicats doivent recevoir avis de la liquidation :

> **68.** . . .
>
> (2) *If the employer or the administrator, as the case may be, intends to wind up the pension plan, the administrator shall give written notice of the intended wind up to,*
>
> . . .
>
> (c) *each trade union that represents members of the pension plan or that, on the date of the wind up* [à la date de la liquidation], *represented the members, former members or retired members of the pension plan;*

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In contrast to the phrase "to the date of wind up", "on the date of wind up" clearly includes the date of wind up. (The French version does not indicate a different intention.) Similarly, s. 70(6), which formed part of the *PBA* until 2012 (rep. S.O. 2010, c. 9, s. 52(5)), read as follows:

70. . . .

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

The words "on the effective date of the partial wind up" indicate that the members are entitled to those benefits from the date of the partial wind up, in the sense that members can claim their benefits beginning on the date of the wind up itself. This is how the legislature expresses itself when it wants to speak of a period of time including a specific date. By comparison, "to the date of the wind up" is devoid of language that would include the actual date of wind up. This conclusion is further supported by the structure of the *PBA* and its legislative history and evolution, to which I will turn shortly.

[149] To sum up with respect to the ordinary and grammatical meaning of the phrase "accrued to the date of the wind up", the most plausible ordinary and grammatical meaning is that such amounts are fully constituted and precisely ascertained immediately before the date fixed as the date of wind up. Thus, according to the ordinary and grammatical meaning of the words, the wind-up deficiency obligation set out in s. 75(1)(b) has not "accrued to the date of the wind up" as required by s. 57(4). Moreover, the liability for the wind-up deficiency arises where a pension plan is wound up (s. 75(1)(b)) and so it cannot be a liability that "accrued to the date of the wind up" (s. 57(4)).

Contrairement à la formule « *to the date of wind up* », l'expression « *on the date of wind up* » englobe clairement la date de la liquidation. (La version française ne se prête pas à une autre interprétation.) De même, le par. 70(6), qui figurait dans la *LRR* jusqu'en 2012 (abr. L.O. 2010, ch. 9, par. 52(5)), énonce ce qui suit :

70. . . .

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

Il appert de l'expression anglaise « *on the effective date of the partial wind up* » que les participants ont droit aux prestations à compter de la date de la liquidation partielle, c'est-à-dire qu'ils peuvent les réclamer à compter de la liquidation elle-même. Le législateur s'exprime ainsi lorsqu'il veut qu'une période englobe une date précise. À l'opposé, lorsqu'il dit en anglais « *to the date of the wind up* » (en français, « à la date de la liquidation »), il n'entend pas englober la date où survient la liquidation. Cette conclusion prend en outre appui sur l'architecture de la *LRR*, ainsi que sur son évolution et son historique. J'y reviendrai brièvement.

[149] Bref, le sens ordinaire et grammatical le plus plausible d'« accumulées à la date [*to the date*] de la liquidation » veut que soient visées les sommes entièrement constituées et déterminées immédiatement avant la date prévue de liquidation. Ainsi, l'obligation liée au déficit de liquidation visé à l'al. 75(1)b) n'est donc pas « accumul[é] à la date [*to the date*] de la liquidation » comme l'exige le par. 57(4). De plus, comme cette obligation naît lorsque le régime de retraite est liquidé (al. 75(1)b)), son objet ne peut donc pas être « accumul[é] à la date de la liquidation » (par. 57(4)).

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(b) *The Scheme of the Act*

[150] As discussed earlier, s. 57 establishes deemed trusts over funds which must be contributed to a pension plan, including the one in s. 57(4), which is at issue here. It is helpful to consider these deemed trusts in the context of the obligations to pay funds which give rise to them. Specifically, the relationship between the deemed trust provisions in s. 57(3) and (4), on one hand, and s. 75(1), which sets out liabilities on wind up on the other. According to my colleague Justice Deschamps, s. 75(1) "elegantly parallels the wind-up deemed trust provision" (para. 42) such that the deemed trusts must include the wind-up deficiency. I disagree. In my view, the deemed trusts parallel only s. 75(1)(a), which does not relate to the wind-up deficiency. The correspondence between the deemed trusts and s. 75(1)(a), and the absence of any such correspondence with s. 75(1)(b), makes it clear that the wind-up deficiency is not covered by the deemed trust provisions.

[151] I would recall here the difference between the deemed trusts created by s. 57(3) and (4). While a plan is ongoing, there may be payments which the employer is required to, but has failed to make. The s. 57(3) trust applies to these payments because they are "<u>due and not paid</u>". When a plan is wound up, however, there will be payments that are outstanding in the sense that they are fully constituted, but not yet due. This occurs with respect to the so-called stub period referred to earlier. During this stub period, regular and special liabilities will accrue on a daily basis, as provided for in s. 58(1), but may not be due at the time of wind up. While s. 57(3) cannot apply to these payments because they are not yet due, the deemed trust under s. 57(4) applies to these payments because liability for them has "accrued to the date of the wind up" and they are "<u>not yet due</u>".

[152] The important point is how these two deemed trust provisions relate to the wind-up liabilities as described in ss. 75(1)(a) and 75(1)(b).

b) *Le régime de la Loi*

[150] Je le répète, l'art. 57 dispose que les sommes dues à un régime de retraite sont réputées détenues en fiducie. La disposition applicable en l'espèce est le par. 57(4). Il est utile de se pencher sur ces fiducies réputées en liaison avec les obligations de versement qui les font naître. Plus précisément, il s'agit de considérer la relation entre, d'une part, les fiducies dont l'existence est réputée aux par. 57(3) et (4) et, d'autre part, le par. 75(1), qui prescrit certains versements à la liquidation. Selon ma collègue la juge Deschamps, le libellé du par. 75(1) « fait élégamment écho à celui qui crée la fiducie réputée à la liquidation » (par. 42), de sorte que la fiducie réputée doit englober le déficit de liquidation. Je ne suis pas d'accord. À mon avis, la fiducie réputée ne fait écho qu'à l'al. 75(1)a), lequel ne porte pas sur le déficit de liquidation. Il ressort de la correspondance existant entre les fiducies créées et l'al. 75(1)a), et de l'absence d'une telle correspondance avec l'al. 75(1)b) que le déficit de liquidation ne fait pas l'objet d'une fiducie réputée.

[151] Je rappelle la différence entre les fiducies réputées des par. 57(3) et (4). Pendant la durée du régime, l'employeur peut omettre d'effectuer les versements auxquels il est tenu. La fiducie créée au par. 57(3) vise ces versements, car il s'agit de sommes « <u>dues et impayées</u> ». Cependant, lorsque le régime est liquidé, des versements demeurent en suspens en ce sens que le droit y afférent est entièrement constitué, mais que les sommes en cause ne sont pas encore dues. La situation se présente pendant la période tampon mentionnée précédemment où les paiements normaux et spéciaux s'accumulent chaque jour conformément au par. 58(1), mais peuvent ne pas être dus au moment de la liquidation. Bien que le par. 57(3) ne puisse s'appliquer à ces paiements parce qu'ils ne sont pas encore dus, la fiducie créée au par. 57(4) les englobe, car l'obligation s'y rapportant est « accumulé[e] à la date de la liquidation », mais les sommes en question ne sont « <u>pas encore dues</u> ».

[152] L'élément important réside dans le rapport entre ces deux dispositions créant une fiducie et les versements exigés aux al. 75(1)a) et 75(1)b) en cas

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The two paragraphs refer to sums of money that are different in kind: while s. 75(1)(a) refers to liabilities that accrue before wind up and that are created elsewhere in the Act, s. 75(1)(b) creates a completely new liability that comes into existence only once the plan is wound up. There is no dispute, as I understand it, that these two paragraphs refer to different liabilities and that it is the liability described in s. 75(1)(b) that is the wind-up deficiency in issue here. The parties do not dispute that s. 75(1)(a) does *not* include wind-up deficiency payments.

[153] It is striking how closely the text of s. 75(1)(a) — which does not relate to the wind-up deficiency — tracks the language of the deemed trust provisions in s. 57(3) and (4). As noted, s. 57(3) deals with "employer contributions due and not paid", while s. 57(4) deals with "employer contributions accrued to the date of the wind up but not yet due". Section 75(1)(a) includes both of these types of employer contributions. It refers to "payments that . . . are due . . . and that have not been paid" (i.e. subject to the deemed trust under s. 57(3)) or that have "accrued and that have not been paid" (i.e. subject to the deemed trust under s. 57(4) to the extent that these payments accrued to the date of wind up). This very close tracking of the language between s. 57(3) and (4) on the one hand and s. 75(1)(a) on the other, and the absence of any correspondence between the language of these deemed trust provisions with s. 75(1)(b), suggests that the s. 57(3) and (4) deemed trusts refer to the liability described in s. 75(1)(a) and not to the wind-up deficiency created by s. 75(1)(b). It is difficult to understand why, if the intention had been for s. 57(4) to capture the wind-up deficiency liability under s. 75(1)(b), the legislature would have so closely tracked the language of s. 75(1)(a) alone in creating the deemed trusts. Thus, in my respectful view, the elegant parallel to which my colleague, Justice Deschamps refers exists only between the deemed trust and s. 75(1)(a), and not between the deemed trust and the wind-up deficiency.

de liquidation. Ces deux alinéas visent des sommes de nature différente. L'alinéa 75(1)a) renvoie au passif accumulé avant la liquidation et qui résulte de l'application d'autres dispositions de la Loi, alors que l'al. 75(1)b) crée un passif entièrement nouveau qui naît seulement une fois le régime liquidé. Nul ne conteste, pour autant que je sache, que les deux alinéas renvoient à des passifs différents et que le déficit de liquidation visé en l'espèce correspond à l'obligation prévue à l'al. 75(1)b). Les parties ne contestent pas que l'al. 75(1)a) *ne* vise *pas* les paiements visant à combler le déficit de liquidation.

[153] Il est frappant de constater à quel point le libellé de l'al. 75(1)a) — qui ne porte pas sur le déficit de liquidation — s'apparente à celui des par. 57(3) et (4), qui créent des fiducies. Le paragraphe 57(3) vise les « cotisations de l'employeur qui sont dues et impayées », alors que le par. 57(4) a pour objet les « cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues ». Les deux types de cotisations de l'employeur entrent dans le champ d'application de l'al. 75(1)a), lequel renvoie aux « paiements qui [. . .] sont dus [. . .] et qui n'ont pas été versés » (qui sont donc réputés détenus en fiducie suivant le par. 57(3)) ou qui sont « accumulés, et qui n'ont pas été versés » (qui sont donc réputés détenus en fiducie suivant le par. 57(4), dans la mesure où ils sont accumulés à la date de la liquidation). La grande ressemblance du libellé des par. 57(3) et (4), d'une part, et du texte de l'al. 75(1)a), d'autre part, et l'absence de toute correspondance entre le libellé de ces dispositions créant une fiducie et le texte de l'al. 75(1)b) donnent à penser que l'objet des fiducies dont l'existence est réputée aux par. 57(3) et (4) s'entend de l'obligation faite à l'al. 75(1)a), et non du déficit de liquidation visé à l'al. 75(1)b). On comprend difficilement que le législateur, s'il a voulu que l'obligation de combler le déficit de liquidation visé à l'al. 75(1)b) bénéficie de l'application du par. 57(4), ait repris le seul libellé de l'al. 75(1)a) pour créer les fiducies. En toute déférence, si comme le dit ma collègue la juge Deschamps, des libellés se font élégamment écho, ce sont ceux de la fiducie réputée et de l'al. 75(1)a), et non ceux de la fiducie réputée et du déficit de liquidation.

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[154] I conclude that the scheme of the *PBA* reinforces my conclusion that the ordinary grammatical sense of the words in s. 57(4) does not extend to the wind-up deficiency provided for in s. 75(1)(b).

(c) *Legislative History and Evolution*

[155] Legislative history and evolution may form an important part of the overall context within which a provision should be interpreted. Legislative evolution refers to the various formulations of the provision while legislative history refers to evidence about the provision's conception, preparation and enactment: see, e.g., *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 43.

[156] Both the legislative evolution and history of the *PBA* show that it was never the legislature's intention to include the wind-up deficiency in the deemed trust. The evolution and history of the *PBA* are rather intricate and sometimes difficult to follow so I will review them briefly here before delving into a more detailed analysis.

[157] The deemed trust was first introduced into the *PBA* in 1973. At that time, it covered employee contributions held by the employer and employer contributions that were due but not paid. In 1980, the *PBA* was amended so that the deemed trust was expanded to include employer contributions whether they were due or not. Also, new provisions were added allowing for employee elections and requiring additional payments by the employer where a plan was wound up. The 1980 amendments gave rise to confusion on two fronts: first, it was unclear whether the payments that were required on wind up were subject to the deemed trust; second, it was unclear whether a lien over some employer contributions covered the same amount as the deemed trust. In 1983, both these points were clarified. The sections were reworded and rearranged to make it clear that the wind-up deficiency was distinct from the amounts covered by the deemed trust, and that the lien and the

[154] L'architecture de la *LRR* me conforte dans l'opinion que le sens ordinaire et grammatical des termes qui y sont employés n'emporte pas l'application du par. 57(4) au déficit de liquidation visé à l'al. 75(1)b).

c) *L'évolution et l'historique législatifs*

[155] L'évolution et l'historique législatifs peuvent constituer un élément important du contexte global dans lequel une disposition législative doit être interprétée. L'évolution législative s'entend des diverses formulations successives du texte de loi, alors que l'historique législatif s'entend des éléments touchant à sa conception, à son élaboration et à son adoption (voir, p. ex., *Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, 2011 CSC 53, [2011] 3 R.C.S. 471, par. 43).

[156] Il appert tant de l'évolution de la *LRR* que de son historique que le législateur n'a jamais voulu que le déficit de liquidation fasse l'objet de la fiducie réputée. L'évolution et l'historique de la *LRR* étant plutôt complexes et parfois difficiles à suivre, je les examine brièvement avant de me livrer à une analyse plus approfondie.

[157] La fiducie réputée a fait son apparition dans la *LRR* en 1973. À cette époque, elle visait les cotisations des salariés que détenait l'employeur et les cotisations de l'employeur qui étaient dues, mais impayées. En 1980, la *LRR* a été modifiée de sorte que la fiducie réputée englobe toutes les cotisations de l'employeur, qu'elles soient dues ou non. En outre, de nouvelles dispositions permettaient aux salariés de faire des choix et exigeaient des versements supplémentaires de l'employeur lorsque le régime était liquidé. La réforme de 1980 a créé de l'incertitude sous deux rapports. Premièrement, on se demandait si les versements requis à la liquidation faisaient l'objet de la fiducie réputée et, deuxièmement, si certaines cotisations de l'employeur faisaient l'objet d'un privilège à raison du montant visé par la fiducie réputée. En 1983, ces deux points ont été clarifiés. Les articles ont été remaniés et leur libellé reformulé afin de préciser que le déficit de liquidation était distinct des

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deemed trust covered the same amount. A statement by the responsible Minister in 1982 confirms that *the deemed trusts were never intended to cover the wind-up deficiency.*

[158] My colleague, Justice Deschamps maintains that this history suggests an evolution in the intention of the legislature from protecting "only the service contributions that were due to all amounts due and accrued upon wind up" (para. 42). I respectfully disagree. In my view, the history and evolution of the *PBA* leading up to and including 1983 show that the legislature never intended to include the wind-up deficiency in the deemed trust. Moreover, legislative evolution after 1983 confirms that this intention did not change.

(i) *The Pension Benefits Amendment Act, 1973*, S.O. 1973, c. 113

[159] So far as I can determine, statutory deemed trusts were first introduced into the *PBA* by *The Pension Benefits Amendment Act, 1973*, S.O. 1973, c. 113, s. 6. Those amendments created deemed trusts over two amounts: employee pension contributions received by employers (s. 23*a*(1), similar to the deemed trust in the current s. 57(1)) and employer contributions that had fallen due under the plan (s. 23*a*(3), similar to the current s. 57(3) deemed trust for employer contributions "due and not paid"). The full text of these provisions and those referred to below, up to the current version of the 1990 Act, are found in the Appendix.

(ii) *The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80

[160] Ontario undertook significant pension reform leading to *The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80; see Kaplan, at pp. 54-56. I will concentrate on the deemed trust provisions and how they related to the liabilities on

sommes réputées détenues en fiducie, et que le privilège et la fiducie réputée portaient sur un même montant. En 1982, le ministre responsable a confirmé que *la fiducie réputée n'a jamais été censée s'appliquer au déficit de liquidation.*

[158] Pour ma collègue la juge Deschamps, cet historique reflèterait l'évolution de l'intention du législateur que la protection couvre d'abord « uniquement les cotisations dues [puis s'étende à tous] les montants dus ou accumulés à la liquidation » (par. 42). Soit dit en tout respect, je ne suis pas d'accord. À mon avis, l'historique et l'évolution de la *LRR* jusqu'en 1983 inclusivement montrent que le législateur n'a jamais voulu que le déficit de liquidation fasse l'objet de la fiducie réputée. Qui plus est, il appert de l'évolution de la *LLR* postérieure à 1983 que cette intention demeure inchangée.

(i) *The Pension Benefits Amendment Act, 1973*, S.O. 1973, ch. 113

[159] Aussi loin que je puisse remonter, la fiducie réputée a vu le jour dans la *LRR* par suite de l'adoption de la *Pension Benefits Amendment Act, 1973*, S.O. 1973, ch. 113, art. 6. L'existence d'une fiducie a été réputée à l'égard, d'une part, des cotisations des salariés au régime de retraite touchées par les employeurs (par. 23*a*(1), ce qui s'apparente à la fiducie prévue au par. 57(1) actuel) et, d'autre part, des cotisations de l'employeur devenues exigibles aux termes du régime (par. 23*a*(3), ce qui s'apparente aux cotisations de l'employeur « qui sont dues et impayées » et qui sont réputées détenues en fiducie en application du par. 57(3) actuel). Le texte intégral de ces dispositions et de celles mentionnées ci-après, jusqu'à la version actuelle datant de 1990, figure en annexe.

(ii) *The Pension Benefits Amendment Act, 1980*, S.O. 1980, ch. 80

[160] L'Ontario a entrepris une réforme majeure des régimes de retraite qui a débouché sur l'adoption de la *Pension Benefits Amendment Act, 1980*, S.O. 1980, ch. 80 (voir Kaplan, p. 54-56). Je m'attacherai aux dispositions sur la fiducie réputée et à

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wind up and, for ease of reference, I will refer to the sections as they were renumbered in the 1980 consolidation: R.S.O. 1980, c. 373. The 1980 legislation expanded the deemed trust relating to employer contributions. Although far from clear, the new provisions appear to have created a deemed trust and lien over the employer contributions whether otherwise payable or not and calculated as if the plan had been wound up on the relevant date.

leur interaction avec le passif issu de la liquidation. Pour faciliter la consultation, je renvoie aux dispositions selon leur nouvelle numérotation datant de la refonte de 1980 (R.S.O. 1980, ch. 373). La loi de 1980 a accru la portée de la fiducie réputée quant aux cotisations de l'employeur. Même si elles ne sont pas du tout claires, les nouvelles dispositions semblent faire en sorte que les cotisations de l'employeur, qu'elles soient exigibles ou non, dont le montant est établi comme si le régime avait été liquidé à la date considérée, fassent l'objet d'une fiducie réputée et d'un privilège.

[161] It was unclear after the reforms of 1980 whether the deemed trust applied to all employer contributions that arose on wind up. According to s. 23(4), on any given date, the trust extended to an amount to be determined "as if the plan had been wound up on that date". However, the provisions of the 1980 version of the Act did not explicitly state what such a calculation would include. Under s. 21(2) of the 1980 statute, the employer was obligated to pay on wind up "all amounts that would otherwise have been required to be paid to meet the tests for solvency . . . , up to the date of such termination or winding up". Under s. 32, however, the employer had to make a payment on wind up that was to be "[i]n addition" to that due under s. 21(2). Whether the legislature intended that the trust should cover this latter payment was left unclear.

[161] Après la réforme de 1980, l'incertitude persistait quant à savoir si la fiducie réputée visait toutes les cotisations exigibles de l'employeur une fois le régime liquidé. Suivant le par. 23(4), était détenu en fiducie, à une date donnée, un montant devant être déterminé [TRADUCTION] « comme si le régime avait été liquidé à cette date ». Or, les dispositions de 1980 ne précisaient pas expressément les éléments à inclure dans ce calcul. Aux termes du par. 21(2) de la loi de 1980, à la liquidation, l'employeur était tenu de verser « les sommes dont le versement aurait été par ailleurs requis pour satisfaire aux critères de solvabilité [. . .] jusqu'à la date de la cessation ou de la liquidation du régime ». L'article 32 disposait cependant que, à la liquidation, l'employeur effectuait un versement « [e]n plus » de celui exigé au par. 21(2). Restait à savoir si l'intention du législateur était que ce dernier paiement soit détenu en fiducie.

[162] It was also unclear whether the lien applied to a different amount than was subject to the deemed trust. According to s. 23(3), "the members have a lien upon the assets of the employer in such amount that in the ordinary course of business would be entered into the books of account whether so entered or not". This comes in the middle of two portions of the provision which explicitly refer to the deemed trust, but it is not clear whether the legislature intended to refer to the same amount throughout the provision.

[162] Il n'était pas clair non plus que l'objet du privilège était le même que celui de la fiducie réputée. Suivant le par. 23(3), [TRADUCTION] « les participants ont un privilège sur l'actif de l'employeur à raison du montant qui, dans le cours normal des affaires, serait consigné dans les livres de comptes, qu'il y soit consigné ou non ». Ce passage figure entre deux parties de la disposition qui renvoient expressément à la fiducie réputée, mais l'intention du législateur demeure incertaine quant à savoir si c'est le même montant qui est visé chaque fois.

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(iii) *The Pension Benefits Amendment Act, 1983*, S.O. 1983, c. 2

[163] The 1983 amendments substantially clarified the scope of the deemed trust and lien for employer contributions. They make clear that neither the deemed trust nor the lien applied to the wind-up deficiency; the responsible Minister confirmed that this was the intention of the amendments.

[164] The new provision was amended by s. 3 of the 1983 amendments and is found in s. 23(4) which provided:

> **23.** . . .
>
> (4) An employer who is required by a pension plan to contribute to the pension plan shall be deemed to hold in trust for the members of the pension plan an amount of money equal to the total of,
>
> (a) all moneys that the employer is required to pay into the pension plan to meet,
>
> (i) the current service cost, and
>
> (ii) the special payments prescribed by the regulations,
>
> that are due under the pension plan or the regulations and have not been paid into the pension plan; and
>
> (b) where the pension plan is terminated or wound up, any other money that the employer is liable to pay under clause 21 (2) (a).

Section 21(2)(a) provides that on wind up, the employers must pay an amount equal to *the current service cost and the special payments* that "have accrued to and including the date of the termination winding up but, under the terms of the pension plan or the regulations, are not due on that date"; the provision adds that these amounts shall be deemed to accrue on a daily basis. These provisions make it clear that the s. 23(4) deemed trust applies only to the special payments and current service costs that have accrued, on a daily basis, up to and including

(iii) *The Pension Benefits Amendment Act, 1983*, S.O. 1983, ch. 2

[163] Les modifications de 1983 ont considérablement précisé la portée de la fiducie réputée et du privilège et elles ont circonscrit les cotisations de l'employeur qui en faisaient l'objet. Il en ressort que ni la fiducie réputée ni le privilège n'ont pour objet le déficit de liquidation; le ministre responsable a confirmé que telle était l'intention du législateur en apportant les modifications.

[164] La nouvelle disposition a été modifiée par l'art. 3 de la loi de 1983 pour devenir le par. 23(4), lequel disposait dès lors ce qui suit :

> [TRADUCTION]
>
> **23.** . . .
>
> (4) L'employeur qui, dans le cadre d'un régime de retraite, est tenu de cotiser à ce régime est réputé détenir en fiducie pour le compte des participants du régime une somme égale au total
>
> (a) de toutes les sommes que l'employeur est tenu de verser au régime pour acquitter
>
> (i) le coût du service courant et
>
> (ii) les paiements spéciaux prescrits par règlement,
>
> qui sont dus aux termes du régime ou du règlement, et qui n'ont pas été versés;
>
> (b) lors de la cessation ou de la liquidation du régime, toute autre somme que l'employeur est tenu de payer en vertu de l'alinéa 21 (2) a).

Suivant l'alinéa 21(2)a), l'employeur est tenu, lors de la liquidation, de verser un montant égal au *coût du service courant et aux paiements spéciaux* qui [TRADUCTION] « sont accumulés à la date de la cessation ou de la liquidation, celle-ci comprise, mais qui, suivant les conditions du régime et le libellé du règlement, ne sont pas encore dus ». La disposition prévoit en outre que ces postes sont réputés s'accumuler sur une base quotidienne. Il est donc clair, suivant le par. 23(4), que seuls sont détenus en fiducie les paiements spéciaux et le coût

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the date of wind up. The deemed trust clearly does not extend to the wind-up deficiency.

du service courant qui sont accumulés, sur une base quotidienne, jusqu'à la date de la liquidation, celle-ci comprise. Le déficit de liquidation ne fait manifestement pas l'objet de la fiducie réputée.

[165] The provision referring to the additional payments required on wind up also makes clear that those payments are not within the scope of the deemed trust. These additional liabilities were described by s. 32, a provision very similar to s. 75(1)(b). These amounts are first, the amount guaranteed by the Guarantee Fund and, second, the value of pension benefits vested under the plan that exceed the value of the assets of the plan. Section 32(2) specifies that these amounts *are* "in addition to the amounts that the employer is liable to pay under subsection 21 (2)" (which are the payments comparable to the current s. 75(1)(a) payments) and that *only the latter* fall within the deemed trust. The inevitable conclusion is that, in 1983, the wind-up deficiency was not included in the scope of the deemed trust.

[165] La disposition relative au versement supplémentaire exigé à la liquidation établit aussi clairement que ce versement n'est pas réputé détenu en fiducie. Le montant de ce versement supplémentaire est précisé à l'art. 32, dont le libellé est très semblable à celui de l'al. 75(1)b). Il s'agit premièrement de la somme garantie par le Fonds de garantie et, deuxièmement, de l'excédent des prestations de retraite acquises en vertu du régime sur l'actif du régime. Le paragraphe 32(2) dispose que le versement exigé de l'employeur *s'ajoute* à celui exigé au par. 21(2) (lequel s'apparente à celui que vise l'actuel al. 75(1)a) et donc que *seul ce dernier* est réputé détenu en fiducie. Force est de conclure que, en 1983, le déficit de liquidation échappait à la fiducie réputée.

[166] The 1983 amendments also clarified the scope of the lien. They indicated that the scope of the lien was identical to the scope of the deemed trust. Section 23(5) specified that the lien extended only to the amounts that were deemed to be held in trust under s. 23(4) (i.e. the *current service costs and special payments that had accrued to and including the date of the wind up but are not yet due*).

[166] Les modifications de 1983 ont également clarifié la portée du privilège en précisant qu'elle était identique à celle de la fiducie réputée. Le paragraphe 23(5) précisait que le privilège ne valait que pour les sommes réputées détenues en fiducie suivant le par. 23(4) (à savoir le *coût du service courant et les paiements spéciaux accumulés à la date de la liquidation, celle-ci comprise, mais qui ne sont pas encore dus*).

[167] This makes two things clear: that the lien covers the same amounts as the deemed trust, and that neither covers the wind-up deficiency.

[167] Deux choses sont donc claires. L'objet du privilège et de la fiducie réputée est le même et il exclut le déficit de liquidation.

[168] A brief, but significant piece of legislative history seems to me to dispel any possible doubt. In speaking at first reading of the 1983 amendments, the Minister responsible, the Honourable Robert Elgie said this:

[168] L'historique législatif renferme un passage bref mais important qui me paraît dissiper tout doute éventuel à cet égard. Lors de la première lecture du projet de modification de 1983, le ministre responsable, l'honorable Robert Elgie, a déclaré ce qui suit :

> The first group of today's amendments makes up the housekeeping changes needed for us to do what we set out to do in late 1980; that is, to guarantee pension benefits following the windup of a defined pension

> [TRADUCTION] La première série de modifications examinée aujourd'hui apporte les changements administratifs nécessaires pour atteindre l'objectif que nous avons fixé vers la fin de 1980,

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benefit plan. These amendments will clarify the ways in which we can attain that goal.

> In Bill 214 [i.e. the 1980 amendments] the employees were given a lien on the employer's assets for employee contributions to a pension plan collected by the employer, as well as accrued employer contributions. . . .
>
> Unfortunately, this protection has resulted in different legal interpretations on the extent of the lien. An argument has been advanced that the amount of the lien includes an employer's potential future liability on the windup of a pension plan. This was never intended and is not necessary to provide the required protection. The amendment to section 23 clarifies the intent of Bill 214. [Emphasis added.]

(Ontario (Hansard), No. 99, 2nd Sess., 32nd Parl., July 7, 1982, p. 3568)

The 1983 amendments made the scope of the lien correspond precisely to the scope of the deemed trust over the employer's accrued contributions. It is thus clear from this statement that it was never the legislative intention that either should apply to "an employer's potential future liability" on wind up (i.e. the wind-up deficiency). In 1983, there is therefore, in my view, virtually irrefutable evidence of legislative intent to do exactly the opposite of what the Court of Appeal held in this case had been done.

[169] Subsequent legislative evolution shows no change in this legislative intent. In fact, subsequent amendments demonstrate a clear legislative intent to exclude from the deemed trust employer liabilities that arise only upon wind up of the plan.

(iv) *Pension Benefits Act, 1987*, S.O. 1987, c. 35

[170] Amendments to the *PBA* in 1987 resulted in it being substantially in its current form. With those amendments, the extent of the deemed trusts was further clarified. The provision in the 1983

à savoir garantir les prestations de retraite après la liquidation d'un régime de retraite à prestations déterminées. Ces modifications préciseront les moyens grâce auxquels cet objectif pourra être atteint.

> Dans le projet de loi 214 [la réforme de 1980], les employés bénéficiaient d'un privilège sur l'actif de l'employeur à l'égard des cotisations versées au régime de retraite et perçues par l'employeur, ainsi que des cotisations de l'employeur accumulées. . .
>
> Malheureusement, la portée du privilège fait l'objet de différentes interprétations juridiques. On a fait valoir que le montant protégé grâce au privilège comprenait toute somme éventuelle due par l'employeur à la liquidation du régime, ce qui n'a jamais été voulu par le législateur et n'était pas nécessaire pour assurer la protection souhaitée. La modification apportée à l'article 23 précise l'intention qui sous-tend le projet de loi 214. [Je souligne.]

(Ontario (Hansard), nº 99, 2ᵉ sess., 32ᵉ lég., 7 juillet 1982, p. 3568)

Les modifications de 1983 ont fait en sorte que la portée du privilège corresponde exactement à celle de la fiducie réputée en ce qui a trait aux cotisations accumulées de l'employeur. Il ressort donc de l'extrait qui précède que le législateur n'a jamais voulu que la fiducie réputée ou le privilège s'appliquent à « toute somme éventuelle due par l'employeur » lors de la liquidation (à savoir, le déficit de liquidation). À mon sens, il est donc pour ainsi dire établi que, en 1983, le législateur entendait accomplir précisément le contraire de ce qui, selon la Cour d'appel, aurait résulté de ces modifications.

[169] L'évolution législative ultérieure montre que l'intention du législateur n'a pas changé. En fait, les modifications subséquentes révèlent clairement son intention d'exclure de la fiducie réputée les obligations de l'employeur qui naissent seulement lors de la liquidation du régime.

(iv) *Loi de 1987 sur les régimes de retraite*, L.O. 1987, ch. 35

[170] Les modifications apportées à la *LRR* en 1987 l'ont essentiellement fait évoluer jusqu'à sa version actuelle. Elles ont précisé davantage la portée des fiducies réputées. Dans la Loi de 1983,

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version of the Act combined within a single subsection a deemed trust for employer contributions that were due and not paid (s. 23(4)(a)) and employer contributions that had accrued to and including the date of wind up but which were not yet due (s. 23(4)(b), referring to s. 21(2)(a)). In the 1987 amendments, these two trusts were each given their own subsection and their scope was further clarified. Moreover, after the 1987 revision, one no longer had to refer to a separate provision (formerly s. 21(2)(a)) to determine the scope of the trust covering payments that were accrued but not yet due. Thus, while the substance of the provisions did not change in 1987, their form was simplified.

un même paragraphe créait une fiducie réputée pour les cotisations de l'employeur qui étaient dues mais impayées (al. 23(4)a)) et une autre pour les cotisations de l'employeur qui étaient accumulées jusqu'à la date de la liquidation, celle-ci comprise, mais qui n'étaient pas encore dues (al. 23(4)b), qui renvoyait à l'al. 21(2)a)). Dès 1987, les deux fiducies ont fait l'objet de paragraphes distincts et leur portée a été davantage circonscrite. En outre, après la réforme de 1987, il n'était plus nécessaire de renvoyer à une autre disposition (l'ancien al. 21(2)a)) pour déterminer la portée de la fiducie créée pour les paiements accumulés, mais non encore dus. Par conséquent, si le fond des dispositions n'a pas été modifié en 1987, leur forme a été simplifiée.

[171] The new s. 58(3) (which is exactly the same as the current s. 57(3)) replaced the former s. 23(4)(a). This created a trust for employer contributions due and not paid. Section 58(4) (which is exactly the same as s. 57(4) as it stood at the time) replaced the former s. 23(4)(b) and part of s. 21(2)(a) and created a trust that arises on wind up and covers "employer contributions accrued <u>to the date of the wind up</u> but not yet due".

[171] Le nouveau par. 58(3) (identique au par. 57(3) actuel) a remplacé l'ancien al. 23(4)a), lequel créait une fiducie pour les cotisations de l'employeur dues mais impayées. Le paragraphe 58(4) (identique au par. 57(4) actuel) a remplacé l'ancien al. 23(4)b) et, en partie, l'al. 21(2)a), et dispose que, dès la liquidation, les « cotisations de l'employeur qui sont accumulées <u>à la date de la liquidation</u>, mais qui ne sont pas encore dues » sont détenues en fiducie.

[172] The 1987 amendment also shows that the legislature adverted to the difference between "to the date of the wind up" and "to and including" the date of wind up and chose the former. This is reflected in a small but significant change in the wording of the relevant provisions. The former provision, s. 23(4)(b), by referring to s. 21(2)(a) captured current service costs and special payments that "have <u>accrued to and including</u> the date of the termination or winding up." The new version in s. 58(4) deletes the words "and including", putting the section in its present form. This deletion, to my way of thinking, reinforces the legislative intent to *exclude* from the deemed trust liabilities that arise only *on* the date of wind up. Respectfully, the legislative record does not support Deschamps J.'s view that there was a legislative evolution towards a more expanded deemed trust. Quite the opposite.

[172] La modification de 1987 montre également que le législateur était conscient de la différence entre « à la date de la liquidation » et « à la date [de la liquidation], celle-ci comprise » et qu'il a choisi la première formule. C'est ce qui appert d'un changement léger, mais important, apporté au libellé des dispositions en cause. L'ancienne disposition, l'al. 23(4)b), par son renvoi à l'al. 21(2)a), englobait le coût du service courant et les paiements spéciaux [TRADUCTION] « accumulés <u>à la date</u> de cessation ou de liquidation, <u>celle-ci comprise</u> ». Dans la nouvelle disposition, le par. 58(4), les mots « celle-ci comprise » sont supprimés pour donner le libellé actuel. À mon sens, cette suppression appuie l'intention du législateur d'*exclure* du champ d'application de la fiducie réputée les obligations qui naissent seulement *à la* date même de la liquidation. En toute déférence, l'historique législatif n'étaye pas le point de vue de ma collègue la juge Deschamps selon lequel il y aurait eu, au fil de l'évolution législative, accroissement de la portée de la fiducie réputée. C'est plutôt le contraire.

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[173] To sum up, I draw the following conclusions from this review of the legislative evolution and history. The legislation differentiates between two types of employer liability relevant to this case. The first is the contributions required to cover current service costs and any other payments that are either due or have accrued on a daily basis up to the relevant time. These are the payments referred to in the current s. 75(1)(a), that is, payments due or accrued but not paid. The second relates to additional contributions required when a plan is wound up which I have referred to as the wind-up deficiency. These payments are addressed in s. 75(1)(b). The legislative history and evolution show that the deemed trusts under s. 57(3) and (4) were intended to apply only to the former amounts and that it was never the intention that there should be a deemed trust or a lien with respect to an employer's potential future liabilities that arise once the plan is wound up.

(d) *The Purpose of the Legislation*

[174] Excluding the wind-up deficiency from the deemed trust is consistent with the broader purposes of the legislation. Pension legislation aims at important protective purposes. These protective purposes, however, are not pursued at all costs and are clearly intended to be balanced with other important interests within the context of a carefully calibrated scheme: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152, at paras. 13-14.

[175] In this instance, the legislature has created trusts over contributions that were due or accrued to the date of the wind up in order to protect, to some degree, the rights of pension plan beneficiaries and employees from the claims of the employer's other creditors. However, there is also good reason to think that the legislature had in mind other competing objectives in not extending the deemed trust to the wind-up deficiency.

[173] En résumé, voici ce que je conclus de l'évolution et de l'historique législatifs. La loi établit une distinction entre deux types d'obligation de l'employeur qui sont pertinents en l'espèce. Il y a d'une part les cotisations requises pour acquitter le coût du service courant et d'autres paiements qui sont dus ou qui sont accumulés sur une base quotidienne jusqu'à la date considérée. Il s'agit des paiements prévus à l'actuel al. 75(1)a), à savoir les paiements qui sont dus ou accumulés, mais qui n'ont pas été versés. Et d'autre part, il y a les cotisations supplémentaires exigées lorsque le régime est liquidé (ou, comme j'y renvoie précédemment, le déficit de liquidation). Ces paiements font l'objet de l'al. 75(1)b). Il appert de l'évolution et de l'historique législatifs que les fiducies réputées des par. 57(3) et (4) devaient seulement englober les cotisations du premier type et que le législateur n'a jamais voulu que les obligations ultérieures de l'employeur qui naissent une fois le régime liquidé fassent l'objet d'une fiducie réputée ou d'un privilège.

d) *L'objet de la loi*

[174] L'exclusion du déficit de liquidation de la fiducie réputée est conforme aux objectifs généraux de la loi. Les dispositions sur les régimes de retraite ont une importante vocation de protection. Or, le législateur n'entend pas atteindre son objectif de protection à n'importe quel prix, son intention étant clairement de le mettre en balance avec d'autres intérêts importants dans le cadre d'un régime soigneusement conçu (*Monsanto Canada Inc. c. Ontario (Surintendant des services financiers)*, 2004 CSC 54, [2004] 3 R.C.S. 152, par. 13-14).

[175] Dans le cas qui nous intéresse, le législateur a créé des fiducies à l'égard des cotisations qui sont dues ou accumulées à la date de la liquidation afin de protéger, dans une certaine mesure, les droits des bénéficiaires d'un régime de retraite et ceux des employés contre les réclamations des autres créanciers de l'employeur. Or, il y a de bonnes raisons de penser que c'est en raison d'autres objectifs concurrents que le législateur s'est abstenu d'accroître la portée de la fiducie réputée et d'y inclure le déficit de liquidation.

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[176] First, if there were to be a deemed trust over all employer liabilities that arise when a plan is wound up, much simpler and clearer words could readily be found to achieve that objective.

[177] Second, extending the deemed trust protections to the wind-up deficiency might well be viewed as counter-productive in the greater scheme of things. A deemed trust of that nature might give rise to considerable uncertainty on the part of other creditors and potential lenders. This uncertainty might not only complicate creditors' rights, but it might also affect the availability of funds from lenders. The wind-up liability is potentially large and, while the business is ongoing, the extent of the liability is unknown and unknowable for up to five years. Its amount may, as the facts of this case disclose, fluctuate dramatically during this time. A liability of this nature could make it very difficult to assess the creditworthiness of a borrower and make an appropriate apportionment of payment among creditors extremely difficult.

[178] While I agree that the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. In her conclusion, Justice Deschamps notes that although the protection of pension plans is a worthy objective, courts should not use the law of equity to re-arrange the priorities that Parliament has established under the *CCAA*. This is a matter of policy where courts must defer to legislatures (reasons of Justice Deschamps, at para. 82). In my view, my colleague's comments on this point are equally applicable to the policy decisions reflected in the text of the *PBA*. The decision as to the level of protection that should be provided to pension beneficiaries is one to be left to the Ontario legislature. Faced with the language in the *PBA*, I would be slow to infer that the broader protective purpose, with all its potential disadvantages, was intended.

[176] Premièrement, si le législateur avait voulu créer une fiducie applicable à la totalité des obligations de l'employeur qui découlent de la liquidation d'un régime, il lui aurait été aisé de s'exprimer beaucoup plus simplement et clairement.

[177] Deuxièmement, si on considère la situation avec un certain recul, il pourrait fort bien être néfaste de protéger le déficit de liquidation au moyen de la fiducie réputée. Il pourrait en effet en résulter une grande incertitude pour les autres créanciers et prêteurs éventuels, une incertitude qui pourrait non seulement compliquer l'exercice des droits des créanciers, mais aussi compromettre l'accès d'une entreprise en difficulté aux fonds des prêteurs. L'ampleur des obligations à la liquidation peut être considérable et, lorsque l'entreprise demeure en exploitation, on ne peut savoir quelle sera cette ampleur sur une période de cinq ans. Le quantum de ces obligations peut, comme le montrent les faits de la présente espèce, fluctuer radicalement pendant cet intervalle. De telles obligations peuvent rendre très difficile l'évaluation de la solvabilité de l'emprunteur et plus difficile encore la juste répartition des paiements entre les créanciers.

[178] Je conviens certes que la protection des régimes de retraite constitue un objectif important, mais il n'appartient pas à la Cour de décider de la mesure dans laquelle cet objectif sera poursuivi ou d'autres intérêts en souffriront. Dans sa conclusion, la juge Deschamps souligne que même si la protection des régimes de retraite constitue un objectif valable, les tribunaux ne doivent pas recourir à l'equity pour modifier les priorités du législateur qui sous-tendent la *LACC*. Il s'agit d'une question de politique générale, et les tribunaux doivent déférer à la décision du législateur (motifs de la juge Deschamps, par. 82). À mon avis, les propos de ma collègue sur ce point valent également pour les décisions de politique générale qui sous-tendent le texte de la *LRR*. Il appartient à l'Assemblée législative de l'Ontario de décider du degré de protection qu'il convient d'accorder aux bénéficiaires d'un régime de retraite. Au vu du

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In short, the interpretation I would adopt is consistent with a balanced approach to protection of benefits which the legislature intended.

libellé de la *LRR*, j'hésite à inférer que le législateur a voulu conférer une vaste protection avec tous les inconvénients que cela pouvait comporter. En somme, l'interprétation que je préconise s'accorde avec l'approche équilibrée du législateur dans la protection du droit à des prestations.

[179] For these reasons, I am of the respectful view that the Court of Appeal erred in finding that the s. 57(4) deemed trust applied to the wind-up deficiency.

[179] C'est pourquoi j'estime que la Cour d'appel a tort de conclure que la fiducie réputée du par. 57(4) vise le déficit de liquidation.

B. *Second Issue: Did the Court of Appeal Err in Finding That Indalex Breached the Fiduciary Duties it Owed to the Pension Beneficiaries as the Plans' Administrator and in Imposing a Constructive Trust as a Remedy?*

B. *Deuxième question en litige : La Cour d'appel a-t-elle tort de conclure qu'Indalex a manqué à ses obligations fiduciaires envers les bénéficiaires en tant qu'administrateur des régimes de retraite et d'imposer une fiducie par interprétation à titre de réparation?*

(1) Introduction

(1) Introduction

[180] The Court of Appeal found that during the *CCAA* proceedings Indalex breached its fiduciary obligations as administrator of the pension plans: para. 116. As a remedy, it imposed a remedial constructive trust over the reserve fund, effectively giving the plan beneficiaries recovery of 100 cents on the dollar in priority to all other creditors, including creditors entitled to the super priority ordered by the *CCAA* court.

[180] La Cour d'appel conclut que, dans le cadre de la procédure fondée sur la *LACC*, Indalex a manqué à ses obligations fiduciaires d'administrateur des régimes de retraite (par. 116). En guise de réparation, elle impose une fiducie par interprétation à l'égard du fonds de réserve et permet ainsi aux bénéficiaires des régimes de retraite de recouvrer l'intégralité de leur créance de préférence à tous les autres créanciers, notamment ceux auxquels le tribunal a accordé une superpriorité sous le régime de la *LACC*.

[181] The breaches identified by the Court of Appeal fall into three categories. First, Indalex breached the prohibition against a fiduciary being in a position of conflict of interest because its interests in dealing with its insolvency conflicted with its duties as plan administrator to act in the best interests of the plans' members and beneficiaries: para. 142. According to the Court of Appeal, the simple fact that Indalex found itself in this position of conflict of interest was, of itself, a breach of its fiduciary duty as plan administrator. Second, Indalex breached its fiduciary duty by applying, without notice to the plans' beneficiaries, for *CCAA* protection: para. 139. Third, Indalex

[181] Les manquements relevés par la Cour d'appel sont de trois ordres. D'abord, Indalex n'a pas respecté l'interdiction faite au fiduciaire de se trouver en conflit d'intérêts car, dans le cadre de la procédure fondée sur la *LACC*, ses intérêts d'entreprise insolvable s'opposaient à son obligation d'administrateur d'agir au mieux des intérêts des participants et des bénéficiaires des régimes (par. 142). Selon la Cour d'appel, ce conflit d'intérêts constituait à lui seul un manquement d'Indalex à ses obligations fiduciaires d'administrateur des régimes. Deuxièmement, Indalex a manqué à ses obligations fiduciaires en demandant, sans en informer au préalable les

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breached its fiduciary duty by seeking and/or obtaining various relief in the *CCAA* proceedings including the "super priority" in favour of the DIP lenders, approval of the sale of the business knowing that no payment would be made to the underfunded plans over the statutory deemed trusts and seeking to be put into bankruptcy with the intention of defeating the deemed trust claims: para. 139. As a remedy for these breaches of fiduciary duty the court imposed a constructive trust.

bénéficiaires des régimes, la protection offerte par la *LACC* (par. 139). Troisièmement, Indalex a manqué à ses obligations fiduciaires en sollicitant puis en obtenant diverses mesures dans le cadre de la procédure fondée sur la *LACC*, dont la « superpriorité » de la créance des prêteurs DE, l'approbation de la vente de l'entreprise alors qu'elle savait que nul versement ne serait fait aux régimes sous-capitalisés en sus des sommes protégées par les fiducies réputées d'origine législative, et en demandant sa mise en faillite dans l'intention de faire échec aux prétentions relatives à la fiducie réputée (par. 139). En guise de réparation de ces manquements à l'obligation fiduciaire, la cour a imposé une fiducie par interprétation.

[182] In my view, the Court of Appeal took much too expansive a view of the fiduciary duties owed by Indalex as plan administrator and found breaches where there were none. As I see it, the only breach of fiduciary duty committed by Indalex occurred when, upon insolvency, Indalex's corporate interests were in obvious conflict with its fiduciary duty as plan administrator to ensure that all contributions were made to the plans when due. The breach was not in failing to avoid this conflict — the conflict itself was unavoidable. Its breach was in failing to address the conflict to ensure that the plan beneficiaries had the opportunity to have representation in the *CCAA* proceedings as if there were independent plan administrators. I also conclude that a remedial constructive trust is not available as a remedy for this breach.

[182] À mon sens, la Cour d'appel confère une portée excessive aux obligations fiduciaires d'Indalex en tant qu'administrateur des régimes et elle relève des manquements qui n'en sont pas. Indalex a seulement manqué à son obligation fiduciaire lorsque, une fois devenue insolvable, ses intérêts sont clairement entrés en conflit avec son obligation fiduciaire d'administrateur d'assurer le versement aux régimes de toutes les cotisations devenues exigibles. Son manquement réside dans l'omission non pas d'éviter ce conflit, qui était en soi inévitable, mais de pallier le problème en veillant à ce que les bénéficiaires des régimes puissent être représentés dans le cadre de la procédure fondée sur la *LACC* comme si l'administrateur des régimes avait été indépendant. Je conclus également que la fiducie par interprétation ne saurait être accordée à titre de réparation pour ce manquement.

[183] This part of the appeals requires us to answer two questions which I will address in turn:

(i) What fiduciary duties did Indalex have in its role as plan administrator and did it breach them?

(ii) If so, was imposition of a constructive trust an appropriate remedy?

[183] Ce volet des pourvois commande de répondre à deux questions que j'examine successivement :

(i) Quelles étaient les obligations fiduciaires d'Indalex en tant qu'administrateur des régimes de retraite, et y a-t-il eu manquement à ces obligations?

(ii) Dans l'affirmative, l'imposition d'une fiducie par interprétation constituait-elle une réparation appropriée?

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(2) What Fiduciary Duties Did Indalex Have in its Role as Plan Administrator and Did it Breach Those Duties?

(a) *Legal Principles*

[184] The appellants do not dispute that Indalex, in its role of administrator of the plans, had fiduciary duties to the members of the plan and that when it is acting in that role it can only act in the interests of the plans' beneficiaries. It is not necessary for present purposes to decide whether a pension plan administrator is a *per se* or *ad hoc* fiduciary, although it must surely be rare that a pension plan administrator would not have fiduciary duties in carrying out that role: *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273, at para. 41, aff'g 2008 ONCA 394, 67 C.C.P.B. 1, at para. 55.

[185] However, the conclusion that Indalex as plan administrator had fiduciary duties to the plan beneficiaries is the beginning, not the end of the inquiry. This is because fiduciary duties do not exist at large, but arise from and relate to the specific legal interests at stake: *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 31. As La Forest J. put it in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574:

> The obligation imposed [on a fiduciary] may vary in its specific substance depending on the relationship . . . . [N]ot every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty. . . .
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> . . .
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> It is only in relation to breaches of the specific obligations imposed because the relationship is one characterized as fiduciary that a claim for breach of fiduciary duty can be founded. . . . [Emphasis added; pp. 646-47.]

[186] The nature and scope of the fiduciary duty must, therefore, be assessed in the legal framework governing the relationship out of which the

(2) Quelles étaient les obligations fiduciaires d'Indalex en tant qu'administrateur des régimes de retraite, et y a-t-il eu manquement à ces obligations?

a) *Principes juridiques*

[184] Les appelants ne contestent pas que, en tant qu'administrateur des régimes de retraite, Indalex avait des obligations fiduciaires envers les participants et que, à ce titre, elle ne pouvaient agir que dans l'intérêt des bénéficiaires des régimes. Point n'est besoin, aux fins du pourvoi, de déterminer si l'administrateur d'un régime de retraite est fiduciaire en soi ou *ad hoc*, bien qu'il soit assurément rare qu'un tel administrateur n'ait pas d'obligations fiduciaires dans l'exercice de cette fonction (*Burke c. Cie de la Baie d'Hudson*, 2010 CSC 34, [2010] 2 R.C.S. 273, par. 41, conf. 2008 ONCA 394, 67 C.C.P.B. 1, par. 55).

[185] Or, la conclusion portant que, à titre d'administrateur des régimes, Indalex avait des obligations fiduciaires envers les bénéficiaires marque le début de l'examen, et non sa fin, car les obligations fiduciaires n'existent pas en général, mais découlent des intérêts juridiques qui sont précisément en jeu et s'y rattachent (*Alberta c. Elder Advocates of Alberta Society*, 2011 CSC 24, [2011] 2 R.C.S. 261, par. 31). Comme l'affirme le juge La Forest dans *Lac Minerals Ltd. c. International Corona Resources Ltd.*, [1989] 2 R.C.S. 574 :

> La nature particulière de cette obligation [du fiduciaire] peut varier selon les rapports concernés [. . .] [C]e ne sont pas tous les droits découlant de rapports présentant des caractéristiques fiduciaires qui justifient une demande pour manquement à une obligation fiduciaire. . .
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> . . .
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> La prétention qu'il y a manquement à une obligation fiduciaire ne peut se fonder que sur le manquement aux obligations particulières qui découlent des rapports dits fiduciaires. . . [Je souligne; p. 646-647.]

[186] Il convient donc d'apprécier la nature et la portée de l'obligation fiduciaire dans le cadre juridique applicable à la relation dont est issue cette

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fiduciary duty arises: see, e.g., *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175, at para. 141; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at paras. 36-37; *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403, at para. 41. So, for example, as a general rule, a fiduciary has a duty of loyalty including the duty to avoid conflicts of interest: see, e.g., *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, at para. 35; *Lac Minerals*, at pp. 646-47. However, this general rule may have to be modified in light of the legal framework within which a particular fiduciary duty must be exercised. In my respectful view, this is such a case.

obligation (voir, p. ex., *Sharbern Holding Inc. c. Vancouver Airport Centre Ltd.*, 2011 CSC 23, [2011] 2 R.C.S. 175, par. 141; *Galambos c. Perez*, 2009 CSC 48, [2009] 3 R.C.S. 247, par. 36-37; *K.L.B. c. Colombie-Britannique*, 2003 CSC 51, [2003] 2 R.C.S. 403, par. 41). À titre d'exemple, la règle générale veut que le fiduciaire ait un devoir de loyauté doublé d'une obligation d'éviter tout conflit d'intérêts (voir, p. ex., *Strother c. 3464920 Canada Inc.*, 2007 CSC 24, [2007] 2 R.C.S. 177, par. 35; *Lac Minerals*, p. 646-647). Toutefois, il peut se révéler nécessaire d'adapter cette règle générale au cadre juridique dans lequel doit être exercée une obligation fiduciaire en particulier. Tel est, à mon humble avis, le cas en l'espèce.

(b) *The Legal Framework of Indalex's Dual Role as a Plan Administrator and Employer*

b) *Le cadre juridique de la double fonction d'Indalex à titre d'administrateur de régime et d'employeur*

[187] In order to define the nature and scope of Indalex's role and fiduciary obligations as a plan administrator, we must examine the legal framework within which the administrator functions. This framework is established primarily by the plan documents and the relevant provisions of the *PBA*. It is to these sources, first and foremost, that we look in order to shape the specific fiduciary duties owed in this context.

[187] Pour déterminer la nature et la portée de la fonction et des obligations fiduciaires d'Indalex en tant qu'administrateur des régimes, nous devons considérer le cadre juridique dans lequel évolue l'administrateur. Ce cadre juridique découle principalement des documents constitutifs des régimes de retraite et des dispositions pertinentes de la *LRR*, des sources qui doivent être examinées avant toutes autres pour déterminer les obligations fiduciaires spécifiques qui incombent à l'administrateur dans ce contexte.

[188] Turning first to the plan documents, I take the salaried plan as an example. Under it, the company is appointed the plan administrator: art. 13.01. The term "Company" is defined to mean Indalex Limited and any reference in the plan to actions taken or discretion to be exercised by the Company means Indalex acting through the board of directors or any person authorized by the board for the purposes of the plan: art. 2.09. Article 13.01 provides that the "Management Committee of the Board of Directors of the Company will appoint a Pension and Benefits Committee to act on behalf of the Company in its capacity as administrator of the Plan. The Pension and Benefits Committee will decide conclusively all matters relating to the operation, interpretation and application of the Plan".

[188] En ce qui concerne d'abord les documents constitutifs des régimes de retraite, considérons ceux relatifs au régime des salariés. Ils confient à la société l'administration du régime (art. 13.01). Le terme « société » s'entend d'Indalex Limited, et toute mention par le régime d'une mesure prise ou d'un pouvoir discrétionnaire exercé par la société suppose qu'Indalex agit par l'entremise du conseil d'administration ou d'une personne autorisée par celui-ci aux fins du régime (art. 2.09). Suivant l'art. 13.01, le [TRADUCTION] « comité de gestion du conseil d'administration de la société nomme un comité de retraite et de prestations pour agir au nom de la société dans l'exercice de sa fonction d'administrateur du régime. Le comité de retraite et de prestations se prononce de manière définitive

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Thus, the Pension and Benefits Committee is to act on behalf of the company and by virtue of art. 2.09 its acts are considered those of the company. Article 13.02 sets out the duties of the Pension and Benefits Committee which include the "performance of all administrative functions not performed by the Funding Agent, the Actuary or any group annuity contract issuer": art. 13.02(1).

[189] The plan administrator also has statutory powers and duties by virtue of the *PBA*. Section 22 lists the general duties of plan administrators, three of which are particularly relevant to these appeals:

> **22.** (1) [Care, diligence and skill] The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.
>
> (2) [Special knowledge and skill] The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.
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> . . .
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> (4) [Conflict of interest] An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

[190] Not surprisingly, the powers and duties conferred on the administrator by the legislation are administrative in nature. For the most part they pertain to the internal management of the pension fund and to the relationship among the pension administrator, the beneficiaries, and the Superintendent of Financial Services ("Superintendent"). The list includes: applying

sur toute question relative au fonctionnement, à l'interprétation et à l'application du régime ». Le comité de retraite et de prestations a donc pour mandat d'agir pour le compte de la société et, suivant l'art. 2.09, ses actes sont assimilés à ceux de la société. L'article 13.02 énonce les fonctions du comité, dont l'exercice de toute fonction administrative qui ne relève pas du gestionnaire de la caisse, de l'actuaire ou de l'émetteur de tout contrat de rente collective (par. 13.02(1)).

[189] La *LRR* attribue également pouvoirs et obligations à l'administrateur d'un régime. L'article 22 énumère les obligations générales faites à l'administrateur, dont trois importent particulièrement dans les présents pourvois :

> **22.** (1) [Soin, diligence et compétence] L'administrateur d'un régime de retraite apporte à l'administration et au placement des fonds de la caisse de retraite le soin, la diligence et la compétence qu'une personne d'une prudence normale exercerait relativement à la gestion des biens d'autrui.
>
> (2) [Connaissances et compétences particulières] L'administrateur d'un régime de retraite apporte à l'administration du régime de retraite et à l'administration et au placement des fonds de la caisse de retraite toutes les connaissances et compétences pertinentes que l'administrateur possède ou devrait posséder en raison de sa profession, de ses affaires ou de sa vocation.
>
> . . .
>
> (4) [Conflit d'intérêts] L'administrateur, ou si l'administrateur est un comité de retraite ou un conseil de fiduciaires, un membre du comité ou du conseil qui est l'administrateur du régime de retraite ne permet pas sciemment que son intérêt entre en conflit avec ses attributions à l'égard du régime de retraite.

[190] Il n'est pas étonnant que les pouvoirs et les obligations légaux de l'administrateur soient de nature administrative. La plupart ont trait à la gestion interne de la caisse de retraite et à la relation entre l'administrateur du régime de retraite, les bénéficiaires et le surintendant des services financiers (le « surintendant »). Mentionnons la demande au surintendant d'enregistrer le régime ou de le

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to the Superintendent for registration of the plan and any amendments to it as well as filing annual information returns: ss. 9, 12 and 20 of the *PBA*; providing beneficiaries and eligible potential beneficiaries with information and documents: s. 10(1)12 and 25; ensuring that the plan is administered in accordance with the *PBA* and its regulations and plan documents: s. 19; notifying beneficiaries of proposed amendments to the plan that would reduce benefits: s. 26; paying commuted value for pensions: s. 42; and filing wind-up reports if the plan is terminated: s. 70.

modifier, et le dépôt de la déclaration annuelle (art. 9, 12 et 20 de la *LRR*), la transmission aux bénéficiaires et aux bénéficiaires éventuels admissibles de renseignements et de documents (par. 10(1)12 et art. 25), l'observation de la *LRR* et de son règlement d'application, ainsi que des documents constitutifs du régime (art. 19), l'envoi aux bénéficiaires d'un avis relatif à une modification projetée qui réduirait les prestations (art. 26), le paiement de la valeur de rachat d'une pension différée (art. 42) et le dépôt d'un rapport de liquidation advenant la cessation du régime (art. 70).

[191] Of special relevance for this case are two additional provisions. Under s. 56, the administrator has a duty to ensure that pension payments are made when due and to notify the Superintendent if they are not and, under s. 59, the administrator has the authority to commence court proceedings when pension payments are not made.

[191] Deux autres dispositions importent particulièrement en l'espèce. L'article 56 dispose que l'administrateur a l'obligation de veiller à ce que les cotisations soient versées à la date d'exigibilité et d'en informer le surintendant lorsqu'elles ne l'ont pas été; l'art. 59 habilite l'administrateur à engager une instance judiciaire en cas de défaut de paiement.

[192] The fiduciary duties that employer-administrators owe to plan beneficiaries relate to the statutory and other tasks described above; these are the "specific legal interests" with respect to which the employer-administrator's fiduciary duties attach.

[192] Les obligations fiduciaires de l'employeur-administrateur envers les bénéficiaires d'un régime ont trait aux attributions légales et autres susmentionnées; il s'agit des « intérêts juridiques particuliers » auxquels se rattachent les obligations fiduciaires de l'employeur-administrateur.

[193] Another important aspect of the legal context for Indalex's fiduciary duties as a plan administrator is that it was acting in the dual role of an employer-administrator. This dual role is expressly permitted under s. 8(1)(a) of the *PBA*, but this provision creates a situation where a single entity potentially owes two sets of fiduciary duties (one to the corporation and the other to the plan members).

[193] Un autre aspect important du contexte juridique dans lequel s'inscrivent les obligations fiduciaires d'Indalex à titre d'administrateur des régimes tient à sa double fonction d'employeur et d'administrateur. L'alinéa 8(1)a) de la *LRR* autorise expressément ce double rôle, mais il crée une situation où une même entité peut devoir s'acquitter de deux ensembles distincts d'obligations fiduciaires (les unes envers la société, les autres envers les participants du régime de retraite).

[194] This was the case for Indalex. As an employer-administrator, Indalex acted through its board of directors and so it was that body which owed fiduciary duties to the plan members. The board of directors also owed a fiduciary duty to the company to act in its best interests: *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 122(1)(*a*); *BCE Inc. v. 1976 Debentureholders*,

[194] Telle était la situation d'Indalex. À titre d'employeur-administrateur, Indalex agissait par l'entremise de son conseil d'administration, de sorte que ce dernier avait des obligations fiduciaires envers les participants des régimes. Le conseil d'administration avait également l'obligation fiduciaire d'agir au mieux des intérêts de la société (*Loi canadienne sur les sociétés par actions*, L.R.C.

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2008 SCC 69, [2008] 3 S.C.R. 560, at para. 36. In deciding what is in the best interests of the corporation, a board may look to the interests of shareholders, employees, creditors and others. But where those interests are not aligned or may conflict, it is for the directors, acting lawfully and through the exercise of business judgment, to decide what is in the overall best interests of the corporation. Thus, the board of Indalex, as an employer-administrator, could not always act exclusively in the interests of the plan beneficiaries; it also owed duties to Indalex as a corporation.

1985, ch. C-44, al. 122(1)*a*); *BCE Inc. c. Détenteurs de débentures de 1976*, 2008 CSC 69, [2008] 3 R.C.S. 560, par. 36). Pour déterminer ce qui est au mieux des intérêts de l'entreprise, le conseil d'administration peut considérer les intérêts des actionnaires, des employés, des créanciers et d'autres personnes. Or, lorsque ces intérêts ne sont pas concordants ou peuvent entrer en conflit, il appartient aux administrateurs, dans le respect de la loi et dans l'exercice de son appréciation commerciale, de déterminer ce qui sert au mieux les intérêts de la société. Par conséquent, le conseil d'administration d'Indalex, en tant qu'employeur-administrateur, ne pouvait pas toujours agir dans le seul intérêt des bénéficiaires des régimes, mais devait aussi s'acquitter de ses obligations envers la société Indalex.

(c) *Breaches of Fiduciary Duty*

[195] Against the background of these legal principles, I turn to consider the Court of Appeal's findings in relation to Indalex's breach of its fiduciary duties as administrator of the plans. As noted, they fall into three categories: being in a conflict of interest position; taking steps to reduce pension obligations in the *CCAA* proceedings; and seeking bankruptcy status.

c) *Manquements à l'obligation fiduciaire*

[195] Au vu de ces principes juridiques, j'examine les conclusions de la Cour d'appel concernant les manquements d'Indalex à ses obligations fiduciaires à titre d'administrateur des régimes. Je le répète, ces manquements sont de trois ordres : l'existence du conflit d'intérêts, les mesures prises dans le cadre de la procédure fondée sur la *LACC* pour réduire ses obligations vis-à-vis des régimes de retraite et la demande présentée en vue de faire faillite.

(i) Conflict of Interest

[196] The questions here are first what constitutes a conflict of interest or duty between Indalex as business decision-maker and Indalex as plan administrator and what must be done when a conflict arises?

[197] The Court of Appeal in effect concluded that a conflict of interest arises whenever Indalex makes business decisions that have "the potential to affect the Plans beneficiaries' rights" (para. 132) and that whenever such a conflict of interest arose, the employer-administrator was immediately in breach of its fiduciary duties to the plan members. Respectfully, this position puts the matter far too broadly. It cannot be the case that a conflict

(i) Conflit d'intérêts

[196] Il faut d'abord se demander en quoi consiste, dans le cas d'Indalex, un conflit d'intérêts ou d'obligations entre sa fonction de décideur commercial et celle d'administrateur de régime, et quelles mesures elle doit alors prendre?

[197] La Cour d'appel conclut en fait qu'il y a conflit d'intérêts dès qu'Indalex prend une décision de nature commerciale [TRADUCTION] « susceptible d'avoir une incidence sur les droits des bénéficiaires des régimes » (par. 132) et qu'il y a alors manquement immédiat de l'employeur-administrateur à ses obligations fiduciaires envers les participants des régimes de retraite. En toute déférence, il s'agit d'une interprétation beaucoup

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arises simply because the employer, exercising its management powers in the best interests of the corporation, does something that has the potential to affect the plan beneficiaries.

trop extensive. On ne saurait dire qu'il y a conflit d'intérêts uniquement parce que l'employeur, dans l'exercice de son pouvoir de gérer la société au mieux des intérêts de celle-ci, prend une mesure susceptible d'avoir une incidence sur les bénéficiaires des régimes.

[198] This conclusion flows inevitably from the statutory context. The existence of apparent conflicts that are inherent in the two roles being performed by the same party cannot be a breach of fiduciary duty because those conflicts are specifically authorized by the statute which permits one party to play both roles. As noted earlier, the *PBA* specifically permits employers to act as plan administrators (s. 8(1)(a)). Moreover, the broader business interests of the employer corporation and the interests of pension beneficiaries in getting the promised benefits are almost always at least potentially in conflict. Every important business decision has the potential to put at risk the solvency of the corporation and therefore its ability to live up to its pension obligations. The employer, within the limits set out in the plan documents and the legislation generally, has the authority to amend the plan unilaterally and even to terminate it. These steps may well not serve the best interests of plan beneficiaries.

[198] Telle est la conclusion qui découle nécessairement du contexte législatif. L'existence de conflits apparents qui sont inhérents à la double fonction exercée par une même personne ne peut constituer un manquement à l'obligation fiduciaire, car ces conflits sont expressément autorisés par la loi, laquelle permet à une personne d'exercer les deux fonctions. Rappelons que la *LRR* permet expressément à l'employeur d'administrer un régime (al. 8(1)a)). En outre, les intérêts commerciaux de la société-employeur en général et les intérêts des bénéficiaires d'un régime de retraite liés à l'obtention des prestations promises risquent presque toujours d'entrer en conflit. Toute décision commerciale importante est susceptible de nuire à la solvabilité de la société et, partant, à sa capacité de respecter ses obligations à l'égard du régime. Sous réserve des limites prévues par les documents constitutifs du régime de retraite et de la loi en général, l'employeur peut modifier unilatéralement le régime, voire y mettre fin, des mesures qui peuvent fort bien ne pas cadrer avec les intérêts des bénéficiaires du régime.

[199] Similarly, the simple existence of the sort of conflicts of interest identified by the Court of Appeal — those inherent in the employer's exercise of business judgment — cannot of themselves be a breach of the administrator's fiduciary duty. Once again, that conclusion is inconsistent with the statutory scheme that expressly permits an employer to act as plan administrator.

[199] De même, les conflits d'intérêts relevés par la Cour d'appel — ceux inhérents à l'appréciation commerciale de l'employeur — ne peuvent emporter à eux seuls le manquement à l'obligation fiduciaire de l'administrateur. Là encore, c'est ce qui appert du régime législatif, qui permet expressément à l'employeur d'administrer un régime.

[200] How, then, should we identify conflicts of interest in this context?

[200] Comment devons-nous donc déterminer s'il y a conflit d'intérêts dans ce contexte?

[201] In *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631, Binnie J. referred to the *Restatement Third, The Law Governing Lawyers* (2000), at § 121, to explain when a conflict of interest occurs in the

[201] Dans *R. c. Neil*, 2002 CSC 70, [2002] 3 R.C.S. 631, le juge Binnie renvoie au *Restatement Third, The Law Governing Lawyers* (2000), § 121, pour expliquer à quelles conditions il y a conflit

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context of the lawyer-client relationship: para. 31. In my view, the same general principle, adapted to the circumstances, applies with respect to employer-administrators. Thus, a situation of conflict of interest occurs when there is a substantial risk that the employer-administrator's representation of the plan beneficiaries would be materially and adversely affected by the employer-administrator's duties to the corporation. I would recall here, however, that the employer-administrator's obligation to represent the plan beneficiaries extends only to those tasks and duties that I have described above.

[202] In light of the foregoing, I am of the view that the Court of Appeal erred when it found, in effect, that a conflict of interest arose whenever Indalex was making decisions that "had the potential to affect the Plans beneficiaries' rights": para. 132. The Court of Appeal expressed both the potential for conflict of interest or duty and the fiduciary duty of the plan administrator much too broadly.

(ii) Steps in the *CCAA* Proceedings to Reduce Pension Obligations and Notice of Them

[203] The Court of Appeal found that Indalex breached its fiduciary duty simply by commencing *CCAA* proceedings knowing that the plans were underfunded and by failing to give the plan beneficiaries notice of the proceedings: para. 139. As I understand the court's reasons, the decision to commence *CCAA* proceedings was solely the responsibility of the corporation and not part of the administration of the pension plan: para. 131. The difficulty which the Court of Appeal saw arose from the potential of the *CCAA* proceedings to result in a reduction of the corporation's pension obligations to the prejudice of the beneficiaries: paras. 131-32.

[204] I respectfully disagree. Like Justice Deschamps, I find that seeking an initial order protecting the corporation from actions by its creditors did not, on its own, give rise to any conflict of interest or duty on the part of Indalex (reasons of Justice Deschamps, at para. 72).

d'intérêts dans le cadre de la relation entre l'avocat et son client (par. 31). À mon avis, le même principe général, adapté aux circonstances, vaut pour l'employeur-administrateur. Il y a donc conflit d'intérêts lorsqu'il existe un risque important que les obligations de l'employeur-administrateur envers la société nuisent de façon appréciable à la défense des intérêts des bénéficiaires d'un régime. Je rappelle cependant que l'obligation de l'employeur-administrateur de représenter les bénéficiaires d'un régime ne s'entend que des attributions et des fonctions énoncées précédemment.

[202] J'estime dès lors que la Cour d'appel a tort de conclure qu'il y avait conflit d'intérêts aussitôt qu'Indalex prenait une décision [TRADUCTION] « susceptible d'avoir une incidence sur les droits des bénéficiaires des régimes » (par. 132). Elle interprète de manière beaucoup trop extensive la notion de conflit éventuel d'intérêts ou d'obligations et celle d'obligation fiduciaire de l'administrateur d'un régime.

(ii) Mesures prises par Indalex dans le cadre de la procédure fondée sur la *LACC* afin de réduire ses obligations vis-à-vis des régimes de retraite et avis de ces mesures

[203] Pour la Cour d'appel, Indalex a manqué à son obligation fiduciaire du seul fait qu'elle a engagé une procédure en application de la *LACC* tout en sachant que les régimes étaient sous-capitalisés, et ce, sans en informer au préalable les bénéficiaires des régimes (par. 139). Si j'interprète bien ses motifs, la décision d'entreprendre cette démarche relevait uniquement de l'administration de la société, et non de l'administration des régimes de retraite (par. 131). La difficulté résidait selon elle dans le risque que la procédure réduise les obligations de la société vis-à-vis des régimes de retraite au détriment des bénéficiaires (par. 131-132).

[204] En toute déférence, je ne suis pas d'accord. Comme ma collègue la juge Deschamps, j'estime que, à elle-seule, la mesure initiale visant à protéger la société contre ses créanciers ne plaçait pas Indalex en situation de conflit d'intérêts ou d'obligations (motifs de la juge Deschamps, par. 72).

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[205] First, it is important to remember that the purpose of *CCAA* proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:

> . . . the purpose of the *CCAA* . . . is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57 (dissenting):

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

For this reason, I would be very reluctant to find that, simply by virtue of embarking on *CCAA* proceedings, an employer-administrator breaches its duties to plan members.

[206] Second, the facts of this case do not support the contention that the interests of the plan beneficiaries and the employer were in conflict with respect to the decision to seek *CCAA* protection. It cannot seriously be suggested that some other course would have protected more fully the rights of the plan beneficiaries. The Court of Appeal did not suggest an alternative to seeking *CCAA* protection from creditors, nor did any of the parties. Indalex was in serious financial difficulty and its options were limited: either make a proposal to its creditors (under the *CCAA* or under the *BIA*), or go bankrupt. Moreover, the plan administrator's duty and authority do not extend to ensuring the solvency of the corporation and an independent administrator could not reasonably expect to be

[205] Premièrement, il importe de rappeler que la procédure de la *LACC* n'a pas pour objet de défavoriser les créanciers, mais bien de trouver une solution à l'insolvabilité d'une société qui soit constructive pour tous les intéressés. Comme le fait remarquer ma collègue la juge Deschamps dans *Century Services*, au par. 15 :

> . . . la *LACC* [. . .] a pour objectif de permettre au débiteur de continuer d'exercer ses activités et, dans les cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif.

Dans le même arrêt (par. 59), elle cite également en l'approuvant l'extrait suivant des motifs du juge Doherty, dissident, dans *Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57 :

> [TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu'elle fournit un moyen d'éviter les effets dévastateurs, — tant sur le plan social qu'économique — de la faillite ou de l'arrêt des activités d'une entreprise, à l'initiati[ve] des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

C'est pourquoi j'incline très peu à conclure que l'employeur-administrateur manque à ses obligations envers les participants des régimes de retraite du seul fait qu'il engage une procédure sur le fondement de la *LACC*.

[206] Deuxièmement, les faits de la présente affaire n'appuient pas la prétention selon laquelle les intérêts de l'employeur s'opposaient à ceux des bénéficiaires des régimes quant à la décision de se prévaloir ou non de la protection de la *LACC*. On ne saurait sérieusement soutenir qu'une autre mesure aurait protégé davantage les droits des bénéficiaires des régimes. Ni la Cour d'appel ni les parties n'avancent quelque autre solution qui eût été préférable à la protection contre les créanciers demandée sous le régime de la *LACC*. Indalex éprouvait de graves difficultés financières et ses options étaient limitées : elle pouvait présenter une proposition à ses créanciers (suivant la *LACC* ou la *LFI*) ou faire faillite. Qui plus est, les attributions de l'administrateur des régimes

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consulted about the plan sponsor's decision to seek *CCAA* protection. Finally, the application for *CCAA* proceedings did not reduce pension obligations other than to temporarily relieve the corporation of making special payments and it was the only step with any prospect of the pension funds obtaining from the insolvent corporation the money that would become due. There was thus no conflict of duty or interest between the administrator and the employer when protective action was taken for the purpose of preserving the *status quo* for the benefit of all stakeholders.

n'englobaient pas le fait d'assurer la solvabilité de la société, et un administrateur indépendant n'aurait pu raisonnablement s'attendre à être consulté relativement à la décision du promoteur des régimes de se prévaloir de la protection de la *LACC*. Enfin, la demande présentée sur le fondement de la *LACC* n'a pas réduit les obligations de l'employeur vis-à-vis des régimes de retraite, si ce n'est temporairement quant à l'obligation d'effectuer des paiements spéciaux, et c'était la seule mesure susceptible de permettre aux régimes de retraite d'obtenir de la société insolvable les sommes qui leur étaient dues. L'administrateur-employeur ne s'est donc pas trouvé en conflit d'intérêts ou d'obligations lorsqu'il a demandé protection afin de demeurer en exploitation au bénéfice de tous les intéressés.

[207] The Court of Appeal also found that it was a breach of fiduciary duty not to give the plan beneficiaries notice of the initial application for *CCAA* protection. Again, here, I must join Deschamps J. in disagreeing with the Court of Appeal's conclusion. Section 11(1) of the *CCAA*, as it stood at the time of the proceedings, provided that parties could commence *CCAA* proceedings without giving notice to interested persons:

[207] La Cour d'appel conclut en outre que la société a manqué à son obligation fiduciaire en omettant de donner aux bénéficiaires des régimes un avis de sa demande initiale de protection sous le régime de la *LACC*. Je me range encore une fois à l'opinion de ma collègue la juge Deschamps, qui exprime son désaccord avec cette conclusion. Dans sa version en vigueur au moment de la procédure, le par. 11(1) de la *LACC* disposait qu'une partie pouvait engager une procédure sous le régime de la *LACC* sans en donner avis aux intéressés :

> **11.** (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

> **11.** (1) Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

[208] This provision was renumbered but not substantially changed when the Act was amended in September of 2009 (S.C. 2005, c. 47, s. 128, in force Sept. 18, 2009, SI/2009-68). Although it is not appropriate in every case, *CCAA* courts have discretion to make initial orders on an *ex parte* basis. This may be an appropriate — even necessary — step in order to prevent "creditors from moving to realize on their claims, essentially a 'stampede to the assets' once creditors learn of the debtor's financial distress": J. P. Sarra, *Rescue! The Companies' Creditors Arrangement*

[208] Malgré la nouvelle numérotation issue des modifications apportées à la Loi en septembre 2009 (L.C. 2005, ch. 47, art. 128, entrée en vigueur le 18 septembre 2009, TR/2009-68), la disposition est foncièrement demeurée la même. Le tribunal saisi en vertu de la *LACC* dispose du pouvoir discrétionnaire de rendre une ordonnance initiale *ex parte*. L'exercice de ce pouvoir n'est pas toujours indiqué, mais il peut l'être, voire se révéler nécessaire, afin d'empêcher [TRADUCTION] « les créanciers de réaliser leurs créances en se ruant littéralement sur l'actif dès qu'ils sont informés des difficultés

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Act (2007), at p. 55 ("*Rescue!*"); see also *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194, at para. 7. The respondents did not challenge Morawetz J.'s decision to exercise his discretion to make an *ex parte* order in this case.

[209] This is not to say, however, that *ex parte* initial orders will always be required or acceptable. Without attempting to be exhaustive or to express any final view on these issues, I simply note that there have been at least three ways in which courts have mitigated the possible negative effect on creditors of making orders without notice to potentially affected parties. First, courts have been reluctant to grant *ex parte* orders where the situation of the debtor company is not urgent. In *Rescue!*, Janis P. Sarra explains that courts are increasingly expecting applicants to have given notice before applying for a stay under the *CCAA*: p. 55. An example is *Marine Drive Properties Ltd., Re*, 2009 BCSC 145, 52 C.B.R. (5th) 47, a case in which Butler J. held that "[i]nitial applications in *CCAA* proceedings should not be brought without notice merely because it is an application under that Act. The material before the court must be sufficient to indicate an emergent situation": para. 27. Second, courts have included "come-back" clauses in their initial orders so that parties could return to court at a later date to seek to set aside some or all of the order: *Rescue!*, at p. 55. Note that such a clause was included in the initial order by Morawetz J.: para. 46. Finally, courts have limited their initial orders to the issues that need to be resolved immediately and have left other issues to be resolved after all interested parties have been given notice. Thus, in *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169, Morawetz J. limited the initial *CCAA* order so that priorities were only granted over the party that had been given notice. The discussion of suspending special payments or granting creditors priority over pension beneficiaries was left to a later date, after the parties that would be affected had been given notice. A similar approach was taken in the case of *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6459 (CanLII). In his initial *CCAA* order, Gascon J. put off the decision regarding the

financières du débiteur » (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 55 (« *Rescue!* »); voir également *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194, par. 7). Les intimés ne contestent pas l'exercice par le juge Morawetz de son pouvoir discrétionnaire de rendre une ordonnance *ex parte* en l'espèce.

[209] Il ne s'ensuit cependant pas qu'il est toujours nécessaire ou acceptable de rendre une ordonnance initiale *ex parte*. Sans prétendre à l'exhaustivité ni vouloir trancher définitivement la question, je fais simplement remarquer l'existence d'au moins trois cas de figure où les tribunaux atténuent l'effet négatif que pourrait avoir sur les créanciers l'ordonnance rendue sans préavis aux parties susceptibles d'être touchées. Premièrement, lorsque la situation de la société débitrice n'est pas urgente, les tribunaux se montrent réticents à accorder une ordonnance *ex parte*. Dans *Rescue!*, Janis P. Sarra explique que les tribunaux s'attendent de plus en plus à ce que, avant de solliciter une suspension sous le régime de la *LACC*, la demanderesse informe les intéressés au préalable de son intention (p. 55). Par exemple, dans *Marine Drive Properties Ltd., Re*, 2009 BCSC 145, 52 C.B.R. (5th) 47, le juge Butler opine que, [TRADUCTION] « [d]ans le cadre d'une procédure fondée sur la *LACC*, une demande initiale ne saurait être présentée sans préavis pour le seul motif que cette loi s'applique. Les éléments présentés doivent permettre au tribunal de conclure à l'existence d'une situation d'urgence » (par. 27). Deuxièmement, dans l'ordonnance initiale, les tribunaux précisent que les parties peuvent présenter une nouvelle demande afin d'obtenir l'annulation de l'ordonnance en tout ou en partie (*Rescue!*, p. 55). Soulignons que l'ordonnance initiale du juge Morawetz confère cette faculté (par. 46). Enfin, les tribunaux ne rendent une ordonnance initiale qu'à l'égard des questions qui doivent être tranchées sans délai et ils diffèrent le règlement des autres jusqu'à ce que tous les intéressés aient reçu avis de la demande. Ainsi, dans *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169, le juge Morawetz circonscrit l'ordonnance initiale rendue en application de la *LACC* de telle sorte qu'une priorité n'est accordée qu'aux parties auxquelles un avis de la demande a été

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suspension of past service contributions or special payments to the pension plans in question until the parties likely to be affected could be advised of the applicant's request: para. 7.

donné. La décision de suspendre ou non les paiements spéciaux ou d'octroyer ou non aux créanciers une priorité sur les bénéficiaires des régimes de retraite est reportée à une date ultérieure, soit jusqu'à ce que les parties susceptibles d'être touchées aient été avisées. Le tribunal adopte une démarche apparentée dans l'affaire *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6459 (CanLII). Dans son ordonnance initiale fondée sur la *LACC*, le juge Gascon reporte la décision de suspendre ou non le versement des cotisations pour service antérieur ou des paiements spéciaux aux régimes de retraite en cause jusqu'à ce que les parties susceptibles d'être touchées reçoivent avis de la demande (par. 7).

[210] Failure to give notice of the initial *CCAA* proceedings was not a breach of fiduciary duty in this case. Indalex's decision to act as an employer-administrator cannot give the plan beneficiaries any greater benefit than they would have if their plan was managed by a third party administrator. Had there been a third party administrator in this case, Indalex would not have been under an obligation to tell the administrator that it was planning to enter *CCAA* proceedings. The respondents are asking this Court to give the advantage of Indalex's knowledge as employer to Indalex as the plan administrator in circumstances where the employer would have been unlikely to disclose the information itself. I am not prepared to blur the line between employers and administrators in this way.

[210] En l'espèce, l'omission de donner avis de la demande initiale présentée sur le fondement de la *LACC* ne constituait pas un manquement à l'obligation fiduciaire. La décision d'Indalex d'agir à titre d'employeur-administrateur ne peut conférer aux bénéficiaires des régimes plus d'avantages que si l'administration de leurs régimes avait été confiée à un tiers indépendant. Dans ce dernier cas, Indalex n'aurait pas été tenue de révéler à ce tiers son intention d'engager une procédure sous le régime de la *LACC*. Les intimés demandent à notre Cour d'attribuer à Indalex, l'administrateur, l'avantage que détient Indalex, l'employeur, grâce à sa connaissance de certaines données, dans des circonstances où l'employeur n'aurait vraisemblablement pas communiqué ces données. Je ne suis pas disposé à brouiller ainsi la distinction entre la fonction d'employeur et celle d'administrateur.

[211] I conclude that Indalex did not breach its fiduciary duty by commencing *CCAA* proceedings or by not giving notice to the plan beneficiaries of its intention to seek the initial *CCAA* order.

[211] Je conclus qu'Indalex n'a pas manqué à son obligation fiduciaire en engageant la procédure fondée sur la *LACC* ou en omettant d'informer les bénéficiaires des régimes de son intention d'obtenir une ordonnance initiale fondée sur la *LACC*.

[212] I turn next to the Court of Appeal's conclusion that seeking and obtaining the DIP orders without notice to the plan beneficiaries and seeking and obtaining the sale approval order constituted breaches of fiduciary duty.

[212] Je me penche maintenant sur la conclusion de la Cour d'appel selon laquelle la demande et l'obtention des ordonnances DE sans préavis aux bénéficiaires des régimes, ainsi que la demande et l'obtention de l'approbation de la vente constituaient des manquements à l'obligation fiduciaire.

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[213] To begin, I agree with the Court of Appeal that "just because the initial decision to commence *CCAA* proceedings is solely a corporate one . . . does not mean that all subsequent decisions made during the proceedings are also solely corporate ones": para. 132. It was at this point that Indalex's interests as a corporation came into conflict with its duties as a pension plan administrator.

[213] D'abord, je conviens avec la Cour d'appel que [TRADUCTION] « même si la décision initiale d'engager une procédure sous le régime de la *LACC* est de nature strictement commerciale [. . .], toutes les décisions ultérieures prises pendant l'instance ne le sont pas pour autant » (par. 132). C'est à cette étape que les intérêts commerciaux d'Indalex sont entrés en conflit avec ses obligations d'administrateur des régimes de retraite.

[214] The DIP orders could easily have the effect of making it impossible for Indalex to satisfy its funding obligations to the plan beneficiaries. When Indalex, through the exercise of business judgment, sought *CCAA* orders that would or might have this effect, it was in conflict with its duty as plan administrator to ensure that all contributions were paid when due.

[214] Les ordonnances DE auraient fort bien pu faire en sorte qu'Indalex ne puisse plus s'acquitter de ses obligations de capitalisation vis-à-vis des bénéficiaires des régimes. Lorsque, à l'issue de son appréciation commerciale et sur le fondement de la *LACC*, Indalex a sollicité des ordonnances qui auraient eu ou auraient pu avoir une telle conséquence, elle était en conflit avec son obligation d'administrateur des régimes de veiller au versement de toutes les cotisations dès leur exigibilité.

[215] I do not think, however, that the simple existence of this conflict of interest and duty, on its own, was a breach of fiduciary duty in these circumstances. As discussed earlier, the *PBA* expressly permits an employer to be a pension administrator and the statutory provisions about conflict of interest must be understood and applied in light of that fact. Moreover, an independent plan administrator would have no decision-making role with respect to the conduct of *CCAA* proceedings. So in my view, the difficulty that arose here was not the existence of the conflict itself, but Indalex's failure to take steps so that the plan beneficiaries would have the opportunity to have their interests protected in the *CCAA* proceedings as if the plans were administered by an independent administrator. In short, the difficulty was not the existence of the conflict, but the failure to address it.

[215] Je ne crois cependant pas que la seule existence de ce conflit d'intérêts et d'obligations constituait en soi un manquement à l'obligation fiduciaire dans les circonstances. Je le rappelle, la *LRR* autorise expressément l'employeur à administrer un régime, et les dispositions législatives relatives au conflit d'intérêts doivent être interprétées et appliquées en conséquence. En outre, un administrateur indépendant n'aurait eu aucun rôle décisionnel à jouer dans le déroulement de la procédure fondée sur la *LACC*. À mon sens, la difficulté résidait en l'espèce non pas dans l'existence du conflit, mais bien dans l'omission d'Indalex de prendre quelque mesure afin que les bénéficiaires des régimes aient la possibilité de veiller à la protection de leurs intérêts dans le cadre de la procédure fondée sur la *LACC* comme si l'administrateur des régimes avait été indépendant. En résumé, le manquement ne tenait pas à l'existence du conflit, mais plutôt à l'omission de prendre les mesures qu'elle commandait.

[216] Despite Indalex's failure to address its conflict of interest, the plan beneficiaries, through their own efforts, were represented at subsequent steps in the *CCAA* proceedings. The effect of Indalex's

[216] Malgré l'omission d'Indalex de pallier le conflit d'intérêts, les bénéficiaires des régimes ont eux-mêmes pris des mesures pour être représentés aux étapes ultérieures de l'instance fondée sur la

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breach was therefore mitigated, a point which I will discuss in greater detail when I turn to the issue of the constructive trust.

[217] Nevertheless, for the purposes of providing some guidance for future *CCAA* proceedings, I take this opportunity to briefly address what an employer-administrator can do to respond to these sorts of conflicts. First and foremost, an employer-administrator who finds itself in a conflict must bring the conflict to the attention of the *CCAA* judge. It is not enough to include the beneficiaries in the list of creditors; the judge must be made aware that the debtor, as an administrator of the plan is, or may be, in a conflict of interest.

[218] Given their expertise and their knowledge of particular cases, *CCAA* judges are well placed to decide how best to ensure that the interests of the plan beneficiaries are fully represented in the context of "real-time" litigation under the *CCAA*. Knowing of the conflict, a *CCAA* judge might consider it appropriate to appoint an independent administrator or independent counsel as *amicus curiae* on terms appropriate to the particular case. Indeed, there have been cases in which representative counsel have been appointed to represent tort claimants, clients, pensioners and non-unionized employees in *CCAA* proceedings on terms determined by the judge: *Rescue!*, at p. 278; see, e.g., *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299 (CanLII); *Nortel Networks Corp., Re* (2009), 75 C.C.P.B. 206 (Ont. S.C.J.). In other circumstances, a *CCAA* judge might find that it is feasible to give notice directly to the pension beneficiaries. In my view, notice, though desirable, may not always be feasible and decisions on such matters should be left to the judicial discretion of the *CCAA* judge. Alternatively, the judge might consider limiting draws on the DIP facility until notice can be given to the beneficiaries: *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Ct. J. (Gen. Div.)), at para. 24. Ultimately, the appropriate response or combination of responses should be left to the discretion of the *CCAA* judge in a particular case.

LACC. Les conséquences du manquement d'Indalex ont ainsi été atténuées; je reviendrai plus en détail sur ce point au moment de me pencher sur la fiducie par interprétation.

[217] Néanmoins, aux fins du bon déroulement de toute procédure susceptible d'être engagée ultérieurement en application de la *LACC*, je saisis l'occasion d'offrir des repères en examinant brièvement les mesures que l'employeur-administrateur pourrait prendre pour pallier un tel conflit. Avant toute chose, l'employeur-administrateur qui se trouve en situation de conflit doit en informer le juge saisi sur le fondement de la *LACC*. Il ne suffit pas d'inscrire les bénéficiaires sur la liste des créanciers; le juge doit être informé que le débiteur, en sa qualité d'administrateur de régime, est en conflit d'intérêts ou susceptible de l'être.

[218] Étant donné son expertise et ses connaissances dans ce domaine, le juge saisi en vertu de la *LACC* est bien placé pour déterminer la meilleure façon de faire en sorte que les bénéficiaires d'un régime soient dûment représentés au moment même où se déroule la procédure fondée sur la *LACC*. Informé de l'existence du conflit, le juge peut juger opportun de nommer, aux conditions qui lui paraissent indiquées, un administrateur ou un avocat indépendant à titre d'*amicus curiae*. Il est en effet arrivé qu'un juge nomme un avocat — et détermine les conditions de son mandat — pour représenter dans une instance fondée sur la *LACC* des personnes ayant intenté une action en responsabilité délictuelle, des clients, des pensionnés et des employés non syndiqués (*Rescue!*, p. 278; voir, p. ex., *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299 (CanLII); *Nortel Networks Corp., Re* (2009), 75 C.C.P.B. 206 (C.S.J. Ont.)). Dans d'autres cas, le juge peut estimer qu'il est possible de donner avis aux bénéficiaires du régime sans recourir à quelque intermédiaire. À mon sens, la transmission d'un avis, même si elle est souhaitable, peut ne pas toujours être réaliste, et la décision s'y rapportant devrait relever du pouvoir discrétionnaire du juge. En revanche, le juge peut décider de limiter les prélèvements sur le financement DE jusqu'à ce que les bénéficiaires aient reçu un avis (*Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (C.J. Ont.

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The point, as well expressed by the Court of Appeal, is that the insolvent corporation which is also a pension plan administrator cannot "simply ignore its obligations as the Plans' administrator once it decided to seek *CCAA* protection": para. 132.

(Div. gén.)), par. 24). En définitive, il appartient au juge d'exercer son pouvoir discrétionnaire et d'arrêter la ou les mesures appropriées. Comme l'exprime bien la Cour d'appel, ce qu'il faut se rappeler c'est que l'entreprise insolvable qui est également administrateur de régime ne peut [TRADUCTION] « simplement ignorer les obligations qui lui incombent en tant qu'administrateur des régimes une fois qu'elle a décidé de se prévaloir de la protection de la *LACC* » (par. 132).

[219] I conclude that the Court of Appeal erred in finding that Indalex breached its fiduciary duties as plan administrator by taking the various steps it did in the *CCAA* proceedings. However, I agree with the Court of Appeal that it breached its fiduciary duty by failing to take steps to ensure that the plan beneficiaries had the opportunity to be as fully represented in those proceedings as if there had been an independent plan administrator.

[219] J'estime que la Cour d'appel conclut à tort qu'Indalex a manqué à ses obligations fiduciaires d'administrateur des régimes en prenant diverses mesures dans le cadre de la procédure fondée sur la *LACC*. Je conviens cependant avec elle qu'Indalex a manqué à son obligation fiduciaire en omettant de faire ce qu'il fallait pour que les bénéficiaires des régimes puissent être dûment représentés dans le cadre de cette procédure comme si l'administrateur des régimes avait été indépendant.

(iii) The Bankruptcy Motion

(iii) La motion présentée en vue de faire faillite

[220] Indalex also applied to lift the *CCAA* stay so that it could file an assignment into bankruptcy. As Campbell J. put it, this was done "to ensure the priority regime [it] urged as the basis for resisting the deemed trust": para. 52. The Court of Appeal concluded that this was a breach of Indalex's fiduciary duties because the motion was brought "with the intention of defeating the deemed trust claims and ensuring that the Reserve Fund was transferred to [the U.S. debtors]": para. 139. I respectfully disagree.

[220] Indalex a aussi demandé la levée de la suspension accordée sur le fondement de la *LACC* afin qu'elle puisse faire cession de ses biens. Comme le dit le juge Campbell, cette démarche [TRADUCTION] « visait à donner effet à l'ordre de priorité qu'Indalex faisait valoir à l'encontre de la fiducie réputée » (par. 52). La Cour d'appel conclut qu'il s'agit d'un manquement aux obligations fiduciaires d'Indalex, car la motion a été présentée [TRADUCTION] « afin de faire échec aux prétentions relatives à la fiducie réputée et d'obtenir le transfert du fonds de réserve aux [débitrices américaines] » (par. 139). En toute déférence, je ne suis pas d'accord.

[221] It was certainly open to Indalex as an employer to bring a motion to voluntarily enter into bankruptcy. A pension plan administrator has no responsibility or authority in relation to that step. The problem here is not that the motion was brought, but that Indalex failed to meaningfully address the conflict between its corporate interests and its duties as plan administrator.

[221] Il était certainement loisible à Indalex, l'employeur, de présenter une motion en vue de faire cession volontaire de ses biens. L'administrateur d'un régime de retraite n'a ni obligation, ni pouvoir à cet égard. Le problème en l'espèce tient non pas à la présentation de la motion, mais plutôt à ce qu'Indalex a omis de s'attaquer véritablement au problème du conflit entre ses intérêts commerciaux et ses obligations d'administrateur des régimes.

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[222] To sum up, I conclude that Indalex did not breach any fiduciary duty by undertaking *CCAA* proceedings or seeking the relief that it did. The breach arose from Indalex's failure to ensure that its pension plan beneficiaries had the opportunity to have their interests effectively represented in the insolvency proceedings, particularly when Indalex sought the DIP financing approval, the sale approval and the motion for bankruptcy.

(3) *Was Imposing a Constructive Trust Appropriate in This Case?*

[223] The next issue is whether a remedial constructive trust is, as the Court of Appeal concluded, an appropriate remedy in response to the breach of fiduciary duty.

[224] The Court of Appeal exercised its discretion to impose a constructive trust and its exercise of this discretion is entitled to deference. Only if the discretion has been exercised on the basis of an erroneous principle should the order be overturned on appeal: *Donkin v. Bugoy*, [1985] 2 S.C.R. 85, cited in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at para. 54, by Sopinka J. (dissenting, but not on this point). In my respectful view, the Court of Appeal's erroneous conclusions about the scope of a plan administrator's fiduciary duties require us to examine the constructive trust issue anew. Moreover, the Court of Appeal, in my respectful opinion, erred in principle in finding that the asset in this case resulted from the breach of fiduciary duty such that it would be unjust for the party in breach to retain it.

[225] As noted earlier, the Court of Appeal imposed a constructive trust in favour of the plan beneficiaries with respect to funds retained in the reserve fund equal to the total amount of the wind-up deficiency for both plans. In other words, upon insolvency of Indalex, the plan beneficiaries received 100 cents on the dollar as a result of a judicially imposed trust taking priority over

[222] En résumé, j'estime qu'Indalex n'a pas manqué à une obligation fiduciaire lorsqu'elle a engagé la procédure fondée sur la *LACC* ou demandé la mesure en cause. Il y a eu manquement parce qu'Indalex n'a pas fait en sorte que les intérêts des bénéficiaires des régimes de retraite soient effectivement défendus dans le cadre de la procédure liée à son insolvabilité, en particulier lorsqu'elle a demandé l'approbation du financement DE et de la vente, puis présenté une motion en vue de faire faillite.

(3) *Convenait-il en l'espèce d'imposer une fiducie par interprétation?*

[223] La question qui se pose ensuite est celle de savoir si, comme le conclut la Cour d'appel, l'imposition d'une fiducie par interprétation constitue une réparation adéquate du manquement à l'obligation fiduciaire.

[224] La Cour d'appel exerce son pouvoir discrétionnaire d'imposer une fiducie par interprétation, et cet exercice commande la déférence. Une telle mesure ne peut être infirmée en appel que si l'exercice du pouvoir discrétionnaire s'appuie sur un principe erroné (*Donkin c. Bugoy*, [1985] 2 R.C.S. 85, cité dans *Soulos c. Korkontzilas*, [1997] 2 R.C.S. 217, par. 54, le juge Sopinka (dissident, mais pas sur ce point)). En toute déférence, les conclusions erronées de la Cour d'appel sur la portée des obligations fiduciaires de l'administrateur du régime nous obligent à revoir les conditions de l'imposition d'une fiducie par interprétation. Qui plus est, la Cour d'appel commet selon moi une erreur de principe lorsqu'elle conclut que l'actif convoité résulte du manquement à l'obligation fiduciaire, de sorte qu'il serait injuste que la partie fautive se l'approprie.

[225] Comme je le mentionne précédemment, la Cour d'appel statue que le fonds de réserve fait l'objet d'une fiducie par interprétation à l'intention des bénéficiaires des régimes à raison d'un montant égal au déficit de liquidation global des deux régimes. En d'autres termes, une fois Indalex devenue insolvable, les bénéficiaires des régimes avaient droit au paiement de l'intégralité de leurs créances

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secured creditors, and indeed over other unsecured creditors, assuming there was no deemed trust for the executive plan.

grâce à l'imposition judiciaire d'une fiducie prenant rang avant les créances garanties, ainsi que les créances chirographaires, à supposer que le régime des cadres n'ait bénéficié d'aucune fiducie réputée.

[226] I have explained earlier why I take a different view than did the Court of Appeal of Indalex's breach of fiduciary duty. In light of what I conclude was the breach which could give rise to a remedy, my view is that the constructive trust cannot properly be imposed in this case and the Court of Appeal erred in principle in exercising its discretion to impose this remedy.

[226] J'expose précédemment les raisons pour lesquelles je diffère d'opinion avec la Cour d'appel en ce qui concerne le manquement à l'obligation fiduciaire d'Indalex. Vu mes conclusions sur la nature du manquement susceptible de donner droit à réparation, je crois que la fiducie par interprétation ne saurait être imposée en l'espèce et que la Cour d'appel commet une erreur de principe en exerçant son pouvoir discrétionnaire d'accorder cette réparation.

[227] I part company with the Court of Appeal with respect to several aspects of its constructive trust analysis; it is far from clear to me that any of the conditions for imposing a constructive trust were present here. However, I will only address one of them in detail. As I will explain, a remedial constructive trust for a breach of fiduciary duty is only appropriate if the wrongdoer's acts give rise to an identifiable asset which it would be unjust for the wrongdoer (or sometimes a third party) to retain. In my view, Indalex's failure to meaningfully address conflicts of interest that arose during the *CCAA* proceedings did not result in any such asset.

[227] Je suis en désaccord avec la Cour d'appel sur plusieurs points au sujet de la fiducie par interprétation; il ne me paraît pas du tout évident que l'une ou l'autre des conditions auxquelles une telle fiducie peut être imposée est remplie en l'espèce. Je n'examine cependant en détail que l'un de ces points. Comme je l'explique ci-après, l'imposition d'une fiducie par interprétation par suite d'un manquement à une obligation fiduciaire ne constitue une réparation appropriée que si un actif déterminable résulte des actes de l'auteur du manquement et qu'il serait injuste que ce dernier ou, parfois, un tiers, conserve cet actif. Or, selon moi, un tel actif n'a pas résulté de l'omission d'Indalex de pallier véritablement les conflits d'intérêts auxquels donnait lieu la procédure fondée sur la *LACC*.

[228] As the Court of Appeal recognized, the governing authority concerning the remedial constructive trust outside the domain of unjust enrichment is *Soulos*. In *Soulos*, McLachlin J. (as she then was) wrote that a constructive trust may be an appropriate remedy for breach of fiduciary duty: paras. 19-45. She laid out four requirements that should generally be satisfied before a constructive trust will be imposed: para. 45. Although, in *Soulos*, McLachlin J. was careful to indicate that these are conditions that "generally" must be present, all parties in this case accept that these four conditions must be present before a remedial constructive trust may be ordered for

[228] La Cour d'appel reconnaît que, sauf lorsqu'il est question d'enrichissement sans cause, l'arrêt *Soulos* s'applique en matière de fiducie par interprétation imposée en guise de réparation. Aux paragraphes 19-45 de cet arrêt, la juge McLachlin (maintenant Juge en chef) écrit qu'une fiducie par interprétation peut constituer une réparation appropriée du manquement à l'obligation fiduciaire. Au paragraphe 45, elle énonce quatre conditions qui doivent généralement être réunies pour qu'une fiducie par interprétation puisse être imposée. Même si, dans *Soulos*, la juge McLachlin précise bien qu'il s'agit de conditions qui doivent « généralement » être réunies, toutes les parties au

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breach of fiduciary duty. The four conditions are these:

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

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

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

(4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected. [para. 45]

[229] My concern is with respect to the second requirement, that is, whether the breach resulted in an asset in the hands of Indalex. A constructive trust arises when the law imposes upon a party an obligation to hold specific property for another: D. W. M. Waters, M. R. Gillen and L. D. Smith, *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 454 ("*Waters*"). The purpose of imposing a constructive trust as a remedy for a breach of duty or unjust enrichment is to prevent parties "from retaining property which in 'good conscience' they should not be permitted to retain": *Soulos*, at para. 17. It follows, therefore, that while the remedial constructive trust may be appropriate in a variety of situations, the wrongdoer's conduct toward the plaintiff must generally have given rise to assets in the hands of the wrongdoer (or of a third party in some situations) which cannot in justice and good conscience be retained. That cannot be said here.

pourvoi conviennent qu'elles doivent toutes être respectées pour que le tribunal puisse imposer une fiducie par interprétation à titre de réparation par suite d'un manquement à une obligation fiduciaire. Ces quatre conditions sont les suivantes :

(1) le défendeur doit avoir été assujetti à une obligation en *equity*, c'est-à-dire une obligation du type de celles dont les tribunaux d'*equity* ont assuré le respect, relativement aux actes qui ont conduit à la possession des biens [ou de l'actif];

(2) il faut démontrer que la possession des biens [ou de l'actif] par le défendeur résulte des actes qu'il a ou est réputé avoir accomplis à titre de mandataire, en violation de l'obligation que l'*equity* lui imposait à l'égard du demandeur;

(3) le demandeur doit établir qu'il a un motif légitime de solliciter une réparation fondée sur la propriété, soit personnel soit lié à la nécessité de veiller à ce que d'autres personnes comme le défendeur s'acquittent de leurs obligations;

(4) il ne doit pas exister de facteurs qui rendraient injuste l'imposition d'une fiducie par interprétation eu égard à l'ensemble des circonstances de l'affaire; par exemple, les intérêts des créanciers intervenants doivent être protégés. [par. 45]

[229] Je doute que la deuxième condition — la possession des biens (ou de l'actif) par Indalex résultant du manquement à ses obligations — soit remplie. Il y a fiducie par interprétation lorsque la loi impose à une personne de détenir un bien précis pour autrui (D. W. M. Waters, M. R. Gillen et L. D. Smith, *Waters' Law of Trusts in Canada* (3e éd. 2005), p. 454 (« *Waters* »)). Lorsqu'une telle réparation est accordée par suite d'un manquement à une obligation ou d'un enrichissement sans cause, elle vise à « empêcher [les personnes] de conserver des biens qu'en toute "conscience" elles ne devraient pas être autorisées à garder » (*Soulos*, par. 17). Il s'ensuit donc que la fiducie par interprétation peut certes constituer une réparation convenable dans divers cas, mais que la possession de biens doit généralement résulter des actes de la partie fautive (parfois, d'un tiers) vis-à-vis du demandeur, cette partie ou ce tiers fautif ne pouvant alors en toute justice et conscience garder les biens. Ce n'est pas le cas en l'espèce.

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[230] The Court of Appeal held that this second condition was present because "[t]he assets [i.e. the reserve fund monies] are directly connected to the process in which Indalex committed its breaches of fiduciary obligation": para. 204. Respectfully, this conclusion is based on incorrect legal principles. To satisfy this second condition, it must be shown that the breach *resulted in* the assets being in Indalex's hands, not simply, as the Court of Appeal thought, that there was a "connection" between the assets and "the process" in which Indalex breached its fiduciary duty. Recall that in *Soulos* itself, *the defendant's acquisition of the disputed property was a direct result of his breach of his duty of loyalty* to the plaintiff: para. 48. This is not our case. As the Court observed, in the context of an unjust enrichment claim in *Peter v. Beblow*, [1993] 1 S.C.R. 980, at p. 995:

> . . . for a constructive trust to arise, the plaintiff must establish a direct link to the property which is the subject of the trust by reason of the plaintiff's contribution.

[231] While cases of breach of fiduciary duty are different in important ways from cases of unjust enrichment, La Forest J. (with Lamer J. concurring on this point) applied a similar standard for proprietary relief in *Lac Minerals*, a case in which wrongdoing was the basis for the constructive trust: p. 678, quoted in *Waters*, at p. 471. His comments demonstrate the high standard to be met in order for a constructive trust to be awarded:

> The constructive trust awards a right in property, but that right can only arise once a right to relief has been established. In the vast majority of cases a constructive trust will not be the appropriate remedy. . . . [A] constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. [p. 678]

[232] The relevant breach in this case was the failure of Indalex to meaningfully address the conflicts of interest that arose in the course of the

[230] La Cour d'appel conclut que cette deuxième condition est respectée car [TRADUCTION] « [l]'actif [les sommes constituant le fonds de réserve] est directement lié à la procédure dans le cadre de laquelle Indalex a manqué à son obligation fiduciaire » (par. 204). À mon humble avis, cette conclusion s'appuie sur des principes de droit erronés. Pour satisfaire à la deuxième condition, il faut démontrer que la possession de l'actif par Indalex *résulte* du manquement à son obligation, et non seulement, comme le croit la Cour d'appel, qu'il y a un « lien » entre l'actif et la « procédure » dans le cadre de laquelle Indalex a manqué à ses obligations fiduciaires. Rappelons que, dans *Soulos*, *l'acquisition par le défendeur de l'immeuble en cause était la conséquence directe du manquement à son devoir de loyauté* envers le demandeur (par. 48). Telle n'est pas la situation en l'espèce. Comme le dit notre Cour dans l'arrêt *Peter c. Beblow*, [1993] 1 R.C.S. 980, p. 995, dans le contexte d'une allégation d'enrichissement sans cause,

> pour qu'il y ait fiducie par interprétation, le demandeur doit établir qu'il a, du fait de sa contribution, un lien direct avec le bien qui se trouve grevé d'une fiducie.

[231] Même si le manquement à l'obligation fiduciaire diffère grandement de l'enrichissement sans cause, dans l'arrêt *Lac Minerals*, le juge La Forest (avec l'accord du juge Lamer sur ce point) applique un critère semblable à une réparation liée au droit de propriété. Dans cette affaire, la fiducie par interprétation faisait suite à un acte fautif (p. 678, cité dans *Waters*, p. 471). Les remarques du juge La Forest confirment le caractère strict de la norme applicable à l'imposition judiciaire d'une fiducie par interprétation :

> La fiducie par interprétation confère un droit de propriété, mais ce droit ne peut exister que si un droit à une réparation a déjà été établi. Dans la grande majorité des cas, la fiducie par interprétation ne sera pas la réparation appropriée. [. . .] [I]l n'y a lieu de conférer une fiducie par interprétation qu'en présence d'un motif pour accorder au demandeur les droits supplémentaires découlant de la reconnaissance d'un droit de propriété. [p. 678]

[232] Le manquement intervenu en l'espèce consiste dans l'omission d'Indalex de pallier véritablement les conflits d'intérêts qu'a fait naître la

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CCAA proceedings. (The breach that arose with respect to the bankruptcy motion is irrelevant because that motion was not addressed and therefore could not have given rise to the assets.) The "assets" in issue here are the funds in the reserve fund which were retained from the proceeds of the sale of Indalex as a going concern. Indalex's breach in this case did not give rise to the funds which were retained by the Monitor in the reserve fund.

[233] Where does the respondents' claim of a procedural breach take them? Taking their position at its highest, it would be that the DIP approval proceedings and the sale would not have been approved. This position, however, is fatally flawed. Turning first to the DIP approval, there is no evidence to support the view that, had Indalex addressed its conflict in the DIP approval process, the DIP financing would have been rejected or granted on different terms. The *CCAA* judge, being fully aware of the pension situation, ruled that the DIP financing was "required", that there was "no other alternative available to the Applicants for a going concern solution", and that "the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing": endorsement of Morawetz J., April 8, 2009, at paras. 6 and 9. In effect, the respondents are claiming funds which arose only because of the process to which they now object. Taking into account that there was an absence of any evidence that more favourable financing terms were available, that the judge's decision was made with full knowledge of the plan beneficiaries' claims, and that he found that the DIP financing was necessary, the respondents' contention is not only speculative, it also directly contradicts the conclusions of the *CCAA* judge.

[234] Turning next to the sale approval and the approval of the distribution of the assets, it is clear that the plan beneficiaries had independent representation but that this did not change the result.

procédure fondée la *LACC*. (Le manquement qui aurait découlé de la motion présentée en vue de faire faillite n'a pas à être considéré puisque la motion n'a été examinée et ne peut donc pas avoir permis l'entrée en possession de l'actif.) L'actif en cause correspond au fonds de réserve constitué par prélèvement sur le produit de la vente de l'entreprise en exploitation d'Indalex. Ce manquement d'Indalex n'est pas à l'origine des fonds que le contrôleur a conservés en constituant le fonds de réserve.

[233] Quelle peut être l'issue de l'allégation des intimés selon laquelle il y a eu manquement aux exigences de procédure? Suivant la plus favorable, ni le financement DE ni la vente n'auraient été approuvés. Or, cette thèse est irrémédiablement viciée. Premièrement, en ce qui concerne la procédure d'approbation du financement DE, aucun élément de preuve n'établit que si Indalex avait pallié ses conflits dans le cadre de cette procédure, le financement aurait été refusé ou autorisé à d'autres conditions. Parfaitement informé de la situation des régimes de retraite, le juge saisi sur le fondement de la *LACC* estime que le financement DE [TRADUCTION] « s'impose », que « les requérantes ne disposent d'aucune autre solution permettant la continuité de l'exploitation » et que « les avantages du financement DE pour les intéressés et les créanciers l'emportent sur tout préjudice que pourrait causer aux créanciers non garantis l'octroi d'un financement garanti par une superpriorité » (motifs du juge Morawetz, 8 avril 2009, par. 6 et 9). En fait, les intimés réclament des fonds qui ont été obtenus uniquement grâce à la procédure qu'ils contestent aujourd'hui. Vu l'absence d'éléments de preuve voulant que des modalités de financement plus avantageuses aient pu être obtenues, et comme le juge est bien conscient de l'existence des réclamations des bénéficiaires des régimes et qu'il conclut que le financement DE s'impose, la prétention des intimés est non seulement conjecturelle, mais va aussi directement à l'encontre des conclusions du juge.

[234] En ce qui concerne l'approbation de la vente et de la répartition de l'actif, il est clair que les bénéficiaires des régimes ont été représentés de manière indépendante, mais que cette mesure n'a

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Although, perhaps with little thanks to Indalex, the interests of both plans were fully and ably represented before Campbell J. at the sale approval and interim distribution motions in July of 2009.

rien changé au résultat. En juillet 2009, devant le juge Campbell, pendant toute l'audition des motions visant l'approbation de la vente et la répartition provisoire du produit de la vente, les intérêts des deux régimes ont bel et bien été défendus, même si Indalex n'y a peut-être pas été pour grand-chose.

[235] The executive plan retirees, through able counsel, objected to the sale on the basis that the liquidation values set out in the Monitor's seventh report would provide greater return for unsecured creditors. The motions judge dismissed this objection "on the basis that there was no clear evidence to support the proposition and in any event the transaction as approved did preserve value for suppliers, customers and preserve approximately 950 jobs": trial reasons of Campbell J., at para. 13 (emphasis added). Both the executive plan retirees and the USW, which represented some members of the salaried plan, objected to the proposed distribution of the sale proceeds. In response to this objection, it was agreed that those objections would be heard promptly and that the Monitor would retain sufficient funds to satisfy the pensioners' claims if they were upheld: trial reasons of Campbell J., at paras. 14-16.

[235] Par l'entremise d'un avocat compétent, les retraités du régime des cadres se sont opposés à la vente en arguant que, selon le septième rapport du contrôleur, les valeurs de liquidation permettaient aux créanciers chirographaires de recouvrer plus d'argent. Le juge saisi des motions a rejeté leur opposition [TRADUCTION] « au motif qu'aucun élément de preuve n'appuyait clairement cette prétention et que, de toute façon, l'opération approuvée garantissait la valeur de l'actif pour les fournisseurs et les clients, et préservait environ 950 emplois » (motifs du juge Campbell en première instance, par. 13 (je souligne)). Les retraités du régime des cadres et le Syndicat, qui représentait certains participants du régime des salariés, a contesté la répartition projetée du produit de la vente. Il a dès lors été convenu que le juge entendrait leurs arguments au plus tôt et que le contrôleur conserverait des fonds suffisants pour donner suite aux prétentions des retraités dans le cas où il y serait fait droit (motifs du juge Campbell en première instance, par. 14-16).

[236] There is no evidence to support the contention that Indalex's breach of its fiduciary duty as pension administrator resulted in the assets retained in the reserve fund. I therefore conclude that the Court of Appeal erred in law in finding that the second condition for imposing a constructive trust — i.e. that the assets in the defendant's hands must be shown to have resulted from the defendant's breaches of duty to the plaintiff — had been established.

[236] Aucun élément de preuve n'appuie la prétention que l'actif constituant le fonds de réserve découle du manquement d'Indalex à son obligation fiduciaire en tant qu'administrateur de régime. Je suis donc d'avis que la Cour d'appel a tort de conclure que la deuxième condition à remplir pour qu'une fiducie par interprétation puisse être imposée — démontrer que la possession des biens par le défendeur résulte des manquements à ses obligations envers le demandeur — a été remplie.

[237] I would add only two further comments with respect to the constructive trust. A major concern of the Court of Appeal was that unless a constructive trust were imposed, the reserve funds would end up in the hands of other Indalex entities which were not operating at arm's length from Indalex. The U.S. debtors claimed the reserve fund

[237] Voici deux autres remarques au sujet de la fiducie par interprétation. L'une des préoccupations principales de la Cour d'appel est que, à défaut d'une telle fiducie par interprétation, le fonds de réserve se retrouve en la possession de sociétés ayant un lien de dépendance avec Indalex. Les débitrices américaines ont réclamé l'octroi du fonds

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because it had paid on its guarantee of the DIP loans and thereby stepped into the shoes of the DIP lender with respect to priority. Sun Indalex claims in the U.S. bankruptcy proceedings as a secured creditor of the U.S. debtors. The Court of Appeal put its concern this way: "To permit Sun Indalex to recover on behalf of [the U.S. debtors] would be to effectively permit the party who breached its fiduciary obligations to take the benefit of those breaches, to the detriment of those to whom the fiduciary obligations were owed": para. 199.

[238] There are two difficulties with this approach, in my respectful view. The U.S. debtors paid real money to honour their guarantees. Moreover, unless there is a legal basis for ignoring the separate corporate personality of separate corporate entities, those separate corporate existences must be respected. Neither the parties nor the Court of Appeal advanced such a reason.

[239] Finally, I would note that imposing a constructive trust was wholly disproportionate to Indalex's breach of fiduciary duty. Its breach — the failure to meaningfully address the conflicts of interest that arose during the *CCAA* process — had no adverse impact on the plan beneficiaries in the sale approval process which gave rise to the "asset" in issue. Their interests were fully represented and carefully considered before the sale was approved and the funds distributed. The sale was nonetheless judged to be in the best interests of the corporation, all things considered. In my respectful view, imposing a $6.75 million penalty on the other creditors as a remedial response to this breach is so grossly disproportionate to the breach as to be unreasonable.

[240] A judicially ordered constructive trust, imposed long after the fact, is a remedy that tends to destabilize the certainty which is essential for

de réserve en faisant valoir les sommes versées en exécution de leur garantie des prêts DE et qu'elles étaient par conséquent subrogées aux droits des créanciers DE et bénéficiaient de la priorité accordée à ces derniers. Sun Indalex a présenté une réclamation dans le cadre de la procédure de faillite intentée aux É.-U. à titre de créancier garanti des débitrices américaines. La Cour d'appel formule sa réticence comme suit : [TRADUCTION] « Permettre à Sun Indalex de recouvrer des sommes pour le compte [des débitrices américaines] équivaudrait à autoriser le débiteur d'obligations fiduciaires à tirer profit de manquements à celles-ci, et ce, au détriment des créanciers de ces obligations » (par. 199).

[238] À mon humble avis, cette approche comporte deux failles. Les débitrices américaines ont dû véritablement débourser de l'argent pour honorer leurs garanties. De plus, à moins qu'un fondement juridique permette de faire abstraction de la personnalité morale distincte de chacune des entreprises, leur existence distincte doit être respectée. Ni les parties ni la Cour d'appel n'ont avancé un tel fondement.

[239] Enfin, il convient de signaler que l'imposition d'une fiducie par interprétation est une mesure totalement disproportionnée au manquement d'Indalex à son obligation fiduciaire. Ce manquement — l'omission de pallier véritablement les conflits d'intérêts nés à l'occasion de la procédure fondée sur la *LACC* — n'a pas eu d'incidence défavorable sur les bénéficiaires des régimes par suite de la procédure d'approbation de la vente dont a résulté la possession des « biens » en cause. Les intérêts des régimes ont été dûment défendus avant que la vente ne soit approuvée et les fonds répartis. Tout compte fait, le tribunal a néanmoins estimé que la vente était dans le meilleur intérêt de l'entreprise. À mon humble avis, priver les autres créanciers de 6,75 millions de dollars pour réparer ce manquement est disproportionné au point d'être déraisonnable.

[240] L'imposition judiciaire d'une fiducie par interprétation longtemps après les faits à titre de réparation risque de nuire à la certitude qui est

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commercial affairs and which is particularly important in financing a workout for an insolvent corporation. To impose a constructive trust in response to a breach of fiduciary duty to ensure for the plan beneficiaries some procedural protections that they in fact took advantage of in any case is an unjust response in all of the circumstances.

essentielle à l'activité commerciale et qui est particulièrement importante lorsqu'il s'agit de financer le sauvetage d'une entreprise insolvable. Imposer une fiducie par interprétation par suite du manquement à l'obligation fiduciaire de veiller à ce que les bénéficiaires des régimes de retraite jouissent de garanties procédurales, alors qu'ils en ont bénéficié dans les faits, se révèle inéquitable au vu de l'ensemble des circonstances.

[241] I conclude that a constructive trust is not an appropriate remedy in this case and that the Court of Appeal erred in principle by imposing it.

[241] Je conclus que la fiducie par interprétation ne constitue pas une réparation appropriée en l'espèce et que la Cour d'appel a tort, sur le plan des principes, de l'imposer.

C. *Third Issue: Did the Court of Appeal Err in Concluding That the Super Priority Granted in the CCAA Proceedings Did Not Have Priority by Virtue of the Doctrine of Federal Paramountcy?*

C. *Troisième question en litige : La Cour d'appel a-t-elle tort de conclure que la superpriorité accordée dans le cadre de la procédure fondée sur la LACC ne confère pas de préséance par application de la prépondérance fédérale?*

[242] Although I disagree with my colleague Justice Deschamps with respect to the scope of the s. 57(4) deemed trust, I agree that if there was a deemed trust in this case, it would be superseded by the DIP loan because of the operation of the doctrine of federal paramountcy: paras. 48-60.

[242] Bien que je ne sois pas d'accord avec ma collègue la juge Deschamps en ce qui concerne la portée de la fiducie réputée du par. 57(4), je conviens que si une fiducie est réputée exister en l'espèce, la créance DE prend rang avant elle en application de la doctrine de la prépondérance fédérale (par. 48-60).

D. *Fourth Issue: Did the Court of Appeal Err in its Cost Endorsement Respecting the USW?*

D. *Quatrième question en litige : La décision de la Cour d'appel sur les dépens du Syndicat est-elle entachée d'une erreur?*

(1) Introduction

(1) Introduction

[243] The disposition of costs in the Court of Appeal was somewhat complex. Although the costs appeal relates only to the costs of the USW, it is necessary in order to understand their position to set out the costs order below in full.

[243] L'adjudication des dépens en Cour d'appel s'est révélée assez complexe. Bien que le volet du présent pourvoi relatif aux dépens ne vise que ceux adjugés au Syndicat, il convient de revoir en détail l'ordonnance du tribunal inférieur sur les dépens afin de bien saisir les prétentions de cette partie.

[244] With respect to the costs of the appeal to the Court of Appeal, no order was made for or against the Monitor due to its prior agreement with the former executives and the USW. However, the court ordered that the former executives and the USW, as successful parties, were each entitled to

[244] Pour ce qui concerne les dépens en Cour d'appel, il n'y a pas d'adjudication favorable ou défavorable au contrôleur étant donné l'entente préalable conclue avec les anciens cadres et le Syndicat. La Cour d'appel ordonne toutefois que les anciens cadres et le Syndicat, qui ont gain de

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costs on a partial indemnity basis fixed at $40,000 inclusive of taxes and disbursements from Sun Indalex and the U.S. Trustee, payable jointly and severally: costs endorsement, 2011 ONCA 578, 81 C.B.R. (5th) 165, at para. 7.

[245] Morneau Shepell Ltd., the Superintendent, and the former executives reached an agreement with respect to legal fees and disbursements and the Court of Appeal approved that agreement. The former executives received full indemnity legal fees and disbursements in the amount of $269,913.78 to be paid from the executive plan attributable to each of the 14 former executives' accrued pension benefits, allocated among the 14 former executives in relation to their pension entitlement from the executive plan. In other words, the costs would not be borne by the other three members of the executive plan who did not participate in the proceedings: C.A. costs endorsement, at para. 2. The costs of the appeal payable by Sun Indalex and the U.S. Trustee were to be paid into the fund of the executive plan and allocated among the 14 former executives in relation to their pension entitlement from the executive plan.

[246] USW sought an order for payment of its costs from the fund of the salaried plan. However, the Court of Appeal declined to make such an order because the USW was in a "materially different position" than that of the former executives: costs endorsement, at para. 3. The latter were beneficiaries to the pension fund (14 of the 17 members of the plan), and they consented to the payment of costs from their individual benefit entitlements. Those who had not consented would not be affected by the payment. In contrast, the USW was the bargaining agent (not the beneficiary) for only 7 of the 169 beneficiaries of the salaried plan, none of whom was given notice of, or consented to, the payment of legal costs from the salaried plan. Moreover, the USW sought and seeks an order that its costs be paid out of the fund. This request is significantly different than the order made in favour of the former executives. The former executives explicitly ensured that their choice to pursue the litigation would not put at risk the pension benefits of those members who did not retain counsel even though of course those members would benefit in the

cause, se voient adjuger sur la base de l'indemnisation partielle des dépens de 40 000 $, frais et débours compris, payables solidairement par Sun Indalex et le syndic américain (décision relative aux dépens, 2011 ONCA 578, 81 C.B.R. (5th) 165, par. 7).

[245] Le surintendant, Morneau Shepell Ltd., et les anciens cadres ont conclu une entente en ce qui concerne les honoraires et les débours, et la Cour d'appel l'a approuvée. Les anciens cadres ont obtenu, sur la base d'une indemnisation complète, la somme de 269 913,78 $ pour les honoraires et les débours, payable par prélèvement sur la caisse de retraite des cadres correspondant aux prestations de retraite accumulées respectivement par les 14 anciens cadres, puis répartie entre ces derniers selon leurs droits respectifs à pension aux termes du régime. En d'autres termes, les dépens ne devaient pas être supportés par les trois membres du régime des cadres qui n'ont pas pris part à l'instance (décision de la C.A. relative aux dépens, par. 2). Les dépens de l'appel payables par Sun Indalex et le syndic américain devaient être versés à la caisse du régime des cadres puis répartis entre les 14 anciens cadres selon leurs droits à pension suivant leur régime.

[246] Le Syndicat a demandé le paiement de ses dépens à partir de la caisse du régime des salariés. La Cour d'appel a cependant rejeté la demande au motif que le Syndicat se trouvait dans une [TRADUCTION] « situation fondamentalement différente » de celle des anciens cadres (décision relative aux dépens, par. 3). Ces derniers étaient bénéficiaires de la caisse de retraite (14 des 17 participants au régime), ils avaient consenti au paiement des dépens à partir de leurs droits respectifs à des prestations et ceux qui n'avaient pas consenti à ce prélèvement n'étaient pas tenus à ce paiement. En revanche, le Syndicat était l'agent négociateur (et non le bénéficiaire) de seulement 7 des 169 participants du régime des salariés, dont aucun n'avait été avisé du paiement des frais de justice par prélèvement sur leur régime, ou y avait consenti. En outre, le Syndicat a demandé et demande toujours que ses dépens soient payés à partir de la caisse de retraite, ce qui diffère sensiblement de l'ordonnance rendue en faveur des anciens cadres. Ces derniers ont expressément fait en sorte que leur décision d'engager l'instance

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event the litigation was successful. The USW is not proposing to insulate the 162 members whom it does not represent from the risk of litigation; it seeks an order requiring all members to share the risk of the litigation even though it represents only 7 of the 169. The proposition advanced by the USW was thus materially different from that advanced on behalf of the executive plan and approved by the court.

ne compromette pas les prestations de retraite des participants qui n'avaient pas retenu les services d'un avocat, même s'ils auraient évidemment tiré avantage d'un dénouement favorable au régime des cadres. Le Syndicat n'entend pas mettre les 162 participants qu'il ne représente pas à l'abri du risque lié à la poursuite. Il demande que tous les participants partagent ce risque même s'ils ne représentent que 7 d'entre eux. La démarche du Syndicat était donc substantiellement différente de celle des anciens cadres et que la cour a approuvée.

(2) Standard of Review

[247] In *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, Rothstein J. held that "costs awards are quintessentially discretionary": para. 126. Discretionary costs decisions should only be set aside on appeal if the court below "has made an error in principle or if the costs award is plainly wrong": *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27.

(2) Norme de contrôle

[247] Dans *Nolan c. Kerry (Canada) Inc.*, 2009 CSC 39, [2009] 2 R.C.S. 678, le juge Rothstein statue que « l'adjudication des dépens est un exemple typique d'une décision discrétionnaire » (par. 126). L'attribution discrétionnaire de dépens ne doit donc être annulée en appel que si le tribunal inférieur « a commis une erreur de principe ou si cette attribution est nettement erronée » (*Hamilton c. Open Window Bakery Ltd.*, 2004 CSC 9, [2004] 1 R.C.S. 303, par. 27).

(3) Analysis

[248] I do not see any basis to interfere with the Court of Appeal's costs endorsement in this case. In my view, the USW's submissions are largely based on an inaccurate reading of the Court of Appeal's costs endorsement. Contrary to what the USW submits, the Court of Appeal did *not* require the consent of plan beneficiaries as a prerequisite to ordering payment of costs from the fund. Nor is it correct to suggest that the costs endorsement would "restrict recovery of beneficiary costs to instances when there is a surplus in the pension trust fund" or "preclude financing of beneficiary action when a fund is in deficit": USW factum, at paras. 71 and 76. Nor would I read the Court of Appeal's brief costs endorsement as laying down a rule that a union representing pension beneficiaries cannot recover costs from the fund because the union itself is not a beneficiary.

(3) Analyse

[248] Je ne vois en l'espèce aucune raison de revenir sur la décision de la Cour d'appel quant aux dépens. À mon avis, les prétentions du Syndicat reposent en grande partie sur une interprétation erronée de la décision de la Cour d'appel à cet égard. Contrairement à ce que fait valoir le Syndicat, la Cour d'appel *ne* tient *pas* le consentement des bénéficiaires du régime pour une condition préalable au paiement des dépens à partir de la caisse de retraite. Il est aussi erroné de laisser entendre que la décision relative aux dépens fait en sorte que [TRADUCTION] « les bénéficiaires ne peuvent être indemnisés des dépens que lorsqu'il existe un surplus dans la caisse de retraite en fiducie » ou qu'ils ne peuvent « financer l'exercice d'un recours lorsque la caisse est déficitaire » (mémoire du Syndicat, par. 71 et 76). Je ne considère pas non plus que, dans sa brève décision, la Cour d'appel établit la règle qu'un syndicat représentant les bénéficiaires d'une caisse de retraite ne peut être indemnisé de ses dépens par la caisse de retraite parce qu'il n'est pas lui-même bénéficiaire.

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[249] The premise of the USW's appeal appears to be that it was entitled to costs because it met what it refers to in its submissions as the Costs Payment Test and that if the executive plan members got their costs out of their pension fund, the union should get its costs out of the salaried employees' pension fund. Respectfully, I do not accept the validity of either premise.

[250] The decision whether to award costs from the pension fund remains a discretionary matter. In *Nolan*, Rothstein J. surveyed the various factors that courts have taken into account when deciding whether to award a litigant its costs out of a pension trust. The first broad inquiry considered in *Nolan* was into whether the litigation concerned the due administration of the trust. In connection with this inquiry, courts have considered the following factors: (1) whether the litigation was primarily about the construction of the plan documents; (2) whether it clarified a problematic area of the law; (3) whether it was the only means of clarifying the parties' rights; (4) whether the claim alleged maladministration; and (5) whether the litigation had no effect on other beneficiaries of the trust fund: *Nolan*, at para. 126.

[251] The second broad inquiry discussed in *Nolan* was whether the litigation was ultimately adversarial: para. 127. The following factors have been considered: (1) whether the litigation included allegations by an unsuccessful party of a breach of fiduciary duty; (2) whether the litigation only benefited a class of members and would impose costs on other members if successful; and (3) whether the litigation had any merit.

[252] I do not think that it is correct to elevate these two inquiries (which constitute the Costs Payment Test articulated by the USW) to a test for entitlement to costs in the pension context. The factors set out in *Nolan* and other cases cited therein are best understood as highly relevant

[249] La thèse du Syndicat paraît avoir pour prémisses le droit qu'il aurait au paiement des dépens parce qu'il satisfait au critère qu'il formule à cet égard dans son mémoire et, puisque les participants du régime des cadres ont obtenu le paiement de leurs dépens à partir de leur caisse de retraite, le droit du Syndicat au paiement de ses dépens par prélèvement sur la caisse de retraite des salariés. J'estime néanmoins que ces prémisses ne sont pas valables.

[250] La décision d'ordonner le paiement de dépens à partir d'une caisse de retraite demeure discrétionnaire. Dans *Nolan*, le juge Rothstein considère les différentes questions que se posent les tribunaux pour décider d'adjuger ou non à une partie des dépens qui seront payés par prélèvement sur une fiducie de retraite. Dans *Nolan*, la première considération générale était celle de savoir si l'objet du litige est la bonne administration de la fiducie. Pour se prononcer, les tribunaux se sont posé les questions suivantes : (1) le litige concerne-t-il essentiellement l'interprétation des documents constitutifs du régime; (2) vise-t-il à clarifier un aspect problématique du droit applicable; (3) constitue-t-il le seul moyen de préciser les droits des parties; (4) la mauvaise administration est-elle alléguée; (5) y a-t-il absence d'incidence sur les autres bénéficiaires de la fiducie? (*Nolan*, par. 126).

[251] La deuxième considération générale examinée au par. 127 de l'arrêt *Nolan* est celle de savoir si le litige a été de nature contradictoire, ce qui soulève les questions suivantes : (1) la partie déboutée alléguait-elle le manquement à l'obligation fiduciaire; (2) le litige ne servait-il que les intérêts d'une catégorie de participants, et si les demandeurs avaient eu gain de cause, des dépens auraient-ils été imposés à d'autres participants; (3) le litige avait-il quelque fondement?

[252] Je ne crois pas qu'il convienne de faire des deux considérations retenues dans *Nolan* (lesquelles constituent le critère applicable au paiement des dépens que formule le Syndicat) le critère qui permet de déterminer le droit à l'adjudication des dépens dans le contexte des régimes de retraite.

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considerations guiding the exercise of judicial discretion with respect to costs.

Il est préférable de voir dans les facteurs énoncés dans *Nolan* — et dans la jurisprudence qui y est citée — des considérations de grande importance qui orientent les tribunaux dans l'exercice de leur pouvoir discrétionnaire en matière de dépens.

[253] The litigation undertaken here raised novel points of law with all of the uncertainty and risk inherent in such an undertaking. The Court of Appeal in essence decided that the USW, representing only 7 of 169 members of the plan, should not without consultation be able to in effect impose the risks of that litigation on all of the plan members, the vast majority of whom were not union members. Whatever arguments might be raised against the Court of Appeal's decision in light of the success of the litigation and the sharing by all plan members of the benefits, the failure of the litigation seems to me to leave no basis to impose the cost consequences of taking that risk on all of the plan members of an already underfunded plan.

[253] Comme l'instance engagée en l'espèce portait sur des points de droit nouveaux, son issue était incertaine et les demandeurs couraient le risque d'être déboutés. La Cour d'appel opine essentiellement que le Syndicat, qui représentait seulement 7 des 169 participants du régime, ne devait pas être en mesure, dans les faits, d'imposer à tous les participants du régime, dont la plupart n'étaient pas membres du Syndicat, les risques inhérents au litige sans les consulter. Quels que puissent être les arguments invoqués à l'encontre de la décision de la Cour d'appel à la lumière de l'issue favorable du recours et du partage par tous les participants du régime des gains obtenus, l'échec du recours ne saurait justifier que tous les participants d'un régime déjà sous-capitalisé subissent les conséquences pécuniaires du risque couru.

[254] The second premise of the USW appeal appears to be that if the executive plan members have their costs paid out of the fund, so too should the salaried plan members. Respectfully, however, this is not an accurate statement of the order made with respect to the executive plan.

[254] Suivant la seconde prémisse de la prétention du Syndicat, si les participants du régime des cadres obtiennent paiement de leurs dépens à partir de leur caisse de retraite, les participants du régime des salariés devraient l'obtenir également. Or, telle n'est pas la teneur exacte de l'ordonnance de la Cour d'appel relative au régime des cadres.

[255] The Court of Appeal's order with respect to the executive plan meant that only the pension fund attributable to those members of the plan who actually supported the litigation — the vast majority I would add — would contribute to the costs of the litigation even though all members of the plan would benefit in the case of success. As the Court of Appeal noted:

> The individual represented Retirees, who comprise 14 of 17 members of the Executive Plan, have consented to the payment of costs from their individual benefit entitlements. Those who have not consented will not be affected by the payment. [Costs endorsement, at para. 3]

[255] Suivant cette ordonnance, seule la partie de la caisse de retraite attribuable aux participants qui ont pris part au recours — la grande majorité d'entre eux, faut-il le préciser — contribue au paiement des dépens même si tous les participants du régime tirent avantage du dénouement favorable. La Cour d'appel signale d'ailleurs ce qui suit :

> [TRADUCTION] Les retraités représentés par avocat, soit 14 des 17 participants du régime des cadres, ont consenti au paiement des dépens à partir de leurs droits respectifs à des prestations, et ceux qui n'ont pas consenti à ce prélèvement ne seront pas tenus au paiement. [Décision relative aux dépens, par. 3]

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[256] The Court of Appeal therefore approved an agreement as to costs which did not put at further risk the pension funds available to satisfy the pension entitlements of those who did not support the litigation. Thus, the Court of Appeal did not apply what the USW refers to as the Costs Payment Test to the executive plan because the costs order was the product of agreement and did not order payment of costs out of the fund as a whole.

[256] La Cour d'appel approuve donc un accord sur les dépens qui n'expose pas à un risque supplémentaire les fonds constituant les caisses de retraite et devant permettre le versement des prestations auxquelles ont droit ceux qui n'appuient pas l'exercice du recours. Par conséquent, elle n'applique pas au régime des cadres le critère qui, selon le Syndicat, vaudrait pour le paiement des dépens, car l'ordonnance relative aux dépens découle d'un accord et elle ne prévoit pas le paiement des dépens par prélèvement sur la caisse de retraite dans sa globalité.

[257] In the case of the USW request, there was no such agreement and no such limitation of risk to the supporters of the litigation.

[257] S'agissant de la demande du Syndicat, nul accord n'est intervenu au même effet, et ce n'était pas seulement les participants derrière le recours qui s'exposaient au risque lié à l'issue de celui-ci.

[258] I see no error in principle in the Court of Appeal's refusal to order the USW costs to be paid out of the pension fund, particularly in light of the disposition of the appeal to this Court. I would dismiss the USW costs appeal but without costs.

[258] Je ne vois aucune erreur de principe dans le refus de la Cour d'appel d'ordonner que les dépens du Syndicat soient payés à partir de la caisse de retraite, étant donné surtout l'issue du pourvoi devant notre Cour. Je suis d'avis de rejeter sans frais le pourvoi du Syndicat relatif aux dépens.

IV. Disposition

IV. Dispositif

[259] I would allow the Sun Indalex, FTI Consulting and George L. Miller appeals and, except as noted below, I would set aside the orders of the Ontario Court of Appeal and restore the February 18, 2010 orders of Campbell J.

[259] Je suis d'avis d'accueillir les pourvois de Sun Indalex, de FTI Consulting et de George L. Miller, d'annuler les ordonnances de la Cour d'appel de l'Ontario et de rétablir celles rendues par le juge Campbell le 18 février 2010, sauf dans la mesure précisée ci-après.

[260] With respect to costs, I would set aside the Court of Appeal's orders with respect to the costs of the appeals before that court and order that all parties bear their own costs in the Court of Appeal and in this Court.

[260] En ce qui concerne les dépens, je suis d'avis d'annuler les ordonnances de la Cour d'appel sur les dépens afférents aux appels interjetés devant elle et d'ordonner que chacune des parties paie ses propres dépens devant la Cour d'appel et devant notre Cour.

[261] I would not disturb paras. 9 and 10 of the order of the Court of Appeal in the former executives' appeal so that the full indemnity legal fees and disbursements of the former executives in the amount of $269,913.78 shall be paid from the fund of the executive plan attributable to each of the 14 former executives' accrued pension benefits, and

[261] Je suis d'avis de ne pas modifier les par. 9 et 10 de l'ordonnance de la Cour d'appel rendue concernant l'appel des anciens cadres, de sorte que les débours et honoraires de ces derniers, établis sur la base de l'indemnisation complète, qui totalisent 269 913,78 $, soient payés par prélèvement sur la partie de la caisse de retraite du régime des cadres

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specifically such amounts shall be allocated among the 14 former executives in relation to their pension entitlement from the executive plan and will not be borne by the other three members of the executive plan.

correspondant aux prestations de retraite accumulées respectivement par les 14 anciens cadres; plus particulièrement, les dépens seront répartis entre les 14 anciens cadres en fonction de leurs droits respectifs à pension aux termes du régime et ne seront pas supportés par les trois autres participants.

[262] I would dismiss the USW costs appeal, but without costs.

[262] Je suis d'avis de rejeter sans frais le pourvoi interjeté par le Syndicat relativement aux dépens.

The reasons of LeBel and Abella JJ. were delivered by

Version française des motifs des juges LeBel et Abella rendus par

LEBEL J. (dissenting) —

LE JUGE LEBEL (dissident) —

I. Introduction

I. Introduction

[263] The members of two pension plans set up by Indalex Limited ("Indalex") stand to lose half or more of their pension benefits as a consequence of the insolvency of their employer and of the arrangement approved by the Ontario Superior Court of Justice under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The Court of Appeal for Ontario found that the members were entitled to a remedy. For different and partly conflicting reasons, my colleagues Justices Deschamps and Cromwell would hold that no remedy is available to them. With all due respect for their opinions, I would conclude, like the Court of Appeal, that the remedy of a constructive trust is open to them and should be imposed in the circumstances of this case, for the following reasons.

[263] Les participants à deux régimes de retraite établis par Indalex Limited (« Indalex ») risquent de perdre au moins la moitié de leurs prestations de retraite du fait de l'insolvabilité de leur employeur et de l'arrangement homologué par la Cour supérieure de justice de l'Ontario en application de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). La Cour d'appel de l'Ontario a jugé que ces participants avaient droit à une réparation. Mes collègues, les juges Deschamps et Cromwell, arrivent à la conclusion contraire, pour des motifs différents et en partie contradictoires. Avec égard pour leur opinion, et à l'instar de la Cour d'appel, je suis d'avis que la fiducie par interprétation peut s'appliquer en l'espèce et devrait être imposée, pour les motifs qui suivent.

[264] I do not intend to summarize the facts of this case, which were outlined by my colleagues. I will address these facts as needed in the course of my reasons. Before moving to my areas of disagreement with my colleagues, I will briefly indicate where and to what extent I agree with them on the relevant legal issues.

[264] Je ne résumerai pas les faits de l'affaire, mes collègues les ayant déjà exposés. Je m'y reporterai au besoin dans mes motifs. Cependant, avant d'expliquer mes divergences d'opinions avec mes collègues, j'indiquerai brièvement les questions de droit sur lesquelles je souscris, en totalité ou en partie, à leurs motifs.

[265] Like my colleagues, I conclude that no deemed trust could arise under s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), in the case of the Executive Plan because this plan had not been wound up when the *CCAA*

[265] À l'instar de mes collègues, je conclus que le régime des cadres ne pouvait être protégé par aucune fiducie réputée résultant de l'application du par. 57(4) de la *Loi sur les régimes de retraite*, L.R.O. 1990, ch. P.8 (« *LRR* »), puisque ce régime

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proceedings were initiated. In the case of the Salaried Employees Plan, I agree with Deschamps J. that a deemed trust arises in respect of the wind-up deficiency. But, like her, I accept that the debtor-in-possession ("DIP") super priority prevails by reason of the application of the federal paramountcy doctrine. I also agree that the costs appeal of the United Steelworkers should be dismissed.

n'avait pas été liquidé lorsque la procédure fondée sur la *LACC* a été enclenchée. Comme la juge Deschamps, je conclus à l'existence d'une fiducie réputée dans le cas du déficit de liquidation du régime des salariés. Je reconnais toutefois aussi que la priorité de la créance des prêteurs au débiteur-exploitant (« DE ») sur toutes les autres l'emporte, par application du principe de la prépondérance fédérale. Je conviens également qu'il faut rejeter l'appel interjeté par le Syndicat des Métallos sur la question des dépens.

[266] But, with respect for the opinions of my colleagues, I take a different view of the nature and extent of the fiduciary duties of an employer who elects to act as administrator of a pension plan governed by the *PBA*. This dual status does not entitle the employer to greater leniency in the determination and exercise of its fiduciary duties or excuse wrongful actions. On the contrary, as we shall see below, I conclude that Indalex not only neglected its obligations towards the beneficiaries, but actually took a course of action that was actively inimical to their interests. The seriousness of these breaches amply justified the decision of the Court of Appeal to impose a constructive trust. To that extent, I propose to uphold the opinion of Gillese J.A. and the judgment of the Court of Appeal (2011 ONCA 265, 104 O.R. (3d) 641).

[266] Toutefois, malgré le respect que je porte à mes collègues, je conçois différemment d'eux la nature et la portée des obligations fiduciaires de l'employeur qui choisit d'administrer un régime de retraite régi par la *LRR*. Sa double fonction n'autorise pas l'employeur à faire preuve de laxisme dans la définition et l'exercice de ses obligations fiduciaires, ni ne justifie ses actes répréhensibles. Au contraire, comme je l'expliquerai, j'estime qu'Indalex a non seulement manqué à ses obligations envers les bénéficiaires, mais adopté en fait une démarche qui allait à l'encontre de leurs intérêts. La gravité de ces manquements justifiait amplement la décision de la Cour d'appel d'imposer une fiducie par interprétation. Dans cette mesure, je suis d'avis de confirmer les motifs de la juge Gillese et le jugement de la Cour d'appel (2011 ONCA 265, 104 O.R. (3d) 641).

II. The Employer as Administrator of a Pension Plan: Its Fiduciary Duties

II. Les obligations fiduciaires de l'employeur en sa qualité d'administrateur d'un régime de retraite

[267] Before entering into an analysis of the obligations of an employer as administrator of a pension plan under the *PBA*, it is necessary to consider the position of the beneficiaries. Who are they? At what stage are they in their lives? What are their vulnerabilities? A fiduciary relationship is a relationship, grounded in fact and law, between a vulnerable beneficiary and a fiduciary who holds and may exercise power over the beneficiary in situations recognized by law. Any analysis of such a relationship requires careful consideration of the characteristics of the beneficiary. It ought not stop at the level of a theoretical and detached approach that fails to address how, very concretely,

[267] Avant d'analyser les obligations de l'employeur à titre d'administrateur d'un régime de retraite visé par la *LRR*, il faut examiner la situation des bénéficiaires. Qui sont-ils? À quelle période de leur vie en sont-ils? En quoi consistent leurs points vulnérables? Une relation fiduciaire s'entend de la relation factuelle et juridique entre un bénéficiaire vulnérable et un fiduciaire qui détient et peut exercer un pouvoir sur le bénéficiaire dans les situations prévues par la loi. L'analyse d'une telle relation nécessite un examen attentif des caractéristiques du bénéficiaire. Il ne faut pas s'en tenir à une perspective théorique et détachée, en négligeant de voir, très concrètement, comment la

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this relationship works or can be twisted, perverted or abused, as was the situation in this case.

relation fonctionne et comment il est possible de la fausser, de la faire dévier ou d'en abuser, comme ce fut le cas en l'espèce.

[268] The beneficiaries were in a very vulnerable position relative to Indalex. They did not enjoy the protection that the existence of an independent administrator might have given them. They had no say and no input in the management of the plans. The information about the plans and their situation came from Indalex in its dual role as employer and manager of the plans. Their particular vulnerability arose from their relationship with Indalex, acting both as their employer and as the administrator of their retirement plans. Their vulnerability was substantially a consequence of that specific relationship (*Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 68, *per* Cromwell J.). The nature of this relationship had very practical consequences on their interests. For example, as Gillese J.A. noted in her reasons (at para. 40) the consequences of the decisions made in the course of management of the plan and during the *CCAA* proceedings signify that the members of the Executive Plan stand to lose one-half to two-thirds of their retirement benefits, unless additional money is somehow paid into the plan. These losses of benefits are, in all probability, permanent in the case of the beneficiaries who have already retired or who are close to retirement. They deeply affect their lives and expectations. For most of them, what is lost is lost for good. No arrangement will allow them to get a start on a new life. We should not view the situation of the beneficiaries as regrettable but unavoidable collateral damage arising out of the ebbs and tides of the economy. In my view, the law should give the members some protection, as the Court of Appeal intended when it imposed a constructive trust.

[268] Les bénéficiaires se trouvaient dans une position de grande vulnérabilité par rapport à Indalex. Ils ne jouissaient pas de la protection que l'existence d'un administrateur indépendant aurait pu leur assurer. Ils n'avaient pas la possibilité de donner leur avis ni de participer aux décisions à l'égard de la gestion des régimes. Toute l'information sur les régimes et sur leur situation leur provenait d'Indalex, à titre à la fois d'employeur et d'administrateur. Leur vulnérabilité particulière découlait essentiellement de leur relation avec Indalex, qui assumait cette double fonction (*Galambos c. Perez*, 2009 CSC 48, [2009] 3 R.C.S. 247, par. 68, le juge Cromwell). La nature de cette relation a entraîné des conséquences très concrètes sur leurs intérêts. Par exemple, comme le signale la juge Gillese dans ses motifs (par. 40), les décisions prises au fil de la gestion du régime des cadres et pendant la procédure fondée sur la *LACC* risquent de faire perdre aux participants entre la moitié et les deux tiers de leurs prestations, à moins d'une injection de fonds. Dans le cas des bénéficiaires retraités ou en fin de carrière, il s'agit probablement de pertes permanentes. Leur vie et leurs attentes s'en trouvent profondément affectées. Pour la plupart d'entre eux, ces pertes sont irrémédiables; aucun arrangement ne leur permettra d'entamer une nouvelle étape de leur vie. Nous ne devons pas considérer la situation des bénéficiaires comme une conséquence indirecte regrettable, mais inévitable, des fluctuations de l'économie. À mon avis, la loi devrait offrir une certaine protection aux bénéficiaires, et c'est ce que la Cour d'appel a tenté de faire en imposant la fiducie par interprétation.

[269] Indalex was in a conflict of interest from the moment it started to contemplate putting itself under the protection of the *CCAA* and proposing an arrangement to its creditors. From the corporate perspective, one could hardly find fault with such a decision. It was a business decision. But the trouble is that at the same time, Indalex was a

[269] Indalex se trouvait en situation de conflit d'intérêts dès qu'elle a envisagé de demander la protection de la *LACC* et de proposer un arrangement à ses créanciers. Du point de vue de l'entreprise, on ne pourrait guère trouver à redire à cette décision. Il s'agissait d'une décision d'affaires. Cependant, Indalex jouait en même temps le rôle de fiduciaire à

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fiduciary in relation to the members and retirees of its pension plans. The "two hats" analogy offers no defence to Indalex. It could not switch off the fiduciary relationship at will when it conflicted with its business obligations or decisions. Throughout the arrangement process and until it was replaced by an independent administrator (Morneau Shepell Ltd.) it remained a fiduciary.

l'égard des participants aux régimes et des retraités, et c'est là où le bât blesse. L'analogie avec les « deux chapeaux » ne constitue pas un moyen de défense pour Indalex. Elle ne pouvait pas mettre la relation fiduciaire de côté à sa guise lorsque cette relation entrait en conflit avec ses obligations ou ses décisions d'affaires. Tout au long de la procédure intentée sous le régime de la *LACC* et jusqu'à la nomination d'un administrateur indépendant (Morneau Shepell Ltd.) qui s'est substitué à elle, elle demeurait une fiduciaire.

[270] It is true that the *PBA* allows an employer to act as an administrator of a pension plan in Ontario. In such cases, the legislature accepts that conflicts of interest may arise. But, in my opinion, nothing in the *PBA* allows that the employer *qua* administrator will be held to a lower standard or will be subject to duties and obligations that are less stringent than those of an independent administrator. The employer remains a fiduciary under the statute and at common law (*PBA*, s. 22(4)). The employer is under no obligation to assume the burdens of administering the pension plans that it has agreed to set up or that are the legacy of previous decisions. However, if it decides to do so, a fiduciary relationship is created with the expectation that the employer will be able to avoid or resolve the conflicts of interest that might arise. If this proves to be impossible, the employer is still "seized" with fiduciary duties, and cannot ignore them out of hand.

[270] Certes, la *LRR* autorise un employeur à agir à titre d'administrateur d'un régime de retraite en Ontario. Le législateur admet dans ces cas la possibilité d'un conflit d'intérêts. Néanmoins, à mon avis, rien dans la *LRR* ne permet de conclure que l'employeur, en sa qualité d'administrateur, serait assujetti à une norme moindre ou assumerait des fonctions et des obligations moins strictes qu'un administrateur indépendant. Il demeure un fiduciaire aux termes de la loi et en common law (*LRR*, par. 22(4)). L'employeur n'est pas tenu d'assumer le fardeau de l'administration des régimes de retraite qu'il a convenu d'établir ou qui sont le fruit de décisions antérieures. Par contre, s'il choisit de l'assumer, une relation fiduciaire prend naissance et l'on s'attend à ce que l'employeur soit capable d'éviter ou de régler les conflits d'intérêts susceptibles d'intervenir. Lorsque cela se révèle impossible, l'employeur demeure soumis à ses obligations fiduciaires et ne peut s'en débarrasser sommairement.

[271] Once Indalex had considered the *CCAA* process and decided to proceed in that manner, it should have been obvious that such a move would trigger conflicts of interest with the beneficiaries of the pension plans and that these conflicts would become untenable, as per the terms of s. 22(4) of the *PBA*. Given the nature of its obligations as administrator and fiduciary, it was impossible to wear the "two hats". Indalex had to discharge its corporate duties, but at the same time it had to address its fiduciary obligations to the members and beneficiaries of the plans. I do not fault it for applying under the *CCAA*, but rather for not relinquishing its position as administrator of the plans at the time of the application. It even retained

[271] Dès qu'Indalex a envisagé la possibilité d'engager une procédure fondée sur la *LACC* et a opté pour cette solution, il aurait dû lui paraître évident que sa décision engendrerait des conflits avec les intérêts des bénéficiaires des régimes de retraite, en contravention au par. 22(4) de la *LRR*, et que la situation deviendrait insoutenable. Compte tenu de la nature des obligations qui lui incombaient à titre d'administrateur et de fiduciaire, Indalex ne pouvait plus coiffer « deux chapeaux ». Indalex avait le devoir de protéger les intérêts de la société, mais elle devait aussi s'acquitter de ses obligations fiduciaires envers les participants et bénéficiaires des régimes. Je ne lui reproche pas d'avoir présenté une demande sous le régime de la

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this position once it engaged in the arrangement process. Other conflicts and breaches of fiduciary duties and of fundamental rules of procedural equity in the Superior Court flowed from this first decision. Moreover, Indalex maintained a strongly adversarial attitude towards the interest of the beneficiaries throughout the arrangement process, while it was still, at least in form, the administrator of the plans.

LACC, mais plutôt de ne pas avoir alors renoncé à administrer les régimes. Elle a même continué à les administrer pendant la procédure en vue de conclure un arrangement. D'autres conflits d'intérêts et manquements à ses obligations fiduciaires ainsi qu'aux règles fondamentales d'équité procédurale devant la Cour supérieure ont découlé de cette décision initiale. Qui plus est, Indalex a conservé tout au long de cette procédure une attitude fortement contraire aux intérêts des bénéficiaires, malgré le fait qu'elle administrait toujours les régimes, à tout le moins théoriquement.

[272] The option given to employers to act as administrators of pension plans under the *PBA* does not constitute a licence to breach the fiduciary duties that flow from this function. It should not be viewed as an invitation for the courts to whitewash the consequences of such breaches. The option is predicated on the ability of the employer-administrator to avoid the conflicts of interests that cause these breaches. An employer deciding to assume the position of administrator cannot claim to be in the same situation as the Crown when it discharges fiduciary obligations towards certain groups in society under the Constitution or the law. For those cases, the Crown assumes those duties because it is obligated to do so by virtue of its role, not because it chooses to do so. In such circumstances, the Crown must often balance conflicting interests and obligations to the broader society in the discharge of those fiduciary duties (*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at paras. 37-38). If Indalex found itself in a situation where it had to balance conflicting interests and obligations, as it essentially argues, it could not retain the position of administrator that it had willingly assumed. The solution was not to place its function as administrator and its associated fiduciary duties in abeyance. Rather, it had to abandon this role and diligently transfer its function as manager to an independent administrator.

[272] Si la *LRR* offre à l'employeur le choix d'agir à titre d'administrateur d'un régime de retraite, elle ne l'autorise pas à manquer aux obligations fiduciaires qui découlent de cette fonction et il ne faudrait pas conclure qu'elle invite les tribunaux à escamoter les conséquences de tels manquements. Cette faculté de choisir présuppose la capacité de l'employeur-administrateur d'éviter les conflits d'intérêts qui entraînent de tels manquements. L'employeur qui choisit d'agir à titre d'administrateur ne saurait prétendre se trouver dans la même situation que l'État qui s'acquitte des obligations fiduciaires que lui impose la Constitution ou la loi à l'égard de certains groupes de la société. Ces obligations incombent à l'État, non pas par choix, mais en raison de son rôle. Dans ces circonstances, l'État est souvent appelé à concilier des intérêts opposés avec ses obligations envers la société en général (*Alberta c. Elder Advocates of Alberta Society*, 2011 CSC 24, [2011] 2 R.C.S. 261, par. 37-38) en s'acquittant de ses obligations fiduciaires. Si Indalex devait concilier des intérêts et des obligations contradictoires, comme elle le prétend, elle ne pouvait pas conserver la fonction d'administrateur qu'elle avait assumée de son plein gré. La solution consistait non pas à mettre en veilleuse sa fonction d'administrateur avec les obligations fiduciaires en découlant, mais à y renoncer et à la transférer avec diligence à un administrateur indépendant.

[273] Indalex could apply for protection under the *CCAA*. But, in so doing, it needed to make arrangements to avoid conflicts of interests. As nothing was done, the members of the plans were

[273] Il était loisible à Indalex de demander la protection de la *LACC*. Toutefois, il lui fallait dans ce cas prendre des mesures pour éviter les conflits d'intérêts. Son inaction a forcé les

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left to play catch up as best they could when the process that put in place the DIP financing and its super priority was initiated. The process had been launched in such a way that it took significant time before the beneficiaries could effectively participate in the process. In practice, the United Steelworkers union, which represented only a small group of the members of the Salaried Employees Plan, acted for them after the start of the procedures. The members of the Executive Plan hired counsel who appeared for them. But, throughout, there were problems with notices, delays and the ability to participate in the process. Indeed, during the *CCAA* proceedings, the Monitor and Indalex seemed to have been more concerned about keeping the members of the plans out of the process rather than ensuring that their voices could be heard. Two paragraphs of the submissions to this Court by Morneau Shepell Ltd., the subsequently appointed administrator of the plan, aptly sums up the behaviour of Indalex and the Monitor towards the beneficiaries, whose representations were always deemed to be either premature or late:

> When counsel for the Retirees again appeared at a motion to approve the bidding procedure, his objections were considered premature:
>
> > In my view, the issues raised by the retirees do not have any impact on the Bidding Procedures. The issues can be raised by the retirees on any application to approve a transaction — but that is for another day.
>
> Only when counsel appeared at the sale approval motion, as directed by the motions judge, were the concerns of the pension plan beneficiaries heard. At that time, the Appellants complain, the beneficiaries were too late and their motion constituted a collateral attack on the original DIP Order. However, it cannot be the case that stakeholder groups are too early, until they are too late. [R.F., at paras. 54-55]

[274] I must also mention the failed attempt to assign Indalex in bankruptcy once the sale of its

participants aux régimes à se débrouiller de leur mieux pour rattraper le train en marche une fois que le processus de financement DE assorti d'une priorité sur toutes les autres créances avait été mis en branle. Compte tenu de la manière dont ce processus a été engagé, un délai considérable s'est écoulé avant que les bénéficiaires puissent y participer réellement. Dans les faits, le Syndicat des Métallos, qui ne représentait qu'un petit nombre de bénéficiaires du régime des salariés, a agi en leur nom après le début du processus. Pour leur part, les participants au régime des cadres ont retenu les services d'un avocat. Cependant, du début à la fin, ils se sont heurtés à des difficultés concernant les avis, les délais et leur capacité de participer au processus. En effet, tout au long de la procédure intentée sous le régime de la *LACC*, le contrôleur et Indalex semblent s'être souciés davantage d'écarter les participants aux régimes que de veiller à ce qu'ils puissent être entendus. Le passage suivant des arguments présentés devant notre Cour par Morneau Shepell Ltd., l'administrateur ultérieur du régime, résume bien la conduite d'Indalex et du contrôleur à l'égard des bénéficiaires, dont les observations ne semblaient jamais tomber à point :

> [TRADUCTION] Lorsque l'avocat représentant les retraités a comparu à nouveau à l'audience sur la motion en approbation du processus de vente par soumission, ses objections ont été considérées comme prématurées :
>
> > À mon avis, les questions soulevées par les retraités n'ont aucune incidence sur le processus de vente par soumission. Les retraités pourront soulever ces questions lorsqu'une motion en homologation d'une opération sera présentée — ce qui n'est pas le cas maintenant.
>
> Ce n'est que lorsque l'avocat a comparu relativement à la motion en homologation de la vente, conformément aux directives du juge des requêtes, que les préoccupations des bénéficiaires du régime de retraite ont finalement été entendues. À ce moment-là, selon les appelants, l'intervention des bénéficiaires arrivait trop tard et constituait une contestation indirecte de l'ordonnance DE initiale. Or, il ne peut pas être toujours soit trop tôt soit trop tard pour les groupes intéressés. [m.i., par. 54-55]

[274] Je ne saurais passer sous silence la tentative ratée d'Indalex de faire cession de ses biens

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business had been approved. One of the purposes of this action was essentially to harm the interests of the members of the plans. At the time, Indalex was still wearing its two hats, at least from a legal perspective. But its duties as a fiduciary were clearly not at the forefront of its concerns. There were constant conflicts of interest throughout the process. Indalex did not attempt to resolve them; it brushed them aside. In so acting, it breached its duties as a fiduciary and its statutory obligations under s. 22(4) *PBA*.

en faillite après l'homologation de la vente de l'entreprise. Cette manoeuvre visait entre autres à nuire aux intérêts des participants aux régimes. À l'époque, Indalex cumulait toujours ses deux fonctions, du moins sur le plan juridique. Cependant, ses obligations fiduciaires ne se trouvaient de toute évidence pas au centre de ses préoccupations. Les conflits d'intérêts se sont multipliés au cours de la procédure. Au lieu d'essayer de les régler, Indalex les a balayés du revers de la main. Elle a ainsi manqué à ses obligations fiduciaires et aux prescriptions du par. 22(4) de la *LRR*.

III. Procedural Fairness in *CCAA* Proceedings

III. L'équité procédurale dans une procédure intentée sous le régime de la *LACC*

[275] The manner in which this matter was conducted in the Superior Court was, at least partially, the result of Indalex disregarding its fiduciary duties. The procedural issues that arose in that court did not assist in mitigating the consequences of these breaches. It is true that, in the end, the beneficiaries obtained, or were given, some information pertaining to the proceedings and that counsel appeared on their behalf at various stages of the proceedings. However, the basic problem is that the proceedings were not conducted according to the spirit and principles of the Canadian system of civil justice.

[275] La manière dont l'instance s'est déroulée devant la Cour supérieure résultait, du moins en partie, du non-respect par Indalex de ses obligations fiduciaires. Les points de procédure soulevés devant la cour n'ont pas permis d'atténuer les conséquences de ces manquements. Certes, les bénéficiaires ont finalement obtenu ou reçu certains renseignements concernant la procédure et ils ont pu être représentés par un avocat à diverses étapes, mais l'esprit et les principes du système canadien de justice civile n'ont pas été respectés, et c'est là le problème fondamental.

[276] I accept that those procedures are often urgent. The situation of a debtor requires quick and efficient action. The turtle-like pace of some civil litigation would not meet the needs of the application of the *CCAA*. However, the conduct of proceedings under this statute is not solely an administrative process. It is also a judicial process conducted according to the tenets of the adversarial system. The fundamentals of such a system must not be ignored. All interested parties are entitled to a fair procedure that allows their voices to be raised and heard. It is not an answer to these concerns to say that nothing else could be done, that no other solution would have been better, that, in substance, hearing the members would have been a waste of time. In all branches of procedure whether in administrative law, criminal law or civil action, the rights to be informed and to be heard in some

[276] Je reconnais que, souvent, le temps presse dans ce genre de procédure. La situation d'un débiteur nécessite la prise de mesures rapides et efficaces. Un litige qui s'éternise, comme certaines actions civiles, ne saurait convenir pour l'application de la *LACC*. Toutefois, la procédure prévue par cette loi n'est pas de nature purement administrative. Il s'agit également d'un processus judiciaire, assujetti à ce titre aux principes du système contradictoire. Les règles fondamentales de ce système ne sauraient être bafouées. Toutes les parties intéressées ont droit à une procédure équitable qui leur permet d'exprimer leur point de vue et d'être entendues. Il ne suffit pas à cet égard de répondre que rien d'autre ne pouvait être tenté, qu'il n'existait pas de solution meilleure ou, essentiellement, qu'entendre les participants aurait constitué une perte de temps. Dans toute procédure,

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way remain fundamental principles of justice. Those principles retain their place in the *CCAA*, as some authors and judges have emphasized (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 55-56; *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. C.J. (Gen. Div.)), at para. 5, *per* Farley J.). This was not done in this case, as my colleagues admit, while they downplay the consequences of these procedural flaws and breaches.

que ce soit en droit administratif, pénal ou civil, le droit d'être informé et celui d'être entendu d'une manière ou d'une autre demeurent des principes fondamentaux de la justice. Ils demeurent applicables sous le régime de la *LACC*, comme le font remarquer certains auteurs et juges (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 55-56; *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (C.J. Ont. (Div. gén.)), par. 5 (le juge Farley)). Ces principes n'ont pas été respectés en l'espèce, et mes collègues le reconnaissent, mais minimisent les conséquences de tels manquements et vices de procédure.

IV. Imposing a Constructive Trust

[277] In this context, I see no error in the decision of the Court of Appeal to impose a constructive trust (paras. 200-207). It was a fair decision that met the requirements of justice, under the principles set out by our Court in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, and in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217. The remedy of a constructive trust was justified in order to correct the wrong caused by Indalex (*Soulos*, at para. 36, *per* McLachlin J. (as she then was)). The facts of the situation met the four conditions that generally justify the imposition of a constructive trust (*Soulos*, at para. 45), as determined by Justice Gillese in her reasons, at paras. 203-4: (1) the defendant was under an equitable obligation in relation to the activities giving rise to the assets in his or her hands; (2) the assets in the hands of the defendant were shown to have resulted from deemed or actual agency activities of the defendant in breach of his or her equitable obligation to the plaintiff; (3) the plaintiff has shown a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendants remain faithful to their duties; and (4) there are no factors which would render imposition of a constructive trust unjust in all the circumstances of the case, such as the protection of the interests of intervening creditors.

IV. Imposition d'une fiducie par interprétation

[277] Dans les circonstances, la décision de la Cour d'appel d'imposer une fiducie par interprétation ne me paraît pas erronée (par. 200-207). Il s'agit d'une décision équitable conforme aux exigences de la justice, selon les principes énoncés par notre Cour dans les arrêts *Canson Enterprises Ltd. c. Boughton & Co.*, [1991] 3 R.C.S. 534, et *Soulos c. Korkontzilas*, [1997] 2 R.C.S. 217. Pareille réparation pour le tort causé par Indalex est fondée (*Soulos*, par. 36, la juge McLachlin (maintenant Juge en chef)). Les faits de l'espèce respectent les quatre conditions qui justifient généralement l'imposition d'une fiducie par interprétation (*Soulos*, par. 45), comme le constate la juge Gillese aux par. 203-204 de ses motifs : (1) le défendeur était assujetti à une obligation en equity relativement aux actes qui ont conduit à la possession des biens; (2) il a été démontré que la possession des biens par le défendeur résultait des actes qu'il a ou est réputé avoir accomplis à titre de mandataire, en violation de l'obligation que l'equity lui imposait à l'égard du demandeur; (3) le demandeur a établi qu'il a un motif légitime de solliciter une réparation fondée sur la propriété, soit personnel soit lié à la nécessité de veiller à ce que d'autres personnes comme le défendeur s'acquittent de leurs obligations; (4) il n'existe pas de facteurs qui rendraient injuste l'imposition d'une fiducie par interprétation eu égard à l'ensemble des circonstances de l'affaire, comme la protection des intérêts des créanciers intervenants.

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[278] In crafting such a remedy, the Court of Appeal was relying on the inherent powers of the courts to craft equitable remedies, not only in respect of procedural issues, but also of substantive questions. Section 9 of the *CCAA* is broadly drafted and does not deprive courts of their power to fill in gaps in the law when this is necessary in order to grant justice to the parties (G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law, 2007* (2008), 41, at pp. 78-79).

[279] The imposition of the trust did not disregard the different corporate personalities of Indalex and Indalex U.S. It properly acknowledged the close relationship between the two companies, the second in effect controlling the first. This relationship could and needed to be taken into consideration in order to determine whether a constructive trust was a proper remedy.

[280] For these reasons, I would uphold the imposition of a constructive trust and I would dismiss the appeal with costs to the respondents.

APPENDIX

The Pension Benefits Amendment Act, 1973, S.O. 1973, c. 113

6. The said Act is amended by adding thereto the following sections:

23*a*.—(1) Any sum received by an employer from an employee pursuant to an arrangement for the payment of such sum by the employer into a pension plan as the employee's contribution thereto shall be deemed to be held by the employer in trust for payment of the same after his receipt thereof into the pension plan as the employee's contribution thereto and the employer shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust.

[278] En imposant pareille réparation, la Cour d'appel a exercé la compétence inhérente des tribunaux de concevoir une réparation en equity en réponse non seulement à une question de procédure, mais également à une question de fond. L'article 9 de la *LACC* est formulé en termes généraux et n'a pas pour effet de priver le tribunal du pouvoir de combler au besoin les lacunes du droit pour rendre justice aux parties (G. R. Jackson et J. Sarra, « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », dans J. P. Sarra, dir., *Annual Review of Insolvency Law, 2007* (2008), 41, p. 78-79).

[279] En imposant la fiducie, la Cour n'a pas négligé le fait qu'Indalex et Indalex É.-U. constituent des personnes morales distinctes. Elle a tenu compte à juste titre de leurs rapports étroits, la seconde contrôlant dans les faits la première. Il était possible, voire nécessaire, de prendre ces rapports en compte pour déterminer si la fiducie par interprétation constituait une réparation adéquate en l'espèce.

[280] Pour les motifs qui précèdent, je suis d'avis de confirmer la fiducie par interprétation et de rejeter l'appel avec dépens en faveur des intimés.

ANNEXE

The Pension Benefits Amendment Act, 1973, S.O. 1973, ch. 113

[TRADUCTION]

6. La même loi est modifiée par l'adjonction de ce qui suit :

23*a*.—(1) Toute somme qu'un employeur reçoit d'un employé conformément à une entente relative à son versement par l'employeur à titre de cotisation salariale est réputée détenue en fiducie par l'employeur en vue de son versement, après qu'il l'a reçue, au régime de retraite à titre de cotisation salariale, et l'employeur ne peut s'en approprier quelque partie ni la transformer à son usage personnel ou à un autre usage non autorisé par la fiducie.

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

(2) Pour les besoins du paragraphe 1, la somme qu'un employeur prélève sur une somme payable à l'employé, notamment par retenue salariale, est réputée constituer une somme que l'employeur reçoit de l'employé.

(3) Any sum required to be paid into a pension plan by an employer as the employer's contribution to the plan shall, when due under the plan, be deemed to be held by the employer in trust for payment of the same into the plan in accordance with the plan and this Act and the regulations as the employer's contribution and the employer shall not appropriate or convert any part of the amount required to be paid to the fund to his own use or to any use not authorized by the terms of the pension plan.

(3) Toute somme qu'un employeur doit verser à un régime de retraite à titre de cotisation patronale et qui est exigible aux termes du régime est réputée détenue en fiducie par l'employeur en vue de son versement au régime de retraite conformément à celui-ci, à la présente loi et au règlement, et l'employeur ne peut s'approprier ni transformer à son usage personnel ou à tout autre usage non autorisé par le régime quelque partie du montant qui doit être versé à la caisse.

Pension Benefits Act, R.S.O. 1980, c. 373

Pension Benefits Act, R.S.O. 1980, ch. 373

[TRADUCTION]

21. . . .

(2) Upon the termination or winding up of a pension plan filed for registration as required by section 17, the employer is liable to pay all amounts that would otherwise have been required to be paid to meet the tests for solvency prescribed by the regulations, up to the date of such termination or winding up, to the insurer, administrator or trustee of the pension plan.

21. . . .

(2) À la cessation ou à la liquidation d'un régime de retraite déposé en vue de son agrément en vertu de l'article 17, l'employeur est tenu de verser à l'assureur, à l'administrateur ou au fiduciaire du régime de retraite les sommes dont le versement aurait été par ailleurs exigible pour satisfaire aux critères de solvabilité, et ce, jusqu'à la date de la cessation ou de la liquidation du régime.

. . .

23.—(1) Where a sum is received by an employer from an employee under an arrangement for the payment of the sum by the employer into a pension plan as the employee's contribution thereto, the employer shall be deemed to hold the sum in trust for the employee until the sum is paid into the pension plan whether or not the sum has in fact been kept separate and apart by the employer and the employee has a lien upon the assets of the employer for such amount that in the ordinary course of business would be entered in books of account whether so entered or not.

. . .

23.—(1) L'employeur qui reçoit une somme d'un employé conformément à une entente relative à son versement par l'employeur à un régime de retraite à titre de cotisation salariale est réputé la détenir en fiducie jusqu'à son versement au régime de retraite, et ce, qu'il l'ait conservée séparément ou non, et l'employé a un privilège sur l'actif de l'employeur à raison du montant qui, dans le cours normal des affaires, serait consigné dans les livres de compte, qu'il y soit consigné ou non.

. . .

(3) Where an employer is required to make contributions to a pension plan, he shall be deemed to hold in trust for the members of the plan an amount calculated in accordance with subsection (4), whether or not,

. . .

(3) L'employeur qui est tenu de cotiser à un régime de retraite est réputé détenir en fiducie pour le compte des participants au régime une somme dont le montant est calculé conformément au paragraphe (4), et ce,

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(*a*) the employer contributions are payable into the plan under the terms of the plan or this Act; or

(*b*) the amount has been kept separate and apart by the employer,

and the members have a lien upon the assets of the employer in such amount that in the ordinary course of business would be entered into the books of account whether so entered or not.

(4) For the purpose of determining the amount deemed to be held in trust under subsection (3) on a specific date, the calculation shall be made as if the plan had been wound up on that date.

. . .

32. In addition to any amounts the employer is liable to pay under subsection 21 (2), where a defined benefit pension plan is terminated or wound up or the plan is amended so that it is no longer a defined benefit pension plan, the employer is liable to the plan for the difference between,

(*a*) the value of the assets of the plan; and

(*b*) the value of pension benefits guaranteed under subsection 31 (1) and any other pension benefit vested under the terms of the plan,

and the employer shall make payments to the insurer, trustee or administrator of the pension plan to fund the amount owing in such manner as is prescribed by regulation.

Pension Benefits Amendment Act, 1983, S.O. 1983, c. 2

2. Subsection 21 (2) of the said Act is repealed and the following substituted therefor:

(2) Upon the termination or winding up of a registered pension plan, the employer of employees covered by the pension plan shall pay to the administrator, insurer or trustee of the pension plan,

(a) an amount equal to,

a) que la cotisation de l'employeur soit payable ou non aux termes du régime ou de la présente Loi et

b) que l'employeur l'ait conservée séparément ou non,

et les participants ont un privilège sur l'actif de l'employeur à raison du montant qui, dans le cours normal des affaires, serait consigné dans des livres de compte, qu'il y soit consigné ou non.

(4) Aux fins de déterminer le montant qui est réputé détenu en fiducie en application du paragraphe (3) à une date précise, le calcul est effectué comme si le régime avait été liquidé à cette date.

. . .

32. En plus des sommes que l'employeur est tenu de payer en application du paragraphe 21 (2), lors de la cessation ou de la liquidation d'un régime de retraite à prestations déterminées ou lorsqu'une modification fait en sorte qu'un régime n'est plus un régime de retraite à prestations déterminées, l'employeur est tenu de combler la différence entre

a) la valeur de l'actif du régime et

b) la valeur des prestations de retraite garanties suivant le paragraphe 31 (1) et de toutes autres prestations de retraite auxquelles le droit est acquis aux termes du régime,

et l'employeur verse à l'assureur, au fiduciaire ou à l'administrateur du régime de retraite les sommes ainsi requises de la manière prévue par règlement.

Pension Benefits Amendment Act, 1983, S.O. 1983, ch. 2

[TRADUCTION]

2. Le paragraphe 21 (2) de la même loi est abrogé et remplacé par ce qui suit :

(2) Lors de la cessation ou de la liquidation d'un régime de retraite enregistré, l'employeur dont les employés bénéficient du régime verse à l'administrateur, à l'assureur ou au fiduciaire du régime

a) une somme dont le montant est égal

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(i) the current service cost, and

(ii) the special payments prescribed by the regulations,

that have accrued to and including the date of the termination or winding up but, under the terms of the pension plan or the regulations, are not due on that date; and

(b) all other payments that, by the terms of the pension plan or the regulations, are due from the employer to the pension plan but have not been paid at the date of the termination or winding up.

(2a) For the purposes of clause (2) (a), the current service cost and special payments shall be deemed to accrue on a daily basis.

3. Section 23 of the said Act is repealed and the following substituted therefor:

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

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

(3) The administrator or trustee of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsection (1).

(4) An employer who is required by a pension plan to contribute to the pension plan shall be deemed to hold in trust for the members of the pension plan an amount of money equal to the total of,

(a) all moneys that the employer is required to pay into the pension plan to meet,

(i) the current service cost, and

(ii) the special payments prescribed by the regulations,

that are due under the pension plan or the regulations and have not been paid into the pension plan; and

(i) au coût du service courant et

(ii) aux paiements spéciaux prescrits par règlement,

qui sont accumulés à la date de la cessation ou de la liquidation, celle-ci comprise, mais qui, suivant les conditions du régime et le libellé du règlement, ne sont pas encore dus;

b) toute autre somme qui, aux termes du régime de retraite ou du règlement, est due par l'employeur au régime de retraite, mais qui n'a pas été versée à la date de la cessation ou de la liquidation.

(2a) Pour les besoins de l'alinéa (2) a), le coût du service courant et les paiements spéciaux sont réputés s'accumuler sur une base quotidienne.

3. L'article 23 de la même loi est abrogé et remplacé par ce qui suit :

23.—(1) L'employeur qui reçoit de l'argent d'un employé en vertu d'un arrangement précisant que l'employeur versera cet argent à un régime de retraite en tant que cotisation de l'employé aux termes du régime de retraite est réputé détenir cet argent en fiducie pour l'employé jusqu'à ce que l'employeur verse cet argent au régime de retraite.

(2) Pour l'application du paragraphe (1), toute retenue à la source ou autre somme prélevée par l'employeur est réputée constituer de l'argent que l'employeur reçoit de l'employé.

(3) L'administrateur ou le fiduciaire du régime de retraite a un privilège sur l'actif de l'employeur à raison d'un montant égal à la somme réputée détenue en fiducie suivant le paragraphe (1).

(4) L'employeur qui, dans le cadre d'un régime de retraite, est tenu de cotiser à ce régime est réputé détenir en fiducie pour le compte des participants du régime une somme égale au total

a) de toutes les sommes que l'employeur est tenu de verser au régime pour acquitter

(i) le coût du service courant et

(ii) les paiements spéciaux prescrits par règlement

qui sont dus aux termes du régime ou du règlement, et qui n'ont pas été versés;

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(b) where the pension plan is terminated or wound up, any other money that the employer is liable to pay under clause 21 (2) (a).

(5) The administrator or trustee of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsection (4).

(6) Subsections (1) and (4) apply whether or not the moneys mentioned in those subsections are kept separate and apart from other money.

. . .

8. Sections 32 and 33 of the said Act are repealed and the following substituted therefor:

32.—(1) The employer of employees who are members of a defined benefit pension plan that the employer is bound by or to which the employer is a party and that is partly or wholly wound up shall pay to the administrator, insurer or trustee of the plan an amount of money equal to the amount by which the value of the pension benefits guaranteed by section 31 plus the value of the pension benefits vested under the defined benefit pension plan exceeds the value of the assets of the plan allocated in accordance with the regulations for payment of pension benefits accrued with respect to service in Ontario.

(2) The amount that the employer is required to pay under subsection (1) is in addition to the amounts that the employer is liable to pay under subsection 21 (2).

(3) The employer shall pay the amount required under subsection (1) to the administrator, insurer or trustee of the defined benefit pension plan in the manner prescribed by the regulations.

Pension Benefits Act, 1987, S.O. 1987, c. 35

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

. . .

b) lors de la cessation ou de la liquidation du régime, toute autre somme que l'employeur est tenu de payer en vertu de l'alinéa 21 (2) a).

(5) L'administrateur ou le fiduciaire du régime de retraite a un privilège sur l'actif de l'employeur à raison d'un montant égal à celui de la somme qui est réputée détenue en fiducie suivant le paragraphe (4).

(6) Les paragraphes (1) et (4) s'appliquent que les sommes mentionnées soient conservées séparément ou non.

. . .

8. Les articles 32 et 33 de la même loi sont abrogés et remplacés par ce qui suit :

32.—(1) L'employeur dont les employés participent à un régime de retraite à prestations déterminées par lequel il est lié ou auquel il est partie et qui fait l'objet d'une liquidation partielle ou totale est tenu de verser à l'administrateur, à l'assureur ou au fiduciaire du régime un montant égal à l'excédent de la valeur des prestations de retraite garanties par l'article 31 et de la valeur des prestations de retraite acquises suivant le régime de retraite à prestations déterminées sur la valeur de l'actif du régime établie conformément au règlement applicable au paiement des prestations de retraite accumulées eu égard aux états de services en Ontario.

(2) Le versement que l'employeur est tenu d'effectuer suivant le paragraphe (1) s'ajoute à celui exigé au paragraphe 21 (2).

(3) L'employeur verse à l'assureur, au fiduciaire ou à l'administrateur du régime de retraite à prestations déterminées, de la manière prescrite par règlement, toute somme dont le versement est exigé au paragraphe (1).

Loi de 1987 sur les regimes de retraite, L.O. 1987, ch. 35

58. (1) L'employeur qui reçoit de l'argent d'un employé en vertu d'un arrangement précisant que l'employeur versera cet argent à une caisse de retraite en tant que cotisation de l'employé aux termes du régime de retraite, est réputé détenir cet argent en fiducie pour l'employé jusqu'à ce que l'employeur verse cet argent à la caisse de retraite.

. . .

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

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

. . .

59.—(1) Money that an employer is required to pay into a pension fund accrues on a daily basis.

(2) Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements.

. . .

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

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

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

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

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

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to

(3) L'employeur qui est tenu de cotiser à une caisse de retraite est réputé détenir en fiducie pour le compte des bénéficiaires du régime de retraite un montant égal aux cotisations de l'employeur qui sont dues et impayées à la caisse de retraite.

(4) Si un régime de retraite est liquidé en totalité ou en partie, l'employeur qui est tenu de cotiser à la caisse de retraite est réputé détenir en fiducie pour le compte des bénéficiaires du régime de retraite un montant égal aux cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements.

. . .

59. (1) L'intérêt sur l'argent qu'un employeur est tenu de verser à une caisse de retraite s'accumule sur une base quotidienne.

(2) L'intérêt sur les cotisations est calculé et crédité à des taux qui ne sont pas inférieurs aux taux prescrits et conformément aux exigences prescrites.

. . .

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

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

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

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

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

c) une pension réduite dont le montant correspond à celui à verser aux termes du régime de retraite commençant à la date à laquelle le participant

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the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

. . .

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

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

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

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

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

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 40 (3) (50 per cent rule) and section 75,

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

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

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

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

aurait droit à la pension réduite en vertu du régime de retraite si celui-ci n'était pas liquidé et que l'affiliation du participant avait continué jusqu'à cette date.

. . .

76. (1) Si un régime de retraite est liquidé en totalité ou en partie, l'employeur verse à la caisse de retraite :

a) d'une part, un montant égal au total de tous les paiements qui, en vertu de la présente loi, des règlements et du régime de retraite, sont dus ou accumulés, et qui n'ont pas été versés à la caisse de retraite;

b) d'autre part, un montant égal au montant dont :

(i) la valeur des prestations de retraite aux termes du régime de retraite qui seraient garanties par le Fonds de garantie en vertu de la présente loi et des règlements si la Commission déclare que le Fonds de garantie s'applique au régime de retraite,

(ii) la valeur des prestations de retraite accumulées à l'égard de l'emploi en Ontario et acquises aux termes du régime de retraite,

(iii) la valeur des prestations accumulées à l'égard de l'emploi en Ontario et qui résultent de l'application du paragraphe 40 (3) (règle des 50 pour cent),

dépassent la valeur de l'actif de la caisse de retraite attribué, comme cela est prescrit, pour le paiement de prestations de retraite accumulées à l'égard de l'emploi en Ontario.

Loi sur les régimes de retraite, L.R.O. 1990, ch. P.8

57. (1) [Bien en fiducie] L'employeur qui reçoit de l'argent d'un employé en vertu d'un arrangement précisant que l'employeur versera cet argent à une caisse de retraite en tant que cotisation de l'employé aux termes du régime de retraite, est réputé détenir cet argent en fiducie pour l'employé jusqu'à ce que l'employeur verse cet argent à la caisse de retraite.

(2) [Sommes retenues] Pour l'application du paragraphe (1), l'argent retenu des sommes payables à l'employé par l'employeur, que ce soit par retenues salariales ou autrement, est réputé être de l'argent que l'employeur a reçu de l'employé.

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

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

. . .

58. (1) [Accrual] Money that an employer is required to pay into a pension fund accrues on a daily basis.

(2) [Interest] Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements.

. . .

74. (1) [Activating events] This section applies if a person ceases to be a member of a pension plan on the effective date of one of the following activating events:

1. The wind up of a pension plan, if the effective date of the wind up is on or after April 1, 1987.
2. The employer's termination of the member's employment, if the effective date of the termination is on or after July 1, 2012. However, this paragraph does not apply if the termination occurs in any of the circumstances described in subsection (1.1).
3. The occurrence of such other events as may be prescribed in such circumstances as may be specified by regulation.

(1.1) [Same, termination of employment] Termination of employment is not an activating event if the termination is a result of wilful misconduct, disobedience or wilful neglect of duty by the member that is not trivial and has not been condoned by the employer or if the termination occurs in such other circumstances as may be prescribed.

(3) [Cotisations accumulées] L'employeur qui est tenu de cotiser à une caisse de retraite est réputé détenir en fiducie pour le compte des bénéficiaires du régime de retraite un montant égal aux cotisations de l'employeur qui sont dues et impayées à la caisse de retraite.

(4) [Liquidation] Si un régime de retraite est liquidé en totalité ou en partie, l'employeur qui est tenu de cotiser à la caisse de retraite est réputé détenir en fiducie pour le compte des bénéficiaires du régime de retraite un montant égal aux cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements.

. . .

58. (1) [Accumulation] L'argent qu'un employeur est tenu de verser à une caisse de retraite s'accumule sur une base quotidienne.

(2) [Intérêt] L'intérêt sur les cotisations est calculé et crédité à des taux qui ne sont pas inférieurs aux taux prescrits et conformément aux exigences prescrites.

. . .

74. (1) [Événements déclencheurs] Le présent article s'applique si une personne cesse d'être un participant à la date de prise d'effet de l'un des événements déclencheurs suivants :

1. La liquidation du régime de retraite, si sa date de prise d'effet tombe le 1er avril 1987 ou après cette date.
2. La cessation, par l'employeur, de l'emploi d'un participant, si sa date de prise d'effet tombe le 1er juillet 2012 ou après cette date, la présente disposition ne s'appliquant toutefois pas si la cessation se produit dans les circonstances visées au paragraphe (1.1).
3. L'arrivée d'autres événements prescrits dans les circonstances prescrites par règlement.

(1.1) [Idem : cessation d'emploi] La cessation de l'emploi n'est pas un événement déclencheur si elle résulte d'un acte d'inconduite délibérée, d'indiscipline ou de négligence volontaire du participant qui n'est pas frivole et que l'employeur n'a pas toléré, ou qu'elle se produit dans les autres circonstances prescrites.

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(1.2) [Exceptions, election by certain pension plans] This section does not apply with respect to a jointly sponsored pension plan or a multi-employer pension plan while an election made under section 74.1 for the plan and its members is in effect.

(1.3) [Benefit] A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least 55 on the effective date of the activating event has the right to receive,

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

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

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

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the activating event had not occurred and if the member's membership continued to that date; or

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

(2) [Part year] In determining the combination of age plus employment or membership, one-twelfth credit shall be given for each month of age and for each month of continuous employment or membership on the effective date of the activating event.

(3) [Member for 10 years] Bridging benefits offered under the pension plan to which a member would be entitled if the activating event had not occurred and if his or her membership were continued shall be included in calculating the pension benefit under subsection (1.3) of a person who has at least 10 years of continuous employment with the employer or has been a member of the pension plan for at least 10 years.

(1.2) [Exceptions : choix fait par certains régimes de retraite] Le présent article ne s'applique pas à l'égard d'un régime de retraite conjoint ou d'un régime de retraite interentreprises tant qu'un choix fait en vertu de l'article 74.1 pour le régime et les participants est en vigueur.

(1.3) [Prestation] En Ontario, un participant à un régime de retraite dont le total de l'âge plus le nombre d'années d'emploi continu ou d'affiliation continue est d'au moins 55, à la date de prise d'effet de l'événement déclencheur, a droit à l'une des pensions suivantes :

a) une pension conforme aux conditions du régime de retraite si, aux termes de celui-ci, il est admissible au paiement immédiat d'une prestation de retraite;

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

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

(ii) la date à laquelle il aurait droit à une pension non réduite aux termes du régime de retraite si l'événement déclencheur ne s'était pas produit et que son affiliation avait continué jusqu'à cette date;

c) une pension réduite dont le montant correspond à celui à verser aux termes du régime de retraite commençant à la date à laquelle il aurait droit à la pension réduite en vertu du régime de retraite si l'événement déclencheur ne s'était pas produit et que son affiliation avait continué jusqu'à cette date.

(2) [Partie d'année] Pour déterminer le total de l'âge plus l'emploi ou l'affiliation, un crédit d'un douzième est accordé pour chaque mois d'âge et pour chaque mois d'emploi ou d'affiliation continus à la date de prise d'effet de l'événement déclencheur.

(3) [Participant pendant 10 ans] Les prestations de raccordement offertes aux termes du régime de retraite auxquelles un participant aurait droit si l'événement déclencheur ne s'était pas produit et que l'affiliation du participant continuait, sont incluses dans le calcul de la prestation de retraite prévue au paragraphe (1.3) dans le cas d'une personne qui a accumulé au moins 10 années d'emploi continu chez l'employeur ou qui est un participant depuis au moins 10 ans.

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(4) [Prorated bridging benefit] For the purposes of subsection (3), if the bridging benefit offered under the pension plan is not related to periods of employment or membership in the pension plan, the bridging benefit shall be prorated by the ratio that the member's actual period of employment bears to the period of employment that the member would have to the earliest date on which the member would be entitled to payment of pension benefits and a full bridging benefit under the pension plan if the activating event had not occurred.

(5) [Notice of termination of employment] Membership in a pension plan that is wound up includes the period of notice of termination of employment required under Part XV of the *Employment Standards Act, 2000*.

(6) [Application of subs. (5)] Subsection (5) does not apply for the purpose of calculating the amount of a pension benefit of a member who is required to make contributions to the pension fund unless the member makes the contributions in respect of the period of notice of termination of employment.

(7) [Consent of employer] For the purposes of this section, where the consent of an employer is an eligibility requirement for entitlement to receive an ancillary benefit, the employer shall be deemed to have given the consent.

(7.1) [Consent of administrator, jointly sponsored pension plans] For the purposes of this section, where the consent of the administrator of a jointly sponsored pension plan is an eligibility requirement for entitlement to receive an ancillary benefit, the administrator shall be deemed to have given the consent.

(8) [Use in calculating pension benefit] A benefit described in clause (1.3) (a), (b) or (c) for which a member has met all eligibility requirements under this section shall be included in calculating the member's pension benefit or the commuted value of the pension benefit.

. . .

75. (1) [Liability of employer on wind up] Where a pension plan is wound up, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension

(4) [Prestation de raccordement distribuée proportionnellement] Pour l'application du paragraphe (3), si la prestation de raccordement offerte aux termes du régime de retraite ne se rapporte pas à des périodes d'emploi ou d'affiliation au régime de retraite, la prestation de raccordement est distribuée selon le rapport qui existe entre la période réelle d'emploi du participant à la période d'emploi que le participant aurait faite à la première date à laquelle le membre aurait droit au paiement de prestations de retraite et d'une pleine prestation de raccordement aux termes du régime de retraite si l'événement déclencheur ne s'était pas produit.

(5) [Avis de licenciement] L'affiliation à un régime de retraite qui est liquidé inclut la période de préavis de licenciement exigé en vertu de la partie XV de la *Loi de 2000 sur les normes d'emploi*.

(6) [Champ d'application du par. (5)] Le paragraphe (5) ne s'applique pas afin de calculer le montant de la prestation de retraite d'un participant qui est tenu de cotiser à la caisse de retraite, à moins que le participant verse les cotisations à l'égard de la période de préavis de licenciement.

(7) [Consentement de l'employeur] Pour l'application du présent article, si le consentement de l'employeur est une condition d'admissibilité au droit de recevoir une prestation accessoire, l'employeur est réputé avoir donné son consentement.

(7.1) [Consentement de l'administrateur : régimes de retraite conjoints] Pour l'application du présent article, si le consentement de l'administrateur d'un régime de retraite conjoint est une condition d'admissibilité au droit de recevoir une prestation accessoire, l'administrateur est réputé avoir donné son consentement.

(8) [Calcul de la prestation de retraite] La prestation mentionnée à l'alinéa (1.3) a), b) ou c) à l'égard de laquelle un participant a rempli toutes les conditions d'admissibilité prévues au présent article est incluse dans le calcul de la prestation de retraite du participant ou de sa valeur de rachat.

. . .

75. (1) [Responsabilité de l'employeur à la liquidation] Si un régime de retraite est liquidé, l'employeur verse à la caisse de retraite :

a) d'une part, un montant égal au total de tous les paiements qui, en vertu de la présente loi, des

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plan, are due or that have accrued and that have not been paid into the pension fund; and

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

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

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

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

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

Appeals of Sun Indalex Finance, George L. Miller and FTI Consulting allowed, LEBEL *and* ABELLA JJ. *dissenting. Appeal of USW dismissed.*

Solicitors for the appellant Sun Indalex Finance, LLC: Goodmans, Toronto.

Solicitors for the appellant George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors: Chaitons, Toronto.

Solicitors for the appellant FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited: Stikeman Elliott, Toronto.

Solicitors for the appellant/respondent United Steelworkers: Sack Goldblatt Mitchell, Toronto.

Solicitors for the respondents Keith Carruthers, et al.: Koskie Minsky, Toronto.

Solicitors for the respondent Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited

règlements et du régime de retraite, sont dus ou accumulés, et qui n'ont pas été versés à la caisse de retraite;

b) d'autre part, un montant égal au montant dont :

(i) la valeur des prestations de retraite aux termes du régime de retraite qui seraient garanties par le Fonds de garantie en vertu de la présente loi et des règlements si le surintendant déclare que le Fonds de garantie s'applique au régime de retraite,

(ii) la valeur des prestations de retraite accumulées à l'égard de l'emploi en Ontario et acquises aux termes du régime de retraite,

(iii) la valeur des prestations accumulées à l'égard de l'emploi en Ontario et qui résultent de l'application du paragraphe 39 (3) (règle des 50 pour cent) et de l'article 74,

dépassent la valeur de l'actif de la caisse de retraite attribué, comme cela est prescrit, pour le paiement de prestations de retraite accumulées à l'égard de l'emploi en Ontario.

Pourvois de Sun Indalex Finance, George L. Miller et FTI Consulting accueillis, les juges LEBEL *et* ABELLA *sont dissidents. Pourvoi du Syndicat des Métallos rejeté.*

Procureurs de l'appelante Sun Indalex Finance, LLC : Goodmans, Toronto.

Procureurs de l'appelant George L. Miller, syndic de faillite des débitrices Indalex É.-U., nommé en vertu du chapitre 7 : Chaitons, Toronto.

Procureurs de l'appelante FTI Consulting Canada ULC, en sa qualité de contrôleur d'Indalex Limited désigné par le tribunal, au nom d'Indalex Limited : Stikeman Elliott, Toronto.

Procureurs de l'appelant/intimé le Syndicat des Métallos : Sack Goldblatt Mitchell, Toronto.

Procureurs des intimés Keith Carruthers, et autres : Koskie Minsky, Toronto.

Procureurs de l'intimée Morneau Shepell Ltd. (anciennement connue sous le nom de Morneau

2013 SCC 6 (CanLII)

Partnership): Cavalluzzo Hayes Shilton McIntyre & Cornish, Toronto.

Solicitor for the respondent/intervener the Superintendent of Financial Services: Attorney General of Ontario, Toronto.

Solicitors for the intervener the Insolvency Institute of Canada: Thornton Grout Finnigan, Toronto.

Solicitors for the intervener the Canadian Labour Congress: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Canadian Federation of Pensioners: Paliare, Roland, Rosenberg, Rothstein, Toronto.

Solicitors for the intervener the Canadian Association of Insolvency and Restructuring Professionals: McMillan, Montréal.

Solicitors for the intervener the Canadian Bankers Association: Osler, Hoskin & Harcourt, Toronto.

Sobeco, société en commandite) : Cavalluzzo Hayes Shilton McIntyre & Cornish, Toronto.

Procureur de l'intimé/intervenant le Surintendant des services financiers : Procureur général de l'Ontario, Toronto.

Procureurs de l'intervenant l'Institut d'insolvabilité du Canada : Thornton Grout Finnigan, Toronto.

Procureurs de l'intervenant le Congrès du travail du Canada : Sack Goldblatt Mitchell, Toronto.

Procureurs de l'intervenante la Fédération canadienne des retraités : Paliare, Roland, Rosenberg, Rothstein, Toronto.

Procureurs de l'intervenante l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation : McMillan, Montréal.

Procureurs de l'intervenante l'Association des banquiers canadiens : Osler, Hoskin & Harcourt, Toronto.

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TAB 6

Court File No. CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]

THE HONOURABLE	)	~~WEDNESDAY~~ THURSDAY, THE ~~10th~~ 18th DAY OF
	)	
JUSTICE MORAWETZ	)	OCTOBER 2012

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Applicants

ORDER
(Approval of Priority Claim Adjudication Protocol)

This Motion, made by Investissement Québec for an order approving the Priority Claim Adjudication Protocol and referring the adjudication of the BSI Pension Reimbursement Claims to the Superior Court of Québec (Commercial Division) was heard this day at 330 University Avenue, Toronto, ON.

On the consent of counsel for Timminco Limited and Bécancour Silicon Inc., FTI Consulting Canada Inc., in its capacity as court-appointed Monitor of the Timminco entities, Investissement Québec, Mercer Canada, the administrator of the Haley Pension Plan, The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW") and BSI Union and Non-Union employee Pension Committees:

1. **THIS COURT ORDERS** that the Priority Claim Adjudication Protocol, attached hereto as Schedule "A", be and the same is hereby authorized and approved.

2. **THIS COURT ORDERS** that the adjudication of whether the BSI Pension Reimbursement Claims are Priority Claims, all as defined in the attached Priority Claim Adjudication Protocol, be and the same is hereby referred exclusively to the Superior Court of Québec (Commercial Division) to be determined in accordance with the Priority Claim Adjudication Protocol.

3. **THIS COURT HEREBY REQUESTS** the aid and recognition of the Superior Court of Québec (Commercial Division) to give effect to this order and to adjudicate whether the BSI Pension Reimbursement Claims constitute Priority Claims in accordance with the terms of the Priority Claims Adjudication Protocol.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

OCT 19 2012

CITATION: Timminco Limited (Re), 2012 ONSC 5959
COURT FILE NO.: CV-12-9539-00CL
DATE: 20121018

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC., Applicants**

BEFORE: **MORAWETZ J.**

COUNSEL: **S. J. Weisz, for FTI Consulting Canada Inc., in its capacity as court-appointed Monitor of the Timminco Entities**

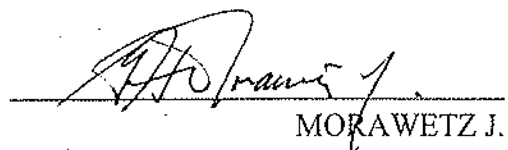
HEARD: **OCTOBER 18, 2012**

ENDORSEMENT

[1] On consent of Timminco Limited and Bécancour Silicon Inc., FIT Consulting Canada Inc., in its capacity as court-appointed Monitor of the Timminco Entities, Investissement Québec, Mercer Canada, the Administrator of the Haley Pension Plan, The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW") and BSI Union and Non-Union Employee Pension Committees, the Priority Claim Adjudication Protocol is approved. The adjudication of whether the BSI Pension Reimbursement Claims are Priority Claims is referred to the Superior Court of Québec (Commercial Division) to be determined in accordance with the terms of the Priority Claims Adjudication Protocol.

[2] This determination has been made pursuant to s. 17 of the CCAA, and I express my thanks, in advance, to the Superior Court of Québec.

[3] To the extent leave is required to proceed, such leave is granted.



MORAWETZ J.

Date: October 18, 2012

TAB 7

SCHEDULE "A"

Court File No. CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Applicants

PRIORITY CLAIM ADJUDICATION PROTOCOL

A. OVERVIEW

1. In accordance with the Reimbursement Agreement (the "**Reimbursement Agreement**") among Investissement Québec ("**IQ**"), FTI Consulting Canada Inc., as court-appointed Monitor, and Bécancour Silicon Inc., dated August 28, 2012 and the August 28, 2012 Interim Distribution Order (the "**Interim Distribution Order**")[1], two (2) sets of claims have been designated as Reimbursement Claims, namely:

   (i) a claim on behalf of Mercer Canada ("**Mercer**"), as administrator of the Haley Pension Plan, and on behalf of the beneficiaries of that plan (the "**Mercer Reimbursement Claim**"), which claim is supported by The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("**USW**"); and

   (ii) a claim by Le Comité de retraite du Régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc. and a claim by Le Comité de retraite du Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (collectively the "**BSI Pension Committees**") (the "**BSI Pension Reimbursement Claims**").

2. IQ disputes that the above Reimbursement Claims have priority over the IQ Security and the parties do not anticipate the dispute will be resolved through the consented resolution process

[1] Unless otherwise indicated, any capitalized terms used but not defined herein shall have the meaning ascribed to such term in the Reimbursement Agreement and the Interim Distribution Order.

provided for in the Interim Distribution Order. Accordingly, an adjudication is required to determine whether such Reimbursement Claims constitute Priority Claims.

The following is the protocol for the adjudication of whether the Reimbursement Claims constitute Priority Claims.

B. THE MERCER REIMBURSEMENT CLAIM

1. The Mercer Reimbursement Claim shall be adjudicated by way of a motion before this Court wherein Mercer and USW will be the moving parties and IQ will be the respondent. If at any time Mercer shall cease the prosecution of the Mercer Reimbursement Claim, the USW shall be entitled to prosecute the Mercer Reimbursement Claim in the place and stead of Mercer.

As issues to be adjudicated regarding the Mercer Reimbursement Claim (such as, by way of example, substantive consolidation) may impact on other stakeholders of BSI or Timminco, the motion material hereafter described shall be served on the service list herein. Any creditor of the Timminco Entities or the Monitor, or the Timminco Entities themselves ("**Interested Stakeholders**") shall have the right to file material and participate in the motion proceedings in accordance with the following timetable:

(i) Mercer and USW, if so advised, will deliver moving party motion material by October 29, 2012;

(ii) IQ and Interested Stakeholders, if any, shall deliver responding material by November 30, 2012;

(iii) Mercer and USW will deliver reply material, if so advised, by December 17, 2012;

(iv) cross-examinations on filed affidavits, if required, will be conducted during the week of January 13, 2012. During this period, the examination of Peter Kalins, (a former officer and director of Timminco and BSI) as a witness to the motion, shall be conducted if consented to by Peter Kalins or if an appropriate court order has been obtained;

(v) Mercer and USW, if so advised, will deliver moving party's facta by January 25, 2013;

(vi) IQ and any Interested Stakeholders will deliver responding facta by February 13, 2013;

(vii) Mercer and USW will deliver reply facta by February 20, 2013, if so advised; and

(viii) the hearing of the motion will take place during the week of February 25, 2013.

2. In determining whether the Mercer Reimbursement Claim constitutes a Priority Claim, the determination of the quantum of such Priority Claim shall be postponed until after the determination of the nature of the claim and will be determined in accordance with the Claims Procedure Order or further order of the Court.

C. THE BSI PENSION REIMBURSEMENT CLAIMS

1. The adjudication of whether the BSI Reimbursement Claims constitute Priority Claims shall be referred exclusively to the Superior Court of Québec (Commercial Division) wherein the BSI Pension Committees will be the moving parties and IQ will be the respondent in accordance with the following timetable:

(i) the BSI Pension Committees shall deliver their motion to institute proceedings within 60 days after the Order is made referring this matter to the Superior Court of Québec (Commercial Division);

(ii) IQ and any Interested Stakeholders shall deliver their Statement of Defence within 30 days after receipt of the motion to institute proceedings;

(iii) the BSI Pension Committees shall have up to 30 days after receipt of the IQ defence to deliver their response, if any;

(iv) examinations, if necessary, are to be conducted by January 11, 2013;

(v) written arguments and joint books of procedure and exhibits shall be delivered at least 2 weeks before the hearing of the motion; and

(vi) the hearing of the motion is to be scheduled between February 18, 2013 and March 15, 2013 based upon a 1-2 day hearing.

For greater certainty, any appeal from an order of the Superior Court of Québec (Commercial Division) herein shall be to the Court of Appeal of Québec.

2. In determining whether the BSI Reimbursement Claims constitute Priority Claims, the determination of the quantum of such Priority Claims shall be postponed until after the determination of the nature of the claim and will be determined in accordance with the Claims Procedure Order or further order of the Court.

D. MONITOR'S REPORT

1. The Monitor, if it deems it necessary and appropriate to do so, may file a report with the court in connection with adjudication of either Reimbursement Claim.

In the matter of the *Companies' Creditors Arrangement Act*,
R.S.C. 1985, c. C-36, As Amended

And in the Matter of a Plan of Compromise or Arrangement
of Timminco Limited and Bécancour Silicon Inc.

Applicants

Court File No. CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
Commercial List

Proceedings commenced at

TORONTO

ORDER
(Approval of Priority Claim Adjudication Protocol)

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Indexed as:

Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.

Between
Her Majesty The Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development, Plaintiff, and
Curragh Inc., Defendant

[1994] O.J. No. 953

114 D.L.R. (4th) 176

27 C.B.R. (3d) 148

47 A.C.W.S. (3d) 471

Action No. B112/93-C

Ontario Court of Justice - General Division
Commercial List - Toronto, Ontario

Farley J.

Heard: March 17, 1994 with further material submitted by the lien claimants and the Interim Receiver on March 25, 1994.
Judgment: April 3, 1994.

(22 pp.)

Bankruptcy -- Administration of estate -- Sale of land -- Effect of miners' liens.

Application by an interim receiver for direction regarding the sale of property. The nature of the miners' lien involved appeared to be an in rem claim against real property interests in the Yukon Territory. An order advertising for claims, including claims to a miners' lien, would not infringe on the jurisdiction of any other court.

HELD: There should be a sale after advertising for claims. The mining lien claims should be adjudicated on by the Yukon courts, but the Ontario court had the ability to set a date by which proofs of claim not filed with the interim receiver for adjudication in the Yukon courts would be barred.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 46, 47, 183, 188, 244.
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.
Miners Lien Act, R.S.Y.T. 1968, c. 116, ss. 2, 3.
Yukon Quartz Mining Act (Canada), R.S.C. 1985, c. Y-4.

K. McElcheran and Andrea Nicholls, for Peat Marwick Thorne Inc. Receiver of Curragh Inc., Defendant Fred Myers, for certain lien claimants pursuant to the Miners Lien Act of the Yukon Territory. R.B. Jones, for Round Table Resources Inc., Ross River Dena Development Corporation and Kasko Inc. D. Dowdall, for the noteholders. John Porter, for the Plaintiff. Edward Sellers, for the Yukon Territorial Government. Johanna Superina, for the Bank of Nova Scotia. C. Cole, for Triathlon Leasing Inc.

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1 FARLEY J.:-- Peat Marwick Thorne Inc. was appointed as the interim receiver ("IR") of the defendant's Faro mine pursuant to s. 47 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3, as amended in 1992 ("BIA") by my order of October 15, 1993. What the IR proposed was that for the purpose of facilitating a sale of the Faro mine, the IR would advertise for any claims against that asset and that if a claim were not made by a certain date (originally proposed to be April 22, 1994) then the IR wanted an order from this Court barring any claims against those assets or the IR (but not against the defendant). The draft order went on to provide for this Court requesting the aid and assistance of any court in Canada, the United States of America or elsewhere to the extent necessary to give effect to the terms of this order. The IR's position was that this Court had the inherent jurisdiction to issue such an order notwithstanding the location of the Faro mine in the Yukon. The position of the lien claimants (claiming pursuant to the Miners Lien Act, R.S.Y.T. 1968, c.116 ("MLA")) was that this Court should not attempt to deal with any in rem matter affecting Yukon assets.

2 On January 12, 1994, I granted leave pursuant to paragraph 14 of my October 15, 1993 order to any MLA claimants to pursue their claims in the Supreme Court of the Yukon Territory (including priority aspects vis-à-vis the Bank of Nova Scotia security), provided they not enforce any judgment by sale of the property except by further leave from this Court. Thus it would appear to me that this Court operating as the bankruptcy court under the insolvency legislation of the BIA retains overall

jurisdiction in this matter. That is appropriate in my view given that the defendant's head office is in Toronto but with operations literally at the very opposites of Canada (Nova Scotia, British Columbia and the Yukon Territory).

3 I do pause to note that the BIA involves and affects secured creditors to a degree that was not present under the pre-1992 legislation. Under the previous legislation, the practical result was that secured creditors were not affected - as witness the lead-in provisions such as "subject to the rights of secured creditors...". However, under the revised legislation a debtor company is able to initiate action leading to a proposal and thereby bind, at least for the time being, secured creditors. Perhaps more to the point is the requirement of s. 244 requiring any secured creditor who wishes to enforce his security on the debtor company's general undertaking to give notice and refrain from taking that enforcement action for 10 days. However s. 47 allows for the appointment of an interim receiver in such s. 244 circumstances. Section 47 provides:

> s. 47 (1) Where the court is satisfied that a notice is about to be sent or has been sent under subsection 244(1), the court may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates, for such term as the court may determine.
>
> (2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
>
> (a) take possession of all or part of the debtor's property mentioned in the appointment;
>
> (b) exercise such control over that property, and over the debtor's business, as the court considers advisable; and
>
> (c) take such other action as the court considers advisable.
>
> (3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of
>
> (a) the debtor's estate; or
>
> (b) the interests of the creditor who sent the notice under subsection 244(1). [emphasis added]

4 The provisions of s. 47 should be contrasted with the provisions of s. 46:

> s. 46 (1) The court may, if it is shown to be necessary for the protection of the estate of a debtor, at any time after the filing of a petition for a receiving order and before a receiving order is made, appoint a licensed trustee as interim receiver of the property of the debtor or of any part thereof and direct him to take immediate possession thereof on such

undertaking being given by the petitioner as the court may impose with respect to interference with the debtor's legal rights and with respect to damages in the event of the petition being dismissed.

(2) The interim receiver appointed under subsection (1) may, under the direction of the court, take conservatory measures and summarily dispose of property that is perishable or likely to depreciate rapidly in value and exercise such control over the business of the debtor as the court deems advisable, but the interim receiver shall not unduly interfere with the debtor in the carrying on of his business except as may be necessary for the conservatory purposes or to comply with the order of the court. [emphasis added]

5 Certainly under these circumstances, the interim receivership has survived for a much longer period of time than the 10 days. It would seem that in many practical aspects in these circumstances that the IR is functioning as a quasi-receiver and manager/trustee in bankruptcy. It would not be generally said that interim receivers have "sale powers" - beyond of course the aspect of disposing of perishable goods or those items with a predilection to depreciation in value. These aspects are referred to in s. 46(2); it would not seem reasonable to assume that a s. 47(1) interim receiver had less authority in this regard. Although we may observe that one is not dealing with fruit which is subject to rot, one is dealing with mining properties which involve certain potential environment frailties and the possibility of safety risks if not attended to. It is perhaps unfortunate that certain of those directly involved in the protection of the public (i.e. the governmental organizations) have not taken a more aggressive and positive role in funding the activities of the IR since it is only the IR which stands in between the band-aid environmental solution and the abandonment of the property with ensuing environmental risks. Indeed the environmental legislation regime appears to have frozen the situation with the likelihood that the IR will "continue" until the Faro mine is in fact sold. It appears that the object of the process at the present time is to maintain the property on a shoestring (which has thus far worked) while marketing it with a view towards its sale. With a sale the new owner would then take charge of the property, with the general requirement to maintain it in good condition for environmental purposes and exploiting it in due course when it is determined that conditions are favourable.

6 The 1992 amendments to the BIA significantly affected this legislation, especially in respect of affecting the rights of secured creditors and more extensively dealing with the aspect of insolvency (as contrasted with bankruptcy. Pre-amendment cases must be analyzed with care, especially those of some antiquity. For example, Westlake v. Martin (1930), 11 C.B.R. 469 (Ont. C.A.) dealt with an interim receiver. However as Fisher J.A. pointed out at p. 477:

But the defendant having been appointed receiver and subsequently custodian and trustee his duties as such are clearly defined by the Act. Under sec. 5(2) of The Bankruptcy Act [9 C.B.R. 37],

> an interim receiver may, under the direction of the court, summarily dispose of any perishable goods and carry on the business of the debtor for all conservatory purposes.
>
> Under sec. 34(2) [9 C.B.R. 99] a custodian has the same powers as a receiver, and by subsec. (3) he "shall remain in possession until a trustee is appointed by the creditors"; and after his appointment as trustee he is governed by the powers given to him by sec. 43 [9 C.B.R. 112].
>
> The appointment of a receiver does not effect a transfer of the debtor's property; he has no estate vested in him, the object of his appointment being simply for protection of the estate: see In re Berry; Duffield v. Williams, [1896] 1 Ch.939, at p. 944, 65 L.J. Ch.245, and unless it is for protection or preservation of the property, a receiver has no right to sell property of the debtor: see In re Wells and Croft (1895), 72 L.T. 359, 2 Manson 41.

He had previously observed at p. 474 that the court order appointing the interim receiver was not expansive:

> ... The order appointing the defendant as receiver contains, apart from the usual undertaking as to damages, authority to "take possession of the property" to "summarily dispose of any perishable goods" "to control the receipts and disbursements of the business of the debtor" and "to not unduly interfere with the carrying on of the business of the debtor in the ordinary way."

Certainly in that case the interim receiver went beyond the authority granted under the then legislation and the appointment order since at p. 476 Fisher J.A. recited that the interim receiver "carried on business generally" and did not limit himself to perishable goods. This should be contrasted with the rather flexible regime under a s. 47(1) BIA appointment of an interim receiver; the court may allow the interim receiver to exercise control over the business in question - but as well pursuant to s. 47(2)(c) it would be possible for the interim receiver to apply to the court for directions. Certainly it would appear that these directions should be tailored to meet the practical demands of the situation which are being encountered in any given case.

7 The IR relies upon s. 47(2) and s. 188 of the BIA with respect to the requested order. It submits that the sale aspect is a natural development or extension of the process in these circumstances -- and that a sale would be enhanced if potential bidders were alerted to the number, nature and extent of claims against the property and with a confidence that these would be the sole claims, all others having been barred. I am of the view that this would be an obvious practical benefit in the

circumstances. Section 47(2) has been set out above; Section 188 provides:

> s. 188 (1) An order made by the court under this Act shall be enforced in the courts having jurisdiction in bankruptcy elsewhere in Canada in the same manner in all respects as if the order had been made by the court hereby required to enforce it.
>
> (2) All courts and the officers of all courts, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of one court seeking aid, with a request to another court, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court that made the request or the court to which the request is made could exercise in regard to similar matters within its jurisdiction.

8 I think it also helpful to recall that the bankruptcy court is the court of superior jurisdiction in the various provinces and territories: see s. 183(1). Thereby the BIA confers on a preexisting court a jurisdiction in bankruptcy and insolvency and judges of these courts have jurisdiction therein and the power to deal with such matters: see Re Dominion Shipbuilding (1926), 7 C.B.R. 349 (Ont. S.C.); Re Holley; Holley v. Gifford Smith Ltd. (1986), 59 C.B.R. (N.S.) 17, 54 O.R. (2d) 225, 26 D.L.R. (4th) 230, 14 O.A.C. 65 (C.A.).

9 Houlden and Morawetz, The Annotated Bankruptcy and Insolvency Act 1993 (Toronto, Carswell) at pp. 354-5 state:

> It is sometimes a difficult matter to decide whether or not the bankruptcy court has jurisdiction. In deciding the issue, there are two aspects which have to be considered. First, the person against whom the proceeding is brought. If the action is taken against the person who is not a creditor that it is a stranger to the bankruptcy, the bankruptcy court may not have jurisdiction. Second, the nature of the remedy that is sought. If the action seeks a remedy that is given by Bankruptcy and Insolvency Act, such as an act to declare a transaction, a settlement or preference, the bankruptcy court has jurisdiction. But if the remedy is not given by the Bankruptcy and Insolvency Act or by comparable provincial legislation, the bankruptcy court ordinarily does not have jurisdiction: see Case Comment Re M.B. Greer & Co. (1953), 33 C.B.R. 69 (Ont. S.C.) at pp. 74-75; Mancini v. Falconi (1987), 65 C.B.R. (N.S.) 246 (Ont. S.C.) and Annotation at p. 247, and Bankruptcy Rule 89.

10 In the 1994 edition of the foregoing book, Houlden and Morawetz further examine this having broken down the topic into various categories. The following excerpts at pp. 365-7 are illustrative; while the cases referred to deal with trustees and bankruptcy situations, there will be some

relevance to interim receivers in s. 244 situations:

(1) Generally

Generally speaking, the Bankruptcy Court has jurisdiction over matters relating to the administration of the bankrupt estate. The bankrupt and the creditors, being parties to that administration, are subject to that jurisdiction. Furthermore, there are transactions, such a fraudulent preferences, settlements, and invalid personal property securities, which by provincial or federal legislation are also subject to the jurisdiction of the court, even though they involve third parties. But the mere fact that a trustee in bankruptcy has a claim against a stranger to the bankruptcy does not ipso facto give the Bankruptcy Court jurisdiction to hear the matters: Ellis v. Silber (1872), 8 Ch. App. 83, 42 L.J. Ch. 666, 28 L.T. 156, 21 W.R. 346 (L.C.). In some cases the Bankruptcy Court has jurisdiction, and in other cases it does not. [p. 365]

...

(2) Proceedings to Determine Whether or not a Person is a Creditor or the Rights and Obligations of a Creditor

If proceedings are taken to determine whether a person is a creditor of the bankrupt estate or the rights and obligations of a creditor, the Bankruptcy Court has jurisdiction... [p. 365]

(5) Proceedings Against Strangers to the Bankruptcy

Although it is said that the trustee has no right to bring a stranger into the Bankruptcy Court and to compel him to submit his rights for determination by that court (see, for example, Re Reynolds (1928), 10 C.B.R. 127, 62 O.L.R. 271, [1928] 2 D.L.R. 520 (S.C.), affirmed (1928), 10 C.B.R. 127 at 131, 62 O.L.R. 360, [1928] 3 D.L.R. 562 (C.A.)), this statement is too wide.

In determining jurisdiction where strangers to the bankruptcy are involved, it is submitted that the court has to assume that the trustee will be successful in his application. The question then is, will the unsuccessful

claimant be a creditor of the bankrupt estate as a result of losing the application? If the answer is yes, then the Bankruptcy Court has jurisdiction. If the answer is no, then the Bankruptcy Court does not have jurisdiction... [p. 366]

(9) Concurrent Jurisdiction of Bankruptcy Courts and Ordinary Civil Courts

The jurisdiction of the Bankruptcy Court is not exclusive. Even though a remedy can be claimed in the Bankruptcy Court, the same remedy can also be claimed in the ordinary civil courts: Stillwater Lumber & Shingle Co. v. Canada Lumber & Timber Co. (1923), 3 C.B.R. 807, [1923] 1 W.W.R. 1333, 32 B.C.R. 81, [1923] 2 D.L.R. 900 (C.A.). Re Westam Development Ltd. (1967), 10 C.B.R. (N.S.) 61, 59 W.W.R. 65, 61 D.L.R. (2d) 421 (B.C.C.A.); Phoenix Assurance Co. v. Montreal (Ville) Office municipal d'habitation (1979), 34 C.B.R. (N.S.) 158 (Que. S.C.); Discovery Enterprises Inc. v. Hongkong Bank of Canada (1990), 3 C.B.R. (3d) 309, 48 C.P.C. (2d) 290 (B.C.S.C.), leave to appeal to B.C.C.A. refused (1991), 3 C.B.R. (3d) 318, 48 C.P.C. (2d) 300. [p. 367]

11 What do we have here regarding the lien claimants under the MLA? That legislation (incorporating the definitions of the Yukon Quartz Mining Act (Canada), R.S.C. 1985, c.Y-4) involves liens which attach to mining interests. Sections 2 and 3 provide:

s. 2 (1) Any person who performs any work or service in respect of or places or furnishes any material to be used in the mining or working of any placer or quartz mine or mining claim shall, by virtue thereof, have a lien for the price of such work, service or material upon the minerals or ore produced from and the estate or interest of the owner in the mine or mining claim in or in respect of which such work or service is performed or material furnished, limited however in amount to the sum justly due to the person entitled to the lien.

(2) The lien shall attach upon the estate or interest of the owner and of all persons having any interest in the mine or mining claim and all appurtenances thereto, the minerals or ores produced therefrom, the land occupied thereby or enjoyed therewith and the chattels, equipment and machinery in, upon or used in connection with such mine, mining claim or land.

(3) Upon registration, the lien shall attach and take effect as against persons purchasing and mortgagees and other encumbrancers registering their mortgages or encumbrances subsequent to the commencement of

> performance of work or service or furnishing of material in respect of which the lien is claimed.
>
> s. 3 Any lien registered under this Act shall, as to one-half of the output from the mine or mining claim in respect of which the lien is claimed, take priority over all mortgages and encumbrances registered subsequent to November 16, 1957.

This legislation and its concept of the lien affecting the output of the mine or mining claim is apparently unique to the Yukon Territory. It was felt appropriate to have the courts of the Territory deal with the interpretation and entitlement of those provisions. Certainly their approach is the preferable one when looked at from the aspect of one court according due deference to another with a "closer" connection to the situation and this course alleviates the necessity of having to deal with the MLA through opinions on foreign law. It would appear to me on a cursory review that the nature of the lien is an in rem claim against real property interests in the Territory: see W.J.C. Kaufmann Co. Ltd. v. Berberi (1982), 36 O.R. (2d) 774 (Div. Ct.) at p. 780:

> Enforcement of the lien is therefore by an action in rem against the land or money standing in place of the land (see Pankka v. Butchart et al., [1956] O.R. 837, 4 D.L.R. (2d) 345 (C.A.)).

It would therefore seem to me that I should not do anything which would interfere with the determination of the rights which persons claiming under the MLA would have against the Faro mine (i.e. its output).

12 However, does that mean that what we will have is a fork in the road with the problem being not that one has to chose between the two branches but rather that participants in this matter must in effect straddle to keep a foot on both paths. I think not for this would be to give everyone the worst of all possible solutions.

13 Clearly a solution which allows for the determination of the exact nature and amount of the claim against the Faro mine will be of assistance in marketing that asset. A prospective purchaser will know what he is facing when making an offer for the mine. It would therefore be of significant assistance if this determination could be made rather soon as to clarify the situation before offers are requested.

14 I do not see that an order providing for advertising for claims -- including those under the MLA -- would infringe upon the jurisdiction of any other court nor the rights of any potential claimant. It was proposed that a letter go out to any person shown in the books of the defendant as a potential claimant as well as advertising in several newspapers having circulation in material areas. The point in contention would appear to be whether this Court has jurisdiction to order that a claim that has not in effect been registered with this Court by a certain date (by filing a proof of claim with the IR who would then report to this Court) could be barred.

15 Certainly the non-bankruptcy courts of this country have exercised their inherent jurisdiction to bar claims against specified assets and receivers: see Ultra Care Management Inc. v. Alexandra Gammon, Order of Austin J. dated October 19, 1993; Liquidators of Wallace Smith Trust Co. Limited v. Dundalk Investment Corporation Limited et al., Order of Blair J. dated September 22, 1993. As MacDonald J. said in Re Westar Mining Ltd., [1992] 6 W.W.R. 331 (B.C.S.C.) at p. 337:

> I have concluded that "justice dictates" they should, and that the circumstances call for the exercise of this court's inherent jurisdiction to achieve that end: see Winnipeg Supply & Fuel Co. v. Genevieve Mortgage Corp., [1972] 1 W.W.R. 651, 23 D.L.R. (3d) 160 (Man. C.A.), at p. 657 [W.W.R.].
>
> The circumstances in which this court will exercise its inherent jurisdiction are not the subject of an exhaustive list. The power is defined by Halsbury's (4th ed., vol. 37, para. 14) as:
>
> > ...the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so...
>
> Proceedings under the C.C.A.A. are a prime example of the kind of situations where the court must draw upon such powers to "flesh out" the bare bones of an inadequate and incomplete statutory provision in order to give effect to its objects.

In commenting on this decision and discussing the stay provisions of the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36 ("CCAA") and the U.S. Bankruptcy Code, Tysoe J. observed in Re Woodward's Ltd., [1993] B.C.J. No. 42 at p. 11:

> Hence it is my view that the inherent jurisdiction of the Court can be invoked for the purpose of imposing stays of proceedings against third parties. However, it is a power that should be used cautiously. In Westar Macdonald J. relied upon the Court's inherent jurisdiction to create a charge against Westar's assets because he was of the view that Westar would have no chance of completing a successful reorganization if he did not create the charge. I do not think that it is a prerequisite to the Court exercising its inherent jurisdiction that the insolvent company will not be able to complete a reorganization unless the inherent jurisdiction is exercised. But I do think that the exercise of the inherent jurisdiction must be shown to be important to the reorganization process.

> In deciding whether to exercise its inherent jurisdiction the Court should weigh the interests of the insolvent company against the interests of the parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the Court should decline to exercise its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to persuade the Court that it should not exercise its discretion under s. 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

16 While the BIA is generally a very fleshed out piece of legislation when one compares it to the CCAA, it should be observed that s. 47(2)(c): "The court may direct an interim receiver... to ...(c) take such other action as the court considers advisable" is not in itself a detailed code. It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands." It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability. I think it should be emphasized again what I was discussing earlier in my reasons: that an asset of the nature of the Faro mine is not one which can be easily mothballed and insulated from nature affecting its present condition. Rather, it must be constantly attended to so as to avoid adverse environmental deterioration which will not only be very costly to clean up but will create a health and safety hazard. The danger cannot be ignored. (I do not mean to imply that this asset is unusual or out of the ordinary for other mines in similar circumstances.) Abandonment of the property would likely carry heavy political consequences given the ultimate responsibility of the various levels of government for environmental and other concerns. A shoestring (budget) will support a great weight -- but only momentarily. Given the conditions prevailing and these circumstances, it would appear to me that the best practical solution would be that a new owner take over care and custody of this asset through purchase.

17 Ought I to do anything to assist in this regard? As was stated in Tezcan v. Tezcan (1987), 46 D.L.R. (4th) 176 (B.C.C.A.) at p. 179:

> The general rule is that the courts of a country have no jurisdiction to adjudicate on the right and title to lands not situate within its borders. Only the courts of the jurisdiction in which lands are situate, may adjudicate on the rights and title to such lands: Duke v. Andler, [1932] S.C.R. 734. The rule is not confined to the formalities of transfer of title, but extends to all

> disputes touching the land, including debt, trust, or tort: see Deschamps v. Miller, [1980] 1 Ch. 856; Purdom v. A.E. Pavey & Co. (1986), 26 S.C.R. 412; British South Africa Co. v. Companhia de Mocambique, [1893] A.C. 602 (H.L.).

See also J.G. Castel, Canadian Conflict of Law, 2nd ed.(1986; Butterworths, Toronto) at pp. 405-6.

18 However I do not see that these principles answer all the question. It must be recognized that Yukon law and the Yukon courts will determine the amount of the MLA claims and their priority; however this must interface with the general aspect of the defendant's insolvency. It strikes me that we might well analogize to the overall problem of multi-jurisdiction bankruptcies which I discussed in my paper "Potpourri of Current Topics" given at the 1993 Insolvency Institute of Canada Conference. I said at pp. 29-30:

> There are three possible approaches to insolvency where assets and creditors are located in more than one country (see: Warren and Westbrook, The Law of Debtors and Creditors (1986), p. 721):
>
> (1) The universalist approach whereby the courts of one country have exclusive jurisdiction over the insolvency of a particular debtor, and all the creditors have to bring their claims before that original bankruptcy court. Such a solution could only be achieved by means of a multinational treaty.
>
> (2) The strict territorial approach, whereby each country distributes the assets located within its jurisdiction according to its own law, and does not recognize and foreign representative of creditors.
>
> (3) A mixed or compromise approach, whereby the courts of each country exercise insolvency jurisdiction over the assets present in that country, but recognize the interests of foreign representatives of creditors and seek to co-operate with foreign courts.
>
> For an interesting discussion of choice of law issues vis-a-vis the traditional approach (territoriality, unity and universality) and proposals for new approaches see: Jay L. Westbrook, "Conflict of Laws Issues In International Insolvencies", The Twenty-Third Annual Workshop on Commercial and Consumer Law: Conference on International and Comparative Commercial Insolvency Law, (June 24-26, 1993), University of Toronto, Faculty of Law, p. 718.

I am of the view that the mixed or compromise approach is the reasonable one to adopt in these circumstances. It seems to me that this can be achieved by having the Yukon court adjudicate the

MLA claims but providing that this Court as the one involved in the insolvency proceedings grant an order that any MLA claims for which proofs of claim not filed with the IR for adjudication in the Yukon Court (assuming no excess problem) by a specific date will be barred. In this regard, I would request the aid of the Yukon Court in its bankruptcy capacity (see s. 188 BIA) to assist in the implementation of this to the extent necessary.

19 I have indicated that there should be a specific period of time to allow for the advertising and submission of claims. Given that several weeks have elapsed since this motion was heard, it would seem to me that the originally proposed time frame is likely too tight. I would request the counsel for the IR and MLA claimants see me at a convenient 9:30 this coming week to resolve the timing question.

FARLEY J.

TAB 8

Case Name:

Yukon Zinc Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended, and IN THE MATTER OF the Business Corporations Act, S.B.C. 2002, c. 57, and IN THE MATTER OF Yukon Zinc Corporation, Petitioner

[2015] B.C.J. No. 2342

2015 BCSC 1961

260 A.C.W.S. (3d) 213

5 P.P.S.A.C. (4th) 9

2015 CarswellBC 3121

Docket: S152166

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

S.C. Fitzpatrick J.

Heard: July 30, 2015.
Judgment: October 28, 2015.

(73 paras.)

Conflict of laws -- Jurisdiction -- Domestic issues (between Canadian jurisdictions) -- Forum conveniens -- Procedure for determining -- Application by two truck companies to lift stay of proceedings granted in petitioner's restructuring proceedings allowed -- Trucking companies wished to continue with their proceedings commenced in Yukon to determine validity of their miners liens -- Yukon court was clearly more appropriate forum to achieve fair and efficient process to

determine validity of lien claims -- Court Jurisdiction and Proceedings Transfer Act, s. 11(2).

Conflict of laws -- Conflicts by legal area -- Bankruptcy and insolvency law -- Compromises and arrangements -- Property -- Application by two truck companies to lift stay of proceedings granted in petitioner's restructuring proceedings allowed -- Trucking companies wished to continue with their proceedings commenced in Yukon to determine validity of their miners liens -- Yukon court was clearly more appropriate forum to achieve fair and efficient process to determine validity of lien claims -- Court Jurisdiction and Proceedings Transfer Act, s. 11(2).

Application by two truck companies to lift a stay of proceedings granted in the petitioner's restructuring proceedings. In 2014, the petitioner retained the trucking companies to haul minerals and equipment between its mine in the Yukon to several locations in British Columbia. Substantial amounts were owing to the trucking companies, both of which had filed miners liens against the petitioner and its assets in the Yukon. In 2015, the petitioner commenced restructuring proceedings in British Columbia. The trucking companies wished to continue with their proceedings commenced in the Yukon to determine the validity of their miners liens. The petitioner had presented a plan of arrangement that had been accepted by the creditors and had been sanctioned by the court.

HELD: Application allowed. There was little difference in the convenience and expense of any of the parties in proceeding in the Yukon. The trucking companies' issues arose solely under the Yukon Miners Lien Act, which favoured the Yukon court as the more appropriate forum. Any concerns regarding the enforcement of judgments could be addressed by circumscribing the relief that might be addressed by the Yukon court. The Yukon court was clearly the more appropriate forum to achieve a fair and efficient process to determine the validity of the trucking companies' lien claims.

Statutes, Regulations and Rules Cited:

Business Corporations Act, S.B.C. 2002, c. 57,

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

Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28, s. 3(b), s. 3(c), s. 3(d), s. 3(e), s. 7(c), s. 7(d), s. 10, s. 10(e)(i), s. 10(e)(ii), s. 10(h), s. 11(1), s. 11(2)

Miners Lien Act, R.S.Y. 2002, c. 151, s. 2(1), s. 3, s. 6, s. 8, s. 9, s. 10, s. 11(1)

Counsel:

Counsel for the Petitioner: Kibben Jackson, Fergus McDonnell.

Counsel for the Monitor, PricewaterhouseCoopers Inc.: Lance Williams, Tijana Gavric.

Counsel for Hy's North Transportation Inc.: David Gruber.

Counsel for P.S. Sidhu Trucking Ltd.: Scott Boucher.

Counsel for Jinduicheng Canada Resources Corporation Limited: Edward Wang.

Counsel for Ford Credit Canada Limited: Saktish Pillai.

Reasons for Judgment

S.C. FITZPATRICK J.:--

Introduction

1 These applications concern the question of whether the British Columbia or Yukon court should resolve certain issues relating to lien claims advanced in these insolvency proceedings.

2 In March 2015, the petitioner, Yukon Zinc Corporation ("Yukon Zinc"), commenced these restructuring proceedings pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). Yukon Zinc is the owner of the Wolverine mine (the "Mine") located in the Yukon.

3 From July 2014 to February 2015, Yukon Zinc retained two trucking companies, Hy's North Transportation Inc. ("Hy's"), and P.S. Sidhu Trucking Ltd. ("Sidhu"), to haul minerals and equipment between the Mine and several locations in British Columbia. There are substantial amounts owing to Hy's and Sidhu by Yukon Zinc. Both have filed miners liens against Yukon Zinc and its assets in the Yukon.

4 In June 2015, Hy's and Sidhu applied to lift the stay of proceeding granted in these *CCAA* proceedings which prevented the filing of legal proceedings against Yukon Zinc, save with its and the monitor's consent, or by order of this Court. Hy's and Sidhu wish to continue with proceedings they commenced in the Yukon Supreme Court to determine the validity of their miners liens filed against Yukon Zinc, pursuant to the *Miners Lien Act*, R.S.Y. 2002, c. 151 (the "*MLA*").

5 Yukon Zinc opposed, and continues to oppose, that relief, taking the position that the validity of any lien claims should be decided by this Court within the *CCAA* proceedings.

6 The applications to lift the stay were heard on July 30, 2015. I initially found the applications were premature for two reasons: firstly, the Yukon litigation would require Yukon Zinc to expend time and resources, which were better spent focusing on the larger restructuring issues (such as

whether it would present a plan to its creditors or arrange a sale of its assets); and, secondly, the claims process underway might provide further clarity and, perhaps, resolve the issues arising from the lien claims. Accordingly, the applications were adjourned generally.

7 Since July, the restructuring has proceeded to the point that Yukon Zinc has presented a plan of arrangement that has been accepted by the creditors. In addition, on September 23, 2015, the plan was sanctioned by the court in accordance with the *CCAA*. The plan provides for a return to unsecured creditors on their proven claims. More importantly, for the purposes of this application, the plan refers to "Unaffected Creditors", namely, those whose rights are not affected by the plan. Such creditors include those with lien claims that have priority over the registered security interests of Yukon Zinc's parent company, Jinduicheng Canada Resources Corporation Limited ("JDC Canada"), in both British Columbia and the Yukon. If Hy's and Sidhu are able to establish the validity of their liens, either before this Court or in the Yukon, they may be deemed "Unaffected Creditors" under the plan.

8 At present, the claims process has now substantially concluded; however, that process has not resulted in any resolution of the issue of the validity of the miners lien claims of Hy's and Sidhu.

Background and Position of the Parties

The Miners Lien Claims

9 On July 22, 2014, Yukon Zinc and Sidhu entered into an agreement by which Sidhu was to haul ore concentrate from the Mine to Stewart, British Columbia. Sidhu was to be paid for each tonne of concentrate transported from the Mine, in addition to being reimbursed for other costs such as fuel and labour. The Sidhu agreement provides that it is to be "governed exclusively by and construed and enforced in accordance with the laws in British Columbia".

10 The services in question were performed by Sidhu from July 29, 2014 to January 30, 2015. Pursuant to certain invoices provided to Yukon Zinc, Sidhu claims to be owed $865,921.35.

11 Similarly, Hy's advances a claim for work or services provided to Yukon Zinc from November 17, 2014 to February 2, 2015. Those services are described as:

> "freighting necessary supplies, equipment and mining materials and returning to Richmond, British Columbia (including storage en route) ore and concentrated ore including copper, zinc, carbon and lead ..."

Hy's invoiced Yukon Zinc for the sum of $550,869.70 as of February 28, 2015 for these freighting services.

12 On March 10, 2015, just prior to the *CCAA* filing and the granting of the initial order, Sidhu filed a Claim of Lien under the *MLA* (the "Sidhu Lien"). The Sidhu Lien is asserted against the

Mine, minerals in the ground at the Mine, all minerals as defined in the *MLA*, severed or recovered from the Mine in the hands of Yukon Zinc, and all fixtures, machinery, tools, appliances and other property in or on the Mine.

13 On April 1, 2015, Hy's filed a Claim of Lien pursuant to the *MLA* (the "Hy's Lien"). The Hy's Lien was asserted against various mineral claims held by Yukon Zinc, defined as the "Project", and "all minerals severed and recovered from the Project".

14 On May 5, 2015, Sidhu commenced an action in the Yukon Supreme Court to enforce the Sidhu Lien. The commencement of this proceeding was allowed under paragraph 16(iv) of the *CCAA* initial order granted March 13, 2015 because it was only to preserve Sidhu's statutory lien rights, which required the filing of the action within 60 days: *MLA*, s. 8. However, no further step in the lien proceedings, beyond service of the petition, was allowed without leave of this Court.

15 On May 15, 2015, Hy's commenced an action in the Yukon Supreme Court to enforce the Hy's Lien. That pleading was subsequently amended on May 25, 2015. By that amendment, the Hy's Lien was expanded to include a claim against the same extensive list of assets as Sidhu had done. The amount claimed was also corrected to assert a debt owing by Yukon Zinc of $534,701.70.

Lien Issues per Yukon Zinc

16 Based on the materials considered by me in July 2015, Yukon Zinc raised a number of issues in relation to the Sidhu Lien and the Hy's Lien.

17 Yukon Zinc takes issue with the validity of both the Hy's Lien and the Sidhu Lien. Firstly, it takes the position that the trucking services provided to Yukon Zinc are not lienable under s. 2(1) of the *MLA*. Secondly, it takes the position that the Claims of Lien were not filed within the prescribed period of time under the *MLA*, s. 6.

18 On June 26, 2015, a claims process order was granted in these *CCAA* proceedings. In July 2015, both Hy's and Sidhu filed proofs of claim against Yukon Zinc. Those claims and Yukon Zinc's response is as follows:

a) Hy's filed a proof of claim as a secured creditor in the amount of $488,294.70, which is lower than the amount indicated in its amended petition. Yukon Zinc delivered a notice of revision or disallowance, which accepted the claim in that amount but as an unsecured creditor. Hy's delivered a notice of dispute regarding this position;

b) Sidhu filed an amended proof of claim as a secured creditor in the same amount as indicated in the Sidhu Lien, namely $865,921.35. Yukon Zinc has not yet formally responded by the delivery of a notice of revision or

> disallowance, although it is evident that it will dispute Sidhu's claim as a secured creditor and possibly reduce the amount claimed. Yukon Zinc's initial reaction to Sidhu's claim was that the amount owing was $687,653.21, not $865,921.35.

19 Accordingly, under the claims process order, the result of these disputes would be an application to this Court to resolve the issues.

20 With respect to the lifting of the stay, Hy's and Sidhu only seek to have the Yukon court adjudicate on certain discrete issues: namely, whether the services provided by them can be subject to a lien under the *MLA*; and, if so, whether their liens were filed within the statutory deadline. Hy's also raises a third issue, arguing that even if its lien was not filed in accordance with the *MLA*, s. 6, it can still assert a lien claim in light of the earlier proceedings commenced by another Yukon miners lien claimant, Procon Mining & Tunnelling Ltd. ("Procon"), pursuant to the *MLA*, s. 11(1). I also understood that both lien claimants submit that the relative priority of any other miners liens filed in the Yukon should be determined by the Yukon court.

21 It is agreed that any remaining issues, such as the quantum of the claims, are to be determined under the claims process.

<u>Jurisdiction Issues</u>

22 In somewhat similar circumstances relating to Procon, I discussed many of the jurisdiction issues that arise on this application: see *Yukon Zinc Corporation (Re)*, 2015 BCSC 836, at paras. 69-99 (the "Procon Reasons"). The Procon Reasons addressed a priority dispute between Procon, a miners lien claimant, and Transamine Trading S.A. ("Transamine"), who was a purchaser of ore concentrate from Yukon Zinc.

23 Both Procon and Transamine asserted priority with respect to substantial amounts of ore concentrate held in Stewart, British Columbia and at the Mine. Procon had provided mining services for Yukon Zinc and had filed a miners lien in the Yukon. Procon contended that it had a priority lien on the ore concentrate in both British Columbia and the Yukon. Transamine asserted that it had already purchased this concentrate and that it had priority over Procon's claim. Transamine brought an urgent application to address the issues, asserting that it was necessary for it to arrange for shipment of the concentrate to its markets in the Far East.

24 In the Procon Reasons, I addressed Procon's position that this Court should decline to exercise its jurisdiction to hear and decide the priority dispute between Transamine and Procon. I refused Procon's request that I decline to exercise jurisdiction in favour of the Yukon court, finding that the British Columbia court was the most appropriate forum to adjudicate the dispute.

25 As with Procon, neither Hy's nor Sidhu dispute that this Court has jurisdiction *simpliciter* to determine the validity of their lien claims. That broad jurisdiction, of course, arises under the

CCAA, which is intended to provide a "single proceeding" model to the determination of issues arising in the proceeding: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, at para. 22.

26 There is also no controversy concerning the principles which govern applications by creditors under the *CCAA* to lift the stay of proceedings to litigate claims in other courts or forums, other than by the procedures in place in the restructuring proceedings:

a) the lifting of the stay is discretionary: *Canwest Global Communications Corp.*, 2011 ONSC 2215, at paras. 19, 27;

b) there are no statutory guidelines and the applicant faces a "very heavy onus" in making such an application: *Canwest Global Communications Corp. (Re)* (2009), 61 C.B.R. (5th) 200, at para. 32, 183 A.C.W.S. (3d) 634 (Ont. S.C.J.) ("*Canwest* (2009)"), as applied in *Azure Dynamics Corporation (Re)*, 2012 BCSC 781, at para. 5 and *505396 B.C. Ltd. (Re)*, 2013 BCSC 1580, at para. 19;

c) there are no set circumstances where a stay will or will not be lifted, although examples of situations where the courts have lifted stay orders are set out in *Canwest* (2009) at para. 33;

d) relevant factors will include the status of the *CCAA* proceedings and what impact the lifting of the stay will have on the proceedings. The court may consider whether there are sound reasons for doing so consistent with the objectives of the *CCAA*, including a consideration of the relative prejudice to parties and, where relevant, the merits of the proposed action: *Canwest* (2009) at para. 32;

e) particularly where the issue is one which is engaged by a claims process in place, it must be remembered that one of the objectives of the *CCAA* is to promote a streamlined process to determine claims that reduces expense and delay; and

f) as an overarching consideration, the court must consider whether it is in the interests of justice to lift the stay: *Canwest* (2009); *Azure Dynamics* at para. 28.

27 It is not entirely unusual that an issue arises in a *CCAA* proceeding which raises the question as to whether it is appropriately decided in the insolvency proceedings or in another forum.

28 As stated by Mr. Justice Walker in *Pope & Talbot Ltd. (Re)*, 2009 BCSC 1014, at para. 72, the "starting point" for a determination of jurisdiction *simpliciter* or territorial competence is the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 (the "*CJPTA*").

29 On the matter of the territorial competence of this Court, both Hy's and Sidhu have submitted to its jurisdiction in British Columbia: *CJPTA*, s. 3(b). In addition, Hy's is arguably ordinary resident in this jurisdiction, particularly given its business operations and management in British Columbia: *CJPTA*, s. 3(d), 7(c) and (d). Finally, the agreement between Yukon Zinc and Sidhu provides for the law of British Columbia to be applied in respect of its enforcement: *CJPTA*, s. 3(c).

30 There is also no dispute that territorial competence in respect of both claims is established under the "real and substantial connection" test outlined in the *CJPTA*, s. 3(e). Relevant factors under s. 10 of the *CJPTA* are that the proceeding concerns contractual obligations and the contractual obligations, to a substantial extent, were to be performed in British Columbia (s. 10(e)(i)); as it relates to Sidhu, the proceeding concerns contractual obligations and, by its express terms, the contract is governed by the law of British Columbia (s. 10(e)(ii)); and, the proceeding concerns a business carried on in British Columbia (s. 10(h)).

31 That said, Hy's and Sidhu argue that this Court should exercise its discretion and decline jurisdiction, in favour of certain issues relating to their miners liens claims being addressed by the Yukon Supreme Court as the "more appropriate forum": *CJPTA*, s. 11(1).

32 The *CJPTA* provides that in exercising its discretion, the court must have regard to the circumstances outlined in s. 11(2):

> 11 (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
>
> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
>
> (b) the law to be applied to issues in the proceeding,
>
> (c) the desirability of avoiding multiplicity of legal proceedings,

(d) the desirability of avoiding conflicting decisions in different courts,

(e) the enforcement of an eventual judgment, and

(f) the fair and efficient working of the Canadian legal system as a whole.

33 In *Laxton v. Anstalt*, 2011 BCCA 212, the court stated, at para. 44, that the list of factors in s. 11(2) is a codification of the traditional common law factors in a *forum non conveniens* analysis and that the court must consider this non-exhaustive list.

34 Finally, Yukon Zinc points to earlier jurisprudence to the effect that a judge's discretion to decline to hear an action on the basis of *forum non conveniens* is only to be exercised on an exceptional basis: see *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, at paras. 77-79, applied in *Right Business Limited v. Affluent Public Limited*, 2011 BCSC 783, at para. 75. This is consistent with another authority which refers to the applicant's burden to satisfy the onus under the *CJPTA* that the other forum is clearly more appropriate: *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85, at para. 59.

Discussion and Analysis

35 I turn to consider the circumstances arising under the *CJPTA*, s. 11(2).

Convenience and Expense

36 Sidhu and Hy's argue that these factors support that the litigation should proceed in the Yukon. They point to the fact that the proceedings have already been filed there, and the issues have already been raised in their pleadings and the supporting evidence.

37 I confess to not having an in-depth knowledge of the Yukon litigation process to address miners liens; however, I presume that it is not terribly different than what we have in British Columbia concerning the enforcement of builders liens. Section 9 of the *MLA* contemplates that the matter will, at least in the first instance, be adjudicated on application, on the basis of the affidavits filed in support of the liens. Section 10 provides that on the return of the application, the judge may adjudicate on the liability of the owner "or other person" in respect of the claim.

38 The supporting affidavits of the Sidhu and Hy's deponents, from Whitehorse and Kamloops respectively, are already before the Yukon court. I am not aware that any of the factual matters in those affidavits are in dispute. If there are any facts in dispute, presumably Yukon Zinc is able to adduce its own evidence on the issues relating to the timing of the filing of the liens and the nature of the services provided.

39 I also presume that if a triable issue should arise, it is within the discretion of the Yukon court to direct a trial of any issue or issues.

40 In the event of a notice of revision or disallowance and notice of dispute being delivered under the claims process order dated June 26, 2015, paragraph 41 of that order provides that Yukon Zinc is to bring forward an application in these proceedings to determine the disputed claim. By proceeding in the Yukon, the parties will avoid the extra costs of filing further materials on these issues in this Court under the claims process.

41 Counsel for Yukon Zinc, Hy's, and Sidhu are all located here in Vancouver. Both Yukon Zinc and the lien claimants made submissions concerning the location of witnesses. Sidhu and its employees are located in the Yukon. Hy's operational and management employees are located in Kamloops, British Columbia. Some operational personnel of Yukon Zinc are located in the Yukon, but central management is here in Vancouver.

42 At this stage of the proceedings, I see little difference in the convenience and expense of any of the parties given the apparent common intention to have the issues decided based on affidavit evidence. If cross-examination on affidavits is required, both the Sidhu and Hy's deponents are located outside of Vancouver and arrangements will have to be made to fly them or counsel to the examination site regardless.

43 I consider that the only real "saving" to the parties in having the hearing in Vancouver is in avoiding the cost and expense of flying counsel to Whitehorse for what is expected to be a one-day hearing. Presumably, Sidhu and Hy's are happy to bear this cost.

44 In my view, this is a relatively neutral factor, with a slight edge to British Columbia in terms of the costs of proceeding in the Yukon. That concern is alleviated to some extent, as I presume that Yukon Zinc, if successful, could seek an award of costs against Sidhu and Hy's.

Law to be Applied

45 A more compelling circumstance arises from the law to be applied in the determination of this dispute.

46 Section 2(1) of the *MLA* dictates who is entitled to file a miners lien. Section 6 of the *MLA* addresses the deadline by which a lien must be registered, being "45 days from the last day on which the work or service or material which is the subject matter of the claim, was performed". Section 10 of the *MLA* refers to adjudication as to the liability of the owner in respect of a miners lien claim.

47 Hy's and Sidhu argue that the issues relating to the validity of their miners lien involves the interpretation and application of the *MLA*, which is a statute unique to the Yukon. I agree with this statement. I found that, similarly, Procon's miners lien was to be determined in accordance with the

MLA: Procon Reasons, para. 75.

48 Hy's and Sidhu further argue that since the issues arise under the *MLA* alone, the preferable approach is to have the Yukon court address the issues. Again, there is no dispute that this Court has jurisdiction to apply statutes from other Canadian provinces and territories, just as I did in the Procon Reasons. The issue is, however, whether this Court should decline to exercise its jurisdiction to do so.

49 There are many examples of Western Canadian corporations who have filed insolvency proceedings in other jurisdictions, notably Ontario. The proceedings were commenced notwithstanding the substantial business operations of those corporations in either British Columbia or the Yukon. The filing of a miners lien by Curragh Inc., who operated the Faro mine in the Yukon, is but one example where the insolvency proceedings were filed in Toronto: *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176, 27 C.B.R. (3d) 148 (Ont. Gen. Div.) In *Curragh*, an issue arose when the interim receiver wished to conduct a claims process. This was contested by Yukon miners lien claimants, who insisted that the Yukon court should address those claims.

50 I addressed Mr. Justice Farley's decision in *Curragh* in the Procon Reasons:

> [84] In *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.*, [1994] 27 C.B.R. (3d) 148 (Ont. Gen. Div.), Farley J. was addressing a similar situation to what is found here. Curragh Inc. was subject to bankruptcy proceedings in Ontario but its main asset was a Yukon mine against which various persons had filed liens. Within what the court described as its "overall jurisdiction" under the bankruptcy legislation (at 150), Farley J. fashioned a middle ground that left the overall jurisdiction with the Ontario court but still allowed for certain issues to be determined by the Yukon court in respect of miner's lien claims against the real property interests there.

51 Farley J. decided that the Yukon court should determine specific lien issues arising there. He stated:

> This legislation [the *MLA*] and its concept of the lien affecting the output of the mine or mining claim is apparently unique to the Yukon Territory. It was felt appropriate to have the courts of the territory deal with the interpretation and entitlement of those provisions. Certainly their approach is the preferable one when looked at from the aspect of one court accordingly due deference to another with a "closer" connection to the situation and this course alleviates the necessity of having to deal with the MLA through opinions on foreign law.
>
> ...

It would therefore seem to me that I should not do anything which would interfere with the determination of the right which persons claiming under the MLA would have against the Faro mine (*i.e.* its output).

...

... It must be recognized that Yukon law and the Yukon courts will determine the amount of the MLA claims and their priority; however this must interface with the general aspect of the defendant's insolvency.

...

I am of the view that the mixed or compromise approach is the reasonable one to adopt in these circumstances. It seems to me that this can be achieved by having the Yukon court adjudicate the MLA claims but providing that this Court as the one involved in the insolvency proceedings grant an order that any MLA claims for which proofs of claim not filed with the [interim receiver] for adjudication in the Yukon Court (assuming no excess problem) by a specific date will be barred. In this regard, I would request the aid of the Yukon Court in its bankruptcy capacity (see s. 188 BIA) to assist in the implementation of this to the extent necessary.

(at 183, 186-187).

52 Arising from Farley J.'s decision, the issue of the validity of the miners liens filed against Curragh was later addressed by Mr. Justice Hudson of the Yukon Supreme Court in *Yukon Energy Corp. v. Curragh Inc.*, [1994] Y.J. No. 132 (S.C.). Hudson J. determined the amounts owing to the lien claimants, the property to which the liens attached, and the relative priority as between the lien claimants: para. 50. He further stated:

[30] Neither the statue nor the authorities contemplate a contest between lien claimants and other creditors. It is simply a question of the entitlement of the lien claimants pursuant to statute.

53 Sidhu and Hy's argue that the same result should be reached here by allowing the Yukon court to determine the validity of their liens under the *MLA*. They say that the circumstances relating to

Procon's miners lien, particularly in relation to its dispute with Transamine, were materially different because that determination involved a "blend" of British Columbia and Yukon law: Procon Reasons, paras. 86, 89-91. That factor was an important consideration in this Court's refusal to decline jurisdiction, in favour of the Yukon court, to resolve the dispute.

54 Sidhu and Hy's submit that the issues they seek to be addressed before the Yukon court are only related to the application of the *MLA* and do not interfere with the issues before this Court in these *CCAA* proceeding. These issues do not involve any priority determinations with other creditors, any property located outside of the Yukon, or engage contract law where British Columbia law might apply. This last point is particularly important in Sidhu's case, as their agreement with Yukon Zinc states that British Columbia law will apply to any dispute under the contract.

55 I would note, however, that there was some suggestion during submissions that Hy's and Sidhu might assert their lien claims against assets of Yukon Zinc in British Columbia, or seek a remedy from the Yukon court in respect of returning assets removed from the Yukon back to the Yukon.

56 Also relevant were my comments in the Procon Reasons concerning possible proceedings in the Yukon to decide certain issues, including those relating to the Sidhu Lien:

> [96] I am sensitive to the expertise of the Yukon court in terms of applying the *MLA* and employing the procedures under the *MLA* in adjudicating the issues that arise. However, I consider, as did Farley J. in *Canada v. Curragh*, that there is a middle ground available here that would do the least violence with regard to the jurisdiction of the Yukon court in that respect.
>
> [97] Accordingly, I acknowledge and agree that the Yukon court is likely the more appropriate forum for the purpose of adjudicating the validity of the 2015 Procon Lien, particularly in light of the substantial issues that Yukon Zinc raises in that respect. I would reemphasize that it has been assumed, for the limited purposes of this application, that the 2015 Procon Lien is valid.
>
> [98] There is also the matter of the Sidhu Trucking Lien that has been filed, although I am not aware that any action has been commenced. If the lien is valid, it may be the case that issues arise as to how those two liens are to be addressed in relation to each other. Finally, Procon and Sidhu Trucking's rights, in relation to the Mine and any other minerals that might be situated in Yukon, would appear to be matters that may be addressed by the Yukon court, if necessary. On this point, I note that there is currently no application before me to lift the *CCAA* stay of proceedings to allow this to occur and my conclusions in this respect are,

at this stage, preliminary.

57 In my view, the above factor supports that the Yukon court is the more appropriate forum to adjudicate the very specific issues raised by Hy's and Sidhu on this application. These issues are confined to the interpretation and application of the *MLA*, a unique piece of legislation that the Yukon courts have familiarity and expertise with. Assessing the validity of the miners liens should not require an application of British Columbia law or involve any *CCAA* considerations.

Multiplicity of Proceedings and Conflicting Decisions

58 At present, no application is before the court in these *CCAA* proceedings to address the issues relating to the Sidhu Lien and the Hy's Lien. Accordingly, I do not presently see any problems arising in this respect.

59 I agree that it is possible that the dispute proceedings, under the claims process order, might arise at the same time as any Yukon proceedings; however, it is my understanding that, in that event, the claims process would be narrowly focused on the quantum of the lien claims.

60 If Sidhu and Hy's are permitted to proceed in the Yukon, there may be other potential proceedings in relation to these lien claims. Section 11(1) of the *MLA* provides for the joining of various lien claims into one proceeding if the liens are registered within 60 days after the commencement of the proceedings, or provided that a statement of the lien claim is filed within that time. This is the third issue raised by Hy's referred to above. It is difficult to say whether the relative priority of other miners liens is a real issue as I have no details concerning such other claimants, other than Procon, as discussed in the Procon Reasons. No other lien claimant has similarly asked to lift the stay to allow them to proceed in the Yukon.

61 In addition, Hy's pleadings in the Yukon court refer to a substantial number of respondents, many of whom I believe to be persons who have registered security interests in the Yukon. One of the respondents is JDC Canada, who holds security against Yukon Zinc's assets in the Yukon and British Columbia. In addition, as I understand it, JDC Canada has acquired the lien rights of Procon.

62 The *MLA* includes a priority provision:

> 3 Any lien registered under this Act shall take priority over any mortgages or encumbrances to the extent the lien arises from work, services, or materials provided to the mine for a period of up to 60 days.

This interpretation of this provision has been addressed by the Yukon courts in *Ross v. Ross Mining Ltd.*, 2011 YKSC 91, at paras. 72-75; aff'd 2012 YKCA 8.

63 In any event, neither Hy's nor Sidhu argue that the stay should be lifted to address any priority issues with other persons, other than possible other miners lien claimants. This would include any

priority issue with JDC Canada, which is, of course, the central issue as to whether any valid liens will be paid in full as an "Unaffected Claim" under the plan. If such an issue arises, it will have to be determined by the British Columbia court in the *CCAA* proceedings.

Enforcement of Judgments

64 In the context of these insolvency proceedings, this circumstance concerns the effect of either Sidhu or Hy's obtaining relief from the Yukon court and, if successful, seeking to enforce any claim as against the assets of Yukon Zinc.

65 In my view, any such concerns can be addressed by circumscribing the relief that might be addressed by the Yukon Court. If the lien claimants are given any rights against the assets of Yukon Zinc, any further action or enforcement of these rights could continue to be stayed and only addressed within the insolvency proceedings before this Court. This Court would continue to have overall jurisdiction to determine any disputes between creditors as they arise in these proceedings and as they may affect Yukon Zinc's restructuring efforts generally.

Fair and Efficient Working of the Canadian Legal System

66 I have already referred to statements of the Supreme Court of Canada in *Century Services*, which confirm that, in most instances, it will be beneficial in insolvency proceedings such as this to corral all issues to be decided in one "collective" proceeding. This unified approach to the resolution of issues aids in achieving the objectives of a successful restructuring under the *CCAA*.

67 As stated by the court in both *Canwest* decisions noted above, the stay is an integral tool in achieving those objectives since it provides stability and breathing room to the debtor towards a successful restructuring.

68 In these circumstances, that concern is somewhat attenuated by the fact that Yukon Zinc has substantially achieved a successful restructuring by reason of the *CCAA* proceedings. It has successfully put forward a plan of arrangement to its creditors and the court and the implementation of the plan is underway. To that extent, Yukon Zinc's concerns about a determination of the lien issues affecting possible voting outcomes on the plan does not arise.

69 A major aspect of the plan is, of course, to provide for compensation to creditors having valid claims in accordance with the plan. Claims must first be determined in order to allow that process to proceed. The claims process is substantially complete and Yukon Zinc is underway in terms of implementing the plan. It is, however, necessary, at this juncture, to determine whether these lien claims are valid or not. If not valid, or if these liens do not have priority over JDC Canada, then Hy's and Sidhu's claim will receive a distribution in accordance with the plan. If the liens are valid and have priority over JDC Canada, then it is expected that Hy's and Sidhu will be paid, failing which they may seek to enforce their claims.

Conclusion

70 In substance, the issue here is to determine which court can better conduct a fair and efficient process to determine the validity of Hy's and Sidhu's lien claims. Needless to say, both courts can undertake that matter, but after considering all of the circumstances, I am satisfied that the Yukon court is clearly the more appropriate forum to achieve that result.

71 Accordingly, I am exercising my discretion to decline jurisdiction in relation to certain of the lien issues with a view to those issues being determined by the Yukon court. The order sought by Hy's and Sidhu to lift the stay of proceedings is granted; however, the stay is lifted only to a limited extent. I grant an order seeking the aid of the Yukon court to assist this Court by determining the following specific issues:

a) do Hy's and Sidhu have valid liens under the *MLA*?

b) what is the relative priority of all valid miners liens filed against Yukon Zinc, including by Hy's and Sidhu, under the *MLA*? and

c) to what assets of Yukon Zinc in the Yukon, if any, do any valid liens attach under the *MLA*?

72 It will be apparent that I am not seeking the aid of the Yukon court in respect of any contractual issues arising between Yukon Zinc and Hy's and Sidhu, including the amount owing under the Sidhu contract. Also, I am not seeking any determination of rights with respect to assets held by Yukon Zinc outside of the Yukon at the time any liens arose, when the Claims of Lien were filed, or when the Yukon proceedings were commenced by Procon, Hy's and Sidhu.

73 Lastly, upon a determination of the above issues by the Yukon court, and any appeals from that determination, the stay of proceedings granted in these proceedings will continue to apply to Hy's and Sidhu in respect of their claims. In particular, if they are successful, the stay under the *CCAA* initial order will continue to apply and prohibit any proceedings against Yukon Zinc and its assets, save with it and the monitor's consent, or leave of this Court.

S.C. FITZPATRICK J.

TAB 9

Century Services Inc. *Appellant*

v.

Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada *Respondent*

Indexed as: Century Services Inc. v. Canada (Attorney General)

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

Century Services Inc. *Appelante*

c.

Procureur général du Canada au nom de Sa Majesté la Reine du chef du Canada *Intimé*

Répertorié : Century Services Inc. c. Canada (Procureur général)

2010 CSC 60

N[o] du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

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

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).

Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.

Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?

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The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("*ETA*") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("*BIA*"). However, s. 18.3(1) of the *CCAA* provided that any statutory deemed trusts in favour of the Crown did not operate under the *CCAA*, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the *CCAA* chambers judge, a payment not exceeding $5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the *BIA*. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the *ETA* to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the *CCAA* to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by

La compagnie débitrice a déposé une requête sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* ») et obtenu la suspension des procédures dans le but de réorganiser ses finances. Parmi les dettes de la compagnie débitrice au début de la réorganisation figurait une somme due à la Couronne, mais non versée encore, au titre de la taxe sur les produits et services (« TPS »). Le paragraphe 222(3) de la *Loi sur la taxe d'accise* (« *LTA* ») crée une fiducie réputée visant les sommes de TPS non versées. Cette fiducie s'applique malgré tout autre texte législatif du Canada sauf la *Loi sur la faillite et l'insolvabilité* (« *LFI* »). Toutefois, le par. 18.3(1) de la *LACC* prévoyait que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, les fiducies réputées établies par la loi en faveur de la Couronne ne s'appliquaient pas sous son régime.

Le juge siégeant en son cabinet chargé d'appliquer la *LACC* a approuvé par ordonnance le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars. Toutefois, il a également ordonné à la compagnie débitrice de retenir un montant égal aux sommes de TPS non versées et de le déposer séparément dans le compte en fiducie du contrôleur jusqu'à l'issue de la réorganisation. Ayant conclu que la réorganisation n'était pas possible, la compagnie débitrice a demandé au tribunal de lever partiellement la suspension des procédures pour lui permettre de faire cession de ses biens en vertu de la *LFI*. La Couronne a demandé par requête le paiement immédiat au receveur général des sommes de TPS non versées. Le juge siégeant en son cabinet a rejeté la requête de la Couronne et autorisé la cession des biens. La Cour d'appel a accueilli l'appel pour deux raisons. Premièrement, elle a conclu que, après que la tentative de réorganisation eut échoué, le juge siégeant en son cabinet était tenu, en raison de la priorité établie par la *LTA*, d'autoriser le paiement à la Couronne des sommes qui lui étaient dues au titre de la TPS, et que l'art. 11 de la *LACC* ne lui conférait pas le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne. Deuxièmement, la Cour d'appel a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur, le juge siégeant en son cabinet avait créé une fiducie expresse en faveur de la Couronne.

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell : Il est possible de résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* en les interprétant d'une manière qui tienne compte adéquatement de l'historique de la *LACC*, de la fonction de cette loi parmi

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Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et des principes d'interprétation de la *LACC* reconnus dans la jurisprudence. L'historique de la *LACC* permet de distinguer celle-ci de la *LFI* en ce sens que, bien que ces lois aient pour objet d'éviter les coûts sociaux et économiques liés à la liquidation de l'actif d'un débiteur, la *LACC* offre plus de souplesse et accorde aux tribunaux un plus grand pouvoir discrétionnaire que le mécanisme fondé sur des règles de la *LFI*, ce qui rend la première mieux adaptée aux réorganisations complexes. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence permettant aux créanciers de savoir s'ils ont la priorité dans l'éventualité d'une faillite. Le travail de réforme législative contemporain a principalement visé à harmoniser les aspects communs à la *LACC* et à la *LFI*, et l'une des caractéristiques importantes de cette réforme est la réduction des priorités dont jouit la Couronne. Par conséquent, la *LACC* et la *LFI* contiennent toutes deux des dispositions neutralisant les fiducies réputées établies en vertu d'un texte législatif en faveur de la Couronne, et toutes deux comportent des exceptions expresses à la règle générale qui concernent les fiducies réputées établies à l'égard des retenues à la source. Par ailleurs, ces deux lois considèrent les autres créances de la Couronne comme des créances non garanties. Ces lois ne comportent pas de dispositions claires et expresses établissant une exception pour les créances relatives à la TPS.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event,

Les tribunaux appelés à résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* ont été enclins à appliquer l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* et à trancher en faveur de la *LTA*. Il ne convient pas de suivre cet arrêt. C'est plutôt la *LACC* qui énonce la règle applicable. Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Il semble découler de la logique interne de la *LACC* que la fiducie réputée établie à l'égard de la TPS est visée par la renonciation du législateur à sa priorité. Il y aurait une étrange asymétrie si l'on concluait que la *LACC* ne traite pas les fiducies réputées à l'égard de la TPS de la même manière que la *LFI*, car cela encouragerait les créanciers à recourir à la loi la plus favorable, minerait les objectifs réparateurs de la *LACC* et risquerait de favoriser les maux sociaux que l'édiction de ce texte législatif visait justement à

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recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

prévenir. Le paragraphe 222(3) de la *LTA*, une disposition plus récente et générale que le par. 18.3(1) de la *LACC*, n'exige pas l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. En tout état de cause, par suite des modifications apportées récemment à la *LACC* en 2005, l'art. 18.3 a été reformulé et renuméroté, ce qui en fait la disposition postérieure. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS. Le conflit entre la *LTA* et la *LACC* est plus apparent que réel.

L'exercice par les tribunaux de leurs pouvoirs discrétionnaires a fait en sorte que la *LACC* a évolué et s'est adaptée aux besoins commerciaux et sociaux contemporains. Comme les réorganisations deviennent très complexes, les tribunaux chargés d'appliquer la *LACC* ont été appelés à innover. Les tribunaux doivent d'abord interpréter les dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour établir leur pouvoir de prendre des mesures dans le cadre d'une procédure fondée sur la *LACC*. À cet égard, il faut souligner que le texte de la *LACC* peut être interprété très largement. La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. L'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Il s'agit de savoir si l'ordonnance contribuera utilement à la réalisation de l'objectif d'éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. Ce critère s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. En l'espèce, l'ordonnance du juge siégeant en son cabinet qui a suspendu l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS contribuait à la réalisation des objectifs de la *LACC*, parce qu'elle avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et favorisait une transition harmonieuse entre la *LACC* et la *LFI*, répondant ainsi à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*, mais il n'existe aucun hiatus entre ces lois étant donné qu'elles s'appliquent de concert et que, dans les deux cas, les créanciers examinent le régime de distribution prévu par la *LFI* pour connaître la situation qui serait la leur en cas d'échec de la réorganisation. L'ampleur du pouvoir discrétionnaire conféré au tribunal par la *LACC* suffit pour établir une passerelle vers une liquidation opérée sous le régime de la *LFI*. Le juge siégeant en son cabinet pouvait donc rendre l'ordonnance qu'il a prononcée.

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No express trust was created by the chambers judge's order in this case because there is no certainty of object inferrable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the *CCAA* established above, because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount.

L'ordonnance du juge siégeant en son cabinet n'a pas créé de fiducie expresse en l'espèce, car aucune certitude d'objet ne peut être inférée de cette ordonnance. La création d'une fiducie expresse exige la présence de certitudes quant à l'intention, à la matière et à l'objet. Lorsque le juge siégeant en son cabinet a accepté la proposition que les sommes soient détenues séparément dans le compte en fiducie du contrôleur, il n'existait aucune certitude que la Couronne serait le bénéficiaire ou l'objet de la fiducie, car il y avait un doute quant à la question de savoir qui au juste pourrait toucher l'argent en fin de compte. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à l'argent, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a *CCAA* or *BIA* provision explicitly confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakeable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

Le juge Fish : Les sommes perçues par la débitrice au titre de la TPS ne font l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité, mais il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il s'agit d'un exercice délibéré du pouvoir discrétionnaire de légiférer. Par contre, en maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, les tribunaux ont protégé indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. Dans le contexte du régime canadien d'insolvabilité, il existe une fiducie réputée uniquement lorsqu'une disposition législative crée la fiducie et qu'une disposition de la *LACC* ou de la *LFI* confirme explicitement l'existence de la fiducie. La *Loi de l'impôt sur le revenu*, le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* renferment toutes des dispositions relatives aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*, mais le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions est confirmé à l'art. 37 de la *LACC* et au par. 67(3) de la *LFI* en termes clairs et explicites. La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne confirme pas l'existence de la fiducie dans la *LFI* ou la *LACC*, ce qui témoigne de son intention de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

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Per Abella J. (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(*f*) of the *Interpretation Act*, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

La juge Abella (dissidente) : Le paragraphe 222(3) de la *LTA* donne préséance, dans le cadre d'une procédure relevant de la *LACC*, à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Cette disposition définit sans équivoque sa portée dans des termes on ne peut plus clairs et n'exclut que la *LFI* de son champ d'application. Les termes employés révèlent l'intention claire du législateur que le par. 222(3) l'emporte en cas de conflit avec toute autre loi sauf la *LFI*. Cette opinion est confortée par le fait que des modifications ont été apportées à la *LACC* après l'édiction du par. 222(3) et que, malgré les demandes répétées de divers groupes, le par. 18.3(1) n'a pas été modifié pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. Cela indique que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

Cette conclusion est renforcée par l'application d'autres principes d'interprétation. Une disposition spécifique antérieure peut être supplantée par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale. Le paragraphe 222(3) accomplit cela de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » sauf la *LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3). Selon l'alinéa 44*f*) de la *Loi d'interprétation*, le fait que le par. 18.3(1) soit devenu le par. 37(1) à la suite de l'édiction du par. 222(3) de la *LTA* n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure ». Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi autre que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1), ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent, il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

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APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith JJ.A.), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, reversing a judgment of Brenner C.J.S.C., 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

Mary I. A. Buttery, *Owen J. James* and *Matthew J. G. Curtis*, for the appellant.

Gordon Bourgard, *David Jacyk* and *Michael J. Lema*, for the respondent.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ. was delivered by

[1] DESCHAMPS J. — For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency*

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Newbury, Tysoe et Smith), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, qui a infirmé une décision du juge en chef Brenner, 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, qui a rejeté la demande de la Couronne sollicitant le paiement de la TPS. Pourvoi accueilli, la juge Abella est dissidente.

Mary I. A. Buttery, *Owen J. James* et *Matthew J. G. Curtis*, pour l'appelante.

Gordon Bourgard, *David Jacyk* et *Michael J. Lema*, pour l'intimé.

Version française du jugement de la juge en chef McLachlin et des juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell rendu par

[1] LA JUGE DESCHAMPS — C'est la première fois que la Cour est appelée à interpréter directement les dispositions de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). À cet égard, deux questions sont soulevées. La première requiert la conciliation d'une disposition de la *LACC* et d'une disposition de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), qui, selon des juridictions inférieures, sont en conflit l'une avec l'autre. La deuxième concerne la portée du pouvoir discrétionnaire du tribunal qui surveille une réorganisation. Les dispositions législatives pertinentes sont reproduites en annexe. Pour ce qui est de la première question, après avoir examiné l'évolution des priorités de la Couronne en matière d'insolvabilité et le libellé des diverses lois qui établissent ces priorités, j'arrive à la conclusion que c'est la *LACC*, et non la *LTA*, qui énonce la règle applicable. Pour ce qui est de la seconde question, je conclus qu'il faut interpréter les larges pouvoirs discrétionnaires conférés au juge en tenant compte de la nature réparatrice de la *LACC* et de la législation sur l'insolvabilité en général. Par conséquent, le tribunal avait le pouvoir

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Act, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

I. Facts and Decisions of the Courts Below

[2] Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

[3] Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

discrétionnaire de lever partiellement la suspension des procédures pour permettre au débiteur de faire cession de ses biens en vertu de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »). Je suis d'avis d'accueillir le pourvoi.

1. Faits et décisions des juridictions inférieures

[2] Le 13 décembre 2007, Ted LeRoy Trucking Ltd. (« LeRoy Trucking ») a déposé une requête sous le régime de la *LACC* devant la Cour suprême de la Colombie-Britannique et obtenu la suspension des procédures dans le but de réorganiser ses finances. L'entreprise a vendu certains éléments d'actif excédentaires, comme l'y autorisait l'ordonnance.

[3] Parmi les dettes de LeRoy Trucking figurait une somme perçue par celle-ci au titre de la taxe sur les produits et services (« TPS ») mais non versée à la Couronne. La *LTA* crée en faveur de la Couronne une fiducie réputée visant les sommes perçues au titre de la TPS. Cette fiducie réputée s'applique à tout bien ou toute recette détenue par la personne qui perçoit la TPS et à tout bien de cette personne détenu par un créancier garanti, et le produit découlant de ces biens doit être payé à la Couronne par priorité sur tout droit en garantie. Aux termes de la *LTA*, la fiducie réputée s'applique malgré tout autre texte législatif du Canada sauf la *LFI*. Cependant, la *LACC* prévoit également que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, ne s'appliquent pas sous son régime les fiducies réputées qui existent en faveur de la Couronne. Par conséquent, pour ce qui est de la TPS, la Couronne est un créancier non garanti dans le cadre de cette loi. Néanmoins, à l'époque où LeRoy Trucking a débuté ses procédures en vertu de la *LACC*, la jurisprudence dominante indiquait que la *LTA* l'emportait sur la *LACC*, la Couronne jouissant ainsi d'un droit prioritaire à l'égard des créances relatives à la TPS dans le cadre de la *LACC*, malgré le fait qu'elle aurait perdu cette priorité en vertu de la *LFI*. La *LACC* a fait l'objet de modifications substantielles en 2005, et certaines des dispositions en cause dans le présent pourvoi ont alors été renumérotées et reformulées (L.C. 2005, ch. 47). Mais ces modifications ne sont entrées en vigueur que le 18 septembre 2009. Je ne me reporterai aux dispositions modifiées que lorsqu'il sera utile de le faire.

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[4] On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of $305,202.30 be held by the Monitor in its trust account.

[4] Le 29 avril 2008, le juge en chef Brenner de la Cour suprême de la Colombie-Britannique, dans le contexte des procédures intentées en vertu de la *LACC*, a approuvé le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars, soit le produit de la vente d'éléments d'actif excédentaires. LeRoy Trucking a proposé de retenir un montant égal aux sommes perçues au titre de la TPS mais non versées à la Couronne et de le déposer dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Afin de maintenir le statu quo, en raison du succès incertain de la réorganisation, le juge en chef Brenner a accepté la proposition et ordonné qu'une somme de 305 202,30 $ soit détenue par le contrôleur dans son compte en fiducie.

[5] On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221).

[5] Le 3 septembre 2008, ayant conclu que la réorganisation n'était pas possible, LeRoy Trucking a demandé à la Cour suprême de la Colombie-Britannique l'autorisation de faire cession de ses biens en vertu de la *LFI*. Pour sa part, la Couronne a demandé au tribunal d'ordonner le paiement au receveur général du Canada de la somme détenue par le contrôleur au titre de la TPS. Le juge en chef Brenner a rejeté cette dernière demande. Selon lui, comme la détention des fonds dans le compte en fiducie du contrôleur visait à [TRADUCTION] « faciliter le paiement final des sommes de TPS qui étaient dues avant que l'entreprise ne débute les procédures, mais seulement si un plan viable était proposé », l'impossibilité de procéder à une telle réorganisation, suivie d'une cession de biens, signifiait que la Couronne perdrait sa priorité sous le régime de la *LFI* (2008 BCSC 1805, [2008] G.S.T.C. 221).

[6] The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, 270 B.C.A.C. 167). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

[6] La Cour d'appel de la Colombie-Britannique a accueilli l'appel interjeté par la Couronne (2009 BCCA 205, 270 B.C.A.C. 167). Rédigeant l'arrêt unanime de la cour, le juge Tysoe a invoqué deux raisons distinctes pour y faire droit.

[7] First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and

[7] Premièrement, le juge d'appel Tysoe a conclu que le pouvoir conféré au tribunal par l'art. 11 de la *LACC* n'autorisait pas ce dernier à rejeter la demande de la Couronne sollicitant le paiement immédiat des sommes de TPS faisant l'objet de la fiducie réputée,

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that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

après qu'il fut devenu clair que la tentative de réorganisation avait échoué et que la faillite était inévitable. Comme la restructuration n'était plus une possibilité, il ne servait plus à rien, dans le cadre de la *LACC*, de suspendre le paiement à la Couronne des sommes de TPS et le tribunal était tenu, en raison de la priorité établie par la *LTA*, d'en autoriser le versement à la Couronne. Ce faisant, le juge Tysoe a adopté le raisonnement énoncé dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), suivant lequel la fiducie réputée que crée la *LTA* à l'égard des sommes dues au titre de la TPS établissait la priorité de la Couronne sur les créanciers garantis dans le cadre de la *LACC*.

[8] Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

[8] Deuxièmement, le juge Tysoe a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur le 29 avril 2008, le tribunal avait créé une fiducie expresse en faveur de la Couronne, et que les sommes visées ne pouvaient être utilisées à quelque autre fin que ce soit. En conséquence, la Cour d'appel a ordonné que les sommes détenues par le contrôleur en fiducie pour la Couronne soient versées au receveur général.

2. Issues

2. Questions en litige

[9] This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

[9] Le pourvoi soulève trois grandes questions que j'examinerai à tour de rôle :

(1) Le paragraphe 222(3) de la *LTA* l'emporte-t-il sur le par. 18.3(1) de la *LACC* et donne-t-il priorité à la fiducie réputée qui est établie par la *LTA* en faveur de la Couronne pendant des procédures régies par la *LACC*, comme il a été décidé dans l'arrêt *Ottawa Senators*?

(2) Le tribunal a-t-il outrepassé les pouvoirs qui lui étaient conférés par la *LACC* en levant la suspension des procédures dans le but de permettre au débiteur de faire cession de ses biens?

(3) L'ordonnance du tribunal datée du 29 avril 2008 exigeant que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte en fiducie du contrôleur a-t-elle créé une fiducie expresse en faveur de la Couronne à l'égard des fonds en question?

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3. Analysis

[10] The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite . . . any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

[11] In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 *Purpose and Scope of Insolvency Law*

[12] Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain

3. Analyse

[10] La première question porte sur les priorités de la Couronne dans le contexte de l'insolvabilité. Comme nous le verrons, la *LTA* crée en faveur de la Couronne une fiducie réputée à l'égard de la TPS due par un débiteur « [m]algré [. . .] tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*) » (par. 222(3)), alors que selon la disposition de la *LACC* en vigueur à l'époque, « par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme [tel] » (par. 18.3(1)). Il est difficile d'imaginer deux dispositions législatives plus contradictoires en apparence. Cependant, comme c'est souvent le cas, le conflit apparent peut être résolu au moyen des principes d'interprétation législative.

[11] Pour interpréter correctement ces dispositions, il faut examiner l'historique de la *LACC*, la fonction de cette loi parmi l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et les principes reconnus dans la jurisprudence. Nous verrons que les priorités de la Couronne en matière d'insolvabilité ont été restreintes de façon appréciable. La réponse à la deuxième question repose aussi sur le contexte de la *LACC*, mais l'objectif de cette loi et l'interprétation qu'en a donnée la jurisprudence jouent également un rôle essentiel. Après avoir examiné les deux premières questions soulevées en l'espèce, j'aborderai la conclusion du juge Tysoe selon laquelle l'ordonnance rendue par le tribunal le 29 avril 2008 a eu pour effet de créer une fiducie expresse en faveur de la Couronne.

3.1 *Objectif et portée du droit relatif à l'insolvabilité*

[12] L'insolvabilité est la situation de fait qui se présente quand un débiteur n'est pas en mesure de payer ses créanciers (voir, généralement, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), p. 16). Certaines procédures judiciaires peuvent être intentées en cas d'insolvabilité. Ainsi, le débiteur peut généralement obtenir une ordonnance judiciaire

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a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

ayant pour effet de suspendre les mesures d'exécution de ses créanciers, puis tenter de conclure avec eux une transaction à caractère exécutoire contenant des conditions de paiement plus réalistes. Ou alors, les biens du débiteur sont liquidés et ses dettes sont remboursées sur le produit de cette liquidation, selon les règles de priorité établies par la loi. Dans le premier cas, on emploie habituellement les termes de réorganisation ou de restructuration, alors que dans le second, on parle de liquidation.

[13] Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

[13] Le droit canadien en matière d'insolvabilité commerciale n'est pas codifié dans une seule loi exhaustive. En effet, le législateur a plutôt adopté plusieurs lois sur l'insolvabilité, la principale étant la *LFI*. Cette dernière établit un régime juridique autonome qui concerne à la fois la réorganisation et la liquidation. Bien qu'il existe depuis longtemps des mesures législatives relatives à la faillite, la *LFI* elle-même est une loi assez récente — elle a été adoptée en 1992. Ses procédures se caractérisent par une approche fondée sur des règles préétablies. Les débiteurs insolvables — personnes physiques ou personnes morales — qui doivent 1 000 $ ou plus peuvent recourir à la *LFI*. Celle-ci comporte des mécanismes permettant au débiteur de présenter à ses créanciers une proposition de rajustement des dettes. Si la proposition est rejetée, la *LFI* établit la démarche aboutissant à la faillite : les biens du débiteur sont liquidés et le produit de cette liquidation est versé aux créanciers conformément à la répartition prévue par la loi.

[14] Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either

[14] La possibilité de recourir à la *LACC* est plus restreinte. Le débiteur doit être une compagnie dont les dettes dépassent cinq millions de dollars. Contrairement à la *LFI*, la *LACC* ne contient aucune disposition relative à la liquidation de l'actif d'un débiteur en cas d'échec de la réorganisation. Une procédure engagée sous le régime de la *LACC* peut se terminer de trois façons différentes. Le scénario idéal survient dans les cas où la suspension des recours donne au débiteur un répit lui permettant de rétablir sa solvabilité et où le processus régi par la *LACC* prend fin sans qu'une réorganisation soit nécessaire. Le deuxième scénario le plus souhaitable est le cas où la transaction ou l'arrangement proposé par le débiteur est

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the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

accepté par ses créanciers et où la compagnie réorganisée poursuit ses activités au terme de la procédure engagée en vertu de la *LACC*. Enfin, dans le dernier scénario, la transaction ou l'arrangement échoue et la compagnie ou ses créanciers cherchent habituellement à obtenir la liquidation des biens en vertu des dispositions applicables de la *LFI* ou la mise sous séquestre du débiteur. Comme nous le verrons, la principale différence entre les régimes de réorganisation prévus par la *LFI* et la *LACC* est que le second établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire, ce qui rend le mécanisme mieux adapté aux réorganisations complexes.

[15] As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

[15] Comme je vais le préciser davantage plus loin, la *LACC* — la première loi canadienne régissant la réorganisation — a pour objectif de permettre au débiteur de continuer d'exercer ses activités et, dans les cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif. Les propositions faites aux créanciers en vertu de la *LFI* répondent au même objectif, mais au moyen d'un mécanisme fondé sur des règles et offrant moins de souplesse. Quand la réorganisation s'avère impossible, les dispositions de la *LFI* peuvent être appliquées pour répartir de manière ordonnée les biens du débiteur entre les créanciers, en fonction des règles de priorité qui y sont établies.

[16] Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors*

[16] Avant l'adoption de la *LACC* en 1933 (S.C. 1932-33, ch. 36), la liquidation de la compagnie débitrice constituait la pratique la plus courante en vertu de la législation existante en matière d'insolvabilité commerciale (J. Sarra, *Creditor Rights and the Public Interest : Restructuring Insolvent Corporations* (2003), p. 12). Les ravages de la Grande Dépression sur les entreprises canadiennes et l'absence d'un mécanisme efficace susceptible de permettre aux débiteurs et aux créanciers d'arriver à des compromis afin d'éviter la liquidation commandaient une solution législative. La *LACC* a innové en permettant au débiteur insolvable de tenter une réorganisation sous surveillance judiciaire, hors du cadre de la législation existante en matière d'insolvabilité qui, une fois entrée en jeu,

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Arrangement Act, [1934] S.C.R. 659, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

[17] Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

[18] Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

[19] The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make

aboutissait presque invariablement à la liquidation (*Reference re Companies' Creditors Arrangement Act*, [1934] R.C.S. 659, p. 660-661; Sarra, *Creditor Rights*, p. 12-13).

[17] Le législateur comprenait, lorsqu'il a adopté la *LACC*, que la liquidation d'une compagnie insolvable causait préjudice à la plupart des personnes touchées — notamment les créanciers et les employés — et que la meilleure solution consistait dans un arrangement permettant à la compagnie de survivre (Sarra, *Creditor Rights*, p. 13-15).

[18] Les premières analyses et décisions judiciaires à cet égard ont également entériné les objectifs réparateurs de la *LACC*. On y reconnaissait que la valeur de la compagnie demeurait plus grande lorsque celle-ci pouvait poursuivre ses activités, tout en soulignant les pertes intangibles découlant d'une liquidation, par exemple la disparition de la clientèle (S. E. Edwards, « Reorganizations Under the Companies' Creditors Arrangement Act » (1947), 25 *R. du B. can.* 587, p. 592). La réorganisation sert l'intérêt public en permettant la survie de compagnies qui fournissent des biens ou des services essentiels à la santé de l'économie ou en préservant un grand nombre d'emplois (*ibid.*, p. 593). Les effets de l'insolvabilité pouvaient même toucher d'autres intéressés que les seuls créanciers et employés. Ces arguments se font entendre encore aujourd'hui sous une forme un peu différente, lorsqu'on justifie la réorganisation par la nécessité de remettre sur pied des compagnies qui constituent des volets essentiels d'un réseau complexe de rapports économiques interdépendants, dans le but d'éviter les effets négatifs de la liquidation.

[19] La *LACC* est tombée en désuétude au cours des décennies qui ont suivi, vraisemblablement parce que des modifications apportées en 1953 ont restreint son application aux compagnies émettant des obligations (S.C. 1952-53, ch. 3). Pendant la récession du début des années 1980, obligés de s'adapter au nombre grandissant d'entreprises en difficulté, les avocats travaillant dans le domaine de l'insolvabilité ainsi que les tribunaux ont redécouvert cette loi et s'en sont servis pour relever les nouveaux défis de l'économie. Les participants aux

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the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

procédures en sont peu à peu venus à reconnaître et à apprécier la caractéristique propre de la loi : l'attribution, au tribunal chargé de surveiller le processus, d'une grande latitude lui permettant de rendre les ordonnances nécessaires pour faciliter la réorganisation du débiteur et réaliser les objectifs de la *LACC*. Nous verrons plus loin comment les tribunaux ont utilisé de façon de plus en plus souple et créative les pouvoirs qui leur sont conférés par la *LACC*.

[20] Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, at 15:15-15:16).

[20] Ce ne sont pas seulement les tribunaux qui se sont employés à faire évoluer le droit de l'insolvabilité pendant cette période. En 1970, un comité constitué par le gouvernement a mené une étude approfondie au terme de laquelle il a recommandé une réforme majeure, mais le législateur n'a rien fait (voir *Faillite et insolvabilité : Rapport du comité d'étude sur la législation en matière de faillite et d'insolvabilité* (1970)). En 1986, un autre comité d'experts a formulé des recommandations de portée plus restreinte, qui ont finalement conduit à l'adoption de la *Loi sur la faillite et l'insolvabilité* de 1992 (L.C. 1992, ch. 27) (voir *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité* (1986)). Des dispositions à caractère plus général concernant la réorganisation des débiteurs insolvables ont alors été ajoutées à la loi canadienne relative à la faillite. Malgré l'absence de recommandations spécifiques au sujet de la *LACC* dans les rapports de 1970 et 1986, le comité de la Chambre des communes qui s'est penché sur le projet de loi C-22 à l'origine de la *LFI* a semblé accepter le témoignage d'un expert selon lequel le nouveau régime de réorganisation de la *LFI* supplanterait rapidement la *LACC*, laquelle pourrait alors être abrogée et l'insolvabilité commerciale et la faillite seraient ainsi régies par un seul texte législatif (*Procès-verbaux et témoignages du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale*, fascicule n° 15, 3e sess., 34e lég., 3 octobre 1991, 15:15-15:16).

[21] In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a

[21] En rétrospective, cette conclusion du comité de la Chambre des communes ne correspondait pas à la réalité. Elle ne tenait pas compte de la nouvelle vitalité de la *LACC* dans la pratique contemporaine,

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flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

ni des avantages qu'offrait, en présence de réorganisations de plus en plus complexes, un processus souple de réorganisation sous surveillance judiciaire par rapport au régime plus rigide de la *LFI*, fondé sur des règles préétablies. La « souplesse de la LACC [était considérée comme offrant] de grands avantages car elle permet de prendre des décisions créatives et efficaces » (Industrie Canada, Direction générale des politiques-cadres du marché, *Rapport sur la mise en application de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2002), p. 50). Au cours des trois dernières décennies, la résurrection de la *LACC* a donc été le moteur d'un processus grâce auquel, selon un auteur, [TRADUCTION] « le régime juridique canadien de restructuration en cas d'insolvabilité — qui était au départ un instrument plutôt rudimentaire — a évolué pour devenir un des systèmes les plus sophistiqués du monde développé » (R. B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 481).

[22] While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing,

[22] Si les instances en matière d'insolvabilité peuvent être régies par des régimes législatifs différents, elles n'en présentent pas moins certains points communs, dont le plus frappant réside dans le modèle de la procédure unique. Le professeur Wood a décrit ainsi la nature et l'objectif de ce modèle dans *Bankruptcy and Insolvency Law* :

> [TRADUCTION] Elles prévoient toutes une procédure collective qui remplace la procédure civile habituelle dont peuvent se prévaloir les créanciers pour faire valoir leurs droits. Les recours des créanciers sont collectivisés afin d'éviter l'anarchie qui régnerait si ceux-ci pouvaient exercer leurs recours individuellement. En l'absence d'un processus collectif, chaque créancier sait que faute d'agir de façon rapide et déterminée pour saisir les biens du débiteur, il sera devancé par les autres créanciers. [p. 2-3]

Le modèle de la procédure unique vise à faire échec à l'inefficacité et au chaos qui résulteraient de l'insolvabilité si chaque créancier engageait sa propre procédure dans le but de recouvrer sa créance. La réunion — en une seule instance relevant d'un même tribunal — de toutes les actions possibles contre le débiteur a pour effet de faciliter la négociation avec

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rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

les créanciers en les mettant tous sur le même pied. Cela évite le risque de voir un créancier plus combatif obtenir le paiement de ses créances sur l'actif limité du débiteur pendant que les autres créanciers tentent d'arriver à une transaction. La *LACC* et la *LFI* autorisent toutes deux pour cette raison le tribunal à ordonner la suspension de toutes les actions intentées contre le débiteur pendant qu'on cherche à conclure une transaction.

[23] Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, s. 25; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*).

[23] Un autre point de convergence entre la *LACC* et la *LFI* concerne les priorités. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence pour ce qui se produira dans une telle situation. De plus, l'une des caractéristiques importantes de la réforme dont ces deux lois ont fait l'objet depuis 1992 est la réduction des priorités de la Couronne (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73 et 125; L.C. 2000, ch. 30, art. 148; L.C. 2005, ch. 47, art. 69 et 131; L.C. 2009, ch. 33, art. 25; voir aussi *Québec (Revenu) c. Caisse populaire Desjardins de Montmagny*, 2009 CSC 49, [2009] 3 R.C.S. 286; *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité*).

[24] With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

[24] Comme les régimes de restructuration parallèles de la *LACC* et de la *LFI* constituent désormais une caractéristique reconnue dans le domaine du droit de l'insolvabilité, le travail de réforme législative contemporain a principalement visé à harmoniser, dans la mesure du possible, les aspects communs aux deux régimes et à privilégier la réorganisation plutôt que la liquidation (voir la *Loi édictant la Loi sur le Programme de protection des salariés et modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et d'autres lois en conséquence*, L.C. 2005, ch. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta L.R. (4th) 192, par. 19).

[25] Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

[25] Ayant à l'esprit le contexte historique de la *LACC* et de la *LFI*, je vais maintenant aborder la première question en litige.

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3.2 *GST Deemed Trust Under the CCAA*

[26] The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

[27] The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

[28] The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims

3.2 *Fiducie réputée se rapportant à la TPS dans le cadre de la LACC*

[26] La Cour d'appel a estimé que la *LTA* empêchait le tribunal de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS, lorsqu'il a partiellement levé la suspension des procédures engagées contre le débiteur afin de permettre à celui-ci de faire cession de ses biens. Ce faisant, la cour a adopté un raisonnement qui s'insère dans un courant jurisprudentiel dominé par l'arrêt *Ottawa Senators*, suivant lequel il demeure possible de demander le bénéfice d'une fiducie réputée établie par la *LTA* pendant une réorganisation opérée en vertu de la *LACC*, et ce, malgré les dispositions de la *LACC* qui semblent dire le contraire.

[27] S'appuyant largement sur l'arrêt *Ottawa Senators* de la Cour d'appel de l'Ontario, la Couronne plaide que la disposition postérieure de la *LTA* créant la fiducie réputée visant la TPS l'emporte sur la disposition de la *LACC* censée neutraliser la plupart des fiducies réputées qui sont créées par des dispositions législatives. Si la Cour d'appel a accepté ce raisonnement dans la présente affaire, les tribunaux provinciaux ne l'ont pas tous adopté (voir, p. ex., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), autorisation d'appel accordée, 2010 QCCA 183 (CanLII)). Dans ses observations écrites adressées à la Cour, Century Services s'est fondée sur l'argument suivant lequel le tribunal pouvait, en vertu de la *LACC*, maintenir la suspension de la demande de la Couronne visant le paiement de la TPS non versée. Au cours des plaidoiries, la question de savoir si l'arrêt *Ottawa Senators* était bien fondé a néanmoins été soulevée. Après l'audience, la Cour a demandé aux parties de présenter des observations écrites supplémentaires à ce sujet. Comme il ressort clairement des motifs de ma collègue la juge Abella, cette question a pris une grande importance devant notre Cour. Dans ces circonstances, la Cour doit statuer sur le bien-fondé du raisonnement adopté dans l'arrêt *Ottawa Senators*.

[28] Le contexte général dans lequel s'inscrit cette question concerne l'évolution considérable, signalée plus haut, de la priorité dont jouit la Couronne en tant que créancier en cas d'insolvabilité. Avant les

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largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as added by S.C. 1997, c. 12, s. 126).

années 1990, les créances de la Couronne bénéficiaient dans une large mesure d'une priorité en cas d'insolvabilité. Cette situation avantageuse suscitait une grande controverse. Les propositions de réforme du droit de l'insolvabilité de 1970 et de 1986 en témoignent — elles recommandaient que les créances de la Couronne ne fassent l'objet d'aucun traitement préférentiel. Une question connexe se posait : celle de savoir si la Couronne était même assujettie à la *LACC*. Les modifications apportées à la *LACC* en 1997 ont confirmé qu'elle l'était bel et bien (voir *LACC*, art. 21, ajouté par L.C. 1997, ch. 12, art. 126).

[29] Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bankr. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

[29] Les revendications de priorité par l'État en cas d'insolvabilité sont abordées de différentes façons selon les pays. Par exemple, en Allemagne et en Australie, l'État ne bénéficie d'aucune priorité, alors qu'aux États-Unis et en France il jouit au contraire d'une large priorité (voir B. K. Morgan, « Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy » (2000), 74 *Am. Bankr. L.J.* 461, p. 500). Le Canada a choisi une voie intermédiaire dans le cadre d'une réforme législative amorcée en 1992 : la Couronne a conservé sa priorité pour les sommes retenues à la source au titre de l'impôt sur le revenu et des cotisations à l'assurance-emploi (« AE ») et au Régime de pensions du Canada (« RPC »), mais elle est un créancier ordinaire non garanti pour la plupart des autres sommes qui lui sont dues.

[30] Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at §2).

[30] Le législateur a fréquemment adopté des mécanismes visant à protéger les créances de la Couronne et à permettre leur exécution. Les deux plus courants sont les fiducies présumées et les pouvoirs de saisie-arrêt (voir F. L. Lamer, *Priority of Crown Claims in Insolvency* (feuilles mobiles), §2).

[31] With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property

[31] Pour ce qui est des sommes de TPS perçues, le législateur a établi une fiducie réputée. La *LTA* précise que la personne qui perçoit une somme au titre de la TPS est réputée la détenir en fiducie pour la Couronne (par. 222(1)). La fiducie réputée s'applique aux autres biens de la personne qui perçoit la taxe, pour une valeur égale à la somme réputée détenue en fiducie, si la somme en question n'a pas été versée en conformité avec la *LTA*. La fiducie réputée vise

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held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

[32] Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

[33] In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

également les biens détenus par un créancier garanti qui, si ce n'était de la sûreté, seraient les biens de la personne qui perçoit la taxe (par. 222(3)).

[32] Utilisant pratiquement les mêmes termes, le législateur a créé de semblables fiducies réputées à l'égard des retenues à la source relatives à l'impôt sur le revenu et aux cotisations à l'AE et au RPC (voir par. 227(4) de la *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.) (« *LIR* »), par. 86(2) et (2.1) de la *Loi sur l'assurance-emploi*, L.C. 1996, ch. 23, et par. 23(3) et (4) du *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8). J'emploierai ci-après le terme « retenues à la source » pour désigner les retenues relatives à l'impôt sur le revenu et aux cotisations à l'AE et au RPC.

[33] Dans *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411, la Cour était saisie d'un litige portant sur la priorité de rang entre, d'une part, une fiducie réputée établie en vertu de la *LIR* à l'égard des retenues à la source, et, d'autre part, des sûretés constituées en vertu de la *Loi sur les banques*, L.C. 1991, ch. 46, et de la loi de l'Alberta intitulée *Personal Property Security Act*, S.A. 1988, ch. P-4.05 (« *PPSA* »). D'après les dispositions alors en vigueur, une fiducie réputée — établie en vertu de la *LIR* à l'égard des biens du débiteur pour une valeur égale à la somme due au titre de l'impôt sur le revenu — commençait à s'appliquer au moment de la liquidation, de la mise sous séquestre ou de la cession de biens. Dans *Sparrow Electric*, la Cour a conclu que la fiducie réputée de la *LIR* ne pouvait pas l'emporter sur les sûretés, au motif que, comme celles-ci constituaient des privilèges fixes grevant les biens dès que le débiteur acquérait des droits sur eux, il n'existait pas de biens susceptibles d'être visés par la fiducie réputée de la *LIR* lorsqu'elle prenait naissance par la suite. Ultérieurement, dans *First Vancouver Finance c. M.R.N.*, 2002 CSC 49, [2002] 2 R.C.S. 720, la Cour a souligné que le législateur était intervenu pour renforcer la fiducie réputée de la *LIR* en précisant qu'elle est réputée s'appliquer dès le moment où les retenues ne sont pas versées à la Couronne conformément aux exigences de la *LIR*, et en donnant à la Couronne la priorité sur toute autre garantie (par. 27-29) (la « modification découlant de l'arrêt *Sparrow Electric* »).

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[34] The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

[34] Selon le texte modifié du par. 227(4.1) de la *LIR* et celui des fiducies réputées correspondantes établies dans le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* à l'égard des retenues à la source, la fiducie réputée s'applique malgré tout autre texte législatif fédéral sauf les art. 81.1 et 81.2 de la *LFI*. La fiducie réputée de la *LTA* qui est en cause en l'espèce est formulée en des termes semblables sauf que la limite à son application vise la *LFI* dans son entier. Voici le texte de la disposition pertinente :

222. . . .

. . .

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed . . . .

222. . . .

. . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés . . .

[35] The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

[35] La Couronne soutient que la modification découlant de l'arrêt *Sparrow Electric*, qui a été ajoutée à la *LTA* par le législateur en 2000, visait à maintenir la priorité de Sa Majesté sous le régime de la *LACC* à l'égard du montant de TPS perçu, tout en reléguant celle-ci au rang de créancier non garanti à l'égard de ce montant sous le régime de la *LFI* uniquement. De l'avis de la Couronne, il en est ainsi parce que, selon la *LTA*, la fiducie réputée visant la TPS demeure en vigueur « malgré » tout autre texte législatif sauf la *LFI*.

[36] The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

[36] Les termes utilisés dans la *LTA* pour établir la fiducie réputée à l'égard de la TPS créent un conflit apparent avec la *LACC*, laquelle précise que, sous réserve de certaines exceptions, les biens qui sont réputés selon un texte législatif être détenus en fiducie pour la Couronne ne doivent pas être considérés comme tels.

[37] Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have,

[37] Par une modification apportée à la *LACC* en 1997 (L.C. 1997, ch. 12, art. 125), le législateur

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subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[38] An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

18.3 . . .

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

semble, sous réserve d'exceptions spécifiques, avoir neutralisé les fiducies réputées créées en faveur de la Couronne lorsque des procédures de réorganisation sont engagées sous le régime de cette loi. La disposition pertinente, à l'époque le par. 18.3(1), était libellée ainsi :

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

Cette neutralisation des fiducies réputées a été maintenue dans des modifications apportées à la *LACC* en 2005 (L.C. 2005, ch. 47), où le par. 18.3(1) a été reformulé et renuméroté, devenant le par. 37(1) :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

[38] La *LFI* comporte une disposition analogue, qui — sous réserve des mêmes exceptions spécifiques — neutralise les fiducies réputées établies en vertu d'un texte législatif et fait en sorte que les biens du failli qui autrement seraient visés par une telle fiducie font partie de l'actif du débiteur et sont à la disposition des créanciers (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73; *LFI*, par. 67(2)). Il convient de souligner que, tant dans la *LACC* que dans la *LFI*, les exceptions visent les retenues à la source (*LACC*, par. 18.3(2); *LFI*, par. 67(3)). Voici la disposition pertinente de la *LACC* :

18.3 . . .

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

Par conséquent, la fiducie réputée établie en faveur de la Couronne et la priorité dont celle-ci jouit de ce fait sur les retenues à la source continuent de s'appliquer autant pendant la réorganisation que pendant la faillite.

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[39] Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

18.4 . . .

. . .

(3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution . . . .

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

[40] The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize

[39] Par ailleurs, les autres créances de la Couronne sont considérées par la *LACC* et la *LFI* comme des créances non garanties (*LACC*, par. 18.4(1); *LFI*, par. 86(1)). Ces dispositions faisant de la Couronne un créancier non garanti comportent une exception expresse concernant les fiducies réputées établies par un texte législatif à l'égard des retenues à la source (*LACC*, par. 18.4(3); *LFI*, par. 86(3)). Voici la disposition de la *LACC* :

18.4 . . .

. . .

(3) Le paragraphe (1) [suivant lequel la Couronne a le rang de créancier non garanti] n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation . . .

Par conséquent, non seulement la *LACC* précise que les créances de la Couronne ne bénéficient pas d'une priorité par rapport à celles des autres créanciers (par. 18.3(1)), mais les exceptions à cette règle (maintien de la priorité de la Couronne dans le cas des retenues à la source) sont mentionnées à plusieurs reprises dans la Loi.

[40] Le conflit apparent qui existe dans la présente affaire fait qu'on doit se demander si la règle de la *LTA* adoptée en 2000, selon laquelle les fiducies réputées visant la TPS s'appliquent malgré tout autre texte législatif fédéral sauf la *LFI*, l'emporte sur la règle énoncée dans la *LACC* — qui a d'abord été édictée en 1997 à l'art. 18.3 — suivant laquelle, sous réserve de certaines exceptions explicites, les fiducies réputées établies par une disposition législative sont sans effet dans le cadre de la *LACC*. Avec égards pour l'opinion contraire exprimée par mon collègue le juge Fish, je ne crois pas qu'on puisse résoudre ce conflit apparent

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conflicts, apparent or real, and resolve them when possible.

en niant son existence et en créant une règle qui exige à la fois une disposition législative établissant la fiducie présumée et une autre la confirmant. Une telle règle est inconnue en droit. Les tribunaux doivent reconnaître les conflits, apparents ou réels, et les résoudre lorsque la chose est possible.

[41] A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (Alta. Q.B.); *Gauntlet*).

[41] Un courant jurisprudentiel pancanadien a résolu le conflit apparent en faveur de la *LTA*, confirmant ainsi la validité des fiducies réputées à l'égard de la TPS dans le cadre de la *LACC*. Dans l'arrêt déterminant à ce sujet, *Ottawa Senators*, la Cour d'appel de l'Ontario a invoqué la doctrine de l'abrogation implicite et conclu que la disposition postérieure de la *LTA* devait avoir préséance sur la *LACC* (voir aussi *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (B.R. Alb.); *Gauntlet*).

[42] The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

> The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[42] Dans *Ottawa Senators*, la Cour d'appel de l'Ontario a fondé sa conclusion sur deux considérations. Premièrement, elle était convaincue qu'en mentionnant explicitement la *LFI* — mais pas la *LACC* — au par. 222(3) de la *LTA*, le législateur a fait un choix délibéré. Je cite le juge MacPherson :

> [TRADUCTION] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d'exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[43] Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy,

[43] Deuxièmement, la Cour d'appel de l'Ontario a comparé le conflit entre la *LTA* et la *LACC* à celui dont a été saisie la Cour dans *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862, et les a jugés [TRADUCTION] « identiques » (par. 46). Elle s'estimait donc tenue de suivre l'arrêt *Doré* (par. 49). Dans cet arrêt, la Cour a conclu qu'une disposition d'une loi de nature plus générale et récemment adoptée établissant un délai de prescription — le *Code civil du Québec*, L.Q. 1991, ch. 64 (« *C.c.Q.* ») — avait eu pour effet d'abroger une disposition plus spécifique

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the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

d'un texte de loi antérieur, la *Loi sur les cités et villes* du Québec, L.R.Q., ch. C-19, avec laquelle elle entrait en conflit. Par analogie, la Cour d'appel de l'Ontario a conclu que le par. 222(3) de la *LTA*, une disposition plus récente et plus générale, abrogeait implicitement la disposition antérieure plus spécifique, à savoir le par. 18.3(1) de la *LACC* (par. 47-49).

[44] Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

[44] En examinant la question dans tout son contexte, je suis amenée à conclure, pour plusieurs raisons, que ni le raisonnement ni le résultat de l'arrêt *Ottawa Senators* ne peuvent être adoptés. Bien qu'il puisse exister un conflit entre le libellé des textes de loi, une analyse téléologique et contextuelle visant à déterminer la véritable intention du législateur conduit à la conclusion que ce dernier ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la *LACC*, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a apporté à la *LTA*, en 2000, la modification découlant de l'arrêt *Sparrow Electric*.

[45] I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists

[45] Je rappelle d'abord que le législateur a manifesté sa volonté de mettre un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité. Selon le par. 18.3(1) de la *LACC* (sous réserve des exceptions prévues au par. 18.3(2)), les fiducies réputées de la Couronne n'ont aucun effet sous le régime de cette loi. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. Par exemple, le par. 18.3(2) de la *LACC* et le par. 67(3) de la *LFI* énoncent expressément que les fiducies réputées visant les retenues à la source continuent de produire leurs effets en cas d'insolvabilité. Le législateur a donc clairement établi des exceptions à la règle générale selon laquelle les fiducies réputées n'ont plus d'effet dans un contexte d'insolvabilité. La *LACC* et la *LFI* sont en harmonie : elles préservent les fiducies réputées et établissent la priorité de la Couronne seulement à l'égard des retenues à la source. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la

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in those Acts carving out an exception for GST claims.

TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Alors que les retenues à la source font l'objet de dispositions explicites dans ces deux lois concernant l'insolvabilité, celles-ci ne comportent pas de dispositions claires et expresses analogues établissant une exception pour les créances relatives à la TPS.

[46] The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

[46] La logique interne de la *LACC* va également à l'encontre du maintien de la fiducie réputée établie dans la *LTA* à l'égard de la TPS. En effet, la *LACC* impose certaines limites à la suspension par les tribunaux des droits de la Couronne à l'égard des retenues à la source, mais elle ne fait pas mention de la *LTA* (art. 11.4). Comme les fiducies réputées visant les retenues à la source sont explicitement protégées par la *LACC*, il serait incohérent d'accorder une meilleure protection à la fiducie réputée établie par la *LTA* en l'absence de dispositions explicites en ce sens dans la *LACC*. Par conséquent, il semble découler de la logique de la *LACC* que la fiducie réputée établie par la *LTA* est visée par la renonciation du législateur à sa priorité (art. 18.4).

[47] Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

[47] De plus, il y aurait une étrange asymétrie si l'interprétation faisant primer la *LTA* sur la *LACC* préconisée par la Couronne était retenue en l'espèce : les créances de la Couronne relatives à la TPS conserveraient leur priorité de rang pendant les procédures fondées sur la *LACC*, mais pas en cas de faillite. Comme certains tribunaux l'ont bien vu, cela ne pourrait qu'encourager les créanciers à recourir à la loi la plus favorable dans les cas où, comme en l'espèce, l'actif du débiteur n'est pas suffisant pour permettre à la fois le paiement des créanciers garantis et le paiement des créances de la Couronne (*Gauntlet*, par. 21). Or, si les réclamations des créanciers étaient mieux protégées par la liquidation sous le régime de la *LFI*, les créanciers seraient très fortement incités à éviter les procédures prévues par la *LACC* et les risques d'échec d'une réorganisation. Le fait de donner à un acteur clé de telles raisons de s'opposer aux procédures de réorganisation fondées sur la *LACC* dans toute situation d'insolvabilité ne peut que miner les objectifs réparateurs de ce texte législatif et risque au contraire de favoriser les maux sociaux que son édiction visait justement à prévenir.

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[48] Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

[49] Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

[48] Peut-être l'effet de l'arrêt *Ottawa Senators* est-il atténué si la restructuration est tentée en vertu de la *LFI* au lieu de la *LACC*, mais il subsiste néanmoins. Si l'on suivait cet arrêt, la priorité de la créance de la Couronne relative à la TPS différerait selon le régime — *LACC* ou *LFI* — sous lequel la restructuration a lieu. L'anomalie de ce résultat ressort clairement du fait que les compagnies seraient ainsi privées de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la *LACC*, régime privilégié en cas de réorganisations complexes.

[49] Les indications selon lesquelles le législateur voulait que les créances relatives à la TPS soient traitées différemment dans les cas de réorganisations et de faillites sont rares, voire inexistantes. Le paragraphe 222(3) de la *LTA* a été adopté dans le cadre d'un projet de loi d'exécution du budget de nature générale en 2000. Le sommaire accompagnant ce projet de loi n'indique pas que, dans le cadre de la *LACC*, le législateur entendait élever la priorité de la créance de la Couronne à l'égard de la TPS au même rang que les créances relatives aux retenues à la source ou encore à un rang supérieur à celles-ci. En fait, le sommaire mentionne simplement, en ce qui concerne les fiducies réputées, que les modifications apportées aux dispositions existantes visent à « faire en sorte que les cotisations à l'assurance-emploi et au Régime de pensions du Canada qu'un employeur est tenu de verser soient pleinement recouvrables par la Couronne en cas de faillite de l'employeur » (Sommaire de la L.C. 2000, ch. 30, p. 4a). Le libellé de la disposition créant une fiducie réputée à l'égard de la TPS ressemble à celui des dispositions créant de telles fiducies relatives aux retenues à la source et il comporte la même formule dérogatoire et la même mention de la *LFI*. Cependant, comme il a été souligné précédemment, le législateur a expressément précisé que seules les fiducies réputées visant les retenues à la source demeurent en vigueur. Une exception concernant la *LFI* dans la disposition créant les fiducies réputées à l'égard des retenues à la source est sans grande conséquence, car le texte explicite de la *LFI* elle-même (et celui de la *LACC*) établit ces fiducies et maintient leur effet. Il convient toutefois de souligner que ni la *LFI* ni la *LACC* ne comportent de disposition équivalente assurant le maintien en vigueur des fiducies réputées visant la TPS.

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[50] It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

[51] Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

[52] I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough

[50] Il semble plus probable qu'en adoptant, pour créer dans la *LTA* les fiducies réputées visant la TPS, le même libellé que celui utilisé pour les fiducies réputées visant les retenues à la source, et en omettant d'inclure au par. 222(3) de la *LTA* une exception à l'égard de la *LACC* en plus de celle établie pour la *LFI*, le législateur ait par inadvertance commis une anomalie rédactionnelle. En raison d'une lacune législative dans la *LTA*, il serait possible de considérer que la fiducie réputée visant la TPS continue de produire ses effets dans le cadre de la *LACC*, tout en cessant de le faire dans le cas de la *LFI*, ce qui entraînerait un conflit apparent avec le libellé de la *LACC*. Il faut cependant voir ce conflit comme il est : un conflit apparent seulement, que l'on peut résoudre en considérant l'approche générale adoptée envers les créances prioritaires de la Couronne et en donnant préséance au texte de l'art. 18.3 de la *LACC* d'une manière qui ne produit pas un résultat insolite.

[51] Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Il crée simplement un conflit apparent qui doit être résolu par voie d'interprétation législative. L'intention du législateur était donc loin d'être dépourvue d'ambiguïté quand il a adopté le par. 222(3) de la *LTA*. S'il avait voulu donner priorité aux créances de la Couronne relatives à la TPS dans le cadre de la *LACC*, il aurait pu le faire de manière aussi explicite qu'il l'a fait pour les retenues à la source. Or, au lieu de cela, on se trouve réduit à inférer du texte du par. 222(3) de la *LTA* que le législateur entendait que la fiducie réputée visant la TPS produise ses effets dans les procédures fondées sur la *LACC*.

[52] Je ne suis pas convaincue que le raisonnement adopté dans *Doré* exige l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. La question principale dans *Doré* était celle de l'impact de l'adoption du *C.c.Q.* sur les règles de droit administratif relatives aux municipalités. Bien que le juge Gonthier ait conclu, dans cet arrêt, que le délai de prescription établi à l'art. 2930 du *C.c.Q.* avait eu pour effet d'abroger implicitement une disposition de la *Loi sur les cités et villes* portant sur la prescription, sa conclusion n'était pas

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contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

[53] A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

[54] I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding

fondée seulement sur une analyse textuelle. Il a en effet procédé à une analyse contextuelle approfondie des deux textes, y compris de l'historique législatif pertinent (par. 31-41). Par conséquent, les circonstances du cas dont était saisie la Cour dans *Doré* sont loin d'être « identiques » à celles du présent pourvoi, tant sur le plan du texte que sur celui du contexte et de l'historique législatif. On ne peut donc pas dire que l'arrêt *Doré* commande l'application automatique d'une règle d'abrogation implicite.

[53] Un bon indice de l'intention générale du législateur peut être tiré du fait qu'il n'a pas, dans les modifications subséquentes, écarté la règle énoncée dans la *LACC*. D'ailleurs, par suite des modifications apportées à cette loi en 2005, la règle figurant initialement à l'art. 18.3 a, comme nous l'avons vu plus tôt, été reprise sous une formulation différente à l'art. 37. Par conséquent, dans la mesure où l'interprétation selon laquelle la fiducie réputée visant la TPS demeurerait en vigueur dans le contexte de procédures en vertu de la *LACC* repose sur le fait que le par. 222(3) de la *LTA* constitue la disposition postérieure et a eu pour effet d'abroger implicitement le par. 18.3(1) de la *LACC*, nous revenons au point de départ. Comme le législateur a reformulé et renuméroté la disposition de la *LACC* précisant que, sous réserve des exceptions relatives aux retenues à la source, les fiducies réputées ne survivent pas à l'engagement de procédures fondées sur la *LACC*, c'est cette loi qui se trouve maintenant à être le texte postérieur. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS.

[54] Je ne suis pas d'accord avec ma collègue la juge Abella pour dire que l'al. 44*f*) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, permet d'interpréter les modifications de 2005 comme n'ayant aucun effet. La nouvelle loi peut difficilement être considérée comme une simple refonte de la loi antérieure. De fait, la *LACC* a fait l'objet d'un examen approfondi en 2005. En particulier, conformément à son objectif qui consiste à faire concorder l'approche de la *LFI* et celle de la *LACC* à l'égard de l'insolvabilité, le législateur a apporté aux deux textes des modifications allant dans le même sens en ce qui concerne les

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the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

propositions présentées par les entreprises. De plus, de nouvelles dispositions ont été ajoutées au sujet des contrats, des conventions collectives, du financement temporaire et des accords de gouvernance. Des clarifications ont aussi été apportées quant à la nomination et au rôle du contrôleur. Il convient par ailleurs de souligner les limites imposées par l'art. 11.09 de la *LACC* au pouvoir discrétionnaire du tribunal d'ordonner la suspension de l'effet des fiducies réputées créées en faveur de la Couronne relativement aux retenues à la source, limites qui étaient auparavant énoncées à l'art. 11.4. Il n'est fait aucune mention des fiducies réputées visant la TPS (voir le Sommaire de la L.C. 2005, ch. 47). Dans le cadre de cet examen, le législateur est allé jusqu'à se pencher sur les termes mêmes utilisés dans la loi pour écarter l'application des fiducies réputées. Les commentaires cités par ma collègue ne font que souligner l'intention manifeste du législateur de maintenir sa politique générale suivant laquelle seules les fiducies réputées visant les retenues à la source survivent en cas de procédures fondées sur la *LACC*.

[55] In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA*'s override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

[55] En l'espèce, le contexte législatif aide à déterminer l'intention du législateur et conforte la conclusion selon laquelle le par. 222(3) de la *LTA* ne visait pas à restreindre la portée de la disposition de la *LACC* écartant l'application des fiducies réputées. Eu égard au contexte dans son ensemble, le conflit entre la *LTA* et la *LACC* est plus apparent que réel. Je n'adopterais donc pas le raisonnement de l'arrêt *Ottawa Senators* et je confirmerais que l'art. 18.3 de la *LACC* a continué de produire ses effets.

[56] My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

[56] Ma conclusion est renforcée par l'objectif de la *LACC* en tant que composante du régime réparateur instauré la législation canadienne en matière d'insolvabilité. Comme cet aspect est particulièrement pertinent à propos de la deuxième question, je vais maintenant examiner la façon dont les tribunaux ont interprété l'étendue des pouvoirs discrétionnaires dont ils disposent lorsqu'ils surveillent une réorganisation fondée sur la *LACC*, ainsi que la façon dont le législateur a dans une large mesure entériné cette interprétation. L'interprétation de la *LACC* par les tribunaux aide en fait à comprendre comment celle-ci en est venue à jouer un rôle si important dans le droit canadien de l'insolvabilité.

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3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

[57] Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

[58] *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

[59] Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)

[60] Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by

3.3 *Pouvoirs discrétionnaires du tribunal chargé de surveiller une réorganisation fondée sur la LACC*

[57] Les tribunaux font souvent remarquer que [TRADUCTION] « [l]a *LACC* est par nature schématique » et ne « contient pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44, le juge Blair). Par conséquent, [TRADUCTION] « [l]'histoire du droit relatif à la LACC correspond à l'évolution de ce droit au fil de son interprétation par les tribunaux » (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (C. Ont. (Div. gén.)), par. 10, le juge Farley).

[58] Les décisions prises en vertu de la *LACC* découlent souvent de l'exercice discrétionnaire de certains pouvoirs. C'est principalement au fil de l'exercice par les juridictions commerciales de leurs pouvoirs discrétionnaires, et ce, dans des conditions décrites avec justesse par un praticien comme constituant [TRADUCTION] « la pépinière du contentieux en temps réel », que la *LACC* a évolué de façon graduelle et s'est adaptée aux besoins commerciaux et sociaux contemporains (voir Jones, p. 484).

[59] L'exercice par les tribunaux de leurs pouvoirs discrétionnaires doit évidemment tendre à la réalisation des objectifs de la *LACC*. Le caractère réparateur dont j'ai fait état dans mon aperçu historique de la Loi a à maintes reprises été reconnu dans la jurisprudence. Voici l'un des premiers exemples :

> [TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu'elle fournit un moyen d'éviter les effets dévastateurs, — tant sur le plan social qu'économique — de la faillite ou de l'arrêt des activités d'une entreprise, à l'initiation des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

(*Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57, le juge Doherty, dissident)

[60] Le processus décisionnel des tribunaux sous le régime de la *LACC* comporte plusieurs aspects. Le tribunal doit d'abord créer les conditions propres à permettre au débiteur de tenter une réorganisation.

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staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

Il peut à cette fin suspendre les mesures d'exécution prises par les créanciers afin que le débiteur puisse continuer d'exploiter son entreprise, préserver le statu quo pendant que le débiteur prépare la transaction ou l'arrangement qu'il présentera aux créanciers et surveiller le processus et le mener jusqu'au point où il sera possible de dire s'il aboutira (voir, p. ex., *Chef Ready Foods Ltd. c. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), p. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, par. 27). Ce faisant, le tribunal doit souvent déterminer les divers intérêts en jeu dans la réorganisation, lesquels peuvent fort bien ne pas se limiter aux seuls intérêts du débiteur et des créanciers, mais englober aussi ceux des employés, des administrateurs, des actionnaires et même de tiers qui font affaire avec la compagnie insolvable (voir, p. ex., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, par. 144, la juge Paperny (maintenant juge de la Cour d'appel); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (C.S.J. Ont.), par. 3; *Air Canada, Re*, 2003 CanLII 49366 (C.S.J. Ont.), par. 13, le juge Farley; Sarra, *Creditor Rights*, p. 181-192 et 217-226). En outre, les tribunaux doivent reconnaître que, à l'occasion, certains aspects de la réorganisation concernent l'intérêt public et qu'il pourrait s'agir d'un facteur devant être pris en compte afin de décider s'il y a lieu d'autoriser une mesure donnée (voir, p. ex., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (C.S.J. Ont.), par. 2, le juge Blair (maintenant juge de la Cour d'appel); Sarra, *Creditor Rights*, p. 195-214).

[61] When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

[61] Quand de grandes entreprises éprouvent des difficultés, les réorganisations deviennent très complexes. Les tribunaux chargés d'appliquer la *LACC* ont ainsi été appelés à innover dans l'exercice de leur compétence et ne se sont pas limités à suspendre les procédures engagées contre le débiteur afin de lui permettre de procéder à une réorganisation. On leur a demandé de sanctionner des mesures non expressément prévues par la *LACC*. Sans dresser la liste complète des diverses mesures qui ont été prises par des tribunaux en vertu de la *LACC*, il est néanmoins utile d'en donner brièvement quelques exemples, pour bien illustrer la marge de manœuvre que la loi accorde à ceux-ci.

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[62] Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Ct. (Gen. Div.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4th) 144 (S.C.); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see *Metcalfe & Mansfield*). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA*'s supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

[63] Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) What are the sources of a court's authority during *CCAA* proceedings? (2) What are the limits of this authority?

[64] The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against

[62] L'utilisation la plus créative des pouvoirs conférés par la *LACC* est sans doute le fait que les tribunaux se montrent de plus en plus disposés à autoriser, après le dépôt des procédures, la constitution de sûretés pour financer le débiteur demeuré en possession des biens ou encore la constitution de charges super-prioritaires grevant l'actif du débiteur lorsque cela est nécessaire pour que ce dernier puisse continuer d'exploiter son entreprise pendant la réorganisation (voir p. ex. *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (C. Ont. (Div. gén.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, conf. (1999), 12 C.B.R. (4th) 144 (C.S.); et, d'une manière générale, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 93-115). La *LACC* a aussi été utilisée pour libérer des tiers des actions susceptibles d'être intentées contre eux, dans le cadre de l'approbation d'un plan global d'arrangement et de transaction, malgré les objections de certains créanciers dissidents (voir *Metcalfe & Mansfield*). Au départ, la nomination d'un contrôleur chargé de surveiller la réorganisation était elle aussi une mesure prise en vertu du pouvoir de surveillance conféré par la *LACC*, mais le législateur est intervenu et a modifié la loi pour rendre cette mesure obligatoire.

[63] L'esprit d'innovation dont ont fait montre les tribunaux pendant des procédures fondées sur la *LACC* n'a toutefois pas été sans susciter de controverses. Au moins deux des questions que soulève leur approche sont directement pertinentes en l'espèce : (1) Quelles sont les sources des pouvoirs dont dispose le tribunal pendant les procédures fondées sur la *LACC*? (2) Quelles sont les limites de ces pouvoirs?

[64] La première question porte sur la frontière entre les pouvoirs d'origine législative dont dispose le tribunal en vertu de la *LACC* et les pouvoirs résiduels dont jouit un tribunal en raison de sa compétence inhérente et de sa compétence en equity, lorsqu'il est question de surveiller une réorganisation. Pour justifier certaines mesures autorisées à l'occasion de procédures engagées sous le régime de la *LACC*, les tribunaux ont parfois prétendu se fonder sur leur compétence en equity dans le but

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purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

de réaliser les objectifs de la Loi ou sur leur compétence inhérente afin de combler les lacunes de celle-ci. Or, dans de récentes décisions, des cours d'appel ont déconseillé aux tribunaux d'invoquer leur compétence inhérente, concluant qu'il est plus juste de dire que, dans la plupart des cas, les tribunaux ne font simplement qu'interpréter les pouvoirs se trouvant dans la *LACC* elle-même (voir, p. ex., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, par. 45-47, la juge Newbury; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), par. 31-33, le juge Blair).

[65] I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

[65] Je suis d'accord avec la juge Georgina R. Jackson et la professeure Janis Sarra pour dire que la méthode la plus appropriée est une approche hiérarchisée. Suivant cette approche, les tribunaux procédèrent d'abord à une interprétation des dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour justifier des mesures prises dans le cadre d'une procédure fondée sur la *LACC* (voir G. R. Jackson et J. Sarra, « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2007* (2008), 41, p. 42). Selon ces auteures, pourvu qu'on lui donne l'interprétation téléologique et large qui s'impose, la *LACC* permettra dans la plupart des cas de justifier les mesures nécessaires à la réalisation de ses objectifs (p. 94).

[66] Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

[66] L'examen des parties pertinentes de la *LACC* et de l'évolution récente de la législation me font adhérer à ce point de vue jurisprudentiel et doctrinal : dans la plupart des cas, la décision de rendre une ordonnance durant une procédure fondée sur la *LACC* relève de l'interprétation législative. D'ailleurs, à cet égard, il faut souligner d'une façon particulière que le texte de loi dont il est question en l'espèce peut être interprété très largement.

[67] The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company . . . on the application of any person interested in the

[67] En vertu du pouvoir conféré initialement par la *LACC*, le tribunal pouvait, « chaque fois qu'une demande [était] faite sous le régime de la présente loi à l'égard d'une compagnie, [. . .] sur demande

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matter, . . . subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

[68] In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus, in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, . . . make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

[69] The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

[70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all

d'un intéressé, [. . .] sous réserve des autres dispositions de la présente loi [. . .] rendre l'ordonnance prévue au présent article » (*LACC*, par. 11(1)). Cette formulation claire était très générale.

[68] Bien que ces dispositions ne soient pas strictement applicables en l'espèce, je signale à ce propos que le législateur a, dans des modifications récentes, apporté au texte du par. 11(1) un changement qui rend plus explicite le pouvoir discrétionnaire conféré au tribunal par la *LACC*. Ainsi, aux termes de l'art. 11 actuel de la *LACC*, le tribunal peut « rendre [. . .] sous réserve des restrictions prévues par la présente loi [. . .] toute ordonnance qu'il estime indiquée » (L.C. 2005, ch. 47, art. 128). Le législateur semble ainsi avoir jugé opportun de sanctionner l'interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence.

[69] De plus, la *LACC* prévoit explicitement certaines ordonnances. Tant à la suite d'une demande initiale que d'une demande subséquente, le tribunal peut, par ordonnance, suspendre ou interdire toute procédure contre le débiteur, ou surseoir à sa continuation. Il incombe à la personne qui demande une telle ordonnance de convaincre le tribunal qu'elle est indiquée et qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue (*LACC*, par. 11(3), (4) et (6)).

[70] La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. Toutefois, l'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Sous le régime de la *LACC*, le tribunal évalue l'opportunité de l'ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi. Il s'agit donc de savoir si cette ordonnance contribuera utilement à la réalisation de l'objectif réparateur de la *LACC* — à savoir éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. J'ajouterais que le critère de l'opportunité s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. Les tribunaux

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stakeholders are treated as advantageously and fairly as the circumstances permit.

doivent se rappeler que les chances de succès d'une réorganisation sont meilleures lorsque les participants arrivent à s'entendre et que tous les intéressés sont traités de la façon la plus avantageuse et juste possible dans les circonstances.

[71] It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

[71] Il est bien établi qu'il est possible de mettre fin aux efforts déployés pour procéder à une réorganisation fondée sur la *LACC* et de lever la suspension des procédures contre le débiteur si la réorganisation est [TRADUCTION] « vouée à l'échec » (voir *Chef Ready*, p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (C.A.C.-B.), par. 6-7). Cependant, quand l'ordonnance demandée contribue vraiment à la réalisation des objectifs de la *LACC*, le pouvoir discrétionnaire dont dispose le tribunal en vertu de cette loi l'habilite à rendre à cette ordonnance.

[72] The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

[72] L'analyse qui précède est utile pour répondre à la question de savoir si le tribunal avait, en vertu de la *LACC*, le pouvoir de maintenir la suspension des procédures à l'encontre de la Couronne, une fois qu'il est devenu évident que la réorganisation échouerait et que la faillite était inévitable.

[73] In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

[73] En Cour d'appel, le juge Tysoe a conclu que la *LACC* n'habilitait pas le tribunal à maintenir la suspension des mesures d'exécution de la Couronne à l'égard de la fiducie réputée visant la TPS après l'arrêt des efforts de réorganisation. Selon l'appelante, en tirant cette conclusion, le juge Tysoe a omis de tenir compte de l'objectif fondamental de la *LACC* et n'a pas donné à ce texte l'interprétation téléologique et large qu'il convient de lui donner et qui autorise le prononcé d'une telle ordonnance. La Couronne soutient que le juge Tysoe a conclu à bon droit que les termes impératifs de la *LTA* ne laissaient au tribunal d'autre choix que d'autoriser les mesures d'exécution à l'endroit de la fiducie réputée visant la TPS lorsqu'il a levé la suspension de procédures qui avait été ordonnée en application de la *LACC* afin de permettre au débiteur de faire cession de ses biens en vertu de la *LFI*. J'ai déjà traité de la question de savoir si la *LTA* a un effet contraignant dans une procédure fondée sur la *LACC*. Je vais maintenant traiter de la question de savoir si l'ordonnance était autorisée par la *LACC*.

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[74] It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

[75] The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

[76] There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA* the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament . . . that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as

[74] Il n'est pas contesté que la *LACC* n'assujettit les procédures engagées sous son régime à aucune limite temporelle explicite qui interdirait au tribunal d'ordonner le maintien de la suspension des procédures engagées par la Couronne pour recouvrer la TPS, tout en levant temporairement la suspension générale des procédures prononcée pour permettre au débiteur de faire cession de ses biens.

[75] Il reste à se demander si l'ordonnance contribuait à la réalisation de l'objectif fondamental de la *LACC*. La Cour d'appel a conclu que non, parce que les efforts de réorganisation avaient pris fin et que, par conséquent, la *LACC* n'était plus d'aucune utilité. Je ne partage pas cette conclusion.

[76] Il ne fait aucun doute que si la réorganisation avait été entreprise sous le régime de la *LFI* plutôt qu'en vertu de la *LACC*, la Couronne aurait perdu la priorité que lui confère la fiducie réputée visant la TPS. De même, la Couronne ne conteste pas que, selon le plan de répartition prévu par la *LFI* en cas de faillite, cette fiducie réputée cesse de produire ses effets. Par conséquent, après l'échec de la réorganisation tentée sous le régime de la *LACC*, les créanciers auraient eu toutes les raisons de solliciter la mise en faillite immédiate du débiteur et la répartition de ses biens en vertu de la *LFI*. Pour pouvoir conclure que le pouvoir discrétionnaire dont dispose le tribunal ne l'autorise pas à lever partiellement la suspension des procédures afin de permettre la cession des biens, il faudrait présumer l'existence d'un hiatus entre la procédure fondée sur la *LACC* et celle fondée sur la *LFI*. L'ordonnance du juge en chef Brenner suspendant l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS faisait en sorte que les créanciers ne soient pas désavantagés par la tentative de réorganisation fondée sur la *LACC*. Cette ordonnance avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et, de ce fait, elle contribuait à la réalisation des objectifs de la *LACC*, dans la mesure où elle établit une passerelle entre les procédures régies par la *LACC* d'une part et celles régies par la *LFI* d'autre part. Cette interprétation du pouvoir discrétionnaire du tribunal se trouve renforcée par

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the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

l'art. 20 de la *LACC*, qui précise que les dispositions de la Loi « peuvent être appliquées conjointement avec celles de toute loi fédérale [. . .] autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers », par exemple la *LFI*. L'article 20 indique clairement que le législateur entend voir la *LACC* être appliquée *de concert* avec les autres lois concernant l'insolvabilité, telle la *LFI*.

[77] The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

[77] La *LACC* établit les conditions qui permettent de préserver le statu quo pendant qu'on tente de trouver un terrain d'entente entre les intéressés en vue d'une réorganisation qui soit juste pour tout le monde. Étant donné que, souvent, la seule autre solution est la faillite, les participants évaluent l'impact d'une réorganisation en regard de la situation qui serait la leur en cas de liquidation. En l'espèce, l'ordonnance favorisait une transition harmonieuse entre la réorganisation et la liquidation, tout en répondant à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure collective.

[78] Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be

[78] À mon avis, le juge d'appel Tysoe a donc commis une erreur en considérant la *LACC* et la *LFI* comme des régimes distincts, séparés par un hiatus temporel, plutôt que comme deux lois faisant partie d'un ensemble intégré de règles du droit de l'insolvabilité. La décision du législateur de conserver deux régimes législatifs en matière de réorganisation, la *LFI* et la *LACC*, reflète le fait bien réel que des réorganisations de complexité différente requièrent des mécanismes légaux différents. En revanche, un seul régime législatif est jugé nécessaire pour la liquidation de l'actif d'un débiteur en faillite. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*. Toutefois, comme l'a signalé le juge Laskin de la Cour d'appel de l'Ontario dans un litige semblable opposant des créanciers garantis et le Surintendant des services financiers de l'Ontario qui invoquait le bénéfice d'une fiducie réputée, [TRADUCTION] « [l]es deux lois sont

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lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

liées » et il n'existe entre elles aucun « hiatus » qui permettrait d'obtenir l'exécution, à l'issue de procédures engagées sous le régime de la *LACC*, de droits de propriété qui seraient perdus en cas de faillite (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, par. 62-63).

[79] The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

[79] La priorité accordée aux réclamations de la Couronne fondées sur une fiducie réputée visant des retenues à la source n'affaiblit en rien cette conclusion. Comme ces fiducies réputées survivent tant sous le régime de la *LACC* que sous celui de la *LFI*, ce facteur n'a aucune incidence sur l'intérêt que pourraient avoir les créanciers à préférer une loi plutôt que l'autre. S'il est vrai que le tribunal agissant en vertu de la *LACC* dispose d'une grande latitude pour suspendre les réclamations fondée sur des fiducies réputées visant des retenues à la source, cette latitude n'en demeure pas moins soumise à des limitations particulières, applicables uniquement à ces fiducies réputées (*LACC*, art. 11.4). Par conséquent, si la réorganisation tentée sous le régime de la *LACC* échoue (p. ex. parce que le tribunal ou les créanciers refusent une proposition de réorganisation), la Couronne peut immédiatement présenter sa réclamation à l'égard des retenues à la source non versées. Mais il ne faut pas en conclure que cela compromet le passage harmonieux au régime de faillite ou crée le moindre « hiatus » entre la *LACC* et la *LFI*, car le fait est que, peu importe la loi en vertu de laquelle la réorganisation a été amorcée, les réclamations des créanciers auraient dans les deux cas été subordonnées à la priorité de la fiducie réputée de la Couronne à l'égard des retenues à la source.

[80] Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition

[80] Abstraction faite des fiducies réputées visant les retenues à la source, c'est le mécanisme complet et exhaustif prévu par la *LFI* qui doit régir la répartition des biens du débiteur une fois que la liquidation est devenue inévitable. De fait, une transition ordonnée aux procédures de liquidation est obligatoire sous le régime de la *LFI* lorsqu'une proposition est rejetée par les créanciers. La *LACC* est muette à l'égard de cette transition, mais l'ampleur du pouvoir discrétionnaire conféré au tribunal par cette loi est suffisante pour établir une passerelle vers une liquidation opérée sous le régime

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to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

de la *LFI*. Ce faisant, le tribunal doit veiller à ne pas perturber le plan de répartition établi par la *LFI*. La transition au régime de liquidation nécessite la levée partielle de la suspension des procédures ordonnée en vertu de la *LACC*, afin de permettre l'introduction de procédures en vertu de la *LFI*. Il ne faudrait pas que cette indispensable levée partielle de la suspension des procédures provoque une ruée des créanciers vers le palais de justice pour l'obtention d'une priorité inexistante sous le régime de la *LFI*.

[81] I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

[81] Je conclus donc que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir de lever la suspension des procédures afin de permettre la transition au régime de liquidation.

3.4 *Express Trust*

3.4 *Fiducie expresse*

[82] The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

[82] La dernière question à trancher en l'espèce est celle de savoir si le juge en chef Brenner a créé une fiducie expresse en faveur de la Couronne quand il a ordonné, le 29 avril 2008, que le produit de la vente des biens de LeRoy Trucking — jusqu'à concurrence des sommes de TPS non remises — soit détenu dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Un autre motif invoqué par le juge Tysoe de la Cour d'appel pour accueillir l'appel interjeté par la Couronne était que, selon lui, celle-ci était effectivement la bénéficiaire d'une fiducie expresse. Je ne peux souscrire à cette conclusion.

[83] Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29, especially fn. 42).

[83] La création d'une fiducie expresse exige la présence de trois certitudes : certitude d'intention, certitude de matière et certitude d'objet. Les fiducies expresses ou « fiducies au sens strict » découlent des actes et des intentions du constituant et se distinguent des autres fiducies découlant de l'effet de la loi (voir D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3e éd. 2005), p. 28-29, particulièrement la note en bas de page 42).

[84] Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008 sufficient to support an express trust.

[84] En l'espèce, il n'existe aucune certitude d'objet (c.-à-d. relative au bénéficiaire) pouvant être inférée de l'ordonnance prononcée le 29 avril 2008 par le tribunal et suffisante pour donner naissance à une fiducie expresse.

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[85] At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus, there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

[85] Au moment où l'ordonnance a été rendue, il y avait un différend entre Century Services et la Couronne au sujet d'une partie du produit de la vente des biens du débiteur. La solution retenue par le tribunal a consisté à accepter, selon la proposition de LeRoy Trucking, que la somme en question soit détenue séparément jusqu'à ce que le différend puisse être réglé. Par conséquent, il n'existait aucune certitude que la Couronne serait véritablement le bénéficiaire ou l'objet de la fiducie.

[86] The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

[86] Le fait que le compte choisi pour conserver séparément la somme en question était le compte en fiducie du contrôleur n'a pas à lui seul un effet tel qu'il suppléerait à l'absence d'un bénéficiaire certain. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à la priorité de rang, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question. Cependant, il se peut fort bien que le juge en chef Brenner ait estimé que, conformément à l'arrêt *Ottawa Senators*, la créance de la Couronne à l'égard de la TPS demeurerait effective si la réorganisation aboutissait, ce qui ne serait pas le cas si le passage au processus de liquidation régi par la *LFI* était autorisé. Une somme équivalente à cette créance serait ainsi mise de côté jusqu'à ce que le résultat de la réorganisation soit connu.

[87] Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008 denying the Crown's application to enforce the trust once it was clear

[87] Par conséquent, l'incertitude entourant l'issue de la restructuration tentée sous le régime de la *LACC* exclut l'existence d'une certitude permettant de conférer de manière permanente à la Couronne un intérêt bénéficiaire sur la somme en question. Cela ressort clairement des motifs exposés de vive voix par le juge en chef Brenner le 29 avril 2008, lorsqu'il a dit : [TRADUCTION] « Comme il est notoire que [des procédures fondées sur la *LACC*] peuvent échouer et que cela entraîne des faillites, le maintien du statu quo en l'espèce me semble militer en faveur de l'acceptation de la proposition d'ordonner au contrôleur de détenir ces fonds en fiducie. » Il y avait donc manifestement un doute quant à la question de savoir qui au juste pourrait toucher l'argent

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that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

en fin de compte. L'ordonnance ultérieure du juge en chef Brenner — dans laquelle ce dernier a rejeté, le 3 septembre 2008, la demande de la Couronne sollicitant le bénéfice de la fiducie présumée après qu'il fut devenu évident que la faillite était inévitable — confirme l'absence du bénéficiaire certain sans lequel il ne saurait y avoir de fiducie expresse.

4. Conclusion

[88] I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

4. Conclusion

[88] Je conclus que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne sollicitant le bénéfice de la fiducie réputée visant la TPS, tout en levant par ailleurs la suspension des procédures de manière à permettre à LeRoy Trucking de faire cession de ses biens. Ma conclusion selon laquelle le par. 18.3(1) de la *LACC* neutralisait la fiducie réputée visant la TPS pendant la durée des procédures fondées sur cette loi confirme que les pouvoirs discrétionnaires exercés par le tribunal en vertu de l'art. 11 n'étaient pas limités par la priorité invoquée par la Couronne au titre de la TPS, puisqu'il n'existe aucune priorité de la sorte sous le régime de la *LACC*.

[89] For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

[89] Pour ces motifs, je suis d'avis d'accueillir le pourvoi et de déclarer que la somme de 305 202,30 $ perçue par LeRoy Trucking au titre de la TPS mais non encore versée au receveur général du Canada ne fait l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Cette somme ne fait pas non plus l'objet d'une fiducie expresse. Les dépens sont accordés à l'égard du présent pourvoi et de l'appel interjeté devant la juridiction inférieure.

The following are the reasons delivered by

Version française des motifs rendus par

FISH J. —

LE JUGE FISH —

I

[90] I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

[91] More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

I

[90] Je souscris dans l'ensemble aux motifs de la juge Deschamps et je disposerais du pourvoi comme elle le propose.

[91] Plus particulièrement, je me rallie à son interprétation de la portée du pouvoir discrétionnaire conféré au juge par l'art. 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C.

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And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

1985, ch. C-36 (« *LACC* »). Je partage en outre sa conclusion suivant laquelle le juge en chef Brenner n'a pas créé de fiducie expresse en faveur de la Couronne en ordonnant que les sommes recueillies au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

[92] J'estime néanmoins devoir ajouter de brefs motifs qui me sont propres au sujet de l'interaction entre la *LACC* et la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »).

[93] In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

[93] En maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), et les décisions rendues dans sa foulée ont eu pour effet de protéger indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. À mon avis, il convient en l'espèce de rompre nettement avec ce courant jurisprudentiel.

[94] Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

[94] La juge Deschamps expose d'importantes raisons d'ordre historique et d'intérêt général à l'appui de cette position et je n'ai rien à ajouter à cet égard. Je tiens toutefois à expliquer pourquoi une analyse comparative de certaines dispositions législatives connexes vient renforcer la conclusion à laquelle ma collègue et moi-même en arrivons.

[95] Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

[95] Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité. Il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il ne nous appartient pas de nous interroger sur les raisons de ce choix. Nous devons plutôt considérer la décision du législateur de maintenir en vigueur les dispositions en question comme un exercice délibéré du pouvoir discrétionnaire de légiférer, pouvoir qui est exclusivement le sien. Avec égards, je rejette le point de vue suivant lequel nous devrions plutôt qualifier l'apparente contradiction entre le par. 18.3(1) (maintenant le par. 37(1)) de la *LACC* et l'art. 222 de la *LTA* d'anomalie rédactionnelle ou de lacune législative susceptible d'être corrigée par un tribunal.

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II

[96] In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

[97] This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

[98] The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), where s. 227(4) *creates* a deemed trust:

> (4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

[99] In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

> (4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person . . . equal in value to the amount so deemed to be held in trust is deemed
>
> (*a*) to be held, from the time the amount was deducted or withheld by the person, separate and

II

[96] Dans le contexte du régime canadien d'insolvabilité, on conclut à l'existence d'une fiducie réputée uniquement lorsque deux éléments complémentaires sont réunis : en premier lieu, une disposition législative qui *crée* la fiducie et, en second lieu, une disposition de la *LACC* ou de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* ») qui *confirme* l'existence de la fiducie ou la maintient explicitement en vigueur.

[97] Cette interprétation se retrouve dans trois lois fédérales, qui renferment toutes une disposition relative aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*.

[98] La première est la *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.) (« *LIR* »), dont le par. 227(4) *crée* une fiducie réputée :

> (4) Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l'absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi. [Dans la présente citation et dans celles qui suivent, les soulignements sont évidemment de moi.]

[99] Dans le paragraphe suivant, le législateur prend la peine de bien préciser que toute disposition législative fédérale ou provinciale à l'effet contraire n'a aucune incidence sur la fiducie ainsi constituée :

> (4.1) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne [. . .] d'une valeur égale à ce montant sont réputés :
>
> *a*) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu,

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apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, . . .

. . .

. . . and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

[100] The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

[101] The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

[102] Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

. . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

[100] Le maintien en vigueur de cette fiducie réputée est expressément *confirmé* à l'art. 18.3 de la *LACC* :

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

[101] L'application de la fiducie réputée prévue par la *LIR* est également confirmée par l'art. 67 de la *LFI* :

(2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

[102] Par conséquent, le législateur a *créé*, puis *confirmé le maintien en vigueur* de la fiducie réputée établie par la *LIR* en faveur de Sa Majesté *tant* sous le régime de la *LACC* *que* sous celui de la *LFI*.

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[103] The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

[103] La deuxième loi fédérale où l'on retrouve ce mécanisme est le *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8 (« *RPC* »). À l'article 23, le législateur crée une fiducie réputée en faveur de la Couronne et précise qu'elle existe malgré les dispositions contraires de toute autre loi fédérale. Enfin, la *Loi sur l'assurance-emploi*, L.C. 1996, ch. 23 (« *LAE* »), crée dans des termes quasi identiques, une fiducie réputée en faveur de la Couronne : voir les par. 86(2) et (2.1).

[104] As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) of the *CCAA* and in s. 67(3) of the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

[104] Comme nous l'avons vu, le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions de la *LIR*, du *RPC* et de la *LAE* est confirmé au par. 18.3(2) de la *LACC* et au par. 67(3) de la *LFI*. Dans les trois cas, le législateur a exprimé en termes clairs et explicites sa volonté de voir la fiducie réputée établie en faveur de la Couronne produire ses effets pendant le déroulement de la procédure d'insolvabilité.

[105] The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

[105] La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne *confirme* pas l'existence de la fiducie — ni ne prévoit expressément le maintien en vigueur de celle-ci — dans la *LFI* ou dans la *LACC*. Le second des deux éléments obligatoires que j'ai mentionnés fait donc défaut, ce qui témoigne de l'intention du législateur de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

[106] The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

[106] Le texte des dispositions en cause de la *LTA* est substantiellement identique à celui des dispositions de la *LIR*, du *RPC* et de la *LAE* :

> **222.** (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a

> **222.** (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la personne, jusqu'à ce qu'il soit

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security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

. . .

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, . . .

. . .

. . . and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

[107] Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

[108] In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

[109] With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust

versé au receveur général ou retiré en application du paragraphe (2).

. . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

. . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[107] Pourtant, aucune disposition de la *LACC* ne prévoit le maintien en vigueur de la fiducie réputée une fois que la *LACC* entre en jeu.

[108] En résumé, le législateur a imposé *deux* conditions explicites — ou « composantes de base » — devant être réunies pour que survivent, sous le régime de la *LACC*, les fiducies réputées qui ont été établies par la *LIR*, le *RPC* et la *LAE*. S'il avait voulu préserver de la même façon, sous le régime de la *LACC*, les fiducies réputées qui sont établies par la *LTA*, il aurait inséré dans la *LACC* le type de disposition confirmatoire qui maintient explicitement en vigueur d'autres fiducies réputées.

[109] Avec égards pour l'opinion contraire exprimée par le juge Tysoe de la Cour d'appel, je ne trouve pas [TRADUCTION] « inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception » (2009 BCCA

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provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

205, 98 B.C.L.R. (4th) 242, par. 37). *Toutes* les dispositions établissant des fiducies réputées qui sont reproduites ci-dessus font explicitement mention de la *LFI*. L'article 222 de la *LTA* ne rompt pas avec ce modèle. Compte tenu du libellé presque identique des quatre dispositions établissant une fiducie réputée, il aurait d'ailleurs été étonnant que le législateur ne fasse aucune mention de la *LFI* dans la *LTA*.

[110] Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

[110] L'intention du législateur était manifestement de rendre inopérantes les fiducies réputées visant la TPS dès l'introduction d'une procédure d'insolvabilité. Par conséquent, l'art. 222 mentionne la *LFI* de manière à l'*exclure* de son champ d'application — et non de l'y *inclure*, comme le font la *LIR*, le *RPC* et la *LAE*.

[111] Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

[111] En revanche, je constate qu'*aucune* de ces lois ne mentionne expressément la *LACC*. La mention explicite de la *LFI* dans ces textes n'a aucune incidence sur leur interaction avec la *LACC*. Là encore, ce sont les dispositions confirmatoires que l'on trouve *dans les lois sur l'insolvabilité* qui déterminent si une fiducie réputée continuera d'exister durant une procédure d'insolvabilité.

[112] Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

[112] Enfin, j'estime que les juges siégeant en leur cabinet ne devraient pas, comme cela s'est produit en l'espèce, ordonner que les sommes perçues au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur pendant le déroulement d'une procédure fondée sur la *LACC*. Il résulte du raisonnement de la juge Deschamps que les réclamations de TPS deviennent des créances non garanties sous le régime de la *LACC*. Le législateur a délibérément décidé de supprimer certaines superpriorités accordées à la Couronne pendant l'insolvabilité; nous sommes en présence de l'un de ces cas.

III

[113] For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada

III

[113] Pour les motifs qui précèdent, je suis d'avis, à l'instar de la juge Deschamps, d'accueillir le pourvoi avec dépens devant notre Cour et devant les juridictions inférieures, et d'ordonner que la somme de 305 202,30 $ — qui a été perçue par LeRoy Trucking

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be subject to no deemed trust or priority in favour of the Crown.

au titre de la TPS mais n'a pas encore été versée au receveur général du Canada — ne fasse l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne.

The following are the reasons delivered by

Version française des motifs rendus par

[114] ABELLA J. (dissenting) — The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

[114] LA JUGE ABELLA (dissidente) — La question qui est au cœur du présent pourvoi est celle de savoir si l'art. 222 de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), et plus particulièrement le par. 222(3), donnent préséance, dans le cadre d'une procédure relevant de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »), à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. À l'instar du juge Tysoe de la Cour d'appel, j'estime que tel est le cas. Il s'ensuit, à mon avis, que le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC* est circonscrit en conséquence.

[115] Section 11[1] of the *CCAA* stated:

> **11.** (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

[115] L'article 11[1] de la *LACC* disposait :

> **11.** (1) Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

Pour être en mesure de déterminer la portée du pouvoir discrétionnaire conféré au tribunal par l'art. 11, il est nécessaire de trancher d'abord la question de la priorité. Le paragraphe 222(3), la disposition de la *LTA* en cause en l'espèce, prévoit ce qui suit :

1 Section 11 was amended, effective September 18, 2009, and now states:

> **11.** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

1 L'article 11 a été modifié et le texte modifié, qui est entré en vigueur le 18 septembre 2009, est rédigé ainsi :

> **11.** Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

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(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[116] Century Services argued that the *CCAA*'s general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

18.3 (1) . . . [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[117] As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory

[116] Selon Century Services, la disposition dérogatoire générale de la *LACC*, le par. 18.3(1), l'emportait, et les dispositions déterminatives à l'art. 222 de la *LTA* étaient par conséquent inapplicables dans le cadre d'une procédure fondée sur la *LACC*. Le paragraphe 18.3(1) dispose :

18.3 (1) . . . [P]ar dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

[117] Ainsi que l'a fait observer le juge d'appel MacPherson, dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), le par. 222(3) de la *LTA* [TRADUCTION] « entre nettement en conflit » avec le par. 18.3(1) de la *LACC* (par. 31). Essentiellement, la résolution du conflit entre ces deux dispositions requiert à mon sens une

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interpretation: Does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

opération relativement simple d'interprétation des lois : Est-ce que les termes employés révèlent une intention claire du législateur? À mon avis, c'est le cas. Le texte de la disposition créant une fiducie réputée, soit le par. 222(3) de la *LTA*, précise sans ambiguïté que cette disposition s'applique malgré toute autre règle de droit sauf la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »).

[118] By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* . . . . The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[118] En excluant explicitement une seule loi du champ d'application du par. 222(3) et en déclarant de façon non équivoque qu'il s'applique malgré toute autre loi ou règle de droit au Canada *sauf* la *LFI*, le législateur a défini la portée de cette disposition dans des termes on ne peut plus clairs. Je souscris sans réserve aux propos suivants du juge d'appel MacPherson dans l'arrêt *Ottawa Senators* :

> [TRADUCTION] L'intention du législateur au par. 222(3) de la *LTA* est claire. En cas de conflit avec « tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*) », c'est le par. 222(3) qui l'emporte. En employant ces mots, le législateur fédéral a fait deux choses : il a décidé que le par. 222(3) devait l'emporter sur tout autre texte législatif fédéral et, fait important, il a abordé la question des exceptions à cette préséance en en mentionnant une seule, la *Loi sur la faillite et l'insolvabilité* [. . .] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d'exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[119] MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

[119] L'opinion du juge d'appel MacPherson suivant laquelle le fait que la *LACC* n'ait pas été soustraite à l'application de la *LTA* témoigne d'une intention claire du législateur est confortée par la façon dont la *LACC* a par la suite été modifiée après l'édiction du par. 18.3(1) en 1997. En 2000, lorsque le par. 222(3) de la *LTA* est entré en vigueur, des modifications ont également été apportées à la *LACC*, mais le par. 18.3(1) de cette loi n'a pas été modifié.

[120] The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from

[120] L'absence de modification du par. 18.3(1) vaut d'être soulignée, car elle a eu pour effet de maintenir le statu quo législatif, malgré les

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various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

[121] Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

demandes répétées de divers groupes qui souhaitaient que cette disposition soit modifiée pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. En 2002, par exemple, lorsque Industrie Canada a procédé à l'examen de la *LFI* et de la *LACC*, l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation ont recommandé que les règles de la *LFI* en matière de priorité soient étendues à la *LACC* (Joint Task Force on Business Insolvency Law Reform, *Report* (15 mars 2002), ann. B, proposition 71). Ces recommandations ont été reprises en 2003 par le Comité sénatorial permanent des banques et du commerce dans son rapport intitulé *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies*, ainsi qu'en 2005 par le Legislative Review Task Force (Commercial) de l'Institut d'insolvabilité du Canada et de l'Association canadienne des professionnels de l'insolvabilité *et de la* réorganisation dans son *Report on the Commercial Provisions of Bill C-55*, et en 2007 par l'Institut d'insolvabilité du Canada dans un mémoire soumis au Comité sénatorial permanent des banques et du commerce au sujet de réformes alors envisagées.

[121] La *LFI* demeure néanmoins la seule loi soustraite à l'application du par. 222(3) de la *LTA*. Même à la suite de l'arrêt rendu en 2005 dans l'affaire *Ottawa Senators*, qui a confirmé que la *LTA* l'emportait sur la *LACC*, le législateur n'est pas intervenu. Cette absence de réaction de sa part me paraît tout aussi pertinente en l'espèce que dans l'arrêt *Société Télé-Mobile c. Ontario*, 2008 CSC 12, [2008] 1 R.C.S. 305, où la Cour a déclaré ceci :

> Le silence du législateur n'est pas nécessairement déterminant quant à son intention, mais en l'espèce, il répond à la demande pressante de Telus et des autres entreprises et organisations intéressées que la loi prévoie expressément la possibilité d'un remboursement des frais raisonnables engagés pour communiquer des éléments de preuve conformément à une ordonnance. L'historique législatif confirme selon moi que le législateur n'a pas voulu qu'une indemnité soit versée pour l'obtempération à une ordonnance de communication. [par. 42]

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[122] All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

[123] Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

[124] Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

[122] Tout ce qui précède permet clairement d'inférer que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

[123] Je ne vois pas non plus de « considération de politique générale » qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur. Je ne saurais expliquer mieux que ne l'a fait le juge d'appel Tysoe les raisons pour lesquelles l'argument invoquant des considérations de politique générale ne peut, selon moi, être retenu en l'espèce. Je vais donc reprendre à mon compte ses propos à ce sujet :

> [TRADUCTION] Je ne conteste pas qu'il existe des raisons de politique générale valables qui justifient d'inciter les entreprises insolvables à tenter de se restructurer de façon à pouvoir continuer à exercer leurs activités avec le moins de perturbations possibles pour leurs employés et pour les autres intéressés. Les tribunaux peuvent légitimement tenir compte de telles considérations de politique générale, mais seulement si elles ont trait à une question que le législateur n'a pas examinée. Or, dans le cas qui nous occupe, il y a lieu de présumer que le législateur a tenu compte de considérations de politique générale lorsqu'il a adopté les modifications susmentionnées à la *LACC* et à la *LTA*. Comme le juge MacPherson le fait observer au par. 43 de l'arrêt *Ottawa Senators*, il est inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception. Je signale par ailleurs que les modifications apportées en 1992 à la *LFI* ont permis de rendre les propositions concordataires opposables aux créanciers garantis et que, malgré la plus grande souplesse de la *LACC*, il est possible pour une compagnie insolvable de se restructurer sous le régime de la *LFI*. [par. 37]

[124] Bien que je sois d'avis que la clarté des termes employés au par. 222(3) tranche la question, j'estime également que cette conclusion est même renforcée par l'application d'autres principes d'interprétation. Dans leurs observations, les parties indiquent que les principes suivants étaient, selon elles, particulièrement pertinents : la Couronne a invoqué le principe voulant que la loi « postérieure » l'emporte; Century Services a fondé son argumentation sur le principe de la préséance de la loi spécifique sur la loi générale (*generalia specialibus non derogant*).

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[125] The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

[126] The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862).

[127] The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> . . . the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, . . . at p. 239 . . . :
>
> > The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the

[125] Le principe de la préséance de la « loi postérieure » accorde la priorité à la loi la plus récente, au motif que le législateur est présumé connaître le contenu des lois alors en vigueur. Si, dans la loi nouvelle, le législateur adopte une règle inconciliable avec une règle préexistante, on conclura qu'il a entendu déroger à celle-ci (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 346-347; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3e éd. 2000), p. 358).

[126] L'exception à cette supplantation présumée des dispositions législatives préexistantes incompatibles réside dans le principe exprimé par la maxime *generalia specialibus non derogant* selon laquelle une disposition générale plus récente n'est pas réputée déroger à une loi spéciale antérieure (Côté, p. 359). Comme dans le jeu des poupées russes, cette exception comporte elle-même une exception. En effet, une disposition spécifique antérieure peut dans les faits être « supplantée » par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale (*Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862).

[127] Ces principes d'interprétation visent principalement à faciliter la détermination de l'intention du législateur, comme l'a confirmé le juge d'appel MacPherson dans l'arrêt *Ottawa Senators*, au par. 42 :

> [TRADUCTION] . . . en matière d'interprétation des lois, la règle cardinale est la suivante : les dispositions législatives doivent être interprétées de manière à donner effet à l'intention du législateur lorsqu'il a adopté la loi. Cette règle fondamentale l'emporte sur toutes les maximes, outils ou canons d'interprétation législative, y compris la maxime suivant laquelle le particulier l'emporte sur le général (*generalia specialibus non derogant*). Comme l'a expliqué le juge Hudson dans l'arrêt *Canada c. Williams*, [1944] R.C.S. 226, [. . .] à la p. 239 . . . :
>
> > On invoque la maxime *generalia specialibus non derogant* comme une règle qui devrait trancher la question. Or cette maxime, qui n'est pas une règle de droit mais un principe d'interprétation, cède le pas

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legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

[128] I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3).

[129] It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(*f*)). It directs that new enactments not be construed as

2 The amendments did not come into force until September 18, 2009.

devant l'intention du législateur, s'il est raisonnablement possible de la dégager de l'ensemble des dispositions législatives pertinentes.

(Voir aussi Côté, p. 358, et Pierre-André Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4e éd. 2009), par. 1335.)

[128] J'accepte l'argument de la Couronne suivant lequel le principe de la loi « postérieure » est déterminant en l'espèce. Comme le par. 222(3) de la *LTA* a été édicté en 2000 et que le par. 18.3(1) de la *LACC* a été adopté en 1997, le par. 222(3) est, de toute évidence, la disposition postérieure. Cette victoire chronologique peut être neutralisée si, comme le soutient Century Services, on démontre que la disposition la plus récente, le par. 222(3) de la *LTA*, est une disposition générale, auquel cas c'est la disposition particulière antérieure, le par. 18.3(1), qui l'emporte (*generalia specialibus non derogant*). Mais, comme nous l'avons vu, la disposition particulière antérieure n'a pas préséance si la disposition générale ultérieure paraît la « supplanter ». C'est précisément, à mon sens, ce qu'accomplit le par. 222(3) de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » *sauf la LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3).

[129] Il est vrai que, lorsque la *LACC* a été modifiée en 2005[2], le par. 18.3(1) a été remplacé par le par. 37(1) (L.C. 2005, ch. 47, art. 131). Selon la juge Deschamps, le par. 37(1) est devenu, de ce fait, la disposition « postérieure ». Avec égards pour l'opinion exprimée par ma collègue, cette observation est réfutée par l'al. 44*f*) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, qui décrit expressément l'effet (inexistant) qu'a le remplacement — sans modifications notables sur le fond — d'un texte antérieur qui a été abrogé (voir *Procureur général du Canada c. Commission des relations de travail dans la Fonction publique*, [1977] 2 C.F. 663, qui portait sur

2 Les modifications ne sont entrées en vigueur que le 18 septembre 2009.

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"new law" unless they differ in substance from the repealed provision:

> **44.** Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> . . .
>
> (*f*) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an "enactment" as "an Act or regulation or any portion of an Act or regulation".

[130] Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

> **37.** (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[131] The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to re-order the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the

la disposition qui a précédé l'al. 44*f*)). Cet alinéa précise que le nouveau texte ne doit pas être considéré de « droit nouveau », sauf dans la mesure où il diffère au fond du texte abrogé :

> **44.** En cas d'abrogation et de remplacement, les règles suivantes s'appliquent :
>
> . . .
>
> *f*) sauf dans la mesure où les deux textes diffèrent au fond, le nouveau texte n'est pas réputé de droit nouveau, sa teneur étant censée constituer une refonte et une clarification des règles de droit du texte antérieur;

Le mot « texte » est défini ainsi à l'art. 2 de la *Loi d'interprétation* : « Tout ou partie d'une loi ou d'un règlement. »

[130] Le paragraphe 37(1) de la *LACC* actuelle est pratiquement identique quant au fond au par. 18.3(1). Pour faciliter la comparaison de ces deux dispositions, je les ai reproduites ci-après :

> **37.** (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

> **18.3** (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

[131] L'application de l'al. 44*f*) de la *Loi d'interprétation* vient tout simplement confirmer l'intention clairement exprimée par le législateur, qu'a indiquée Industrie Canada dans l'analyse du Projet de loi C-55, où le par. 37(1) était qualifié de « modification d'ordre technique concernant le réaménagement des dispositions de la présente loi ». Par ailleurs, durant la deuxième lecture du projet de loi

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Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

[132] Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

[133] This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

[134] While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request

au Sénat, l'honorable Bill Rompkey, qui était alors leader adjoint du gouvernement au Sénat, a confirmé que le par. 37(1) représentait seulement une modification d'ordre technique :

> Sur une note administrative, je signale que, dans le cas du traitement de fiducies présumées aux fins d'impôt, le projet de loi ne modifie aucunement l'intention qui sous-tend la politique, alors que dans le cas d'une restructuration aux termes de la LACC, des articles de la loi ont été abrogés et remplacés par des versions portant de nouveaux numéros lors de la mise à jour exhaustive de la LACC.

(*Débats du Sénat*, vol. 142, 1re sess., 38e lég., 23 novembre 2005, p. 2147)

[132] Si le par. 18.3(1) avait fait l'objet de modifications notables sur le fond lorsqu'il a été remplacé par le par. 37(1), je me rangerais à l'avis de la juge Deschamps qu'il doit être considéré comme un texte de droit nouveau. Mais comme les par. 18.3(1) et 37(1) ne diffèrent pas sur le fond, le fait que le par. 18.3(1) soit devenu le par. 37(1) n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure » (Sullivan, p. 347).

[133] Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. La question qui se pose alors est celle de savoir quelle est l'incidence de cette préséance sur le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC*.

[134] Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, L.R.C. 1985, ch. W-11, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi *autre* que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1) ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent,

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for payment of the GST funds during the *CCAA* proceedings.

il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

[135] Given this conclusion, it is unnecessary to consider whether there was an express trust.

[135] Vu cette conclusion, il n'est pas nécessaire d'examiner la question de savoir s'il existait une fiducie expresse en l'espèce.

[136] I would dismiss the appeal.

[136] Je rejetterais le présent pourvoi.

APPENDIX

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) [Powers of court] Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

. . .

(3) [Initial application court orders] A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) [Other than initial application court orders] A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

ANNEXE

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 13 décembre 2007)

11. (1) [Pouvoir du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

. . .

(3) [Demande initiale — ordonnances] Dans le cas d'une demande initiale visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour une période maximale de trente jours :

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

(4) [Autres demandes — ordonnances] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime indiquée :

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(*a*) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

. . .

(6) [Burden of proof on application] The court shall not make an order under subsection (3) or (4) unless

(*a*) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(*b*) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) [Her Majesty affected] An order made under section 11 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

. . .

(6) [Preuve] Le tribunal ne rend l'ordonnance visée aux paragraphes (3) ou (4) que si :

a) le demandeur le convainc qu'il serait indiqué de rendre une telle ordonnance;

b) dans le cas de l'ordonnance visée au paragraphe (4), le demandeur le convainc en outre qu'il a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue.

11.4 (1) [Suspension des procédures] Le tribunal peut ordonner :

a) la suspension de l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents, à l'égard d'une compagnie lorsque celle-ci est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour une période se terminant au plus tard :

(i) à l'expiration de l'ordonnance rendue en application de l'article 11,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

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(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) [When order ceases to be in effect] An order referred to in subsection (1) ceases to be in effect if

(*a*) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) la suspension de l'exercice par Sa Majesté du chef d'une province, pour une période se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition législative de cette province à l'égard d'une compagnie, lorsque celle-ci est un débiteur visé par la loi provinciale et qu'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(2) [Cessation] L'ordonnance cesse d'être en vigueur dans les cas suivants :

a) la compagnie manque à ses obligations de paiement pour un montant qui devient dû à Sa Majesté après l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou

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as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person

d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne,

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and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same

ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(3) [Effet] Les ordonnances du tribunal, autres que celles rendues au titre du paragraphe (1), n'ont pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou

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effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) [Deemed trusts] Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

18.3 (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

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18.4 (1) [Status of Crown claims] In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Operation of similar legislation] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and

18.4 (1) [Réclamations de la Couronne] Dans le cadre de procédures intentées sous le régime de la présente loi, toutes les réclamations de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail, y compris les réclamations garanties, prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii),

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in respect of any related interest, penalties or other amounts.

20. [Act to be applied conjointly with other Acts] The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

11. [General power of court] Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

11.02 (1) [Stays, etc. — initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) [Stays, etc. — other than initial application] A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

20. [La loi peut être appliquée conjointement avec d'autres lois] Les dispositions de la présente loi peuvent être appliquées conjointement avec celles de toute loi fédérale ou provinciale, autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers.

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 18 septembre 2009)

11. [Pouvoir général du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

11.02 (1) [Suspension : demande initiale] Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de trente jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(2) [Suspension : demandes autres qu'initiales] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)*a*);

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(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) [Burden of proof on application] 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.

. . .

11.09 (1) [Stay — Her Majesty] An order made under section 11.02 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income*

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(3) [Preuve] Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

. . .

11.09 (1) [Suspension des procédures : Sa Majesté] L'ordonnance prévue à l'article 11.02 peut avoir pour effet de suspendre :

a) l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents, à l'égard d'une compagnie qui est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour la période se terminant au plus tard :

(i) à l'expiration de l'ordonnance,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) l'exercice par Sa Majesté du chef d'une province, pour la période que le tribunal estime indiquée et se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition

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Tax Act, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(*a*) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the

législative de cette province à l'égard d'une compagnie qui est un débiteur visé par la loi provinciale, s'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(2) [Cessation d'effet] Les passages de l'ordonnance qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*) cessent d'avoir effet dans les cas suivants :

a) la compagnie manque à ses obligations de paiement à l'égard de toute somme qui devient due à Sa Majesté après le prononcé de l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la

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collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection

perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens

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3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(3) [Effet] L'ordonnance prévue à l'article 11.02, à l'exception des passages de celle-ci qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*), n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

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37. (1) [Deemed trusts] Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured

37. (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des sommes réputées détenues en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des sommes réputées détenues en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, si, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est une province instituant un régime général de pensions au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un régime provincial de pensions au sens de ce paragraphe, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier de la compagnie et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15 (en date du 13 décembre 2007)

222. (1) [Montants perçus détenus en fiducie] La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la

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creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

. . .

(3) [Extension of trust] Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

(1.1) [Montants perçus avant la faillite] Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la *Loi sur la faillite et l'insolvabilité*, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à la section II.

. . .

(3) [Non-versement ou non-retrait] Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3 (en date du 13 décembre 2007)

67. (1) [Biens du failli] Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants :

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(*a*) property held by the bankrupt in trust for any other person,

(*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(*b*.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) [Deemed trusts] Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) [Exceptions] Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

a) les biens détenus par le failli en fiducie pour toute autre personne;

b) les biens qui, à l'encontre du failli, sont exempts d'exécution ou de saisie sous le régime des lois applicables dans la province dans laquelle sont situés ces biens et où réside le failli;

b.1) dans les circonstances prescrites, les paiements au titre de crédits de la taxe sur les produits et services et les paiements prescrits qui sont faits à des personnes physiques relativement à leurs besoins essentiels et qui ne sont pas visés aux alinéas *a*) et *b*),

mais ils comprennent :

c) tous les biens, où qu'ils soient situés, qui appartiennent au failli à la date de la faillite, ou qu'il peut acquérir ou qui peuvent lui être dévolus avant sa libération;

d) les pouvoirs sur des biens ou à leur égard, qui auraient pu être exercés par le failli pour son propre bénéfice.

(2) [Fiducies présumées] Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) [Exceptions] Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

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(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Exceptions] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

86. (1) [Réclamations de la Couronne] Dans le cadre d'une faillite ou d'une proposition, les réclamations prouvables — y compris les réclamations garanties — de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

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(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

Appeal allowed with costs, ABELLA J. *dissenting.*

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Attorney General of Canada, Vancouver.

Pourvoi accueilli avec dépens, la juge ABELLA *est dissidente.*

Procureurs de l'appelante : Fraser Milner Casgrain, Vancouver.

Procureur de l'intimé : Procureur général du Canada, Vancouver.

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