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 QUÉBEC IRON MINING ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC.

Petitioners

-and-

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

Mises-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

-and-

MICHAEL KEEPER, **TERENCE WATT**, **DAMIEN LEBEL AND NEIL JOHNSON**

REPRESENTATIVES-Mis-en-cause

UNITED STEELWORKERS, LOCAL 6254, UNITED STEELWORKERS, LOCAL 6285

MORNEAU SHEPELL

HER MAJESTY IN RIGHT OF NEWFOUNDLAND & LABRADOR, AS REPRESENTED BY THE SUPERINTENDENT OF PENSIONS

THE ATTORNEY GENERAL OF CANADA, ACTING ON BEHALF OF THE OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

RÉGIE DES RENTES DU QUÉBEC

Mis-en-cause

BOOK OF AUTHORITIES in support of the Argumentation Outline of Representatives of the Salaried/Non-Union Employees and Retirees (In response to the Monitor's Amended Motion for Direction with respect to the Pension Claim)

1.	*Bloom Lake, g.p.l. (Arrangement relatif à),* 2015 QCCS 3064 (Que. S.C.)
2.	*Arrangegement relatif à Bloom Lake,* 2017 QCCS 284 (Que. S.C.)
3.	*IBM Canada Limited v. Waterman,* 2013 SCC 70, [2013] 3 S.C.R. 985 (S.C.C.)
4.	*Schmidt v. Air Products Canada Ltd.,* [1994] 2 S.C.R. 611 (S.C.C.)
5.	*Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services),* 2004 SCC 54 (S.C.C.)
6.	*British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 (S.C.C.)
7.	*Alternative granite & marbre inc., Re,* 2009 SCC 49 (S.C.C.)
8.	*Re Indalex,* 2013 SCC 6 [2013] 1 S.C.R. 271 (S.C.C.)
9.	*Indalex Limited (Re)*, 2013 ONSC 7932 (Ont. S.C.)
10.	*Timminco Limited* (CV-12-9539-00CL), Twenty-Fifth Report of the Monitor dated June 9, 2014 (appendices omitted)
11.	*Timminco ltée (Arrangement relatif à),* 2014 QCCS 174 (Que. S.C.)
12.	*Bloom Lake, g.p.l. (Arrangement relatif à),* 2015 QCCA 1351 (Que. C.A.)
13.	*Provincial Memorandum of Reciprocal Agreement*, 1968; A. Financial Services Commission of Ontario, *Questions and Answers on 2016 Agreement Respecting Multi-jurisdictional Pension Plans* (26 September 2016) online: < www.fsco.gov.on.ca/en/pensions/administrators/pages/mjppaqanda.aspx>.
14.	*Dinney v. Great-West Life* [2002] M.J. No. 466 (Man. Q.B.)
15.	Tower Watson, *Ontario and Quebec Announce Signing of Agreement Respecting Multi-Jurisdictional Pension Plan* (Tower Watson: 20 June 2011)
16.	Office of the Superintendent of Financial Institutions Canada, *Knowledge of Plan and Identification of Significant Activities: Risk Assessment Framework Pension Supervisory Guidance Note RAF 1* (Ottawa: OSFI, 31 July 2014)

17.	*Hislop v. Canada (Attorney General),* 2009 ONCA 354 (Ont. C.A.)
18.	*Champagne v. Atomic Energy of Canada Ltd.*, 2012 CarswellNat 708 (CA Lab. Arb.)
19.	*Davey v Gibson,* [1930] 65 O.L.R. 379 (Ont. S.C.)
20.	*The 2016-2017 Annotated Bankruptcy and Insolvency Act*, Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra
21.	*Target Canada Co. (Re),* 2015 ONSC 303 (Ont. S.C.)
22.	*Re Nortel Networks Corporation et al,* 2014 ONSC 5274 (Ont. S.C.)
23.	Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act,* 2nd ed. (Toronto: Carswell, 2013)
24.	Janis Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law" (2017) *Annual Review of Insolvency Law 2016*
25.	*Re Rizzo & Rizzo Shoes Ltd.,* [1998] 1 S.C.R. 27 (S.C.C.)
26.	Andrew J. Hatnay, "Restructuring, Liquidating, Now Disengagement: The Use of the *CCAA* by Corporate Parents to Disengage from Canadian Operations", (2017) *Annual Review of Insolvency Law 2016*
27.	*Bloom Lake, g.p.l. (Arrangement relatif à)* (20 May 2015), No. 500-11-048114-157 (Que. SCJ)
28.	*Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342 (S.C.C.)
29.	Newfoundland and Labrador, Legislative Assembly, Hansard, 43rd General Assembly, 1st Sess, No 55 (17 December 1996) (Ernie McLean)
30.	*Textron Financial Canada Limited v. Beta Limitee/Beta Brands Limited*, 2007 CanLII 43908 (Ont. S.C.J.)

MONTREAL and TORONTO, May 12, 2017

KOSKIE MINSKY LLP & NICHOLAS SCHEIB

Attorneys for the Petitioners-Mises-en-cause Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson

TAB 1

Case Name:

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

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

[2015] Q.J. No. 6111

2015 QCCS 3064

2015EXP-2208

J.E. 2015-1232

No.: 500-11-048114-157

Quebec Superior Court

District of Montreal

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

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

(148 paras.)

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

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

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

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

Statutes, Regulations and Rules Cited:

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

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

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

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

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

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

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

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

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

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

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

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

INTRODUCTION

1 These proceedings raise essentially three issues:

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

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

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

BACKGROUND

The parties

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

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

The pension plans and other post-employment benefits

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

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

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

5 Wabush Mines is the administrator of both plans.

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

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

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

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

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

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

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

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

The Interim Financing

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

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

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

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

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

CCAA proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[...]

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

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

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

THE POSITION OF THE OBJECTING PARTIES

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

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

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

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

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

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

N&L Superintendent

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

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

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

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

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

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

OSFI

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

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

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

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

The Union

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

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

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

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

Non-union retirees

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

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

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

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

POSITION OF THE WABUSH CCAA PARTIES

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

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

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

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

POSITION OF THE MONITOR

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

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

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

ISSUES IN DISPUTE

53 The issues in dispute can be outlined as follows;

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

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

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

ANALYSIS

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

1. Super-priority of the Interim Lender Charge

General

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

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

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

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

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

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

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

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

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

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

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

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

(Emphasis added)

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

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

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

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

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

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

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

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

Effectiveness of the PBSA deemed trust in CCAA proceedings

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

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

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

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

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

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

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

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

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

(Emphasis added)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) an amount equal to the aggregate of

(i) the normal actuarial cost, and

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

(b) all

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

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

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

(Emphasis added)

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

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

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

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

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

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

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

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

Factors under Section 11.2(4) CCAA

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

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

arrangement being made in respect of the company;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The nature and value of the company's property

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

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

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

Other potential considerations

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

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

94 The Court makes the following findings:

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

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

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

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

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

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

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

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

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

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

98 Similarly, Justice Morawetz stated in *Timminco*:

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

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

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

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

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

2. Suspension of special payments

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

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

105 Several reasons underlie the existence of this jurisdiction.

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

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

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

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

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

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

approximately $5.5 million due in July 2015.

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

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

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

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

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

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

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

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

3. Suspension of the OPEBs

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

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

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

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

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

124 The retirees plead that there are two important differences.

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

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

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

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

128 This argument does not withstand scrutiny.

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

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

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

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

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

4. Breach of fiduciary duties

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

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

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

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

5. Representation order sought by the Union

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

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

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

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

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

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

FOR THESE REASONS, THE COURT:

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

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

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

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

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

148 **WITHOUT COSTS**.

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

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

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

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

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

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

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

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

8 *Ibid*, par. 38.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

30 *Ibid*, par. 58.

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

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

TAB 2

Case Name:

Arrangement relatif à Bloom Lake

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

[2017] Q.J. No. 449

2017 QCCS 284

2017EXP-1248

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

2017 CarswellQue 329

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

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

EYB 2017-275611

No.: 500-11-048114-157

Quebec Superior Court
District of Montréal

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

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

(92 paras.)

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

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

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

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

Statutes, Regulations and Rules Cited:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Counsel:

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

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

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

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

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

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

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

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

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

JUDGMENT

INTRODUCTION

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

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

CONTEXT

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

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

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

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

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

6 Wabush Mines was the administrator of both plans.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

POSITION OF THE PARTIES

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

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

* The Plan Administrator;

* The representatives of the salaried employees and retirees; and

* The NL Superintendent.

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

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

a) unpaid current service costs;

b) unpaid special payments; and,

c) unpaid wind-up liability.

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

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

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

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

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

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

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

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

* The Monitor;

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

* The Ville de Sept-Îles.

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

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

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

* Retraite Québec.

ANALYSIS

1. The jurisdiction of the CCAA Court

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Specific grounds

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

summarized as follows:

a) Legal considerations:

* These are complex and important issues of provincial law;

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

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

b) Factual considerations:

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

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

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

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

c) Practical considerations:

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

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

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

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

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

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

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

a) Legal considerations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

58 Section 32 NLPBA provides:

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

ensure, with respect to a pension plan, that

(a) the money in the pension fund;

(b) an amount equal to the aggregate of

(i) the normal actuarial cost, and

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

(c) all

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

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

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

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

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

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

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

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

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

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

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

61 In Québec, the SPPA provides :

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

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

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

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

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

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

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

relevant:

> 2. The Salaried Plan is registered in Newfoundland and regulated by the NPBA.
>
> a) (i) Does the PBSA deemed trust also apply to those members of the Salaried Plan who worked on the railway (i.e., a federal undertaking)?
>
> (ii) If yes, is there a conflict with the NPBA and PBSA if so, how is the conflict resolved?
>
> b) (i) Does the SPPA also apply to those members of the Salaried Plan who reported for work in Québec?
>
> (ii) If yes, is there a conflict with the NPBA and SPPA and if so, how is the conflict resolved?
>
> (iii) Do the Quebec SPPA deemed trusts also apply to Québec Salaried Plan members?

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

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

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

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

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

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

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

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

b) Factual considerations

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

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

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

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

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

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

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

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

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

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

c) Practical considerations

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

* The parties will have to hire experts, which is costly and time consuming;

* It will be difficult to find experts because these questions have never been litigated before;

* If there is an appeal, the interpretation of the NLPBA will be treated as a question of fact and therefore only subject to be overturned if there is a palpable and overriding error.

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

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

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

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

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

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

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

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

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

CONCLUSION

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

FOR THESE REASONS, THE COURT:

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

92 **THE WHOLE WITHOUT JUDICIAL COSTS**.

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

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

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

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

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

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

6 Exhibit R-13.

7 Exhibit R-14.

8 Exhibits R-13 and R-14.

9 Exhibit RESP-7.

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

11 Exhibit R-15.

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

13 Exhibit R-16.

14 Exhibit R-16.

15 Exhibit R-17.

16 Exhibit R-17.

17 Exhibit R-18.

18 Exhibit R-19.

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

20 *Ibid*, par. 27.

21 *Ibid*, par. 64.

22 *Ibid*, par. 76.

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

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

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

26 *Supra* note 19, par. 62.

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

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

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

30 2013 QCCS 3015, par. 18.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

46 Watt Affidavit, par. 16.

47 Article 2809 C.C.Q.

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

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

50 *Supra* note 37.

51 2014 QCCS 174.

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

TAB 3

** Preliminary Version **

Case Name:

IBM Canada Limited v. Waterman

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

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

[2013] A.C.S. no 70

2013 SCC 70

[2013] 3 S.C.R. 985

[2013] 3 R.C.S. 985

347 B.C.A.C. 43

452 N.R. 207

2013EXP-4007

2013EXPT-2316

J.E. 2013-2186

D.T.E. 2013T-851

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

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

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

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

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

[2014] CLLC para. 210-008

[2014] 2 W.W.R. 452

2013 CarswellBC 3726

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

File No.: 34472.

Supreme Court of Canada

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

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

(155 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

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

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

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

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

Statutes, Regulations and Rules Cited:

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

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

Subsequent History:

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

Court Catchwords:

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

Court Summary:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cases Cited

By Cromwell J.

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

By Rothstein J. (dissenting)

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

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History and Disposition:

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

Counsel:

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

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

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

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

CROMWELL J.:--

I. Introduction

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

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

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

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

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

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

II. Overview of Facts and Proceedings

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

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

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

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

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

III. Positions of the Parties

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

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

IV. Analysis

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

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

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

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

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

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

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

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

18 My more detailed analysis follows.

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

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

(1) What Is a Collateral Benefit Problem?

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

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

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

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

(2) When Does a Collateral Benefit Problem Arise?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) *Charitable Gifts*

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

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

(b) *Private Insurance*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) The Nature and Purpose of the Benefit

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) Broader Policy Considerations

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

responsible behaviour.

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

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

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

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

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

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

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

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

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

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

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

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

(3) Application to This Case

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

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

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

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

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

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

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

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

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

83 There is an even more fundamental difference. As Prowse J.A. points out in her reasons in the Court of Appeal, pension benefits like those in issue here bear many of the hallmarks of a property right. They, as she put it, are regarded as belonging to the employee:

> ... although the payments under the [Defined Benefit Pension] Plan are made wholly by IBM, they are made "on behalf of" the employee. This is also reflected in IBM's [Defined Contribution] Plan, where employer contributions are attributed to a fund in the name of the employee. In both instances, 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 as earned income." The pension is therefore a form of retirement savings earned over the years of

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

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

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

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

> The respondent's contractual right to damages for wrongful dismissal and his contractual right to disability benefits are based on opposite assumptions about his ability to work and it is incompatible with the employment contract for the respondent to receive both amounts. The damages are based on the premise that he would have worked during the notice period. The disability payments are

> only payable because he could not work. It makes no sense to pay damages based on the assumption that he would have worked in addition to disability benefits which arose solely because he could not work. This suggests that the parties did not intend the respondent to receive both damages and disability benefits. [Emphasis added; para. 17.]

88 As I read *Sylvester*, this analysis does not suggest that we should focus narrowly on the precise provisions of the employment contract, unless of course they deal expressly with the issue of whether pension benefits should be deducted from wrongful dismissal damages. In the absence of such an explicit provision -- and, as in *Sylvester*, there is no explicit provision in this case -- we must look at the contract in an attempt to determine what the parties intended with respect to the receipt of both wrongful dismissal damages and pension benefits.

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

90 First, an employee who is dismissed before his date of retirement would receive, without deduction, wrongful dismissal damages and all of his or her entitlements under the plan (for example, a deferred pension or its commuted value transferred to a locked-in savings vehicle). No one has suggested that these amounts would in any way affect wrongful dismissal damages. In fact, the value of any pension entitlements lost during the notice period would be a compensable loss in an unjust dismissal action: see, e.g., J. R. Sproat, *Wrongful Dismissal Handbook* (6th ed. 2012), at pp. 6-51 to 6-52.6. Second, a retired employee would receive, in full, both his pension benefits and any employment income earned from another employer. There is nothing before us to suggest that a retired IBM employee could not obtain employment with another employer and keep both his or her pension income and the new employment income. Third, once an employee reaches age 71, he or she could receive in full both employment income *from IBM* and pension benefits: plan description, at p. 2 (A.R., at p. 103); plan art. 9.02 (A.R., at p. 132). In *Sylvester*, not only was it impossible *in all circumstances* to receive salary and disability benefits, it was clear that the amount of disability benefits would be reduced by any other income, whatever its source, received by the employee: para. 14. Unlike *Sylvester*, it cannot be said here that the rights to damages for unjust dismissal and to pension benefits are based on opposite or incompatible assumptions. This conclusion is also consistent with the understanding of vested pension entitlements as being akin to property rights which accrue over time for the employee's benefit.

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

employment income.

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

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

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

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

95 My colleague Rothstein J. suggests that failure to deduct earned pension benefits from wrongful dismissal damages may disadvantage other employees in the future because it may "incentivize" employers to require an employee to work through the duration of the reasonable notice period to the potential disadvantage of employees. However, the risk of such an incentive

seems to me to be highly speculative. There are pluses and minuses for both the employer and employee of giving (and receiving) working notice. From the employer's perspective, it may not be advantageous to have the employee remain on the employer's premises during the period of working notice. In addition, the employer loses the benefit of the employee's efforts to mitigate damages by finding alternate employment, a benefit that is often unpredictable at the time of termination. The employer is always able to negotiate before firing an employee rather than firing without first negotiating. In light of these considerations, among others, it seems to me to be highly speculative to say that refusal to deduct pension benefits will encourage employers to give working notice rather than offer severance.

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

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

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

V. Disposition

99 I would dismiss the appeal with costs throughout.

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

ROTHSTEIN J. (dissenting):--

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

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

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

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

Factual Background

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

105 As an employee of IBM, Mr. Waterman became a member of the company's defined benefit pension plan. Under the terms of the plan, IBM was required to make contributions to the pension plan on behalf of its employees and, upon an employee's eligibility to receive benefits, IBM would provide the employee with monthly benefits according to a predetermined formula until the employee's death. An employee became eligible to receive his monthly benefits upon retiring after reaching the age of 65. An employee whose employment was terminated prior to the age of 65 could receive his pension benefits upon turning 65 or could elect to transfer the actuarial equivalent of his accrued pension to a new employer. An employee also became eligible to receive his benefits upon reaching the age of 71, independent of whether he had been terminated or retired, which, according to the parties, was necessary for the plan to comply with income tax regulations. At the time Mr. Waterman was terminated by IBM, the monthly payment he would receive upon becoming eligible had already been determined for several years.

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

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

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

Procedural History

Supreme Court of British Columbia, 2010 BCSC 376, 2010 CLLC para210-021

109 After a summary trial, Goepel J. found that IBM breached Mr. Waterman's employment contract by failing to provide him with reasonable notice. Goepel J. held that IBM was required to provide Mr. Waterman with an additional 18 months of notice beyond the two months that had been provided. As a result, Mr. Waterman was entitled to the salary he would have earned and benefits he would have accrued if he had continued to work for IBM during that time.

110 Goepel J. did not deduct the pension benefits that IBM paid to Mr. Waterman during the notice period in calculating his damages. Goepel J. expressed the view that he was bound by the Court of Appeal for British Columbia's decision in *Girling v. Crown Cork & Seal Canada Inc.* (1995), 9 B.C.L.R. (3d) 1, in which it was held that pension benefits should not be deducted from

wrongful dismissal damages. He acknowledged the possibility that *Girling* was no longer an accurate statement of the law in light of this Court's decision in *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315, but found it incumbent upon him to follow *Girling* for reasons of judicial comity.

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

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

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

113 Prowse J.A. observed that the approach the Court of Appeal had previously taken in *Girling* was rejected by this Court's decision in *Sylvester*. In particular, *Sylvester* rejected the Court of Appeal for British Columbia's approach of treating agreements for employee benefits as contracts distinct from the employment contract. According to Prowse J.A., under *Sylvester*, Mr. Waterman's entitlement to both salary and payment of his pension benefits during the notice period turned on the construction of the contractual arrangement between the parties.

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

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

Issue

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

Analysis

117 My analysis proceeds in two stages. First, I consider whether it is necessary to deduct the pension benefits Mr. Waterman received during the reasonable notice period in order to put him in the position he would have been in had the contract been performed -- i.e. had he been given reasonable notice and worked through the end of the reasonable notice period. Second, I consider whether there is a basis for applying the private insurance exception, which allows a plaintiff to

receive excess compensation in certain circumstances. I conclude that, to put Mr. Waterman in the position he would have been in had the contract been performed, the pension benefits he received must be deducted. The private insurance exception is not applicable to this case.

Contract Damages for Wrongful Dismissal

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

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

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

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

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

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

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

125 Throughout Mr. Waterman's argument before this Court, he has made submissions that his pension operates like a savings account. He is not alone in this respect. The Court of Appeal, at para. 48, quoted with approval language from Kent J. in *Chandler v. Ball Packaging Products Canada Ltd.*, [1992] O.J. No. 3114 (QL) (Gen. Div.), that pension payments should be viewed "as akin to a registered Retirement Savings Plan" (para. 4).

126 The majority too accepts the analogy. It holds that "[p]ension benefits ... constitute a type of retirement savings" (para. 4; see also para. 85). It quotes, with emphasis, the following language from J. M. Perillo, "The Collateral Source Rule in Contract Cases" (2009), 46 San Diego L. Rev. 705, at p. 706:

> Suppose an employer fires an employee without justification, breaching a contract of employment, and the employee turns to his or her savings account for living expenses. No one would argue that the employee's recovery against the employer should be diminished by the employee's withdrawals from savings. The savings account is a collateral source. 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., at para. 85.]

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

However, analogizing Mr. Waterman's pension to a savings account misconceives the nature of the defined benefit pension plan at issue in this case.

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

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

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

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

131 As an aside, not distinguishing between defined benefit and defined contribution plans may

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

132 This incentive argument is based on a false premise: that deducting pension benefits from reasonable notice damages would make it cheaper to dismiss a pensionable employee than a non-pensionable employee. That is not the case. The pension benefits that Mr. Waterman received during the notice period did not come out of thin air. With a defined benefit pension plan, the employer is solely responsible for providing the employee with the guaranteed defined benefits. In the event the payment of the defined benefits results in an actuarial deficit in the pension fund, the employer will be required to top up the fund to meet its statutory obligation to keep it fully funded. Alternatively, if the fund is operating at an actuarial surplus despite payment of the benefits, the contribution holiday that the employer may otherwise be able to take -- i.e. the break from its regular contributions to the pension fund -- would be reduced. In this way, withdrawal of the benefits from the pension fund, like any other payment, affects the employer's bottom line.

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

134 It follows that, with respect to the cost of dismissing pensionable and non-pensionable employees, there is a difference only in form, not substance. That is to say, in the case of an employee who is not eligible to receive his defined pension benefits, the employer compensates a dismissed employee by paying him damages equal to the salary he would have earned during the reasonable notice period. In the case of an employee who is eligible to receive his defined pension benefits, the employer pays: (1) pension benefits from the employer's pension fund, which it is responsible for maintaining, and (2) damages equal to the salary the employee would have earned during the notice period less what it has already paid from the pension fund. In both cases, the cost to the employer is the same: an amount equal to the salary the employee would have earned had he worked through the reasonable notice period. There is thus no incentive to terminate pensionable employees.

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

demanded to receive both his salary and his pension benefits had he continued to work for IBM through the reasonable notice period.

Applicability of the Private Insurance Exception

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

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

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

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

140 For this reason, the majority's approach to this case contains an inherent inconsistency: the majority concludes that Mr. Waterman had "private insurance" that allows him to keep his pension benefits in addition to his salary. To the extent Mr. Waterman had such "private insurance", it must have come from his employment contract. However, if Mr. Waterman's employment contract indeed allowed him to have pension benefits in addition to his salary, there would be no need to reach any exception: he would get the benefits by simply giving him what he would have expected under the terms of the contract.

141 In addition to this troubling inconsistency, applying the private insurance exception to this

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

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

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

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

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

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

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

147 Further, the choice before the courts in *Price* and *Phillips* was whether to (1) require the defendant to honour both of its legal duties (the legal duty to take reasonable care under tort and the legal duty to pay the plaintiff the amount promised under his employment contract) such that the plaintiff would receive compensation for his loss and the benefits he was entitled to under his employment contract; or (2) allow the defendant to offset the damages for breaching its duty of care using the benefits that it had separately promised the plaintiff in his employment contract, such that those benefits would enure to the defendant. Again, there is no parallel here. This case involves a single legal duty to honour the terms of an employment contract. The terms of that contract provided that Mr. Waterman would receive only his salary during his reasonable notice period.

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

The Majority's Treatment of Sylvester

149 The majority has devoted an extensive portion of its reasons in attempting to distinguish this case from *Sylvester* and at the same time attempting to rely on *Sylvester* (paras. 80-98). As I read the majority's reasons with respect to *Sylvester*, they say that, under the ordinary principles of contract damages, *Sylvester* would support the proposition that Mr. Waterman is entitled to both his salary and his pension benefits at the same time (paras. 88-91). Indeed, if *Sylvester* was authority for such a result, it is difficult to understand the majority's resort to the private insurance exception. With respect, the majority's analysis of *Sylvester* is strained. In my respectful opinion, a straightforward reading of *Sylvester* demonstrates that it is a fully applicable authority supporting

the proposition that under a single contract of employment, barring contract terminology to the contrary, an individual cannot receive salary as if he is working and pension benefits as if he is retired. These are opposite, incompatible assumptions. Thus, salary and pension income are not payable at the same time.

Efficient Breach

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

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

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

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

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

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

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

Conclusion

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

Appeal dismissed with costs throughout, MCLACHLIN C.J. *and* ROTHSTEIN J. *dissenting.*

Solicitors:

Solicitors for the appellant: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the respondent: MacKenzie Fujisawa, Vancouver.

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Corrigendum, released January 10, 2014

Please note the following changes in the English version of *IBM Canada Limited v. Waterman*, 2013 SCC 70, released December 13, 2013:

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

Paragraph 145, second sentence should read: "The options are to (1) not deduct, requiring the defendant to pay more than it agreed to pay the plaintiff under the terms of the employment contract and awarding the plaintiff more than he bargained for; or (2) deduct, requiring the defendant to pay an amount equal to the plaintiff's loss (i.e. the amount required to put the plaintiff in the position he would have been in had the contract been performed) and awarding the plaintiff an amount equal to his loss."

TAB 4

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.

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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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Employment Pension Plans Act, S.A. 1986, c. E-10.05, ss. 42(2), 58(a), (b), (c).
Income Tax Act, S.C. 1970-71-72, c. 63.
Income Tax Regulations, ss. 8502(c), 8503(4)(c).
Pension Benefits Act, R.S.A. 1980, c. P-3.
Pension Benefits Act, R.S.M. 1987, c. P32, s. 26(2).
Pension Benefits Act, R.S.O. 1990, c. P.8.
Pension Benefits Standards Act, S.B.C. 1991, c. 15.
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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 I.2 of that agreement, and the definition of "Trust Fund" contained in the 1959 Plan, taken together, make it clear that the trust fund was comprised of all contributions made by both the company and the employees, together with any earnings of those monies. The fact that the 1959 plan was a defined contribution plan under which no surplus could arise does not affect this definition of the trust fund. These provisions in themselves refute the company's argument that only that portion of the fund necessary to cover the benefits defined in the plan was subject to the trust.

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

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

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

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

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

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

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

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

> Section XXII of the 1959 plan provided:

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

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

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

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

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

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

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

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

B. Contribution Holiday

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

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

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

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

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

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

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

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

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

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

2. The Stearns Plan

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

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

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

ARTICLE XIV

Amendment or Termination of the Plan

14.1 . . .

c) . . .

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

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

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

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

13.2

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

14.1 . . .

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

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

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

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

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

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

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

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

(b) The Pension Brochure

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

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

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

answer questions.

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

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

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

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

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

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

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

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

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

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

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

(c) Interpretation of the Plan Provisions

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

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

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

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

14.1

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

deem advisable, subject to the following provisions:

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

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

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

13.2

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

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

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

13.4

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

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

(d) The Contribution Holiday

149 For the reasons given on the appeal, Air Products was entitled to take a contribution holiday. The application of an actuarial surplus to current service funding obligations was permitted under the terms of the Air Products Plan, and did not have the effect of reducing any benefits which had accrued to the employees.

(e) The Need for Legislation

150 The results in these appeals demonstrate the need for legislation. In both appeals the pension fund was created to benefit the employees. During the contribution holiday enjoyed by the employer they continued to pay into the pension fund. They had a real stake in the fund which was created for their benefit and funded in part by their contributions. It seems unfair that there should be a different result for these two groups of employees based only upon a finding that a trust was created in one case but not in the other. In my opinion there should be a legislative scheme set up for determining the proportion of the surplus which should be awarded to the employer and the employees. It could be based at least in part upon their contributions to the creation of the surplus. Principles of equity and fairness should encourage legislators to draft a scheme to provide for the equitable distribution of any surplus in pension plans that are terminated.

VII. Disposition

151 In the result, I would dispose of these appeals as follows:

The Appeal

152

1. The former Catalytic Employees are entitled to any surplus remaining in the pension fund which derives from former Catalytic plans. The appeal is dismissed on this ground and the order of the Court of Appeal varied accordingly.
2. Air Products was entitled under the terms of its pension plan to take a contribution holiday. The appeal is allowed on this ground.

The Cross-Appeal

153

1. Air Products is entitled to all surplus remaining in the pension fund which derives from the former Stearns plan.
2. Air Products was entitled to take a contribution holiday.

154 The cross-appeal is dismissed on both grounds. In light of the potentially misleading provisions contained in the brochure prepared and circulated by the employer, there should be no costs against the employees.

155 The costs of all parties on the appeal should be paid out of the Catalytic pension fund on a solicitor and client basis.

156 Similarly the costs of all parties on the cross-appeal should be paid out of the Stearns pension fund on a solicitor and client basis.

APPENDIX A

The following is an edited version of the Agreed Statement of Facts provided by the parties. The full text of the document is incorporated in the reasons of the Chief Justice of the Alberta Court of Queen's Bench.

I. HISTORY OF CATALYTIC PLANS
A. THE 1959 CATALYTIC PLAN

The 1959 Catalytic Plan was a money purchase plan which contained the following provisions:

SECTION V TRUST FUND

All contributions made by the members and the Company will be paid to the Trustee to be administered subject to the provisions of the Act governing the

investment of Pension funds, and in accordance with the terms of the Trust Agreement which forms part of this plan and of which this plan is Exhibit "A".

All benefits on the death or break of service of a Member shall be payable from the Trust Fund. All benefits on the retirement of a Member shall be payable as set forth in Section XV.

Expenses of the Trust Fund shall be paid out of the Fund unless paid by the Company.

SECTION VIII MEMBERS' ACCOUNTS

The Pension Committee shall keep for each Member of the Plan two accounts as follows:

1. Member's Account

   Here will be kept a cumulative record of any contributions made by the Member and the interest income and capital gains and losses realized and unrealized allocated thereon in accordance with Section X.

2. The Company Account

   Here will be kept a cumulative record of the amounts allocated to the Member as follows:

   (a) the Company's contribution allocated in accordance with Section IX.
   (b) The interest income and capital gains and losses realized and unrealized allocated in accordance with Section X.
   (c) The forfeitures allocated in accordance with Section XI.

SECTION XXII FUTURE OF THE PLAN

1. The Company hopes and expects to continue the Plan and the payment of contributions hereunder indefinitely but such continuance is not assumed as a contractual obligation. The Company expressly reserves the right, by action of its Board, to amend or terminate the Plan in whole or in part, if in the opinion of the Company future conditions warrant such action.
2. No amendment to the Plan shall operate to reduce the benefits which have occrued (sic) to the Members of the Plan prior to the date of amendment.
3. In the event of termination of the Plan, the Company cannot recover any sums paid to the date thereof and each Member of the Plan shall receive the proceeds of his Member's Account and his Company Account as of the date of such termination. No other employees will become eligible to become Members and no further contributions will be made by the Company.

. . .

B. TRUST AGREEMENT

As contemplated by the 1959 Catalytic Plan, Catalytic entered into an agreement dated September 8, 1959 (the "Trust Agreement") with Canada Trust Company whereby Canada Trust, as trustee, was to hold, invest and administer the fund. The Trust Agreement provided:

ARTICLE I

ESTABLISHMENT OF TRUST

1. This Agreement is hereby made a part of the PLAN.
2. The Company may pay or cause to be paid from time to time to the Trustee upon the trusts of this Agreement money or property acceptable to the Trustee for the purpose of the PLAN, all of which together with the earnings, profit and increments thereon and property from time to time substituted therefore shall constitute the FUND hereby created and established.
3. The Trustee hereby accepts the trusts herein set out and agrees to hold, invest, distribute and administer the FUND in accordance with the provisions of this Agreement.

ARTICLE V

MODIFICATION AND TERMINATION

1. Subject as herein and in the PLAN provided, the Company reserves the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the PLAN (including this Agreement) provided that no such amendment which affects the rights, duties, compensation, or responsibilities of the Trustee shall be made without its consent, and provided further that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the FUND to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the PLAN as amended from time to time, and for the payment of taxes or other assessments as provided in paragraph 2 of Article II hereof, and the expenses and compensation of the Trustee as provided in paragraph 4 of Article IV hereof.
2. This Agreement may be terminated at any time by the Company upon at least sixty (60) days' prior written notice to the Trustee, and with its termination, or upon the dissolution or liquidation of the Company, the FUND shall be paid out by the Trustee as directed by the Company.

C. THE 1966 CATALYTIC PLAN

The 1966 Catalytic Plan changed the benefit formula from a money purchase formula to a defined benefit formula. . . . [E]ffective October 1, 1966 the plan provided that:

> . . . the Company shall not less frequently than annually make such contributions as are necessary to provide the benefits accruing to Members during the current year and to amortize any initial unfunded liability or experience deficiency in accordance with the provisions of The Pension Benefits Act of Ontario. (Section VI)

The provisions regarding the future of the plan remained unchanged from Section XXII of the 1959 Catalytic Plan.

The money purchase portion of the Catalytic 1959 and 1966 Plans was segregated and is administered separately from the funds generated in the defined benefit plans. No surplus was or could be generated from the money purchase portion of the 1959 and 1966 Catalytic Plans.

D. THE 1978 CATALYTIC PLAN

This plan was a defined benefit plan. . . . [It] provided . . .:

. . .

SECTION 2 -- DEFINITIONS

2.12 "Funding Agency" means the trustees, trust company or insurance company that the Company may appoint to hold and invest the Pension Fund or the Pooled Pension Trust Fund or such successor trustees, trust company or insurance company as the Company may appoint from time to time to hold and invest the Pension Fund or the Pooled Pension Trust Fund.

2.13 "Funding Agreement" means the agreement entered into between the Company and the Funding Agency establishing and maintaining the Pension Fund.

2.18 "Pension Fund" means the fund established pursuant to the Funding Agreement to which contributions are made by the Members and Company and from which retirement and other benefits under the Plan are to be provided.

SECTION 4 -- CONTRIBUTIONS

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

. . .

SECTION 17 -- AMENDMENT TO OR TERMINATION OF THE PLAN

17.01 Continuation of Plan

The Company expects and intends to maintain this Plan in force indefinitely but necessarily reserves the right to amend or discontinue the Plan either in whole or in part, if, in the opinion of the Company, future conditions warrant such action, subject always to the requirements of the Department of National Revenue and the provisions of the Pension Benefits Act.

17.02 Amendment of Plan

No amendment to the Plan shall operate to reduce the pension benefits which have accrued to Members thereunder prior to the date of such amendment.

17.03 Discontinuance of Plan

Should the Plan be wholly terminated, the Company shall not be obligated to make any further contributions to the Plan and the assets held under the Pension Fund shall be allocated for the provisions of the accrued benefits to which the Members, their Beneficiaries and their joint annuitants are entitled in such equitable manner as may be determined by the Company in consultation with the Actuary until all liabilities under the Plan have been met. Such benefits may be provided through the purchase of annuity contracts from insurance companies licensed to transact business in Canada, in the form elected by the Members, or through the continuation of the Funding Agreement for this purpose. If the assets of the Pension Fund are not sufficient to provide the aforementioned accrued benefits, the Pension Fund shall be allocated in a manner approved under the Pension Benefits Act.

. . .

17.05 Distribution of Benefits

If, after full provision has been made for the accrued benefits payable to the Members, their Beneficiaries and their joint annuitants, there should remain any excess assets in the Pension Fund, such excess shall be used as the Company or liquidator or trustee in bankruptcy, if appropriate, may direct. Any distribution of the Pension Fund resulting from termination of the Plan shall be in accordance with the applicable provisions of the Pension Benefits Act and the Income Tax Act, and with the rules and regulations of the

> Department of National Revenue with respect to registered pension plans.

. . .

II. A HISTORY OF THE STERNS PLANS

A. THE 1962 STEARNS PLAN

On January 1, 1962, Stearns obtained a Group Annuity Policy (GA577) from the Mutual Life Assurance Company for the purpose of providing retirement benefits to its employees. No surplus was or could have been derived pursuant to this plan.

B. THE 1970 STEARNS PLAN

Stearns established a pension plan effective January 1, 1970 for the retirement of and payment of pensions to its employees.

. . .

As required by Article 13.1 of this plan, the Company entered into a Group Annuity Policy (GA1328) with the Mutual Life Assurance Company and a fund was established by transfer of the assets from the 1962 Stearns Plan and by contributions from the employees and the Company.

The 1970 Stearns Plan provided that:

ARTICLE I

DEFINITIONS

> Fund shall mean the Fund to be established under the Deposit Administration Policy issued by the Insurer by transfer of assets from the Prior Plan and by contributions by the Participants and the Company from which the benefits of the Plan are to be provided.

ARTICLE II

ESTABLISHMENT OF THE PLAN

. . .

2.2

> Prior to the Effective Date, certain Employees of the Company had accumulated retirement benefits under the Prior Plan. The Prior Plan shall be terminated 31 December 1969 and all benefits earned thereunder shall be transferred to the Plan. All benefits accrued under the

Prior Plan transferred to the Plan shall become a liability of the Plan and shall be paid in accordance with the provisions of the Plan. Future contributions by such Employees and Employees who become eligible on and after the Effective Date shall be made under the Plan.

ARTICLE IV

CONTRIBUTIONS

4.3

(a) The Company will contribute each year to the Fund such amounts as determined by the Actuary, which, when added to the Participant's contributions made under Section 4.1 will provide the regular benefits described in the Plan and will provide for funding in accordance with the tests for solvency prescribed by the regulations under the Pension Benefits Act.

(b) It is expressly stipulated that the Company will not make any additional contributions corresponding to or in respect of the additional voluntary contributions made by a Participant as provided for in Section 4.2 or 4.4.

ARTICLE XIII

RETIREMENT FUND

13.2

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

ARTICLE XIV

Amendment or Termination of the Plan

14.1

The Company retains the right to amend or modify or terminate the Plan in whole or in part, at any time and from time to time, and in such manner and to such extent as it may deem advisable, subject to the following provisions:

a) No amendment shall have the effect of reducing any Participant's, former Participant's, joint annuitant's,

beneficiary's, or estate's then existing interest in the Fund;

b) No amendment shall have the effect of diverting any part of the Fund to purposes other than for the exclusive benefit of the Participants, former Participants, joint annuitants, beneficiaries, or estates;

Article 14.1(c) set out the following scheme of distribution to be instituted upon termination of the plan:

c) If it should become necessary to discontinue the Plan, the assets of the Fund shall be used, to the extent adequate, for the following purposes:

. . .

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

C. BROCHURE . . .

On June 1, 1972, Stearns issued to its employees a brochure entitled 'Employee Benefits' which provided that:

Future of the Plan

It is the intention of the Company that the plan will continue indefinitely but of necessity they reserve the right to amend, modify or terminate the plan at any time. If it becomes necessary to terminate the plan at some future date, all employees would be granted 100% vesting, regardless of their service. No part of the assets of the fund will be available to the Company until all benefits earned under the plan to the date of termination have been paid. In the event there is a surplus in the fund after all benefits have been paid it is the Company's intention the surplus will be distributed in an equitable manner to the employees active in the plan at the date of termination.

D. THE 1977 STEARNS PLAN . . .

By an amendment dated January 1, 1977, Stearns amended the 1970 plan. . . .

The 1977 Stearns Plan contained . . . the following provisions:

ARTICLE I

DEFINITIONS

1.14 Fund means the corpus and all earnings, appreciations, or additions thereon and thereto held by the Funding Agency under the Funding Agreement.

1.15 Funding Agency means the Trust Company, Trustees, Insurance Company or successors thereof as the Company may appoint to hold the Fund pursuant to the Funding Agreement.

1.16 Funding Agreement means the agreement or contract entered into between the Company and the Funding Agency establishing the Fund.

ARTICLE IV

CONTRIBUTIONS

4.1 The Company will contribute to the Fund, not less frequently than annually, such amounts which are not less than those certified by the Actuary as being necessary to provide benefits accruing during each Plan Year and to make provision in accordance with the Pension Benefits Act for the amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued after taking into account the assets of the Fund and such other factors as may be deemed relevant. The Company reserves the right, however, subject to the provisions of Article XIII, to pay its contributions from such surpluses as may accumulate and shall be determined in a valuation of the Funds' assets and liabilities certified by an Actuary.

4.2 Participants shall not be required to contribute to the Plan.

ARTICLE XIII

ESTABLISHMENT OF THE FUND

13.4

No part of the Fund shall be used for, or diverted to, purposes other than for the exclusive benefit of Participants, their designated Beneficiaries, or estates, except to the extent that surpluses, as certified by the Actuary, may be returned to the Company with the approval of the Minister of National Revenue and the Superintendent of Pensions and except as provided in Sub-section 14.2 (d) of Article XIV. No Participant, retired Participant, survivor, or designated Beneficiary under this Plan, or any other person, shall have any interest in or right to any part of the Fund except and to the extent expressly provided in this Plan.

ARTICLE XIV

AMENDMENT OR TERMINATION OF THE PLAN

14.1

The Company retains the right to amend or modify or terminate the Plan in whole or in part, at any time and from time to time, and in such manner and to such extent as it may deem advisable, subject to the following provisions:

(a) no amendment, modification or termination shall have the effect of reducing any Participant's, former Participant's, joint annuitant's, Beneficiary's or estate's then existing interest in the Fund.

(b) no amendment, modification or termination shall have the effect of diverting any part of the Fund to purposes other than for the exclusive benefit of the Participants, former Participants, joint annuitants, Beneficiaries or estates.

The scheme of distribution upon termination was . . . contained in Article 14.2 . . .:

14.2

Should the Plan be terminated, whether by the Company or as a result of wind-up or bankruptcy of the Company, the assets of the Fund shall be used, to the extent adequate, and subject to the provisions of the Pension Benefits Act, for the following purposes:

. . .

14.3

Any balance remaining in the Fund after distributions have been made in accordance with the foregoing Section 14.2 after satisfying all other liabilities of the Plan may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions, be returned to the Company or may be used for the benefit of Participants, former Participants, designated Beneficiaries, or estates, in such equitable manner as the Company may at its discretion determine.

E. THE 1982 STEARNS PLAN CONSOLIDATION . . .

The 1982 Stearns Plan Consolidation is virtually identical to the 1977 Stearns Plan with one important exception. Article 14.3 of the 1982 Sterns Plan Consolidation provides that:

14.3

> Any balance remaining in the Fund after distributions have been made in accordance with the foregoing Section 14.2 after satisfying all other liabilities of the Plan may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions, be returned to the former Participants, designated Beneficiaries, or estates, in such equitable manner as the Company may at its discretion determine, so long as the surplus is distributed in such manner as to observe the maximum benefit allowed by the Department of National Revenue.

This consolidation was not registered with the Employment Pension Plans Branch and there is no Directors' Resolution authorizing it.

III. THE STEARNS CATALYTIC PENSION PLANS

[I]n 1983 with the amalgamation of Stearns and Catalytic, the Company instituted the two Stearns Catalytic Pension Plans. . . .

These plans contained, . . . the following terms:

> SECTION 1 -- ESTABLISHMENT OF THE PLAN
>
> The benefits provided by this Plan, in respect of service prior to October 1, 1983, are in lieu of all and any benefits to which any person, active or retired, may have been entitled under either of these Prior Plans, and in no event shall be less than the benefits to which they were entitled under these Prior Plans.
>
> Effective October 1, 1983, the respective pension funds of the Catalytic Enterprises Plan and the Stearns-Roger Plan shall be merged and held as one fund to the benefit of members of this Pension Plan for Employees (Senior Members of Management) of Stearns Catalytic Ltd. - Construction Division.
>
> SECTION 2 -- DEFINITIONS

2.19 "Pension Fund" means the fund established pursuant to the Trust Agreement to which contributions are made by the Members and the Company and from which retirement and other benefits under the Plan are to be provided.

2.24 "Trustee" means the trustees, trust company or insurance company that the Company may appoint from time to time, to hold and invest the Pension Fund.

2.25 "Trust Agreement" means the agreement entered into between the Company and the Trustee establishing and maintaining the Pension Fund.

. . .

SECTION 4 -- CONTRIBUTIONS

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

. . .

6.05 Statutory Maximum Retirement Benefit

In no event shall the annual retirement benefit payable under the Plan in respect of the retirement or termination of service of a Member or termination of the Plan exceed the lesser of:

a) $1,715 for each year of the Member's Credited Service to a maximum of 35 years; and
b) 2% of the Member's average best three (3) consecutive years' Earnings multiplied by his years of Credited Service, to a maximum of 35 years.

. . .

SECTION 18 -- AMENDMENT TO OR TERMINATION OF THE PLAN

18.01

Continuation of Plan

The Company expects and intends to maintain this Plan in force indefinitely but necessarily reserves the right to amend or discontinue the Plan either in whole or in part, if, in the opinion of the Company, future conditions warrant such action, subject always to the requirements of the Department of National Revenue and the provisions of the Pension Benefits Act.

18.02

Amendment of Plan

No amendment to the Plan shall operate to reduce the pension benefits which have accrued to Members thereunder prior to the date of such amendment.

18.03

Discontinuance of Plan

Should the Plan be wholly terminated, the Company shall not be obligated to make any further contributions to the Plan and the assets held under the Pension Fund shall be allocated for the provisions of the accrued benefits to which the Members, their Beneficiaries and their joint annuitants are entitled in such equitable manner as may be determined by the Company in consultation with the Actuary until all liabilities under the Plan have been met. Such benefits may be provided through the purchase of annuity contracts from insurance companies licensed to transact annuities business in Canada, in the form elected by the Members, or through the continuation of the Trust Agreement for this purpose. If the assets of the Pension Fund are not sufficient to provide the aforementioned accrued benefits, the Pension Fund shall be allocated in a manner approved under the Pension Benefits Act.

. . .

18.05

Distribution of Benefits

If, after full provision has been made for the accrued benefits payable to the Members, their Beneficiaries and their joint annuitants, there should remain any excess assets in the Pension Fund, such excess shall be used as the Company or liquidator or trustee in bankruptcy, if appropriate, may direct.

Any distribution of the Pension Fund resulting from termination of the Plan shall be in accordance with the applicable provisions of the Pension Benefits Act and the Income Tax Act, and with the rules and regulations of the Department of National Revenue with respect to registered pension plans.

The distribution of the assets of the fund must not result in a Member's retirement benefits exceeding the maximum indicated in Section 6.05 hereof. If any surplus remains in the Fund after all allocations have been made, such surplus shall be refunded to the Company.

The contributions made to the Stearns Catalytic Pension Plans [were] provided to Confederation Life Insurance Company under the terms of an Investment Contract dated October 29, 1984. . . .

[This contract] provided . . . that:

PROVISION 6 -- WITHDRAWALS

6.1

Confederation Life shall make withdrawals from the Accounts in order to make payments as designated in writing by the Contractholder provided that any such withdrawal shall be for the sole purpose of making payments in accordance with one of the following conditions:

(c) Payments to the Contractholder of any certified actuarial surplus as may be approved by any provincial or federal government body having jurisdiction in the matter.

The following are the reasons delivered by

157 SOPINKA J. (dissenting in part on the appeal (File No. 23047)):-- I have read the reasons of Justices Cory and McLachlin. Like McLachlin J. I agree with most of Cory J.'s conclusions but disagree with him on the question of entitlement to the surplus in the Catalytic plan. In my view, the surplus in the Catalytic plan reverts to the employer. However, I have arrived at this conclusion by a somewhat different route from McLachlin J.

158 While I agree with Cory J. that all monies in the Catalytic pension fund, including the surplus, were impressed with a trust, this does not foreclose amendment of that trust. In the case of a pension plan, the nature of the rights of amendment will continue to depend upon the terms of the plan and the trust agreement, if any. In my view, nothing in the Catalytic plan precluded the company from exercising the express power of amendment in the plan so as to provide that any surplus funds would revert to it upon termination of the plan.

159 I should state at the outset that I agree with Cory J.'s conclusion that the parties intended Article V of the Trust Agreement to apply to all monies in the pension fund after 1966, including the surplus funds. Article V purports to restrict the company's right to make amendments which divert parts of the "FUND" and reads as follows:

ARTICLE V
MODIFICATION AND TERMINATION

1. Subject as herein and in the PLAN provided, the Company reserves the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the PLAN (including this Agreement) provided that no such amendment which affects the rights, duties, compensation, or responsibilities of the Trustee shall be made without its consent, and provided further that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the FUND to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the PLAN as amended from time to time, and for the payment of taxes or other assessments as provided in paragraph 2 of Article II hereof, and the expenses and compensation of the Trustee as provided in paragraph 4 of Article IV hereof. [Emphasis added.]

160 Under the 1959 Catalytic Plan, the Trust Agreement was made part of the plan. It was clear that the terms upon which the monies contributed to that plan were to be held and administered were contained in both the plan and the Trust Agreement. The 1966 Catalytic Plan amended the 1959 Plan but retained a provision stating that all contributions to the plan were to be administered in accordance with the terms of the Trust Agreement. Thus it is clear that when the Catalytic Plan

became a defined benefit plan in 1966, the parties intended the provisions of the Trust Agreement to continue to apply to monies contributed to the plan. Furthermore, at all relevant times the Trust Agreement provided that the "FUND" referred to in that Agreement included all the monies paid to the Trustee by the Company for the purpose of the plan, as well as the earnings, profit and increments therefrom. The Catalytic surplus is derived from monies contributed to the plan after 1966 and thus is obviously part of the Fund. Therefore, it follows that Article V applies to amendments concerning the use of the surplus.

161 This, however, does not end the matter. By its terms Article V is subject to the terms of the plan. Both the 1959 and the 1966 versions of the plan reserved broader powers of amendment to the company than those contained in Article V of the Trust Agreement. The relevant provisions of the 1959 Catalytic Plan are as follows:

SECTION XXII FUTURE OF THE PLAN

1. The Company hopes and expects to continue the Plan and the payment of contributions hereunder indefinitely but such continuance is not assumed as a contractual obligation. The Company expressly reserves the right, by action of its Board, to amend or terminate the Plan in whole or in part, if in the opinion of the Company future conditions warrant such action.
2. No amendment to the Plan shall operate to reduce the benefits which have occrued [sic] to the Members of the Plan prior to the date of amendment.
3. In the event of termination of the Plan, the Company cannot recover any sums paid to the date thereof and each Member of the Plan shall receive the proceeds of his Member's Account and his Company Account as of the date of such termination. No other employees will become eligible to become Members and no further contributions will be made by the Company.

162 These provisions were carried over into the 1966 version of the Catalytic plan, renumbered as Section XXI. By virtue of those provisions, the only limitation upon the company's power to amend the plan was that no amendment could reduce accrued benefits. The right to receive surplus monies in the pension fund was not a benefit which had accrued to the members of the plan at the time that the company amended the plan to permit the surplus to be distributed to itself. Under the terms of the 1959 and 1966 plan the employees may have obtained a right to the surplus upon termination of the plan, but no such right had accrued to them prior to termination. Even if such a right could be said to have accrued at the time of amendment, it is not a benefit contemplated by that provision. The benefits contemplated by the plan are those to which the members were entitled pursuant to other Articles of the plan. The right to the surplus is not one of those benefits. Indeed,

when Article XXII.2 was drafted, it could not have referred to a surplus because no surplus was possible under a defined contribution plan. For both these reasons I conclude that from the outset the company reserved the power to amend the Catalytic plan so as to permit any surplus to be distributed to itself.

163 Assuming that a provision disposing of the surplus in favour of the employer is a partial revocation, I see no magic in the use of those specific words. If the powers of amendment are sufficiently explicit to permit a change which is in law a partial revocation, they should be given effect. After all, a trust can be created by the use of apt words without express reference to a trust. Words are apt to create a trust if the intention of the settlor is clear. Conversely, limitations on the nature of the trust must surely be determined on the same basis.

164 It is the contention of the respondents that the right to the surplus is an accrued benefit and a reduction of accrued benefits is a revocation or partial revocation of the trust. The fact that reduction in accrued benefits was made an express exception from the power of amendment shows that when the trust was created the parties considered that in the absence of this exception the power of amendment would extend to reduce accrued benefits. It follows that the power of amendment included the power to make changes having the effect of revocation or partial revocation. The real issue, therefore, is whether the right to the surplus comes within the exception. For the reason I have given above, it does not.

165 As Cory J. points out, there is a fundamental disagreement in the authorities as to whether a power of amendment can be sufficiently explicit to include a power of revocation. This disagreement is said to derive from the conflicting views expressed in Waters, Law of Trusts in Canada (2nd ed. 1984) and Scott, The Law of Trusts (4th ed. 1989), vol. 4. As I understand my colleague's reasons, he would apply a statement in Waters as requiring nothing short of the use of the actual words "power of revocation" in order to permit the settlor to effect a change which would amount to a revocation or partial revocation. With respect, I am of the opinion that Waters does not go that far. In the passage to which my colleague refers and which was quoted by Zuber J.A. in Re Reevie and Montreal Trust Co. of Canada (1986), 53 O.R. (2d) 595, at p. 600, the learned author states: "A settlor cannot revoke his trust unless he has expressly reserved the power to do so." I do not read this to mean that if the settlor uses language that, when interpreted by reference to the usual canons of construction, clearly establishes an intention to include changes having the effect of revocation, the absence of the magic words is fatal. Nor do I believe that Zuber J.A. was of the opinion that no power of amendment could authorize a change having the effect of revocation. It is clear that he was of the opinion that, in applying the statement in Waters, the appropriate inquiry was whether the wording of the relevant documents could be interpreted to authorize a change having the effect of revocation. At page 600, he stated:

> The appellant does not take issue with these general principles [stated in Waters] but asserts that it has reserved a power of amendment which is wide enough to entitle him to recover surplus funds. In my opinion, this proposition is

> simply untenable. The language of the trust agreement and the pension plan do not support such an argument. The section in the pension plan (prior to the 1981 amendment) dealing with the powers of amendment specifically affirms the irrevocability of the contributions and the fact that the members of the plan are the sole beneficiaries.

166 The terms of the trust agreement and plan in Reevie, supra, were not identical to the wording of the agreements in this case.

167 But even if Waters stands for the proposition advanced by Cory J., the logic of the contrary position, which is stated in Scott, The Law of Trusts, supra, and adopted by McLennan J. in Re Campbell-Renton & Cayley, [1960] O.R. 550 (H.C.), and the British Columbia Court of Appeal in Hockin v. Bank of British Columbia (1990), 71 D.L.R. (4th) 11, appeals to me in preference to a formulaic approach that would disregard the clear intention of the parties. Nor am I persuaded that we should adopt a rule of interpretation that ignores the clear intention of the parties in order to maintain the fundamental character of a trust. Trusts can be revocable or irrevocable. Neither is more fundamental than the other. All we are debating is the means by which we distinguish one from the other. Moreover, the true nature of a trust established as part of a pension plan is to provide funds needed to pay the benefits which accrue to employees under the plan. A power of amendment which is qualified by the requirement that it cannot be used to reduce accrued benefits is not inconsistent with the fundamental purpose of a defined benefits pension trust.

168 Cory J. also reasons that the circumstances which prevailed when the plans in question were created support his interpretation of the breadth of the power of amendment. In my view, however, the most relevant of those circumstances is the fact that neither the company nor the employees appear to have foreseen the existence of a surplus when the plan was created. In fact, there was no reason for the employees to expect to receive anything more than the defined benefits set out in the plan. Therefore, I see nothing inequitable in allowing the employer to take advantage of the broad amending power to distribute the surplus to itself, so long as it did nothing to reduce the level of benefits provided to the employees.

169 As far as the tax legislation in force when the plans were created is concerned, I agree with Cory J.'s observation that the tax motivations of the parties to pension plans are of limited relevance in interpreting those plans. I note however that the Catalytic plan expressly stated that the plan was structured so as to ensure that the company's contributions were deductible under the Income Tax Act, S.C. 1970-71-72, c. 63, and any amendments thereto. It is not unreasonable to infer that the broad amending power retained in the 1959 Catalytic plan and subsequent versions of the plan was retained in part to deal with changes in income tax legislation. The amendment of the 1983 Air Products Plan to include Section 18.05 was required by Revenue Canada in order to comply with the pension plan registration requirements under the Income Tax Act. Therefore, if anything, consideration of the parties' tax motivations supports a broad interpretation of the power of amendment.

170 Moreover, the approach which Cory J. adopts may make it difficult for the numerous pension plans that had an existence prior to 1981, which do not have an express power of revocation, to conform with the new registration requirements. Both Information Circulars Nos. 72-13R7 (1981) and No. 72-13R8 (1988) provide that the plan must contain a provision permitting an actuarial surplus to be refunded to the employer on termination of the plan. This requirement has apparently been incorporated in ss. 8502(c) and 8503(4)(c) of the Income Tax Regulations. The Minister has indicated that these regulations may be amended; for the time being, however, they have the force of law.

171 For the above reasons I conclude that Section 17.05 of the 1978 plan was a valid amendment to the Catalytic plan, as was Section 18.05 of the 1983 Air Products plan. Pursuant to those provisions the surplus in the Catalytic plan should revert to the company. In light of the result which I have reached by interpreting the terms of the plan it is not necessary for me to consider whether the funds could revert to the employer by the operation of a resulting trust.

172 In the result I would dispose of the appeals as proposed by Cory J., except with regards to the distribution of the surplus in the Catalytic plan. In this respect, I would allow the appeals with costs.

The following are the reasons delivered by

173 McLACHLIN J. (dissenting in part on the appeal (File No. 23047)):-- I have read the reasons of Justice Cory. I agree with his conclusions except on the question of the right to surplus on the Catalytic plan. In my view, the surplus on the Catalytic Plan reverts to the employer, either on the terms of the plan or on the basis of the doctrine of resulting trust.

Background:

Situating the Problem

174 Modern private pension plans date to the late 19th century. Fundamental and pervasive societal changes -- large scale industrialization coupled with the breakdown of family, village and church assistance networks -- produced a need to devise methods of caring for those past working age. Employer-sponsored private pension plans, supplemented later by government plans, were the response. Today, together with personal savings, private and public pension plans provide the primary source of income for retired Canadians.

175 There are two main types of pension plans. In the first type, the "defined contribution" plan, the amount paid in by the contributors to the fund is set. The eventual size of the employee's annuity is determined by the rate of return on the invested contributions. It follows that a low rate of return on investment will result in a smaller pension than if the rate of return is high. While the employer contributes to the plan, the employer does not guarantee the amount of the annuity. The employee is not assured of any particular benefit. The 1959 Catalytic plan was this sort of plan.

176 In the other type of pension plan, the "defined benefit" or "money purchase" plan, the employee, who may or may not contribute to the fund, is assured of a certain monetary benefit upon retirement. An actuary is employed to determine the amount of contribution which the employer must make in order to ensure that the plan can meet its present and future obligations. The market risk, assumed by the employee in a defined contribution plan, falls on the employer in a defined benefit plan. If, at any time, the plan is unable to meet its obligations, the employer is liable to make up any shortfall. For these two reasons -- the guarantee of a certain benefit and the assumption by the employer of the market risk -- a defined benefit plan is regarded as more advantageous to employees than a defined contribution plan.

177 The defined benefit plan possesses a feature which the defined contribution plan does not -- a feature which is at the heart of this appeal, the actuarial surplus. A defined contribution plan can never have a surplus; everything, after deduction of taxes and expenses, must be paid out to the pensioners. However a surplus may accumulate in a defined benefit plan when the amount in the fund exceeds the amount required to meet the defined benefits as calculated by the actuary.

178 In valuing the assets of a pension plan, the actuary must take into account a number of factors and make assumptions about each of them. These factors include the rate of investment return, the rate of price inflation, salary increases, rates of mortality for active and retired members, rates of employee turnover, incidence of disability and utilization of early retirement options. As might be expected, actuaries advising employers tend to err on the side of caution to produce what is called an "experience gain" rather than an "experience deficiency", since the latter would deprive pensioners of the benefits guaranteed to them.

179 In the early 1980s this actuarial conservatism combined with a particular set of economic factors to produce massive surpluses in many pension funds. These factors included the level of interest rates -- as high as 20 percent at one point -- which gave returns on investments in fixed value securities far in excess of those predicted. The stock market boom from 1982 to 1987 also resulted in much higher capital gains than were anticipated. Furthermore, the recession of 1981-82 caused widespread layoffs of employees who had no vested right to pension benefits. Money contributed on their account remained in the plan and either reduced unfunded liability for other employees or fell into surplus. At the same time, employers, uncertain as to whether they could use surplus for ongoing funding, often continued to contribute to over-funded plans in years when investment returns were at their highest, increasing existing surpluses: Gary Nachshen, "Access to Pension Fund Surpluses: The Great Debate", in New Developments in Employment Law (Meredith Memorial Lectures, 1988), 1989. The result of these events was to increase pension surpluses in Canada which, by 1982, had already been estimated to be between $4 billion and $8 billion: D. Don Ezra, The Struggle for Pension Fund Wealth (1983).

180 So long as a pension plan remains operational, hefty surpluses pose no problem except perhaps to employers wondering whether they can use the surplus for current funding needs, taking a "contribution holiday". When a plan terminates, however, the question arises of who is entitled to

the surplus. That is the problem that faces us on this appeal. It is not, we are told, an isolated one. Many plans such as this were set up in the 1960s and the decades that followed. Few contained express provisions as to distribution of surplus.

181 The Catalytic plan in this appeal was set up in 1959 as a defined contribution plan. As one would expect in that type of plan, all funds would ultimately be paid out to the pensioners or beneficiaries. There could be no surplus.

182 In 1966, however, the plan was changed to a defined benefit plan and the possibility of a surplus arose. In 1978, the Plan Agreement was redrafted. This restatement raised for the first time the issue of what should be done with any surplus. It empowered the company to use the surplus as it saw fit after making full provision for the accrued benefits payable to members and beneficiaries. When the plan was terminated in 1988, a large surplus was revealed. The issue was who should have it -- the employees and their beneficiaries or the employer?

Implications Flowing from the Nature of the Defined Benefit Plan

183 As noted, the employer is legally obliged under a defined benefits plan to ensure that all pension benefits owing are paid when they fall due. The employer thus bears the risk that contributions may be insufficient or that investments may not perform as well as predicted. The converse of this proposition is that the employer should be permitted to take advantage of the excess when investments do better than predicted.

184 From an economic policy perspective, if employers cannot retrieve surpluses, they may be inclined to request that their actuaries take a more optimistic view of the future of their investments and fund existing pensions less generously. Alternatively, they may refuse to enter into new pension regimes or, in some cases, terminate those which already exist. Inability to retrieve surpluses may also lead employers, unwilling to assume the risk of providing guaranteed benefits without the possibility of recovering surplus funding, to choose defined contribution plans rather than defined benefit plans. Employees, no longer assured of a specific pension and required to assume the risk of insufficient funding themselves, would be the losers.

185 On the other side of the coin, permitting employers to recover surplus in a defined benefit plan is not unfair to employees. It is argued that employees should have the surplus because they have paid for it through direct contributions or by accepting lower wages and fewer fringe benefits. This argument overlooks the nature of the employees' legitimate expectations under a defined benefit plan. The employees, having bargained for specific benefits, will receive precisely what they bargained for. The benefits, as defined by the plan, are the quid pro quo for their services and contributions. Indeed, the intention of the parties -- and the very purpose of the plan -- is that they receive these benefits. To give the employees the surplus, however, is to give them more than they bargained for. It is a windfall to the employees and a denial of the equitable interest which the employer holds in the surplus.

186 This practical view of things is supported by the policy of the Minister of National Revenue. Information Circular No. 72-13R7, December 31, 1981, is based on the assumption that surplus is normally returnable to the employer. In order to comply with registration requirements, surplus in excess of the employer's current service funding obligations in the following 24-month period must be either refunded to the employer or applied against the employer's obligations for contributions on account of current or past service in the current and subsequent years. Furthermore, all pension plans are to contain a provision permitting an actuarial surplus to be refunded to contributing employers of the plan. This requirement, it may be noted, may prevent problems such as the one presented on this appeal from arising in plans set up after the Circular.

The Position in Other Jurisdictions

187 The problem of surplus in defined benefit pension plans is a recent one. The matter has, however, been considered by courts in England and the United States. It is fair to say that they have generally come down on the side of returning the surplus to the employers.

188 Courts in Great Britain have relied primarily upon principles of trust law when attempting to resolve the question of pension surplus. In Davis v. Richards & Wallington Industries Ltd., [1991] 2 All E.R. 563 (Ch. D.), for example, Scott J. applied the doctrine of resulting trust and concluded that a surplus in a contributory defined benefits pension fund should be paid to the employer. He held that the result could be otherwise only if the plan contained a provision expressly excluding return of the funds to the employer. He rejected the argument that a resulting trust operated in favour of the employees in view of their contributions mainly on the ground that what the employees had paid for was the specific benefit received from the fund. See also, In re Courage Group's Pension Schemes, [1987] 1 W.L.R. 495 (Ch.D.).

189 In the United States, the courts look to the terms of the plan documents and the intent of the parties. They also tend to the view that the surplus would represent an unintended windfall profit if it were retained by the employees: Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co., 555 F.Supp. 257 (D.C. 1983). Provisions to the effect that amendments to the plan or trust documents may not enable an employer to divert or recover any portion of the trust funds are treated as prohibiting diversion prior to satisfaction of the plan's liabilities, but not thereafter. Once the pensioners are assured of their benefits, the surplus is recoverable by the employer: In re C. D. Moyer Co. Trust Fund, 441 F.Supp. 1128 (E.D. Pa. 1977); Pollock v. Castrovinci, 476 F.Supp. 606 (S.D.N.Y. 1979); Washington-Baltimore Newspaper Guild; Wilson v. Bluefield Supply Co., 819 F.2d 457 (4th Cir. 1987). Where courts in the United States have found that a surplus could not be recovered by the employer, they have done so on the basis that the wording of the plan documents unequivocally precluded such recovery: Bryant v. International Fruit Products Co., 793 F.2d 118 (6th Cir. 1986); Audio Fidelity Corp. v. Pension Benefit Guaranty Corp., 624 F.2d 513 (4th Cir. 1980).

Consistency with the Right to Use Surplus for a "Contribution Holiday"

190 It has repeatedly been held that employers are entitled to use the surplus in defined benefit plans for purposes of funding their actuarially determined contributions: Maurer v. McMaster University (1991), 4 O.R. (3d) 139; Askin v. Ontario Hospital Association (1991), 2 O.R. (3d) 641; Re Reevie and Montreal Trust Co. of Canada (1986), 53 O.R. (2d) 595. Cory J. arrives at the same conclusion in this case.

191 The obvious question immediately presents itself. If the employer is entitled to use the surplus to fund future contributions, why should the employer be denied the ability to recoup the surplus from previous funding? If, on the other hand, the fund in equity belongs to the employees in some notional sense, how can the employer usurp that interest by using the surplus to discharge its ongoing funding responsibility? Consistency suggests that both past and present funding and entitlement should be treated in the same way.

192 Some commentators, while recognizing the anomaly of allowing the employer to use the surplus for a contribution holiday but not to recoup past over-contributions from the surplus, argue that, from a "practical and symbolic" point of view, the two questions may be different since "all funds paid into the pension stay there, at least notionally": Bernard Adell, "Pension Plan Surpluses and the Law: Finding a Path for Reform", Task Force on Inflation Protection for Employment Pension Plans, Research Studies, vol. 2 (1988), at p. 242. Cory J. makes a similar point. So, it is suggested, an employer's entitlement to a contribution holiday may "not automatically entitle him to ownership of the actuarial surplus, as well": Nachshen, supra, at p. 77.

193 Nevertheless, it remains true that as a matter of principle, there appears to be no reason why an employer permitted to use surplus for ongoing contributions should not be allowed to reclaim the result of past over-contributions from the same surplus.

Summary

194 Consideration of the nature of defined benefit plans leads to the conclusion that the normal and just result is that surplus in such plans (as distinguished from defined contribution plans) should revert to the employer. Against this background, I turn to the documents which govern this case and the principles of law applicable to them.

Analysis

The Private Regime

195 Pension plans such as those at issue here are private arrangements bestowed by an employer on employees as a benefit of employment or set up pursuant to agreement between employer and employees. The employees may contribute (contributory plans), or the employer may bear the entire cost (non-contributory plans). The plan may be funded through insurance purchased by the employer for payment of the benefits (an insured plan), or the monies may be placed in a trust (a "trusteed" plan). Whatever form they take, as private contractual or as trust arrangements, the law of

contract or trust determines how the funds are distributed. This may be varied by legislation, but in this case that did not occur. We must look to the principles of private law for a solution to the problem of distribution of surpluses. In so far as we are concerned with an agreement, we look to the law of contract; in so far as a trust arises, we look to the law of trusts. We are not concerned with making some new law peculiar to pension surpluses.

196 The primary rule in construing an agreement or defining the terms of a trust is respect for the intention of the parties or, in the case of a trust, the intention of the settlor. The task of the court is to examine the language of the documents to ascertain what, on a fair reading, the parties intended. Unless there is a legal reason preventing it, the courts will seek to give effect to that intention. The search for an answer to the problem before us must therefore focus primarily on the documents relating to the plans and the intention of the parties, if any, with respect to a surplus arising under a defined benefits plan.

The Documents

197 It is my conclusion, after studying the documents and applying them to the plan as it stood at all relevant times, that apart from the reference in the 1978 restatement which provided that surplus should go to the employer, the documents are silent on the question of surplus. There is a dispute about whether the 1978 stipulation was a valid "amendment" to the original trust documents. As I see it, and for the reasons discussed below, it was a valid amendment and, as such, ought to stand. Alternatively, even if the 1978 stipulation were disregarded, the surplus would devolve on the employer under the doctrine of resulting trust.

198 The crux of the debate is Article V of the 1959 Trust Agreement:

ARTICLE V

MODIFICATION AND TERMINATION

1. Subject as herein and in the PLAN provided, the Company reserves the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the PLAN (including this Agreement) provided that no such amendment which affects the rights, duties, compensation, or responsibilities of the Trustee shall be made without its consent, and provided further that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the FUND to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the PLAN as amended from time to time, and for the payment of taxes or other assessments as provided in paragraph 2 of Article II hereof, and the expenses and compensation of the Trustee as provided in paragraph 4 of Article IV hereof. [Emphasis added.]

199 Moore C.J. upheld in the Court of Appeal, interpreted the underlined portion of Article V as precluding any amendment of the plan which would have the effect of conferring money in the plan to anyone other than the beneficiaries. Reasoning that the surplus here in issue constituted funds under the plan, he concluded that the 1978 amendment was ineffective and that, consequently, the surplus must go to the employees. Cory J., as I understand his reasons, adopts the same approach.

200 The problematic step in this logical process is the assumption that the surplus arising after conversion to a defined benefit plan in 1966 forms part of the fund to which Article V is addressed. For the reasons outlined earlier, at the time Article V was drafted, there could never be a surplus. It was simply impossible to have a surplus under the defined contribution plan then in place. The surplus was a new entity, created years later as a consequence of converting the plan to a defined benefits plan. The "FUND" referred to in Article V cannot therefore refer to the surplus with which we are concerned. Rather, it refers to the fund in place under the defined contributions scheme. This is apparent from the latter part of Article V, which permits deductions for only those things which would be deductible under a defined contribution policy: "taxes or other assessments as provided in paragraph 2 of Article II hereof, and the expenses and compensation of the Trustee as provided in paragraph 4 of Article IV hereof".

201 With respect, I think Moore C.J. gave a broader scope to Article V of the 1959 Trust Agreement than it can reasonably be made to bear. In effect, he read "FUND", which at the time of drafting could not by definition have included any surplus, as extending to the surplus which later arises under quite a different arrangement.

202 The problem is a common one. A contract or trust deed is drafted. Later, a new, unanticipated situation arises. The first question is whether the new situation falls within an existing term of the document. Courts facing this question look at the factual context in which it was drafted. They consider the wording against this background to determine whether the new situation can reasonably be said to fall within this clause. If the answer to this question is negative, the court may go on to ask itself whether a term covering the new situation can be implied, whether as a matter of fact, law or custom: see Treitel, The Law of Contract (4th ed. 1975), at p. 128. The limiting principle is that the courts will not make a new contract or trust to which the parties have not agreed: Murphy v. McSorley, [1929] S.C.R. 542.

203 In the case at bar, there is nothing in the evidence that suggests that the parties who signed Article V intended it to apply to a surplus which might arise under a conversion of the plan to a defined benefit plan. There is no suggestion that conversion of the plan was foreseen, much less that a surplus might arise under such a scheme. Article V by its terms clearly applies to the specific defined contribution plan which the parties were putting in place in 1959. It refers to a specific "PLAN", the 1959 plan, and, consistent with a defined contribution plan, it treats all funds as falling into one of two categories -- benefits payable to the employees and expenses. Finally, to apply Article V to a surplus under the unforeseen defined benefit plan would, for the reasons enunciated earlier, produce a result which, if not anomalous, is out of step with the characteristics of a defined

benefits plan and the approach which has been taken to this problem in other jurisdictions. It is not reasonable, in my opinion, to conclude that Article V applies to the surplus that could only develop after conversion of the plan years later to a defined benefit plan.

204 The same considerations negate the possibility of implying a term that the provisions of Article V apply to the unforeseen surplus. An attempt to imply a term to cover an unforeseen factual situation will generally fail if it is not clear that the parties would have agreed to the term, or where one or both of the parties is shown not to have known of the new situation at the time of contracting: Treitel, supra, at pp. 129-130. There is no suggestion that the parties who signed Article V in 1959 knew about the possibility of a surplus; nor can it be said that they would have agreed that it should go to the employees had they foreseen it. Indeed, the inference from the 1978 provision that surplus go to the employer suggests the contrary.

205 I am thus led to conclude that Article V, drafted in the context of a defined contribution plan, should not be read as applying to the surplus which arose under the later defined benefit plan. It follows that the 1978 provision stipulating that the surplus should go to the employer is valid and determines the issue.

Express Trust

206 It is argued that the surplus here in question is impressed with an express trust in favour of the employees which prevents the employer from claiming it.

207 I note initially that this argument must be distinguished from the argument based on the doctrine of resulting trust. The doctrine of resulting trust does not deal with the classic express trust, but is rather an equitable doctrine permitting those who have an interest in funds held in the name of another to recover them. In the first case we are concerned with the interpretation of terms of an express trust document; in the latter about the application of a legal (equitable) doctrine to a given situation.

208 The 1959 plan created a trust. All contributions were made subject to the trust. This did not mean, however, that all contributions were payable to the employees. Under the 1959 plan, expenses and administrative fees were payable to those who earned them, and the balance was payable to the beneficiaries. Consistent with a defined contribution plan, these were the only two classes of disbursements.

209 When the plan was changed in 1966 to a defined benefits plan, the nature of the trust necessarily changed. For one thing, the two accounts which the trustee was obliged to hold under the 1959 plan, the Employee's Account and the Company Account, no longer made sense and were necessarily collapsed. For another, the benefits payable to the employees were redefined. The trustee's former obligation to pay out the balance in the member's share of the two accounts after expenses, was replaced with a new and different obligation to pay out the defined benefits. And finally, as the fund continued to operate in its new form, there appeared a new element; the surplus

which accumulated from year to year.

210 It appears that when the change was first made from a defined contribution to a defined benefit plan, no thought was given to the question of surplus. Certainly the 1966 plan made no reference to surplus. In theory, the actuarial projections should be so perfect that a surplus does not arise. But in reality, as the years passed, it became evident that a surplus was being generated. This new situation needed to be addressed. The response was the 1978 stipulation that any surplus which existed after all defined benefits and expenses had been met, was payable to the employer.

211 Against this background, we return to the obligations on the trustee. The situation, as I see it, was this. Under the 1966 plan the trustee was obliged to pay defined benefits to each entitled employee. The trustee was further required to pay all administrative expenses of the trust. In addition to these two obligations, however, the trustee, as the years passed, found itself holding a third fund which was attached neither by the obligation to pay out benefits nor the obligation to pay expenses -- the accumulating surplus. The original trust documents did not contemplate this fund and gave no guidance as to what to do with it.

212 The trustee was left with the following options with respect to the surplus. Prior to the 1978 stipulation, the trustee's only option, had the question of distribution of surplus arisen, would have been to apply to the court for a ruling. Had this occurred, the appropriate ruling would have been that it go to the employer on the principles of resulting trust, for the reasons discussed below. As it happened, however, a stipulation that the surplus go to the employer was made before the question of surplus distribution arose. For the reasons discussed earlier, that stipulation was valid. It follows that the surplus goes to the employer pursuant to the 1978 amendment.

213 It is contended that payment of the surplus to the employer constitutes revocation of a trust and that a trust cannot be revoked without express wording so permitting. This argument, however, fails because the surplus was an unanticipated development which was never contemplated by the original trust and was not addressed by any changes to the trust until 1978. The error in the respondents' submissions, as I see it, lies in assuming that the 1959 trust provisions apply to a surplus. In fact, they do not. All contributions fell into the trust, but to stop the analysis there is to beg the critical question: what was the trustee to do with the portion of the fund which became surplus after conversion of the plan to a defined benefit plan? The answer to that question does not amount to revocation of a trust, as the respondents suggest. Rather, it amounts to fulfilling the trust.

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

Resulting Trust

215 I have argued that under the terms of the governing documentation, and in particular the 1978 amendment which I consider valid, surplus contributions are returnable to the employer. If I were wrong in concluding that the documentation requires this result, the same conclusion would nevertheless flow from application of the doctrine of resulting trust.

216 Waters, Law of Trusts in Canada (2nd ed. 1984), at p. 299, describes the concept of resulting trust as follows:

> . . . a resulting trust arises whenever legal or equitable title to property is in one party's name, but that party, because he is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner, or to the person who did give value for it. [Emphasis in original.]

217 The concept of resulting trust does not depend on there being an express trust in existence. However, one of its applications is in the case where residual monies not designated to a particular person or purposes arise in an express trust. Where this happens in a charitable trust, the courts will order the residual sum cy-près, among all the creditors. Where the trust is non-charitable, the sum generally reverts to the settlor: see Waters, supra, at p. 322.

218 If the 1978 amendment as to surplus is invalid, these principles suggest that the doctrine of resulting trust requires that the surplus be available to the employer. The employer was responsible for ensuring a fund sufficient to meet all defined benefits owing to employees. As it turns out, the employer paid more than required for the purpose of the trust, the provision of benefits to all eligible employees. The residual sum should therefore return to the employer.

219 As noted earlier, the doctrine of resulting trust has been applied to this situation in Great Britain, with the result that surplus funds in defined benefit pension plans have been ordered paid to the employer. It has also been applied in Canada. The case of Re Canada Trust Co. and Cantol Ltd. (1979), 103 D.L.R. (3d) 109 (B.C.S.C.), raised similar issues as those before us. The first question was the validity of an amendment directing that surplus should revert to the employer. Gould J. found that the attempted amendment in that case was invalid. However, he went on to hold that the surplus reverted to the employer under the doctrine of resulting trust. He stated, at p. 111:

> The method which the board has employed [directors' resolution to allow reversion] does not accomplish the purpose for which it was intended. If this method is ineffectual, how then must the money remaining in the fund be distributed?
>
> . . .
>
> The purposes of this trust simply did not exhaust the fund and the outcome here, i.e., a surplus balance of $31,163.38, was not foreseen by the respondent Dependable. The situation appears to be one where a resulting trust arises by

operation of the law. [Emphasis added.]

220 My colleague seeks to distinguish this case on two grounds. He questions Gould J.'s conclusion that there could be a resulting trust in favour of the employer because of a clause in the plan providing that no amendment "shall permit any part of the trust fund to revert to or to be recoverable by the Company" (p. 110). But Gould J. was not talking about reversion under an amendment (having found the attempt to amend had failed), but rather about reversion by operation of law. My colleague also points to the fact that unlike the plan at bar, the plan in Cantol was non-contributory. But as we have seen, even where employees contribute to a defined benefit plan, that contribution is taken to be fully satisfied by receipt of the defined benefits: Davis v. Richards & Wallington Industries Ltd., supra. Once the defined obligations to the employees have been paid, it is difficult to argue that the employees have an interest in the surplus on the basis of a resulting trust in their favour. It is in the nature of a defined benefit that it represents a fixed amount to which the employee is entitled from the plan. The employee accepts this fixed amount in lieu of the greater or lesser amounts he or she might obtain on a defined contribution plan. Generally, this is thought to be in the employee's interest.

221 To put it another way, once the stipulated benefit is paid, the employee is no longer a beneficiary -- he or she has exhausted his or her rights under the plan. As Gould J. put it in Cantol, at p. 111, "[a]ll of the beneficiaries have been paid off in accordance with [the trust] provisions, and no beneficiaries remain in any of the categories". Moreover, the complications of holding otherwise appear significant. As Scott J. points out in Davis, supra, at p. 595, different employees contribute different amounts, and often receive benefits disproportionate to their contributions, depending on when they started working, how long they have been working, and other factors. The task of restoring to each employee his or her fair share of any surplus would be impossible. I can do no better than echo the query of Scott J.: "How can a resulting trust work as between the various employees inter se? I do not think it can and I do not see why equity should impute to them an intention that would lead to an unworkable result."

Conclusion

222 I conclude that the surplus in the Catalytic plan should revert to the employer. It is not touched by Article V of the 1959 agreement, with the result that the 1978 provision for its disposition is determinative. There is nothing in the Trust Agreement which requires its return to the beneficiaries, once their stipulated entitlement under the agreement has been fully met. If, in the alternative, the 1978 provision does not settle the matter, the doctrine of resulting trust would require that the surplus revert to the employer.

223 I would dispose of the appeals as proposed by Cory J., except on the question of the distribution of surplus in the Catalytic fund, where I would allow the appeal with costs.

TAB 5

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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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.

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

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

The judgment of the Court was delivered by

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

2 In particular, does s. 70(6) of the Ontario *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("Act"), require the distribution of a proportional share of actuarial surplus when a defined benefit pension plan is partially wound up? The Superintendent of Financial Services answered this question in the affirmative. She refused to approve the partial wind-up report of the appellant, Monsanto Canada Inc. ("Monsanto"), for failing to provide for the distribution of surplus assets related to the part of the Pension Plan being wound up. A majority of the Financial Services Tribunal ("Tribunal") disagreed with the Superintendent and ordered her to approve the report: (2000), 3 B.L.R (3d) 99. The majority held that s. 70(6) provides no more than a right to participate in surplus distribution when, if ever, the Plan fully winds up. The Ontario Divisional Court overturned the Tribunal on appeal ((2001), 198 D.L.R. (4th) 109) and the Court of Appeal agreed ((2002), 62 O.R. (3d) 305). Monsanto and the Association of Canadian Pension Management now appeal to this Court. The

appeal, for the reasons that follow, should be dismissed.

I. Facts

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

4 One of the bases for the Superintendent's refusal to approve Monsanto's report was the failure to provide for the distribution of this surplus on partial wind-up, in accordance with s. 70(6) of the Act. This is the only ground still in issue before this Court as the other bases for refusal were not pursued on this appeal. Also noteworthy is the fact that this matter is preliminary to the question of surplus entitlement, which is not affected by this decision and will need to be determined at a later date.

II. Issue

5 The only issue in this appeal is whether the Tribunal properly interpreted s. 70(6) of the Act as not requiring distribution of the actuarial surplus on a partial plan wind-up. Thus, the analysis must proceed in two stages. First, the appropriate standard of review of the Tribunal's decision must be determined. Second, the Tribunal's interpretation of s. 70(6) must be measured against this standard. All of the relevant legislative provisions are annexed at the end of these reasons.

III. Standard of Review

6 The courts below found, and the appellants and respondent agreed, that the appropriate standard of review of the Tribunal's decision was reasonableness. However, the standard of review is a question of law, and agreement between the parties cannot be determinative of the matter. An evaluation of the four factors comprising the pragmatic and functional approach is required to decide the appropriate level of deference this Court should grant in reviewing the decision.

A. *Privative Clause*

7 The legislature did not enact a privative clause to insulate the Tribunal's jurisdiction. To the

contrary, s. 91(1) of the Act provides for a statutory right of appeal to the Divisional Court. While not determinative, this factor suggests that the legislature intended less deference to be afforded to the Tribunal on judicial review (*Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28, at para. 11; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, 2001 SCC 36, at para. 27).

B. *Nature of the Problem*

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

C. *Relative Expertise*

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

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

11 On the other hand, the Tribunal does not have specific expertise in this area. The Tribunal is a general body that was created under the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28 ("*FSCOA*"), s. 20, to replace the specialized Pension Services Commission. It is responsible for adjudication in a variety of "regulated sector[s]" (*FSCOA*, s. 1), including co-operatives, credit unions, insurance, mortgage brokers, loans and trusts, and pensions (*FSCOA*, s. 1). In addition, the nature of the Tribunal's expertise is primarily adjudicative. Unlike the former Pension Services Commission or the current Financial Services Commission, the Tribunal has no policy functions as part of its pensions mandate (see *FSCOA*, s. 22). As noted in *Mattel Canada, supra*, and in *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324,

involvement in policy development will be an important consideration in evaluating a tribunal's expertise. Lastly, in appointing members to the Tribunal and assigning panels for hearings, the statute advises that, to the extent practicable, expertise and experience in the regulated sectors should be taken into account (*FSCOA*, ss. 6(4) and 7(2)). However, there is no requirement that members necessarily have special expertise in the subject matter of pensions. The Tribunal is a small entity of 6 to 12 members which further reduces the likelihood that any particular panel would have expertise in the matter being adjudicated (*FSCOA*, s. 6(3)).

12 Overall, there is little to indicate that the legislature intended to create a body with particular expertise over the statutory interpretation of the Act. The Tribunal would not have any greater expertise than the courts in construing s. 70(6). Thus, this factor also suggests a lower amount of deference is required to be given to the Tribunal's decisions on the issue of statutory interpretation.

D. *Purposes of the Legislation and the Provision*

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

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

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

15 Here, however, the Tribunal assumes a different role and function in relation to the statutory purpose of the particular provision at issue. The determination of the meaning of s. 70(6) is not "polycentric" in nature. In other words, s. 70(6) does not grant the Tribunal broad discretionary powers nor a range of policy-laden remedial choices that involve the balancing of multiple sets of interests of competing constituencies (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 56; *Pushpanathan, supra*, at para. 36; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at paras. 30-31). Moreover, the issues raised in s. 70(6) are legal in nature, rather than economic, broad, specialized, technical or scientific in such a way as to substantially deviate from the normal role of

the courts (*Dr. Q, supra*, at para. 31; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at paras. 48-49). Therefore, this factor also seems to indicate less deference be accorded to the Tribunal's interpretation.

E. *Conclusion on the Standard of Review*

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

IV. Statutory Interpretation of Section 70(6)

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

> **70...** .
>
> (6) On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.

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

19 The established approach to statutory interpretation was recently reiterated by Iacobucci J. in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

I will examine each of these factors in turn, beginning first with the background context.

A. *Historical Context*

20 Pension plans have a long history in Canada, first appearing in the late 19th century. However, it was not until after the Second World War that the development of pension plans flourished in tandem with the economic growth and prosperity of the era (see *Report of the Royal Commission on the Status of Pensions in Ontario* (1980), vol. I, at p. 35; R. L. Deaton, *The Political Economy of Pensions: Power, Politics and Social Change in Canada, Britain and the United States* (1989), at p. 79). In the early days, pensions were commonly regarded as gratuitous rewards for long and faithful service, subject to the discretion and financial health of the employer (see *Report of the Royal Commission on the Status of Pensions in Ontario, supra*, at p. 2; *Mercer Pension Manual* (loose-leaf ed.), at p. 1-9). However, particularly as pensions became a more familiar sight at the collective bargaining table, a competing conception as an enforceable employee right developed (see E. E. Gillese, "Pension Plans and the Law of Trusts" (1996), 75 *Can. Bar Rev.* 221, at pp. 226-27; Deaton, *supra*, at pp. 122-23). The enactment of minimum standards legislation in Ontario, first in 1963 and again in 1987, "considerably expanded the rights of plan members. It altered, again, the power balance between employers and employees in the matter of pensions" (Gillese, *supra*, at p. 228).

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

22 If, in a given year, the assets of the fund, evaluated as a going concern, are found to be insufficient to cover the current service cost, there is said to be an "unfunded liability" and the employer will be called upon to make up the deficit through contributions (see, generally, s. 4(1) of the *Pension Benefits Act* General Regulations, R.R.O. 1990, Reg. 909). If the plan is underfunded on wind-up, then benefits will be reduced, subject to the application in Ontario of the Pension Benefits Guarantee Fund (ss. 77 and 84(1) of the Act). In contrast, if the value of the assets are greater than originally estimated, the fund is said to have a surplus, being "the excess of the value of the assets of a pension fund related to a pension plan over the value of the liabilities under the pension plan" (s. 1 of the Act). The surplus is considered "actuarial" because it has not yet been concretely realized through the liquidation of assets and the payment of liabilities.

23 Consequently, in the 80s, the surplus issue became a hotly contested one. Employers claimed the surplus as the result of their assumption of risk, while employees maintained that the fund, including the surplus, represented deferred wages belonging to them. It was in this context that the legislature re-enacted s. 70(6) as part of the *Pension Benefits Act, 1987*, S.O. 1987, c. 35, virtually unchanged from the previous version introduced in 1969 (O. Reg. 103/66, s. 11, as am. by O. Reg. 91/69, s. 3; see Legislative Assembly of Ontario, *Hansard -- Official Report of Debates*, 33rd Parl., January 13, 1986 to June 25, 1987). Also at this time, definitions of "partial wind up" and "surplus" were included in the scheme. Concurrently, a moratorium was placed on surplus withdrawals from ongoing plans in 1986 (R.R.O. 1980, Reg. 746, s. 21(2), as am. by O. Reg. 31/87), which was extended to plans on wind-up in 1988 (O. Reg. 708/87, s. 7a (added by O. Reg. 100/88)). The surplus sharing regulation was enacted to replace the moratorium (O. Reg. 708/87, s. 7c (added by O. Reg. 412/90)), requiring that no payments be made from the surplus of a pension plan that is being wound up in whole or in part unless it is (a) made to or for the benefit of members, former members or persons other than the employer who are entitled to payments; or (b) made to the employer with the written agreement of a prescribed number of members (R.R.O. 1990, Reg. 909, s. 8(1)). This regulation, designed to encourage agreement and sharing between employers and employees, ceases to have effect after December 31, 2004 (Reg. 909, s. 8(3)).

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

B. *Grammatical and Ordinary Sense*

25 As noted by the Court of Appeal, s. 70(6) specifies the timing, group and rights to which the section applies. First, the timing is the partial wind-up of a pension plan. Second, the specified group of "members, former members and other persons entitled to benefits under the pension plan" is generally meant to refer to the members affected by a partial wind-up (para. 41). Lastly, the rights accorded are those rights and benefits that are not less than the group would have if there were a full wind-up on the date of partial wind-up (para. 42). The parties agree with these propositions.

26 Where the disagreement lies is with regard to the timing of distribution following a partial wind-up of a plan in which there is an actuarial surplus. The respondent reasons that, since (i) s. 70(6) requires the rights and benefits on a partial wind-up to not be less than those available on full wind-up, and (ii) all parties agree that surplus distribution would occur on a full wind-up (Court of Appeal judgment, at para. 43; see also s. 79(4)), then (iii) s. 70(6) must require surplus distribution on a partial wind-up. In contrast, the appellants argue that, at most, s. 70(6) requires the vesting of

the right to participate in surplus distribution in a potential future full wind-up because it is only on final wind-up that an actual, rather than actuarial, surplus can exist. In my opinion, the former interpretation accords better with the ordinary and grammatical meaning of the section.

27 First, the section mandates that the Affected Members "shall have", on the effective date of the partial wind-up, the rights and benefits they "would have" on a full wind-up. This wording transposes the timing of the rights and benefits exigible on full wind-up up to the effective date of partial wind-up. It does not connote any delay until the future date of full wind-up before the exercise of acquired rights.

28 Second, the phrase "on the effective date" (emphasis added) suggests more immediacy than other possible alternatives, such as "as of". If the provision was worded "shall have rights and benefits ... as of the effective date", this would be more indicative of a situation where rights were being vested presently but paid out in the future. The actual wording of "shall have rights and benefits ... on the effective date" (emphasis added) indicates a more immediate realization of rights and benefits.

29 Third, the appellants' proposed interpretation, as adopted by the majority of the Tribunal, in effect reads out this last phrase of the provision. In my opinion, without the phrase "on the effective date of the partial wind up", it may have been open to read s. 70(6) as only vesting rights to be exercised on full wind-up. However, the presence of this phrase confirms that rights and benefits are not only measured but also realized on the effective date of partial wind-up.

30 Lastly, s. 70(6) acts as a residual deeming provision rather than being an independent delineation of substantive rights. As a matter of logic, if it equalizes the position of the full and partial wind-up groups, and it is clear that there is surplus distribution on full wind-up, then there should also be surplus distribution on partial wind-up.

31 In sum, the provision indicates that the assessment of rights and benefits is to be conducted as if the Plan was winding up in full on the effective date of partial wind-up. The realization of rights and benefits, including the distribution of surplus assets, then occurs for the part of the Plan actually being wound up. Therefore, the Affected Members, if entitled, may receive their pro rata share of the surplus existing in the fund on a partial wind-up, as if the Plan was being fully wound up on that day.

C. *Scheme of the Act*

32 The statutory scheme further supports this conclusion. First, the definitions of "wind up" and "partial wind up" in s. 1 of the Act closely parallel one another, both requiring a distribution of assets:

> "partial wind up" means the termination of part of a pension plan and the distribution of the assets of the pension fund related to that part of

> the pension plan;
>
> "wind up" means the termination of a pension plan and the distribution of the assets of the pension fund;

It then follows that s. 70(1)(c) requires the administrator to file as part of its full or partial wind-up report, "the methods of allocating and distributing the assets of the pension plan". Similarly, s. 28.1(2) of Reg. 909 requires that the administrator of the Plan give to each person entitled to a pension a statement setting out, among other things: "[t]he method of distributing the surplus assets", "[t]he formula for allocating the surplus among the plan beneficiaries" and "[a]n estimate of the amount allocated to the person." Thus, delaying the distribution would not be consonant with these provisions that make distribution of surplus assets an intended part of the wind-up process, whether the wind-up is in whole or in part.

33 Second, the statutory scheme makes an important distinction between continuing plans and winding-up plans. The partial wind-up falls, for all purposes, in the latter group, even though there is a remaining part of the Plan that continues to exist. Under the scheme, in evaluating rights and procedural requirements, partial wind-up is treated the same as a full wind-up, which coincides with the purpose and effect of s. 70(6). For instance, in s. 78(1) the general rule is established that "[n]o money may be paid out of a pension fund to the employer without the prior consent of the Superintendent." Sections 79(1) and 79(3) then provide for exceptions to this rule depending on whether the application for payment is being made with regard to a plan that is continuing or one that is winding up. As with the additional conditions set out in the regulations (Reg. 909, ss. 8 to 10 and 25 to 28.1), it is much more difficult to justify surplus withdrawal from a continuing plan than from a plan winding up in whole or in part. The interpretation of s. 70(6) herein proposed is consistent with the logic of this aspect of the statutory scheme and the legislature's choice to treat partial wind-ups in the same manner as full wind-ups. As a result, a partial wind-up requires a full wind-up to notionally occur for the purposes of evaluating the pro rata share of the assets and liabilities related to the partial wind-up, followed by the continuation of the remainder of the Plan.

34 Lastly, in this statutory scheme, the role of s. 70(6) appears to be as a residual deeming provision reflecting the legislature's intent of assuring that rights on partial wind-up are not less than those available on full wind-up, whether granted under the Act or under the terms of the Pension Plan. In almost every section where wind-up is mentioned, the legislature has already clarified that it is referring to wind-up "in whole or in part". This is the case when referring to grow-in rights (s. 74(1)) and immediate vesting rights (s. 73(1)(b)). These are special rights that members affected by a wind-up acquire but that ordinary retirees or individuals leaving employment do not. Provisions regarding the procedural requirements on wind-up similarly specify application on wind-up both "in whole or in part" (see, e.g., ss. 68 to 70). One of the rare instances in the Act where both are not expressly included is with regard to transfer rights on wind-up, which only mentions "wind up" (s. 73(2)). The appellants seem to agree, correctly in my opinion, that those rights would still have

effect on partial wind-up even though it is not explicitly mentioned. Presumably, this must result from the application of s. 70(6), and controverts any sort of *expressio unius est exclusio alterius* logic for s. 73(2).

35 As a last point, it is worth commenting on the approach of the majority judgment of the Tribunal in disregarding the regulations in construing the meaning of s. 70(6). While it is true that a statute sits higher in the hierarchy of statutory instruments, it is well recognized that regulations can assist in ascertaining the legislature's intention with regard to a particular matter, especially where the statute and regulations are "closely meshed" (see *R. v. Campbell*, [1999] 1 S.C.R. 565, at para. 26; *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 282). In this case, the statute and the regulations form an integrated scheme on the subject of surplus treatment and the thrust of s. 70(6) can be gleaned in light of this broader context.

36 In summary, the scheme of the Act and of the regulations supports the ordinary and grammatical meaning of s. 70(6) as requiring distribution of surplus at the time of partial wind-up.

D. *Object of the Act*

37 A purposive interpretation of s. 70(6) should be mindful of the legislative objective in the context of the statutory scheme surrounding surplus and partial wind-up.

38 The Act is public policy legislation that recognizes the vital importance of long-term income security. As a legislative intervention in the administration of voluntary pension plans, its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans (see *GenCorp*, *supra*; *Firestone Canada Inc. v. Ontario (Pension Commission)* (1990), 1 O.R. (3d) 122 (C.A.), at p. 127). This is especially important when, as recognized by this Court in *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, at p. 646, it is remembered that pensions are now generally given for consideration rather than being merely gratuitous rewards. At the same time, the voluntary nature of the private pension system requires the interventions in this area to be carefully calibrated. This is necessary to avoid discouraging employers from making plan decisions advantageous to their employees. The Act thus seeks, in some measure, to ensure a balance between employee and employer interests that will be beneficial for both groups and for the greater public interest in established pension standards.

39 Employers often argue that the risk and responsibility of a defined benefit plan are borne by the employer and, thus, it should be allowed the control and flexibility to manage the plan as it sees fit. It is contended that requiring distribution of surplus weighs the balance too heavily in favour of the employees and will result in funds being contributed to according to less cautious actuarial estimates, fewer defined benefit plans, and fewer private pension plans overall. While important considerations, these arguments are unpersuasive. First, the requirement of distribution is value-neutral to the question of entitlement, which must be determined separately under the provisions of the Plan and the Act. Second, the statutory scheme protects against underfunding by

requiring employers and administrators to follow accepted actuarial practice in their valuations (Reg. 909, s. 16). Lastly, the provision of pensions serves a number of labour market functions which benefit the corporate sector, including attracting a labour supply, reducing turnover, improving morale, increasing productivity and efficiency, promoting loyalty to the corporation, and so on (Deaton, *supra*, at p. 119). In short, there are many reasons for employers to maintain pension plans and a construction of s. 70(6) that is in accordance with the terms of the statute is unlikely to disrupt the balance between employer and employee interests.

40 As between employees, it is difficult to see how this interpretation of s. 70(6) results in any unfairness to the ongoing members, as was argued before us in this appeal. Requiring that the pro rata share of the actuarial surplus be distributed at the time of partial wind-up is unlikely to compromise the continuing integrity of the pension fund. By definition, the fund will still be in surplus after the distribution, except that the amount of surplus will be reduced in proportion to the size and level of entitlement, if any, of the partial wind-up group and subject to the statutory restrictions on withdrawal of surplus by the employer. In this case, approximately $16 million in actuarial surplus would have remained in the fund even if the entire surplus related to the partial wind-up was distributed.

41 By contrast, if Affected Members are required to await a full wind-up at some indeterminate future date to share in the distribution of surplus, it would place them in a worse position than continuing employees. Affected Members are placed in a significantly different position from continuing employees because they have just lost their jobs, their level of pensionable earnings are reduced, and they will rarely be able to replicate the same level of benefits elsewhere. Since pension plans are theoretically intended to be indeterminate in nature, Affected Members may no longer be reachable if a full wind-up occurs. It makes sense for the Affected Members to be subject to the risks of the Plan while they are a part of it, but not after they have been terminated from it. This same rationale would equally apply to future Affected Members if another partial wind-up occurs and to all members at the time of a full wind-up, so that each group would bear the consequences of market forces at the time of their termination from the Plan. This seems to be the fairest distribution of risk and in accordance with the object of the Act.

42 There are also policy and practical reasons supporting an interpretation requiring distribution upon partial wind-up. A surplus is, in effect, a windfall because it was not within the expectations of either the employer or the employees when the regime was implemented. The employer contributes to the fund as much as is necessary to match the funding target of the Plan on a going concern basis, taking into consideration actuarial estimates and assumptions. The basic expectation of the employees when joining the Plan is to receive periodic pension benefits on retirement. The fluctuation in the value of the assets is essentially the result of unforeseen market performance or plan experience. As discussed earlier, the most equitable solution is to distribute the fortunes of favourable markets at the time Affected Members are terminated. In this way, the windfall is related to their actual time and participation in the plan rather than being subject to the experience of a plan of which they are no longer a part.

43 Moreover, the increasingly mobile nature of labour should be recognized. When a group of employees is terminated and that part of the Plan is wound up, those accounts should generally be settled concurrently. The Affected Members should be able to know their status at the time of their termination so as to arrange their affairs accordingly and not be indefinitely tied to an employer that laid them off. On the flip side, if Affected Members only have a right to surplus distribution on full wind-up, assuming they are so entitled to receive it, they may no longer be alive to realize their right when, if ever, a full wind-up occurs. Even if they are, they may be difficult to locate or contact. As a practical matter, it is at the time of termination that their right to surplus, if any, is most needed, considering they have just lost their jobs and their source of regular income.

44 Furthermore, the argument that actuarial surplus is notional and thus too unreliable to justify the liquidation of any Plan assets is unconvincing. Although the assessment of an actuarial surplus is of necessity an estimate, it does not follow that the distribution of surplus would be unsound. Actuarial estimates of pension values are used for many purposes, including the sale of corporations or divisions of corporations, the division of matrimonial property, and the taking of contribution holidays by employers. Further, while the actuarial assumptions at play can vary, some uniformity can be found by requiring particular methods of valuation for certain purposes. For instance, the regulations prescribe that a "going concern valuation" (defined in Reg. 909, s. 1(2)) be used for valuing 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.

TAB 6

Indexed as:

British Columbia v. Henfrey Samson Belair Ltd.

Her Majesty The Queen in right of the Province of British Columbia, appellant;
v.
Henfrey Samson Belair Ltd., respondent;
and
The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of Nova Scotia, the Attorney General for New Brunswick, the Attorney General of Manitoba, the Attorney General for Alberta and the Attorney General of Newfoundland, interveners.

[1989] 2 S.C.R. 24

[1989] 2 R.C.S. 24

[1989] S.C.J. No. 78

[1989] A.C.S. no 78

File No.: 20515.

Supreme Court of Canada

1989: April 21 / 1989: July 13.

Present: Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy -- Priority -- Statutorily created trust for tax collected -- Tax collected commingled with bankrupt's assets -- All assets applied to reduce bank's indebtedness -- Whether or not province should be given priority over other creditors because of statutorily created trust -- Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 47(a), 107(1)(j) -- Social Service Tax Act, R.S.B.C. 1979, c. 388, s. 18.

Tops Pontiac Buick Ltd. collected provincial sales tax in the course of its business operations, as required by the Social Service Tax Act, and mingled the tax collected with its other assets. A creditor placed Tops in receivership and Tops then made an assignment in bankruptcy. The receiver sold the assets and applied the full proceeds to reduce the bank's indebtedness.

The province contended that the Social Service Tax Act created a statutory trust over the assets of Tops equal to the amount of the sales tax collected but not remitted, and that it had priority over the bank and all other creditors for this amount. The chambers judge [page25] held that the Social Service Tax Act did not create a trust and that the province had no priority under the Bankruptcy Act. The Court of Appeal held that the legislation created a statutory trust but the Bankruptcy Act did not confer priority on such a trust. At issue here is whether the statutory trust created by s. 18 of the British Columbia Social Service Tax Act gives the province priority over other creditors under the Bankruptcy Act.

Held (Cory J. dissenting): The appeal should be dismissed.

Per Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: The statutory trust created by the provincial legislation is not a trust within s. 47(a) of the Bankruptcy Act but merely a Crown claim under s. 107(1)(j). Section 47(a), which concerns "property held by the bankrupt in trust for any other person", permits removal of property which can be specifically identified as not belonging to the bankrupt under general principles of trust law from the distribution scheme established by the Bankruptcy Act. Section 107(1)(j), on the other hand, does not deal with rights conferred by general law, but with the statutorily created claims of federal and provincial tax collectors. If sections 47(a) and 107(1)(j) are read in this way, no conflict arises between them. This construction of ss. 47(a) and 107(1)(j) of the Bankruptcy Act conforms with the principle that provinces cannot create priorities under the Bankruptcy Act by their own legislation.

Section 18 of Social Service Tax Act deems a statutory trust at the moment the tax is collected. The trust property is identifiable at that time and the requirements for a trust under the principles of trust law are met. The money when collected would therefore be exempt from distribution to creditors by reason of s. 47(a). The trust at common law ceases to exist, however, when the tax money collected is mingled with other money so that it cannot be traced and is no longer identifiable. The province has a claim secured only by a charge or lien created by s. 18(2) of the Social Service Tax Act, and s. 107(1)(j) of the Bankruptcy Act would accordingly apply. Here, no specific property impressed with a trust could be identified and s. 47(a) of the Bankruptcy Act did not extend to the province's claim.

Per Cory J. (dissenting): The moneys collected as sales tax by a vendor belong to the province and the vendor is in every sense of the word a trustee for them. The province did not need to rely on the vendor's [page26] keeping separate bank accounts to protect its trust property but rather could and did implement a registration system that allowed it to specify precisely the amount owing through a system of bookkeeping. If the tax were not paid to the province then a vendor must have stolen the

funds, converted them to its own use or most charitably lost the funds for which it would be responsible and for which it would be accountable to the province.

The Bankruptcy Act prevents the provinces from creating priorities but it does not prevent them from creating a deemed trust or lien. It protects funds which, at the moment they were paid, were truly trust funds and the validity of the trust need not be determined exclusively on the basis of common law. Since section 18 of the Social Service Tax Act and ss. 47(a) and 107 of the Bankruptcy Act do not conflict, the doctrine of federal paramountcy cannot apply and s. 18 should prevail. The property at issue which was subject to s. 18 of the Social Service Tax Act never at any time became the property of the bankrupt and was therefore not subject to distribution as the property of the bankrupt pursuant to s. 107 of the Bankruptcy Act.

The trust, created by s. 18, contained the three essential characteristics required of a trust by equity: certainty of intention, subject matter and of objects. The statute established certainty of intention and of object and through the use of a clear formula established the trust property. A statutorily constituted trust has an advantage over a privately constituted trust in that it is recognized without the beneficiary's having to undertake the often inordinately expensive action of tracing commingled funds. This advantage should not deprive the statutory trust property of its trust character or take it outside the policies determined by this Court.

Cases Cited

By McLachlin J.

Applied: Deputy Minister of Revenue v. Rainville, [1980] 1 S.C.R. 35; Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board, [1985] 1 S.C.R. 785; referred to: Re Phoenix Paper Products Ltd. (1983), 48 C.B.R. (N.S.) 113.

[page27]

By Cory J. (dissenting)

Royal Trust Co. v. Tucker, [1982] 1 S.C.R. 250; John M. M. Troup Ltd. v. Royal Bank of Canada, [1962] S.C.R. 487; Re Deslauriers Construction Products Ltd. (1970), 3 O.R. 599; Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd., [1980] 1 S.C.R. 1182; Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161; Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board, [1985] 1 S.C.R. 785; Re Diplock's Estate, [1948] Ch. 465, [1948] 2 All E.R. 318, aff'd sub nom. Min. of Health v. Simpson, [1951] A.C. 251, [1950] 2 All E.R. 1137 (H.L.); Deputy Minister of Revenue v. Rainville, [1980] 1 S.C.R. 35; Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail), [1988] 1 S.C.R. 1061.

Statutes and Regulations Cited

Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 47(a), 107(1)(j).
Builders' Lien Act, R.S.A. 1980, c. B-12, s. 16.1.
Business Corporations Act, S.A. 1981, c. B-15, s. 191(1).
Canada Pension Plan, R.S.C. 1985, c. C-8, s. 23(4).
Construction Lien Act, S.O. 1983, c. 6, s. 7.
Employment Standards Act, R.S.A. 1980, c. E-10.1, s. 113.
Health Insurance Act, R.S.O. 1980, c. 197, s. 18.
Health Insurance Premiums Regulation, Alta. Reg. 217/81.
Insurance Act, R.S.A. 1980, c. I-5, s. 123(1).
Insurance Act, R.S.O. 1980, c. 218, s. 359.
Mechanics' Lien Act, R.S.O. 1950, c. 227.
Pension Benefits Act, S.O. 1987, c. 35, s. 58.
Real Estate Agents' Licensing Act, R.S.A. 1980, c. R-5, s. 14.
Revenue Act, R.S.B.C. 1979, c. 367.
Social Service Tax Act, R.S.B.C. 1979, c. 388, ss. 5, 6, 8, 9, 10, 18(1), (2), 27.
Social Services Tax Act Regulations, B.C. Reg. 84/58, Division 5.

Authors Cited

Driedger, Elmer A. Construction of Statutes, 2nd ed. Toronto: Butterworths, 1983.
Hardy, Anne E. Crown Priority in Insolvency. Toronto: Carswells, 1986.
Waters, D.W.M. Law of Trusts in Canada, 2nd ed. Toronto: Carswells, 1984.

APPEAL from a judgment of the British Columbia Court of Appeal (1987), 13 B.C.L.R. [page28] (2d) 346; 40 D.L.R. (4th) 728; [1987] 4 W.W.R. 673; 65 C.B.R. (N.S.) 24; 5 A.C.W.S. (3d) 47, dismissing an appeal from a judgment of Meredith J. in chambers (1986), 5 B.C.L.R. (2d) 212, 61 B.C.R. (N.S.) 59. Appeal dismissed, Cory J. dissenting.

William A. Pearce and J.G. Pottinger, for the appellant. Wendy G. Baker, Q.C., and Gillian E. Parson, for the respondent. James M. Mabbutt, Q.C., for the intervener the Attorney General of Canada. Janet E. Minor and Timothy Macklem, for the intervener the Attorney General for Ontario. Yves de Montigny and Madeleine Aubé, for the intervener the Attorney General of Quebec. Reinhold M. Endres, for the intervener the Attorney General of Nova Scotia. Richard Burns, for the intervener the Attorney General for New Brunswick. W. Glenn McFetridge and Dirk D. Blevins, for the intervener the Attorney General of Manitoba. Robert C. Maybank, for the intervener the Attorney General for Alberta. W.G. Burke-Robertson, Q.C., for the intervener the Attorney General of Newfoundland.

Solicitor for the appellant: The Ministry of the Attorney General of British Columbia, Victoria. Solicitors for the respondent: Davis & Company, Vancouver. Solicitor for the intervener the Attorney General of Canada: The Deputy Attorney General of Canada, Ottawa. Solicitor for the

intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto. Solicitor for the intervener the Attorney General of Quebec: The Attorney General of Quebec, Ste-Foy. Solicitor for the intervener the Attorney General of Nova Scotia: The Department of the Attorney General of Nova Scotia, Halifax. Solicitor for the intervener the Attorney General for New Brunswick: The Attorney General for New Brunswick, Fredericton. Solicitor for the intervener the Attorney General of Manitoba: Gordon E. Pilkey, Winnipeg. Solicitor for the intervener the Attorney General for Alberta: The Attorney General for Alberta, Edmonton. Solicitor for the intervener the Attorney General of Newfoundland: The Attorney General of Newfoundland. St. John's.

The judgment of Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. was delivered by

1 **McLACHLIN J.**:-- The issue on this appeal is whether the statutory trust created by s. 18 of the British Columbia Social Service Tax Act, R.S.B.C. 1979, c. 388, gives the province priority over other creditors under the Bankruptcy Act, R.S.C. 1970, c. B-3.

2 Tops Pontiac Buick Ltd. collected sales tax for the provincial government in the course of its business operations, as it was required to do by the Social Service Tax Act. Tops mingled the tax collected with its other assets. When the Canadian Imperial Bank of Commerce placed Tops in receivership pursuant to its debenture and Tops [page29] made an assignment in bankruptcy, the receiver sold the assets of Tops and applied the full proceeds in reduction of the indebtedness of the bank.

3 The province contends that the Social Service Tax Act creates a statutory trust over the assets of Tops equal to the amount of the sales tax collected but not remitted ($58,763.23), and that it has priority over the bank and all other creditors for this amount.

4 The Chambers judge held that the Social Service Tax Act did not create a trust and that the province did not have priority. On appeal the receiver conceded that the legislation created a statutory trust, but contended that the chambers judge was correct in ruling that the Province did not have priority because the Bankruptcy Act did not confer priority on such a trust. The British Columbia Court of Appeal accepted this submission. The Province now appeals to this Court.

5 The section of the Social Service Tax Act which the Province contends gives it priority provides:

> 18. (1) Where a person collects an amount of tax under this Act

> (a) he shall be deemed to hold it in trust for Her Majesty in right of the Province for the payment over of that amount to Her Majesty in the manner and at the time required under this Act and regulations, and
> (b) the tax collected shall be deemed to be held separate from and form no part of the person's money, assets or estate, whether or not the amount of the tax has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who collected the amount of the tax under this Act.
>
> (2) The amount of taxes that, under this Act,
>
> (a) is collected and held in trust in accordance with subsection (1); or
> (b) is required to be collected and remitted by a vendor or lessor
>
> forms a lien and charge on the entire assets of
>
> (c) the estate of the trustee under paragraph (a); [page30]
> (d) the person required to collect or remit the tax under paragraph (b); or
> (e) the estate of the person required to collect or remit the tax under paragraph (d).

6 The Province argues that s. 18(1) creates a trust within s. 47(a) of the Bankruptcy Act, which provides:

> 47. The property of a bankrupt divisible among his creditors shall not comprise
>
> (a) property held by the bankrupt in trust for any other person,

7 The respondent, on the other hand, submits that the deemed statutory trust created by s. 18 of the Social Service Tax Act is not a trust within s. 47 of the Bankruptcy Act, in that it does not possess the attributes of a true trust. It submits that the Province's claim to the tax money is in fact a debt falling under s. 107(1)(j) of the Bankruptcy Act, the priority to which falls to be determined according to the priorities established by s. 107.

> 107. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as

follows:

. . .

(j) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, pari passu notwithstanding any statutory preference to the contrary.

Discussion

8 The issue may be characterized as follows. Section 47(a) of the Bankruptcy Act exempts trust property in the hands of the bankrupt from distribution to creditors, giving trust claimants absolute priority. Section 107(1) establishes priorities between creditors on distribution; s. 107(1)(j) ranks Crown claims last. Section 18 of the Social Service Tax Act creates a statutory trust which lacks the essential characteristics of a trust, namely, that the property impressed with the trust be identifiable or traceable. The question is whether the statutory trust created by the provincial legislation is a trust within s. 47(a) of the Bankruptcy Act or a mere Crown claim under s. 107(1)(j).

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9 In my opinion, the answer to this question lies in the construction of the relevant provisions of the Bankruptcy Act and the Social Service Tax Act.

10 In approaching this task, I take as my guide the following passage from Driedger, Construction of Statutes (2nd ed. 1983), at p. 105:

> The decisions ... indicate that the provisions of an enactment relevant to a particular case are to be read in the following way:
>
> 1. The Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament (the law as expressly or impliedly enacted by the words), the object of the Act (the ends sought to be achieved), and the scheme of the Act (the relation between the individual provisions of the Act).
> 2. The words of the individual provisions to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in the light of the intention of Parliament embodied in the Act as a whole, the object of the Act and the scheme of the Act, and if they are clear and unambiguous and in harmony with that intention, object and scheme and with the general body of the law, that is the end.

11 With these principles in mind, I turn to the construction of ss. 47(a) and 107(1)(j) of the Bankruptcy Act. The question which arises under s. 47(a) of the Act concerns the meaning of the phrase "property held by the bankrupt in trust for any other person". Taking the words in their ordinary sense, they connote a situation where there is property which can be identified as being held in trust. That property is to be removed from other assets in the hands of the bankrupt before distribution under the Bankruptcy Act because, in equity, it belongs to another person. The intention of Parliament in enacting s. 47(a), then, was to permit removal of property which can be specifically identified as not belonging to the bankrupt under general principles of trust law from the distribution scheme established by the Bankruptcy Act.

12 Section 107(1)(j), on the other hand, has been held to deal not with rights conferred by general law, but with the statutorily created claims of federal and provincial tax collectors. The purpose of s. 107(1)(j) was discussed by this Court in Deputy Minister of Revenue v. Rainville, [1980] 1 [page32] S.C.R. 35. Pigeon J., speaking for the majority, stated at p. 45:

> There is no need to consider the scope of the expression "claims of the Crown". It is quite clear that this applies to claims of provincial governments for taxes and I think it is obvious that it does not include claims not secured by Her Majesty's personal preference, but by a privilege which may be obtained by anyone under general rules of law, such as a vendor's or a builder's privilege.

13 If sections 47(a) and 107(1)(j) are read in this way, no conflict arises between them. If a trust claim is established under general principles of law, then the property subject to the trust is removed from the general distribution by reason of s. 47(a). Following the reasoning of Pigeon J. in Deputy Minister of Revenue v. Rainville, such a claim would not fall under s. 107(1)(j) because it is valid under general principles of law and is not a claim secured by the Crown's personal preference.

14 This construction of ss. 47(a) and 107(1)(j) of the Bankruptcy Act conforms with the principle that provinces cannot create priorities under the Bankruptcy Act by their own legislation, a principle affirmed by this Court in Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board, [1985] 1 S.C.R. 785. As Wilson J. stated at p. 806:

> ... the issue in Re Bourgault [Deputy Minister of Revenue v. Rainville] and Re Black Forest Restaurant Ltd. was not whether a proprietary interest has been created under the relevant provincial legislation. It was whether provincial legislation, even if it did create a proprietary interest, could defeat the scheme of distribution under s. 107(1) of the Bankruptcy Act. These cases held that it could not, that while the provincial legislation could validly secure debts on the property of the debtor in a non-bankruptcy situation, once bankruptcy occurred s. 107(1) determined the status and priority of the claims specifically dealt with in the section. It was not open to the claimant in bankruptcy to say: By virtue of the applicable provincial legislation I am a secured creditor within the meaning of

> the opening words of s. 107(1) of the Bankruptcy Act and therefore the priority accorded my claim under the relevant paragraph of s. 107(1) does not apply to me. In effect, this is the position adopted by the Court of Appeal and advanced [page33] before us by the respondent. It cannot be supported as a matter of statutory interpretation of s. 107(1) since, if the section were to be read in this way, it would have the effect of permitting the provinces to determine priorities on a bankruptcy, a matter within exclusive federal jurisdiction.

While Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board was concerned with provincial legislation purporting to give the Province the status of a secured creditor for purposes of the Bankruptcy Act, the same reasoning applies in the case at bar.

15 To interpret s. 47(a) as applying not only to trusts as defined by the general law, but to statutory trusts created by the provinces lacking the common law attributes of trusts, would be to permit the provinces to create their own priorities under the Bankruptcy Act and to invite a differential scheme of distribution on bankruptcy from province to province.

16 Practical policy considerations also recommend this interpretation of the Bankruptcy Act. The difficulties of extending s. 47(a) to cases where no specific property impressed with a trust can be identified are formidable and defy fairness and common sense. For example, if the claim for taxes equalled or exceeded the funds in the hands of the trustee in bankruptcy, the trustee would not recover the costs incurred to realize the funds. Indeed, the trustee might be in breach of the Act by expending funds to realize the bankrupt's assets. Other difficulties would arise in the case of more than one claimant to the trust property. The spectre is raised of a person who has a valid trust claim under the general principles of trust law to a specific piece of property, finding himself in competition with the Crown claiming a statutory trust in that and all the other property. Could the Crown's general claim pre-empt the property interest of the claimant under trust law? Or would the claimant under trust law prevail? To admit of such a possibility would be to run counter to the clear intention of Parliament in enacting the Bankruptcy Act of setting up a clear and orderly [page34] scheme for the distribution of the bankrupt's assets.

17 In summary, I am of the view that s. 47(a) should be confined to trusts arising under general principles of law, while s. 107(1)(j) should be confined to claims such as tax claims not established by general law but secured "by her Majesty's personal preference" through legislation. This conclusion, in my opinion, is supported by the wording of the sections in question, by the jurisprudence of this Court, and by the policy considerations to which I have alluded.

18 I turn next to s. 18 of the Social Service Tax Act and the nature of the legal interests created by it. At the moment of collection of the tax, there is a deemed statutory trust. At that moment the trust property is identifiable and the trust meets the requirements for a trust under the principles of trust law. The difficulty in this, as in most cases, is that the trust property soon ceases to be identifiable. The tax money is mingled with other money in the hands of the merchant and

converted to other property so that it cannot be traced. At this point it is no longer a trust under general principles of law. In an attempt to meet this problem, s. 18(1)(b) states that tax collected shall be deemed to be held separate from and form no part of the collector's money, assets or estate. But, as the presence of the deeming provision tacitly acknowledges, the reality is that after conversion the statutory trust bears little resemblance to a true trust. There is no property which can be regarded as being impressed with a trust. Because of this, s. 18(2) goes on to provide that the unpaid tax forms a lien and charge on the entire assets of the collector, an interest in the nature of a secured debt.

19 Applying these observations on s. 18 of the Social Service Tax Act to the construction of ss. 47(a) and 107(1)(j) of the Bankruptcy Act which [page35] I have earlier adopted, the answer to the question of whether the Province's interest under s. 18 is a "trust" under s. 47(a) or a "claim of the Crown" under s. 107(1)(j) depends on the facts of the particular case. If the money collected for tax is identifiable or traceable, then the true state of affairs conforms with the ordinary meaning of "trust" and the money is exempt from distribution to creditors by reason of s. 47(a). If, on the other hand, the money has been converted to other property and cannot be traced, there is no "property held ... in trust" under s. 47(a). The Province has a claim secured only by a charge or lien, and s. 107(1)(j) applies.

20 In the case at bar, no specific property impressed with a trust can be identified. It follows that s. 47(a) of the Bankruptcy Act should not be construed as extending to the Province's claim in this case.

21 The province, however, argues that it is open to it to define "trust" however it pleases, property and civil rights being matters within provincial competence. The short answer to this submission is that the definition of "trust" which is operative for purposes of exemption under the Bankruptcy Act must be that of the federal Parliament, not the provincial legislatures. The provinces may define "trust" as they choose for matters within their own legislative competence, but they cannot dictate to Parliament how it should be defined for purposes of the Bankruptcy Act: Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board.

22 Nor does the argument that the tax money remains the property of the Crown throughout withstand scrutiny. If that were the case, there would be no need for the lien and charge in the Crown's favour created by s. 18(2) of the Social Service Tax Act. The Province has a trust interest and hence property in the tax funds so long as they can be identified or traced. But once they lose that character, any common law or equitable property interest disappears. The Province is left with a statutory deemed trust which does not give it the same property interest a common law trust would, [page36] supplemented by a lien and charge over all the bankrupt's property under s. 18(2).

23 The province relies on Re Phoenix Paper Products Ltd. (1983), 48 C.B.R. (N.S.) 113 (Ont. C.A.), where the Ontario Court of Appeal held that accrued vacation pay mixed with other assets of a bankrupt constituted a trust under s. 47(a) of the Bankruptcy Act. As the Court of Appeal in this

case pointed out, the Ontario Court of Appeal in Re Phoenix Paper Products Ltd., in considering the two divergent lines of authority presented to it, did not have the advantage of considering what was said in Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board, and the affirmation in that case of the line of authority which the Ontario Court of Appeal rejected.

24 The appellant raised a second question in the alternative, namely:

> If the Province is divested of its trust property by reason of S. 18(1) being in conflict with S. 107(1)(j) of the Bankruptcy Act, does [that] property devolve to the secured creditor [the Bank] or is it distributed to unsecured creditors pursuant to S. 107 of the Bankruptcy Act?

This question was not raised in the courts below, nor on the application for leave to appeal. It concerns parties who were not present on the appeal. For these reasons, I would decline to consider it.

Conclusion

25 For the reasons stated, I conclude that s. 47(a) of the Bankruptcy Act does not apply in this case and the priority of the Province's claim is governed by s. 107(1)(j) of the Act. I would decline to answer the alternative question posed by the appellants.

26 I would dismiss the appeal, with costs.

> The following are the reasons delivered by

27 CORY J. (dissenting):-- I have read with great interest the compelling reasons of my colleague Justice McLachlin. Unfortunately I cannot agree [page37] that s. 47(a) of the Bankruptcy Act, R.S.C. 1970, c. B-3, does not apply in this case. If section 18 of the British Columbia Social Service Tax Act, R.S.B.C. 1979, c. 388, creates a valid trust, then s. 47(a) of the Bankruptcy Act must apply. In order to determine the effect of s. 18 it may be helpful to consider the Social Service Tax Act as a whole.

Scheme of the B.C. Social Service Tax Act

28 Registration under this Act is a condition precedent to carrying on a retail sales business in the province of British Columbia. Subject to certain irrelevant and minor exceptions, the Act provides that no one may sell "tangible personal property" in the province at a retail sale without being registered with the "commissioner", the provincial official appointed to administer the Act. It is sufficient to note that the term "tangible personal property" is given a very broad definition. With the approval of the Minister, the Commissioner may cancel or suspend the certificate of anyone found guilty of an offence under the Act thus terminating the retail business. This is the ultimate form of control that the province exercises over those who collect the taxes assessed under the Act.

In addition, the regulations passed pursuant to the Act provide for close scrutiny of the use of the registration certificates issued to vendors.

29 Pursuant to s. 5 of the Act, retail vendors are deemed to be agents of the Minister for the purposes of levying and collecting sales tax. Section 6 provides that these agents are deemed to be tax collectors for the purposes of the Revenue Act, R.S.B.C. 1979, c. 367, and are made subject to the provisions of ss. 22 to 28 of that Act. Sections 22 to 28 prescribe the penalties for tax collectors who fail to render their accounts as required by the statute. Pursuant to s. 27, where a collector has received money belonging to the Crown in right of the Province and has failed to pay it to the province, the defaulting collector's property may be seized. As a quid pro quo, s. 8 of the Social Service Tax Act provides that vendors are to [page38] receive remuneration for the service they provide to the government by collecting the tax.

30 Under ss. 9 and 10 of the Act every vendor is required to make returns and keep tax records in the form prescribed by the regulations and must keep a record of all purchases and sales. Division 5 of the Social Services Tax Act Regulations, B.C. Reg. 84/58, makes detailed provision for these returns and records. The regulations make clear that there is to be continuous supervision of sales tax collection. Separate monthly returns must be made for each place of business and the returns must be made no later than fifteen days after the last day of each monthly period. The regulations provide in detail for the means of calculating upon each return the commission for each vendor on the collection of sales tax.

31 The requirements concerning the keeping of records and accounts emphasize the trust nature of the arrangement. They provide that books of account must contain distinct records of all (1) sales, (2) purchases, (3) non-taxable sales, (4) taxable sales, (5) amounts of tax collected and (6) disposal of tax including commission taken. The records further stress that "all entries concerning the tax and such books of account, records and documents shall be kept separate and distinguishable from other entries made therein." (Emphasis added.) As well the tax must be shown as a separate item on all receipts given to purchasers. Section 27 of the Act provides wide powers for the inspection of these records.

32 It is against this background that s. 18 of the Social Service Tax Act must be considered. That section provides:

> 18. (1) Where a person collects an amount of tax under this Act
>
> (a) he shall be deemed to hold it in trust for Her Majesty in right of the Province for payment over of that amount to Her Majesty in the manner and at the time required under this Act and regulations, and [page39]
>
> (b) the tax collected shall be deemed to be held separate from and form no part of the person's money, assets or estate, whether or not the

> amount of the tax has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who collected the amount of the tax under this Act.
>
> (2) The amount of taxes that, under this Act,
>
> (a) is collected and held in trust in accordance with subsection (1); or
> (b) is required to be collected and remitted by a vendor or lessor
>
> forms a lien and charge on the entire assets of
>
> (c) the estate of the trustee under paragraph (a);
> (d) the person required to collect or remit the tax under paragraph (b); or
> (e) the estate of the person required to collect or remit the tax under paragraph (d).

33 It can be seen that the moneys collected by a vendor such as Tops as the tax collector of the sales tax never belongs to the vendor. The sales tax is payable by the purchaser who owes that sum to the province. The vendor never has any interest in those funds and is in every sense of the word a trustee of the funds collected for the sales tax. The vendor is simply the conduit for payment of the sales tax to the province. The province has not relied upon a requirement that separate bank accounts be kept by a vendor to protect its trust property. Rather, it has put into place a system of registration of all retail sales businesses and provided for a regulated means of record keeping and inspection. This system permits the government to specify precisely what money is due to it and to ascertain what is happening to its money on a monthly basis.

34 If the tax is not paid to the province then a vendor such as Tops must have stolen the funds, converted them to its own use or most charitably lost the funds for which it was responsible and for which it was accountable to the province.

35 From the point of view of fairness, there would seem to be no objection to the provincial government creating a lien or charge on the assets of [page40] the vendor for the amount of the sales tax (the trust funds) which the vendor was responsible for collecting and remitting to the province.

Does Section 18 Create a Valid Trust?

36 The question may be phrased more precisely by asking: If, as the chambers judge found, sales tax money "was misappropriated by Tops and mingled with its assets", does that put an end to the

trust? It is said that the trust, although validly existing at the moment the funds were paid by the purchaser, ceases to exist or have any validity once the funds were mingled so that they could not be traced readily. To begin with, and somewhat simplistically, there is no prohibition in the Bankruptcy Act against the province creating a deemed trust or lien against the retail vendor's property for the extent of the sales tax nor is there a conflict between s. 18 of the Social Service Tax Act and s. 47(a) and s. 107 of the Bankruptcy Act. This is not a statutory ruse to evade the provisions of the Bankruptcy Act. It is simply an attempt to protect trust funds which are earmarked to be used for the public benefit and public use. Rather than insist that on each sale there be a separate payment to the province, the Act created a system which was in the best interest of retail purchasers, retail vendors, the business community and the province as a whole. The Act does no more than protect funds which at the moment they were paid were truly trust funds. Nor am I sure that the validity of a trust must be determined exclusively on the basis of common law. It has been held by this Court that the civil law of trust is not the same as that of common law. See Royal Trust Co. v. Tucker, [1982] 1 S.C.R. 250, at p. 261.

37 There are a number of provincial statutory provisions which create trusts. This type of legislation is common to a wide range of statutes that may benefit employees, purchasers of insurance, payers of health and insurance and many others who lack the organization or bargaining power to establish a trust for themselves. See for example, [page41] Pension Benefits Act, S.O. 1987, c. 35, s. 58; Insurance Act, R.S.O. 1980, c. 218, s. 359; Health Insurance Act, R.S.O. 1980, c. 197, s. 18; Builders' Lien Act, R.S.A. 1980, c. B-12, s. 16.1; Construction Lien Act, S.O. 1983, c. 6, s. 7; Business Corporations Act, S.A. 1981, c. B-15, s. 191(1); Employment Standards Act, R.S.A. 1980, c. E-10.1, s. 113; Insurance Act, R.S.A. 1980, c. I-5, s. 123(1); Real Estate Agents' Licensing Act, R.S.A. 1980, c. R-5, s. 14, and Health Insurance Premiums Regulation, Alta. Reg. 217/81.

38 This Court has held that a province may, to further and protect a principle of social policy, create a statutory trust. In John M. M. Troup Ltd. v. Royal Bank of Canada, [1962] S.C.R. 487, at p. 494, the trust provisions of The Mechanics' Lien Act, R.S.O. 1950, c. 227, (now the Construction Lien Act) were found to be validly enacted. The statutory trusts referred to above provide needed protection for their beneficiaries and forward salutary social objectives which the provinces have jurisdiction to pursue.

39 Subsection 23(4) of the Canada Pension Plan, R.S.C. 1985, c. C-8, creates a statutory trust using language almost identical to s. 18 of the Social Service Tax Act. In Re Deslauriers Construction Products Ltd. (1970), 3 O.R. 599 (C.A.), Gale C.J.O., for a unanimous Court, noted that the Act deemed Pension Plan moneys to be kept separate and apart from the estate of the employer "whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate", and commented at p. 601:

> [These words] were inserted in the Act specifically for the purpose of taking the moneys equivalent to the deductions out of the estate of the bankrupt by the [page42] creation of a trust and making those moneys the property of the

> Minister.

From this he drew the following conclusion at pp. 602-3:

> In the Canada Pension Plan the fund is deemed to be property which does not comprise part of the bankruptcy at all, so that the Crown under that act is not a creditor, but is deemed to hold property which is not the property of the bankrupt.

Gale C.J.O's judgment was cited with approval by Pigeon J. writing for the majority in this Court in Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd., [1980] 1 S.C.R. 1182, at p. 1198, who stated: "I find the reasoning in Deslauriers wholly persuasive ...."

40 The provisions of s. 18 then should prevail unless they are in conflict with the provisions of the Bankruptcy Act. Sections 47 and 107 of the Act provide:

> 47. The property of a bankrupt divisible among his creditors shall not comprise
>
> (a) property held by the bankrupt in trust for any other person;
>
> . . .
>
> 107. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:
>
> . . .
>
> (j) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, pari passu notwithstanding any statutory preference to the contrary.

41 The doctrine of federal paramountcy of legislation can only apply if there is actual conflict in the operation of the provincial and federal statutes. The principle was set forth in Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161, at p. 191, by Dickson J., as he then was, in these words:

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens [page43] are being told to do inconsistent things"; compliance with one is defiance of the other.

42 In this case there is no conflict as the property which was subject to s. 18 of the Social Service Tax Act never at any time became the property of the bankrupt and is therefore not subject to distribution as the property of the bankrupt pursuant to s. 107 of the Bankruptcy Act. On a plain reading of s. 47 of the Bankruptcy Act there is no conflict created by the two statutes.

43 It is true that this Court has in Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board, [1985] 1 S.C.R. 785, recognized and emphasized that provinces cannot, by means of their own legislation, create priorities under the Bankruptcy Act. However, s. 18 has not created a priority. It did no more than give statutory recognition to a valid trust. It then eliminated the necessity of setting up a separate bank account for sales tax moneys and substituted a system of registration and record-keeping to control these funds which never at any time belonged to the vendor trustee. That latter step did not alter the existence of the valid trust of the funds collected from the purchasers for payment to the province. I do not think that the decision in Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board, supra, can be taken to have altered the meaning of the words "property of the bankrupt" contained in s. 47 of the Bankruptcy Act.

44 This appears to be the opinion expressed by Anne E. Hardy, the author of Crown Priority in Insolvency (1986). She concedes that in the interest of consistency with Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board, supra, the lien portion of the deemed trust section should probably be held to be ineffective on the bankruptcy of the trustee. Nonetheless at p. 107 she sets out her position in this way:

> Thus, as a matter of interpretation, it is questionable to limit the scope of section 47(a) of the Bankruptcy Act to trusts which either exist in fact or do not benefit the Crown or a creditor whose claim is referred to in subsection 107(1) of the Act. Until the Act is amended to permit the courts to construe section 47 in this manner, they are probably not justified in taking this [page44] approach. The Coopers & Lybrand case therefore appears to be incorrectly decided. The judgments in most cases which have upheld statutory deemed trusts in bankruptcy and refused to rank the claims covered by them under subjection 107(1) of the Act are preferable.
>
> As argued above, trusts should generally be upheld on the bankruptcy of the trustee regardless of the manner in which they arise. It is possible, however, that certain types be deemed trust provisions should be held to be ineffective and that a valid trust would therefore not come into existence. Most of the trust cases decided since Re Bourgault have distinguished that case because it did not discuss trust provisions or the relationship between the trusts covered by section 47(a) and subsection 107(1) of the Bankruptcy Act. Some of these decisions dealt with trust provisions under which an amount deemed to be held in trust had been made a lien and charge on the assets of the trustee.

That view should I think prevail.

45 Furthermore, it seems that the trust although imposed by statute contains all the essential characteristics required of a trust. In order for a trust to be recognized in equity, there had to be three fundamental aspects complied with, that is to say there had to be certainty of intention, certainty of subject matter and certainty of objects. It is conceded that the statute establishes certainty of intention and of object. The respondent argues that there cannot be certainty of subject matter because the trust property cannot be identified and that thus trust in the traditional sense has not come into existence. However, here the subject matter was clearly identified at the moment of the sales by the vendor (Tops). The only issue that remained was whether or not the trust property could be identified so that such a trust could succeed in a tracing action. This subject matter was addressed by Professor Waters in the Law of Trusts in Canada (2nd ed. 1984), at pp. 119-22:

> When the courts say that there must be certainty of subject-matter, they mean that the property must either [page45] be described in the trust instrument, or there must be "a formula or method given for identifying it."
>
> . . .
>
> In determining certainty, what the courts are looking for is the certainty of concept rather than whether it is too difficult to ascertain the subject-matter.

He distinguishes this question from the tracing issue:

> Initial ascertainability does not exist, so far as case law is concerned, unless specific property is earmarked as the trust property. Once this has occurred, and the trust has come into effect, the trust beneficiary can trace that property, whether it is converted into other forms, or, if money, it is mixed with other funds. [Emphasis in original.]

46 There can be no doubt that the statute provides a clear formula for establishing the trust property, that is to say the sales tax, and therefore certainty of subject matter does indeed exist. The three certainties of intention, object and subject matter are thus established by statute. It could not be said that funds which were collected by Tops for sales tax became the property of Tops on the ground that the certainties required of a trust by equity do not exist as the statute has validly created them.

47 Neither could it be said that the statutory trust funds (the sales tax collected) became the property of the bankrupt Tops by reason of the fact that Tops improperly mingled those funds with its own property. In equity, funds mingled in this way remained impressed with their trust obligations. This left the beneficiary with two possible recourses against the trustee for its wrongful conduct. The beneficiary might either seek to recover the trust property by itself through the remedy of tracing or might choose instead to seek compensation for the loss by means of an action against

the trustee.

48 Although there is some dispute as to whether at common law funds can be "followed" once they have been mixed with the defendant's own funds, in equity those monies can be traced "either as a [page46] separate fund or as part of a mixed fund or as latent in property acquired by means of such a fund": Re Diplock's Estate, [1948] Ch. 465, at p. 521, [1948] 2 All E.R. 318, at p. 347 (C.A.), per Lord Green M.R.; aff'd sub nom. Min. of Health v. Simpson, [1951] A.C. 251, [1950] 2 All E.R. 1137 (H.L.). The limits to a tracing action are largely fixed by the difficulties and ultimately the prohibitive excuse of providing the necessary accounts. See D. W. M. Waters, supra, at pp. 1037 ff. There is no reason why a statutorily constituted trust cannot provide an advantage over a privately constituted trust by recognizing the existence of the trust in property held by the trustee without requiring the beneficiary to undertake the often inordinately expensive action of tracing commingled funds. This advantage should not deprive the statutory trust property of its trust character or take it outside the policies articulated in Deputy Minister of Revenue v. Rainville, [1980] 1 S.C.R. 35; Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board, supra, and Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail), [1988] 1 S.C.R. 1061. It would thus seem that the statutory trust complies with the requirements of a valid trust that would be recognized in equity.

49 If as stated in Deputy Minister of Revenue v. Rainville mechanics' liens or construction liens may be recognized, although it would be impossible to trace the funds of the sub-contractors in the commingled accounts of the general contractor, so too should the statutory trust pertaining to sales tax be recognized.

50 Nor will such a conclusion create practical problems. If the proposed trustee in bankruptcy is faced with the question as to whether or not the assets are subject to a trust, an application may be made to the court to determine that issue at the outset of the proceedings. Further, if there is a dispute between those claiming a trust interest it can be determined on the basis of priority predicated upon the date on which the trust arose.

[page47]

Disposition

51 I conclude therefore that the trust described in s. 18 of the British Columbia Social Service Tax Act is not in any sense a claim against the property of the bankrupt so as to conflict with the policy underlying s. 107(1) of the Bankruptcy Act as that policy has been expounded in Deputy Minister of Revenue v. Rainville; Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board and Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail) for the following reasons:

(a) The sums constituting the trust were never the property of the bankrupt, but were transferred from purchasers of vehicles to the provincial Crown, for whom Tops acted as trustee, in satisfaction of an obligation incurred by those purchasers;

(b) the trust was validly constituted in that it complied with the three certainties required of trusts by the law of equity: s. 18 of the Social Service Tax Act does not dispense with those certainties, but conforms to them, in the same way that a contractual trust instrument must;

(c) the only relevant distinction between this statutory trust and a contractual express trust lies in the deemed tracing remedy provided by the statute. The existence of this remedy

(i) does not negate the trusts;

(ii) is largely facilitative and thus does not take the trust out of the policy enunciated in Deputy Minister of Revenue v. Rainville; Deloitte Haskins & Sells Ltd. v. Workers' Compensation Board and Federal Business Development Bank v. Québec (Commission de la santé et de la sécurité de travail);

(d) The trust therefore properly falls within s. 47(a) of the Bankruptcy Act and outside the property of the bankrupt, as that term is to be understood in light of the policy underlying s. 107(1) of the Act.

52 I would therefore answer the constitutional question as follows:

[page48]

Are the provisions of s. 18(1) of the Social Service Tax Act, R.S.B.C. 1979, c. 388, as amended, inoperative by reason of being in conflict with s. 107(1)(j) of the Bankruptcy Act, R.S.C. 1970, c. B-3?

Answer: No.

53 I would allow the appeal, set aside the decision of the Court of Appeal and that of the chambers judge and direct that the special case be answered "the defendant was not correct in granting the Canadian Imperial Bank of Commerce priority over the statutory trust of the plaintiff."

TAB 7

** Preliminary Version **

Case Name:

Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny

Deputy Minister of Revenue of Quebec and Her Majesty The Queen, Appellants;
v.
Caisse populaire Desjardins de Montmagny and Raymond Chabot Inc., in its capacity as Trustee in bankruptcy of 9083-4185 Québec Inc., Respondents, and
Canadian Association of Insolvency and Restructuring Professionals, Intervener.
And between
Deputy Minister of Revenue of Quebec and Her Majesty The Queen, Appellants;
v.
Raymond Chabot Inc., in its capacity as Trustee for the estate of the debtor, Consortium Promecan Inc., Respondent.
And between
Deputy Minister of Revenue of Quebec and Her Majesty The Queen, Appellants;
v.
National Bank of Canada, Respondent, and
Canadian Association of Insolvency and Restructuring Professionals, Intervener.

[2009] S.C.J. No. 49

[2009] A.C.S. no 49

2009 SCC 49

[2009] 3 S.C.R. 286

[2009] 3 R.C.S. 286

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J.E. 2009-1958

394 N.R. 368

60 C.B.R. (5th) 1

182 A.C.W.S. (3d) 261

2009 CarswellQue 10706

File Nos.: 32486, 32489, 32492.

Supreme Court of Canada

Heard: March 17, 2009;
Judgment: October 30, 2009.

Present: McLachlin C.J., Binnie, LeBel, Fish, Abella, Rothstein and Cromwell JJ.

(30 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Insolvency -- Claims -- Priorities -- Claims by Crown -- In amending the Bankruptcy and Insolvency Act (BIA), the federal government intended to reduce the Crown to the rank of an ordinary creditor in bankruptcy situations -- The Quebec legislation respecting the QST did not contain a provision similar to the one of the Excise Tax Act that rendered the deemed trust in favour of the tax authorities ineffective in bankruptcy situations -- However, the provincial legislatures could not modify the order of priority established in the BIA -- The deemed trusts in favour of the Crown were terminated at the time of the bankruptcy -- Appeal dismissed.

Taxation -- Goods and Services Tax (GST) -- Collection and enforcement -- In amending the Bankruptcy and Insolvency Act (BIA), the federal government intended to reduce the Crown to the rank of an ordinary creditor in bankruptcy situations -- The Quebec legislation respecting the QST

did not contain a provision similar to the one of the Excise Tax Act that rendered the deemed trust in favour of the tax authorities ineffective in bankruptcy situations -- However, the provincial legislatures could not modify the order of priority established in the BIA -- The deemed trusts in favour of the Crown were terminated at the time of the bankruptcy -- Appeal dismissed.

Taxation -- Sales and service taxes -- Enforcement -- Collection -- Quebec Sales Tax -- In amending the Bankruptcy and Insolvency Act (BIA), the federal government intended to reduce the Crown to the rank of an ordinary creditor in bankruptcy situations -- The Quebec legislation respecting the QST did not contain a provision similar to the one of the Excise Tax Act that rendered the deemed trust in favour of the tax authorities ineffective in bankruptcy situations -- However, the provincial legislatures could not modify the order of priority established in the BIA -- The deemed trusts in favour of the Crown were terminated at the time of the bankruptcy -- Appeal dismissed.

Appeal by the Canadian and Quebec tax authorities of a decision of the Quebec Court of Appeal allowing the appeal of the trustees in bankruptcy of certain businesses and financial institutions holding various security interests in the property of the bankrupts. The parties disagreed about what should be done with taxes on consumption that had been collected but not remitted, or were collectible, as of the date of the bankruptcy. The tax authorities submitted that they were entitled to the amounts in issue as the owners thereof, as opposed to creditors. In their opinion, the trustee collected the taxes on their behalf, as their mandatary, and these amounts were not part of the bankrupt's patrimony. The respondents contended that, under the law applicable in bankruptcy matters, the federal or provincial Crown was only an ordinary creditor and had to be ranked as such with the debtors' other creditors. The financial institutions submitted that their security interests could be set up against the Crown as against any ordinary creditor. The Quebec Superior Court found for the Crown. The Quebec Court of Appeal set aside the judgments and accepted the arguments of the trustees and financial institutions.

HELD: Appeal dismissed. In amending the Bankruptcy and Insolvency Act (BIA), the federal government intended to reduce the Crown to the rank of an ordinary creditor in bankruptcy situations. The Quebec legislation respecting the QST did not contain a provision similar to s. 222(1.1) of the Excise Tax Act that rendered the deemed trust in favour of the tax authorities ineffective in bankruptcy situations. However, according to a settled principle of constitutional law regarding the Parliament of Canada's legislative authority over bankruptcy and insolvency, the provincial legislatures could not modify the order of priority established in the BIA. The tax authorities' position amounted to maintaining that the deemed trusts established by tax legislation continued to exist after a bankruptcy. This argument was inconsistent with the nature of their rights under the system for the collection and remittance of the GST and QST. It also conflicted with Parliament's clear intent and with the very explicit wording of the relevant statutory provisions regarding what was to happen if a supplier went bankrupt. The deemed trusts in favour of the Crown were terminated at the time of the bankruptcy.

Statutes, Regulations and Rules Cited:

Act respecting the Ministre du Revenu, R.S.Q., c. M-31, s. 20, s. 23

Act respecting the QuÚbec sales tax, R.S.Q., c. T-0.1, s. 16, s. 82, s. 302.1, s. 422, s. 425, s. 427, s. 437

Act respecting the QuÚbec sales tax and amending various fiscal legislation, S.Q. 1991, c. 67,

Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof, S.C. 1992, c. 27,

Bank Act, S.C. 1991, c. 46, s. 427

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 67, s. 67(2), s. 67(3), s. 86(1)

Constitution Act, 1867, R.S.C. 1985, App. II, No. 5, s. 92(2)

Excise Tax Act, R.S.C. 1985, c. E-15, s. 141.01, s. 165, s. 169(1), s. 221(1), s. 222, s. 222(1), s. 222(1.1), s. 222(3), s. 223, s. 224, s. 228, s. 265, s. 296(1)(b)

Subsequent History:

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Court Catchwords:

Bankruptcy and insolvency -- Crown claims -- Goods and services tax -- Provincial sales tax -- Tax amounts that have been collected but not remitted, or are collectible, at time of bankruptcy of supplier -- Legal characterization of Crown's rights in amounts of such taxes -- Whether federal or provincial Crown is ordinary creditor or owner of tax amounts -- Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(1), (1.1) -- Act respecting the Ministère du Revenu, R.S.Q., c. M-31, s. 20 -- Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 67(2).

Court Summary:

The GST imposed under the *Excise Tax Act* ("*ETA*") and the QST payable under the *Act respecting the Québec Sales Tax* are taxes that are collected, and in respect of which credits are available, at each step of the manufacturing and marketing of taxable goods and services. They are payable by the recipient, who is regarded as the debtor in respect of the tax liability to the Crown. In principle, the supplier acts only as a mandatary of the Crown in collecting and remitting these taxes and is deemed to hold the amounts so collected in trust for Her Majesty.

A number of businesses went bankrupt. The Canadian and Quebec tax authorities (the "tax authorities") claimed from the trustees the GST and QST amounts that had been collected but not remitted, or were collectible, by those businesses as of the dates of their bankruptcies. The tax authorities submitted that they were entitled to the amounts in issue as the owners thereof. Financial institutions that held various security interests in the property of the bankrupts contended that, under the law applicable in bankruptcy matters, the federal or provincial Crown is only an ordinary creditor and must be ranked as such with the debtors' other creditors, and that their security interests could therefore be set up against the Crown. The Quebec Superior Court found for the tax authorities on the basis that the GST and QST amounts were not part of the bankrupts' patrimonies. The Quebec Court of Appeal set aside the judgments.

Held: The appeals should be dismissed.

When a supplier goes bankrupt, the tax authorities do not own GST and QST amounts that have been collected but not remitted or are collectible at the time of the bankruptcy. Instead, they have an unsecured claim against the supplier. The legal characterization of the relationships between the tax authorities and the suppliers and recipients of goods and services cannot be considered in isolation from the overall context of the system for the collection and remittance of these taxes and from the provisions of the *Bankruptcy and Insolvency Act* ("*BIA*"). The tax authorities' position amounts to maintaining that the deemed trusts established by s. 222 *ETA* and s. 20 of the *Act respecting the Ministère du Revenu* ("*AMR*") continue to exist after a bankruptcy, which conflicts with both the words and the intent of the statutory provisions in question, and is inconsistent with the nature of the tax authorities' rights under the system for the collection and remittance of the GST and QST. [para. 7] [para. 21] [paras. 28-29]

In light of the 1992 amendments to s. 67 *BIA*, the deemed trusts established by ss. 222 *ETA* and 20 *AMR* are terminated at the time of the bankruptcy. Parliament also enacted concordance amendments to the *ETA* by adding subsection (1.1) to s. 222. As a result of this provision, deemed trusts intended to secure GST claims are ineffective in bankruptcy situations. Although the Quebec legislation does not contain a provision similar to s. 222(1.1) *ETA*, Parliament's legislative authority over bankruptcy prevents the provincial legislatures from modifying the order of priority established in the *BIA*. Thus, the trustee is responsible for liquidating patrimonies that include the GST and QST amounts in issue. The mandate the supplier or the trustee is deemed to have been given with respect to the two taxes involves the performance of obligations to collect and then to remit, not the amounts collected, but a balance resulting from offsetting claims of the Crown and the supplier. [paras. 7-8] [paras. 16-17] [para. 23] [paras. 27-28]

Cases Cited

Referred to: *Reference re Quebec Sales Tax*, [1994] 2 S.C.R. 715; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *D.I.M.S. Construction inc. (Trustee of) v. Quebec* (*Attorney General)*, 2005 SCC 52, [2005] 2 S.C.R. 564; *Victuni AG v. Minister of Revenue of Quebec*, [1980]

1 S.C.R. 580; *Lefebvre (Trustee of)*, 2004 SCC 63, [2004] 3 S.C.R. 326; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94.

Statutes and Regulations Cited

Act respecting the Ministère du Revenu, R.S.Q., c. M-31, ss. 20, 23, 24.

Act respecting the Québec sales tax, R.S.Q., c. T-0.1, ss. 16, 82, 302.1, 422, 425, 427, 437.

Act respecting the Québec sales tax and amending various fiscal legislation, S.Q. 1991, c. 67.

Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof, S.C. 1992, c. 27.

Bank Act, S.C. 1991, c. 46, s. 427.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 67, 86(1), 87(1).

Constitution Act, 1867, s. 92(2).

Excise Tax Act, R.S.C. 1985, c. E-15, ss. 141.01, 165, 169(1), 221(1), 222, 223, 224, 228, 265, 296(1)(*b*).

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History and Disposition:

APPEAL from a judgment of the Quebec Court of Appeal (Forget, Doyon and Duval Hesler JJ.A.), 2007 QCCA 1837, [2008] R.J.Q. 39, 40 C.B.R. (5) 18, [2008] G.S.T.C. 3, SOQUIJ AZ-50464769, [2007] J.Q. no 14712 (QL), 2007 CarswellQue 12231, setting aside a decision of Boisvert J., 2006 QCCS 2108, 34 C.B.R. (5) 245, [2007] G.S.T.C. 185, SOQUIJ AZ-50368833, [2006] J.Q. no 3613 (QL), 2006 CarswellQue 3427. Appeal dismissed.

APPEAL from a judgment of the Quebec Court of Appeal (Forget, Doyon and Duval Hesler JJ.A.), 2007 QCCA 1835, 40 C.B.R. (5) 18, [2008] G.S.T.C. 3, SOQUIJ AZ-50464328, [2007] J.Q. no 14713 (QL), 2007 CarswellQue 12231, setting aside a decision of St-Julien J., 2006 QCCS 6370, SOQUIJ AZ-50412620, [2006] J.Q. no 15239 (QL), 2006 CarswellQue 11998. Appeal dismissed.

APPEAL from a judgment of the Quebec Court of Appeal (Forget, Doyon and Duval Hesler JJ.A.), 2007 QCCA 1813, 40 C.B.R. (5) 18, [2008] G.S.T.C. 3, SOQUIJ AZ-50464770, [2007] J.Q. no 14564 (QL), 2007 CarswellQue 12231, setting aside a decision of Bouchard J., 2006 QCCS 2656, 21 C.B.R. (5) 289, [2006] G.S.T.C. 123, SOQUIJ AZ-50373960, [2006] J.Q. no 11028 (QL), 2006 CarswellQue 4759. Appeal dismissed.

Counsel:

Christian Boutin, Michel Beauchamp and *Jean-Yves Bernard*, for the appellant the Deputy Minister of Revenue of Quebec.

Pierre Cossette and *Guy Laperrière*, for the appellant Her Majesty The Queen.

Reynald Auger and *Jean-Patrick Dallaire*, for the respondents Caisse populaire Desjardins de Montmagny and Raymond Chabot Inc., in its capacity as Trustee in bankruptcy of 9083-4185 Québec Inc. (32486)

Mason Poplaw and *Miguel Bourbonnais*, for the respondent Raymond Chabot Inc., in its capacity as Trustee for the estate of the debtor Consortium Promecan Inc. (32489)

Marc Germain, for the respondent National Bank of Canada (32492).

Éric Vallières and *Sidney Elbaz*, for the intervener.

English version of the judgment of the Court delivered by

LeBEL J.:--

I. Introduction

1 In these three cases, the Canadian and Quebec tax authorities, on the one hand, and the trustees in bankruptcy of certain businesses and financial institutions holding various security interests in the property of the bankrupts, on the other, disagree about what should be done with taxes on consumption that had been collected but not remitted, or were collectible, as of the date of the bankruptcy. The tax authorities submit that they are entitled to the amounts in issue as the owners thereof. The respondents contend that, under the law applicable in bankruptcy matters, the federal or provincial Crown is only an ordinary creditor and must be ranked as such with the debtors' other creditors. The financial institutions submit that their security interests can be set up against the Crown as against any ordinary creditor. The Quebec Superior Court found for the Crown. The Quebec Court of Appeal set aside the judgments and accepted the arguments of the trustees and financial institutions. In my view, that decision is well founded, and I would uphold it.

II. Origins of the Cases

2 These three cases result from the bankruptcies of a number of businesses and from problems that arose as a result of their insolvency in respect of the administration of the federal goods and services tax ("GST") imposed under the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), and the Quebec sales tax ("QST") payable under the *Act respecting the Québec sales tax*, R.S.Q., c. T-0.1 ("*AQST*"). To begin, I will summarize the facts that must be considered to understand these cases. The relevant statutory provisions are reproduced in the Appendix.

A. *Deputy Minister of Revenue of Quebec and Her Majesty the Queen in Right of Canada v. Caisse populaire Desjardins de Montmagny and Raymond Chabot Inc., in its Capacity as Trustee for the Bankruptcy of 9083-4185 Québec inc.*

3 In this case, a manufacturing company required, as a supplier, to collect the GST and the QST went bankrupt on September 7, 2005. Raymond Chabot Inc. was appointed trustee in bankruptcy. The debtor had hypothecated its claims and accounts receivable in favour of the respondent Caisse populaire Desjardins de Montmagny. Quebec's Deputy Minister of Revenue gave the trustee notice that he considered it to be his mandatary for the recovery of GST and QST amounts that had been collected but not remitted or were collectible. The tax authorities claimed that they owned the amounts in question. Furthermore, the record shows that some of the taxes that had been collected or were collectible at the time of the bankruptcy had been payable for more than 60 days. The Caisse populaire Desjardins de Montmagny claimed to hold valid security interests, which could be set up against the tax authorities, in the tax amounts related to the claims hypothecated in its favour. In view of these conflicting claims, the trustee asked the Superior Court to determine to whom the tax amounts belonged.

B. *Deputy Minister of Revenue of Quebec and Her Majesty the Queen in Right of Canada v. Raymond Chabot Inc. in its Capacity as Trustee for the Estate of the Debtor Consortium Promecan inc.*

4 In this case, Consortium Promecan inc. went bankrupt on March 20, 2004, and Raymond Chabot Inc. was appointed trustee. The debtor had not filed returns with respect to the GST and the QST since February 1, 2004. Quebec's Deputy Minister of Revenue asked the trustee to remit to him all GST and QST amounts in respect of the period between February 1 and March 20, 2004 that had been collected or were collectible. The trustee replied that, in its view, the Deputy Minister was only an ordinary creditor in the bankruptcy, and it denied his request. The Crown appealed that decision to the Superior Court.

C. *Deputy Minister of Revenue of Quebec and Her Majesty the Queen in Right of Canada v. National Bank of Canada*

5 The tax claims in this case result from the bankruptcies of two companies, Alternative Granite et Marbre inc. and Stone Vogue Resources inc., on November 5, 2004. The Crown claimed GST and QST amounts related to the accounts receivable of the bankrupt debtors. The National Bank of Canada had obtained, on those accounts, security under s. 427 of the *Bank Act*, S.C. 1991, c. 46, and movable hypothecs. It tried to exercise its rights under these various security interests and claimed the proceeds of the accounts receivable as well as the GST and QST amounts related to these claims. It then applied to the Superior Court to resolve the resulting dispute between itself and the tax authorities. In the meantime, the Bank's mandatary, the trustee and the Crown all collected portions of the disputed taxes and even of the accounts receivable.

III. Judicial History

A. *Quebec Superior Court*

6 The Superior Court heard the three cases separately. The result was the same in all of them. All three judges concluded that the Crown owned the disputed GST and QST amounts. If the trustee in bankruptcy collected them, it was as a mandatary of the tax authorities. Quebec's Deputy Minister of Revenue and the Minister of National Revenue could not be considered to be mere ordinary creditors. In essence, the Superior Court judges held that the GST and QST amounts were not part of the bankrupt's patrimony: 2006 QCCS 2108, 34 C.B.R. (5th) 245 (*per* Boisvert J.), 2006 QCCS 6370, [2006] Q.J. No. 15239 (QL) (*per* St-Julien J.), 2006 QCCS 2656, 21 C.B.R. (5th) 289 (*per* Bouchard J.). All three judgments were appealed to the Quebec Court of Appeal.

B. *Quebec Court of Appeal, Forget, Doyon and Duval Hesler JJ.A.*

7 Duval Hesler J.A., writing for the Court of Appeal, allowed the appeals and set aside the Superior Court's judgments: 2007 QCCA 1837, 2007 QCCA 1835, 2007 QCCA 1813, [2008] R.J.Q. 39. She acknowledged that the QST and the GST are direct taxes payable by the recipient of

the good or service. But in her view, as a result of the 1992 amendments to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), the tax authorities must be treated as an ordinary creditor in such a case. They do not own tax amounts payable by purchasers of goods and services that are subject to the GST and QST, but instead have a claim against the supplier. Furthermore, any deemed trust in favour of the tax authorities ended at the time of the bankruptcy. The tax amounts in issue were therefore part of the bankrupt's patrimony but remained subject to any security interests that had been validly granted to creditors like the Caisse populaire Desjardins de Montmagny and the National Bank of Canada. This Court granted leave for three appeals from that judgment.

IV. Analysis

A. *Issues and Positions of the Parties*

8 The issue is the nature of the rights of the tax authorities, the trustee in bankruptcy and the secured creditors to GST and QST amounts that have been collected but not remitted or are collectible at the time of the bankruptcy of a supplier within the meaning of the *AQST* and the *ETA*. In sum, the tax authorities submit that they own these amounts. In their opinion, the trustee collects the taxes on their behalf, as their mandatary, and these amounts are not part of the bankrupt's patrimony. The respondents reply that the amounts are part of the bankrupt's patrimony, subject to any validly granted security interests. In their view, the Crown does not have a right of ownership in the tax amounts and enjoys only the rights of an ordinary creditor in a bankruptcy situation. To resolve this issue, it will be necessary to begin by considering the nature of the two taxes in issue, the GST and the QST, and the mechanism for administering them. I will also need, before ruling on the legal characterization of the Crown's rights, to discuss the effect of the 1992 amendments to the *BIA*.

B. *Nature of the GST and the QST*

9 The GST and the QST are similar types of taxes on consumption. The legal framework for imposing them was established almost 20 years ago now. They are considered to be direct taxes, and the ultimate recipient of taxable goods and services is responsible for paying them. However, the taxes are collected, and credits apply, at each step of the manufacturing and marketing chains. In principle, the supplier acts only as a mandatary of the Crown in collecting and remitting these taxes (*Reference re Quebec Sales Tax*, [1994] 2 S.C.R. 715, at pp. 720-22).

10 The GST, which was implemented in 1990 by legislation that amended the *ETA* (S.C. 1990, c. 45), replaced the former federal manufacturers' sales tax. The GST can be regarded as a value-added tax. It is collected at every stage of the manufacturing and marketing of goods and services and is payable by the recipient, who is regarded as the debtor in respect of the tax liability to the Crown (s. 165 *ETA*). However, the supplier is responsible for collecting and remitting the tax (s. 221(1) *ETA*). The supplier is deemed to hold the amounts so collected in trust for Her Majesty (s. 222(1) and (3) *ETA*) and must periodically file returns and make remittances. In addition, the Act establishes a system under which input credits can be claimed, at each step of the marketing and supply of the

good, in respect of the taxes the supplier has had to pay to his or her own suppliers (ss. 141.01 and 169(1) *ETA*). The ultimate recipient bears the full burden of the tax (R. Brakel & Associates Ltd., *Value-Added Taxation in Canada: GST, HST and QST* (2nd ed. 2003), at pp. 2-3). This Court has confirmed this as a valid exercise of the Parliament of Canada's taxing power (*Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445).

11 In parallel with this federal tax reform, an in-depth review of the consumption tax system took place in Quebec. In 1991, the National Assembly enacted new sales tax legislation, the *Act respecting the Québec sales tax and amending various fiscal legislation*, S.Q. 1991, c. 67. The National Assembly's intention in enacting this statute was to achieve extensive harmonization with the GST and to align this aspect of Quebec's tax system with the model chosen by the Parliament of Canada. The legislation came into force on July 1, 1992 (Brakel, at pp. 3-4). Under an agreement with the Government of Canada, the Quebec government is responsible for collecting both the GST and the QST in Quebec (Brakel, at p. 4). Moreover, pursuant to s. 20 of the *Act respecting the Ministère du Revenu*, R.S.Q. c. M-31 ("*AMR*"), amounts collected by suppliers of goods and services are deemed to be held in trust for the "State". This Court held that this new sales tax falls within the provincial taxing power under s. 92(2) of the *Constitution Act, 1867* (*Reference re Quebec Sales Tax*).

C. *Effects of the Amendments to the BIA on the Status of Claims of the Crown*

12 In 1992, the Parliament of Canada also made extensive changes to the *BIA*, and those changes are of particular relevance to this issue of the nature and extent of the Crown's rights to recover the GST and QST amounts. The amendments in question were set out in the *Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, S.C. 1992, c. 27. Some of these changes related to the Crown's priority in bankruptcy situations. The federal government seemed at the time to want to respond to criticisms that the system establishing the priority of the Crown's claims often left nothing for a bankrupt's ordinary creditors. A government spokesperson acknowledged these concerns at the time of the introduction of the legislation to revise the Crown priority system:

We also took steps to limit the priority of the Crown, one of the more blatantly unfair aspect[s] of the present Bankruptcy Act.

> (*House of Commons Debates*, vol. II, 3rd Sess., 34th Parl., June 19, 1991, at p. 2106)

13 Felix Holtmann, the Chairman of the Standing Committee on Consumer and Corporate Affairs and Government Operations, also acknowledged the problems and injustices caused by the proliferation of deemed trusts developed to protect the Crown's claims. He stressed the need to reduce the extent of such trusts in order to achieve a better balance among creditors in bankruptcy situations:

> One of the main areas is Crown priority. Under the present Bankruptcy Act the Crown has a preferred claim for various types of taxes and ranks ahead of all unsecured creditors. In 1970 a study report made reference to Crown priority; then again in 1986 proposed bankruptcy amendments recommended the abolition of the Crown priority. With the Crown priority, creditors are less likely to participate in an insolvency, in a bankruptcy, and today rarely come out to meetings of creditors because there are no assets. The assets are fully secured to the secured creditors, banks and major lenders as well as to Crowns. As a result there is virtually nothing left for the unsecureds. We recommend that the Crown priority be abolished and that if the Crown wants to contract directly with the debtor, it be entitled to a contractual priority but not a Crown priority.
>
> (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 9, September 5, 1991, at p. 9:5)

14 During the parliamentary debates on Bill C-22 regarding the amendment of the *BIA*, comments by the government spokesperson confirmed that the government intended to reduce the Crown to the rank of an ordinary creditor in bankruptcy situations:

> A second very important point in the legislation is that the Government of Canada, the Crown, does not put itself in a priority position. It stands in line with the unsecured creditors in almost all cases except for the deductions of tax and unemployment owed.
>
> (*House of Commons Debates*, vol. IV, 3rd Sess., 34th Parl., November 1, 1991, at p. 4354)

In the course of the discussions in the Standing Committee on Consumer and Corporate Affairs and Government Operations, the government spokesperson had clearly expressed the intention to abolish the deemed trust in respect of the GST in bankruptcy situations:

> As far as the GST is concerned, if there is a deemed trust for GST, it will not come under this particular provision so it will not survive. If there is a statutory lien or priority, or a statutory security interest for GST, it will not take priority under this legislation unless it is a registered interest.
>
> (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 10, September 5,1991, at p. 10:18)

15 The amendments to the bankruptcy legislation appear to be consistent with the legislative intention announced during the parliamentary debates. First of all, s. 67 *BIA* reinforces the principle that all the bankrupt's property is part of the estate of the bankrupt and constitutes the common pledge of the creditors, although with the exception of property held in trust for another person. However, s. 67(2) *BIA* provides that, with certain exceptions, property may not be regarded as held in trust unless it would be so regarded in the absence of a statutory provision. This renders statutory trusts ineffective without affecting trusts resulting from the common law or the civil law or statutory trusts that secure claims of the federal and provincial Crowns related to source deductions for income tax, a comprehensive pension plan or the federal employment insurance program (s. 67(3) *BIA*). No mention is made of trusts related to the GST or to provincial taxes such as the QST. Moreover, s. 86(1) *BIA* confirms that the Crown is only an ordinary creditor in a bankruptcy situation:

> **86.** (1) In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

16 In addition, not long after these changes to the *BIA*, the Parliament of Canada enacted concordance amendments with regard to GST claims (S.C. 1993, c. 27). It added subsection (1.1) to s. 222 *ETA.* As a result of this provision, deemed trusts intended to secure GST claims are ineffective in bankruptcy situations:

> **222.** ...
>
> (1.1) Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

17 The Quebec legislation respecting the QST does not contain a provision similar to s. 222(1.1) *ETA* that renders the deemed trust in favour of the tax authorities ineffective in bankruptcy situations. However, according to a settled principle of constitutional law regarding the Parliament of Canada's legislative authority over bankruptcy and insolvency, the provincial legislatures may not modify the order of priority established in the *BIA*. In the event of conflict, the *BIA* will prevail and the provincial statute will be inapplicable regardless of the legislature's intention (*D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, 2005 SCC 52, [2005] 2 S.C.R. 564, at para. 12, *per* Deschamps J.).

18 The tax authorities do not dispute the clear terms of the statutory provisions. Rather, they argue that those provisions do not apply to the GST and the QST and that the Crown is not a creditor, but the owner of the tax amounts. Thus, the amounts collected or collectible at the time of

the bankruptcy in respect of the GST or the QST do not form part of the bankrupt's patrimony. As a result, they are not included in the property that is to be liquidated in accordance with the order of priority established in the *BIA*. It will therefore be necessary to resolve the issue of the legal characterization of the Crown's rights with respect to the GST and QST amounts. The characterization of those rights will essentially resolve the dispute before this Court.

D. *Legal Characterization of the Crown's Rights*

19 In this analysis, it is important to abide by the fundamental rules of contemporary statutory interpretation. Parliament's intent must be ascertained, and to do this, it is often necessary to review the statutory provisions at issue in their overall context (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 276). This approach casts doubt on the validity of the tax authorities' arguments.

20 The appellants' arguments consist of a few fundamental propositions. They submit, first, that the GST and the QST are direct taxes on consumption. They are imposed on the consumer, and more specifically on the ultimate recipient of a taxable good or service. The legislation establishes a direct link between the Crown and the recipient, as the former may claim the taxes payable directly from the latter if they have not been collected (s. 296(1)(*b*) *ETA*). The appellants contend that where the GST is collected by a trustee in bankruptcy, the trustee, like the bankrupt supplier, collects it as an agent of, and on behalf of, the Crown. And the Crown is in a similar legal situation where the QST is concerned. The recipient owes the sales tax to the Crown pursuant to ss. 16 and 82 *AQST*. The supplier collects the tax on the Crown's behalf and is deemed to be a mandatary of the Crown pursuant to s. 422 *AQST*. Moreover, under s. 23 *AMR*, a person who does not collect a tax he or she was required to collect becomes a debtor of the "State" for that amount. The appellants further submit that, in the context of the *ETA* and the *AQST*, the supplier, a mandatary of the Crown, is responsible, after supplying a taxable service or good to a consumer, for the recovery of property -- a GST or QST amount -- that belongs to the Crown and that remains Crown property, until it is remitted to the Crown. The legal situation is the same regardless of whether the tax is collected by the supplier or by a trustee after its bankruptcy. In the appellants' view, when the collected tax is remitted, the mandatary does not settle a claim, but remits to the Crown its own property. Moreover, according to this argument, this Court has established a general principle that, in performing its obligation, the mandatary does not discharge a debt, but delivers over property belonging to the mandator (*Victuni AG v. Minister of Revenue of Quebec*, [1980] 1 S.C.R. 580, at p. 584, *per* Pigeon J.).

21 This set of legal propositions disregards the mechanisms for administering the GST and the QST. The legal characterization of the relationships between the tax authorities and the suppliers and recipients of goods and services cannot be considered in isolation from the overall context of the system for the collection and remittance of these taxes and from the provisions of the *BIA*.

22 An initial comment must be made about the impact of the federal bankruptcy legislation. The

appellants are oversimplifying the trustee's role and, in particular, his or her legal situation vis-à-vis the bankrupt. This Court has noted the complexity of the trustee's duties in, for example, *Lefebvre (Trustee of)*, 2004 SCC 63, [2004] 3 S.C.R. 326, at paras. 35-37. The trustee's role is not limited to representing the bankrupt. The trustee manages the bankrupt's patrimony and is seised thereof as a result of the bankruptcy, but he or she also represents the creditors and is responsible to them for the liquidation and orderly distribution of the patrimony.

23 In the cases before the Court, the trustees were responsible for liquidating a patrimony that included the GST and QST amounts in issue, as the Court of Appeal concluded (see paras. 51-55). In her reasons, Duval Hesler J.A. clearly and correctly defined the nature of the trustee's role in this respect. The reason why the supplier was given the status of a mandatary was to ensure that the tax qualified as a direct tax so that the imposition, by the province of Quebec, of the QST in a form compatible with that of the federal GST would be constitutional (para. 50). However, the fact that this tax is ultimately borne by the recipient does not support a finding that the supplier and then the trustee, the bankrupt's representative, merely collect and remit the Crown's "property" or "thing". The nature of the collection mechanism for the two taxes suggests another interpretation of the legal situation.

24 This mechanism is designed to implement a direct tax that is also a tax on the value added at each stage of the production and marketing of the good or service until it is acquired by its ultimate recipient. In such a system, as Duval Hesler J.A. noted, _TRANSLATION_ "[t]he dollar collected is not the dollar remitted" (para. 52).

25 First of all, the collection mechanism does not require separate invoices for the GST and the QST. These taxes are indicated and included in the invoice or other document given to the recipient (s. 223 *ETA*; s. 425 *AQST*). Next, the tax amounts collected by suppliers are remitted in accordance with the accrual, not cash, method of accounting. At periodic intervals, which vary depending on the individual supplier's sales and sometimes on the nature of the business, suppliers remit to the tax authorities amounts corresponding to the tax amounts that have been billed for and are collectible during the reporting period in question even if these collectible amounts have not in fact been collected from the recipients. When sending remittances, suppliers deduct from the amounts being remitted credits corresponding to their own inputs, that is, to the taxes they have paid to their own suppliers. Thus, they remit net tax amounts based on the difference between the taxes they have collected and the taxes they themselves have paid (s. 228 *ETA*; s. 437 *AQST*). At times, under this system, they can obtain rebates.

26 Moreover, nothing in the legislation respecting the GST and the QST requires suppliers to keep the taxes they collect separate. Until a bankruptcy occurs, only the deemed trusts established by s. 22 *ETA* and s. 20 *AMR* lead to this legal result by giving the tax authorities a right to equivalent amounts from the suppliers' assets. Finally, while it is true that the recipient owes the tax to the Crown, a supplier who has remitted the tax owed by the recipient but has not collected it has a cause of action against the recipient (s. 224 *ETA*; s. 427 *AQST*).

27 The statutory mandate imposed on the supplier to collect the GST and the QST differs from the mandate in issue in *Victuni*, which related to the acquisition and development of an immovable. The mandate with respect to the two taxes involves the performance of obligations to collect and then to remit, not the amounts collected, but a balance resulting from offsetting claims of the Crown and the supplier. The existence of these offsetting claims confirms that claims for the amounts collected by suppliers are fungible, as this Court in fact pointed out in *British Colombia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, at pp. 34-35.

28 I note that the appellants' position amounts to maintaining that the deemed trusts established by ss. 222 *ETA* and 20 *AMR* continue to exist after a bankruptcy. The appellants' argument is inconsistent with the nature of their rights under the system for the collection and remittance of the GST and QST. It also conflicts with Parliament's clear intent and with the very explicit wording of the relevant statutory provisions regarding what is to happen if a supplier goes bankrupt. Before 1992, the Crown held a priority where certain tax claims were concerned. These claims were often protected by an increasingly complex series of statutory deemed trusts. The 1992 amendments to the *BIA* rendered these trusts ineffective in a bankruptcy situation, although there were exceptions with respect, for example, to claims for income tax source deductions (see, for example, *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94). Other than where these exceptions apply, when a debtor goes bankrupt, the Crown becomes an ordinary creditor. The trustee will give it the same priority as other creditors of the same rank. The trustee will be personally responsible for paying the GST or QST in respect of its own activities only (s. 265 *ETA*; s. 302.1 *AQST*).

29 Canadian tax authorities are bound by the choice of legislative policy now expressed in the *BIA.* The order of priority established in the *BIA* is also binding on the Quebec tax authorities, even though the *AMR* is silent on what happens to the deemed trust established in s. 20 thereof in the event of bankruptcy. The appellants' arguments conflict with both the words of the statutory provisions in question and their underlying legislative intent, and cannot be accepted.

V. Conclusion

30 For these reasons, I would affirm the decision of the Quebec Court of Appeal and dismiss the appellants' appeals with costs.

* * * * *

APPENDIX

Excise Tax Act, R.S.C. 1985, c. E-15

> **165.** (1) Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada tax in respect of the supply calculated at the rate of 5% on the value of the consideration for the supply.

...

221. (1) Every person who makes a taxable supply shall, as agent of Her Majesty in right of Canada, collect the tax under Division II payable by the recipient in respect of the supply.

...

222. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person,

whether or not the property is subject to a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

* * *

165. (1) Sous réserve des autres dispositions de la présente partie, l'acquéreur d'une fourniture taxable effectuée au Canada est tenu de payer à Sa Majesté du chef du Canada une taxe calculée au taux de 5% sur la valeur de la contrepartie de la fourniture.

...

221. (1) La personne qui effectue une fourniture taxable doit, à titre de mandataire de Sa Majesté du chef du Canada, percevoir la taxe payable par l'acquéreur en vertu de la section II.

...

222. (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

(1.1) Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la *Loi sur la faillite et l'insolvabilité*, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à

la section II.

...

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4)du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne -- y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens -- d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

An Act respecting the Québec sales tax, R.S.Q., c. T-0.1

16. Every recipient of a taxable supply made in Québec shall pay to the Minister of Revenue a tax in respect of the supply calculated at the rate of 7.5% on the value of the consideration for the supply.

...

422. Every person who makes a taxable supply shall, as a mandatary of the Minister, collect the tax payable by the recipient under section 16 in respect of the supply.

* * *

16. Tout acquéreur d'une fourniture taxable effectuée au Québec doit payer au ministre du Revenu une taxe à l'égard de la fourniture calculée au taux de 7,5 % sur la valeur de la contrepartie de la fourniture.

...

422. Toute personne qui effectue une fourniture taxable doit, à titre de mandataire du ministre, percevoir la taxe payable par l'acquéreur en vertu de l'article 16 à l'égard de cette fourniture.

An Act respecting the Ministère du Revenu, R.S.Q., c. M-31

20. Every person who deducts, withholds or collects any amount under a fiscal law is deemed to hold it in trust for the State, separately from the person's patrimony and the person's own funds, for payment to the State in the manner and at the time provided under a fiscal law.

Where at any time an amount deemed by the first paragraph to be held by a person in trust for the State is not paid to the State in the manner and at the time provided under a fiscal law, an amount equal to the amount thus deducted, withheld or collected is deemed, from the time the amount is deducted, withheld or collected, to be held in trust for the State, separately from the person's patrimony and the person's own funds, and to form a separate fund not forming part of the property of that person, whether or not the amount has in fact been held separately from that person's patrimony or that person's own funds.

...

23. Every person who does not collect a duty that he was bound to collect as a mandatary of the Minister or does not withhold a duty that he was bound to withhold, under a fiscal law or a regulation made under such a law, shall become a debtor of the State for the amount of that duty, with the exception of the withholding provided for in section 1015 of the Taxation Act (chapter I-3), unless the withholding concerns a duty that a person was required to withhold

from an amount paid to another person who is not resident in Canada for services performed in Québec.

...

24. Every person who deducts, withholds or collects an amount under a fiscal law is bound to pay to the Minister, at the date fixed by such law, or in accordance with the provision for such payment, an amount equal to that which the person must remit under the said Act.

...

* * *

20. Toute personne qui déduit, retient ou perçoit un montant quelconque en vertu d'une loi fiscale est réputée le détenir en fiducie pour l'État, séparé de son patrimoine et de ses propres fonds, et en vue de le verser à l'État selon les modalités et dans le délai prévus par une loi fiscale.

En cas de non-versement à l'État, selon les modalités et dans le délai prévus par une loi fiscale, d'un montant qu'une personne est réputée par le premier alinéa détenir en fiducie pour l'État, un montant égal au montant ainsi déduit, retenu ou perçu est réputé, à compter du moment où le montant est déduit, retenu ou perçu, être détenu en fiducie pour l'État, séparé de son patrimoine et de ses propres fonds, et former un fonds séparé ne faisant pas partie des biens de cette personne, que ce montant ait été ou non, dans les faits, tenu séparé du patrimoine de cette personne ou de ses propres fonds.

...

23. Toute personne qui ne perçoit pas un droit qu'elle était tenue de percevoir comme mandataire du ministre ou ne retient pas un droit qu'elle était tenue de retenir, en vertu d'une loi fiscale ou d'un règlement adopté en vertu d'une telle loi, devient débitrice envers l'État du montant de ce droit, à l'exception de la retenue prévue à l'article 1015 de la Loi sur les impôts (chapitre I-3), sauf si cette retenue concerne un droit qu'une personne devait retenir sur un montant payé à une autre personne qui ne réside pas au Canada pour services rendus au Québec.

...

24. Toute personne qui déduit, retient ou perçoit un montant en vertu d'une loi fiscale est tenue de payer au ministre, à la date fixée par cette loi ou

conformément à la disposition prévue pour un tel paiement, un montant égal à celui qu'elle est tenue de remettre en vertu de cette loi.

...

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

67. (1) The property of a bankrupt divisible among his creditors shall not comprise

(*a*) property held by the bankrupt in trust for any other person,

...

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

87. (1) A security provided for in federal or provincial legislation for the sole or principal purpose of securing a claim of Her Majesty in right of Canada or of a province or of a workers' compensation body is valid in relation to a bankruptcy or proposal only if the security is registered under a prescribed system of registration before the date of the initial bankruptcy event.

* * *

67. (1) Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants :

(*a*) les biens détenus par le failli en fiducie pour toute autre personne;

...

(2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé "disposition fédérale" au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province,

dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes : *a*) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est "une province instituant un régime général de pensions" au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un "régime provincial de pensions" au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

86. (1) Dans le cadre d'une faillite ou d'une proposition, les réclamations prouvables -- y compris les réclamations garanties -- de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail prennent rang comme réclamations non garanties.

...

87. (1) Les garanties créées aux termes d'une loi fédérale ou provinciale dans le seul but -- ou principalement dans le but -- de protéger des réclamations mentionnées au paragraphe 86(1) ne sont valides, dans le cadre d'une faillite ou d'une proposition, que si elles ont été enregistrées, conformément à un système d'enregistrement prescrit, avant l'ouverture de la faillite.

Appeals dismissed with costs.

Solicitors:

Solicitor for the appellant the Deputy Minister of Revenue of Quebec: Department of Justice, Montréal.

Solicitor for the appellant Her Majesty The Queen: Attorney General of Canada, Montréal.

Solicitors for the respondents Caisse populaire Desjardins de Montmagny and Raymond Chabot Inc., in its capacity as trustee in bankruptcy of 9083-4185 Québec Inc.: Langlois Kronström Desjardins, Lévis. (32486)

Solicitors for the respondent Raymond Chabot Inc., in its capacity as Trustee for the estate of the debtor Consortium Promecan Inc.: McCarthy Tétrault, Montréal. (32489)

Solicitors for the respondent National Bank of Canada: Stein, Monast, Québec. (32492)

Solicitors for the intervener: McMillan, Montréal.

TAB 8

** Preliminary Version **

Case Name:

Sun Indalex Finance, LLC v. United Steelworkers

Sun Indalex Finance, LLC, Appellant;

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville, Respondents.

And between

George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors, Appellant;

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville, Respondents.

And between

FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited, Appellant;

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville, Respondents.

And between

United Steelworkers, Appellant;

v.

Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership) and Superintendent of Financial Services, Respondents, and

Superintendent of Financial Services, Insolvency Institute of Canada, Canadian Labour Congress, Canadian Federation of

Pensioners, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers Association, Interveners.

[2013] S.C.J. No. 6

[2013] A.C.S. no 6

2013 SCC 6

[2013] 1 S.C.R. 271

[2013] 1 R.C.S. 271

301 O.A.C. 1

96 C.B.R. (5th) 171

8 B.L.R. (5th) 1

354 D.L.R. (4th) 581

2013EXP-356

2013EXPT-246

J.E. 2013-185

D.T.E. 2013T-97

EYB 2013-217414

439 N.R. 235

2013 CarswellOnt 733

223 A.C.W.S. (3d) 1049

20 P.P.S.A.C. (3d) 1

2 C.C.P.B. (2d) 1

File No.: 34308.

Supreme Court of Canada

Heard: June 5, 2012;
Judgment: February 1, 2013.

Present: McLachlin C.J. and LeBel, Deschamps, Abella, Rothstein, Cromwell and Moldaver JJ.

(280 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Priority -- Appeals from judgment setting aside decision concluding that deemed trust did not apply to wind-up deficiencies allowed -- Statutory deemed trust extended to contributions employer had to make to ensure that pension fund was sufficient to cover liabilities upon wind-up -- However, deemed trust was superseded by security granted to creditor that loaned money to employer during insolvency proceedings -- Although employer, as plan administrator, might have put itself in position of conflict of interest by failing to give plan's members proper notice of motion requesting financing of its operations during restructuring process, there was no realistic possibility that, had members received notice and had CCAA court found they were secured creditors, it would have ordered priorities differently -- Consequently, it was not appropriate to order equitable remedy such as constructive trust ordered by Court of Appeal.

Pensions and benefits law -- Private pension plans -- Bankruptcy, effect of -- Appeals from judgment setting aside decision concluding that deemed trust did not apply to wind-up deficiencies allowed -- Statutory deemed trust extended to contributions employer had to make to ensure that pension fund was sufficient to cover liabilities upon wind-up -- However, deemed trust was superseded by security granted to creditor that loaned money to employer during insolvency proceedings -- Although employer, as plan administrator, might have put itself in position of conflict of interest by failing to give plan's members proper notice of motion requesting financing of its operations during restructuring process, there was no realistic possibility that, had members received notice and had CCAA court found they were secured creditors, it would have ordered priorities differently -- Consequently, it was not appropriate to order equitable remedy such as constructive trust ordered by Court of Appeal.

Appeals from a judgment of the Ontario Court of Appeal setting aside a decision concluding that a deemed trust did not apply to wind-up deficiencies. Indalex became insolvent in 2009. At that time, Indalex was the administrator of two registered pension plans. Indalex obtained protection under the Companies' Creditors Arrangement Act ("CCAA"). Both plans faced funding deficiencies when

Indalex filed for the CCAA stay. Indalex's financial distress threatened the interests of all the plan members. Indalex was authorized to borrow US$24.4 million from the DIP lenders and grant them priority over all other creditors. Indalex subsequently received a bid for approximately US$30 million, and the buyer did not assume responsibility for the pension plans' wind-up deficiencies. The plan members contended that Indalex had breached its fiduciary obligations by failing to meet its obligations as a plan administrator throughout the insolvency proceedings. The plan members brought motions for a declaration that a deemed trust equal in amount to the unfunded pension liability was enforceable against the proceeds of the sale. They contended that they had priority over the secured creditors. The court concluded that the deemed trust did not apply to the wind-up deficiencies because the associated payments were not "due" or "accruing due" as of the date of the wind up. The Ontario Court of Appeal allowed the plan members' appeals. It found that the deemed trust created by section 57(4) of the Pension Benefits Act applied to all amounts due with respect to plan wind-up deficiencies. The Court of Appeal also concluded that a constructive trust was an appropriate remedy for Indalex's breach of its fiduciary obligations.

HELD: Appeals allowed. A contribution had "accrued" when the liabilities were completely constituted, even if the payment itself would not fall due until a later date. The fact that the precise amount of the contribution was not determined as of the time of the wind-up did not make it a contingent contribution that could not have accrued for accounting purposes. The relevant provisions, the legislative history and the purpose were all consistent with inclusion of the wind-up deficiency in the protection afforded to members with respect to employer contributions upon the wind up of their pension plan. Therefore, Court of Appeal correctly held that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency with respect to salaried plan. It was difficult to accept the Court of Appeal's sweeping intimation that the debtor in possession ("DIP") lenders would have accepted that their claim ranked below claims resulting from the deemed trust. As a result of the application of the doctrine of federal paramountcy, the DIP charge superseded the deemed trust. Although the employer, as plan administrator, might have put itself in a position of conflict of interest by failing to give the plan members proper notice of a motion requesting financing of its operations during a restructuring process, there was no realistic possibility that, had the members received notice and had the CCAA court found that they were secured creditors, it would have ordered the priorities differently. Consequently, it was not appropriate to order an equitable remedy such as the constructive trust ordered by the Court of Appeal.

Statutes, Regulations and Rules Cited:

Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, S.C. 2007, c. 36,

Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to

other Acts, S.C. 2005, c. 47, s. 128

Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 122(1)(a)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2, s. 11

Pension Benefits Act, R.S.O. 1980, c. 373, s. 21(2), s. 23, s. 32

Pension Benefits Act, R.S.O. 1990, c. P.8, s. 1(1), s. 8(1)(a), s. 9, s. 10(1)12, s. 12, s. 19, s. 20, s. 22, s. 25, s. 26, s. 42, s. 56, s. 57, s. 57(3), s. 57(4), s. 58, s. 59, s. 68, s. 69, s. 70, s. 73, s. 74, s. 75, s. 75(1)(a), s. 75(1)(b)

Pension Benefits Act, 1965, S.O. 1965, c. 96, s. 22(2)

Pension Benefits Act, 1987, S.O. 1987, c. 35, s. 58, s. 59, s. 75(1), s. 76(1)

Pension Benefits Amendment Act, 1973, S.O. 1973, c. 113, s. 23(a)

Pension Benefits Amendment Act, 1980, S.O. 1980, c. 80,

Pension Benefits Amendment Act, 1983, S.O. 1983, c. 2, s. 21, s. 22, s. 32

Pension Benefits Amendment Act, 2010, S.O. 2010, c. 9, s. 52(5)

Personal Property Security Act, R.S.O. 1990, c. P.10, s. 30(7)

R.R.O. 1990, Reg. 909, s. 4(4)3, s. 5(1)(b), s. 5(1)(e), s. 14, s. 29, s. 31

Securing Pension Benefits Now and for the Future Act, 2010, S.O. 2010, c. 24, s. 21(2)

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Pensions -- Bankruptcy and Insolvency -- Priorities -- Company who was both employer and administrator of pension plans seeking protection from creditors under Companies' Creditors Arrangement Act ("CCAA") -- Pension funds not having sufficient assets to fulfill pension promises made to plan members -- Company entering into debtor in possession ("DIP") financing allowing it to continue to operate -- CCAA court granting priority to DIP lenders -- Proceeds of sale of business insufficient to pay back DIP lenders -- Whether pension wind-up deficiencies subject to deemed trust -- If so, whether deemed trust superseded by CCAA priority by virtue of doctrine of

federal paramountcy -- Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 57(3), 57(4), 75(1)(a), 75(1)(b) -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Pensions -- Trusts -- Company who was both employer and administrator of pension plans seeking protection from creditors under CCAA -- Pension funds not having sufficient assets to fulfill pension promises made to plan members -- Whether pension wind-up deficiencies subject to deemed trust -- Whether company as plan administrator breached fiduciary duties -- Whether pension plan members are entitled to constructive trust.

Civil Procedure -- Costs -- Appeals -- Standard of review -- Whether Court of Appeal erred in costs endorsement concerning one party.

Court Summary:

Indalex Limited ("Indalex"), the sponsor and administrator of two employee pension plans, one for salaried employees and the other for executive employees, became insolvent. Indalex sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The salaried plan was being wound up when the *CCAA* proceedings began. The executive plan had been closed but not wound up. Both plans had wind-up deficiencies.

In a series of court-sanctioned steps, the company was authorized to enter into debtor in possession ("DIP") financing in order to allow it to continue to operate. The *CCAA* court granted the DIP lenders, a syndicate of pre-filing senior secured creditors, priority over the claims of all other creditors. Repayment of these amounts was guaranteed by Indalex U.S.

Ultimately, with the approval of the *CCAA* court, Indalex sold its business but the purchaser did not assume pension liabilities. The proceeds of the sale were not sufficient to pay back the DIP lenders and so Indalex U.S., as guarantor, paid the shortfall and stepped into the shoes of the DIP lenders in terms of priority. The *CCAA* court authorized a payment in accordance with the priority but ordered an amount be held in reserve, leaving the plan members' arguments on their rights to the proceeds of the sale open for determination later.

The plan members challenged the priority granted in the *CCAA* proceedings. They claimed that they had priority in the amount of the wind-up deficiency by virtue of a statutory deemed trust under s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*") and a constructive trust arising from Indalex's alleged breaches of fiduciary duty as administrator of the pension funds. The judge at first instance dismissed the plan members' motions concluding that the deemed trust did not apply to wind up deficiencies. He held that, with respect to the wind-up deficiency, the plan members were unsecured creditors. The Court of Appeal reversed this ruling and held that the pension plan wind-up deficiencies were subject to deemed and constructive trusts which had priority over the DIP financing priority and over other secured creditors. In addition, the Court of Appeal rejected a claim brought by the United Steelworkers, which represented some members of the salaried plan, seeking payment of its costs from the latter's pension fund.

Held (LeBel and Abella JJ. dissenting): The Sun Indalex Finance, George L. Miller and FTI Consulting appeals should be allowed.

Held: The United Steelworkers appeal should be dismissed.

(1) *Statutory Deemed Trust*

Per **Deschamps** and Moldaver JJ.: It is common ground that the contributions provided for in s. 75(1)(a) of the *PBA* are covered by the deemed trust contemplated by s. 57(4) of the *PBA*. The only question is whether this statutory deemed trust also applies to the wind-up deficiency payments required by s. 75(1)(b). The response to this question as it relates to the salaried employees is affirmative in view of the provision's wording, context and purpose. The situation is different with respect to the executive plan as s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up.

The wind-up deemed trust provision (s. 57(4) *PBA*) does not place an express limit on the "employer contributions accrued to the date of the wind up but not yet due". Section 75(1)(a) explicitly refers to "an amount equal to the total of all payments" that have *accrued*, even those that were not yet due as of the date of the wind-up, whereas s. 75(1)(b) contemplates an "amount" that is calculated on the basis of the value of assets and of liabilities that have *accrued* when the plan is wound up. Since both the amount with respect to payments (s. 75(1)(a)) and the one ascertained by subtracting the assets from the liabilities accrued as of the date of the wind-up (s. 75(1)(b)) are to be paid upon wind up as employer contributions, they are both included in the ordinary meaning of the words of s. 57(4) of the *PBA*: "amount of money equal to employer contributions accrued to the date of the wind-up but not yet due under the plan or regulations".

The time when the calculation is actually made is not relevant as long as the liabilities are assessed as of the date of the wind-up. The fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes. As a result, the words "contributions accrued" can encompass the contributions mandated by s. 75(1)(b) of the *PBA*.

It can be seen from the legislative history that the protection has expanded from (1) only the service contributions that were due, to (2) amounts payable calculated as if the plan had been wound up, to (3) amounts that were due and had accrued upon wind-up but excluding the wind-up deficiency payments, to (4) all amounts due and accrued upon wind-up. Therefore, the legislative history leads to the conclusion that adopting a narrow interpretation that would dissociate the employer's payment provided for in s. 75(1)(b) of the *PBA* from the one provided for in s. 75(1)(a) would be contrary to the Ontario legislature's trend toward broadening the protection.

The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. The remedial purpose favours an approach that includes all wind-up payments in the value of the deemed trust. In this case, the Court of Appeal correctly held with respect to the salaried plan, that

Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

Per **LeBel** and Abella JJ.: There is agreement with the reasons of Deschamps J. on the statutory deemed trust issue.

Per McLachlin C.J. and Rothstein and **Cromwell** JJ.: Given that there can be no deemed trust for the executive plan because that plan had not been wound up at the relevant date, the main issue in connection with the salaried plan boils down to the narrow statutory interpretative question of whether the wind-up deficiency provided for in s. 75(1)(b) is "accrued to the date of the wind-up" as required by s. 57(4) of the *PBA*.

When the term "accrued" is used in relation to a sum of money, it will generally refer to an amount that is at the present time either quantified or exactly quantifiable but which may or may not be due. In the present case, s. 57(4) uses the word "accrued" in contrast to the word "due". Given the ordinary meaning of the word "accrued", the wind-up deficiency cannot be said to have "accrued" to the date of wind-up. The extent of the wind-up deficiency depends on employee rights that arise only upon wind-up and with respect to which employees make elections only after wind-up. The wind-up deficiency therefore is neither ascertained nor ascertainable on the date fixed for wind-up.

The broader statutory context reinforces the view according to which the most plausible grammatical and ordinary sense of the words "accrued to the date of wind up" is that the amounts referred to are precisely ascertained immediately before the effective date of the plan's wind-up. Moreover, the legislative evolution and history of the provisions at issue show that the legislature never intended to include the wind-up deficiency in a statutory deemed trust. Rather, they reinforce the legislative intent to *exclude* from the deemed trust liabilities that arise only *on* the date of wind-up.

The legislation differentiates between two types of employer liability relevant to this case. The first is the contributions required to cover current service costs and any other payments that are either due or have accrued on a daily basis up to the relevant time. These are the payments referred to in the current s. 75(1)(a), that is, payments due or accrued but not paid. The second relates to additional contributions required when a plan is wound up which I have referred to as the wind-up deficiency. These payments are addressed in s. 75(1)(b). The legislative history and evolution show that the deemed trusts under s. 57(3) and (4) were intended to apply only to the former amounts and that it was never the intention that there should be a deemed trust or a lien with respect to an employer's potential future liabilities that arise once the plan is wound up.

In this case, the s. 57(4) deemed trust does not apply to the wind-up deficiency. This conclusion to exclude the wind-up deficiency from the deemed trust is consistent with the broader purposes of the legislation. The legislature has created trusts over contributions that were due or accrued to the date of the wind-up in order to protect, to some degree, the rights of pension plan beneficiaries and employees from the claims of the employer's other creditors. However, there is also good reason to think that the legislature had in mind other competing objectives in not extending the deemed trust

to the wind-up deficiency. While the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. The decision as to the level of protection that should be provided to pension beneficiaries under the *PBA* is one to be left to the Ontario legislature.

(2) *Priority Ranking*

Per **Deschamps** and Moldaver JJ.: A statutory deemed trust under provincial legislation such as the *PBA* continues to apply in federally-regulated *CCAA* proceedings, subject to the doctrine of federal paramountcy. In this case, granting priority to the DIP lenders subordinates the claims of other stakeholders, including the plan members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

Per McLachlin C.J. and Rothstein and **Cromwell** JJ.: Although there is disagreement with Deschamps J. in connection with the scope of the s. 57(4) deemed trust, it is agreed that if there was a deemed trust in this case, it would be superseded by the DIP loan because of the operation of the doctrine of federal paramountcy.

Per **LeBel** and Abella JJ.: There is agreement with the reasons of Deschamps J. on the priority ranking issue as determined by operation of the doctrine of federal paramountcy.

(3) *Constructive Trust As A Remedy for Breach of Fiduciary Duties*

Per McLachlin C.J. and Rothstein and **Cromwell** JJ.: It cannot be the case that a conflict of interests arises simply because an employer, exercising its management powers in the best interests of the corporation, does something that has the potential to affect the beneficiaries of the corporation's pension plan. This conclusion flows inevitably from the statutory context. The existence of apparent conflicts that are inherent in the two roles of employer and pension plan administrator being performed by the same party cannot be a breach of fiduciary duty because those conflicts are specifically authorized by the statute which permits one party to play both roles. Rather, a situation of conflict of interest occurs when there is a substantial risk that the employer-administrator's representation of the plan beneficiaries would be materially and adversely affected by the employer-administrator's duties to the corporation.

Seeking an initial order protecting the corporation from actions by its creditors did not, on its own, give rise to any conflict of interest or duty on the part of Indalex. Likewise, failure to give notice of the initial *CCAA* proceedings was not a breach of fiduciary duty to avoid conflicts of interest in this case. Indalex's decision to act as an employer-administrator cannot give the plan members any greater benefit than they would have if their plan was managed by a third party administrator.

It was at the point of seeking and obtaining the DIP orders without notice to the plan beneficiaries

and seeking and obtaining the sale approval order that Indalex's interests as a corporation came into conflict with its duties as a pension plan administrator. However, the difficulty that arose here was not the existence of the conflict itself, but Indalex's failure to take steps so that the plans' beneficiaries would have the opportunity to have their interests protected in the *CCAA* proceedings as if the plans were administered by an independent administrator. In short, the difficulty was not the existence of the conflict, but the failure to address it.

An employer-administrator who finds itself in a conflict must bring the conflict to the attention of the *CCAA* judge. It is not enough to include the beneficiaries in the list of creditors; the judge must be made aware that the debtor, as an administrator of the plan is, or may be, in a conflict of interest. Accordingly, Indalex breached its fiduciary duty by failing to take steps to ensure that the pension plans had the opportunity to be as fully represented in those proceedings as if there had been an independent plan administrator, particularly when it sought the DIP financing approval, the sale approval and a motion to voluntarily enter into bankruptcy.

Regardless of this breach, a remedial constructive trust is only appropriate if the wrongdoer's acts give rise to an identifiable asset which it would be unjust for the wrongdoer (or sometimes a third party) to retain. There is no evidence to support the contention that Indalex's failure to meaningfully address conflicts of interest that arose during the *CCAA* proceedings resulted in any such asset. Furthermore, to impose a constructive trust in response to a breach of fiduciary duty to ensure for the pension plans some procedural protections that they in fact took advantage of in any case is an unjust response in all of the circumstances.

Per **Deschamps** and Moldaver JJ.: A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the corporate employer must be prepared to resolve conflicts where they arise. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.

In the instant case, Indalex's fiduciary obligations as plan administrator did in fact conflict with management decisions that needed to be taken in the best interests of the corporation. Specifically, in seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the *CCAA* court to override the plan members' priority. The corporation's interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator's duty to the plan members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator's duty to the plan members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the plan members.

As for the constructive trust remedy, it is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property. There is agreement with Cromwell J. that this condition was not met in the case at bar and his reasoning on this issue is adopted. Moreover, it was unreasonable for the Court of Appeal to reorder the priorities in this case.

Per **LeBel** and Abella JJ. (dissenting): A fiduciary relationship is a relationship, grounded in fact and law, between a vulnerable beneficiary and a fiduciary who holds and may exercise power over the beneficiary in situations recognized by law. It follows that before entering into an analysis of the fiduciary duties of an employer as administrator of a pension plan under the *PBA*, it is necessary to consider the position and characteristics of the pension beneficiaries. In the present case, the beneficiaries were in a very vulnerable position relative to Indalex.

Nothing in the *PBA* allows that the employer *qua* administrator will be held to a lower standard or will be subject to duties and obligations that are less stringent than those of an independent administrator. The employer is under no obligation to assume the burdens of administering the pension plans that it has agreed to set up or that are the legacy of previous decisions. However, if it decides to do so, a fiduciary relationship is created with the expectation that the employer will be able to avoid or resolve the conflicts of interest that might arise.

Indalex was in a conflict of interest from the moment it started to contemplate putting itself under the protection of the *CCAA* and proposing an arrangement to its creditors. From the corporate perspective, one could hardly find fault with such a decision. It was a business decision. But the trouble is that at the same time, Indalex was a fiduciary in relation to the members and retirees of its pension plans. The solution was not to place its function as administrator and its associated fiduciary duties in abeyance. Rather, it had to abandon this role and diligently transfer its function as manager to an independent administrator.

In the present case, the employer not only neglected its obligations towards the beneficiaries, but actually took a course of action that was actively inimical to their interests. The seriousness of these breaches amply justified the decision of the Court of Appeal to impose a constructive trust.

(4) *Costs in United Steelworkers Appeal*

Per McLachlin C.J. and Rothstein and **Cromwell** JJ.: There is no basis to interfere with the Court of Appeal's costs endorsement as it relates to United Steelworkers in this case. The litigation undertaken here raised novel points of law with all of the uncertainty and risk inherent in such an undertaking. The Court of Appeal in essence decided that the United Steelworkers, representing only 7 of 169 members of the salaried plan, should not without consultation be able to in effect impose the risks of that litigation on all of the plan members, the vast majority of whom were not union members. There is no error in principle in the Court of Appeal's refusal to order the United Steelworkers costs to be paid out of the pension fund, particularly in light of the disposition of the appeal to this Court.

Per **Deschamps** and Moldaver JJ.: There is agreement with the reasons of Cromwell J. on the issue of costs in the United Steelworkers appeal.

Per **LeBel** and Abella JJ.: There is agreement with the reasons of Cromwell J. on the issue of costs in the United Steelworkers appeal.

Cases Cited

By Deschamps J.

Referred to: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Hydro-Electric Power Commission of Ontario v. Albright* (1922), 64 S.C.R. 306; *Canadian Pacific Ltd. v. M.N.R.* (1998), 41 O.R. (3d) 606; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307; *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273; *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558.

By Cromwell J.

Referred to: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53; *Hydro-Electric Power Commission of Ontario v. Albright* (1922), 64 S.C.R. 306; *Canadian Pacific Ltd. v. M.N.R.* (1998), 41 O.R. (3d) 606; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152; *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273, aff'g 2008 ONCA 394, 67 C.C.P.B. 1; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247; *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403; *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177; *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560; *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631; *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282; *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4) 194; *Marine Drive Properties Ltd., Re*, 2009 BCSC 145, 52 C.B.R. (5) 47; *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5) 169; *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6459 (CanLII); *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299 (CanLII); *Nortel Networks Corp., Re* (2009), 75 C.C.P.B. 206; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4) 314; *Donkin v. Bugoy*, [1985] 2 S.C.R. 85; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217; *Peter v. Beblow*, [1993] 1 S.C.R. 980; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678; *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303.

By LeBel J. (dissenting)

Galambos v. Perez, 2009 SCC 48, [2009] 3 S.C.R. 247; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261; *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4) 293; *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217.

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Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 1(1) "administrator","wind up", 8(1)(a), 9, 10(1)12, 12, 19, 20, 22, 25, 26, 42, 56, 57, 58, 59, 68, 69, 70, 73, 74, 75.

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History and Disposition:

APPEALS from a judgment of the Ontario Court of Appeal (MacPherson, Gillese and Juriansz JJ.A.), 2011 ONCA 265, 104 O.R. (3d) 641, 276 O.A.C. 347, 331 D.L.R. (4) 352, 75 C.B.R. (5) 19, 89 C.C.P.B. 39, 17 P.P.S.A.C. (3d) 194, [2011] O.J. No. 1621 (QL), 2011 CarswellOnt 2458, setting aside a decision of Campbell J., 2010 ONSC 1114, 79 C.C.P.B. 301, [2010] O.J. No. 974 (QL), 2010 CarswellOnt 893. Appeals allowed, LeBel and Abella JJ. dissenting.

APPEAL from a judgment of the Ontario Court of Appeal (MacPherson, Gillese and Juriansz JJ.A.), 2011 ONCA 578, 81 C.B.R. (5) 165, 92 C.C.P.B. 277, [2011] O.J. No. 3959 (QL), 2011 CarswellOnt 9077. Appeal dismissed.

Counsel:

Benjamin Zarnett, Frederick L. Myers, Brian F. Empey and *Peter Kolla*, for the appellant Sun Indalex Finance, LLC.

Harvey G. Chaiton and *George Benchetrit*, for the appellant George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors.

David R. Byers, Ashley John Taylor and *Nicholas Peter McHaffie*, for the appellant FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited.

Darrell L. Brown, for the appellant/respondent the United Steelworkers.

Andrew J. Hatnay and *Demetrios Yiokaris*, for the respondents Keith Carruthers, et al.

Hugh O'Reilly and *Amanda Darrach*, for the respondent Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership).

Mark Bailey, *Leonard Marsello* and *William MacLarkey*, for the respondent/intervener the Superintendent of Financial Services.

Robert I. Thornton and *D. J. Miller*, for the intervener the Insolvency Institute of Canada.

Steven Barrett and *Ethan Poskanzer*, for the intervener the Canadian Labour Congress.

Kenneth T. Rosenberg, Andrew K. Lokan and *Massimo Starnino*, for the intervener the Canadian Federation of Pensioners.

Éric Vallières, Alexandre Forest and *Yoine Goldstein*, for the intervener the Canadian Association of Insolvency and Restructuring Professionals.

Mahmud Jamal, *Jeremy Dacks* and *Tony Devir*, for the intervener the Canadian Bankers Association.

The judgment of Deschamps and Moldaver JJ. was delivered by

1 **DESCHAMPS J.**:-- Insolvency can trigger catastrophic consequences. Often, large claims of ordinary creditors are left unpaid. In insolvency situations, the promise of defined benefits made to employees during their employment is put at risk. These appeals illustrate the materialization of such a risk. Although the employer in this case breached a fiduciary duty, the harm suffered by the pension plans' beneficiaries results not from that breach, but from the employer's insolvency. For the following reasons, I would allow the appeals of the appellants Sun Indalex Finance, LLC; George L. Miller, Indalex U.S.'s trustee in bankruptcy and FTI Consulting Canada ULC.

2 To improve the prospect of pensioners receiving their full benefits after a pension plan is wound up, the Ontario legislature has protected contributions to the pension fund that have accrued but are not yet due at the time of the wind up by providing for a deemed trust that supersedes all other provincial priorities over certain assets of the plan sponsor (s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and s. 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*")). The parties disagree on the scope of the deemed trust. In my view, the relevant provisions and the context lead to the conclusion that it extends to contributions the employer must make to ensure that the pension fund is sufficient to cover liabilities upon wind up. In the instant case, however, the deemed trust is superseded by the security granted to the creditor that loaned money to the employer, Indalex Limited ("Indalex"), during the insolvency proceedings. In addition, although the employer, as plan administrator, may have put itself in a position of conflict of interest by failing to give the plan's members proper notice of a motion requesting financing of its operations during a restructuring process, there was no realistic possibility that, had the members received notice and had the *CCAA* court found that they were secured creditors, it would have ordered the priorities differently. Consequently, it would not be appropriate to order an equitable remedy such as the constructive trust ordered by the Court of Appeal.

I. Facts

3 Indalex is a wholly owned Canadian subsidiary of a U.S. company, Indalex Holding Corp. ("Indalex U.S."). Indalex and its related companies formed a corporate group (the "Indalex Group") that manufactured aluminum extrusions. The U.S. and Canadian operations were closely linked.

4 In 2009, a combination of high commodity prices and the economic recession's impact on the

end-user market for aluminum extrusions plunged the Indalex Group into insolvency. On March 20, 2009, Indalex U.S. filed for Chapter 11 bankruptcy protection in Delaware. On April 3, 2009, Indalex applied for a stay under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), and Morawetz J. granted the stay in an initial order. He also appointed FTI Consulting Canada ULC (the "Monitor") to act as monitor.

5 At that time, Indalex was the administrator of two registered pension plans. One was for its salaried employees (the "Salaried Plan"), the other for its executives (the "Executive Plan"). Members of the Salaried Plan included seven employees for whom the United Steelworkers ("USW") acted as bargaining agent. The Salaried Plan was in the process of being wound up when the *CCAA* proceedings began. The effective date of the wind up was December 31, 2006. The Executive Plan had been closed but not wound up. Overall, the deficiencies of the pension plans' funds concern 49 persons (members of the Salaried Plan and the Executive Plan are referred to collectively as the "Plan Members").

6 Pursuant to the initial order made by Morawetz J. on April 3, 2009, Indalex obtained protection under the *CCAA*. Both plans faced funding deficiencies when Indalex filed for the *CCAA* stay. The wind-up deficiency of the Salaried Plan was estimated at $1.8 million as of December 31, 2008. The funding deficiency of the Executive Plan was estimated at $3.0 million on a wind-up basis as of January 1, 2008.

7 From the beginning of the insolvency proceedings, the Indalex Group's reorganization strategy was to sell both Indalex and Indalex U.S. as a going concern while they were under *CCAA* and Chapter 11 protection. To this end, Indalex and Indalex U.S. sought to enter into a common agreement for debtor-in-possession ("DIP") financing under which the two companies could draw from joint credit facilities and would guarantee each other's liabilities.

8 Indalex's financial distress threatened the interests of all the Plan Members. If the reorganization failed and Indalex were liquidated under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), they would not have recovered any of their claims against Indalex for the underfunded pension liabilities, because the priority created by the provincial statute would not be recognized under the federal legislation: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453. Although the priority was not rendered ineffective by the *CCAA*, the Plan Members' position was uncertain.

9 The Indalex Group solicited terms from a variety of possible DIP lenders. In the end, it negotiated an agreement with a syndicate consisting of the pre-filing senior secured creditors. On April 8, 2009, the *CCAA* court issued an Amended and Restated Initial Order ("Amended Initial Order") authorizing Indalex to borrow US$24.4 million from the DIP lenders and grant them priority over all other creditors ("DIP charge") in that amount. In his endorsement of the order, Morawetz J. made a finding that Indalex would be unable to achieve a going-concern solution without DIP financing. Such financing was necessary to support Indalex's business until the sale

could be completed.

10 The Plan Members did not participate in the initial proceedings. The initial stay had been granted *ex parte*. The *CCAA* judge ordered Indalex to serve a copy of the stay order on every creditor owed $5,000 or more within 10 days of the initial order of April 3. As of April 8, when the motion to amend the initial order was heard, none of the Executive Plan's members had been served with that order; nor did any of them receive notice of the motion to amend it. The USW did receive short notice, but chose not to attend. Morawetz J. authorized Indalex to proceed on the basis of an abridged time for service. The Plan Members were given notice of all subsequent proceedings. None of the Plan Members appealed the Amended Initial Order to contest the DIP charge.

11 On June 12, 2009, Indalex applied for authorization to increase the DIP loan amount to US$29.5 million. At the hearing, the Executive Plan's members initially opposed the motion, seeking to reserve their rights. After it was confirmed that the motion was merely to increase the amount of the DIP charge (without changing the terms of the loan), they withdrew their opposition and the court granted the motion.

12 On April 22, 2009, the court extended the stay of proceedings and approved a marketing process for the sale of Indalex's assets. The Plan Members did not oppose the application to approve the marketing process. Under the approved bidding procedure, the Indalex Group solicited a wide variety of potential buyers.

13 Indalex received a bid from SAPA Holding AB ("SAPA"). It was for approximately US$30 million, and SAPA did not assume responsibility for the pension plans' wind-up deficiencies. According to the Monitor's estimate, the liquidation value of Indalex's assets was US$44.7 million. Indalex brought an application for an order approving a bidding procedure for a competitive auction and deeming SAPA's bid to be a qualifying bid. The Executive Plan's members opposed the application, expressing concern that the pension liabilities would not be assumed. Morawetz J. nevertheless issued the order on July 2, 2009; in it, he approved the bidding procedure for sale, noting that the Executive Plan's members could raise their objections at the time of approval of the final bid.

14 The bidding procedure did not trigger any competing bids. On July 20, 2009, Indalex and Indalex U.S. brought motions before their respective courts to approve the sale of substantially all their assets under the terms of SAPA's bid. Indalex also moved for approval of an interim distribution of the sale proceeds to the DIP lenders. The Plan Members opposed Indalex's motion. First, they argued that it was estimated that a forced liquidation would produce greater proceeds than SAPA's bid. Second, they contended that their claims had priority over that of the DIP lenders because the unfunded pension liabilities were subject to a statutory deemed trust under the *PBA*. They also contended that Indalex had breached its fiduciary obligations by failing to meet its obligations as a plan administrator throughout the insolvency proceedings.

15 The court dismissed the Plan Members' first objection, holding that there was no evidence

supporting the argument that a forced liquidation would be more beneficial to suppliers, customers and the 950 employees. It approved the sale on July 20, 2009. The order in which it did so directed the Monitor to make a distribution to the DIP lenders. With respect to the second objection, however, Campbell J. ordered the Monitor to hold a reserve in an amount to be determined by the Monitor, leaving the Plan Members' arguments based on their right to the proceeds of the sale open for determination at a later date.

16 The sale to SAPA closed on July 31, 2009. The Monitor collected $30.9 million in proceeds. It distributed US$17 million to the DIP lenders, paid certain fees, withheld a portion to cover various costs and retained $6.75 million in reserve pending determination of the Plan Members' rights. At the closing, Indalex owed US$27 million to the DIP lenders. The payment of US$17 million left a US$10 million shortfall in the amount owed to these lenders. The DIP lenders called on Indalex U.S. to cover this shortfall under the guarantee contained in the DIP lending agreement. Indalex U.S. paid the amount of the shortfall. Since Indalex U.S. was, as a term of the guarantee, subrogated to the DIP lenders' priority, it became the highest ranking creditor of Indalex, with a claim for US$10 million.

17 Following the sale of Indalex's assets, its directors resigned. Indalex U.S., a part of Indalex Group, took over the management of Indalex, whose assets were limited to the sale proceeds held by the Monitor. A Unanimous Shareholder Declaration was executed on August 12, 2009; in it, Mr. Keith Cooper was appointed to manage Indalex's affairs. Mr. Cooper was an employee of FTI Consulting Inc.

18 In accordance with the right reserved by the court on July 20, 2009, the Plan Members brought motions on August 28, 2009 for a declaration that a deemed trust equal in amount to the unfunded pension liability was enforceable against the proceeds of the sale. They contended that they had priority over the secured creditors pursuant to s. 57(4) of the PBA and s. 30(7) of the *PPSA*. Indalex, in turn, brought a motion for an assignment in bankruptcy to secure the priority regime it argued for in opposing the Plan Members' motions.

19 On October 14, 2009, while judgment was pending, Indalex U.S. converted the Chapter 11 restructuring proceeding in the U.S. into a Chapter 7 liquidation proceeding. On November 5, 2009, the Superintendent of Financial Services ("Superintendent") appointed the actuarial firm of Morneau Sobeco Limited Partnership ("Morneau") to replace Indalex as administrator of the plans.

20 On February 18, 2010, Campbell J. dismissed the Plan Members' motions, concluding that the deemed trust did not apply to the wind-up deficiencies, because the associated payments were not "due" or "accruing due" as of the date of the wind up. He found that the Executive Plan did not have a wind-up deficiency, since it had not yet been wound up. He thus found it unnecessary to rule on Indalex's motion for an assignment in bankruptcy (2010 ONSC 1114, 79 C.C.P.B. 301). The Plan Members appealed the dismissal of their motions.

21 The Ontario Court of Appeal allowed the Plan Members' appeals. It found that the deemed

trust created by s. 57(4) of the *PBA* applies to all amounts due with respect to plan wind-up deficiencies. Although the court noted that it was likely that no deemed trust existed for the Executive Plan on the plain meaning of the provision, it declined to address this question, because it found that the Executive Plan's members had a claim arising from Indalex's breach of its fiduciary obligations in failing to adequately protect the Plan Members' interests (2011 ONCA 265, 104 O.R. (3d) 641).

22 The Court of Appeal concluded that a constructive trust was an appropriate remedy for Indalex's breach of its fiduciary obligations. The court was of the view that this remedy did not harm the DIP lenders, but affected only Indalex U.S. It imposed a constructive trust over the reserved fund in favour of the Plan Members. Turning to the question of distribution, it also found that the deemed trust had priority over the DIP charge because the issue of federal paramountcy had not been raised when the Amended Initial Order was issued, and that Indalex had stated that it intended to comply with any deemed trust requirements. The Court of Appeal found that there was nothing in the record to suggest that not applying the paramountcy doctrine would frustrate Indalex's ability to restructure.

23 The Court of Appeal ordered the Monitor to make a distribution from the reserve fund in order to pay the amount of each plan's deficiency. It also issued a costs endorsement that approved payment of the costs of the Executive Plan's members from that plan's fund, but declined to order the payment of costs to the USW from the fund of the Salaried Plan (2011 ONCA 578, 81 C.B.R. (5th) 165).

24 The Monitor, together with Sun Indalex, a secured creditor of Indalex U.S., and George L. Miller, Indalex U.S.'s trustee in bankruptcy, appeals the Court of Appeal's order. Both the Superintendent and Morneau support the Plan Members' position as respondents. A number of stakeholders are also participating in the appeals to this Court. In addition, USW appeals the costs endorsement. As I agree with my colleague Cromwell J. on the appeal from the costs endorsement, I will not deal with it in these reasons.

II. Issues

25 The appeals raise four issues:

1. Does the deemed trust provided for in s. 57(4) of the *PBA* apply to wind-up deficiencies?
2. If so, does the deemed trust supersede the DIP charge?
3. Did Indalex have any fiduciary obligations to the Plan Members when making decisions in the context of the insolvency proceedings?
4. Did the Court of Appeal properly exercise its discretion in imposing a constructive trust to remedy the breaches of fiduciary duties?

III. Analysis

A. *Does the Deemed Trust Provided for in Section 57(4) of the PBA Apply to Wind-up Deficiencies?*

26 The first issue is whether the statutory deemed trust provided for in s. 57(4) of the *PBA* extends to wind-up deficiencies. This question is one of statutory interpretation, which requires examination of both the wording and context of the relevant provisions of the *PBA*. Section 57(4) of the *PBA* affords protection to members of a pension plan with respect to their employer's contributions upon wind up of the plan. The provision reads:

> **57...** .
>
> (4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

27 The most obvious interpretation is that where a plan is wound up, this provision protects all contributions that have accrued but are not yet due. The words used appear to include the contribution the employer is to make where a plan being wound up is in a deficit position. This quite straightforward interpretation, which is consistent with both the historical broadening of the protection and the remedial purpose of the provision, is being challenged on the basis of a narrow definition of the word "accrued". I do not find that this argument justifies limiting the protection afforded to plan members by the Ontario legislature.

28 The *PBA* sets out the rules for the operation of funded contributory defined benefit pension plans in Ontario. In an ongoing plan, an employer must pay into a fund all contributions it withholds from its employees' salaries. In addition, while the plan is ongoing, the employer must make two kinds of payments. One relates to current service contributions -- the employer's own regular contributions to the pension fund as required by the plan. The other ensures that the fund is sufficient to meet the plan's liabilities. The employees' interest in having the contributions made while the plan is ongoing is protected by a deemed trust provided for in s. 57(3) of the *PBA*.

29 The *PBA* also establishes a comprehensive scheme for winding up a pension plan. Section 75(1)(a) imposes on the employer the obligation to "pay" an amount equal to the total of all "payments" that are due or that have accrued and have not been paid into the fund. In addition, s. 75(1)(b) sets out a formula for calculating the amount that must be paid to ensure that the fund is sufficient to cover all liabilities upon wind up. Within six months after the effective date of the wind up, the plan administrator must file a wind-up report that lists the plan's assets and liabilities as of the date of the wind up. If the wind-up report shows an actuarial deficit, the employer must make wind-up deficiency payments. Consequently, s. 75(1)(a) and (b) jointly determine the amount of the

contributions owed when a plan is wound up.

30 It is common ground that the contributions provided for in s. 75(1)(a) are covered by the wind-up deemed trust. The only question is whether it also applies to the deficiency payments required by s. 75(1)(b). I would answer this question in the affirmative in view of the provision's wording, context and purpose.

31 It is readily apparent that the wind-up deemed trust provision (s. 57(4) PBA) does not place an express limit on the "employer contributions accrued to the date of the wind up but not yet due", and I find no reason to exclude contributions paid under s. 75(1)(b). Section 75(1)(a) explicitly refers to "an amount equal to the total of all payments" that have *accrued*, even those that were not yet due as of the date of the wind up, whereas s. 75(1)(b) contemplates an "amount" that is calculated on the basis of the value of assets and of liabilities that have *accrued* when the plan is wound up. Section 75(1) reads as follows:

> **75.** (1) Where a pension plan is wound up, the employer shall pay into the pension fund,
>
> (a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and
> (b) an amount equal to the amount by which,
>
> (i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,
> (ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and
> (iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,
>
> exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

32 Since both the amount with respect to payments (s. 75(1)(a)) and the one ascertained by subtracting the assets from the liabilities accrued as of the date of the wind up (s. 75(1)(b)) are to be paid upon wind up as employer contributions, they are both included in the ordinary meaning of the words of s. 57(4) of the *PBA*: "amount of money equal to employer contributions accrued to the

date of the wind up but not yet due under the plan or regulations". As I mentioned above, this reasoning is challenged in respect of s. 75(1)(b), not of s. 75(1)(a).

33 The appellant Sun Indalex argues that since the deficiency is not finally quantified until well after the effective date of the wind up, the liability of the employer cannot be said to have accrued. The Monitor adds that the payments the employer must make to satisfy its wind-up obligations may change over the five-year period within which s. 31 of the *PBA* Regulations, R.R.O. 1990, Reg. 909, requires that they be made. These parties illustrate their argument by referring to what occurred to the Salaried Plan's fund in the case at bar. In 2007-8, Indalex paid down the vast majority of the $1.6 million wind-up deficiency associated with the Salaried Plan as estimated in 2006. By the end of 2008, however, this deficiency had risen back up to $1.8 million as a result of a decline in the fund's asset value. According to this argument, the amount could not have accrued as of the date of the wind up, because it could not be calculated with certainty.

34 Unlike my colleague Cromwell J., I find this argument unconvincing. I instead agree with the Court of Appeal on this point. The wind-up deemed trust concerns "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". Since the employees cease to accumulate entitlements when the plan is wound up, the entitlements that are used to calculate the contributions have all been accumulated before the wind-up date. Thus the liabilities of the employer are complete -- have accrued -- before the wind up. The distinction between my approach and the one Cromwell J. takes is that he requires that it be possible to perform the calculation before the date of the wind up, whereas I am of the view that the time when the calculation is actually made is not relevant as long as the liabilities are assessed as of the date of the wind up. The date at which the liabilities are *reported* or the employer's *option* to spread its contributions as allowed by the regulations does not change the legal nature of the contributions.

35 In *Hydro-Electric Power Commission of Ontario v. Albright* (1922), 64 S.C.R. 306, Duff J. considered the meaning of the word "accrued" in interpreting the scope of a covenant. He found that

> the word "accrued" according to well recognized usage has, as applied to rights or liabilities the meaning simply of completely constituted -- and it may have this meaning although it appears from the context that the right completely constituted or the liability completely constituted is one which is only exercisable or enforceable *in futuro* -- a debt for example which is *debitum in praesenti solvendum in futuro*. [Emphasis added; pp. 312-13.]

36 Thus, a contribution has "accrued" when the liabilities are completely constituted, even if the payment itself will not fall due until a later date. If this principle is applied to the facts of this case, the liabilities related to contributions to the fund allocated for payment of the pension benefits contemplated in s. 75(1)(b) are completely constituted at the time of the wind up, because no pension entitlements arise after that date. In other words, no new liabilities accrue at the time of or after the wind up. Even the portion of the contributions that is related to the elections plan members

may make upon wind up has "accrued to the date of the wind up", because it is based on rights employees earned before the wind-up date.

37 The fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes (*Canadian Pacific Ltd. v. M.N.R.*, (1998), 41 O.R. (3d) 606 (C.A.), at p. 621). The use of the word "accrued" does not limit liabilities to amounts that can be determined with precision. As a result, the words "contributions accrued" can encompass the contributions mandated by s. 75(1)(b) of the *PBA*.

38 The legislative history supports my conclusion that wind-up deficiency contributions are protected by the deemed trust provision. The Ontario legislature has consistently expanded the protection afforded in respect of pension plan contributions. I cannot therefore accept an interpretation that would represent a drawback from the protection extended to employees. I will not reproduce the relevant provisions, since my colleague Cromwell J. quotes them.

39 The original statute provided solely for the employer's obligation to pay all amounts required to be paid to meet the test for solvency (*The Pension Benefits Act, 1965*, S.O. 1965, c. 96, s. 22(2)), but the legislature subsequently afforded employees the protection of a deemed trust on the employer's assets in an amount equal to the sums withheld from employees as contributions and sums due from the employer as service contributions (s. 23*a*, added by *The Pension Benefits Amendment Act, 1973*, S.O. 1973, c. 113, s. 6). In a later version, it protected not only contributions that were due, but also those that had accrued, with the amounts being calculated as if the plan had been wound up (*The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80).

40 Whereas *all* employer contributions were originally covered by a single provision, the legislature crafted a separate provision in 1980 that specifically imposed on the employer the obligation to fund the wind-up deficiency. At the time, it was clear from the words used in the provision that the amount related to the wind-up deficiency was excluded from the deemed trust protection (*The Pension Benefits Amendment Act, 1980*). In 1983, the legislature made a distinction between the deemed trust for ongoing employer contributions and the one for certain payments to be made upon wind up (ss. 23(4)(a) and 23(4)(b), added by *Pension Benefits Amendment Act, 1983*, S.O. 1983, c. 2, s. 3). In that version, the wind-up deficiency payments were still excluded from the deemed trust. However, the legislature once again made changes to the protection in 1987. The 1987 version is, in substance, the one that applies in the case at bar. In the *Pension Benefits Act, 1987*, S.O. 1987, c. 35, a specific wind-up deemed trust was maintained, but the wind up deficiency payments were no longer excluded from it, because the limitation that had been imposed until then with respect to payments that were due or had accrued while the plan was ongoing had been eliminated. My comments to the effect that the previous versions excluded the wind-up deficiency payments do not therefore apply to the 1987 statute, since it was materially different.

41 Whereas it is clear from the 1983 amendments that the deemed trust provided for in s.

23(4)(b) was intended to include only current service costs and special payments, this is less clear from the subsequent versions of the *PBA*. To give meaning to the 1987 amendment, I have to conclude that the words refer to a deemed trust in respect of *all* "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations".

42 The employer's liability upon wind up is now set out in a single section which elegantly parallels the wind-up deemed trust provision. It can be seen from the legislative history that the protection has expanded from (1) only the service contributions that were due, to (2) amounts payable calculated as if the plan had been wound up, to (3) amounts that were due and had accrued upon wind up but excluding the wind-up deficiency payments, to (4) all amounts due and accrued upon wind up.

43 Therefore, in my view, the legislative history leads to the conclusion that adopting a narrow interpretation that would dissociate the employer's payment provided for in s. 75(1)(b) of the *PBA* from the one provided for in s. 75(1)(a) would be contrary to the Ontario legislature's trend toward broadening the protection. Since the provision respecting wind-up payments sets out the amounts that are owed upon wind up, I see no historical, legal or logical reason to conclude that the wind-up deemed trust provision does not encompass all of them.

44 Thus, I am of the view that the words and context of s. 57(4) lend themselves easily to an interpretation that includes the wind-up deficiency payments, and I find additional support for this in the purpose of the provision. The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. This purpose militates against adopting the limited scope proposed by Indalex and some of the interveners. In the case of competing priorities between creditors, the remedial purpose favours an approach that includes all wind-up payments in the value of the deemed trust in order to achieve a broad protection.

45 In sum, the relevant provisions, the legislative history and the purpose are all consistent with inclusion of the wind-up deficiency in the protection afforded to members with respect to employer contributions upon the wind up of their pension plan. I therefore find that the Court of Appeal correctly held with respect to the Salaried Plan, which had been wound up as of December 31, 2006, that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

46 The situation is different with respect to the Executive Plan. Unlike s. 57(3), which provides that the deemed trust protecting employer contributions exists while a plan is ongoing, s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up. This is a choice made by the Ontario legislature. I would not interfere with it. Thus, the deemed trust entitlement arises only once the condition precedent of the plan being wound up has been fulfilled. This is true even if it is certain that the plan will be wound up in the future. At the time of the sale, the Executive Plan was in the process of being, but had not yet been, wound up. Consequently, the deemed trust provision does not apply to the employer's wind-up deficiency payments in respect of

that plan.

47 The Court of Appeal declined to decide whether a deemed trust arose in relation to the Executive Plan, stating that it was unnecessary to decide this issue. However, the court expressed concern that a reasoning that deprived the Executive Plan's members of the benefit of a deemed trust would mean that a company under *CCAA* protection could avoid the priority of the *PBA* deemed trust simply by not winding up an underfunded pension plan. The fear was that Indalex could have relied on its own inaction to avoid the consequences that flow from a wind up. I am not convinced that the Court of Appeal's concern has any impact on the question whether a deemed trust exists, and I doubt that an employer could avoid the consequences of such a security interest simply by refusing to wind up a pension plan. The Superintendent may take a number of steps, including ordering the wind up of a pension plan under s. 69(1) of the *PBA* in a variety of circumstances (see s. 69(1)(d), *PBA*). The Superintendent did not choose to order that the plan be wound up in this case.

B. *Does the Deemed Trust Supersede the DIP Charge?*

48 The finding that the interests of the Salaried Plan's members in all the employer's wind-up contributions to the Salaried Plan are protected by a deemed trust does not mean that part of the money reserved by the Monitor from the sale proceeds must be remitted to the Salaried Plan's fund. This will be the case only if the provincial priorities provided for in s. 30(7) of the *PPSA* ensure that the claim of the Salaried Plan's members has priority over the DIP charge. Section 30(7) reads as follows:

> (7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.

The effect of s. 30(7) is to enable the Salaried Plan's members to recover from the reserve fund, insofar as it relates to an account or inventory and its proceeds in Ontario, ahead of all other secured creditors.

49 The Appellants argue that any provincial deemed trust is subordinate to the DIP charge authorized by the *CCAA* order. They put forward two central arguments to support their contention. First, they submit that the *PBA* deemed trust does not apply in *CCAA* proceedings because the relevant priorities are those of the federal insolvency scheme, which do not include provincial deemed trusts. Second, they argue that by virtue of the doctrine of federal paramountcy the DIP charge supersedes the *PBA* deemed trust.

50 The Appellants' first argument would expand the holding of *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, so as to apply federal bankruptcy priorities to *CCAA* proceedings, with the effect that claims would be treated similarly under the *CCAA* and the *BIA*. In *Century Services*, the Court noted that there are points at which the two schemes

converge:

> Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. [para. 23]

51 In order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements. Yet this does not mean that courts may read bankruptcy priorities into the *CCAA* at will. Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to *CCAA* proceedings or to proposals under the *BIA*. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the *CCAA*, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation under the *BIA*. Indalex achieved the goal it was pursuing. It chose to sell its assets under the *CCAA*, not the *BIA*.

52 The provincial deemed trust under the *PBA* continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy (*Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60, at para. 43). The Court of Appeal therefore did not err in finding that at the end of a *CCAA* liquidation proceeding, priorities may be determined by the *PPSA*'s scheme rather than the federal scheme set out in the *BIA*.

53 The Appellants' second argument is that an order granting priority to the plan's members on the basis of the deemed trust provided for by the Ontario legislature would be unconstitutional in that it would conflict with the order granting priority to the DIP lenders that was made under the *CCAA*. They argue that the doctrine of paramountcy resolves this conflict, as it would render the provincial law inoperative to the extent that it is incompatible with the federal law.

54 There is a preliminary question that must be addressed before determining whether the doctrine of paramountcy applies in this context. This question arises because the Court of Appeal found that although the *CCAA* court had the power to authorize a DIP charge that would supersede the deemed trust, the order in this case did not have such an effect because paramountcy had not been invoked. As a result, the priority of the deemed trust over secured creditors by virtue of s. 30(7) of the *PPSA* remained in effect, and the Plan Members' claim ranked in priority to the claim of the DIP lenders established in the *CCAA* order.

55 With respect, I cannot accept this approach to the doctrine of federal paramountcy. This doctrine resolves conflicts in the application of overlapping valid provincial and federal legislation (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at paras. 32 and 69).

Paramountcy is a question of law. As a result, subject to the application of the rules on the admissibility of new evidence, it can be raised even if it was not invoked in an initial proceeding.

56 A party relying on paramountcy must "demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law" (*Canadian Western Bank*, at para. 75). This Court has in fact applied the doctrine of paramountcy in the area of bankruptcy and insolvency to come to the conclusion that a provincial legislature cannot, through measures such as a deemed trust, affect priorities granted under federal legislation (*Husky Oil*).

57 None of the parties question the validity of either the federal provision that enables a *CCAA* court to make an order authorizing a DIP charge or the provincial provision that establishes the priority of the deemed trust. However, in considering whether the *CCAA* court has, in exercising its discretion to assess a claim, validly affected a provincial priority, the reviewing court should remind itself of the rule of interpretation stated in *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 (at p. 356), and reproduced in *Canadian Western Bank* (at para. 75):

> When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

58 In the instant case, the *CCAA* judge, in authorizing the DIP charge, did not consider the fact that the Salaried Plan's members had a claim that was protected by a deemed trust, nor did he explicitly note that ordinary creditors, such as the Executive Plan's members, had not received notice of the DIP loan motion. However, he did consider factors that were relevant to the remedial objective of the *CCAA* and found that Indalex had in fact demonstrated that the *CCAA*'s purpose would be frustrated without the DIP charge. It will be helpful to quote the reasons he gave on April 17, 2009 in authorizing the DIP charge ((2009), 52 C.B.R. (5th) 61):

> (a) the Applicants are in need of the additional financing in order to support operations during the period of a going concern restructuring;
> (b) there is a benefit to the breathing space that would be afforded by the DIP Financing that will permit the Applicants to identify a going concern solution;
> (c) there is no other alternative available to the Applicants for a going concern solution;
> (d) a stand-alone solution is impractical given the integrated nature of the business of Indalex Canada and Indalex U.S.;
> (e) given the collateral base of Indalex U.S., the Monitor is satisfied that it is unlikely that the Post-Filing Guarantee with respect to the U.S. Additional Advances will ever be called and the Monitor is also satisfied that the

> benefits to stakeholders far outweighs the risk associated with this aspect of the Post-Filing Guarantee;
>
> (f) the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing against the assets of the Applicants;
>
> (g) the Pre-Filing Security has been reviewed by counsel to the Monitor and it appears that the unsecured creditors of the Canadian debtors will be in no worse position as a result of the Post-Filing Guarantee than they were otherwise, prior to the CCAA filing, as a result of the limitation of the Canadian guarantee set forth in the draft Amended and Restated Initial Order ... ; and
>
> (h) the balancing of the prejudice weighs in favour of the approval of the DIP Financing. [para. 9]

59 Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the *CCAA* judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate" (2009 CanLII 37906, at paras. 7 and 8).

60 In this case, compliance with the provincial law necessarily entails defiance of the order made under federal law. On the one hand, s. 30(7) of the *PPSA* required a part of the proceeds from the sale related to assets described in the provincial statute to be paid to the plan's administrator before other secured creditors were paid. On the other hand, the Amended Initial Order provided that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" (para. 45). Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the Plan Members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

C. *Did Indalex Have Fiduciary Obligations to the Plan Members?*

61 The fact that the DIP financing charge supersedes the deemed trust or that the interests of the Executive Plan's members are not protected by the deemed trust does not mean that Plan Members have no right to receive money out of the reserve fund. What remains to be considered is whether an equitable remedy, which could override all priorities, can and should be granted for a breach by Indalex of a fiduciary duty.

62 The first stage of a fiduciary duty analysis is to determine whether and when fiduciary obligations arise. The Court has recognized that there are circumstances in which a pension plan administrator has fiduciary obligations to plan members both at common law and under statute (*Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273, at para. 41). It is clear that the indicia of a fiduciary relationship attach in this case between the Plan Members and Indalex as plan administrator. Sun Indalex and the Monitor do not dispute this proposition.

63 However, Sun Indalex and the Monitor argue that the employer has a fiduciary duty only when it acts as plan administrator -- when it is wearing its administrator's "hat". They contend that, outside the plan administration context, when directors make decisions in the best interests of the corporation, the employer is wearing solely its "corporate hat". On this view, decisions made by the employer in its corporate capacity are not burdened by the corporation's fiduciary obligations to its pension plan members and, consequently, cannot be found to conflict with plan members' interests. This is not the correct approach to take in determining the scope of the fiduciary obligations of an employer acting as plan administrator.

64 Only persons or entities authorized by the *PBA* can act as plan administrators (ss. 1(1) and 8(1)(a)). The employer is one of them. A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the fact that the corporate employer can act as administrator of a pension plan means that s. 8(1)(a) of the *PBA* is based on the assumption that not all decisions taken by directors in managing a corporation will result in conflict with the corporation's duties to the plan's members. However, the corporate employer must be prepared to resolve conflicts where they arise. Reorganization proceedings place considerable burdens on any debtor, but these burdens do not release an employer that acts as plan administrator from its fiduciary obligations.

65 Section 22(4) of the *PBA* explicitly provides that a plan administrator must not permit its own interest to conflict with its duties in respect of the pension fund. Thus, where an employer's own interests do not converge with those of the plan's members, it must ask itself whether there is a potential conflict and, if so, what can be done to resolve the conflict. Where interests do conflict, I do not find the two hats metaphor helpful. The solution is not to determine whether a given decision can be classified as being related to either the management of the corporation or the administration of the pension plan. The employer may well take a sound management decision, and yet do something that harms the interests of the plan's members. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the

competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.

66 When the interests the employer seeks to advance on behalf of the corporation conflict with interests the employer has a duty to preserve as plan administrator, a solution must be found to ensure that the plan members' interests are taken care of. This may mean that the corporation puts the members on notice, or that it finds a replacement administrator, appoints representative counsel or finds some other means to resolve the conflict. The solution has to fit the problem, and the same solution may not be appropriate in every case.

67 In the instant case, Indalex's fiduciary obligations as plan administrator did in fact conflict with management decisions that needed to be taken in the best interests of the corporation. Indalex had a number of responsibilities as plan administrator. For example, s. 56(1) of the *PBA* required it to ensure that contributions were paid when due. Section 56(2) required that it notify the Superintendent if contributions were not paid when due. It was also up to Indalex under s. 59 to commence proceedings to obtain payment of contributions that were due but not paid. Indalex, as an employer, paid all the contributions that were due. However, its insolvency put contributions that had accrued to the date of the wind up at risk. In an insolvency context, the administrator's claim for contributions that have accrued is a provable claim.

68 In the context of this case, the fact that Indalex, as plan administrator, might have to claim accrued contributions from itself means that it would have to simultaneously adopt conflicting positions on whether contributions had accrued as of the date of liquidation and whether a deemed trust had arisen in respect of wind-up deficiencies. This is indicative of a clear conflict between Indalex's interests and those of the Plan Members. As soon as it saw, or ought to have seen, a potential for conflict, Indalex should have taken steps to ensure that the interests of the Plan Members were protected. It did not do so. On the contrary, it contested the position the Plan Members advanced. At the very least, Indalex breached its duty to avoid conflicts of interest (s. 22(4), *PBA*).

69 Since the Plan Members seek an equitable remedy, it is important to identify the point at which Indalex should have moved to ensure that their interests were safeguarded. Before doing so, I would stress that factual contexts are needed to analyse conflicts between interests, and that it is neither necessary nor useful to attempt to map out all the situations in which conflicts may arise.

70 As I mentioned above, insolvency puts the employer's contributions at risk. This does not mean that the decision to commence insolvency proceedings entails on its own a breach of a fiduciary obligation. The commencement of insolvency proceedings in this case on April 3, 2009 in an emergency situation was explained by Timothy R. J. Stubbs, the then-president of Indalex. The company was in default to its lender, it faced legal proceedings for unpaid bills, it had received a termination notice effective April 6 from its insurers, and suppliers had stopped supplying on credit. These circumstances called for urgent action by Indalex lest a creditor start bankruptcy proceedings

and in so doing jeopardize ongoing operations and jobs. Several facts lead me to conclude that the stay sought in this case did not, in and of itself, put Indalex in a conflict of interest.

71 First, a stay operates only to freeze the parties' rights. In most cases, stays are obtained *ex parte*. One of the reasons for refraining from giving notice of the initial stay motion is to avert a situation in which creditors race to court to secure benefits that they would not enjoy in insolvency. Subjecting as many creditors as possible to a single process is seen as a way to treat all of them more equitably. In this context, plan members are placed on the same footing as the other creditors and have no special entitlement to notice. Second, one of the conclusions of the order Indalex sought was that it was to be served on all creditors, with a few exceptions, within 10 days. The notice allowed any interested party to apply to vary the order. Third, Indalex was permitted to pay all pension benefits. Although the order excluded special solvency payments, no ruling was made at that point on the merits of the creditors' competing claims, and a stay gave the Plan Members the possibility of presenting their arguments on the deemed trust rather than losing it altogether as a result of a bankruptcy proceeding, which was the alternative.

72 Whereas the stay itself did not put Indalex in a conflict of interest, the proceedings that followed had adverse consequences. On April 8, 2009, Indalex brought a motion to amend and restate the initial order in order to apply for DIP financing. This motion had been foreseen. Mr. Stubbs had mentioned in the affidavit he signed in support of the initial order that the lenders had agreed to extend their financing, but that Indalex would be in need of authorization in order to secure financing to continue its operations. However, the initial order had not yet been served on the Plan Members as of April 8. Short notice of the motion was given to the USW rather than to all the individual Plan Members, but the USW did not appear. The Plan Members were quite simply not represented on the motion to amend the initial stay order requesting authorization to grant the DIP charge.

73 In seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the *CCAA* court to override the Plan Members' priority. This was a case in which Indalex's directors permitted the corporation's best interests to be put ahead of those of the Plan Members. The directors may have fulfilled their fiduciary duty to Indalex, but they placed Indalex in the position of failing to fulfil its obligations as plan administrator. The corporation's interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator's duty to the Plan Members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator's duty to the Plan Members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the Plan Members. Because Indalex supported the motion asking that a priority be granted to its lender, it could not at the same time argue for a priority based on the deemed trust.

74 The Court of Appeal found a number of other breaches. I agree with Cromwell J. that none of the subsequent proceedings had a negative impact on the Plan Members' rights. The events that occurred, in particular the second DIP financing motion and the sale process, were predictable and, in a way, typical of reorganizations. Notice was given in all cases. The Plan Members were represented by able counsel. More importantly, the court ordered that funds be reserved and that a full hearing be held to argue the issues.

75 The Monitor and George Miller, Indalex U.S.'s trustee in bankruptcy, argue that the Plan Members should have appealed the Amended Initial Order authorizing the DIP charge, and were precluded from subsequently arguing that their claim ranked in priority to that of the DIP lenders. They take the position that the collateral attack doctrine bars the Plan Members from challenging the DIP financing order. This argument is not convincing. The Plan Members did not receive notice of the motion to approve the DIP financing. Counsel for the Executive Plan's members presented the argument of that plan's members at the first opportunity and repeated it each time he had an occasion to do so. The only time he withdrew their opposition was at the hearing of the motion for authorization to increase the DIP loan amount after being told that the only purpose of the motion was to increase the amount of the authorized loan. The *CCAA* judge set a hearing date for the very purpose of presenting the arguments that Indalex, as plan administrator, could have presented when it requested the amendment to the initial order. It cannot now be argued, therefore, that the Plan Members are barred from defending their interests by the collateral attack doctrine.

D. *Would an Equitable Remedy Be Appropriate in the Circumstances?*

76 The definition of "secured creditor" in s. 2 of the *CCAA* includes a trust in respect of the debtor's property. The Amended Initial Order (at para. 45) provided that the DIP lenders' claims ranked in priority to all trusts, "statutory or otherwise". Indalex U.S. was subrogated to the DIP lenders' claim by operation of the guarantee in the DIP lending agreement.

77 Counsel for the Executive Plan's members argues that the doctrine of equitable subordination should apply to subordinate Indalex U.S.'s subrogated claim to those of the Plan Members. This Court discussed the doctrine of equitable subordination in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558, but did not endorse it, leaving it for future determination (p. 609). I do not need to endorse it here either. Suffice to say that there is no evidence that the lenders committed a wrong or that they engaged in inequitable conduct, and no party has contested the validity of Indalex U.S.'s payment of the US$10 million shortfall.

78 This leaves the constructive trust remedy ordered by the Court of Appeal. It is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property. I agree with my colleague Cromwell J. that this condition is not met in the case at bar. I adopt his reasoning on this issue.

79 Moreover, I am of the view that it was unreasonable for the Court of Appeal to reorder the priorities in this case. The breach of fiduciary duty identified in this case is, in substance, the lack of

notice. Since the Plan Members were allowed to fully argue their case at a hearing specifically held to adjudicate their rights, the *CCAA* court was in a position to fully appreciate the parties' positions.

80 It is difficult to see what gains the Plan Members would have secured had they received notice of the motion that resulted in the Amended Initial Order. The *CCAA* judge made it clear, and his finding is supported by logic, that there was no alternative to the DIP loan that would allow for the sale of the assets on a going-concern basis. The Plan Members presented no evidence to the contrary. They rely on conjecture alone. The Plan Members invoke other cases in which notice was given to plan members and in which the members were able to fully argue their positions. However, in none of those cases were plan members able to secure any additional benefits. Furthermore, the Plan Members were allowed to fully argue their case. As a result, even though Indalex breached its fiduciary duty to notify the Plan Members of the motion that resulted in the Amended Initial Order, their claim remains subordinate to that of Indalex U.S.

IV. Conclusion

81 There are good reasons for giving special protection to members of pension plans in insolvency proceedings. Parliament considered doing so before enacting the most recent amendments to the *CCAA*, but chose not to (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, in force September 18, 2009, SI/2009-68; see also Bill C-501, *An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection)*, 3rd Sess., 40th Parl., March 24, 2010 (subsequently amended by the Standing Committee on Industry, Science and Technology, March 1, 2011)). A report of the Standing Senate Committee on Banking, Trade and Commerce gave the following reasons for this choice:

> Although the Committee recognizes the vulnerability of current pensioners, we do not believe that changes to the BIA regarding pension claims should be made at this time. Current pensioners can also access retirement benefits from the Canada/Quebec Pension Plan, and the Old Age Security and Guaranteed Income Supplement programs, and may have private savings and Registered Retirement Savings Plans that can provide income for them in retirement. The desire expressed by some of our witnesses for greater protection for pensioners and for employees currently participating in an occupational pension plan must be balanced against the interests of others. As we noted earlier, insolvency - at its essence - is characterized by insufficient assets to satisfy everyone, and choices must be made.
>
> The Committee believes that granting the pension protection sought by some of the witnesses would be sufficiently unfair to other stakeholders that we cannot recommend the changes requested. For example, we feel that super

> priority status could unnecessarily reduce the moneys available for distribution to creditors. In turn, credit availability and the cost of credit could be negatively affected, and all those seeking credit in Canada would be disadvantaged.
>
> *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at p. 98; see also p. 88.)

82 In an insolvency process, a *CCAA* court must consider the employer's fiduciary obligations to plan members as their plan administrator. It must grant a remedy where appropriate. However, courts should not use equity to do what they wish Parliament had done through legislation.

83 In view of the fact that the Plan Members were successful on the deemed trust and fiduciary duty issues, I would not order costs against them either in the Court of Appeal or in this Court.

84 I would therefore allow the main appeals without costs in this Court, set aside the orders made by the Court of Appeal, except with respect to orders contained in paras. 9 and 10 of the judgment of the Court of Appeal in the former executive members' appeal and restore the orders of Campbell J. dated February 18, 2010. I would dismiss USW's costs appeal without costs.

The reasons of McLachlin C.J. and Rothstein and Cromwell JJ. were delivered by

CROMWELL J. (Concurring in Result):--

I. Introduction

85 When a business becomes insolvent, many interests are at risk. Creditors may not be able to recover their debts, investors may lose their investments and employees may lose their jobs. If the business is the sponsor of an employee pension plan, the benefits promised by the plan are not immune from that risk. The circumstances leading to these appeals show how that risk can materialize. Pension plans and creditors find themselves in a zero-sum game with not enough money to go around. At a very general level, this case raises the issue of how the law balances the interests of pension plan beneficiaries with those of other creditors.

[para86 Indalex Limited, the sponsor and administrator of employee pension plans, became insolvent and sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Although all current contributions were up to date, the company's pension plans did not have sufficient assets to fulfill the pension promises made to their members. In a series of court-sanctioned steps, which were judged to be in the best interests of all stakeholders, the company borrowed a great deal of money to allow it to continue to operate. The parties injecting the operating money were given a super priority over the claims by other creditors.

When the business was sold, thereby preserving hundreds of jobs, there was a shortfall between the sale proceeds and the debt. The pension plan beneficiaries thus found themselves in a dispute about the priority of their claims. The appellant, Sun Indalex Finance LLC, claimed it had priority by virtue of the super priority granted in the *CCAA* proceedings. The trustee in bankruptcy of the U.S. Debtors (George Miller) and the Monitor (FTI Consulting) joined in the appeal. The plan beneficiaries claimed that they had priority by virtue of a statutory deemed trust under the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and a constructive trust arising from the company's alleged breaches of fiduciary duty.

[para87 The Ontario Court of Appeal sided with the plan beneficiaries and Sun Indalex, the trustee in bankruptcy and the Monitor all appeal. The specific legal points in issue are:

> A. Did the Court of Appeal err in finding that the statutory deemed trust provided for in s. 57(4) of the *PBA* applied to the salaried plan's wind-up deficiency?
>
> B. Did the Court of Appeal err in finding that Indalex breached the fiduciary duties it owed to the pension plan beneficiaries as the plans' administrator and in imposing a constructive trust as a remedy?
>
> C. Did the Court of Appeal err in concluding that the super priority granted in the *CCAA* proceedings did not have priority by virtue of the doctrine of federal paramountcy?
>
> D. Did the Court of Appeal err in its cost endorsement respecting the United Steelworkers ("USW")?

[para88 My view is that the deemed trust does not apply to the disputed funds, and even if it did, the super priority would override it. I conclude that the corporation failed in its duty to the plan beneficiaries as their administrator and that the beneficiaries ought to have been afforded more procedural protections in the *CCAA* proceedings. However, I also conclude that the Court of Appeal erred in using the equitable remedy of a constructive trust to defeat the super priority ordered by the *CCAA* judge. I would therefore allow the main appeals.

II. Facts and Proceedings Below

A. *Overview*

[para89 These appeals concern claims by pension fund members for amounts owed to them by the plans' sponsor and administrator which became insolvent.

90 Indalex Limited is the parent company of three non-operating Canadian companies. I will refer to both Indalex Limited individually and to the group of companies collectively as "Indalex", unless the context requires further clarity. Indalex Limited is the wholly owned subsidiary of its U.S. parent, Indalex Holding Corp. which owned and conducted related operations in the U.S. through its U.S. subsidiaries which I will refer to as the "U.S. debtors".

91 In late March and early April of 2009, Indalex and the U.S. debtors were insolvent and sought protection from their creditors, the former under the Canadian *CCAA*, and the latter under the United States Bankruptcy Code, 11 U.S.C., Chapter 11. The dispute giving rise to these appeals concern the priority granted to lenders in the *CCAA* process for funds advanced to Indalex and whether that priority overrides the claims of two of Indalex's pension plans for funds owed to them.

92 Indalex was the sponsor and administrator of two registered pension plans relevant to these proceedings, one for salaried employees and the other for executive employees. At the time of seeking *CCAA* protection, the salaried plan was being wound up (with a wind-up date of December 31, 2006) and was estimated to have a wind-up deficiency (as of the end of 2007) of roughly $2.252 million. The executive plan, while it was not being wound up, had been closed to new members since 2005. It was estimated to have a deficiency of roughly $2.996 million on wind up. At the time the *CCAA* proceedings were started, all regular current service contributions had been made to both plans.

93 Shortly after Indalex received *CCAA* protection, the *CCAA* judge authorized the company to enter into debtor in possession ("DIP") financing in order to allow it to continue to operate. The court granted the DIP lenders, a syndicate of banks, a "super priority" over "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise": initial order, at para. 35 (joint A.R., vol. I, at pp. 123-24). Repayment of these amounts was guaranteed by the U.S. debtors.

94 Ultimately, with the approval of the *CCAA* court, Indalex sold its business; the purchaser did not assume pension liabilities. A reserve fund was established by the *CCAA* Monitor to answer any outstanding claims. The proceeds of the sale were not sufficient to pay back the DIP lenders and so the U.S. debtors, as guarantors, paid the shortfall and stepped into the shoes of the DIP lenders in terms of priority.

95 The appellant Sun Indalex is a pre-*CCAA* secured creditor of both Indalex and the U.S. debtors. It claims the reserve fund on the basis that the US$10.75 million paid by the guarantors would otherwise have been available to Sun Indalex as a secured creditor of the U.S. debtors in the U.S. bankruptcy proceedings. The respondent plan beneficiaries claim the reserve fund on the basis that they have a wind-up deficiency which is covered by a deemed trust created by s. 57(4) of the *PBA*. This deemed trust includes "an amount of money equal to employer contributions 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.

96 The reserve fund is not sufficient to pay back both Sun Indalex and the pension plans and so the main question on the main appeals is which of the creditors is entitled to priority for their respective claims.

97 The judge at first instance rejected the plan beneficiaries' deemed trust arguments and held that, with respect to the wind-up deficiency, the plan beneficiaries were unsecured creditors, ranking behind those benefitting from the "super priority" and secured creditors (2010 ONSC 1114, 79 C.C.P.B. 301). The Court of Appeal reversed this ruling and held that pension plan deficiencies were subject to deemed and constructive trusts which had priority over the DIP financing and over other secured creditors (2011 ONCA 265, 104 O.R. (3d) 641). Sun Indalex, the trustee in bankruptcy and the Monitor appeal.

B. *Indalex's CCAA Proceedings*

(1) The Initial Order (Joint A.R., vol. I, at p. 112)

98 As noted earlier, Indalex was in financial trouble and, on April 3, 2009, sought and obtained protection from its creditors under the *CCAA*. The order (which I will refer to as the initial order) also contained directions for service on creditors and others: paras. 39-41. The order also contained a so-called "comeback clause" allowing any interested party to apply for a variation of the order, provided that that party served notice on any other party likely to be affected by any such variation: para. 46. It is common ground that the plan beneficiaries did not receive notice of the application for the initial order but the *CCAA* court nevertheless approved the method of and time for service. Full particulars of the deficiencies in the pension plans were before the court in the motion material and the initial order addressed payment of the employer's current service pension contributions.

(2) The DIP Order (Joint A.R., vol. I, at p. 129)

99 On April 8, 2009, in what I will refer to as the DIP order, the *CCAA* judge, Morawetz J., authorized Indalex to borrow funds pursuant to a DIP credit agreement. The judge ordered among many other things, the following:

- He approved abridged notice: para. 1;

- He allowed Indalex to continue making current service contributions to the pension plans, but not special payments: paras. 7(a) and 9(b);

- He barred all proceedings against Indalex, except by consent of Indalex and the Monitor or leave of the court, until May 1, 2009: para. 15;

- He granted the DIP lenders a so-called super priority:

> THIS COURT ORDERS that each of the Administration Charge, the Directors' Charge and the DIP Lenders Charge (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trust, liens, charges and encumbrances, statutory or otherwise (collectively, "Encumbrances") in favour of any Person. [Emphasis added; para. 45.]

- He required Indalex to send notice of the order to all known creditors, other than employees and creditors to which Indalex owed less than $5,000 and stated that Indalex and the Monitor were "at liberty" to serve the Initial Order to interested parties: paras. 49-50.

100 In his endorsement for the DIP order, Morawetz J. found that "there is no other alternative available to the Applicants [Indalex] for a going concern solution" and that DIP financing was necessary: (2009), 52 C.B.R. (5th) 61 (Ont. S.C.J.), at para. 9(c). He noted that the Monitor in its report was of the view that approval of the DIP agreement was both necessary and in the best interests of Indalex and its stakeholders, including its creditors, employees, suppliers and customers: paras. 14-16.

101 The USW, which represented some of the members of the salaried plan, was served with notice of the motion that led to the DIP order, but did not appear. Morawetz J. specifically ordered as follows with regard to service:

> THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged so that this Application is properly returnable today and hereby dispenses with further service thereof. [DIP order, at para. 1]

(3) The DIP Extension Order (Joint A.R., vol. I, at p. 156)

102 On June 12, 2009, Morawetz J. heard and granted an application by Indalex to allow them to borrow approximately $5 million more from the DIP lenders, thus raising the allowed total to US$29.5 million.

103 Counsel for the former executives received the motion material the night before. Counsel for USW was also served with notice. At the motion, the former executives (along with second priority secured noteholders) sought to "reserve their rights with respect to the relief sought": 2009 CanLII 37906 (Ont. S.C.J.), at para. 4. Morawetz J. wrote that any "reservation of rights" would create

uncertainty for the DIP lenders with regard to priority, and may prevent them from extending further advances. Moreover, the parties had presented no alternative to increased DIP financing, which was both "necessary and appropriate" and would, it was to be hoped, "improve the position of the stakeholders": paras. 5-9.

(4) The Bidding Order ((2009), 79 C.C.P.B. 101 (Ont. S.C.J.))

104 On July 2, 2009, Indalex brought a motion for approval of proposed bidding procedures for Indalex's assets. Morawetz J. decided that a stalking horse bid by SAPA Holding AB ("SAPA") for Indalex's assets could count as a qualifying bid. Counsel on behalf of the members of the executive plan appeared, with the concern that "their position and views have not been considered in this process": para. 8. In his decision, Morawetz J. decided that these arguments could be dealt with later, at a sale approval motion: para. 10. The judge said:

> The position facing the retirees is unfortunate. The retirees are currently not receiving what they bargained for. However, reality cannot be ignored and the nature of the Applicants' insolvency is such that there are insufficient assets to meet its liabilities. The retirees are not alone in this respect. The objective of these proceedings is to achieve the best possible outcome for the stakeholders. [Emphasis added; para. 9.]

(5) The Sale Approval Order (Joint A.R., vol. I, at p. 166)

105 On July 20, 2009, Indalex brought two motions before Campbell J.

106 The first motion sought approval for the sale of Indalex's assets as a going concern to SAPA. SAPA was not to assume any pension liabilities. Campbell J. granted an order approving this sale.

107 The second motion sought approval for an interim distribution of the sale proceeds to the DIP lenders. Counsel on behalf of the executive plan members and the USW, representing some of the salaried employees, objected to the planned distribution of the sale proceeds on grounds that a statutory deemed trust applied to the deficiencies in their plans and that Indalex had breached fiduciary duties that it owed to them. Campbell J. ordered the Monitor to pay the DIP agent from the sale proceeds, but also ordered the Monitor to set up a reserve fund in an amount sufficient to answer, among other things, the claims of the plan beneficiaries pending resolution of those matters. Campbell J. ordered that the U.S. debtors be subrogated to the DIP lenders to the extent that the U.S. debtors were required under the guarantee to satisfy the DIP lenders' claims: para. 14.

(6) The Sale and Distribution of Funds

108 SAPA bought Indalex's assets on July 31, 2009. Taking the reserve fund into account, the sale did not produce sufficient funds to repay the DIP lenders in full and so the U.S. debtors paid

US$10,751,247 as guarantor to the DIP lenders: C.A. reasons, at para. 65.

(7) The Order Under Appeal

109 On August 28, 2009, Campbell J. heard claims by the USW (appearing on behalf of some members of the salaried plan) and counsel appearing on behalf of the executive plan members that the wind-up deficiency was subject to a deemed trust. He rejected these claims in a written decision on February 18, 2010. He decided that the s. 57(4) *PBA* deemed trust did not apply to wind-up deficiencies. The executive plan had not been wound up, and therefore there was no wind-up deficiency to be the subject of the deemed trust. As for the salaried plan, Campbell J. held that the wind-up deficiency was not an obligation that had "accrued to the date of the wind up" and as a result did not fall within the terms of the s. 57(4) deemed trust.

110 Indalex had asked for the stay granted under the initial order to be lifted so that it could assign itself into bankruptcy. Because he did not find a deemed trust, Campbell J. did not feel that he needed to decide on the motion to lift the stay.

(8) The Decision of the Ontario Court of Appeal

111 The Ontario Court of Appeal allowed an appeal from the decision of Campbell J.

112 Writing for a unanimous panel, Gillese J.A. decided that the s. 57(4) deemed trust is applicable to wind-up deficiencies. She took the view that s. 57(4)'s reference to "employer contributions accrued to the date of the wind up but not yet due" included all amounts that the employer owed on the wind-up of its pension plan: para. 101. In particular, she concluded that the deemed trust applied to the wind-up deficiency in the salaried plan. Gillese J.A. declined, however, to decide whether the deemed trust also applied to deficiencies in the executive plan, which had not been wound up by the relevant date: paras. 110-12. A decision on this latter point was unnecessary given her finding on the applicability of a constructive trust in this case.

113 Gillese J.A. found that the super priority provided for in the DIP order did not trump the deemed trust over the salaried plan's wind-up deficiency. Morawetz J. had not "invoked" the issue of paramountcy or made an explicit finding that the requirements of federal law required that the provincially created deemed trust must be overridden: paras. 178-79. Gillese J.A. also took the view that this Court's decision in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, did not mean that provincially created priorities that would be ineffective under the *Bankruptcy and Insolvency* Act, R.S.C. 1985, c. B-3 ("BIA"), were also ineffective under the *CCAA*: paras. 185-96. The deemed trust therefore ranked ahead of the DIP security.

114 In addition to her findings regarding deemed trusts, Gillese J.A. granted the plan beneficiaries a constructive trust over the amount of the reserve fund on the ground that Indalex, as pension plan administrator, had breached fiduciary duties that it owed to the plan beneficiaries during the *CCAA* proceedings.

115 She held that as a plan administrator who was also an employer, Indalex had fiduciary duties both to the plan beneficiaries and to the corporation: para. 129. In her view, Indalex was subject to both sets of duties throughout the *CCAA* proceedings and it had breached its duties to the plan beneficiaries in several ways. While Indalex had the right to initiate *CCAA* proceedings, this action made the plan beneficiaries vulnerable and therefore triggered its fiduciary obligations as plan administrator: paras. 132-33. Gillese J.A. enumerated the many ways in which she thought Indalex subsequently failed as plan administrator: it did nothing in the *CCAA* proceedings to fund the deficit in the underfunded plans; it applied for *CCAA* protection without notice to the beneficiaries; it obtained DIP financing on the condition that DIP lenders be granted a super priority over "statutory trusts"; it obtained this financing without notice to the plan beneficiaries; it sold its assets knowing the purchaser was not taking over the plans; and it attempted to enter into voluntary bankruptcy, which would defeat any deemed trust claims the beneficiaries might have asserted: para. 139. Gillese J.A. also noted that throughout the *CCAA* proceedings Indalex was in a conflict of interest because it was acting for both the corporation and the beneficiaries.

116 Indalex's failure to live up to its fiduciary duties meant that the plan beneficiaries were entitled to a constructive trust over the amount of the reserve fund: para. 204. Since the beneficiaries had been wronged by Indalex, and the U.S. debtors were not, with respect to Indalex, an "arm's length innocent third party" the appropriate response was to grant the beneficiaries a constructive trust: para. 204. Her conclusion on this point applied equally to the salaried and executive plans.

III. Analysis

A. *First Issue: Did the Court of Appeal Err in Finding That the Deemed Statutory Trust Provided for in Section 57(4) of the PBA Applied to the Salaried Plan's Wind-up Deficiency?*

(1) Introduction

117 The main issue addressed here concerns whether the statutory deemed trust provided for in s. 57(4) of the *PBA* applies to wind-up deficiencies, the payment of which is provided for in s. 75(1)(b).

118 The deemed trust created by s. 57(4) applies to "employer contributions accrued to the date of the wind-up but not yet due under the plan or regulations". Thus, to be subject to the deemed trust, the pension plan must be wound up and the amounts in question must meet three requirements. They must be (1) "employer contributions", (2) "accrued to the date of the wind-up" and (3) "not yet due". A wind-up deficiency arises "[w]here a pension plan is wound up": s. 75(1). I agree with my colleagues that there can be no deemed trust for the executive plan, because that plan had not been wound up at the relevant date. What follows, therefore, is relevant only to the salaried plan.

119 The wind-up deficiency payments are "employer contributions" which are "not yet due" as of

the date of wind-up within the meaning of the *PBA*. The main issue before us, therefore, boils down to the narrow interpretative question of whether the wind-up deficiency described in s. 75(1)(b) is "accrued to the date of the wind-up".

120 Campbell J. at first instance found that it was not, while the Court of Appeal reached the opposite conclusion. In essence, the Court of Appeal reasoned that the deemed trust in s. 57(4) "applies to all employer contributions that are required to be made pursuant to s. 75", that is, to "all amounts owed by the employer on the wind-up of its pension plan": para. 101.

121 I respectfully disagree with the Court of Appeal's conclusion for three main reasons. First, the most plausible grammatical and ordinary sense of the words "accrued to the date of the wind up" is that the amounts referred to are precisely ascertained immediately before the effective date of the plan's wind-up. The wind-up deficiency only arises upon wind-up and it is neither ascertained nor ascertainable on the date fixed for wind-up. Second, the broader statutory context reinforces this view: the language of the deemed trusts in s. 57(3) and (4) is virtually exactly repeated in s. 75(1)(a), suggesting that both deemed trusts refer to the liability on wind-up referred to in s. 75(1)(a) and not to the further and distinct wind-up deficiency liability created under s. 75(1)(b). Finally, the legislative evolution and history of these provisions show, in my view, that the legislature never intended to include the wind-up deficiency in a statutory deemed trust.

122 Before turning to the precise interpretative issue, it will be helpful to provide some context about the employer's wind-up obligations and the deemed trust provisions that are the subject of this dispute.

(2) Employer Obligations on Wind Up

123 A "wind up" means that the plan is terminated and the plan assets are distributed: see *PBA*, s. 1(1), definition of "wind up". The employer's liability on wind-up consists of two main components. The first is provided for in s. 75(1)(a) and includes "an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund". This liability applies to contributions that were due as at the wind-up date but does *not* include payments required by s. 75(1)(b) that arise as a result of the wind up: A. N. Kaplan, *Pension Law* (2006), at pp. 541-42. This second liability is known as the wind-up deficiency amount. The employer must pay all additional sums to the extent that the assets of the pension fund are insufficient to cover the value of all immediately vested and accelerated benefits and grow-in benefits: Kaplan, at p. 542. Without going into detail, there are certain statutory benefits that may arise only on wind-up, such as certain benefit enhancements and the potential for acceleration of pension entitlements. Thus, wind-up will usually result in additional employer liabilities over and above those arising from the obligation to pay all benefits provided for in the plan itself: see, e.g., ss. 73 and 74; Kaplan, at p. 542. As the Court of Appeal concluded, the payments provided for under s. 75(1)(a) are those which the employer had to make while the plan was ongoing, while s. 75(1)(b) refers to the employer's obligation to make up for any wind-up

deficiency: paras. 90-91.

124 For convenience, the provision as it then stood is set out here.

> **75.** (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,
>
> (a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and
>
> (b) an amount equal to the amount by which,
>
> (i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,
>
> (ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and
>
> (iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,
>
> exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

125 While a wind up is effective as of a fixed date, a wind up is nonetheless best thought of not simply as a moment or a single event, but as a process. It begins by a triggering event and continues until all of the plan assets have been distributed. To oversimplify somewhat, the wind-up process involves the following components.

126 The assets and liabilities of the plan as of the wind-up date must be determined. As noted earlier, the precise extent of the liability, while *fixed as of that date*, will not be ascertained or ascertainable *on that date*. The extent of the liability may depend on choices open to plan beneficiaries under the plan and on the exercise by them of certain statutory rights beyond the options that would otherwise have been available under the plan itself. The plan members must be notified of the wind-up and have their entitlements and options set out for them and given an opportunity to make their choices. The plan administrator must file a wind-up report which includes a statement of the plan's assets and liabilities, the benefits payable under the terms of the plan, and the method of allocating and distributing the assets including the priorities for the payment of benefits: *PBA*, s. 70(1), and R.R.O. 1990, Reg. 909, s. 29 (the "*PBA* Regulations").

127 Benefits to members may take the form of "cash refunds, immediate or deferred annuities, transfers to registered retirement saving plans, [etc.] ... In principle, the value of these benefits is the present value of the benefits accrued to the date of plan termination": The *Mercer Pension Manual* (loose-leaf), vol. 1, at p. 10-41. That present value is an actuarial calculation performed on the basis of various assumptions including assumptions about investment return, mortality and so forth.

128 If, when the assets and liabilities are calculated, the assets are insufficient to satisfy the liabilities, the employer (i.e. the plan sponsor) must make up for any wind-up deficiency: *PBA*, s. 75(1)(b). An employer can elect to space these payments out over the course of five years: *PBA* Regulations, s. 31(2). Because these payments are based on the extent to which there is a deficit between assets in the pension plan and the benefits owed to beneficiaries, their amount varies with the market and other assumed elements of the calculation over the course of the permitted five years.

129 To take the salaried plan as an example, at the time of wind-up, all regular current service contributions had been made: C.A. reasons, at para. 33. The wind-up deficiency was initially estimated to be $1,655,200. Indalex made special wind-up payments of $709,013 in 2007 and $875,313 in 2008, but as of December 31, 2008, the wind-up deficiency was $1,795,600 -- i.e. higher than it had been two years before, notwithstanding that payments of roughly $1.6 million had been made: C.A. reasons, at para. 32. Indalex made another payment of $601,000 in April 2009: C.A. reasons, at para. 32.

(3) The Deemed Trust Provisions

130 The *PBA* contains provisions whose purpose is to exempt money owing to a pension plan, and which is held or owing by the employer, from being seized or attached by the employer's other creditors: Kaplan, at p. 395. This is accomplished by creating a "deemed trust" with respect to certain pension contributions such that these amounts are held by the employer in trust for the employees or pension beneficiaries.

131 There are two deemed trusts that we must examine here, one relating to employer contributions that are *due but have not been paid* and another relating to employer contributions *accrued but not due*. This second deemed trust is the one in issue here, but it is important to understand how the two fit together.

132 The deemed trust relating to employer contributions "due and not paid" is found in s. 57(3). The *PBA* and *PBA* regulations contain many provisions relating to contributions required by employers, the due dates for which are specified. Briefly, the required contributions are these.

133 When a pension is ongoing, employers need to make regular current service cost contributions. These are made monthly, within 30 days after the month to which they relate: *PBA* Regulations, s. 4(4)3. There are also special payments, which relate to deficiencies between a pension plan's assets and liabilities. There are "going-concern" deficiencies and "solvency"

deficiencies, the distinction between which is unimportant for the purposes of these appeals. A plan administrator must regularly file actuarial reports, which may disclose deficiencies: *PBA* Regulations, s. 14. Where there is a going-concern deficiency the employer must make equal monthly payments over a 15-year period to rectify it: *PBA* Regulations, s. 5(1)(b). Where there is a solvency deficiency, the employer must make equal monthly payments over a five-year period to rectify it: *PBA* Regulations, s. 5(1)(e). Once these regular or special payments become due but have not been paid, they are subject to the s. 57(3) deemed trust.

134 I turn next to the s. 57(4) deemed trust, which gives rise to the question before us. The subsection provides that "[w]here a pension plan is wound up ... an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan 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 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).

140 Of course, the meaning of the word "accrued" may vary with context. In general, when the term "accrued" is used in relation to legal rights, its common meaning is that the right has become fully constituted even though the monetary implications of its enforcement are not yet known or knowable. Thus, we speak of the "accrual" of a cause of action in tort when all of the elements of the cause of action come into existence, even though the extent of the damage may well not be known or knowable at that time: see, e.g., *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53. However, when the term is used in relation to a sum of money, it will generally refer to an amount that is at the present time either quantified or exactly quantifiable but which may or may not be due.

141 In some contexts, a liability is said to accrue when it becomes due. An accrued liability is said to be "properly chargeable" or "owing on a given day" or "completely constituted": see, e.g., *Black's Law Dictionary* (9th ed. 2009), at p. 997, "accrued liability"; D.A. Dukelow, *The Dictionary of Canadian Law* (4th ed. 2011), at p. 13, "accrued liability"; *Hydro-Electric Power Commission of Ontario v. Albright* (1922), 64 S.C.R. 306.

142 In other contexts, an amount which has accrued may not yet be due. For example, we speak of "accrued interest" meaning a precise, quantified amount of interest that has been earned but may not yet be payable. The term "accrual" is used in the same way in "accrual accounting". In accrual method accounting, "transactions that give rise to revenue or costs are recognized in the accounts when they are earned and incurred respectively": B. J. Arnold, *Timing and Income Taxation: The Principles of Income Measurement for Tax Purposes* (1983), at p. 44. Revenue is earned when the recipient "substantially completes performance of everything he or she is required to do as long as the amount due is ascertainable and there is no uncertainty about its collection": P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (7th ed., 2010), at s. 6.5(b); see also Canadian Institute of Chartered Accountants, *CICA Handbook - Accounting*, Part II, s. 1000, at paras. 41-44. In this context, the amount must be ascertained at the time of accrual.

143 The *Hydro-Electric Power Commission* case offers a helpful definition of the word "accrued" in this sense. On a sale of shares, the vendor undertook to provide on completion "a sum estimated

by him to be equal to sinking fund payments [on the bonds and debentures] which shall have accrued but shall not be due at the time for completion": p. 344 (emphasis added). The bonds and debentures required the company to pay on July 1 of each year a fixed sum for each electrical horsepower sold and paid for during the preceding calendar year. A dispute arose as to what amounts were payable in this respect on completion. Duff J. held that in this context accrued meant "completely constituted", referring to this as a "well recognized usage": p. 312. He went on:

> Where ... a lump sum is made payable on a specified date and where, having regard to the purposes of the payment or to the terms of the instrument, this sum must be considered to be made up of an accumulation of sums in respect of which the right to receive payment is completely constituted before the date fixed for payment, then it is quite within the settled usage of lawyers to describe each of such accumulated parts as a sum accrued or accrued due before the date of payment: p. 316.

Thus, at every point at which a liability to pay a fixed sum arose under the terms of the contract, that liability accrued. It was fully constituted even though not yet due because the obligation to make the payment was in the future. In reaching this conclusion, Duff J. noted that the bonds and debentures used the word "accrued" in contrast to "due" and that this strengthened the interpretation of "accrued" as an obligation fully constituted but not yet payable. Similarly in s. 57(4), the word "accrued" is used in contrast to the word "due".

144 Given my understanding of the ordinary meaning of the word "accrued", I must respectfully disagree with my colleague, Justice Deschamps' position that the wind-up deficiency can be said to have "accrued" to the date of wind up. In her view, "[s]ince the employees cease to accumulate entitlements when the plan is wound up, the entitlements that are used to calculate the contributions have all been accumulated before the wind-up date" (para. 34) and "no new liabilities accrue at the time of or after the wind up" (para. 36). My colleague maintains that "[t]he fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes" (para. 37 referring to *Canadian Pacific Ltd. v. M.N.R.* (1998), 41 O.R. (3d) 606 (C.A.)).

145 I cannot agree that no new liability accrues on or after the wind up. As discussed in more detail earlier, the wind-up deficiency in s. 75(1)(b) is made up of the difference between the plan's assets and liabilities calculated as of the date of wind up. On wind up, the *PBA* accords statutory entitlements and protections to employees that would not otherwise be available: Kaplan, at p. 532. Wind up therefore gives rise to new liabilities. In particular, on wind up, and only on wind up, plan beneficiaries are entitled, under s. 74, to make elections regarding the payment of their benefits. The plan's liabilities cannot be determined until those elections are made. Contrary to what my colleague Justice Deschamps suggests, the extent of the wind-up deficiency depends on employee rights that arise only upon wind up and with respect to which employees make elections only after wind up.

146 Moreover, the wind-up deficiency will vary after wind up because the amount of money necessary to provide for the payment of the plan sponsor's liabilities will vary with the market. Section 31 of the *PBA* Regulations allows s. 75 payments to be spaced out over the course of five years. As we have seen, the amount of the wind-up deficiency will fluctuate over this period (I set out earlier how this amount in fact fluctuated markedly in the case of the salaried plan in issue here). Thus, while estimates are periodically made and reported after the wind up to determine how much the employer needs to pay, the precise amount of the wind-up deficiency is not ascertained or ascertainable on the date of the wind up.

147 I turn next to the ordinary and grammatical sense of the words "to the date of the wind up" in s. 57(4). In my view, these words indicate that only those contributions that accrue before the date of wind up, and not those amounts the liability for which arises only on the day of wind up -- that is, the wind-up deficiency -- are included.

148 Where the legislature intends to include the date of wind up, it has used suitable language to effect that purpose. For example, the English version of a provision amending the *PBA* in 2010 (c. 24, s. 21(2)), s. 68(2)(c), indicates which trade unions are entitled to notice of the wind up:

> (2) If the employer or the administrator, as the case may be, intends to wind up the pension plan, the administrator shall give written notice of the intended wind up to,
>
> ...
>
> (c) each trade union that represents members of the pension plan or that, <u>on the date of the wind up</u>, represented the members, former members or retired members of the pension plan;

In contrast to the phrase "to the date of wind up", "on the date of wind up" clearly includes the date of wind up. (The French version does not indicate a different intention.) Similarly, s. 70(6), which formed part of the *PBA* until 2012 (rep. S.O. 2010, c. 9, s. 52(5)), read as follows:

> (6) On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan <u>on the effective date of the partial wind up</u>.

The words "on the effective date of the partial wind up" indicate that the members are entitled to those benefits from the date of the partial wind up, in the sense that members can claim their benefits beginning on the date of the wind up itself. This is how the legislature expresses itself when it wants to speak of a period of time including a specific date. By comparison, "to the date of the wind up" is devoid of language that would include the actual date of wind up. This conclusion is further supported by the structure of the *PBA* and its legislative history and evolution, to which I

will turn shortly.

149 To sum up with respect to the ordinary and grammatical meaning of the phrase "accrued to the date of the wind up", the most plausible ordinary and grammatical meaning is that such amounts are fully constituted and precisely ascertained immediately before the date fixed as the date of wind up. Thus, according to the ordinary and grammatical meaning of the words, the wind-up deficiency obligation set out in s. 75(1)(b) has not "accrued to the date of the wind up" as required by s. 57(4). Moreover, the liability for the wind-up deficiency arises where a pension plan is wound up (s. 75(1)(b)) and so it cannot be a liability that "accrued to the date of the wind up" (s. 57(4)).

(b) *The Scheme of the Act*

150 As discussed earlier, s. 57 establishes deemed trusts over funds which must be contributed to a pension plan, including the one in s. 57(4), which is at issue here. It is helpful to consider these deemed trusts in the context of the obligations to pay funds which give rise to them. Specifically, the relationship between the deemed trust provisions in s. 57(3) and (4), on one hand, and s. 75(1), which sets out liabilities on wind up on the other. According to my colleague Justice Deschamps, s. 75(1) "elegantly parallels the wind-up deemed trust provision" (para. 42) such that the deemed trusts must include the wind-up deficiency. I disagree. In my view, the deemed trusts parallel only s. 75(1)(a), which does not relate to the wind-up deficiency. The correspondence between the deemed trusts and s. 75(1)(a), and the absence of any such correspondence with s. 75(1)(b), makes it clear that the wind-up deficiency is not covered by the deemed trust provisions.

151 I would recall here the difference between the deemed trusts created by s. 57(3) and (4). While a plan is ongoing, there may be payments which the employer is required to, but has failed to make. The s. 57(3) trust applies to these payments because they are "due and not paid". When a plan is wound up, however, there will be payments that are outstanding in the sense that they are fully constituted, but not yet due. This occurs with respect to the so-called stub period referred to earlier. During this stub period, regular and special liabilities will accrue on a daily basis, as provided for in s. 58(1), but may not be due at the time of wind up. While s. 57(3) cannot apply to these payments because they are not yet due, the deemed trust under s. 57(4) applies to these payments because liability for them has "accrued to the date of the wind up" and they are "not yet due".

152 The important point is how these two deemed trust provisions relate to the wind-up liabilities as described in ss. 75(1)(a) and 75(1)(b). The two paragraphs refer to sums of money that are different in kind: while s. 75(1)(a) refers to liabilities that accrue before wind up and that are created elsewhere in the Act, s. 75(1)(b) creates a completely new liability that comes into existence only once the plan is wound up. There is no dispute, as I understand it, that these two paragraphs refer to different liabilities and that it is the liability described in s. 75(1)(b) that is the wind-up deficiency in issue here. The parties do not dispute that s. 75(1)(a) does *not* include wind-up deficiency payments.

153 It is striking how closely the text of s. 75(1)(a) -- which does not relate to the wind-up deficiency -- tracks the language of the deemed trust provisions in s. 57(3) and (4). As noted, s.

57(3) deals with "employer contributions due and not paid", while s. 57(4) deals with "employer contributions accrued to the date of the wind up but not yet due." Section 75(1)(a) includes both of these types of employer contributions. It refers to "payments that ... are due ... and that have not been paid" (i.e. subject to the deemed trust under s. 57(3)) or that have "accrued and that have not been paid" (i.e. subject to the deemed trust under s. 57(4) to the extent that these payments accrued to the date of wind up). This very close tracking of the language between s. 57(3) and (4) on the one hand and s. 75(1)(a) on the other, and the absence of any correspondence between the language of these deemed trust provisions with s. 75(1)(b), suggests that the s. 57(3) and (4) deemed trusts refer to the liability described in s. 75(1)(a) and not to the wind-up deficiency created by s. 75(1)(b). It is difficult to understand why, if the intention had been for s. 57(4) to capture the wind-up deficiency liability under s. 75(1)(b), the legislature would have so closely tracked the language of s. 75(1)(a) alone in creating the deemed trusts. Thus, in my respectful view, the elegant parallel to which my colleague, Justice Deschamps refers exists only between the deemed trust and s. 75(1)(a), and not between the deemed trust and the wind-up deficiency.

154 I conclude that the scheme of the *PBA* reinforces my conclusion that the ordinary grammatical sense of the words in s. 57(4) does not extend to the wind-up deficiency provided for in s. 75(1)(b).

(c) *Legislative History and Evolution*

155 Legislative history and evolution may form an important part of the overall context within which a provision should be interpreted. Legislative evolution refers to the various formulations of the provision while legislative history refers to evidence about the provision's conception, preparation and enactment: see, e.g., *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 43.

156 Both the legislative evolution and history of the *PBA* show that it was never the legislature's intention to include the wind-up deficiency in the deemed trust. The evolution and history of the *PBA* are rather intricate and sometimes difficult to follow so I will review them briefly here before delving into a more detailed analysis.

157 The deemed trust was first introduced into the *PBA* in 1973. At that time, it covered employee contributions held by the employer and employer contributions that were due but not paid. In 1980, the *PBA* was amended so that the deemed trust was expanded to include employer contributions whether they were due or not. Also, new provisions were added allowing for employee elections and requiring additional payments by the employer where a plan was wound up. The 1980 amendments gave rise to confusion on two fronts: first, it was unclear whether the payments that were required on wind up were subject to the deemed trust; second, it was unclear whether a lien over some employer contributions covered the same amount as the deemed trust. In 1983, both these points were clarified. The sections were reworded and rearranged to make it clear that the wind-up deficiency was distinct from the amounts covered by the deemed trust, and that the

lien and the deemed trust covered the same amount. A statement by the responsible Minister in 1982 confirms that *the deemed trusts were never intended to cover the wind-up deficiency*.

158 My colleague, Justice Deschamps maintains that this history suggests an evolution in the intention of the legislature from protecting "only the service contributions that were due ... to all amounts due and accrued upon wind up" (para. 42). I respectfully disagree. In my view, the history and evolution of the *PBA* leading up to and including 1983 show that the legislature never intended to include the wind-up deficiency in the deemed trust. Moreover, legislative evolution after 1983 confirms that this intention did not change.

(i) *The Pension Benefits Amendment Act,1973*, S.O. 1973, c. 113

159 So far as I can determine, statutory deemed trusts were first introduced into the *PBA* by *The Pension Benefits Amendment Act, 1973*, S.O. 1973, c. 113, s. 6. Those amendments created deemed trusts over two amounts: employee pension contributions received by employers (s. 23*a* (1), similar to the deemed trust in the current s. 57(1)) and employer contributions that had fallen due under the plan (s. 23*a* (3), similar to the current s. 57(3) deemed trust for employer contributions "due and not paid"). The full text of these provisions and those referred to below, up to the current version of the 1990 Act, are found in the Appendix.

(ii) *The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80

160 Ontario undertook significant pension reform leading to *The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80; see Kaplan at pp. 54-56. I will concentrate on the deemed trust provisions and how they related to the liabilities on wind up and, for ease of reference, I will refer to the sections as they were renumbered in the 1980 consolidation: R.S.O. 1980, c. 373. The 1980 legislation expanded the deemed trust relating to employer contributions. Although far from clear, the new provisions appear to have created a deemed trust and lien over the employer contributions whether otherwise payable or not and calculated as if the plan had been wound up on the relevant date.

161 It was unclear after the reforms of 1980 whether the deemed trust applied to all employer contributions that arose on wind up. According to s. 23(4), on any given date, the trust extended to an amount to be determined "as if the plan had been wound up on that date". However, the provisions of the 1980 version of the Act did not explicitly state what such a calculation would include. Under s. 21(2) of the 1980 statute, the employer was obligated to pay on wind up "all amounts that would otherwise have been required to be paid to meet the tests for solvency ... , up to the date of such termination or winding up". Under s. 32, however, the employer had to make a payment on wind up that was to be "[i]n addition" to that due under s. 21(2). Whether the legislature intended that the trust should cover this latter payment was left unclear.

162 It was also unclear whether the lien applied to a different amount than was subject to the deemed trust. According to s. 23(3), "the members have a lien upon the assets of the employer in

such amount that in the ordinary course of business would be entered into the books of account whether so entered or not". This comes in the middle of two portions of the provision which explicitly refer to the deemed trust, but it is not clear whether the legislature intended to refer to the same amount throughout the provision.

(iii) *The Pension Benefits Amendment Act, 1983*, S.O. 1983, c. 2

163 The 1983 amendments substantially clarified the scope of the deemed trust and lien for employer contributions. They make clear that neither the deemed trust nor the lien applied to the wind-up deficiency; the responsible Minister confirmed that this was the intention of the amendments.

164 The new provision was amended by s. 3 of the 1983 amendments and is found in s. 23(4) which provided:

> (4) An employer who is required by a pension plan to contribute to the pension plan shall be deemed to hold in trust for the members of the pension plan an amount of money equal to the total of,
>
> (a) all moneys that the employer is required to pay into the pension plan to meet,
>
> (i) the current service cost, and
> (ii) the special payments prescribed by the regulations,
>
> that are due under the pension plan or the regulations and have not been paid into the pension plan; and
>
> (b) where the pension plan is terminated or wound up, any other money that the employer is liable to pay under clause 21 (2) (a).

Section 21(2)(a) provides that on wind up, the employers must pay an amount equal to *the current service cost and the special payments* that "have accrued to and including the date of the termination winding up but, under the terms of the pension plan or the regulations, are not due on that date"; the provision adds that these amounts shall be deemed to accrue on a daily basis. These provisions make it clear that the s. 23(4) deemed trust applies only to the special payments and current service costs that have accrued, on a daily basis, up to and including the date of wind up. The deemed trust clearly does not extend to the wind-up deficiency.

165 The provision referring to the additional payments required on wind up also makes clear that those payments are not within the scope of the deemed trust. These additional liabilities were described by s. 32, a provision very similar to s. 75(1)(b). These amounts are first, the amount guaranteed by the Guarantee Fund and, second, the value of pension benefits vested under the plan that exceed the value of the assets of the plan. Section 32(2) specifies that these amounts *are* "in addition to the amounts that the employer is liable to pay under subsection 21(2)" (which are the payments comparable to the current s. 75(1)(a) payments) and that *only the latter* fall within the deemed trust. The inevitable conclusion is that, in 1983, the wind-up deficiency was not included in the scope of the deemed trust.

166 The 1983 amendments also clarified the scope of the lien. They indicated that the scope of the lien was identical to the scope of the deemed trust. Section 23(5) specified that the lien extended only to the amounts that were deemed to be held in trust under s. 23(4) (i.e. the *current service costs and special payments that had accrued to and including the date of the wind up but are not yet due)*.

167 This makes two things clear: that the lien covers the same amounts as the deemed trust, and that neither covers the wind-up deficiency.

168 A brief, but significant piece of legislative history seems to me to dispel any possible doubt. In speaking at first reading of the 1983 amendments, the Minister responsible, the Honourable Robert Elgie said this:

> The first group of today's amendments makes up the housekeeping changes needed for us to do what we set out to do in late 1980; that is, to guarantee pension benefits following the windup of a defined pension benefit plan. These amendments will clarify the ways in which we can attain that goal.
>
> In Bill 214 [i.e. the 1980 amendments] the employees were given a lien on the employer's assets for employee contributions to a pension plan collected by the employer, as well as accrued employer contributions... .
>
> Unfortunately, this protection has resulted in different legal interpretations on the extent of the lien. An argument has been advanced that the amount of the lien includes an employer's potential future liability on the windup of a pension plan. This was never intended and is not necessary to provide the required protection. The amendment to section 23 clarified the intent of Bill 214. [Emphasis added.]
>
> (*Legislature of Ontario Debates: Official Report (Hansard)*, No. 99, 2nd Sess., 32nd Parl., July 7, 1982, p. 3568)

The 1983 amendments made the scope of the lien correspond precisely to the scope of the deemed trust over the employer's accrued contributions. It is thus clear from this statement that it was never the legislative intention that either should apply to "an employer's potential future liability" on wind up (i.e. the wind-up deficiency). In 1983, there is therefore, in my view, virtually irrefutable evidence of legislative intent to do exactly the opposite of what the Court of Appeal held in this case had been done.

169 Subsequent legislative evolution shows no change in this legislative intent. In fact, subsequent amendments demonstrate a clear legislative intent to exclude from the deemed trust employer liabilities that arise only upon wind up of the plan.

(iv) *Pension Benefits Act,1987*, S.O. 1987, c. 35

170 Amendments to the *PBA* in 1987 resulted in it being substantially in its current form. With those amendments, the extent of the deemed trusts was further clarified. The provision in the 1983 version of the Act combined within a single subsection a deemed trust for employer contributions that were due and not paid (s. 23(4)(a)) and employer contributions that had accrued to and including the date of wind up but which were not yet due (s. 23(4)(b), referring to s. 21(2)(a)). In the 1987 amendments, these two trusts were each given their own subsection and their scope was further clarified. Moreover, after the 1987 revision, one no longer had to refer to a separate provision (formerly s. 21(2)(a)) to determine the scope of the trust covering payments that were accrued but not yet due. Thus, while the substance of the provisions did not change in 1987, their form was simplified.

171 The new s. 58(3) (which is exactly the same as the current s. 57(3)) replaced the former s. 23(4)(a). This created a trust for employer contributions due and not paid. Section 58(4) (which is exactly the same as s. 57(4) stood at the time) replaced the former s. 23(4)(b) and part of s. 21(2)(a) and created a trust that arises on wind up and covers "employer contributions accrued to the date of the wind up but not yet due".

172 The 1987 amendment also shows that the legislature adverted to the difference between "to the date of the wind up" and "to and including" the date of wind up and chose the former. This is reflected in a small but significant change in the wording of the relevant provisions. The former provision, s. 23(4)(b), by referring to s. 21(2)(a) captured current service costs and special payments that "have accrued to and including the date of the termination or winding up." The new version in s. 58(4) deletes the words "and including", putting the section in its present form. This deletion, to my way of thinking, reinforces the legislative intent to *exclude* from the deemed trust liabilities that arise only *on* the date of wind up. Respectfully, the legislative record does not support Deschamps J.'s view that there was a legislative evolution towards a more expanded deemed trust. Quite the opposite.

173 To sum up, I draw the following conclusions from this review of the legislative evolution and history. The legislation differentiates between two types of employer liability relevant to this case.

The first is the contributions required to cover current service costs and any other payments that are either due or have accrued on a daily basis up to the relevant time. These are the payments referred to in the current s. 75(1)(a), that is, payments due or accrued but not paid. The second relates to additional contributions required when a plan is wound up which I have referred to as the wind-up deficiency. These payments are addressed in s. 75(1)(b). The legislative history and evolution show that the deemed trusts under s. 57(3) and (4) were intended to apply only to the former amounts and that it was never the intention that there should be a deemed trust or a lien with respect to an employer's potential future liabilities that arise once the plan is wound up.

(d) *The Purpose of the Legislation*

174 Excluding the wind-up deficiency from the deemed trust is consistent with the broader purposes of the legislation. Pension legislation aims at important protective purposes. These protective purposes, however, are not pursued at all costs and are clearly intended to be balanced with other important interests within the context of a carefully calibrated scheme: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152, at paras. 13-14.

175 In this instance, the legislature has created trusts over contributions that were due or accrued to the date of the wind up in order to protect, to some degree, the rights of pension plan beneficiaries and employees from the claims of the employer's other creditors. However, there is also good reason to think that the legislature had in mind other competing objectives in not extending the deemed trust to the wind-up deficiency.

176 First, if there were to be a deemed trust over all employer liabilities that arise when a plan is wound up, much simpler and clearer words could readily be found to achieve that objective.

177 Second, extending the deemed trust protections to the wind-up deficiency might well be viewed as counter-productive in the greater scheme of things. A deemed trust of that nature might give rise to considerable uncertainty on the part of other creditors and potential lenders. This uncertainty might not only complicate creditors' rights, but it might also affect the availability of funds from lenders. The wind-up liability is potentially large and, while the business is ongoing, the extent of the liability is unknown and unknowable for up to five years. Its amount may, as the facts of this case disclose, fluctuate dramatically during this time. A liability of this nature could make it very difficult to assess the creditworthiness of a borrower and make an appropriate apportionment of payment among creditors extremely difficult.

178 While I agree that the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. In her conclusion, Justice Deschamps notes that although the protection of pension plans is a worthy objective, courts should not use the law of equity to re-arrange the priorities that Parliament has established under the *CCAA*. This is a matter of policy where courts must defer to legislatures (reasons of Justice Deschamps, at para. 82). In my view, my colleague's comments on this point are

equally applicable to the policy decisions reflected in the text of the *PBA*. The decision as to the level of protection that should be provided to pension beneficiaries is one to be left to the Ontario legislature. Faced with the language in the *PBA*, I would be slow to infer that the broader protective purpose, with all its potential disadvantages, was intended. In short, the interpretation I would adopt is consistent with a balanced approach to protection of benefits which the legislature intended.

179 For these reasons, I am of the respectful view that the Court of Appeal erred in finding that the s. 57(4) deemed trust applied to the wind-up deficiency.

B. *Second Issue: Did the Court of Appeal Err in Finding That Indalex Breached the Fiduciary Duties it Owed to the Pension Beneficiaries as the Plans' Administrator and in Imposing a Constructive Trust as a Remedy?*

(1) Introduction

180 The Court of Appeal found that during the *CCAA* proceedings Indalex breached its fiduciary obligations as administrator of the pension plans: para. 116. As a remedy, it imposed a remedial constructive trust over the reserve fund, effectively giving the plan beneficiaries recovery of 100 cents on the dollar in priority to all other creditors, including creditors entitled to the super priority ordered by the *CCAA* court.

181 The breaches identified by the Court of Appeal fall into three categories. First, Indalex breached the prohibition against a fiduciary being in a position of conflict of interest because its interests in dealing with its insolvency conflicted with its duties as plan administrator to act in the best interests of the plans' members and beneficiaries: para. 142. According to the Court of Appeal, the simple fact that Indalex found itself in this position of conflict of interest was, of itself, a breach of its fiduciary duty as plan administrator. Second, Indalex breached its fiduciary duty by applying, without notice to the plans' beneficiaries, for *CCAA* protection: para. 139. Third, Indalex breached its fiduciary duty by seeking and/or obtaining various relief in the *CCAA* proceedings including the "super priority" in favour of the DIP lenders, approval of the sale of the business knowing that no payment would be made to the underfunded plans over the statutory deemed trusts and seeking to be put into bankruptcy with the intention of defeating the deemed trust claims: para. 139. As a remedy for these breaches of fiduciary duty the court imposed a constructive trust.

182 In my view, the Court of Appeal took much too expansive a view of the fiduciary duties owed by Indalex as plan administrator and found breaches where there were none. As I see it, the only breach of fiduciary duty committed by Indalex occurred when, upon insolvency, Indalex's corporate interests were in obvious conflict with its fiduciary duty as plan administrator to ensure that all contributions were made to the plans when due. The breach was not in failing to avoid this conflict -- the conflict itself was unavoidable. Its breach was in failing to address the conflict to ensure that the plan beneficiaries had the opportunity to have representation in the *CCAA* proceedings as if there were independent plan administrators. I also conclude that a remedial constructive trust is not available as a remedy for this breach.

183 This part of the appeals requires us to answer two questions which I will address in turn:

(i) What fiduciary duties did Indalex have in its role as plan administrator and did it breach them?

(ii) If so, was imposition of a constructive trust an appropriate remedy?

(2) What Fiduciary Duties did Indalex Have in its Role as Plan Administrator and Did it Breach Those Duties?

(a) *Legal Principles*

184 The appellants do not dispute that Indalex, in its role of administrator of the plans, had fiduciary duties to the members of the plan and that when it is acting in that role it can only act in the interests of the plans' beneficiaries. It is not necessary for present purposes to decide whether a pension plan administrator is a *per se* or *ad hoc* fiduciary, although it must surely be rare that a pension plan administrator would not have fiduciary duties in carrying out that role: *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273, at para. 41, aff'g 2008 ONCA 394, 67 C.C.P.B. 1, at para. 55.

185 However, the conclusion that Indalex as plan administrator had fiduciary duties to the plan beneficiaries is the beginning, not the end of the inquiry. This is because fiduciary duties do not exist at large, but arise from and relate to the specific legal interests at stake: *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 31. As La Forest J. put it in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574:

> The obligation imposed [on a fiduciary] may vary in its specific substance depending on the relationship ... [N]ot every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty... . It is only in relation to breaches of the specific obligations imposed because the relationship is one characterized as fiduciary that a claim for breach of fiduciary duty can be founded. [Emphasis added; pp. 646-47.]

186 The nature and scope of the fiduciary duty must, therefore, be assessed in the legal framework governing the relationship out of which the fiduciary duty arises: see, e.g., *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175, at para. 141; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at paras. 36-37; *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403, at para. 41. So, for example, as a general rule, a fiduciary has a duty of loyalty including the duty to avoid conflicts of interest: see, e.g., *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, at para. 35; *Lac Minerals*, at pp. 646-47. However, this general rule may have to be modified in light of the legal framework within which a particular fiduciary duty must be exercised. In my respectful view, this is such a case.

(b) *The Legal Framework of Indalex's Dual Role as a Plan Administrator and*

Employer

187 In order to define the nature and scope of Indalex's role and fiduciary obligations as a plan administrator, we must examine the legal framework within which the administrator functions. This framework is established primarily by the plan documents and the relevant provisions of the *PBA*. It is to these sources, first and foremost, that we look in order to shape the specific fiduciary duties owed in this context.

188 Turning first to the plan documents, I take the salaried plan as an example. Under it, the company is appointed the plan administrator: art. 13.01. The term "Company" is defined to mean Indalex Limited and any reference in the plan to actions taken or discretion to be exercised by the Company means Indalex acting through the board of directors or any person authorized by the board for the purposes of the plan: art. 2.09. Article 13.01 provides that the "Management Committee of the Board of Directors of the Company will appoint a Pension and Benefits Committee to act on behalf of the Company in its capacity as administrator of the Plan. The Pension and Benefits Committee will decide conclusively all matters relating to the operation, interpretation and application of the Plan." Thus, the Pension and Benefits Committee is to act on behalf of the company and by virtue of art. 2.09 its acts are considered those of the company. Article 13.02 sets out the duties of the Pension and Benefits Committee which include the "performance of all administrative functions not performed by the Funding Agent, the Actuary or any group annuity contract issuer": art. 13.02(1).

189 The plan administrator also has statutory powers and duties by virtue of the *PBA*. Section 22 lists the general duties of plan administrators, three of which are particularly relevant to these appeals:

> **22.** (1) [Care, diligence and skill] The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.
>
> (2) [Special knowledge and skill] The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.
>
> ...
>
> (4) [Conflict of interest] An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the

> administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

190 Not surprisingly, the powers and duties conferred on the administrator by the legislation are administrative in nature. For the most part they pertain to the internal management of the pension fund and to the relationship among the pension administrator, the beneficiaries, and the Superintendent of Financial Services ("Superintendent"). The list includes: applying to the Superintendent for registration of the plan and any amendments to it as well as filing annual information returns: ss. 9, 12 and 20 of the *PBA*; providing beneficiaries and eligible potential beneficiaries with information and documents: ss. 10(1)12 and 25; ensuring that the plan is administered in accordance with the *PBA* and its regulations and plan documents: s. 19; notifying beneficiaries of proposed amendments to the plan that would reduce benefits: s. 26; paying commuted value for pensions: s. 42; and filing wind-up reports if the plan is terminated: s. 70.

191 Of special relevance for this case are two additional provisions. Under s. 56, the administrator has a duty to ensure that pension payments are made when due and to notify the Superintendent if they are not and, under s. 59, the administrator has the authority to commence court proceedings when pension payments are not made.

192 The fiduciary duties that employer-administrators owe to plan beneficiaries relate to the statutory and other tasks described above; these are the "specific legal interests" with respect to which the employer-administrator's fiduciary duties attach.

193 Another important aspect of the legal context for Indalex's fiduciary duties as a plan administrator is that it was acting in the dual role of an employer-administrator. This dual role is expressly permitted under s. 8(1)(a) of the *PBA*, but this provision creates a situation where a single entity potentially owes two sets of fiduciary duties (one to the corporation and the other to the plan members).

194 This was the case for Indalex. As an employer-administrator, Indalex acted through its board of directors and so it was that body which owed fiduciary duties to the plan members. The board of directors also owed a fiduciary duty to the company to act in its best interests: *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 122(1)(*a*); *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, at para. 36. In deciding what is in the best interests of the corporation, a board may look to the interests of shareholders, employees, creditors and others. But where those interests are not aligned or may conflict, it is for the directors, acting lawfully and through the exercise of business judgment, to decide what is in the overall best interests of the corporation. Thus, the board of Indalex, as an employer-administrator, could not always act exclusively in the interests of the plan beneficiaries; it also owed duties to Indalex as a corporation.

(c) *Breaches of Fiduciary Duty*

195 Against the background of these legal principles, I turn to consider the Court of Appeal's

findings in relation to Indalex's breach of its fiduciary duties as administrator of the plans. As noted, they fall into three categories: being in a conflict of interest position; taking steps to reduce pension obligations in the *CCAA* proceedings; and seeking bankruptcy status.

(i) Conflict of Interest

196 The questions here are first what constitutes a conflict of interest or duty between Indalex as business decision-maker and Indalex as plan administrator and what must be done when a conflict arises?

197 The Court of Appeal in effect concluded that a conflict of interest arises whenever Indalex makes business decisions that have "the potential to affect the Plans beneficiaries' rights" (para. 132) and that whenever such a conflict of interest arose, the employer-administrator was immediately in breach of its fiduciary duties to the plan members. Respectfully, this position puts the matter far too broadly. It cannot be the case that a conflict arises simply because the employer, exercising its management powers in the best interests of the corporation, does something that has the potential to affect the plan beneficiaries.

198 This conclusion flows inevitably from the statutory context. The existence of apparent conflicts that are inherent in the two roles being performed by the same party cannot be a breach of fiduciary duty because those conflicts are specifically authorized by the statute which permits one party to play both roles. As noted earlier, the *PBA* specifically permits employers to act as plan administrators (s. 8(1)(a)). Moreover, the broader business interests of the employer corporation and the interests of pension beneficiaries in getting the promised benefits are almost always at least potentially in conflict. Every important business decision has the potential to put at risk the solvency of the corporation and therefore its ability to live up to its pension obligations. The employer, within the limits set out in the plan documents and the legislation generally, has the authority to amend the plan unilaterally and even to terminate it. These steps may well not serve the best interests of plan beneficiaries.

199 Similarly, the simple existence of the sort of conflicts of interest identified by the Court of Appeal -- those inherent in the employer's exercise of business judgment -- cannot of themselves be a breach of the administrator's fiduciary duty. Once again, that conclusion is inconsistent with the statutory scheme that expressly permits an employer to act as plan administrator.

200 How, then, should we identify conflicts of interest in this context?

201 In *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631, Binnie J. referred to the *Restatement Third, The Law Governing Lawyers* (2000), at s. 121, to explain when a conflict of interest occurs in the context of the lawyer-client relationship: para. 31. In my view, the same general principle, adapted to the circumstances, applies with respect to employer-administrators. Thus, a situation of conflict of interest occurs when there is a substantial risk that the employer-administrator's representation of the plan beneficiaries would be materially and adversely affected by the employer-administrator's

duties to the corporation. I would recall here, however, that the employer-administrator's obligation to represent the plan beneficiaries extends only to those tasks and duties that I have described above.

202 In light of the foregoing, I am of the view that the Court of Appeal erred when it found, in effect that a conflict of interest arose whenever Indalex was making decisions that "had the potential to affect the Plans beneficiaries' rights": para. 132. The Court of Appeal expressed both the potential for conflict of interest or duty and the fiduciary duty of the plan administrator much too broadly.

(ii) Steps in the CCAA Proceedings to Reduce Pension Obligations and Notice of Them

203 The Court of Appeal found that Indalex breached its fiduciary duty simply by commencing *CCAA* proceedings knowing that the plans were underfunded and by failing to give the plan beneficiaries notice of the proceedings: para. 139. As I understand the court's reasons, the decision to commence *CCAA* proceedings was solely the responsibility of the corporation and not part of the administration of the pension plan: para. 131. The difficulty which the Court of Appeal saw arose from the potential of the *CCAA* proceedings to result in a reduction of the corporation's pension obligations to the prejudice of the beneficiaries: paras. 131-32.

204 I respectfully disagree. Like Justice Deschamps, I find that seeking an initial order protecting the corporation from actions by its creditors did not, on its own, give rise to any conflict of interest or duty on the part of Indalex (reasons of Justice Deschamps, at para. 72).

205 First, it is important to remember that the purpose of *CCAA* proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:

> ... the purpose of the *CCAA* ... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57 (dissenting):

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

For this reason, I would be very reluctant to find that, simply by virtue of embarking on *CCAA* proceedings, an employer-administrator breaches its duties to plan members.

206 Second, the facts of this case do not support the contention that the interests of the plan beneficiaries and the employer were in conflict with respect to the decision to seek *CCAA* protection. It cannot seriously be suggested that some other course would have protected more fully the rights of the plan beneficiaries. The Court of Appeal did not suggest an alternative to seeking *CCAA* protection from creditors, nor did any of the parties. Indalex was in serious financial difficulty and its options were limited: either make a proposal to its creditors (under the *CCAA* or under the *BIA*), or go bankrupt. Moreover, the plan administrator's duty and authority do not extend to ensuring the solvency of the corporation and an independent administrator could not reasonably expect to be consulted about the plan sponsor's decision to seek *CCAA* protection. Finally, the application for *CCAA* proceedings did not reduce pension obligations other than to temporarily relieve the corporation of making special payments and it was the only step with any prospect of the pension funds obtaining from the insolvent corporation the money that would become due. There was thus no conflict of duty or interest between the administrator and the employer when protective action was taken for the purpose of preserving the *status quo* for the benefit of all stakeholders.

207 The Court of Appeal also found that it was a breach of fiduciary duty not to give the plan beneficiaries notice of the initial application for *CCAA* protection. Again, here, I must join Deschamps J. in disagreeing with the Court of Appeal's conclusion. Section 11(1) of the *CCAA* as it stood at the time of the proceedings, provided that parties could commence *CCAA* proceedings without giving notice to interested persons:

> **11.** (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

208 This provision was renumbered but not substantially changed when the Act was amended in September of 2009 (S.C. 2005, c. 47, s. 128, in force Sept. 18, 2009, SI/2009-68). Although it is not appropriate in every case, *CCAA* courts have discretion to make initial orders on an *ex parte* basis. This may be an appropriate -- even necessary -- step in order to prevent "creditors from moving to realize on their claims, essentially a 'stampede to the assets' once creditors learn of the debtor's financial distress": J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 55 ("*Rescue!*"); see also *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194, at para. 7. The respondents did not challenge Morawetz J.'s decision to exercise his discretion to make an *ex parte* order in this case.

209 This is not to say, however, that *ex parte* initial orders will always be required or acceptable. Without attempting to be exhaustive or to express any final view on these issues, I simply note that

there have been at least three ways in which courts have mitigated the possible negative effect on creditors of making orders without notice to potentially affected parties. First, courts have been reluctant to grant *ex parte* orders where the situation of the debtor company is not urgent. In *Rescue!*, Janis Sarra explains that courts are increasingly expecting applicants to have given notice before applying for a stay under the *CCAA*: p. 55. An example is *Marine Drive Properties Ltd,.Re*, 2009 BCSC 145, 52 C.B.R. (5th) 47, a case in which Butler J. held that "[i]nitial applications in *CCAA* proceedings should not be brought without notice merely because it is an application under that Act. The material before the court must be sufficient to indicate an emergent situation": para. 27. Second, courts have included "come-back" clauses in their initial orders so that parties could return to court at a later date to seek to set aside some or all of the order: *Rescue!*, at p. 55. Note that such a clause was included in the initial order by Morawetz J.: para. 46. Finally, courts have limited their initial orders to the issues that need to be resolved immediately and have left other issues to be resolved after all interested parties have been given notice. Thus, in *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169, Morawetz J. limited the initial *CCAA* order so that priorities were only granted over the party that had been given notice. The discussion of suspending special payments or granting creditors priority over pension beneficiaries was left to a later date, after the parties that would be affected had been given notice. A similar approach was taken in the case of *AbitibiBowater inc.(Arrangement relatif à)*, 2009 QCCS 6459 (CanLII). In his initial *CCAA* order, Gascon J. put off the decision regarding the suspension of past service contributions or special payments to the pension plans in question until the parties likely to be affected could be advised of the applicant's request: para. 7.

210 Failure to give notice of the initial *CCAA* proceedings was not a breach of fiduciary duty in this case. Indalex's decision to act as an employer-administrator cannot give the plan beneficiaries any greater benefit than they would have if their plan was managed by a third party administrator. Had there been a third party administrator in this case, Indalex would not have been under an obligation to tell the administrator that it was planning to enter *CCAA* proceedings. The respondents are asking this Court to give the advantage of Indalex's knowledge as employer to Indalex as the plan administrator in circumstances where the employer would have been unlikely to disclose the information itself. I am not prepared to blur the line between employers and administrators in this way.

211 I conclude that Indalex did not breach its fiduciary duty by commencing *CCAA* proceedings or by not giving notice to the plan beneficiaries of its intention to seek the initial *CCAA* order.

212 I turn next to the Court of Appeal's conclusion that seeking and obtaining the DIP orders without notice to the plan beneficiaries and seeking and obtaining the sale approval order constituted breaches of fiduciary duty.

213 To begin, I agree with the Court of Appeal that "just because the initial decision to commence *CCAA* proceedings is solely a corporate one ... does not mean that all subsequent decisions made during the proceedings are also solely corporate ones": para. 132. It was at this point

that Indalex's interests as a corporation came into conflict with its duties as a pension plan administrator.

214 The DIP orders could easily have the effect of making it impossible for Indalex to satisfy its funding obligations to the plan beneficiaries. When Indalex, through the exercise of business judgment, sought *CCAA* orders that would or might have this effect, it was in conflict with its duty as plan administrator to ensure that all contributions were paid when due.

215 I do not think, however, that the simple existence of this conflict of interest and duty, on its own, was a breach of fiduciary duty in these circumstances. As discussed earlier, the *PBA* expressly permits an employer to be a pension administrator and the statutory provisions about conflict of interest must be understood and applied in light of that fact. Moreover, an independent plan administrator would have no decision-making role with respect to the conduct of *CCAA* proceedings. So in my view, the difficulty that arose here was not the existence of the conflict itself, but Indalex's failure to take steps so that the plan beneficiaries would have the opportunity to have their interests protected in the *CCAA* proceedings as if the plans were administered by an independent administrator. In short, the difficulty was not the existence of the conflict, but the failure to address it.

216 Despite Indalex's failure to address its conflict of interest, the plan beneficiaries, through their own efforts, were represented at subsequent steps in the *CCAA* proceedings. The effect of Indalex's breach was therefore mitigated, a point which I will discuss in greater detail when I turn to the issue of the constructive trust.

217 Nevertheless, for the purposes of providing some guidance for future *CCAA* proceedings, I take this opportunity to briefly address what an employer-administrator can do to respond to these sorts of conflicts. First and foremost, an employer-administrator who finds itself in a conflict must bring the conflict to the attention of the *CCAA* judge. It is not enough to include the beneficiaries in the list of creditors; the judge must be made aware that the debtor, as an administrator of the plan is, or may be, in a conflict of interest.

218 Given their expertise and their knowledge of particular cases, *CCAA* judges are well placed to decide how best to ensure that the interests of the plan beneficiaries are fully represented in the context of "real-time" litigation under the *CCAA*. Knowing of the conflict, a *CCAA* judge might consider it appropriate to appoint an independent administrator or independent counsel as *amicus curiae* on terms appropriate to the particular case. Indeed, there have been cases in which representative counsel have been appointed to represent tort claimants, clients, pensioners and non-unionized employees in *CCAA* proceedings on terms determined by the judge: *Rescue!*, at p. 278; see, e.g., *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299 (CanLII); *Nortel Networks Corp., Re*, (2009), 75 C.C.P.B. 206 (Ont. S.C.J.). In other circumstances, a *CCAA* judge might find that it is feasible to give notice directly to the pension beneficiaries. In my view, notice, though desirable, may not always be feasible and decisions on such matters should be left to the

judicial discretion of the *CCAA* judge. Alternatively, the judge might consider limiting draws on the DIP facility until notice can be given to the beneficiaries: *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Ct. J. (Gen. Div.)), at para. 24. Ultimately, the appropriate response or combination of responses should be left to the discretion of the *CCAA* judge in a particular case. The point, as well expressed by the Court of Appeal, is that the insolvent corporation which is also a pension plan administrator cannot "simply ignore its obligations as the Plans' administrator once it decided to seek *CCAA* protection": para. 132.

219 I conclude that the Court of Appeal erred in finding that Indalex breached its fiduciary duties as plan administrator by taking the various steps it did in the *CCAA* proceedings. However, I agree with the Court of Appeal that it breached its fiduciary duty by failing to take steps to ensure that the plan beneficiaries had the opportunity to be as fully represented in those proceedings as if there had been an independent plan administrator.

(iii) The Bankruptcy Motion

220 At the same time Indalex applied for the sale approval order, it also applied to lift the *CCAA* stay so that it could file an assignment into bankruptcy. As Campbell J. put it, this was done "to ensure the priority regime [it] urged as the basis for resisting the deemed trust": para. 52. The Court of Appeal concluded that this was a breach of Indalex's fiduciary duties because the motion was brought "with the intention of defeating the deemed trust claims and ensuring that the Reserve Fund was transferred to [the U.S. debtors]": para. 139. I respectfully disagree.

221 It was certainly open to Indalex as an employer to bring a motion to voluntarily enter into bankruptcy. A pension plan administrator has no responsibility or authority in relation to that step. The problem here is not that the motion was brought, but that Indalex failed to meaningfully address the conflict between its corporate interests and its duties as plan administrator.

222 To sum up, I conclude that Indalex did not breach any fiduciary duty by undertaking *CCAA* proceedings or seeking the relief that it did. The breach arose from Indalex's failure to ensure that its pension plan beneficiaries had the opportunity to have their interests effectively represented in the insolvency proceedings, particularly when Indalex sought the DIP financing approval, the sale approval and the motion for bankruptcy.

(3) Was Imposing a Constructive Trust Appropriate in This Case?

223 The next issue is whether a remedial constructive trust is, as the Court of Appeal concluded, an appropriate remedy in response to the breach of fiduciary duty.

224 The Court of Appeal exercised its discretion to impose a constructive trust and its exercise of this discretion is entitled to deference. Only if the discretion has been exercised on the basis of an erroneous principle should the order be overturned on appeal: *Donkin v. Bugoy*, [1985] 2 S.C.R. 85, cited in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at para. 54, by Sopinka J. (dissenting, but not

on this point). In my respectful view, the Court of Appeal's erroneous conclusions about the scope of a plan administrator's fiduciary duties require us to examine the constructive trust issue anew. Moreover, the Court of Appeal, in my respectful opinion, erred in principle in finding that the asset in this case resulted from the breach of fiduciary duty such that it would be unjust for the party in breach to retain it.

225 As noted earlier, the Court of Appeal imposed a constructive trust in favour of the plan beneficiaries with respect to funds retained in the reserve fund equal to the total amount of the wind-up deficiency for both plans. In other words, upon insolvency of Indalex, the plan beneficiaries received 100 cents on the dollar as a result of a judicially imposed trust taking priority over secured creditors, and indeed over other unsecured creditors, assuming there was no deemed trust for the executive plan.

226 I have explained earlier why I take a different view than did the Court of Appeal of Indalex's breach of fiduciary duty. In light of what I conclude was the breach which could give rise to a remedy, my view is that the constructive trust cannot properly be imposed in this case and the Court of Appeal erred in principle in exercising its discretion to impose this remedy.

227 I part company with the Court of Appeal with respect to several aspects of its constructive trust analysis; it is far from clear to me that any of the conditions for imposing a constructive trust were present here. However, I will only address one of them in detail. As I will explain, a remedial constructive trust for a breach of fiduciary duty is only appropriate if the wrongdoer's acts give rise to an identifiable asset which it would be unjust for the wrongdoer (or sometimes a third party) to retain. In my view, Indalex's failure to meaningfully address conflicts of interest that arose during the *CCAA* proceedings did not result in any such asset.

228 As the Court of Appeal recognized, the governing authority concerning the remedial constructive trust outside the domain of unjust enrichment is *Soulos*. In *Soulos*, McLachlin J. (as she then was) wrote that a constructive trust may be an appropriate remedy for breach of fiduciary duty: paras. 19-45. She laid out four requirements that should generally be satisfied before a constructive trust will be imposed: para. 45. Although, in *Soulos*, McLachlin J. was careful to indicate that these are conditions that "generally" must be present, all parties in this case accept that these four conditions must be present before a remedial constructive trust may be ordered for breach of fiduciary duty. The four conditions are these:

> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
> (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
> (3) The plaintiff must show a legitimate reason for seeking a proprietary

> remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
>
> (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected. [para. 45]

229 My concern is with respect to the second requirement, that is, whether the breach resulted in an asset in the hands of Indalex. A constructive trust arises when the law imposes upon a party an obligation to hold specific property for another: D. W. M. Waters, M. R. Gillen and L. D. Smith, *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 454 ("*Waters*"). The purpose of imposing a constructive trust as a remedy for a breach of duty or unjust enrichment is to prevent parties "from retaining property which in 'good conscience' they should not be permitted to retain": *Soulos, at* para. 17. It follows, therefore, that while the remedial constructive trust may be appropriate in a variety of situations, the wrongdoer's conduct toward the plaintiff must generally have given rise to assets in the hands of the wrongdoer (or of a third party in some situations) which cannot in justice and good conscience be retained. That cannot be said here.

230 The Court of Appeal held that this second condition was present because "[t]he assets [i.e. the reserve fund monies] are directly connected to the process in which Indalex committed its breaches of fiduciary obligation": para. 204. Respectfully, this conclusion is based on incorrect legal principles. To satisfy this second condition, it must be shown that the breach *resulted in* the assets being in Indalex's hands, not simply, as the Court of Appeal thought, that there was a "connection" between the assets and "the process" in which Indalex breached its fiduciary duty. Recall that in *Soulos* itself, *the defendant's acquisition of the disputed property was a direct result of his breach of his duty of loyalty* to the plaintiff: para. 48. This is not our case. As the Court observed, in the context of an unjust enrichment claim in *Peter v. Beblow*, [1993] 1 S.C.R. 980, at p. 995;

> ... for a constructive trust to arise, the plaintiff must establish a direct link to the property which is the subject of the trust by reason of the plaintiff's contribution.

231 While cases of breach of fiduciary duty are different in important ways from cases of unjust enrichment, La Forest J. (with Lamer J. concurring on this point) applied a similar standard for proprietary relief in *Lac Minerals*, a case in which wrongdoing was the basis for the constructive trust: p. 678, quoted in *Waters'*, at p. 471. His comments demonstrate the high standard to be met in order for a constructive trust to be awarded:

> The constructive trust awards a right in property, but that right can only arise once a right to relief has been established. In the vast majority of cases a constructive trust will not be the appropriate remedy... . [A] constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. [p. 678]

232 The relevant breach in this case was the failure of Indalex to meaningfully address the

conflicts of interest that arose in the course of the *CCAA* proceedings. (The breach that arose with respect to the bankruptcy motion is irrelevant because that motion was not addressed and therefore could not have given rise to the assets.) The "assets" in issue here are the funds in the reserve fund which were retained from the proceeds of the sale of Indalex as a going concern. Indalex's breach in this case did not give rise to the funds which were retained by the Monitor in the reserve fund.

233 Where does the respondents' claim of a procedural breach take them? Taking their position at its highest, it would be that the DIP approval proceedings and the sale would not have been approved. This position, however, is fatally flawed. Turning first to the DIP approval, there is no evidence to support the view that, had Indalex addressed its conflict in the DIP approval process, the DIP financing would have been rejected or granted on different terms. The *CCAA* judge, being fully aware of the pension situation, ruled that the DIP financing was "required", that there was "no other alternative available to the Applicants for a going concern solution", and that "the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing": endorsement of Morawetz J., April 8, 2009, at paras. 6 and 9. In effect, the respondents are claiming funds which arose only because of the process to which they now object. Taking into account that there was an absence of any evidence that more favourable financing terms were available, that the judge's decision was made with full knowledge of the plan beneficiaries' claims, and that he found that the DIP financing was necessary, the respondents' contention is not only speculative, it also directly contradicts the conclusions of the *CCAA* judge.

234 Turning next to the sale approval and the approval of the distribution of the assets, it is clear that the plan beneficiaries had independent representation but that this did not change the result. Although, perhaps with little thanks to Indalex, the interests of both plans were fully and ably represented before Campbell J. at the sale approval and interim distribution motions in July of 2009.

235 The executive plan retirees, through able counsel, objected to the sale on the basis that the liquidation values set out in the Monitor's seventh report would provide greater return for unsecured creditors. The motions judge dismissed this objection "on the basis that there was no clear evidence to support the proposition and in any event the transaction as approved did preserve value for suppliers, customers and preserve approximately 950 jobs": trial reasons of Campbell J., at para. 13 (emphasis added). Both the executive plan retirees and the USW, which represented some members of the salaried plan, objected to the proposed distribution of the sale proceeds. In response to this objection, it was agreed that those objections would be heard promptly and that the Monitor would retain sufficient funds to satisfy the pensioners' claims if they were upheld: trial reasons of Campbell J., at paras. 14-16.

236 There is no evidence to support the contention that Indalex's breach of its fiduciary duty as pension administrator resulted in the assets retained in the reserve fund. I therefore conclude that the Court of Appeal erred in law in finding that the second condition for imposing a constructive trust -- i.e. that the assets in the defendant's hands must be shown to have resulted from the defendant's

breaches of duty to the plaintiff -- had been established.

237 I would add only two further comments with respect to the constructive trust. A major concern of the Court of Appeal was that unless a constructive trust were imposed, the reserve funds would end up in the hands of other Indalex entities which were not operating at arm's length from Indalex. The U.S. debtors claimed the reserve fund because it had paid on its guarantee of the DIP loans and thereby stepped into the shoes of the DIP lender with respect to priority. Sun Indalex claims in the U.S. bankruptcy proceedings as a secured creditor of the U.S. debtors. The Court of Appeal put its concern this way: "To permit Sun Indalex to recover on behalf of [the U.S. debtors] would be to effectively permit the party who breached its fiduciary obligations to take the benefit of those breaches, to the detriment of those to whom the fiduciary obligations were owed": para. 199.

238 There are two difficulties with this approach, in my respectful view. The U.S. debtors paid real money to honour their guarantees. Moreover, unless there is a legal basis for ignoring the separate corporate personality of separate corporate entities, those separate corporate existences must be respected. Neither the parties nor the Court of Appeal advanced such a reason.

239 Finally, I would note that imposing a constructive trust was wholly disproportionate to Indalex's breach of fiduciary duty. Its breach -- the failure to meaningfully address the conflicts of interest that arose during the *CCAA* process -- had no adverse impact on the plan beneficiaries in the sale approval process which gave rise to the "asset" in issue. Their interests were fully represented and carefully considered before the sale was approved and the funds distributed. The sale was nonetheless judged to be in the best interests of the corporation, all things considered. In my respectful view, imposing a $6.75 million penalty on the other creditors as a remedial response to this breach is so grossly disproportionate to the breach as to be unreasonable.

240 A judicially ordered constructive trust, imposed long after the fact, is a remedy that tends to destabilize the certainty which is essential for commercial affairs and which is particularly important in financing a workout for an insolvent corporation. To impose a constructive trust in response to a breach of fiduciary duty to ensure for the plan beneficiaries some procedural protections that they in fact took advantage of in any case is an unjust response in all of the circumstances.

241 I conclude that a constructive trust is not an appropriate remedy in this case and that the Court of Appeal erred in principle by imposing it.

C. *Third Issue: Did the Court of Appeal Err in Concluding That the Super Priority Granted in the CCAA Proceedings Did Not Have Priority by Virtue of the Doctrine of Federal Paramountcy?*

242 Although I disagree with my colleague Justice Deschamps with respect to the scope of the s. 57(4) deemed trust, I agree that if there was a deemed trust in this case, it would be superseded by the DIP loan because of the operation of the doctrine of federal paramountcy: paras. 48-60.

D. *Fourth Issue: Did the Court of Appeal Err in its Cost Endorsement Respecting the USW?*

(1) Introduction

243 The disposition of costs in the Court of Appeal was somewhat complex. Although the costs appeal relates only to the costs of the USW, it is necessary in order to understand their position to set out the costs order below in full.

244 With respect to the costs of the appeal to the Court of Appeal, no order was made for or against the Monitor due to its prior agreement with the former executives and the USW. However, the court ordered that the former executives and the USW, as successful parties, were each entitled to costs on a partial indemnity basis fixed at $40,000 inclusive of taxes and disbursements from Sun Indalex and the U.S. Trustee, payable jointly and severally: costs endorsement, 2011 ONCA 578, 81 C.B.R. (5th) 165, at para. 7.

245 Morneau Shepell Ltd., the Superintendent, and the former executives reached an agreement with respect to legal fees and disbursements and the Court of Appeal approved that agreement. The former executives received full indemnity legal fees and disbursements in the amount of $269,913.78 to be paid from the executive plan attributable to each of the 14 former executives' accrued pension benefits, allocated among the 14 former executives in relation to their pension entitlement from the executive plan. In other words, the costs would not be borne by the other three members of the executive plan who did not participate in the proceedings: C.A. costs endorsement, at para. 2. The costs of the appeal payable by Sun Indalex and the U.S. Trustee were to be paid into the fund of the executive plan and allocated among the 14 former executives in relation to their pension entitlement from the executive plan.

246 USW sought an order for payment of its costs from the fund of the salaried plan. However, the Court of Appeal declined to make such an order because the USW was in a "materially different position" than that of the former executives: costs endorsement, at para. 3. The latter were beneficiaries to the pension fund (14 of the 17 members of the plan), and they consented to the payment of costs from their individual benefit entitlements. Those who had not consented would not be affected by the payment. In contrast, the USW was the bargaining agent (not the beneficiary) for only 7 of the 169 beneficiaries of the salaried plan, none of whom was given notice of, or consented to, the payment of legal costs from the salaried plan. Moreover, the USW sought and seeks an order that its costs be paid out of the fund. This request is significantly different than the order made in favour of the former executives. The former executives explicitly ensured that their choice to pursue the litigation would not put at risk the pension benefits of those members who did not retain counsel even though of course those members would benefit in the event the litigation was successful. The USW is not proposing to insulate the 162 members whom it does not represent from the risk of litigation; it seeks an order requiring all members to share the risk of the litigation even though it represents only 7 of the 169. The proposition advanced by the USW was thus materially different from that advanced on behalf of the executive plan and approved by the court.

(2) Standard of Review

247 In *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, Rothstein J. held that "costs awards are quintessentially discretionary": para. 126. Discretionary costs decisions should only be set aside on appeal if the court below "has made an error in principle or if the costs award is plainly wrong": *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27.

(3) Analysis

248 I do not see any basis to interfere with the Court of Appeal's costs endorsement in this case. In my view, the USW's submissions are largely based on an inaccurate reading of the Court of Appeal's costs endorsement. Contrary to what the USW submits, the Court of Appeal did *not* require the consent of plan beneficiaries as a prerequisite to ordering payment of costs from the fund. Nor is it correct to suggest that the costs endorsement would "restrict recovery of beneficiary costs to instances when there is a surplus in the pension trust fund" or "preclude financing of beneficiary action when a fund is in deficit": USW factum, at paras. 71 and 76. Nor would I read the Court of Appeal's brief costs endorsement as laying down a rule that a union representing pension beneficiaries cannot recover costs from the fund because the union itself is not a beneficiary.

249 The premise of the USW's appeal appears to be that it was entitled to costs because it met what it refers to in its submissions as the Costs Payment Test and that if the executive plan members got their costs out of their pension fund, the union should get its costs out of the salaried employees' pension fund. Respectfully, I do not accept the validity of either premise.

250 The decision whether to award costs from the pension fund remains a discretionary matter. In *Nolan*, Rothstein J. surveyed the various factors that courts have taken into account when deciding whether to award a litigant its costs out of a pension trust. The first broad inquiry considered in *Nolan* was into whether the litigation concerned the due administration of the trust. In connection with this inquiry, courts have considered the following factors: (1) whether the litigation was primarily about the construction of the plan documents; (2) whether it clarified a problematic area of the law; (3) whether it was the only means of clarifying the parties' rights; (4) whether the claim alleged maladministration; and (5) whether the litigation had no effect on other beneficiaries of the trust fund: *Nolan*, at para. 126.

251 The second broad inquiry discussed in *Nolan* was whether the litigation was ultimately adversarial: para. 127. The following factors have been considered: (1) whether the litigation included allegations by an unsuccessful party of a breach of fiduciary duty; (2) whether the litigation only benefited a class of members and would impose costs on other members if successful; and (3) whether the litigation had any merit.

252 I do not think that it is correct to elevate these two inquiries (which constitute the Costs Payment Test articulated by the USW) to a test for entitlement to costs in the pension context. The

factors set out in *Nolan* and other cases cited therein are best understood as highly relevant considerations guiding the exercise of judicial discretion with respect to costs.

253 The litigation undertaken here raised novel points of law with all of the uncertainty and risk inherent in such an undertaking. The Court of Appeal in essence decided that the USW, representing only 7 of 169 members of the plan, should not without consultation be able to in effect impose the risks of that litigation on all of the plan members, the vast majority of whom were not union members. Whatever arguments might be raised against the Court of Appeal's decision in light of the success of the litigation and the sharing by all plan members of the benefits, the failure of the litigation seems to me to leave no basis to impose the cost consequences of taking that risk on all of the plan members of an already underfunded plan.

254 The second premise of the USW appeal appears to be that if the executive plan members have their costs paid out of the fund, so too should the salaried plan members. Respectfully, however, this is not an accurate statement of the order made with respect to the executive plan.

255 The Court of Appeal's order with respect to the executive plan meant that only the pension fund attributable to those members of the plan who actually supported the litigation -- the vast majority I would add -- would contribute to the costs of the litigation even though all members of the plan would benefit in the case of success. As the Court of Appeal noted:

> The individual represented Retirees, who comprise 14 of 17 members of the Executive Plan, have consented to the payment of costs from their individual benefit entitlements. Those who have not consented will not be affected by the payment. [Costs endorsement, at para. 3]

256 The Court of Appeal therefore approved an agreement as to costs which did not put at further risk the pension funds available to satisfy the pension entitlements of those who did not support the litigation. Thus, the Court of Appeal did not apply what the USW refers to as the Costs Payment Test to the executive plan because the costs order was the product of agreement and did not order payment of costs out of the fund as a whole.

257 In the case of the USW request, there was no such agreement and no such limitation of risk to the supporters of the litigation.

258 I see no error in principle in the Court of Appeal's refusal to order the USW costs to be paid out of the pension fund, particularly in light of the disposition of the appeal to this Court. I would dismiss the USW costs appeal but without costs.

IV. Disposition

259 I would allow the Sun Indalex, FTI Consulting and George L. Miller appeals and, except as noted below, I would set aside the orders of the Ontario Court of Appeal and restore the February

18, 2010 orders of Campbell J.

260 With respect to costs, I would set aside the Court of Appeal's orders with respect to the costs of the appeals before that court and order that all parties bear their own costs in the Court of Appeal and in this Court.

261 I would not disturb paras. 9 and 10 of the order of the Court of Appeal in the former executives' appeal so that the full indemnity legal fees and disbursements of the former executives in the amount of $269,913.78 shall be paid from the fund of the executive plan attributable to each of the 14 former executives' accrued pension benefits, and specifically such amounts shall be allocated among the 14 former executives in relation to their pension entitlement from the executive plan and will not be borne by the other three members of the executive plan.

262 I would dismiss the USW costs appeal, but without costs.

The reasons of LeBel and Abella JJ. were delivered by

LeBEL J. (dissenting):--

I. Introduction

263 The members of two pension plans set up by Indalex Limited ("Indalex") stand to lose half or more of their pension benefits as a consequence of the insolvency of their employer and of the arrangement approved by the Ontario Superior Court of Justice under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The Court of Appeal for Ontario found that the members were entitled to a remedy. For different and partly conflicting reasons, my colleagues Justices Deschamps and Cromwell would hold that no remedy is available to them. With all due respect for their opinions, I would conclude, like the Court of Appeal, that the remedy of a constructive trust is open to them and should be imposed in the circumstances of this case, for the following reasons.

264 I do not intend to summarize the facts of this case, which were outlined by my colleagues. I will address these facts as needed in the course of my reasons. Before moving to my areas of disagreement with my colleagues, I will briefly indicate where and to what extent I agree with them on the relevant legal issues.

265 Like my colleagues, I conclude that no deemed trust could arise under s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), in the case of the Executive Plan because this plan had not been wound up when the *CCAA* proceedings were initiated. In the case of the Salaried Employees Plan, I agree with Deschamps J. that a deemed trust arises in respect of the wind-up deficiency. But, like her, I accept that the debtor-in-possession ("DIP") super priority prevails by

reason of the application of the federal paramountcy doctrine. I also agree that the costs appeal of the United Steelworkers should be dismissed.

266 But, with respect for the opinions of my colleagues, I take a different view of the nature and extent of the fiduciary duties of an employer who elects to act as administrator of a pension plan governed by the *PBA*. This dual status does not entitle the employer to greater leniency in the determination and exercise of its fiduciary duties or excuse wrongful actions. On the contrary, as we shall see below, I conclude that Indalex not only neglected its obligations towards the beneficiaries, but actually took a course of action that was actively inimical to their interests. The seriousness of these breaches amply justified the decision of the Court of Appeal to impose a constructive trust. To that extent, I propose to uphold the opinion of Gillese J.A. and the judgment of the Court of Appeal (2011 ONCA 265, 104 O.R. (3d) 641).

II. The Employer as Administrator of a Pension Plan: Its Fiduciary Duties

267 Before entering into an analysis of the obligations of an employer as administrator of a pension plan under the *PBA*, it is necessary to consider the position of the beneficiaries. Who are they? At what stage are they in their lives? What are their vulnerabilities? A fiduciary relationship is a relationship, grounded in fact and law, between a vulnerable beneficiary and a fiduciary who holds and may exercise power over the beneficiary in situations recognized by law. Any analysis of such a relationship requires careful consideration of the characteristics of the beneficiary. It ought not stop at the level of a theoretical and detached approach that fails to address how, very concretely, this relationship works or can be twisted, perverted or abused, as was the situation in this case.

268 The beneficiaries were in a very vulnerable position relative to Indalex. They did not enjoy the protection that the existence of an independent administrator might have given them. They had no say and no input in the management of the plans. The information about the plans and their situation came from Indalex in its dual role as employer and manager of the plans. Their particular vulnerability arose from their relationship with Indalex, acting both as their employer and as the administrator of their retirement plans. Their vulnerability was substantially a consequence of that specific relationship (*Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 68, *per* Cromwell J.). The nature of this relationship had very practical consequences on their interests. For example, as Gillese J.A. noted in her reasons (at para. 40) the consequences of the decisions made in the course of management of the plan and during the *CCAA* proceedings signify that the members of the Executive Plan stand to lose one-half to two-thirds of their retirement benefits, unless additional money is somehow paid into the plan. These losses of benefits are, in all probability, permanent in the case of the beneficiaries who have already retired or who are close to retirement. They deeply affect their lives and expectations. For most of them, what is lost is lost for good. No arrangement will allow them to get a start on a new life. We should not view the situation of the beneficiaries as regrettable but unavoidable collateral damage arising out of the ebbs and tides of the economy. In my view, the law should give the members some protection, as the Court of Appeal

intended when it imposed a constructive trust.

269 Indalex was in a conflict of interest from the moment it started to contemplate putting itself under the protection of the *CCAA* and proposing an arrangement to its creditors. From the corporate perspective, one could hardly find fault with such a decision. It was a business decision. But the trouble is that at the same time, Indalex was a fiduciary in relation to the members and retirees of its pension plans. The "two hats" analogy offers no defence to Indalex. It could not switch off the fiduciary relationship at will when it conflicted with its business obligations or decisions. Throughout the arrangement process and until it was replaced by an independent administrator (Morneau Shepell Ltd.) it remained a fiduciary.

270 It is true that the *PBA* allows an employer to act as an administrator of a pension plan in Ontario. In such cases, the legislature accepts that conflicts of interest may arise. But, in my opinion, nothing in the *PBA* allows that the employer *qua* administrator will be held to a lower standard or will be subject to duties and obligations that are less stringent than those of an independent administrator. The employer remains a fiduciary under the statute and at common law (*PBA*, s. 22(4)). The employer is under no obligation to assume the burdens of administering the pension plans that it has agreed to set up or that are the legacy of previous decisions. However, if it decides to do so, a fiduciary relationship is created with the expectation that the employer will be able to avoid or resolve the conflicts of interest that might arise. If this proves to be impossible, the employer is still "seized" with fiduciary duties, and cannot ignore them out of hand.

271 Once Indalex had considered the *CCAA* process and decided to proceed in that manner, it should have been obvious that such a move would trigger conflicts of interest with the beneficiaries of the pension plans and that these conflicts would become untenable, as per the terms of s. 22(4) of the *PBA*. Given the nature of its obligations as administrator and fiduciary, it was impossible to wear the "two hats". Indalex had to discharge its corporate duties, but at the same time it had to address its fiduciary obligations to the members and beneficiaries of the plans. I do not fault it for applying under the *CCAA*, but rather for not relinquishing its position as administrator of the plans at the time of the application. It even retained this position once it engaged in the arrangement process. Other conflicts and breaches of fiduciary duties and of fundamental rules of procedural equity in the Superior Court flowed from this first decision. Moreover, Indalex maintained a strongly adversarial attitude towards the interest of the beneficiaries throughout the arrangement process, while it was still, at least in form, the administrator of the plans.

272 The option given to employers to act as administrators of pension plans under the *PBA* does not constitute a licence to breach the fiduciary duties that flow from this function. It should not be viewed as an invitation for the courts to whitewash the consequences of such breaches. The option is predicated on the ability of the employer-administrator to avoid the conflicts of interests that cause these breaches. An employer deciding to assume the position of administrator cannot claim to be in the same situation as the Crown when it discharges fiduciary obligations towards certain groups in society under the Constitution or the law. For those cases, the Crown assumes those duties

because it is obligated to do so by virtue of its role, not because it chooses to do so. In such circumstances, the Crown must often balance conflicting interests and obligations to the broader society in the discharge of those fiduciary duties (*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at paras. 37-38). If Indalex found itself in a situation where it had to balance conflicting interests and obligations, as it essentially argues, it could not retain the position of administrator that it had willingly assumed. The solution was not to place its function as administrator and its associated fiduciary duties in abeyance. Rather, it had to abandon this role and diligently transfer its function as manager to an independent administrator.

273 Indalex could apply for protection under the *CCAA*. But, in so doing, it needed to make arrangements to avoid conflicts of interests. As nothing was done, the members of the plans were left to play catch up as best they could when the process that put in place the DIP financing and its super priority was initiated. The process had been launched in such a way that it took significant time before the beneficiaries could effectively participate in the process. In practice, the United Steelworkers union, which represented only a small group of the members of the Salaried Employees Plan, acted for them after the start of the procedures. The members of the Executive Plan hired counsel who appeared for them. But, throughout, there were problems with notices, delays and the ability to participate in the process. Indeed, during the *CCAA* proceedings, the Monitor and Indalex seemed to have been more concerned about keeping the members of the plans out of the process rather than ensuring that their voices could be heard. Two paragraphs of the submissions to this Court by Morneau Shepell Ltd., the subsequently appointed administrator of the plan, aptly sums up the behaviour of Indalex and the Monitor towards the beneficiaries, whose representations were always deemed to be either premature or late:

> When counsel for the Retirees again appeared at a motion to approve the bidding procedure, his objections were considered premature:
>
> In my view, the issues raised by the retirees do not have any impact on the Bidding Procedures. The issues can be raised by the retirees on any application to approve a transaction -- but that is for another day. [(2009), 79 C.C.P.B. 101 (Ont. S.C.J.), at para. 10, *per* Morawetz J.]
>
> Only when counsel appeared at the sale approval motion, as directed by the motions judge, were the concerns of the pension plan beneficiaries heard. At that time, the Appellants complain, the beneficiaries were too late and their motion constituted a collateral attack on the original DIP Order. However, it cannot be the case that stakeholder groups are too early, until they are too late. [Factum, at paras. 54-55]

274 I must also mention the failed attempt to assign Indalex in bankruptcy once the sale of its

business had been approved. One of the purposes of this action was essentially to harm the interests of the members of the plans. At the time, Indalex was still wearing its two hats, at least from a legal perspective. But its duties as a fiduciary were clearly not at the forefront of its concerns. There were constant conflicts of interest throughout the process. Indalex did not attempt to resolve them; it brushed them aside. In so acting, it breached its duties as a fiduciary and its statutory obligations under s. 22(4) *PBA*.

III. Procedural Fairness in *CCAA* Proceedings

275 The manner in which this matter was conducted in the Superior Court was, at least partially, the result of Indalex disregarding its fiduciary duties. The procedural issues that arose in that court did not assist in mitigating the consequences of these breaches. It is true that, in the end, the beneficiaries obtained, or were given, some information pertaining to the proceedings and that counsel appeared on their behalf at various stages of the proceedings. However, the basic problem is that the proceedings were not conducted according to the spirit and principles of the Canadian system of civil justice.

276 I accept that those procedures are often urgent. The situation of a debtor requires quick and efficient action. The turtle-like pace of some civil litigation would not meet the needs of the application of the *CCAA*. However, the conduct of proceedings under this statute is not solely an administrative process. It is also a judicial process conducted according to the tenets of the adversarial system. The fundamentals of such a system must not be ignored. All interested parties are entitled to a fair procedure that allows their voices to be raised and heard. It is not an answer to these concerns to say that nothing else could be done, that no other solution would have been better, that, in substance, hearing the members would have been a waste of time. In all branches of procedure whether in administrative law, criminal law or civil action, the rights to be informed and to be heard in some way remain fundamental principles of justice. Those principles retain their place in the *CCAA*, as some authors and judges have emphasized (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 55-56; *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. C.J. (Gen. Div.)), at para. 5, *per* Farley J.). This was not done in this case, as my colleagues admit, while they downplay the consequences of these procedural flaws and breaches.

IV. Imposing a Constructive Trust

277 In this context, I see no error in the decision of the Court of Appeal to impose a constructive trust (paras. 200-207). It was a fair decision that met the requirements of justice, under the principles set out by our Court in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, and in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217. The remedy of a constructive trust was justified in order to correct the wrong caused by Indalex (*Soulos*, at para. 36, *per* McLachlin J. (as she then was)). The facts of the situation met the four conditions that generally justify the imposition of a constructive trust (*Soulos*, at para. 45), as determined by Justice Gillese in her reasons, at paras. 203

and 204: (1) the defendant was under an equitable obligation in relation to the activities giving rise to the assets in his or her hands; (2) the assets in the hands of the defendant were shown to have resulted from deemed or actual agency activities of the defendant in breach of his or her equitable obligation to the plaintiff; (3) the plaintiff has shown a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendants remain faithful to their duties; and (4) there are no factors which would render imposition of a constructive trust unjust in all the circumstances of the case, such as the protection of the interests of intervening creditors.

278 In crafting such a remedy, the Court of Appeal was relying on the inherent powers of the courts to craft equitable remedies, not only in respect of procedural issues, but also of substantive questions. Section 9 of the *CCAA* is broadly drafted and does not deprive courts of their power to fill in gaps in the law when this is necessary in order to grant justice to the parties (G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law, 2007* (2008), 41, at pp. 78-79).

279 The imposition of the trust did not disregard the different corporate personalities of Indalex and Indalex U.S. It properly acknowledged the close relationship between the two companies, the second in effect controlling the first. This relationship could and needed to be taken into consideration in order to determine whether a constructive trust was a proper remedy.

280 For these reasons, I would uphold the imposition of a constructive trust and I would dismiss the appeal with costs to the respondents.

* * * * *

APPENDIX

The Pension Benefits Amendment Act, 1973, S.O. 1973, c. 113

> **6.** The said Act is amended by adding thereto the following sections:
>
> 23*a*. -- (1) Any sum received by an employer from an employee pursuant to an arrangement for the payment of such sum by the employer into a pension plan as the employee's contribution thereto shall be deemed to be held by the employer in trust for payment of the same after his receipt thereof into the pension plan as the employee's contribution thereto and the employer shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust.

(2) For the purposes of subsection 1, any sum withheld by an employer, whether by payroll deduction or otherwise, from moneys payable to an employee shall be deemed to be a sum received by the employer from the employee.

(3) Any sum required to be paid into a pension plan by an employer as the employer's contribution to the plan shall, when due under the plan, be deemed to be held by the employer in trust for payment of the same into the plan in accordance with the plan and this Act and the regulations as the employer's contribution and the employer shall not appropriate or convert any part of the amount required to be paid to the fund to his own use or to any use not authorized by the terms of the pension plan.

Pension Benefits Act, R.S.O. 1980, c. 373

21... .

(2) Upon the termination or winding up of a pension plan filed for registration as required by section 17, the employer is liable to pay all amounts that would otherwise have been required to be paid to meet the tests for solvency prescribed by the regulations, up to the date of such termination or winding up, to the insurer, administrator or trustee of the pension plan.

...

23. -- (1) Where a sum is received by an employer from an employee under an arrangement for the payment of the sum by the employer into a pension plan as the employee's contribution thereto, the employer shall be deemed to hold the sum in trust for the employee until the sum is paid into the pension plan whether or not the sum has in fact been kept separate and apart by the employer and the employee has a lien upon the assets of the employer for such amount that in the ordinary course of business would be entered in books of account whether so entered or not.

...

(3) Where an employer is required to make contributions to a pension plan, he shall be deemed to hold in trust for the members of the plan an amount calculated in accordance with subsection (4), whether or not,

(*a*) the employer contributions are payable into the plan under the terms of the plan or this Act; or

(*b*) the amount has been kept separate and apart by the employer,

and the members have a lien upon the assets of the employer in such amount that in the ordinary course of business would be entered into the books of account whether so entered or not.

(4) For the purpose of determining the amount deemed to be held in trust under subsection (3) on a specific date, the calculation shall be made as if the plan had been wound up on that date.

...

32. In addition to any amounts the employer is liable to pay under subsection 21 (2), where a defined benefit pension plan is terminated or wound up or the plan is amended so that it is no longer a defined benefit pension plan, the employer is liable to the plan for the difference between,

(*a*) the value of the assets of the plan; and

(*b*) the value of pension benefits guaranteed under subsection 31 (1) and any other pension benefit vested under the terms of the plan,

and the employer shall make payments to the insurer, trustee or administrator of the pension plan to fund the amount owing in such manner as is prescribed by regulation.

Pension Benefits Amendment Act, 1983, S.O. 1983, c. 2

2. Subsection 21 (2) of the said Act is repealed and the following substituted therefor:

(2) Upon the termination or winding up of a registered pension plan, the employer of employees covered by the pension plan shall pay to the administrator, insurer or trustee of the pension plan,

(a) an amount equal to,

(i) the current service cost, and
(ii) the special payments prescribed by the regulations,

that have accrued to and including the date of the termination or winding up but, under the terms of the pension plan or the regulations, are not due on that date; and

(b) all other payments that, by the terms of the pension plan or the regulations, are due from the employer to the pension plan but have not been paid at the date of the termination or winding up.

(2a) For the purposes of clause (2) (a), the current service cost and special payments shall be deemed to accrue on a daily basis.

3. Section 23 of the said Act is repealed and the following substituted therefor:

23. -- (1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension plan as the employee's contribution to the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension plan.

(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from moneys payable to an employee shall be deemed to be money received by the employer from the employee.

(3) The administrator or trustee of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsection (1).

(4) An employer who is required by a pension plan to contribute to the pension plan shall be deemed to hold in trust for the members of the pension plan an amount of money equal to the total of,

(a) all moneys that the employer is required to pay into the pension plan to meet,

(i) the current service cost, and
(ii) the special payments prescribed by the regulations,

that are due under the pension plan or the regulations and have not been paid into the pension plan; and

(b) where the pension plan is terminated or wound up, any other money that the employer is liable to pay under clause 21 (2) (a).

(5) The administrator or trustee of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsection (4).

(6) Subsections (1) and (4) apply whether or not the moneys mentioned in those subsections are kept separate and apart from other money.

...

8. Sections 32 and 33 of the said Act are repealed and the following substituted therefor:

32. -- (1) The employer of employees who are members of a defined benefit pension plan that the employer is bound by or to which the employer is a party and that is partly or wholly wound up shall pay to the administrator, insurer or trustee of the plan an amount of money equal to the amount by which the value of the pension benefits guaranteed by section 31 plus the value of the pension benefits vested under the defined benefit pension plan exceeds the value of the assets of the plan allocated in accordance with the regulations for payment of pension benefits accrued with respect to service in Ontario.

(2) The amount that the employer is required to pay under subsection (1) is in addition to the amounts that the employer is liable to pay under subsection 21 (2).

(3) The employer shall pay the amount required under subsection (1) to the administrator, insurer or trustee of the defined benefit pension plan in the manner prescribed by the regulations.

Pension Benefits Act, 1987, S.O. 1987, c. 35

58. -- (1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

...

(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

...

59. -- (1) Money that an employer is required to pay into a pension fund accrues on a daily basis.

(2) Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements.

...

75. -- (1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective

date of the wind up of the pension plan in whole or in part, has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

...

76. -- (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Commission declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 40 (3) (50 per cent rule) and section 75,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

Pension Benefits Act, R.S.O. 1990, c. P.8

57. (1) [Trust property] Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

(2) [Money withheld] For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employer from the employee.

(3) [Accrued contributions] An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

(4) [Wind up] Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

...

58. (1) [Accrual] Money that an employer is required to pay into a pension fund accrues on a daily basis.

(2) [Interest] Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements.

...

74. (1) [Activating events] This section applies if a person ceases to be a member of a pension plan on the effective date of one of the following activating events:

1. The wind up of a pension plan, if the effective date of the wind up is on or after April 1, 1987.
2. The employer's termination of the member's employment, if the effective date of the termination is on or after July 1, 2012. However, this paragraph does not apply if the termination occurs in any of the circumstances described in subsection (1.1).
3. The occurrence of such other events as may be prescribed in such circumstances as may be specified by regulation.

(1.1) [Same, termination of employment] Termination of employment is not an activating event if the termination is a result of wilful misconduct, disobedience or wilful neglect of duty by

the member that is not trivial and has not been condoned by the employer or if the termination occurs in such other circumstances as may be prescribed.

(1.2) [Exceptions, election by certain pension plans] This section does not apply with respect to a jointly sponsored pension plan or a multi-employer pension plan while an election made under section 74.1 for the plan and its members is in effect.

(1.3) [Benefit] A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least 55 on the effective date of the activating event has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the activating event had not occurred and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the activating event had not occurred and if the member's membership continued to that date.

(2) [Part year] In determining the combination of age plus employment or membership, one-twelfth credit shall be given for each month of age and for each month of continuous employment or membership on the effective date of the activating event.

(3) [Member for 10 years] Bridging benefits offered under the pension plan to which a member would be entitled if the activating event had not occurred and if his or her membership were continued shall be included in calculating the pension benefit under subsection (1.3) of a person who has at least 10 years of continuous employment with the employer or has been a member of the pension plan for at least 10 years.

(4) [Prorated bridging benefit] For the purposes of subsection (3), if the bridging benefit offered under the pension plan is not related to periods of employment or membership in the pension plan, the bridging benefit shall be prorated by the ratio that the member's actual period of employment bears to the period of employment that the member would have to the earliest date on

which the member would be entitled to payment of pension benefits and a full bridging benefit under the pension plan if the activating event had not occurred.

(5) [Notice of termination of employment] Membership in a pension plan that is wound up includes the period of notice of termination of employment required under Part XV of the *Employment Standards Act, 2000*.

(6) [Application of subs. (5)] Subsection (5) does not apply for the purpose of calculating the amount of a pension benefit of a member who is required to make contributions to the pension fund unless the member makes the contributions in respect of the period of notice of termination of employment.

(7) [Consent of employer] For the purposes of this section, where the consent of an employer is an eligibility requirement for entitlement to receive an ancillary benefit, the employer shall be deemed to have given the consent.

(7.1) [Consent of administrator, jointly sponsored pension plans] For the purposes of this section, where the consent of the administrator of a jointly sponsored pension plan is an eligibility requirement for entitlement to receive an ancillary benefit, the administrator shall be deemed to have given the consent.

(8) [Use in calculating pension benefit] A benefit described in clause (1.3) (a), (b) or (c) for which a member has met all eligibility requirements under this section shall be included in calculating the member's pension benefit or the commuted value of the pension benefit.

...

75. (1) [Liability of employer on wind up] Where a pension plan is wound up, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in

> Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,
>
> exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

Appeals of Sun Indalex Finance, George L. Miller and FTI Consulting allowed, LEBEL *and* ABELLA JJ. *dissenting. Appeal of USW dismissed.*

Solicitors:

Solicitors for the appellant Sun Indalex Finance, LLC: Goodmans, Toronto.

Solicitors for the appellant George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors: Chaitons, Toronto.

Solicitors for the appellant FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited: Stikeman Elliott, Toronto.

Solicitors for the appellant/respondent United Steelworkers: Sack Goldblatt Mitchell, Toronto.

Solicitors for the respondents Keith Carruthers, et al.: Koskie Minsky, Toronto.

Solicitors for the respondent Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership): Cavalluzzo Hayes Shilton McIntyre & Cornish, Toronto.

Solicitor for the respondent/intervener the Superintendent of Financial Services: Attorney General of Ontario, Toronto.

Solicitors for the intervener the Insolvency Institute of Canada: Thornton Grout Finnigan, Toronto.

Solicitors for the intervener the Canadian Labour Congress: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Canadian Federation of Pensioners: Paliare, Roland, Rosenberg, Rothstein, Toronto.

Solicitors for the intervener the Canadian Association of Insolvency and Restructuring Professionals: McMillan, Montréal.

Solicitors for the intervener the Canadian Bankers Association: Osler, Hoskin & Harcourt, Toronto.

TAB 9

Case Name:

Indalex Ltd. (Re)

RE: IN THE MATTER OF a Plan of Compromise or Arrangement of Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc., Applicants

[2013] O.J. No. 5916

2013 ONSC 7932

236 A.C.W.S. (3d) 292

9 C.C.P.B. (2d) 64

9 C.B.R. (6th) 270

2013 CarswellOnt 18028

Court File No. CV-09-8122-00CL

Ontario Superior Court of Justice
Commercial List

D.M. Brown J.

Heard: December 19, 2013.
Judgment: December 21, 2013.

(12 paras.)

Counsel:

A. Taylor and Y. Katirai, for the Monitor, FTI Consulting Canada ULC.

B. Empey, for Sun Indalex Finance, LLC.

H. O'Reilly, for Morneau Shepell Ltd., Administrator of the Salaried and Executive Plans.

D. Brown, for the United Steelworkers.

D. McPhail, for the Financial Services Commission of Ontario.

H. Chaiton, for the Chapter 7 Trustee of the Bankruptcy Estates of the US Indalex Debtors.

A. Hatney, for Keith Carruthers et al.

REASONS FOR DECISION

D.M. BROWN J.:--

I. Motions to approve a settlement and to amend a pension plan to implement the settlement

1 This appears to be the final chapter in the Indalex saga.

2 The Monitor, FTI Consulting, moved for the approval of a settlement agreement. Morneau Shepell Ltd., in its capacity as administrator of the Retirement Plan for Salaried Employees of Indalex Limited and Associated Companies and the Retirement Plan for Executive Employees of Indalex Limited and Associated Companies, moved for an order amending the Salaried Plan to give effect to the Settlement Agreement. On December 19, 2013, I granted both motions with reasons to follow.

II. The Monitor's Settlement Motion

3 After the Supreme Court of Canada released its decision in *Sun Indalex Finance, LLC v. United Steelworkers*[1] on February 1, 2013, the Monitor paid the US Trustee approximately U.S. $10.751 pursuant to an approval and vesting order. As of late November, the Monitor was holding $4.06 million and US $918,055 available for distribution to the creditors of the estate, subject to administration costs.

4 In March counsel for the USW and Retired Executives requested that the Monitor distribute those funds to the Salaried Plan and the Executive Plan. The Monitor was faced with a number of parties asserting priority claims: (i) US Trustee - US $5.4 million; (ii) Salaried Plan - $5.008 million; (iii) Executive Plan - $3.305 million; and, (iv) Sun Indalex Finance, LLC - $38.049 million. Priority for the claims by the Salaried Plan and the Executive Plan rested on the deemed trust, lien and charge provisions of the Ontario *Pension Benefits Act*. In addition, 347 creditors had filed claims of approximately $33.8 million. Although the US Trustee did not file a proof of claim, it informed the Monitor that there were payments of about $12.355 million made by US debtors to the applicants which could potentially constitute preferential payments under the US Code.

5 In June, 2013, the Monitor secured a litigation timetable order to determine threshold issues

relating to the distribution of estate funds. Some of the issues related to the claims advanced by the two pension plans, including: (i) whether the deemed trust claimed by the Executive Plan was enforceable against Indalex's accounts or inventory; (ii) the effect of a bankruptcy order on the existence, enforceability and priority of both Plans' deemed trust claims; and (iii) whether the beneficiaries of the Plans were "secured creditors" of Indalex for purposes of the *Bankruptcy and Insolvency Act*.

6 In the result, on September 13, 2013, Sun, the US Trustee, the Pension Administrators, the Superintendent, the Retired Executives and the USW reached a Settlement Agreement under which the funds in the hands of the Monitor would be distributed, in general terms, as follows:

(i) The distribution of $1.405 million to (i) the Pensions Administrator for deposit to the Salaried Plan ($650,000), (ii) $105,000 to the USW for seven members of the Salaried Plan, (iii) $15,000 to four members of the Executive Plan, (iv) $350,000 to counsel in trust for the Retired Executives, and (v) $285,000 to counsel as partial reimbursement of the legal fees of the Retired Executives; and,

(ii) The balance of the funds would be paid to the US Trustee on behalf of the bankruptcy estates of the US Debtors without prejudice to the claims of Sun in those proceedings.

Other provisions of the Settlement Agreement dealt with releases and the lack of need to indemnify certain D&O claims.

7 The US Trustee received US court approval to enter into the Settlement Agreement on October 10, 2013.

8 The Monitor recommended approval of the Settlement Agreement because costly and lengthy litigation would be required to determine the outstanding competing claims against estate funds.

9 I accepted the Monitor's recommendation, especially given that no interested party voiced any opposition to the approval order sought. The Settlement Agreement is a reasonable, proportionate resolution of the outstanding claims. Accordingly, I granted the approval order, together with orders discharging the D&O Charge, authorizing the distribution of funds, and approving the fees and disbursements of the Monitor ($1.038 million for the period April 3, 2009 to November 17, 2013) and Monitor's counsel ($1.734 million for the same period of time).

III. Motion by the Salaried Plan Administrator

10 Implementation of the Settlement Agreement requires an amendment to the Salaried Plan, specifically the addition of a paragraph excluding the Salaried Plan members represented by the USW from the $650,000 to be deposited into the Plan. Notice of the proposed amendment was sent to all Salaried Plan members.

11 No party opposed the proposed amendment. However, the applicant, Indalex Limited, is the employer under the Salaried Plan and, as such, the only party entitled to amend the Salaried Plan. The Administrator reported that neither Indalex Limited nor the US Trustee was willing or able to take the corporate steps necessary to enact the proposed amendment.

12 I granted an order amending the Salaried Plan as proposed by the Administrator. Although no clear explanation was given about why Indalex Limited, as employer, would not or could not amend the Salaried Plan, the need for the amendment in order to implement the Settlement Agreement was established. Indalex Limited, by filing an application under the *Companies' Creditors Arrangement Act* invoked the jurisdiction of this Court, including the general power of this Court under *CCAA* s. 11 to "make any order that it considers appropriate in the circumstances". That power includes the ability of the Court to amend a pension plan of an applicant where the amendment is necessary to give effect to a reasonable compromise of claims against the estate of the applicant, where notice of the proposed amendment is given to all affected persons, and where no affected person objects to the amendment sought. Consequently, I granted the Plan amending order requested by the Administrator.

D.M. BROWN J.

1 2013 SCC 6.

TAB 10

Court File No. CV-12-9539-00CL

Timminco Limited
Bécancour Silicon Inc.

TWENTY-FIFTH REPORT OF THE MONITOR

June 9, 2014

FTI CONSULTING

Court File No. CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

TWENTY-FIFTH REPORT TO THE COURT SUBMITTED BY FTI CONSULTING CANADA INC., IN ITS CAPACITY AS MONITOR

INTRODUCTION

1. On January 3, 2012, Timminco Limited ("**Timminco**") and its wholly owned subsidiary, Bécancour Silicon Inc. ("**BSI**", together with Timminco, the "**Timminco Entities**") made an application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") and an initial order (the "**Initial Order**") was made by the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) (the "**Court**"), granting, *inter alia*, a stay of proceedings against the Timminco Entities until February 2, 2012, (the "**Stay Period**") and appointing FTI Consulting Canada Inc. as monitor of the Timminco Entities (the "**Monitor**"). The proceedings commenced by the Timminco Entities under the CCAA will be referred to herein as the "**CCAA Proceedings**".

2. The Stay Period has been extended a number of times. Pursuant to the Order of the Honourable Mr. Justice Newbould granted December 16, 2014 (the "**December 16 Order**") the Stay Period currently expires on June 16, 2014.

3. On June 15, 2012, the Honourable Mr. Justice Morawetz granted an order approving a procedure for the submission, review and adjudication of claims against the Timminco Entities and of claims against the directors and officers of the Timminco Entities (the "**Claims Procedure Order**"). The Claims Bar Date was set at 5:00 p.m. Toronto time on July 23, 2012. The Monitor has reviewed all claims and been in contact with various claimants in order to attempt to resolve a variety of outstanding issues.

4. By Order of the Honourable Mr. Justice Newbould dated August 17, 2012, Russell Hill Advisory Services Inc. ("**Russell Hill**") was appointed as Chief Restructuring Officer (the "**CRO**") of the Timminco Entities and the engagement letter dated July 24, 2012, between Russell Hill and the Timminco Entities (the "**CRO Agreement**") was approved.

5. The CRO Agreement was for an initial term of six months with any extension to be negotiated with the Monitor subject to approval of the Court. The CRO Agreement was extended a number of times pursuant to the terms of the CRO Extension Agreement dated April 25, 2013 approved by the Court on May 14, 2013.

6. The CRO was discharged on December 16, 2013 pursuant to the provisions of the December 16 Order. On the same date, Mr. Justice Newbould issued an Order (the "**Monitor Powers Order**") expanding the powers of the Monitor to enable the Monitor to complete the estate in the name of and on behalf of the Timminco Entities.

7. To date, the Monitor has filed twenty-four reports on various matters relating to the CCAA Proceedings. This, the Monitor's Twenty-Fifth Report, should be read in conjunction with the Monitor's Twenty-Fourth Report, a copy of which is attached hereto as **Appendix A** for ease of reference. The purpose of the Monitor's Twenty-Fifth Report is to:

(a) Provide further information with respect to the Monitor's motion for advice and directions from the Court in respect of a motion for leave to appeal and, if granted, an appeal by the Timminco Entities, acting by the Monitor, of the decision of the Honourable Mr. Justice Mongeon the Superior Court of Québec (Commercial Division) delivered January 24, 2014 in respect of the priority of the BSI Pension Reimbursement Claims as described in the Monitor's Twenty-Fourth Report (the "**Advice and Directions Motion**") and to inform the Court of the Monitor's decision to seek to withdraw the Advice and Direction Motion and not pursue the appeal;

(b) Request the granting of an Order declaring that the Unresolved D&O Claim, as hereinafter defined, is not a claim secured by the D&O Charge;

(c) Request the granting of an Order authorizing the Monitor, subject to holding such reserves as it deems appropriate in its sole discretion, to make distributions from the estates of Timminco and BSI as described in this report; and

(d) Request the granting of an Order extending the Stay Period until September 30, 2014.

TERMS OF REFERENCE

8. In preparing this report, the Monitor has relied upon unaudited financial information of the Timminco Entities, the Timminco Entities' books and records, certain financial information prepared by the Timminco Entities and discussions with various parties.

9. Except as described in this Report:

(a) The Monitor has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would comply with Generally Accepted Assurance Standards pursuant to the Canadian Institute of Chartered Accountants Handbook;

(b) The Monitor has not examined or reviewed financial forecasts and projections referred to in this report in a manner that would comply with the procedures described in the Canadian Institute of Chartered Accountants Handbook;

10. Future oriented financial information reported or relied on in preparing this report is based on management's assumptions regarding future events; actual results may vary from forecast and such variations may be material.

11. The Monitor has prepared this Report in connection with the motion described in its Notice of Motion dated March 3, 2014, returnable June 12, 2014, and its Notice of Motion dated June 9, 2014, returnable on a date to be fixed by the Court at a 9:30 Chambers appointment scheduled for June 10, 2014. The Report should not be relied on for other purposes.

12. Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian Dollars. Capitalized terms not otherwise defined herein have the meanings defined in the previous reports of the Monitor, the Initial Order or other Order of the Court issued in the CCAA Proceedings.

THE ADVICE AND DIRECTIONS MOTION

BACKGROUND

13. On August 28, 2012, the Honourable Mr. Justice Newbould granted an Order authorizing and directing an interim distribution to be made by the Monitor to Investissement Quebec ("**IQ**"), a secured creditor of BSI (the "**Interim Distribution Order**"). The Interim Distribution Order authorized an initial distribution of $25,393,057.43. In accordance with the endorsement of the Honourable Justice Newbould dated August 31, 2012, the Monitor made a subsequent distribution to IQ of $1,213,000. A final distribution in the amount of $1,714,879.90 was made on January 31, 2013 following completion of the Working Capital Settlement Agreement as defined and described in the Monitor's Eighteenth Report.

14. The Interim Distribution Order also provided for a process for other parties that had filed a secured claim against BSI in accordance with the Claims Procedure Order to assert priority over the monies paid to IQ and approved a reimbursement agreement dated August 28, 2012 between BSI, the Monitor and IQ (the "**Reimbursement Agreement**") pursuant to which IQ is obliged to reimburse any portion of the Interim Distribution necessary to satisfy any Reimbursement Claim (as defined in the Reimbursement Agreement) that is proven to have priority over IQ's security.

15. Pursuant to an Order of the Honourable Mr. Justice Morawetz granted October 18, 2012, the Priority Claim Adjudication Protocol was approved and two claims were designated as Reimbursement Claims, being:

    (a) A claim on behalf of Mercer Canada ("**Mercer**"), as administrator of the Haley Pension Plan, and on behalf of the beneficiaries of that plan (the "**Mercer Reimbursement Claim**"), which claim was supported by The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("**USW**"); and

(b) A claim by Le Comité de retraite du Régime de rentes pour les employés nonsyndiqués de Silicium Bécancour Inc. and a claim by Le Comité de retraite du Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (collectively, the "**BSI Pension Committees**") (the "**BSI Pension Reimbursement Claims**").

16. On October 24, 2012, both Mercer and the USW informed the Monitor and IQ that they would not be pursuing the Mercer Reimbursement Claim.

17. Pursuant to the Priority Claim Adjudication Protocol, the adjudication of whether the BSI Pension Reimbursement Claims constitute Priority Claims (as defined in the Interim Distribution Order) was to be determined exclusively by the Superior Court of Québec (Commercial Division) (the "**Quebec Court**"). The motion for such determination is referred to herein as the "**Quebec Priority Motion**".

18. The BSI Pension Reimbursement Claims consisted of the following:

(a) The unpaid special payments due to the BSI Pension Plan for unionized employees (the "**BSI Union Plan**");

(b) The unpaid special payments due to the BSI Pension Plan for non-unionized employees (the "**BSI Non-union Plan**");

(c) The solvency deficit of the BSI Union Plan; and

(d) The solvency deficit of the BSI Non-union Plan.

19. Special payments for the BSI Union Plan (the "**BSI Union Plan Special Payments**") were stated to be in the amount of $93,810 per month, with $668,690 claimed as owing for the months December 2011 to June 2012. The solvency deficit for the BSI Union Plan (the **"BSI Union Plan Deficit"**) was estimated to be $9,889,600 at December 31, 2011. Special payments for the BSI Non-union Plan (the "**BSI Non-union Plan Special Payments**" and together with the BSI Union Plan Special Payments, the "**BSI Special Payments**") were stated to be in the amount of $41,710 per month, with $297,520 claimed as owing for the months December 2011 to June 2012. The solvency deficit for the BSI Non-union Plan (the **"BSI Non-union Plan Deficit"** and together with the BSI Union Plan Deficit, the "**BSI Plan Deficits**") was estimated to be $3,998,700 at December 31, 2011.

20. Pursuant to Section C of the Priority Adjudication Protocol, any appeal from an order of the Quebec Court on the Quebec Priority Motion shall be to the Court of Appeal of Quebec and in determining whether the BSI Reimbursement Claims constitute Priority Claims, the determination of the quantum of such Priority Claims was postponed until after the determination of the nature of the claim and will be determined in accordance with the Claims Procedure Order or further order of the Court.

21. The Quebec Priority Motion was heard by the Honourable Mr. Justice Mongeon of the Quebec Court on May 27 and 28, 2013, who reserved his decision.

22. On January 24, 2014, Mr. Justice Mongeon released his decision in respect of the Quebec Priority Motion (the "**Quebec Priority Decision**"). Mr. Justice Mongeon found that:

    (a) The unpaid BSI Special Payments and interest thereon are subject to a deemed trust that is enforceable against IQ;

(b) The unpaid BSI Special Payments and interest thereon are unassignable and unseizable, are excluded from the application of IQ's movable and immovable hypothec without delivery and have priority over IQ's secured claim; and

(c) The BSI Plan Deficits are not subject to a deemed trust and do not have priority over IQ's secured claim.

23. The quanta of the claims in respect of the BSI Special Payments and interest thereon (collectively, the "**BSI Deemed Trust Claim**") ranking in priority to IQ and subject to reimbursement under the Reimbursement Agreement is yet to be determined.

24. On or around February 11, 2014, the Monitor learned that IQ would not be seeking leave to appeal the Quebec Priority Decision.

25. In order to protect the rights of Timminco, which has asserted the largest unsecured claim against BSI, the rights of unsecured creditors of BSI and the rights of the Timminco Pension Plan which have asserted deemed trust claims over amounts owing to Timminco and to ensure that rights of affected creditors are not adversely affected by the passage of time, Timminco and BSI, acting by the Monitor, filed a motion seeking leave to appeal the Quebec Priority Decision on February 14, 2014 (the "**Leave Motion**").

26. The Leave Motion is expressly subject to the Monitor seeking advice and directions of the Ontario Superior Court of Justice. The grounds for the appeal are that the Quebec Priority Decision contains several errors of law and raises legal issues of public interest as it:

(a) Creates a statutory deemed trust in contradiction to the previous judicial decisions on this issue by the same First Instance Judge;

(b) Creates a priority for those deemed trusts in contradiction to Supreme Court of Canada case law;

(c) Contrary to prior case law in Quebec, provides that a purported priority created by provincial legislation remains operative in a proceeding under the federal CCAA;

(d) Affects the interests of pension plans and pensioners of the Timminco Pension Plan who have valid deemed trust claims in Ontario in accordance with applicable legislation and the decision of the Supreme Court of Canada in *re. lndalex*; and

(e) Prejudices the rights of other unsecured creditors of BSI.

27. On March 3, 2014, the Monitor served the Advice and Directions Motion, including the Twenty-Fourth Report setting out the reasons for the need for advice and directions of the Court.

ADDITIONAL INFORMATION IN RESPECT OF THE IQ CLAIM

28. The final distribution to IQ described earlier in this report was made based on a pay-out statement provide by IQ dated January 29, 2013 (the "**January 29 Statement**"). Based on that pay-out statement, it was the belief and understanding of both the Monitor and the CRO that as a result of the distributions made, IQ was fully paid and had no additional claim against the estate.

29. While in attendance at Court on March 6, 2014 for a scheduling hearing in respect of the Advice and Directions Motion, the Monitor was informed by counsel to the BSI Pension Committees that the materials filed by IQ in the Quebec Priority Motion included a statement of account dated March 18, 2013 that showed IQ having an outstanding claim of $1,197,804.82. The Monitor was unaware of that statement.

30. The Monitor's analysis and conclusions in its Twenty-Fourth Report were based on the assumption that IQ was paid in full and that the remaining BSI realizations, totalling approximately $1.4 million, less additional costs of the CCAA Proceeding, would be available to unsecured creditors of BSI in the event that the Leave Motion was successful.

31. Following receipt of the information that IQ may have amounts that remained outstanding on its secured claim, the Monitor requested that IQ provide an explanation of how it was claiming that amounts were outstanding when the full amount shown on the January 29 Statement has been paid.

32. In a letter dated March 26, 2014 (the "**March 26 Letter**"), counsel to IQ stated that the January 29 Pay-out Statement had a clerical error that resulted in the omission of $1,074,217.30 (the "**Reserve Amount**") from the January 29 Statement. A copy of the March 26 Letter is attached hereto as **Appendix B**.

33. Following receipt of the March 26 Letter, the Monitor requested and received various additional information from IQ with respect to its alleged claim and the calculation thereof.

34. On April 9, 2014, counsel to IQ provided a revised updated statement of account dated March 27, 2014, showing the amount owing to IQ to be $1,339,269.03 (the "**March 27 Statement**").

35. Following receipt of the March 27 Statement, the Monitor requested and received various additional information from IQ with respect to its alleged claim and the calculation thereof.

36. The Monitor has now concluded its analysis of the IQ Claim. Based on that analysis, the Monitor is satisfied that IQ did indeed make an error in the January 29 Statement, but is of the view that the IQ Claim should not include interest of $141,464.21 accrued since February 1, 2013.

37. As described in the affidavit of Sean Dunphy sworn August 23, 2012 and filed in support of the Timminco Entities' motion for the Interim Distribution Order, the stated purpose of entering into the Reimbursement Agreement and making distributions to IQ while preserving the ability for other creditors of BSI to assert a claim ranking in priority to IQ (i.e. the Quebec Priority Motion) was to halt the interest expense. But for IQ's clerical error in the January 29 Statement, the Reserve Amount would have been paid on February 1, 2013 and no further interest would have accrued. Given the stated purpose of making distributions to IQ in advance of the final determination of the Quebec Priority Motion and the reliance placed on the January 29 Statement by the Timminco Entities, the Monitor does not believe that IQ should be entitled to interest after February 1, 2014 and the outstanding IQ Claim should be $1,197,804.82 rather than $1,339,269.03.

38. The Monitor has discussed its position with IQ and IQ has confirmed that it accepts the Monitor's position with respect to interest accruing after February 1, 2013 and that IQ's outstanding claim amounts to $1,197,804.82 (the "**IQ Claim**").

ADDITIONAL INFORMATION IN RESPECT OF THE ENTERPRISE ARSENAULT CLAIM

39. Enterprise Arsenault ("**EA**") filed a secured claim pursuant to the Claims Procedure in the amount of $306,956.84 (the "**EA Claim**") with the EA Claim purportedly secured by a hypothec registered against the HP2 Facility and the Silica Fumes Property, although the amount of the claim relating to each property was not specified. While the Monitor did not dispute the amount of the EA Claim, the Monitor disallowed the claim status of the claim as secured on the bases that:

(a) EA failed to perfect its hypothec within the required timeframe of six months; and

(b) Any amount of the claim that was attributable to the Silica Fumes Property would be unsecured as there was no realizable value.

40. EA disputed the Monitor's Notice of Disallowance, asserting that it was not necessary from them to take additional steps in respect of the perfection of the hypothec as paragraph 7 of the Approval and Vesting Order states that "the proceeds of sale stood in the stead of the assets and that all Claims shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale".

41. Based on additional information recently provided by EA, including confirmation that all of the outstanding amount relates to work performed on the HP2 facility, and advice recently received from its legal counsel, the Monitor now accepts EA's assertion that, as a result of the wording of the Approval and Vesting Order, it was not necessary to take further steps to perfect the hypothec after the granting of the Approval and Vesting Order. EA and the Monitor have agreed that EA has a secured claim for work performed on the HP2 facility in the amount of $200,000 (the "**EA Secured Claim**") and that the EA Secured Claim ranks in priority to the IQ Claim in respect of the BSI monies held by the Monitor.

42. The Monitor has discussed the foregoing with IQ and IQ has confirmed that it does not dispute the quantum, validity or priority of the EA Secured Claim.

IMPACT OF THE IQ CLAIM ON THE ADVICE AND DIRECTIONS MOTION

43. There is approximately $1.25 million, less additional costs of the proceeding, in the estate of BSI that is available to creditors beyond the amount already paid to IQ. Given the EA Secured Claim and the IQ Claim, there would be no monies available to available to unsecured creditors of BSI even if the Quebec Priority Decision was overturned on appeal. This result is materially different than what was believed would have been the case at the time of the Monitor's Twenty-Fourth Report when the IQ Claim was unknown.

44. As EA is not impacted by an appeal of the Quebec Priority Decision, there are therefore no creditors with any economic interest in an appeal of the Quebec Priority Motion, other than IQ which chose not to seek leave to appeal the Quebec Priority Decision.

THE MONITOR'S CONCLUSION AND RECOMMENDATION

45. While the Monitor continues to believe that the grounds for an appeal of the Quebec Priority Decision are sound and that clarification of the conflicting case law on the issue would be in the public interest, it does not believe that further expenditure of the Timminco Entities' funds pursuing the Advice and Directions Motion, the Leave Motion or the appeal of the Quebec Priority Decision is justified.

46. Accordingly, the Monitor intends to seek to withdraw the Advice and Directions Motion and the Leave Motion.

QUANTIFICATION OF BSI DEEMED TRUST CLAIM

47. As noted earlier in this report, pursuant to Section C of the Priority Adjudication Protocol the determination of the quantum of the BSI Deemed Trust Claim was postponed until after the determination of the nature of the claim and will be determined in accordance with the Claims Procedure Order or further order of the Court.

48. The Monitor intends to discuss the process for the quantification of the BSI Deemed Trust Claim with counsel for the BSI Pension Committees and counsel for IQ and expects to provide a report thereon to the Court prior to the return of the motion.

D&O CHARGE

49. Paragraphs 26 and 27 of the Initial Order state:

> "26. THIS COURT ORDERS that the Timminco Entities shall indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers of the Timminco Entities after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.
>
> 27. THIS COURT ORDERS that the directors and officers of the Timminco Entities shall be entitled to the benefit of and are hereby granted a charge (the "D&O Charge") on the Property, which charge shall not exceed an aggregate amount of $400,000, as security for the indemnity provided in paragraph 26 of this Order. The D&O Charge shall have the priority set out in paragraphs 38 and 40 herein."

50. Twenty-nine claims in the aggregate amount of $15,760,643 were filed as D&O Claims pursuant to the Claims Procedure Order. Of these, 28 claims in the aggregate amount of $760,143 were finally determined to not be valid D&O Claims.

51. The remaining claim of $15,000,000 was filed by the Communications, Energy and Paperworkers Union (the "**CEP**") and was disallowed by the Monitor. The Monitor's disallowance was disputed and the claim remains unresolved (the "**Unresolved D&O Claim**").

52. The Unresolved D&O Claim claims liability on the part of one former director and officer and two former officers of BSI in respect of alleged breaches of fiduciary duty failure to disclose information to the pension committee relating to a corporate restructuring of BSI and the creation of QSLP in or around 2010.

53. In the opinion of the Monitor, the Unresolved D&O Claim is not a claim which is secured by the D&O Charge as the amount claimed is not an obligation or liability incurred by virtue of being a director or officer of the Timminco Entities after the commencement of the CCAA Proceedings.

54. D&O Counsel has agreed that the Unresolved D&O Claim would be dealt with by D&O Counsel outside the Claims Procedure as provided for in paragraph 34 of the Claims Procedure Order.

55. In order to make distributions to creditors of Timminco and BSI in accordance with their legal priorities, the D&O Charge must be released.

56. Accordingly, the Monitor now seeks an Order:

    (a) Declaring that the Unresolved D&O Claim is not secured by the D&O Charge; and

    (b) Releasing the D&O Charge.

DISTRIBUTIONS TO CREDITORS

57. The Monitor currently holds approximately $2.42 million. Applying the Cost Allocation Methodology approved by the Order of the Honourable Mr. Justice Newbould granted December 16, 2013, approximately $1.17 million is for the estate of Timminco (the "**Timminco Estate Funds**") and approximately $1.25 million is for the estate of BSI (the "**BSI Estate Funds**"), each subject to additional costs and disbursements.

58. Pursuant to paragraph 2.1 of the Reimbursement Agreement, IQ is required to reimburse to BSI by payrnent to the Monitor such portion of the Interim Distribution as may be necessary to satisfy the BSI Deemed Trust Claim.

59. Subject to the approval of the Court and subject to the costs of the completion of the Timminco CCAA Proceedings, the Monitor will be in a position to make the following distributions from the estate of BSI:

(a) To EA on account of the EA Secured Claim; and

(b) Absent a bankruptcy of BSI and a determination that such bankruptcy reverses the priority of the BSI Deemed Trust over the secured claim of IQ, to the BSI Pension Committees on account of the BSI Deemed Trust Claim once the quantum is agreed or otherwise finally determined and IQ has reimbursed the necessary amount.

60. As previously reported, there is a deemed trust claim in respect of the solvency deficit of the Timminco pension plan (the "**Haley Deemed Trust**"), which was estimated to be approximately $5.1 million as at January 1, 2012. The Administrator estimates the solvency deficit to be approximately $4.3 million as at February 28, 2014. While the Monitor has not yet agreed the quantum of the Haley Deemed Trust Claim, absent a bankruptcy of Timminco overturning the Haley Deemed Trust and subject to the costs of the completion of the Timminco CCAA Proceedings, the remaining Timminco Estate Funds would be payable to the Administrator of the Haley Plan unless the Haley Deemed Trust Claim was less than $1.17 million (the amount of funds available to the Timminco estate).

61. Bankruptcies of Timminco and BSI may overturn the Haley Deemed Trust and the BSI Deemed Trust. To date, no creditor has taken steps to seek a bankruptcy of either Timminco or BSI.

62. Accordingly, the Monitor respectfully requests an Order from the Court authorizing the Monitor, subject to holding such reserves as it deems appropriate in its sole discretion, to make distributions from time to time as follows:

(a) From Timminco on account of the Haley Deemed Trust, once the quantum of the Haley Deemed Trust Claim is finally determined, or is determined to be in excess of the amount available to the Timminco estate; and

(b) From BSI on account of the EA Secured Claim and account of the BSI Deemed Trust Claim once the quantum of the BSI Deemed Trust Claim is agreed or otherwise finally determined and IQ has reimbursed the necessary amount.

EXTENSION OF THE STAY PERIOD

MATTERS REMAINING TO BE COMPLETED

63. The only known significant activities remaining to be completed prior to the termination of the CCAA Proceedings and the discharge of the Monitor are as follows:

(a) Completing the quantification of the BSI Deemed Trust Claim and the Haley Plan Deemed Trust Claim;

(b) Completing the distributions described herein and matters related thereto;

(c) Statutory and administrative duties and filings; and

(d) Termination of CCAA Proceedings and discharge of Monitor and matters ancillary thereto.

64. In addition, the Monitor very recently received a call from a party expressing an interest in the tax attributes of the corporate shells and a potential transaction that could provide additional value to creditors. That party has told the Monitor that it will provide a term sheet for consideration, though has not yet done so. Accordingly, the Monitor cannot provide any comment at this time as to the nature of the potential transaction or the likelihood that it would be beneficial for the estate to pursue the potential transaction.

STAY PERIOD EXTENSION

65. The Stay Period currently expires on June 16, 2014. Additional time is required for the Timminco Entities to complete the remaining matters in the CCAA Proceedings as described earlier in this report. Accordingly, the Timminco Entities now seek an extension of the Stay Period to September 30, 2014.

66. As at the date of this report, the Timminco Entities have cash on hand, including amounts held by the Monitor, of approximately $2.4 million. The Timminco Entities therefore appear to have sufficient funding for the extension of the Stay Period.

67. Based on the information currently available, the Monitor believes that creditors would not be materially prejudiced by an extension of the Stay Period to September 30, 2014.

68. The Monitor also believes that the Timminco Entities have acted, and are acting, in good faith and with due diligence and that circumstances exist that make an extension of the Stay Period appropriate.

The Monitor respectfully submits to the Court this, its Twenty-Fifth Report.

Dated this 9th day of June, 2014.

FTI Consulting Canada Inc.
In its capacity as Monitor of
Timminco Limited and Bécancour Silicon Inc.

Nigel D. Meakin
Senior Managing Director

Toni Vanderlaan
Senior Managing Director

TAB 11

Intitulé de la cause :

Timminco ltée (Arrangement relatif à)

DANS L'AFFAIRE DE LA LOI SUR LES ARRANGEMENTS AVEC LES CRÉANCIERS DES COMPAGNIES, L.R.C. (1985), c. C-36 EN SA VERSION MODIFIÉE

et

DANS L'AFFAIRE D'UN PLAN DE TRANSACTION OU D'ARRANGEMENT DE : TIMMINCO LIMITÉE, BÉCANCOUR SILICON INC., débitrices

et

FTI CONSULTING INC., contrôleur

et

COMITÉ DE RETRAITE DU RÉGIME DE RENTES POUR LES EMPLOYÉS SYNDIQUÉS DE SILICIUM BÉCANCOUR INC., COMITÉ DE RETRAITE DU RÉGIME DE RENTES POUR LES EMPLOYÉS NON-SYNDIQUÉS DE SILICIUM BÉCANCOUR INC., requérants

c.

INVESTISSEMENT QUÉBEC, intimée

[2014] J.Q. no 402

2014 QCCS 174

2014EXP-451

J.E. 2014-233

EYB 2014-232146

9 C.C.P.B. (2d) 100

9 C.B.R. (6th) 173

2014 CarswellQue 384

No : 500-11-043844-121

Cour supérieure du Québec
District de Montréal

L'honorable Robert Mongeon, J.C.S.

Entendu : 27, 28 mai 2013.
Rendu : 24 janvier 2014.

(181 paragr.)

Successions et fiducies -- Fiducie -- Constitution -- Fiducie statutaire -- L'art. 49 de la Loi sur les régimes complémentaires de retraite établit une fiducie réputée touchant les cotisations d'équilibre suspendues et non versées aux comités de retraite -- La fiducie réputée de l'art. 49 de la Loi pouvait donc affecter la portion des liquidités de SBI représentant le total des cotisations d'équilibre dues et non encore versées aux comités de retraite, à cause de l'ordonnance de suspension, sans qu'il soit nécessaire de les séparer du reste des actifs liquides de SBI et, du même fait, les caractères d'incessibilité et d'insaisissabilité de ces mêmes montants aux termes de l'art. 264 de la Loi pouvaient les affecter -- Requête pour directives et jugement déclaratoire accueillie en partie.

Régimes de retraite et pensions -- Régimes privés de retraite -- Administration du régime -- Cotisations -- Suspension -- Législation -- Interprétation -- L'art. 49 de la Loi sur les régimes complémentaires de retraite établit une fiducie réputée touchant les cotisations d'équilibre suspendues et non versées aux comités de retraite -- La fiducie réputée de l'art. 49 de la Loi pouvait donc affecter la portion des liquidités de SBI représentant le total des cotisations d'équilibre dues et non encore versées aux comités de retraite, à cause de l'ordonnance de suspension, sans qu'il soit nécessaire de les séparer du reste des actifs liquides de SBI et, du même fait, les caractères d'incessibilité et d'insaisissabilité de ces mêmes montants aux termes de l'art. 264 de la Loi pouvaient les affecter -- Requête pour directives et jugement déclaratoire accueillie en partie.

Sûretés et publicité des droits -- Hypothèque -- Étendue et objet -- La notion d'incessibilité et d'insaisissabilité des cotisations d'équilibre dues et non versées empêche SBI et ses créanciers d'utiliser ces sommes à des fins autres que celles prévues à la Loi sur les régimes complémentaires de retraite -- Ces sommes ne peuvent donc faire l'objet d'une hypothèque mobilière universelle avec ou sans dépossession -- Requête pour directives et jugement déclaratoire accueillie en partie.

Requête pour directives et jugement déclaratoire présentée par le Comité de retraite du régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. et le Comité de retraite du régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc. (les Comités). Silicium Bécancour Inc. (SBI) est une société filiale de Timminco Inc. Les deux sociétés sont sous la protection de la Loi sur les arrangements avec les créanciers des compagnies. Par ordonnance rendue le 16 janvier 2012, tous les paiements d'équilibre devant être effectués par SBI en faveur de deux régimes de retraite à prestations déterminées au bénéfice de ses employés ont été suspendus. Les deux régimes de retraite sont en situation de terminaison de régime vu qu'ils n'ont, à toutes fins pratiques, plus d'employés participants. De plus, ces régimes de retraite sont en situation de déficit actuariel de solvabilité. Les Comités soutiennent qu'en vertu du droit québécois, les montants

réclamés pour les cotisations d'équilibre et pour les déficits actuariels sont réputés détenus en fiducie par SBI en faveur des Régimes de retraite. En date du 20 juillet 2012, les réclamations des Comités totalisent 10 558 290 $ et 4 296 220 $ respectivement. Les Comités sont d'avis que leurs réclamations constituent des créances prioritaires prenant rang avant celle d'Investissement Québec (IQ), qui détient une hypothèque universelle sans dépossession sur la totalité des biens meubles et immeubles de SBI et en vertu de laquelle elle a reçu un paiement de quelques 29 millions de dollars en remboursement de sa créance. Les Comités prétendent que leurs réclamations prioritaires se doivent d'être reconnues comme telles par le Tribunal.

DISPOSITIF : Requête accueillie. L'art. 49 de la Loi sur les régimes complémentaires de retraite (Loi) établit une fiducie réputée touchant les cotisations d'équilibre suspendues et non versées aux Comités. Pour qu'une fiducie réputée existe en droit québécois, il faut que le législateur intervienne clairement en ce sens, ce qui est le cas en l'espèce. La fiducie réputée de l'art. 49 de la Loi pouvait donc affecter la portion des liquidités de SBI représentant le total des cotisations d'équilibre dues et non encore versées aux Comités, à cause de l'ordonnance de suspension, sans qu'il soit nécessaire de les séparer du reste des actifs liquides de SBI et, du même fait, les caractères d'incessibilité et d'insaisissabilité de ces mêmes montants aux termes de l'art. 264 de la Loi pouvaient les affecter. Le fait que les sommes aient été distribuées à IQ sous réserve des droits des Comités n'a pas eu pour effet de faire perdre à ces actifs leur caractère de biens fiduciaires, incessibles et insaisissables. La notion d'incessibilité et d'insaisissabilité des cotisations dues et non versées empêche SBI et ses créanciers d'utiliser ces sommes à des fins autres que celles prévues à la Loi. Ces sommes ne peuvent donc faire l'objet d'une hypothèque mobilière universelle avec ou sans dépossession. On ne peut cependant étendre l'application de l'art. 49 ou de l'art. 264 de la Loi aux déficits actuariels. Le remboursement de ces soldes est régi par une série de règles particulières.

Législation citée :

Code civil du Bas-Canada

Code civil du Québec, art. 1260 et ss., art. 1260, art. 1261, art. 1262, art. 1263, art. 2644, art. 2645

Code de procédure civile, art. 46, art. 553(7)

Loi de l'impôt sur le revenu, L.R.C. 1985, ch. 1, art. 227, art. 227(5)

Loi modifiant la Loi concernant l'Impôt sur le tabac, la Loi sur le Ministère du Revenu et d'autres dispositions législatives d'ordre fiscal L.Q. 1993, c. 79, art. 39

Loi ontarienne sur les sûretés mobilières, L.R.O. 1990, ch. D-10, art. 30(7)

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3, art. 67, art. 67(1), art. 67(1)(b), art. 67(3), art. 227(4.1)

Loi sur le Ministère du revenu, L.R.Q., c. M-31, art. 20, art. 20, al. 2

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11, art. 17

Loi sur les banques, L.C. 1991, ch. 46, art. 427

Loi sur les régimes complémentaires de retraite, L.R.Q., c. R-15.1, chapitre XIII, art. 6, art. 7, art. 8, art. 9, art. 14-18, art. 37-52, art. 37, art. 38, art. 39, art. 49, art. 138, art. 139, art. 198 et ss., art. 205(3), art. 208 et ss., art. 228-264, art. 228, art. 229-230, art. 230.0.01-230.0.012, art. 264, art. 264(3), al. 2

Pensions Benefit Act, R.S.O. 1990, c. P-8, art. 57, art. 57(3), art. 57(4)

Règlement sur les régimes complémentaires de retraite, (1990) 122 C.O. II-3246, art. 28(3)

Avocats :

Me Tina Hobday, Me Alexander Herman, Langlois Kronström Desjardins, procureurs de la partie demanderesse.

Me Charles Mercier, Me Émilie Truchon, Fasken Martineau, procureurs de la partie défenderesse.

Me Adam Spiro, Me Steven Weisz, Blake, Cassels & Graydon, procureurs de la partie intimée.

JUGEMENT SUR DIRECTIVES ET
JUGEMENT DÉCLARATOIRE TOUCHANT
CERTAINES RÉCLAMATIONS PRIORITAIRES
(Articles 11 et 17 LACC)

INTRODUCTION ET MISE EN SITUATION

1 Bécancour Silicon Inc. ou, dans sa dénomination française, Silicium Bécancour Inc. (SBI) est une société filiale de Timminco Inc. (TI).

2 SBI et TI sont sous la protection de la *Loi sur les arrangements avec les créanciers des compagnies L.R.C. (1985) c. c-36* telle qu'amendée (la LACC) depuis le 3 janvier 2012, suite à l'émission d'une ordonnance initiale prononcée par le juge Geoffrey Morawetz de la Cour supérieure de justice de l'Ontario.

3 Par ordonnance subséquente rendue le 16 janvier 2012 (l'"Ordonnance de Suspension")[1], tous les paiements d'équilibre devant être effectués par SBI en faveur de deux régimes de retraite à

prestations déterminées au bénéfice de ses employés syndiqués[2] et non-syndiqués[3] ont été suspendus.

4 Ces régimes sont régis d'une part par les contrats les constituant (P-1 et P-2) et par la *Loi sur les régimes complémentaires de retraite, LRQ c. R-15.1* telle qu'amendée (la LRCR). Il est admis que les cotisations d'exercice et d'équilibre ont été versées par l'employeur SBI jusqu'au 31 janvier 2012 et que les cotisations d'exercice ont été versées jusqu'à date.

5 Les deux régimes de retraite P-1 et P-2 sont (ou sont sur le point de le devenir) en situation de terminaison de régime vu que ces deux régimes n'ont, à toutes fins pratiques, plus d'employés participants. De plus, ces régimes de retraite sont en situation de déficit actuariel de solvabilité.

6 Au 31 décembre 2011, le déficit actuariel de solvabilité du régime des employés syndiqués était de 9 889 600,00$ (pièce P-3) tandis que celui des employés non-syndiqués était de 3 998 700,00$ (pièce P-4)[4].

7 Pour effacer, du moins en partie, les déficits actuariels précités, SBI devait verser des cotisations d'équilibre de 93 810,00$ et de 41 710,00$ par mois dans les caisses des deux régimes précités (pièces P-3 et P-4). Ces cotisations d'équilibre sont suspendues depuis l'Ordonnance de Suspension précitée.

8 Les Comités de retraite requérants sont d'avis que leurs réclamations précitées constituent des créances prioritaires prenant rang avant celle de l'Intimée Investissement Québec (IQ), qui détient une hypothèque universelle sans dépossession sur la totalité des biens meubles et immeubles de SBI et en vertu de laquelle elle a reçu un paiement de quelques 29 millions de dollars en remboursement de sa créance.

9 L'objet du présent jugement porte sur le statut de ces réclamations prioritaires.

10 Les deux Comités de retraite requérants prétendent que leurs réclamations prioritaires se doivent d'être reconnues comme telles par le Tribunal, prenant rang devant celle de IQ et dudit paiement de plus de 29 millions$ effectué par le Contrôleur en faveur de IQ dans le cadre d'un processus de liquidation des actifs de SBI effectué sous l'empire de la LACC.

11 Les parties sont aussi d'accord pour stipuler que si les réclamations des requérants sont reconnues comme prioritaires en tout ou en partie, IQ devra rembourser lesdites réclamations pouvant aller jusqu'à 14.8 millions$ (sauf à parfaire) aux deux Comités de retraite selon leurs intérêts respectifs. Par contre, si le Tribunal vient à la conclusion que les réclamations en question ne sont pas prioritaires, IQ n'aura rien à rembourser. Un tel scénario ferait en sorte que, puisqu'il n'existe pas (ou très peu) de reliquat disponible pour rembourser les réclamations non-prioritaires, les caisses de retraite seraient privées de sommes importantes qui auront comme conséquence l'amputation des prestations de retraite des retraités pouvant aller jusqu'à hauteur de près de 40%. On réalise donc facilement l'importance de la question pour les retraités.

LA CHRONOLOGIE DES FAITS PERTINENTS

12 Voici la chronologie des faits et des documents pertinents et nécessaires à une bonne compréhension des questions à résoudre et de la solution du présent litige :

a) 3 janvier 2012 : Première ordonnance du juge Morawetz, [2012] O.J. No. 266, visant la suspension de toutes les procédures de réclamation contre TI et sa filiale SBI, avec date effective à 0h01 le 3 janvier 2012;

b) 16 janvier 2012 : Ordonnance de Suspension des cotisations d'équilibre par TI et SBI. Le juge Morawetz était d'avis d'une part que les états financiers de TI et/ou de SBI ne leur permettaient pas d'assumer de telles obligations. De plus, le juge Morawetz a écrit (dans ses motifs déposés le 2 février 2012) :

> **[56] The courts have characterized special (or amortization) payments as pre-filing obligations which are stayed upon an initial order being granted under the CCAA. (See *AbitibiBowater Inc.*, (Re) reflex, (2009) 57 C.B.R. (5th) 285 (Q.S.C.); *Collins & Aikman Automotive Canada Inc.* 2007 CanLII 45908 (ON SC), (2007), 37 C.B.R. (5th) 282 (Ont. S.C.J.) and *Fraser Papers Inc. (Re)* 2009 CanLII 39776 (ON SC), (2009), 55 C.B.R. (5th) 217 (Ont. S.C.J.).**
>
> **[57] I accept the submission of counsel to the Applicants to the effect that courts in Ontario and Quebec have addressed the issue of suspending special (or amortization) payments in the context of a CCAA restructuring and have ordered the suspension of such payments where the failure to stay the obligation would jeopardize the business of the debtor company and the company's ability to restructure.**
>
> **...**
>
> **[60] Counsel to the Timminco Entities submits that where it is necessary to achieve the objective of the CCAA, the court has the jurisdiction to make an order under the CCAA suspending the payment of the pension contributions, even if such order conflicts with, or overrides, the QSPPA or the PBA.**

[61] The evidence has established that the Timminco Entities are in a severe liquidity crisis and, if required to make the pension contributions, will not have sufficient funds to continue operating. The Timminco Entities would then be forced to cease operations to the detriment of their stakeholders, including their employees and pensioners.

[62] On the facts before me, <u>I am satisfied that the application of the QSPPA and the PBA would frustrate the Timminco Entities ability to restructure and avoid bankruptcy</u>. Indeed, while the Timminco Entities continue to make Normal Cost Contributions to the pension plans, requiring them to pay what they owe in respect of special and amortization payments for those plans would deprive them of sufficient funds to continue operating, forcing them to cease operations to the detriment of their stakeholders, including their employees and pensioners.

(soulignements ajoutés)

c) 13-14 juin 2012 : Vente de la quasi-totalité des actifs importants appartenant à SBI et à TI. Ces ventes avaient été préalablement approuvées par le juge Morawetz (pièce P-10). Les ventes d'actifs ont généré des liquidités de 30.8 millions$[5];

d) 17 août 2012 : Nomination d'un CRO ("Chief Restructuring Officer");

e) 28 août 2012 : Remboursement du prêt (garanti par hypothèque sur l'universalité des biens de SBI) au montant de 25 millions$ plus certains intérêts accumulés (voir pièces P-11 et P-16). Ce paiement a été fait sous réserve des droits des Comités de retraite requérants;

f) 7 septembre 2012 : Demandes de priorité des Comités de retraite requérants couvrant a) les deux déficits actuariels de solvabilité des deux régimes (9 889 600,00$ et 3 998 700,00$) sauf à parfaire et b) le solde des cotisations d'équilibre non versées pour les mois de décembre 2011 à juin 2012 (668 690,00$ et 297 520,00$), le tout selon la pièce P-17.

g) 18 octobre 2012 : Ordonnance du juge Morawetz, suite à une demande des parties (pièce P-19) visant à référer la requête des Comités de retraite à la Cour supérieure du Québec (pièce P-20). Les parties ont aussi convenu que la requête serait scindée, le tribunal québécois devant d'abord se prononcer

sur les questions de droit avant de se prononcer dans un deuxième temps sur le quantum des réclamations, le cas échéant.

13 Plus spécifiquement, la pièce P-20 reproduit l'ordonnance du juge Morawetz approuvant un "Priority Claim Adjudication Protocol" ("le Protocole") aux termes duquel la Cour supérieure de l'Ontario demande à la Cour supérieure du Québec de déterminer si les réclamations des Comités de retraite requérants jouissent d'une priorité notamment sur la réclamation de IQ[6].

14 Le Protocole stipule ce qui suit :

A. OVERVIEW

1. In accordance with the Reimbursement Agreement (the "Reimbursement Agreement") among Investissement Québec ("IQ"), FTI Consulting Canada Inc., as court-appointed Monitor, and Bécancour Silicon Inc., dated August 28, 2012 and the August 28, 2012 Interim Distribution Order (the "Interim Distribution Order"), two (2) sets of claims have been designated as Reimbursement Claims, namely:

...

(ii) a claim by Le Comté de retraite du Régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc. and a claim by Le Comité de retraite du Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (collectively the "BSI Pension Committees") (the "BSI Pension Reimbursement Claims").

2. IQ disputes that the above Reimbursement Claims have priority over the IQ Security and the parties do not anticipate the dispute will be resolved through the consented resolution process provided for in the Interim Distribution Order. Accordingly, an adjudication is required to determine whether such Reimbursement Claims constitute Priority Claims.

The following is the protocol for the adjudication of

whether the Reimbursement Claims constitute Priority Claims.

...

15 La Requête des Comités de retraite pour directives et jugement déclaratoire touchant les réclamations prioritaires a donc été déposée le 17 décembre 2012. A la demande des parties, l'échéancier a été modifié et l'audition des questions de droit a été débattue les 27 et 28 mai 2013 devant le soussigné.

16 Voici comment les Comités de retraite formulent les questions de droit :

> **49.** **La question en litige est de déterminer si les réclamations des Comités de retraite ont priorité sur la créance d'Investissement Québec. La question du statut des réclamations des Comités de retraite vis-à-vis les DIP Charges n'est pas une question en litige et a déjà été tranchée par le juge Morawetz (voir l'Ordonnance du 8 février 2012, [2012] O.J. No. 596, Pièce P-9).**
>
> **50.** **SBI a cessé de verser les cotisations d'équilibre suite à l'Ordonnance du 16 janvier 2012 qui les a suspendues. Au 23 juillet 2012, les cotisations d'équilibre (avec intérêts) accumulés mais non-versées pour les deux Régimes de retraite totalisaient environ 1 million de dollars (voir lettres du 20 juillet 2012, Pièce P-3 et Pièce P-4).**
>
> **51.** **Les déficits de solvabilité (qui incluraient les cotisations d'équilibre non-versées) pour les deux Régimes de retraite au 31 décembre 2011 totalisaient environ 14 millions de dollars (voir lettres du 20 juillet 2012, Pièce P-3 et Pièce P-4) et seront cristallisés si la terminaison des Régimes de retraite par la Régie des rentes du Québec est complétée.**
>
> **52.** **En vertu du droit québécois applicable à la question en litige, les montants réclamés par les Comités de retraite pour les cotisations d'équilibre et pour les déficits actuariels, sont réputés détenus en fiducie par l'employeur SBI en faveur des Régimes de retraite.**
>
> **53.** **Il est évident que de telles fiducies réputées ont un rang prioritaire sur la réclamation garantie d'Investissement Québec.**

(soulignements ajoutés)

17 Une fois que le Tribunal aura statué sur l'existence ou non d'une fiducie réputée affectant les créances des Comités de retraite, une seconde étape devra déterminer l'effet d'une telle fiducie réputée sur la créance hypothécaire de IQ.

18 Les Comités requérants demandent donc au Tribunal de :

> **DÉCLARER comme étant des Réclamations prioritaires [Priority Claims] en vertu de la Convention de remboursement entérinée par l'Ordonnance du 28 août 2012 de la Cour supérieure de justice (Rôle commercial) de l'Ontario, les réclamations suivantes :**
>
> **1.** **les cotisations d'équilibre non versées à la Caisse de retraite du Régime de rentes des employés syndiqués de Silicium Bécancour Inc.;**
>
> **2.** **les cotisations d'équilibre non versées à la Caisse de retraite du Régime de rentes des employés non syndiqués de Silicium Bécancour Inc.;**
>
> **3.** **le déficit actuariel de solvabilité du Régime de rentes des employés syndiqués de Silicium Bécancour Inc.; et**
>
> **4.** **le déficit actuariel de solvabilité du Régime de rentes des employés non-syndiqués de Silicium Bécancour Inc.**
>
> **PRENDRE ACTE du paragraphe C.2. du Protocole d'adjudication afin que les quantums des Réclamations prioritaires [Priority Claims] soient déterminés une fois que cette honorable Cour aura décidé sur la nature des réclamations, et soient déterminés selon l'Ordonnance du Processus de réclamation [Claims Procedure Order] ou selon une ordonnance de cette Cour.**
>
> **PRENDRE ACTE du paragraphe 9 de l'Ordonnance du 28 août 2012 de la Cour supérieure de justice (Rôle commercial) de l'Ontario et de la Convention de remboursement à l'annexe "A" de celle-ci, en vertu de laquelle Investissement Québec remboursera les sommes déclarées par cette Cour comme étant prioritaires, le cas échéant, à Silicium Bécancour Inc. par l'entremise du Contrôleur, FTI Consulting Inc., afin que Silicium Bécancour Inc. transmette ces sommes aux Requérants.**

19 Subsidiairement et à défaut de reconnaître que la LRCR crée une telle fiducie, les Comités de retraite demandent au Tribunal d'utiliser ses pouvoirs inhérents et/ou découlant de l'article 46 du Code de Procédure Civile du Québec pour conclure à l'existence d'une créance prioritaire en leur faveur.

20 La question de savoir si l'article 49 LRCR crée une telle fiducie a déjà été abordée dans l'affaire *White Birch*[7] alors que le soussigné a répondu négativement à la question. Au surplus, ce

jugement énonce que si elle existe, la fiducie réputée de l'article 49 LRC est affectée par l'application de la doctrine de la préséance des lois fédérales sur les lois provinciales lorsqu'il y a conflit entre ces deux régimes législatifs. Dans *White Birch*, il s'agissait de déterminer si la fiducie réputée de l'article 49 LRCR aurait eu priorité sur la créance super-prioritaire du prêteur "DIP" autorisée sous l'empire de la LACC.

21 Les Comités de retraite requérants contestent cette analyse. Ils prétendent que la conclusion voulant que l'article 49 LRCR ne crée pas de fiducie réputée est mal fondée en droit. Ils reviennent donc à la charge mais avec certains arguments additionnels et reformulés qui méritent d'être examinés.

22 Quant à la position de l'Intimée IQ, ses arguments suivent en tous points l'affaire White Birch précitée. Forte de cette décision, IQ prétend que la Requête des Comités de retraite n'a donc aucun fondement légal et doit être rejetée.

23 Voyons, dans un premier temps et plus en détail la situation telle qu'elle se présentait dans l'affaire *White Birch* : alors que l'une des plus importantes papetières au Canada, est sous la protection de la LACC et qu'une ordonnance initiale suspend les cotisations d'équilibre payables par l'employeur à l'endroit de plusieurs régimes de retraite à prestations déterminées, une requête est déposée visant à ordonner à la débitrice de continuer à verser lesdites cotisations d'équilibre. Nous sommes au lendemain de la décision de la Cour d'appel de l'Ontario dans l'affaire *Indalex*[8], qui vient de reconnaître que ce genre d'obligation doit être honoré par les employeurs malgré la protection de la LACC, et ce, notamment, parce que ces sommes sont réputées être détenues en fiducie par les employeurs au bénéfice des Régimes de retraite concernés et que cette fiducie n'est pas affectée par le processus de restructuration de la LACC.

24 Dans l'affaire *White Birch*, les syndicats, comtés de retraite et regroupements de retraités requérants ont notamment plaidé que l'article 49 LRCR créait, en droit québécois, le même genre de fiducie que celle qui était créée aux termes de l'article 57 du *Pensions Benefit Act*[9] de l'Ontario. L'essentiel du jugement *White Birch* décide que l'article 49 LRCR ne crée pas de fiducie légale réputée selon le droit québécois. Partant de là, les cotisations d'équilibre ou encore les soldes des déficits actuariels des régimes de retraite ne jouissent d'aucune priorité par rapport aux autres dettes de l'employeur et ne constituent que des dettes chirographaires.

25 Le présent recours, basé sur une trame factuelle quasi-identique, devrait donc à première vue suivre le même sort : en l'absence d'une fiducie opposable à IQ, la requête des Comités de retraite devrait donc être rejetée. Par contre, comme nous le verrons plus loin, les faits du présent dossier ne sont pas exactement les mêmes et certains arguments juridiques plaidés en l'instance ou soulevés par le Tribunal n'ont pas été abordés dans l'affaire *White Birch*.

LES ARGUMENTS DES PARTIES

26 Les Comités de retraite soutiennent que même si la décision dans *White Birch* énonce et

répond négativement à la question de savoir si l'article 49 LRCR crée une fiducie en droit québécois, il y a lieu de revoir l'ensemble de la question.

27 Dans un premier temps, les Comités de retraite recherchent l'intervention du soussigné comme juge agissant sous l'autorité de la LACC afin que sa décision soit prise dans l'objectif général de cette loi et ... "de permettre au débiteur de continuer d'exercer ses activités et, dans le cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif."[10]

28 Toutefois, une question préliminaire se pose visant à déterminer si le soussigné agit à titre de juge superviseur du processus en vertu de la LACC ou s'il agit à titre de décideur délégué par le juge superviseur pour entendre et régler un différend entre deux créanciers qui prétendent avoir un droit prioritaire sur la créance de l'autre, à la lumière du contexte législatif du Québec.

29 Le soussigné est d'avis qu'il n'agit pas à titre de juge superviseur mais à titre de décideur délégué, (analogue à un "Claims Officer") désigné comme tel en vertu d'un Protocole de détermination de réclamations établi sous l'empire de la LACC.

30 Les Comités de retraite plaident, dans un premier temps, que la LRCR est une loi d'intérêt public. Cela n'est pas contredit. Les principes énoncés en ce sens, notamment par le juge Pierre Dalphond dans l'arrêt *Hydro-Québec*[11] rendu par la Cour d'appel en 2005, sont tout à fait justes. Il en va de même pour ceux que l'on retrouve dans les affaires *Monsanto*[12] et *Buschau*.[13]

31 Les Comités de retraite font aussi état du fait que, contrairement aux affaires *White Birch*[14] et *Indalex*,[15] le litige ne se situe pas entre un créancier de la débitrice et un prêteur "DIP" jouissant d'une super-priorité en vertu de la LACC. Ils ont raison et le soussigné n'entend pas faire bénéficier IQ d'une quelconque super-priorité découlant de la LACC. D'ailleurs, IQ n'en réclame aucune. IQ n'invoque que son statut de créancière garantie aux termes de son hypothèque universelle.

POSITION DES REQUÉRANTS SUR LA FIDUCIE RÉPUTÉE DE L'ARTICLE 49 LRCR

32 L'existence d'une fiducie réputée créée par l'article 49 LRCR demeure le principal argument des Comités de retraite.

33 Leur raisonnement est le suivant :

a) Tout d'abord, l'article 49 LRCR se lit comme suit :

> **"Jusqu'à leur versement à la caisse de retraite ou à l'assureur, les cotisations et les intérêts accumulés sont réputés détenus en fiducie par l'employeur, que ce dernier les ait ou non gardés séparément de ses biens."**

(soulignements ajoutés)

b) Cet article doit se lire avec l'article 1262 C.c.Q. qui se lit ainsi :

"La fiducie est établie par contrat, à titre onéreux ou gratuit, par testament ou, dans certains cas, par la loi. Elle peut aussi, lorsque la loi l'autorise, être établie par jugement."

(soulignements ajoutés)

Donc, pour les requérants, le constituant de la fiducie de l'article 49 LRCR est l'employeur, le patrimoine fiduciaire est constitué des cotisations à être versées, le fiduciaire est la caisse de retraite concernée et le transfert des biens (ou les séparation des biens) est réputé exister selon les termes de l'article 49.

c) Étant donné que le Code civil du Québec prévoit à son article 1262 qu'une fiducie peut être établie, notamment par la loi, il s'ensuit toujours, selon les Comités requérants, que le simple texte de l'article 49 LRCR est suffisant pour constituer une véritable fiducie opposable aux créanciers de BSI, prioritaires ou non.

d) La thèse des Comités de retraite exclut l'application de l'article 1260 C.c.Q. à la fiducie créée par la loi. Voici ce qu'ils plaident dans leur plan d'argumentation aux paragraphes 54, 55 et 56 :

54. Il y a plusieurs formes de fiducies qui sont créées par différents moyens, tel qu'énoncé à l'article 1262 CCQ.

1262. La fiducie est établie par contrat, à titre onéreux ou gratuit, par testament ou, dans certains cas, par la loi. Elle peut aussi, lorsque la loi l'autorise, être établie par jugement.

55. Si une fiducie est établie par contrat, l'article 1260 CCQ stipule que cette fiducie doit rencontrer certaines conditions formelles.

1260. La fiducie résulte d'un acte par lequel une personne, le constituant, transfère de son patrimoine à un autre patrimoine qu'il constitue, des biens qu'il affecte à une fin particulière et qu'un fiduciaire s'oblige, par le fait de son acceptation, à détenir et à administrer.

56. L'article 1262 CCQ reconnaît aussi la fiducie établie par la loi. Afin que le législateur crée une telle fiducie, il le fait par législation <u>sans que cette création n'ait à rencontrer les conditions formelles prévues à l'article 1260 CCQ</u>. Le législateur a donc le pouvoir de créer des fiducies par voie d'une disposition statutaire de fiducies réputées. C'est exactement l'effet du texte de l'article 49 Loi RCR : cet article énonce que peu importe si les montants ont été gardés séparément ou non des biens de l'employeur, ils sont néanmoins réputés être détenus en fiducie dans un patrimoine d'affectation distinct pour le bénéfice des Comités de retraite de SBI.

(soulignements ajoutés)

e) Ainsi, pour les Requérants, l'article 1262 C.c.Q. permet la création d'une fiducie par le seul effet de la loi et la loi peut alors prévoir l'existence d'une fiducie valide même si les quatre conditions d'existence de la fiducie du *Code civil* prévues à l'article 1260 C.c.Q. ne sont pas remplies. Il suffit alors que la loi écarte spécifiquement l'une de ces conditions. Selon eux, c'est exactement ce que fait l'article 49 LRCR en éliminant la condition de l'article 1260 C.c.Q. exigeant que les biens mis en fiducie soient séparés du patrimoine du constituant.

f) Plus encore, les Comités requérants prétendent que leur raisonnement correspond aux exigences de l'article 1261 C.c.Q. Ils plaident au paragraphe 57 de leur plan d'argumentation :

57. L'article 1261 s'applique à toutes formes de fiducies, incluant celles établies par la loi.

1261. Le patrimoine fiduciaire, formé des biens transférés en fiducie, constitue un patrimoine d'affectation autonome et distinct de celui du constituant, du fiduciaire ou du bénéficiaire sur lequel aucun d'entre

eux n'a de droit réel.

g) Ainsi, les Comités requérants prétendent que les montants des cotisations d'équilibre, dues mais non versées, constituent un patrimoine d'affectation autonome et distinct de celui du constituant, sous le contrôle juridique d'un fiduciaire et réputé séparé des biens du constituant (l'employeur), même si ce patrimoine n'a pas été séparé des autres biens de ce même constituant.[16]

h) Ainsi, le concept de fiducie réputée suffit pour que les actifs de SBI soient grevés d'une charge fiduciaire prioritaire qui les soustrait des biens de l'employeur et du gage commun des créanciers de ce dernier.[17]

i) Pour conclure, les Comités requérants suggèrent que s'il fallait que l'article 49 LRCR se conforme aux conditions essentielles de l'article 1260 C.c.Q., l'article 49 LRCR n'aurait aucun effet, ce qui serait contraire au principe de base d'interprétation des lois voulant que le législateur ne parle pas pour ne rien dire et qu'il faut nécessairement donner un sens à un texte législatif clair. De plus, la LRCR étant une loi d'application spécifique, elle doit être interprétée comme ayant préséance sur une loi d'application générale telle que le Code civil du Québec.

POSITION DE IQ SUR LA FIDUCIE RÉPUTÉE DE L'ARTICLE 49 LRCR

34 IQ reprend à son crédit les principes déjà énoncés dans les dossiers *AbitibiBowater*[18] et *White Birch*[19].

35 IQ insiste plus particulièrement sur le fait que toute fiducie établie par la loi, tel que le prévoit l'article 1262 C.c.Q., doit se conformer à toutes les exigences de l'article 1260 C.c.Q. Citant notamment l'auteur Jacques Beaulne[20], IQ souligne que les quatre éléments de l'article 1260 C.c.Q. doivent être rencontrés, soit :

a) le transfert d'un bien du patrimoine du constituant
b) à un autre patrimoine;
c) dont les biens sont affectés à une fin particulière;
d) qu'un fiduciaire s'oblige à détenir et à administrer.

36 Citant les affaires *Banque de Nouvelle-Écosse c. Thibault*[21] et *White Birch*[22], IQ rappelle que (par la juge Deschamps dans *Thibault*) :

... "le modèle de la fiducie ne peut être travesti pour incorporer des contrats

> **où le constituant conserve tous les droits sur le patrimoine. Je conclus donc que le Régime n'a pas les caractéristiques d'une fiducie."**
>
> *et que (par le soussigné dans White Birch) :*
>
> **"La comparaison dans la situation qui nous occupe est flagrante : ici, White Birch ne se départit de rien. Elle garde l'entier contrôle sur les biens censés faire partie d'une fiducie et ne crée aucun patrimoine d'affectation."**

37 IQ soutient donc que, SBI ne s'étant jamais départie de certains actifs en vue de constituer un patrimoine distinct, il ne peut y avoir de fiducie réelle applicable en l'espèce[23].

38 Avant de poursuivre plus loin, il est nécessaire d'établir ce sur quoi porte l'article 49 LRCR.

39 L'article 49 LRCR date de la promulgation de la loi, soit depuis 1989.

40 A l'époque, les nouvelles dispositions du *Code civil du Québec* n'existaient pas. La notion de fiducie telle qu'elle se retrouvait au *Code civil du Bas-Canada* n'avait rien d'équivalent ni de comparable au droit actuel.

41 Par contre, le genre de disposition que l'on retrouve à l'article 49 LRCR se retrouvait déjà dans plusieurs lois fiscales québécoises. La notion de "fiducie présumée" "ou de fiducie réputée" n'était pas inconnue.

42 Mais d'abord, il faut déterminer ce sur quoi porterait cette fiducie réputée, pour autant qu'elle existe et qu'elle soit opposable à IQ.

43 Voyons, dans un premier temps, les dispositions pertinentes de la LRCR, reprises par les parties dans leurs positions respectives. Au fur et à mesure de leur citation, certains commentaires liminaires s'avéreront nécessaires.

LES DISPOSITIONS LÉGISLATIVES PERTINENTES DE LA LRCR

44 La notion de régime de retraite est énoncée à l'article 6 LRCR :

> **Un régime de retraite est un contrat en vertu duquel le participant bénéficie d'une prestation de retraite dans des conditions et à compter d'un âge donnés, dont le financement est assuré par des cotisations à la charge soit de l'employeur seul, soit de l'employeur et du participant.**
>
> **À moins qu'il ne soit garanti, tout régime de retraite doit avoir une caisse de**

> **retraite où sont notamment versés les cotisations ainsi que les revenus qui en résultent. Cette caisse constitue un patrimoine fiduciaire affecté principalement au versement des remboursements et prestations auxquels ont droit les participants et bénéficiaires.**

45 Voici, selon IQ, une fiducie parfaite et complète, créée par la loi et qui respecte en tous points les dispositions de l'article 1260 C.c.Q. Cette fiducie légale est d'ailleurs citée en exemple comme un modèle du genre.

46 Cet article crée une caisse de retraite, donc un patrimoine fiduciaire séparé des actifs de l'employeur (le constituant), un apport fiduciaire (les cotisations), sous la responsabilité de fiduciaires (les dirigeants de la caisse)[24].

47 Les articles 7, 8 et 9 LRCR[25] distinguent entre les régimes à prestation déterminée, à cotisations déterminées, garantis ou non-garantis.

48 Dans le cas qui nous occupe, les régimes sont non-garantis et à prestations déterminées.

49 Les articles 37 à 52 LRCR établissent la nature des diverses cotisations, l'obligation de les verser à la caisse de retraite ainsi que les modalités de perception et de versement de ces mêmes cotisations aux régimes de retraite concernés. Il n'y a pas lieu de reproduire ces articles, toutes les parties s'entendent pour reconnaître que :

a) la *cotisation salariale* est la quote-part du participant alors que la *cotisation patronale* est constituée de la quote-part de l'employeur (article 37 LRCR);

b) la *cotisation d'exercice* est la somme que l'employeur doit verser au régime et qui représente la totalité des prestations prévues aux régimes de retraite au titre des services effectués. Il s'agit normalement de la totalité des cotisations salariales et patronales couvrant une période donnée (article 38 LRCR)[26].

Précisons tout de suite que ces trois types de cotisatons ne sont pas ici en litige. Elles ont toutes été perçues et versées aux caisses de retraite requérants.

c) L'article 39 LRCR établit un autre type de cotisation : c'est la *cotisation d'équilibre*. Cette cotisation vise à compenser, selon certaines modalités déterminées par les actuaires du régime, les déficits actuariels de capitalisation et/ou de solvabilité du régime, rendues nécessaires par la fluctuation de l'actif de la caisse de retraite et l'ensemble des obligations de

cette même caisse face à ses participants et retraités.

50 Ce sont les cotisations d'équilibre de l'employeur SBI qui sont ici en jeu.

51 Tel qu'indiqué ci-haut, tous s'entendent pour soutenir que les "cotisations" versées ou à être versées par l'employeur regroupent l'ensemble des cotisations salariales qu'il a perçues de ses employés participants, de sa cotisation patronale, ces deux éléments constituant la cotisation d'exercice, à laquelle la cotisation d'équilibre vient s'ajouter lorsque celle-ci est nécessaire.

52 Vient alors l'article 49 LRCR qui stipule que les "cotisations" sont réputées détenues en fiducie par l'employeur que ce dernier les ait gardées ou non séparément de ses biens.

53 Il est donc acquis que les cotisations d'équilibre sont touchées par l'application de l'article 49 LRCR. On ne saurait conclure que seules les cotisations perçues ou déduites par l'employeur sont visées par cet article.

54 Si l'article 49 LRCR crée une véritable fiducie opposable à IQ, il faut donc conclure que les cotisations d'équilibre non versées depuis l'ordonnance du juge Morawetz les suspendant seront visées par cette fiducie.

LES ARGUMENTS ADDITIONNELS DES CAISSES DE RETRAITE

55 Les Comités de retraite ajoutent que les autres dispositions de la LRCR pouvant trouver application sont les articles 228 et 264 LRCR.

56 Les Comités de retraite plaident en effet que non seulement les cotisations d'équilibre sont couvertes par la fiducie réputée de l'article 49 LRCR mais aussi que les soldes des déficits actuariels sont aussi couverts. Or, cet argument additionnel ne peut résister longuement à l'analyse. L'article 228 LRCR affirme plutôt que :

> **228. Constitue une dette de l'employeur le manque d'actif nécessaire à l'acquittement des droits des participants ou bénéficiaires visés par le retrait d'un employeur partie à un régime interentreprises ou par la terminaison d'un régime de retraite. Ce manque d'actif doit être établi à la date de la terminaison.**
>
> **Si l'employeur a, à la date de la terminaison, omis de verser des cotisations à la caisse de retraite ou, selon le cas, à l'assureur, cette dette est l'excédent du manque d'actif sur ces cotisations.**
>
> **Dans le cas d'un régime interentreprises, le présent article s'applique à chaque employeur partie au régime et auquel se rapporte un groupe de**

> **droits formé en application de la sous-section 3 et composé des droits de participants ou bénéficiaires visé par le retrait ou la terminaison.**
>
> (soulignements ajoutés)

57 Cet article fait partie du chapitre XIII de la LRCR qui traite de la liquidation des droits des participants et des bénéficiaires[27]. Ce chapitre traite aussi de la terminaison d'un régime lorsqu'il n'y a plus de participant actif[28].

58 Un processus de liquidation est alors mis en branle[29] et lorsque l'actif du régime s'avère insuffisant, l'article 228 s'applique : l'employeur est donc endetté envers le régime. Cette dette ne constitue pas une cotisation. D'ailleurs, nulle part dans les dispositions de la LRCR définissant ce qu'est une cotisation ne peut-on trouver une quelconque référence permettant de conclure que les soldes des déficits actuariels sont visés par l'article 49 LRCR.

59 Il semble donc clair que la fiducie réputée de l'article 49 LRCR ne peut s'appliquer qu'aux "*cotisations*" visées par cet article et non aux soldes des déficits actuariels. D'ailleurs, le remboursement de ces soldes est régi par une série de règles particulières.[30]

60 Finalement, les Comités de retraite requérants invoquent l'article 264 LRCR qui se lit ainsi :

> **264. Sauf dispositions contraires de la loi, est incessible et insaisissable :**
>
> **1. toute cotisation versée ou qui doit être versée à la caisse de retraite ou à l'assureur, ainsi que les intérêts accumulés;**
>
> **2. toute somme remboursée ou toute prestation versée en vertu d'un régime de retraite ou de la présente loi;**
>
> **3. toute somme attribuée au conjoint du participant à la suite d'un partage ou d'une autre cession de droits visés au chapitre VIII, avec les intérêts accumulés, ainsi que les prestations constituées avec ces sommes.**
>
> **Sauf dans la mesure où elles proviennent de cotisations volontaires ou représentent une part d'excédent d'actif attribuée après la terminaison d'un régime de retraite, l'incessibilité et l'insaisissabilité valent également à l'égard des sommes susmentionnées qui ont fait l'objet d'un transfert dans un régime de retraite visé à l'article 98, avec les intérêts accumulés, de tout**

> **remboursement de ces sommes et de toute prestation en résultant, ainsi qu'à l'égard de la rente ou du paiement ayant remplacé une rente en application de l'article 92.**
>
> (soulignements ajoutés)

61 Les Comités requérants plaident que la notion d'incessibilité et d'insaisissabilité des "*cotisations versées ou à être versées à la caisse de retraite"* vient renforcer leur argument que ces mêmes *cotisations* sont assujetties à la fiducie réputée de l'article 49 LRCR. Inversement, si les cotisations dues mais non versées font l'objet d'une fiducie réputée, l'article 264 LRCR doit alors s'appliquer à celles-ci et les rendre incessibles et insaisissables. Ainsi, il serait impossible pour l'employeur et ses créanciers d'avoir un quelconque accès aux sommes représentant ou pouvant représenter une cotisation "*à être versée*" à la caisse de retraite. Par l'effet combiné des articles 49 et 264 LRCR, les cotisations d'équilibre non versées et les intérêts y afférant constitueraient des créances prioritaires à celle de IQ.

62 La position de IQ est de soutenir que cet article ne peut s'adresser qu'aux sommes qui ont été clairement identifiées comme des cotisations et qui ont été clairement séparées du reste du patrimoine de l'employeur. Par exemple, si l'employeur ouvre un compte séparé dans lequel il dépose les cotisations qui seront versées à la caisse de retraite, ces sommes sont alors insaisissables et incessibles. Pour IQ, l'article 264 LRCR ne peut s'appliquer que s'il y a séparation de patrimoines.

63 Sinon, sur le plan pratique, à chaque fois qu'un employeur paie une somme d'argent à un créancier, ce dernier devrait alors s'assurer (ou l'employeur devrait être en mesure de lui démontrer) que toutes les cotisations à être versées à la caisse de retraite sont payées, et que le déficit actuariel est adéquatement couvert sous peine de voir ces montants réclamés par le Comité de retraite concerné, comme c'est le cas en l'espèce.

64 Cela ne ferait, selon IQ, aucun sens.

65 Il s'ensuivrait que tout employeur ne pourrait jamais être certain qu'il a payé valablement une dette à un tiers, lorsqu'il serait, par exemple, en retard de paiement sur l'une ou l'autre de ses cotisations ou encore que le ou les régimes de retraite de ses employés soient adéquatement pourvus de manière à éviter tout risque de déficit.

66 Pour IQ, la portée de cet article serait donc de rendre incessible ou insaisissable toute cotisation identifiée comme telle qui aura fait l'objet d'une séparation physique du patrimoine de l'employeur en vue d'effectuer un paiement à une caisse de retraite.

LES DISPOSITIONS DU *CODE CIVIL DU QUÉBEC* EN MATIÈRE DE FIDUCIES

67 Depuis 1994, le droit des fiducies au Québec a subi une transformation complète.

68 Toutes les fiducies de droit québécois sont dorénavant assujetties aux règles édictées par les articles 1260 et suivants C.c.Q.

69 Il n'est définitivement plus question au Québec de reconnaître autre chose que la fiducie du Code civil. Les fiducies de droit anglo-saxon ou dérivant de la Common Law en vigueur dans les autres provinces canadiennes n'ont donc pas d'existence légale.

70 Le Code civil est une loi d'application générale de par son importance, de la multitude des sujets qu'elle couvre et du fait que l'on y retrouve l'ensemble des dispositions gouvernant notre droit civil et notre droit privé. Par contre, les Régimes de retraite requérants soutiennent que la LRCR est une loi spécifique dont les dispositions doivent l'emporter sur une loi d'application générale.

71 La question se pose différemment lorsqu'un chapitre entier consacré à un concept comme la fiducie est inséré au Code civil. On ne peut, selon IQ, du simple fait que ce chapitre est inséré au *Code civil*, conclure que les dispositions particulières en matière de fiducie perdent leur statut de loi particulière au point de prétendre que les dispositions de la LRCR, elles, auraient préséance sur les articles 1260 et suivants du *Code civil*.

72 Les articles pertinents du *Code civil* sont les suivants :

> **1260. La fiducie résulte d'un acte par lequel une personne, le constituant, transfère de son patrimoine à un autre patrimoine qu'il constitue, des biens qu'il affecte à une fin particulière et qu'un fiduciaire s'oblige, par le fait de son acceptation, à détenir et à administrer.**
>
> (soulignements ajoutés)

73 Cet article, comme nous l'avons vu, détermine les composantes essentielles d'une fiducie de droit québécois :

- l'existence d'un constituant;
- la nécessité d'un transfert de son patrimoine à un autre patrimoine;
- des biens spécifiques;
- affectés à une fin particulière.

74 L'article 1261 édicte ce qui suit :

> **1261. Le patrimoine fiduciaire, formé des biens transférés en fiducie, constitue un patrimoine d'affectation autonome et distinct de celui du constituant, du fiduciaire ou du bénéficiaire, sur lequel aucun d'entre eux n'a de droit réel.**

(soulignements ajoutés)

75 Il faut donc, selon cette façon de voir, qu'il y ait transfert complet des sommes ou des biens pour constituer un patrimoine autonome et distinct de celui du constituant, du fiduciaire et du bénéficiaire et que ni l'un ni l'autre d'entre eux ne puisse y faire valoir un quelconque droit réel.

76 L'article 1262 C.c.Q. énonce les modes d'établissement d'une fiducie :

> **1262. La fiducie est établie par contrat, à titre onéreux ou gratuit, par testament ou, dans certains cas, par la loi. Elle peut aussi, lorsque la loi l'autorise, être établie par jugement.**

(soulignements ajoutés)

77 Si la loi permet la création d'une fiducie selon l'article 1262 C.c.Q., la loi peut-elle déroger aux critères de l'article 1260 C.c.Q.?

78 L'article 1263 C.c.Q. se lit ainsi :

> **1263. La fiducie établie par contrat à titre onéreux peut avoir pour objet de garantir l'exécution d'une obligation. En ce cas, la fiducie doit, pour être opposable aux tiers, être publiée au registre des droits personnels et réels mobiliers ou au registre foncier, selon la nature mobilière ou immobilière des biens transférés en fiducie.**
>
> **Le fiduciaire est, en cas de défaut du constituant, assujetti aux règles relatives à l'exercice des droits hypothécaires énoncées au livre Des priorités et des hypothèques**.

79 Il est intéressant de noter ici que pour être opposable aux tiers (ici, IQ est un tiers), la fiducie contractuelle doit être publiée au RDPRM ou au registre foncier. Une fiducie créée par la loi opposable au tiers ne semble pas requérir un tel élément même si la fiducie a pour objet de garantir le paiement d'une cotisation par l'employeur à un régime de retraite.

80 De ce qui précède, le Tribunal conclut que si l'article 49 LRCR crée une véritable fiducie réputée opposable à IQ :

a) cette fiducie réputée s'appliquera à toutes les cotisations non versées aux Comités de retraite requérants;
b) plus spécifiquement, elle s'appliquera aux cotisations d'équilibre ayant fait l'objet de l'Ordonnance de Suspension émise par le juge Morawetz;
c) par contre, cette fiducie réputée ne s'appliquera qu'aux cotisations et non

aux soldes déficits actuariels qui, eux, sont des dettes de l'employeur conformément aux dispositions de l'article 228 LRCR.

d) l'article 264 LRCR pourra s'appliquer aussi aux cotisations non versées aux Comités de retraite et non aux soldes des déficits actuariels.

81 Il reste à déterminer

a) si l'article 49 LRCR crée une fiducie réputée opposable à IQ; et
b) si oui, les biens visés par une telle fiducie réputée sont incessibles et insaisissables et, partant de là, s'ils sont exclus de la garantie hypothécaire dont bénéficie IQ.

ANALYSE

a) La fiducie réputée de l'article 49 LRCR

82 Pour les motifs qui suivent et malgré l'analyse du soussigné dans l'affaire *White Birch*, force est de conclure que l'article 49 LRCR crée une fiducie réputée opposable à la créance de IQ. Toutefois, le présent dossier touche une question différente des affaires *White Birch* et *Indalex*. Dans ces deux dossiers, il s'agissait de décider si les contributions d'équilibre ou les soldes des déficits actuariels des régimes de retraite avaient préséance sur la créance du prêteur "DIP", elle-même protégée par une super-priorité en vertu de la LACC, et ce, alors que la loi provinciale entrevoyait l'existence d'une fiducie réputée applicable aux cotisations ou soldes actuariels en question, selon le cas.

83 La présente instance porte sur la priorité des créances de deux créanciers qui ne bénéficient pas de super-priorités alors que la débitrice SBI est au stade de rembourser ses créanciers selon leur priorités respectives établies par le droit québécois. Il s'agit donc de décider si, aux termes du droit québécois, l'ordre de priorité attaché à chacune de ces créances fait en sorte que les Comités de retraite peuvent se réclamer d'un rang prioritaire à celui de IQ.

84 Ainsi, même si l'on doit conclure à l'existence d'une fiducie créée par la loi en vertu de l'article 49 LRCR, une telle conclusion, si elle avait été retenue dans *White Birch* n'aurait pas eu d'impact sur la finalité de ce débat car la question était toute autre.

85 En effet, la conclusion finale retenue dans *White Birch* demeure la même car la doctrine de la préséance du droit fédéral fait en sorte que la fiducie de l'article 49 LRCR, si elle avait été retenue, ne lui aurait pas donné priorité de rang sur la créance super-prioritaire du prêteur DIP.[31]

86 La question des fiducies réputées en droit québécois a donné lieu à plusieurs décisions au cours des quelques 20 dernières années, surtout en matière fiscale et presqu'exclusivement dans un contexte de faillite. Cependant, même si la fiducie réputée de l'article 49 LRCR s'inscrit dans un contexte fort différent, la façon dont nos tribunaux ont analysé la fiducie réputée en matière fiscale

nous permet de comprendre comment l'on doit s'y prendre pour analyser celle que nous suggère l'article 49 LRCR.

87 Il faut remonter à l'affaire *Nolisair*[32] alors que la Cour d'appel renversait un jugement du juge Roland Durand du 16 octobre 1994[33]. Le fond du litige portait sur la fiducie présumée dont se réclamait alors le Ministère du revenu et qui avait déposé une preuve de réclamation prioritaire couvrant l'ensemble des actifs de la débitrice. Le syndic a rejeté cette réclamation, alléguant l'absence d'une telle fiducie au motif que *Nolisair* n'avait pas gardé les retenues à la source perçues de ses employés dans un compte séparé de son patrimoine. Le SMRQ objectait que l'article 20 de la *Loi sur le Ministère du revenu*[34] (la LMRQ) créait une telle fiducie présumée.

88 Le juge Durand a décidé en première instance que l'article 20 LMRQ ne créait pas de fiducie au sens de l'article 67(3) de la *Loi sur la faillite et l'insolvabilité*.

89 Parallèlement à l'affaire *Nolisair* le juge Roger Banford décidait dans l'affaire *Sécurité Saglac (1992) Inc. c. Sous-ministre du revenu du Québec*[35] que ce même article 20 créait une fiducie présumée.

90 Les deux dossiers ont été entendus en même temps par la Cour d'appel et ont fait l'objet de deux jugements séparés, l'un accueillant l'appel formé à l'endroit du jugement du juge Durand[36] et l'autre rejetant l'appel formé à l'endroit de celui du juge Banford[37].

91 La Cour d'appel, à deux juges contre un, a alors reconnu l'existence d'une fiducie réputée créée par l'article 20 LMRQ qui se lisait alors ainsi :

> **20. Toute personne qui <u>déduit, retient ou perçoit</u> un montant quelconque en vertu d'une loi fiscale est réputée le détenir en fiducie pour Sa Majesté aux droits du Québec.**
>
> **<u>Un tel montant doit être tenu</u>, par la personne qui l'a déduit, retenu ou perçu, <u>distinctement et séparément de ses propres fonds</u> et dans les cas d'une liquidation, cession ou faillite, un montant égal au montant ainsi déduit, retenu ou perçu <u>doit être considéré comme formant un fonds séparé ne faisant pas partie des biens</u> sujets à la liquidation, cession ou faillite.**
>
> **Toutefois, cette personne peut, lors de la production au ministre d'une déclaration en vertu des articles 468 ou 470 de la *Loi sur la taxe de vente au Québec* et modifiant certaines dispositions législatives d'ordre fiscal (*1991 c. 67*) retirer du total des fonds tenus séparément et distinctement de ses propres fonds, les montants qu'elle a droit de déduire et qu'elle a effectivement déduits dans le calcul de son montant à remettre.**

92 On aura remarqué, et c'est là l'intérêt de la chose, que ce texte vise des montants "déduits, retenus ou perçus" par une personne à des fins fiscales et non des montants dus par cette même personne. Somme toute, les sommes ici visées sont des sommes qui n'appartiennent pas et qui n'ont jamais appartenu à la personne en question.

93 On aura aussi remarqué que l'article 20 LMRQ, tel qu'il existait alors, ne contenait pas les mots qui y seront ajoutés quelques mois plus tard et qui se liront, après l'amendement en question[38] :

> **"... que ce montant ait été ou non, dans les faits tenu séparé des éléments du patrimoine de cette personne ou de ses propres fonds."**

94 C'est d'ailleurs à cause de l'absence de ces mots que le juge Durand refusera de reconnaître la fiducie réputée de l'article 20 LMRQ. On remarquera, cependant, la présence de ces mêmes mots dans l'article 49 LRCR.

95 Malgré le bénéfice de cet amendement, les juges Bamford (dans l'affaire *Sécurité Saglac*) en première instance et Chamberland en Cour d'appel, se basant sur une analyse des mots ... "*un montant égal au montant ainsi déduit, retenu ou perçu doit être considéré comme formant un fonds séparé*"... du deuxième alinéa de l'article 20 LMRQ ont décidé que le texte était suffisant pour que cet article puisse créer une fiducie réputée créée par la loi. Le juge Chamberlalnd conclut en ces termes[39] :

> **La fiducie réputée**
>
> **Aux fins de cette opinion, j'entends par "fiducie réputée" la fiducie qui n'existe que parce que le législateur, provincial ou fédéral, dit qu'elle existe, alors que, dans les faits, elle ne revêt pas tous les attributs d'une fiducie. L'existence de la fiducie dépend de la présence conjuguée de trois certitudes: 1) certitude quant à l'intention du constituant de créer une fiducie, 2) certitude quant à l'identité du bénéficiaire de la fiducie, et enfin, 3) certitude quant aux biens assujettis à la fiducie, en ce sens que ces biens doivent être conservés par le fiduciaire de façon autonome et distincte de son patrimoine (L.W. HOULDEN et C.H. MORAWETZ, Bankruptcy and Insolvency Law of Canada, 3rd Ed., mis à jour 1996 (No 7), aux pages 3-17 à 3-30, chapitre intitulé "Trust Property").**
>
> **...**
>
> **La fiducie réputée est l'un "des moyens auxquels les législateurs ont souvent recours pour recouvrer des sommes qui auraient dû leur être versées, mais**

qui ont été illégalement détournées par un débiteur qui a, par la suite, éprouvé des difficultés financières et s'est vu forcé de liquider son entreprise" (Banque Royale c. Sparrow Electric Corp., 1997 CanLII 377 (CSC), [1997] 1 R.C.S. 411, le juge Gonthier, à la page 435).

Revenant à la première question soulevée par ce litige, il s'agit donc de décider si l'article 20 de la LMRevenu Québec crée une fiducie réputée.

L'appelant plaide que non parce que certains mots, à son avis essentiels à la création d'une fiducie réputée - et que l'on retrouve, par exemple, au paragraphe 5 de l'article 227 de la LIR fédérale - ne s'y trouvent pas. En somme, en l'absence des mots "que ce montant ait été ou non, en fait, tenu séparé des propres fonds de la personne ou des éléments du patrimoine", l'article 20 de la LMRevenu Québec ne créerait pas de fiducie réputée; il ne ferait que confirmer l'existence d'une fiducie réelle, opposable à la masse des créanciers que dans la mesure où les sommes déduites ont été réellement détenues à part par le débiteur, ce qui n'est pas le cas en l'espèce.

Je ne partage pas ce point de vue.

...

De fait, le texte de l'article 20 est bien différent de celui que la Cour supérieure étudiait, en 1977, dans l'affaire Joe's Steak House, [1977] C.S. 374, précitée. Le législateur y a ajouté des mots -"un montant égal au montant ainsi déduit, retenu ou perçu" - qui ont, à mon avis, le même effet - la création d'une fiducie réputée - même si les mots "que ce montant ait été ou non, en fait, tenu séparé des propres fonds de la personne ou des éléments du patrimoine", utilisés au paragraphe 227(5) de la LIR fédérale ne s'y trouvent pas.

Comparons les textes de l'article 20 à l'époque de l'affaire Joe's Steak House, précitée, (en 1979) et durant la période en litige (en 1992) :

Toute personne qui déduit, retient ou perçoit un montant quelconque en vertu d'une loi fiscale est réputée le détenir en fiducie pour Sa Majesté aux

droits du Québec.

Un tel montant doit être tenu par la personne qui l'a déduit, retenu ou perçu distinctement et séparément de ses propres fonds et dans les cas d'une liquidation, cession ou faillite, doit être considéré comme formant un fonds séparé ne faisant pas partie des biens sujets à la liquidation, cession ou faillite. Toute personne qui déduit, retient ou perçoit un montant quelconque en vertu d'une loi fiscale est réputée le détenir en fiducie pour Sa Majesté aux droits du Québec.

Un tel montant doit être tenu, par la personne qui l'a déduit, retenu ou perçu, distinctement et séparément de ses propres fonds et dans les cas d'une liquidation, cession ou faillite, un montant égal au montant ainsi déduit, retenu ou perçu doit être considéré comme formant un fonds séparé ne faisant pas partie des biens sujets à la liquidation, cession ou faillite.

[...]

(soulignements ajoutés)

Le premier paragraphe est identique; le législateur y prévoit expressément, en utilisant les mots "est réputée", qu'une personne qui a déduit, retenu ou perçu un montant en vertu d'une loi fiscale détient ce montant en fiducie et que Sa Majesté aux droits du Québec est la bénéficiaire de cette fiducie. Le début du deuxième paragraphe est également identique; le législateur y crée l'obligation pour la personne visée de tenir le montant ainsi déduit, retenu ou perçu "distinctement et séparément de ses propres fonds". Si tel est le cas, il y a fiducie réelle et, advenant faillite, ces montants constituent des "biens détenus par le failli en fiducie pour toute autre personne", au sens de l'alinéa 67(1)(a) de la Loi FI, et ils ne sont pas compris dans les biens du failli.

La seconde partie du deuxième paragraphe a été modifiée par l'ajout des mots "un montant égal au montant ainsi déduit, retenu ou perçu [...]". L'ajout de ces mots ne s'explique, à mon avis, que par la volonté du législateur de créer une fiducie réputée et de la distinguer de la fiducie réelle en éliminant expressément la nécessité de respecter la troisième des

> **conditions essentielles à l'existence d'une fiducie, soit le fait pour le fiduciaire de conserver les biens affectés à la fiducie séparément et distinctement de son patrimoine. En effet, les mots "un montant égal au montant ainsi déduit, retenu ou perçu" sont inutiles dans le contexte où le failli tient un compte distinct et séparé de ses propres fonds pour les montants déduits, retenus ou perçus; les mots n'ont de sens que si le failli ne tient pas un tel compte distinct et séparé. Dans le contexte, ces mots suffisaient pour conclure à la création d'une fiducie réputée; le premier paragraphe de l'article 20 et le début du second visaient la fiducie réelle alors que le premier paragraphe et la fin du second visaient la fiducie réputée.**
>
> **D'où, à mon avis, la conclusion que le législateur a ainsi créé une fiducie réputée même s'il n'a pas repris tous les mots du législateur fédéral au paragraphe 5 de l'article 227. L'utilisation des mots "un montant égal au montant ainsi déduit, retenu ou perçu" rendait, à mon avis, inutile l'utilisation des mots "que ce montant ait été ou non, en fait, tenu séparé des propres fonds de la personne".**
>
> (soulignements ajoutés)

96 Cette longue citation indique la manière retenue alors par la Cour d'appel pour conclure à l'existence d'une fiducie réputée en se basant sur les mots retenus par le législateur. En appliquant ce genre d'analyse à l'article 49 LRCR, on doit d'abord se poser la question à savoir si le texte de cet article est suffisamment clair et complet pour conclure à l'existence d'une fiducie réputée. Un tel exercice convainc le Tribunal que l'on doit répondre affirmativement à cette question surtout lorsque l'on constate que l'article 49 LRCR reprend les mots alors présumés manquants à l'article 20 LMRQ et qui, plus tard, feront en sorte que l'article 20 LMRQ crée effectivement une fiducie réputée.

97 Ainsi, pour le juge Chamberland, les mots utilisés par le Législateur dans l'ancien article 20 LMR étaient suffisamment clairs pour établir une fiducie réputée, faisant des déductions déduites, retenues ou perçues par la partie débitrice un patrimoine fiduciaire suffisamment bien défini, "...comme formant un fonds séparé ne faisant pas partie des biens..." de ladite débitrice dans le contexte d'une cession ou d'une faillite.

98 Malgré l'intérêt et la logique du raisonnement, la Cour suprême ne verra pas les choses de la même façon.

99 Tant dans *Nolisair* que dans *Sécurité Saglac*, le juge Fish, siégeant alors à la Cour d'appel, était dissident. Pour lui, en l'absence des mots ajoutés à l'article 20 LMRQ par l'amendement de

1993, ledit article ne créait pas de fiducie réputée[40]. Il écrira :

> **"In fact and in effect, these deductions simply consisted in book keeping entries: no moneys were actually retained by the employer in an identifiable form, separate from the employer's own funds."**

100 Pour le juge Fish, l'amendement de 1993 vient corriger le problème pour le futur mais non pour les deux cas dont la Cour est saisie, dont les faits remontent à une date antérieure à la prise d'effet dudit amendement. Il se dit d'accord avec le raisonnement du juge Durand dans *Nolisair* et en désaccord avec celui du juge Banford dans *Sécurité Saglac*.

101 Par contre, une lecture attentive de l'opinion du juge Fish fait ressortir que l'amendement de 1993 n'a pour effet que de rendre l'article 20 LMRQ compatible avec l'article 67 de la *Loi sur la faillite et l'insolvabilité* et l'article 227 de la *Loi sur les impôts fédérale*.

102 Le juge Fish écrira donc, et c'est là où il est en désaccord avec le raisonnement du juge Chamberland :

> **As I have already mentioned, the Minister of Revenue seeks to recover, from an estate in bankruptcy, income tax and pension contributions that were deducted at source by the debtor, but not separated from the rest of the debtor's patrimony, and never remitted to the government.**
>
> **To succeed on this claim, the Minister must establish that s. 20 MRA, prior to its amendment in 1993, created a deemed trust "substantially similar to subs. 227(4) of the Income Tax Act", within the meaning of s. 67(3)(a). The Minister must demonstrate as well that the Crown's beneficial interest under the trust attached to unremitted deductions at source whether or not the amounts deducted were held separately from the patrimony of the bankrupt debtor.**
>
> **Deductions at source under the ITA are in law the property of the employee. The employer, at the point of withholding, therefore holds the amounts deducted as trustee of a fund belonging to the employees, not to the Crown. It is subs. 227(4) ITA that has the effect of making Her Majesty the beneficiary under that trust.**
>
> **When the employer fails to retain the deductions in a separate fund, however, Her Majesty's beneficial interest becomes intermingled with the employer's general assets and "Her Majesty's claim ... then becomes that of**

a beneficiary under a non-existent trust".

Here, the employer failed to separate the source deductions from his own property. Accordingly, the deemed trust created by s. 20 MRA, if it were "substantially similar" to the deemed trust of subs. 227(4) ITA, would likewise make the Minister of Revenue "a beneficiary under a non-existent trust".

In considering whether a provincial deemed trust is substantially similar to the federal standard created by subs. 227(4), however, one cannot insulate the text of subs. 227(4) from its context. Subsection 227(5) is linked by reference to subs. 227(4) and, together, the two subsections may be said to create a coherent whole in the context of a bankruptcy.

For the purposes of disposing of the appeal, we should therefore, I believe, take into account the impact of subs. 227(5) ITA on the kind of deemed trust that will meet the requirements of subs. 67(3) BIA. In my view, we are also bound to read subs. 67(3) in a manner that respects the evident intent of Parliament to place deemed trusts, provincial and federal, on the same footing with respect to priority in the event of a bankruptcy.

To benefit from the full protection afforded by subs. 67(3), the deemed trust referred to in subs. 227(4) ITA must also conform to subs. 227(5). And to be eligible for that same protection, a provincial provision creating a deemed trust must be "substantially similar", having essentially the same reach and complying with the same basic requirements.

In particular, the provincial deemed trust must, to achieve the result of its federal counterpart under subs. 227(5), explicitly impress upon the amount of the unremitted deductions at source whether or not that amount has in fact been kept separate and apart from the debtor's own moneys or from the assets of the estate.

Prior to its amendment in 1993, s. 20 MRA did not, in my respectful view, meet this test.

> **Accordingly, even on the assumption that subs. 67(3) BIA authorized the creation by Quebec of a deemed trust substantially similar to the type contemplated either by subs. 227(4) ITA read alone, or by subss. 227(4) and (5) read together, I would feel bound to dismiss the appeal.**
>
> (soulignements ajoutés)

103 Rappelant par la suite les affaires Re: *Deslauriers Construction Productions Ltd.* [1970] 3 O.R. 599 (C.A.), *Dauphin Plains Credit Union Ltd c. Xyloid Industries Ltd.* [1980] 1 R.C.S. 1182, *British Columbia c. Henfrey Samson Bélair Ltd.* [l989] 2 R.C.S. 24 et *Royal Bank of Canada c. Sparrow Electric Corp.* [1997] 1 S.C.R. 411, le juge Fish conclut que le texte de l'article 20 LMRQ, tel qu'il existait antérieurement à l'amendement de 1993, ne rencontrait pas les exigences des articles 67 LFI et 227(5) de la *Loi fédérale sur les impôts*. Le texte de l'amendement de 1993 a eu pour effet de régler le problème de la fiducie présumée de l'article 20 LMRQ mais force est de constater que le texte de l'article 49 LRCR contient les mots "sacramentels" confirmant l'existence d'une fiducie réputée, même si l'employeur n'a pas gardé les cotisations qu'il doit verser aux Comités de retraite requérants séparées ou non de ses autres biens.

104 Les affaires *Saglac* et *Nolisair* ont été portées en appel devant la Cour suprême du Canada[41] et dans un jugement aussi court qu'unanime, les jugements de la Cour d'appel ont été renversés au profit de la dissidence du juge Fish, sans rien y ajouter.

105 L'opinion combinée des juges Chamberland et Fish démontre en fait une seule chose : pour qu'une fiducie réputée existe, il faut que le langage qui la constitue soit sans équivoque et qu'il démontre que les sommes ou biens réputés être détenus en fiducie le sont, même sans séparation desdits biens ou sommes du reste des actifs de la partie débitrice.

106 C'est ce qui semble exister en l'espèce, à la lecture de l'article 49 LRCR.

107 Pourtant, plusieurs années plus tard, dans *Québec (Sous-ministre du Revenu) c. De Courval*, 2009 QCCA 409[42], la Cour d'appel avait à décider des conditions d'existence ou non d'une fiducie au sens de l'article 20 de la *Loi sur le Ministère du Revenu*. La juge Dutil a écrit ceci :

> **[10] S'appuyant sur un jugement de la Cour supérieure, dans l'affaire de la faillite de *Chibou-Vrac inc. (Syndic de)* et *Groupe Thibault Van Houtte & Associés ltée*, [2003] J.Q. no 11364, le juge de première instance conclut que la TVQ peut être détenue dans une fiducie présumée au sens de l'article 20 *LMR*. Toutefois, pour que ces sommes d'argent ne soient pas considérées comme des biens du failli, par l'application de l'alinéa 67(1) a) de la *Loi sur la faillite et l'insolvabilité (LFI)*, il doit s'agir d'une fiducie réelle, ce qui n'est pas le cas en l'espèce.**

> **[11] Le juge de première instance estime également que l'*obiter dictum* du juge Letarte, dans l'arrêt *Giguère (Syndic de)* c. *Lloyd Woodfine*, [2001] J.Q. no 4825 [*Giguère*], concernant des sommes détenues en fiducie, "ne peut servir de base juridique qui aurait pour effet de modifier profondément tout le courant jurisprudentiel antérieur sur la question de l'application des articles 15.3.1 et 20 de la Loi."**

108 Après avoir cité les dispositions pertinentes de la *Loi sur le Ministère du Revenu* et de la *Loi sur la faillite et l'insolvabilité*, la juge Dutil pose le problème en ces termes :

> **[19] Le syndic soutient que l'article 20 *LMR* ne confère aucun droit de propriété aux autorités fiscales en ce qui a trait aux montants dus à titre de TVQ. Prenant appui sur un arrêt récent de notre Cour, dans *9083-4185 Québec inc. (Syndic de) et Caisse populaire Desjardins de Montmagny*, [2007] J.Q. no 14712 [*9083-4185 Québec inc.*], le syndic plaide que le paragraphe 67(2) *LFI* fait en sorte que des biens détenus dans une fiducie pour Sa Majesté, par le biais d'une disposition législative, demeurent des biens du failli. Seuls ceux détenus par un failli dans une fiducie réelle, pour une autre personne, sont exclus de la faillite. En outre, puisque les sommes détenues en fiducie sont entremêlées avec d'autres fonds, elles ne sont plus identifiables. En conséquence, le ministre ne peut en être propriétaire.**
>
> **...**
>
> **[28] L'article 20 *LMR* édicte qu'une personne qui perçoit un montant dû en vertu d'une loi fiscale est réputée le détenir pour l'État, séparé de son patrimoine et de ses propres fonds. Il précise qu'en cas de non-versement à l'État dans le délai et selon les modalités prescrites, ce montant est réputé former un fonds séparé ne faisant pas partie des biens de cette personne.**
>
> **[29] En vertu de cet article, il y avait donc une présomption que les montants détenus par la Banque en date du 10 juillet 2006 l'étaient en fiducie pour l'État. Toutefois, ces montants perçus par la débitrice avaient été déposés dans un compte où elle en détenait également d'autres provenant de différentes sources. Il ne s'agissait donc que d'une fiducie créée par l'effet de la *LMR* et non d'une fiducie réelle.**
>
> **[30] Dans l'arrêt *Colombie-Britannique c. Henfrey, Samson, Belair Ltd.* [*Colombie-Britannique*], la Cour suprême explique que dès que le montant**

> **de la taxe est confondu avec d'autres sommes, il n'existe plus de fiducie de common law :**
>
> **[...] Au moment de la perception de la taxe, il y a fiducie légale réputée. À ce moment-là, le bien en fiducie est identifiable et la fiducie répond aux exigences d'une fiducie établie en vertu des principes généraux du droit. La difficulté que présente l'espèce, qui est la même que dans la plupart des cas, vient de ce que le bien en fiducie cesse bientôt d'être identifiable. Le montant de la taxe est confondu avec d'autres sommes que détient le marchand et immédiatement affecté à l'acquisition d'autres biens de sorte qu'il est impossible de le retracer. Dès lors, il n'existe plus de fiducie de *common law*. Pour obvier à ce problème, l'al. 18(1)b) prévoit que la taxe perçue sera réputée être détenue de manière séparée et distincte des deniers, de l'actif ou du patrimoine de celui qui l'a perçue. Mais, comme l'existence de la disposition déterminative le reconnaît tacitement, en réalité, après l'affectation de la somme, la fiducie légale ressemble peu à une fiducie véritable. [...]**
>
> **[31] Je conclus donc que l'avis expédié en vertu de l'article 15 *LMR* n'a pas transformé cette fiducie présumée en fiducie réelle, ce qui aurait pu, effectivement, faire en sorte que ces biens ne soient pas compris dans le patrimoine de la débitrice faillie en vertu de l'alinéa 67(1) a) *LFI*.**
>
> **[32] En effet, le paragraphe 67(2) *LFI* édicte que, sous réserve de certaines exceptions (dont entre autres les retenues à la source), un bien n'est pas considéré être détenu en fiducie aux fins de la *LFI* si, en l'absence d'une disposition législative, il ne le serait pas. Or, c'est exactement le cas dans la présente affaire : les montants étaient réputés être détenus en fiducie en vertu de l'article 20 *LMR*, mais il n'existait aucune fiducie réelle.**

109 Cette décision suivait alors la logique de l'arrêt Sparrow Electric[43] en Cour suprême, où il fut établi que la garantie bancaire consentie à la Banque Royale du Canada en vertu de l'article 427 de la *Loi sur les banques* (LB)[44] avait priorité sur la fiducie réputée que l'on retrouve à l'article 227(5) de la *Loi sur l'impôt sur le revenu* (LIR)[45].

110 Pour conclure ainsi dans *Sparrow*, la Cour suprême a dû constater que la garantie de l'article 427 de la *Loi sur les banques* avait été mise en place avant que la débitrice soit en défaut de remettre à l'État les retenues fiscales prévues à l'article 227(5) LIR. Donc, en l'absence d'une autre disposition donnant priorité de rang à la fiducie réputée, les termes de la garantie bancaire n'étaient

pas affectés par le défaut subséquent de la débitrice à l'égard de la Couronne fédérale.

111 Voici comment le juge Gonthier (dissident sur le fond) pose le problème :

> **23 Il est malheureux que, jusqu'à maintenant, la jurisprudence n'ait pas su susciter la certitude qui est si manifestement souhaitable dans ce domaine du droit commercial. En fait, la jurisprudence a été qualifiée de [TRADUCTION] "secteur trouble du droit" (*Manitoba (Minister of Labour) c. Omega Autobody Ltd. (Receiver of)* 1989 CanLII 178 (MB CA), (1989), 59 D.L.R. (4th) 34 (C.A. Man.), à la p. 36), et elle a fait l'objet, à certains moments, de critiques acerbes de la part d'auteurs de doctrine (Roderick J. Wood, "Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*" (1995), 10 *B.F.L.R.* 429, ainsi que Roderick J. Wood et Michael I. Wylie, "Non-Consensual Security Interests in Personal Property" (1992), 30 *Alta. L. Rev.* 1055). L'opinion générale a, je crois, été résumée par le professeur Wood dans son commentaire de décision fort utile, "Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*", *loc. cit.*, à la p. 430: [TRADUCTION] "[i]l est quelque peu embarrassant de constater qu'après plus de deux décennies, nous ne pouvons toujours pas prédire en toute confiance le résultat d'un litige quant à la priorité de rang entre une fiducie réputée et une garantie". Les commentaires ci-dessus tirés de la jurisprudence et de la doctrine invitent, je crois, notre Cour à s'orienter résolument vers une énonciation de principes clairs qui permettront de déterminer la priorité de rang entre les fiducies légales et les garanties consensuelles.**

112 Contrairement à ce que soutiendra la majorité, le juge Gonthier retrouvera dans les éléments de l'affaire *Sparrow Electric* les principes lui permettant de conclure à l'existence d'une priorité de rang de la fiducie réputée de la Couronne sur la garantie conventionnelle de la banque. Malgré la longueur du texte qui suit, il y a lieu de le reproduire :

> **30 Notre Cour a récemment eu l'occasion d'examiner les principes de droit qui doivent être appliqués à l'interprétation des lois fiscales. Dans *Alberta (Treasury Branches) c. M.R.N.; Banque Toronto-Dominion c. M.R.N.*, 1996 CanLII 244 (CSC), [1996] 1 R.C.S. 963, aux pp. 975 et 976, le juge Cory cite l'arrêt de notre Cour *Friesen c. Canada*, 1995 CanLII 62 (CSC), [1995] 3 R.C.S. 103, où les principes pertinents sont résumés ainsi, aux pp. 112 à 114 :**
>
> **Pour interpréter les dispositions de la Loi de l'impôt sur le revenu, il**

convient, comme l'affirme le juge Estey dans l'arrêt Stubart Investments Ltd. c. La Reine, 1984 CanLII 20 (CSC), [1984] 1 R.C.S. 536, d'appliquer la règle du sens ordinaire. À la page 578, le juge Estey se fonde sur le passage suivant de l'ouvrage de E. A. Driedger, intitulé Construction of Statutes (2e éd. 1983), à la p. 87 :

[TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

Le principe voulant que le sens ordinaire des dispositions pertinentes de la Loi de l'impôt sur le revenu prévale, à moins d'être en présence d'une opération simulée, a récemment été approuvé par notre Cour dans l'arrêt Canada c. Antosko, 1994 CanLII 88 (CSC), [1994] 2 R.C.S. 312. Le juge Iacobucci affirme, au nom de la Cour, aux pp. 326 et 327 :

Même si les tribunaux doivent examiner un article de la *Loi de l'impôt sur le revenu* à la lumière des autres dispositions de la Loi et de son objet, et qu'ils doivent analyser une opération donnée en fonction de la réalité économique et commerciale, ces techniques ne sauraient altérer le résultat lorsque les termes de la Loi sont clairs et nets et que l'effet juridique et pratique de l'opération est incontesté : *Mattabi Mines Ltd. c. Ontario (Ministre du Revenu)*, 1988 CanLII 58 (CSC), [1988] 2 R.C.S. 175, à la p. 194; voir également *Symes c. Canada*, 1993 CanLII 55 (CSC), [1993] 4 R.C.S. 695.

J'accepte les commentaires suivants qui ont été faits à l'égard de l'arrêt *Antosko* dans l'ouvrage de P. W. Hogg et J. E. Magee, intitulé *Principles of Canadian Income Tax Law* (1995), dans la section 22.3c) [TRADUCTION] "Interprétation stricte et fondée sur l'objet visé", aux pp. 453 et 454 :

[TRADUCTION] La Loi de l'impôt sur le revenu serait empreinte d'une incertitude intolérable si le libellé clair d'une disposition détaillée de la Loi était nuancé par des exceptions tacites tirées de la conception qu'un tribunal a de l'objet de la disposition. (...) (L'arrêt *Antosko*) ne fait que reconnaître que "l'objet" ne peut jouer qu'un rôle limité dans l'interprétation d'une loi aussi précise et détaillée que la Loi de l'impôt sur le revenu. Lorsqu'une

disposition est rédigée dans des termes précis qui n'engendrent aucun doute ni aucune ambiguïté quant à son application aux faits, elle doit être appliquée nonobstant son objet. Ce n'est que lorsque le libellé de la loi engendre un certain doute ou une certaine ambiguïté, quant à son application aux faits, qu'il est utile de recourir à l'objet de la disposition.

Aux pages 976 et 977 de l'arrêt *Alberta (Treasury Branches)*, précité, le juge Cory conclut :

En conséquence, lorsqu'il n'y a aucun doute quant au sens d'une mesure législative ni aucune ambiguïté quant à son application aux faits, elle doit être appliquée indépendamment de son objet. Je reconnais que des juristes habiles pourraient probablement déceler une ambiguïté dans une demande aussi simple que "fermez la porte, s'il vous plaît", et très certainement même dans le plus court et le plus clair des dix commandements. Cependant, l'historique même de la présente affaire, conjugué aux divergences évidentes d'opinions entre les juges de première instance et la Cour d'appel de l'Alberta, révèle que, pour des juristes doués et expérimentés, ni le sens de la mesure législative ni son application aux faits ne sont clairs. Il semblerait donc convenir d'examiner l'objet de la mesure législative. Même si l'ambiguïté n'était pas apparente, il importe de signaler qu'il convient toujours d'examiner "l'esprit de la loi, l'objet de la loi et l'intention du législateur" pour déterminer le sens manifeste et ordinaire de la loi en cause.

31 En l'espèce, j'estime que le texte du par. 227(5) est clair et sans ambiguïté, compte tenu, particulièrement, du fait que cette disposition suit immédiatement le par. 227(4), qui prévoit que les sommes non versées sont conservées en fiducie pour Sa Majesté. À mon avis, ce paragraphe vise, en cas de liquidation, cession, mise sous séquestre ou faillite, à rattacher le droit que Sa Majesté détient à titre bénéficiaire aux biens que le débiteur possède alors. À vrai dire, la fiducie n'est pas réelle, étant donné que son objet ne peut être identifié à compter de la date de création de la fiducie: D. W. M. Waters, *Law of Trusts in Canada* (2e éd. 1984), à la p. 117. Cependant, le par. 227(5) a pour effet de revitaliser la fiducie dont l'objet a perdu toute identité. L'identification de l'objet de la fiducie est donc faite après coup. À cet égard, je suis d'accord avec la conclusion que le juge Twaddle tire dans l'arrêt *Roynat*, [1992] M.J. No. 105, précité, lorsqu'il affirme, à la p. 647, au sujet de l'effet du par. 227(5), que [TRADUCTION] "la Loi confère à Sa Majesté un droit d'accès à tous les éléments d'actif, quels qu'ils soient, que

l'employeur possède alors, au moyen desquels elle peut réaliser la fiducie initiale dont elle est bénéficiaire".

32 J'ajoute que, dans l'arrêt *Re Deslauriers Construction Products Ltd.*, précité, à la p. 601, le juge en chef Gale a adopté ce point de vue relativement à une disposition semblable au par. 227(5), et que notre Cour a confirmé la validité de son raisonnement dans l'arrêt *Dauphin Plains*, précité. Dans l'affaire *Deslauriers*, précitée, un syndic de faillite et le bénéficiaire d'une fiducie légale réputée créée par le *Régime de pensions du Canada*, S.C. 1964-65, ch. 51, se faisaient la lutte pour obtenir la priorité de rang. Les paragraphes 24(3) et (4) de cette loi prévoyaient ceci :

24. ...

(3) L'employeur qui a déduit de la rémunération d'un employé un montant au titre de la cotisation que ce dernier est tenu de verser, ou à valoir sur celle-ci, mais ne l'a pas remis au receveur général du Canada, doit garder ce montant à part, en un compte distinct du sien et il est réputé détenir le montant ainsi déduit en fiducie pour Sa Majesté.

(4) En cas de liquidation, de cession ou de faillite d'un employeur, un montant égal à celui qui, selon le paragraphe (3), est réputé détenu en fiducie pour Sa Majesté doit être considéré comme étant séparé et ne formant pas partie des biens en liquidation, cession ou faillite, que ce montant ait été ou non, en fait, conservé distinct et séparé des propres fonds de l'employeur ou de la masse des biens.

À la page 1198 de l'arrêt *Dauphin Plains*, précité, notre Cour approuve la conclusion du juge en chef Gale (à la p. 601 de l'arrêt *Deslauriers*, précité) quant à l'interprétation du par. 24(4) :

[TRADUCTION] Il nous semble que le par. (4), en particulier les six derniers mots, a été inséré dans la Loi dans le but spécifique de soustraire de la masse des biens du failli, par la création d'une fiducie, un montant équivalent aux déductions et d'en faire la propriété du ministre.

33 Cette interprétation du par. 227(5) a aussi l'avantage d'être compatible avec le régime de répartition établi par la *Loi sur la faillite et l'insolvabilité*, L.R.C. (1985), ch. B-3. L'article 67 de cette loi retire expressément de la masse des biens du failli les créances relatives à des retenues sur la paye non versées et conservées en fiducie (notamment) en vertu de l'art. 227 *LIR* :

67. (1) Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants :

***a*) les biens détenus par le failli en fiducie pour toute autre personne;**

...

(2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) Le paragraphe (2) ne s'applique pas à l'égard des paragraphes 227(4) et (5) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) et (4) du *Régime de pensions du Canada* ou des paragraphes 57(2) et (3) de la *Loi sur l'assurance-chômage*...

Il faut remarquer qu'en plus de rattacher le droit de Sa Majesté aux biens du débiteur lorsque survient l'un des événements précisés au par. 227(5), la fiducie réputée profite encore à Sa Majesté d'une manière accessoire, en ce sens que le par. 227(5) permet de rattacher le droit de Sa Majesté à un bien donné en garantie qui est grevé d'un privilège fixe, si les déductions à l'origine de la demande de Sa Majesté ont été faites avant que le privilège ne soit rattaché au bien donné en garantie. Cette proposition découle de l'arrêt de notre Cour *Dauphin Plains*, précité, où il était question de déterminer l'ordre de priorité quant au produit d'une vente de liquidation d'un administrateur-séquestre. Dans cette affaire, les créances de Sa Majesté (notamment) résultaient du non-versement de retenues sur la paye liées à l'application du *Régime de pensions du Canada*, S.R.C. 1970, ch. C-5, et de la

Loi de 1971 sur l'assurance-chômage, S.C. 1970-71-72, ch. 48. Ces lois rendaient Sa Majesté bénéficiaire de créances conformément à des fiducies réputées créées en vertu de dispositions dont le texte était fort semblable à celui des par. 227(4) et (5) dont il est question en l'espèce. En concluant que ces créances avaient priorité sur un privilège flottant qui s'était cristallisé après que les retenues en cause eurent été faites, le juge Pigeon a affirmé à la p. 1199 :

Il faut d'abord faire remarquer que, pour des raisons analogues à celles qui motivent l'arrêt _Avco_, [1979] 2 R.C.S. 699, précité, la réclamation des déductions au titre du Régime de pensions et de l'assurance-chômage ne peut affecter le produit de la réalisation de biens grevés d'un privilège fixe et spécifique. À partir de la création de cette charge, l'actif qui en est grevé n'est plus la propriété du débiteur qu'à charge de ce privilège. La réclamation des déductions est née plus tard et ne peut donc primer ce privilège en l'absence d'une loi le prescrivant spécifiquement. Cependant, le privilège général ne s'est pas cristallisé avant la délivrance du bref d'assignation et la nomination du séquestre. En l'espèce, que l'on choisisse l'une ou l'autre date n'a pas d'importance, les deux étant postérieures aux déductions. [Je souligne]

Ainsi, le par. 227(5) permet subsidiairement de rattacher rétroactivement le droit de Sa Majesté au bien en litige donné en garantie, si la garantie concurrente s'est concrétisée après que les déductions à l'origine de la créance de Sa Majesté eurent été faites. Sur le plan conceptuel, la fiducie réputée, visée au par. 227(5), permet à la créance de Sa Majesté de s'appliquer rétroactivement et de rattacher le droit qu'elle possède en vertu du par. 227(4) au bien donné en garantie avant qu'il devienne grevé d'un privilège fixe. La même chose se produit lorsqu'un privilège légal s'applique avant la constitution d'une hypothèque sur un bien en litige donné en garantie. Dans l'arrêt _Avco_, précité, le juge Martland, s'exprimant au nom de notre Cour, fait le commentaire suivant au sujet d'un tel scénario (à la p. 706) :

À compter de ce jour, le privilège s'applique aux biens de l'employeur et, comme le prévoit le par. (1), il prévaut sur toute autre créance, y compris une cession ou une hypothèque. En d'autres termes, lorsque le privilège s'applique, l'ordre de préférence n'est pas modifié par une disposition du bien par l'employeur. L'hypothèque consentie avant la création du privilège

> **n'est pas touchée. Le privilège s'applique uniquement au droit de l'employeur dans ce bien. [Je souligne.]**

113 Le juge Gonthier reconnaît donc dans ces énoncés que les dispositions de la LIR créent une fiducie réputée mais que ces dispositions ne sont pas nécessairement suffisantes pour donner priorité de rang à la créance de la Couronne. Pour ce faire, il faut que l'article 227(5) LIR (tel qu'il existait alors) accorde cette priorité.

114 Le juge Gonthier ajoute :

> **76 En l'espèce, la CGG accordait expressément à Sparrow la permission de vendre les biens de l'inventaire dans le cours de ses affaires et d'utiliser le produit dont elle disposerait; la GLB comportait implicitement la même permission. Bien qu'il soit vrai que la CGG comportait une clause de produit en fiducie, je considère que cela ne peut pas avoir pour effet de limiter la portée de la permission alors que l'arrangement réel intervenu entre les parties voulait, comme cela a été précisé, que Sparrow puisse utiliser le produit de la vente des biens de l'inventaire dans le cours de ses affaires. Dans cette affaire, la banque n'était pas un petit financier de biens d'inventaire, qui exigeait que Sparrow lui verse immédiatement le produit de la vente des biens de l'inventaire. Au contraire, la banque était un gros bailleur de fonds qui permettait à Sparrow d'utiliser le produit de la vente des biens de l'inventaire pour maintenir la viabilité de son entreprise. Pour ces motifs, appliquant le critère du professeur Wood, je conclus que, en vertu de la permission de "vendre [. . .] les biens figurant dans l'inventaire" "dans le cours normal de[s] affaires" et d'"utiliser les sommes d'argent dont [elle] dispose[rait]", la banque permettait à Sparrow de vendre les biens de l'inventaire pour payer des salaires et, nécessairement, pour verser des retenues sur la paye.**
>
> **77 Pour tous ces motifs, en application de la thèse de la permission, je conclus que la fiducie réputée dont bénéficie l'appelante en vertu du par. 227(5) doit avoir priorité de rang sur les garanties que la banque détient sur les biens en litige donnés en garantie. Le fonds en fiducie constitué des retenues effectuées, bien que sans objet identifié au moment de sa constitution, est capable de viser après coup les biens faisant l'objet de cette fiducie. Encore une fois, la banque a consenti à la diminution de sa garantie sur les biens de l'inventaire pour payer les retenues sur la paye au moment où elles ont été effectuées, et le par. 227(5) *LIR* a pour effet de reporter ce consentement jusqu'au moment de la mise sous séquestre. En consentant à ce que Sparrow paie les salaires au moyen du produit de la vente des biens**

> **de l'inventaire dans le cours de ses affaires, la banque consentait par le fait même au régime légal de recouvrement des retenues sur la paye non versées, établi par la *LIR*. Bref, en l'espèce, la permission d'aliéner le produit de la vente des biens figurant dans l'inventaire, conjuguée au régime légal des par. 227(4) et (5) *LIR*, accorde priorité de rang aux demandes de Sa Majesté relatives aux retenues légales sur la paye. Cela vaut tant à l'égard de la CGG de la banque que de sa GLB.**

115 Le juge Gonthier finira par conclure ainsi :

> **87 Il est possible de résumer mes conclusions en l'espèce au moyen des cinq propositions suivantes :**
>
> **1. On résout la question de la priorité de rang entre des fiducies légales et des garanties consensuelles en déterminant quel droit grève les biens en litige donnés en garantie, au moment où la fiducie légale devient opérante.**
>
> **2. La fiducie réputée du par. 227(5) *LIR* grève tous les biens du débiteur qui existent au moment de la liquidation, cession, faillite ou mise sous séquestre.**
>
> **3. Par exemple, si des retenues sont effectuées avant qu'un privilège fixe grève les biens donnés en garantie, la fiducie réputée du par. 227(5) fera en sorte que le droit que Sa Majesté possède à titre bénéficiaire grèvera rétroactivement ces biens. Le privilège fixe applicable à ces biens sera, par la suite, assujetti aux créances préexistantes de Sa Majesté relatives aux retenues sur la paye non versées.**
>
> **4. Sous cette réserve, si une garantie tient d'un privilège fixe et spécifique, elle confère à son détenteur le droit de propriété sur les biens donnés en garantie, de sorte qu'une fiducie légale concurrente subséquente ne pourra pas s'y appliquer. Dans ce cas, tout ce que la fiducie légale peut grever est le droit de rachat que l'*equity* reconnaît relativement aux biens donnés en garantie.**
>
> **5. Cependant, à titre d'exception aux deuxième et quatrième propositions, si le détenteur d'une garantie fixe permet au débiteur de vendre les biens donnés en garantie, cela peut donner ouverture à l'application de la fiducie légale. Cette éventualité dépend entièrement des faits de chaque affaire. Le**

> **critère applicable consiste à déterminer si, au moment où les retenues ont été effectuées, le débiteur avait le droit de vendre les biens donnés en garantie et d'utiliser le produit de cette vente pour exécuter l'obligation liée à la fiducie légale.**

116 Les juges majoritaires se rallieront cependant à l'opinion du juge Iacobucci qui refuse de voir dans les dispositions de la LIR, les mots sacramentels permettant de confirmer la priorité de la fiducie réputée de la Couronne sur les garanties antérieures de la Banque Royale.

117 Le juge Iacobucci énonce plutôt ce qui suit :

> **11 La présomption n'est donc pas un moyen de supprimer une garantie existante. Elle permet plutôt de retourner en arrière pour chercher un élément d'actif qui, au moment où l'impôt est devenu exigible, n'était pas assujetti à une garantie opposée. Bref, la disposition en matière de fiducie réputée ne peut s'appliquer que s'il est <u>préalablement</u> déterminé qu'il existe des éléments d'actifs libres de toute charge qui peuvent faire l'objet d'une fiducie réputée. La présomption suit la réponse à la question de la garantie mobilière; elle ne détermine pas cette réponse.**
>
> **12 En fait, le juge Gonthier considère que la nature particulière de la fiducie réputée peut justifier l'établissement d'une distinction entre le droit de Sa Majesté et les droits opposés. Toutefois, son argument diffère de celui que j'ai exposé dans la mesure où il met l'accent sur l'exécution réputée de l'obligation qui existe envers Sa Majesté. Mon collègue semble considérer que la permission de vendre ne contribue à réduire la valeur de la garantie qu'à l'égard des obligations exécutées et non à l'égard des obligations inexécutées. À son avis, cela représente un obstacle suffisant à la thèse de la permission. Je conviens que, si la distinction entre les obligations exécutées et les obligations inexécutées pouvait être maintenue, la probabilité que la permission anéantisse la garantie serait alors considérablement réduite. J'estime cependant que cette distinction ne saurait être maintenue. Comme le juge Gonthier l'affirme à plus d'une reprise dans ses motifs, la thèse de la permission repose sur le consentement des parties. Toutefois, les parties en l'espèce ont consenti à ce que les biens figurant dans l'inventaire soient vendus [TRADUCTION] "dans le cours normal de[s] affaires [du débiteur]". Les termes utilisés sont formels. Aucune distinction n'est établie entre les obligations exécutées et les obligations inexécutées. La seule exécution prévue par la permission est la vente réelle des biens figurant dans l'inventaire et l'utilisation du produit de cette vente pour rembourser une dette. Comme je l'ai déjà affirmé, le mécanisme de la présomption ne**

satisfait pas à l'exigence de vente réelle. Je conclus donc que si l'on veut rendre justice au libellé de la permission en tant qu'indice de l'intention des parties, il ne saurait y avoir de distinction entre les obligations exécutées et les obligations inexécutées.

13 Mon collègue attache beaucoup d'importance au fait que le débiteur s'est engagé, dans la convention de garantie générale, à [TRADUCTION] "payer tous les impôts, tarifs, redevances, cotisations et autres sommes de toute nature qui peuvent être légalement perçues, cotisées ou imposées à l'égard du débiteur ou d'un bien donné en garantie, lorsque ces sommes sont dues et exigibles". Toutefois, cet engagement qui, du reste, n'est qu'un engagement à respecter la loi, ne fait pas partie de la permission donnée. Il n'ajoute rien au par. 153(1) *LIR*. Il ne prescrit pas non plus l'issue d'une lutte pour obtenir la priorité de rang. Qui plus est, l'engagement à payer des impôts n'est qu'un seul parmi plusieurs engagements contenus dans la convention. Un autre engagement veut que le débiteur [TRADUCTION] "exploite [son] entreprise [. . .] d'une manière appropriée et efficiente". Le débiteur pourrait vraisemblablement contracter des dettes subséquentes en exploitant son entreprise. Le juge Gonthier n'énonce aucun principe qui pourrait permettre de régler les luttes que Sa Majesté et des prêteurs subséquents se feraient pour obtenir la priorité de rang. En cas de conflit, chacun d'eux bénéficierait de la permission de vendre les biens figurant dans l'inventaire ainsi que d'engagements explicites, de sorte qu'il faudrait trouver un autre critère pour déterminer qui a priorité. Ici, comme auparavant, la perspective d'un renversement des règles ordinaires en matière de priorité est immédiate et inquiétante.

118 Et plus loin, il ajoute :

23 De plus, pour les raisons que j'ai déjà exposées, il est fort probable qu'une interprétation large de la thèse de la permission contreviendrait à la *PPSA*. La Loi prévoit clairement que le financement des biens figurant dans un inventaire est un outil commercial important. Toutefois, permettre que la simple mise à exécution potentielle d'une permission de vendre fasse obstacle à une garantie sur les biens figurant dans un inventaire dépouillerait cette garantie de toute efficacité. Ce ne serait plus une garantie contre des obligations subséquentes.

24 Finalement, je tiens à souligner qu'il est loisible au législateur d'intervenir et d'accorder la priorité absolue à la fiducie réputée. Le

> **paragraphe 224(1.2) *LIR* illustre clairement comment cela pourrait se faire. Cette disposition attribue à Sa Majesté certaines sommes "malgré toute autre garantie au titre de ce[s] somme[s]", et prévoit qu'elles "doi[vent] être payée[s] au receveur général par priorité sur toute autre garantie au titre de ce[s] somme[s]". Pour obtenir le résultat souhaité, il suffit d'utiliser des termes aussi clairs. En l'absence de pareils termes, l'innovation judiciaire n'est pas souhaitable parce qu'il s'agit d'une question qui regorge de considérations de principe et parce qu'une prescription du législateur est plus susceptible d'être claire qu'une règle dont les limites précises ne seront établies que par suite d'une longue et coûteuse série de poursuites.**
>
> (soulignements ajoutés)

119 On sait donc comment éviter l'impact de l'arrêt *Sparrow Electric*. Il suffit que la LRCR comporte un texte produisant le même effet juridique que l'amendement apporté à la LIR pour assurer la préséance de la fiducie réputée de la LIR sur les hypothèques mobilières sans dépossession. Il faudra voir si l'article 264 LRCR rencontre cet objectif.

120 Donc, en 2009, après l'affaire *SMRQ c. De Courval*, force est de constater que la Cour d'appel n'est pas enclin à lire dans l'article 20 LMRQ l'existence d'une fiducie réputée, alors que les jugements dans les affaires *Nolisair* et *Sécurité Saglac* proposent une lecture fort différente du texte de loi (avec ou sans les mots qui y furent ajoutés par l'amendement de 1993).

121 D'ailleurs, l'opinion du soussigné dans *White Birch* a été, entre autres choses, basée sur l'interprétation de la Cour d'appel dans *De Courval*.

122 Par ailleurs, la décision de la Cour d'appel dans *SMRQ c. De Courval* a été critiquée et non suivie par la Cour d'appel fédérale dans une affaire de la *Banque Toronto Dominion c. S.M. la Reine* rapportée à 2010 CAF 174.

123 Vient alors l'affaire *Banque nationale du Canada c. Agence du revenu du Québec*, 2011 QCCA 1943 en appel d'un jugement de la Cour du Québec, 2009 QCCQ 8079[46]. Cette affaire est une autre illustration de la difficulté d'interprétation de la notion de fiducie réputée (dans l'article 20 LMRQ). Dans cette instance, le juge Gilson Lachance de la Cour du Québec a conclu que l'article 20 LMRQ créait une fiducie réputée mais sans considérer ni l'arrêt de la Cour d'appel dans *Québec (SMRQ) c. De Courval* précitée[47] et sans non plus analyser les dispositions du *Code civil du Québec* en matière de fiducies.

124 Le juge Lachance analyse cependant la portée de l'article 20 LMRQ sur les créances de créanciers garants, à la lumière de *R. c. First Vancouver Finance* et *Great West Transport Ltd* 2002 CSC 49; [2002] 2 R.C.S. 720, qui a apparenté la fiducie réputée de l'article 227 (4.1) LFI à une "charge flottante[48] grevant la totalité des biens du débiteur fiscal au profit de Sa Majesté"[49].

125 La décision du juge Lachance a fait l'objet d'un appel[50] et le juge Dalphond accepte le raisonnement du juge de première instance sauf en ce qui a trait à une correction de chiffres.

126 Voici comment le juge Dalphond aborde la question :

> **[16] Le premier juge conclut que Revenu Québec bénéficie d'une fiducie présumée en vertu de l'article 20 de la *Loi sur le ministère du Revenu*, L.R.Q., c. M-31 (LMR), sur les sommes retenues à la source par Canouxa. Cette fiducie s'applique, selon lui, sur l'ensemble des biens de la débitrice fiscale, sauf sur les biens vendus dans le cours normal des activités de l'entreprise, où la fiducie se transporte sur le produit de cette vente ou sur le bien de remplacement. La BNC, créancière de Canouxa, n'est pas un tiers acquéreur et est assujettie à la fiducie, comme la Cour suprême l'a établi dans l'arrêt *FirstVancouverFinance c. M.R.N.*, 2002 CSC 49 (CanLII), [2002] 2 R.C.S. 720, 2002 CSC 49. De plus, cette situation n'est pas modifiée par la faillite de Canouxa selon l'article 67(1) a) de la *Loi sur la faillite et l'insolvabilité*, L.R.C. (1985), ch. B-3 (LFI). L'intention du législateur est d'assujettir les créanciers garantis au respect de la fiducie présumée en cas de faillite, ce qui emporte une obligation de remettre à l'autorité fiscale le produit de la vente des biens assujettis à cette fiducie.**

127 Il ajoute cependant ce qui suit :

> **[29] Je n'ai pas d'hésitation à conclure que les sommes réclamées de la débitrice fiscale en vertu de l'art. 1015 de la *Loi sur les impôts*, L.R.Q., c. I-3 (retenues à la source sur salaire) sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu* et que la loi provinciale prévoit un impôt semblable à celle de la loi fédérale. Il en va de même pour les contributions au RRQ par rapport à celles au RPC.**
>
> **[30] Quant à la nature et l'étendue de l'assiette de la fiducie invoquée, elles sont précisées à l'article 20 LMR :**
>
> > **20. Toute personne qui déduit, retient ou perçoit un montant quelconque en vertu d'une loi fiscale est réputée le détenir en fiducie pour l'État, séparé de son patrimoine et de ses propres fonds, et en vue de le verser à l'État selon les modalités et dans le délai prévus par une loi fiscale.**
> >
> > **En cas de non-versement à l'État, selon les modalités et dans le délai**

prévus par une loi fiscale, d'un montant qu'une personne est réputée par le premier alinéa détenir en fiducie pour l'État, un montant égal au montant ainsi déduit, retenu ou perçu est réputé, à compter du moment où le montant est déduit, retenu ou perçu, être détenu en fiducie pour l'État, séparé de son patrimoine et de ses propres fonds, et former un fonds séparé ne faisant pas partie des biens de cette personne, que ce montant ait été ou non, dans les faits, tenu séparé du patrimoine de cette personne ou de ses propres fonds.

Toutefois, cette personne peut, lors de la production au ministre d'une déclaration en vertu des articles 468 ou 470 de la Loi sur la taxe de vente du Québec (chapitre T-0.1), retirer du montant total qu'elle est réputée par le premier alinéa détenir en fiducie pour l'État, les montants qu'elle a droit de déduire et qu'elle a effectivement déduits dans le calcul de son montant à remettre. [je souligne]

[31] La fiducie présumée porte donc sur les montants perçus et, en cas de non-remise, sur des montants équivalents appartenant au débiteur fiscal. La situation est donc équivalente à ce que prévoit l'art. 227 (4) de la *Loi de l'impôt sur le revenu*, L.R.C. (1985), c. 1 (5e suppl.), mais ne s'étend pas aux biens autres du débiteur, comme le prévoit l'art. 227 (4.1) de la loi fédérale :

227(4) Montant détenu en fiducie

Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l'absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi.

(4.1) Non-versement

Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement

à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne, et les biens détenus par son créancier garanti au sens du paragraphe 224(1.3) qui, en l'absence d'une garantie au sens du même paragraphe, seraient ceux de la personne, d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu, séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est déduit ou retenu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à une telle garantie.

Ces biens sont des biens dans lesquels Sa Majesté a un droit de bénéficiaire malgré toute autre garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie. [je souligne]

[32] Commentant l'art. 227 de la loi fédérale, M. le juge Iacobucci écrit dans *First Vancouver Finance* :

27 Le législateur a donné suite à l'arrêt *Sparrow Electric* en modifiant les dispositions relatives à la fiducie réputée en 1998 (avec effet rétroactif en 1994) pour adopter leur libellé actuel. Plus particulièrement, les mots "malgré toute autre garantie [...] le concernant" ont été ajoutés au par. 227(4). De même, le par. 227(4.1) (l'ancien par. 227(5)) a accru la portée de la fiducie réputée de façon qu'elle englobe les "biens détenus par son créancier garanti [...] qui, en l'absence d'une garantie [...] seraient ceux de la personne". Le paragraphe 227(4.1) a également été modifié par la suppression du renvoi aux événements déclencheurs (liquidation, faillite, etc.), le législateur établissant plutôt une présomption selon laquelle les biens du débiteur fiscal et de ses créanciers garantis sont détenus en fiducie "en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est

> **réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté". Enfin, le par. 227(4.1) précise désormais que les biens sont réputés être détenus en fiducie "à compter du moment où le montant est déduit ou retenu".**
>
> **28 Ces modifications démontrent que le législateur a voulu que les par. 227(4) et (4.1) accordent la priorité de rang à la fiducie réputée lorsque les biens sont par ailleurs grevés d'une garantie, que celle-ci ait pris effet avant ou après les retenues à la source ou l'application de la fiducie réputée. C'est ce qui ressort clairement de l'expression "malgré toute autre garantie" employée aux par. 227(4) et (4.1). En d'autres termes, vu la manière dont les dispositions relatives à la fiducie réputée avaient été interprétées dans l'affaire *Sparrow Electric*, le législateur les a modifiées de façon à accorder la priorité de rang à la fiducie réputée lorsque le ministre et des créanciers garantis font valoir concurremment un droit sur les biens du débiteur fiscal.**
>
> **29 Comme je l'indique précédemment, le législateur a également modifié le moment auquel la fiducie se matérialise. Tout renvoi à un événement déclencheur emportant l'application de la fiducie, comme la liquidation ou la faillite, a été supprimé. Le paragraphe 227(4.1) dispose désormais qu'une fiducie réputée s'applique "en cas de non-versement [de retenues à la source] à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi" (je souligne). Ainsi, l'application de la fiducie réputée est désormais enclenchée dès qu'il y a manquement à l'obligation de verser les retenues à la source. En outre, suivant l'al. 227(4.1) a), les biens sont réputés être détenus en fiducie "à compter du moment où le montant est déduit ou retenu" Par conséquent, bien que l'omission de verser les retenues à la source enclenche l'application de la fiducie, cette dernière est réputée prendre effet rétroactivement au moment où les retenues à la source ont été faites. Ces modifications révèlent que le législateur a manifestement voulu consolider la fiducie réputée et en accroître la portée afin de faciliter les opérations de recouvrement du ministre. [je souligne]**

128 Ainsi, la fiducie réputée de l'article 20 LMRQ est donc reconnue sans équivoque. Plus encore, l'interprétation que nous donne le juge Dalphond dissipe les doutes et, une fois cette interprétation appliquée au texte de l'article 49 LRCR, le soussigné doit conclure que cette disposition établit une fiducie réputée touchant les cotisations suspendues et non versées aux Comités de retraite requérants.

129 Plusieurs auteurs supportent une telle conclusion.

130 Louis Payette dans son texte "*Les sûretés réelles dans le Code civil du Québec*", 2010, EYB2010SUR3, indique au paragraphe 63, pages 19 et 20, que le législateur peut prévoir qu'une fiducie légale réputée peut exister dans la mesure où les biens visés par la fiducie sont simplement réputés détenus en fiducie (i.e. sans séparation physique du patrimoine du débiteur). Au paragraphe 1821 du même texte, page 104, Me Payette ajoute :

> **Certaines lois créent une fiction aux termes de laquelle les biens d'un contribuable sont "réputés" être détenus en fiducie au profit des pouvoirs publics dont il est le débiteur. L'existence d'une hypothèque sur un bien n'empêche pas la naissance de telles fiducies sur ce bien et une prise en paiement n'entraîne pas leur extinction; le preneur en paiement doit par conséquent rendre compte des sommes dues au bénéficiaire de la fiducie présumée, à hauteur de la valeur du bien ou du prix de sa revente.**

131 Voir aussi John Claxton "*Studies on the Quebec Law of Trust*", Thomson Carswell 2005, pages 84 et suivantes, nos. 4.2 et suivants, viz : "*Trust Constituted by Operation of Law"*; Roger P. Simard dans *Juris Classeur Québec - sûreté* viz : "*Fiducies réputées*".

132 Cette revue de la jurisprudence pertinente en matière de fiducies réputées permet donc de conclure ainsi :

a) Pour qu'une fiducie réputée existe en droit québécois, il faut que le législateur intervienne clairement en ce sens. C'est le cas en l'espèce.
b) La fiducie réputée de l'article 49 LRCR stipule que celle-ci produit ses effets, qu'il y ait ou qu'il n'y ait pas séparation physique des biens visés par la fiducie du patrimoine de l'employeur. Ces mots, une fois qu'ils furent ajoutés aux dispositions de l'article 20 de la LIR, ont permis à cette dernière fiducie réputée de produire les effets visés par le législateur. Après réflexion, il apparaît évident que les mêmes mots utilisés dans l'article 49 LRCR doivent produire les mêmes effets;
c) Contrairement à ce que le soussigné a conclu dans *Whilte Birch* précitée, l'article 49 LRCR crée une véritable fiducie légale au sens de l'article 1262 C.c.Q. et fait en sorte que les cotisations d'équilibre dues et non payées à cause de l'effet suspensif de l'ordonnance du juge Morawetz sont visées par ladite fiducie réputée, laquelle doit donc produire ses effets;
d) Cependant, cela n'est pas suffisant pour conclure que cette fiducie prend rang avant l'hypothèque mobilière sur l'universalité des biens de SBI en faveur de IQ;
e) En effet, contrairement aux "Personal Property Security Acts" de certaines autres provinces, le Québec ne possède aucune disposition législative

faisant en sorte qu'une fiducie réputée puisse avoir préséance sur les sûretés légales ou conventionnelles que l'on retrouve au Code civil du Québec;

f) Donc, à moins que la LRCR ne contienne d'autres dispositions faisant en sorte que les biens visés par la fiducie réputée de l'article 49 LRCR échappent à l'hypothèque universelle de IQ, cette dernière devra donc recevoir son plein effet à l'égard de la totalité des biens de SBI, défaisant en cela toute possibilité de récupération par les Comités de retraite requérants;

g) Il faut donc décider si l'article 264 LRCR permet de remédier à la question et faire en sorte que les biens faisant l'objet de la fiducie réputée de l'article 49 LRCR ne soient pas touchés par l'hypothèque universelle de IQ. Voilà la question que l'on doit maintenant débattre.

b) **L'effet de l'article 264 LRCR sur la créance de IQ**

133 Les Comités de retraite plaident que l'article 264 LRCR vient renforcer leur thèse selon laquelle les cotisations d'équilibre sont affectées d'une fiducie réputée et ne font pas partie du gage commun des créanciers de SBI.

134 Rappelons ici la disposition pertinente de l'article 264 LRCR :

> **264. Sauf dispositions contraires de la loi, est incessible et insaisissable :**
>
> **1. toute cotisation versée ou qui doit être versée à la caisse de retraite ou à l'assureur, ainsi que les intérêts accumulés;**

135 Serait donc insaisissable ou incessible toute cotisation versée ou qui doit être versée à la caisse de retraite des employés syndiqués on non-syndiqués de SBI. S'il faut donner un sens à cet article, il faut conclure que les cotisations ... "à être versées"... sont littéralement hors de la portée des autres créanciers de SBI, que ces derniers soient garantis ou non, qu'ils bénéficient d'une garantie antérieure à la date d'exigibilité des cotisations payées ou non.

136 Le mot "cotisation" utilisé à l'article 264 LRCR se doit d'avoir le même sens que celui qu'on lui donne à l'article 49 LRCR. Il inclut donc la cotisation d'équilibre "qui doit être versée" mais qui fait l'objet d'une suspension depuis l'émission de l'ordonnance initiale.

137 Les Comités de retraite plaident aussi que l'article 264 LRCR n'est pas la seule disposition qui rendrait insaisissables les cotisations non versées à la caisse de retraite. L'article 553(7) du *Code de procédure civile* stipule en effet que sont insaisissables :

> **7. Les prestations accordées au titre d'un régime complémentaire de retraite auquel cotise un employeur pour le compte des employés, les autres sommes déclarées insaisissables par une loi régissant ces régimes <u>ainsi que les cotisations qui sont ou qui doivent être versées à ces régimes.</u>**
>
> (soulignement ajouté)

138 En conséquence, ces montants ne tomberaient pas dans le gage commun des créanciers de SBI et ne pourraient faire l'objet ni d'une hypothèque ou d'une autre forme d'affectation en faveur d'un tiers.

139 Les articles 2644 et 2645 C.c.Q. viennent renforcer cette approche :

> **Art. 2644. Les biens du débiteur sont affectés à l'exécution de ses obligations et constituent le gage commun de ses créanciers.**
>
> **Art. 2645. Quiconque est obligé personnellement est tenu de remplir son engagement sur tous ses biens meubles et immeubles, présents et à venir, <u>à l'exception de ceux qui sont insaisissables et de ceux qui font l'objet d'une division de patrimoine permise par la loi</u>.**
>
> **Toutefois, le débiteur peut convenir avec son créancier qu'il ne sera tenu de remplir son engagement que sur les bines qu'ils désignent.**
>
> (soulignement ajouté)

140 Il s'ensuit donc, selon les Comités requérants que les cotisations d'équilibre suspendues par l'ordonnance initiale sont incessibles et insaisissables en vertu de l'article 264 LRCR en plus de faire l'objet d'une fiducie réputée selon l'article 49 LRCR. L'effet combiné de ces deux dispositions fait donc en sorte que les sommes non versées aux régimes de retraite sont exclues du patrimoine de SBI et ne peuvent être utilisées pour rembourser la créance hypothécaire de IQ.

141 Dans *Marché Bernard Lemay c. Beljaars*, 2003 CanLII 30892, la Cour supérieure a décidé ce qui suit :

> **[40] Les dispositions de cette loi particulière [la LRCR] devraient primer sur les articles généraux du Code civil ou de la Loi sur les sociétés de fiducie... et sont très claires.**

> **[41] Il semble évident que l'article 264 de la LRCR, jumelé à l'article 553, 7 C.p.c. qui traite aussi de l'insaisissabilité, conférant ce caractère aux droits accordés au titre d'un régime de retraite, doivent primer sur toutes autres dispositions moins pertinentes ou moins spécifiques parce que plus générales, comme les articles du Code civil sur le sujet et dont nous avons traité.**

142 Voir aussi : *Loi sur les régimes complémentaires de retraite - Annotations et Commentaires* par la Régie des rentes du Québec, Bibliothèque nationale du Québec 1998, paragraphe 264.3.[51]

143 Qui plus est, dans un contexte de faillite, ces sommes n'entreraient pas, non plus, dans les "biens du failli" et ne feraient pas partie de la saisine d'un syndic, vu le libellé de l'article 67(1)(b) LFI qui édicte que :

> **67(1) Les biens d'un failli constituant le patrimoine attribué à ses créanciers ne comprennent pas les biens suivants :**
>
> **a)** **les biens détenus par le failli en fiducie pour toute autre personne;**
>
> **b)** **les biens qui, selon le droit applicable dans la province dans laquelle ils sont situé et où réside le failli, ne peuvent faire l'objet d'une mesure d'exécution ou de saisie contre celui-ci;**

(soulignements ajoutés)

144 Force est de reconnaître que ces arguments sont, à première vue, convaincants.

145 IQ prétend, à l'encontre de ce qui précède, que pour que l'article 264 LRCR puisse recevoir application, il faut qu'il y ait eu séparation physique des cotisations qui doivent être versées pour que leur qualité d'incessibilité et d'insaisissabilité puisse recevoir pleine application. IQ ajoute que ces cotisations font l'objet d'une ordonnance de suspension de paiement suite à l'ordonnance initiale prononcée par le juge Morawetz. Ces cotisations ne seraient donc pas "dues et exigibles".

146 Le soussigné n'est pas d'accord avec une telle proposition.

147 Le soussigné est d'avis qu'effectivement, les articles 49 et 264 LRCR doivent être lus et interprétés dans le même contexte.

148 Si l'article 49 LRCR crée une fiducie réputée opposable à IQ, cela veut dire que les biens visés par la fiducie réputée sont non seulement facilement identifiables et que les montants qu'ils représentent sont disponibles mais qu'effectivement, ils se trouvent clairement "identifiés" par l'effet même de l'article 49. De même, l'article 264 LRCR peut s'appliquer aux montants auxquels l'article

49 LRCR s'applique.

149 Il ne sera donc pas plus nécessaire dans ce contexte particulier de procéder à une séparation physique des cotisations d'équilibre à être versées du reste des actifs de SBI pour que le produit desdites cotisations jouissent du caractère d'incessibilité et d'insaisissabilité que leur procure l'article 264 LRCR, qu'il n'est nécessaire de le faire pour que la fiducie réputée de l'article 49 LRCR ne produise ses effets.

150 En ce sens, l'article 264 LRCR vient compléter la logique de l'article 49 LRCR et, autrement, ces deux mêmes articles deviennent complètement dénudés de leur sens de leur portée et de leur effet.

151 Lorsque la requête des Comités de retraite requérants est formulée, les seuls actifs de SBI sont constitués d'une somme liquide de quelques 30 millions$. Les parties ont convenu que ce montant devait être versé à IQ pour atténuer l'impact des intérêts courant sur la créance de cette dernière.

152 La fiducie réputée de l'article 49 LRCR pouvait donc affecter cette portion des liquidités de SBI représentant le total des cotisations d'équilibre dues et non encore versées aux Comités de retraite requérants, à cause de l'ordonnance du suspension, sans qu'il soit nécessaire de les séparer du reste des actifs liquides de SBI et, du même fait, les caractères d'incessibilité et d'insaisissabilité de ces mêmes montants aux termes de l'article 264 LRCR pouvaient les affecter.

153 Finalement, le fait que les sommes aient été distribuées à IQ sous réserve des droits des Comités de retraite requérants n'ont pas eu pour effet de faire perdre à ces actifs leur caractère de biens fiduciaires, incessibles et insaisissables.

154 Quant à l'argument de IQ à l'effet que lors de la suspension des paiements des cotisations d'équilibre par l'émission de l'ordonnance initiale rendue par le juge Morawetz, aucune cotisation d'équilibre n'était due et non encore versée (et, partant, aucune somme ne pouvait être assujettie ni à l'article 49 LRCR, ni à l'article 264 LRCR), cet argument doit aussi être rejeté. En effet, il faut distinguer entre l'effet suspensif de l'obligation de payer ces sommes et leur assujettissement aux l'articles 49 et 264 LRCR. Ces articles couvrent toute somme non encore versée. Il faut distinguer entre l'exigibilité d'une dette et une suspension (temporaire) de l'obligation d'en effectuer le paiement. Les cotisations demeurent donc dues et exigibles mais seule l'exécution du paiement de ces sommes est suspendue.

155 La notion d'incessibilité et d'insaisissabilité des cotisations dues et non versées empêche l'employeur et ses créanciers d'utiliser ces sommes à des fins autres que celles prévues à la LRCR. Ces sommes ne peuvent donc faire l'objet d'une hypothèque mobilière universelle avec ou sans dépossession.

156 La conséquence de ce qui précède est que le raisonnement de l'arrêt Sparrow Electric ne peut

s'appliquer en l'espèce.

157 IQ plaide aussi l'application de l'affaire *Poulin c. Morency*[52], où il s'agissait de déterminer si les sommes cotisées par un employé dans un régime de retraite insaisissable avait perdu son caractère d'insaisissabilité suite au transfert des biens du régime à un REER. La Cour d'appel du Québec avait décidé que la totalité du REER de l'appelant Poulin était saisissable, ce qui fut confirmé par la Cour suprême, et que la disposition d'insaisissabilité ne protégeait pas les sommes transférées à la demande de l'appelant aux fins d'investissement dans un REER.

158 En l'instance, sont incessibles et insaisissables les cotisations dues par l'employeur et qui ne sont pas encore versées aux Comités de retraite requérants. La vente des actifs de SBI et leur transformation en actifs liquides n'enlève donc rien au caractère d'incessibilité et d'insaisissabilité desdites cotisations.

159 Dans *Poulin c. Morency* (précitée) ce qui a fait perdre le caractère d'insaisissabilité et d'incessibilité aux sommes en litige, c'est leur transfert dans un REER car alors les sommes en question devaient nécessairement passer sous le contrôle de l'appelant avant qu'elles aboutissent dans un REER. D'ailleurs, comme l'expose le juge Gonthier[53] lorsque le législateur québécois veut étendre l'insaisissabilité de certaines sommes visées par l'article 264 LRCR, il le fait expressément[54].

160 Finalement, force est de constater que l'article 264 LRCR a, par analogie, sensiblement le même effet que l'article 30(7) de la *Loi ontarienne sur les sûretés mobilières* (LRO 1990, ch. D-10) que l'on appelle communément le "PPSA" et qui subordonne les sûretés mobilières à l'intérêt du bénéficiaire d'une fiducie réputée créée par une loi portant sur les régimes de retraite. Comme le confirme la Cour suprême dans *Indalex,* n'eût été de l'application de la doctrine de la prépondérance du droit fédéral, une telle fiducie réputée aurait eu priorité sur une créance garantie en vertu d'une sûreté consentie par une débitrice.

161 L'exécution d'une garantie en faveur de IQ de la nature d'une hypothèque immobilière et mobilière sans dépossession, même dûment enregistrée au RDPRM, n'a pas pour effet d'anéantir ce caractère. Si c'était le cas, l'article 264 LRCR n'aurait aucun effet pratique. De fait, les cotisations à être versées et qui ne l'ont pas été n'appartenant pas à SBI à cause notamment de l'effet de la fiducie réputée de l'article 49 LRCR portant sur les mêmes actifs, ne font ni partie des biens de SBI ni du gage commun des créanciers de cette dernière.

162 En conclusion, le Tribunal est d'avis que :

1) les cotisations d'équilibre objet du présent litige, font l'objet d'une fiducie réputée créée par la loi;
2) lesdites cotisations sont incessibles et insaisissables;
3) elles ne sont pas affectées par l'hypothèque universelle dont bénéficie IQ, et ce, même si lesdites cotisations d'équilibre sont devenues payables aux

> Comités de retraite requérants après la mise ne place de ladite hypothèque universelle.

Conclusion générale

163 Nous sommes à la fin d'un processus de réorganisation sous l'empire de la LACC qui a pris la forme d'une vente des actifs de SBI à une nouvelle entité (qui continuera les activités de cette dernière). Il s'agit maintenant de distribuer le produit de cette vente d'actifs aux créanciers de SBI. Ces créanciers ne détiennent aucune super-priorité qui aurait pu leur être accordée sous l'empire de la LACC. La priorité accordée aux créances des Comités de retraite, d'une part, et de IQ, d'autre part, doit donc être analysée à la seule lumière du droit québécois. Il n'est nullement question de l'application de la doctrine de la préséance du droit fédéral sur le droit provincial.

164 S'opposent ici deux obstacles à l'exercice du droit de IQ sur la totalité des actifs de SBI : certains de ces actifs sont incessibles et insaisissables en plus de faire l'objet d'une fiducie réputée.

165 Sont donc hors de la portée de IQ, les cotisations d'équilibre non versées depuis l'ordonnance de suspension du 16 janvier 2012. Les déficits actuariels des régimes de retraite existant à la date de terminaison de ces derniers ne sont visés ni par l'article 49 ni par l'article 264 LRCR.

166 Les articles 49 et 264 LRCR doivent être lus et appliqués restrictivement compte tenu du fait qu'ils créent un régime exceptionnel. Une fiducie réputée ne peut faire l'objet d'une interprétation large et libérale, et ce, même si la LRCR, dans son ensemble, doit être interprétée de façon généreuse. On ne peut donc étendre l'application de l'article 49 ou de l'article 264 LRCR aux déficits actuariels.

167 L'article 49 LRCR ne s'applique qu'aux cotisations et aux intérêts accumulés sur ces cotisations.

168 C'est l'effet combiné des articles 49 et 264 LRCR qui viennent soustraire les actifs de SBI représentant le montant des cotisations d'équilibre non versées aux Comités de retraite (plus les intérêts y afférant) à la créance hypothécaire de IQ. Ces deux dispositions ont pour effet de sortir littéralement ces actifs du gage commun des créanciers de SBI.

169 Dans *Indalex* en Cour suprême, la juge Deschamps écrit :

> **[51] ... 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] La fiducie réputée créée par la LRR continue de s'appliquer dans les instances relevant de la LACC, sous réserve de la doctrine de la prépondérance fédérale (Crystalline Investments Ltd. c. Domgroup Ltd., 2004 CSC 3 (CanLII), 2004 CSC 3, [2004] 1 R.C.S. 60, par. 43). La Cour d'appel a donc jugé à bon droit que, à l'issue d'un processus de liquidation relevant de la LACC, les priorités peuvent être établies selon le régime prévu dans la LSM, plutôt que selon le régime fédéral établi dans la LFI.**
>
> (soulignements ajoutés)

170 Il en va de même pour la fiducie réputée de l'article 49 LRCR et de la protection que l'article 264 LRCR accorde à ces actifs.

171 En l'absence de l'application de la doctrine de la prépondérance fédérale, force est de conclure que ces dispositions doivent recevoir leur plein effet.

172 Supposons le scénario suivant : au lieu de se retrouver dans un contexte de réorganisation sous l'empire de la LACC, SBI aurait tout simplement décidé de vendre ses actifs à une nouvelle société avant de payer ses créanciers à même le produit de cette vente, sans pour autant faire honneur à son obligation de verser aux Comités de retraite requérants les cotisations d'équilibre qui leur sont dues. Le raisonnement qui précède aurait été applicable sans que l'on s'interroge plus loin. Le Tribunal est d'avis que dans le contexte du présent débat, ce raisonnement doit être appliqué.

173 Avec égards pour l'opinion contraire, le soussigné est d'avis que les questions en litige ne se résolvent ni par une référence à l'affaire *Sparrow Electric* ni par une référence à l'article 37 LACC. Dans *Sparrow* il n'était pas question d'insaisissabilité ou d'incessibilité des sommes devant revenir à la Couronne fédérale mais uniquement de la non-application prioritaire des sommes visées par la fiducie réputée contenue à la LIR, problème qui a été corrigé par un amendement subséquent à la *Loi de l'impôt*. Ici, les biens constituant l'assiette de la fiducie réputée sont littéralement exclus de l'application de la garantie dont bénéficie IQ. Pour IQ, ces biens sont inaccessibles car ils ne peuvent faire partie d'une quelconque cession ou transfert par SBI.

174 Il n'est, non plus, ni utile, ni possible d'en référer aux pouvoirs inhérents de la Cour supérieure sous l'empire de l'article 46 C.p.c. pour faire en sorte que les cotisations d'équilibre soient versées aux Comités de retraite, car elles le sont de toutes façons. Il n'est pas approprié d'appliquer ce concept afin de permettre à ces mêmes requérants de récupérer les soldes des déficits actuariels réclamés, ces déficits étant clairement identifiés comme des dettes de l'employeur (article 228 LR R) et clairement exclus de la portée de l'article 49 LRCR. En présence de dispositions législatives aussi claires, il n'y a aucune justification de recourir aux pouvoirs inhérents de la Cour, le législateur ayant déjà pris position sur la question.

175 Ce débat a été fort bien préparé et plaidé par les procureurs impliqués. Même après l'audition des 27 et 28 mai 2013, les procureurs ont pu soumettre plusieurs textes additionnels au soussigné, clarifiant certaines de leurs positions ou répondant aux questions du soussigné. Le Tribunal leur en sait gré et les remercie. Les échanges entre les procureurs se sont échelonnés de juin à octobre 2013, ce qui explique en partie la longueur du délibéré.

POUR L'ENSEMBLE DE CES MOTIFS, le Tribunal

176 **ACCUEILLE** en partie la requête des Comités de retraite requérants;

177 **DÉCLARE** que les cotisations d'équilibre ainsi que les intérêts y afférant et non versés aux Comités de retraite requérants font l'objet d'une fiducie réputée opposable à l'Intimée Investissement Québec Inc. aux termes de l'article 49 LRCR.

178 **DÉCLARE** que ces cotisations et intérêts y afférant sont incessibles et insaisissables, sont exclus de l'application de l'hypothèque mobilière et immobilière sans dépossession dont bénéficie Investissement Québec Inc. et ont priorité sur la créance de cette dernière, par l'effet combiné des articles 49 et 264 LRCR.

179 **REJETTE** la requête des Comités de retraite requérants quant à leur prétention que les déficits actuariels desdits régimes de retraite jouissent du même avantage que les cotisations d'équilibre et des intérêts y afférant.

180 **CONTINUE** la requête pour directives à une date à être déterminée pour fins de fixation du quantum des sommes devant être remboursées aux Comités de retraite requérants par Investissement Québec Inc.

181 **LE TOUT**, sans frais.

ROBERT MONGEON, J.C.S.

1 [2012] O.J. No. 472, Motifs écrits déposés le 2 février 2012.

2 Pièce P-1.

3 Pièce P-2.

4 En date du 20 juillet 2012, les réclamations prioritaires des Comités de retraite totalisent 10 558 290,00$ et 4 296 220,00$ respectivement (pièces P-3, P-4, P-13 et P-14).

5 Rapport no. 13 du Contrôleur, pièce P-5, paragraphe 7.

6 Voir paragraphes 1 à 3 de l'ordonnance : **1. THIS COURT ORDERS that the Priority claim Adjudication Protocol, attached hereto as Schedule "A", be and the same is hereby authorized and approved. 2. THIS COURT ORDERS that the adjudication of whether the BSI Pension Reimbursement Claims are Priority Claims, all as defined in the attached Priority Claim Adjudication Protocol, be and the same is hereby referred exclusively to the Superior Court of Québec (Commercial Division) 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.**

7 White Birch Paper Holding Co. (Arrangement relatif à) 2012 QCCS 1679.

8 La décision de la Cour d'appel de l'Ontario est rapportée à 2011 ONCA 265.

9 RSO 1990 c. P-8. A noter, cependant, qu'en Ontario, ce sont les déficits actuariels qui sont touchés par l'article 57(4) de ladite loi, tandis qu'au Québec, ce sont les cotisations qui sont visées par l'article 49 LRCR.

10 *Century Services Inc. c. Canada* (Procureur Général) [2010] 3 R.C.S. 379, paragraphe [15].

11 *APRHQ c. Hydro-Québec*, 2005 QCCA 304, paragraphe 32.

12 *Monsanto c. Surintendant des services financiers* [2004] 3 R.C.S. 152, paragraphe 38.

13 *Buschau c. Rogers Communications Inc.* [2006] 1 R.C.S. 973, paragraphe 19.

14 2012 QCCS 1679, paragraphes 216 et 217.

15 2013 CSC 6, paragraphes 58 et 59.

16 Voir paragraphe 58, Plan d'Argumentation des Requérants.

17 Voir : "*Loi sur les régimes complémentaires de retraite, Annotations et Commentaires*", Régie des rentes du Québec, Bibliothèque Nationale du Québec, 1998, p. 49-3 : "Par une fiction juridique ou présomption légale, le législateur considère que les cotisations à verser et les intérêts accumulés sont détenus en fiducie. Comme la fiducie constitue un patrimoine d'affectation distinct de celui de l'employeur, les biens réputés détenus en fiducie se trouvent donc soustraits des biens de l'employeur, lesquels constituent le gage commun de ses créanciers, conformément à l'article 2645 du *Code civil du Québec*. [...] Ainsi le présent article pourrait être invoqué à l'encontre du créancier de l'employeur qui prend possession du compte bancaire ou des créances de ce dernier en vertu par exemple des articles 2721 ou 2773 du Code civil du Québec, [...] Voir aussi Lyne Duhaime : "*Les aspects juridiques des régimes de retraite*", Publications CCH Ltée, Brossard, 2011, p. 138 : "Jusqu'à leur versement à la caisse de retraite, les cotisations et les intérêts accumulés sont réputés détenus en fiducie par l'employeur, que ce dernier les ait ou non gardés séparément de ses biens. Ceci signifie que dans une situation d'insolvabilité ou de faillite, les cotisations et intérêts ainsi accumulés ne feraient pas partie du patrimoine de l'employeur et seraient donc à l'abri des réclamations des créanciers." (soulignements ajoutés)

18 *AbitibiBowater (Arrangement relatif à)*, 2009 QCCS 2028, juge Danièle Mayrand, j.c.s. qui écrit : [34] (...) D'ailleurs, la Cour d'appel de l'Ontario, dans l'affaire *Ivaco*, [2006] O.J. No. 4152, alors qu'elle décide de la portée de l'article 57(3) du *Pension Benefit Act* (dont les termes sont au même effet que ceux de l'article 49 LRCR), mentionne ce qui suit à l'égard des fiducies présumées (Deemed Trust); (...) "This Legislative designation by itself does not create a true trust. If the province wants to require an employer to keep its unpaid contributions to a pension plan in a separate account, it must legislate that separation. It has not done so.""

19 *White Birch Paper Holding Company (Arrangement relatif à)* 2012 QCCS 1679, pages 43 et 44.

20 Beaulne, Jacques, *Droit des fiducies*, 2e édition. Collection Bleue, Montréal, 2005, page 129. Voir aussi au même effet : Commentaires du Ministre de la justice, tome 1, le Code civil du Québec, art. 1260, page 748; Duhaime Lyne, op.cit. page 15; Claxton, John B. *Langage du droit de la fiducie*, Revue du Barreau EYB2002, RDB64, pages 6 à 8.

21 [2004] 1 R.C.S. 758, page 22, paragraphe 41. Il faut spécifier ici qu'il ne s'agissait pas d'une fiducie présumée ou créée par une loi mais d'un régime contractuel d'épargne enregistré de retraite.

22 2012 QCCS 1679, page 56, paragraphe 169.

23 Voir notamment *White Birch Paper Holding Company (Arrangement relatif à)* 2012

QCCS 1679, aux paragraphes 173, 174, 189 et 191 cités par QI dans son Plan d'Argumentation, pages 11 et 12, paragraphes 67 et 68.

24 Voir aussi les articles 14 à 18 LRCR qui détaillent toutes les composantes d'un régime de retraite.

25 7. Le régime de retraite est à cotisation déterminée s'il détermine à l'avance les cotisations patronales et, le cas échéant, les cotisations salariales, ou la méthode pour les calculer, et si la rente normale est fonction des sommes portées au compte du participant. Il est à prestations déterminées si la rente normale est soit un montant déterminé, indépendant de la rémunération du participant, soit un montant qui correspond à un pourcentage de cette rémunération. Il est à cotisation et prestations déterminées s'il détermine à l'avance les cotisations patronales et, le cas échéant, les cotisations salariales, ainsi que la rente normale, ou la méthode pour les calculer. 8. Le régime de retraite est contributif si le participant y verse des cotisations salariales. 9. Est garanti le régime de retraite dont les remboursements et prestations sont à tout moment garantis par un assureur.

26 Voir aussi les articles 138 et 139 LRCR qui déterminent le calcul de la cotisation d'exercice.

27 Articles 198 ss. LRCR.

28 Article 205(3e) LRCR.

29 Articles 208 ss. LRCR.

30 Articles 229-230 et 230.0.01 à 230.0.012.

31 Voir *Century Services* précité.

32 Re : Faillite de *Nolisair International Inc. c. Le Sous-ministre du revenu du Québec*, [1997] J.Q. no 2972, (1997) AZ 97011738 (C.A.).

33 [1994] J.Q. no 1201, 700-11-000069-932 (C.S. St-Jérôme) AZ-94021150.

34 *LRQ c. M-31*.

35 C.S. Chicoutimi, no. 150-11-000012-930.

36 1997 CanLII 10022 (QC.CA) 1.

37 1997 CanLII 10026 (QC.CA).

38 Article 39, *Loi* modifiant la *Loi concernant l'Impôt sur le tabac*, la *Loi sur le Ministère du*

Revenu et d'autres dispositions législatives d'ordre fiscal L.Q. *1993 c. 79* sanctionnée le 17 décembre 1993 et applicable à toute faillite, liquidation ou cession survenue après le 23 avril 1993.

39 Opinion du juge Chamberland dans *Sécurité Saglac*.

40 Opinion du juge Fish dans *Nolisair* en Cour d'appel.

41 [1999] 1 R.C.S. 759.

42 En appel du jugement du soussigné dans Services Sécurité Québec, [2007] J.Q. no 6702.

43 Royal Bank of Canada c. Sparrow Electric Corp. [1997] 1 RCS 411.

44 LC (1991) ch. 46.

45 LRC (1985) ch. 1.

46 La décision de la Cour du Québec date du 16 juillet 2009.

47 L'arrêt de la Cour d'appel est du 3 mars 2009.

48 Cette notion de "charge flottante" a été écartée dans *White Birch aux paragraphes [203] à [207]*.

49 Paragraphe 18, 2009 QCCQ 8079. Voir aussi paragraphe [25] de la même décision.

50 Banque Natinale du Canada c. Agence du Revenu du Québec, 2011 QCCA 1943.

51 Un bien incessible est un bien qui ne peut faire l'objet d'une transmission entre vifs, que ce soit à titre onéreux ou à titre gratuit. La cession de droit pourrait se concrétiser par la vente du bien cédé, par sa donation, par sa mise en garantie ou tout simplement au moyen d'une renonciation à un droit dans le bien. Le bien insaisissable, quant à lui, ne peut faire l'objet d'une saisie, qui est une procédure en vertu de laquelle un créancier met sous le contrôle de la justice des biens qui appartiennent à son débiteur dans le but d'assurer la conservation de ses droits. Soulignons qu'il existe deux types de saisies : la saisie-arrêt, qui consiste à ordonner au détenteur d'un bien de ne pas s'en départir, et la saisie-exécution, qui consiste à ordonner au détenteur d'un bien de le remettre afin de payer la créance de son propriétaire ... L'article 2465 du *Code civil du Québec* prévoit qu'une personne qui est obligée personnellement est tenue de remplir son engagement sur tous ses biens meubles et immeubles, présents et à venir, à moins qu'ils ne soient insaisissables. Ainsi, en règle générale, les biens d'une personne sont saisissables; ce n'est qu'exceptionnellement qu'ils sont insaisissables. L'article 264 constitue donc une exception à la règle générale... (soulignements ajoutés)

52 1999 3 RCS 351; 1999 CanLii 662.

53 Voir les paragraphes 37 et suivants de son opinion.

54 Voir article 264(3), second alinéa. Voir aussi l'article 28(3) du Règlement sur les régimes complémentaires de retraite (1990) 122 C.O. II-3246.

TAB 12

Case Name:

Bloom Lake g.p.l. (Arrangement relatif à)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED:

Between

MICHAEL KEEFER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON, as representatives of the salaried / non-union employees and retirees, Applicants -- objecting parties, and

BLOOM LAKE GENERAL PARTNER LIMITED, QUINTO MINING CORPORATION, 8568391 CANADA LIMITED, CLIFFS QUEBEC IRON MINING ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC, Respondents -- petitioners, and

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, BLOOM LAKE RAILWAY COMPANY LIMITED, WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED, Impleaded Parties -- impleaded parties, and

FTI CONSULTING CANADA INC., Impleaded Party -- monitor, and

HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR, as represented by THE SUPERINTENDENT OF PENSIONS, THE ATTORNEY GENERAL OF CANADA, SYNDICAT DES MÉTALLOS, SECTION LOCALE 6254, SYNDICAT DES MÉTALLOS, SECTION LOCALE 6285, Impleaded Parties -- objecting parties

And between

SYNDICAT DES MÉTALLOS, SECTION LOCALE 6254, SYNDICAT DES MÉTALLOS, SECTION LOCALE 6285, Applicants -- objecting parties, and

BLOOM LAKE GENERAL PARTNER LIMITED, QUINTO MINING CORPORATION, 8568391 CANADA LIMITED, CLIFFS QUEBEC IRON MINING ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC, Respondents -- petitioners, and

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, BLOOM LAKE RAILWAY COMPANY LIMITED, WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED, Impleaded Parties -- impleaded parties, and FTI CONSULTING CANADA INC., Impleaded Party -- monitor, and HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR, as represented by THE SUPERINTENDENT OF PENSIONS, THE ATTORNEY GENERAL OF CANADA, MICHAEL KEEFER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON, as representatives of the salaried / non-union employees and retirees, Impleaded Parties -- objecting parties, and QUEBEC NORTHSHORE AND LABRADOR RAILWAY COMPANY INC., IRON ORE COMPANY OF CANADA, Impleaded Party -- impleaded parties

[2015] Q.J. No. 7736

2015 QCCA 1351

2015EXP-2491

J.E. 2015-1381

EYB 2015-255623

Nos.: 500-09-025441-155, 500-09-025469-156 (500-11-048114-157)

Quebec Court of Appeal
Registry of Montreal

The Honourable Nicholas Kasirer J.A.

Heard: August 5, 2015.
Judgment: August 18, 2015.

(63 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application of Act -- Debtor company -- Compromises and arrangements -- Claims -- Priority --

Effect of related legislation -- In the matter of Bloom Lake's arrangement, representatives of non-union and retired employees and the union sought leave of appeal from a judgment which dismissed their contestations -- Given the findings of fact concerning the fragility of the Wabush C.C.A.A. parties as observed by the judge, the positions of both petitioners were unconvincing -- It was not enough to say, without more, that the amount was a small one in the grand scheme of things, as did the non-union and retired employees, or that another interim lender could be found without difficulty as the action proceeded -- Motions for leave to appeal dismissed.

Bankruptcy and insolvency law -- Proceedings -- Appeals and judicial review -- Leave to appeal -- In the matter of Bloom Lake's arrangement, representatives of non-union and retired employees and the union sought leave of appeal from a judgment which dismissed their contestations -- Given the findings of fact concerning the fragility of the Wabush C.C.A.A. parties as observed by the judge, the positions of both petitioners were unconvincing -- The risk of default on the interim financing and of bankruptcy to the Wabush C.C.A.A. parties was serious -- If leave were granted, the petitioners would likely obtain, at best, a Pyrrhic victory if they succeeded on appeal -- Motions for leave to appeal dismissed.

In the matter of the Companies' Creditors Arrangement surrounding Bloom Lake, g.p.l., representatives of non-union employees and retired employees and the Syndicat des Métallos, sections locales 6254 and 6285 (Union) sought leave of appeal from a judgment which dismissed their contestations. In so doing, the Superior Court confirmed Bloom Lake's request to grant priority to an interim lender charge over claims made by the petitioners based on deemed trusts in pension legislation. The Court also suspended certain payments due under pension plans as well as for post-retirement benefits. The Companies' Creditors Arrangement Act (C.C.A.A.) judge gave reasons for his decision to grant the Wabush parties' request to suspend their obligation to make special and other post-employment benefits (OPEB) payments. He held that forcing them to make special payments would lead to a default under the interim financing arrangement and a likely bankruptcy. He came to the same conclusion in respect of the OPEBs. In so doing, he rejected the argument that the suspension of the OPEBs amounted to a resiliation of the insurance contract under which the benefits were provided, resiliation which would have required notice under s. 32 C.C.A.A. The C.C.A.A. judge rejected all other grounds for contestation. He confirmed the priority of the interim lending charge over the deemed trusts as set out in the initial order and ordered the suspension of payment by the Wabush parties of monthly amortization payments, of the annual lump sum catch-up payments, and of other post-retirement benefits.

HELD: Motions dismissed. Given the findings of fact concerning the fragility of the Wabush parties as observed by the C.C.A.A. judge, the positions of both petitioners were unconvincing. Even the "strategic" decision of the non-union and retired employees to contest the judgment on a narrower basis did not satisfy this criterion. Both proposed appeals would unduly hinder the action. The findings of fact, while not immune from review, were deserving of deference on appeal. It was not enough to say, without more, that the amount was a small one in the grand scheme of things, as did

the non-union and retired employees, or that another interim lender could be found without difficulty as the action proceeded. The C.C.A.A. judge decided specifically otherwise. A reviewable error would have to be shown on this point to overcome the strong impression that came from reading the judgment that granting leave and suspending provisional execution would hinder the action. The risk of default on the interim financing and of bankruptcy to the Wabush parties was serious. Granting leave would, in this setting, risk hindering the action. If leave were granted, the petitioners would likely obtain, at best, a Pyrrhic victory if they succeeded on appeal.

Statutes, Regulations and Rules Cited:

Code of Civil Procedure, art. 29, art. 511, art. 550

Companies' Creditors Arrangement Act, R.S.C. (1985), c. C-36, s. 6(6), s. 11.2, s. 13, s. 14, s. 14(2), s. 32, s. 36(7)

Pension Benefits Standards Act, 1985, s. 8(2)

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Gerald N. Apostolatos, LANGLOIS KRONSTRÖM DESJARDINS, For the Creditors Quebec

North Shore and Labrador Railway Company Inc. and Iron Ore Company of Canada.

JUDGMENT

1 Sitting as judge in chambers pursuant to sections 13 and 14 of the *Companies' Creditors Arrangement Act*[1] ("CCAA") and articles 29, 511 and 550 C.C.P., I am seized of two motions for leave to appeal from a judgment of the Superior Court, District of Montreal (the Honourable Stephen Hamilton), rendered on June 26, 2015. The Superior Court dismissed contestations made on behalf of the petitioners, who are, respectively, representatives of non-union employees and retired employees (petitioners in court file C.A.M. 500-09-025441-155 and hereinafter designated the "Salaried Members") and the Syndicat des Métallos, sections locales 6254 and 6285 (in court file C.A.M. 500-09-025469-156, hereinafter referred to together as the "Union"). In so doing, the Superior Court confirmed the respondent's request to grant priority to an interim lender charge over claims made by the petitioners based on deemed trusts in pension legislation. The Court also suspended certain payments due under pension plans as well as for post-retirement benefits.

2 The Union filed an amended motion prior to the hearing. Both motions for leave also ask for orders to suspend provisional execution of the judgment notwithstanding appeal.

I Background

3 The facts are usefully and completely recounted in the judgment *a quo*.[2]

4 On May 20, 2015, the CCAA Judge Hamilton, J. granted a motion for the issuance of an initial order to commence proceedings under the CCAA to respondents Wabush Iron Ore Co. Ltd., Wabush Resources Inc., Wabush Mines, Arnaud Railway Company and Wabush Railway Co. Ltd. (the "Wabush CCAA Parties"). The CCAA proceedings as they concern the Wabush CCAA Parties were joined to CCAA proceedings started some four months earlier involving the "Bloom Lake CCAA Parties".[3]

5 Prior to the filing of the motion, Wabush Mines operated an iron ore mine located near the Town of Wabush and Labrador City, in the province of Newfoundland and Labrador, with facilities at Pointe-Noire, Quebec.

6 The Wabush CCAA Parties are currently involved in a court-ordered sales process, originally commenced in the Bloom Lake CCAA proceedings, whereby they seek to sell assets with a view either to concluding a plan of compromise with their creditors (including the petitioners) or disposing of assets and distributing the proceeds to creditors (including the petitioners).

7 The Wabush CCAA Parties have two defined pension plans for their employees, one for

salaried employees and the other for unionized employees paid an hourly wage. Because some employees work in a provincially-regulated setting in Newfoundland and Labrador and others work in federally-regulated industries, the plans are subject to oversight by both the federal Office of Superintendent of Financial Institutions and the Newfoundland and Labrador Superintendent of Pensions.

8 Both plans are underfunded. The CCAA Judge set forth estimated amounts to be paid as winding-up deficiencies, monthly amortization payments and lump-sum "catch-up" amortization payments. He noted as well that the Wabush CCAA Parties provide other post-employment benefits ("OPEB"), including health care and life insurance, to certain retired employees. Accumulated benefits' obligations for the OPEBs, as well as monthly premiums required to fund those benefits, are to be paid by the Wabush CCAA Parties. In addition, amounts are due pursuant to a supplemental retirement arrangement plan for certain salaried employees (see paras [4] to [13] of the judgment).

9 The Wabush CCAA Parties arranged for interim financing (a debtor-in-possession or "DIP" loan) from Cliffs Mining Company, a related company. The CCAA Judge was of the view that the Wabush CCAA Parties' cash-flow was compromised and that the interim financing was necessary to continue operations during restructuring. The Wabush initial order approved an interim financing term sheet pursuant to which the interim lender would provide US$10M of interim financing, on conditions, for the Wabush CCAA Parties short-term liquidity needs during the CCAA proceedings. These conditions included, as the CCAA Judge recorded in paragraph [16] of his reasons, a requirement that the interim lender have a charge in the principal amount of CDN $15M, with priority over all charges, against Wabush CCAA Parties' property, subject to some exceptions. There is a further condition that Wabush CCAA Parties may not make any special payments in relation to the pension plans or any payments in respect of the OPEBs. The initial order granted the interim lender charge of $15M but did not give priority to that charge over existing secured creditors in order to allow the parties to make representations at a comeback hearing.

10 At that comeback hearing, the Wabush CCAA Parties sought, *inter alia*, priority for the interim lender charge ahead of deemed trusts created by pension legislation and a suspension of obligations to pay amortization payments in relation to the pension plans and payments for OPEBs. The Salaried Members and the Union contested these matters. The CCAA Judge issued an order on June 9, 2015 granting priority to the interim lender charge, subject to the rights of, *inter alia*, the Salaried Members, the Union and the federal and provincial pension authorities to be determined at a later hearing.

11 That hearing on June 22, 2015 gave rise to the judgment a *quo* in which the CCAA Judge granted the Wabush CCAA Parties' comeback motion and dismissed the contestations brought by the Salaried Members and the Union.

II The judgment of the Superior Court

12 The CCAA Judge made numerous findings and rendered different orders, not all of which concern the motions before me. I will limit my comments to those aspects of the judgment relevant here.

13 After setting forth the context and the arguments of the parties, the CCAA Judge considered the conflict between the super-priority of the interim lender charge and the deemed trusts created by federal and provincial legislation. (His findings in respect of the provincial rules do not concern us directly at this stage).

14 As to the impact of CCAA proceedings on the deemed trust created by subsection 8(2) of the *Pension Benefits Standards Act, 1985*,[4] the judge wrote "there is no general rule that deemed trusts in favour of anyone other than the Crown are ineffective in insolvency" (para. [72]). He then considered the effect of subsection 8(2) PBSA on the provisions of the CCAA that deal with pension obligations, including subsections 6(6) and 36(7) CCAA that were added to the Act in 2009. Based on his interpretation of the general rule in subsection 8(2) PBSA and the particular rules in the CCAA, the judge concluded, as an exercise of statutory interpretation, that "Parliament's intent is that federal pension claims are protected in [...] restructurings only to the limited extent set out in the [...] CCAA, notwithstanding the potentially broader language in the PBSA" (para. [78]). In the alternative, he wrote, "the Court could conclude that a liquidation under the CCAA does not fall within the term "liquidation" in Subsection 8(2) PBSA such that there has been no triggering event" (para. [79]). Either way, he observed, the deemed trust in subsection 8(2) PBSA did not prevent him from granting a priority to the interim lending charge if the conditions of section 11.2 CCAA were met.

15 After considering the relevant factors under the CCAA to the facts of the case, the CCAA Judge decided that the proposed sale was in the interests of the Wabush CCAA Parties and their stakeholders as it should lead to a greater recovery. The sale required new financing and, without that financing, it is likely that the Wabush CCAA Parties would go bankrupt. The judge also expressed his view that the terms and conditions of the interim financing were reasonable, and that the security is limited to the amount of the new financing. He then wrote that "[t]his is sufficient for the Court to conclude that the Interim Financing should be approved and the interim lender charge should be granted with priority over the deemed trust under the PBSA, if it is effective in the CCAA context" (para. [95]). He also found that the terms of the interim lending sheet, including the requirement that the interim lender be granted super priority, were not unusual and that he was not satisfied that the Superior Court had jurisdiction to order the lender to advance the funds on other terms (para. [100]).

16 The CCAA Judge then gave reasons for his decision to grant the Wabush CCAA Parties' request that their obligation to make special and OPEB payments be suspended. He held that forcing the Wabush CCAA Parties to make special payments would lead to a default under the interim financing arrangement and a likely bankruptcy (para. [112]). He came to the same conclusion in respect of the OPEBs (para. [122]). In so doing, he rejected the argument that the

suspension of the OPEBs amounted to a resiliation of the insurance contract under which the benefits are provided, resiliation which would have required notice under section 32 CCAA (paras [127] to [131]).

17 The CCAA Judge rejected all other grounds for contestation. He confirmed the priority of the interim lending charge over the deemed trusts as set out in the initial order; he ordered the suspension of payment by the Wabush CCAA Parties of monthly amortization payments, of the annual lump sum catch-up payments, and of other post-retirement benefits.

III The motions for leave

18 The two motions raise some similar issues but are different in scope.

19 The Salaried Members ask for leave to appeal in respect of conclusions relating to two aspects of the judgment.

20 First, the Salaried Members seek to reverse the CCAA Judge's approval of what they characterize as the termination of OPEBs and of payment of supplemental pension benefits imposed by the Wabush CCAA Parties without proper notice as required by section 32 CCAA. In this regard, the Salaried Members object to the following paragraph in the judgment *a quo*:

> [146] ORDERS the suspension of payment by the Wabush CCAA Parties of other post-retirement benefits to former hourly and salaried employees of their Canadian subsidiaries hired before January 1, 2013, including without limitation payments for life insurance, health care and a supplemental retirement arrangement plan, *nunc pro tunc* to the Wabush Filing Date.

21 In argument, the Salaried Members also contended that the CCAA Judge's finding that the Wabush CCAA Parties did not have the funds to meet the $182,000 monthly payments for the premiums to fund the OPEBs and the supplemental pension benefits was mistaken.

22 Second, the Salaried Members seek to reverse that portion of the CCAA Judge's reasons bearing on the ineffectiveness of the federal statutory deemed trust in CCAA proceedings. They say that to hold the deemed trust priority under the PBSA to be "of no force and effect in CCAA Proceedings on a wholesale basis" is wrong in law. Specifically they state that the deemed trust priority should continue to apply for the benefit of Salaried Members over the assets of the company in future priority distributions (after the DIP and CCAA-ordered priorities). For this second argument, the Salaried Members target the following paragraphs of the CCAA Judge's reasons as they pertain to the effectiveness of the PBSA deemed trust in CCAA proceedings:

> [78] For all of these reasons, the Court concludes that Parliament's intent is that federal pension claims are protected in insolvency and restructurings only to the limited extent set out in the *BIA* and the *CCAA*, notwithstanding the potentially

> broader language in the PBSA.
>
> [79] In the alternative, the Court could conclude that a liquidation under the CCAA does not fall within the term "liquidation" in Section 8(2) PBSA such that there has been no triggering event.

23 It may be noted that the Salaried Members had initially contemplated objecting to the non-payment of other amounts owing by the Wabush CCAA Parties in respect of the pension plans. But given limits to the Wabush CCAA Parties' cash-flow and the significant amounts of these payments, the Salaried Members chose not to pursue the objections in these proceedings.

24 As noted, the Salaried Members also ask to suspend provisional execution notwithstanding appeal of this order.

25 The Union's proposed appeal is somewhat broader.

26 In respect of the portion of the judgment regarding the deemed trust provided in the PBSA, the Union is of the view, like the Salaried Members, that the CCAA Judge erred in holding that the subsection 8(2) PBSA deemed trust is ineffective in CCAA proceedings. Moreover, the Union disagrees with the CCAA Judge that the pension amortization payments constitute ordinary, unsecured claims under the CCAA rather than trust claims (paras [103] to [118] of the judgment). The Union also says the CCAA Judge was mistaken in deciding that the financing conditions in respect of the interim financial loan were reasonable insofar as those conditions precluded the payment of OPEBs (paras [119] to [133]). The judge should have set aside the unreasonable conditions in the interim lending sheet. Had he done so, the judge would have found that the Wabush CCAA Parties had the necessary funds to make the payments owed under the plans.

27 The Union also seeks a stay of provisional execution of the judgment.

28 It bears mentioning that the Union's motion was filed late. In keeping with section 14(2) CCAA, the Union obtained permission from the CCAA Judge to bring the late appeal, subject to the determination by a judge in chambers of this Court as to whether the appeal is a serious one.[5] None of the parties objected to this way of proceeding and I find the Union's amended motion to be correctly before me.

IV Criteria for granting leave

29 The test for leave under the CCAA is well known. Writing for the Court of Appeal for Saskatchewan in *Re Stomp Pork Farm Ltd.*,[6] Jackson, J.A. wrote:

> [15] In a series of cases emanating first from British Columbia and then from Quebec, Alberta and Ontario, there has developed a consensus among the Courts

> of Appeal that leave to appeal an order or decision made under the *CCAA* should be granted only where there are serious and arguable grounds that are of real significance and interest to the parties and to the practice in general. The test is often expressed as a four-part one:
>
> 1. whether the issue on appeal is of significance to the practice;
>
> 2. whether the issue raised is of significance to the action itself;
>
> 3. whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and,
>
> 4. whether the appeal will unduly hinder the progress of the action.

30 Judges sitting in chambers of this Court have consistently applied this four-part test to measure the seriousness of a proposed appeal. As my colleague Hilton, J.A. observed in *Statoil Canada Ltd. (Arrangement relative à)*, 2012 QCCA 665,[7] the above-mentioned four criteria are understood to be cumulative, with the result that if a petitioner fails to establish any one of them, the motion for leave will be dismissed. Hilton, J.A. alluded to the oft-repeated injunction that a petitioner seeking leave to appeal faces a heavy burden given the role of a CCAA judge, the discretionary character of the decisions he or she must make and the nature of the proceedings. He recalled the longstanding cautionary note that motions for leave should only be granted "sparingly".[8]

31 The grounds upon which a stay of provisional execution notwithstanding appeal may be granted by a judge in chambers are also well known.[9] Applying the principles developed pursuant to article 550 C.C.P. to this case, I note that the petitioners must show that the judgment suffers from a plain weakness; that failing to grant the stay would result in serious harm (sometimes characterized as irreparable harm) to them; and that the balance of inconvenience favours granting a stay.

IV Analysis

32 Despite the importance of certain of the questions raised in the motions for leave to the practice and to this action, and notwithstanding the *prima facie* meritorious character of some arguments made by the petitioners, I am of the respectful view that both the Salaried Members and the Union have failed to meet the test for leave. In particular, they have not convinced me that an appeal would not unduly hinder the progress of the action.

33 I shall make brief comments on each of the four criteria in turn.

IV.1 Importance of the questions to the practice

34 Some questions raised in both motions, to varying degrees, have importance to the practice as that notion is understood in connection with applications for leave brought under sections 13 and 14 CCAA.

35 The issue of the effectiveness of the PBSA deemed trust in CCAA proceedings raised in both motions meets this first criterion. This issue is not, as the respondent argued, a settled matter. In pointing to the CCAA Judge's comment in paragraph [61] to the effect that "[t hese are not new issues", respondent has, it seems to me, quoted the judge out of context. It is of course true, as the CCAA Judge observed, that courts, including the Supreme Court, have been called upon to consider the effect of statutory deemed trusts in insolvency on numerous occasions. But as the CCAA Judge's own reasons make plain, the interpretation of the deemed trust protection in subsection 8(2) PBSA in light of amendments made to the CCAA in 2009, in particular subsections 6(6) and 36(7), involve a different exercise of statutory interpretation. In undertaking that work, the judge did have the benefit of principles set out in *Century Services*[10] relating to the conflict between the deemed trust for the GST and the CCRA, in *Sparrow Electric*[11] dealing with a deemed trust in favour of the Crown in respect of payroll deductions for taxation, as well as *Indalex*[12] in which a conflict between provincial deemed trust and federal insolvency law was in part at issue. But these settings were different from that of the case at bar. Others have observed that difficulties arising out of the interaction between deemed trust rules for pensions and the CCAA persist, notwithstanding the jurisprudence of the Supreme Court on point.[13] Moreover, the narrow issue would be new to this Court and the practice would have a precise consideration of the interaction between the federal deemed trust in subsection 8(2) and the CCAA by an appellate court.

36 This is not to say that the CCAA Judge was the first to consider the problem. He had the benefit of *Aveos*[14], decided by Schrager, J., as he then was, as well as a scholarly paper on the topic which he cited with approval in paragraph [77]. And while the CCAA Judge and Schrager, J. agree on central aspects of that interpretation exercise, they are not at ones on all points, including the importance of a Crown exception in this context (as the CCAA Judge himself noted at para. [72]). While I recognize the care with which the CCAA Judge examined the question of statutory interpretation, as well as the alternative argument as to whether "any liquidation" within the meaning of subs. 8(2) PBSA includes CCAA proceedings -- a point not given full analysis in *Aveos* -- the matter of the effectiveness of the federal deemed trust in CCAA proceedings is not settled law and remains important to CCAA practice.

37 Is the issue raised by the Salaried Members of the proper scope of section 32 CCAA, and the prior notice rule, also of sufficient importance to the practice?

38 As I will note below, I am of the respectful view that the merits of this argument are less strong. Nonetheless, the matter of the proper scope of section 32 in light of the kind of insurance contract that provided benefits here, and in particular of competing notions of suspension and

termination of OPEBs, is one of importance to the practice.

39 What about the Union's argument that the judge erred in holding that the terms of the interim financing were reasonable?

40 This decision was one that called upon the CCAA Judge to make a determination of fact and exercise discretion afforded him under the Act, matters generally viewed as less consequential to the practice. Moreover, it would seem to me that the ability of a lender to determine the basis of risk he or she is willing to tolerate in a restructuring is not a matter widely disputed. I have not been convinced that this point, viewed on its own, is important to the practice.

IV.2 Importance of the questions to the present action

41 The decision not to apply the PBSA deemed trust in CCAA proceedings has meaningful negative consequences for both the Salaried Members and the Union. The importance to the action in this regard seems beyond serious dispute.

42 I agree with the petitioners that the question relating to the suspension or termination of the OPEBs is also significant to the action. The CCAA Judge recognized at para. [126] and again at para. [133] of his reasons that if the Wabush CCAA Parties fail to pay the premiums on the insurance policy, the policy will be cancelled thereby causing hardship to the Petitioners. I agree too with the position of counsel to the Union who argued that aspects of the pension claims may usefully be compared to alimentary claims, and that the hardship in suspending them gives the question sufficient importance to the action.

IV.3 The proposed appeals are *prima facie* meritorious and not frivolous

43 The arguments brought in service of the petitioners' view that the deemed trust under the PBSA remains effective in CCAA proceedings are not frivolous. While the exercise of statutory interpretation undertaken by the CCAA Judge -- which, it should be noted, is not a discretionary exercise in and of itself -- shows no *prima facie* weakness, that is not to say that it precludes an arguable case for the other side.[15] There are, in my view, grounds for framing a statutory interpretation argument for the petitioners' position that have *prima facie* merit when one considers, for example, that the CCAA amendments are the product of a complicated evolution; that the CCAA and the PBSA have different policy objectives which may shape interpretation; that the relevance of principles developed by the Supreme Court in other settings to the deemed trusts problem faced in this case is the matter of fair debate; that comparisons might be made with deemed trust regimes from the provinces or other statutes, and more. All of these factors suggest to me that, notwithstanding the strength of the judgment *a quo*, there are *prima facie* meritorious lines of argument that might be pressed on appeal. The parties debated vigorously the scope of "any liquidation" in subs. 8(2) PBSA before me, for example, as they did the proper scope of amendments to the CCAA and the policy they reflect. On the question of the effectiveness of the PBSA deemed trust as raised by the Salaried Members and in the first three grounds of appeal in the

Union's amended motion, I am of the view that this criterion is satisfied.

44 The issue of the proper scope of section 32 CCAA, and the prior notice rule, strikes me, from my disadvantaged position, to be less compelling, but I would not say it is wholly lacking in merit.

45 Counsel for the monitor argued, in support of the respondents' position that leave should be refused, that this ground of appeal was frivolous. He contended that the CCAA Judge rightly held that section 32 plainly did not apply to the resiliation of the Wabush CCA Parties' insurance contract. Like the respondents, the monitor said the CCAA Judge rightly relied on *Mine Jeffrey*[16] decided by this Court in 2003, and that his analysis of the "tri-partite relationship" between the employer, the insurer and the beneficiary in paragraphs [129] *et seq*. is free from error.

46 The question as to the applicability of section 32 here is not frivolous, even if *Mine Jeffrey* presents a formidable obstacle to a successful appeal. While not equal in strength, arguments raised by counsel for the Salaried Members as to type of contract to which the rule applies and, in particular, to the distinction between the termination of a contract and the suspension of a contract, are not without some merit. While I recognize that the test of the relative merit of the arguments proposed can be construed in some circumstances as requiring more than "a limited prospect of success"[17] given the nature of CCAA proceedings, I would not dismiss the motions on this narrow issue on this basis alone.

47 The Union says the interim lender's conditions should be set aside as unreasonable. I am not convinced that this argument is *prima facie* meritorious.

48 Counsel for the Union argues strongly that the interim lender should not be allowed to dictate terms to the CCAA Judge or to the stakeholders as a whole by imposing conditions on financing that have the effect of exploiting the vulnerability of the employees and former employees. He says that if the interim lender's conditions were struck as unreasonable, the Wabush CCAA Parties would have access to those funds and that there would be no need to suspend the various payments due to the petitioners.

49 With respect, this argument strikes me as flawed in two respects. First, it requires an overturning of the CCAA Judge's view -- with all the advantages of perspective he has in so deciding -- that as a matter of fact the conditions of the interim financing are reasonable. Secondly, the Union has left unanswered the questions raised by the judge concerning the "harsh commercial realities of interim financing" at paragraph [115]. Why indeed should the interim lender advance funds be used to pay someone else's debt, particularly one that is pre-filing and unsecured? Why should a condition of the financing be ignored, effectively forcing the lender to advance funds on disadvantageous terms to which it did not agree? It is not a matter of the CCAA Judge being callous or insensitive to hardship faced by vulnerable parties. In my view, the comment of Deschamps, J. for the majority in *Indalex*, as adapted to the setting of federal deemed trusts, is apposite here: "The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to

legislate in favour of pension fund beneficiaries".[18]

IV.4 The appeal will not hinder the progress of the action

50 The petitioners argue that the Wabush CCAA Parties are undergoing a court-supervised sales process in accordance with timelines and procedures that are supervised by the CCAA Judge with the oversight of the monitor. In the circumstances, they say, the proposed appeal, especially if it were placed on an accelerated roll, would not hinder the progress of the action. They contend, to differing degrees, that the CCAA Judge erred in his measure of the financial vulnerability of the Wabush CCAA Parties. Mindful no doubt of the difficulty that this aspect of the analysis presents to their leave application, the Salaried Members "part company" (to use the expression of counsel) with the Union in framing their appeal more narrowly, in particular in respect of the recognition that the DIP loan enjoys a wider priority than does the Union, and in limiting their claim in respect of the payments that should escape suspension.

51 Given the findings of fact concerning the fragility of the Wabush CCAA Parties as observed by the CCAA Judge, I find the positions of both petitioners on this point unconvincing. Even the "strategic" decision of the Salaried Members to contest the judgment on a narrower basis does not satisfy this criterion. In my view, both proposed appeals would unduly hinder the action.

52 My conclusion is based largely on the findings of fact arrived at by the CCAA Judge regarding the vulnerability of the Wabush CCAA Parties at this stage of the restructuring.

53 In canvassing the circumstances in which the interim financing was put in place, the CCAA Judge observed that the cash-flow position of the Wabush CCAA Parties was compromised with the result that they needed the interim financing to continue even their limited operations during the CCAA process (para. [16]). The CCAA Judge made the following specific findings, which I consider to be findings of fact: (1) that the sale and investor solicitation process in progress are in the interests of the Wabush CCAA Parties and their stakeholders because they will likely lead to a greater recovery; (2) that without new financing, the Wabush CCAA Parties could not complete the sale; (3) that without new financing allowing them to complete the sale, it is likely that the Wabush CCAA Parties will go bankrupt; (4) that the Wabush CCAA Parties and the monitor have not identified any other source of new financing; and (5) that the terms of the interim financing are reasonable (para. [94]).

54 When discussing the suspension of special payments, the CCAA Judge observed, at para. [112]:

> [112] The Wabush CCAA Parties do not have the funds available to make these payments. The cash flow statements filed with the Court show that the Wabush CCAA Parties need the funds from the Interim Financing to meet their current obligations other than the special payments. The Interim Lender Term Sheet expressly requires the Wabush CCAA Parties not to make any special payments.

> As a result, forcing the Wabush CCAA Parties to make the special payments would lead to a default under the Interim Financing and a likely bankruptcy.
>
> [Footnote omitted.]

55 In respect of the suspension of the OPEBs -- including what the Salaried Members characterize as the modest premiums of $182,000 per month and the supplemental retirement arrangement plan amount -- the CCAA Judge recalled at para. [122] that "[t]he Wabush CCAA Parties do not have any funding valuable to continue to pay any of the foregoing OPEBs, as the Interim Financing Sheet prohibits such payments". In para. [125], the CCAA Judge explained that it was not enough to say, as did the Salaried Members, that $182,000 and the supplemental amount could be found elsewhere if the interim lending sheet prevents them from making the payments: "Given the cash flow statement filed with the Court and the language of the Interim Lender Sheet, the Court accepts that the Wabush CCAA Parties do not have the funds".

56 These findings of fact, while not immune from review, are deserving of deference on appeal. It is not enough to say, without more, that the amount is a small one in the grand scheme of things, as do the Salaried Members, or that another interim lender could be found without difficulty as the action proceeds. The CCAA Judge decided specifically otherwise. A reviewable error would have to be shown on this point to overcome the strong impression that comes from reading the judgment that granting leave and suspending provisional execution would hinder the action.

57 In like circumstances, leave has been denied. Recently in *Bock inc. (arrangement relative à)*,[19] my colleague Bich, J.A. declined to grant leave, notwithstanding the presence of a question she characterized as "interesting" for the purposes of an eventual appeal and one in respect of which, like ours, there was a paucity of appellate court consideration. "Granting leave to appeal", she wrote at para. [12] of her reasons, "would most likely jeopardize the course of the action and cause irreparable harm to the debtor company and, consequently, all other stakeholders (creditors, employees, etc.)". Similarly, in *Re: Consumer Packaging Inc.*,[20] a bench of the Court of Appeal for Ontario declined to grant leave in circumstances where conditions set by the interim lender meant that the time and financial constraints that would have come with an appeal were prohibitive: "Leave to appeal should not be granted", wrote the Court at para. [5], "where, as in the present case, granting leave would be prejudicial to restructuring the business for the benefit of stakeholders as a whole [...]".[21]

58 All told, the risk of default on the interim financing and of bankruptcy to the Wabush CCAA Parties is serious. Granting leave would, in this setting, risk hindering the action. If leave were granted, the petitioners would likely obtain, at best, a Pyrrhic victory if they succeeded on appeal.

***

59 Given my conclusion that leave should be denied, the motions seeking a stay of the judgment

pursuant to article 550 C.C.P. are without further object and should be dismissed as well. In any event, the conditions necessary for a stay were not present. While the petitioners have, to be sure, shown that they have an arguable case, they have not pointed to something I would characterize as a weakness in the judgment *a quo*. They did satisfy the burden of showing that the failure to grant a stay would cause them harm. However, the balance of inconvenience -- considering the impact that lifting the stay would have on the Wabush CCAA Parties -- would not have favoured granting a stay.

60 Counsel should be commended for their helpful presentation of the matter in dispute.

61 **FOR THE AFOREMENTIONED REASONS**: the undersigned:

62 **DISMISSES** the Salaried Members motion for leave to appeal and for a stay, with costs;

63 **DISMISSES** the Union's amended motion for leave to appeal and for a stay, with costs.

THE HONOURABLE NICHOLAS KASIRER J.A.

1 R.S.C. 1985, c. C-36.

2 2015 QCCS 3064.

3 The pre-existing CCAA proceedings were commenced on January 27, 2015, by an initial order issued by Castonguay, J. of the Superior Court, in respect of Bloom Lake General Partner Ltd., Quinto Mining Corp., 8568391 Canada Ltd., Cliffs Quebec Iron Mining ULC, The Bloom Lake Iron Ore Partnership and Bloom Lake Railway Co. Ltd. (the "Bloom Lake CCAA Parties").

4 R.S.C. 1985, c. 32 (2nd Supp.).

5 2015 QCCS 3584, paras [32] to [34] (*per* Hamilton, J.).

6 [2008] S.J. No. 349, 2008 SKCA 73 (footnotes omitted).

7 2013 QCCA 851, para. [4] (in chambers).

8 *Ibid.*, para. [4].

9 Recently summarized by the Court in *Imperial Tobacco Canada Ltd*. v. *Conseil québécois sur le tabac et la santé*, 2015 QCCA 1224, para. [14].

10 *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379.

11 *Royal Bank of Canada v. Sparow Electric Corp.*, [1997] 1 S.C.R. 411.

12 *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, 272.

13 Scholars have alluded to the different permutations of the deemed trust problem in CCAA matters as important to the practice: see, *e.g.*, Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Carswell, 2013) at 370 *et seq*. and a useful comment by Jassmine Girgis entitled "*Indalex*: Priority of Provincial Deemed Trusts in CCAA Restructuring" posted by the University of Calgary Faculty of Law on the website http://ablawg.ca in which the author comments on the on-going importance of the issue after *Indalex*.

14 *Aveos Fleet Performance Inc. (arrangement relatif à)*, 2013 QCCS 5762.

15 The gradation between "*prima facie* meritorious" and "frivolous" is not always clear, and the better view may well be that "meritorious" and "frivolous" do not constitute a *summa division* for proposed appeals: see *Statoil, supra*, note 7, para. [11]. It is certainly true that the petitioners may have an arguable case -- one with *prima facie* merit -- but that the judgment *a quo* may still be said to suffer from no apparent weakness: see the helpful comments, albeit in another context, in *Droit de la famille -- 081957*, 2008 QCCA 1541, para. [4] (Morissette, J.A., in chambers).

16 *Syndicat national de l'amiante d'Asbestos inc. c. Mine Jeffrey Inc.*, [2003] R.J.Q. 420 (C.A.).

17 *Doman Industries Ltd.* v. *Communications, Energy and Paperworkers' Union, Local 514*, 2004 BCCA 253, para. [15] (per Prowse, J.A., in chambers).

18 *Indalex, supra* note 12, para. [59].

19 2013 QCCA 851 (in chambers).

20 2001 CanLII 6708 (Ont. C.A.).

21 As a final observation on this point, it may be recalled that, prudently, the CCAA Judge offered a further observation that gives weight, I think, to the conclusion that granting leave would be inopportune here. He suggested that even if the PBSA deemed trusts were effective in CCAA proceedings, he would have exercised his discretion under the CCAA to grant priority to the interim lender: see para. [95].

TAB 13

ACCORD MULTILATERAL DE RECIPROCITE

ATTENDU que chaque signataire de cet accord possède des fonctions et pouvoirs statutaires relatifs aux régimes de rentes couvrant des employés de la province de sa juridiction;

ATTENDU que, du fait que certains régimes couvrent des employés de plus d'une province, plus d'un signataire peut posséder des fonctions et pouvoirs statutaires relatifs à un régime de rentes;

ATTENDU que lesdits signataires ont considéré qu'il serait souhaitable qu'un seul signataire exerce tous les pouvoirs statutaires et fonctions relatifs à un même régime de rentes, agissant en son nom et au nom de tout autre signataire possédant des fonctions et pouvoirs relatifs à ce régime;

ATTENDU qu'en conséquence, chaque signataire s'est entendu avec chacun des autres signataires dans le sens énoncé ci-après;

EN FOI DE QUOI, et en vertu des ententes ci-haut mentionnées, les signataires de cet accord sont liés par les arrangements administratifs suivants:

1. Interprétation

Dans le présent accord,

a) "régime" signifie une caisse ou un régime de retraite ou de rentes;

b) "autorité" signifie une personne ou un organisme possédant des fonctions et pouvoirs statutaires relatifs à l'enregistrement, la capitalisation, la dévolution, la solvabilité, la

MEMORANDUM OF RECIPROCAL AGREEMENT

WHEREAS each signatory hereto has statutory functions and powers with respect to pension plans coverin employees in the jurisdiction represented by such signatory;

AND WHEREAS, by reason of some pension plans covering employees in more than one jurisdiction, more than one signatory may have statutory functions and powers in respect of the same pension plan;

AND WHEREAS the said signatories have deemed it desirable that statutory functions and powers in respect of any one pension plan be exercised by one signatory only, acting both on its own behalf and on behalf of any other signatory having statutory functions and powers in respect of such plan;

AND WHEREAS each signatory has accordingly agreed with each other signatory to the effect hereinafter set forth;

NOW THEREFORE this Memorandum withnesseth that the signatories hereto are, by virtue of the aforementioned agreements, governed by the following administrative arrangement:

1. Interpretation

In this Memorandum,

a) "plan" means a superannuation or pension fund or plan;

b) "authority" means a person or body having statutory functions and powers with respect to registration, funding, vesting, solvency, audit, obtaining information, inspec-

vérification, l'obtention de renseignements, l'inspection, la liquidation et autres aspects des régimes;

c) "autorité participante" signifie une autorité qui est signataire du présent accord;

d) "autorité majoritaire" signifie, relativement à un régime, l'autorité participante de la province où la majorité des membres du régime sont employés (il ne sera pas tenu compte dans ce calcul des membres employés dans une province qui n'a pas d'autorité participante);

e) "autorité minoritaire" signifie, relativement à un régime, l'autorité participante de toute province où un ou plusieurs membres du régime sont employés, mais ne signifie pas l'autorité majoritaire.

2. L'autorité majoritaire de chaque régime exerce à la fois ses propres fonctions et pouvoirs statutaires et les fonctions et pouvoirs statutaires de chaque autorité minoritaire de ce régime.

3. Toute autorité peut s'exclure de l'application de l'article 2 à l'égard d'un régime déterminé en avisant par écrit l'autorité majoritaire d'un tel régime à cet effet (ou bien toutes les autorités minoritaires au cas où l'autorité majoritaire est celle qui s'exclue); et en pareil cas l'autorité qui s'exclue sera considérée comme n'étant plus une autorité participante à l'égard d'un tel régime.

4. Toute autorité participante peut s'exclure de l'application de l'article 2 à l'égard de tous régimes pour lesquels, n'était-ce cette exclusion, elle agirait comme autorité majoritaire; dans ce cas, et seulement aux fins de déterminer l'autorité majoritaire régissant chacun desdits régimes, elle ne sera pas considérée comme autorité participante.

5. Toutes les autorités participantes qui possèdent des fonctions et pouvoirs statutaires à l'égard d'un

tion, winding up, and other aspects, of plans;

c) "participating authority" means an authority which is a signatory hereto;

d) "major authority" means, with respect to a plan, the participating authority of the province where the plurality of the plan members are employed (save that members employed in a province not having a participating authority shall not be counted);

e) "minor authority" means, with respect to a plan, the participating authority of any province where one or more plan members are employed, but does not include the major authority

2. The major authority for each plan shall exercise both its own statutory functions and powers and the statutory functions and powers of each minor authority for such plan.

3. Any authority may except itself from the operation of section 2 in respect of a specific plan by giving written notice to that effect to the major authority (or, if the major authority is the excepting authority, then to all the minor authorities) for such plan; and in such event the excepting authority shall be deemed not to be a participating authority in respect of such plan

4. Any participating authority may except itself from the operation of section 2, in respect of all plans for which it would, but for such exception, act as the major authority; and in such event it shall, for the purpose only of determining the major authority of each such plan, be deemed not to be a participating authority.

5. All participating authorities having statutory functions and powers in respect of a specific

régime déterminé peuvent s'entendre et considérer l'une d'entre elles comme étant l'autorité majoritaire à l'endroit de ce régime.

plan may concur in deeming one of their number to be the major authority for such plan.

6. Lorsque les circonstances entourant un régime déterminé changent de telle sorte qu'une autorité participante devient, ou cesse d'être, une autorité minoritaire de ce régime, l'autorité majoritaire doit en aviser cette autorité minoritaire.

6. Where changing circumstances in respect of a specific plan result in a participating authority becoming or ceasing to be, a minor authority for such plan, such minor authority shall be advised accordingly by the major authority.

7. Lorsque les circonstances entourant un régime déterminé changent de telle sorte qu'il en résulte un changement de l'autorité majoritaire, toutes les autorités minoritaires en seront avisées et l'ancienne autorité majoritaire fournira à la nouvelle autorité majoritaire tous documents et renseignements relatifs à ce régime.

7. Where changing circumstances in respect of a specific plan result in a change in the major authority for such plan, all minor authorities for such plan shall be advised accordingly, and the former major authority shall deliver all documents and information concerning such plan to the new major authority.

8. Une autorité majoritaire agissant en vertu de l'article 2 fournira à chaque autorité minoritaire des renseignements complets concernant l'exercice de toute fonction et de tout pouvoir exercés au nom de cette autorité minoritaire.

8. A major authority acting pursuant to section 2 shall fully inform each minor authority as to the exercise of any functions and powers exercised on behalf of such minor authority.

9. Lorsqu'une autorité majoritaire est incapable d'exercer un pouvoir dont dispose l'une des autorités minoritaires, elle en avisera cette autorité minoritaire.

9. Where a major authority is unable to exercise a particular power or enforcement available to one of the minor authorities, it shall so advise that minor authority.

10. La participation de toute autorité à l'arrangement administratif qui précède commence à la date où elle signe cet accord (la signature ne doit être apposée qu'avec le consentement de tous les signataires précédents), et elle cesse le 31 décembre 1970, à moins que ladite autorité ne renonce avant cette date à cette terminaison.
Cependant, toute autorité peut mettre fin à sa participation à cet arrangement administratif au moyen d'un avis écrit d'un an envoyé en même temps à toutes les autres autorités participantes.

10. Participation by any authority in the foregoing Administrative Arrangement commences upon the date it becomes a signatory to this Memorandum (such signature to be affixed only with the consent of all prior signatories), and terminates on the 31st day of December, 1970, unless such authority disclaims such termination prior to that date; provided that any authority may terminate its participation in this Administrative Arrangement by contemporaneous delivery of one year's written notice to the other participating authorities.

11. Du fait qu'une autorité signe cet accord, elle conclut des accords de réciprocité avec toutes les autres autorités participantes.

11. Execution of this Memorandum by any authority shall evidence its entry into reciprocal agreements with all the other participating authorities.

12. "The Pension Commission of Ontario" est le dépositaire de cet accord jusqu'à ce que toutes les autorités participantes s'entendent sur le choix d'un autre dépositaire; et le dépositaire informera toutes les autorités participantes de la signature de cet accord par une autorité participante subséquemment à la date des présentes.

12. The Pension Commission of Ontario shall be the depositary of this Memorandum, until such time as the participating authorities agree to another depositary; and the depositary shall inform all participating authorities in connection with the execution of this Memorandum by any participating authority subsequent to the date hereof.

EN FOI DE QUOI les autorités soussignées apposent leurs signatures sur le présent accord réciproque:

IN WITNESS WHEREOF the undersigned authorities do hereby execute this Memorandum of Agreement

LA REGIE DES RENTES DU QUEBEC

June 27,1968 _____
Membre et la Régie

QUEBEC PENSION BOARD

June 27,1968 _____
Member of the Board

LA COMMISSION DES RENTES DE L'ONTARIO

June 27,1968 _____
Président

THE PENSION COMMISSION OF ONTARIO

June 27,1968 _____
Chairman

LE SURINTENDANT DES RENTES, ALBERTA

June 27,1968 _____
Surintendant

THE SUPERINTENDENT OF PENSIONS, ALBERTA

June 27,1968 _____
Superintendent

LE SURINTENDANT DES RENTES, SASKATCHEWAN

February 5,1969 _____
Surintendant

THE SUPERINTENDENT OF PENSIONS, SASKATCHEWAN

February 5, 1969 _____
Superintendant

LA COMMISSION DES RENTES DU MANITOBA

7/x/76 _____
Président

THE PENSION COMMISSION OF MANITOBA

7/x/76 _____
Chairman

LE SURINTENDANT DES RENTES,
NOVA SCOTIA

May 3 1977 _____
Surintendant

THE SUPERINTENDENT OF PENSIONS,
NOVA SCOTIA

May 3 1977 _____
Superintendent

LE SURINTENDANT DES RENTES,
TERRE NEUVE

February 26, 1986 _____
Surintendant

THE SUPERINTENDENT OF PENSIONS,
NEW FOUNDLAND

February 26, 1986 _____
Superintendent

Ministre Enseignement supérieur et Travail

Juin 1, 1992 _____

Minister Advanced Education and Labour
New Brunswick

June 1, 1992 _____

Ministre de la main d'oeuvre, de la formation et du travail de la Colombie britannique

FEB. 16, 1994 _____

Minister of Skills, Training and Labour
of British Columbia

FEB. 16, 1994 _____

TAB 13A

Questions and Answers on 2016 Agreement Respecting Multi-jurisdictional Pension Plans

The 2016 Agreement Respecting Multi-jurisdictional Pension Plans (2016 Agreement) currently relates only to members, former members, retired members and other persons with benefits in multi-jurisdictional pension plans registered in Ontario, British Columbia, Nova Scotia, Quebec and Saskatchewan if the plan is subject to the pension legislation of two or more of those jurisdictions.

Information on the 2016 Agreement and its impact on the administration and regulation of multi-jurisdictional pension plans, is provided below. This will be updated and expanded as further questions arise.

General

Q10. What is a multi-jurisdictional pension plan?

A10. A multi-jurisdictional pension plan is a pension plan that provides benefits for plan members (active, former or retired) in two or more Canadian jurisdictions. -05/2011

Q11. Our pension plan only has Ontario members (active, former and retired). Does this agreement apply to our plan?

A11. No, the 2016 Agreement Respecting Multi-jurisdictional Pension Plans (2016 Agreement) and the information provided here does not apply to your pension plan. However, should members in British Columbia, Nova Scotia, Quebec or Saskatchewan be added to the pension plan, the 2016 Agreement would then apply.

If new plan members are added in a jurisdiction that has not signed the 2016 Agreement:

- for new members employed in a province that has not signed the 2016 Agreement, the earlier Memorandum of Reciprocal Agreement (signed by the provinces starting in 1968) would apply to the plan in respect of those members; and
- for new members in 'included employment' as defined under the federal government's pension legislation, the bi-lateral agreement between Ontario and the federal government

(signed in 1968) would apply to the plan in respect of those members in included employment. -06/2016

Q12. What is the major authority?

A12. The major authority is the pension regulator in Canada with which a multi-jurisdictional pension plan is registered. The 2016 Agreement and the earlier agreements between governments respecting the regulation of multi-jurisdictional pension plans generally require that the major authority for a multi-jurisdictional pension plan be the pension regulator of the jurisdiction with the plurality of active members in the plan.

The pension regulators for all other jurisdictions that have members in the plan are minor authorities. For example, if the Financial Services Commission of Ontario is the major authority for a multi-jurisdictional pension plan and the plan also has members in British Columbia, Nova Scotia, Quebec and Saskatchewan, the pension regulators for British Columbia, Nova Scotia, Quebec and Saskatchewan would be minor authorities for the pension plan. -06/2016

Q13. What are the differences between the 2016 Agreement Respecting Multi-jurisdictional Pension Plans (2016 Agreement) and the 2011 Agreement Respecting Multi-jurisdictional Pension Plans (2011 Agreement)?

A13. The Canadian Association of Pension Supervisory Authorities (CAPSA) website provides a version of the 2016 Agreement that shows the changes from the 2011 Agreement. -06/2016

Application of the 2016 Agreement

Q100. What is the 2016 Agreement Respecting Multi-jurisdictional Pension Plans?

A100. The 2016 Agreement Respecting Multi-jurisdictional Pension Plans (2016 Agreement) is a legal agreement between the governments of certain Canadian jurisdictions (currently Ontario, British Columbia, Nova Scotia, Quebec and Saskatchewan) that sets out how those jurisdictions' pension legislation will apply to a multi-jurisdictional pension plan.

The 2016 Agreement is an interim measure to replace the earlier 2011 Agreement Respecting Multi-jurisdictional Pension Plans (2011 Agreement) while the Canadian Association of Pension Supervisory Authorities (CAPSA) completes the development of amendments to the 2016 Agreement, to deal with changing pension plan funding regimes across jurisdictions. The 2011 Agreement (which was entered into by Ontario and Quebec) was designed at a time when the funding regimes were similar across all jurisdictions.

The 2016 Agreement is intended to mitigate any adverse impact on pension plan members due to the application of those legislative amendments in the context of the Agreement, while CAPSA develops amendments to the agreement to deal with those legislative amendments on a long-term basis.

The 2016 Agreement includes modifications to the asset allocation rules found in the 2011 Agreement, and provides additional transitional rules for when the agreement first applies to a

pension plan. It continues to facilitate the administration and regulation of multi-jurisdictional pension plans. -06/2016

Q101. What does the 2016 Agreement Respecting Multi-jurisdictional Pension Plans require?

A101. Like the 2011 Agreement Respecting Multi-jurisdictional Pension Plans, the 2016 Agreement Respecting Multi-jurisdictional Pension Plans (2016 Agreement) provides a legal framework for the administration and regulation of multi-jurisdictional pension plans in Canada. Among other things, the 2016 Agreement:

- requires that a multi-jurisdictional plan only register with one pension regulator (the 'major authority') in Canada, and sets out rules for determining which pension regulator will be the major authority for the plan;
- provides that certain requirements of the major authority's pension legislation (such as general funding requirements, investment requirements, etc.) will apply to the entire plan and all of its members despite the requirements of any other jurisdiction's pension legislation, while the remaining requirements of those other jurisdictions' pension legislation will continue to apply to the members and the plan as it operates within those other jurisdictions;
- requires that the 'final location' approach to determining a plan member's benefits be applied in cases where the member has been employed in more than one jurisdiction while a member of the plan; and
- sets out clear rules for allocating the assets of a plan between jurisdictions in the event of a plan termination and wind-up or a plan split. -06/2016

Q102. When does the 2016 Agreement Respecting Multi-jurisdictional Pension Plans apply to a multi-jurisdictional pension plan?

A102. The 2016 Agreement Respecting Multi-jurisdictional Pension Plans (2016 Agreement) is intended to apply starting July 1, 2016, if:

- the multi-jurisdictional pension plan is registered with the pension regulator of one of the jurisdictions that has signed the 2016 Agreement (currently, Ontario, British Columbia, Nova Scotia, Quebec and Saskatchewan); and
- the pension plan provides benefits to members, former members or retired members in two or more of the jurisdictions that are subject to the 2016 Agreement (currently, Ontario, British Columbia, Nova Scotia, Quebec and Saskatchewan). -06/2016

Q103. Can you give me some examples of how the 2016 Agreement Respecting Multi-jurisdictional Pension Plans is applied?

A103. The following examples set out different situations to help determine how the pension legislation of certain jurisdictions apply to a multi-jurisdictional pension plan once the 2016 Agreement Respecting Multi-jurisdictional Pension Plans (2016 Agreement) is in effect.

Where the major authority and one or more minor authorities are subject to the 2016 Agreement:
Example: A multi-jurisdictional pension plan is registered in Ontario and the plan has members in Ontario, Quebec and Manitoba. Manitoba has not yet signed the 2016 Agreement.

The 2016 Agreement will apply to the plan as between Ontario and Quebec. Ontario and Quebec members will have their benefits determined in accordance with the 2016 Agreement. The earlier Memorandum of Reciprocal Agreement between the provinces will apply to the Manitoba members.

Where the major authority is subject to the 2016 Agreement, but the minor authorities are not:
Example: A multi-jurisdictional pension plan is registered in Ontario and the plan has members in Ontario, Alberta and Manitoba. Neither Alberta nor Manitoba have signed the 2016 Agreement.

The 2016 Agreement does not apply to the plan at this time. The earlier Memorandum of Reciprocal Agreement between the provinces will continue to determine how the pension legislation of Ontario, Alberta and Manitoba are applied to the plan and the plan's members.

Where one or more minor authorities are subject to the 2016 Agreement, but the major authority is not:
Example: A multi-jurisdictional pension plan is registered in Manitoba and the plan has members in Ontario, Quebec and Manitoba. Manitoba has not yet signed the 2016 Agreement.

The 2016 Agreement does not apply to the plan at this time. The earlier Memorandum of Reciprocal Agreement between the provinces will continue to determine how the pension legislation of Ontario, Quebec and Manitoba are applied to the plan and the plan's members. -06/2016

Q104. Our pension plan is registered in Ontario and has members in all jurisdictions. With the signing of the 2016 Agreement Respecting Multi-jurisdictional Pension Plans, are all plan members subject to the 2016 Agreement?

A104. If a pension plan is registered in Ontario, British Columbia, Nova Scotia, Quebec or Saskatchewan and the plan has members from two or more of these jurisdictions, as well as members from jurisdictions that are not signatories to the 2016 Agreement Respecting Multi-jurisdictional Pension Plans (2016 Agreement), the plan would only be subject to the 2016 Agreement with respect to members in Ontario, British Columbia, Nova Scotia, Quebec and Saskatchewan. Members from jurisdictions that are not signatories to the 2016 Agreement would continue to be subject to the earlier Memorandum of Reciprocal Agreement and/or other similar bilateral agreements with the federal government. -06/2016

Q105. How can I determine whether to apply 2016 Agreement Respecting Multi-jurisdictional Pension Plans (2016 Agreement) or the 2011 Agreement Respecting Multi-jurisdictional Pension Plans (2011 Agreement) to an on-going activity or transaction?

A105. Any activity or transaction that was pending before the Financial Services Commission of Ontario, Retraite Québec (formerly the Régie des rentes du Québec), an administrative body or a court under the 2011 Agreement will continue to be covered under that agreement until it is completed. All new activities and transactions that arise on or after July 1, 2016, will be covered under the 2016 Agreement. -06/2016

Administration

Revised Q200. Many pension plans are currently preparing annual statements for their plan members. With the 2016 Agreement Respecting Multi-jurisdictional Pension Plans taking effect this year, what are the required changes to the annual statements in respect of members in British Columbia, Nova Scotia, Quebec and Saskatchewan?

A200. Where Ontario is the province of registration for a multi-jurisdictional pension plan that has members in Quebec, the plan administrator must provide annual statements to Quebec members in accordance with Ontario's pension legislation (as would have been the case under the 2011 Agreement).

Where Ontario is the province of registration for a multi-jurisdictional pension plan that has members in British Columbia, Nova Scotia or Saskatchewan, during the 2016 transitional year, the plan's fiscal year-end is the key date to determine which legislation applies:

- If the plan's fiscal year-end is before July 1, 2016, the plan administrator must provide annual statements to the British Columbia, Nova Scotia and Saskatchewan members in accordance with each province's requirements.
- If the plan's fiscal year-end is on or after July 1, 2016, the plan administrator must provide annual statements in accordance with Ontario's pension legislation to the British Columbia, Nova Scotia and Saskatchewan members. The annual statements must be provided to members in these jurisdictions within six months after the plan's fiscal year-end and must contain the information required by Ontario's pension legislation.

Following the 2016 transitional year, for plans where Ontario is the province of registration, plan administrators must provide annual statements to members in Quebec, British Columbia, Nova Scotia or Saskatchewan in accordance with Ontario's pension legislation. -09/2016

Q201. Does the 2016 Agreement Respecting Multi-jurisdictional Pension Plans change the funding rules for plans registered in Quebec?

A.201. No, the 2016 Agreement Respecting Multi-jurisdictional Pension Plans does not make any changes to Quebec's funding rules. A pension plan that is registered in Quebec continues to be subject to the Quebec funding rules. -06/2016

Changes to the Way the Pension Plan is Regulated

Q300. What is happening with the earlier Memorandum of Reciprocal Agreement, which was originally signed in 1968? Does it still apply?

A300. The earlier Memorandum of Reciprocal Agreement will continue to apply to multi-jurisdictional pension plans where:

- the major authority for the plan is the pension regulator for a jurisdiction that has not signed the 2016 Agreement Respecting Multi-jurisdictional Pension Plans (2016 Agreement);
- the major authority for the plan is the pension regulator for a jurisdiction that has signed the 2016 Agreement, but none of the plan members (active, former or retired) outside of the major authority's jurisdiction are from jurisdictions that have signed the 2016 Agreement; or
- the major authority for the plan is the pension regulator for a jurisdiction that has signed the 2016 Agreement, and some members (active, former or retired) outside of the major authority's jurisdiction are from jurisdictions that have also signed the 2016 Agreement,

while other members are from jurisdictions that have not signed the 2016 Agreement. The plan members from jurisdictions that have signed the 2016 Agreement will be subject to the 2016 Agreement, while the members from jurisdictions that have not signed the 2016 Agreement will continue to be governed by either the earlier Memorandum of Reciprocal Agreement and/or the similar bilateral agreement between Ontario and the federal government for plan members subject to the pension legislation of the federal jurisdiction.

Note: Where plan members are only from Ontario, British Columbia, Nova Scotia, Quebec and Saskatchewan (i.e., the jurisdictions that have signed the 2016 Agreement), the Memorandum of Reciprocal Agreement will no longer apply to that plan. -06/2016

Q301. If the 2016 Agreement Respecting Multi-jurisdictional Pension Plans does not apply to a multi-jurisdictional pension plan, how is the plan regulated in Canada?

A301. The 2016 Agreement Respecting Multi-jurisdictional Pension Plans (2016 Agreement) will not apply to a multi-jurisdictional pension plan at all in either of the following circumstances:

- the plan is registered with the pension regulator of a jurisdiction that has not signed the 2016 Agreement; or
- the plan is registered with the pension regulator of a jurisdiction that has signed the 2016 Agreement, but none of the plan members (active, former or retired) outside that jurisdiction are from jurisdictions that have signed the 2016 Agreement.

In these circumstances, the earlier Memorandum of Reciprocal Agreement and/or similar bilateral agreements between the provinces and the federal government will apply to the plan. -06/2016

Member Benefits

Q400. Does the 2016 Agreement Respecting Multi-jurisdictional Pension Plans change the benefits that will be given to a member of a multi-jurisdictional pension plan?

A400. All jurisdictions (with the exception of Ontario, as noted below) calculate a pension plan member's benefits based on the rules of the last jurisdiction in which the member's benefits are accrued. Except as provided under the 2016 Agreement Respecting Multi-jurisdictional Pension Plans (2016 Agreement) and the earlier 2011 Agreement Respecting Multi-jurisdictional Pension Plans (2011 Agreement), Ontario requires the benefits accrued by a member under Ontario's pension laws and the benefits accrued under all other jurisdictions' pension laws to be determined separately. In effect, except as provided under the 2016 Agreement and 2011 Agreement, member benefits accrued in Ontario remain subject to Ontario's pension legislation while all other jurisdictions use a 'final location' approach for calculating a member's benefits.

Once the 2016 Agreement applies to a pension plan, the 2016 Agreement requires that a final location approach be used when calculating the benefits accrued by a pension plan member in the jurisdictions that are subject to the 2016 Agreement, including Ontario. This may have an effect on a member's overall accrued benefits. In general, all benefits accrued by a member in these jurisdictions will be determined as if the member were always subject to the final pension

legislation that applied to the member at the time of benefit determination. This provides for a more consistent application of the final location approach to benefit determination across Canadian jurisdictions.

Note: Despite the above, Ontario's Pension Benefits Guarantee Fund (PBGF) coverage continues to apply to benefits accrued by pension plan members in Ontario, regardless of where in Canada the member terminates employment and plan membership. The administrator of a pension plan that is subject to the PBGF must keep a record of all periods of members' service in Ontario for the purpose of determining the application of the PBGF on the termination of a pension plan. -06/2016.

Q401. How is Ontario's Pension Benefits Guarantee Fund (PBGF) affected by the 2016 Agreement Respecting Multi-jurisdictional Pension Plans?

A401. The PBGF provides coverage only for benefits accrued in Ontario by members, former members and retired members of a pension plan. This protection does not extend to benefits accrued in any other jurisdiction. The 2016 Agreement Respecting Multi-jurisdictional Pension Plans does not affect the application of the PBGF. -06/2016

Q402. When I terminate my employment, I plan to transfer my pension value to a locked-in account. Is this still possible under the terms of the 2016 Agreement Respecting Multi-jurisdictional Pension Plans?

A402. The 2016 Agreement Respecting Multi-jurisdictional Pension Plans does not change the options that would be available to you on termination of employment. -06/2016

More Information

- FSCO Communiqué - 2016 Agreement Respecting Multi-jurisdictional Pension Plans
- 2016 Agreement Respecting Multi-jurisdictional Pension Plans Size: ## kb
- CAPSA Website
- Questions/Comments: contact FSCO's Pension Division by e-mail

TAB 14

Case Name:

Dinney v. Great-West Life Assurance Co.

Between
George R. Dinney on his own behalf and on behalf of certain former employees of The Great-West Life Assurance Company, plaintiff, and
The Great-West Life Assurance Company and the trustees, from time to time, of the pension fund established under Part A of The Great-West Life Assurance Company System of Insurance and Pensions for certain employees and agents, defendants

[2002] M.J. No. 466

2002 MBQB 277

169 Man.R. (2d) 317

33 C.C.P.B. 208

118 A.C.W.S. (3d) 734

Docket: CI 96-01-98992

Manitoba Court of Queen's Bench
Winnipeg Centre

Jewers J.

November 19, 2002.

(16 paras.)

Conflict of laws -- Contracts -- Choice of law -- Pension plans.

Motion by Great-West Life to determine whether the provisions of the Manitoba Pension Benefits Act applied to pensioners who were employed outside the province. A judgment had already been

delivered that certain pensioners had not received the full amount of the increments to which they were entitled. There were 129 pensioners who were employed outside Manitoba. There was nothing in the plan indicating an intention that more than one law should govern.

HELD: The extra-provincial employees were included in the class. The parties intended the plan and the vesting provisions to be interpreted in accordance with Manitoba law. There was no reason why, where the proper law of the plan was Manitoba, the entitlement of the pensioners should be governed by the laws of another province.

Statutes, Regulations and Rules Cited:

Pension Benefits Act, R.S.M. 1987, c. P32, s. 21(8).

Counsel:

R.L. Tapper, Q.C. and R.M. Swystun, for the plaintiff.
E.W. Olson, Q.C. and S. Mattheos, for the defendants.

---

1 JEWERS J.:-- This motion raises the issue of the extent to which provisions of the Manitoba Pension Benefits Act, R.S.M. 1987 c. P32 should apply to pensioners who were employed outside of the Province.

2 In an earlier judgment delivered on November 30, 2000, this Court answered four questions related to the Great-West pension plan and held that certain Great-West Life pensioners had not received the full amounts of the increments to which they were entitled under the plan. Since that time the parties have been engaged in discussions in an attempt to settle issues relating to the specific classes of pensioners entitled to benefit under the judgment; for example, there was an issue which has now been settled as to the extent to which agents should participate.

3 It now transpires that there were one hundred and twenty-nine pensioners who were employed in various provinces outside of Manitoba and the defendants question whether they should be included. The defendants point out that key to the earlier decision was s. 21(8) of The Pension Benefits Act and that this section was the basis of the finding that the pensioners had obtained a vested interest in the indexing provisions of the plan that could not be divested through subsequent amendments or legislation. Section 21(8) provides:

> Vesting on retirement at normal retirement age
>
> 21(8) Every pension plan shall provide that a member of the pension plan who

> retires on or after reaching the normal retirement age for the pension plan is entitled to an annuity in accordance with the terms of the pension plan, as those terms are at the date of retirement and that is not less than the pension benefits in respect of service as an employee after January 1, 1984.
>
> (my emphasis)

4 The defendants submit that their preliminary researches have shown that at least some of the other provinces do not have provisions to the same effect as this section and that therefore pensioners who were employed in those provinces would not necessarily have the same vested rights as those employed in Manitoba.

5 The plaintiff submits that the proper law of the plan is that of Manitoba and that the provisions of pension acts in other provinces are not relevant.

6 I agree that the proper law of the contract is Manitoba and that, generally speaking, Manitoba law should and would govern the plan.

7 This is a matter of the interpretation and effect of the contract. The above section provides that each pension plan shall provide for vesting on retirement at normal retirement age; that is the interpretation to be given to the contract and the effect which it has. Dicey and Morris The Conflict of Laws Eleventh Edition Volume 2 page 1232 states:

> Rule 185 - The interpretation of a contract is to be determined in accordance with the proper law of the contract.
>
> COMMENT
>
> Interpretation. That a contract must be construed in accordance with its proper law, in so far as its meaning depends on technical, legal or commercial terms or upon rules of law or usages of trade, is almost self-evident. The aim of a court, when called upon to interpret a contract, must be to give to it the sense which was affixed to it by the parties when entering into it. But if the law and the usage to which the parties looked are disregarded, a sense may be given to the terms of their agreement totally different from the sense which they were intended to bear. ...

And at page 1236:

> Rule 186. - (1) The effect of a contract, i.e. the rights and obligations under it of the parties thereto, is to be determined in accordance with the proper law of the contract.

.....

COMMENT

Effect. The rights and obligations under a contract of the parties thereto, and the extent (if any) to which those rights and obligations affect third parties, must be determined in accordance with the proper law of the contract. For, if a contract made with a view to the law of one country be given effect in accordance with the law of some other country, it is all but certain that the end of the contract will not be attained, but that one or each of the parties will acquire rights or incur liabilities different from those which the agreement was intended to confer or impose. "If the proper law of a contract is the law of a foreign country the courts of this country are by our law bound to apply that foreign law in determining the effect of the obligations undertaken by the parties." Thus, the Supreme Court of Canada has held that the effect of a fundamental breach of a contract for the carriage of goods by sea must be determined in accordance with its proper law.

8 But, the defendants submit that this ignores the well-known constitutional principle that one province, in this case Manitoba, cannot pass laws which are effective in another province or provinces. They cite and rely upon the case of Régie des rentes du Québec v. Pension Commission of Ontario, [2000] O.J. No. 2845 (Ont. S.C.).

9 In that case, McColl-Frontenac Petroleum Inc. made an application to the Pension Commission of Ontario under the Ontario Pension Benefits Act to obtain the Commission's consent to the withdrawal of the surplus remaining in the pension plan of Leco Inc., a predecessor corporation to McColl-Frontenac. The Commission approved the payment of the surplus to McColl-Frontenac and the applicant Régie des rentes du Québec representing Quebec employees involved in the plan moved to quash the decision by way of judicial review on the ground that it was not reasonable. The Ontario Superior Court of Justice Divisional Court quashed the decision on the ground that the Commission should have followed Quebec law.

10 The plan specifically provided as follows:

13.6 The Plan shall be construed and administered in accordance with the laws of the Province of Québec, the Province of Ontario and the rules of the Department of National Revenue.

14.2 ..., in the event of the termination of the Plan, the Employer shall not be obligated to make any further contributions to the Plan and, if there be any excess

> to the Plan after the benefits accrued under the Plan have been purchased from an Insurance Company, such excess amount shall be paid to the Employer. It is provided, however, that the provisions of any Pension Benefits Act to which the Plan is subject will be applied on termination of the Plan.

11 The plan included members in Ontario and Quebec but the majority of members reported to work in Ontario and for these reasons, under the terms of a reciprocal agreement between Ontario and Quebec, the plan was registered solely with the Commission in Ontario and the Commission acted as the "major authority" in relation to the plan.

12 It will be seen that the plan provided that upon termination, any excess shall be paid to the employer and presumably, it was for this reason that the Ontario Commission decided to order the excess amount payable to McColl-Frontenac. However, in so doing the Commission ignored and did not give effect to the provisions of the Quebec Supplemental Pension Plans Act which specifically provides that a member may request arbitration if no agreement is reached on surplus distribution when such arbitration had been requested.

13 The court held that in the absence of specific provisions stating otherwise either in the reciprocal agreement or in the Quebec Act, the Commission knew or ought to have known as a matter of constitutional law that the law of Quebec applied to McColl-Frontenac's surplus application insofar as it affected the Quebec members.

14 However, in my opinion that case is distinguished from the case at bar. In the Ontario case, the plan specifically stated that it was to be construed and administered in accordance with the laws of the Province of Quebec as well of the Province of Ontario and the rules of the Department of National Revenue. Not only that, but the plan provided that the provisions of any Pension Benefits Act to which the plan is subject will be applied on termination of the plan. There are no such provisions in the plan in question. I can see no reason in principle why, where the proper law of the plan is Manitoba, the entitlement of the pensioners should be governed by the laws of another province. There is nothing in the plan indicating an intention that more than one law should govern. I agree with the statement in the case of Gerling Global General Insurance Co. v. Canadian Occidental Petroleum Ltd., [1998] A.J. No. 918 (Alta. Q.B.) (page 12):

> ... Although there may be exceptional circumstances where it may be inferred that a contract is to be governed by the law of more than one jurisdiction, the courts in Canada are reluctant to split the proper law of a contract without good and compelling reason. Even in situations where the contract may be performed in more than one place, the more usual determination is that the substance of the contract is to be determined by one law only, although the method and manner of performance may be regulated by the law of the place of performance (Montreal Trust Co., [1966] 1 O.R. 258, Kenton Natural Resources Co. v. Burkinshaw (1983), 47 A.R. 321, Q.B.). It is also clear that the proper law of a contract does

> not shift from time to time, but is to be determined as of the date the contract was made (Colmenares, [1967] S.C.R. 443 at 449-450).

15 There may very well be instances where Manitoba law would have to give way to the laws of another province; for example, one can conceive of a situation where one province would lay down regulatory standards for the protection of persons employed in that province and such like but in my view this is not one of those cases. This case is essentially one of the interpretation of the plan and the court can certainly infer - as I do here - that the parties intended the plan and specifically the vesting provisions to be interpreted in accordance with Manitoba law.

16 In the result, I would hold and direct that the extra-provincial employees should be included in the class.

JEWERS J.

cp/e/qlemo/qlbrl

TAB 15

TOWERS WATSON

Client Advisory

Ontario and Quebec Announce Signing of Agreement Respecting Multi-Jurisdictional Pension Plans

June 20, 2011

Summary

On May 20, 2011, the governments of Ontario and Quebec announced the signing of the *Agreement Respecting Multi-Jurisdictional Pension Plans* (Agreement). The Agreement will be effective July 1, 2011 for multi-jurisdictional pension plans (MJPPs) where the major authority (province of registration) is Ontario or Quebec, and the plans have both Ontario and Quebec members. Other provincial governments and the federal government are expected to sign the Agreement in due course.

The Agreement brings welcome clarity in the application of pension legislation to the administration of MJPPs, including administrator's duties, member communications, funding and investment rules, without substantially changing how these plans are administered.

Background

Most of the country's pension regulators have ratified the existing *Memorandum of Reciprocal Agreement* (Memorandum) since its creation in 1968. The main purpose of the Memorandum was to eliminate the need for employers to register a plan with multiple pension standards jurisdictions, thereby reducing the administrative burden for plan administrators.

A pension plan is registered in the jurisdiction where a plurality of active members is employed, i.e. the jurisdiction in which more members are employed than in any other. Under the Memorandum, the regulator of the jurisdiction of registration is the "major authority"; while other regulators in jurisdictions in which members are employed are "minor authorities". A convention has developed whereby the major authority applies the rules of the jurisdiction of employment to a member's benefit entitlements and the rules of the major authority govern the funding of the plan.

Due to the experience and evolution of legislation since 1968, replacing the Memorandum with clearer provisions was much needed. This was particularly true following the July 26, 2000 decision of the Ontario Divisional Court in *Régie des rentes de Québec v. Pension Commission of Ontario* (Leco), which held that the Memorandum did not expressly provide for procedural and administrative manners to be determined according to the law of the province of registration and member entitlements to be determined according to the law in each member's province of employment.

The Agreement

The Agreement introduces a detailed framework for the regulation of MJPPs. It maintains the major authority principles of the Memorandum and contains clear provisions under which the pension legislation of the plan's jurisdiction of registration governs, including:

- The plan's registration and filings, including amendments;
- Who may be the plan administrator and the right of plan members to establish an advisory committee;
- Duties and powers of the plan administrator and other persons involved in the plan administration, including requirements to hold periodic or annual meetings with plan members;
- Records retention periods;
- Funding (with specified exceptions), including the ability to take contribution holidays;
- Requirements for contributions, including the deadlines for making them;
- Requirements for actuarial reports, including content, deadlines and standards;
- The investment of the pension fund, including requirements regarding the statement of investment policies and procedures;
- Plan summaries, annual member statements and information for members regarding plan amendments; and
- Acceptable classes of employees and the ability to establish separate plans for full-time and part-time employees.

Pension legislation of the member's jurisdiction of employment will continue to govern minimum benefit standards (e.g., vesting, locking-in, portability, spousal protection, pension payment options, "grow-in" rights) and information requirements upon termination of active membership.

The Agreement requires that the "final location" method be used to determine a member's entitlements (i.e. the minimum standards applicable to the benefits, rights and options of a terminating member who was employed in more than one jurisdiction during his/her career are those of his/her last jurisdiction of employment). However, the Agreement stipulates that the Ontario Pension Benefits Guarantee Fund (PBGF) continues to only apply to the benefits accrued in Ontario. The administrator of a pension plan that is subject to the PBGF must therefore continue to maintain a record of all periods of members' service in Ontario for the purpose of determining the application of the PBGF on plan termination.

The Agreement specifies the rules governing the allocation of plan assets among jurisdictions in case of full or partial wind-up. Once assets have been allocated among jurisdictions, assets must be distributed in accordance with the pension standards legislation of each jurisdiction. Rules governing the distribution of surplus assets upon plan wind-up will continue to be governed by the member's jurisdiction of employment.

The Agreement also specifies transition rules governing the loss of majority status, which may occur when the plurality of active members shifts to another jurisdiction as a result of changes in the plan sponsor's workforce. A change in a defined benefit plan's major authority could impact the use of alternative funding arrangements, such as letters of credit, where the legislation of the new major authority does not permit the use of that arrangement.

Implications

The Agreement will not substantially change how pension standards apply to MJPPs. Its major benefit is to confirm that most multi-jurisdictional issues are already being handled appropriately. Moreover, the Agreement eliminates much uncertainty in the application of some pension standards. For example, it becomes clear that plans registered outside Quebec would not have to comply with the Quebec requirements to have a pension committee and annual member meetings for members employed in Quebec.

The adoption of the Agreement is not necessarily a prelude to increased uniformity in pension standards in Canada because it may not inhibit each jurisdiction from adopting individualized approaches to pension plan regulation.

For more information

This Advisory is not intended to constitute or serve as a substitute for legal, accounting, actuarial or other professional advice. For information on how this issue may affect your organization, please contact your Towers Watson consultant, or:

Dean Taylor, 416.813.4441

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TAB 16

Office of the Superintendent of Financial Institutions Canada
Bureau du surintendant des institutions financières Canada

Knowledge of Plan and Identification of Significant Activities

Risk Assessment Framework

Pension Supervisory Guidance Note RAF 1

July 31, 2014

OSFI BSIF

Canada

Knowledge of Plan and Identification of Significant Activities Pension Supervisory Guidance Note RAF1

Table of Contents

Knowledge of Plan and Identification of Significant Activities Pension Supervisory Guidance Note RAF1

1. Introduction

The purpose of this guidance note is to assist the Relationship Manager (RM) in the risk assessment process and the completion of a Risk Assessment Summary (RAS). An overview of this process can be found in the *Risk Assessment Framework for Federally Regulated Private Pension Plans* document.

Before assessing the risks associated with a pension plan, it is important to have a sound knowledge of the plan. An in-depth knowledge of the plan provides the basis for identifying the activities that are significant to the plan meeting its obligations, and a foundation for rating the risks associated with the plan.

This guidance note assists an RM in gathering the relevant information to be familiar with prior to undertaking the risk assessment process. The following sections expand on the key information that must be understood in order to rate individual items within a risk assessment. Rating risks associated with significant activities, the effect of the employer, and other factors of the risk assessment process are covered in separate guidance notes.

2. Included Employment

The type of work, undertaking or business in which members in a plan are employed determines the jurisdiction that applies to the plan. Pension plans associated with employment in connection with any work, undertaking or business that is subject to the legislative authority of Parliament, or located in the Yukon, Northwest Territories or Nunavut are regulated federally. This concept of "included employment" is contained in subsection 4(4) of the *Pension Benefits Standards Act, 1985* (PBSA) and section 2 of the *Pooled Registered Pension Plans Act* (PRPPA).Subsection 4(5) of the PBSA defines 'excepted employment'. The RM should be aware of which category of included employment the plan belongs to.

At times, further explanation may be necessary to clarify why a plan is federally registered. Some pension plans cover employees in "included employment" and employees who are subject to provincial pension legislation. These plans are known as multi-jurisdictional pension plans. OSFI is the lead regulator when the plurality of members of the plan is in included employment. To eliminate the need to register a pension plan with each designated province under whose jurisdiction the employees fall, the federal Minister of Finance has entered into bilateral reciprocal agreements with all provincial pension authorities except for Newfoundland (Note: OSFI has a reciprocal agreement with Quebec only for plans established in the Northwest Territories and the Yukon). These agreements authorize OSFI to administer the province's pension legislation on their behalf for those members subject to that province's jurisdiction. An RM must be aware if OSFI is monitoring the plan on behalf of any provincial jurisdiction.

3. Plan/Fund Administration

The plan administrator is the person or body legally responsible for administering the pension plan and its fund, as specified by section 7 of the PBSA and section 2 of the PRPPA. The administrator of a plan registered under the PBSA should be defined in the plan text, and may be the employer, a Board of Trustees, a Pension Committee, or another governing body. If it is a Board or similar type body, a description of the composition of the Board or body, such as Board members and their background, may be relevant. For a PRPP, the administrator is a corporation that holds a licence from the Superintendent of Financial Institutions authorizing it to be a PRPP administrator.

In addition, other parties who are usually involved in the administration of the plan and fund may include:

- Pension Committee/Council (retirees, union representatives, etc);
- Employer(s);
- Custodian(s);
- Individual Trustees;
- Actuary;
- Third Party Administrator;
- Auditor;
- Consultant(s);
- Legal Counsel;
- Investment Manager(s);
- Investment Advisor(s) (for the plan administrator or the employees); and
- Union(s).

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4. Plan Characteristics

The overall characteristics of a plan dictate the risks and challenges that the plan may encounter. The RM should consider these characteristics when conducting a risk assessment. Plans may exhibit one or more of the following characteristics:

- Defined Benefit (DB) provisions;
- Defined Contribution (DC) provisions;
- Combination of DB and DC provisions;
- Pooled Registered Pension Plan (PRPP);
- Negotiated Contribution (NC) Plan;
- Multiple Employer Pension Plan (MEPP), including number of employers;
- Designated Plan as defined in the *Income Tax Act, 1985* (ITA, Reg. 8515);
- Established pursuant to a collectively bargained agreement.

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5. Plan Provisions

The provisions of a plan establish the eligibility criteria for plan members and determine the amount of employer and employee contributions as well as the benefits provided by the plan. There are several provisions that the RM

should understand prior to conducting a risk assessment. Though the following are considered key provisions, the RM should note that other provisions may exist within plans that can also be important in the risk assessment process.

Benefit Formula

In a plan with defined benefit provisions, the benefit formula determines the benefit a member is accruing and will receive on retirement or termination, or that the survivor or beneficiary is entitled to upon the member's death. Included in the benefit formula is whether or not the plan provides for indexation. The benefit formula may indicate other items that the RM should consider, such as ancillary benefits. Types of benefit formulas include:

- Career Average Earnings (CAE);
  - e.g. 2% of the members' total career average salary, per year of active service
- Final or Best Average Earnings (FAE or BAE); and
  - e.g. 2% of the members' average annual salary over their final (or best) five years of service, per year of active service
- Flat Benefit (Flat).
  - e.g. $20 per month per year of active service

Variable payments may also be available to members of certain plans, as contemplated for example under section 48 of the PRPPA.

Contribution Rates

It is important to know whether the plan is contributory or non-contributory for members. The plan text or other supporting documentation will set the contribution rates.

Funding

The plan should be funded in accordance with the prescribed tests and standards for solvency.

In respect of a plan that is not a MEPP, the employer should pay into the fund all amounts required to meet the prescribed tests and standards for solvency.

In respect of a MEPP, each participating employer should pay into the fund all contributions that they are required to pay under an agreement between participating employers or a collective agreement, statute or regulation.

Distressed Pension Plan Workout Scheme

An employer and plan member representatives can negotiate a distressed pension plan workout scheme (DPPWS) in respect of a plan with defined benefit provisions where the employer does not anticipate being able to meet the minimum funding requirement of the PBSA. The scheme must meet the requirements set out in the PBSA, and be approved by the Minister of Finance. MEPPs are not eligible for workout schemes.

Ancillary Benefits
RMs should be aware of other benefits that may be available to members, such as:

- Subsidized Early Retirement benefits;
- Bridge benefits; and
- Consent benefits.

Pensionable Age
Pensionable age is an important concept since it is unique to the federal pension legislation and is a key determinant in valuing pension benefits. Additional information on Pensionable Age is available in Pension Update No. 13 available at www.osfi-bsif.gc.ca.

Pensionable age is defined as the earliest age at which an unreduced pension benefit is payable to a member under the terms of the pension plan without the consent of the administrator. A plan could have multiple pensionable ages, based on age, age and service, or other criteria that the member must meet in order to receive an unreduced pension. Members' benefits on termination, death or retirement are all payable at pensionable age. A plan that only provides capital accumulation accounts[1] will have a normal retirement age.

Additionally, the RM should check that the plan is compliant with the "R-10" rule found in subsection 16(2) of the PBSA, which states that members and former members of the plan shall be eligible, commencing ten years before pensionable age, to receive an immediate pension benefit based on the period of employment and salary up to the actual retirement date.

Priority Provisions
Some plans establish a hierarchy for the disbursement of benefits on plan termination, which may result in some members receiving a larger share of their benefits than other members if the plan is terminated while under-funded. These rules, referred to as "priority provisions", stipulate the order in which plan funds are used to meet the pension obligations of specified groups of members (retirees, actives, deferred, etc). Not all plans have priority provisions, in which case all groups are generally treated in an equal manner (i.e. receive a pro-rata share of accrued benefits).

Power/Authority to Reduce Accrued Benefits
The RM should be aware of whether the plan administrator has the power to amend the Plan and whether that power restricts the plan administrator under the terms of the plan text, trust agreement or any other document that supports the plan text from making an amendment that would have the effect of reducing the accrued benefits of any members. The restriction on reducing accrued benefits limits the plan administrator's options to address

[1] References to plans with capital accumulation accounts cover plans with defined contribution provisions and Pooled Registered Pension Plans (PRPPs).

situations where minimum funding is not being met. As prescribed by the PBSA, the administrator of a negotiated contribution plan has the power to amend the plan to reduce accrued benefits regardless of the terms of the plan, subject to the Superintendent's approval.

There may be other parties, such as a union or employer, who play a role in consenting to specific plan amendments, for example terminating the plan or reducing accrued benefits.

Surplus Ownership

Every plan filing for registration must provide for the use of surplus on both a going concern and termination basis. The current documentation for plans registered prior to June 1998 may not clearly identify the use of surplus on a going-concern or termination basis. For these plans, a legal review of the plan documents such as plan texts, amendments, employee booklets, and trust agreements since the plan's inception would generally be required to determine surplus ownership.

Contribution holidays (paying the plan's normal cost from the lesser of the going-concern surplus and the portion of the solvency surplus that exceeds five percent of solvency liabilities) are permitted under the PBSA if the pension plan is fully funded with a margin of more than five percent of solvency liabilities. However, some plans may contain provisions which prohibit contribution holidays. Before using surplus to pay for normal costs, plan administrators should ensure that contribution holidays are permitted under the terms of the plan.

Eligibility/Classes

The plan text will set out the classes of members eligible to participate in the plan. The PBSA does not define what constitutes a class. The classes must relate to employment. Classes could be segregated by union/non-union status, employment positions, geographical location or other factors. A class may be closed to new entrants. Having numerous classes in a plan adds to the complexity of its administration.

Plan History

The history of the plan will provide an understanding of how the plan administrator has performed. Past events, such as late filings or remittances, as well as the performance of the plan should be noted for potential impacts on the risk profile. The consideration of plan history should also include the effective date of the plan, any past mergers, transfers or significant plan amendments, and any prior intervention actions taken by OSFI.

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6. Plan Financials / Demographics

a) The RM should understand the financial position of the plan in order to assess the plan's risk profile. Factors to consider include:

- Fund Size;
- Solvency, Average Solvency and Going-concern Funded Ratios (for

defined benefit and combination plans);
- Contribution information (normal cost, special payments);
- Liabilities (dollar value, percentage of retiree liabilities);
- Rate of return on investments;
- Investment portfolio mix (equities, bonds, real estate, etc.);
- Letters of Credit being used to satisfy funding obligations;
- Whether the plan is following a distressed pension plan workout scheme funding schedule; and
- Plan specific funding regulations that set different funding requirements for a specific employer.

b) Often, the acceptable risk parameters for a plan are determined by the demographics of a plan. Two plans with the same issue but different demographic factors may be assigned very different risk ratings. Demographic considerations of a plan include:
- Membership profile (active, retired, deferred vested, etc.);
- Average age of the plan membership; and
- Average pension amount.

The financial and demographic information of a plan should be considered together in order to gain an accurate risk assessment of a plan.

7. Employer / Industry

The employer must contribute to the pension plan in accordance with the plan provisions and the PBSA's minimum funding requirements or the PRPPA. Failure to do so could have serious repercussions on the future of the plan and on members receiving their promised benefits. As such, the financial health of an employer of a pension plan may have a significant effect on the risk profile of a pension plan. RMs should be aware of the general health and basic financial information of the employer in order to determine potential effects on the plan. Financial information may or may not be provided to OSFI if the employer is a private company. Similarly, the industry in which the employer operates could impact a plan's risk rating. An industry that is growing might give the RM confidence while an industry on the decline may raise concerns. The information gleaned in this exercise will be used to determine the funding risk rating in the risk assessment process.

Information about the industry/employer may include:
- Source of Funding:
  - A public or private company;
  - A government program. For example, under the Band Employee Benefit Program, the Department of Aboriginal Affairs and Northern Development Canada may provide funding to First Nations pension plans. Also, a Municipal, Provincial, or the Federal Government may provide funding for a publicly funded organization or Crown Corporation.

- Financial data;
- Industry trends;
- Economic outlook of industry;
- Industry standing of the employer;
- Expansion intentions;
- Employer credit rating; and
- Merger and acquisition activity within the industry.

8. Significant Activities

Based on knowledge of the plan, the RM will be able to identify the extent to which each of the four significant activities applies to the plan and the key information required to assess the risk of each applicable significant activity. The significant activities that apply to plans are defined below.

Administration

The Administration activity focuses on the general administration and management of the plan. It includes items such as benefit calculations; benefit payments; payment of expenses; regulatory filings; record keeping; and collection and remittance of contributions to the custodian. Administration also covers plan design and amending the plan as necessary.

Communication

The Communications to Members activity requires that members understand the nature of the plan, its promised benefits, and who bears what risks. It involves ensuring the plan's membership receives the prescribed information and is aware of all relevant plan decisions and the impact they might have on the members' rights and benefits. In regards to a plan with capital accumulation accounts, member education and awareness is very important because members bear the investment risk. Information on investment options for these members is essential.

Actuarial

The Actuarial activity involves actuarial valuation of the plan assets and liabilities, as well as advice, analysis, testing and special reports provided at the request of the administrator, and compliance with professional standards and legislation. This activity is not applicable to plans with only capital accumulation accounts.

Asset Management

The Asset Management activity focuses on managing the plan's funds, which encompasses the development of the investment strategy, including the establishment of a Statement of Investment Policies and Procedures (SIP&P) and asset/liability management, investment decisions, regulatory compliance with investment rules, and monitoring and reporting, including the preparation of special financial or risk management reports.

9. Conclusion

The factors discussed in this guidance note will be used in the determination and documentation of the risk profile of a plan.

It is important to note that information identified during the Knowledge of Plan process should be considered as a whole. Often, individual factors may not give an indication of the effect on risk until given perspective by other pieces of information identified through this exercise. When conducting a risk assessment, an RM is expected to analyze the risk while drawing connections between the items discussed in this guide.

TAB 17

Case Name:

Hislop v. Canada (Attorney General)

Between
George Hislop, Brent E. Daum, Albert McNutt, Eric Brogaard and Gail Meredith, Plaintiffs (Appellants),
and
The Attorney General of Canada, Defendant (Respondent)
PROCEEDING UNDER the Class Proceedings Act, 1992

[2009] O.J. No. 1756

2009 ONCA 354

95 O.R. (3d) 81

248 O.A.C. 205

177 A.C.W.S. (3d) 514

Docket: C48570

Ontario Court of Appeal
Toronto, Ontario

S.E. Lang, P.S. Rouleau and D. Watt JJ.A.

Heard: September 30, 2008.
Judgment: April 30, 2009.

(64 paras.)

Legal profession -- Barristers and solicitors -- Compensation -- Agreement for fees -- Solicitor's lien -- Statutory charging order -- Appeal by lawyers who represented plaintiffs in a class action to receive CPP survivors pensions from the dismissal of their application for an order granting them a first charge for their fees on the award they achieved dismissed -- The prohibition against assignment or charge of CPP benefits prevailed over first charge lawyers would usually have over monetary award under Class Proceedings Act -- Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 32(3) -- Canada Pension Plan, R.S.C. 1985, c. C-8, ss. 2(1), 65(1).

Professional responsibility -- Self-governing professions -- Professions -- Legal -- Barristers and solicitors -- Appeal by lawyers who represented plaintiffs in a class action to receive CPP survivors pensions from the dismissal of their application for an order granting them a first charge for their fees on the award they achieved dismissed -- The prohibition against assignment or charge of CPP benefits prevailed over first charge lawyers would usually have over monetary award under Class Proceedings Act -- Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 32(3) -- Canada Pension Plan, R.S.C. 1985, c. C-8, ss. 2(1), 65(1).

Constitutional law -- Division of powers -- Determination of jurisdiction -- Appeal by lawyers who represented plaintiffs in a class action to receive CPP survivors pensions from the dismissal of their application for an order granting them a first charge for their fees on the award they achieved dismissed -- The prohibition against assignment or charge of CPP benefits prevailed over first charge lawyers would usually have over monetary award under Class Proceedings Act -- Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 32(3) -- Canada Pension Plan, R.S.C. 1985, c. C-8, ss. 2(1), 65(1).

Appeal by lawyers who represented plaintiffs in a class action from the dismissal of their application for an order granting them a first charge for their fees on the award they achieved. Hislop and others brought a class action in which they claimed that certain amendments made by the Modernization of Benefits and Obligations Act to the Canada Pension Plan (CPP) breached s. 15(1) of the Charter. The class members had been denied CPP survivors pensions because they and their deceased partners were of the same sex. The trial judge struck down two subsections of the CPP and granted class members a constitutional exemption from two general sections of the CPP. In the result, each class member was to receive full arrears on their pensions, depending on the date of their same-sex partner's death, as far back as 1985, plus the prospective CPP survivor's pension. As a result of the trial judgment, otherwise eligible class members became entitled to receive prospective survivors' pensions and survivors' pensions arrears calculated from one month following the death of their partner, plus interest. Lawyers who conducted class proceedings under Ontario law were compensated in accordance with a fee agreement if approved by a Superior Court judge. Amounts owing to the lawyers under the approved fee agreement were a first charge on any settlement funds or monetary award made in the litigation under the provincial Class Proceedings Act. However, Canada Pension Plan benefits could not be assigned or charged, and any transaction that purported to assign or charge those benefits was void under the federal Canada Pension Plan. The trial judge approved the retainer agreement entered into between the lawyers and the Hislop class members. The application judge decided that a declaration that some class members were entitled to an award of retroactive and future Canada Pension Plan (CPP) benefits was both a "monetary award" under the Class Proceedings Act and a "benefit" under the CPP. The judge also decided that the prohibition against assignment or charge of CPP benefits prevailed over the first charge the lawyers would usually have over a monetary award under the Act.

HELD: Appeal dismissed. The litigation and the remedy obtained had to do with CPP benefits, and

the award to the Hislop class was an award of benefits under the CPP. It was arguable that the remedy obtained by the Hislop class was a "monetary award" that was subject to a first charge in favour of the lawyers. Section 94A of the Constitution Act, 1867, resolved conflicts between federal and provincial "laws in relation to old age pensions and supplementary benefits." This section enacted a reverse paramountcy rule, assigning predominance to provincial laws contrary to the usual preferential place accorded federal laws. However, to engage s. 94A, there had to be both federal and provincial "laws in relation to old age pensions and supplementary benefits," or laws in relation to either one of those subjects. The CPP qualified as a law "in relation to old age pensions and supplementary benefits," but the Class Proceedings Act could not claim any such constitutional foundation. The Class Proceedings Act was a statute of general application, a law that dealt with procedure in civil matters. It was not a law "in relation to old age pensions and supplementary benefits." In the result, the conditions precedent to the rule establishing provincial paramountcy were not established. Therefore, the lawyers could not summon s. 94A of the Constitution Act in support of their claim that they were entitled to a first charge under s. 32(3) of the Class Proceedings Act.

Statutes, Regulations and Rules Cited:

Canada Pension Plan, R.S.C. 1985, c. C-8, s. 2(1), s. 44(1.1), s. 60(2), s. 65, s. 65(1), s. 65(1.1), s. 65(2), s. 65(3), s. 72(1), s. 72(2)

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B,

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 32, s. 32(3)

Constitution Act, 1867, R.S.C. 1985, App. II, No. 5, s. 92, s. 94A

Constitution Act, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 52(1)

Modernization of Benefits and Obligations Act, S.C. 2000, c. 12,

Appeal From:

On appeal from the order of Justice Ellen M. Macdonald of the Superior Court of Justice dated February 29, 2008 with reasons reported at 2008 CanLII 8248 (ON.S.C.).

Counsel:

Peter L. Roy, R. Douglas Elliott and Sean M. Grayson, for the appellants.

Cynthia Koller and Barney Brucker, for the Crown.

[Editor's note: An amended judgment was released by the Court May 8, 2009. The changes were not indicated. This document contains the amended text.]

The judgment of the Court was delivered by

D. WATT J.A.:--

I OVERVIEW

1 Lawyers who conduct class proceedings under Ontario law are compensated in accordance with a fee agreement if approved by a judge of the Superior Court of Justice. Amounts owing to the lawyers under the approved fee agreement are a first charge on any settlement funds or monetary award made in the litigation: *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 32(3) (*CPA*).

2 Canada Pension Plan benefits cannot be assigned or charged and any transaction that purports to assign or charge those benefits is void: *Canada Pension Plan*, R.S.C. 1985, c. C-8, ss. 2(1) and 65(1) (*CPP*).

3 In this case, a judge of the Superior Court of Justice decided that a declaration that some class members were entitled to an award of retroactive and future Canada Pension Plan (CPP) benefits was both a "monetary award" under the *CPA* and a "benefit" under the *CPP*. The judge also decided that the prohibition against assignment or charge of CPP benefits prevailed over the first charge the lawyers would usually have over a monetary award under the *CPA*.

4 The appellants, the lawyers who represented the plaintiffs in the class proceedings litigation, collectively known as the plaintiffs' counsel group (PCG), say that the judge was wrong in failing to grant them a first charge for their fees on the award they achieved. I agree with the judge at first instance and would dismiss the appeal.

II THE BACKGROUND FACTS

(1) The Original Claim and its Disposition at Trial

5 George Hislop and several others (the Hislop class) undertook class action proceedings in which they claimed that certain amendments made to the *CPP* by the *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12, offended s. 15(1) of the *Charter* - the class members had been denied CPP survivors pensions because they and their deceased partners were of the same sex. The Hislop class sought declaratory relief, damages and a monetary judgment.

6 The trial judge struck down two subsections of the *CPP* under s. 52(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, and granted class members a constitutional exemption from two general sections of the *CPP*, ss. 60(2) and 72(1). In the result, each class member would receive full arrears on their pensions, depending on the date of their same-sex partner's death, as far back as 1985, plus the prospective CPP Survivor's Pension: *Hislop*

v. Canada (Attorney General) (2003), 234 D.L.R. (4th) 465 (Ont. S.C.).

7 As a result of the trial judgment, otherwise eligible class members became entitled to receive prospective survivors' pensions and survivors' pensions arrears calculated from one month following the death of their partner, plus interest.

(2) The Appellate Proceedings

8 On appeal to this court and the Supreme Court of Canada, the constitutional exemptions granted by the trial judge were set aside but the declaration of invalidity of ss. 44(1.1) and 72(2) of the *CPP* was upheld. In the end, otherwise eligible class members are entitled to CPP survivors' pensions. The amount of arrears to which individual class members are entitled varies with the date of application: *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429, aff'g (2004), 73 O.R. (3d) 641 (C.A.).

(3) The Retainer Agreement and Fee Approval

9 On April 30, 2004, the trial judge approved the retainer agreement entered into between the PCG and Hislop class members and applied a 4.8 multiplier for the trial and appeal.

10 The respondent was not a party to PCG's motion to approve the retainer agreement.

11 Prior to the application of the 4.8 multiplier, PCG has incurred total fees in excess of $5.3 million and has received fees, exclusive of all disbursements, of slightly less than $2 million. The respondent's estimate of the quantum of pension arrears owing to Hislop class members, according to its interpretation of the judgment, exceeds $3.5 million.

III THE ISSUES

12 This appeal involves the applicability and operation of two statutes, one provincial the other federal, which seem at odds with one another over PCG's right to a first charge on a monetary award made in a class proceeding to establish entitlement to CPP benefits.

13 The issues raised may be reduced to a series of three questions:

1. Did the Hislop class obtain a "benefit" within s. 2(1) of the *CPP* that is subject to the provisions of s. 65(1) of the *CPP*?
2. Did the Hislop class obtain a "monetary award" within s. 32(3) of the *CPA*?
3. If the answer to both questions 1 and 2 is "yes", which statute prevails?

IV THE RELEVANT STATUTORY PROVISIONS

(1) The *CPP*

14 Section 2(1) of the *CPP* provides exhaustive definitions of the terms "applicant", "benefit" and "pension":

Definitions

2(1) In this Act,

"applicant" means, in Part II,

(a) a person or an estate that has applied for a benefit,
(b) a person who has applied for a division of unadjusted pensionable earnings under section 55 or paragraph 55.1(1)(b) or (c), or
(c) a person in respect of whom division of unadjusted pensionable earnings has been approved under paragraph 55.1(1)(a);

...

"benefit" means a benefit payable under this Act and includes a pension;

...

"pension" means a pension payable under this Act

15 Section 65(1) of the *CPP* prohibits various transactions involving benefits payable under the CPP:

Benefit not to be assigned, etc.

65(1) A benefit shall not be assigned, charged, attached, anticipated or given as security, and any transaction purporting to assign, charge, attach, anticipate or give as security a benefit is void.

16 Section 65(1.1) exempts benefits from seizure and execution, both at law and in equity.

(2) The *CPA*

17 Section 32 of the *CPA* authorizes fee agreements and provides for their enforceability. Of particular importance here is s. 32(3):

Priority of amounts owed under approved agreement

> 32 (3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

18 The term "monetary award" in s. 32(3) is not defined in or for the purposes of the *CPA* or in any other applicable statute.

(3) *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3

19 Section 94A of the *Constitution Act, 1867* empowers Parliament to make laws in relation to old age pensions and supplementary benefits, including survivors' and supplementary benefits, irrespective of age, but assigns federal legislation to a subservient place in the face of provincial legislation in relation to the same-subject matter.

Legislation respecting old age pensions and supplementary benefits

> 94A. The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits, including survivors' and disability benefits irrespective of age, but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter.

V ANALYSIS

(1) The First Issue: Did the Hislop class obtain a "benefit" under the *CPP*?

Introduction

20 Section 65(1) of the *CPP* prohibits assignment and transactions purporting to assign benefits under the *CPP*. Similarly, the subsection bars charging and transactions purporting to charge benefits under the *CPP*. The benefits are exempt from seizure and execution either at law or in equity.

21 The first issue that ripens for decision here is whether what the Hislop class obtained was a "benefit" under s. 2(1) of the *CPP*, thus whether PCG's s. 32(3) *CPA* claim falls foul of s. 65(1) of the *CPP*.

The Positions of the Parties

22 PCG denies that s. 65(1) of the *CPP* bars their claim under s. 32(3) of the *CPA*.

23 PCG argues that the monetary award the Hislop class achieved only became available to class

members and payable to them as a result of a successful constitutional challenge to the provisions of the *CPA*. In other words, the remedy, although it related to CPP benefits, was *not payable under* the CPP as it must be to trigger the prohibition of s. 65(1) of the *CPP*.

24 The appellants also say that the application of s. 65(1) would undermine the access to justice principles that underpin the *CPA*. Section 65(1) is typical of pension legislation and its rigorous enforcement would stifle future proceedings similar to those undertaken here.

25 The respondent takes the position that s. 65(1) applies to prohibit the appellants' first charge under s. 32(3) of the *CPA* in this case. The obvious purpose of s. 65(1) is to protect CPP beneficiaries from the conduct of third parties who seek to attach pension benefits created to ensure comfort and security in retirement years. PCG seeks to impose and execute a solicitor's lien, which amounts to a charge on benefits payable under the CPP. The Act brooks no exceptions, apart from those described in ss. 65(2) and (3), neither of which applies here.

26 The respondent points out that the declaration of constitutional invalidity does not take the remedy granted outside the *CPP*. The benefits to which the Hislop class is entitled are benefits payable under the CPP, the source of the benefits claimed.

Discussion

27 The application of s. 65(1) *CPP* requires a confluence of subject-matter and conduct. The subject-matter must be a benefit payable under the CPP. The conduct must be in the nature of an assignment, charge, attachment, anticipation or giving of a CPP benefit as security, or other such transaction that purports to assign, charge, attach, anticipate or give as security a CPP benefit.

28 Under s. 2(1) of the *CPP*, a "benefit" is exhaustively defined as a benefit payable under the Act. A "benefit" includes, but is not limited to, a pension as defined elsewhere in s. 2(1) of the *CPP*.

29 To constitute a "benefit" within ss. 2(1) and 65(1) of the Act, the benefit must have its origins in the Act. In other words, the obligation to pay and the entitlement to receive the benefit must originate in the Act and not reside elsewhere.

30 It is scarcely necessary to advance beyond the issues formulated by the Supreme Court of Canada in the proceedings before it and the relief granted by that court to conclude that this litigation and the remedy obtained had to do with CPP benefits. The invocation of the *Charter* to establish entitlement does not eliminate the CPP as the source of the benefits obtained. The award to the Hislop class was an award of benefits under the *CPP*.

31 The appellants seek to collect amounts owing to them for their legal services under an enforceable agreement approved by a judge of the Superior Court of Justice under the *CPA*. They seek to do so by imposing a "first charge" on a "monetary award" under s. 32(3) of that Act.

32 In my view, the "first charge" for which s. 32(3) of the *CPA* provides, essentially a solicitor's lien, sits comfortably within the term, "charged", perhaps "assigned" as well, in s. 65(1) of the *CPP*. Any transaction purporting to assign or charge a CPP benefit is declared void by s. 65(1) of the Act.

33 The language of s. 65(1), for that matter s. 65(1.1) of the *CPP*, is unqualified and has been vigorously enforced, as have similar provisions in provincial pension legislation: *Trick v. Trick* (2006), 81 O.R. (3d) 241 (C.A.), at paras. 66-67 and 71-72; *Hooper v. Hooper* (2002), 59 O.R. (3d) 787 (C.A.), at paras. 44, 51, and 60; *Canada (Minister of Human Resources Development) v. Tait* (2006), 356 N.R. 382 (F.C.A.), at para. 32; *Mintzer v. Canada*, [1996] 2 F.C. 146 (C.A.), at para. 15.

34 The appellants' invocation of s. 32(3) of the *CPA* to impose and execute a first charge on the "monetary award" made in the original proceedings implicates s. 65(1) of the *CPP* if the "monetary award" under s. 32(3) of the *CPA* is also a "benefit" under ss. 2(1) and 65(1) of the *CPP*. The first charge awarded by s. 32(3) of the *CPA* is a transaction purporting to charge or attach a CPP benefit, thereby void if ss. 65(1) of the *CPP* prevails.

(2) The Second Issue: Did the Hislop class obtain a "monetary award" within s. 32(3) of the *CPA*?

Introduction

35 This issue requires a determination of whether s. 32(3) *CPA* applies to the remedy granted to the Hislop class in the original class proceeding. Unless what was granted amounts to a "monetary award" within s. 32(3), the appellants' case fails *in limine* for want of anything to which their first charge can attach.

The Position of the Parties

36 The appellants say that, as a remedial statute, the *CPA* and its various provisions, including s. 32(3), should be given a broad purposive interpretation consonant with its objects, which include judicial economy, increased access to the courts and behaviour modification.

37 It is the appellants' position that the remedy granted here, when all is said and done, is a "monetary award" within s. 32(3) of the *CPA*. After all, the remedy resulted effectively in an award of arrears of pension benefits, said otherwise, the payment of money, to those who could establish their eligibility in accordance with the CPP scheme. The mere fact that a declaration was a necessary first step does not alter the inalienable fact that the ultimate result of the litigation was that qualified applicants in the Hislop class will be paid money under the CPP.

38 The respondent sees it differently. From its perspective, the relief granted here was declaratory only. The final decision simply declared an entitlement to CPP benefits, the right to stand in line, along with others, to obtain benefits on proof of entitlement. The mere fact that the declaratory

relief granted will ultimately generate money for eligible Hislop class members does not transform the fundamental nature of the relief from a declaration to a monetary award.

39 The respondent points out that where the remedy is simply a monetary judgment, the payment provisions of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, would have been engaged requiring a statutory appropriation of public monies and payment out of the Consolidated Revenue Fund, rather than acceptance and processing of claims by staff administering the CPP.

40 The respondent also takes issue with the appellants' invocation of access to justice principles in support of their claim. They argue that denial of the appellants' claim will not deter future class actions and class counsel will be well compensated through costs awards in this case and readily embrace new class proceedings.

Discussion

41 The term "monetary award" in s. 32(3) of the *CPA* is not defined anywhere in the statute or elsewhere in any statute incorporated by reference or of general application. It follows that the term, more broadly, the words of the subsection, must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, its object and the intention of a legislature: *Bell ExpressVu v. Rex*, [2000] 2 S.C.R. 559, at para. 26.

42 The *CPA* is a procedural statute, one adopted by the legislature to ensure that the courts had a procedural tool sufficiently refined to allow them to deal efficiently, and on a principled rather than an *ad hoc* basis, with increasingly complicated modern litigation: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, at para. 14; *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (S.C.), at para. 50.

43 Despite its procedural nature, the *CPA* is to be construed generously: *Hollick* at para. 14. The phrase "generous construction" is not, however, a licence to run amok and to confer on statutory language a meaning that it does not reasonably bear, but neither can it sponsor a triumph of form over substance.

44 In ordinary speech, "monetary" means "of or pertaining to money," said otherwise, pecuniary. In similar discourse, "award" refers to a payment or penalty imposed by judicial authority. A monetary award is a payment of money imposed by judicial authority.

45 In the end, what the plaintiffs sought in their proceeding were CPP benefits, monies payable under the CPP. To gain those benefits, the Hislop class was first required to establish the constitutional invalidity of the statutory provisions that excluded them from participation in the benefits of the plan. With the statutory impediments set aside, any class member who can demonstrate entitlement will receive the benefits for which the plan provides: payments in money.

46 The decision of the Supreme Court of Canada in the original proceedings, *Canada (Attorney*

General v. Hislop), is replete with references like "survivor benefits", "retroactive benefits", "pension payments" and the like. Indeed, the court appears to have considered the plaintiffs' claim to be "tantamount to a claim for compensatory damages flowing from the underinclusiveness of the legislation": *Hislop* at para. 102.

47 The conclusion that I have reached on the third issue renders it unnecessary to make a final determination of whether the declaratory aspects of the remedy obtained by the Hislop class removes that remedy from a "monetary award" within s. 32(3) of the *CPA*, thus from the first charge in the appellant's favour that the subsection authorizes. For present purposes I am prepared to assume, without deciding, that the Hislop class obtained a "monetary award" that, *prima facie*, would be subject to a first charge in favour of *PCG*.

(3) The Third Issue: Which statute prevails?

Introduction

48 The final issue requires a resolution of the conflict between the two statutes. Does one give ground? Or can they get along together?

The Position of the Parties

49 The appellants favour an approach that validates both statutory provisions by permitting a charge to attach to the portion of the arrears that exceeds 11 months, thus validating both s. 32(3) and the goals of the *CPA*. At the same time, s. 65(1) of the *CPP* can shelter the statutory level of benefits payable under the CPP, namely current pensions plus 11 months of arrears.

50 The appellants advance an alternative argument in the event that their claim of concurrent operation fails. Section 94A of the *Constitution Act, 1867*, the appellants say, assigns to the provincial legislation, the *CPA*, a paramount place in the event of conflict between the two statutory schemes.

51 The *CPA* is valid provincial legislation, a procedural statute enacted to permit and regulate the form of class proceedings. Its validity is not affected simply because it has an incidental effect on validly enacted federal legislation governing old age security and pension benefits. After all, the province has always had at least concurrent jurisdiction over the same subject-matter.

52 The *CPP* is valid federal legislation, enacted pursuant to the authority furnished by s. 94A of the *Constitution Act, 1867*. Section 65 of the Act touches on property and civil rights in the province, but merely because it has such an incidental effect is not, in itself, reason to assign it a subservient position under s. 94A.

53 The appellants say that the enforcement of s. 32(3) will not frustrate the federal purpose in

enacting the *CPP*. Section 65(1), a single provision, is not essential to the operation of the *CPP*. The statue itself does not contemplate the payments awarded here, thus could not have contemplated their protection under s. 65(1). The remainder of this section will continue to operate and its statutory purpose will be enhanced by ensuring access to justice under the *CPA*. This minimal conflict does not invoke federal paramountcy.

54 The respondent takes the position that s. 94A of the *Constitution Act, 1867*, provides a complete answer to the appellants' submissions on this issue.

55 The respondent says that the language "in relation to any such matter" in s. 94A refers to legislation "in relation to old age pensions and supplementary benefits". The *CPA* is *not* a law in relation to old age pensions and supplementary benefits. Provincial paramountcy under s. 94A only applies where *both* the federal and provincial laws are "laws in relation to old age pensions and supplementary benefits". Since that is not the case here, s. 94A cannot operate to assign paramountcy to the *CPA*.

56 According to the respondent, when s. 94A is cast aside, the general rule of federal paramountcy in cases of inconsistency between federal and provincial enactments applies, s. 65(1) of the *CPP* prevails and the purported charge cannot operate.

Discussion

The *CPA*

57 The *CPA* is a comprehensive procedural statute to provide for and regulate the conduct of class proceedings in Ontario. It neither modifies nor creates substantive rights: *Hollick v Toronto (City)*, at para. 14; *Bisaillon v. Concordia University*, [2006] 1 S.C.R. 666, at para. 17; *Ontario New Home Warranty Program v. Chevron Chemical Co.*, at para. 50; *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, at paras. 27-29. The *CPA* is a statute of general application, lacking any specific provisions for class actions involving pensions or supplementary benefits.

58 It is common ground that the *CPA* is constitutionally valid provincial legislation, enacted under the authority of heads 13 and 14 of s. 92 of the *Constitution Act, 1867*.

The *CPP*

59 The CPP was created by the enactment of a statute of the same name in 1965. Its constitutional sponsor is s. 94A of the *Constitution Act, 1867,* first enacted in 1951 and amended to add "and supplementary benefits" in 1964.

60 The power s. 94A confers on Parliament to make laws in relation to old age pensions and

supplementary benefits is expressly concurrent with provincial power over the same subject-matter.

The Paramountcy Rule in s. 94A

61 Section 94A of the *Constitution Act, 1867*, resolves conflicts between federal and provincial "laws in relation to old age pensions and supplementary benefits". This section enacts a reverse paramountcy rule, assigning predominance to provincial laws contrary to the usual preferential place accorded federal laws.

62 To engage s. 94A, there must be both federal and provincial "laws in relation to old age pensions and supplementary benefits", or laws in relation to either one of those subjects.

63 In this case, the *CPP* qualifies as a law "in relation to old age pensions and supplementary benefits". But the *CPA* cannot claim any such constitutional foundation. The *CPA* is a statute of general application, a law that deals with procedure in civil matters. The *CPA*, in its current form, is not and does not purport to be a law "in relation to old age pensions and supplementary benefits". In the result, the conditions precedent to the rule establishing provincial paramountcy are not established. And so it is that the appellants cannot summon s. 94A in support of their claim that they are entitled to a first charge under s. 32(3) of the *CPA*.

VI DISPOSITION

64 I would dismiss the appeal. Since the Attorney General does not seek costs, I would make no order as to costs.

TAB 18

Case Name:

Champagne v. Atomic Energy of Canada Ltd.

IN THE MATTER OF an Adjudication held in Ottawa, Ontario, on December 12, 2011, pursuant to Division XIV -- Part III of the Canada Labour Code, R.C. 1985, c. L.2 as amended.
Between
Stephane Champagne (hereinafter referred to as the "Complainant"), and Atomic Energy of Canada Limited (hereinafter referred to as the "Employer")

[2012] C.L.A.D. No. 57

No. YM2707-8914

2012 CarswellNat 708

2012 CanLII 97650

Canada
Labour Arbitration

Panel: Joseph E. Roach (Arbitrator)

Award: February 10, 2012.

(89 paras.)

Employment law -- Wrongful dismissal -- Dismissal without cause.

Employment law -- Wrongful dismissal -- Remedies.

The complainant alleged that he was unjustly dismissed from his employment as a Fire Prevention Officer. The employer raised a preliminary issue concerning its right to terminate the complainant's employment without cause and the sufficiency of the severance package paid to the complainant. The employer argued that it was entitled to terminate the complainant without cause provided it complied with ss. 230(1) and 235(1) of the Canada Labour Code. Those sections provided for

provision of notice and payment of wages on termination. The complainant maintained that ss. 230(1) and 235(1) did not apply because he had already brought a complaint alleging unjust dismissal. He contended that ss. 240 to 246 of the Code contained a complete scheme for addressing unjust dismissal complaints.

HELD: Preliminary objection dismissed. The employer could not benefit from ss. 230(1) and 235(1) or pursuant to the Employer's Procedural Manual and the common law in terminating the complainant's employment without cause where the complainant had filed a written complaint alleging unjust dismissal. The parties could not contract out of the unjust dismissal provisions in ss. 240 to 246, nor could the employer circumvent the provisions in those sections by paying reasonable notice pursuant to the common law.

Statutes, Regulations and Rules Cited:

Canada Labour Code, R.S.C. 1985, c. L-2, Division XIV -- Part III, s. 168(1), s. 189, s. 230, s. 230(1), s. 230(1)(a), s. 232, s. 235, s. 235(1), s. 235(2), s. 240, s. 240(1), s. 240(2), s. 241, s. 241(1), s. 241(3), s. 242, s. 242(1), s. 242(3), s. 242(4), s. 243, s. 244, s. 245, s. 246, s. 246(2)

Employment Standards Act, s. 40, s. 40(a)

Financial Administration Act, R.S.C. 1985, c. F-11, s. 12(3)

Appearances:

Appearances for the Complainant: Mr Reagan R. Ruslim, Counsel, Mr Stephane Champagne, Complainant, Mr Rudy Cronk, Witness.

Appearances for the Employer: Mr Ronald M. Snyder, Counsel, Mr Patrick Murphy, Senior Legal Counsel & Associate Corporation Secretary.

PRELIMINARY AWARD

I. THE EVENTS GIVING RISE TO THE COMPLAINT OF UNJUST DISMISSAL FILED ON MARCH 10TH, 2011

1 The preliminary award deals solely with the issue raised by the Employer concerning its right to terminate on a "without cause" basis the Complainant's employment on January 12th 2011 and sufficiency of the severance package paid to the Complainant.

2 The Complainant commenced his employment on October 31, 2006 as a Fire Prevention Officer with Atomic Energy of Canada Limited (AECL) (see Exhibit "4"). On January 12, 2011, the Employer informed the Complainant that his employment was being terminated, using the following language (see Exhibit "B"):

> This letter will confirm our discussion today that your employment with Atomic Energy Canada Limited (AECL) is terminated effective immediately "without cause". To assist you in your transition, AECL is providing you with the following compensation package [...].

3 On March 10, 2011, the Complainant filed an "unjust dismissal" complaint with Human Resources Services Development Canada (HRSDC) pursuant to Part III of the *Canada Labour Code*. The nature of his complaint is that his employment was "terminated on a without cause basis" in violation of subsection 240(1) of the *Code* which reads as follows:

> *DIVISION XIV*
>
> *UNJUST DISMISSAL*
>
> *Complaint to Inspector for unjust dismissal*
>
> *240. (1) Subject to subsections (2) and 242(3.1), any person*
>
> *(a) who has completed twelve consecutive months of continuous employment by an employer, and*
>
> *(b) who is not a member of a group of employees subject to a collective agreement, may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust*
>
> *Time for making complaint*
>
> *(2) Subject to subsection (3), a complaint under subsection (I) shall be made within ninety days from the date on which the person making the complaint was dismissed.*

SECTION XIV

CONGEDIEMENT INJUSTE

Plainte

240. (1) Sous réserve des paragraphes (2) et 242(3.1), toute personne qui se croit injustement congédiée peut déposer une plainte écrite auprès d'un inspecteur si :

(a) d'une part, elle travaille sans interruption depuis au moins douze mois pour le même employeur;

(b) d'autre part, elle ne fait pas partie d'un groupe d'employés régis par une con vention collective.

Délai

(2) Sous réserve du paragraphe (3), la plainte doit être déposée dans les quatre-vingt-dix jours qui suivent la date du congédiement.

In the present case, there is no dispute that the Complainant is an employee and has completed twelve consecutive months (12) of continuous employment and his application is timely.

4 On April 26, 2011, pursuant to the requirement of section 241(1) of the *Code*, the Employer provided a written statement in accordance with the said section which reads as follows:

Reasons for dismissal

241. (1) Where an employer dismisses a person described in subsection 240(1), the person who was dismissed or any inspector may make a request in writing to the employer to provide a written statement giving the reasons for the dismissal, and any employer who receives such a request shall provide the person who made the request with such a statement within fifteen days after the request is made.

Motifs du congédiement

241. (1) La personne congédiée visée au paragraphe 240(1) ou tout inspecteur peut demander par écrit à l'employeur de lui faire connaître les motifs du congédiement; le cas échéant, l'employeur est tenu de lui fournir une déclaration écrite à cet effet dans les quinze jours qui suivent la demande.

The Employer provided the following reasons for the Complaints' dismissal:

> Further to your letter dated 25 April 2011 in respect of the above-captioned and in particular, your request for a section 241(1) CLC letter, we advise that the complainant was terminated by AECL on a non-cause basis. In view of a number of recorded incidents over the course of his employment, it was determined he was not a proper fit and was provided the appropriate dismissal package in accordance with the CLC provisions and the common law.

5 On August 23, 2011, I was appointed as adjudicator by the Minister of Labour to hear the complaint at band. An extensive exchange of correspondence took place between September 13 and November 24, 2011, including a teleconference to determine the scope of a two day hearing scheduled on December 12 and 13, 2011. The issue, concerning the ability of an employer to dismiss the Complainant on a "without cause" basis, has been raised from the outset by Employer's counsel in his letter of September 13, 2011 where he made the following observation:

> Both AECL's letter of termination to the complainant dated 12 January 2011, and its section 241 letter to the HRSDC, dated 26 April 2011, confirm that the complainant was dismissed on a "non-cause" basis. He was consequently provided a severance package.
>
> Earlier this year, the complainant's counsel remitted the undersigned correspondence in which it appears that underlying basis for the complainant's claim is that an employer, pursuant to Part III of the Code, is precluded from terminating an employee "without cause". Such a claim, we submit goes directly to the foundation of, and is contrary to, the purpose of the notice and severance provisions of this legislation.
>
> To the extent that this specific legal issue will arguably be determinative of the complaint, we ask that the above referenced hearing date be reserved solely to address this preliminary matter. At that time, evidence adduced can be limited to whether the complainant's severance package provided met the requirement of the Code and the common law.

6 On October 17th 2011, Complaint's Counsel provided the following response relating to its position on this very matter:

> The Atomic Energy of Canada Ltd. (the "Company") has acknowledged that Mr. Champagne's termination was on a without cause / non-cause basis [...].
>
> On January 27, 2011, Mr. Dunsmore responded to Mr. Murphy. A copy of this letter is also enclosed. As the Company terminated Mr. Champagne's employment on a non-cause basis, our client is still seeking reinstatement with full back pay pursuant to subsection 240.2(4) of the *Code*, We expect the Company to call its evidence including all witnesses, and present its *full* case accordingly.
>
> In the letter of January 27, 2011, Mr. Dunsmore also invited the Company to provide him with law that suggested that the "right to seek reinstatement under s. 240.2(4) is eliminated by common law reasonable notice." The Company has never responded to this invitation.

7 During the teleconference of November 24, 20H, it was determined that the hearing schedule for December 12 and 13, 2011 would commence with the preliminary issue raised by the Employer in its letter of September 13, 2011. The Parties at the hearing have agreed upon the following statement of facts:

1. The Respondent Atomic Energy of Canada Ltd ("AECL") is an agent Crown Corporation that provides full service nuclear technology to nuclear utilities around the world on a commercial basis while meeting strategic science and innovation policy objectives for Canada.

2. On 30 October 2006, AECL hired the Complainant, Stephane Champagne, on a indeterminate basis, as a Fire Prevention Office, an "excluded position", which duties are outlines in the position's job description. He supervised no employees nor otherwise maintained any supervisory authority.

3. On 12 January 2011, AECL, terminated Mr. Champagne's employment on a "without cause", basis, as stipulated in his letter of termination (Exhibit "B") and confirmed in AECL's section 241(1) Canada Labour Code letter to Human Resources and Skills Development Canada (Exhibit "C"). This letter asserted that the dismissal was effected in view of "a number of recorded incidents over the course of his employments", resulting in a determination that "he was not a

proper fit" for the organization, His length of service with AECL was therefore approximately four (4) years and two (2) months in duration.

4. On his dismissal date, Mr. Champagne was offered, in consideration of his executing a full and final Release, a severance package totalling $38,723.08, which was equal to an aggregated total of 24 weeks (i.e. 6 months') pay. The details of this severance package are set out in his letter of termination (Exhibit "B"). Had his severance package been calculated in accordance with the minimum statutory notice and severance requirements of the Canada Labour Code (i.e. 230 and 235), his entitlement would have amounted solely to twenty-three (23) days' pay.

5. Ms. Champagne's severance package was determined in accordance with AECL's policy on the "Termination of Employment for Non-Bargaining Unit Employees' (Exhibit "D"). This policy was not registered with Mr. Champagne.

6. The Complainant did not execute the aforementioned Release referred to in paragraph 4 above. At his counsel's request, the Complainant remained on AECL's payroll until 09 February 2011 (i.e. 21 days following his date of dismissal), and on 12 February 2011, was paid out an additional twenty (20) days, in the amount of $6, 453.85. In summary, in the absence of a signed Release, AECL has, to date, paid a severance to Mr. Champagne amounting to forty-one (41) days' pay.

7. On the date of his termination, Mr. Champagne was 38 years old and was in receipt of an annual salary of $83, 900.00 that was comprised of the following components: $72,300.00 salary, $5,200.00 "on call" premium and $6,400.00 compression premium. In addition, Mr. Champagne was also covered by an extended health benefits package throughout his employment and was a member of a pension plan.

8. On 10 March 2011, Mr. Champagne filed and "unjust dismissal" complaint with the Human Resources Services Department Canada (HRSDC) pursuant to Part III of the Canada Labour Code (Exhibit "E"). The nature of his complaint is that he was "terminated on a without cause basis in violation of subsection 240(1) of the Code.

9. The above constitutes the full and complete facts placed before the Adjudicator to determine the preliminary questions of whether AECL could lawfully terminate the Complainant on a "without couse" basis, and if so, whether the severance package offered (in consideration of a Release (Exhibit F) gives rise to a "just" dismissal. No party shall adduce any further evidence in respect to these preliminary issues.

8 The sole issue to be determined is whether or not the Employer may invoke sections 230(1), and 235(1) of the *Code* and the common law in terminating the Complainant's employment on a "without cause" basis where the said Complainant has filed a written complaint pursuant to Division XIV, "Unjust Dismissal", section 240(1) of the *Code,* on the basis that he "considers the dismissal to be unjust".

II. THE POSITIONS OF THE PARTIES

A. The Employer's Position -- Grounds invoked by the Employer for terminating the Complainant's employment

9 Relying on sections 230 and 235 of the *Code,* the *Employer Procedure Manual Number 00-271.2* entitled *Termination of Employment for non bargaining unit employees,* section 5.3.1. and jurisprudence formulated in *Armsworthy v. L.H. & Co.,* [2005] C.L.A.D. No. 161 (Can Adj. Wakeling), *Prosper v. PADC Management Co.,* [2010] C.L.A.D. No. 430 (Can. Adj. Campbell), *Halkowich v. Fairford First Nation,* [1998] C.L.A.D. No. 486 (Can, Adj. Deely), *Daniels v. Whitecap Dakota First Nation* [2008] C.L.A.D, No. 135 (Can. Adj. Denysiuk) and *Chalifoux v. Driftpile First Nation-Driftpile River Band No. 450,* [2001] F.C.J. No. 1134 (T.D.), affd [2002] F.C.J, o. 1826 (C.A.) leave to appeal to the S.C.C., ref'd [2003] S.C.C.A. No. 87, the Employer maintains that it acted properly in terminating the Complainant's employment on January 12, 2011 on a "without cause" basis by providing wages in lieu of notice and further providing a severance pay in accordance with the *Code,* Simply put, the Employer maintains that it acted in accordance with its statutory rights in dismissing the Complainant on a "without cause" basis since it fully complied with the requirements of Part III, sections 230 and 235 of the *Code.* It must be stated that pursuant to the Complainant's request under provision 242(1) of the *Code,* the Employer explicitly stated that the Complainant's employment was terminated on a non cause basis adding that it was determined that "he was not a proper fit" due to a number of incidents during his employment. The Employer further maintains that his actions are in accordance with the rules governing dismissal at common law.

B. The Complainant's Position - Grounds invoked by the Complainant for rejecting the Employer's preliminary request for an order dismissing his complaint

In his submission, the Complainant's counsel invoked the following grounds:

a) Section 240 must be given the meaning intended by the Legislature. The

Employer's interpretation would render section 240 of the Code meaningless.

b) Alternatively, the Code grants adjudicators broad remedial powers to remedy an unjust dismissal. Those remedial powers would be rendered meaningless or unduly and improperly limited if an employer could circumvent the unjust dismissal provisions of the Code by paying what the employer determined to be common law reasonable notice.

c) The unjust dismissal provisions of the Code were introduced to address the shortfalls of the common law as it applies to federal employees, not to reinforce them.

III. Decision

10 The sole issue to be determined, is whether or not, the Employer, may benefit from sections 230(1) and 235(1) of the *Code* and the common law rules in terminating the Complainant's employment on a "without cause" basis where the said Complainant has filed a written complaint pursuant to Division XIV, "Unjust Dismissal", section 240(1) of the *Code* on the basis that he "considers the dismissal to be unjust". It must be emphasized that by reason of the narrow question, which must be answered in this preliminary award as described in Part I, I need not address the substantive issue as to whether or not the Complainant's conduct justified his dismissal on January 12, 2011 or whether it is deemed to be unjust under the terms of section 242(3) of the *Code*. This preliminary award deals solely with the interpretation and application of Division ÏX, "Individual Termination of Employment", sections 230, 232, 235 of the *Code* and Division XIV, "Unjust dismissal", sections 240 to 246.

A. Benefits-conferring legislation to he interpreted in a broad and generous manner

1. The scheme of Part III of the *Code*

11 The scope of Part III of the *Code* is similar to the one found in traditional working conditions and benefits granted under provincial minimum employment standards legislation. It comprises sixteen divisions under the following headings: (i) hours of work, (ii) minimum wages, (iii) equal wages, (iv) annual vacations, (v) general holidays, (vi) multi-employer employment, (vii) reassignment, maternity leave and parental leave, (viii) bereavement leave, (ix) group termination of employment, (x) individual terminations of employment, (xi) severance pay, (xii) garnishment, (xiii) sick leave, (xiv) unjust dismissal, (xv.1) sexual harassment, (xvi) administration and general, including provision related to recovery of wages namely articles 251.1 and section 254(1) related to deductions from wages. As indicated in Part II of the award relating to the position of the parties, this preliminary award is concerned solely with the interpretation and application of Division IX, "Individual Termination of Employment", and Division XIV, "Unjust dismissal".

12 In *Iron v. Kanaweyimik Child and Family Services Inc,* [2002] C.L.A.D, No. 517 reviewed in detail below, Adjudicator England addressed specifically the statutory meaning of "unjust" making reference to Justice Iacobucci's remarks:

> The correct interpretation of the word "unjust" in section 240 must be gleaned from the overall scheme and purpose of the section and the Code as a whole. In this regard, the courts have frequently held that employee right under protective employment standards acts such as Part III of the Canada Labour Code must be given a broad, generous and liberal interpretation so as to further the general remedial goal of such legislation. (See for example, the remarks of Iacobucci J. to this effect in Re Rizzo and Rizzo Shoes Ltd. (1998) 1 S.C.R. 27, at p. 36, involving the meaning of the word "terminated" in the Ontario Employment Standards Act).

13 In *Rizzo & Rizzo Shoes Limited* (1998) 1 S.C.R. 27, the Supreme Court of Canada found that the termination and severance pay provision of the *Employment Standards Act,* R.S.O. 1980 c. 137, namely section 40 and 40a), must be interpreted to include termination of employment resulting from bankruptcy of the employer. In arriving at this conclusion, Justice Iacobucci, made the following observation at paragraph 36 regarding the object of the *Employment Standards Act* as well as the rule of statutory interpretation which must be applied in resolving conflicts:

> [W]ith regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Attorney General of Canada*, 1983 CanLII 17 (S.C.C.), [1983] 1 S.C.R. 2, at p. 10; *Hills v. Canada (Attorney General),* 1988 CanLII 67 (S.C.C.), [1988] 1 S.C.R, 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40a of the *ESA,* the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

The learned judge added at paragraph 31:

> [T]he use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., *R. v. Vasil,* 1981 CanLII 46 (S.C.C.). [1981] 1 S.C.R. 469, at p. 487; *paul v. The Queen,* 1982 CanLII 179 (S.C.C), [1982] 1 S.C.R. 621, at pp. 635, 653 and 660).

14 In *Machtinger v. HOJ Industries Ltd,* [1992] 1 S.C.R. 986, cited in *Rizzo, supra,* Iacobucci J. formulated at paragraph 32 the same principle under heading D - Policy Consideration:

> Accordingly, an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not. In this regard, the fact that many individual employees may be unaware of their statutory and common law rights in the employment context is of fundamental importance, As B. Etherington suggests in "The Enforcement of Harsh Termination Provisions in Personal Employment Contracts; The Rebirth of Freedom of Contract in Ontario"(1990), 35 McGill L.J. 459, at p. 468, "the majority of unorganized employees would not even expect reasonable notice prior to dismissal and many would be surprised to learn they are not employed at the employer's discretion".

15 Considering the scheme of the legislation whose object is to confer benefits and to protect the interest of employees, Iacobucci J. found that it ought to be interpreted in favour of employees adding that "an overly restrictive approach that is inconsistent with the scheme of the Act" must be avoided. It is apparent that Division XIV, ss. 240-246 must be interpreted in the interest of employees such as the Complainant.

16 I should add as an à *côté* or by way of *dicta,* a parallel approach was adopted by the House of Lords in resolving a dispute regarding adverse possession by focusing on the benefits conferred by the legislation. In *J.A. Pye (Oxford) Ltd. v. Graham,* [2002] 3 W.E.R. 865, [2002] 3 W.L.R. 221 (H.L.), Lord Browne-Wilkinson guided by the object of the legislation, namely the *Limitation Act 1833,* made the following statement: "the sufficiency of the possession can depend on the intention not of the squatter [possessor] but of the true owner is heretical and wrong", It is apparent by looking at the object of the legislation, that the focus of the court is to afford the full benefit to those intended to be protected by the legislation. Justice Iacobucci raising policy consideration regarding the application of benefits -- conferring legislation made the same observation: "[...] an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not".

17 It is evident that where the conflict between the parties raises issues of statutory interpretation, with respect to "benefits-conferring legislation" such as those granted under Part III of the *Code,* that it must not only be interpreted in a broad and generous manner but also "be resolved in a favour of the claimant".

2. Termination of Employment on a "without cause" basis under sections 230(1) and 235 of the Code

a. Statutory rights conferred by sections 230(1) and 235

18 The Employer maintains that having regard to the language of section 230(1) of the *Cock,* the

Complainant's employment can be terminated in the absence of a "just cause" in accordance with these provisions, that is with notice or two weeks wages in lieu of notice. The relevant provision section 230(1) reads as follows:

DIVISION X

INDIVIDUAL TERMINATIONS OF EMPLOYMENT

Notice or wages in lieu of notice

230. (1) Except where subsection (2) applies, an employer who terminates the employment of an employee who has completed three consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, give the employee either

(a) notice in writing, at least two weeks before a date specified in the notice, of the employer's intention to terminate his employment on that date, or

(b) two weeks wages at his regular rate of wages for his regular hours of work, in lieu of the notice.

SECTION X

LICENCIEMENTS INDIVIDUELS

Préavis ou indemnité

230. (1) Sauf cas prévu au paragraphe (2) et sauf s'il s'agit d'un congédiement justifié, l'employeur qui licencie un employé qui travaille pour lui sans interruption depuis au moins trois mois est tenu :

a) soit de donner à l'employé un préavis de licenciement écrit d'au moins deux semaines;

b) soit de verser, en guise et lieu de préavis, une indemnité égale à deux semaines de salaire au taux régulier pour le nombre d'heures de travail normal

19 The Employer states that section 230(1) grants in the clearest terms the right to an employer to dismiss an employee without notice providing the wages requirement in lieu of notice is met. The Employer further maintains that the severance provision of the *Code*, namely section 235(1), similarly contemplates that a federal employee may be terminated on a "without cause" basis:

DIVISION XI

SEVERANCE PAY

Minimum rate

235. (1) An employer who terminates the employment of an employee who has completed twelve consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, pay to the employee the greater of

(a) two days wages at the employee's regular rate of wages for his regular hours of work in respect of each completed year of employment that is within the term of the employee's continuous employment by the employer, and

(b) five days wages at the employee's regular rate of wages for his regular hours of work.

SECTION XI

INDEMNITÉ DE DÉPART

235. (1) L'employeur qui licencie un employé qui travaille pour lui sans

> *interruption depuis au moins douze mois est tenu, sauf en cas de congédiement justifié, de verser à celui-ci le plus élevé des montants suivants :*
>
> > *(a) deux jours de salaire, au taux régulier et pour le nombre d'heures de travail normal, pour chaque année de service;*
> >
> > *(b) cinq jours de salaire, au taux régulier et pour le nombre d'heures de travail normal*

20 The Employer also maintains that the termination of the Complainants employment was exercised in conformity to section 230(l)(a) and it provided a severance pay in excess to the requirement of section 235(1) of the *Code.* The Employer further submitted that its statutory rights to dismiss the Complainant in the absence of "just cause" is reflected by the expiration of notice provisions found in section 232 in the *Code:*

> *Expiration of notice*
>
> ***232.*** *Where an employee to whom notice is given by his employer pursuant to subsection 230(1) continues to be employed by the employer for more than two weeks after the date specified in the notice, his employment shall not, except with the written consent of the employee, be terminated except by way of dismissal for just cause unless the employer again complies with subsection 230(1) in respect of the employee.*
>
> *Expiration du délai de préavis*
>
> ***232.*** *Si l'employé reste à son service plus de deux semaines après la date de licenciement fixée dans le préavis visé au paragraphe 230(1), l'employeur ne peut te licencier qu 'en se conformant de nouveau à ce paragraphe, sauf consentement écrit de l'employé à l'effet contraire ou cas de congédiement justifié.*

21 According to the Employer, these unambiguous provisions make it abundantly clear that the employer is granted the right to terminate his employees in the absence of "just cause".

22 In citing *Prosper v. PADC Management Co.,* the Employer submitted that the very purpose of sections 230(1) and 235 of the *Code* is to provide the employer the right to dismiss his employees on a "without cause" basis. Adjudicator Campbell made the following observations at paragraph 17:

> I conclude that a dismissal without cause, but with payment in lieu of notice as required at common law or under the notice provision of the *Canada Labour Code*, is not an unjust dismissal for the purpose of the *Canada Labour Code.* Section 230 of the Code states that except where a termination is by way of dismissal for just cause, employees must be given specified notice or payment in lieu of that notice, depending upon the length of employment with the employer. That section must mean (except where the termination is by way of dismissal for just cause) that if the proper notice or pay in lieu of notice is provided, then it is not an unjust dismissal I accept the argument of Adjudicator Deeley referred to above that "not all employees under federal jurisdiction will enjoy the security of tenure for life or until just cause for their termination can be shown. If the Code intended to prevent employees from being dismissed, except where the termination is by way of dismissal for just cause, there would be no requirement to set out the required notice provisions which they have done in s. 230(1) and s. 235(1). In conclusions, provided that the employer pays to the employee the greater of the benefits under s. 230 of the Canada Labour Code or the benefits under PAGC Personnel Policy Manual, then the complainant has no right to make a complaint under the Canada Labour code.

23 In the case of the complainant Dorothy Prosper, she had been employed as a Childcare Supervisor by the Prince Albert Grand Council from 1995 to 2002. On September 2002, she was re-hired by the Council as a cook and held that position until June 2008 when she was dismissed without cause. Having concluded that where an employer, such as the Grand Council, pays the employee the greater benefit of section 230 of the *Cock* or the benefit required under the Grand Counsel manual policy, the complainant Prosper had no right to make a complaint under the *Code,* The learned adjudicator made the following finding:

> ... I believe the complainant is entitled to two days of wages at the employee's regular rate of wages or her regular hours of work in respect of each completed year of employment that is within the term of the employee's continuous employment by the employer, plus the six weeks' notice required under the PAGC Personnel Policy Manual. This is what the PAGC Personnel Policy Manual provides and is certainly greater than what the Canada Labour Code requires. If the complainant has not received the amount referred to above, then she is entitled to a hearing under her complaint, but she is not entitled to a hearing if those payments have been made or offered. If she refused to accept payment for the six weeks' notice provided under the PAGC Personnel Policy Manual, then that payment will be deemed to have been paid.

24 Relying on the arbitral jurisprudence formulated by Adjudicator Campbell, the Employer submits that the Complainant was dismissed lawfully and cannot be considered to be unjust since it paid the greater of the benefits under sections 230 and 235 of the *Code* and the Employer's Manual

Personal Policy or otherwise in accordance with the common law.

25 In his 2010 Award, Adjudicator Campbell relied on *Halkowich v. Fairford First Nation*, [1998] C.L.A.D. No. 486 (Can. Adj. Deeley) and found on the facts of the case that "...an adjudicator does not have jurisdiction to make any award involving reinstatement or compensation since there has been no "dismissal" of the complainants". Adjudicator Deeley found that the three teachers with 18, 24 and 28 years of experiences, respectively, were first employed by the Federal Department of Northern Affairs. At the time of the termination of employment by Fairford First Nation, operating at Pinaymootang Education Authority, the employees were on a one year fixed term contract of employment. There was no suggestion that the teachers were not competent or that they could not have filled the vacancies which were advertised only a few days after receipt of the letter of May 14, 1996. Their contract was simply not renewed. Simply put, Adjudicator Deeley found that there were no dismissals under section 240 of the *Code* because the respective complainants were hired under a one year fixed term contract which was not renewed. The Adjudicator found that their employment ended by reason of the expiration of their one year contract. Rejecting the argument that under the *Code* that dismissal can only be for cause, the Adjudicator formulated the jurisprudence as follows at paragraph 87:

> Therefore, when the previously agreed fixed term of employment, expired, the employment contract was at an end. By agreement of the parties, the employment relationship was terminated. In my opinion this would not amount to a "dismissal" under Section 240 and 242 of the Canada Labour Code.

26 Accordingly, the Adjudicator found that he did not have jurisdiction to make an award involving reinstatement or compensation since the employer's conduct did not amount to a "dismissal" under sections 240 and 242 of the *Code.*

27 In *Armsworthy v. L.H. & Co.,* [2005] C.L.A.D. No. 161 (Can. Adj. Wakeling) the complainant filed an unjust dismissal complaint under section 240(1) of the *Code* alleging that his employment was unjustly terminated on February 2005. He had eight years of experience and was not seeking reinstatement. Adjudicator Wakeling found that the employer did not have just cause to dismiss the complainant and did not pay him the greater of his entitlement under sections 230(1) and 235(1) of the *Code* or under governing common law principles.

28 With respect to the remedies, having made reference to the applicable statutory provisions, namely sections 230(1), 235(2), 240(1)(2) and 242(4) of the *Code,* Adjudicator Wakeling made the following finding: "...an appropriate remedy under section 242(4) of the Canada Labour Code is a direction to Walton Trucking ordering it to comply with sections 230(1) and 235(1) of the Canada Labour Code". However, the Adjudicator found that the dismissal of the truck driver was unjust because the employer had failed to comply with sections 230(1) and 235 of the *Code* but had not driven the motor vehicle in an unsafely manner.

29 As to the application of section 242(4) enumerating the remedies which may be granted to a

complainant as a result of a finding of unjust dismissal, Adjudicator Wakeling made the following finding in *Armsworthy v. L.H. & Co* at paragraph 39:

> Exercising the authority bestowed on an adjudicator by section 242(4) of the Canada Labour Code, bearing in mind the principles set out in Memnook v. Cold Lake First Nations 16-17 (Wakeling, August 2, 2000), I order Walton Trucking to pay Mr. Armsworthy two weeks wages at his regular rate of wages and his regular hours of work, the obligation imposed on Walton Trucking under section 23091) of the Canada Labour Code, and five days wages at his regular rate of wages for his regular hours of work, the obligation imposed on Walton Trucking by section 235 (1) of the *Canada Labour Code,* The mileage part of the wage must be calculated using the 32 cents per mile rate in force on December 12, 2003.

30 In light of the arbitral jurisprudence cited above, the Employer maintains that having complied with the provision of 230(1) of the *Code,* it cannot be said that it acted unjustly in terminating the complainant's employment on January 12, 2011.

b The meaning of "unjust dismissal" pursuant the principles in *Knopp v. Westcan Bulk Transportation Ltd,* [1994] C.L.À.D. No. 172

31 According to the principles in *Knopp,* reference to "unjust" dismissal under sections 240 to 246 should be interpreted in a manner consistent with common law principles and not one that would create a "drastically different legal order". In *Chalifoux,* Adjudicator Wakeling rendered, on August 5th 1998, a decision where he found that the Driftpile First Nation had unjustly dismissed the complainant Elizabeth Chalifoux for failing to renew her employment contract as an elementary school teacher at the end of the school year of 1995-1996 where she had been teaching for 11 years. The Adjudicator awarded her compensation for $4, 393.24 but refused to reinstate her in her former employment as requested by the complainant. At page 1 of his decision, he provided the following reasons:

> Ms. Chalifoux asked me to reinstate her. I declined to do so. In Knopp v. Westcan Bulk Transport Ltd (Feb. 22, 1994) I stated that "in most cases of unjust dismissal under the Code an award which measured the compensation ... [an] employee ... would have received had he or she been given reasonable notice is appropriate and equitable... ." There was nothing in Ms. Chalifoux's situation which prompted me to conclude that I should exercise the power bestowed on an adjudicator under section 242(4)b) of the Canada Labour Code, R.S.C. 1985, c.L-2, as amended (sometimes the "Code") and order the band to reinstate her.

32 Complainant Chalifoux applied for judicial review and Justice Campbell directed Adjudicator Wakeling to revisit the issue related to reinstatement, having found his analysis to be "wholly deficient" and adding the following directives: "to reconsider the reinstatement issue after

"weighing...all considerations for and against an award of reinstatement, including an evaluation of the nature of the relationship between the applicant and respondent on the record as it exists".

33 Having reviewed the record "as it exists" Adjudicator Wakeling concluded that reinstatement was not an appropriate remedy providing the following reasons at paragraph 7:

> In most eases of unjust dismissal under the Code, an award which takes into account the compensation an employee would have received had he or she been given reasonable notice is appropriate and equitable. See Atomic Energy of Canada Ltd v. Sheikholeslami, [1998] 3 F.C. 349. 363 n.6 & Knopp v. Westcan Bulk Transport Ltd. 15 & 16 (Wakeling Feb. 22, 1994). I was fully aware that Ms. Chalifoux was a status Indian, that she had to make some adjustments to her lifestyle as a result of the loss of her employment with the band, that she would have to pay income tax on her off-reserve employment income and that she was a competent teacher and was willing to work with those who administer and teach at the band's school, I was satisfied then and I am satisfied now, after weighing ... all considerations for and against an award of reinstatement", that reinstatement is not an appropriate remedy on the facts of this case.

34 The relevant provision of the *Code* cited by the Adjudicator, namely Part III, Division XIV, "Unjust Dismissal", section 242(4) of the *Code*, provides that an adjudicator may, after a finding of a just dismissal, order the following remedies:

> *Where an adjudicator decides pursuant to subsection 3 that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to*
>
> *(a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;*
>
> *(b) reinstate the person in his employ; and.*
>
> *(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.*

35 Adjudicator Wakeling held that the meaning to be given to "unjust dismissal" must be governed by the principles formulated in his 1994 decision, *Knopp, supra*, as described in paragraph 12 and which has been adopted subsequently by some adjudicators:

> A series of cases, the first of which Knopp v. Westcan Bulk Transportation Ltd. (Wakeling Feb. 22, 1994) and the last of which is Chalifoux v. Driftpile First Nation-Driftpile River Band No. 450 (Wakeling Aug. 5, 1998), set out the principles which I think determine whether a dismissal is unjust under the Code. Associate Dean Ross of the University of Alberta Faculty of Law discussed theses principles in the following passage in Jalbert v. Westcan Bulk Transport Ltd. 7-8 (July 18, 1996):
>
> > Adjudicator T. Wakeling determined [in Knopp v. Westcan Bulk Transport Ltd.] that for a dismissal to be unjust, there must not only be a lack of just cause, but also a failure to provide the employee with "the more generous of the dismissal packages required by sections 230(1) and 235(1) of the Code and at the common law"... . He was of the view that the Code's preservation of common law remedies, and its lack of an express provision giving employees a "right to the job" meant that s. 240's reference to "unjust" dismissal should be interpreted in the manner consistent with common law principles, and not in a manner that would create a "drastically different legal order". I agree.
> >
> > ...Adjudicator Wakeling reviewed the language in the Code and found no express or implied statement that employees cannot be discharged except for just cause... . Others have taken the opposite position (I. Christie, Employment Law in Canada" p. 669 and D. Harris, Wrongful Dismissal, pp. 6.7-6,9) but they assume without a clear rational that the term "unjust dismissal" means dismissal without just cause, as opposed to a distinct meaning closer to common law wrongful dismissal. In my view, Adjudicator Wakeling's conclusion to the contrary is better reasoned.

36 Adjudicator Wakeling, in support of his finding as to the meaning of unjust dismissal under sections 240-246, devoted twenty four pages of his decision regarding the preparatory work of *The General Conference of the International Labour Organisation,* more specifically the Convention No. 158 concerning *Termination of Employment* at *The initiative of the Employer,* as well as the view of academic writers and adjudicators regarding the proper interpretation of "unjust dismissal" under the said provision of the *Code.* See paragraphs 15-71.

37 The complainant *Chalifoux* sought a judicial review of the Adjudicator's second decision. Justice Gibson, having found that Adjudicator Wakeling had dwelt at considerable length on his view that reinstatement following unjust dismissal is neither a right nor a presumptive right, made the following observation:

> I find that portion of the adjudicator's decision to be entirely obiter, given the mandate given to him by Mr. Justice Campbell. While counsel for the applicant urged that the adjudicator erred in this aspect of his decision, counsel acknowledged that that aspect of the decision was obiter. ïn the circumstances, I will not dwell on the merits or demerits of that portion of the adjudicator's decision.

38 In conducting the judicial review, Justice Gibson indicated that the sole issue to be determined was whether or not the Adjudicator had made an analysis of all consideration for and against an award of reinstatement as mandated by Mr. Justice Campbell. In quashing the application, Justice Gibson concluded "that the adjudicator made no reviewable error in deciding as he did with respect to the mandate given to him by Mr. Justice Campbell", adding the following observation at paragraph 23:

> At risk of being accused of equally failing to engage in an adequate analysis of the issue before me, I conclude, with some regret, that the adjudicator's weighing or analysis of the factors for and against reinstatement is sufficient to justify his conclusion. In reaching this conclusion, Ï take into account the restriction on the mandate afforded to the adjudicator by Mr. Justice Campbell relating to the consideration of further and perhaps more time-relevant evidence regarding the impact that reinstatement might have. While I am satisfied it might. have been open to the adjudicator on his own initiative, to nonetheless seek out evidence as to current impact, I conclude that it was not incumbent on him to do so. The failure to take into account some of the evidence before him regarding the impact that reinstatement, might have had some years ago is, I conclude, not determinative.

39 Justice Gibson's review of Adjudicator Wakeling's decision was limited to the interpretation and application of section 242(4) of the *Code*, The complainant *Chalifoux* appealed from the order dismissing her application for judicial review. Justice Desjardins, speaking for the Federal Court of Appeal, limited her decision to the application of section 242(4). The learned judge found that the refusal of the adjudicator to reinstate the complainant under section 242(4) of the *Code* was within the discretion of the adjudicator providing the following reasons at paragraph 30:

> It is clear from section 242 of the Code that adjudicators have a very broad discretion in fashioning an appropriate remedy for unjust dismissal. The existence and breadth of that discretion is recognized in Atomic Energy of Canada Ltd., supra., considering, in particular, the applicable test of patent unreasonableness. Gibson J, held, in the case at bar, that the weighing analysis done by the adjudicator, although thin, was nevertheless sufficient, considering the limitation set by Campbell J. that the relationship between the employer and employee be considered on the record as is. I see no reviewable error in Gibson

> J.'s appreciation of the adjudicator's decision which would warrant our intervention.

40 Desjardins J. also made reference to *Atomic Energy of Canada Ltd.* in paragraph 14 where her own court made the following observation regarding the interpretation and application of section 242(1) in the following terms:

> In his statement, Marceau J.A. recognizes however recognizes the importance of "making whole" an employee's real world losses caused by dismissals (See in this regard Slaight Communications Inc. v. Davidson, [1985] 1 F.C. 253 at 257 (C.A.), per Urie J.; Banca Nazionale Del Lavaro of Canada Ltd. v. Lee-Shanok, [1988] F.C J. No. 594 (C.A.), pages 7 to 9).

41 Furthermore, Desjardins J., at paragraph 13, provided the following analysis regarding the Adjudicator's discretion in ordering the complainant's reinstatement:

> The word "may" found in subsection 242(4) of the Code also suggests that reinstatement is only one of a number of remedies available to the adjudicator. This view is confirmed by the majority opinion of this Court in Atomic Energy of Canada Ltd., supra, where Marceau LA., speaking for himself and for Strayer J.A., writes at paragraphs 11 and 12 of his reasons.
>
> [...]
>
> The unfair dismissal provisions for non-unionized employees in the Canada Labour Code no doubt represent a statutory modification of the traditional rule that an employment contract will never be specifically enforced. But they certainly do not, and even could not, go as far as to create a right in the person of the wrongfully dismissed employee. It would be contrary to the common sense that precisely supports the traditional rule. They simply provide for reinstatement as a possible remedy that may be resorted to in proper situations. It is often said that, in practice, it is the remedy favoured by adjudicators in their efforts to "make whole" an employee's real-world losses caused by dismissal. It is undisputable, however, on a mere reading of subsection 242(4) of the Code, that an adjudicator is given full discretion to order compensation in lieu of reinstatement, if, in his opinion, the relationship of trust between the parties could not be restored.

42 The Employer maintains that the jurisprudence fully supports its position that reinstatement under section 242(4) may not be invoked by the Complainant since its actions in terminating his employment are on a "without cause" basis. It further emphasized that it was exercising its statutory

rights, granted under the provisions of sections 230(1) and 235 of the *Code,* as well as the requirement of the common law, including the severance package.

43 Accordingly, the Employer submitted that in view of its action described above, it cannot be said that the Complainant's dismissal constitutes an unjust dismissal. Therefore, the Employer requests a decision and an order that the complaint be dismissed. Simply put under the *Knopp* principles formulated by Adjudicator Wakeling, Division X, "Individual Termination of Employment", and Division XIV, "Unjust Dismissal" in Part III of the *Code* are not stand alone divisions. Indeed, they provide different benefits to employees depending upon years of service and must be read together. Thus in accordance with the *Knopp* principles" the remedies provided in section 242(4) of the *Code* only arises when the employer has not fully complied with the provision of sections 230(1) and 235 of the *Code,* resulting in a finding of unjust dismissal by an adjudicator. Under the *Knopp* principles the remedial provisions pursuant to section 242(4) only arises where an adjudicator has made a finding of unjust dismissal under Division X, "Individual Termination of Employment".

44 The Employer also maintained that there is a complete absence of any provisions in the Code, stating that federal employees may only be terminated for cause. In its submission regarding section 240(1) of the *Code,* the Employer indicated that a person that considered his or her dismissal to be "unjust" may file a complaint with HRSDC. Under the provision of section 242(3)(a) of the *Code,* an adjudicator to whom the complaint has been submitted must determine whether the person's dismissal was unjust. However, the Employer emphasize that the Code does not provide a definition or guidance as to the meaning of unjust dismissal. Citing *Chalifoux*, the Employer submitted that there is a complete absence of any provision in the *Code* that states that federal employees may only be termination for cause, adding that "had Parliament intended this to be the case it would have expressly provided for it". Adjudicator Wakeling made the following observation for justifying his conclusion at paragraph 13:

> The analysis presented in Knopp v. Westcan Bulk Transport Ltd. still appeals to me. It is consistent with the Federal Court of Appeal's decision in Atomic Energy of Canada Ltd. v. Sheikholeslami, [1998] 3 F.C. 349. Those who have expressed a contrary opinion have not explained in a manner I regard as convincing why Parliament, if it intended An Act to amend the Canada Labour Code, S.C. 1977-78, c. 27, s. 21 (sometimes "Bill C-8") to limit the right of an employer to terminate an employment relationship to cases where just cause existed, did not say so.
>
> Nova Scotia's Legislative Assembly did not have any difficulty when passing An Act to Amend Chapter 10 of the Acts of 1972, the Labour Standards Act, S.N.S. 1975, o. 50, s. 4 plainly stating that an "employer shall not discharge ... [an] employee without just cause". This is not a challenging task for a legislative

> drafter. Federal officials were aware of Nova Scotia's legislative initiative, having met with their Nova Scotia counterparts as part of the consultative process preceding enactment of An Act to amend the Canada Labour Code, S.C. 1977-78, c. 27, the legislation which contained the unjust dismissal provisions. Minutes of Proceedings and Evidence of the Standing Committee on Labour, Manpower and Immigration respecting Bill C-8, An Act to amend the Canada Labour Code 1.18 (House of Commons Feb. 9, 1978).

45 The Employer further submitted an example where Parliament expressly prohibits federal employees from being dismissed "without cause" in the *Financial Administration Act* where section 12(3), excluding Crown Corporations, explicitly provides that termination of employment *"may only be for cause"*. It reads as follows: "Disciplinary action against, or the termination of employment or the demotion of, any person under paragraph *(1)(c), (d),* or *(e)* or *(2)(c)* or *(d)* may only be for cause". The Employer emphasized that no such restriction exists under the *Code.* To the contrary, the *Code* specifically contemplates that employees may be terminated on a "without cause" basis, provided appropriate statutory notice and severance requirements are met. The Employer further submitted that, the "notice" or "wages in lieu of notice" under section 230 of the *Code,* confirms that an employee's dismissal may be effected in the absence of "just cause", as well as under the severance provision of section 235 of the *Code.*

> **3. Rights or benefits conferred to the Complainant under sections 240 to 246 of the Code.**

46 Relying on *Roberts and the Bank of Nova Scotia,* 38 A.C.W.S (2d) 247 (1979) 1 L.A.C. (3d) 259 at paragraph 11, 16 - 19 (Adams), *Re Canadian Imperial Bank of Commerce and Boisvert* [1986] 2 F.C. 431, *Iron v. Kanaweyimik Child and Family Services Inc,* [2002] C.L.A.D. no. 517 as well as academic writing,, the Complainant maintains that he may fully rely on section 240 of the *Code,* providing non-unionized employees with a remedy for unjust dismissal even though the employee had been given proper notice of termination. Reference was also made to the comments of the Minister of Labour when the honourable member introduced the 1978 legislation, "Minutes of Proceedings and Evidence of the Standing Committee in Labour, Manpower and Immigration", 3rd session, 30th Parliament, March 16, 1978, at. P.p. 11, 46-47:

> Unjust dismissal: The intent of this provision is to provide employees not represented by a union, including managers and professionals, with the right to appeal against arbitrary dismissal-protection the government believes to be a fundamental right of workers and already a part of all collective agreements.
>
> [...]
>
> Undoubtedly there will be certain costs involved but their sum will not be

> unreasonable, especially in view of the fundamental right that is being protected. The arbitration process outlined in the amendment will allow workers to appeal to Labour Canada if they feel they have been unjustly dismissed. If the matter cannot be resolved by a labour affairs officer of the department, the matter will be referred to the Minister of Labour who will then decide whether the case should be referred to an adjudicator.
>
> *Congédiement injuste* : Cette disposition foumit aux employés qui ne sont pas représentés par un syndicat, y compris les cadres et les membres de professions libérales, un droit d'appel contre tout congédiement arbitraire; ce droit assure une protection dont, solon le gouvernement, tous les travailleurs doivent bénéficier et qui figure également dans toutes les conventions collectives.
>
> [...]
>
> Il ne fait aucun doute qu'il y aura certains coûts à assumer, mais ils seront raisonnables, particulièrement si l'on tient compte du droit fondamental qui est protégé, Le processus d'arbitrage exposé dans la modification permettra aux travailleurs d'en appeler h Travail Canada s'ils estiment avoir été injustement congédiés. Si la question ne peut être réglée par un agent des affaires du travail du Ministère, elle sera transmise au ministre du Travail qui déterminera alors si le cas devrait être transmis à un arbitre.

47 Accordingly, the Complainant submitted that the government, in introducing sections 240 - 246 of the *Code* in 1978, expressly recognised the goal of equal treatment between unionized and non-unionized workers, Citing *Re Roberts and Bank of Nova Scotia* (1979) 1 L.A.C. (3d) 259, the Complainant's counsel submitted that the object of section 240 of the *Code* was broadly interpreted by Arbitrator Adams. In describing the impact of the 1978 legislation as "one of the most novel employment law experiments in North America", the Adjudicator highlighted the just cause provisions of section 240 of the *Code* as follows:

> When Parliament used the notion of "unjustness" in framing s. 61,5, [ss. 240-246] it had in mind the right that most organized employees have under collective agreements - the right to be dismissed only for "just cause". I am of this view because the common law standard is simply "cause" for dismissal whereas "unjust" denotes a much more qualitative approach to dismissal cases. Indeed, in the context of modern labour relations, the term has a well understood content - a common law of the shop if you will: see Cox, "Reflections Upon Labour Arbitration", 72 Harv. L. Rev. 1482 (1958) at p. 1492.

48 Similarly, it was submitted that the Federal Court gave a special meaning to the term unjust dismissal In *Canadian Imperial Bank of Commerce and Boisvert* [1986] F.C. 431., Marceau J.A., speaking for the Federal Court of Appeal, reiterated that section 242 does not contain a definition for the term "unjust dismissal". However, he noted that courts have attached certain criteria to the concept of "just dismissal", requiring an employer to show objectivity or a "real and substantial cause", Marceau J.A. at paragraph 44:

> The very right of dismissal has been completely altered to preclude arbitrary action by the employer and to ensure continuity of employment. Only a right of "just" dismissal now exists, and this certainly means dismissal based on an objective, real and substantial cause, independent of caprice, convenience or purely personal disputes, entailing action taken exclusively to ensure the effective operation of the business.

49 Simply put, the Complainant maintains that sections 230 and 235 of the *Code,* relied upon by the Employer do not meet the purpose or intention of section 240, namely the threshold of substantial cause. Most specifically, it is submitted by the Complainant that Division XIV, "Unjust Dismissal", sections 240 - 246 of the *Code* constitutes a complete scheme for addressing unjust dismissal complaints.

50 Citing *Iron v. Nanawayimik, supra,* counsel for the Complainant emphasized that the Employer's position concerning the notion of termination of employment on a "without cause" basis, relying on sections 230 and 235 of the *Code,* has been rejected as being repugnant with the purpose and intent of section 240 of the *Code.* In *Iron,* Adjudicator England reviewed the context of Adjudicator Wakeling's decision in *Chalifoux* and other similar cases reviewed in Section 2 a. and b. He made the following observations:

> In my view, it would be repugnant with the remedial policy of section 240 if an employer were allowed to dismiss an employee for "cause" according to the employer's whim and fancy simply by providing the employee with the requisite pay in lieu of notice required to terminate the contract lawfully at common law, Suppose, for instance, that the employer includes an express term in the contract of employment stating that two week's notice of termination must be given, and assume that this conforms with the minimum notice required under section 230 of the Code.

The Adjudicator further elaborated on the purpose of section 240 of the *Code* in the following manner at paragraph 60:

> Assuming that the vary purpose for enacting section 240 in the first place was to remedy the deficiencies of the common law wrongful dismissal action - such an assumption is highly plausible for otherwise there would seem to be no reason for the enactment - one such deficiency is that the employer can insulate its

> substantive reasons for dismissal from review by a neutral adjudicator by the simple technical device of complying with the contractual notice requirement. It seems to me that the legislators intended a section 240 "just cause" review to pierce the technical veil of the contractual notice requirement and focus on the substance of employer's grounds for dismissal by applying criteria such as rationality, proportionality, good faith, discrimination, arbitrariness and procedural fairness.

51 In reviewing the facts in *Kanawyimik,* the Complainant's counsel noted that the very same issue was raised, namely whether the employer had terminated the complainant's employment on a "without cause" basis having offered three months of pay in lieu of notice. The employer had terminated the complainant's employment because of an alleged personality conflict with her supervisor. Adjudicator England rejected the employer's position that it could terminate employment, pursuant to the provision of the common law notice and that such dismissal was not unjust. Simply put, the Complainant submitted that the Employer's proposition regarding the application and interpretation of sections 230 and 235 of the *Code* must be rejected and effect must be given to meaning of section 240 of the *Code* as intended by the Legislature.

52 The Complainant also cited *Lockwood v. B&D Walter Trucking Ltd,* [2010] C.L.A.D. No. 172, where Adjudicator K. Williams-Whitt was confronted with a set of facts similar to the case at hand. He made the following ruling in the clearest terms, against the Employer's position:

> I have no doubt that the principals of B&D Walter Trucking sincerely believed they were complying with the requirements of the Canada Labour Code. However, their understanding of the just cause requirement and their argument that there is a common law right to dismiss employees as long as they provide the requisite pay in lieu of notice and severance must fail. They needed to have just cause to dismiss Mr. Lockwood.

53 In that case the employer had relied solely on sections 230 and 235 of the *Code,* where his position had been summarised as follows at paragraph 60: "it is the position of the Employer that as a necessary part of running the business, they are allowed to terminate an employee as long as they follow the rules in the Canada Labour Code, particularly section 230 and 235 ..."

54 For these very reasons, the Complainant submits that the Employer's position must be rejected. See also *Stack Valley Freight Ltd. v. Moore* [2007] C.L.A.D. No. 191 at para. 33 and *Morriston v. Gitanmaax Band* [2011] C.L.A. no. 23 at paragraph 27.

> **4. Effect must be given to the benefits conferred by sections 240 to 246, unjust dismissal to the categories of persons described therein**

55 Having regard to the evidence, the purpose of the benefits-conferring provisions of sections 240 - 246 of the *Code* as formulated in *Rizzo, supra,* and by the Minister of Labour, *Roberts,* the

seminal decision on point, as well as the jurisprudence reviewed above. I am in agreement with the Complainant's submission that sections 230 and 235 may not be invoked by the Employer to the prejudice of the said Complainant. Furthermore, if there is a conflict between these benefits-conferring provisions of the *Code*, namely section 230 and 235, Division X, and sections 240 to 246, Division XIV, under the principles formulated in *Rizzo, supra*, Section 1, it "should be resolved in favour of the claimant", the Complainant in the present case.

56 I am also in agreement with *Lockwood* cited above, where Adjudicator K, Williams-Whitt, in his 2010 decision, fully endorsed *Roberts* summarizing its effect as follows:

> I will deal first with the "common law right to dismiss" as long as pay in lieu of notice and severance are provided to the employee. In *Roberts and Bank of Nova Scotia (1979), 1 L.A.C. (3d) 259*, Adjudicator George Adams addresses this very question. Adjudicator Adams held that by making the unjustness of dismissal subject to review as it is in sections 242 and 243 of the *Code*, Parliament intended to provide non-union employees with just cause protection similar to that enjoyed by unionized workers. This means that employees covered by the *Canada Labour Code* are protected from being dismissed except where there is just cause.

57 In *Stack Valley Freight Ltd. v. Moore, supra*, a 2005 decision, Referee Groves, in dealing with the wage recovery provision of Part III, made the following observation with respect to the meaning of "just cause" under the *Code:*

> The *Code* nowhere expressly defines the phrase "just cause". Nevertheless, it has been interpreted to embody a statutory meaning which has more in common with the standard applied by collective agreement arbitrators in a union setting than the common law concept of cause in wrongful dismissal complaints decided by courts.

58 I support the Complainant's submission that Division XIV, comprising sections 240 to 246 construed together, permit an employee who has been dismissed from his or her employment for reasons other than lay off or discontinuance of a function, to seek written reasons for the dismissal And, if the employee feels those reasons are unjust, he or she may file a complaint alleging unjust dismissal under the provision of section 240(1).

59 Looking at Part III of the *Code* as a whole, it is apparent that the sixteen Divisions provide employees specific benefits found in many minimum employment standards legislation. I am also of the view that there is no foundation for limiting a finding of "unjust dismissal" to cases where the employer has failed to give a proper notice or wages in lieu of notice under section 230 or has failed to provide the required severance pay under section 235. Section 240 speaks to a person who considers his or her dismissal "to be unjust". Division X, section 230 provides certain wages or notice in lieu of wages for a person who has worked for a three consecutive month period following

a termination of employment. Severance pay is guaranteed to those persons who have worked for a twelve consecutive month period.

60 Similarly, Division XIV, "Unjust Dismissal", section 240(1), speaks to any person who "has completed twelve consecutive months of continuous employment" and is not a member of a bargaining unit under a collective agreement. Such a person, provided it acted in a timely manner, may make a complaint in writing to an inspector "[(i)] if the employee has been dismissed and [(h)] considers the dismissal to be unjust". The French version makes it abundantly clear that section 240(1) grants an absolute right in providing that: "toute personne qui se croit injustement congédié peut déposer une plainte écrite auprès d'un inspecteur". The language of section 240(1) under Division XIV is a standalone section in that it is not dependent upon its operation on any other divisions such as Division X. It provides benefit to the category of employees described therein to have their complaint adjudicated under the provision of section 242.

61 Moreover, there is no provision under Division XIV, "Unjust Dismissal", sections 240 - 246 permitting an employer to derogate from its statutory obligation under s. 240(1) requiring "to provide a written statement giving the reasons for the dismissal to an inspector" nor is there any provision allowing an employer for interfering with the appointment of an Adjudicator under provision 241(3) of the *Code.* Simply put, the Employer cannot derogate from the provisions of section 240(1) of the *Code,* nullifying the benefit conferred upon the Claimant by means of a letter of termination asserting that it is on "without cause" basis where an employee alleges that he or she considers his or her dismissal to be unjust. Division XIV, paragraph 3 of the *Code,* section 246, constitutes a complete code or mechanism for a category of persons benefiting from the said provisions advancing a claim of unjust dismissal.

62 Where other provisions of Part III apply to the operation of Division XIV, it specifically makes reference to such provisions, thus section 246(2) states that section 189 of Division IV applies to Division XIV, By way of comparison, it is important to note that Division X, "Individual Termination of Employment", sections 230 - 237 is similar in scope in that it makes reference to no other provision of Part III except section 189.

63 in *Furber v. Polymer Distribution Inc.,* [2011] C.L.A.D. No 112, although Adjudicator Petersen was not dealing with the application of sections 230 and 235 of the *Code* but rather with the application of section 240, made reference as to the distinction which must be made regarding the purpose of those different provisions of the *Code:*

> One of the major differences between, for example, an action for wrongful dismissal and a Section 240 complaint are the remedies available to adjudicators. The traditional award for wrongful dismissal is damages measured by reasonable notice, and some adjudicators have followed that approach. The policy rationale underlying Section 240 is to make the successful complainant "whole," re-instatement, despite being granted sparingly, is the presumptive remedy under

Section 240.

64 It is apparent that the two approaches cannot be reconciled. On the one hand, in *Prosper, supra,* a 2010 decision, Adjudicator Campbell, in applying the principle formulated in the 1994 *Knopp* decision, gave full effect to section 230 depriving the Complainant of any of the benefits conferred under sections 240 - 246 of the *Code,* The Adjudicator summarized the principles as follows in the last three lines of paragraph 17 cited above in Section 2 a.:

> In conclusions, provided that the employer pays to the employee the greater of the benefits under s. 230 of the Canada Labour Code or the benefits under PAGC Personnel Policy Manual then the complainant has no right to make a complaint under the Canada Labour code.

65 Similar conclusions were reached in two 1998 decisions namely, *Halkowich, supra,* and *Chalifoux, supra,* and one in 2005 *Armsworthy, supra.*

66 On the other hand" in *Lockwood, supra,* a 2010 decision, Adjudicator K. Williams-Whitt, in rejecting the employer's proposition regarding the application of sections 230 and 235 as being inconsistent with the scheme of Part III of the *Code,* held that full effect must be given to section 240 as intended by the Legislature. In *Morrison v. Gitanmaax Band* [2011] C.L.A.D. No. 23, Adjudicator Petersen, in dealing with an application under section 240 having found that the Complainant had been unjustly dismissed, made two pertinent observations regarding its operations at paragraphs 20 and 27:

> Under the *Canada Labour Code,* for policy reasons, an adjudicator lacks jurisdiction in certain specific circumstances, where the employer, for *bona fide* business reasons, reorganized or downsizes its workforce due to economic or business reasons *(Bagelman v. Kwakiutl Laich-Kwil-Tach Nations Treaty Society* [2002] C.L.A.D. No. 192 (Love)) [...]

> Most adjudicators give "just cause" a broader meaning than the common law standard, closer to the standard applied by collective agreement arbitrators. This reflects, in my view, the remedial purpose of s. 240, counteracting the perceived deficiencies in the common law principles of wrongful dismissal.

67 Since there is a conflict regarding the interpretation and application of two divisions of Part III, namely Division X, "Individual Termination of Employment", sections 230 and 235, and Division XIV, "Unjust Dismissal", sections 240 - 246, the latter ought to be resolved, according to *Rizzo, supra,* in favour of the Complainant. These provisions, namely sections 240 - 246, have been enacted to protect the interest of employees described as benefits - conferring legislation. The object of sections 240 - 246 once described as "one of the most novel employment law experiments in North America" by Adjudicator Adams must be given its intended meaning.

68 Having regard to the exhaustive and learned review of the preparatory work of *The General Conference of the International Labour Organisation* prior to the adoption of Division XIV, sections 240 - 246 of the *Code* made by Adjudicator Wakeling and an equally learned review of the history of the legislation by Adjudicator England, there can be no dispute as to the conflicts regarding the interpretation of the two divisions referred to above. In *Rizzo, supra,* Justice Iacobucci provided the following guideline to resolve the kind of conflict which exists between the two distinct divisions of Part III of the *Code,* as relied upon by the parties: "Any doubt arising from difficulties of language should be resolved in favour of the claimant".

69 Moreover, to borrow the words of Justice Iacobbuci, section 240 must be given a "broad, generous and liberal interpretation so as to further the general remedial goal of such legislation". When a person considers his or her dismissal to be unjust and choose to file a complaint in accordance with the provision of the said section 240, full affect must be given to the benefit-conferring legislation notwithstanding the fact the he or she has been served with a notice of termination in accordance with sections 230 and 235 of the *Code.*

B. Alternatively, the *Code* grants adjudicator broad remedial powers to remedy an unjust dismissal.

70 The Complainant maintains that those remedial powers granted to adjudicators under section 242(4) of the *Code* would be rendered meaningless and improperly limited if an employer could circumvent the unjust dismissal provisions of the *Code* by paying what the employer determined to be common law reasonable notice. Furthermore, in *Mathur v. Bank of Nova Scotia* (2001) C.L.A.D. No. 524, Adjudicator T.E. Armstrong made an exhaustive review following a 19 days hearing, including decisions of Adjudicator Wakeling in both *Knopp* and *Chalifoux* and made the following observation at para 58:

> ...it is unecessary for me to embrace or repudiate the contending views to which adjudicator Wakeling refers. Nor is it necessary for me to express an opinion, in determining the meaning of s. 240 of the Code, as to whether there is a meaningful distinction between "just cause" and "unjust dismissal". Whether Wakeling's analysis of that issue is correct or not, he concludes in Knopp, at page 15 of the award that s. 242(4) does nothing more than give the adjudicator the power to order remedies not available at common law. The adjudicator may nonetheless decide that remedies at common law are equitable.

71 Arbitrator Armstrong in emphasizing the broad scope of remedies, available under section 242(4)(b) of the *Code* made the following statement: "I have concluded that my right to consider broad spectrum of remedies, including, reinstatement is unfettered".

72 The Complainant also relied on *Sherman v. Bank of Montreal* (2011) C.L.A.D. No. 213 where Adjudicator Murray, following an 11 day hearing, made an exhaustive review of the jurisprudence dealing with the issue at hand including *Chalifoux* and stated that section 242(4) of the *Code,* "vests

Adjudicator with a broad corrective mandate". In that case, Adjudicator Murray continued to hear and review all of the submissions, evidence and consideration of the parties in accordance with the Code, The hearing proceeded despite the fact that the termination of 44 year-old employee, who had a 12 year tenure, was on a "without cause" basis and the employer had provided 68 weeks of notice. Ultimately, the complainant was awarded reinstatement, albeit at a different bank location.

73 Having regard to the facts as agreed by the parties, the benefits conferred by sections 240 - 246, under heading "Unjust Dismissal" and the jurisprudence reviewed above, Ï am of the view that sections 232 and 235, under heading "Individual Terminations of Employment", may not be invoked to by the Employer to the prejudice of the Claimant.

C. Termination of Employment Pursuant to *Employer Procedure Manual* section 53.1 and the common law

74 Relying on the *Employer Procedure Manual Number 00-2 71.2* under heading *Termination of Employment for non bargaining unit employees,* section 5.3.1 *Termination Compensation for Non-union, Non-management Employees* and the jurisprudence formulated in *Prosper,* the Employer maintains that the complainant's employment was properly terminated. Adjudicator Campbell in *Halkowivch* having found, in the alternative, that the contract of employment provided a mechanism for the termination of employment, made the following observation:

> It was agreed by the parties that pursuant to section 6(b) the contract could be terminated by written notice given at least one month prior to the 15th of June, terminating the contract on the 30th June. One May 24, 1996, such notice was given to the complainants. Therefore, under the agreed terms of the agreement in question the contract of employment was terminated.

He added that:

> The question again becomes whether that termination of the written agreement, carried out in a manner previously mutually agreed to, constituted a "dismissal" under the provisions of the *Code.*

75 Citing the Federal Court of Appeal in *Eskasowni School Board v. Maclssac* (1986), 86 C.L.L.C. 12, 247, the Adjudicator found support for his conclusion that the complainant was not dismissed. Therefore, a person employed under a written contract for a specific period of one year cannot be "dismissed" under the *Code* when there is failure to renew such a fixed term contract. Justice Pratt speaking for the Court of Appeal made the following observation:

> The Labour Code does not contain any definition of the words "to dismiss" and "dismissal". However, the meaning of these words and of their French equivalents "congédier" and "congédiement" is reasonably clear: They all refer to an act or decision of an employer that has effect of terminating a contract of

> employment. In the absence of a statutory provision extending the normal meaning of these expressions, I am unable to read them as embracing the failure of an employer to renew a contract of a fixed term of employment.

76 In *Sagkeen Education Authority v. Guimond* (1996), 16 C.C.E.L. (2d) 259, the Trial Division of the Federal Court of Canada came to the same conclusion. See also *Lahache and Poison v. The Long Point Band Council* [2007] F.C.J. No. 1277.

77 It must be noted that in the present case, as opposed to the cases cited above, the Complainant was hired on an indeterminate basis. However, in *Daniels v. Whitecap Dakota First Nation* [2008] C.L.A.D. No. 135, Adjudicator S. Denysiuk found that the complainant did not have a fixed term contract but one providing for termination by notice. The complainant alleged that she was unjustly dismissed from her employment. More specifically, she alleges that she was dismissed without cause and entitled to full monetary compensation under section 240(4) of the *Code.* She was employed as an accountant in the finance department for the employer First Nation. The facts are summarized at paragraph 1 and 2 which read as follows:

> Thelma Daniels started working as an accountant in the Finance Department at Whitecap Dakota First Nation on April 18, 2005. She signed an employment contract at the outset and each year thereafter. On May 23, 2007 Whitecap terminated her employment. Daniels filed a Complaint of unjust dismissal under s. 240 of the Canada Labour Code (the Code), On December 3, 2007 I was appointed by the Minister of Labour (Canada) to adjudicate the Complaint. The hearing was held in Saskatoon on February 4, 2008.
>
> Daniels received $3,846.16, before deductions, as pay in lieu of notice at the time she was terminated. In its opening statement at the hearing Whitecap advised that it would not be arguing that it had just cause to dismiss Daniels, rather, the issue is whether the pay in lieu of notice was appropriate under the Code. U intended to call some evidence regarding Daniels' performance for background and context, but was not alleging cause.

At paragraph 16 the complainant's final performance appraisal dated March 2007 is as follows:

> Daniels' final performance appraisal was done by Kammerer on March 27, 2007. The Report (C1) was signed by both Kammerer and Daniels, Her performance was satisfactory in all categories. In a paragraph asking about Daniels' overall suitability, Kammerer says "Thelma is a hard working individual, honest and dependable. Her experience and skills are a very good fit with her duties".

78 Adjudicator Denysiuk noted that since the employer was not alleging cause, the complainant's performance was not an issue so that whether the incriminating email on her part regarding her

employer justified the dismissal is not a question that needs to be answered. The Adjudicator added however: "I would say that the evidence I heard would have been insufficient to justify the termination had it been necessary for me to make such a decision. That is not to say I heard all the evidence that was available on this issue, but certainly the evidence that was presented did not justify termination for cause".

79 Having made a careful analysis of the nature of the complainant's contract, the Adjudicator concluded that she did not have a fix term contract but one providing for termination by a proper notice. Making the following observations at 72, the Adjudicator stated:

> Daniels did not have a fixed-term contract, however the termination provision in Article II-4 is otherwise enforceable. Accordingly, I find that the severance paid to Daniels was not unjust in that it was paid in accordance with Article II-4.1 note that four weeks exceeds what Daniels would otherwise have received under s. 230(1) and 235(1) of the Code, I make no comment on whether the contractual provision would have been upheld if the severance under the Code had exceeded four weeks of pay.

80 Having found that the Complainant's employment had been terminated by notice when Whitecap legitimately exercised its right to terminate her employment on four weeks' notice, in accordance with the terms of the contract of employment, the Adjudicator held that the termination of employment could not be considered to be unjust. This conclusion is all fours with the Employer's position claiming likewise that section 5.31 of the *Employer Procedure Manual Policy No. 00-2-71* (referred above), is fully enforceable, thus, rejecting the proposition that the unjust dismissal provision under section 240(1) is engaged in the present case. For the reasons stated in Section A. 4, the Employer's conclusion is inconsistent with the provisions of sections 240 - 246, Furthermore, section 168(1) of Part III of the *Code* regarding its applications states that it does not affect contracts of employment providing for more generous benefits:

> This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part.

81 In *Prosper v. PADC Management Co.,* Adjudicator Campbell made the following observation regarding the party's ability to contract out of the rights or benefits under Part III of the *Code* at paragraph 11 :

> I believe the section is clear in stating that you cannot contract out of the *Code* and the intent of that section is to say that if there are any provisions in a contract or other custom that are more favourable, this section does not prevent an employee from being entitled to those rights and benefits, as well as the rights

and benefits they are entitled to under the *Code.*

82 It is evident that section 168(1) of the *Code* mirrors the object of minimum employment standards legislation that it imposes a level of benefits or rights as it relates to working conditions and benefits but does not effect in any manner benefits that are more favourable to an employee. Accordingly, I am of the view that the Complainant may fully benefit from the provisions of 240 - 246 since the parties may not contract out of the said provisions.

E. Notice requirement pursuant to the common law

83 The Employer, relying on *Bardal v. Globe & Mail Ltd* [1960] 24 D.L.R. 92d) 140 (Ont H.C.), *Dunbar v. Port Coquitlam (City)* (1992), 44 C.C.E.L. 206 (B.C.S.C.), *Kewin v. Canadian Forest Products Ltd* (1991), 50 A.C.W.S. (3d) 1045 (B.S.S.C.) and *Serbanescu v. Span Manufacturing Ltd,* (2010), 85 C.C.E.L. (3d) 294 (Ont, Supr.Ct.), maintains that wages in lieu of notice and severance payment granted to the Complainant not only exceed the minimum requirement under sections 230(1) and 235 of the *Code* but was in accordance with the Employer's termination policy and requirements of the common law.

84 As indicated, the Employer also maintains that the Complainant's termination of employment was in accordance with the common law. In *Berdal, supra,* reviewing the rules governing dismissal at common law, Mcruer C.J.O. succinctly summarised at paragraph 21, the rules as follows:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

85 Applying these principles, the court found that a reasonable notice to be given by an employer of its intention to terminate the employment to be one year having regard to the circumstances, length of service, namely 16-17 years. In *Dunbar v. Coquitlam,* the Adjudicator found that the employer had terminated its interim fire chief without cause or notice. He had been employed for 17 years. The Court found that he was entitled to receive 24 month salary in lieu of notice at the fire chiefs salary. In *Kewin e Canadian Forest Products Ltd.* the Court awarded fourteen months salary in lieu of notice where the employee has accumulated 16 and a half years of service. In *Serbanescu,* the Court found that where an employee has been employed for three years as an engineer that a reasonable notice period was found to be five months. In the present case, the Complainant who had been employed for four years and two months, the Employer suggested a six months notice to be appropriate.

86 I fully agree with the Complainant that the Employer may not circumvent the unjust dismissal provision of the *Code* by paying reasonable notice. Accordingly, the Employer's position that

payment in lieu of notice renders the dismissal "just" must be rejected given that it renders section 240 of the *Code* inoperative. In *Furber v. Polymer Distribution Inc*, [2011] C.L.A.D. No 112, Adjudicator S. Peterson rejected the employer's submission that he should apply the common law principle in assessing damages. At paragraph 85, the Adjudicator provided the following reason for rejecting the employer's submission:

> Employers cannot contract out of the Code. This may have implication for the ability of employers to regulate the relationship with their employees. For example, employment contract provisions that purport to justify dismissal for specified offences do not bind an adjudicator, although such provisions may inform the parties as to their mutual expectations. A successful claimant will be compensated for loss of earnings. In my view, unlike the common law, the remedy may also reflect the employee's contribution to the situation. This reflects, in my view, the remedial purpose of section 240 counteracting the perceived deficiencies in the common law principles of wrongful dismissal.

87 Furthermore, I am also of the view that the Employer cannot invoke the common law rule to contravene the provision of section 240 of the *Code* for the reasons given in Section A. 4.

IV. Conclusion

88 In the light of the evidence and the arbitral jurisprudence reviewed in Part ÏÏÏ and for the reasons given throughout the award, the Employer may not benefit from sections 230(1) and 235(1) of the *Code* nor pursuant the *Employer's Procedural Manual* section 5.3.1 and the common law in terminating the Complainant's employment on a "without cause" basis where the said Complainant has filed a written complaint pursuant to Division XIV, "Unjust Dismissal", section 240(1) of the *Code* on the basis that he "considers the dismissal to be unjust".

89 Accordingly, I will contact the parties for a resumption of the hearing.

Dated at Ottawa, February 10, 2012

Joseph E. Roach
Arbitrator

TAB 19

Indexed as:

Davey v. Gibson

[1930] O.J. No. 122

65 O.L.R. 379

[1930] 3 D.L.R. 606

38 O.W.N. 144

11 C.B.R. 341

Ontario Supreme Court - Appellate Division

Magee, Middleton, Orde and Grant JJ.A.

April 15, 1930.

(13 paras)

Company -- Bankruptcy -- Unpaid Claims for Wages -- Ontario Companies Act, sec. 100 -- "Gone into Liquidation."

Bankruptcy to a "going into liquidation" within the meaning of sec. 100(1) (b) of the Companies Act, R.S.O. 1927, ch. 218.

Horsey Estate Co. Ltd. v. Steiger, [1898] 2 Q.B. 259, [1899] 2 Q.R 79, and Fryer v. Ewart, [1902] A.C. 187, applied and followed.

Judgment of Kelly, J., (1929), 64 O.L.R. 827, affirmed.

Counsel:

J.B. Allen, for the appellants.
H.H. Davis, K.C., and C.T.S. Evans, for the plaintiff, respondent.

1 AN appeal by the defendants from the judgment of KELLY, J. (1929), 64 O.L.R. 627.

2 February 7. The appeal was heard by MAGEE, MIDDLETON, ORDE, and GRANT, JJ.A.

3 April 15. The judgment of the Court was read by MIDDLETON J.A.:-- Appeal by the defendants from a judgment of Mr. Justice Kelly, bearing date the 6th December, 1929, whereby he awarded to the plaintiffs $4,582.73, the amount of certain wage-claims assigned to the plaintiffs, against the defendants, directors of William Cane & Sons Company Limited, a company incorporated under the laws of the Province of Ontario, which had been declared bankrupt, and a receiving order made on the 21st January, 1927. The claims for wages due to the employees of the company in no case exceed the wages for one year. The liability of the directors is based on sec. 100 of the Companies Act, R.S.O. 1927, ch. 218*.

4 The appeal is limited to one point and to one point only. The statutory provision relied upon provides that the directors of a company shall be jointly and severally liable to the labourers, servants and apprentices, for all debts not exceeding one year's wages due for services performed for the company while they are such directors. But, by subsec. 2, a director is not to be liable unless, inter alia, the company has, within one year after the debt has become due, "gone into liquidation or has been ordered to be wound up and the claim for such debt has been duly filed and proved." The company has been declared to be bankrupt under the provisions of the Dominion Bankruptcy Act, and the appellants contend that this bankruptcy is not a going into liquidation within the meaning of the Ontario statute. The learned trial Judge was of opinion that going into bankruptcy is properly regarded as going into liquidation within the meaning of the statute, and with this opinion we agree.

5 The argument before us turned rather upon a discussion of the question whether the Act should be strictly or liberally construed. It is not, in my view, necessary to enter upon any such discussion. The statute appears to me to be free from difficulty. For the protection of wage-earners the directors of a company are made liable for a year's wages, but, to protect a director from vexatious action on the part of a wage-earner, this liability is not to be enforced unless he is sued while still a director or within one year after he has ceased to be a director; and, secondly, the company, too, must first be sued within one year after the debt became due, and execution must be returned unsatisfied in whole or in part, unless the company has within the same period "gone into liquidation," or has been ordered to be wound up, and the claim in that case must be duly filed and proved.

6 The term "gone into liquidation" is not anywhere defined; the language is more or less colloquial, for there is not, at the present time, any legal proceeding known as liquidation. At one time there was, but it has long since been obsolete. The technical term used in the Companies Act is "wind-up," although the officer appointed to conduct the winding-up is designated a liquidator.

7 If one searches dictionaries, it is not hard to find a definition of liquidation wide enough to include bankruptcy. In the Century Dictionary this is given: "Liquidation: the act or operation of winding up the affairs of a firm or company by getting in the assets, settling with its debtors and creditors, and apportioning the amount of each partner's or shareholder's profit or loss, etc." In the

Oxford Dictionary is the following: "Liquidate: Law and commerce: To ascertain and set out clearly the liabilities of (a company or firm) and to arrange the apportioning of the assets; to wind up." In Corpus Juris, that mine of information, is this definition: "Liquidation, a word of French origin, is not a technical term, and, therefore, can have no fixed legal meaning; but it has a fairly defined legal meaning, and it is said to be a term of jurisprudence, of finance, and of commerce. It is defined as the act of settling, adjusting debts, or ascertaining their amounts or balance due; settlement or adjustment of an unsettled account ... Applied to a partnership or company, the act or operation of winding up the affairs of a firm or company by getting in the assets, settling with its debtors and creditors, and appropriating the amount of profit or loss." All of these definitions are ample to include bankruptcy as carried out under the Dominion statute.

8 There are, however, English cases which are very helpful. I refer particularly to Horsey Estate Ltd. v. Steiger, [1898] 2 Q.B. 259, [1899] 2 Q.B. 79, and to Fryer v. Ewart, [1902] A.C. 187.

9 In the first of these cases there was a lease with a proviso for re-entry if the lessees, a company, shall enter into liquidation, voluntarily or compulsorily. The company, desiring a reconstruction, went into voluntary liquidation, although it was solvent-its desire being to acquire additional capital. The landlord sought to exercise the right of forfeiture, and the company contended that he could not do so because liquidation within the meaning of the lease, in its view, meant a liquidation in the nature of bankruptcy. Mr. Justice Hawkins at the trial, and the Court of Appeal, held that liquidation was a term of wider significance than mere bankruptcy. It unquestionably included bankruptcy, but applied also to winding-up where there was no pretence of insolvency.

10 In the second case the question also arose upon a lease. The company went into liquidation for the purpose of reconstruction and amalgamation-the only way in which, as the law then stood, this desired end could be accomplished. The decision in the earlier case was adopted and approved, and incidentally it was held that this voluntary liquidation was "a condition for forfeiture on the bankruptcy of the lessee" within the Conveyancing and Law of Property Act.

11 These authorities, I think, are ample to justify a finding that bankruptcy is a going into liquidation within the meaning of the statute in question.

12 If one seeks to find the probable intention of the Legislature everything points in the same direction. It is far more probable that the Legislature intended in this provision-manifestly for the protection of the directors from vexatious actions-that bankruptcy should be regarded as a "liquidation," rather than that the legislative intention was that in the event of bankruptcy the directors should escape from liability.

13 For these reasons the appeal should be dismissed with costs.

Appeal dismissed.

qp/s/qlcbk/qlafr

* 100.-(1) The directors of the company shall be jointly and severally liable to the labourers, servants and apprentices thereof for all debts not exceeding one year's wages due for services performed for the company while they are such directors respectively.

(2) A director shall not be liable under subsection 1 unless,-

(a) the company has been sued for the debt within one year after it has become due and execution has been returned unsatisfied in whole or in part; or

(b) the company has, within that period, gone into liquidation or has been ordered to be wound up and the claim for such debt has been duly filed and proved.

nor unless he to sued for such debt while a director or within one year after he has ceased to be a director.

(3) If execution has so issued the amount recoverable against the director shall be the amount remaining unsatisfied on the execution.

(4) If the claim for such debt has been proved in liquidation or winding-up proceedings a director, upon payment of the debt, shall be entitled to any preference which the creditor paid would have been entitled to, and where a judgment has been recovered he shall be entitled to an assignment of the judgment.

TAB 20

CARSWELL

THE 2016-2017 ANNOTATED BANKRUPTCY AND INSOLVENCY ACT

Including
General Rules under the Act
Orderly Payment of Debts Regulations
Companies' Creditors Arrangement Act
CCAA Regulations and Forms
Farm Debt Mediation Act
Wage Earner Protection Program Act
Directives and Circulars

Dr. Janis P. Sarra, B.A., M.A., LL.B., LL.M., S.J.D.
of University of British Columbia
Faculty of Law and the Ontario Bar

The Honourable Geoffrey B. Morawetz, B.A., LL.B.
of the Superior Court of Justice

The Honourable L. W. Houlden, B.A., LL.B.
1922-2012, formerly a Judge of the Court of Appeal for Ontario

STATUTES OF CANADA ANNOTATED

THOMSON REUTERS

CCAA Proceeding", in *Annual Review of Insolvency Law, 2011* (Toronto: Carswell, 2012) 165–190; B.E. Romaine, "Reflections on Comity and Sovereignty — Ten Years Later", in J.P. Sarra and B.E. Romaine, eds, *Annual Review of Insolvency Law 2012* (Toronto: Carswell, 2013) at 1-26; Neil Narfason, "Reflections on the Evolving Role of the Monitor and the Question of Monitor Independence", in J.P. Sarra and B.E. Romaine, eds, *Annual Review of Insolvency Law 2012* (Toronto: Carswell, 2013) at 27-36; Tevia R.M. Jeffries, "Unsecured Creditors' Committees in Canada and the United States: Does the Canadian Monitor Play a More Effective Role in Restructuring?", in J.P. Sarra and B.E. Romaine, eds, *Annual Review of Insolvency Law 2012* (Toronto: Carswell, 2013) at 101-122; D.J. Miller, Hugh O'Reilly, Robert I. Thornton and Amanda Darrach, "Charting A New Course: Best Practices When Dealing with Employees, Retirees and Union Stakeholders in a Restructuring", in J.P. Sarra and B.E. Romaine, eds, *Annual Review of Insolvency Law 2012* (Toronto: Carswell, 2013) at 187-222; Janis Sarra, "Of Paramount Importance: Interpreting the Landscape of Insolvency and Environmental Law", in J.P. Sarra and B.E. Romaine, eds, *Annual Review of Insolvency Law 2012* (Toronto: Carswell, 2013) at 453-508.

N§2 — Purpose of the *CCAA*

While the *CCAA* does not have an express purpose clause, its long title, *An Act to facilitate compromises and arrangements between companies and their creditors* indicates that its objective is to assist insolvent companies in developing and seeking approval of compromises and arrangements with their creditors. The *CCAA* has a broad remedial purpose, giving a debtor company an opportunity to find a way out of financial difficulties short of bankruptcy, foreclosure or the seizure of assets through receivership proceedings. It allows the debtor to devise a plan that will enable it to meet the demands of its creditors through refinancing with new lending, equity financing or the sale of the business as a going concern. This alternative may give the creditors of all classes a larger return and protect the jobs of the company's employees: *Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133, 1991 CarswellOnt 168 (Ont. Gen. Div.); *Re Gyro-Trac (USA) Inc.* (2010), 2010 CarswellQue 3727, 66 C.B.R. (5th) 159 (Que. C.A.). However, the *CCAA* should not be the last gasp of a dying company; any plan should be implemented at a stage prior to the death throes: *Re Inducon Development Corp.* (1991), 8 C.B.R. (3d) 306, 1991 CarswellOnt 219 (Ont. Gen. Div.).

The Supreme Court of Canada has held that 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: *Century Services Inc. v. Canada (A.G.)*, [2010] 3 S.C.R. 379 (S.C.C.).

The court has identified the following purposes of the legislation:

- to permit an insolvent company to avoid bankruptcy by making a composition or arrangement with its creditors: *Browne v. Southern Canada Power Co.* (1941), 1941 CarswellQue 14, 23 C.B.R. 131 (Que. C.A.); *Multidev Immobilia Inc. v. S.A. Just Invest* (1988), 1988 CarswellQue 38, 70 C.B.R. (N.S.) 91 (Que. S.C.);
- to permit a company to carry on business and where possible avoid the social and economic costs of liquidating its assets: *Alberta Treasury Branches v. Tallgrass Energy Corp.*, 2013 CarswellAlta 1496, 8 C.B.R. (6th) 161, 2013 ABQB 432 (Alta. Q.B.);
- to maintain the *status quo* for a period to provide a structured environment in which an insolvent company can continue to carry on business and retain control over its assets while the company attempts to gain the approval of its creditors for a proposed arrangement that will enable the company to remain in operation for the future benefit of the

TAB 21

Case Name:

Target Canada Co. (Re)

RE: 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 Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC.

[2015] O.J. No. 247

2015 ONSC 303

2015 CarswellOnt 620

248 A.C.W.S. (3d) 753

22 C.B.R. (6th) 323

Court File No.: CV-15-10832-00CL

Ontario Superior Court of Justice

G.B. Morawetz R.S.J.

Heard: January 15, 2015.
Judgment: January 16, 2015.

(85 paras.)

Counsel:

Tracy Sandler and *Jeremy Dacks*, for the Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the "Applicants").

Jay Swartz, for the Target Corporation.

Alan Mark, Melaney Wagner, and *Jesse Mighton*, for the Proposed Monitor, Alvarez and Marsal Canada ULC ("Alvarez").

Terry O'Sullivan, for The Honourable J. Ground, Trustee of the Proposed Employee Trust.

Susan Philpott, for the Proposed Employee Representative Counsel for employees of the Applicants.

ENDORSEMENT

1 G.B. MORAWETZ R.S.J.:-- Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

2 TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".

3 In early 2011, Target Corporation determined to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of today, TCC operates 133 stores, with at least one store in every province of Canada. All but three of these stores are leased.

4 Due to a number of factors, the expansion into Canada has proven to be substantially less successful than expected. Canadian operations have shown significant losses in every quarter since

stores opened. Projections demonstrate little or no prospect of improvement within a reasonable time.

5 After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation concluded that, in the interest of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.

6 Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

7 The Applicants are of the view that an orderly wind-down under Court supervision, with the benefit of inherent jurisdiction of the CCAA, and the oversight of the proposed monitor, provides a framework in which the Target Canada Entities can, among other things:

a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;

b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;

c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and

d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

8 The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the "breathing room" required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going

concern or as an orderly liquidation or wind-down.

9 TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise 1 S. à r.l. ("NE1"), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

10 TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC's employees are not represented by a union, and there is no registered pension plan for employees.

11 The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

12 A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 -- 150 people, described as "Team Members" and "Team Leaders", with a total of approximately 16,700 employed at the "store level" of TCC's retail operations.

13 TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

14 In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation's Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

15 TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than $2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC's operations are not wound down, it is projected that they would remain unprofitable for at least 5 years and would require significant and continued funding from Target Corporation during that period.

16 TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian online retail presence.

17 Following a detailed review of TCC's operations, the Board of Directors of Target Corporation decided that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.

18 Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidated financial results of TCC and its subsidiaries), TCC had total assets of approximately $5.408 billion and total liabilities of approximately $5.118 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC's financial situation.

19 Mr. Wong states that TCC's operational funding is provided by Target Corporation. As of November 1, 2014, NE1 (TCC's direct parent) had provided equity capital to TCC in the amount of approximately $2.5 billon. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of $62 million since November 1, 2014.

20 NE1 has also lent funds to TCC under a Loan Facility with a maximum amount of $4 billion. TCC owed NE1 approximately $3.1 billion under this Facility as of January 2, 2015. The Loan Facility is unsecured. On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this Loan Facility to payment in full of proven claims against TCC.

21 As at November 1, 2014, Target Canada Property LLC ("TCC Propco") had assets of approximately $1.632 billion and total liabilities of approximately $1.643 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC Propco's financial situation. TCC Propco has also borrowed approximately $1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. $89 million to Target Corporation under a Demand Promissory Note.

22 TCC has subleased almost all the retail store leases to TCC Propco, which then made real estate improvements and sub-sub leased the properties back to TCC. Under this arrangement, upon termination of any of these sub-leases, a "make whole" payment becomes owing from TCC to TCC Propco.

23 Mr. Wong states that without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they become due, including TCC's next payroll (due January 16, 2015). The Target Canada Entities, therefore state that they are insolvent.

24 Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation

seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

25 On this initial hearing, the issues are as follows:

a) Does this court have jurisdiction to grant the CCAA relief requested?

a) Should the stay be extended to the Partnerships?

b) Should the stay be extended to "Co-tenants" and rights of third party tenants?

c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?

d) Should the Court approve protections for employees?

e) Is it appropriate to allow payment of certain pre-filing amounts?

f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;

g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?

h) Should the court exercise its discretion to approve the Court-ordered charges?

26 "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc. (Re)*, [2004] O.J. No. 1257, [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a

corporation "reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Priszm Income Fund (Re)*, [2011] O.J. No. 1491 (SCJ), 2011 and *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286, (SCJ) [*Canwest*].

27 Having reviewed the record and hearing submissions, I am satisfied that the Target Canada Entities are all insolvent and are debtor companies to which the CCAA applies, either by reference to the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* (the "BIA") or under the test developed by Farley J. in *Stelco.*

28 I also accept the submission of counsel to the Applicants that without the continued financial support of Target Corporation, the Target Canada Entities face too many legal and business impediments and too much uncertainty to wind-down their operations without the "breathing space" afforded by a stay of proceedings or other available relief under the CCAA.

29 I am also satisfied that this Court has jurisdiction over the proceeding. Section 9(1) of the CCAA provides that an application may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.

30 In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. A number of office locations are in Ontario; 2 of TCC's 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC's operations work in Ontario.

31 The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured "going concern" solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Century Services Inc.* v. *Canada (Attorney General)*, 2010 SCC 50 ("*Century Services*") that "courts frequently observe that the CCAA is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred". The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more "rules-based" approach of the BIA.

32 Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or

wind-down of the debtor companies' assets or business.

33 The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

34 In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are affected, are, in my view, suited to the flexible framework and scope for innovation offered by this "skeletal" legislation.

35 The required audited financial statements are contained in the record.

36 The required cash flow statements are contained in the record.

37 Pursuant to s. 11.02 of the CCAA, the court may make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the court considers necessary" provided the stay is no longer than 30 days. The Target Canada Entities, in this case, seek a stay of proceedings up to and including February 13, 2015.

38 Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the partnerships. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each performs key functions in relation to the Target Canada Entities' businesses.

39 The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

40 I am satisfied that it is appropriate that an initial order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA should be granted.

41 Pursuant to section 11.7(1) of the CCAA, Alvarez & Marsal Inc. is appointed as Monitor.

42 It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd. (1993), 17 CBR (3d) 24 (Ont. Gen. Div.)*; *Re Priszm Income Fund,* 2011 ONSC 2061; *Re Canwest Publishing Inc.* 2010 ONSC 222 ("*Canwest Publishing*") and *Re*

Canwest Global Communications Corp., 2009 CarswellOnt 6184 ("*Canwest Global*").

43 In these circumstances, I am also satisfied that it is appropriate to extend the stay to the Partnerships as requested.

44 The Applicants also seek landlord protection in relation to third party tenants. Many retail leases of non-anchored tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. In order to alleviate the prejudice to TCC's landlords if any such non-anchored tenants attempt to exercise these rights, the Applicants request an extension of the stay of proceedings (the "Co-Tenancy Stay") to all rights of these third party tenants against the landlords that arise out of the insolvency of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order.

45 The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *Re T. Eaton Co.*, 1997 CarswellOnt 1914 (Gen. Div.) as a precedent where a stay of proceedings of the same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

46 In these proceedings, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to implementing a sales process for some or all of its real estate portfolio. The Applicants submit that it is premature to determine whether this process will be successful, whether any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. The Applicants further contend that while this process is being resolved and the orderly wind-down is underway, the Co-Tenancy Stay is required to postpone the contractual rights of these tenants for a finite period. The Applicants contend that any prejudice to the third party tenants' clients is significantly outweighed by the benefits of the Co-Tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

47 The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

48 I am satisfied the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time. To the extent that the affected parties wish to challenge the broad nature of this stay, the same can be addressed at the "comeback hearing".

49 The Applicants also request that the benefit of the stay of proceedings be extended (subject to

certain exceptions related to the cash management system) to Target Corporation and its U.S. subsidiaries in relation to claims against these entities that are derivative of the primary liability of the Target Canada Entities.

50 I am satisfied that the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time and the stay is granted, again, subject to the proviso that affected parties can challenge the broad nature of the stay at a comeback hearing directed to this issue.

51 With respect to the protection of employees, it is noted that TCC employs approximately 17,600 individuals.

52 Mr. Wong contends that TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated as part of the wind-down process.

53 In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum of $70 million.

54 The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative Counsel. The proposed trustee is The Honourable J. Ground. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of Target Canada Entities. Target Corporation has agreed not to seek to recover from the Target Canada Entities estates any amounts paid out to employee beneficiaries under the Employee Trust.

55 In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

56 The Applicants seek the approval of a KERP and the granting of a court ordered charge up to the aggregate amount of $6.5 million as security for payments under the KERP. It is proposed that the KERP Charge will rank after the Administration Charge but before the Directors' Charge.

57 The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Re Nortel Networks Corp.*, 2009 CarswellOnt 1330 (S.C.J.) [*Nortel Networks (KERP)]*, and *Re Grant Forest Products Inc.*, 2009 CarswellOnt 4699 (Ont. S.C.J.). In *U.S. Steel Canada Inc.*, 2014 ONSC 6145, I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

58 In this case, the KERP was developed by the Target Canada Entities in consultation with the proposed monitor. The proposed KERP and KERP Charge benefits between 21 and 26 key management employees and approximately 520 store-level management employees.

59 Having reviewed the record, I am of the view that it is appropriate to approve the KERP and the KERP Charge. In arriving at this conclusion, I have taken into account the submissions of counsel to the Applicants as to the importance of having stability among the key employees in the liquidation process that lies ahead.

60 The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

61 I am satisfied that section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see *Re Nortel Networks Corp.*, 2009 CarswellOnt 3028 (S.C.J.) (Nortel Networks Representative Counsel)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:

(i) the vulnerability and resources of the groups sought to be represented;

(ii) the social benefit to be derived from the representation of the groups;

(iii) the avoidance of multiplicity of legal retainers; and

(iv) the balance of convenience and whether it is fair and just to creditors of the

estate.

62 The Applicants also seek authorization, if necessary, and with the consent of the Monitor, to make payments for pre-filing amounts owing and arrears to certain critical third parties that provide services integral to TCC's ability to operate during and implement its controlled and orderly wind-down process.

63 Although the objective of the CCAA is to maintain the status quo while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

64 The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

a) Logistics and supply chain providers;

b) Providers of credit, debt and gift card processing related services; and

c) Other suppliers up to a maximum aggregate amount of $10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

65 In my view, having reviewed the record, I am satisfied that it is appropriate to grant this requested relief in respect of critical suppliers.

66 In order to maximize recovery for all stakeholders, TCC indicates that it intends to liquidate its inventory and attempt to sell the real estate portfolio, either en bloc, in groups, or on an individual property basis. The Applicants therefore seek authorization to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities inventory in a liquidation process.

67 TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015. Mr. Wong states that Target Corporation and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively, the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. $175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%. Mr.

Wong also states that it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

68 The DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a court- ordered charge on the property of the Borrower to secure the amount actually borrowed under the DIP Facility (the "DIP Lenders Charge"). The DIP Lenders Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge and the Directors' Charge.

69 The authority to grant an interim financing charge is set out at section 11.2 of the CCAA. Section 11.2(4) sets out certain factors to be considered by the court in deciding whether to grant the DIP Financing Charge.

70 The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

71 Accordingly, the DIP Lenders' Charge is granted in the amount up to U.S. $175 million and the DIP Facility is approved.

72 Section 11 of the CCAA provides the court with the authority to allow the debtor company to enter into arrangements to facilitate a restructuring under the CCAA. The Target Canada Entities wish to retain Lazard and Northwest to assist them during the CCCA proceeding. Both the Target Canada Entities and the Monitor believe that the quantum and nature of the remuneration to be paid to Lazard and Northwest is fair and reasonable. In these circumstances, I am satisfied that it is appropriate to approve the engagement of Lazard and Northwest.

73 With respect to the Administration Charge, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, Lazard and Northwest be protected by a court ordered charge and all the property of the Target Canada Entities up to a maximum amount of $6.75 million as security for their respective fees and disbursements (the "Administration Charge"). Certain fees that may be payable to Lazard are proposed to be protected by a Financial Advisor Subordinated Charge.

74 In *Canwest Publishing Inc.*, 2010 ONSC 222, Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

a. The size and complexity of the business being restructured;

b. The proposed role of the beneficiaries of the charge;

c. Whether there is an unwarranted duplication of roles;

d. Whether the quantum of the proposed Charge appears to be fair and reasonable;

e. The position of the secured creditors likely to be affected by the Charge; and

f. The position of the Monitor.

75 Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

76 The Applicants seek a Directors' and Officers' charge in the amount of up to $64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

77 Pursuant to section 11.51 of the CCAA, the court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain obligations.

78 I accept the submissions of counsel to the Applicants that the requested Directors' Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors' Charge is granted.

79 In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

80 The stay of proceedings is in effect until February 13, 2015.

81 A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

82 The comeback hearing is to be a "true" comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the

order should be set aside or varied.

83 Finally, a copy of Lazard's engagement letter (the "Lazard Engagement Letter") is attached as Confidential Appendix "A" to the Monitor's pre-filing report. The Applicants request that the Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

84 Having considered the principles set out in *Sierra Club of Canada* v. *Canada (Minister of Finance)*(2002), 211 D.L.R (4th) 193, [2002] 2 S.C.R. 522, I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix "A" to the Monitor's pre-filing report.

85 The Initial Order has been signed in the form presented.

G.B. MORAWETZ R.S.J.

TAB 22

Case Name:

Nortel Networks 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 a plan of compromise or arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
APPLICATION UNDER the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

[2014] O.J. No. 4588

2014 ONSC 5274

Court File No. 09-CL-7950

Ontario Superior Court of Justice
Commercial List

F.J.C. Newbould J.

Heard: July 25, 2014.
Judgment: September 11, 2014.

(63 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Amount -- Bondholders of Nortel, in CCAA protection, not entitled to interest on their bonds post-filing -- Interest stops rule applied to limit bondholders'

claims to face value of bonds plus pre-filing interest -- Companies' Creditors Arrangement Act.

Determination of whether or not post-filing interest was payable on crossover bonds issued by Nortel companies prior to the commencement of Nortel's CCAA proceeding. The bonds, including pre-filing interest, amounted to $4.1 USD. The bondholders claimed they were also entitled to post-filing interest of $1.6 USD. These amounts would represent a substantial portion of the $7.3 USD realized from the sale of Nortel's assets worldwide. The Monitor and Canadian Nortel companies took the position post-filing interest was not payable on the bonds. The bondholders took the position that no distribution of Nortel's sale proceeds could take place without the approval of a plan recognizing the full amount of their claims, including post-filing interest.

HELD: Post-filing interest was not payable on the crossover bonds. The interest stops rule applied in Nortel's CCAA proceeding. To hold otherwise would place the bondholders in a better position than others with claims to the sale proceeds.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3,

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11(1)

United States Bankruptcy Code, 11 U.S.C. Chapter 11,

Winding-Up Act,

Counsel:

Benjamin Zarnett and *Graham Smith*, for the Monitor and Canadian Debtors.

Ken Rosenberg, for the Canadian Creditors' Committee.

Michael Barrack, *D.J. Miller* and *Michael Shakra*, for the UK Pension Claimants.

Tracy Wynne, for EMEA Debtors.

Kenneth Kraft, for the Wilmington Trust, National Association.

Richard Swan, *Gavin Finlayson* and *Kevin Zych*, for the Ad Hoc Group of Bondholders.

Shayne Kukulowicz, for the US Unsecured Creditors' Committee.

John D. Marshall, for Law Debenture Trust Company of New York.

Brett Harrison, for Bank of New York Mellon.

Andrew Gray and *Scott Bomhof,* for the US Debtors.

AMENDED ENDORSEMENT

1 F.J.C. NEWBOULD J.:-- Nortel Networks Corporation ("NNC") and other Canadian debtors filed for and were granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, ("CCAA") on January 14, 2009. On the same date, Nortel Network Inc. ("NNI") and other US debtors filed petitions in Delaware under the United States Bankruptcy Code, 11 U.S.C., Chapter 11.

2 Beginning in 1996, unsecured *pari passu* notes were issued under three separate bond indentures, first by a US Nortel corporation guaranteed by Nortel Networks Limited ("NNL"), a Canadian corporation, and then by NNL in several tranches jointly and severally guaranteed by NNC and NNI (the "crossover bonds"). Thus all of the notes are payable by Nortel entities in both Canada and the US, either as the maker or guarantor. Under claims procedures in both the Canadian and US proceedings, claims by bondholders for principal and pre-filing interest in the amount of US$4.092 billion have been made against each of the Canadian and US estates. The bondholders also claim to be entitled to post-filing interest and related claims under the terms of the bonds which, as of December 31, 2013, amounted to approximately US$1.6 billion.

3 The total assets realized on the sale of Nortel assets worldwide which are the subject of the allocation proceedings amongst the Canadian, US, and European, Middle East and African estates ("EMEA") are approximately US$7.3 billion, and thus the post-filing bond interest claims of now more than US$1.6 billion represent a substantial portion of the total assets available to all three estates. While the post-filing bond interest grows at various compounded rates under the terms of the bonds, the US$7.3 billion is apparently not growing at any appreciable rate because of the very conservative nature of the investments made with it pending the outcome of the insolvency proceedings. Apart from the bondholders, the main claimants against the Canadian debtors are Nortel disabled employees, former employees and retirees.

4 The bond claims in the Canadian proceedings have been filed pursuant to a claims procedure order in the CCAA proceedings dated July 30, 2009. The order contemplated that the claims filed under it would be finally determined in accordance with further procedures to be authorized, including by a further claims resolution order. By order dated September 16, 2010, a further order was made in the CCAA proceedings that authorized procedures to determine claims for all purposes.

5 By direction of June 24, 2014, it was ordered that the following issues be argued:

( ) whether the holders of the crossover bond claims are legally entitled in each jurisdiction to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US$4.092 billion); and

( ) if it is determined that the crossover bondholders are so entitled, what additional amounts are such holders entitled to so claim and receive.

6 The hearing in the US Bankruptcy Court was scheduled to proceed at the same time as the hearing in this Court but was adjourned due to an apparent settlement between the US Debtors and certain bondholders.

7 The Monitor and Canadian debtors, supported by the Canadian Creditors' Committee, the UK Pension Claimants, the EMEA debtors, and the Wilmington Trust take the position that in a liquidating CCAA proceeding such as this, post-filing interest is not legally payable on the crossover bonds as a result of the "interest stops" rule. The Ad Hoc Group of Bondholders, supported by the Law Debenture Trust Company of New York and Bank of New York Mellon take the position that there is no "interest stops" rule in CCAA proceedings and that the right to interest on the crossover bonds is not lost on the filing of CCAA proceedings and can be the subject of negotiations regarding a CCAA plan of reorganization. They take the position that no distribution of Nortel's sale proceeds that fails to recognize the full amount of the crossover bondholders' claims, including post-filing interest, can be ordered under the CCAA except under a negotiated CCAA plan duly approved by the requisite majorities of creditors and sanctioned by the court.

8 For the reasons that follow, I accept the position and hold that post-filing interest is not legally payable on the crossover bonds in this case.

The interest stops rule

9 In this case, the bondholders have a contractual right to interest. The other major claimants, being pensioners, do not. The Canadian debtors contend that the reason for the interest stops rule is one of fundamental fairness and that the rule should apply in this case.

10 The Canadian debtors contend that the interest-stops rule is a common law rule corollary to the *pari passu* rule governing rateable payments of an insolvent's debts and that while the CCAA is silent as to the right to post-filing interest, it does not rule out the interest-stops rule.

11 The bondholders contend that to deny them the right to post-filing interest would amount to a confiscation of a property right to interest and that absent express statutory authority the court has no ability to interfere with their contractual entitlement to interest. I do not see their claim to interest

as being a property right, as the bonds are unsecured. See *Thibodeau v. Thibodea*u (C.A.), 104 O.R. (3d) 161, at para. 43. However, the question remains as to whether their contractual rights should prevail.

12 It is a fundamental tenet of insolvency law that all debts shall be paid *pari passu* and all unsecured creditors receive equal treatment. See *Shoppers Trust Co. (Liquidator of) v. Shoppers Trust Co.* (2005), 74 O.R. (3d) 652 (C.A.) at para. 25, per Blair J.A. and *Indalex Ltd. (Re)* (2009), 55 C.B.R. (5th) 64 (Ont. S.C.), at para. 16 per Morawetz J. This common law principle has led to the development of the interest stops rule. In *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.J. No. 2610, (Ont. S.C.), Blair J. (as he then was) stated the following:

> **20** One of the governing principles of insolvency law - including proceedings in a winding-up - is that the assets of the insolvent debtor are to be distributed amongst classes of creditors rateably and equally, as those assets are found at the date of the insolvency. This principle has led to the development of the "interest stops rule", i.e., that no interest is payable on a debt from the date of the winding-up or bankruptcy. As Lord Justice James put it, colourfully, in *Re Savin* (1872), L.R. 7 Ch. 760 (C.A.), at p. 764:
>
> > I believe, however, that if the question now arose for the first time I should agree with the rule [i.e. the "interest stops rule"], seeing that the theory in bankruptcy is to stop all things at the date of the bankruptcy, and to divide the wreck of the man's property as it stood at that time.

13 This rule is "judge-made" law. See *In re Humber Ironworks and Shipbuilding Company* (1869), L.R. 4 Ch. App. 643 at 647, per Sir G.M. Giffard, L.J.

14 In *Shoppers Trust*, Blair J.A. referred to *pari passu* principles in the context of the interest stops rule and the common law understanding of those rules in liquidation proceedings. He stated:

> 25. The rationale underlying this approach rests on a fundamental principle of insolvency law, namely, that "in the case of an insolvent estate, all the money being realized as speedily as possible, should be applied equally and rateably in payment of the debts as they existed at the date of the winding-up": *Humber Ironworks*, *supra*, at p. 646 Ch. App. Unless this is the case, the principle of *pari passu* distribution cannot be honoured. See also *Re McDougall*, [1883] O.J. No. 63, 8 O.A.R. 309, at paras. 13-15; *Principal Savings & Trust Co. v. Principal Group Ltd. (Trustee of)* (1993), 109 D.L.R. (4th) 390, 14 Alta. L.R. (3d) 442 (C.A.), at paras. 12-16; and *Canada (Attorney General) v. Confederation Trust Co.* (2003), 65 O.R. (3d) 519, [2003] O.J. No. 2754 (S.C.J.), at p. 525 [O.R.] While these cases were decided in the context of what is known as the "interest stops" rule, they are all premised on the common law understanding that claims

> for principal and interest are provable in liquidation proceedings to the date of the winding-up.

15 The interest stops rule has been applied in winding-up cases in spite of the fact that the legislation did not provide for it. In *Shoppers Trust*, Blair J.A. stated:

> 26. Thus, it was of little moment that the provisions of the *Winding-up Act* in force at the time of the March 10, 1993 order did not contain any such term. The 1996 amendment to s. 71(1) of the *Winding-up and Restructuring Act*, establishing that claims against the insolvent estate are to be calculated as at the date of the winding-up, merely clarified and codified the position as it already existed in insolvency law.

16 In *Abacus Cities Ltd. (Trustee of) v. AMIC Mortgage Investment Corp.* (1992), 11 C.B.R. (3d) 193 (Alta. C.A.), Kerans J.A. applied the interest stops rule in a bankruptcy proceeding under the BIA even although, in his view, the BIA assumed that interest was not payable after bankruptcy but did not expressly forbid it. He did so on the basis of the common law rule enunciated in *Re Savin*, quoted by Blair J. in *Confederation Life*. Kerans J.A. stated:

> 19. ... I accept that *Savin* expresses the law in Canada today: claims provable in bankruptcy cannot include interest after bankruptcy.

17 In *Confederation Life*, Blair J. was of the view that the Winding-Up Act and the BIA could be interpreted to permit post-filing interest. Yet he held that the common law insolvency interest stops rule applied. He stated:

> **22** This common law principle has been applied consistently in Canadian bankruptcy and winding-up proceedings. This is so notwithstanding the language of subsection 71(1) of the Winding-Up Act and section 121 of the BIA, which might be read to the contrary, in my view...
>
> **23** Yet the "interest stops" principle has always applied to the payment of post-insolvency interest, and the provisions of subsection 71(1) have never been interpreted to trump the common law insolvency "interest stops rule".

18 Thus I see no reason to not apply the interest stops rule to a CCAA proceeding because the CCAA does not expressly provide for its application. The issue is whether the rule should apply to this CCAA proceeding.

Nature of the CCAA proceeding

19 When the Nortel entities filed for CCAA protection on January 14, 2009, and filed on the

same date in the US and the UK, the stated purpose was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. However that hope quickly evaporated and on June 19, 2009 Nortel issued a news release announcing it had sold its CMDA business and LTE Access assets and that it was pursuing the sale of its other business interests. Liquidation followed, first by a sale of Nortel's eight business lines in 2009-2011 for US$2.8 billion and second by the sale of its residual patent portfolio under a stalking-horse bid process in June 2011 for US$4.5 billion. The sale of the CMDA and LTE assets was approved on June 29, 2009.

20 The Canadian debtors contend that this CCAA proceeding is a liquidating proceeding, and thus in substance the same as a bankruptcy under the BIA. The bondholders contend that there is no definition of a "liquidating" CCAA proceeding and no distinct legal category of a liquidating CCAA, essentially arguing that like beauty, it is in the eyes of the beholder.

21 In this case, I think there is little doubt that this is a liquidating CCAA process and has been since June, 2009, notwithstanding that there was some consideration given to monetizing the residual intellectual property in a new company to be formed (referred to as IPCO) before it was decided to sell the residual intellectual property that resulted in the sale to the Rockstar consortium for US$4.5 billion. In *Re Nortel Networks Corp.*, 2012 ONSC 1213, 88 C.B.R. (5th) 111, Morawetz J. referred to his recognizing in his June 29, 2009 Nortel decision approving the sale of the CMDA and LTE assets that the CCAA can be applied in "a liquidating insolvency". See also Dr. Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act,* 2nd ed. (Toronto: Carswell, 2013) at p. 167, in which she states "increasingly, there are 'liquidating CCAA' proceedings, whereby the debtor corporation is for all intents and purposes liquidated".

22 In *re Lehndorff General Partners Ltd*. (1993), 17 C.B.R. (3d) 24 (Ont. S.C.), Farley J. recognized in para. 7 that a CCAA proceeding might involve liquidation. He stated:

> It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company ... provided the same is proposed in the best interests of the creditors generally.

23 It is quite common now for there to be liquidating CCAA proceedings in which there is no successful restructuring of the business but rather a sale of the assets and a distribution of the proceeds to the creditors of the business. Nortel is unfortunately one of such CCAA proceedings.

Can the interest stops rule apply in a CCAA proceeding?

24 There is no controlling authority in Canada in a case such as this in which there is a contested claim being made by bondholders for post-filing interest against an insolvent estate under the CCAA, let alone under a liquidating CCAA process, or in which the other creditors are mainly pensioners with no contractual right to post-filing interest. Accordingly, it is necessary to deal with first principles and with various cases raised by the parties.

25 The Canadian debtors contend that the rationale for the interest stops rule is equally applicable to a liquidating CCAA proceeding as it is in a BIA or Winding-Up proceeding. They assert that the reason for the interest stops rule is one of fundamental fairness. An insolvency filing under the CCAA stays creditor enforcement. Accordingly, it is unfair to permit the bondholders with a contractual right to receive a payment on account of interest, and thus compensation for the delay in receipt of payment, while other creditors such as the pension claimants, who have been equally delayed in payment by virtue of the insolvency, receive no compensation. They cite Sir G.M. Giffard, L.J. in *Humber Ironworks*:

> I do not see with what justice interest can be computed in favour of creditors whose debts carry interest, while creditors whose debts do not carry interest are stayed from recovering judgment, and so obtaining a right to interest.

26 In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, Deschamps J. reaffirmed that the purpose of a CCAA stay of proceedings is to preserve the *status quo*. She stated at para. 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.

27 If post-filing interest is available to one set of creditors while the other creditors are prevented from asserting their rights and obtaining post-judgment interest, the Canadian Creditors' Committee contend that the *status quo* has not been preserved.

28 It has long been recognized that the federal insolvency regime includes the CCAA and the BIA and that the two statutes create a complimentary and interrelated scheme for dealing dealing with the property of insolvent companies. See *Re Ivaco Inc.* (2006), 83 O.R. (3d) 108 (C.A.), at paras. 62 and 64, per Laskin J.A.

29 Recently the Supreme Court of Canada analysed the CCAA and indicated that the BIA and CCAA are to be considered parts of an integrated insolvency scheme, the court will favour interpretations that give creditors analogous entitlements under the CCAA and BIA, and the court will avoid interpretations that give creditors incentives to prefer BIA processes.

30 In *Century Services*, Deschamps J. enunciated guiding principles for interpreting the CCAA. Deschamps J. also stated that the case was the first time that the Supreme Court was called upon to directly interpret the provisions of the CCAA. The case involved competing interpretations of the federal *Excise Tax Act* ("ETA") and the CCAA in considering a deemed trust for GST collections. The ETA expressly excluded the provisions in the BIA rendering deemed trusts ineffective, but did not exclude similar provisions in the CCAA. In holding in favour of a stay under the CCAA, Deschamps J. was guided in her interpretation of the relevant CCAA provision by the desire to have similar results under the BIA and CCAA.

31 In her analysis, Deschamps J. made a number of statements, including

> 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)
>
> 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. (para. 24)
>
> 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. (para. 47)
>
> 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... (para. 54)
>
> The CCAA and BIA 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 lost in bankruptcy. (para. 78)

32 In *Re Indalex*, [2013] 1 S.C.R. 271, a case involving a competition between a deemed trust under provincial pension legislation and the right of a lender to security granted under the DIP lending provisions of the CCAA, Deschamps J. had occasion to refer to the *Century Services* case and her statement in Century Services in para 23 referred to above. She then stated:

> In order to avoid a race to liquidation under the BIA, courts will favour an

interpretation of the CCAA that affords creditors analogous entitlements.

33 Thus it is a fair comment taken the direction of the Supreme Court in *Century Services* and *Indalex* regarding the aims of insolvency law in Canada to say that if the common law principle of the interest stops rule was applicable to proceedings under the BIA and *Winding-Up Act* before legislative amendments to those statutes were made, (or if the comments of Blair J. in *Confederation Life* are accepted that the BIA still might be read to prevent its application but does not trump the application of the rule), there is no reason not to apply the interest stops rule in liquidating CCAA proceedings. I accept this and note that there is no provision in the CCAA that would not permit the application of the rule.

34 There are also policy reasons for this result, and they flow from *Century Services* and *Indalex*. I accept the argument of the Canadian Creditors' Committee that to permit some creditors' claims to grow disproportionately to others during the stay period would not maintain the *status quo* and would encourage creditors whose interests are being disadvantaged to immediately initiate bankruptcy proceedings, threatening the objectives of the CCAA.

35 In my view, there is no need for there to be a "liquidating" CCCAA proceeding in order for the interest stops rule to apply to a CCAA proceeding. The reasoning for the application of the common law insolvency rule, being the desire to prevent a stay of proceedings from militating against one group of unsecured creditors over another in violation of the *pari passu* rule, is equally applicable to a CCAA proceeding that is not a liquidating proceeding. In such a proceeding, the parties would of course be free to include post-filing interest payments in a plan of arrangement, as is sometimes done.

36 The bondholders contend, however, that *Re Stelco Inc*., 2007 ONCA 483, 32 B.L.R. (4th) 77 is binding authority that the interest stops rule does not apply in any CCAA proceeding. I do not agree. The facts of the case were quite different and did not involve a claim for post-filing interest against the debtor. Stelco was successfully restructured under the CCAA by a plan of compromise and arrangement approved by the creditors. The sanctioned plan did not provide for payment of post-petition interest. As among senior unsecured debenture holders, subordinated (junior) debenture holders and ordinary unsecured creditors, the plan treated all in the same class and *pro rata* distributions were calculated on the basis that no post-filing interest was allowed. That result was not challenged.

37 The relevant pre-filing indenture in *Stelco* provided that in the event of any insolvency, the holders of all senior debt would first be entitled to receive payment in full of the principal and interest due thereon, before the junior debenture holders would be entitled to receive any payment or distribution of any kind which might otherwise be payable in respect of their debentures. While the plan cancelled all Stelco debentures, subject to section 6.01(2) of the plan, that section provided that the rights between the debenture holders were preserved. The plan was agreed to by the junior debenture holders. After the plan had been sanctioned, the junior debenture holders challenged the

senior debt holders' right to receive the subordinated payments towards their outstanding interest.

38 Wilton-Siegel J. rejected the argument, holding that the subordination agreement continued to operate independently of the sanctioned plan and was not affected by it. While it is not clear why, the junior Noteholders contended that interest stopped accruing in respect of the claims of the senior debenture holders against Stelco after the CCAA filing. There was no issue about a claim against Stelco for post-filing interest, as no such claim had ever been made. The issue was a contest between the two levels of debenture holders. However, Wilton-Siegel J. stated that in situations in which there was value to the equity, a CCAA plan could include post-filing interest. I take this statement to be *obiter*, but in any event, it is not the situation in Nortel as there is no equity at all. At the Court of Appeal, O'Connor A.C.J.O, Goudge and Blair JJ.A. agreed that the interest stops rule did not preclude the continuation of interest to the senior note holders from the subordinated payments to be made by the junior note holders under the binding inter-creditor arrangements.

39 In the course of its reasons, the Court of Appeal stated that there was no persuasive authority that supports an interest stops rule in a CCAA proceeding, and referred to statements of Binnie J. in *Canada 3000 Inc., Re; Inter--Canadian (1991) Inc. (Trustee of)*, 2006 SCC 24, [2006] 1 S.C.R. 865, [*NAV Canada*]. A number of comments can be made.

40 First, *Stelco* did not involve proceeding or claims against the debtor for post-filing interest. Second, the decision in *Stelco* was derived from the terms of negotiated inter-creditor agreements in the note indenture that were protected by plan. There was nothing about the common law interest stops rule that precluded one creditor from being held to its agreement to subordinate its realization to that of another creditor including foregoing its right to payment until the creditor with priority received principal and interest. That is what the Court of Appeal concluded by stating "We do not accept that there is a 'Interest Stops Rule' that precludes such a result". Third, the general statements made in *Stelco* and *NAV Canada* must now be considered in light of the later direction in *Century Services* and *Indalex*. I now turn to *NAV Canada.*

41 In *NAV Canada*, Canada 3000 Airlines filed for protection under the CCAA. Three days later the Monitor filed an assignment in bankruptcy on its behalf. Federal legislation gave the airport authorities a right to apply to the court authorizing the seizure of aircraft for outstanding payments owed by an airline for using an airport. The contest in the case was between the airport authorities and the owners/lessors of the aircraft as to the extent that the owners/lessors were liable for those payments and whether a seizure order could be made against the aircraft leased to the airline. It was ultimately held that the owners/lessors were not liable for the outstanding payments owed by the airline but that the aircraft could be seized.

42 Interest on the arrears was raised in the first instance before Ground J. He held that the airport authorities were entitled as against the bankrupt airline to detain the aircraft until all amounts with interest were paid in full or security for such payment was posted under the provisions of the legislation, i.e. interest continued to accrue and be payable after bankruptcy. The Court of Appeal

did not deal with interest as in their view it was relevant only if the airport authorities had a claim against the owners/lessors of the aircraft, which the court held they did not.

43 In the Supreme Court, which also dealt with an appeal from Quebec which dealt with the same issues, nearly the entire reasons of Binnie J. dealt with the issues as to whether the owners/lessors of the aircraft were liable for the outstanding charges and whether the aircraft could be seized by the airport authorities. It was held that the owners/lessors were not directly liable for the charges owed by the airline but that the aircraft could be seized until the charges were paid.

44 At the end of his reasons, Binnie J. dealt with interest and held that it continued to run until the earlier of payment, the posting of security, or bankruptcy. The bondholders rely on the last two sentences of the following paragraph from the reasons of Binnie J. which refer to the running of interest under the CCAA:

> **96** Given the authority to charge interest, my view is that interest continues to run to the first of the date of payment, the posting of security or bankruptcy. If interest were to stop accruing before payment has been made, then the airport authorities and NAV Canada would not recover the full amount owed to them in real terms. Once the owner, operator or titleholder has provided security, the interest stops accruing. The legal titleholder is then incurring the cost of the security and losing the time value of money. It should not have to pay twice. While a *CCAA* filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the *Bankruptcy and Insolvency Act*.

45 The Quebec airline in question had first filed to make a proposal under the BIA and when that proposal was rejected by its creditors, it was deemed to have made an assignment in bankruptcy as of the date its proposal was filed. Thus the comments of Binnie J. regarding the CCAA could not have related to the Quebec airline, but only to Canada 3000, which had been under the CCAA for only three days before it was assigned into bankruptcy. It is by no means clear how much effort, if any, was spent in argument on the three days' interest issue. Binnie J. did not refer to any argument on the point.

46 There was no discussion of the common law interest stops rule and whether it could apply during the three day period in question or whether it should apply to a liquidating CCAA proceeding. Nor was there any discussion of the definition of claim in the CCAA, being a claim provable within the meaning of the BIA, and how that might impact a claim for post-filing interest under the CCAA. The statement regarding interest under the CCAA was simply conclusory. It may be fair to say that the statement of Binnie J. was *per incuriam*.

47 In my view, the statement of Binnie J. should not be taken as a blanket statement that interest always accrues in a CCAA proceeding, regardless of whether or not it is a liquidating proceeding.

The circumstances in *NAV Canada* were far different from Nortel involving several years of compound interest in excess of US$1.6 billion out of a total world-wide asset base of US$7.3 billion. The statement of Binnie J. should now be construed in light of *Century Services* and *Indalex*.

Need for a CCAA plan

48 The bondholders contend that there is no authority under the CCAA to effect a distribution of a debtor's assets absent a plan of arrangement or compromise that must be negotiated by the debtor with its creditors, and that as a plan can include payment of post-filing interest, it is not possible for a court to conclude that the bondholders have no right to post-filing interest. They assert that there is no jurisdiction for a court to compromise a creditor's claim in a CCAA proceeding except in the context of approving a plan approved by the creditors. They also assert that plan negotiations cannot meaningfully take place "in earnest" until the allocation decision as to how much of the US$7.3 billion is to be allocated to each of the Canadian, US, or EMEA estates.

49 One may ask what is left over in this case to negotiate. The assets have long been sold and what is left is to determine the claims against the Canadian estate and, once the amount of the assets in the Canadian estate are known, distribute the assets on a *pari passu* basis. This is not a case in which equity is exchanged for debt in a reorganization of a business such as *Stelco*.

50 However, even if there were things to negotiate, they would involve creditors compromising some right, and bargaining against those rights. What those rights are need to be determined, and often are in CCAA proceedings.

51 In this case, compensation claims procedure orders were made by Morawetz J. The order covering claims by bondholders is dated July 30, 2009. It was made without any objection by the bondholders. That order provides for a claim to be proven for the purposes of voting and distribution under a plan. The claims resolution order of Morawetz J. dated September 16, 2010 provides for a proven claim to be for all purposes, including for the purposes of voting and distribution under any plan. The determination now regarding the bondholders claim for post-filing interest is consistent with the process of determining whether these claims by the bondholders are finally proven. Contrary to the contention of the bondholders, it is not a process in which the court is being asked to compromise the bondholders' claim for post-filing interest. It is rather a determination of whether they have a right to such interest.

52 It is perhaps not necessary to determine at this stage how the assets will be distributed and whether a plan, or what type of plan, will be necessary. However, in light of the argument advanced on behalf of the bondholders, I will deal with this issue.

53 I first note that the CCAA makes no provision as to how money is to be distributed to creditors. This is not surprising taken that plans of reorganization do not necessarily provide for payments to creditors and taken that the CCAA does not expressly provide for a liquidating CCAA

process. There is no provision that requires distributions to be made under a plan of arrangement.

54 A court has wide powers in a CCAA proceeding to do what is just in the circumstances. Section 11(1) provides that a court may make any order it considers appropriate in the circumstances. Although this section was provided by an amendment that came into force after Nortel filed under the CCAA, and therefore by the amendment the new section does not apply to Nortel, it has been held that the provision merely reflects past jurisdiction. In *Century Services*, Deschamps J. stated:

> **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).
>
> **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 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. (underlining added)

55 I note also that payments to creditors without plans of arrangement or compromises are often ordered. In *Timminco Limited (Re)*, 2014 ONSC 3393, Morawetz J. noted at para. 38 that the assets of Timminco had been sold and distributions made to secured creditors without any plan and with no intention to advance a plan. In that case, there was a shortfall to the secured creditors and no assets available to the unsecured creditors. The fact that the distributions went to the secured

creditors rather than to an unsecured creditor makes no difference to the jurisdiction under the CCAA to do so.

56 In *AbitibiBowater Inc., (Re)*, 2009 QCCS 6461, Gascon J.C.S. (as he then was) granted a large interim distribution from the proceeds of a sale transaction to senior secured noteholders ("SSNs"). The bondholders opposed the distribution on the same grounds as advanced by the bondholders in this case:

> 56 The Bondholders claim that the proposed distribution violates the CCAA. From their perspective, nothing in the statute authorizes a distribution of cash to a creditor group prior to approval of a plan of arrangement by the requisite majorities of creditors and the Court. They maintain that the SSNs are subject to the stay of proceedings like all other creditors.
>
> 57 By proposing a distribution to one class of creditors, the Bondholders contend that the other classes of creditors are denied the ability to negotiate a compromise with the SSNs. Instead of bringing forward their proposed plan and creating options for the creditors for negotiation and voting purposes, the Abitibi Petitioners are thus eliminating bargaining options and confiscating the other creditors' leverage and voting rights.
>
> 58 Accordingly, the Bondholders conclude that the proposed distribution should not be considered until after the creditors have had an opportunity to negotiate a plan of arrangement or a compromise with the SSNs.

57 Justice Gascon did not accept this argument. He stated:

> 71 Despite what the Bondholders argue, it is neither unusual nor unheard of to proceed with an interim distribution of net proceeds in the context of a sale of assets in a CCAA reorganization. Nothing in the CCAA prevents similar interim distribution of monies. There are several examples of such distributions having been authorized by Courts in Canada. (underlining added)

58 Justice Gascon was persuaded that the distribution should be made as it was part and parcel of a DIP loan arrangement that he approved. Whatever the particular circumstances were that led to the exercise of his discretion, he did not question that he had jurisdiction to make an order distributing proceeds without a plan of arrangement. I see no difference between an interim distribution, as in the case of *AbitibiBowater*, or a final distribution, as in the case of *Timminco*, or a distribution to an unsecured or secured creditor, so far as a jurisdiction to make the order is concerned without any plan of arrangement.

59 There is a comment by Laskin J.A. in *Ivaco Inc., (Re)* (2006), 83 O.R. (3d) 108 (C.A.) that questions the right of a judge to order payment out of funds realized on the sale of assets under a CCAA process, in that case to pension plan administrators for funding deficiencies. He stated:

> [I]n my view, absent an agreement, I doubt that the CCAA even authorized the motions judge to order this payment. Once restructuring was not possible and the CCAA proceedings were spent, as the motions judge found and all parties acknowledged, I question whether the court had any authority to order a distribution of the sale proceeds.

60 This was an *obiter* statement. But in any event Justice Laskin was discussing a situation in which all parties agreed that the CCAA proceedings "were spent". That is, there was effectively no CCAA proceeding any more. This is not the situation with Nortel and I do not see the *obiter* statement as being applicable. As stated by Justice Gascon , distribution orders without a plan are common in Canada.

61 While it need not be decided, I am not persuaded that it would not be possible for a court to make an order distributing the proceeds of the Nortel sale without a plan of arrangement or compromise.

Conclusion

62 I hold and declare that holders of the crossover bond claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US$4.092 billion).

63 Those seeking costs may make cost submissions in writing within 10 days and responding submissions may be made in writing within a further 10 days. Submissions are to be brief and include a proper cost outline for costs sought.

F.J.C. NEWBOULD J.

TAB 23

Rescue!

The Companies' Creditors Arrangement Act

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Peter Wall Institute for Advanced Studies

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reasonable balance among the stakeholders while simultaneously providing the ability for the Sino-Forest business to continue as a going concern for the benefit of all stakeholders; the plan adequately considered the public interest, as it would remove uncertainty for Sino-Forest's employees, suppliers, customers and other stakeholders and provide a path for recovery of the debt owed to non-subordinated creditors.[230] See chapter 8 for a further discussion of these cases.

9. Judicial Discretion and Liquidating *CCAA* Proceedings

One policy issue that has not to date been fully explored is whether the *CCAA* should be used to effect an organized liquidation that perhaps more appropriately should have occurred under the *BIA* or receivership proceedings. Increasingly, there are "liquidating *CCAA*" proceedings, whereby the debtor corporation is for all intents and purposes liquidated, but not under the supervision of a trustee in bankruptcy or in compliance with all of the requirements of the *BIA*. While creditors still must vote in support of such plans in the requisite amounts, their vote is often limited to voting on a distribution scheme, since the assets have often all been sold before the plan was developed. As a result, there may be some public policy concerns regarding the use of a restructuring statute to effect liquidation.

A liquidation strategy can occur when a receiver or trustee will not take an appointment due to possible liability concerns, given the language of s. 14.02 of the *BIA;* when a file commences as a restructuring proceeding but it becomes apparent part way through the proceeding that liquidation is unavoidable, either because the business is failing or because it is necessary to sell the assets to transfer the business enterprise to another entity to give effect to the compromise; or when the advisers of the debtor contemplate a sale and transfer of assets, but believe this transfer is better effected in the context of a restructuring proceeding, such as, for instance, where there are rights or contracts the benefit of which could be lost in the context of a bankruptcy or receivership.

A further consideration between a sale under a debtor restructuring statute versus a receivership is the disruptive effect to a complex, going-concern business from a receivership appointment. The exception would be a "pre-packaged" receivership sale; however, the debtor company does not benefit from a stay in such circumstances while undergoing the sale process.

While the courts have endorsed liquidating processes or plans under the *CCAA*, there have been only a few judgments that carefully consider the public policy implications and the benefits and prejudice to expanding the scope of the *CCAA*

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[230] *Ibid.* at para. 65.

TAB 24

Annual Review of Insolvency Law

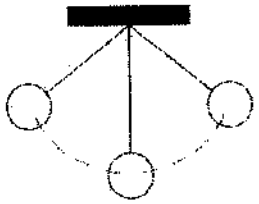
2016

Janis P Sarra
and
Justice Barbara Romaine
Editors

THOMSON REUTERS

The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law

Janis Sarra[*]



When a pendulum is displaced sideways from its resting, equilibrium position, it is subject to a restoring force that combined with the pendulum's mass causes it to oscillate about the equilibrium position, swinging back and forth; the time for one complete cycle of swings called the period.[1]

I. INTRODUCTION

From the first scientific investigations of the pendulum *circa* 1602 by Galileo, the pendulum has represented timing and balance.[2] So too the pendulum is a useful analogy for thinking about Canada's insolvency law system in the past 150 years as it has responded to economic and social challenges generated by oscillations in financial and other markets. The objectives of insolvency law are several-fold: to treat the claims of creditors fairly and equitably, to protect the public interest, to create a fair, timely and cost-effective process, and to achieve a balance of

* Dr Janis Sarra, Presidential Distinguished Professor, University of British Columbia and Professor of Law, Peter Allard School of Law UBC. My sincere thank you to the reviewers for their insightful comments, to the monitors and lawyers that assisted in filling in some of the gaps in the empirical study, and to Graeme Austin, law student, for his assistance with the data.

1 *Miriam Webster's Collegiate Encyclopedia* (Miriam Webster, 2010).

2 W Marrison, "The Evolution of the Quartz Crystal Clock", (1948) 27 *Bell Sys Tech Journal* 510—88.

benefit and cost in deciding whether to restructure or liquidate a business, maximizing enterprise value.[3] As the Supreme Court of Canada has observed, Canadian insolvency law has developed with the goal of "avoiding the social and economic losses resulting from liquidation of an insolvent company".[4]

During various periods, Canada has been more or less successful in meeting these goals, and its sesquicentennial affords an opportunity to briefly reflect on commercial insolvency law in Canada, its development, and its promise for the future. This brief article suggests that there are some important issues that risk the equilibrium so carefully sought, and it is timely to begin a discussion of potential solutions.

II. CONFEDERATION 1867

As Canada became a nation, it had no insolvency law. Two years later, the first bankruptcy legislation was enacted, highly contested at the time.[5] Debates in Parliament reveal polarized views of bankruptcy, from providing relief to the honest and unfortunate debtor "even though he be so through folly or bad judgment",[6] to future Prime Minister Alexander Mackenzie's

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3 L Houlden, G Morawetz and J Sarra, *Bankruptcy and Insolvency Law in Canada*, vol 1 (Toronto: Carswell, 2016); Janis Sarra, *Examining the Insolvency Toolkit: Report on the Public Meetings on the Canadian Commercial Insolvency Law System* (July 2012), online: <https://wwwinsolvencyca/en/iicresources/resources/Examining_the_Insolvency_Toolkit_Dr_J_Sarra_2012pdf> ["Sarra, *Toolkit*"].

4 *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60, [2010] 3 SCR 379 (SCC) at para 70 [*Century Services*].

5 The *Insolvent Act of 1869*, SC 1869, c 36. The original Act was a temporary four-year measure, extended twice: SC 1873, c 2; SC 1874, c 46. *Insolvent Act of 1875*, SC 1875, c 16.

6 Thomas Telfer, *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law 1867-1919* (Toronto: University of Toronto Press, 2014), citing (1869) 43 *Debates of the Senate* (18 June 1869) at 357

views that bankruptcy law was "conducive to public immorality", given one's moral obligation to pay debts.[7]

While the first Canadian legislation did not specify slavery for debts[8] or the debtors' prisons of England that existed for hundreds of years,[9] it was not particularly supportive of the concept of "fresh start". After some extensions of the first temporary legislation, the 1875 *Act* abolished voluntary assignments because debtors were thought to be abusing the statute, and creditors were given increased power to force liquidation.[10] The public debates that informed these changes occurred in the midst of a sustained financial crisis, in which loan default was rampant.[11]

Almost immediately, a movement for repeal was led by financial interests that persuaded the largely agricultural population that it was being treated unfairly, as discharge was available to "traders" and not other debtors.[12] In an era of horse and buggy and trains, while a distant creditor could commence proceedings under the statute, local creditors had lost their advantage of pressing for payment or liquidation to settle claims, literally "a race to the assets".[13] Parliament voted

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(Sanborn); *House of Commons Debates* (2 May 1872) at 286 (Anglin) ["Telfer"].

7 Telfer, *ibid, House of Commons Debates* (11 May 1869) at 253.

8 Under the *Code of Hammurabi*, 4,000 years ago, a creditor was entitled to levy a "distress" or *nipûtum* if a debt was not paid when due, and wives and children were enslaved to work off the debt.

9 Under the English *Bankruptcy Act* of 1542 and the English *Bankruptcy Act* of 1571, the penalty was hanging if the bankrupt committed perjury or concealed assets. It was in 1869 that imprisonment for debt was abolished in the UK, except for dishonest debtors. See UK *Bankruptcy Repeal and Insolvent Court Act, 1869* (UK), 32 & 33 Vict, c 83.

10 Telfer, *supra* note 6.

11 M Bliss, *Northern Enterprise: Five Centuries of Canadian Business* (Toronto: McClelland & Stewart, 1987) at 249.

12 Traders were generally individuals in the market "buying and selling"; Telfer, *supra* note 6; see also J D Edgar, *The Insolvent Act of 1869* (Toronto: Copp Clark, 1869) at 33-34.

13 House of Commons Debates (11 May 1869) at 259. See also *Re Andrews* (1877), 2 OAR 24 (Ont CA) at 30. Provincial legislation enacted during this period, aimed at distributing the debtor's assets

for repeal in 1880,[14] and the Canadian government did not enact another bankruptcy law for 40 years. A nationally united commercial organization, committed to Canadian bankruptcy reform, did not emerge until 1913, and it was another six years before a federal law was enacted.[15]

The 1919 legislation applied for the first time to both companies and individuals, allowing debtors to negotiate a proposal with creditors, subject to court approval.[16] The effectiveness of this early proposal mechanism was limited, as it did not provide any mechanism to negotiate with or bind secured creditors. Amendments enacted in 1923 in response to abuse by debtors and unqualified trustees eliminated proposals before bankruptcy, and by 1930, the *Bankruptcy Act* essentially provided only for liquidation.[17]

III. THE FORCE OF GRAVITY

Over the next period, Canada's economy developed considerably, still grounded heavily in natural resources, but diversifying into manufacturing, construction, services, telecommunications, biomedical and biotechnology, and research and development.[18] There was growing capitalization

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without discharge, offered an alternative to federal law; Telfer, *supra* note 6, notwithstanding that *Constitution Act, 1867* established "bankruptcy and insolvency" as an exclusive power of Parliament.

14 Telfer, *ibid, House of Commons Debates* (7 March 1879) at 220 (Bechard).

15 T Telfer, "The Canadian *Bankruptcy Act of 1919*: Public Legislation or Private Interest", (1994) 24 *CBLJ* 357.

16 Janis Sarra, *Creditors Rights and the Public Interest, Restructuring Insolvent Corporations* (Toronto: University of Toronto Press, 2003) at 12 ["Sarra, *Creditor Rights*"].

17 *Ibid.*

18 Statistics Canada, "GDP by Industry, 2015", online: <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/gdps04a-eng.htm>.

and concentration of wealth.[19] A series of inflationary and recessionary cycles, combined with world events, revealed the liquidation regime to be inadequate, giving rise to devastating losses for creditors, employees and communities.[20] Company liquidation often meant that taxpayers bore the costs of failures in environmental protection and remediation, job loss, and loss of economic activity. A series of legislative reforms responded to the most egregious problems, while still leaving largely intact the hierarchy of creditors' claims.

The impetus for enactment of the *Companies' Creditors Arrangement Act*[21] *(CCAA)* in 1933 was a wave of commercial failures, following which creditors lobbied for national consistency in the administration of insolvent businesses.[22] Dissolution of a financially troubled corporation was now recognized as negatively affecting creditors and employees as well as owners of the company.[23] There was need for a mechanism by which creditors could reach an amicable settlement that would permit the company to restructure and continue in business. In presenting the legislation to Senate, the Honourable Arthur Meighen observed: "the depression has brought almost innumerable companies to the point where some arrangement is necessary in the interest of the company; in the interests of employees, — because the bankruptcy of the company would throw the employees on the street, — and in the interests of security holders, who may decide that it is much better to make some sacrifice than run the risk of losing all in the general debacle of bankruptcy."[24]

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19 Sarra, *Creditor Rights, supra* note 16.

20 *Ibid.*

21 Now the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended [*CCAA*].

22 Sarra, *Creditor Rights, supra* note 16 at 11.

23 *Ibid. Reference re constitutional validity of the Companies' Creditors Arrangement Act (Dom)*, [1934] SCR 659 (SCC).

24 Sarra, *Creditor Rights, supra* note 16 at 14. Meighen was former Prime Minister, 10 July 1920 to 29 December 1921 and 29 June 1926 to 25 September 1926, and was a senator at the time he introduced the bill to Senate.

The *CCAA* afforded financially distressed companies the opportunity for "breathing space" to negotiate with their creditors to find a going-forward business plan that would allow the company to survive. One commentator, writing in 1947, observed that to accomplish reorganization, creditors must give up some of their nominal rights, in order to keep the enterprise going until business is better or defects in management can be remedied, and it is in the interests of the public to continue the enterprise, especially if it employs large numbers of workers who would be thrown out of work by its liquidation.[25] Yet, in its first 14 years, the *CCAA* appears to have been used only seven times.[26] The statute then fell into disuse for half a century, with the Canadian regime favouring liquidation.

The current bankruptcy legislation came into force in 1950, and has been periodically amended to be responsive to particular issues as they arose, aimed at achieving an equilibrium in creditor-debtor relations.[27] The *Bankruptcy and Insolvency Act (BIA)* provides a mechanism for orderly liquidation of a bankrupt's estate and distribution of the value to creditors, assisting with collective action problems and preventing a premature race by creditors to the debtor's assets.[28] Creditors are paid in accordance with their rank in the statutory hierarchy of claims, and that hierarchy has evolved as legislators have placed priorities on the protection of particularly vulnerable groups.[29] Credit markets adjusted to these changes.

The *BIA* also offers both consumer and business debtors the option of making a proposal, allowing them an opportunity to negotiate changes to their credit arrangements and devise new

25 Stanley Edwards, "Reorganizations under the *Companies' Creditors Arrangement Act*", (1947) 25 *Cdn Bar Rev* 587 at 592-3.

26 Sarra, *Creditor Rights, supra* note 16 at 14.

27 Including in 1992, 1997 and 2009. The present statute came into force on 1 July 1950 and is now the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended [*BIA*], the title amended in 1992 to add the word "insolvency"; L Houlden, G Morawetz and J Sarra, *The Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2016).

28 *Ibid.*

29 See, for example, priority status of claims for spousal and child support.

business plans acceptable to their creditors, assisting with certainty in their dealings with one another at the point of insolvency. Last year, 74% of business proposals under the *BIA* were successfully completed.[30]

Amendments to bankruptcy legislation more recently have addressed a range of issues, such as wage and pension priorities, treatment of environmental claims, liability protection for directors, student loans, treatment of securities firm insolvencies, and international insolvencies.[31] Many of these amendments were responsive to particular hardships being suffered by unsecured creditors faced with the insolvency of a corporate debtor.

IV. AN OSCILLATION TOWARDS EQUILIBRIUM

"Fairness" has informed much of the development of Canada's modern bankruptcy law, moving it towards equilibrium. The *BIA* provides for the fair and orderly distribution of the property of a bankrupt among his or her creditors on a *pari passu* basis.[32] The definition of insolvent

30 Division I *BIA* business proposals. 71% of Division II business proposals under the consumer provisions were successfully completed; Janis Sarra, "An Opportune Moment — Retooling the *Bankruptcy and Insolvency Act* to Address Micro, Small and Medium Enterprise (MSME) Insolvency in Canada", in J Sarra and B Romaine, eds, *Annual Review of Insolvency Law 2016* (Toronto: Carswell, 2017) ["Sarra, MSME study"].

31 See for example, *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*, SC 2005, c 47, Royal Assent 25 November 2005; and Bill C-62, Royal Assent 14 December 2007, in force on 7 July 2008 and 18 September 2009.

32 *Re Lalonde* (1952), 32 CBR 191 (SCC); *Langille v TD Bank* (1981),

person references "fair valuation" of property as underpinning whether the person is insolvent.[33] Transfers at undervalue are defined against a benchmark of fairness.[34] Treatment of environmental claims is aimed at "fairness among creditors".[35] Insolvency professionals have a duty to act fairly in the exercise of their authority,[36] including ensuring that the consideration received for property is fair and reasonable.[37] If the court concludes that the debtor has a "fair chance" of meeting its obligations to creditors if it carries on business, the court can refuse to make a bankruptcy order.[38] The regulator owes a duty of fairness in its disclosure and exercise of its investigation powers.[39] The courts have held that

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43 NSR (2d) 608 (NSCA), affirmed (1982), 131 DLR (3d) 571 (SCC); *AEVO Co v D & A Macleod Co* (1991), 4 OR (3d) 368 (Ont Bktcy).

33 Section 2, *BIA*, *supra* note 27.

34 Section 2, *BIA*, *ibid.* *Gingras, Robitaille, Marcoux Ltd v Beaudry* (1980), 36 CBR (NS) 111 (CS Que).

35 *Newfoundland and Labrador v AbitibiBowater Inc*, 2012 SCC 67, [2012] 3 SCR 443 (SCC). The SCC held: "In such cases, the broad approach serves not only to ensure fairness between creditors, but also to allow the debtor to make as fresh a start as possible after a proposal or an arrangement is approved...The purpose of these amendments was to balance the creditor's need for fairness against the debtor's need to make a fresh start." at paras 36, 47.

36 *Impact Tool & Mould Inc (Receiver of) v Impact Tool & Mould Inc (Trustee of)*, 2013 ONSC 2616 (Ont SCJ), application for leave to appeal dismissed 2013 ONCA 697 (Ont CA); *Re Kaiser*, 2011 CarswellOnt 8304, 84 CBR (5th) 29 (Ont SCJ [Commercial List]), additional reasons 2011 CarswellOnt 10575, 85 CBR (5th) 296 (Ont SCJ [Commercial List]), leave to appeal refused 2011 CarswellOnt 12822 (Ont CA [In Chambers]).

37 Section 30(6), *BIA*, *supra* note 27. *Re Rassell* (1999), 177 DLR (4th) 396 (Alta CA); *Re Almadi Enterprises Inc*, 2014 ONSC 1020 (Ont SCJ [Commercial List]); *Re Hafezi*, 2008 CarswellOnt 3381 (Ont SCJ); *Laurentian Bank of Canada v World Vintners Corp* (2002), 35 CBR (4th) 144, 2002 CarswellOnt 2434 (Ont SCJ).

38 *Re Gagnier* (1950), 30 CBR 74 (Ont SC); *Re MTM Electric Co* (1982), 42 CBR (NS) 29 (Ont Bktcy); *Re TDM Software Systems Inc* (1986), 60 CBR (NS) 92 (Ont SC).

39 *Sheriff v Canada (Attorney General)* (2006), 25 CBR (5th) 204 (FCA); *Sam Lévy & Associés Inc c Mayrand* (2006), 28 CBR (5th)

insolvency processes should be fair, transparent and efficient.[40] In these and other examples throughout the legislation and case law, fairness has had both a substantive and procedural component.

This mix of substantive and procedural fairness was also a hallmark of the *CCAA* in the 1990s and 2000s. Numerous developments in both statute and common law situated insolvency more directly in the larger socio-economic context of Canadian law, and sought to establish a series of checks and balance among various stakeholders, recognizing that the redeployment of resources creates externalities, the costs of which are borne disproportionately by stakeholders least able to bear them.[41] The Supreme Court of Canada has held that courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.[42] It observed that 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.[43]

The courts began to recognize the important public interest aspects of insolvency legislation, in that it reaches beyond purely commercial interests to multiple interests affected by firm failure.[44] The courts' admonition to the parties to approach workout negotiations in this fulsome way led to successful and innovative restructurings that allowed businesses to continue, preserving jobs, trade and creditor relationships. Notable cases included protecting broad

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200 (FCA), leave to appeal to SCC refused 2006 CarswellNat 3849, 2006 CarswellNat 3850 (SCC).

40 *Bank of Montreal v Calgary West Hospitality Inc*, 2011 CarswellAlta 698, 78 CBR (5th) 287 (Alta QB).

41 Sarra, *Toolkit*, *supra* note 3 at 8.

42 *Century Services*, *supra* note 4 at para 70.

43 *Ibid* at para 71.

44 See for example, the *CCAA* proceedings in Canadian Red Cross Society.

national services and entire communities from economic collapse.[45]

Notwithstanding changes in Canadian capital markets that allowed debtors to access foreign capital, changing the nature of credit relationships, the courts, through their decisions, instilled in the parties the idea that the first effort should be to try to preserve the business, in a manner that is fair to multiple stakeholders. Sometimes those efforts led to innovative governance and financing of debtor companies, preserving economic activity.[46] Capital markets, already constantly changing, adjusted well to these developments in law and practice.

During this period, the Supreme Court of Canada held that courts must recognize that on occasion the broader public interest will be engaged by aspects of insolvency reorganization and may be a factor in the decision to allow a particular action.[47] It held that 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; that restructuring 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.[48] Companies are often key elements in a complex web of interdependent economic relationships, and in order to avoid the negative consequences of liquidation, the court must be cognizant of the various interests at stake in an insolvency proceeding, including those of employees, creditors and others.[49] The Supreme Court has also made clear that directors have a fiduciary duty to the company, and in exercising their obligation to act in the best interests of the

45 See for example, the *CCAA* proceedings in Air Canada, Algoma Steel, and Canadian Red Cross Society.

46 See for example, the first restructuring of Algoma Steel, discussed in Sarra, *Creditor Rights*, *supra* note 16.

47 *Century Services Inc*, *supra* note 4 at para 60.

48 *Ibid* at para 15.

49 *Ibid* at para 18.

corporation, directors may look to the interests of employees, creditors, consumers, governments and the environment to inform their decisions.[50]

V. THE PENDULUM SWINGS BACK

Notwithstanding consensus by at least a segment of Canadian society that our insolvency laws work well, there are some disturbing trends — a swing back of the pendulum, perhaps not as far as 1880, but in some ways, remarkably similar. Given the limit of a few pages, two examples must suffice to illustrate: the swing from rescue to liquidation and the diminution of the fairness standard, both of which undermine the public interest goals of the legislation.

1. The Swing Back to Liquidation

The insolvency law pendulum has undertaken a swing back to liquidation, in some instances involving a sale as a going-concern, in most cases, a liquidation of assets and inventory and loss of a going-concern business. Restructuring under pre-filing debt and equity structures, with new financing, new investors or conversion of debt to equity, has become less common. The implications of these differing outcomes are clear: in a going-concern sale, trade supply and employment relationships and economic activity may be preserved; in a liquidation of assets, secured creditors are usually paid out, but many others suffer substantial losses.

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50 *BCE Inc v 1976 Debentureholders*, [2008] 3 SCR 560, 2008 SCC 69 (SCC) at para 40, and *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68, [2004] 3 SCR 461 (SCC) at para 42.

The evidence of these changing outcomes has been anecdotal, so it was timely to undertake an empirical analysis to determine the facts of precisely what is occurring,[51] and then to think about what is driving this swing back of the pendulum. Given that the Office of the Superintendent of Bankruptcy requires the filing of notice of all *CCAA* proceedings, there is a complete data set available, although it requires reading thousands of pages of court records, judgments and monitors' reports to accurately discern outcomes of proceedings. In some instances, the results were also confirmed with the monitor in the proceeding, where the official record was not clear.

These data require further "mining", in that there may be particular sectors for which a going-concern outcome would not be possible, even if some of the fairness considerations, discussed in the next part, were in place. However, the global numbers are revealing. With respect to methodology, it is important to note that where there were several entities in a single *CCAA* filing, if there was one entity that emerged from the proceeding as a going-forward business, it counted as a going-concern sale even if other entities were liquidated on an asset basis. The results of the study, are as follows.

From 1 January 2014 to 1 November 2016, 100 *CCAA* proceedings were commenced, of which one was terminated as void *ab initio* because it was revealed that the debtor did not qualify under the statute. Twenty-seven proceedings were ongoing as of 1 November 2016.[52] Of the 72 completed proceedings, 78 percent were "liquidating *CCAA*

51 All *CCAA* proceedings commenced between 1 January 2014 and 1 November 2016 were analyzed. Outcomes were found through searching all court decisions, monitors reports, plans of arrangement and compromise, and materials in support of court motions, and in some instances, speaking with the monitor or lawyer on the file. Data on file with author. Further research will break down these data by region, sanction of a *CCAA* plan or not, etc.

52 Or near-completed where the outcome has been approved by the court and is being implemented. One proceeding was terminated where the only remaining assets were mineral licences in a foreign

proceedings", in that the outcome was a sale. Ten percent of all completed proceedings involved sales in which there was at least one going-concern entity after the sale and 68 percent involved liquidation of assets and inventory, with no going-forward business activity. Twenty-two percent of the completed proceedings were restructuring under some form of the pre-filing structure, with different equity/debt mix and new investors.

While the data are accurate, it is important to note that the ongoing proceedings are primarily filings in 2016, and their ongoing nature may mean that there is some possibility for a workout, whereas many of the files that closed quickly in 2016 were sales of both kinds. Nonetheless, the data are revealing.

72 *CCAA* files by outcome 2014-2016

- Restructuring under a plan of arrangement 22%
- Liquidating CCAA, at least one entity going-concern after sale 10%
- Liquidating CCAA, no continuing business after sale of assets 68%

The trend to liquidation is disturbing, and can likely be attributed to several notable changes in credit markets.

With the various economic oscillations in the past decade, for example, the height of the global financial crisis and now in the Canadian oil and gas sector, the ability to address insolvency

jurisdiction and the secured creditor walked away, unwilling to fund any further insolvency proceedings.

appears to depend on whether operating lenders have a relationship with the debtor companies and the communities in which they operate.[53] At the smaller and mid-cap market level, secured creditors have given debtors extended periods of forbearance before debtors are forced to file; but on filing, liquidation can be a brutally short outcome.

For larger cap companies, the trends are different, particularly where there is cross-border debt. Capital markets have changed significantly in the past two decades in nature and size, in the maturing of Canadian securities regulation that has allowed access to international capital pools, and in the shift from bank lending to public and private market non-bank lending.[54] The ease of capital movement and the accompanying exponential increase in pressure for short-term investor returns led many companies to pay out dividends in preference to investing in their longer-term sustainability.[55] The structure of corporate groups has resulted in the uploading of cash on a frequent basis to the parent company to finance non-domestic related entities, leaving fewer assets in the Canadian debtor to satisfy claims on insolvency,[56] a trend occurring globally. Intercompany credit arrangements have become common, where assets of Canadian debtors are encumbered to finance operations of related entities in foreign jurisdictions.[57]

New products and strategies in the structure of finance, including syndication, securitization and collateralization, have profoundly altered the nature of debt.[58] With the globalization of business, many cross-border enterprises

53 An issue explored also in the fairness discussion in the next part.

54 M Condon, A Anand and J Sarra, *Securities Law in Canada, Cases and Commentary*, 2nd ed (Toronto: Emond, 2010) ["Condon, Anand and Sarra"].

55 Sarra, *Toolkit, supra* note 3.

56 *Ibid.*

57 See for example, the *CCAA* proceeding in The Source at Circuit City; Sarra, *Toolkit, supra* note 3.

58 Janis Sarra, "Creating Fairness and Sustainability in the Credit Derivative Market Design", in C Williams, ed, *The Embedded Firm*

have grown, both originating in Canada and as subsidiaries of large multinational enterprises. The result has been a fundamental shift in credit relationships from the many years of relational lending to a situation where both domestic and foreign creditors have little interest or direct connection with the debtor company and its stakeholders, other than an interest in short-term returns on their investment.[59] In turn, there has been a loss in governance oversight by senior lenders, as they have already fully hedged their risk, resulting in diminished early detection of company financial distress. Governments globally are wrestling with how to deal with the impact of these changes, including their capacity to protect the integrity of the market and engage in regulatory oversight of the conduct of debtor companies and market participants.[60]

In Canada, a result of changes to debt markets has been that the *CCAA* has become largely a senior creditors' statute, with increasing liquidations driven not by the local creditors of early bankruptcy legislation, but often by foreign creditors,[61] resulting, in some instances, in diminution of economic activity and exit of assets.[62] Rather than a race to assets by horse and buggy, the rapidity of distressed debt trading and the rush to litigation or threat of litigation is now

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(Cambridge: Cambridge University Press, 2011) at 205-233 [Sarra, "Credit Derivatives"].

59 Sarra, *Toolkit, supra* note 3.

60 See for example, L'Autorité des marchés financiers du Québec (AMF), Québec *Derivatives Act*, 2015, SQ c I-14.01, online: <http://www.lautorite.qc.ca/en/derivatives.html>.

61 Including, in some cases, foreign parent companies.

62 Sarra, Credit Derivatives, *supra* note 58 at 14; Sarra, *Toolkit, supra* note 3. For example, in August 2015, the monitor in the US Steel *CCAA* proceeding reported that the US parent company unilaterally diverted 15,000 tons of monthly steel production out of the Canadian debtor and sent those orders to its US steel mills, resulting in a significant loss of economic activity, decided without court approval: *Re US Steel Canada Inc*, Court File No CV-14-10695-00CL (Ont SCJ) (Twelfth Report of the Monitor, 31 August 2015, at paras 24 to 27).

pushing the pendulum back to a new kind of race to the assets.[63] Many policies that facilitated trade and the movement of capital across borders, policies that underpinned Canada's economic growth, set the stage for what is occurring now. Courts are confronted with *fait accompli* applications before them, in effect bypassing many of the checks and balances of the system. Sales under these conditions often do not have the protections built into a *CCAA* plan that prevent misconduct.[64]

The question in *CCAA* proceedings has been somewhat miscast; courts have been forced to focus on whether they have the authority to approve the liquidation sale presented to them by debtors and their secured creditors, which they do under their broad statutory authority, rather than on whether or not prejudice is occurring by approving such strategies. Clearly, companies that are not viable should not be continued, and Canada's economic situation affects the viability of companies, as evident currently in the oil and gas sector. Yet, arguably, the current swing to liquidation has removed an important aspect of Canadian insolvency law, pressing parties to seriously consider a going-concern restructuring. More often than not now, the proceeding never gets to the stage of having a plan placed before the court for its approval.

This tendency to liquidation is, ironically, partly the result of Canada's progressive move to support comity and cooperation, endorsed 20 years ago and codified in 2009.[65] Part IV of the *CCAA* expressly promotes cooperation between the courts; the fair and efficient administration of cross-border

63 Sarra, Credit Derivatives, *ibid* at 16.

64 Such as broad notice, appropriate classification of creditors, and negotiation and vote on a plan.

65 Part IV of the *CCAA*, based on the United Nations Commission on International Trade Law, *UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation* (New York: UN, 2014) at 3, online: <https://wwwuncitralorg/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-epdf>.

insolvencies that protects the interests of creditors, other interested persons and debtors; the maximization of the value of the debtor company's property; and the rescue of financially troubled businesses to protect investment and preserve employment.[66] There have been innovative approaches to hearing matters and resolving disputes, such cooperation being particularly important in relationships with the United States ("US").[67] However, the express objectives of preserving employment and rescuing businesses appears increasingly lost in growing litigation and non-conciliatory proceedings.

While the tests for centre of main interest ("COMI") have helpfully crystallized in recent years,[68] Canadian courts have sometimes been too quick to cede jurisdiction by endorsing the COMI of Canadian entities to be in a foreign jurisdiction based on the "practicalities" of the situation.[69] Canadian creditors have commonly not been involved in the decision and their interests may be prejudiced. The important tool of the "come-back" provision is rendered ineffective because of the speed with which any potential Canadian proceedings are lost to US or other foreign proceedings. Thus, while flexibility in proceedings is to be encouraged, the result of liquidating *CCAA* has been to negate years of careful jurisprudence in which the courts required parties to pause and consider the implications of their motions, encouraging diverse stakeholders to come to the negotiation table.[70] That said,

66 *CCAA, supra* note 21, s 44. Janis Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013).

67 See for example, the Nortel sale of assets proceeding.

68 *Re Massachusetts Elephant & Castle Group Inc*, 2011 ONSC 4201, 81 CBR (5th) 102 (Ont SCJ) (Morawetz J); *Re Lightsquared LP*, 2012 ONSC 2994, 92 CBR (5th) 321 (Ont SCJ [Commercial List]) (Morawetz J); *Re Digital Domain Media Group Inc*, 2012 BCSC 1565 (BCSC [In Chambers]) (Fitzpatrick J).

69 See for example, *Re Urbancorp Inc*, 2016 ONSC 3288, 2016 CarswellOnt 8410, 37 CBR (6th) 44 (Ont SCJ [Commercial List]).

70 See for example, Algoma Steel, Canadian Red Cross, Anvil Range Mining Corporation, the asset-backed commercial paper market workout (Metcalfe), Target.

efforts by US creditors to have cross-border proceedings controlled in the US have not always been successful.[71]

Similarly, comity has been cited to encourage courts to endorse motions seeking use of Canadian debtors' assets to fund foreign-based unsecured creditor committees. These parties have no incentive to resolve disputes, as their costs of litigating are paid for out of the assets of the insolvent company. The result is increasing litigation before the *CCAA* courts, leading to fatigue by Canadian creditors who bear substantially more court costs because of increased numbers of contested positions.[72] Issues that previously were negotiated between the parties are being litigated, foreign creditors often testing the limits of the court's authority in ways they would not in their home jurisdiction,[73] exacerbated by renewed nationalistic sentiment in foreign jurisdictions that are some of Canada's largest sources of capital.

The very underpinning of *CCAA* proceedings has now shifted to orderly liquidation, as illustrated by the outcomes of the *CCAA* filings in the past two years. Insolvency restructuring aimed at saving the business activity, employment and trade relationships has become a bonus outcome, but no longer a baseline objective. The fairness inquiry has become limited to process,[74] in stark contrast to a decade ago; and a new generation of insolvency practitioners cannot seem to imagine a role for themselves or the court in ensuring substantive fairness.

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71 See for example, *Re Sanjel Corporation*, 2016 ABQB 257 (Alta QB) (Romaine J) and Nortel *CCAA* proceedings.

72 Sarra, *Toolkit, supra* note 3 at 53; citing *Canwest Global Communications Corp*, Ontario Superior Court, File #: CV-09-8396-00CL. *Canwest Global Publishing Inc*, Ontario Superior Court, File No CV-10-8533-00CL; *Canwest Publishing Inc*, Ontario Superior Court, File No CV-10-8533-00CL.

73 Sarra, *Toolkit, supra* note 3.

74 *Re White Birch Paper Holding Co*, 2010 CarswellQue 10954 (Que SC); *Re Canwest Publishing Inc/Publications Canwest Inc* (2010), 68 CBR (5th) 233, 2010 CarswellOnt 3509 (Ont SCJ [Commercial List]).

As a result of this swing back of the pendulum, it may be that legislative intervention should result.

2. Diminution of the Fairness Standard

The second brief example is the diminution of the fairness standard, particularly in *CCAA* proceedings. While "fairness" permeates Canadian insolvency law and practice,[75] there has been a noticeable shift away from a substantive notion of fairness to one that is largely procedural. An example is found in current sales processes. Practitioners and the courts are attuned to the need for process fairness,[76] yet in considering pre-packaged plans or other outcome strategies, particularly in the larger files, fail to consider substantive fairness. The factors set out in section 36 of the *CCAA*, enacted in 2009 and aimed at transparency and certainty, have pushed the courts to focus on the procedural, rather than the substantive, fairness of the proposed resolution. The move by parties to avoid the costs of a court-supervised restructuring process can boomerang in the sense that creditors view processes and outcomes as unfair. In other instances, the loss of relationship has necessitated new roles for monitors, resulting in creditors expressing concerns regarding their independence and credibility.[77] Yet the role of monitor is integral to the current system. In many other areas of Canadian law, including securities law, fairness is a substantive standard, often pegged to an objective notion of reasonableness or reasonable expectations.[78]

Cognitive neuroscience can offer some insights into recent developments in insolvency law in terms of the shift in fairness considerations away from a substantive inquiry. Cognitive neuroscientists study the brain and its capacity to process and react to situations. The empirical research has found that

75 *In the Matter of the Compromise or Arrangement of Boutique Euphoria Inc and Lingerie Studio Inc* (19 July 2007), Dossier no 500-11-030746-073 (CS Que).

76 *Ibid.*

77 See for example the *CCAA* proceedings of Nortel and Target.

78 Condon, Anand and Sarra, *supra* note 54.

individual understandings of fairness result from a complex interaction of chemicals in the brain, such as oxytocin, creating physiological reactions to situations of fairness or unfairness, an understanding of fairness that is "hard-wired" in the brain.[79] That baseline is then altered by social interactions. We can become inured to different notions of fairness based on our interactions with particular types of groups and people. Fundamental concern about equity and fairness can be diminished where we work in an environment where a narrow consideration of others is prevalent.[80]

Fehr and Schmidt's empirical studies have found that, while fairness goals affect behaviour, the prevailing economic environment also influences behaviour, and a minority of purely selfish people can force a majority of fair-minded people to behave in a purely self-interested manner.[81] One need only look at recent *CCAA* cases to see how these ideas are manifesting themselves in insolvency law.

Relational lending, an underpinning of Canadian insolvency law, has now fundamentally altered for larger corporations, given the shift to international capital markets and the profoundly altered nature of lending. Distressed debt trading leaves the debtor company facing rapidly shifting creditors with different priorities and expectations, leaving debtors unable to negotiate a plan forward.[82] Collateralization of loans, originally a risk management tool, has meant that the originating lender has been fully hedged shortly after the

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79 Janis Sarra, "Embedding Fairness as a Fundamental Norm in Financial Markets", in Janis Sarra, ed, *An Exploration of Fairness, Interdisciplinary Inquiries in Law, Science and the Humanities* (Toronto, Carswell, 2013) at 193-240, citing P Churchland, *Braintrust, What Neuroscience Tells Us About Morality* (Princeton: Princeton University Press, 2011) and other studies.

80 *Ibid*, citing E Tricomi *et al*, "Neural Evidence for Inequality-Adverse Social Preferences", (2010) 463 *Nature* 1089.

81 *Ibid*, citing E Fehr and K M Schmidt, "A Theory of Fairness, Competition and Cooperation", (1999) 114 *The Quarterly Journal of Economics* 817.

82 Sarra, *Toolkit*, *supra* note 3 at 14.

credit transaction, resulting in little or no interest in trying to workout a going-concern business plan with a financially distressed debtor. Syndication, in which a lender may be one of 200 in a syndicated debt, means that no one creditor may have sufficient interest in negotiating a workout and debtors have difficulty identifying creditors, let alone garnering support for a going-concern restructuring.[83]

Many creditors hedge their credit risk with credit default swaps ("CDS"), uncoupling legal and economic interest, distancing themselves from the debtor and its stakeholders. They have decreased incentive to engage in monitoring of the debtor company, in some cases causing an insolvency event in order to be paid out on their swaps.[84] This uncoupling of credit exposure has led to empty voting by senior debt holders, where courts are unaware that the creditors with the "legal claim" have no economic interest at stake in the proceedings.[85] It leads to distorted bargaining and unfairness in the workout process.[86]

Cognitive neuroscientists refer to this form of distancing as skewing normative notions of fairness.[87] The lack of transparency of creditors' interests at risk, in part because of the nature of capital pools and in part because of hedging risk, means that other stakeholders are disadvantaged in negotiations, as are the courts in their consideration of issues.[88]

Derivatives are permitted to function outside of the normal parameters of a *CCAA* stay, falling within the definition of eligible financial contract ("EFC"). When Parliament

83 *Ibid.*

84 *Ibid*, see for example, the AbitibiBowater proceeding. H Hu and B Black, "Debt, Equity, and Hybrid Decoupling: Governance and Systemic Risk Implications", (2008) 14 *European Financial Management Journal* 14.

85 *Ibid.*

86 Sarra, Credit Derivatives, *supra* note 58.

87 Churchland, *supra* note 79.

88 The US has tried to address this issue, in part, by its new Rule 2019 Disclosure Regarding Creditors and Equity Security Holders in Chapter 9 and Chapter 11 Cases under the US *Bankruptcy Code*.

excluded EFC, they involved a narrow category of swaps and futures, and creditors still had "skin in the game".[89] Thus, it made sense to allow parties with forward contracts to exit and obtain coverage elsewhere, avoiding systemic financial risk. The logic is still valid for some swaps and forward contracts, but the broad definition catches many new and different kinds of structured financial products for which there is no compelling reason to grant automatic protection, creating opportunities for mischief, fully protecting some creditors from any economic risk in an insolvency, while actively working against the restructuring process.[90]

The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation. There should be mandatory disclosure during an insolvency proceeding of the real economic risks at stake, including disclosure of the amount of debt that has been hedged by creditors that seek to exercise their voting or oversight rights in an insolvency proceeding. If the *CCAA* is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute. While the courts have broad authority to order transparency, they should perhaps be granted express authority to make orders that advance the goals of the statute in addressing empty voting and behaviour that works against the statute's objectives.

The US has addressed this issue in part. Under the relatively new Rule 2019,[91] every group, committee or entity that consists of or represents multiple creditors or equity security holders

89 *Quebecor World Inc (Arrangement relatif à)*, Québec Superior Court/Court of Appeal, Dossiers no 500-11-032338-085, 500-09-020687-109.

90 Sarra, *Toolkit*, *supra* note 3.

91 Rule 2019, *supra* note 88.

that are acting in concert to advance their common interests in a Chapter 11 US *Bankruptcy Code* case,[92] must file a verified statement setting forth the nature and amount of each disclosable economic interest held in relation to the debtor.[93] A "disclosable economic interest" extends beyond claims and interests owned by a stakeholder and includes, among other types of holdings, short positions, credit default swaps and total return swaps.[94] The definition is aimed at being sufficiently broad to cover any economic interest that could affect the legal and strategic positions a stakeholder takes in a Chapter 11 proceeding. If the court finds a failure to comply, it may refuse to permit the entity, group or committee to be heard or to intervene in the case; and it can hold invalid any authority, acceptance, rejection, or objection given, procured, or received by the entity, group, or committee or grant other appropriate relief. It is timely to consider similar legislative reform in Canada.

While some of the harms created by the diminution of fairness in *CCAA* proceedings have been mitigated by hardship funds, here again the notion of fairness has been constrained. Hardship funds have been important in insolvency proceedings, to relieve against the harshness of insolvency for vulnerable stakeholders such as employees and pensioners.[95] However, in tying the availability of hardship payments to a reasonable expectation that such creditors will receive a payout in a liquidation scenario, we have shifted from a flexible approach to *CCAA* claims to one in which the court is applying

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92 Or a Chapter 9 proceeding under the US *Bankruptcy Code, ibid.*

93 "Disclosable economic interest" is defined in the rule as "any claim, interest, pledge, lien, option, participation, derivative instrument, or any other right or derivative right granting the holder an economic interest that is affected by the value, acquisition, or disposition of a claim or interest." "Represents" means to take a position before the court or to solicit votes regarding the confirmation of a plan on behalf of another.

94 *Ibid.*

95 *Re EarthFirst Canada Inc*, 2009 ABQB 78, 2009 CarswellAlta 142 (Alta QB).

a strict liquidation hierarchy, further empowering the most senior creditors.

Fairness is engaged on a fundamental basis in insolvency law. For example, during the seven years of litigation in Nortel, almost $2.5 billion in assets of the company were paid out in professional fees, yet more than 6,800 Nortel former employees or pensioners died without there being a resolution of their claims.[96] Disturbing is the attack in the proceedings by the official creditors committee of unsecured creditors, which argued that it amounts to judicial moralism when a judge takes into account fairness concerns, an argument rejected by the Ontario Court of Appeal.[97] Once the allocation judgment was

96 *Re Nortel Networks Corporation*, 2016 ONCA 332 (Ont CA) at para 2, decision on motions for leave to appeal from judgment of Justice Frank Newbould, Superior Court of Justice, dated 12 May 2015 and 6 July 2015, at 2015 ONSC 2987 and 2015 ONSC 4170. Justice Newbould had held that he had wide powers under the s 11 of the *CCAA* to do what was just in the circumstances, subject to the provisions of the Act. He wrote:

> [208] In this case, insolvency practitioners, academics, international bodies, and others have watched as Nortel's early success in maximizing the value of its global assets through cooperation has disintegrated into value-erosive adversarial and territorial litigation described by many as scorched earth litigation. The costs have well exceeded $1 billion. A global solution in this unprecedented situation is required and perforce, as this situation has not been faced before, it will by its nature involve innovation. Our courts have such jurisdiction.

In his view, a *pro rata* allocation could be achieved by directing an allocation of the lockbox funds to each debtor estate based on the percentage that the claims against that estate bore to the total claims against all of the debtor estates. The Court of Appeal held at para 78: "The fact that the specifics of the allocation ordered by the trial judge were not identical to those advanced by any of the parties does not, in our view, create unfairness to the parties."; and at para 84: "The trial judge was clearly alive to the fairness concerns and gave reasons for adopting the approach he did after careful consideration of the evidence and argument at trial."

97 *Re Nortel Networks Corporation*, 2016 ONCA 332 (Ont CA) at para 87; the appellate court finding that "the trial judge considered the evidence before him in considerable detail and worked with the facts presented to him. Based on those facts, he concluded that a *pro rata* order constituted the answer to the allocation issue. The fact that the answer is also fair should not detract from the force of his

rendered, why is it that the pensioners in Nortel had to agree to have their claims compromised in order to conclude the proceedings?[98] Because, unlike other parties, who can litigate because their personal resources are not at stake, each day and year that claims remain unresolved creates tremendous hardship for individuals who are already economically vulnerable.

These developments require a careful look at the legislation to determine if there is need for retooling in light of this swing back.

VI. THE NEED FOR EQUILIBRIUM

What then is the equilibrium? Arguably, we require a fulsome public policy discussion, involving more than insolvency practitioners, who, while highly professional, are nonetheless profoundly influenced by the fact that their next file is dependent on the parties with the resources in the process, and who, according to cognitive neuroscientists, may have become limited in their understanding of fairness. While senior creditors and their advisors are unlikely to have to experience the financial and emotional stress of loss of employment and pensions that may broaden their understanding, the federal government could open a dialogue that would allow multiple stakeholders greater voice in how insolvency law should develop going-forward. Insolvency practitioners could move outside their comfort zone and offer insightful leadership in thinking through these issues. It may be that there is need for express statutory language that rebalances fairness

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conclusion." The Court of Appeal found no reason to grant leave to appeal, deferring to the judge's exercise of authority and discretion under the statute.

98 The allocation judgments had allocated roughly 62% of remaining assets to Canada; the pensioners agreed to reduce that amount to 57.1 %. Mark Zigler, counsel, quoted in Janet MacFarland, *The Globe & Mail*, 13 October 2016, online: <http://www.theglobeandmail.com/report-on-business/nortel-settles-fight-to-divvy-up-73-billion-from-liquidation/article32346673/>.

considerations in insolvency proceedings and reinstates some of the restructuring goals of the legislation, providing some new tools to the courts and the parties.

A brief reflective comment cannot propose a comprehensive way forward for the next 150 years. It can, however, suggest that insolvency law needs to return to the goals of fairness and rehabilitation where possible, including measures that slow down the newest forms of race to the assets. While the courts already have this authority, it is being eroded by the way in which motions are being brought before the court. Fairness needs to be embedded once again in insolvency proceedings, including examination of how derivatives are treated, the current priorities of claims, and treatment of stakeholders with an interest in the corporation. The *CCAA* should articulate express principles regarding maximization of value and fairness to stakeholders.[99] While, arguably, parties already have good faith obligations, express statutory language would assist with dealing with foreign pressures, particularly if there were remedies for failure to comply.

If liquidating *CCAA* proceedings are to continue, some basic protections for stakeholders and principles for the court to consider in determining whether to approve such strategies could be codified. Canada's insolvency legislation will never have "one size fits all". As the discussion on legislative reform to address the insolvency of micro, small and medium enterprises in Canada reveals, there is need to develop an expedited process for resolving micro and small business insolvency.[100] At the other end of the scale, it is timely to consider the above-identified challenges in respect of insolvency of larger enterprises that are part of complex multinational relationships.

Insolvency law cannot cure the problems left by pre-insolvency failures, such as the debtor's failure to meet environmental standards or to adequately capitalize pension

99 Sarra, *Toolkit, supra* note 3.

100 Sarra, MSME study, *supra* note 30.

promises, but at the point of insolvency, the law should be able to account for previous externalities in applying fairness principles to decisions before the court. A first response to this idea will inevitably be that the cost and availability of capital will be seriously affected. This argument has been made countless times over the development of insolvency law — in enacting wage priorities, in codifying protection of collective agreements, in placing security on contiguous properties in respect of environmental reclamation; but each time, credit markets have adjusted. A broader public policy discussion would inevitably recognize these risks, but would also better weigh the other risks in the financial distress of enterprises.

Looking forward to the coming period and indeed the next 150 years, the challenge will be to develop policies that reflect the objectives of Canada's insolvency law regime and take account of the tremendous economic, information and power imbalance that the statutes were designed to address.

Canada's sesquicentennial affords the opportunity to reflect on the best and not-so-best of Canadian insolvency law and to invite the main actors to think of potential solutions before others take charge for them. In restructuring and insolvency, proper balance and equilibrium has always been essential. Liquidation and a race to assets cannot and should not be the only realistic avenue. To be reminded that other interests, such as environmental standards, employment issues or pensions considerations, should not be forgotten in the financial distress of businesses is no doubt not welcomed by some. But it cannot be ignored either in the global development and future perspective of this area of the law.

TAB 25

Indexed as:

Rizzo & Rizzo Shoes Ltd. (Re)

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited, appellants;

v.

Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited, respondent, and The Ministry of Labour for the Province of Ontario, Employment Standards Branch, party.

[1998] 1 S.C.R. 27

[1998] 1 R.C.S. 27

[1998] S.C.J. No. 2

[1998] A.C.S. no 2

File No.: 24711.

Supreme Court of Canada

1997: October 16 / 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Employment law -- Bankruptcy -- Termination pay and severance available when employment terminated by the employer -- Whether bankruptcy can be said to be termination by the employer -- Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a -- Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) -- Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) -- Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the Employment Standards Act ("ESA") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to severance, termination or vacation pay under the ESA. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the ESA.

Held: The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40a of the ESA suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Moreover, s. 10 of Ontario's Interpretation Act provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the ESA and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40a to be inapplicable in bankruptcy situations is incompatible with both the object of the ESA and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbitrarily deprive some of a means to cope with economic dislocation.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the Employment Standards Amendment Act, 1981 exempted from severance pay obligations employers who became bankrupt and lost control of their assets

between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the ESA is benefits-conferring legislation, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

When the express words of ss. 40 and 40a are examined in their entire context, the words "terminated by an employer" must be interpreted to include termination resulting from the bankruptcy of the employer. The impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the ESA, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the ESA. Termination as a result of an employer's bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the Bankruptcy Act for termination and severance pay in accordance with ss. 40 and 40a of the ESA. It was not necessary to address the applicability of s. 7(5) of the ESA.

Cases Cited

Distinguished: Re Malone Lynch Securities Ltd., [1972] 3 O.R. 725; Re Kemp Products Ltd. (1978), 27 C.B.R. (N.S.) 1; Mills-Hughes v. Raynor (1988), 63 O.R. (2d) 343; referred to: U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of) (1989), 76 C.B.R. (N.S.) 86; R. v. Hydro-Québec, [1997] 1 S.C.R. 213; Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; Verdun v. Toronto-Dominion Bank, [1996] 3 S.C.R. 550; Friesen v. Canada, [1995] 3 S.C.R. 103; Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986; Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701; R. v. TNT Canada Inc. (1996), 27 O.R. (3d) 546; Re Telegram Publishing Co. v. Zwelling (1972), 1 L.A.C. (2d) 1; R. v. Vasil, [1981] 1 S.C.R. 469; Paul v. The Queen, [1982] 1 S.C.R. 621; R. v. Morgentaler, [1993] 3 S.C.R. 463; Abrahams v. Attorney General of Canada, [1983] 1 S.C.R. 2; Hills v. Canada (Attorney General), [1988] 1 S.C.R. 513; British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of) (1996), 40 C.B.R. (3d) 25; R. v. Z. (D.A.), [1992] 2 S.C.R. 1025.

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Employment Standards Act, R.S.O. 1970, c. 147, s. 13(2).
Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5) [rep. & sub. 1986, c. 51, s. 2], 40(1) [rep. & sub. 1987, c. 30, s. 4(1)], (7), 40a(1) [rep. & sub. ibid., s. 5(1)].
Employment Standards Act, 1974, S.O. 1974, c. 112, s. 40(7).

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2.
Interpretation Act, R.S.O. 1980, c. 219 [now R.S.O. 1990, c. I.11], ss. 10, 17.
Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, ss. 74(1), 75(1).

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APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. par. 210-020, [1995] O.J. No. 586 (QL), reversing a judgment of the Ontario Court (General Division) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. par. 14,013, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.

Steven M. Barrett and Kathleen Martin, for the appellants. Raymond M. Slattery, for the respondent. David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

Solicitors for the appellants: Sack, Goldblatt, Mitchell, Toronto. Solicitors for the respondent: Minden, Gross, Grafstein & Greenstein, Toronto. Solicitor for the Ministry of Labour for the Province of Ontario, Employment Standards Branch: The Attorney General for Ontario, Toronto.

The judgment of the Court was delivered by

1 IACOBUCCI J.:-- This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled

to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

2 Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

3 Pursuant to the receiving order, the respondent, Zittrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

4 In November 1989, the Ministry of Labour for the Province of Ontario, Employment Standards Branch (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the Employment Standards Act, R.S.O. 1980, c. 137, as amended (the "ESA"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately $2.6 million and for severance pay totalling $14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the ESA.

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

6 The relevant versions of the Bankruptcy Act (now the Bankruptcy and Insolvency Act) and the

Employment Standards Act for the purposes of this appeal are R.S.C., 1985, c. B-3 (the "BA"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "ESA") respectively.

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

> 7. --
>
> (5) Every contract of employment shall be deemed to include the following provision:
>
> > All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the Employment Standards Act.
>
> 40. -- (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,
>
> (a) one weeks notice in writing to the employee if his or her period of employment is less than one year;
> (b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;
> (c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;
> (d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;
> (e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;
> (f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;
> (g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;
> (h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,
>
> and such notice has expired.

. . .

(7) Where the employment of an employee is terminated contrary to this section,

(a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . .

40a . . .

(1a) Where,

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or
(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2.--(1) Part XII of the said Act is amended by adding thereto the following section:

. . .

(3) Section 40a of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the Bankruptcy Act (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the Bankruptcy Act (Canada) has been accepted by his

> creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

Bankruptcy Act, R.S.C., 1985, c. B-3

> 121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, R.S.O. 1990, c. I.11

> 10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.
>
> . . .
>
> 17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. Ontario Court (General Division) (1991), 6 O.R. (3d) 441

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the BA. Relying on U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of) (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C. in Bankruptcy), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the ESA such that liability for such payments would arise on bankruptcy as well.

8 In addressing this question, Farley J. began by noting that the object and intent of the ESA is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the ESA is remedial legislation and as such it should be interpreted in a

fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the ESA.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the BA. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the BA.

11 Even if bankruptcy does not terminate the employment relationship so as to trigger the ESA termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the ESA. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

12 Farley J. also considered s. 2(3) of the Employment Standards Amendment Act, 1981, S.O. 1981, c. 22 (the "ESAA"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the ESA. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

B. Ontario Court of Appeal (1995), 22 O.R. (3d) 385

13 Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the ESA. He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or who proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40a(1)(a) (at p. 391) which includes the phrase "employees have their employment terminated by an

employer". Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the ESA, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited Re Malone Lynch Securities Ltd., [1972] 3 O.R. 725 (S.C. in bankruptcy), wherein Houlden J. (as he then was) concluded that the ESA termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon Re Kemp Products Ltd. (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C. in bankruptcy), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

> The plain language of ss. 40 and 40a does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a petition by one of its creditors. No entitlement to either termination or severance pay ever arose.

15 Regarding s. 7(5) of the ESA, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the ESAA. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40a.

16 Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

17 This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the ESA?

5. Analysis

18 The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40a of the ESA, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are:

"No employer shall terminate the employment of an employee. . . ." Similarly, s. 40a(1a) begins with the words, "Where . . . fifty or more employees have their employment terminated by an employer. . . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by an employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the ESA termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by an employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by an employer" for the purpose of triggering entitlement to termination and severance pay under the ESA.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, Statutory Interpretation (1997); Ruth Sullivan, Driedger on the Construction of Statutes (3rd ed. 1994) (hereinafter "Construction of Statutes"); Pierre-André Côté, The Interpretation of Legislation in Canada (2nd ed. 1991)), Elmer Driedger in Construction of Statutes (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: R. v. Hydro-Québec, [1997] 1 S.C.R. 213; Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; Verdun v. Toronto-Dominion Bank, [1996] 3 S.C.R. 550; Friesen v. Canada, [1995] 3 S.C.R. 103.

22 I also rely upon s. 10 of the Interpretation Act, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act

according to its true intent, meaning and spirit".

23 Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the ESA, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

24 In Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701). It was in this context that the majority in Machtinger described, at p. 1003, the object of the ESA as being the protection of ". . . the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination". Accordingly, the majority concluded, at p. 1003, that, ". . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not".

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the ESA requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, Employment Law in Canada (2nd ed. 1993), at pp. 572-81.)

26 Similarly, s. 40a, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In R. v. TNT Canada Inc. (1996), 27 O.R. (3d) 546, Robins J.A. quoted with approval at pp. 556-57 from the words of D. D. Carter in the course of an employment standards determination in Re Telegram Publishing Co. v. Zwelling (1972), 1 L.A.C. (2d) 1 (Ont.), at p. 19, wherein he described the role of severance pay as follows:

> Severance pay recognizes that an employee does make an investment in his employer's business -- the extent of this investment being directly related to the length of the employee's service. This investment is the seniority that the employee builds up during his years of service. . . . Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

27 In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40a of the ESA are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, supra, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, Construction of Statutes, supra, at p. 88).

28 The trial judge properly noted that, if the ESA termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the ESA would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the ESA to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the ESAA introduced s. 40a, the severance pay provision, to the ESA. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

> 2. . . .
>
> (3) Section 40a of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the Bankruptcy Act (Canada) and whose assets have been distributed

> among his creditors or to an employer whose proposal within the meaning of the Bankruptcy Act (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40a was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the ESA. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., R. v. Vasil, [1981] 1 S.C.R. 469, at p. 487; Paul v. The Queen, [1982] 1 S.C.R. 621, at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

32 In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

33 I find support for my conclusion in the decision of Saunders J. in Royal Dressed Meats Inc., supra. Having reviewed s. 2(3) of the ESAA, he commented as follows (at p. 89):

> . . . any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the E.S.A. . . . it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

34 This interpretation is also consistent with statements made by the Minister of Labour at the time he introduced the 1981 amendments to the ESA. With regard to the new severance pay provision he stated:

> The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.

. . .

> . . . the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached.
>
> (Legislature of Ontario Debates, 1st sess., 32nd Parl., June 4, 1981, at pp. 1236-37.)

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

> For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions.
>
> (Legislature of Ontario Debates, 1st sess., 32nd Parl., June 16, 1981, at p. 1699.)

35 Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in R. v. Morgentaler, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:

> . . . until recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

36 Finally, with regard to the scheme of the legislation, since the ESA is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., Abrahams v. Attorney General of Canada, [1983] 1 S.C.R. 2, at p. 10; Hills v. Canada (Attorney General), [1988] 1 S.C.R. 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40a of the ESA, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

37 The Court of Appeal's reasons relied heavily upon the decision in Malone Lynch, supra. In Malone Lynch, Houlden J. held that s. 13, the group termination provision of the former ESA, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the ESA then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect". Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

38 Two years after Malone Lynch was decided, the 1970 ESA termination pay provisions were amended by The Employment Standards Act, 1974, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 ESA eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the Malone Lynch decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 ESA have no application to a bankrupt employer. For this reason, I do not accept the Malone Lynch decision as persuasive authority for the Court of Appeal's findings. I note that the courts in Royal Dressed Meats, supra, and British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of) (1996), 40 C.B.R. (3d) 25 (B.C.S.C.), declined to rely upon Malone Lynch based upon similar reasoning.

39 The Court of Appeal also relied upon Re Kemp Products Ltd., supra, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the ESA. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on Mills-Hughes v. Raynor (1988), 63 O.R. (2d) 343 (C.A.), which cited the decision in Malone Lynch, supra, with approval.

40 As I see the matter, when the express words of ss. 40 and 40a of the ESA are examined in their entire context, there is ample support for the conclusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see R. v. Z. (D.A.), [1992] 2 S.C.R. 1025). I also note that the intention of the Legislature as evidenced in s. 2(3) of the ESAA, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim ESA termination and severance pay where their termination has

resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the ESA, namely, to protect the interests of as many employees as possible.

41 In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the ESA, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the ESA. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the BA for termination and severance pay in accordance with ss. 40 and 40a of the ESA. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the ESA.

42 I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the ESA underwent another amendment. Sections 74(1) and 75(1) of the Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the Interpretation Act directs that, "[t]he repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law". As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

6. Disposition and Costs

43 I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

TAB 26

Restructuring, Liquidating, Now Disengagement: The Use of the *CCAA* by Corporate Parents to Disengage from Canadian Operations

Andrew J Hatnay[*]

Should the *Companies' Creditors Arrangement Act*[1] *(CCAA)* be available to solvent foreign corporate parents to facilitate their disengagement from their Canadian operations? This scenario has arisen in three recent high profile *CCAA* proceedings in Canada: US Steel Canada Inc ("USSC", formerly Stelco), Target Canada Co and Bloom Lake/ Wabush Mines. This article examines the strategy of foreign solvent parent companies using the *CCAA* to disengage from their Canadian operations and how they deal with the liabilities owing to Canadian creditors, in particular employees and retirees, which arise in such disengagement scenarios.

I. THE BUSINESS PARADIGM

CCAA proceedings are often studied by insolvency professionals and academics from the perspective of insolvency law and creditors' rights. It is well accepted that the fundamental objective of the *CCAA* is to give insolvent Canadian companies "breathing room" through the stay of proceedings so that they can negotiate compromises with their creditors, avoid the finality of a bankruptcy, and

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1 *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended [*CCAA*].

prevent the negative collateral damage that bankruptcy can entail to creditors and the community at large. Over the decades since its enactment in 1933, however, companies and their advisors have expanded the use of the *CCAA* to allow for a number of different purposes, including the liquidation of a company (a "liquidating *CCAA*").[2] These days, liquidating *CCAA* far outnumber traditional *CCAA* reorganizations.

However, the use of the *CCAA* as a *disengagement* vehicle by a solvent foreign parent is a different use of the *CCAA*. A disengagement from operations is really the tail end of a broader corporate cycle that can be summarized as follows:

a) a foreign company identifies business opportunities to pursue in Canada;

b) the foreign parent extends financing to establish and/or acquire a Canadian operation, including the incorporation of Canadian business entities;

c) the foreign parent manages and controls the Canadian operation for revenue, for example, dividends and advantageous transfer pricing, and/or other strategic advantages, that flow back to the foreign parent;

d) the foreign parent changes strategic or business direction and decides to disengage from its operations in Canada;

e) the foreign parent ceases funding and investment in its Canadian operations, which then become insolvent;

f) under the direction of the foreign parent, to facilitate the disengagement, the Canadian entity applies for *CCAA* protection; and

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2 See *Century Services Inc v Canada (Attorney General)*, [2010] 3 SCR 379 (SCC) at para 61.

g) the foreign parent controls the *CCAA* proceeding as much as possible, for example, by becoming the interim financing lender.

Depending on the nature of the business, a shutdown of a Canadian operation by a foreign parent can be a complex and costly affair. Briefly, a shutdown involves terminating the employees, cancelling contracts, breaking leases, selling real property and maintaining any mothballed facilities until they are finally disposed of, all of which entail costs and can be very time-consuming. If there is a Canadian pension plan that will be wound up, then amounts owing to the plan will crystallize and generate wind-up liability that needs to be paid in accordance with applicable pension laws. There is additional exposure for environmental liability where a facility requires environmental remediation and shutdown. There are also additional costs associated with the hiring of personnel and professionals to give advice on all of the shutdown requirements. Finally, there is the cost of business goodwill, especially to the parent company, arising from the public reports of the shutdown and perceived failure of the foreign parent's Canadian operation. As discussed below, business goodwill was reported to be a factor for Target Corporation when it made its decision to disengage and shut down its operations in Canada through a *CCAA* proceeding.

II. CASE STUDIES

1. US Steel Canada Inc (formerly Stelco)

United States Steel Corporation ("USS") is a major global corporation with operations in North America and central Europe.[3] USS reported being the 15th largest steel producer in the world in 2014 and has stated that it is the second largest integrated steel producer in North America.[4]

3 *Re US Steel Canada Inc*, 2016 ONSC 569 (Ont SCJ) at para 9.

4 *United States Steel Corporation*, Annual Report pursuant to section

In 2004, Stelco Inc ("Stelco"), a Canadian company, had applied for protection from its creditors under the *CCAA*, which it exited in 2006.[5] On 31 October 2007, USS acquired all of the outstanding shares of Stelco and renamed it USSC.[6] The facilities acquired by USS included Lake Erie Works, Hamilton Works and several joint venture interests, including iron ore operations in the United States ("US") and Canada and a 60 percent interest in Z-Line Company, which owns and operates an automotive-quality hot dip galvanizing line. USS also acquired approximately 4,000 acres of land in Ontario, which it said could potentially be sold or developed.

The acquisition of Stelco by USS required the approval of the Canadian federal government under the *Investment Canada Act*.[7] To obtain such approval and to convince the federal government that its acquisition of Stelco would be of "net benefit" to Canada, USS gave a number of undertakings setting out certain commitments it promised to achieve, including those relating to the funding of Stelco's pension plans, increases in production and exports from Canada, and significant capital expenditures at Stelco's facilities.[8] In its press release of 29 October 2007, USS announced that it had received approval from the federal government:

> We are pleased with this news, which confirms that the Minister of Industry is satisfied that US Steel's acquisition of Stelco will be of net benefit to Canada. US Steel brings the financial strength, operating experience and advanced research and technology capability that are

13 OR 15(d) of *The Securities Exchange Act* of 1934 for the Fiscal Year Ended 31 December 2015.

5 *Re Stelco Inc*, [2006] OJ No 276 (Ont SCJ [Commercial List]).

6 "United States Steel Corporation Completes Acquisition of Stelco Inc", United States Steel Corporation, News Release, 31 October 2007, online: <https://www.ussteel.com/uss/portal/home/newsroom/pressreleases>.

7 *Investment Canada Act*, RSC 1985, c 28 (1st Supp).

8 "US Steel Obtains Investment Canada Act Clearance for its Acquisition of Stelco", United States Steel Corporation, News Release, 29 October 2007, online: <https://www.ussteel.com/uss/portal/home/newsroom/pressreleases>.

> critical for the continued success of the Stelco facilities. We look forward to realizing the benefits of combining our operations with those of Stelco and to building on the unique talents, commitment and expertise of Stelco's employees.[9]

USS became the ultimate parent company of USSC. Following its acquisition of Stelco, USS put in place comprehensive corporate and managerial processes whereby USS took virtually total control over all aspects of USSC's operations, including its marketing, customer order procurement, raw materials procurement and pricing, product and product pricing, financing and credit terms, and ultimately, USSC's revenue and cash flow. USS could directly and significantly alter USSC's balance sheet through, for example, the addition or removal of steel production orders in the USSC order books and by USS exerting control over relationships with steel customers. USSC's balance sheet was therefore not simply a function of market forces.

At the time of the acquisition, USS announced that it had high expectations for USSC. It even made public promises to assure the Canadian Stelco employees and retirees that their pension benefits were secure.[10] Gretchen Haggerty, then-Executive Vice President/Chief Financial Officer of USS, wrote in her Letter to the Editor of the Hamilton Spectator:

> U.S. Steel has agreed to significantly improve the security of the Stelco pension plans. We did so in two ways. First, we agreed to unconditionally guarantee pension funding obligations at the corporate (as opposed to Canadian subsidiary) level. Thus, instead of having to rely solely upon Stelco's ability as a stand-alone enterprise to generate the cash necessary to meet pension funding obligations, Stelco's employees and pensioners can now look to the strength of our entire company to do so. Second, we agreed to make an extraordinary payment of $32.5 million into the plans up front at closing. This is in addition to the pension payment schedule agreed upon by the Ontario pension regulator and Stelco.
>
> ....

9 *Ibid.*

10 "Stelco's pensions safe with US Steel", letter to the Editor from Gretchen R Haggarty, EVP and CFO, USS, *The Hamilton Spectator*, 5 October 2007.

> We want Stelco's employees and retirees to know that we understand the fundamental importance of sound pension funding ... *We will honour our commitment to the Stelco pension plans. That is our history and track record.*[11] [emphasis added]

Unfortunately, USS's grand plan did not bear out. Soon after obtaining approval of the acquisition, USS breached its undertakings,[12] precipitating a lawsuit against it by the federal government. By 2014, following an acrimonious relationship that involved strikes, lock-outs, and increased foreign competition, not to mention changes in USS management, USS decided on a change in direction.

On 16 September 2014, seven years after being acquired by USS, USSC, now a wholly owned subsidiary under the control of USS, again applied for protection from its creditors under the *CCAA*, just as Stelco had done years earlier.[13] USS was significantly involved in the USSC filing, and it is reported that USS had directly participated in drafting and reviewing the terms of the draft *CCAA* order that was presented to the *CCAA* court on the initial *CCAA* application. As a result of USSC filing for *CCAA* protection, USS then determined that USSC would be deconsolidated from USS's financial statements on a prospective basis as of the *CCAA* filing date.[14]

USS's extensive and authoritative control over USSC continued while it proceeded under *CCAA* protection. For example, in July and August 2015, it was reported by the monitor that USS unilaterally diverted 15,000 tons of monthly steel production out of USSC and sent those orders to USS steel mills.[15] USS did this diversion without court or monitor

11 *Ibid.*

12 For an interesting discussion on USS's acquisition of Stelco, see Bruce Livesey and Nicole Mercury, "Who Killed Stelco?", *The Globe and Mail Report on Business*, 29 September 2016.

13 "US Steel Announced Strategic Actions to Strengthen Company and Updates Third Quarter Outlook", United States Steel Corporation, News Release, 16 September 2014.

14 *Ibid.*

15 *Re US Steel Canada Inc*, Court File No CV-14-10695-00CL (Ont SCJ) (Twelfth Report of the Monitor, 31 August 2015, at para 24).

approval and USSC managers and its team of advisors could not stop the transfers. This diversion by USS caused a significant and immediate drop to USSC's revenue, and precipitated USSC having to respond with a "business prevention plan" and to seek court approval for the suspension of a list of obligatory payments, including pension contributions and health benefits coverage,[16] and for USSC to begin operating in a "reduced operating scenario" and at a loss.

USSC's main activity while under *CCAA* protection is conducting sales processes to sell itself in whole or in parts, to an outside purchaser. There was no effort toward an internal reorganization by the USSC board of directors, who were individuals who had been previously installed on the USSC board under the direction of USS. In the first sales process, USS was reported as a bidder who was bidding on certain of the perceived desirable assets of USSC. USS also intended to credit bid for those assets using the amounts it claimed to be owed by USSC on a secured basis toward any purchase price. That sales process did not generate any acceptable bids to the major stakeholders of USSC and was terminated.[17] In September 2015, following an unsuccessful court-ordered mediation, USS shifted direction again and announced that it was entirely disengaging from USSC and had no interest in acquiring any of the assets.[18] USSC then commenced a second sales process, which is ongoing. USS remains actively involved, claiming as a creditor of USSC, and asserting secured and unsecured claims against USSC. USS has also entered into a "transition services agreement" with USSC to provide essential transition services to USSC, for a fee, while USSC proceeds as an independent company, disengaging from USS and looking for a buyer.[19] As of this writing, the second sale process continues.

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16 *Re US Steel Canada Inc*, 2015 ONSC 6331.

17 *Ibid* at paras 152-154.

18 *Ibid* at paras 18-27.

19 *Re US Steel Canada Inc*, Court File No CV-14-10695-00CL (Ont SCJ) (Order of Wilton-Siegel J, 9 October 2015).

2. Wabush Mines

Cliffs Natural Resources Inc ("CNR") is a multinational mining and natural resources company based in Cleveland, Ohio. It is a major supplier of iron ore pellets to the North American steel industry. CNR was the ultimate owner of Canadian mining operations Wabush Mines in Québec and Newfoundland and Labrador.

On 12 October 2009, CNR announced its decision to acquire 100% ownership of Wabush Mines by acquiring US Steel Canada Inc's and ArcelorMittal Dofasco's interests, companies that had been, with CNR, co-joint venturers in Wabush Mines. The CNR press release at the time stated:

> Oct 12, 2009—Cliffs Natural Resources Inc (NYSE: CLF) (Paris: CLF) today announced that it plans to exercise its right of first refusal and acquire US Steel Canada's 44.6% interest and ArcelorMittal Dofasco's 28.6% interest in the Wabush Mines joint venture.[20]

CNR had been managing the Wabush Mines since 1965 when the mine began operating:

> Cliffs indicated that, since Wabush Mines began operation in 1965, Cliffs has been the managing partner, and, as a result, the transaction carries no integration risk. In addition, Cliffs is thoroughly familiar with the unique attributes, opportunities and challenges of Wabush Mines' assets, including the ore body and transportation system.[21]

In 2009, CNR was enthusiastic and positive about its acquisition of Wabush Mines. The CNR press release stated:

> Donald J Gallagher, Cliffs Natural Resources' president, North American business unit, said, "Cliffs is enthusiastic about the opportunity to own 100% of Wabush Mines. Our commercial team has had great success marketing the blast furnace pellets produced there to a diverse customer set, including steelmakers in North America, Europe and Asia. Wabush also has an excellent operating team that understands how to run mines and a dedicated and skilled workforce".[22]

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20 "Cliffs Natural Resources to Exercise Right of First Refusal and Acquire Partners' 73.2% Interest in Wabush Mines", Cliffs Natural Resources, News Release, 12 October 2009.

21 *Ibid.*

22 *Ibid.*

On 1 February 2010, CNR announced that it completed the acquisition of Wabush Mines for approximately $88 million. The CNR press release stated:

> Cliffs announced in October 2009 that it would exercise its right of first refusal to acquire US Steel Canada's 44.6% interest and ArcelorMittal Dofasco's 28.6% interest. With the closing of the acquisition, Cliffs now owns 100% of the operation that it has managed since 1965. The Wabush Mines operation includes the Scully Iron Ore Mine near Wabush, Newfoundland, Labrador; the pellet plant and port facilities at Point Noire, Québec; and integrated rail facilities.[23]

i. CNR changes direction and announces it will idle Wabush Mines

On 11 March 2013, CNR announced that it would idle its Wabush Pointe Noire pellet plant within the city of Sept-Iles in Québec by the end of the second quarter of 2013. In apparent contrast to its earlier enthusiastic statements that CNR "was thoroughly familiar with the unique attributes, opportunities, and challenges of Wabush Mines assets",[24] CNR now stated that its decision to idle its iron ore pellet operation was due to "high production costs and lower pellet premium pricing".[25] The CNR press release stated:

> Due to the dynamics in the marketplace, we are taking measures to adjust our iron ore pellet production at our Wabush operation while continuing to meet our customer commitments," said Joseph A Carrabba...[26]

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23 "Cliffs Natural Resources Inc Closes Wabush Mines Acquisition", Cliffs Natural Resources, News Release, 1 February 2010, online: <http://www.cliffsnaturalresources.com/English/news-center/news-releases/news-releases-details/2010/Cliffs-Natural-Resources-Inc-Closes-Wabush-Mines-Acquisition/default.aspx>.

24 See quote in News Release, 12 October 2009, *supra* note 20.

25 "Cliffs Natural Resources Inc Announce Plans to Idle Wabush Pointe Noire Pellet Plant", Cliffs Natural Resources, News Release, 11 March 2013, online: <http://www.cliffsnaturalresources.com/English/news-center/news-releases/news-releases-details/2013/Cliffs-Natural-Resources-Inc-Announce-Plans-to-Idle-Wabush-Pointe-Noire-Pellet-Plant/default.aspx>.

26 *Ibid.*

Initially, the wind down costs were estimated by CNR management at approximately $100 million.[27]

ii. A boardroom battle, followed by the acceleration of disengagement from Canadian operations

On 28 January 2014, Casablanca Capital, an "activist" hedge fund, announced that it had acquired 5.2% of the shares of CNR, making it one of its biggest shareholders. Casablanca sent a letter to CNR on 30 January 2014, citing CNR's mismanagement and directing it to spin off its assets in Canada and to double the annual dividend paid to shareholders.

The corporate cycle of CNR's plan to disengage from Wabush Mines and to use the *CCAA* as its disengagement tool can be traced through its own press releases. In order to "minimize cash outflows and associated liabilities", CNR first stopped funding Wabush Mines.[28] The 11 February 2014 CNR press release stated:

> Cliffs Natural Resources Inc (NYSE: CLF) (Paris: CLF) announced today it expects its full-year 2014 capital expenditures to be in a range of $375 - $425 million, a greater than 50% year-over-year reduction from its full-year 2013 capital spending of $862 million. *This decrease is driven by a significant reduction in the Company's expansion and tailings and water management capital spending at its Bloom Lake Mine in Québec. Cliffs also announced that it will idle production at its Wabush Mine in the Province of Newfoundland and Labrador by the end of the first quarter of 2014.*
>
> Gary Halverson, president and chief operating officer, said, "Sharper capital allocation must drive our decisions. Today's announcement *to reduce overall capital spending* is an important first step." Mr Halverson further noted that, "Bloom Lake's ore body is well suited for a global market that increasingly values quality and diversification of supply, *but it also requires time and capital to be properly developed*, built out, and

27 *Ibid.*

28 "Cliffs Natural Resources Inc Announces Significant Reduction in 2014 Capital Expenditures", Cliffs Natural Resources, News Release, 11 February 2014, online: <http://www.cliffsnaturalresources.com/English/news-center/news-releases/news-releases-details/2014/Cliffs-Natural-Resources-Inc-Announces-Significant-Reduction-in-2014-Capital-Expenditures/default.aspx>.

operated to realize its full potential. *Ultimately we must extract the highest value from Bloom Lake for our shareholders* and operating Phase I preserves all possible options for this asset. Given the wide range of outlooks for iron ore prices, *we reduced our 2014 capital expenditures at Bloom Lake Mine* as we evaluate the best alternatives for this asset as part of our overall focus on enhancing value for shareholders." [emphasis added]

...

Wabush Mines

Cliffs' Wabush Scully Mine in Newfoundland and Labrador will be idled by the end of the first quarter of 2014. With costs unsustainably high, including fourth-quarter 2013 cash costs of $143 per ton, it is not economically viable to continue running this operation. As previously disclosed, Cliffs idled Wabush Mine's Pointe Noire pellet plant in June of 2013. Approximately 500 employees at both the Wabush Scully Mine and the Pointe Noire rail and port operation in Québec will be impacted by these actions.

Gary Halverson continued, "Over the past three years we have seen pricing drop and Wabush Mine's costs escalate all while we have made significant capital investments into the operation. This is a regrettable but necessary decision. We simply cannot continue operating a high-cost mine while pricing and freight markets are so volatile.[29]

In February 2014, Casablanca announced that it was backing Lourenco Goncalves, the former CEO of Metals USA, to fill the position of chief executive officer of CNR. Casablanca sent a letter to CNR declaring its intention to nominate a majority of directors for election to CNR's board of directors at the 2014 annual meeting. A proxy fight for the control of CNR's board was imminent.

On 7 August 2014, Casablanca won the battle. CNR announced that Mr Goncalves was appointed to the position of Chair, President and CEO of CNR. The previous CEO, Gary Halverson, resigned, after serving in the role for only six months.

29 *Ibid.*

In a media report on 31 October 2014, it was reported in the media that CNR had notified the Newfoundland and Labrador government of its decision to officially close Wabush Mines.[30] In a CNR press release of 19 November 2014, Mr Goncalves, the new CEO of CNR, said that the closure costs of Wabush Mines and Bloom Lake were actually *seven* times the previous estimate and were "in the range of $650-$700 million":

> The Company previously disclosed that to make Bloom Lake viable, the development of the mine's Phase 2 was necessary. The investment was estimated to cost $1.2 billion. In the event of a closure, the estimated closure costs are expected to be in the range of $650 million to $700 million in the next five years.[31]

CNR was working on a plan to avoid these costs. The November 2014 CNR press release goes on to state:

> Despite the continued interest of the prospective equity partners in Bloom Lake and in its high quality ore, the potential investment is not achievable within a time frame acceptable to Cliffs. With expansion no longer viable, *we have shifted our focus to executing an exit option for Eastern Canadian operations that minimizes the cash outflows and associated liabilities.*[32] [emphasis added]

In a media interview on the same day, Mr Goncalves said that CNR's process to "exit" its Eastern Canada operations was underway and that "now it's just execution time":

> We don't have a time frame set in stone but it's a process that we have already started so right now it's just execution time.[33]

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30 "Cliffs Resources officially closing Wabush Mines", *CBC News*, 31 October 2014.

31 "Cliffs Natural Resources Inc to Pursue Exit Options for its Eastern Canadian Operations", Cliffs Natural Resources, News Release, 19 November 2014, online: <http://ir.cliffsnaturalresources.com/English/investors/news-releases/news-releases-details/2014/Cliffs-Natural-Resources-Inc-to-Pursue-Exit-Options-for-its-Eastern-Canadian-Operations/default.aspx>.

32 *Ibid.*

33 "Cliffs to pull up stakes in Eastern Canada", *The Canadian Press*, 19 November 2014, online: <http://thechronicleherald.ca/business/1252137-cliffs-to-pull-up-stakes-in-eastern-canada>.

The next day, in a media interview of 20 November 2014, Mr Goncalves criticized past CNR management:

> The chief executive officer of mining giant Cliffs Natural Resources Inc is taking aim at his predecessors for their decision to pump billions of dollars into Canada, saying every single investment it made here in recent years was a "disaster" that failed to produce any profit.
>
> "I'm walking away from Canada big time — Canada for Cliffs has not been a good thing," Lourenco Goncalves, the company's chairman and CEO, said in an interview Thursday. "All these investments that the company made in Canada after the Wabush mine were a disaster."
>
> "I'm not the type of guy that's too much of a Monday morning quarterback," he said. "But these [decisions] are very clear. Misguided decisions all the way."[34]

In January 2015, CNR directed the Bloom Lake companies to apply for *CCAA* protection from the Québec Superior Court. The CNR Press Release stated:

> On January 27, 2015, Cliffs Natural Resources Inc announced that Bloom Lake General Partner Limited and certain of its affiliates, including Cliffs Québec Iron Mining ULC (collectively, "Bloom Lake Group") commenced restructuring proceedings in Montreal, Québec, under the *Companies' Creditors Arrangement Act* (Canada) ("*CCAA*"). The Bloom Lake Group had recently suspended operations and for several months has been exploring options to sell certain of its Canadian assets, among other initiatives.[35]

Four months later, on 20 May 2015, a motion was brought to extend the Bloom Lake *CCAA* proceedings to five additional CNR-owned entities, including Wabush Iron Co

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34 "Cliffs Natural Resources retreats from Canadian 'disaster'", *The Globe and Mail*, 20 November 2014, online: <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/cliffs-natural-resources-retreats-from-failed-canadian-investments/article21682147/>.

35 "Cliffs Natural Resources Inc Announces Decision on Bloom Lake Mine", Cliffs Natural Resources, News Release, 27 January 2015, online: <http://ir.cliffsnaturalresources.com/English/investors/news-releases/news-releases-details/2015/Cliffs-Natural-Resources-Inc-Announces-Decision-on-Bloom-Lake-Mine/default.aspx>.

Limited, Wabush Resources Inc and certain of their affiliates, including Wabush Mines JC, Arnaud Railway Corporation and Wabush Lake Railway Company Limited (collectively the "Wabush *CCAA* parties").[36] The *CCAA* judge extended the order originally issued in the Bloom Lake *CCAA* proceedings to the Wabush *CCAA* entities.

CNR arranged for one of its subsidiaries, Cliffs Mining Company ("CMC"), to be the interim financing lender (colloquially known as the debtor in possession ("DIP") lender) to the Wabush *CCAA* entities in the *CCAA* proceedings and advanced a $10 million interim financing loan on a super-priority basis to fund the wind down of Wabush Mines *via* the *CCAA* proceedings.

The "term sheet" for the interim financing set out various restrictions for the use of the funds, including that no funds were to be used to pay for health benefits and life insurance benefits for Wabush Mines' employees and retirees. Those benefits were suddenly terminated, without prior notice, as soon as the Wabush Mines parties obtained *CCAA* protection. CMC, in its role as interim financing lender, opposed the retirees' subsequent motion to the court to continue the health benefits, at least for a temporary period, and threatened to withdraw the loan and trigger a bankruptcy if the judge ordered a reinstatement of the health benefits. Following a contested motion hearing, the *CCAA* judge permitted the termination of the health benefits, referencing CMC's threats to withdraw the interim financing and bankrupt Wabush Mines. The judge found that the termination of the health benefits caused "hardship" to the retirees.[37] Leave to appeal the *CCAA* judge's decision was sought to the Québec Court of Appeal. The Québec Court of Appeal judge dismissed the motion, but found that the first

36 *Bloom Lake, gpl (Arrangement relatif à)*, (20 May 2015), No 500-11-048114-157 (Qc SCJ).

37 *Bloom Lake, gpl (Arrangement relatif à)*, 2015 QCCS 3064 (Que Bktcy) at para 126.

three elements of the established four-part leave to appeal test had been met. The Court denied the motion in the face of another round of submissions in court by the interim financing lender's counsel that CMC would terminate the loan and thus precipitate the bankruptcy of Wabush if the court granted leave to appeal. The Court concluded:

> [58] All told, the risk of default on the interim financing and of bankruptcy to the Wabush *CCAA* Parties is serious. Granting leave would, in this setting, risk hindering the action.[38]

The main activity of the Wabush *CCAA* parties is to conduct a sales process to sell their assets. There is no effort to restructure the Canadian operations, although there are efforts to try to sell one of the mines to a purchaser who indicated an interest to restart the mine. As of this writing, the Wabush sales process in the *CCAA* proceeding is ongoing.

3. Target Canada Co

Target Corporation is the second-largest discount retailer in the US and is based in Minneapolis, Minnesota. On 13 January 2011, Target Corp enthusiastically announced that it would expand into Canada. It purchased the leases for up to 220 stores of Zellers for $1.8 billion. A new company, Target Canada, was incorporated and the first Canadian Target store opened in March 2013.

Target Corp's aggressive expansion into Canada became riddled with corporate and operational problems, such as supply chain problems, empty shelves and higher than expected prices. Target Canada rapidly ran up $2.1 billion in debt.

i. Target Corp suddenly changed direction

On 15 January 2015, Target Canada announced that it had obtained protection from its creditors under the *CCAA* and was shutting down all of its operations in Canada. Target Corp said

38 *Bloom Lake, gpl (Arrangement relatif à)*, 2015 QCCA 1351 (CA Que) at para 58.

in its press release that it was pursuing a "court-supervised wind down of its Canadian businesses" and acknowledged its own "missteps that proved too difficult to overcome".[39] In the next three months, Target closed 133 stores in Canada.

The supervising *CCAA* judge, Regional Senior Justice Morawetz, noted in *Target* that, "[t]he 2009 amendments did not expressly address whether the *CCAA* could be used generally to wind-down the business of a debtor company".[40] However, he granted *CCAA* protection given the "sheer magnitude and complexity of the Target Canada entities business, including the number of stakeholders whose interests are affected", finding that the enactment of section 36 of the *CCAA*, codifying the sale of assets out of the ordinary course of business is subject to court approval.[41]

Target Canada did not have pension plan wind-up liability, nor environmental liability that arose on its disengagement. However, it did have significant employee severance costs to pay, as well as significant liability to landlords for broken leases. Target Canada had 17,600 employees in Canada. In both a shrewd and humane move, Target Canada established an "employee trust" of $95 million (CAD) to cover the bulk of the amounts owing to employees for severance pay, which ultimately totaled approximately $81 million.[42] Target Canada also arranged for the appointment of representative counsel for all the Target Canada employees in the initial *CCAA* order so that employees would have legal representation from the outset. In its press release of 15 January 2015, Target Corp stated:

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39 "Target Canada Granted *CCAA* Order", Target Corp, News Release, 15 January 2015, online: <https://corporate.target.com/press/releases/2015/01/target-canada-granted-ccaa-order>.

40 *Re Target Canada Co*, 2015 ONSC 303 (Ont SCJ) at para 33.

41 *Ibid* at para 34.

42 *Re Target Canada Co*, Court File No CV-15-10832-00CL (Ont SCJ) (Twenty-Fourth Report of the Monitor, 9 February 2016, at para 7.1).

> We do not take lightly the impact that our decision to discontinue operations in Canada will have on Target Canada's team members who have worked tirelessly to make improvement to the guest experience, that is why we took the unique step of establishing the Employee Trust", said Bryan Cornell, Target Corp Chairman and CEO. "While this is a difficult decision, we believe it is the right one for Target. We had great expectations for Canada but our early missteps proved too difficult to overcome.[43]

Target's main activity under *CCAA* protection was focused on closing stores, terminating contracts, terminating employees, and dealing with landlords. As a retailer, its main creditor groups included employees, landlords, in-store pharmacists, and trade creditors. Given the financial losses of Target Corp's Canadian expansion and the significant public criticism of Target's management, it was clear that Target Corp wanted to exit Canada quickly. By 25 May 2016, creditors voted in favour of a plan of compromise, which includes compromises made by those main creditor groups on their claims against Target, and releases in favour of Target.[44] On 2 June 2016, the Court granted the sanction and vesting order, which among other things, declared that the plan was approved.[45]

ii. Is disengagement from Canadian operations an appropriate use of the CCAA?

As noted earlier, the winding down of a Canadian business by a solvent foreign parent entails a considerable amount of time and resources. It can have an adverse impact on its employees, clients, creditors, and also the wider markets.

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43 *Ibid.*

44 For an excellent overview of the Target *CCAA* proceedings, see Julius Meltnitzer, "Art of the Case: Target Canada's Restructuring", *Lexpert Magazine*, July-August 2016. See also Joe Castaldo, "The Last Days of Target — The Story of Target Canada's Difficult Birth, Tough Life and Brutal Death", *Canadian Business*, online: <http://www.canadianbusiness.com/the-last-days-of-target-canada/>.

45 *Re Target Canada Co*, order of Morawetz RSJ (2 June 2016), Court File No CV-15-10832-00CL.

From a solvent foreign parent's perspective, the use of the *CCAA* to facilitate disengagement has many attractive features. First, a *CCAA* proceeding does not carry the stigma of a bankruptcy. If brand reputation matters to a foreign parent, a *CCAA* proceeding is a more palatable way to disengage, given that the statute is aimed at "restructuring". Maintaining brand reputation was reportedly an important factor for Target Corp in its decision to disengage from Canada.[46]

Second, by utilizing the expansive stay power in the *CCAA*, a foreign parent can obtain the broad stay of all pending and future proceedings against its Canadian company that will inevitably arise due to the countless contract breaches, broken leases, and other non-payments to its creditors. The stay of proceedings instantly generates an environment that forces creditors to react and thus promotes rapid negotiations with the debtor and the parent. The main advantages for a parent company are two-fold: it accelerates the disengagement process for the foreign parent, and by promoting negotiations and settlements, avoids litigation that could ensnare the debtor and parent company for years and could result in significant liability attaching to the parent. As noted earlier, the disengagement of Target from the date of filing for *CCAA* protection (15 January 2015) to creditor approval of the plan of compromise (25 May 2016) was accomplished in a mere 14 months.

Third, the environment created by the *CCAA* proceeding, *i.e.*, stay of proceedings and forced negotiations among multiple creditors, means that creditors have to assess their potential losses and litigation risk, and thereby engage the debtor quickly. The debtor can leverage settlements that it achieves with one creditor against other creditors. This leveraging encourages the entering of compromise settlements by all creditors, which is generally more advantageous to the foreign parent.

46 Meltnitzer, *supra* note 44.

Fourth, the *CCAA* enables the issuance of expansive releases from the court that can protect a foreign parent, its directors, and other individuals and entities from future litigation. Sealing off such liability exposure for the solvent parent and key management individuals is undoubtedly a major objective in a parent's disengagement plan.

III. CAUSES OF ACTION AGAINST SOLVENT CORPORATE PARENTS

Under traditional principles of corporate law, a corporate parent is not liable for the debts of its subsidiaries. Indeed, one of the main reasons a parent sets up a subsidiary is to prevent liability from flowing up to the parent for the activities of its subsidiary, while allowing the parent to benefit from profits and other arrangements it has with the subsidiary that it can control.

However, there are exceptions to such limitations of liability, both under the common law and various statutes. The next part briefly addresses two such exceptions: claims by employees and pension plan members and environmental claims.

1. Claims by Employees and Pension Plan Members

Where a Canadian operation of a foreign parent is liquidated or closed with amounts left owing to large numbers of employees and retirees, the foreign parent can be liable to those individuals for severance payments, pension benefit reductions and health benefits losses, and other compensation-related losses. The amount of these claims can be significant. Liability can be established under a number of legal doctrines.

i. Common employer under the common law

It is established law that the common employer doctrine applies in Canada. In the leading case on the common employer

doctrine, *Downtown Eatery (1993) Ltd v Ontario*,[47] the Ontario Court of Appeal concluded that the consortium of companies was liable to the plaintiff for wrongful dismissal despite the fact that the plaintiff was not employed directly with all of the constituent companies. In reaching that conclusion, the Court considered the corporate interrelationship between the defendants:

> 30....*As long as there exists a sufficient degree of relationship between the different legal entities who apparently compete for the role of employer, there is no reason in law or in equity why they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees* who, in effect, have served all without regard for any precise notion of to whom they were bound in contract. What will constitute a sufficient degree of relationship will depend, in each case, on the details of such relationship, including such factors as individual shareholdings, corporate shareholdings, and interlocking directorships. The essence of that relationship will be the element of common control.[48] [emphasis added]

The development of the common employer doctrine in Canada recognizes that an employee may have more than one employer where corporate structures and interrelationships are complex. Where a sufficient degree of relationship between the parent and subsidiary exists, the common employer doctrine can impose liability on a foreign parent.[49]

ii. Common employer under employment standards legislation

As the Court in *Downtown Eatery* noted, the common employer doctrine "has a well-recognized statutory pedigree

47 *Downtown Eatery (1993) Ltd v Ontario*, [2001] OJ No 1879, 2001 CanLII 8538 (Ont CA) [*Downtown Eatery*].

48 *Ibid*, citing *Sinclair v Dover Engineering Services Ltd* 1(1987), 11 BCLR (2d) 1761 (BCSC), affirmed (1988), 49 DLR (4th) 297 (BCCA).

49 *Ibid.* This determination is fact-specific. In *Kingston et al v GMA Cover Corp et al*, 2012 ONSC 5019 (Ont SCJ), Gray J agreed that the mere fact that there is a parent/subsidiary relationship is insufficient, on its own, to trigger liability under the common employer doctrine. However, he disagreed "that the doctrine applies only where a number of entities operate a business in a seamless manner".

in most jurisdictions".[50] For example, pursuant to section 1 of the Ontario *Employment Standards Act, 2000*,[51] a foreign parent can be liable if it is the owner and proprietor of an associated or related "activity, business, work, trade, occupation, profession, project or undertaking", had "control or direction of" the employment of the Canadian employees, and is "directly or indirectly responsible for" that employment.[52] Similarly, section 95 of the British Columbia *Employment Standards Act*[53] deems businesses under common control or direction as "one person".

iii. Common pension plan administrator

It is submitted that a foreign parent who exercises control over the management and administration of a Canadian pension plan for Canadian employees can be held liable as the "common pension plan administrator", similar to the US' *Employee Retirement Income Security Act of 1974 (ERISA)* statutory cause of action known as "controlled group liability".[54] The foreign parent may be held to owe a fiduciary duty to the pension plan members of its Canadian operation under pension benefits legislation and the common law, and be held liable for their pension benefit losses. While Canadian courts have yet to rule on this cause of action, it has been asserted in at least one cause of action against a US parent, and

50 *Ibid* at para 2.

51 *Employment Standards Act, 2000*, SO 2000, c 41.

52 *Ibid.*

53 *Employment Standards Act*, RSBC 1996, c 113.

54 A company's "controlled group" includes its subsidiaries, parent, and other subsidiaries of the parent, so long as an 80 percent ownership test is satisfied. For a definition of "parent-subsidiary controlled group", see 26 CFR 1.1563-1(a)(2)(i). Under *ERISA*, every member of an employer's "controlled group" is jointly and severally liable for various types of pension liabilities, including those related to (1) satisfaction of minimum funding requirements (and associated excise taxes), (2) termination of underfunded plans, (3) unpaid PBGC premiums, and (4) multi-employer plan withdrawal liability. *Employee Retirement Income Security Act of 1974*, 29 USC 1001 [*ERISA*].

the action was settled without judicial pronouncement on this cause of action.[55]

iv. Oppression remedy and the tort of conspiracy

Depending on the nature of the conduct, the foreign parent may be held to have acted in a manner that is "oppressive and unfairly prejudicial or unfairly disregards the interests" of the employees and pension plan members under corporate oppression remedy provisions, such as, for example, section 241 of the *Canada Business Corporations Act (CBCA)*.[56] Section 241 of the *CBCA* contemplates that a corporation does not need to be incorporated under that statute for liability to attach. All that is required is that the corporation at whom the oppression remedy is aimed is an "affiliate" of a *CBCA* corporation.

The oppression remedy under section 241 of the *CBCA* and the corresponding provisions of provincial corporate statutes modeled on the *CBCA*, encompasses a range of conduct. A person seeking to access the oppression remedy must also fall within the broad definition of a "complainant", provided under section 238 of the *CBCA*. Some employees are able to satisfy

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55 *Samson v Shaw Group*, unpublished order of Morawetz J (9 October 2013), Court file No Cv-12-9949-00CL (Ont SCJ).

56 *Canada Business Corporations Act*, RSC 1985, c C-44 [*CBCA*]. Application to court re oppression:

> 241. (1) A complainant may apply to a court for an order under this section.
>
> Grounds
>
> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
>
> (*a*) any act or omission of the corporation *or any of its affiliates* effects a result,
>
> (*b*) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (*c*) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

paragraph (b) of the definition because they are a "director or an officer or a former director of a corporation or any of its affiliates". Employees and pensioners can also qualify as a "complainant" under paragraph (d), which provides that a "complainant" means, *inter alia*, "any other person who, in the discretion of a court, is a proper person to make an application under this part". The Ontario Divisional Court has held that the oppression remedy "gives recognition to the fact that there are a number of classes of persons who have a legitimate stake in the manner in which the affairs of a business corporation are conducted", and that the remedy "is designed to address, where oppression is found, the imbalance of power on the part of those in control with the vulnerability on the part of those having a genuine stake in the affairs of corporation but no control over its conduct".[57]

The court's determination on the applicability of an oppression remedy claim is dependent on the facts. While a review of the statutory language and case law indicates that the oppression remedy does not expressly extend to the interests of employees as employees *per se*, the oppression remedy has been held to be available to employees in circumstances where the interests the complainants are trying to protect are connected to their status as corporate stakeholders (*i.e.*, security holders, creditors, directors, or officers), as provided for under section 241(1) of the *CBCA*.[58] As noted by Justice Leitch in *Fortnum v Royal City Plymouth Crysler (1999) Ltd*, critical to the finding that a party is a complainant is the requirement that the person

57 *1413910 Ontario Inc v McLennan*, 2009 CanLII 22544, [2009] ÒJ No 1828 (Ont Div Ct) at paras 31 and 34.

58 In *Waxman v Waxman*, 2002 CarswellOnt 2308 (Ont SCJ), the oppression remedy claim was successfully made out where the complainant's employment was "inextricably linked to his position as shareholder, officer and director". See also *El Ashiri v Pembroke Residence Ltd*, 2015 ONSC 1172 (Ont SCJ), where two hotel employees were found to be creditors of the defendant corporations by virtue of the amounts owed to them for unpaid wages and damages for wrongful dismissal. On the facts of the case, the Ontario Superior Court of Justice found that the director was liable to the employees under the oppression remedy.

has a reasonable expectation that a company's affairs will be conducted with a view to protecting his or her interests.[59]

Similarly, a foreign parent may also be held liable under the tort of conspiracy. The elements of the tort of conspiracy at common law were described by the Supreme Court of Canada in *Canada Cement LaFarge Ltd v Ocean Construction Supplies Limited*.[60] The Court was clear in its decision that there are two types of conspiracy: (1) conspiracy to injure; and (2) conspiracy to perform an unlawful act. With respect to the second branch of the tort of conspiracy, it is not necessary that the predominant purpose of the defendants' conduct be to harm anyone in particular; rather, it is enough that the defendants *should have known* that damage would result from their actions.[61] Moreover, the Ontario Court of Appeal has accepted that the tort of conspiracy can apply as between a parent and a subsidiary corporation.[62]

2. Environmental Claims against the Parent Company and/or Its Directors

Personal liability to the directors and officers of a corporate parent exists under environmental protection statutes.[63] These statutes typically have specific provisions that establish rights to compensation for pollution and environmental damage that pierce parent-subsidiary relationships and can directly attach to individuals. The Ontario Court of Appeal, in the recent case of *Midwest v Thordarson*,[64] summarized this cause of action in the context of the Ontario *Environmental Protection Act*:[65]

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59 *Fortnum v Royal City Plymouth Crysler (1991) Ltd*, 2006 CanLII 42789 (Ont SCJ) at para 14.

60 *Canada Cement LaFarge Ltd v Ocean Construction Supplies Limited*, [1983] 1 SCR 452 (SCC) at 471-472.

61 *Ibid.*

62 *Smith v National Money Mart Co*, [2006] OJ No 1807 (Ont CA) at para 19.

63 See *Environmental Protection Act*, RSO 1990, c E.19 [*EPA*], s 99.

64 *Midwest Properties Ltd v Thordarson et al*, 2015 ONCA 819 (Ont CA) at paras 82-84.

65 *EPA*, *supra* note 63.

> [82] Section 99(2) of the *EPA* establishes a right to compensation from "the owner of the pollutant and the person having control of the pollutant." The term "owner of the pollutant" is defined in s 91(1) as "the owner of the pollutant immediately before the first discharge of the pollutant, whether into the natural environment or not, in a quantity or with a quality abnormal at the location where the discharge occurs."....
>
> [83] Mr Thordarson relies on the "corporate veil" principle set out by this court in *ScotiaMcLeod Inc v Peoples Jewellers Limited* (1995), 1995 CanLII 1301 (ON CA), 26 OR (3d) 481 (CA), at paras 25-26, to argue that he is not personally liable. I disagree.
>
> [84] Section 99(2) provides that an action lies against the owner of the pollutant and the person who controls the pollutant. "Person having control of a pollutant" is defined in s 91(1) as "the person and the person's employee or agent, if any, having the charge, management or control of a pollutant immediately before the first discharge of the pollutant, whether into the natural environment or not, in a quantity or with a quality abnormal at the location where the discharge occurs." This definition, and the use of the word "and" in s 99(2), indicates that the party or entity that owns the pollutant and the person or people, including employees and agents, who manage or control the pollutant can all be held liable under this provision. In other words, *parties with control of a pollutant cannot rely on separate ownership of the pollutant to shield themselves from liability*.[66] [emphasis added]

IV. CONCLUSION

In the Target *CCAA* proceedings, the US parent provided some measure of financial security during the wind-down of its subsidiary and sought to diminish the financial hardship that the employees of Target Canada would suffer with an unprecedented employee trust to pay for severance costs. The same cannot be said for USSC or Wabush. These cases demonstrate that opportunistic solvent foreign parents can exploit the *CCAA* as a vehicle to facilitate their disengagement from their Canadian operations. The deleterious effects of disengagement are particularly alarming where the foreign parent's Canadian operations are concentrated in small communities, as in the case of

66 *Midwest Properties Ltd v Thordarson, supra* note 64.

Wabush Mines, where the mine had been a major employer in the local community.

In cases where it is clear that the foreign parent company is using the *CCAA* to minimize or avoid the associated costs of winding down its Canadian subsidiary, or possibly other nefarious purposes, the question of whether the *CCAA* should be available generally to wind-down the business of a debtor company remains. While certain common law principles and provincial and federal statutes can be used to hold a foreign parent liable for the debts of its subsidiaries, judicial intervention and legal reform are required to deter foreign parents from exploiting the *CCAA* as a disengagement vehicle to the detriment of Canadian employees, retirees and other creditors.

1. The Role of the *CCAA* Judge in a "Disengagement *CCAA* Proceeding"

As noted above, Morawetz RSJ observed in *Target* that "[t]he 2009 amendments did not expressly address whether the *CCAA* could be used generally to wind-down the business of a debtor company".[67] This article extends the scenario somewhat from the observation of Morawetz RSJ to raise the issue of a wind-down scenario of a Canadian company orchestrated by its solvent foreign parent. In the absence of legislative reforms, two concepts are proposed for such cases before Canadian *CCAA* courts.

First, it should be made clear to the *CCAA* judge from the outset of a proposed *CCAA* application that the *CCAA* proceeding involves a wind-down of a Canadian operation by a solvent foreign parent who is seeking to disengage from it. Although this strategy was briefly explained to the *CCAA* judge in *Target* in the monitor's pre-filing report,[68] it is not as clear in

67 *Re Target Canada Co*, 2015 ONSC 303 (Ont SCJ) at para 33.

68 See *Re Target Canada Co*, Court File No CV-15-10832-00CL (Ont SCJ) (Pre-Filing Report of the Monitor, 14 January 2015). The monitor's pre-filing report in *Target* should be read in conjunction

the pre-filing reports in *USSC*[69] and *Wabush*.[70] Upon a review of the latter two pre-filing reports, it appears that while the accompanying affidavits and materials included in the initial order application contain some information with respect to the backdrop for the *CCAA* filing, the monitor's pre-filing reports themselves do not discuss the parent's disengagement plan. This silence is then reflected in the endorsements granting the Canadian companies *CCAA* protection.[71]

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with the affidavit of Mark J Wong, which sets out the corporate structure of the Target Canada entities and the reasons for insolvency. The affidavit also explicitly asks the Court to authorize a liquidation process at the outset. Furthermore, the Target pre-filing report includes a section describing the proposed employee trust to be set up by the parent company.

69 See *Re US Steel Canada Inc*, Court File No CV-14-10695-00CL (Ont SCJ) (Pre-Filing Report of the Monitor, 16 September 2014). The monitor's pre-filing report in USSC details the highly integrated nature of USS and USSC, but does not discuss in any detail the parent's intention to disengage. The accompanying affidavit of Michael McQuade provides some background on USS's role in the restructuring efforts of USSC prior to the issuance of the initial *CCAA* order and USS's decision to withdraw support for USSC in light of the lack of success in those restructuring discussions.

70 See *Bloom Lake, gpl (Arrangement relatif à)*, Court File No 500-11-048114-157 (CS Que) (Pre-Filing Report of the Monitor, 26 January 2015). The monitor's pre-filing report in Wabush neither mentions nor discusses CNR's disengagement and idling of the Wabush Mine and Pointe-Noire Pellets. However, the *CCAA* parties' motion for an initial order, as it is referenced in the pre-filing report, provides some information on CNR's decision to idle the Wabush Mine and CMC's lack of willingness to provide funding to the Wabush *CCAA* parties, except as may be required to execute the proposed *CCAA* proceedings and in such case only on a priority secured basis.

71 In the endorsement granting USSC *CCAA* protection, the only mention of USS is in relation to the continuation of intercompany transactions and services between USSC and USS. The Target endorsement, however, recognizes that Target Canada Corporation ("TCC") is the "Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States" and discusses Target's investment in TCC and subsequent disengagement in greater detail. No endorsement was released in Wabush after the initial order was issued under the *CCAA*.

Secondly, it is submitted that a *CCAA* judge supervising a disengagement *CCAA* of a solvent foreign parent should be more acutely cognizant of the impact on creditors, and less deferential to the debtor's management since the controlling mind behind the *CCAA* disengagement plan is a solvent parent, not an independent Canadian company seeking to avoid the perils of bankruptcy. As recently noted by Mr Justice Wilton-Siegel in the USSC *CCAA* proceedings, "Under the *CCAA*, a court has an obligation and a mandate to scrutinize the decisions of a debtor company through the prism of the rights of the affected stakeholders."[72] Those words, it is submitted, are even more relevant and applicable in a disengagement *CCAA* proceeding.

72 *Re US Steel Canada Inc*, 2016 ONSC 5215 (Ont SCJ) at para 86.

TAB 27

C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF **MONTRÉAL**

SUPERIOR COURT
Commercial Division
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. 36, as amended)

N°: **500-11-048114-157**

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

BLOOM LAKE GENERAL PARTNER LIMITED

-and-

QUINTO MINING CORPORATION

-and-

8568391 CANADA LIMITED

-and-

CLIFFS QUÉBEC IRON MINING ULC

-and-

WABUSH IRON CO. LIMITED, a corporation incorporated pursuant to the laws of the State of Ohio, U.S.A., having its registered office at 200 Public Square, Suite 3300, Cleveland, Ohio, U.S.A.

-and-

WABUSH RESOURCES INC., a corporation incorporated pursuant to the laws of Canada, having its head office at 1155 Rue University, Suite 508, Montréal, Québec

Petitioners

-and-

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP

-and-

BLOOM LAKE RAILWAY COMPANY LIMITED

-and-

WABUSH MINES, an unincorporated contractual joint

venture of Wabush Resources Inc. and Wabush Iron Co. Limited, governed by the laws of Newfoundland and Labrador, having its head office at 1505 Chemin Pointe-Noire, C.P. 878, Sept-Iles, Québec

-and-

ARNAUD RAILWAY COMPANY, a corporation incorporated pursuant to the laws of Québec, having its head office at 1155 Rue University, Suite 508, Montréal, Québec

-and-

WABUSH LAKE RAILWAY COMPANY, LIMITED, a corporation incorporated pursuant to the laws of Newfoundland, having its head office at 1155 Rue University, Suite 508, Montréal, Québec

Mises-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

MOTION FOR THE ISSUANCE OF AN INITIAL ORDER
(Sections 4, 5, 11 and *ff.* of the *Companies' Creditors Arrangement Act* ("**CCAA**"))

TO MR. JUSTICE STEPHEN W. HAMILTON OR ONE OF THE OTHER HONOURABLE JUDGES OF THE SUPERIOR COURT, SITTING IN THE COMMERCIAL DIVISION FOR THE DISTRICT OF MONTRÉAL, THE WABUSH CCAA PARTIES SUBMIT:

1. BACKGROUND

1. On January 27, 2015, Mr. Justice Martin Castonguay, J.S.C., issued an Initial order (as amended on February 20, 2015 and as further amended from time to time, the "**Bloom Initial Order**") commencing these proceedings (the "**CCAA Proceedings**") pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**") in respect of the Petitioners Bloom Lake General Partner Limited ("**Bloom Lake GP**"), Quinto Mining Corporation ("**Quinto**"), 8568391 Canada Limited ("**8568391**") and Cliffs Québec Iron Mining ULC ("**CQIM**") (collectively, the "**Bloom Lake Petitioners**") and the Mises-en-cause The Bloom Lake Iron Ore Mine Limited Partnership ("**Bloom Lake LP**") and Bloom Lake Railway Company Limited ("**Bloom Lake Railway Company**") (collectively, the "**Bloom Lake Mises-en-cause**"; collectively with the Bloom Lake Petitioners, the "**Bloom Lake**

CCAA Parties"), as appears from the Initial Order communicated herewith as **Exhibit R-1**.

2. The Bloom Lake CCAA Parties are affiliated companies and their activities, together, comprise substantially all of the Canadian operations of, and related to, the mine located approximately 13 km north of Fermont, Québec in the Labrador Trough, a mature mining district located in Québec and Labrador, known as the Bloom Lake Mine (the "**Bloom Lake Mine**") and the Leased Port Premises (as defined in the Bloom Lake CCAA Parties' Motion for the Issuance of an Initial Order, communicated herewith as **Exhibit R-2** (the "**Motion for Bloom Initial Order**")).

3. Pursuant to the Bloom Initial Order (Exhibit R-1), *inter alia*:

   a) FTI Consulting Canada Inc. was appointed as monitor of the Bloom Lake CCAA Parties (the "**Monitor**") (para. 39 *ff.* of the Bloom Initial Order);

   b) a stay of proceedings was initially ordered for the Bloom Lake CCAA Parties until February 26, 2015, was extended by Order dated February 20, 2015 to April 30, 2015 and was further extended by way of an Order dated April 17, 2015 to July 31, 2015 (para. 8 *ff.* of the Bloom Initial Order, by way of para. 6 of the stay extension Order rendered on April 17, 2015 communicated herewith as **Exhibit R-3**);

   c) procedural consolidation was ordered in respect of the Bloom Lake CCAA Parties (para. 7 of the Bloom Initial Order); and

   d) the following priority charges were granted:

      i) a Directors' Charge (as defined in the Bloom Initial Order) of $2.5 million (para. 31 of the Bloom Initial Order), ranking ahead of all Encumbrances (as defined in the Bloom Initial Order) (para. 47 of the Bloom Initial Order);

      ii) an Administration Charge (as defined in the Bloom Initial Order; collectively with the Directors' Charge, the "**CCAA Charges**") of $2.5 million, ranking ahead of all Encumbrances (para. 47 of the Bloom Initial Order); and

      iii) a Sale Advisor Charge (as defined in the Bloom Initial Order) of US$8 million (para. 32.1 of the Bloom Initial Order, by way of para. 6 of the sale advisor appointment Order rendered on April 17, 2015 communicated herewith as **Exhibit R-4** (the "**Sale Advisor Order**")), with priority over all claims of the unsecured creditors of the Bloom Lake CCAA Parties, but subordinated to the CCAA Charges and all secured claims (para. 47.1 of the Bloom Initial Order, by way of para. 8 of the Sale Advisor Order (Exhibit R-4)).

4. Since the issuance of the Bloom Initial Order, the Bloom Lake CCAA Parties have, *inter alia*:

   a) obtained an order approving a sale and investor solicitation process (as it relates to the Bloom Lake CCAA Parties, the "**SISP**"), as appears from the Order dated April 17, 2015 communicated herewith as **Exhibit R-5** (the "**SISP Order**");

   b) obtained Court approval of the engagement of Moelis & Company LLC (as it relates to the Bloom Lake CCAA Parties, "**Sale Advisor**"), as appears from the Sale Advisor Order (Exhibit R-4);

   c) obtained Court approval for the lease of the ArcelorMittal Mining Camp (as defined in the Motion for Bloom Initial Order (Exhibit R-2)) by 8568391 to a third party, as appears from the Order dated April 17, 2015 communicated herewith as **Exhibit R-6** (the "**Mining Camp Lease Order**"); and

   d) obtained the issuance of an Order dated April 27, 2015 and communicated herewith as **Exhibit R-7** (the "**Chromite Approval and Vesting Order**"), in respect of CQIM, approving the sale by CQIM of the entirety of its shares of companies operating the Ring of Fire, in the context of the divestiture by CQIM and other related parties of substantially all of CQIM and CNR's (as defined below) indirect investment in a mining district in northern Ontario known as the "**Ring of Fire**", which transaction closed on April 28, 2015.

5. This Motion is to extend the CCAA protection granted to the Bloom Lake CCAA Parties to five additional entities, as described below, to facilitate the reorganization of each of their businesses and operations. More specifically, the Wabush CCAA Parties (as described below) hereby seek the issuance of an Initial Order substantially in the form and substance of the Draft Wabush Initial Order communicated herewith as **Exhibit R-8** (the "**Draft Wabush Initial Order**").

2. THE WABUSH CCAA PARTIES

6. The Petitioners, Wabush Iron Co. Limited ("**Wabush Iron**") and Wabush Resources Inc. ("**Wabush Resources**") (collectively, the "**Wabush Petitioners**"; collectively with the Bloom Lake Petitioners, the "**Petitioners**"), are debtor companies under the CCAA.

7. Wabush Mines ("**Wabush Mines JV**") is an unincorporated contractual joint venture of Wabush Iron and Wabush Resources. Like the Bloom Lake Mises-en-cause, it is not a petitioner in these CCAA Proceedings but seeks to have the protections and authorizations of these CCAA Proceedings extended to it as it is intertwined with the Wabush Petitioners and forms an integral part of the business, operations and/or assets of certain of the Wabush Petitioners and more specifically, the iron ore mine and processing facility located near the Town of Wabush and Labrador City, Newfoundland and Labrador (the "**Wabush Mine**") and the Pointe-Noire Port (both as defined and described more fully below).

8. Each of Arnaud Railway Company ("**Arnaud**"), and Wabush Lake Railway Company, Limited ("**Wabush Lake Railway Company**"; collectively with Arnaud and Wabush Mines JV, the "**Wabush Mises-en-cause**"; collectively with the Bloom Lake Mises-en-cause, the "**Mises-en-cause**") provide essential transportation services (as more fully described below) to certain of the Wabush CCAA Parties (as defined below).

9. Arnaud and Wabush Lake Railway Company also seek to have the protections and authorizations of these CCAA Proceedings extended to them as they are also intertwined with the Wabush Petitioners and form an integral part of the business, operations and/or assets of the Wabush Mines JV and more specifically, the Wabush Mine and the Pointe-Noire Port.

10. The restructuring of the Wabush CCAA Parties and the prospects of finding potential investors and/or purchasers for some or all of the Wabush CCAA Parties or their assets would be significantly enhanced if the Wabush Mises-en-Cause are included as CCAA Parties in these CCAA Proceedings.

11. As described herein, the Wabush Petitioners and the Wabush Mises-en-cause (collectively, the "**Wabush CCAA Parties**") and the Bloom Lake CCAA Parties (collectively with the Wabush CCAA Parties, the "**CCAA Parties**") are affiliated companies and their activities, together, comprise substantially all of the Canadian operations of CQIM (as defined below), particularly, ownership and operation of the Bloom Lake Mine, the Wabush Mine, the Pointe-Noire Port and three railway operations: Arnaud Railway, Wabush Lake Railway and Bloom Lake Railway (each as defined below).

12. A chart illustrating the basic corporate structure of the CCAA Parties, including the Wabush CCAA Parties, is communicated herewith as **Exhibit R-9**.

13. All of the CCAA Parties, with the exception of Bloom Lake GP and Bloom Lake LP, are indirect wholly-owned subsidiaries of Cliffs Natural Resources Inc. ("**CNR**"), an international mining and natural resources company listed on the New York Stock Exchange under the symbol "CLF".

14. Neither CNR nor any of its non-Canadian subsidiaries (other than Wabush Iron) are petitioners or mises-en-cause in these CCAA Proceedings.

15. Various market and economic factors, such as the significant fall in global commodity prices, have affected the value and feasibility of the Wabush Mine assets similar to the effect on the Bloom Lake Mine as described in the Motion for Bloom Initial Order (Exhibit R-2).

16. In June 2013, the Wabush Mines JV idled Pointe-Noire Pellets (as defined below).

17. On February 11, 2014, in addition to announcing that CNR was exploring strategic alternatives for the Bloom Lake Mine, CNR announced plans to idle the Wabush Mine by the end of the first quarter of 2014. The idle was being driven by the unsustainable high cost structure, which resulted in operations that were not viable over time as appears

from a press release issued by CNR on February 11, 2014 communicated herewith as **Exhibit R-10**.

18. The Wabush Mines JV suspended operations at Wabush Mine in March 2014. In November 2014, Wabush Mines JV commenced the process of permanently idling the Wabush Mine which involved the permanent shutdown of the Wabush Mine. As described below, a Wabush Mine Closure Plan (as defined below) with respect to the reclamation of the Wabush Mine has been filed with and accepted by the Newfoundland and Labrador Department of Natural Resources, the implementation of which is subject to an environmental assessment review process.

19. Prior to and after the permanent idling of the Wabush Mine, the Wabush CCAA Parties have invested significant time and effort to finding buyers or investors for the operations and/or assets of the Wabush CCAA Parties.

20. The assets of the Wabush CCAA Parties are included in the SISP that is currently being conducted by the Sales Advisor.

21. None of the Wabush CCAA Parties have been generating any revenue since November 2014 and as a result of the permanent idling of the Wabush Mine and Pointe-Noire Pellets, are not expected to generate any revenue in the foreseeable future. However, the Wabush CCAA Parties continue to incur obligations in connection with the maintenance of the idled Wabush Mine, Pointe-Noire Pellets and the Pointe-Noire Port.

22. Although Cliffs Mining Company ("**CMC**"), the parent of Wabush Iron, had provided some funding to the Wabush CCAA Parties to fund their losses, CMC is no longer prepared in the circumstances to continue to fund further losses of the Wabush CCAA Parties except as may be required by the Wabush CCAA Parties to administer and execute the proposed CCAA proceedings described herein and in such case only on a priority secured basis.

23. As a result of this, the Wabush CCAA Parties are facing a liquidity crisis, in that they are no longer capable of meeting their obligations as they generally become due without outside financing, and the value of their assets appears to be less than their liabilities.

24. The Wabush CCAA Parties have become insolvent and therefore seek the protection of this Court from their creditors under the CCAA, as the Bloom Lake CCAA Parties have obtained.

25. CMC has agreed to finance the Wabush CCAA Parties execution and administration of these CCAA Proceedings by way of interim financing in accordance with the terms of an interim financing term sheet dated as of May 19, 2015 (the "**Interim Financing Term Sheet**") that has been presented to Wabush Iron and Wabush Resources, as borrowers, in an amount up to USD $10 million (the "**Interim Facility**"). The whole of the Interim Financing Term Sheet is communicated herewith as **Exhibit R-11**.

26. The Interim Facility is to be guaranteed by Arnaud and Wabush Lake Railway Company and secured by a priority charge securing up to $15 million over the assets of the Wabush CCAA Parties (the "**Interim Lender Charge**").

27. While the Wabush CCAA Parties had hoped that they would be able to address their financial challenges outside of a CCAA filing, circumstances that have developed over the last several months, including continued disputes with third parties arising from material contracts and on-going arbitration and other proceedings, and their inability to obtain funding to pay for their on-going obligations outside of a CCAA proceeding, have led them to seek creditor protection under the CCAA.

28. The inclusion of the Wabush CCAA Parties in these CCAA Proceedings will:

    a) provide the Wabush CCAA Parties with a more efficient and streamlined process to attempt to preserve the value of their businesses and assets under the supervision of the Court;

    b) provide the Wabush CCAA Parties with the stability and protection from their creditors to allow them to consider and review all restructuring and reorganization options for the benefit of all of their stakeholders and obtain the liquidity needed to fund their post-filing obligations as they become due and owing by way of the Interim Facility secured by the Interim Lender Charge; and

    c) enhance the SISP prospects as it will provide interested bidders in the Wabush CCAA Parties' businesses and assets with a Court supervised process and the opportunity to obtain a vesting order with respect to the assets of the Wabush CCAA Parties as well as simplifying transactions with any party that may be interested in acquiring assets of both the Bloom Lake CCAA Parties and the Wabush CCAA Parties.

29. The need for extending the consolidation of these CCAA proceedings in respect of the Bloom Lake CCAA Parties to include the Wabush CCAA Parties is for administrative purposes only at this time and shall not effect a consolidation of the assets and property of the CCAA Parties, including for the purposes of any plan or plans of arrangement that may be hereafter proposed.

30. Unless expressly provided to the contrary, any reference herein to monetary amounts refers to Canadian dollars.

3. THE WABUSH CCAA PARTIES' CORPORATE STRUCTURE

31. As set out above, a chart setting out the corporate structure of the CCAA Parties is shown in Exhibit R-9.

3.1 Wabush Mines JV

32. The Wabush Mines JV is an unincorporated contractual joint venture of the Wabush Petitioners. CMC, the parent company of Wabush Iron, is the managing agent of the Wabush Mines JV.

33. Prior to 2010, CNR had an indirect minority interest in the Wabush Mines JV. In 2010, CNR, through its wholly-owned subsidiaries, purchased the shares of Wabush Resources from ArcelorMittal Dofasco Inc. and the general and limited partnership units of the HLE Mining Limited Partnership from U.S. Steel Canada Inc. for approximately USD $90,000,000.

34. Following the acquisition of these interests and a series of corporate re-organizations, CNR indirectly became the sole owner of the Wabush Mines JV through Wabush Resources and Wabush Iron.

35. The Wabush Mines JV operated, through its managing agent CMC, the port facilities (the "**Pointe-Noire Port**") and a pellet production facility ("**Pointe-Noire Pellets**"), both located at Pointe-Noire, Québec on the Bay of Sept-Iles and the Wabush Mine.

36. As described below, the Wabush Mines JV owns Pointe-Noire Pellets and certain lands at the Pointe-Noire Port and has a servitude over a dock and adjacent lands managed by the Sept-Iles Port Authority (the **"Port Authority"**).

37. In June 2013, the Wabush Mines JV idled Pointe-Noire Pellets.

38. In March 2014, the operations at Wabush Mine were suspended and were permanently idled in November 2014.

3.2 Wabush Resources

39. Wabush Resources is a corporation incorporated pursuant to the laws of Canada, having its head office located at 1155 Rue University, Suite 508, Montreal, Québec (the "**Montréal Head Office**") as it appears from page 5 of the CNR 2013 Annual Report communicated herewith as **Exhibit R-12**.

40. Wabush Resources is a wholly-owned subsidiary of CQIM.

41. Wabush Resources holds a 73.2% undivided interest in the assets of Wabush Mines JV, including the leases, freehold interests in real property located in Québec and Newfoundland and Labrador and a servitude over a dock managed by the Port Authority at the Pointe-Noire Port.

42. Wabush Resources, together with Wabush Iron, own 100% of Arnaud and Wabush Lake Railway Company, as detailed below.

43. Wabush Resources also holds an interest in certain shares of the following entities: Twin Falls Power Corporation ("**Twin Falls**") (18.73% of the outstanding Class B Shares, carrying one vote per share) and Knoll Lake Minerals Limited ("**Knoll Lake**") (42.6%).

44. The remaining shareholders of Twin Falls are Wabush Iron (6.866% of the outstanding Class B Shares, carrying one vote per share), Iron Ore Company of Canada (74.404% of the outstanding Class B Shares, carrying one vote per share) and Churchill Falls (Labrador) Corporation Limted (100% of the outstanding Class A Shares, carrying four votes per share).

45. The remaining shareholders of Knoll Lake are Wabush Iron (15.6%) and MFC Industrial Ltd., now known as MFC Resource Partnership ("**MFC**"), and other minority shareholders (41.8%).

46. Wabush Resources' sole activity is its joint venture participation in the Wabush Mines JV.

47. Wabush Resources has no employees. As noted above, all employees at Wabush Mine and the Pointe-Noire Port are employees of Wabush Mines JV.

3.3 Wabush Iron

48. Wabush Iron is a corporation incorporated pursuant to the laws of the state of Ohio, U.S.A. with its office located at 200 Public Square, Suite 3300, Cleveland, Ohio, U.S.A., as appears from the company details search conducted with the Ohio Secretary of State, U.S.A. communicated herewith as **Exhibit R-13**.

49. Wabush Iron is a wholly-owned subsidiary of CMC, a Delaware corporation.

50. Wabush Iron's sole activity is its joint venture participation in the Wabush Mines JV.

51. Wabush Iron holds a 26.8% undivided interest in the assets of Wabush Mines JV, including leases, freehold interests in real property located in Québec and Newfoundland and Labrador and a servitude over a dock managed by the Port Authority at the Pointe-Noire Port.

52. Wabush Iron, together with Wabush Resources, own 100% of Arnaud and Wabush Lake Railway Company, as detailed below.

53. Wabush Iron also holds an interest in certain shares of the following entities: Twin Falls (6.866% of the outstanding Class B Shares, carrying one vote per share), Knoll Lake (15.6%) and Northern Land Railway Company (50%).

54. The other shareholders of Twin Falls and Knoll Lake are described above. Iron Ore Company of Canada is the remaining shareholder of Northern Land Railway Company (50%).

55. Wabush Iron has no employees. All employees at Wabush Mine and the Pointe-Noire Port are employees of Wabush Mines JV.

3.4 Arnaud

56. Arnaud is a federally regulated railway incorporated pursuant to the laws of Québec, having its head office located at the Montréal Head Office as appears from page 5 of the CNR 2013 Annual Report (Exhibit R-12).

57. Arnaud is owned by Wabush Resources (75%) and Wabush Iron (25%).

58. Arnaud's primary business is the operation of the Arnaud Railway running from Arnaud Junction, Québec to the Port of Sept-Iles ("**Arnaud Railway**"), for the delivery of iron ore concentrate from the Bloom Lake Mine and the Wabush Mine to the Pointe-Noire Port in the Port of Sept-Iles.

59. The last shipment of iron ore concentrate from Bloom Lake Mine was delivered to the Port of Sept-Iles for loading on a ship operated by a customer of Bloom Lake LP on December 24, 2014.

3.5 Wabush Lake Railway Company

60. Wabush Lake Railway Company is a federally regulated railway incorporated pursuant to the laws of Newfoundland and Labrador, having its head office at the Montréal Head Office as it appears from page 5 of the CNR 2013 Annual Report (Exhibit R-12).

61. Wabush Lake Railway Company is owned by Wabush Resources (73.2%) and Wabush Iron (26.8%).

62. The Wabush Lake Railway Company's primary business is the operation of a railway (the "**Wabush Lake Railway**"). The Wabush Lake Railway connects the Wabush Mine to the Northern Land Railway for the transport of iron ore concentrate from the Wabush Mine through the Québec North Shore and Labrador Railway (the "**QNS&L Railway**") and the Arnaud Railway to the Pointe-Noire Port at the Port of Sept-Iles.

63. As a result of the idling of the Wabush Mine, Wabush Lake Railway Company has not transported iron ore concentrate since September, 2014.

64. Wabush Lake Railway Company has no employees.

3.6 The CCAA Parties' activities are conducted on a consolidated basis

65. The head offices of each of the Bloom Lake CCAA Parties and Wabush Resources, Arnaud and Wabush Lake Railway Company are located at the Montréal Head Office, the whole as it appears from page 5 of the CNR 2013 Annual Report (Exhibit R-12).

66. CQIM provides management and administrative support to the entities which manage the Wabush Mine.

67. The Wabush CCAA Parties' activities are conducted on a consolidated basis with the Bloom Lake CCAA Parties, as more fully appears from pages 7, 32-33, 61-62 of the CNR 2013 Annual Report (Exhibit R-12).

68. The significant majority of the CCAA Parties' revenues and their liabilities have been derived from their operations in Québec.

69. The Bloom Lake Mine, Arnaud Railway and the Pointe-Noire Port, all of which are located in Québec, are expected to be the assets of the CCAA Parties with the highest values.

70. As at May 19, 2015, approximately 17 of the 23 active employees of the Wabush CCAA Parties were located in Québec.

71. In light of the above, the procedural consolidation of these CCAA Proceedings for administrative purposes in respect of the CCAA Parties is appropriate and necessary.

4. THE WABUSH CCAA PARTIES' BUSINESSES AND AFFAIRS

4.1 Wabush Mine

72. The Wabush Mine is an iron ore mine and processing facility located near Wabush City and Labrador City, Newfoundland and Labrador in the Labrador Trough. A map showing the geographical location of the Wabush Mine and the site is communicated herewith as **Exhibit R-14**.

73. The Wabush Mine had been in operation since 1965. Since 2009 until it was idled in 2014, the Wabush Mine had annual productions of between 2.7 million and 3.9 million metric tonnes of iron ore pellets and concentrate.

74. CNR has indirectly invested approximately USD $221.2 million in the Wabush Mine since February 2010.

75. As a result of the depressed global market for steel, particularly in Asia, the corresponding significant decline in the price for iron ore, and the high cost structure of the Wabush Mine, operations at the Wabush Mine were not economically sustainable. Therefore, mining operations at the Wabush Mine were suspended in March 2014.

76. Subsequently, the Wabush Mines JV moved to permanently idle the Wabush Mine. This process was completed in November 2014 and a Wabush Mine Closure Plan (as defined below) has been filed with and accepted by the Newfoundland and Labrador Department of Natural Resources, the implementation of which is subject to an environmental assessment review process.

77. For 2014, the idling costs, employment related expenditures and other expenditures of the Wabush Mines JV related to the closure of the Wabush Mine were approximately USD $105 million.

78. The right of Wabush Mines JV to conduct mining operations at the Wabush Mine arises primarily under a mining sub-sublease with MFC. That sub-sublease is the September 2, 1959 Amendment and Consolidation of Mining Leases made between Canadian Javelin Limited, as lessor (now MFC) and Wabush Iron, as lessee, as amended (the "**Wabush Sublease**").

79. Operations at the Wabush Mine consisted of an open pit truck and shovel mine and a concentrator that utilizes single stage crushing, autogenous grinding mills and gravity separation to produce iron ore concentrate.

80. Similar to the Bloom Lake Mine, iron ore concentrate from the Wabush Mine was transported by rail by the Wabush Lake Railway, and then transferred to the Northern Land Railway, the QNS&L Railway and the Arnaud Railway for delivery to and shipment from the Pointe-Noire Port.

4.2 Pointe-Noire Port

81. The geographical location of the Pointe-Noire Port is as shown in **Exhibit R-14**.

82. Wabush Mines JV has a servitude over one dock and adjacent lands at the Pointe-Noire Port. Wabush Mines JV also owns certain real property and infrastructure at the Pointe-Noire Port, including Pointe-Noire Pellets. Wabush Mines had used its facilities at the Pointe-Noire Port for storage, laydown and transportation of iron ore produced at both the Wabush Mine and the Bloom Lake Mine. As described above, iron ore concentrate was transported by rail by the Wabush Lake Railway, and then transferred to the Northern Land Railway, the QNS&L Railway and the Arnaud Railway for shipment from the Pointe-Noire Port. Iron ore concentrate was then loaded onto transhipping vessels from Dock 31.

83. Transshipping was required because Dock 31 is limited in the size of ships which it can receive. Accordingly, iron ore for many customers must be loaded onto smaller "transhipping" ships which ferry multiple loads out to ocean-going vessels a short distance off-shore in the Bay of Sept-Iles for transport to overseas customers.

84. Wabush Mines JV requested and was refused authorization by the Port Authority to conduct dredging work and install a new loading system on the dock in order to permit the loading of larger ships at the dock and eliminate the need for transhipping in an effort to reduce operating costs.

85. The Port Authority's refusal to provide these work authorizations has been the subject of legal proceedings before the Québec Superior Court initiated by the Wabush CCAA Parties. Such legal proceedings have since been discontinued by the Wabush CCAA Parties.

86. As described below in section 6.13, proceedings involving Arnaud and the Port Authority before the Canadian Transportation Agency (the "**Agency**") are continuing before the Federal Court of Appeal.

4.3 Employees

87. Prior to the permanent idling of the Wabush Mine, the Wabush Mines JV was a significant employer in the areas of the Towns of Wabush and Labrador City, Newfoundland and Labrador and Pointe-Noire, Québec.

88. Prior to the permanent idling of the Wabush Mine in November 2014 and the last shipment of iron ore from the Pointe-Noire Port, the Wabush Mines JV employed approximately 600 employees in its operations at the Wabush Mine and the Pointe-Noire Port.

89. Following the permanent idling of the Wabush Mine and the last shipment of iron ore from the Pointe-Noire Port, employment numbers for Wabush Mines JV have dropped significantly. As described in the following chart, as at May 19, 2015, the Wabush Mines JV employs approximately 23 active employees in its operations at the Wabush Mine and the Pointe-Noire Port and approximately 168 hourly employees on lay-off at the Point-Noire Port.

Employer / (Location)	**Active – Salaried Employees**	**Active – Hourly Employees**	**Non-Active (Leave of Absence/ Leave with Pay)**	**Hourly Lay-off subject to recall rights**	**Total Employees (Salaried, Hourly, Leave, Lay-Off)**
Wabush Mines JV / (Wabush Mine)	6	0	0	0	6
Wabush Mines JV / (Pointe-Noire Port)	11	6	0	168	185
TOTAL	17	6	0	168	191

4.3.1 Employees at Wabush Mine

90. There are presently approximately 6 salaried employees at Wabush Mine. As of December 31, 2014, all hourly employees for the Wabush Mine have been terminated as a result of the permanent idling of the Wabush Mine.

4.3.2 Employees at the Pointe-Noire Port

91. Hourly employees at the Pointe-Noire Port are represented by the United Steelworkers Local 6254. A new collective agreement was entered into effective March 2, 2014 which expires on February 29, 2020.

92. Prior to December 2013, employees at the Pointe-Noire Port and employees of Arnaud were covered by the same bargaining certificate and collective bargaining agreement, and were on the payroll of the Wabush Mines JV. Arnaud employees remained on the Wabush Mines JV payroll until the termination of their employment.

93. Pursuant to a decision rendered by the Canadian Industrial Relations Board on December 18, 2013 on an application brought by Arnaud and the union, Arnaud is considered to be a federally regulated enterprise.

94. Operations at the Pointe-Noire Port were comprised of port operations, Pointe-Noire Pellets, railroad operation and related administrative functions. Certain employees of Pointe-Noire Pellets were laid off in 2013 prior to the permanent idling of the Wabush Mine in 2014 and the transition of the Bloom Lake Mine to care and maintenance mode. Additional lay-offs took place in November 2014 when the Wabush Mine was permanently idled.

95. Certain railroad and port operations and administrative functions continued at the Pointe-Noire Port after the closure of Pointe-Noire Pellets, the permanent idling of the Wabush Mine and the care and maintenance of the Bloom Lake Mine in order to deal with shipments of remaining iron ore from Bloom Lake Mine. On or about January 15, 2015, the last shipment of iron ore was dispatched from the Pointe-Noire Port and these remaining operations then ceased.

96. Unionized employees at the Pointe-Noire Port have a minimum of 36 months recall rights and up to a maximum of 5 years depending on the employee's years of service and subject to the terms of their collective bargaining agreement.

4.3.3 Employee Entitlements

97. Consistent with the treatment of employees of the Bloom Lake CCAA Parties, all salaried employees of the Wabush CCAA Parties who have been terminated on or before the date of this Motion have received their accrued and unpaid wages (including any bonuses), accrued and unpaid vacation indemnities (calculated as per company policies) and statutory severance and termination entitlements ("**Employee Entitlements**").

98. In order to treat all employees equally, the Wabush CCAA Parties intend to pay Employee Entitlements to all other salaried employees who are terminated without cause in the future.

99. With the exception of vacation pay indemnities described below, all hourly employees of the Wabush CCAA Parties who have been laid off have been provided with their Employee Entitlements. In order to treat all employees equally, the Wabush CCAA Parties intend to pay Employee Entitlements to all other hourly employees who are laid off in the future.

100. There is approximately $1.6 million of obligations relating to accrued vacation pay indemnities, of which $1.4 million relate to the hourly active and laid off employees. The

amount of vacation pay indemnities for hourly employees is not included in the May 18 Forecast (as defined below) as the timing of the payment of a majority of this amount is uncertain.

101. All salaried and hourly employees of the Wabush CCAA Parties who have been terminated and all employees who are on lay-off have been provided with all regular group insurance coverage (with the exception of long and short-term disability coverage) for 16 weeks from their respective date of lay-off.

102. As with Employee Entitlements, the Wabush CCAA Parties intend to continue to pay and provide these benefits to all other salaried and hourly employees who are terminated without cause or laid-off in the future.

103. The estimated amounts in respect of the pre-filing and post-filing Employee Entitlements and continuation of benefits as set out above are included in the Wabush CCAA Parties' weekly cash flow forecast to August 14, 2015 discussed in more detail below (as such cash flow forecast may be amended from time to time, the "**May 18 Forecast**") and communicated herewith as **Exhibit R-15**.

104. All statutory employer remittances are current.

4.4 Pension Plans

4.4.1 Defined Contribution Schemes

105. The pension plans for salaried employees at the Wabush Mine hired on or after January 1, 2013 are defined contribution schemes. These are the same defined contribution schemes as are maintained for the employees at the Bloom Lake Mine and the Montréal Head Office, which are described in the Motion for Bloom Initial Order (Exhibit R-2).

106. Wabush Mines JV is the administrator of these defined contribution schemes.

107. Contributions under the defined contribution scheme are paid with each payroll. The defined contribution schemes also includes an employer matching provision whereby the employer contributes up to 6% of each employee's eligible wages with each payroll.

108. All employee and employer contributions are paid current and future contribution amounts have been included in the May 18 Forecast.

4.4.2 Defined Benefit Plans

109. The pension plan for salaried employees at the Wabush Mine and the Pointe-Noire Port hired before January 1, 2013 is a defined benefit plan and is called the Contributory Pension Plan for Salaried Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company (the "**Salaried DB Plan**").

110. The pension plan for unionized hourly employees at the Wabush Mine and Pointe-Noire Port is also a defined benefit plan and is called the Pension Plan for Bargaining Unit

Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company (the **"Hourly DB Plan"** and together with the Salaried DB Plan, the "**DB Plans**").

111. Wabush Mines JV is the administrator of the DB Plans.

112. Based on a valuation as at January 1, 2014 (the "**2014 Valuation**"), the wind-up deficiency for the DB Plans was estimated to be a total of $26,522,582, consisting of $10,718,471 for the Salaried DB Plan and $15,804,111 for the Hourly DB Plan.

113. Based on estimates received from the Wabush CCAA Parties' pension consultant, the Wabush CCAA Parties believe the estimated wind-up deficiencies for the DB Plans as at January 1, 2015 to be a total of approximately $41.5 million, consisting of approximately $18.2 million for the Salaried DB Plan and approximately $23.3 million for the Hourly DB Plan.

114. All monthly normal cost and amortization payments in respect of the DB Plans for January through April, 2015 have been paid in full.

115. The monthly normal cost payments for the DB Plans for 2015 based on the 2014 Valuation are approximately $50,494.83 (Hourly DB Plan) and $41,931.25 (Salaried DB Plan) for a total monthly normal cost payment of $92,46.08 (the "**Normal Cost Payments**"). The Normal Cost Payments are included in the May 18 Forecast.

116. The Wabush CCAA Parties are also paying monthly amortization payments based on the 2014 Valuation of $393,337.00 (Hourly DB Plan) and $273,218.58 (Salaried DB Plan) for a total monthly amortization payment of $666,555.58 (the "**Monthly Amortization Payments**").

117. In addition to the Monthly Amortization Payments, the Wabush CCAA Parties are also required to make a lump sum "catch-up" amortization payment (the "**Yearly Catch Up Amortization Payment**") for the DB Plans estimated to be approximately $5.5 Million due in July 2015.

118. The Wabush CCAA Parties do not have any funding available to continue to pay the Monthly Amortization Payments or to pay the Yearly Catch-Up Amortization Payment due in July 2015 as the proposed Interim Financing Term Sheet prohibits such payments post-filing. As a result, the Monthly Amortization Payments and the Yearly Catch Up Amortization Payment, and any adjustments thereto as noted in paragraph 119 below, are not included in the May 18 Forecast.

119. Updated actuarial valuations as at January 1, 2015 will be completed, which may adjust the amount of the monthly normal cost and amortization payments set out above. However, these updated actuarial valuations are not required to be filed (or available) until June 30, 2015, and therefore no adjustments will be made to the amount of monthly normal cost and amortization payment liabilities until that time.

4.4.3 Other Post-Retirement Benefits

120. The CCAA Parties currently provide other post-retirement employee benefits ("**OPEB**"), including life insurance and health care, to former hourly and salaried employees of its Canadian subsidiaries hired before January 1, 2013, which vary based on whether retirees were formerly members of a bargaining unit or were non-unionized salaried employees.

121. Approximately 933 retired employees and 16 active employees are currently fully eligible for retirement benefits.

122. As of December 31, 2014, accumulated benefits obligations for post-retirement benefits ("**ABO**") totaled approximately $52.1 million.

123. The premiums required to fund the foregoing OPEBs are approximately $182,000 a month.

124. In addition to the foregoing, there is a supplemental retirement arrangement plan (the "**SRA**") for certain current and former salaried employees of Wabush Mines JV. The obligations under the SRA are approximately $1.01 million.

125. The Wabush CCAA Parties do not have any funding available to continue to pay any of the foregoing OPEBs, including the SRA obligations, post-filing as the proposed Interim Financing Term Sheet prohibits such payments. As a result, no payments on account of the OPEBs are included in the May 18 Forecast.

4.5 Employee Housing Arrangements

126. CQIM and Wabush Mines JV own a number of houses in the Pointe-Noire Port area and in the Town of Wabush used by employees and former employees for their housing (collectively, the "**Employee Houses**"). These Employee Houses are subject to a number of arrangements with employees and former employees.

127. Certain employees at Wabush Mine have entered into purchase and sale agreements with Wabush Mines JV to purchase Employee Houses. These arrangements permit the employees to pay for the Employee Houses during their employment with Wabush Mines JV by having the monthly installments deducted from their pay. On termination of employment or upon the expiration of the relevant employee's recall period under the Collective Bargaining Agreement, the employee is required to either complete the purchase of the Employee House if the Employee House has not already been fully paid for, or sell its interest in the Employee House to Wabush JV in accordance with the terms of the purchase and sale agreement.

128. A number of these Employee Houses have been purchased by employees pursuant to this arrangement and a number of these arrangements are scheduled to come to term post-CCAA filing.

129. There are approximately 8 Employee Houses located in the Pointe-Noire Port area that are used by management employees. Title to these Employee Houses are held by CMC, as agent for the Wabush Mines JV. Only 4 of these 8 Employee Houses are currently occupied and it is expected that this will reduce to only 2 Employee Houses at the end of the school year.

130. Paragraph 33(c) of the Bloom Initial Order provides that the Bloom Lake CCAA Parties could sell or otherwise dispose of Employee Houses without the Court's approval but with the approval of the Monitor. The Wabush CCAA Parties are proposing that such provision be extended in the proposed Draft Wabush Initial Order to all of the Employee Houses owned by the Wabush CCAA Parties.

5. ASSETS

131. The approximate aggregate net book values of property, plant, equipment, cash, restricted cash, receivables, inventory, goodwill and intangibles of the Wabush CCAA Parties as of April 30, 2015 based on unaudited internal financial statements are shown in the chart set out below. As a result of the suspension of all mining operations, significant material impairment charges are pending which will result in a material adjustment to these numbers.

132. Subject to the qualifications above and below, the approximate net book value of the assets broken down by legal entity is provided in the chart communicated herewith as **Exhibit R-16**).

Nature	Net Book Value (USD)*
Property, plant and equipment	**$44,644,160**
Cash and Equivalents	**$1,384,165**
Restricted Cash	**$0**
Trade and other receivables	**$2,336,630**
Receivables from associated companies	**$7,270,199**
Inventory	**$13,516,227**
Goodwill and intangibles	**$0**
TOTAL	**$69,151,381***

* The foregoing chart includes only select assets of the Wabush CCAA Parties. For example, the chart does not include other assets of the Wabush CCAA Parties such as deferred income taxes, investments in subsidiaries and other assets. In addition, the combined Net Book Value of the

assets of the Wabush CCAA Parties has not been adjusted to eliminate intercompany balances among the Wabush CCAA Parties.

133. As a result of significant and ongoing losses in November of 2014, the assets of the Wabush Mine were written down by approximately USD $183 million due to the impairment and write-off charges associated with idling the Wabush Mine.

134. The Wabush CCAA Parties are anticipating receiving at some time during the CCAA proceedings, the following tax refunds:

(a) Federal income tax refund for 2013 with respect to carry back of net operating losses for Wabush Resources in the amount of approximately $3.3 million; and

(b) Income tax refund from the Province of Québec for overpayments in 2011 and 2012 and loss carry backs of net operating losses for 2012 and 2013 in the amount of approximately $6.6 million.

6. INDEBTEDNESS

6.1 Overview

135. As described in greater detail in the financial statements of the Wabush CCAA Parties communicated herewith as **Exhibit R-17**, the Wabush CCAA Parties have estimated aggregate outstanding liabilities of USD$ 593 million as of April 30, 2015 for accounting purposes. This amount reflects adjusted amounts for intercompany indebtedness which have been adjusted to take into account estimated fair value adjustments to the face value of the intercompany amounts set out in paragraph 136 below.

6.2 Intercompany Indebtedness

136. As of April 30, 2015, the face value of the outstanding indebtedness of the Wabush CCAA Parties to non-filing affiliated entities (before the accounting adjustments referenced in paragraph 135 above) is estimated to be approximately USD$ 650 million as summarized in the chart communicated herewith as **Exhibit R-18**.

137. In addition to the amounts described above, there are also obligations which have been guaranteed and/or covered by the provision of bonds and/or letters of credit by affiliates of the Wabush CCAA Parties which may give rise to additional intercompany claims against the Wabush CCAA Parties if any of those bonds and letters of credit are called upon by the beneficiaries or holders thereof.

6.2.1 CMC Demand Credit Agreement

138. Pursuant to a demand credit agreement dated as of February 23, 2015 (the "**Demand Credit Agreement**") between CMC, as lender, and Wabush Resources and Wabush Iron, as borrowers on a joint and several basis, Wabush Resources and Wabush Iron are indebted to CMC in the amount of USD $7 million.

139. Pursuant to an equipment security agreement and moveable hypothec dated the same date ("**Equipment Security Agreement**" and "**Moveable Hypothec**", respectively), the obligations of Wabush Resources and Wabush Iron to CMC under the Demand Credit Agreement are secured by any and all present and future right, title and interest of Wabush Resources and Wabush Iron in all equipment located in Newfoundland and Labrador (including any equipment set out in Schedule A to the Equipment Security Agreement and Moveable Hypothec), all accessions thereto, books and records and permits, and all proceeds of any of the foregoing, wherever located, all as more particularly defined and described in the Equipment Security Agreement and Moveable Hypothec.

140. Copies of the Demand Credit Agreement, Equipment Security Agreement and Moveable Hypothec are communicated herewith as **Exhibits R-19**, **R-20** and **R-21**, respectively.

6.3 Equipment Financing

141. Given the idling of the Pointe-Noire Pellets in 2013 and the permanent idling of the Wabush Mine in November 2014, the Wabush CCAA Parties are no longer party to any material equipment financing arrangements.

142. With respect to the remaining miscellaneous equipment financing, the Wabush CCAA Parties are not intending post-filing to pay for any equipment that is subject to a financing arrangement for which they are not using. Similarly, the Wabush CCAA Parties do not intend to pay post-filing for equipment subject to lease arrangements for which they are no longer using.

143. The May 18 Forecast does not provide for payment in respect of these financing and lease arrangements. Therefore, if the relief sought on this Motion is granted, and subject to further Order of the Court, the Wabush CCAA Parties do not intend to make any payments pursuant to these financing or lease arrangements during these CCAA Proceedings.

6.4 Construction Liens

144. As of May 15, 2015, there were 5 legal hypothecs in the aggregate amount of approximately $4,339,284.92 in favor of persons having taken part in the construction or renovation of an immovable, registered against property of each of Wabush Resources and Wabush Iron, respectively, located in Québec (collectively, the "**Legal Hypothecs**"), as more fully appears from a table summarizing the Legal Hypothecs and a copy of the Legal Hypothecs registered as of May 11, 2015, communicated herewith, en liasse, as **Exhibit R-22**.

6.5 Trade Creditors

145. As at April 30, 2015, the Wabush CCAA Parties have a total amount outstanding to trade creditors of approximately USD $8 to 10 million.

6.6 Contracts

146. Due to the Wabush CCAA Parties' current circumstances, including the cessation of mining operations and these CCAA Proceedings, numerous contracts to which the Wabush CCAA Parties are parties have become redundant. Accordingly, if the relief sought on this Motion is granted, it is the intention of the Wabush CCAA Parties to serve notices of resiliation and disclaimer of certain contracts pursuant to the CCAA as soon as practicable.

147. The Wabush Mines JV is also party to a "take or pay" contract. This "take or pay" contract provides for charges based on the usage of services related to the transportation of iron ore, with significant minimum monthly payments. As the Wabush Mine is permanently idled, these services are not being used. Therefore, if granted the relief sought on this Motion, and subject to further Order of the Court, Wabush Mines JV does not intend to make any payments pursuant to any such contract during these CCAA Proceedings.

148. Unless the Wabush CCAA Parties are using the goods or services provided under these kinds of contracts, the Wabush CCAA Parties intend to disclaim these contracts as soon as practicable if the relief sought by this Motion is granted.

6.7 Sandvik Mining and Construction

149. On or about March 4, 2015, Sandvik Mining and Construction Canada a Division of Sandvik Canada Inc. ("**Sandvik**") sent a demand letter to CMC, as managing agent of Wabush Mines JV. The letter demanded payment of approximately $1,753,155.13 allegedly owing in relation to a supply, erection and commissioning agreement involving, among other things, the supply by Sandvik of a ship loader to Wabush Mines JV for the Pointe-Noire Port, and provided notice of termination of the Sandvik supply, erection and commissioning agreement, as appears from a copy of the letter from Sandvik dated March 4, 2015 communicated herewith as **Exhibit R-23**.

150. On or about April 9, 2015, Sandvik informed CMC, as managing agent of Wabush Mines, that Sandvik would be liquidating equipment owned by Wabush Iron and Wabush Resources to satisfy amounts allegedly owing to Sandvik and other losses allegedly suffered by Sandvik, the whole as appears from a copy of the letter from Sandvik dated April 9, 2015 communicated herewith as **Exhibit R-24**.

6.8 Northern Land Company Limited

151. There is approximately $1 million owing by Wabush Iron to Northern Land Company Limited for its share of the capital expenses for the 2014 track replacement program undertaken by Northern Land Company Limited.

6.9 Carol Lake

152. Pursuant to a Maintenance and Operation Agreement dated January 1, 1980 and amended on June 10, 1985 (the "**Maintenance Agreement**"), Wabush Lake Railway

Company is obliged to pay its share of joint costs in relation to the Northern Land Railway to Carol Lake Company. Since Wabush Lake Railway Company has not been running trains on the Northern Land Railway for some years, its share of the joint costs is capped at 20% pursuant to the Maintenance Agreement or approximately $58,000 a month.

6.10 Twin Falls Power Corporation

153. Wabush Mines JV owes approximately $800,000 to Twin Falls for annual maintenance of transmission lines for 2014 constituting its pro rata share of these expenses.

6.11 Municipal Property Taxes Owing

154. There is presently approximately $2.5 million in taxes owed to the City of Sept-Iles.

155. The Town of Wabush is owed outstanding property taxes relating to certain Employee Houses in the amount of approximately $500,000.

6.12 Environmental Matters

156. On September 23, 2014, the Newfoundland and Labrador Department of Natural Resources accepted the updated Rehabilitation and Closure Plan for the Wabush Mine (the "**Wabush Mine Closure Plan**"). Environmental bonds have been posted by an affiliate with respect to the Wabush Mine Closure Plan in the amount of $49.7 million.

157. In February 2015, the Newfoundland and Labrador Department of Environment and Conservation (the "**DEC**") advised that the decommissioning and reclamation work under the Wabush Mine Closure Plan is subject to environmental assessment review pursuant to the Newfoundland and Labrador *Environmental Protection Act* (the "**EPA**"), and that the decommissioning and reclamation work set out in the Wabush Mine Closure Plan could not proceed unless and until the Wabush Mine Closure Plan was registered with the DEC and allowed to proceed by the Minister of the Environment and Conservation. The Wabush Mine Closure Plan has not yet been registered for the purposes of the environmental assessment review process pursuant to the EPA. The EPA does not impose a time limit for registration.

6.13 Litigation

6.13.1 Canadian Transportation Agency Proceedings

158. On April 2, 2014, the Port Authority filed an application with the Agency seeking a determination as to whether certain track on the Arnaud Railway is subject to the transfer and discontinuance process under the Canada Transportation Act ("**CTA**") (the "**Railway Application**"). This process would require Arnaud, Wabush Iron and Wabush Resources to take certain steps prior to transferring or discontinuing operation of this track. The Agency dismissed the Port Authority's application on October 16, 2014.

159. On December 23, 2014, the Agency advised Arnaud, Wabush Iron and Wabush Resources that, at the request of the Minister of Transport, the Agency had appointed an Inquiry Officer pursuant to the CTA to conduct an inquiry with respect to the same track which was the subject of the Railway Application.

160. The inquiry considered, among other things, whether this track is a "railway" pursuant to the CTA; whether it is subject to CTA certificate of fitness requirements; and whether it should be included in Arnaud, Wabush Iron and Wabush Resources' three-year plans under the CTA.

161. On January 20, 2015, the inquiry officer submitted his report to the Agency and found that certain tracks identified as the Wabush Loop and the CQIM Spur Track were railway lines subject to some provisions of the CTA, that Arnaud was the operator of these tracks, and that these tracks were subject to the CTA certificate of fitness requirements; with the exception that the inquiry officer found that the CQIM Spur Track was a spur, and not considered as a railway line, and thus not subject to the three year plan provisions of the CTA.

162. On January 26, 2015, the Agency adopted the findings of the report of the inquiry officer. Arnaud, Wabush Iron and Wabush Resources petitioned the Federal Court of Appeal for leave to appeal CTA's decision of January 26, 2015, and such leave was granted on April 22, 2015.

6.13.2 On-Going Arbitrations and Other Matters

163. Wabush Mines JV is currently party to several ongoing, confidential arbitration proceedings related to disputes arising in connection with certain material contracts.

164. The approximate aggregate amount of claims against the Wabush CCAA Parties that are the subject matter of these arbitration proceedings is in excess of $50 million.

165. These arbitration proceedings have consumed a significant amount of time and resources of Wabush Mines JV.

6.13.3 Royal Bank of Canada Litigation

166. Royal Bank of Canada commenced an action in Newfoundland and Labrador against CMC, as managing agent of Wabush Mines JV, for damages in the amount of approximately $2,113,324 plus interest of approximately $12,434,946 with respect to the alleged breach of a 1996 equipment lease related to the maintenance of two electric shovels. This litigation remains ongoing.

6.14 CMC Secured Funding

167. As set out in paragraph 138, CMC is owed approximately US$7.0 million under the Demand Credit Agreement.

6.15 Registrations in Québec, Ontario, Newfoundland and Labrador, New Brunswick and Ohio registries

168. For ease of reference, a copy of summaries of the search results in Québec, Ontario, Newfoundland and Labrador, New Brunswick, and Ohio in respect of the CCAA Parties are listed below:

a) Real estate search report (Québec) on the Wabush CCAA Parties immovable property, communicated herewith as **Exhibit R-25**;

b) RPMRR (Québec) on the Wabush CCAA Parties movable property, communicated herewith as **Exhibit R-26**;

c) Personal Property Security Act (Ontario, Newfoundland and Labrador, New Brunswick and Ohio) search results summary on the Wabush CCAA Parties' movable property, communicated herewith as **Exhibit R-27**; and

d) Public register of real and immovable mining rights on Wabush Iron Co. Limited and Wabush Resources Inc.'s mining rights in Québec, communicated herewith as **Exhibit R-28** (no registrations).

169. Searches of the real property and mining claims registries in New Brunwick disclosed no registration. Searches of the real property and mining claims registries in Newfoundland and Labrador disclosed one registration in respect of *lis pendens* in respect of the litigation instituted by Royal Bank of Canada as described in paragraph 166 of this Motion.

170. Copies of the raw search results in respect of the foregoing will be available at the hearing of this Motion.

7. CASH MANAGEMENT SYSTEM

171. The Wabush CCAA Parties utilize a centralized cash management system for, among other things, the collection of customer receipts and the payment of suppliers, payroll, employee-related benefits and lease financing amounts. The cash management system is managed by CNR with support from CQIM at the Montréal Head Office with respect to payroll, vendor communications and accounts payable.

172. The majority of the Wabush CCAA Parties' bank accounts are held with the Bank of Montreal which provides for certain cash management services which do not provide for any overdraft or any payment risk credit lines.

8. FINANCIAL RESULTS AND LOSSES

173. For the four months ended April 30, 2015, the Wabush CCAA Parties recorded estimated cumulative net loss of approximately USD $1.17 million before non-cash, accounting adjustments related to the deconsolidation of the Wabush CCAA Parties, as appears from the financial statements of the Wabush CCAA Parties (Exhibit R-17) which

financial statements have not been prepared in accordance with generally accepted principles, as more specifically set out in the notes in Exhibit R-17.

9. EVENTS LEADING TO THE COURT FILING

174. A combination of factors have caused liquidity demands for the Wabush CCAA Parties including, among other things:

a) The depressed global market for steel, particularly in Asia, and the resulting decrease in the price of iron ore. Since 2011, the price of iron ore has fallen from USD $190 per tonne to below USD $67 per tonne;

b) The aforementioned depressed global steel market causing the production at the Wabush Mine to become unsustainable, resulting in significant costs and loss of revenues associated with the idling of the Wabush Mine;

c) Notices of default have been delivered under significant commercial contracts and demands for payment have been made on the Wabush CCAA Parties;

d) Inability to negotiate cost reductions in certain material logistics and other contracts; and

e) The Wabush CCAA Parties do not have sufficient resources or the ability to generate sufficient funds to satisfy their other outstanding obligations in the normal course.

175. The Wabush CCAA Parties responded to the liquidity challenges described above by, among other things:

a) seeking investments, support and other financial contributions from its overseas customers;

b) seeking investment, support and other financial contributions from other potential customers and end users of iron ore;

c) seeking to reduce costs through re-negotiation of certain material contracts;

d) seeking buyer or buyers for the iron ore business or parts thereof;

e) seeking financing or other investment contributions from financial institutions and investment and pension funds; and

f) entering into negotiations with MFC for the sale of the Wabush Mine.

176. These efforts proved unsuccessful and losses relating to the operations of the Wabush CCAA Parties continued to escalate to unsustainable levels.

177. By November 2014, it became apparent to the CCAA Parties that efforts to sell the Wabush Mine and to find strategic partners for the Bloom Lake Mine would not be

successful within a reasonable time frame. Accordingly, a decision was then made to minimize on-going hemorrhaging of capital by transitioning the Wabush Mine to a permanent idle and suspending mining operations at the Bloom Lake Mine and transitioning the Bloom Lake Mine into care and maintenance mode.

178. At this time, given the growing pressures that have been asserted by creditors on the Wabush CCAA Parties, including through pending and costly arbitration and other legal proceedings, the continued financial losses and the significant but unsuccessful efforts to consummate a solution to their financial issues outside of a CCAA filing, the Wabush CCAA Parties have no other alternative but to seek protection from their creditors under the CCAA so that they can continue to pursue restructuring and/or sale options under a court-supervised process for the benefit of all stakeholders.

10. 13 WEEK FORECAST

179. Based on the financial position of the Wabush CCAA Parties, it is the position of the Wabush CCAA Parties that the assumptions set out in the May 18 Forecast (Exhibit R-15) are reasonable.

180. The May 18 Forecast has been prepared by the Wabush CCAA Parties' management in consultation with FTI Consulting Canada Inc., the proposed Monitor for the Wabush CCAA Parties. The Monitor has advised that it will be filing a report on the May 18 Forecast.

181. Based on the May 18 Forecast, the CCAA Parties will require funding under the Interim Facility of approximately USD $1.3 million commencing the week of May 18, 2015 until the Comeback Hearing (as defined below) in order to be able to pay their post-filing obligations in the ordinary course.

182. As described above, the Wabush CCAA Parties are not using equipment which is subject to the various financing arrangements and the May 18 Forecast does not provide for payments in respect of these arrangements. Similarly, the Wabush CCAA Parties are not intending to pay for any lease payments in respect of equipment that they are not using. Therefore, subject to further Order of the Court, the Wabush CCAA Parties do not intend to make any payments pursuant to these financing and lease arrangements during these CCAA Proceedings.

183. As described above, for similar reasons, the Wabush CCAA Parties also do not intend to make any payments with respect to "take or pay" agreements which provide for minimum payments.

184. As described above, the May 18 Forecast does not include provision for amortization payments or OPEBs.

185. Certain costs, such as insurance premiums, are paid by non-filing affiliates on behalf of the Wabush CCAA Parties. To the extent such payments are made after the date of the Wabush Initial Order, the Wabush CCAA Parties intend to reimburse the relevant non-filing affiliates for such amounts.

11. NEED FOR CREDITOR PROTECTION

11.1 The Wabush CCAA Parties are Insolvent

186. Notwithstanding significant efforts of management and the Board of Directors of the Wabush CCAA Parties, the Wabush CCAA Parties are currently insolvent.

187. On-going arbitrations and litigation have also been a significant drain on the Wabush CCAA Parties' time and resources.

188. The Wabush CCAA Parties are no longer generating any revenue and no further revenue is anticipated to be generated due to the permanent idling of the Wabush Mine and the idling of Pointe-Noire Pellets. No further funding is available to the Wabush CCAA Parties from any of its affiliates except under the court-approved interim financing which the Wabush CCAA Parties are seeking approval of on this Motion.

189. As of May 18, 2015, the Wabush CCAA Parties have less than approximately $250,000 in available cash and such resources are insufficient to fund their ongoing obligations as they become due or pay their liabilities in the normal course.

190. The affiliates of the Wabush CCAA Parties have informed the Wabush CCAA Parties that no further funding will be provided to the Wabush CCAA Parties other than as may be required to fund these CCAA Proceedings, in which case, it must be in the form of court-approved interim financing.

191. The Wabush CCAA Parties have negotiated the Interim Facility from CMC in order to maintain their liquidity needs for the funding of these CCAA Proceedings and they hereby seek approval of the Interim Facility and the Interim Lender Charge, as more fully described in this Motion.

192. Based on the May 18 Forecast, and if the Interim Facility is approved by the Court, and the Interim Lender Charge is granted the priority sought at the Comeback Hearing, the Wabush CCAA Parties will have sufficient funding and liquidity to cover anticipated post-filing costs and expenses until August 14, 2015.

193. The Wabush CCAA Parties have businesses and assets which may have significant value and protection from creditors is required as the Wabush CCAA Parties address their current financial situation or seek financing or a sale of all or part of their businesses and assets.

12. PROPOSED RESTRUCTURING

194. The Wabush CCAA Parties require the benefit of the relief requested in this Motion, including a stay of proceedings, in order to allow them to explore further restructuring, refinancing and/or sales efforts, engage in further discussions with key stakeholders such as employees, suppliers, governmental authorities, financiers and affected communities under the stability and guidance of a court supervised process, and to generally pursue available options for the benefit of all stakeholders.

195. With the protection from their creditors requested herein granted to the Wabush CCAA Parties, the Wabush CCAA Parties will focus their resources on:

a. carrying out the SISP that has already been approved by this Court;

b. continuing care and maintenance efforts at the Wabush Mine to maintain the status quo during these CCAA Proceedings;

c. taking other steps to preserve and maintain the value of the Wabush CCAA Parties' assets and properties; and

d. such other matters that may arise throughout the process.

196. Given a reasonable period of time to further implement the SISP, the overall value of the Wabush CCAA Parties' businesses and assets will likely be maximized for the benefit of their stakeholders.

197. In the Wabush CCAA Parties' view, the prospects for these restructuring efforts are significantly enhanced if the Wabush CCAA Parties obtain the relief being sought on this Motion by the granting of protection under the CCAA by this Court on the terms of the Draft Wabush Initial Order (Exhibit R-8).

13. RELIEF SOUGHT

13.1 General

198. The Wabush CCAA Parties are deeply concerned that unless a stay of proceedings is granted to the Wabush CCAA Parties pursuant to the terms of the CCAA, certain suppliers, creditors and other stakeholders may attempt to take steps to try and improve their positions in comparison to other similarly situated stakeholders. This would jeopardize and potentially deplete the value of the Wabush CCAA Parties' estates to the detriment of all stakeholders and disrupt the ongoing restructuring efforts.

199. The granting of the CCAA stay will preserve the status quo and permit the Wabush CCAA Parties to continue with their restructuring efforts along with the rest of the CCAA Parties. This will also allow for the coordination of these CCAA Proceedings between the Bloom Lake CCAA Parties and Wabush CCAA Parties and the SISP and the ability to effect a global restructuring solution for all of the CCAA Parties under a single consolidated proceeding that avoids the potential of any duplication of costs that could occur if separate insolvency proceedings are initiated by or against the Wabush CCAA Parties.

200. It is the Wabush CCAA Parties' view that pursuing options under the CCAA will yield significantly better results for the diverse group of stakeholders than any conceivable liquidation scenario.

201. On this present Motion, the Wabush CCAA Parties seek an initial stay period of 30 days (the "**Stay Period**"). Before the expiry of the Stay Period, the Wabush CCAA Parties

intend to return to this Court for a comeback hearing anticipated to be on or about June 9, 2015, on notice to interested parties, for, among other things, the granting of priority for the court approved charges set out in the Draft Wabush Initial Order (Exhibit R-8), an extension of the Stay Period and other matters which may require the Court's attention at that time (the "**Comeback Hearing**").

13.2 Appointment of the Monitor as Monitor to the Wabush CCAA Parties

202. The Monitor already acting in these CCAA Proceedings in respect of the Bloom Lake CCAA Parties has agreed to act in respect of the Wabush CCAA Parties in the event that the relief sought herein is granted.

203. As CQIM is the parent company of Wabush Resources, the Monitor is familiar with its assets, businesses and personnel associated with the Wabush Mines JV.

204. The Monitor has therefore obtained significant information in respect of the businesses, operations and assets of the Wabush CCAA Parties, an understanding of the many issues faced by the Wabush CCAA Parties and relevant to their restructuring efforts and a familiarity with the management and personnel of the Wabush CCAA Parties. The Monitor is therefore best qualified to act as Monitor with respect to the Wabush CCAA Parties and it is appropriate that the Monitor be appointed as such.

205. The Monitor is prepared to act as Monitor of the Wabush CCAA Parties, pursuant to, and subject to, the terms of the Wabush Initial Order and the statutory provisions of the CCAA.

206. The Wabush CCAA Parties have been informed by the Monitor that it is a licensed trustee within the meaning of section 2 of the *Bankruptcy and Insolvency Act* (Canada). The Monitor is not subject to any of the restrictions on who may be appointed monitor as set out in section 11.7(2) of the CCAA.

207. At no time during the preceding two years has the Monitor been:

a) a director, officer or employee of the Wabush CCAA Parties;

b) related to the Wabush CCAA Parties or to any former director or officer of the Wabush CCAA Parties; or

c) the Wabush CCAA Parties' auditor, accountant or legal counsel, or a partner or employee of the auditor, accountant or legal counsel of the Wabush CCAA Parties.

208. The Monitor is not a trustee under a trust indenture issued by the Wabush CCAA Parties or any person related to the Wabush CCAA Parties, and is not a holder of a power of attorney granted by the Wabush CCAA Parties or by any person related to the Wabush CCAA Parties. The Monitor is not related to a trustee or holder of a power of attorney noted above.

209. Therefore, the Monitor is qualified to act as Monitor and there is no restriction on the Monitor being appointed Monitor of the Wabush CCAA Parties in these CCAA Proceedings.

13.3 Administration Charge

210. Counsel for the Wabush CCAA Parties, independent counsel for the Wabush CCAA Parties' Directors and Officers (as defined below), the Monitor, the Monitor's counsel and counsel to CMC, as the Interim lender, are essential to the restructuring and/or sale efforts contemplated in the CCAA proceedings.

211. They have each advised that they are prepared to provide or continue to provide professional services to the Wabush CCAA Parties only if they are protected by a charge over the assets of the Wabush CCAA Parties.

212. It is contemplated that the Wabush CCAA Parties will each be invoiced and pay fees and expenses of the beneficiaries of the Wabush Administration Charge on a weekly basis and a court ordered charge is sought as security for the fees and disbursements relating to services rendered up to a maximum amount of $1.75 million with the priority set out in the Draft Wabush Initial Order.

213. The Wabush CCAA Parties seek an Administration Charge (the "**Wabush Administration Charge**") in the amount of $1.75 million, to have such charge secure the professional fees and expenses payable by the Wabush CCAA Parties, and to have such charge apply to the assets of the Wabush CCAA Parties.

214. Pursuant to the Draft Wabush Initial Order (Exhibit R-8), the Wabush Administration Charge would rank ahead of the security granted under the Demand Credit Agreement and behind the security or other encumbrances over the property of the Wabush CCAA Parties in favour of any parties not served with notice of the presentation of this Motion. CMC has consented to the Wabush Administration Charge ranking ahead of the security granted under the Demand Credit Agreement.

215. However, as provided in the Draft Wabush Initial Order (Exhibit R-8), it is the intention of the Wabush CCAA Parties to seek priority over all creditors at the Comeback Hearing. Creditors with security interests who are likely to be affected by such priority will be served with notice of that motion.

216. The amount of the Wabush Administration Charge has been determined not on the basis of the total fees payable to these professionals during the CCAA proceedings but on an assessment of what could be an amount outstanding to these professionals at any given time in these CCAA Proceedings.

217. In order to ensure a reasonable allocation of the professional fees and expenses of the CCAA Parties among the CCAA Parties, a protocol will be established which provides for professional fees and expenses to be allocated (a) to the Bloom Lake CCAA Parties in respect of matters that relate exclusively to the Bloom Lake CCAA Parties, their businesses or their assets, (b) to the Wabush CCAA Parties in respect of matters that

relate exclusively to the Wabush CCAA Parties, their businesses or their assets, and (c) initially to the Bloom Lake CCAA Parties to be subsequently allocated among the CCAA Parties with the approval of the Court, in respect of matters that relate jointly to the Bloom Lake CCAA Parties and Wabush CCAA Parties, such as any subsequent claims procedure for the CCAA Parties.

13.4 Directors & Officers' Protection

218. The Wabush CCAA Parties are seeking a Directors' Charge (the "**Wabush Directors' Charge**") in the amount of $2 million, to have such charge also be in favour of the Directors and Officers of the Wabush CCAA Parties, and to have such charge only apply to the assets of the Wabush CCAA Parties.

219. Pursuant to the Draft Wabush Initial Order (Exhibit R-8), the Wabush Directors Charge would rank behind the Wabush Administration Charge, ahead of the security granted under the Demand Credit Agreement and behind the security or other encumbrances over the property of the Wabush CCAA Parties in favour of any parties not served with notice of the presentation of this Motion. CMC has consented to the Wabush Directors Charge ranking ahead of the security granted under the Demand Credit Agreement.

220. However, it is the intention of the Wabush CCAA Parties to seek to have the full amount of the Wabush Directors' Charge rank in priority to all other Encumbrances against the Wabush CCAA Parties' assets at the Comeback Hearing. Creditors with security interests who are likely to be affected by such priority will be served with notice of that motion for the Comeback Hearing.

221. Restructuring efforts for the Wabush CCAA Parties will be significantly enhanced with continuity on the boards' of directors (collectively, the "**Directors**") as well as continuity in the make-up of their respective officers (collectively, the "**Officers**"), given the complexity of the Wabush CCAA Parties' businesses and assets and the historical and specialized expertise and knowledge they possess with respect to the Wabush CCAA Parties' businesses, assets and the mining industry as a whole.

222. CNR maintains primary and excess directors' and officers' liability insurance policies for the directors and officers of its subsidiaries which include the Directors and Officers of the Wabush CCAA Parties (together, the "**D&O Insurance**").

223. The D&O Insurance contain limits and exclusions that could potentially affect the total amount of insurance available to the Directors and Officers of the Wabush CCAA Parties. For example:

a) The D&O Insurance has a limit of liability (inclusive of defence costs) of USD $215 million and expires on July 15, 2015. Additionally, USD $45 million of the D&O Insurance limit only applies in narrow circumstances and is only available to covered claims made during the policy period where CNR fails or refuses to indemnify insured Directors & Officers;

b) The aggregate limit of liability applies to all covered claims made during the policy period. All insureds (including the directors and officers of CNR and of CNR subsidiaries which are not Wabush CCAA Parties) share the limits available under the D&O Insurance, which could further reduce amounts available to satisfy claims of the Directors and Officers;

c) Certain insureds who are not Wabush CCAA Parties have already provided notice of claims unrelated to these CCAA Proceedings to the D&O Insurance carriers which is impairing the aggregate limits of liability under the relevant policies; and

d) Certain claims and certain types of losses are excluded under the D&O Insurance which may mean that not all post-filing claims which could be made against Directors and Officers would be covered. Some principal exclusions include:

   i) Claims for actual or alleged bodily injury or property damage;

   ii) Losses that constitute compensation earned by the claimant in the course of employment but unpaid by the insured, including salary, wages, commissions, bonuses or incentive compensation;

   iii) Losses for any actual or alleged violation of the responsibilities or duties imposed upon fiduciaries by the Employee Retirement Income Security Act of 1974 (ERISA) or a similar Canadian statute;

   iv) Losses that constitute fines, penalties or taxes imposed by law;

   v) Losses that constitute costs associated in testing for, monitoring or cleaning up pollutants;

   vi) Fines, penalties or taxes imposed by law other than penalties assessed against any insured person pursuant to the Foreign Corrupt Practices Act; and

   vii) Any amount of Loss attributable to the cost of any non-monetary relief, including costs associated with complying with injunctive relief.

224. A number of the foregoing exclusions may preclude coverage for employee wages, pension contributions and other employment-related claims, taxes and/or penalties. These exclusions in the D&O Insurance could foreclose any recovery for such claims under the D&O Insurance. These claims account for approximately 80% of the estimated post-filing amounts outstanding from time to time that the Directors and Officers would be exposed to.

225. The Directors and Officers of the Wabush CCAA Parties have expressed significant concern with respect to potential personal liability if they continue in their current capacities through this restructuring process. In the Wabush CCAA Parties' view it is

important that adequate protection be afforded to the Directors and Officers to provide incentive for them to remain as Directors and Officers, respectively, of the Wabush CCAA Parties.

226. In light of the potential for significant personal liability, all of the Directors and Officers of the Wabush CCAA Parties have advised that they will not continue their service and involvement in the proposed restructuring unless the Draft Wabush Initial Order (Exhibit R-8) grants a charge as security for the Wabush CCAA Parties' obligations to the Directors and Officers in the manner and with the priority as described above.

227. The Wabush CCAA Parties have made inquiries through an insurance broker who has advised that no additional directors' and officers' insurance is obtainable by the Wabush CCAA Parties.

228. With the assistance of the Monitor, a calculation has been performed to estimate the potential quantum of post-filing amounts outstanding from time to time for which Directors and Officers may have potential personal liability under various statutes.

229. This amount has been calculated as to approximately $2 million, depending on certain assumptions.

230. The Wabush CCAA Parties thus propose that the Wabush Directors' Charge be granted in the amount of $2 million to the extent such claims are not covered by the D&O Insurance, in order to provide a reasonable level of protection to the Directors and Officers.

231. The Wabush CCAA Parties believe that the amount of the Wabush Directors' Charge is fair and reasonable in the circumstances.

13.5 Terms of Interim Financing and Interim Lender Charge

232. As mentioned above, CMC has advised that it is only willing to fund the Wabush CCAA Parties' participation in these CCAA Proceedings by way of the Interim Facility if (a) the Interim Lender Charge in the amount of up to $15 million, with the priority set out in the Interim Financing Term Sheet, is granted over the assets of the Wabush CCAA Parties, (b) the pricing, including the interest rate, as set out in the Interim Financing Term Sheet is agreed to by the Wabush CCAA Parties and approved by the Court, and (c) the covenants set out in the Interim Financing Term Sheet are agreed to by the Wabush CCAA Parties and approved by the Court.

233. The Wabush CCAA Parties are of the view that the Interim Lender Charge, Interim Facility pricing and covenants set out in the Interim Financing Term Sheet are reasonable and, taking into account the economic and operational status of the Wabush CCAA Parties, significantly superior to market standard for financing of a comparable amount. Accordingly, no other parties were approached about potentially providing interim financing.

234. The Wabush CCAA Parties have no revenue and minimal cash on hand; they accordingly have no liquidity and no ability to fund their participation in the CCAA Proceedings without financing.

235. This Interim Facility is essential to the successful restructuring of the Wabush CCAA Parties in these CCAA Proceedings. Under these circumstances, the Interim Facility, on the terms set out in the Interim Financing Term Sheet, is the most practical, affordable and accessible source for such financing.

236. Pending the Comeback Hearing, the Interim Facility will be in priority to the security granted under the Demand Credit Agreement, but it will be behind the Wabush Administration Charge, the Wabush Directors' Charge and any other secured creditors. It is the intention of the Wabush CCAA Parties to seek a priority charge for the Interim Facility and over all other Encumbrances at the Comeback Hearing. Creditors with security interests who are likely to be affected by such priority will be served with notice of that motion.

13.6 Execution Notwithstanding Appeal

237. In view of the urgency and severity of the circumstances confronting the Wabush CCAA Parties, it is essential that execution of the order requested be granted notwithstanding appeal.

14. CONCLUSIONS

238. The Draft Wabush Initial Order (Exhibit R-8) presented on this Motion is based on the form of standard CCAA Initial Order approved by the Superior Court of Québec, Commercial Division (the "**Model Order**"). A black-lined version comparing the Model Order to the Draft Wabush Initial Order is communicated as **Exhibit R-29**. A black-lined version comparing the Bloom Initial Order to the Draft Wabush Initial Order is communicated as **Exhibit R-30**.

239. For the reasons set forth above, the Wabush CCAA Parties believe that it is both appropriate and necessary that the relief being sought in the Draft Wabush Initial Order (Exhibit R-8) be granted for the purposes of maximizing the restructuring efforts of the Wabush CCAA Parties for the benefit of their stakeholders.

240. The Bloom Initial Order provides that all motions in these CCAA Proceedings are to be brought on not less than ten (10) calendar days' notice to all persons on the service list. The Wabush CCAA Parties have not complied with this requirement in connection with this Motion. Given that this Motion is to seek the issuance of an Initial Order, the Wabush CCAA Parties believe that it is critical in order to preserve and maintain the value of their assets not to provide the creditors and other stakeholders of the Wabush CCAA Parties with an opportunity to pursue the exercise of rights or remedies against the Wabush CCAA Parties, their businesses and/or their assets pending the Court's hearing of this Motion.

241. The Wabush CCAA Parties respectfully submit that this motion should be granted in accordance with its conclusions.

242. The present motion is well-founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

GRANT the present Motion for the Issuance of an Initial Order;

ISSUE an Initial Order in the form of the Draft Wabush Initial Order (Exhibit R-8) communicated in support hereof;

THE WHOLE WITHOUT COSTS, save and except in case of contestation.

Montréal, May 19, 2015

BLAKE, CASSELS & GRAYDON LLP
Attorneys for the Wabush CCAA Parties

AFFIDAVIT

I, the undersigned, **CLIFFORD T. SMITH**, the President of the Petitioners, Wabush Resources Inc. and Wabush Iron Co. Limited, and Vice-President of the Mises-en-Cause, Arnaud Railway Company and Wabush Lake Railway Company, Limited, each having a place of business at 1155 Rue University, Suite 508, in the city and district of Montréal, Québec, solemnly that all the facts alleged in the present Motion for the Issuance of an Initial Order are true.

AND I HAVE SIGNED:

Clifford T Smith

CLIFFORD T. SMITH

SOLEMNLY DECLARED before me
at Montréal, Québec, this 19th day of May,
2015

E D Messier 80,049

Commissioner of Oaths for Québec

COMMISSAIRE À L'ASSERMENTATION
COMMISSIONER FOR OATHS
EDITH MESSIER
#80 049
POUR LE Québec / FOR QUEBEC

C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF **MONTRÉAL**

SUPERIOR COURT
Commercial Division
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. 36, as amended)

N°: **500-11-048114-157**

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

BLOOM LAKE GENERAL PARTNER LIMITED
and AL.

and

WABUSH IRON CO. LIMITED
AND
WABUSH RESOURCES INC.

Petitioners

and

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP
and ALS

Mises-en-cause

and

FTI CONSULTING CANADA INC.

Proposed Monitor

LIST OF EXHIBITS
(In support of the Motion for the issuance of an Initial Order)

R-1 Initial Order as amended on February 20, 2015;

R-2 CCAA Parties' Motion for the Issuance of an Initial Order (First Motion for an Initial Order);

R-3 Stay extension Order rendered on April 17, 2015;

R-4 Sale advisor appointment Order rendered on April 17, 2015;

R-5 SISP Order dated April 17, 2015;

R-6 Mining Camp Lease Order dated April 17, 2015;

R-7 Chromite Approval and Vesting Order dated April 27, 2015;

R-8 Draft Wasbush Initial Order;

R-9 Chart illustrating the basic corporate structures of the CCAA Parties;

R-10 Press release issued by CNR on February 11, 2014;

R-11 Interim Financing Term Sheet dated May 19, 2015;

R-12 CNR 2013 Annual Report;

R-13 Company Profile regarding Wabush Iron Co. Limited;

R-14 Map showing the geographical location of the Wabush Mine and the site and the Pointe-Noire Port;

R-15 New CCAA Parties' weekly cash flow forecast to August 14, 2015 (May 18 Forecast);

R-16 Chart showing net book value of the assets by legal entity;

R-17 Financial statements of April 2015;

R-18 Chart showing the outstanding indebtedness of the New CCAA Parties to other affiliated companies;

R-19 Demand Credit Agreement dated February 23, 2015;

R-20 Equipment Security Agreement dated February 23, 2015;

R-21 Movable Hypothec dated February 23, 2015;

R-22 *En liasse,* Table summarizing the Legal Hypothecs of construction and copy of the Legal Hypothecs of construction registered against property of the New CCAA Parties as of May 11, 2015;

R-23 Demand letter from Sandvik Mining and Construction Canada a Division of Sandvik Canada Inc. dated March 4, 2015;

R-24 Letter from Sandvik dated April 9, 2015;

R-25 Real estate search report (Québec) on the New CCAA Parties immovable property;

R-26 RPMRR (Québec) on the New CCAA Parties movable property;

R-27 Personal Property Security Act (Ontario, New Brunswick, Newfoundland & Ohio) search results summary on the New CCAA Parties' movable property;

R-28 Public register of real and immovable mining rights on Wabush Iron Co. Limited and Wabush Resources Inc.'s mining rights in Québec;

R-29 A black-lined version comparing the Model Order to the Draft Wabush Initial Order;

R-30 A black-lined version comparing the Initial Order to the Draft Wabush Initial Order.

Montréal, May 19, 2015

BLAKE, CASSELS & GRAYDON LLP
Attorneys for CCAA Parties

8455407.1

N°: 500-11-048114-157

SUPERIOR COURT
DISTRICT OF MONTREAL
(Commercial Division)

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

BLOOM LAKE GENERAL PARTNER LIMITED & ALS

Petitioners

-and-

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP & ALS

Mises-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

MOTION FOR THE ISSUANCE OF AN INITIAL ORDER, AFFIDAVIT AND LIST OF EXHIBITS

ORIGINAL

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Our File: 11573-365

TAB 28

Indexed as:

Borowski v. Canada (Attorney General)

Joseph Borowski, appellant;
v.
The Attorney General of Canada, respondent;
and
Interfaith Coalition on the Rights and Wellbeing of Women and Children, R.E.A.L. Women of Canada, and Women's Legal Education and Action Fund (LEAF), interveners.

[1989] 1 S.C.R. 342

[1989] 1 R.C.S. 342

[1989] S.C.J. No. 14

[1989] A.C.S. no 14

File No.: 20411.

Supreme Court of Canada

1988: October 3, 4 / 1989: March 9.

Present: Dickson C.J. and McIntyre, Lamer, Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Appeal -- Mootness -- Abortion provisions of Criminal Code -- Provisions under challenge already found invalid -- Ancillary questions relating to Charter rights of the foetus -- Whether or not issue moot -- Whether or not Court should exercise discretion to hear case -- Criminal Code, R.S.C. 1970, c. C-34, s. 251 -- Canadian Charter of Rights and Freedoms, ss. 7, 15.

Criminal law -- Abortion -- Provisions under challenge already found invalid -- Ancillary questions relating to Charter rights of the foetus -- Whether or not issue moot -- Whether or not Court should exercise discretion to hear case.

Constitutional law -- Charter of Rights -- Right to life, liberty and security of the person -- Right to equality before and under the law -- Whether or not Charter rights extending to foetus -- Charter issues ancillary to question of validity of abortion provisions of Criminal Code -- Provisions under challenge already found invalid -- Whether or not issue moot -- Whether or not Court should exercise discretion to hear case.

Civil procedure -- Standing -- Standing originally found because action seeking declaration as to legislation's validity -- Provisions under challenge already found invalid -- Whether or not standing as originally [page343] determined -- Whether or not s. 24(1) of the Charter and s. 52(1) of the Constitution Act, 1982 able to support claim for standing.

Appellant attacked the validity of s. 251(4), (5) and (6) of the Criminal Code relating to abortion on the ground that they contravened the life and security and the equality rights of the foetus, as a person, protected by ss. 7 and 15 of the Canadian Charter of Rights and Freedoms. Appellant's standing had been found on the basis that he was seeking a declaration that legislation is invalid, that there was a serious issue as to its invalidity, that he had a genuine interest as a citizen in the validity of the legislation and that there was no other reasonable and effective manner in which the issue could be brought before the Court.

The Court of Queen's Bench found s. 251(4), (5) and (6) did not violate the Charter as a foetus was not protected by either s. 7 or s. 15 of the Charter and also held that the s. 1 of Canadian Bill of Rights did not give the courts the right to assess the substantive content or wisdom of legislation. The Court of Appeal concluded that neither s. 7 nor s. 15 of the Charter applied to a foetus. The constitutional questions stated in this Court queried: (1) if a foetus had the right to life as guaranteed by s. 7 of the Charter; (2) if so, whether s. 251(4), (5) and (6) of the Criminal Code violated the principles of fundamental justice contrary to s. 7 of the Charter; (3) whether a foetus had the right to equal protection and equal benefit of the law without discrimination because of age or mental or physical disability as guaranteed by s. 15 of the Charter; (4) if so, whether s. 251(4), (5) and (6) of the Criminal Code violated s. 15; and (5) if questions (2) and (4) were answered affirmatively, whether s. 251(4), (5) and (6) of the Criminal Code were justified by s. 1 of the Charter. All of s. 251, however, was struck down subsequent to the Court of Appeal's decision but before the appeal reached this Court as a result of this Court's decision in R. v. Morgentaler (No. 2).

A serious issue existed at the commencement of the appeal as to whether the appeal was moot. Questions also existed as to whether the appellant had lost his standing and, indeed, whether the matter was justiciable. These issues were addressed as a preliminary matter and decision on them was reserved. The Court then heard argument on the merits of the appeal so that the whole appeal could be decided without recalling the parties for argument should it decide that the appeal should proceed notwithstanding the preliminary issues.

[page344]

Held: The appeal should be dismissed.

The appeal is moot and the Court should not exercise its discretion to hear it. Moreover, appellant no longer has standing to pursue the appeal as the circumstances upon which his standing was originally premised have disappeared.

The doctrine of mootness is part of a general policy that a court may decline to decide a case which raises merely a hypothetical or abstract question. An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The general policy is enforced in moot cases unless the court exercises its discretion to depart from it.

The approach with respect to mootness involves a two-step analysis. It is first necessary to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case. (In the interest of clarity, a case is moot if it does not present a concrete controversy even though a court may elect to address the moot issue.)

This appeal is moot as there is no longer a concrete legal dispute. The live controversy underlying this appeal -- the challenge to the constitutionality of s. 251(4), (5) and (6) of the Criminal Code -- disappeared when s. 251 was struck down in R. v. Morgentaler (No. 2). None of the relief sought in the statement of claim was relevant. Three of the five constitutional questions that were set explicitly concerned s. 251 and were no longer applicable. The remaining two questions addressed the scope of ss. 7 and 15 of the Charter and were not severable from the context of the original challenge to s. 251.

A constitutional question cannot bind this Court and may not be used to transform an appeal into a reference. Constitutional questions are stated to define with precision the constitutional points at issue, not to introduce new issues, and accordingly, cannot be used as an independent basis for supporting an otherwise moot appeal.

The second stage in the analysis requires that a court consider whether it should exercise its discretion to decide the merits of the case, despite the absence of a live controversy. Courts may be guided in the exercise of [page345] their discretion by considering the underlying rationale of the mootness doctrine.

The first rationale for the policy with respect to mootness in that a court's competence to resolve legal disputes is rooted in the adversary system. A full adversarial context, in which both parties have a full stake in the outcome, is fundamental to our legal system. The second is based on the

concern for judicial economy which requires that a court examine the circumstances of a case to determine if it is worthwhile to allocate scarce judicial resources to resolve the moot issue. The third underlying rationale of the mootness doctrine is the need for courts to be sensitive to the effectiveness or efficacy of judicial intervention and demonstrate a measure of awareness of the judiciary's role in our political framework. The Court, in exercising its discretion in an appeal which is moot, should consider the extent to which each of these three basic factors is present. The process is not mechanical. The principles may not all support the same conclusion and the presence of one or two of the factors may be overborne by the absence of the third, and vice versa.

The Court should decline to exercise its discretion to decide this appeal on its merits because of concerns for judicial economy and for the Court's role in the law-making process. The absence of an adversarial relationship was of little concern: the appeal was argued as fully as if it were not moot.

With respect to judicial economy, none of the factors justifying the application of judicial resources applied. The decision would not have practical side effects on the rights of the parties. The case was not one that was capable of repetition, yet evasive of review: it will almost certainly be brought before the Court within a specific legislative context or possibly in review of specific governmental action. An abstract pronouncement on foetal rights here would not necessarily obviate future repetitious litigation. It was not in the public interest, notwithstanding the great public importance of the question involved, to address the merits in order to settle the state of the law. A decision as to whether ss. 7 and 15 of the Charter protect the rights of the foetus is not in the public interest due to the potential uncertainty that could result from such a decision absent a legislative context.

A proper awareness of the Court's law-making function dictated against the Court's exercising its discretion to decide this appeal. The question posed here was not [page346] the question raised in the original action. Indeed, what was sought -- a Charter interpretation in the absence of legislation or other governmental action bringing it into play -- would turn this appeal into a private reference. The Court, if it were to exercise its discretion, would intrude on the right of the executive to order a reference and pre-empt a possible decision of Parliament by dictating the form of legislation it should enact. To do so would be a marked departure from the Court's traditional role.

The appellant also lacked standing to pursue this appeal given the fact that the original basis for his standing no longer existed. Two significant changes in the nature of this action occurred since standing was granted by this Court in 1981. Firstly, the claim is now premised primarily upon an alleged right of a foetus to life and equality pursuant to ss. 7 and 15 of the Charter. Secondly, the legislative context of original claim disappeared when s. 251 of the Criminal Code was struck down. Standing could not be based on s. 24(1) of the Charter for an infringement or denial of a person's own Charter-based right was required. Here, the rights allegedly violated were those of a foetus. Standing could not be based on s. 52(1) of the Constitution Act, 1982 as this is restricted to litigants challenging a law or governmental action pursuant to power granted by law.

Cases Cited

Referred to: R. v. Morgentaler (No. 2), [1988] 1 S.C.R. 30; Minister of Justice of Canada v. Borowski, [1981] 2 S.C.R. 575; Morgentaler v. The Queen (No. 1), [1976] 1 S.C.R. 616; Dehler v. Ottawa Civic Hospital (1980), 29 O.R. (2d) 677 (C.A.), leave to appeal refused [1981] 1 S.C.R. viii; The King ex rel. Tolfree v. Clark, [1944] S.C.R. 69; Moir v. The Corporation of the Village of Huntingdon (1891), 19 S.C.R. 363; Attorney-General for Alberta v. Attorney-General for Canada, [1939] A.C. 117; Coca-Cola Company of Canada Ltd. v. Mathews, [1944] S.C.R. 385; Sun Life Assurance Company of Canada v. Jervis, [1944] A.C. 111; Vic Restaurant Inc. v. City of Montreal, [1959] S.C.R. 58; International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange, [1967] S.C.R. 628; Re Cadeddu and The Queen (1983), 41 O.R. (2d) 481; R. v. Mercure, [1988] 1 S.C.R. 234; Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357; Re Maltby and Attorney-General [page347] of Saskatchewan (1984), 10 D.L.R. (4th) 745; Hall v. Beals, 396 U.S. 45 (1969); United States v. W. T. Grant Co., 345 U.S. 629 (1953); Sibron v. New York, 392 U.S. 40 (1968); Vadebonc(oe)ur v. Landry, [1977] 2 S.C.R. 179; Bisaillon v. Keable, [1983] 2 S.C.R. 60; Southern Pacific Co. v. Interstate Commerce Commission, 219 U.S. 433 (1911); Le Syndicat des Employés du Transport de Montréal v. Attorney General of Quebec, [1970] S.C.R. 713; Wood, Wire and Metal Lathers' Int. Union v. United Brotherhood of Carpenters and Joiners of America, [1973] S.C.R. 756; Minister of Manpower and Immigration v. Hardayal, [1978] 1 S.C.R. 470; Re Opposition by Quebec to a Resolution to amend the Constitution, [1982] 2 S.C.R. 793; Forget v. Quebec (Attorney General), [1988] 2 S.C.R. 90; Thorson v. Attorney General of Canada, [1975] 1 S.C.R. 138; Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265.

Statutes and Regulations Cited

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Canadian Charter of Rights and Freedoms, ss. 1, 7, 15, 24(1).
Constitution Act, 1982, s. 52(1).
Constitution of the United States of America, Art. III, s. 2(1).
Criminal Code, R.S.C. 1970, c. C-34, s. 251(4), (5), (6).
Rules of the Supreme Court of Canada, SOR/83-74, s. 32.

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Macklem, Patrick and Eric Gartner. "Re Skapinker and Mootness Doctrine" (1984), 6 Sup. Ct. L. Rev. 369.
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"The Mootness Doctrine in the Supreme Court" (1974), 88 Harvard L.R. 373.
Tribe, Laurence H. American Constitutional Law, 2nd ed. Mineola, N.Y.: Foundation Press, 1988.

APPEAL from a judgment of the Saskatchewan Court of Appeal (1987), 56 Sask. R. 129, 39 D.L.R.

(4th) 731, [1987] 4 W.W.R. 385, 33 C.C.C. (3d) 402, 59 C.R. (3d) 223, dismissing an appeal from a judgment of Matheson J. (1983), 29 Sask. R. 16, 4 D.L.R. (4th) 112, [1984] 1 W.W.R. [page348] 15, 8 C.C.C. (3d) 392, 36 C.R. (3d) 259. Appeal dismissed.

Morris C. Shumiatcher, Q.C., and R. Bradley Hunter, for the appellant. Claude R. Thomson, Q.C., and Robert W. Staley, for the intervener Interfaith Coalition on the Rights and Wellbeing of Women and Children. Angela M. Costigan and Karla Gower, for the intervener R.E.A.L. Women of Canada. Edward Sojonky, Q.C., for the respondent. Mary Eberts and Helena Orton, for the intervener Women's Legal Education and Action Fund (LEAF).

Solicitors for the appellant: Shumiatcher - Fox, Regina. Solicitors for the intervener Interfaith Coalition on the Rights and Wellbeing of Women and Children: Campbell, Godfrey & Lewtas, Toronto. Solicitor for the intervener R.E.A.L. Women of Canada: Angela M. Costigan, Toronto. Solicitor for the respondent: Frank Iacobucci, Ottawa. Solicitors for the intervener Women's Legal Education and Action Fund (LEAF): Tory, Tory, DesLauriers & Binnington, Toronto.

The judgment of the Court was delivered by

1 **SOPINKA J.**:-- This appeal by leave of this Court is from the Saskatchewan Court of Appeal, [1987] 4 W.W.R. 385, which affirmed the judgment at trial of Matheson J. of the Saskatchewan Court of Queen's Bench, [1984] 1 W.W.R. 15, dismissing the action of the plaintiff (appellant in this Court). In the courts below, the plaintiff attacked the validity of subss. (4), (5) and (6) of s. 251 of the Criminal Code, R.S.C. 1970, c. C-34, relating to abortion on the ground that they contravened protected rights of the foetus. Subsequent to the decision of the Saskatchewan Court of Appeal but by the time the appeal reached this Court, s. 251, including the subsections under attack in this action, had been struck down in R. v. Morgentaler, [1988] 1 S.C.R. 30 (hereinafter R. v. Morgentaler (No. 2)).

2 From this state of the proceedings it was apparent at the commencement of this appeal that a serious issue existed as to whether the appeal was moot. As well, it appeared questionable whether the appellant had lost his standing and, indeed, whether the matter was justiciable. The Court therefore called upon counsel to address these issues as a preliminary matter. Upon completion of these submissions, we reserved decision on these issues and heard the argument of the merits of the [page349] appeal so that we could dispose of the whole appeal without recalling the parties for argument should we decide that, notwithstanding the preliminary issues, the appeal should proceed.

3 In view of the conclusion that I have reached, it is necessary to deal with the issues of mootness

and standing only. Since it is a change in the nature of these proceedings which gives rise to these issues, a review of the history of the action is necessary.

History of the Action

4 Mr. Borowski commenced an action in the Court of Queen's Bench of Saskatchewan by filing a statement of claim on September 5, 1978, which asked for the following relief:

> (a) An Order of this Honourable Court declaring section 251, subsections (4), (5) and (6) of the Criminal Code invalid and inoperative;
> (b) An Order of this Honourable Court declaring that the provisions of all Acts of the Parliament of Canada, and all legal instruments purporting to authorize the expenditure of public moneys for any of the purposes described in section 251, subsections (4), (5) and (6) are invalid and inoperative, and the outlay of such moneys is ultra vires and unlawful;
> (c) A permanent injunction enjoining the Minister of Finance, his servants and agents, from allocating, disbursing or in any way providing public moneys out of the Consolidated Revenue Fund for the establishment or maintenance of therapeutic abortion committees, for the performance of abortions or in support of any act or object relating to the abortion and destruction of individual human foetuses;
> (d) The costs of this action; and
> (e) Such further and other relief as to this Honourable Court seems just and expedient.

5 Prior to trial, a motion was brought by the respondents questioning the jurisdiction of the Court of Queen's Bench. That motion culminated in an appeal to this Court in which a central issue was Mr. Borowski's standing to bring the action. The resulting decision of the majority of this Court, reported in Minister of Justice of Canada v. Borowski, [1981] 2 S.C.R. 575, was that Mr. Borowski had standing to attack the provisions of the Code referred to in his statement of claim. [page350] Martland J., speaking for the majority, stated, at p. 598:

> I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court. In my opinion, the respondent has met this test and should be permitted to proceed with his action.

6 Laskin C.J., with whom Lamer J. concurred, would have denied standing on the basis that Mr. Borowski was not a person affected by the legislation and that there were others, such as doctors and hospitals, who might be so affected. The Chief Justice concluded, therefore, that Mr. Borowski

did not have any judicially cognizable interest in the matter and that the Court ought to exercise its discretion to deny standing.

7 An amended statement of claim was filed on April 18, 1983, in which the original claims based on an alleged violation of the Canadian Bill of Rights, R.S.C. 1970, App. III, were repeated. Allegations based upon the Canadian Charter of Rights and Freedoms, which had been proclaimed on April 17, 1982, were added. The prayer for relief claimed:

> (a) An Order of this Honourable Court declaring Subsections (4), (5) and (6) of Section 251 of the Criminal Code to be ultra vires, unconstitutional, invalid, inoperative and of no force or effect;
> (b) An Order of this Honourable Court declaring that the provisions of all Acts of the Parliament of Canada, and all legal instruments purporting to authorize the expenditure of public moneys for any of the purposes described in Subsections (4), (5) and (6) of Section 251 of the Criminal Code are ultra vires, inoperative, unconstitutional, invalid and of no force or effect and the outlay of such moneys is unlawful:
> (c) The costs of this action; and
> (d) Such further and other relief as to this Honourable Court seems just.

8 The Saskatchewan Court of Queen's Bench dismissed Mr. Borowski's claim relating to an alleged violation of s. 1 of the Canadian Bill of Rights. [page351] Matheson J. held that both Morgentaler v. The Queen, [1976] 1 S.C.R. 616 (hereinafter Morgentaler v. The Queen (No. 1)) and Dehler v. Ottawa Civic Hospital (1980), 29 O.R. (2d) 677 (C.A.) (leave to appeal to S.C.C. refused [1981] 1 S.C.R. viii) concluded that the Canadian Bill of Rights did not give the courts the right to assess the substantive content or wisdom of legislation.

9 Matheson J. noted that Mr. Borowski's principal argument under the Charter was that the foetus is a person and therefore should be afforded the protection of s. 7 of the Charter. It was held, however, that s. 251(4), (5), and (6) did not violate the Charter as a foetus is not included in "everyone" so as to trigger the application of any s. 7 rights.

10 On appeal Mr. Borowski did not pursue his claim that government funding of abortions was unlawful. The Saskatchewan Court of Appeal dismissed Mr. Borowski's appeal by concluding that neither s. 7 nor s. 15 (which had come into effect on April 17, 1985, prior to the hearing before the Court of Appeal) applied to a foetus. Speaking for the Court, Gerwing J.A. examined the historical treatment of the foetus as well as the language and legislative history of s. 7 and concluded that the guarantees of s. 7 were not intended to extend to the unborn. As well, the foetus was held not to be included in "every individual" for the purpose of s. 15.

11 Leave to appeal to this Court was granted on September 3, 1987. The grounds for appeal alleged by the appellant in his notice of motion for leave to appeal refer primarily to ss. 7 and 15 of the Charter. On October 7, 1987, McIntyre J., pursuant to Rule 32 of the Rules of the Supreme

Court of Canada, SOR/83-74, stated the following constitutional questions:

1. Does a child en ventre sa mère have the right to life as guaranteed by Section 7 of the Canadian Charter of Rights and Freedoms?
2. If the answer to question 1 is "yes", do subsections (4), (5) and (6) of Section 251 of the Criminal Code violate or deny the principles of fundamental justice, contrary to Section 7 of the Canadian Charter of Rights and Freedoms? [page352] 3. Does a child en ventre sa mère have the right to the equal protection and equal benefit of the law without discrimination because of age or mental or physical disability that are guaranteed by Section 15 of the Canadian Charter of Rights and Freedoms?
4. If the answer to question 3 is "yes", do subsections (4), (5) and (6) of Section 251 of the Criminal Code violate or deny the rights guaranteed by Section 15?
5. If the answer to question 2 is "yes" or if the answer to question 4 is "yes", are the provisions of subsections (4), (5) and (6) of Section 251 of the Criminal Code justified by Section 1 of the Canadian Charter of Rights and Freedoms, and therefore not inconsistent with the Constitution Act, 1982?

12 On January 28, 1988, after leave to appeal was granted, this Court decided R. v. Morgentaler (No. 2), supra, in which all of s. 251 was found to violate s. 7 of the Charter. Accordingly, s. 251 in its entirety was struck down.

13 In July of 1988 in light of this Court's judgment in R. v. Morgentaler (No. 2), supra, counsel on behalf of the Attorney General of Canada applied to adjourn the hearing of the appeal. The respondent argued that the issue was now moot as s. 251 of the Criminal Code had been nullified and that the two remaining constitutional questions (numbers 1 and 3) which simply ask whether a child en ventre sa mère is entitled to the protection of ss. 7 and 15 of the Charter respectively are not severable from the other, now moot constitutional questions. Although the respondent claimed the matter was moot, no application to quash the appeal was made. The application to adjourn the hearing of the appeal was denied by Chief Justice Dickson on July 19, 1988, leaving it to the Court to address the mootness issue.

14 I am of the opinion that the appeal should be dismissed on the grounds that: (1) Mr. Borowski's case has been rendered moot and (2) he has lost his standing. When section 251 was struck down, the basis of the action disappeared. The initial prayer for relief was no longer applicable. The foundation for standing upon which the previous decision of this Court was based also disappeared.

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Mootness

15 The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.

16 The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

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When is an Appeal Moot? -- The Authorities

17 The first stage in the analysis requires a consideration of whether there remains a live controversy. The controversy may disappear rendering an issue moot due to a variety of reasons, some of which are discussed below.

18 In The King ex rel. Tolfree v. Clark, [1944] S.C.R. 69, this Court refused to grant leave to appeal to applicants seeking a judgment excluding the respondents from sitting and exercising their functions as Members of the Ontario Legislative Assembly. However, the Legislative Assembly had been dissolved prior to the hearing before this Court. As a result, Duff C.J., on behalf of the Court, held at p. 72:

> It is one of those cases where, the state of facts to which the proceedings in the lower Courts related and upon which they were founded having ceased to exist, the sub-stratum of the litigation has disappeared. In accordance with well-settled principle, therefore, the appeal could not properly be entertained. [Emphasis added.]

19 A challenged municipal by-law was repealed prior to a hearing in Moir v. The Corporation of the Village of Huntingdon (1891), 19 S.C.R. 363, leading to a conclusion that the appealing party had no actual interest and that a decision could have no effect on the parties except as to costs. Similarly, in a fact situation analogous to this appeal, the Privy Council refused to address the constitutionality of challenged legislation where two statutes in question were repealed prior to the hearing: Attorney-General for Alberta v. Attorney- General for Canada, [1939] A.C. 117 (P.C.)

20 Appeals have not been entertained in situations in which the appellant had agreed to an undertaking to pay the respondent the damages awarded in the court below plus costs regardless of the disposition of the appeal: Coca-Cola Company of Canada Ltd. v. Mathews, [1944] S.C.R. 385, and Sun Life Assurance Company of Canada v. Jervis, [1944] A.C. 111. In Coca-Cola v. Mathews, Rinfret C.J. held the result of the undertaking was to eliminate any further lis between the parties such [page355] that the Court would have been forced to decide an abstract proposition of law.

21 As well, the sale of a restaurant for which a renewal of a licence was sought as required by the impugned municipal by-law rendered an issue technically moot: Vic Restaurant Inc. v. City of Montreal, [1959] S.C.R. 58. Issues in contention may be of a short duration resulting in an absence of a live controversy by the time of appellate review. Such a situation arose in International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange, [1967] S.C.R. 628, in which the cessation of a strike between the parties ended the actual dispute over the validity of an injunction prohibiting certain strike action by one party.

22 The particular circumstances of the parties to an action may also eliminate the tangible nature of a dispute. The death of parties challenging the validity of a parole revocation hearing (Re Cadeddu and The Queen (1983), 41 O.R. (2d) 481 (C.A.)) and a speeding ticket (R. v. Mercure, [1988] 1 S.C.R. 234) ended any concrete controversy between the parties.

23 As well, the inapplicability of a statute to the party challenging the legislation renders a dispute moot: Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357. This is similar to those situations in which an appeal from a criminal conviction is seen as moot where the accused has fulfilled his sentence prior to an appeal: Re Maltby v. Attorney-General of Saskatchewan (1984), 10 D.L.R. (4th) 745 (Sask. C.A.).

24 The issue of mootness has arisen more frequently in American jurisprudence, and there, the doctrine is more fully developed. This may be due in part to the constitutional requirement, contained in s. 2(1) of Article III of the American Constitution, that there exist a "case or controversy":

> Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, [page356] or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United

> States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

However, despite the constitutional enshrinement of the principle, the mootness doctrine has its roots in common law principles similar to those in Canada: see "The Mootness Doctrine in the Supreme Court" (1974), 88 Harvard L.R. 373, at p. 374. Situations resulting in a finding of mootness are similar to those in Canada. For example, in Hall v. Beals, 396 U.S. 45 (1969), a challenge to a Colorado voter residency requirement of six months was held moot due to a legislative change in the law removing the plaintiff from the application of the statute. Mootness was also raised in United States v. W. T. Grant Co., 345 U.S. 629 (1953), where a defendant voluntarily ceased allegedly unlawful conduct. Similarly, in Sibron v. New York, 392 U.S. 40 (1968), mootness was an issue where an accused completed his sentence prior to an appeal of his conviction.

25 The American jurisprudence indicates a similar willingness to consider the merits of an action in some circumstances even when the controversy is no longer concrete and tangible. The rule that abstract, hypothetical or contingent questions will not be heard is not absolute (see: Tribe, American Constitutional Law (2nd ed. 1988), at p. 84; Kates and Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory" (1974), 62 Calif. L.R. 1385). A two-stage process is involved in which a court may consider the merits of an appeal even where the issue is moot.

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Is this Appeal Moot?

26 In my opinion, there is no longer a live controversy or concrete dispute as the substratum of Mr. Borowski's appeal has disappeared. The basis for the action was a challenge relating to the constitutionality of subss. (4), (5) and (6) of s. 251. That section of the Criminal Code having been struck down in R. v. Morgentaler (No. 2), supra, the raison d'être of the action has disappeared. None of the relief claimed in the statement of claim is relevant. Three of the five constitutional questions that were set explicitly concern s. 251 and are no longer applicable. The remaining two questions addressing the scope of ss. 7 and 15 Charter rights are not severable from the context of the original challenge to s. 251. These questions were only ancillary to the central issue of the alleged unconstitutionality of the abortion provisions of the Criminal Code. They were a mere step in the process of measuring the impugned provision against the Charter.

27 In any event, this Court is not bound by the wording of any constitutional question which is stated. Nor may the question be used to transform an appeal into a reference: Vadebonc(oe)ur v.

Landry, [1977] 2 S.C.R. 179, at pp. 187-88, and Bisaillon v. Keable, [1983] 2 S.C.R. 60, at p. 71. The procedural requirements of Rule 32 of the Rules of the Supreme Court of Canada are not designed to introduce new issues but to define with precision the constitutional points in issue which emerge from the record. Rule 32 provides:

> 32. (1) When a party to an appeal
>
> (a) intends to raise a question as to the constitutional validity or the constitutional applicability of a statute of the Parliament of Canada or of a legislature of a province or of Regulations made thereunder,
> (b) intends to urge the inoperability of a statute of the Parliament of Canada or of a legislature of a province or of Regulations made thereunder.
>
> such party shall, upon notice to the other parties, apply to the Chief Justice or a Judge for the purpose of stating the question, within thirty days from the granting of leave to appeal or within thirty days from the filing of the notice of appeal in an appeal with leave of the court [page358] of final resort in a province, the Federal Court of Appeal, or in an appeal as of right.

The questions cannot, therefore, be employed as an independent basis for supporting an appeal that is otherwise moot.

28 By reason of the foregoing, I conclude that this appeal is moot. It is necessary, therefore, to move to the second stage of the analysis by examining the basis upon which this Court should exercise its discretion either to hear or to decline to hear this appeal.

The Exercise of Discretion: Relevant Criteria

29 Since the discretion which is exercised relates to the enforcement of a policy or practice of the Court, it is not surprising that a neat set of criteria does not emerge from an examination of the cases. This same problem in the United States led commentators there to remark that "the law is a morass of inconsistent or unrelated theories, and cogent judicial generalization is sorely needed." (Kates and Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory", supra, at p. 1387). I would add that more than a cogent generalization is probably undesirable because an exhaustive list would unduly fetter the court's discretion in future cases. It is, however, a discretion to be judicially exercised with due regard for established principles.

30 In formulating guidelines for the exercise of discretion in departing from a usual practice, it is instructive to examine its underlying rationalia. To the extent that a particular foundation for the practice is either absent or its presence tenuous, the reason for its enforcement disappears or diminishes.

31 The first rationale for the policy and practice referred to above is that a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully [page359] argued by parties who have a stake in the outcome. It is apparent that this requirement may be satisfied if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail. For example, although the litigant bringing the proceeding may no longer have a direct interest in the outcome, there may be collateral consequences of the outcome that will provide the necessary adversarial context. This was one of the factors which played a role in the exercise of this Court's discretion in Vic Restaurant Inc. v. City of Montreal, supra. The restaurant, for which a renewal of permits to sell liquor and operate a restaurant was sought, had been sold and therefore no mandamus for a licence could be given. Nevertheless, there were prosecutions outstanding against the appellant for violation of the municipal by-law which was the subject of the legal challenge. Determination of the validity of this by-law was a collateral consequence which provided the appellant with a necessary interest which otherwise would have been lacking.

32 In the United States, the role of collateral consequences in the exercise of discretion to hear a case is well recognized. In Southern Pacific Co. v. Interstate Commerce Commission, 219 U.S. 433 (1911), the United States Supreme Court was asked to examine an order of the Interstate Commerce Commission which fixed maximum rates for certain transportation charges. Despite the expiry of this order, it was held, in part, that the remaining potential liability of the railway company to shippers comprised a collateral consequence justifying a decision on the merits. The principle that collateral consequences of an already completed cause of action warrant appellate review was most clearly stated in Sibron v. New York, supra. The appellant in that case appealed his conviction although his sentence had already been completed. At page 55, Warren C.J. stated:

> ... most criminal convictions do in fact entail adverse collateral legal consequences. The mere "possibility" that this will be the case is enough to preserve a criminal case from ending "ignominiously in the limbo of mootness."

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33 In Canada, the cases of Law Society of Upper Canada v. Skapinker, supra, and R. v. Mercure, supra, illustrate the workings of this principle. In those cases, the presence of interveners who had a stake in the outcome supplied the necessary adversarial context to enable the Court to hear the cases.

34 The second broad rationale on which the mootness doctrine is based is the concern for judicial economy. (See: Sharpe, "Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide", Charter Litigation.) It is an unfortunate reality that there is a need to ration scarce judicial resources among competing claimants. The fact that in this Court the number of live

controversies in respect of which leave is granted is a small percentage of those that are refused is sufficient to highlight this observation. The concern for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it.

35 The concern for conserving judicial resources is partially answered in cases that have become moot if the court's decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action. The influence of this factor along with that of the first factor referred to above is evident in Vic Restaurant Inc. v. City of Montreal, supra.

36 Similarly an expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration. In order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly. This was the situation in International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange, supra. The issue was the validity of an interlocutory injunction prohibiting certain strike action. By the time the case reached this Court the strike had been settled. This is the usual result of the operation of a temporary injunction in labour cases. If the point was ever to be tested, it almost had to be in a case [page361] that was moot. Accordingly, this Court exercised its discretion to hear the case. To the same effect are Le Syndicat des Employés du Transport de Montréal v. Attorney General of Quebec, [1970] S.C.R. 713, and Wood, Wire and Metal Lathers' Int. Union v. United Brotherhood of Carpenters and Joiners of America, [1973] S.C.R. 756. The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.

37 There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law. See Minister of Manpower and Immigration v. Hardayal, [1978] 1 S.C.R. 470, and Kates and Barker, supra, at pp. 1429-1431. Locke J. alluded to this in Vic Restaurant Inc. v. City of Montreal, supra, at p. 91: "The question, as I have said, is one of general public interest to municipal institutions throughout Canada."

38 This was the basis for the exercise of this Court's discretion in the Re Opposition by Quebec to a Resolution to amend the Constitution, [1982] 2 S.C.R. 793. The question of the constitutionality of the patriation of the Constitution had, in effect, been rendered moot by the occurrence of the event. The Court stated at p. 806:

> While this Court retains its discretion to entertain or not to entertain an appeal as of right where the issue has become moot, it may, in the exercise of its

> discretion, take into consideration the importance of the constitutional issue determined by a court of appeal judgment which would remain unreviewed by this Court. [page362] In the circumstances of this case, it appears desirable that the constitutional question be answered in order to dispel any doubt over it and it accordingly will be answered.

39 Patently, the mere presence of an issue of national importance in an appeal which is otherwise moot is insufficient. National importance is a requirement for all cases before this Court except with respect to appeals as of right; the latter, Parliament has apparently deemed to be in a category of sufficient importance to be heard here. There must, therefore, be the additional ingredient of social cost in leaving the matter undecided. This factor appears to have weighed heavily in the decision of the majority of this Court in Forget v. Quebec (Attorney General), [1988] 2 S.C.R. 90.

40 The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch. This need to maintain some flexibility in this regard has been more clearly identified in the United States where mootness is one aspect of a larger concept of justiciability. (See: Kates and Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory", supra, and Tribe, American Constitutional Law (2nd ed. 1988), at p. 67.)

41 In my opinion, it is also one of the three basic purposes of the mootness doctrine in Canada and a most important factor in this case. I generally agree with the following statement in P. Macklem and E. Gertner: "Re Skapinker and Mootness Doctrine" (1984), 6 Sup. Ct. L. Rev. 369, at p. 373:

> The latter function of the mootness doctrine -- political flexibility -- can be understood as the added degree of flexibility, in an allegedly moot dispute, in the law-making function of the Court. The mootness doctrine permits the Court not to hear a case on the ground that there no longer exists a dispute between the parties, notwithstanding the fact that it is of the opinion that it [page363] is a matter of public importance. Though related to the factor of judicial economy, insofar as it implies a determination of whether deciding the case will lead to unnecessary precedent, political flexibility enables the Court to be sensitive to its role within the Canadian constitutional framework, and at the same time reflects the degree to which the Court can control the development of the law.

I prefer, however, not to use the term "political flexibility" in order to avoid confusion with the political questions doctrine. In considering the exercise of its discretion to hear a moot case, the Court should be sensitive to the extent that it may be departing from its traditional role.

42 In exercising its discretion in an appeal which is moot, the Court should consider the extent to

which each of the three basic rationalia for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third, and vice versa.

Exercise of Discretion: Application of Criteria

43 Applying these criteria to this appeal, I have little or no concern about the absence of an adversarial relationship. The appeal was fully argued with as much zeal and dedication on both sides as if the matter were not moot.

44 The second factor to be considered is the need to promote judicial economy. Counsel for the appellant argued that an extensive record had been developed in the courts below which would be wasted if the case were not decided on the merits. Although there is some merit in this position, the same can be said for most cases that come to this Court. To give effect to this argument would emasculate the mootness doctrine which by definition applies if at any stage the foundation for the action disappears. Neither can the fact that this Court reserved on the preliminary points and heard the appeal be weighed in favour of the appellant. In the absence of a motion to quash in advance of the appeal, it was the only practical [page364] course that could be taken to prevent the possible bifurcation of the appeal. It would be anomalous if, by reserving on the mootness question and hearing the argument on the merits, the Court fettered its discretion to decide it.

45 None of the other factors that I have canvassed which justify the application of judicial resources is applicable. This is not a case where a decision will have practical side effects on the rights of the parties. Nor is it a case that is capable of repetition, yet evasive of review. It will almost certainly be possible to bring the case before the Court within a specific legislative context or possibly in review of specific governmental action. In addition, an abstract pronouncement on foetal rights in this case would not necessarily promote judicial economy as it is very conceivable that the courts will be asked to examine specific legislation or governmental action in any event. Therefore, while I express no opinion as to foetal rights, it is far from clear that a decision on the merits will obviate the necessity for future repetitious litigation.

46 Moreover, while it raises a question of great public importance, this is not a case in which it is in the public interest to address the merits in order to settle the state of the law. The appellant is asking for an interpretation of ss. 7 and 15 of the Canadian Charter of Rights and Freedoms at large. In a legislative context any rights of the foetus could be considered or at least balanced against the rights of women guaranteed by s. 7. See R. v. Morgentaler (No. 2), supra, per Dickson C.J., at p. 75; per Beetz J. at pp. 122-23; per Wilson J. at pp. 181-82. A pronouncement in favour of the [page365] appellant's position that a foetus is protected by s. 7 from the date of conception would decide the issue out of its proper context. Doctors and hospitals would be left to speculate as to how to apply such a ruling consistently with a woman's rights under s. 7. During argument the question was posed to counsel for R.E.A.L. Women as to what a hospital would do with a pregnant woman who

required an abortion to save her life in the face of a ruling in favour of the appellant's position. The answer was that doctors and legislators would have to stay up at night to decide how to deal with the situation. This state of uncertainty would clearly not be in the public interest. Instead of rendering the law certain, a decision favourable to the appellant would have the opposite effect.

47 Even if I were disposed in favour of the appellant in respect to the first two factors which I have canvassed, I would decline to exercise a discretion in favour of deciding this appeal on the basis of the third. One element of this third factor is the need to demonstrate some sensitivity to the effectiveness or efficacy of judicial intervention. The need for courts to exercise some flexibility in the application of the mootness doctrine requires more than a consideration of the importance of the subject matter. The appellant is requesting a legal opinion on the interpretation of the Canadian Charter of Rights and Freedoms in the absence of legislation or other governmental action which would otherwise bring the Charter into play. This is something only the government may do. What the appellant seeks is to turn this appeal into a private reference. Indeed, he is not seeking to have decided the same question that was the subject of his action. That question related to the validity of s. 251 of the Criminal Code. He now wishes to ask a question that relates to the Canadian Charter of Rights and Freedoms alone. This is not a request to decide a moot question but to decide a different, abstract question. To accede to this request would intrude on the right of the executive to order a reference and pre-empt a possible decision of Parliament by dictating the form of legislation it should enact. To do so would be a marked departure from the traditional role of the Court.

48 Having decided that this appeal is moot, I would decline to exercise the Court's discretion to decide it on the merits.

Standing

49 Mr. Borowski's original action alleged that subss. (4), (5) and (6) of the Criminal Code [page366] violated the s. 1 right to life of the Canadian Bill of Rights: Minister of Justice of Canada v. Borowski, supra. This Court held Borowski had standing as he was able to demonstrate a "genuine interest" in the validity of the legislation.

50 Standing was granted premised upon Mr. Borowski's desire to challenge specific legislation. Martland J. considered the earlier standing decisions of the Supreme Court in Thorson v. Attorney General of Canada, [1975] 1 S.C.R. 138, and Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265, and concluded that the appellant had standing by reason of his "genuine interest as a citizen in the validity of the legislation" under attack (at p. 598):

51 The Court relied heavily upon the decision in Thorson, supra, where Laskin J. (as he then was), speaking for the majority, stated at p. 161:

> In my opinion, standing of a federal taxpayer seeking to challenge the constitutionality of federal legislation is a matter particularly appropriate for the exercise of judicial discretion, relating as it does to the effectiveness of process.

> Central to that discretion is the justiciability of the issue sought to be raised .... [Emphasis added.]

I believe these decisions were clear in allowing an expanded basis for standing where specific legislation is challenged on constitutional grounds.

52 There have been two significant changes in the nature of this action since this Court granted Mr. Borowski standing in 1981. The claim is now premised primarily upon an alleged right of a foetus to life and equality pursuant to ss. 7 and 15 of the Canadian Charter of Rights and Freedoms. Secondly, by holding s. 251 to be of no force and effect in R. v. Morgentaler (No. 2), supra, the legislative context of this claim has disappeared.

53 By virtue of s. 24(1) of the Charter and 52(1) of the Constitution Act, 1982, there are two possible [page367] means of gaining standing under the Charter. Section 24(1) provides:

> 24. (1) Anyone whose rights or freedoms as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

54 In my opinion s. 24(1) cannot be relied upon here as a basis for standing. Section 24(1) clearly requires an infringement or denial of a Charter-based right. The appellant's claim does not meet this requirement as he alleges that the rights of a foetus, not his own rights, have been violated.

55 Nor can s. 52(1) of the Constitution Act, 1982 be invoked to extend standing to Mr. Borowski. Section 52(1) reads:

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

This section offers an alternative means of securing standing based on the Thorson, McNeil, Borowski trilogy expansion of the doctrine.

56 Nevertheless, in the same manner that the "standing trilogy" referred to above was based on a challenge to specific legislation, so too a challenge based on s. 52(1) of the Constitution Act, 1982 is restricted to litigants who challenge a law or governmental action pursuant to power granted by law. The appellant in this appeal challenges neither "a law" nor any governmental action so as to engage the provisions of the Charter. What the appellant now seeks is a naked interpretation of two provisions of the Charter. This would require the Court to answer a purely abstract question which would in effect sanction a private reference. In my opinion, the original basis for the appellant's standing is gone and the appellant lacks standing to pursue this appeal.

57 Accordingly, the appeal is dismissed on both the grounds that it is moot and that the appellant lacks standing to continue the appeal. In my opinion, in [page368] lieu of applying to adjourn the appeal, the respondent should have moved to quash. Certainly, such a motion should have been brought after the adjournment was denied. Failure to do so has resulted in the needless expense to the appellant of preparing and arguing the appeal before this Court. In the circumstance, it is appropriate that the respondent pay to the appellant the costs of the appeal incurred subsequent to the disposition of the motion to adjourn which was made on July 19, 1988.

TAB 29

December 17, 1996 HOUSE OF ASSEMBLY PROCEEDINGS Vol. XLIII No. 55

The House met at 2:00 p.m.

MR. SPEAKER (Snow): Order, please!

The members will have noted by now that there has been placed on each member's desk a personalized copy of the Bible, and this is presented by Gideons International, along with a letter which outlines the work that the Gideons International have been doing throughout the world.

In that regard the Chair would like to welcome a delegation to the Speaker's Gallery today, led by Mr. Laurie Chaulk, who is the field representative from Atlantic Canada, and Hazel Chaulk, the national president of the Ladies Auxiliary, and a number of representatives from the St. John's and Mount Pearl chapters of Gideon International.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: The hon. the Minister of Health.

MR. MATTHEWS: Thank you, Mr. Speaker.

I am delighted today to be joined in the Speaker's Gallery by a number of friends and colleagues from the Gideon organization, an organization with which I have had some association, and continue to, for the past twenty years.

For those of you who may not be familiar, in the unlikelihood that there is anybody who is not familiar with the organization known as Gideons International, I might just refresh your memory and mind by saying that it is an interdenominational group of business people and lay people who over the past seventy odd years have worked together across denominational lines to provide Scriptures to people in at least 172 countries of the world.

Mr. Speaker, the aim and objective of the organization is to ensure that individuals, to the greatest extent possible, have access to the Holy Scriptures for their personal use, and to that extent the Gideons have a long and historic record of programming that sees that happen in Grade V classes in all of our schools in the country where access is available, and that includes most of the schools of this Province.

In addition to that, of course, you will be familiar with the Gideon Bible as being something that is readily seen in hotel rooms, and in prisons and hospitals and other areas.

I am delighted as being one of the Gideon brethren that is here today to say on behalf of all members, I believe, of this Legislature, thank you to them for their consideration, for their diligence in not only ensuring that we have available to us in this Chamber and this House, as legislators, a copy of the Holy Scriptures, but also in the broader endeavour in which they work, and that is providing Scriptures generally around the world.

Thank you very much, Mr. Speaker, and thank you to the Gideons.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: The hon. the Opposition House Leader.

MR. H. HODDER: Thank you, Mr. Speaker.

I wish to join with my colleague, the Minister of Health, to share his comments relative to the work of the Gideons not just in Newfoundland and Labrador and throughout the country, indeed, throughout the world.

I wish to welcome to the Speaker's gallery some of the people whom I've known for many years, particularly Laurie and Hazel Chaulk and Sid Stacey. These are teacher colleagues of mine who have made it a point in their lives to live exemplary Christian lives and to lead our young people in this Province in their teaching profession in directions that follow the Judaeo-Christian philosophy.

Mr. Speaker, I share with my colleague the Minister of Health as well his compliments to the Gideons on their outreach ministry to those people who are in hospitals, to people who are in prisons, and people who have need for the consolation and wisdom that we find in the holy Scriptures. I want to thank the Gideons for their presentation, reminding all of us of our heritage and how we as people have a role to play in making sure that our society reflects the values that are contained in the Scriptures and are to be there as examples to all of us in our daily lives. Thank you very much, Mr. Speaker.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: The Chair would also like to welcome to the gallery today thirty democracy class students from Booth Memorial High School in the District of St. John's Centre. They are accompanied by their teachers Bill Dowdon and Ian Sparkes.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: The Chair would also like to welcome to the gallery today Mayor Ray Pollet from the City of Corner Brook.

SOME HON. MEMBERS: Hear, hear!

Oral Questions

MR. SPEAKER: The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker. My questions today are for the Premier. The Premier indicated yesterday he was going to speak with Prime Minister Chrétien regarding transfers to this Province. I ask the Premier if he could tell us what specific areas of concern he addressed with the Prime Minister.

MR. SPEAKER: The hon. the Premier.

PREMIER TOBIN: Mr. Speaker, I thank the Leader of the Opposition for his question. Basically all I've raised with the Prime Minister is the question that arises as a result of what we anticipate will be an increase in revenues to the Province once the Hibernia oil field comes on stream in 1997, and once, in addition to the Hibernia oil field coming on stream, the Terra Nova oil field comes on stream a few years subsequent to that event. In addition to that, there will be additional revenues flowing to the Province as a consequence of Voisey Bay coming on stream. All of these things of and by themselves are good and they will bring a revenue stream to the Province, but there is a consequence. The consequence is that as revenue flows into the Province from royalties there will be a decline in revenues in our revenue stream from equalization. All that we have indicated to the Federal Government is that we would like to explore ways in which we could keep a larger share of the revenue stream from resource development in the Province rather than seeing an outflow as a consequence of a reduction in equalization. What the Prime Minister has indicated on a number of occasions, I should say to the Leader of the Opposition, is that the Federal Government is open to a discussion of the issue.

There certainly is no agreement or discussion concluded at this stage but it is something we are going to pursue to see if Newfoundland can have a period of catch-up, if that is possible. I know this is something that both Premier McKenna and Premier Savage are interested in as well. We have collectively at one point discussed it with the Prime Minister so we will be exploring this in the new year to see if there is some additional benefit to be brought to the people and the Province of Newfoundland and Labrador.

MR. SPEAKER: The hon. the Leader of the Opposition on a supplementary.

MR. SULLIVAN: The Premier said he discussed basic revenues, or lack thereof, because of increased prosperity in the Province. I ask the Premier if he discussed the drastic cut this year of $87 million that we receive in the Canada health and social transfer for health, education and social services, a cut that was decided when he was our federal minister?

MR. SPEAKER: The hon. the Premier.

PREMIER TOBIN: Mr. Speaker, no, I did not discuss that with the Prime Minister.

MR. SPEAKER: The hon. the Leader of the Opposition on a supplementary.

MR. SULLIVAN: With reference to cuts in the upcoming fiscal year, which I know are a concern certainly to our Province and our fiscal situation, I ask the Premier if he discussed with the Prime Minister or any of his federal colleagues, or members in his Cabinet, about the further $60 million over and above the $87 million we are going to get under Canada Health and Social Transfers this year?

MR. SPEAKER: The hon. the Premier.

PREMIER TOBIN: Mr. Speaker, the Leader of the Opposition knows that there is a formula put in place with respect to the fiscal transfer to the Province. We know what the numbers are upfront. The formula is national in scope. The Leader of the Opposition now is attempting to score political points by getting up and asking specific questions about specific programs. It is fairly transparent what he is trying to do. I tell the Leader of the Opposition that what the Government of Newfoundland and Labrador is doing is working in collaboration and in co-operation with the Federal Government to go about the business of growing this economy.

One of the things I have discussed with the Prime Minister is the delivery of a $100 million economic development program for the Province of Newfoundland and Labrador that is unique to Newfoundland and Labrador. I discussed that with the Prime Minister. I discussed with the Prime Minister the ways in which the Federal Government and the Provincial Government can work together through a joint environmental assessment, the first of its kind in Canada, to facilitate the development of Voisey's Bay, the development of Terra Nova, the development of a transshipment facility, and the development of the largest and most technologically advanced smelter refinery complex in the world.

These and many other subjects I have discussed with the Prime Minister because I believe, Mr. Speaker, there is much to be positive about in the Province of Newfoundland and Labrador and I believe that we will make progress when we focus on the size of our potential instead of always being overwhelmed, as is the Leader of the Opposition, by the so-called size of our problem.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: A supplementary, the hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

The Premier stated yesterday that the Federal Government could not scrap the GST because it needed the money to reduce its deficit. Now, I say to the Premier, our Province is going to lose over $100 million by the Minister of Finance's admission on this BS tax that you and two other Liberal Premiers entered into in order to disguise the GST. Now, I say to the Premier, you are not in Ottawa now. Are you more concerned with saving money for the Federal Government or with looking after the affairs of this Province?

MR. SPEAKER: The hon. the Premier.

PREMIER TOBIN: Mr. Speaker, I am in St. John's, Newfoundland. I know exactly where I am. I am proud to be in St. John's, Newfoundland, proud to be in Newfoundland and Labrador and I am confident about the future of this Province. Mr. Speaker, we are not going to lose a nickel. I do not know what the Leader of the Opposition

is talking about. Clearly, he believes that if you leave $105 million in the pockets of the people, that is money lost. I happen to think that is a gain for the taxpayers, and God bless them!

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: A supplementary, the hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

If it were going into the pockets of the consumers in this Province, I would not be worrying, I say to the Premier, but that is not where it is going.

MR. SPEAKER: Order, please!

The hon. member is on a supplementary, I ask him to get to his question.

MR. SULLIVAN: In Question Period I will tell the Premier where it is going. Will you confirm, Premier, that our Province gave up $190 million in direct taxes to get the transshipment facility?

MR. SPEAKER: The hon. the Premier.

PREMIER TOBIN: Mr. Speaker, the Leader of the Opposition regularly stands up in the House, makes a statement which cannot absolutely be substantiated, then he sits down and says: `I will talk about it later.' Mr. Speaker, we have had the Leader of the Opposition stand here and talk about secret meetings that occurred, supposedly, in the last election campaign. He named Gerald Fallon, who has denied it. He named my brother - because he thought there was some political mileage in that - who has denied it. It turned out to be totally false. He has now stood up and said there is $105 million going to be lost in the Province and, Mr. Speaker, that is absolutely untrue. There is no money going to be lost in Newfoundland and Labrador. There will be less money flowing to government coffers and more money staying in the pockets of the people of Newfoundland and Labrador. Now, if the Leader of the Opposition is going to stand and say that it is going to disappear, Mr. Speaker, as the Leader of the Opposition, he at least has an obligation to give us some plausible explanation as to where he thinks this money is going to disappear.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: A supplementary, the hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

It is easy to know when the Premier is on the defensive - easy to know. I spoke for one hour on harmonization in this House when you were not here, and I said where it went. I will not take time in Question Period to repeat it but I will immediately after Question Period, I say to the Premier. I challenged you to a public debate on the issue and you refused. I will give you that chance again, Premier.

MR. SPEAKER: Order, please!

I ask the hon. member to get to his question.

MR. SULLIVAN: I ask the Premier: Will he confirm that in the transshipment facility, our Province gave up $190 million in direct taxes on that deal?

MR. SPEAKER: Order, please!

The hon. the Premier.

PREMIER TOBIN: Mr. Speaker, the Leader of the Opposition - and this I find amusing - keeps challenging us to public debates. I have to tell him, this is the people's House, it is a public House and if he has an answer to give, give it here and now with leave of members on this side of the House.

The Leader of the Opposition's notion of public debate, Mr. Speaker, of public policy discussion, is to make an accusation, then, having made the accusation, run for the hills. There is no need to run for the hills. We are here in the people's House and if he is going to say something, he should substantiate it. And on his latest accusation about a $190 million transfer, or giveaway, or money vaporising, Mr. Speaker, that statement is also false.

SOME HON. MEMBERS: Oh, oh!

MR. SPEAKER: Order, please!

The hon. the Leader of the Opposition, a supplementary.

MR. SULLIVAN: Thank you, Mr. Speaker.

In a meeting with the deputy minister and the assistant deputies, I was informed, with members of my staff, that we forfeited $190 million in revenues on taxation on the transshipment facility.

AN HON. MEMBER: Which deputy minister -

MR. SULLIVAN: Oh, I will tell you, I will tell you in due course.

MR. SPEAKER: Order, please!

I ask the hon. member to get to his question.

MR. SULLIVAN: We all want to see prosperity but we also ask the Premier: Will you come clean and lay the facts on the table and not be hiding them, so we can all make a determination what is best for the people of this Province?

MR. SPEAKER: The hon. the Premier.

PREMIER TOBIN: Mr. Speaker, you know, the Leader of the Opposition has been, on every occasion in this House, standing up in the face of every single positive, constructive development that has gone on in the Province of Newfoundland and Labrador and has searched diligently, Mr. Speaker, to find a bit of crisis and a bit of bad news to drag onto the floor of the House.

Mr. Speaker, I am going to say something to the Leader of the Opposition: I am so confident that his politics of bleakness, his politics of defeat, his politics of misery, his politics of defeatism and pessimism, are so unacceptable to the people of Newfoundland and Labrador, that I am going to leave him to stew in his own juice. Because I believe in Newfoundland and Labrador in 1996, and I believe in Newfoundland and Labrador in 1997. I believe we are making progress. We are making progress because the fundamentals in terms of our resource industry are right. We are making progress primarily, I say to the Leader of the Opposition -

MR. SPEAKER: Order, please!

PREMIER TOBIN: - and I will conclude, Mr. Speaker; the people of this Province believe in themselves and believe in their own abilities, and believe in their own strengths, and I say to the leader: Not even Scrooge, let alone the Leader of the Opposition, can steal this Christmas spirit in Newfoundland and Labrador!

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: Order, please!

The hon. the Leader of the Opposition, a supplementary.

MR. SULLIVAN: Thank you, Mr. Speaker.

You wouldn't know but the Premier had a monopoly on the interest of Newfoundlanders and Labradorians. Where were you when I worked in this Province, employing up to 200 jobs and reinvesting in the future of this Province? I believe strongly in the future of this Province, I say to the Premier.

I want to see transshipment. I want to see the facts on the table so we can see the merits, we can see the demerits, and we can render a judgement on what is best and what is not, not take it from political connivery by the Premier in documents that he will not table in this House.

MR. SPEAKER: Order, please!

I believe the hon. member just made a comment that is certainly unparliamentary - political connivery - and I ask him to withdraw that statement.

MR. SULLIVAN: Thank you, Mr. Speaker.

I withdraw the word `connivery' if it is used in -

MR. SPEAKER: Order, please!

That is all the hon. member -

MR. SULLIVAN: Yes, I withdraw it.

MR. SPEAKER: Okay, fine.

The hon. the Leader of the Opposition.

MR. SULLIVAN: I ask the Premier now: Will you lay on the Table of this House, letters of intent and the specific details of the benefits accrued from the transshipment facility so the public can see it and render a decision? Will you do that, Premier?

MR. SPEAKER: The hon. the Premier.

PREMIER TOBIN: Mr. Speaker, I can only say to the Leader of the Opposition, he should save some of his ammunition for the next election. It is still four years away.

We had an announcement of a transshipment facility for Newfoundland and Labrador. We had an analysis done by the Department of Industry, Trade and Technology, showing half-a-billion dollars of net economic benefit to the Province of Newfoundland and Labrador, and that information was given to the Leader of the Opposition and given to anybody else who asked for it, and the Leader of the Opposition said: Bah, humbug!.

Mr. Speaker, we had an attempt to try - and we are in the middle of it - to try and renegotiate the Churchill Falls power contract. We had a resolution put by a private member to the floor of the House to say that we stand behind the attempt to renegotiate the contract, and the Leader of the Opposition says: Bah, humbug!.

Mr. Speaker, we had an announcement by Inco that they are going to spend a billion dollars in the Province of Newfoundland and Labrador. The people of Argentia started a spontaneous parade -

MR. SPEAKER: Order, please!

PREMIER TOBIN: - celebrating the announcement, and the Leader of the Opposition said -

SOME HON. MEMBERS: Bah, humbug!

PREMIER TOBIN: Bah, humbug!

MR. SPEAKER: Order, please!

PREMIER TOBIN: Mr. Speaker, I say to the Leader of the Opposition: Bah, and humbug!

MR. SPEAKER: Order, please!

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: Order, please!

The hon. the Leader of the Opposition, a supplementary.

MR. SULLIVAN: Mr. Speaker, when the Premier cannot answer a question, he puts on a show for everybody. We all know how he acts, a little show by the Premier.

SOME HON. MEMBERS: Hear, hear!

MR. SULLIVAN: All I want Premier is an answer to a simple little question -

MR. SPEAKER: Order, please!

MR. SULLIVAN: Will you let the people of this Province see the details on the transshipment so we can draw a conclusion whether the decision you made in secret is best for this Province? If it is, I will support it, I say to the Premier. Will you do it?

MR. SPEAKER: Order, please!

The hon. the Minister of Industry, Trade and Technology.

MR. FUREY: Mr. Speaker, I should say to the House that we made arrangements to provide a full and comprehensive presentation to the Leader of the Opposition over a month and a half ago. It showed 300 construction jobs at this terminal, 300 at peak; it showed forty full-time jobs in the aftermath. What we talked about was 4 per cent RST exemption on Hibernia transshipped at crude. It talked about fuel tax exemptions, and then it went on, in this presentation, to talk about a positive net economic benefit to the Province over the life of the Hibernia field of $500 million to the economy of the Province.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: Order, please!

A supplementary, the hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker. While the Minister of Industry, Trade and Technology has such a great interest, I've requested from your department on several occasions the letter of intent pertaining to transshipment.

MR. SPEAKER: Order, please!

MR. SULLIVAN: In fact, I faxed to the minister today a written request for that. I haven't received it. Will you see, I say to the minister, that I will receive letters of intent and information pertaining to it? I have been denied it for the past two to three months, Mr. Speaker. Will you ensure that I now receive it?

MR. SPEAKER: The hon. the Minister of Industry, Trade and Technology.

MR. FUREY: Mr. Speaker, the hon. Leader of the Opposition is in dreamland. This was negotiated and made public three months ago. All of the information was made public. It was made public at a press conference. There were literally hundreds of people there. We didn't just stop there. We heard the fuss the hon. member made in the public media trying to grandstand, so we invited him to my department. We sat him down, we made a presentation, and when the numbers got complicated we showed him pictures.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: Order, please!

A supplementary, the hon. the Leader of the Opposition.

MR. SULLIVAN: I say to the Minister of Industry, Trade and Technology, the Premier said at a news conference he would provide it. I called and asked for it. His ADM told me: We don't have it. He said: But we can do an overhead presentation of the generalities. I want to see, minister - you've been denying it for three months, your department. I ask to see the specifics on this deal so we can draw conclusions in the best interest of the people of this Province.

MR. SPEAKER: The hon. the Minister of Industry, Trade and Technology.

MR. FUREY: Mr. Speaker, we have given every single detail. We have explained the 4 per cent RST exemption on Hibernia-related crude. We mapped out and traced for him the fuel tax exemptions which were conceded by the Province. We showed the benefits on the construction side. We showed the benefits of the 100 Newfoundlanders who will take jobs on the two supertankers. What is the hon. member saying? That he wanted this to go to Nova Scotia? We worked very hard for this for the Province of Newfoundland and Labrador.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: A supplementary, the hon. the Leader of the Opposition.

MR. SULLIVAN: It is getting very interesting, Mr. Speaker. In fact, on the overheads there are some of the pages they removed and had to get permission from the Premier before they could send it to us, I would say to you, on generalities.

Will the minister and the Premier admit that their department is hiding the specifics of this deal, keeping it from the people of this Province? I haven't rendered a judgement whether it is good or bad, but I think I have a right, I will say to the Premier and the minister, to be able to see the details so we can render an informed decision on what is best for the people of this Province. Will you provide those specifics?

MR. SPEAKER: The hon. the Minister of Industry, Trade and Technology.

MR. FUREY: Mr. Speaker, when the hon. member came over for the presentation which lasted for a couple of hours I'm told by the Assistant Deputy Minister Mr. Spracklin, who is a very good economist, that the hon. Leader of the Opposition thanked him, thought it was a very comprehensive presentation, thought all the questions were answered honourably and straightforwardly, and all of the details and all of the numbers were given to him. So I can only go by what these senior civil servants who were hired by the former government that are still in our government gave. They gave full and straight and comprehensive answers. I think the hon. member is just fishing. He is on a great fishing expedition.

MR. SPEAKER: A supplementary, the hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

I feel compelled to stand here in this House on inaccuracies by this minister when the DM is not there now - in fact, he is not even there, the one I met with - there is a new DM, I say to him, and I have thanked him for the meeting which I requested and scheduled.

MR. SPEAKER: Order, please!

I ask the hon. member to get to his question.

MR. SULLIVAN: One more time, a final supplementary, Mr. Speaker. I will just ask the minister: If you and the Premier have nothing to hide, let us put it out in a public forum. Let us see the benefits and let us see the areas where we made compromises and let us see if it is an overall good deal. I want to see that and I will support it if it is. Will you provide to us those figures so we can render that judgement, not an outline or sketch of overheads that do not go into any specifics?

MR. SPEAKER: The hon. the Premier.

PREMIER TOBIN: Mr. Speaker, all of the elements of the arrangement that was reached on the transshipment facility were made public at the time the facility was announced. The Leader of the Opposition knows that. The 500 people who were there at the press conference know that and, Mr. Speaker, the Leader of the Opposition, I have no idea what he is doing. I mean, he is spending his time trying to tear down every bit of positive development in the Province.

Mr. Speaker, I say to the Leader of the Opposition, and I ask him to reflect upon what I am saying: there will come a time for us, three or four years hence, to look at another election campaign. In the meantime, all of us in this place - and the obligation is on me as well him - have an obligation on occasion to put aside the partisanship a bit and to try and build Newfoundland and Labrador. We cannot build up the Province if we try to tear down our potential as a way of trying to score political points on each other. I say to the Leader of the Opposition, we saw in the last election campaign an announcement, Sir, by your party, that the transshipment facility after the election was going to be announced for Nova Scotia. That was the major declaration of the Conservative Party. The major reality is, it has been announced for Newfoundland and Labrador and you should try to get used to it!

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: Order, please!

The hon. the Member for Kilbride.

MR. E. BYRNE: Thank you, Mr. Speaker.

Some fourteen months ago, a working group was put together to work towards a better labour relations climate in the Province. Recently, they tabled in the House a document containing forty-eight recommendations called, `New Centuries, New Realities.' Now that the minister has had some time to look at those recommendations and what is contained within the covers of the document, can he tell the House when he sees government acting upon those recommendations? And will it be a comprehensive action on the part of government in terms of whether they will implement all of the recommendations contained in this very comprehensive plan?

MR. SPEAKER: The hon. the Minister of Environment and Labour.

MR. K. AYLWARD: Thank you, Mr. Speaker. I thank the member for his question.

A presentation has been made to government of the documents, that has been developed by the working group on labour relations. They have done a very good job of putting together a report which the government is now considering and over the next few weeks we will take our time to look at the document carefully. We will examine the recommendations carefully. We are also going to discuss further with the working group and also

other groups who have an interest both in labour and in management, on a go-forward basis to see where we can move ahead, to make sure that we have a proper labour relations climate.

Mr. Speaker, we are going to need a good labour relations climate in the Province for all of the new industry that the Premier is attracting to the Province. We are going to work towards ensuring that we do have a proper labour relations climate, Mr. Speaker, because of all of the great, great work that is being done in this Province to attract business. And as we create those new opportunities, we want to make sure that workers in the Province are going to have a good labour relations climate. We are also going to ensure that employers who come to the Province have a good labour relations climate.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: A supplementary, the hon. the Member for Kilbride.

MR. E. BYRNE: Thank you, Mr. Speaker.

Let me say to the minister, that will work towards a better labour relations climate, based upon our natural advantages, which seem to me, are our resources and are not necessarily contained on the other side of the House.

In the report, Mr. Speaker, the working group clearly says to the minister that the recommendations contained here have been arrived at as a result of compromise and trade-offs based upon both business and labour and that implementing these recommendations on a piecemeal sort of approach, or only some of the recommendations, would be harmful and would place in jeopardy - or would provide balance to one group over another.

MR. SPEAKER: Order, please!

I ask the hon. member to get to his question.

MR. E. BYRNE: Will the minister make a commitment that the recommendations contained within this report are very worthwhile, Mr. Speaker, which outline a framework for a labour relations climate heading into the next century? Will he make a commitment today that all of these recommendations from one to forty-eight will be implemented? Can he inform the House, please?

MR. SPEAKER: The hon. the Minister of Environment and Labour.

MR. K. AYLWARD: Mr. Speaker, again, I thank the member for his question. I want to say that the report was well put together. The facilitator, Mr. Austin Thorne, did a great job of putting it together.

SOME HON. MEMBERS: Hear, hear!

MR. K. AYLWARD: We are going to look at the report in a comprehensive fashion. I will not say we are going to accept it carte blanche. We will look at the total report and we will examine all the recommendations. We are going to also have further consultation with business, industry, and labour to ensure that as we evaluate the options that we put in place a proper and very much a positive labour relations climate for all the new business activity that government is now creating.

Thank you, Mr. Speaker.

MR. SPEAKER: The hon. the Member for Bonavista South.

MR. FITZGERALD: Thank you, Mr. Speaker.

My question is to the Minister of Fisheries and Aquaculture. Yesterday, I asked the Premier to confirm reports that Spanish and Portuguese fishing activity has increased dramatically since 1995. In fact, it has increased by 500 per cent in spite of the statement to the House by the Premier a couple of weeks ago. The Premier stated that

he could not confirm those reports since he was not aware of any increased fishing activity. I now ask the Minister of Fisheries and Aquaculture if he is aware of this serious situation, and if so, what is he doing to correct it?

MR. SPEAKER: The hon. the Minister of Fisheries and Aquaculture.

MR. EFFORD: Mr. Speaker, the hon. member opposite is assuming there is a serious situation out there. What we know is that there are more boats fishing this year than last year, but there are observers on all the boats and that is a major improvement over past history. Assuming there is something happening and finding out is another thing. The Minister of Fisheries and Oceans of Canada has said very clearly that he is going to check into it and monitor it on a day-to-day basis, and I have the confidence he will do that.

MR. SPEAKER: The hon. the Member for Bonavista South on a supplementary.

MR. FITZGERALD: Thank you, Mr. Speaker.

There are no assumptions, Mr. Speaker, we know the fishing activity that is out there. It has been clearly reported. Minister, you must have made time last night to speak with your cousins during the expensive love-in down at Hotel Newfoundland. I ask the minister: When will Minister Mifflin act to stop this raping of our turbot stocks, since the allowable quota for this particular year has already been taken?

MR. SPEAKER: The hon. the Minister of Fisheries and Aquaculture.

MR. EFFORD: Mr. Speaker, prior to 1985 when I decided to run for politics, I wanted to know how many family members I had in the great district of Port de Grave, and I found out I had 250, mostly cousins. I was not in Port de Grave last night. I was at Hotel Newfoundland, so my cousins are in Port de Grave, they were not at Hotel Newfoundland. Let the hon. member gets his relationships correct.

Now, I would be honoured if the Prime Minister of Canada saw fit in his busy schedule to sit down and meet with the Minister of Fisheries and Aquaculture for Newfoundland, and if he called me his cousin I would be very honoured. Minister Mifflin and myself are in continuous dialogue on a regular basis, on all activities in the fishing industry of Newfoundland and Labrador, inside and outside the 200 mile limit.

I have never heard the hon. member stand up once in this House and ask a question or do something about the 10 million seals that are out there in the ocean eating fish. If a boat turns up in our direction that is the issue. We are concerned about all activities, inside and outside the 200 mile limit.

MR. SPEAKER: The hon. the Member for Bonavista South on a supplementary.

MR. FITZGERALD: Thank you, Mr. Speaker.

I agree with the minister that probably there were not too many of his cousins down at Hotel Newfoundland, because they are probably like my cousins, they could not afford to pay $500.

MR. SPEAKER: Order, please!

I ask the hon. member to get to his question.

MR. FITZGERALD: Minister, I call on you to admit to the people of Newfoundland and Labrador right here today, that the turbot war was a farce. It was an expensive spectacle put forward to showcase the federal minister at that time, and the real reason that the Spaniards and Portuguese temporarily vacated the Nose and Tail of the Grands Banks -

MR. SPEAKER: Order, please!

I think the hon. member has asked his question.

MR. FITZGERALD: I am asking the question, Mr. Speaker.

Mr. Speaker, will the minister admit that the Spanish and Portuguese vacating the Nose and Tail of the Grand Banks was really for economic reasons and not the intimidation created by the now Premier?

MR. SPEAKER: The hon. the Minister of Fisheries and Aquaculture.

MR. EFFORD: First of all, let me tell the hon. member, my cousins can afford to go to dinner. Now, make no mistake about that. Let me tell the hon. member something else. Let me get on a serious point here. Prior to the Spanish War, there were in excess of eighty vessels fishing 365 days a year on the Grand Banks with no observers, with all the fishing activity that could take place with undersized mesh and everything that they could possibly do wrong. Today, there are less than thirty vessels fishing on the Grand Banks. We know there are observers on each and every vessel. We know that there is a controlled fishery, that there is co-operation between the EU and Canada, and we know that there are major gains being made.

Is he also saying that we would like to revert to the way it was, that we take all observers off the boats? Get your act together and let us talk some sense in this House!

MR. SPEAKER: Order, please!

I ask the hon. the minister to take his seat.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: The hon. the Member for St. John's South.

MR. OSBORNE: Thank you, Mr. Speaker.

My questions today are for the Minister of Justice.

The Justice minister was the head of a Cabinet committee charged with an in-depth total review of the industry department. I ask the Minister of Justice: Has this review been concluded, and when can we expect to see it tabled?

MR. SPEAKER: The hon. the Minister of Justice.

MR. DECKER: Mr. Speaker, I am not sure what the hon. member is talking about. Is he talking about the program review?

AN HON. MEMBER: (Inaudible).

MR. DECKER: The program review is an internal study which is being carried out by ministers. It will be dealt with by Cabinet in due course. Until then, it would not be proper to discuss the issue, before Cabinet has had an opportunity to deal with it.

MR. SPEAKER: The time for Oral Questions has elapsed.

Orders of the Day

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Order No. 26, Bill No. 45. Motion No. 3, the closure motion, Mr. Speaker.

MR. SPEAKER: The hon. Government House Leader is moving, pursuant to Standing Order 50, is it, the motion on closure.

MR. TULK: Yes, closure on Bill No. 45.

MR. SPEAKER: All those in favour of the motion, `aye.'

SOME HON. MEMBERS: Aye!

MR. SPEAKER: Against.

SOME HON. MEMBERS: Nay!

MR. SPEAKER: Carried.

We are now dealing with Order No. 26. We are on second reading of the bill.

The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

The Premier was wondering what is going to happen to the $105 million, or the $150 million I advocate, in there, so I am going to explain to him now basically what might happen there.

I asked the Minister of Finance and Treasury Board yesterday, and I would like the minister to clarify this for me, if it is at all possible. When we look at the GST revenue base we had in the Province last year, according to the figures I received provincially and federally, it has ranged from $279 million to $283 million depending on what month you took. It varied. According to that, there will be a shortfall of $240 million when you take the GST that was collected last year and take that 7 per cent and convert it to an 8 per cent equivalent to what our Province is going to get. When you look at that, there is a $240 million shortfall.

The Minister of Finance and Treasury Board indicated that there is an insurance tax. I think he said the insurance tax is going to bring us in around...$35 million, he said, roughly - or $25 million was the figure he used the first time. He came back after and made a correction. I think he said $35 million the second time. The private sale of vehicles, I think he indicated, is going to be $25 million, and then he indicated, by freezing the tax on tobacco and liquor it is going to be another in the $25 million range, for a total, he said, of about $75 million on those three specific areas.

Now, he said there is going to be another $15 million -

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: I will get to the Premier's question in a minute, now. The Minister of Finance and Treasury Board could check this out in the meantime. There were some other taxes of minor ones, and other taxes he said, that would bring it up to $90 million. So when you subtract $90 million from $240 million, you get $150 million. The minister has not provided information that shows basically where the difference is. Unless the Minister of Finance and Treasury Board can provide to me figures that show it is $105 million, I advocate it is $150 million. Based on the mathematics used in his Budget, based on the answers to his questions in the House of Assembly, there is going to be a $150 million shortfall. In year three, all our money is going to be used up and we will be stuck with a $150-million hole in the Budget.

We all know what happened on the GST. We are all well aware of the Finance minister coming out and admitting he was wrong, saying that they promised to scrap it and abolish it, and he admitted that. Sheila Copps did a poll that showed she could get re-elected in Hamilton East and then she admitted it and went out and got re-elected, as everybody expected. There were no surprises. Now the Prime Minister of Canada will not admit it. He will not admit that he told us the GST would be abolished. The Prime Minister tries to skate around the issue. The Premier of this Province also was one of those who was going to scrap and abolish the GST.

Now, what he has done - and I am in the process of explaining where the $105 million - he wanted so eagerly to know in Question Period. I am getting to that very shortly, I am sure he will be eager to find out and now, he decides to cover up to give the impression that the GST is eliminated when actually it is hidden now by the only three Liberal governments out of ten in this country and the federal government, it is hidden into a tax, with tax-inclusive pricing, and in the tax-inclusive pricing, it is detrimental and now I am getting to answer the Premier's question in Question Period, the reason why it is not going into the pockets of consumers is because the tax-inclusive pricing increases the base cost of the goods.

Anybody out there in business today will tell you, and in accounting out in the fields, that when you add extra costs on to the base price of the goods, whether it is transportation, repackaging, remarking, extra costs of converting cash registers and ongoing costs, is going to be negative and is not going to bite into the profits of businesses, it is going to be absorbed in the cost of the goods and will be a profit margin on top of that. Here is the example I used the last day: I said a hundred-dollar item today at 7 per cent GST and 12 per cent RST, will cost $119.84. With a hundred-dollar item, after tax-in pricing, other related costs, some retailers could be charging $104, it might be $102, it might be 105 depending on the item and the cost of change over in your business, when you put your 15 per cent on top of that basic cost, you are back up to $120. So, what has happened?

What happened with GST and some experts will tell you, GST was supposed to put money back into the pockets of consumers but it became an inflationary tax. Inflationary, because the cost incurred in that tax did not go into the pockets and the profits, did not filter out and go back to the consumer to increase consumer spending but reduced consumer spending, and was absorbed into the basic cost of the goods. I made that point yesterday on an Open Line show.

I had a call from a person who told me he has over thirty years in business. You are absolutely right, he said. I have been in that business in retail and dealing with (inaudible), what you are saying is exactly correct. He said the cost, I have seen it happen there, business does not pass on increased costs of doing business, and let us look at an example: In Ontario, they are shipping goods down, a lot of produce come into this Province from Ontario and right across the country from non-harmonized areas. When you ship in a pre-price, those major corporations on their products, what do they do? If it comes into Newfoundland, you have to have your tax-in pricing. It is going on the shelf, tax-in pricing. When you have tax-in pricing, not only the extra cost of that labelling the wholesale, warehousing aspects here, you also have - just look at a small business person.

A small business person, or large whatever the case may be, you have to reprogram your cash registers, reticketing of these items and you have increased costs. Here is what one company said: A Quebec based company, called MMG Management Group, announced the closure of its stores in New Brunswick and here is what they said: Like the metropolitan Greenberg red apple, they indicated the new tax is going to cost $695,000 to implement, that is a one-time cost and it is going to cost $563,000 annually to manage. I mean, who, do you think pays out this $563,000? I mean, is it that the business is going to absorb that? No.

It is always great to see a reduction in taxes for the consumer, but I don't see the logic in reducing taxes to a consumer and adding up the cost price which brings it back to where it was. That does not make sense, and when that happens, the consumer does not gain, but our Province loses over $100 million in revenue. One hundred million dollars in revenue, so I say to the Minister of Finance and Treasury Board: Where is our Province going to make up over $100 million in revenue that he said we are going to be short? Are there going to be cutbacks in Education further? Are we going to cut back health care further, or social services or are we going to increase other taxes to make up for that shortfall of $100-and some million? He said the economy is going to grow. Well, let us look at it two ways, let us look at both sides of that. If the economy was going to grow, we would get those taxes anyway in extra corporate, extra income tax, and other taxes. If it grows because of harmonization there could be some residual benefits come back, but if it is going to grow anyway we have forfeited future taxes to our Province. What happens if it does not increase?

The Minister of Social Services just released a Strategic Social Plan that said that between now and 2016 the economic prospects in this Province will not be good - released by this government - and that there will be less people working, paying more taxes. There will be more people to support because of an aging population, and

we will have a problem with being able to deliver the social programs of the future. That is what the Minister of Social Services said in that government document that was carefully put together, that went out around this Province to people, in dealing with the future problems we are going to have here in our Province.

I have a grave concern when we do not do responsible planning. It looks great in the short term. There is too much of this short term, to hell with the future, look after today, and don't worry about your children of tomorrow, because we are in a rut in this Province because previous governments - no matter what their political stripe - did not see the need to be able to maintain their debt as a percentage of their GDP.

I said before, I do not think we should go out and start trying to pay off a $5.8 billion direct debt. What I have been saying is important is that we have to be able to, during a mandate of government, maintain the debt levels, and as the economy grows, as the GDP increases - inflation would drive up a GDP number - as it grows, and you keep the debt similar, it comes more insignificant with each passing year. But we do not need to incur more debt on top of what we have, to pass that on to future generations.

We are at a unique time in our history. This past year or two has been very positive on the budgets of provinces of Canada because we have had some of the lowest borrowing rates we have ever had. Much of the saving in the federal budget has been because of abnormally low interest rates. Now, while the low interest rates did not stimulate economic growth in other areas, it did drastically reduce the borrowing costs, and when we have to borrow at high costs, and we have a lot of debt on our books, at 11 per cent and higher, and when you can borrow on the market today in half of that, it is a considerable saving. How many people want to see hundreds of millions of dollars going out of the treasury of this Province to pay down on debt? It bothers me that that number increases, and I feel we must look at the future of this Province in delivering the programs we need to deliver, the social programs, our health and education and social services, but we have to have a revenue on this side to be able to sustain those programs.

We have made a decision on harmonization, or they are in the process of making a decision, that is going to siphon $150 million - based on figures I received from the minister's response and from federal and provincial departments - out of this economy, badly needed, $150 million, that is not going to do anything to stimulate growth because it is not going back into the pockets of consumers to increase consumer spending.

If it would do that I could applaud that, but that is not happening. I want to see a single harmonized tax in this entire country because I think it is good, and I do not think tax-inclusive pricing is bad if all the provinces of Canada buy into the deal, because then you have the level playing field. You do not have certain areas incurring increased cost to the basic price of goods because of that, and you have advantages that are going to filter back.

Now, when 6.6 per cent of this country buys into a harmonized tax, and 93.4 per cent of the country does not, you have the big majority of the country outside this harmonized tax area and there is inherent cost built into the system. Everything you read will tell you, right through numerous people, consumer groups out there, chambers of commerce, businesses, and it is not only... Businesses are there to make money. You cannot put all your faith in what they tell you, but when you have gone through it you know that when goods get marked up - if the tax goes up on gasoline, for example, let's say five cents a gallon, do they keep the same profit by retailers? Or if the price of goods goes up by 5 per cent? No, you have to increase your profits in proportion with the cost of the goods. Profits are generally a percent of that cost of goods, percent of business, look at a profit line. So a 20 per cent profit on a ten dollar item is a big difference from a 20 per cent profit on a one dollar item. So as we increase cost of goods we proportionately increase our profit margins on goods. That is why increasing the basic cost of a good, even if the extra 4 per cent does not all go on the cost, there is some that is going to go into the profit and that is not going to go into consumer pockets. That is going to go into the price that the consumer is going to pay at the cash register.

The Government of Quebec, in 1993, looked at this tax inclusive pricing. They did an analysis. They came back this year and did another one and they came to the conclusion that it is not an option; a major province, the second largest in this country. Here we don't do an analysis, we don't look at it, the minister can't provide it. We don't look at the impact it is going to have, what he did. Nobody can complain dropping the price of cars from 12 per cent to 8 per cent. You can't complain about that. But the minister saw it as an avenue, that in this

Province we are going to lose a lot of revenue, and because it was coming in April 1, decided it is better to act now and give that break. Car dealers are going to benefit and it is fantastic to see it happen but we were going to lose revenues anyway, and they were going to hold off. So, why not get the revenues now and at least help the car industry in the process?

Now, there are people out there too who were not too excited. There are people who may want that new fridge, stove or furniture. In Labrador, Northern Newfoundland - I mean a mode of transportation, the ski-doo, is a major method of transportation in many parts of Labrador. It is their main method of transportation. Even if vehicles that are used in Labrador, or areas of the Province that do not have the same access to transportation, were afforded similar things, it would be considered to be fair. In other words, we would be accelerating the date on which we are bringing in harmonization, when we have not even had a chance to debate it in the House. These decisions were made before the bill was called here for second reading in the House.

There are numerous fundamental problems with this harmonization. What is wrong with a bill when the price of a fur coat goes down - you can go out and buy a mink coat or a fur coat cheaper after April 1 then you could on March 31, but you go in and you pay an extra 8 per cent in taxes on children's clothing or school supplies, or your light bill is going to go up.

The Minister of Social Services - I asked a question, made a reference yesterday: What happened with the $51 supplement to add to people during the wintertime, for people on social assistance to heat their homes? They need that extra money in the winter because $50 extra spending in the winter is not very much compared to summer spending. Are you now going to increase that supplement out to those marginal income people, well below the poverty line? Are you going to increase that? Are there extra costs we are going to be incurring because of that? I mean, they are decisions the minister is going to have to make in the future. Is it now that this increase is going to chew up some of that cost? Is it going to chew it up in clothing, in heating, electricity.

Basic personal services are gone up. Less disposable income for the social services people, which means even their standard is going to be down. Other marginal people, the people out there today working for $200 a week and less, who are just above the level for social assistance, are some of the hardest hit people out there. They are just above that line where they can get assistance. These people now with young kids - and many of them have young kids - who have to spend a significant portion of their income, right now, on clothing, on shelter, with heat and electricity and the basic necessities, are now going to see an increase from 7 per cent to 15 per cent. There is something radically wrong with a system that takes $100-odd million out of our economy and benefits the rich at the expense of the poor. It is not a balanced system of taxation in the Province and it is not moral, I say; it is not.

There have to be avenues when you have harmonization. First of all, I oppose it on the grounds of tax inclusive pricing. There are ways to deal with rectifying this. If you move tax inclusive pricing, if you look at a distribution of the taxation levels, there are numerous ways that would completely restructure this particular bill and certainly would make it palatable to the federal government. What we have done here is we have bent over to the federal government on an initiative that grew out of a desire to get rid of the GST, that failed in every other province in Canada that has an NDP or a PC or a Bloc leader in this country. Every single one said no. The only ones that said yes are some of the poorest provinces in the country: Newfoundland, Nova Scotia and New Brunswick. Why? Where are the benefits?

New Brunswick said: We will rebate to those people that I'm just talking about now. We will give some money back to them. Nova Scotia, I think. are talking about - what? - $8 million to send back, and they are saying it isn't enough. They are talking about that now. The Premier said in answers to questions during question period yesterday: We will look at things and we will see how it will impact. You don't go through with a significant piece of legislation and wander in the dark and feel your way. You do your analysis. You look at how it impacts on people. How many millions more are on the bills of low-income people below $10,000, or below $20,000, or $30,000?

MR. E. BYRNE: But that doesn't matter in the long run. That isn't why the deal was signed. That doesn't matter to them. That has nothing to do with why the deal was signed.

MR. SULLIVAN: That has relevance. It should be based on basic economics and retaining revenues, that we have discretionary income to spend for the people in our Province. We have forfeited over $100 million in extra revenues, and we now do not have discretion over where it is spent in this Province. That takes away a great degree of autonomy over taxation and to be able to regulate levels in the future.

If it is a two-way street, you might live with the autonomy part. But when the federal government can up its taxes under this agreement twice - it can up it twice without consent of the provinces. It can unilaterally increase it twice. But this Province, if it wants to increase it, must get a majority. If it wants to decrease it, if it is as prosperous as the Premier is telling us when he rants and raves about prosperity on the horizon, and we all hope it is, if it is as prosperous, wouldn't we want to give a break to our low-income people and the people on these necessities?

We have to get unanimous approval. New Brunswick has to say yes, Nova Scotia has to say yes, and the federal government has to say yes. In other words, Frank McKenna has to say yes for us to be able to give a break to people here in our Province; or John Savage, or whoever is going to replace him, whatever PC leader is going to replace him.

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: They are refunding money back to these people. That is what they are doing. They are saying: These people, the low-income people who have to pay extra on clothing, who have extra heat and light, will now have a rebate system like the federal does on GST, to go back in the pockets of these people. We are the only province now that does not.

The Premier answered yesterday in question period, I would say to the Member for Conception Bay East & Bell Island: We will look at things next year and tell you how it is going. It is there in Hansard. You will see it in yesterday's Hansard in his response to me. I mean, that isn't -

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: I'm saying it hasn't even gotten to the legislature in New Brunswick and it has made a decision. The legislature went to what is called a public hearing in a legislative process in Nova Scotia where the public had an input. I have said here from day 1, this wasn't in the red book. It wasn't an election campaign, it wasn't a part of the platform. It was signed very shortly after. They knew it was coming down the pipe. They wouldn't let the public discuss it.

I challenge the Premier to public debates on it. Anywhere, any time, any place, at his convenience, morning, noon or night, any time in a twenty-four hour period, I will be available, and I will discuss the merits and demerits of this; and the Premier wouldn't do it. Because the Premier knows he can't base it on fact, the Premier knows he can't stand on that. It is only a smoke screen to buy time with a $348 million pay off to get us by the next election, and then to hell with the future of Newfoundlanders and Labradorians. That is a very poor attitude to have, political decisions in the Province here. We have to make decisions that are based on a solid premise here for the betterment of us all.

I said before, I hope to live here in this Province the rest of my life; and my children. I'm genuinely interested in the future of every Newfoundlander and Labradorian. The Premier talks as if he has a monopoly on the future, on the interests of people in this Province. There are people here in the Legislature who are very genuinely interested. People ran in politics so they can get involved in a way that can help shape and improve the prospects of people in the Province. How can we do it when the public can't have input?

We went around the Province on committees, I can tell you. You would laugh at it, if you knew some of the things committees went around this Province on. Here we have a major taxation scheme and he won't allow it? He wouldn't allow it to go out in the public? He won't allow it to go to a committee of the House?

MR. SPEAKER: Order, please!

The hon. member's time is up.

MR. SULLIVAN: By leave, Mr. Speaker.

SOME HON. MEMBERS: No leave!

MR. SPEAKER: The hon. member doesn't have leave.

MR. TULK: Take a minute, Loyola, to clue up, take a minute.

MR. SULLIVAN: Sure, a minute won't -

MR. SPEAKER: Order, please!

MR. SULLIVAN: Okay, thank you, I will just take a minute.

MR. SPEAKER: Order, please!

The hon. the Leader of the Opposition, by leave.

MR. SULLIVAN: Thank you, Mr. Speaker.

I won't abuse the time. I will just finish what I'm saying. There are some very valid points, I say to the Member of the House of Assembly, on harmonization. It is not an area on which the Opposition is stalling. I have asked simple things: Put it out; let us hear what the people have to say; let us hear what experts out there have to say. Come on, let us deal with this on a rational level, not on a political level, and let us see what is best for the future of Newfoundlanders and Labradorians.

I will judge anything on its merit. I stood on education legislation; numerous things we supported. We expedited processes there, and we have not unduly delayed. I can say we have moved education rapidly through this House, and other issues and other bills, up to twelve in a day. We are not going to resist in areas where we feel there is no need, but when there is a genuine concern that is going to affect Newfoundlanders and Labradorians... We cannot turn the clock back on this deal when it is done and gone too far, because on basic principle they will not do it.

I will leave you with one single question. Has this government looked at what happens with other provinces, if this deal falls apart? What happens with the $348 million? What contingencies has our Province built in to deal with this when it falls flat overall in Canada and we do not get this Blended Sales Tax, or this BS tax, right across the country?

Thank you, Mr. Speaker.

MR. SPEAKER: The hon. the Member for Conception Bay South.

MR. FRENCH: Thank you, Mr. Speaker.

I rise today to say again a few words on the tax harmonization and especially, of course, the motion on closure on this particular bill.

I think that this bill has a great deal of importance for the people of this Province. Some of it, over the next hour or so, will probably be repeated. I do not know how people on the other side of this House feel, but the phone calls that I get clearly indicate that all is not well with this particular piece of legislation, and most of the calls that I get - or all of the calls I get, concerning this particular piece of legislation are certainly not in favour of it but are, indeed, opposed to it.

I guess, over the last several weeks, or certainly since December 13, there is quite a move on, certainly by the federal Liberal Government, to backtrack, to cover up, to do whatever they can, to say that -

AN HON. MEMBER: Be nice, Bob.

MR. FRENCH: I have difficulty being nice on this; I really do. I will be quite honest about that. When they made a promise to the people of Canada to do away with this particular bill, I do not know how the Minister of Health, or any other minister, can sit there and say it was a great thing that they did and now we are not going to do away with it; we are going to leave it into being.

AN HON. MEMBER: They should never have brought it in.

MR. FRENCH: I agree, it should never have been brought in. As a matter of fact, if this member here had sat in the House of Commons when it came up, he would be sitting by himself today because this member here would have had his convictions and would have stood on his own two feet and would have voted against this piece of legislation.

SOME HON. MEMBERS: Hear, hear!

MR. FRENCH: Let me tell you that today, I would have stood on my own two feet.

AN HON. MEMBER: (Inaudible) support us (inaudible).

MR. FRENCH: No, Sir, I certainly did not on this particular piece of legislation. I certainly did not support it.

AN HON. MEMBER: This man supported it.

MR. FRENCH: He probably did.

AN HON. MEMBER: `Lloyd' is a member of the 500 Club.

MR. FRENCH: Oh, I see. I was not aware of that. Oh, I see; he was a member of the 500 Club.

As a matter of fact, during the campaign back in February when I walked through Holyrood, I knocked on a gentleman's door and he told me he could not support me because of Brian Mulroney.

AN HON. MEMBER: He would not?

MR. FRENCH: He would not.

MR. SULLIVAN: `Bob', he ran for us in 1989.

MR. FRENCH: Did he? He ran for us in 1989.

AN HON. MEMBER: Thank God, he did not get elected.

MR. FRENCH: Thank goodness, then, he did not make it.

AN HON. MEMBER: He is a member of both 500 Clubs.

MR. FRENCH: So he is a member of both 500 Clubs? He ran for the nomination and still did not make it.

Mr. Speaker, I, as one member of this House, will not be supporting this legislation. I think my colleagues on this side of the House know me well enough, and I guess, respect my opinion, what I think about it. I, for one, supposing I stand alone here later on tonight or tomorrow, will certainly not be voting for this piece of legislation.

Now, it is great that the minister could bring in the news on Friday to reduce the taxation on cars, and that is great for the motor vehicle industry in this Province, and I have no problem with anyone who is capable of buying a new car, to be able to save.

AN HON. MEMBER: (Inaudible).

MR. FRENCH: Well, they are suffering and will continue to suffer. I would much sooner, if something had to come today or come last Friday, I would much sooner have talked about children's clothing or talked about our light bills. That is what I would much sooner have seen.

It is very interesting, and I made it a point to get some things from the Nova Scotia Legislature as it relates to this particular piece of business. It is called the BST tax and I have my own interpretation of that, of course, Mr. Speaker, which I certainly will not repeat here. A lot of questions were asked in the House in Nova Scotia: Who is this deal really for? Are the young people of Nova Scotia - and this is what went on in their Legislature as it related to this piece of business. It is certainly not for the young, it is certainly not for the old, and it is certainly not, as in this Province, for the working poor of the Province. It goes on and on into great detail and so on, which I will not bother to get into today, but those are just some notes out of the Nova Scotia Legislature.

I would like to read here from the Globe and Mail of December 13. It says: Of particular importance this week has been a clip played on the CBC radio. This was an August 1993 call-in show on a Toronto radio station, CFRB, in which Mr. Chrétien was asked about the GST: `So will you abolish it?' `Yes, I will abolish it,' he replied. Of course, now, he and some of his cohorts in Ottawa are saying this was taken out of context. Well, if you are asked a direct question and you give a direct answer, how in the name of goodness is it taken out of context? He was asked, and he answered, `Yes, I will abolish it,' and then his cohorts say, `Well, it was taken out of context.' Well, I would really like to know how we can interpret that as taking the Prime Minister of this country out of context? Although I do understand that in the last day or so, he certainly tried to cover his tracks, but I do not know if he is doing it very successfully or not.

Privately, of course, the Liberal strategists agree that for this GST there will be a heavy toll to pay, and if anybody thinks it is going to go away before the next election, then they are sadly mistaken. The people are not going to forget a promise to abolish this tax when this tax did not get abolished. Now, in this Province, I guess, we sold out. We got short-term gain for long-term pain, and this pain, Mr. Speaker, will be long-term. I find it interesting that we do not even have the right, if we want to increase or decrease. We do not even have the right to do that on our own. We do not have that right.

The compensation package, as we see it today - and I will not get into that, because I think our leader has done an eloquent job in talking about the figures and what we will owe once this program runs out, what we are going to be short on. It is very interesting to note that his figures came from the Department of Finance and yet in this House he cannot get answers to his questions. Tax harmonization in this Province, certainly back in February, was not an election issue, but was signed in principle by the Premier soon after the election, that (inaudible) a pending deal was hidden from the people.

MR. MATTHEWS: (Inaudible).

MR. FRENCH: Good.

MR. MATTHEWS: Thank you very much.

MR. FRENCH: You are welcome. I enjoyed yours, thank you. Thank you, I say to the Minister of Health.

AN HON. MEMBER: (Inaudible).

MR. FRENCH: Oh, I will put that in especially for you.

AN HON. MEMBER: Sympathy cards (inaudible).

MR. FRENCH: Sympathy cards, yes.

MR. E. BYRNE: One week the Minister of Health says he has nothing to do with hospital boards (inaudible) hospital board.

MR. FRENCH: Yes, and next day he does.

MR. E. BYRNE: (Inaudible), yesterday he had everything to do with them.

MR. FRENCH: Yes, it depends on what suits him. It depends what day of the week he is on.

Now, the three Liberal Premiers gave a pre-election gift to Mr. Chrétien, who is nervous as people remind him of his broken promise to get rid of the GST. I say to the Government House Leader, this will have an impact and the people across this country will not forget Mr. Chrétien for not abolishing this tax. This will not go away, it has not gone away and it will not go away and I believe there is even some talk of maybe getting the federal election - I saw that somewhere today in print - of actually getting the federal election off the ground much sooner, before Canadians, we, in Newfoundland and Labrador, Nova Scotia, New Brunswick have a chance to see exactly what this tax is going to do to us and to the people of this Province. We will have an opportunity to see how this unfolds and how it presents itself to the people of this Province.

Now, when I look back, earlier this year, the calls I had, Mr. Speaker, from people on social assistance who lost out on the sixty-one dollars, who lost out on the drugs, who lost all of this and now, if they have small children, Mr. Speaker, and a lot of them do, they are going to pay more for children's clothing. If we are going to pay a light bill that goes up every month - some of the calls I have had, and I am sure every member of this House has had them, from people who are about to lose their electricity. And how we have all worked - I say this to both sides of the House - how we have all worked to try to help in having people's power reconnected. We have all talked to Social Services, or most of us have, about what these people have to do to try to pay off the debt.

I mean, an individual who called me would have actually had to pay out almost as much, Mr. Speaker, or more than he was taking in. He certainly would not have enough left for food or clothing or anything else. And now, we are going to raise the cost of electricity in this Province to consumers, Mr. Speaker. I think that that is totally, totally, totally wrong.

Again, Mr. Speaker, I have to question British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec and Prince Edward Island, who did not, would not sign on to this particular agreement. Certainly, all have been asked but none of them have signed on. Why? It must be because the agreement is no good for those particular provinces, and I say that it will turn out to be no good for this Province either.

Mr. Speaker, the poor in this Province spend a greater percentage of their income on essentials that will cease to be tax exempt. Heating fuel, as I said, electricity, children's clothing, even funerals, Mr. Speaker, haircuts, legal fees, books, the tax rate on basic necessities will more than double because of this HST. Again, I say to you, Sir, that is totally wrong.

Of course, between now and the next federal election, the people in this country of ours will remember exactly what happened with this. It just blows me away to see that you will pay less for a fur coat and more for children's clothing. As a matter of fact, I believe one of the radio stations quoted last night at the Liberal dinner: There was more mink at the Liberal dinner last night than there was on a farm. There was more mink at the Liberal dinner last night, that walked through the doors, than there would be on a farm.

MR. TULK: (Inaudible).

MR. FRENCH: I am just quoting now. I do not know if it is true or false. I would say the Government House Leader would know more about that than I do.

SOME HON. MEMBERS: Oh, oh!

MR. FRENCH: Go on!

AN HON. MEMBER: (Inaudible) `Beaton Tulks' (inaudible).

MR. FRENCH: Go on! I have some difficulty with that.

AN HON. MEMBER: Do not be so ridiculous! The reality is that this tax will, in effect, increase children's (inaudible) to buy a fur coat.

MR. TULK: (Inaudible).

MR. FRENCH: I doubt that somehow. I really doubt that, I say to the Government House Leader.

Mr. Speaker, we are going to lose our autonomy to set tax rates under this deal, as I said the other day. Ottawa can raise the taxes unilaterally. Any province can veto a tax decrease. If our revenue needs increase, what will we do to get the extra revenue? If our revenue needs decrease, how will we give a sales tax break? We will not give a sales tax break because we cannot do it without the permission of the rest of them. So how are we going to do it? We cannot do it.

The Finance minister tells glowing stories about the economy growing to make up for the loss of the revenue under the HST. But the government's Social Advisory Committee document says that the next few years will bring an economic downturn because of fewer workers, fewer paying taxes, more seniors with needs, and smaller populations and declining transfers. Both cannot be true. The Finance minister is painting a rosy picture, I say, just to sell the tax harmonization bill to the people of this Province. It will not work in this Province.

The government is breaking its promise to put education reform savings back into education because the HST deal will leave it in a revenue crisis. The government rushed into a bad deal without considering the consequences and is desperately selling the deal, not because it is good for the Province, but because they think it is good for the Liberal Party of Canada. That is my assessment of this particular piece of legislation. There should be more to this than just trying to build a very clear and clean road for the Prime Minister of Canada who, like I said earlier, in the last three or four days has done more backtracking - if we could run forward in the Olympics like he has backtracked in the last three or four days, we probably would have won twenty more medals.

The new tax means duplication in tax processing. The cost of this - this new tax will cost this Province jobs. Again, when I spoke on this, I think it was on Friday, I mentioned people in the government departments here who have gone out and met with the revenue people from the Government of Canada, only when they came back to be none the wiser than when they left this building to go. They have been told little or nothing, which to me is a disgrace to be going forward, especially at this time of the year, not knowing once we come back after Christmas: Are you going to get your notice, am I going to get my notice?

I believe, Mr. Speaker, and believe most sincerely, that this is wrong. I think the people of our Province and our employees deserve much better than what we have been getting and what we have been given. We have seen that when the Premier said nobody in Newfoundland need worry any more in 1996 about employment. No more lay offs. The next day when he went to Ottawa we started getting ready to march 143 out of health care, and over the next year or two years we are going to march another 100 out right along with them. That is a shame. Now, under this here, we are going to drive more people away than we are going to employ. That is wrong, I say.

AN HON. MEMBER: (Inaudible).

MR. FRENCH: Just let me say to the Minister of Health, if we were in charge we would certainly look at ways to do it, and we certainly would be doing it differently. We wouldn't have the Premier of our Province coming out, standing up to the local press and to everybody else saying: We aren't going to lay off anybody else! The next day, and even the minister probably knew this, I don't know if he did or not, 143 - if he doesn't he shouldn't be minister, I say to him.

MR. SPEAKER: Order, please! Order, please!

The hon. member's time is up.

MR. FRENCH: By leave, Mr. Speaker?

SOME HON. MEMBERS: By leave!

MR. SPEAKER: Does the hon. member have leave?

SOME HON. MEMBERS: (Inaudible).

MR. SPEAKER: The hon. member by leave.

MR. FRENCH: I just want to, in conclusion, Mr. Speaker, on that particular point I was talking about, to say that we can't afford to lose any more jobs. If the Minister of Health thinks I'm kidding I will tell him another story, because he believes so much in health care in this Province. On the fifth floor of the Health Sciences Centre one room in there has been cleaned once in the last three days -

SOME HON. MEMBERS: No leave!

MR. FRENCH: - stuff wasted on the floors, Mr. Speaker, not cleaned up -

MR. SPEAKER: Order, please! Order, please!

MR. FRENCH: - and the Minister of Health can sit there and (inaudible) your life, Mr. Speaker.

MR. SPEAKER: Order, please!

The hon. member's time leave has been withdrawn.

MR. FRENCH: He knows what I'm saying!

MR. SPEAKER: I ask the member to take his seat.

MR. FRENCH: He knows what I'm saying is true. Thank you.

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: If he was going to stay on the bill, sure we would give him leave to conclude.

Mr. Speaker, I move that this House not adjourn at 5:00 p.m.

SOME HON. MEMBERS: Oh, oh!

MR. SPEAKER: Order, please!

It has been moved and seconded that this House not adjourn at 5:00 p.m.

All in favour of the motion.

SOME HON. MEMBERS: Aye!

MR. SPEAKER: Opposed.

SOME HON. MEMBERS: Nay!

MR. SPEAKER: Carried.

The hon. the Member for St. John's East.

MR. OTTENHEIMER: Thank you, Mr. Speaker. I'm pleased once again to participate in this debate on the proposed HST legislation. Just a couple of days ago we had an opportunity during second reading to explore some of the arguments against the proposed legislation. It is clear that the provinces in Atlantic Canada, which represent a region which entered into this somewhat secret deal, this memorandum of agreement, or whatever it is called, between this region of Canada and the federal government, that the opposition parties in these three parties in these three provinces in this one region, and indeed many of the citizens of each province, have voiced their objection to this legislation which is now before this particular Legislature, has come before another provincial legislature, and is due to be finalized in another in the not-too-distant future.

There is significant debate I would suggest amongst individuals and groups and associations, and indeed political parties, opposition parties, which have great difficulty with the legislation which has been entered into secretly between, I would suggest, a federal Liberal government and three provincial Liberal governments. That sounds to me to be somewhat suspicious and has to be assessed very carefully before the legislation reaches its conclusion.

Mr. Speaker, I would like to review, in a discussion on tax harmonization, the actual specifics as it relates to actual dollars and cents and what this act will mean to the people of this Province. It is careful, Mr. Speaker, that we review in detail the actual figures and with some projections as to the shortfall that this Province will realize after year five. We have to ask certain questions and I will begin with, how much is earned now in sales tax revenues? When we look at the budget and we look at the estimates, Mr. Speaker, we see that in 1995-96 the sales tax revenue from RST in this Province totalled some $565 million. The federal sales tax or GST from Newfoundland, in the most recent twelve month period, totals $283 million for a total sales tax revenue from this Province, from the Province of Newfoundland and Labrador, in this twelve month period, a grand total of $848 million. So that is the figure, Mr. Speaker, that we begin with in our assessment of where we are today and it is important that we carry this discussion along to see exactly where we will be in year five. When we get to that figure it will be clear, I suggest to the members opposite, it will be clear why the members on this side of the House have serious objections to the provisions of this bill.

The question then has to be asked, how much will be earned under the new sales tax, the new envisaged tax? We have to remember that the current GST rate is 7 per cent. The new value added tax rate will be increased to 15 per cent and everything now taxed with GST will be taxed with the new value added tax. So the total revenue should increase by a factor of 15/7. So let's take the figure that we have already suggested will be the federal sales tax figure, which is $283 million. We multiply that, Mr. Speaker, by the 15 per cent, which is the value added tax over the 7 per cent GST tax rate and we end up with a result of $606 million. Now we have that figure, Mr. Speaker, we have to do an analysis by asking ourselves the following question, how much will Newfoundland get under the new tax act because this is our own provincial legislation which is subsequent to this secretive agreement entered into between this Province and the federal Government of Canada.

How much will Newfoundland realize under this new tax? We have a total value added tax revenue of $606 million, which is calculated, Mr. Speaker, by the formula which I just referred to. We now subtract Ottawa's share and when we do that we have a figure of $283 million which has to be subtracted from the $606 million. So Newfoundland's share, Mr. Speaker, of the value added tax revenue now totals $323 million and these are reliable figures obviously, Mr. Speaker, that we have retrieved from our own internal documentation, public documentation which is released by this Province and factors into these figures, the figures revealed by the federal government as well.

How much will Newfoundland be short compared to what it gets now? Again, the current RST revenues in Newfoundland total $565 million. Newfoundland's share of the value added tax revenue, the figure which we just addressed a moment ago, $323 million. So Newfoundland will be short - I would suggest, Mr. Speaker, that Newfoundland will be short in sales tax revenue to the tune of $242 million a year. When the calculations are complete that is the bottom line. So the question has to be asked, is this a good deal for this Province? Upon

careful review, Mr. Speaker, is this arrangement, this secret deal, this arrangement between Newfoundland and other provinces within this region and the Federal Government of Canada, is this an arrangement which is in the best interest of Newfoundlanders and Labradorians? The clear answer to that question must be `no', and the people must stand up and be counted, and raise objections to the proposed legislation.

What about the federal compensation? Federal compensation starts in year one, and it decreases each year, so it sounds good right now. The immediate benefit sounds very attractive, but it whittles itself away. We see a diminishing effect as we continue from year one to two to three to four and finally five, to the point that the benefit which this Province appears to receive at this point is virtually eliminated completely upon the expiry of five years. As I have indicated, it starts in year one, and this now decreases each year over four years.

Mr. Speaker, it is now important, in my view, to do an assessment of this five-year period. Let's try to project exactly what each year means, and how this shortfall will directly impact upon this Province in terms of the tax revenues of this Province. How much will we be short in years one and two?

Mr. Speaker, we have Newfoundland being short $242 million, and we now have to subtract the Newfoundland percentage of 5 per cent, which is $12 million, so the difference Ottawa pays, which is 100 per cent of the difference in years one and two, will be $230 million. So Newfoundland is short $12 million in each of years one and two.

How much are we short in year three? Again, we have the beginning figure of $242 million. Again we subtract the 5 per cent, again the same amount of $12 million. The difference is $230 million, which we arrived at earlier, and Ottawa pays 50 per cent of this difference, because in year three it is now 50 per cent of this difference, and that would be deducting or subtracting $115 million from the $230 million. Newfoundland will then be requested to pay the additional 50 per cent, so again one-half of $230 million equals $115 million. We add again the 5 per cent subtracted value, which is $12 million, so Newfoundland's shortfall using these figures is $127 million. So, after year three we see a shortfall of $127 million.

Let's now move to year four. It is the same figure. Newfoundland will be short $242 million. We subtract 5 per cent, which Newfoundland pays, which is $12 million; the difference, $230 million. Ottawa will now pay 25 per cent of the difference, not 50 per cent, and not 100 per cent, which are the amounts that we started with in years one, two and three. Ottawa now only pays 25 per cent of the difference, equalling $58 million. Newfoundland pays the other 75 per cent, which equals $172 million, and again we have to add the 5 per cent which we subtracted above, for another $12 million, so Newfoundland's shortfall in year four is $184 million.

You can see that the shortfall increases. It is an escalating shortfall. That is what this tax is all about. As time goes on, our shortfall increases, the Federal Government contribution decreases, and the obligation on the people of this Province reaches a point which is almost unmanageable; it is almost out of control.

Mr. Speaker, there has to be careful review of what the bottom line is with respect to this piece of legislation. Newfoundlanders are not being given the truth. Newfoundlanders are not being given the facts. The reality of this harmonization tax bill is that after a period of time Newfoundlanders will be called upon, through this legislation, to dig deeper in their pockets to get funds to compensate the Federal Government of this country simply because this act allows it. I say, Mr. Speaker, that is not good enough. The people of this Province deserve and demand better.

Let us have a look at year five, how much we are short in year five and every year from then on. Newfoundland will be short again. We have our commencement figure of $242 million. In year five and thereafter Ottawa pays us nothing to compensate for our loss in revenue, absolutely nothing. There is no contribution by the federal government after year five, and that is what is frightful about this act, and that is why the people of this Province have to be given the reality, have to be given the details, so that they can then truly assess the impact of this legislation.

After year five Ottawa does not pay this Province one red cent so let us review what Newfoundland is short. In year one we are short $12 million, in year two we are short $12 million, in year three, using those figures and

using those calculations, a deficit of $127 million, in year four a deficit of $184 million, and in year five and each subsequent year, in year five and each year thereafter a deficit of $242 million. That is the end result. That is what this legislation means to the people of this Province, and that is why I would argue that individuals who in the past supported this position, and I am referring very specifically to Mr. Nunziata, basically challenged the Prime Minister several days ago and issued rationale as to why he could no longer support what was being done over GST.

As recently as last night, Mr. Speaker, we saw the Prime Minister of this country attempting to give some form of an apology to the people of this country, an apology, which I would suggest, is not being bought by the people of this country. It is half-hearted, it is qualified, it is conditional, and that is not an apology. An apology, Mr. Speaker, has to be complete. It has to be unconditional, it has to be genuine, and these particular qualities did not accompany the alleged apology or explanation as given by the Prime Minister last night here in our city, and the people of this country will not accept a conditional apology. The message was loud and clear with respect to what the federal Liberal Party of this country stood for with respect to GST.

It was a faint effort, I would suggest, to the people of this country, and the people, as I indicated earlier, simply will not buy it. There have been questions raised, there have been challenges raised, and we see in this Province, for example, a group in our own city, the St. John's Board of Trade, who say that a hidden tax will make our prices appear to be far higher than they would pay at home and this could, at first glance, discourage buying and goods being sold on the open market. People simply will not know what it is they are being taxed for. What is the true tax amount? What is real? What is hidden? It is a feature of this tax regime which is not being accepted by the many critics and many simply commentators, not necessarily critics, but commentators of this tax regime.

The only way government will find it can hope to make up for that shortfall, and let us keep in mind that after year five and each subsequent year we have a shortfall of $242 million, so how does the federal government and indeed this government, the provincial government, plan to cope with this deficit and shortfall? There are several options which are available. Increase other taxes which obviously would be income tax, property tax, or service assessments that are offered by the government. They can ask the people of this Province, when faced with this deficit, to dig in once again, to dig deeper to find solutions to the tax revenue woes of the provincial government of the day. It can create new taxes. It can be creative. Insurance, for example, they can put taxes on insurance. They find new ways to ask the consumers of this Province to deal with the deficit, to deal with the consequences of, to put it simply, poor legislation. It can ask it to have the people of this Province again experience more cuts, closing of hospital beds, reduced spending in health care, reduced benefits in social services, reduced expenses in education, closure of schools. All of these social programs, Mr. Speaker, will be further reduced. The people of this Province will be asked once again to tighten where obviously it is simply impossible to do so. That is how the government, Mr. Speaker, will have to deal with the shortfall which is anticipated after year five.

It can generally, Mr. Speaker, generate more revenues through economic growth but I would suggest that is a positive thing if it can generate economic growth, Mr. Speaker, that is a positive thing as my colleague just indicated, if it can be done and if the government has the wherewithal to find the ways and to find the mechanisms, Mr. Speaker, to generate economic growth. So the government is being forced, now it seems to me, Mr. Speaker, to try and find ways to compensate for a deficit which it, in and of itself has caused. These are projections, Mr. Speaker, these figures which I have used in this assessment appear to be very reliable. They are figures which we collect from provincial government documentation, from the federal government documentation and we see in a summary that the impact of this legislation after year five, is such that ordinary Newfoundlanders and Labradorians will be called upon to, as I have stated, dig deeper in their pockets to find ways, Mr. Speaker, to correct the mistakes, to correct the concealment and to correct the truth of this legislation.

So in conclusion, Mr. Speaker, it is essential that we look very closely at this legislation. It is essential that there be a very careful analysis made of the revenues, of the impact of these revenues vis-à-vis the federal government and the provincial government. It is essential that we do a careful analysis of the impact of this legislation after years one through to year five and only then, will we be able to see, Mr. Speaker, only then will we be able to

see what the true impact of harmonized sales tax, this legislation will be on the ordinary Newfoundlander and Labradorian.

Thank you, Mr. Speaker.

MR. SPEAKER: The hon. the Member for Baie Verte.

MR. SHELLEY: Thank you very much, Mr. Speaker.

I am glad to rise today to make a few more comments on this ludicrous bill that is before the House today. It is amazing, here we are, just a few days before the Christmas break and this type of legislation is before the House that we have to debate. I don't think it should even be here at this point, Mr. Speaker. Where it should be is at public debate so that people can get the pros and cons, and if the government is saying all these positive things and they have nothing to worry about, well let us let people see it up front, Mr. Speaker, so let us just talk about it specifically for a few minutes on the positives and negatives.

Yes, there are positives. There is no doubt, Mr. Speaker, that there are positives and one of the positives is that, as of now, you can go out and buy a new car and, Mr. Speaker, if you have the intentions of buying a new car and if you have the money to buy a new car, that is great, I am glad for those people. I wish I was about to buy a new car now, there is a good savings on cars and that is fine, I agree with that, Mr. Speaker. Now, let us look at, maybe some of the negatives of it. How many people in this Province are ready to go out to buy a new car next week or next month, or, are they really going to buy a second-hand car or, are they going to buy a cheaper car or really, are they going to buy a car at all? That is what we have to ask ourselves and if you start to weigh out, and I ask all members in the House to take the pros and cons, as we should do because there are positives to it, one positive is the harmonizing of sales tax of any kind, I agree with harmonizing of the sales tax, it makes it clearer we hope but, Mr. Speaker, the negatives outweigh the positives, I say to the members of the House and if you really get down to it, you find out where the negatives are and whom they affect.

Whom do they affect, Mr. Speaker? They affect the lower income people in the Province and, Mr. Speaker, the middle income people in the Province, more. Day after day, I hear it all over the Province, all over my district and throughout the Province, about the middle income people. I will come back to the lower income in a second. The middle income people, the people who just scrape by, the people who pay their bills, the people who can send their children to college, the people who can do all of the normal things, or the average things, who have kids in college, who have a car, not a great car, have a decent house, not a super rich house; it is the middle of the road person that this also affects, because the truth is, the negatives that we talk about are the necessities of life. They are not whether you are going to get a fur coat, or if you are going to get a $25,000 car. They are about paying for your light bill. They are about paying your electricity bill. They are about putting gas in the car every second or third day if you have kids that you bring to school, or because of the travel that you have to do. Those are two of the negatives.

Mr. Speaker, let's just talk about this particular so-called break that we gave the car dealers. I am glad for the car dealers, too, because hopefully that will add jobs to the economy in some small way, and that is a positive, but let's talk about who really saves in this.

The truth is that the more money you have, the richer you are, the bigger and more expensive car you are going to buy, and therefore the bigger break. On the other hand, the poorer you are, and the less you are going to pay for your car, the less you are going to save. So this great, big benefit for the car dealer has to be put in perspective of who is the richest down to the poorest.

I think the example was already given of a $20,000 car - that is average for a new car - 4 per cent which you would save on that would be something like $800. So you are going to save $800 when you buy that car. But when you go to a $30,000 car you are talking about a $1,200 saving. So the point is that the richer you are, the more expensive car you buy, the better break you get with this deal on the car tax. But the lower income you have, and the cheaper the car you buy, the less advantage you have from this.

What this deal does with the cars is really show what this whole bill is all about. For the richer people, the people who spend more money, there is a bigger break, and for the people on lower income, the less break you get. That is a fact. That is not made up. There is nothing fictitious about it. It is plain and simple. The more -

AN HON. MEMBER: (Inaudible).

MR. SHELLEY: I am being specific to the car dealership situation. The more that you spend on a car, the more money you have, the bigger break you get. The less money you have to buy a car, the lesser break you get.

Mr. Speaker, the people who are on lower incomes have no intention of going out and buying a new car this year. If they are lucky they will trade in their old one and get another secondhand one, or they will keep the old bomb that they have and try to keep it on the road. That is the reality for a lot of people in the Province, so this was no great news to them.

Also with this particular issue on the car dealership are the people who raised a legitimate concern of other businesses, snowmobilers. If you go somewhere in Labrador, pretty quickly they will tell you that a snowmobile to them is as important, as essential, as a car, I say to the Member for Labrador, and I am sure he agrees. If you go to the people in Nain, Goose Bay, Labrador City... I lived in Labrador City. In Goose Bay there are at least two ski-doos in every driveway, sometimes three, and they do not just use them for recreational purposes. The Members for Labrador know this. For the people in Labrador City and Goose Bay, especially up and down the Coast, the ski-doo becomes a very essential part of their way of life. They use their ski-doo more than a car, especially in the winter months. They jump on their ski-doo because there are paths all through. I do not know what it is like in Goose Bay - maybe the member can tell me - but in Labrador City there are all kinds of paths through the houses and roadways, and everything else. They use their ski-doo to go to the store. They use it to go to the stadium. They use it for all of those things, not just for recreational use of going ice fishing or whatever. Mr. Speaker, those people who talked about their situation with the ski-doos have a legitimate beef with all of this. Why not them, if cars were considered essential?

Of course, I also heard some comment from a furniture store that thought the same thing. They said furniture was essential. Why not them?

Mr. Speaker, it seems what happened here, when it comes to the car dealership, the truth is it was similar to the situation with the smelter with Labrador. Just before they announced the smelter for Argentia, all of a sudden the government started throwing all kinds of little goodies, a motor registration office for Labrador City. Then they talked about $20,000 for a heritage fund somewhere in Labrador. All of this was thrown out. The same thing with this tax; we use the analogy. Just before the HST comes into being, the government is going to throw out a couple of little goodies to calm people down. That is what they are doing, throwing out a couple of little goodies to calm people down, saying (inaudible) tax. Look what we can do for you. We can bring down the price of a car for you.

Well, Mr. Speaker, it hasn't worked. It hasn't worked, it isn't working, it isn't going to work. Because the simple blatant politics of this is that there was a lie told about the GST during the last federal election, admitted to that, and continuous every day. Now we get apologies from the Prime Minister, finally.

It was a funny thing how he apologized. He apologized, but then in the same breath he said how he didn't want to leave an impression. That is how the Prime Minister rebutted on this. He didn't want to leave a full apology, but he said; Okay, I will apologize anyway because it was an honest mistake. That is what he said: I will apologize anyway because it is an honest mistake. But at the same time he said: But I hope I didn't leave the impression with people that we were going to scrap the GST.

You can twist it any way you want, but the recording from this CFRB radio station back in August 1993 - and it is recorded, it is there for anybody to listen to, and you can't change the words around. You can't change the context of that. The question was directly to the Prime Minister: So, Mr. Chrétien, will you abolish it? They were talking about the GST. The reply, and this is the reply by the Prime Minister of the country: Yes, I will abolish it.

How can you twist that or turn it so that you leave a wrong impression like the Prime Minister said? It isn't the wrong impression. What it is is an impression that got him elected in the last federal election. It was plain and simple. You go around anywhere in this Province during the last federal election, and what was the big plank of the red book? We are going to scrap the GST. Sheila Copps admitted it. She called a by-election on it because she knew she had made a mistake, she knew she didn't tell the truth about the GST, and what happened? She called a by-election. What happens a little while later? Paul Martin, the finance minister, apologizes for the Prime Minister. The Prime Minister kept denying it, and lo and behold, he comes to Newfoundland just last night and finally apologizes.

But as he was apologizing he took it right back. Because he said: I apologize, but I still maintain that I did not leave that kind of impression. It is so ridiculous. Then we have `Sheila Flops' who decides that she is going to call a by-election, have the democratic fiasco of the century, and move back. All of a sudden Sheila decides that she is going to prove to Canadians that she can get elected again. Who is going to believe that Sheila Copps didn't have her poll done and have her soldiers in order to win her by-election?

That by-election proved absolutely nothing. Sheila Copps, she decided to do her poll and then she was going to run. Nice safe seat. `Sheila Flops,' the Deputy Prime Minister of the country, Proved it on a by-election, she says. She didn't prove it to Canadians. All she did was prove it to her own district who has a lot of support for her in her own district, and why wouldn't she? The Deputy Prime Minister of Canada, government in power. Why would they go against her? Because they would be threatened. They would lose their Deputy Prime Minister, that is what they were afraid of. Then Paul Martin, out of respect for the Prime Minister, stands up in front of national media and apologizes for the Prime Minister. Then the Prime Minister ends up back in Newfoundland just yesterday apologizing, but in the same breath saying: I didn't mean to leave the wrong impression.

What kind of wrong impression was it? Then: Privately, Liberal strategists agreed that they will have a heavy GST toll to pay, and quote, from a Liberal strategist: If anybody thinks this is going away before the next election they are sadly mistaken, said one. This is our Achilles' heel.

The only way to get any respect back from the people across this country from the Prime Minister is to unequivocally announce that he did mislead the people of this country during the election so they would become the governing party of this country. That is exactly what it was. It was the main plank throughout this Province, throughout every province in Canada, that the GST would be scrapped, the bad GST, the Mulroney GST.

AN HON. MEMBER: What does scrap mean?

MR. SHELLEY: Scrap, abolish. Mr. Speaker, there is no definition to it, I say to my colleague, because when he said abolish it I would abolish it. The context of the sentence is there, twist it as you may.

The bottom line is that this is very political. It is, you can't deny that.

MR. E. BYRNE: Paul, who is the Member for Signal Hill - Quidi Vidi?

MR. SHELLEY: The Member for Signal Hill - Quidi Vidi, Mr. Speaker, was here for about ten minutes after Question Period to see if there was any - oh, that is right, I can't talk about it. I won't mention, Mr. Speaker, that the Member for Signal Hill - Quidi Vidi is not here.

MR. H. HODDER: Talk about Jean Payne and the soup kitchen.

MR. SHELLEY: I won't mention that, Mr. Speaker. I won't mention the fact that he is not here and that he is probably still drinking soup with the hon. Jean Payne, Mr. Speaker. She is not here either.

MR. H. HODDER: Jean Payne was inquiring of all hon. members yesterday whether they had their soup or not.

MR. SHELLEY: I thought it only applied to ministers too. The least he could have done was have a bowl of soup before he had the caribou and the steelhead trout.

Mr. Speaker, this bill has raised its ugly head in this country and we are about to head into a federal election. Simply put, Mr. Speaker, the three Liberal premiers of Canada, in three Atlantic provinces are the only ones that supported this, Mr. Speaker. They did it for a simple reason and that is the Liberal Prime Minister of Canada and the GST coverup. The GST in disguise, the BST. You name it, it is there.

MR. J. BYRNE: Blended.

MR. SHELLEY: Mr. Speaker, the Blended Sales Tax, the BST but that is what it all came down to. It is three provinces - this whole issue comes down to the politics of the GST coverup from the last federal election. The second point is that the poorest people, the most vulnerable people in today's society in this Province, the poorest and the middle income people will be mostly negatively impacted by this. There is no doubt about that. You can see it in the very example of buying a car that the disposable income of the lower income people - and if you sit down with any low income or middle income person in this Province today and just quickly, in about twenty minutes, go over their budget with them and you ask them where they spend most of their disposal income, from 70 per cent to 80 per cent of it is on essentials, if not more, Mr. Speaker. That is a conservative amount. That 70 per cent to 80 per cent of their disposal income for a monthly budget goes to necessities such as fuel, electricity, children's clothes and so on, Mr. Speaker, the necessities, that is what it is.

Mr. Speaker, I will tell you a little story about coming in here on Monday. While I was driving to Deer Lake to fly into St. John's I was listening to the Open Line and they were talking about the HST and right in the middle of the Open Line Show, Fillatre's Funeral Home on the West Coast were advertising for prearranged funerals because they said by April 1, when the HST comes in, it is going to cost more to die. So it is best to get your prearranged funerals done now before the tax comes in. Now, Mr. Speaker, can you imagine? Funeral home companies are going around this Province advertising to get your funeral arranged now so that it is cheaper because it is going to double. It is going to more than double. It is going to go from 7 per cent to 15 per cent, funeral taxes. There is no exaggeration, well I would consider looking into it.

MR. H. HODDER: The Liberals were all in a line-up.

MR. SHELLEY: It is pretty bad when a nineteen or twenty year old is driving around and hears that you had better make prearrangement for your funeral now because the taxes are going to go up on it. That is an awful way to trick people into it, Mr. Speaker.

MR. H. HODDER: Clothes have gone up, the cost of living has gone up and the cost of dying has gone up.

MR. SHELLEY: The cost of living, the cost of dying, Mr. Speaker, so where do you go? The only way out of it is not to be born. So, Mr. Speaker, those are the three main things that I would like to raise in this debate. It is the whole idea of the GST and the coverup and the root of this problem, which started with the last federal election. Now lo and behold our Premier, the boy of the Prime Minister of Canada, his mentor has decided, along with Mr. McKenna and Mr. Savage, that they are going to appease their Liberal Prime Minister and make sure that they help him out. What Mr. Chrétien said is: Boys, you got to help me out. Somebody has to harmonize the tax because we got it in our red book. I can't go around saying I was going to scrap it but I did say we were going to harmonize it in the red book. He is right to that extent. In the red book he did say harmonization but he did, on many occasions, as was quoted here, he did say he was going to abolish it. He was going to harmonize it.

AN HON. MEMBER: (Inaudible).

MR. SHELLEY: Oh, what about what a man says in public? Mr. Chrétien was asked: So will you abolish it? Mr. Chrétien says -

AN HON. MEMBER: (Inaudible).

MR. SHELLEY: Well, Mr. Speaker, I quote, `Mr. Chrétien: so will you abolish it?' `Yes, I will abolish it.' Now how can you judge that? Oh he did harmonize it but he also says -

AN HON. MEMBER: (Inaudible).

MR. SHELLEY: That is right but like the lady, Mr. Speaker, like Joanne Savoie, the Montreal waitress who turned to the Prime Minister the other night at the Town Hall and pointed at him and said: Sir, I voted for you and I voted for you because you said you would scrap the GST, and he said: I did not say that, you should have read the red book. She said: Sir, I did not need to read the red book because I believed you. That is what she said to him, she said: Sir, I believed you that is why I voted for you, I did not want to read the red book, I should not have to read the red book if I could believe you, so she said: I did not.

So, Mr. Speaker, that is what I say to the Government House Leader, that this lady, along with millions of people across this country, that lady was an example of the rest of the country, Mr. Speaker, I heard it in my own district, I heard it throughout when the now Premier was running as our MP in my district, he was also saying the same thing: The GST will be gone when we take over. Mr. Speaker, I suppose that is about true as my colleague for Kilbride said, it is about as true as the Spanish will be gone, 500 per cent increase, Mr. Speaker, Spanish, and the Spanish war is on, according to the Minister of Fisheries and Aquaculture, the Spanish war is on, Mr. Speaker. I thought it was over. Somebody should mention to the Minister of Fisheries and Aquaculture that the Gulf war is over too. The Gulf war is over, somebody should tell him about that, that is over, the Spanish war, the Gulf war.

But, Mr. Speaker, you talk about misleading people and the whole extravagance of what happened with the Spanish war, about how the Spanish were all forced into the harbour of St. John's, how they were arrested for illegal nets, illegal everything, no licences, you name it, it was illegal, guaranteed all proven but, were they put in prison, Mr. Speaker, were they interrogated? No, Mr. Speaker, they were put up in accommodations and taken very good care of and then what happened? We gave them back their frozen fish, made sure it was not spoiled so we froze it for them. We borrowed their nets for $40,000 or $50,000, brought that to New York City and held up a little turbot and stored it all, we wouldn't want the prisoners' fish to spoil while they were incarcerated, put them up in a nice hotel, took care of them, the best of grub - I wonder if the Spanish fishermen were in the St. John's lock-up, Mr. Speaker? When they were arrested, I wonder, did they go to the St. John's lock-up, I wonder, Mr. Speaker? Then the great, big net down in New York and at the United Nations, and the Premier holding up the Spanish turbot and we had all the problems solved.

The Member for Bonavista South, made it clear today, he described it to a `T', the farce, what is the end result -

MR. SPEAKER: Order, please!

The hon. member's time is up.

MR. SHELLEY: By leave, Mr. Speaker?

AN HON. MEMBER: By leave.

MR. SHELLEY: Yes, a minute to clue up?

AN HON. MEMBER: Yes.

MR. SHELLEY: One minute to clue up, I appreciate that.

Thank you, Mr. Speaker, so I will get off that for a second just to conclude on a couple of comments on the GST.

Three-pronged, I say to the Government House Leader, three reasons why I will not support this bill, this tax. One, and most formidable is that, it was a commitment, not even a promise, it is stronger than a promise, it was a commitment by the federal government to abolish the GST and they never followed through. Two, because it

will negatively impact the poorest and the most vulnerable people in this Province, Mr. Speaker, and three, although I would like to believe, I do not believe when the Minister of Finance and Treasury Board says we are going to have a boom in two years, that we will not miss the $105 million once the three or four years run out, I do not believe that is going to happen, Mr. Speaker. I would like to believe it, but we have to start doing some things for the long-term in this Province, not short-term gain for long-term pain. I will have a few more comments to make later on.

Thank you.

MR. SPEAKER: The hon. the Member for Kilbride.

MR. E. BYRNE: Thank you, Mr. Speaker.

I rise to make a twenty-minute commentary on the HST, GST. Only twenty minutes because government has introduced a closure motion on this particular issue. Three members on this side of the House have not even had a chance to debate the main motion. I have been in the House since 1993 and I have seen closure introduced on a number of occasions but not before appropriate debate.

Now, Mr. Speaker, at the core of this issue on HST, is government's spin and the Premier's spin, the Minister of Finance and Treasury Board's spin that what we are doing in essence is passing on $105 million savings to the people of Newfoundland and Labrador. Now, that is what has been said publicly, That is what the Minister of Finance and Treasury Board said.

In their initial press release the minister said: Well, I mean, consultation is still open. In our next budgetary review process we can still consult. The reality is, Mr. Speaker, the deal is done. Now, who is for this deal? Who will save $105 million? Will it be the people who have three and four kids in their family? Will they save $105 million? They will have to buy a lot of new cars, they will have to buy a lot of new washers and dryers, they will have to get a lot of new haircuts, in order to compensate for the cost of increase in children's clothing.

It is a sad commentary on any government, and in particular on all members, I think, when we pass legislation in this House which allows for the sale of a fur coat to become less expensive, and on taxes on children's clothing to become absolutely more expensive. Average people, people who make $80,000 and less in this Province, will be the big losers if this tax regime comes into play on April 1. Mark it down. Why will they become the big losers? That is the question we have to ask, and that is the question I hope to answer today.

Lower middle income Canadians and Newfoundlanders and Labradorians will on average pay more for electricity, for home heating fuel, for children's clothes, will pay more to buy goods and services. The reality in terms of what this legislation will do to the average home owner and the average taxpayer and the average ratepayer, who are all the same person, will have far more detrimental affects on that end than it will in terms of the average cost that will be paid to us.

What about new home owners or new home builders? The cost of building a new home today compared to what it will be after April 1 will rise dramatically as a result of HST. The other question, in terms of legal services. What will be the cost of legal services as a result of HST? Will they go down? No they won't. They will increase. The cost of real estate fees will increase, These are legitimate, everyday costs that consumers and people in this Province must buy.

The biggest arguments I've seen forthcoming have been on a sort of fairy tale level, a level that says any time we reduce taxes to the people of the Province, that we reduce taxes from a 19 per cent regime to a 15 per cent regime in this case, it will automatically produce positive results for the people of this Province. I don't think so. While that is a laudable goal, the details, as in much of what we do here, legislation that is passed in the House, the details and regulations tell the story. While it is something that every government should aim for in reducing taxes, at the same time the reduction in taxes, whose back will bear the brunt of it?

The reality is that we don't have as many horses pulling the economy along today as we used to. We have far fewer horses pulling along and trying to support far more people. That is the reality of it. Socially, each and every year since 1989 the amount of people who are on Social Services have increased dramatically, and there is no expected decrease within the next five to seven years. In government's own Strategic Social Plan, that is indicated. Our labour force is shrinking tremendously, so our ability to generate more revenue and more taxes at this point in time is also shrinking. While there are exciting resource developments on the horizon, some on the immediate horizon, some in the long term, we have no guarantee yet that as a result of increasing revenue coming in from those resource developments the federal government on the same hand will not reduce dollar for dollar off equalization transfer payments. But yet, HST is going to be a good thing.

The real story, if you look at what the federal government did in the HST zone, if it truly believed that HST would be good, then why didn't it pass on, or why didn't it inherit, the same philosophy for something it does itself? When it came to Canada Post and postage and HST the federal government on the one hand made postage exempt, because it would cost far too much in their own estimates, far too much, and this is the telltale sign. When it came to government's own corporation they exempted it from the HST zone because it would cost too much to produce another issue of postage, but yet when it comes to the business sector of our economy what happened? They did not apply the same standard. They did not apply the same standard, Mr. Speaker, simply because this deal has nothing to do with passing on savings to consumers. It has nothing to do at all with passing on savings above and beyond what we would normally expect to consumers and people in this Province.

It has everything to do with saving face. That is what it has to do with, a deal signed so shortly after the election, a Memorandum of Understanding, negotiated, not talked about in public. No Memorandum of Understanding was released to the general public. It was negotiated over the summer and early October the Minister of Finance stands up, calls a press conference, and tells how wonderful it will be, and admits in the press conference that they have some concern over the impact of the HST on lower and middle class incomes.

The Minister of Finance knows that lower and middle class incomes make up the bulk of our Province. They make up the bulk of the people who are supporting the economy in this Province today. The Member for Port au Port has certainly to ask himself a question, like all members, how many people in his district make $80,000 a year or plus? He lives in a district where, probably more than any other district, depends more greatly upon social services and government programs than any other, and there are many other regions in the Province in the same boat. Will his district, and people in his district, be better served by the HST? No, they will not. What about the Member for Placentia & St. Mary's? What about the constituents in his district? Will they be better served by HST? Not likely.

MR. SPARROW: Yes, they will.

MR. E. BYRNE: They will be? Well, I look forward to the opportunity, when these members I just referred to, actually stand up in the House and enlighten us, in their normal eloquent fashion, on how the constituents in their districts will be better served.

The reality, Mr. Speaker, is this is how it works. The Premier made a deal. He tells Cabinet it is going to happen and he expects twenty puppets on the back bench to support it no matter what takes place. That is exactly what is happening here.

April 1 will mark a different sort of approach afterwards. When people wake up on May 1 and see that insurance rates have gone up, see that electricity rates have gone up, see that gas has gone up, and see that home heating fuel has gone up, will they be phoning people and saying, what a great initiative, what a tremendous initiative by government this HST is. It is a tremendous initiative and has done so well for us. The fact is we are all going to have to buy new cars to be able to afford to put gas in them. That is what is going to have to happen. We are all going to have to buy new cars to realize savings, to be able to afford to put gas in the car, to be able to get insurance on our cars, and our homes, etc.

Do we think for one minute that input tax credits back to contractors is going to be passed on to each and every consumer? It will never happen. Government has said what they want to do is deregulate. They want to reduce

taxes, that government does not have the ability to get involved in regulation. It does so, we regulate the economy now. We prescribe hours of work, we prescribe minimum labour standards. We prescribe the amount that people should get paid at a minimum level. What is happening here now is not right and it will not produce any net economic benefits for the people of the Province.

At the end of the day where will this Province make up $105 million? Even if there is a deal on equalization and transfer, even if there are thousands of new jobs in our economy, our gross domestic product will have to grow tremendously if we want to make up a shortfall of $105 million, and if we cannot make up that shortfall what will suffer at the end of the day? What services will suffer at the end of the day because we do not have $105 million in our revenue pot for budgetary purposes?

The Member for Twillingate & Fogo knows what will suffer because the same things will suffer in his district as will suffer in mine. That is the bottom line. Will help the Minister of Industry, Trade and Technology?

AN HON. MEMBER: (inaudible)

MR. E. BYRNE: No, it's a folder my daughter gave to me this morning. She gave me a box of them actually.

AN HON. MEMBER: How old is she?

MR. E. BYRNE: She is three-and-a-half. She really likes Barney, but I told her I couldn't take that philosophy into the House today because the Liberals are not really in a caring, sharing mood. They are not really in a cooperative mood, like many of the kids' programs we see.

HST, closure, is going to come to Committee stage. The House Leader is in a predicament. He is in a jam. We are going to see closure on Committee on HST; and I would say that if he wants every piece of legislation before Friday, closure will be introduced in this House between now and Friday, in a matter of three days - he will have to introduce closure in a matter of three days - more than any other time since Confederation, if he wants it, because that is what it is going to take.

There was no need for closure to be brought in this particular issue. The House of Assembly should be called back in late January or early February. There is a lot of legislation on the books. The government does not need this legislation until April 1. We can debate it two weeks after Christmas. Let's move on with every other piece of legislation if he wants, but that is not what is going to happen. A high-handed, uneven approach existed today.

Minister of Environment and Labour, what will HST do to the labour relations climate? Will it have any impact? What will it do to business investment? Will it be more attractive to businesses? Will it cost businesses more to adjust to the new HST reality, the new HST regulations? It certainly will.

The reality is that this piece of legislation is a result of an agreement between a Premier, a new Premier and a new Cabinet, and an old and tired Prime Minister and an old and tired Federal Cabinet.

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: All the crowd will show for supper tonight but they will not come in the House, will they? Only the stalwarts will stick around.

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: Hearing is always very good. The Jack attack is on the way. You can send up the white flags after.

Ultimately businesses within the HST zone, in terms of tourism, will HST be applied within the zone as we, or any person, travels within the zone? Yes, it will. What about when we travel outside of Atlantic Canada? Will HST apply if we book tickets here, or will it apply for people who are booking tickets to fly in? No, it will not.

It is beyond comprehension how the Federal Government can get involved with taxation initiatives, that one standard applies to a particular region while another standard does not apply to another region, and in the Western region of Canada it does not apply at all. It is beyond belief, really.

The Province of P.E.I. opted out. Why did they opt out of the agreement? If this is such a good deal, is the new government of P.E.I. looking seriously at opting into the HST zone in their regulation? No, they are not, because it does not work. It will not produce benefits to the people of the Province.

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: I am always nice to the Government House Leader. I am always nice to him. He is not always nice to me, but I am always nice to him.

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: I could not let myself down, not to be nice to you or any one of you over there. I would not let myself down.

AN HON. MEMBER: Why?

MR. E. BYRNE: I said, I would not let myself down not to be nice to any one of you over there, even though you are not nice to me. That is irrelevant. That really has nothing to do with the issue at all.

Mr. Speaker, HST is a bad deal, period. It was signed for one reason and one reason only, so the Prime Minister of Canada could, in an attempt, save some face. What do we get? We have a $348 million cheque in the bank right now collecting interest. We can't use it until April 1 and it will continue to collect interest. It sounds good.

MR. J. BYRNE: How much?

MR. E. BYRNE: $33,000 a day.

MR. J. BYRNE: How much money did they give us?

MR. E. BYRNE: $348 million. The reality is, how is it that $348 million - this is a legitimate question - how is it that $348 million is only collecting for us, $33,000 a day? What type of interest rate has it been invested in? Think about it, 2.5 per cent, 3 per cent?

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: My god, 2.5 per cent to 3 per cent. I spoke to officials in the Department of Finance and asked the same question. We have a $348 million cheque in one hand, we deposit it so it collects interest for us on the other hand at less than 3 per cent.

MR. J. BYRNE: What bank?

MR. E. BYRNE: Who are we dealing with? That's a fact, less than 3 per cent. $33,000 a day and change is what that $348 million is collecting for us and it is about 3 per cent or a little less than 3 per cent today it is collecting. I could take $5,000 now, bring it to a bank and get 7.5 per cent to 8 per cent interest.

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: No they are not, no. Not according to the officials of the Department of Finance. If you do the math on it, $348 million collecting $33,000 a day, is not 8 per cent. Think about it, it is not 8 per cent. On $348 million, that is what we are collecting. You will end up with, I think, in a year about $40 million to $50 million surplus on the $348 million. I am just trying to think. I am just trying to recall the information that was given to

me from the Department of Finance dealing with the cheque that you got for HST, the $348 million, even though you cannot use it right now.

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: That is what I understand. Do the times table on it, 365 days a year. You can't use it at the moment is what I am saying. Not until April 1, that is part of the agreement. You should know that, you are in the Cabinet, sacred heart! You should know that, you are in the Cabinet. That is why it is collecting daily interest, you can't use it right now.

AN HON. MEMBER: The Minister of Education, they don't tell him anything.

MR. E. BYRNE: Pardon me?

AN HON. MEMBER: They don't tell the Minister of Education anything.

MR. E. BYRNE: That's right, because one week - that's exactly right. We have seen an example of that. Last week parents were going to decide and this week, well they don't have the ultimate say, the boards are going to decide. Well that is a question that will become evident in time but the information - the Government House Leader is doing some calculations on it but the information came from the Department of Finance.

The reality is, Mr. Speaker, we have a one lump payment that at the end of the day will not cover our losses. People of the Province are going to be worse off as a result of it. We are going to pay more for basic necessities of living and that is the reality that this HST will bring upon the people of this Province. I can't use my colleagues line, he said even the Clerk thinks I am doing a good job but he has already used that line. I can't use that.

AN HON. MEMBER: He has the potential to be Steve Neary.

MR. E. BYRNE: Oh, he is the Steve Neary in the Caucus.

MR. SPEAKER: Order, please!

MR. E. BYRNE: People in the Province on education are asking the same question, Mr. Speaker, to the minister. Is this minister ever going to be relevant or not? All the talk about me being relevant.

Mr. Speaker, I will sit down. I said my bit and piece on it. I wish I had more time but I don't, with that, thank you very much.

AN HON. MEMBER: Steve is going to be quiet today.

MR. SPEAKER: The hon. the Member for Bonavista South.

MR. FITZGERALD: Thank you, Mr. Speaker. I can't say that I am happy to stand here today and take part in this debate, Mr. Speaker, because when you see the activities of this House being crunched, being walked on and trampled on by members of the opposite side, when you see the hobnailed boots and hear them clicking up across this floor, Mr. Speaker, then you know that democracy is not at work.

When my colleague from Kilbride talked about the possibility of setting a record here in this House with the number of closures that will have been brought in within the next two or three days, I think he might be 100 per cent right. I think the Government House Leader might be able to set a record but I am not so sure if it is a record that he will be proud of but it will be a record that I would think that he might set within the next two to three days, the numbers of closures that he will be seen to be bringing to this House in order to get some legislation through in the time frames that he talked about.

But, Mr. Speaker, there is no need of that. All we are asking for, and there are dozens of pieces of legislation there, that can pass through this House without debate. Some of it is just a matter of it going through the first reading, second reading, Committee then to be proclaimed in law, but instead, the minister comes forward or the government of the day comes forward and brings in this HST, Bill 45 and say we want it now, we want it before Christmas. You do not need it until April 1, I say to members opposite, it is a very, very substantive piece of legislation that should be taken out for consultation and let the people of this Province know exactly what they can expect when we implement this blended sales tax or harmonized sales tax.

It is something that everybody in this Province should know what we are getting into because it was not an election issue. It was not brought up at all during the last election. We heard of all the positive things that happened, how the economy of this Province was going to be revitalized, the wonderful things that the Premier was going to do, the now Premier, when he returned to Newfoundland, after we got over the charade that happened for the leadership and the Premier was anointed, the Minister of Education chickened out and the Minister of Fisheries and Aquaculture chickened out and the old chicken plucker himself, where is he? He is not here. The first time I ever saw two news conferences called to tell somebody they were doing something. First time, and it was a record, to tell people they never had the guts to run.

The Minister of Education, did it in a little bit of a different fashion. He just threw out a little bit of bait and baited people along, wanted people to prod him and build him up because, if you realize, Mr. Speaker, the Minister of Education needed that in order to win his district because he was not a real popular person that year. The Education Bill could have had the minister into big trouble so he threw out his name, he was smart. He may have had his picture in the (inaudible) when he played hockey but he will never get it, Mr. Speaker, in the history books of this Province, I can guarantee him that because he did not have the guts to come forward. He may have had his picture in the (inaudible) when he played hockey but he will never get his name in the history books of this Province. He will never have the guts to run for the leadership, Mr. Speaker, and he missed his chance. You can see him, you can see the Adam's apple going up and down in his throat every time the Premier gets up to speak and gets soft with the shaking and the rattling there in his seat, shake, rattle and roll and he says to himself: If only I had run; and I believe the Minister of Education could have been the Premier today. I firmly believe that, I don't say that to offer praise or to make him feel bad but I honestly believe that had he run, he would have been the Premier of this Province today. I firmly believe that but he has missed his call in life, missed the boat that will never come his way again. Opportunity only knocks once.

The Minister of Finance and Treasury Board, never had a chance, no way. The Minister of Finance and Treasury Board looks good, Mr. Speaker, and is in love with himself but does not have a chance of going any farther than he has gone in this government today.

AN HON. MEMBER: (Inaudible).

MR. FITZGERALD: There is a lot over there on that side like that. The Member for Labrador West is going to be the one-term wonder of this government. I tell you right now, and I shout it out loud enough for everybody to hear: The Member for Labrador West, a wonderful fellow - I am not the fellow who is going to put him out - he is a likeable guy, a nice fellow, but he will never, ever win his seat again. It is too bad. He is history unless he sheds the frock and sheds the red coat, and sits - we do not want him here - sits down there. That is the only place he will win his seat the next time around, and he had better take heed or he will be back putting marrettes on the wires down with IOC again. He had better take heed or that is where he will end up.

The Member for Labrador West, I understand, is being called home, not representing his people, the same thing as happened to the Member for Eagle River, and I am not going to get into that because everybody knows what the Member for Eagle River did. Everybody knows how he took on everybody -

MR. E. BYRNE: The Salt Fish Corporation.

MR. FITZGERALD: - including the Salt Fish Corporation -

MR. E. BYRNE: John Crosbie.

MR. FITZGERALD: - John Crosbie, Morrisey Johnson, every Tory that was up in Ottawa.

MR. E. BYRNE: Then he took on his constituents.

MR. FITZGERALD: But he made the one mistake of taking on his constituents. That is the mistake he made. Finally, when he had to go to ask forgiveness, the people came out and turned their backs on him. That is what is going to happen to the Member for Labrador West. Once you lose sight of your people, you are lost.

AN HON. MEMBER: (Inaudible).

MR. FITZGERALD: `Chuck Furey'? `Chuck' does not care anymore. `Chuck' is financially independent. He will not run anymore, will not stay any longer than this term, and I doubt if he will hang around that long.

AN HON. MEMBER: The Minister of Justice?

MR. FITZGERALD: The Minister of Justice, gone.

SOME HON. MEMBERS: Hear, hear!

MR. FITZGERALD: Does not have a chance, will not be there anymore, even if he wanted to. He is gone.

AN HON. MEMBER: He knows it.

MR. FITZGERALD: He knows it, but he has enough sense to realize it and he will not go back looking to the people anymore. A lot of them there in that front bench will not be there anymore. In fact, I said, when the House opened, that if I were in charge of the seating plan, I would have the front row back in the third row, and the second row up in the front row, and some of the people in the third row moved up in the middle row, if you can follow that.

AN HON. MEMBER: (Inaudible).

MR. FITZGERALD: I beg your pardon?

AN HON. MEMBER: (Inaudible).

MR. FITZGERALD: That is probably the reason why. It is a good idea.

Here he is now, Mr. Speaker. The Member for Conception Bay East and Bell Island went down in my district during the election to organize the district.

AN HON. MEMBER: He never?

MR. FITZGERALD: Yes, he did, he and the Member for Terra Nova were down there. They were knocking on doors. I know they were talking to people down there. They did such a wonderful job in organizing the Liberal Party there, and -

AN HON. MEMBER: (Inaudible) the Member for Terra Nova. He fooled me up.

MR. FITZGERALD: No, it wasn't the Member for Terra Nova. Yes, it was the former Member for Terra Nova who fooled you up, no doubt about that. She said to one of the members: Roger Fitzgerald is going to be hard to beat because he does all of those silly things. He goes into people's houses to have coffee.

SOME HON. MEMBERS: Hear, hear!

AN HON. MEMBER: You mean, you talk to your constituents.

MR. FITZGERALD: In other words, I talk to my constituents and listen to them.

AN HON. MEMBER: All those silly things.

AN HON. MEMBER: (Inaudible) silly things. You know them all by name?

MR. FITZGERALD: And I know them all by name - most of them. Most of them might know me.

AN HON. MEMBER: (Inaudible).

MR. FITZGERALD: He is from my district. He knows what is happening down there, and he knows the hurt that is going to be brought about by this piece of legislation.

AN HON. MEMBER: Did his aunts vote (inaudible)?

MR. FITZGERALD: His aunts probably did. They are good people. I know them quite well. And he has been a good minister. I say, the Minister of Environment and Labour has been a good minister, no doubt about that.

SOME HON. MEMBERS: Hear, hear!

MR. FITZGERALD: In fact, he came down to my district to help solve a problem, and it was a problem that had been there for the last twenty years. Finally, this minister was one of the people who stepped in and said: We have to do something about this. This is wrong. No matter which district it is in, it is wrong and has to be corrected; and it was.

AN HON. MEMBER: (Inaudible).

MR. FITZGERALD: I beg your pardon?

AN HON. MEMBER: (Inaudible).

MR. FITZGERALD: No, but he did come down and help solve the problem there, and that is what should be done. If you are a Minister of the Crown, you are a Minister of the Crown for Newfoundland and Labrador, not just Liberal districts or Tory districts.

AN HON. MEMBER: (Inaudible).

MR. FITZGERALD: The Minister of Forest Resources and Agrifoods has been a good man since he has been the Government House Leader. He is a changed man, and I do not know how he could sit back there. In fact, it is the first time I got a good look at the minister, because all of the last term he used to sit like this. He could not look at anybody. He could not look over here, he could not look at his own people, and he could not look at his own leader, but it is all completely different now.

MR. OSBORNE: Give us your synopsis on Roger Grimes.

MR. FITZGERALD: I just did that.

That is the difference, but he is doing a good job now that he is there. I must say, the few times I have had occasion to call him, he has been very accommodating.

MR. SPEAKER: Order, please!

I remind the hon. member that we are debating An Act To Implement The Comprehensive Integrated Tax Coordination Agreement Between The Government Of Canada And The Government Of Newfoundland And Labrador. I ask the member to be relevant.

MR. FITZGERALD: Mr. Speaker, those are the people who brought in the Act and if I cannot refer to the authors, then how can I refer to the Act? Those are the authors of the Act, so I would suggest when I speak to the authors that I am being relevant, not to overshadow your ruling, Mr. Speaker.

This is certainly a bill brought before this House that can do nothing but hurt people. It can do nothing but create hardship for most of the people in Newfoundland and Labrador today. I guess, the first thing that comes in our minds is the 15 per cent that is going to be stuck on our hydro bills. The Minister of ITT does not care much about that because what is another 8 per cent on his hydro bill? It does not matter, Mr. Speaker. The cheque will be written, somebody will take it, and that will be it, it will be paid, but I can assure you that there are a lot of people out in my district who will be hurt when they have to go and probably witness another $20 or $30 a week stuck on their hydro bills. It is money they cannot afford.

The Minister of Fisheries and Aquaculture just rolled in and interrupted in his usual fashion. He had the Spanish War going there in Question Period. The next thing was the Spanish Armada. The Minister of Fisheries and Aquaculture knows very well what is happening out there today, and he knows very well that there are a lot of people out there today who cannot afford to go out and buy fur coats, and spend another 8 per cent on their hydro bill, on their haircuts, legal fees, funerals, and the list goes on.

If members went to their constituencies and asked their constituents what they thought of allowing this particular bill to be brought forward, knowing they would have an increase of 7 per cent or 8 per cent on some of the necessities in their lives today, how many people out there would go and give it their blessing, Mr. Speaker? There have been enough bankruptcies in this Province already. There have been enough businesses close shop. There have been enough layoffs, and that is all I can see happening with this piece of legislation.

Let us go back to the Prime Minister. At least one or two people in the Prime Minister's office have enough guts to speak out and say it is wrong, and that is more than we find on the other side here. I can understand the Cabinet ministers not wanting to speak out, or not wanting to speak up, because they have to go along with their leader. They have been sworn to secrecy. They have been sworn to uphold the thoughts of the leader, and they have been sworn to have Cabinet solidarity. I can understand the Cabinet ministers but I cannot understand people who sit in the back benches of this government today, if they are representing their constituents, staying quiet when they see hardship brought on each and every one of them. I cannot understand that.

All we are doing here as Opposition, Mr. Speaker, is saying, slow down the process. Take this particular bill, Bill 45, out to the people. Use the consultation process, use the committees of the House that former Premier Wells had seen a need for and put together. That is the reason why the House committees, Mr. Speaker, were implemented; that is why they were put in place.

AN HON. MEMBER: The great Democrat.

MR. FITZGERALD: The great Democrat, Mr. Wells and Mr. `Eddie Escobar,' the former Government House Leader, was even more democratic than this House Leader here. At least, Mr. Speaker, it was only after everybody in the House had time to debate an issue that he brought in closure.

I would say, never before in the history of democracy has such a hobnailed, hard-nosed boot style of politics ever been introduced in the Legislature. This is the order of the day. The Minister of Fisheries and Aquaculture, if you talk to him privately, will tell you that he disagrees with that bill. He will tell you that he disagrees with that bill. He will not say it in public because of Cabinet solidarity, but you talk to him privately and he will tell you: You are going a good job, keep it up, because I do not want to see any hurt brought to my people.

People in the back benches - the Member for Terra Nova, if he were to speak honestly, he would stand here today and say that this bill should go to the people, because he believes in the democratic process.

MR. TULK: (Inaudible).

MR. FITZGERALD: God bless him, I wish he were. He believes in the democratic process and it should be taken to the people to have input. That is all we are asking, Mr. Speaker. The committee reports back to the Clerk if the House is not in session, they report back to the Government House Leader if we are sitting, and after we have had hearings, after the committee reports back, and if people out there, if Newfoundlanders and Labradorians agree that this is a good piece of legislation, there would be no need for closure. There would be no need for any more debate. It will pass through the House.

I say to the Government House Leader, there are lots of bills here. That is what he should be dealing with at this time. Not introducing closure on a bill that should be gone before committee and a bill he does not need until April 1 of next year. He does not need it. But it is the same old tactic - bring everybody back two weeks before Christmas, sit every night, let them speak out, wear them down, and we will introduce closure. By 1:00 a.m. they will be talked out and they will go home.

That is not the way the democratic process works. This is the people's House and this is where people's opinions and people's views should be brought to the floor. But it is being stifled by members opposite, and that is wrong.

MR. EFFORD: That is only your opinion.

MR. FITZGERALD: That is my opinion, and that is the opinion of 90 per cent of the people in this House, I say to the Member for Port de Grave.

Mr. Speaker, when you look at the hurt that is out there today, when you look at the people who are unable to find a job and the people out there who struggle every day, whether they are getting a TAGS cheque, an unemployment cheque, a social services cheque or a government cheque, Mr. Speaker, and some of those have gotten very scarce. When you see those people who struggle every day to keep body and soul together, when you see them have to struggle every day to put bread and butter on the table, and you go out and tell them that now you are going to tax their hydro... Mr. Speaker, you are going to give them a break on new cars, you are going to give them a break on new furniture but you are going to attack children's clothing, you are going to attack school books, you are going to attack everything that those people require as necessities and which they now cannot afford. To me, that is wrong; that is not representing your people.

It is one thing, Mr. Speaker, to come in here and get lost in the crowd. It is another to come in here and stand for the people who sent you here. Because they certainly did not send the Member for Labrador West into this House to represent the Premier or to go along with the Premier's wishes. Nobody sent me here, Mr. Speaker, to go along with the opinions and the views of my leader if it were going to hurt them, nobody, and I will never do that.

MR. SPEAKER: Order, please!

The hon. member's time is up.

MR. FITZGERALD: I will never do that. If there is anything ever brought into this House -

MR. SPEAKER: Order, please!

The hon. member's time is up.

AN HON. MEMBER: By leave.

MR. FITZGERALD: If there is anything ever brought into this House that is detrimental to the people I represent, I will stand and be counted.

MR. SPEAKER: Order, please!

The hon. member does not have leave. I ask the hon. member to take his seat.

MR. FITZGERALD: In conclusion, Mr. Speaker, I will sit and allow somebody else to take part in this debate.

MR. SPEAKER: The hon. the Member for Cartwright - L'Anse au-Clair.

MS JONES: Thank you, Mr. Speaker.

I want to rise today and have a few words on the harmonized sales tax. First of all, I guess I would like to say that I certainly support any tax reductions for consumers of the Province and any tax reductions that are going to apply across the board and help them make savings in everyday aspects of their lives.

What I would like to do is just talk a little bit about how the sales tax is going to affect the people of my district. It is certainly not going to mean any savings for the people of Coastal Labrador when we talk about hydro-electricity. I have a part of this Province which is still on diesel electricity. They are paying the highest rates of most people in the Province when it comes to electricity and it is through no fault of their own. But what we are doing today is, we are saying to these people, we are going to charge you another 8 per cent increase on what you are already paying, and that is not fair, Mr. Speaker. It is not fair to the people who have to live in the coastal areas of this Province, to the people who are already paying the high prices of diesel electricity.

When we talk about savings for consumers and savings for people, I have to revert to the exemption that was placed on building materials, on taxes on building materials, going to the people of Labrador. For years that has been one program that has allowed us to correct the inequity within this Province. It has given the people in Labrador an opportunity to buy building materials from the Island, and the cost reduction in taxes has allowed them to subsidize the transportation on getting those building materials in. With this sales tax we are saying to them: We are going to charge you an extra 15 per cent taxes on these building materials. We are no longer going to give you the claw-back on GST, but rather we are going to up the price. That, Mr. Speaker, I cannot support. It is unfair to the people who live there.

This tax affects a lot of small items that consumers use in their everyday lives. It affects small ticket items that a lot of low-income families are dependent upon, people in my district as well. There has been a lot of talk about the taxes that are going to be placed on children's clothing. I would just like to tell you a story about how this works in my district. We do not shop for clothing in stores in our communities, we shop by catalogue. So we are not only paying an 8 per cent increase on the tax of the item, we are also paying a 15 per cent increase on the postage charged to get that item to the consumer. So there are two taxes for parents in communities where I live.

This is very unfair. When we look at harmonizing taxes or making tax reductions in the Province, I agree that it be done for the benefit of everyone, and in this case it is not.

AN HON. MEMBER: (Inaudible).

MS JONES: Not bad at all, boy. If you could all be as good as Chrétien, we would not have any problems, I suppose. But that is not the case, I say to the hon. member, unfortunately.

AN HON. MEMBER: Come on! You and Harvey, come on over!

MS JONES: I cannot come over.

MR. SPEAKER: Order, please!

MS JONES: The only reason why I would cross is if you scrapped this tax program right now.

SOME HON. MEMBERS: Hear, hear!

MS JONES: I am just telling you about the implications that this is going to have in my district. I say to the Government House Leader, stand up and scrap the program and I will be right over!

SOME HON. MEMBERS: Hear, hear!

SOME HON. MEMBERS: Oh, oh!

MR. SPEAKER: Order, please!

AN HON. MEMBER: (Inaudible).

MS JONES: I enjoyed the trout.

MR. SPEAKER: Order, please! Order, please!

MS JONES: Mr. Speaker, we are implementing a tax here that, yes, is going to cause some savings to consumers, but the savings are on high ticket items. The savings are going to be for a select group of people in this Province. The people I represent live in a part of this Province that are already going through one of the highest cost of living.

MR. SPEAKER: Order, please!

The Chair has recognized the hon. Member for Cartwright - L'Anse-au-Clair. If other members wish to debate, they will have to wait until she is finished. If they wish to engage in conversation, they will have to do so outside the Chamber.

SOME HON. MEMBERS: Hear, hear!

MS JONES: Thank you, Mr. Speaker. It is nice to know that you all have an opinion on this Harmonized Sales Tax, and I am sure you are just agreeing with me.

I was saying that the people this tax is going to harm the most are the lower income people in this Province. The people in my district have just gone through a tremendous downsizing in their economic base. We are trying to build it back up. We are doing so with the highest cost of living in this Province, but we are doing it with a positive attitude. We are looking at the right avenues, and we are trying to pull it together. All of a sudden today we are saying to these people who are coming off TAGS and going on social assistance programs, these people who are trying to build new industries, that we are going to slap you with another 8 per cent increase on your diesel/hydro bill, that we are going to slap you with a 15 per cent tax increase on building materials, a tax increase from which you have been exempt for a number of years. We are going to slap you with an 8 per cent increase on your gasoline and your diesel. That is not acceptable to me, and it is not acceptable to the people I represent in my district.

SOME HON. MEMBERS: Hear, hear!

MS JONES: As I said earlier, yes, we have to reform the tax base of this Province and, yes, we have to look at implementing taxes that are going to help people get off social assistance, going to help people to increase their standard of living, help low income families provide a better living for themselves and the communities in which they live, but we are not going to be doing it by taxing the everyday services that they depend upon and that they use.

Mr. Speaker, I have no other choice but to vote against the Harmonized Sales Tax, as it will not benefit the people of my district.

Thank you very much.

MR. SPEAKER: Order, please!

Could we have quiet here, please, while we put the amendment? I assume that members have spoken and we are now ready for the question on the amendment.

All those in favour of the amendment, `aye'.

SOME HON. MEMBERS: Aye.

MR. SPEAKER: All those against, `nay'.

AN HON. MEMBER: (Inaudible) Division.

MR. SPEAKER: Division?

AN HON. MEMBER: Division. Call in the members.

MR. SPEAKER: Call in the members.

Is the House ready? Are members ready?

Division

MR. SPEAKER: All those in favour of the amendment please rise.

Mr. Edward Byrne, Mr. Fitzgerald, Mr. Jack Byrne, Mr. Osborne, Mr. Ottenheimer, Mr. French, Ms. Jones.

MR. SPEAKER: All those against the motion please stand.

The hon. the Minister of Forest Resources and Agrifoods, the hon. the Minister of Fisheries and Aquaculture, the hon. the Minister of Municipal and Provincial Affairs, Mr. Walsh, the hon. the Minister of Mines and Energy, the hon. the Minister of Education, Mr. Lush, Mr. Penney, the hon. the Minister of Works, Services and Transportation, the hon. the Minister of Environment and Labour, the hon. the Minister of Tourism, Culture and Recreation, the hon. the Minister of Development and Rural Renewal, the hon. the Minister of Government Services and Lands, Mr. Noel, Mr. Oldford, Mr. Canning, Mr. Smith, Mr. Ramsay, Mr. Woodford, Mr. Mercer, Mr. Reid, Ms Thistle, Mr. Sparrow.

CLERK: Mr. Speaker, ten `ayes' and twenty-three `nays'.

MR. SPEAKER: I declare the amendment defeated.

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[Continuation of sitting.]

MR. TULK: Mr. Speaker, I presume the next order of business is to call the main motion and then we vote on that after people have spoken. Is that it?

MR. SPEAKER (Snow): We are back to the main motion now, yes.

MR. TULK: Yes.

MR. SPEAKER: The hon. the Member for Cape St. Francis.

SOME HON. MEMBERS: Hear, hear!

MR. J. BYRNE: Thank you, Mr. Speaker.

I cannot say I am pleased to stand in my place today.

MR. EFFORD: The man who won the poll.

MR. SPEAKER: Order, please!

MR. J. BYRNE: The Minister of Fisheries and Aquaculture is at it again. I do not want to hurt his feelings or get him too upset here tonight, Mr. Speaker, so I will just try to ignore him for now.

In the meantime, Bill No. 45. One thing I did not mention the other day when I was on my feet with respect to Bill 45 is closure. I do not know it escaped me that I did not say a few words on that. At least I do not remember saying a few words about closure. I did not think that the Government House Leader would be following in the footsteps of the previous Government House Leader who brought in closure more times in the matter of a week, I think - in the matter of one week they brought in closure more times than it had been brought in since 1949.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: In one week? I believe it was something like four or five times in one week.

MR. TULK: It was the former Government House Leader?

MR. J. BYRNE: I think so.

MR. TULK: Bad man.

MR. J. BYRNE: Bad man. The Government House Leader who is sitting in his place today, Mr. Speaker, says the previous Government House Leader was a bad man. I would not necessarily agree with that. I think he was doing his job, but he just got carried away with it.

Closure on Bill No. 45 was brought in on Friday the thirteenth. And I referred to it the other day. In the bill itself, in one of the formulas, it refers to NUMDAYS. So, on Friday the thirteenth they brought in this legislation. Anybody who is superstitious would think that this may not be a good thing for the people of Newfoundland and Labrador. The closure bill to be brought in, does not give the people of the Province enough time to have a say on this bill, through the members of the House of Assembly. It does not give them enough time to have their say and to properly study, review and have a look at the bill and all the clauses in it.

I have not, to this point in time, seen any members on the opposite side of the House speak to this bill, other than the Member for Conception Bay East & Bell Island. I think there may be one other member planning to get to his feet and say a few words. The Member for Conception Bay East & Bell Island was on his feet - and I have to give him credit, every now and then the Member for Conception Bay East & Bell Island gets to his feet, more so than other members on the opposite side. The only member on the opposite side, I think, who probably got up more often than the Member for Conception Bay East & Bell Island was the former Member for Eagle River. He was up all the time. On anything that went on in the House, he was up doing the performance for the then-premier, Mr. Clyde Wells.

The Member for Conception Bay East & Bell Island made a couple of points. One of them was that there is going to be $105 million put back into the economy of the Province with this tax harmonization. What he neglected to say was that we are going to be short in revenues by $242 million. In due course, that is what is coming down when this bill is fully implemented. At this time, I believe they have $348 million in the bank garnering interest and what have you.

I ask: What is that telling the people of the Province of Newfoundland and Labrador? Obviously, the government has been bought off: `Listen, you put this through for us now and we will give you X amount of money up front' - an attempt at a short-term fix, Mr. Speaker. In other words, short-term gain for long-term pain, as I think someone referred to it.

Now, the Minister of Finance has been on his feet talking about all the positive things that are happening in the Province. And I agree with him, there are a number of positive things happening in this Province. The transshipment site is great for Newfoundland and Labrador, and the Argentia smelter, and Voisey's Bay and some other smaller things ongoing in the Province, but will that turn the economy around? I sincerely hope so, Mr. Speaker. I sincerely hope that will turn the economy around because that is what this government is depending upon.

The Minister of Finance says that the shortfalls will be made up when the economy begins to boom and expand in the next two or three years, and hopefully, it will happen, but it is a lot to put your faith on. We heard it before, Mr. Speaker, with Come by Chance, with Churchill Falls, with the oil refinery in Holyrood, with Long Harbour and, of course, with Hibernia. Now, Hibernia, Mr. Speaker, was a great thing for Newfoundland and Labrador, great when it came along, great timing, because only for that, many more people would have been leaving this Province, a lot more than have left over the past few years; and that is an issue, in itself. The Minister of Finance is talking about the economy expanding, yet, our population is decreasing. So, if our population is decreasing, obviously, there are fewer people paying income tax, fewer people paying retail sales tax and fewer people paying property taxes. All over the Province, there are homes being abandoned and left. So, to say that this is going to be a good thing for the people of Newfoundland and Labrador, I believe is really, really, really stretching it, Mr. Speaker.

Now, the amount of taxes that the people of the Province pay all the time - I am going to get into that in a little while, Mr. Speaker. But this bill itself, I say in all sincerity, will hurt the lower-income people in the Province, people who are on the lower end of the scale, on the working income scale, not to mention the people on social assistance. But take, for example, the working poor, the people who are making $5, $6, $7 or $8 dollars an hour and less. These are the people who are going to be hit hard when they have to pay extra money for their heating bills, for their electricity, for their oil, for their school supplies, for their clothing, Mr. Speaker. When families now, with three or four children, have to come up with extra money in the Fall of the year, each year when their children are being sent off to school, to clothe them, when they have to buy their winter clothing, their heavy coats and their heavy pants, and so on, for the Winter. An extra 8 per cent is quite a burden on these individuals and it is not something that we should be taking lightly.

Now, when this bill was brought before the House, we knew it was at a time when it would be rushed. Closure would be brought in, Mr. Speaker, we knew that. There was no doubt about that, because it was a time of restraint on the number of pieces of legislation before this House. So we know that the government brought this in at a time when there would be very little debate on this bill, where the people in the Province really could not organize and get up against this bill like they are doing in other provinces. So that is something that the people of the Province should be well aware of, and know the tactics of this Administration.

Now, the bill, itself, is before this House and there are only three provinces in Canada that have agreed to go along with this tax harmonization. It is strange - the only common denominator with respect to this bill, in the other two provinces, is that they have a Liberal Administration.

We all know here, it has been said here before, of course by people on this side of the House, not so much by people on that side of the House, but we all know that in the last federal election the Prime Minister made promises that he could not keep. He knew when he was making them he could not keep them. As a matter of fact, he is in the media these past couple of days saying that he could not keep that promise. Even if made the promise he knew, being realistic, it was something he could not keep. Because $16 billion taken out of the economy, how could he promise such a thing? Yet, he promised it verbally, and he promised it in black-and-white.

Now, he has the Minister of Finance, Mr. Martin, on television, through the news media, trying to sweep it aside, saying that it really could not make sense to do that, and he apologized for it. But that is not going to wipe the slate clean. The Prime Minister, as I said, has been in the media twice, I believe, trying to get around it, saying it was something they really could not do, and maybe it was an honest mistake, and so on. An honest mistake? That is like the Minister of Education right here in this Province getting in the media the past few days saying: We never promised that we would redirect the savings in education. In actual fact, we all know what really went

on. We know the money was geared to go into the classroom. It was supposed to. We know that the people in the Province voted on that. They were told that. We were told that was going to happen.

The Prime Minister went around this country and said they would abolish the GST, Mr. Speaker. Abolish does not mean harmonize, it does not mean bring together with something. It means to get rid of, to scrap, the GST. The Deputy Prime Minister, Sheila Copps, publicly stated during the election, if they did not get rid of the GST, she would resign. What happened with the Deputy Prime Minister? She was refusing to resign until such time as she had that much pressure on her, and there was probably a poll done -

AN HON. MEMBER: Who's that?

MR. J. BYRNE: The Deputy Prime Minister. Then she went to the Prime Minister and said: If you call a quick by-election now, I will resign and we will try to make it look good, and the people will forgive us. Sure enough, she resigned - crocodile tears all over the place, and she got re-elected. It was supposed to wipe the plate clean, but it did not. It is only these past weeks, Mr. Speaker, maybe last week, I was watching television and I saw the Prime Minister on one of those town hall meetings. The Prime Minister was there taking questions. Well, Mr. Speaker, I was totally amazed, shocked. The Prime Minister was there sitting back taking questions, and it was put to him point-blank: `You promised to abolish the GST.' He replied: `I did not promise that - you should have read the Red Book.' Mr. Speaker, how arrogant can an individual be? That is the first sign that an administration is in trouble. Now we have five or six months, maybe, to a general election and they are backtracking head over tail, trying to work the GST around.

That is why they got three Liberal premiers to agree to a tax harmonization which is going to do nothing for the people in their provinces, but which is doing something for the Federal Government and the Prime Minister of the country, to try to make him look good. The Minister of Education is over there making some kinds of weird noises and statements.

MR. GRIMES: You should talk a bit faster. I know you only have so much to say.

MR. J. BYRNE: Well, I have so much to say. I can speak a lot faster, I say to the minister, but then, I can talk a lot slower, too. Now, which would you prefer, I ask the Minister of Education?

Mr. Speaker, the Prime Minister of this country made all kinds of promises. The people who ran for him in all the districts in this country made all kinds of promises with respect to the GST and they have not been fulfilled to this day.

Now, getting back to the HST, which is what we are talking about here. It is all a combination, it all goes hand in hand like a hand in a glove. The Premier of this Province has agreed to help get the Prime Minister, the Deputy Prime Minister, the Minister of Finance and his whole Administration out of trouble. On the backs of whom, Mr. Speaker? On the backs of the people of this Province - that is what the Premier is doing and it is not right. It is not fair to the people of the Province - and I do not mind saying so, Mr. Speaker, in this House - that the Premier will be one of the three agreeing to blend the GST and the provincial sales tax.

The Premier stands in his place, every opportunity he gets, and says: Well, you guys, the Opposition, why are you against reducing the taxes from 20 per cent down to 15 per cent? Now, Mr. Speaker, that is twisting, that is why the Premier is now getting the name ` Tornado' - `Tornado', the twister, Mr. Speaker. He is twisting, twisting, twisting; that is all they ever do on that side of the House. Ask a question of any of them, Mr. Speaker, and you get twisting, twisting, twisting and they try to throw it back to this side of the House, that we are at fault - when we do not agree with something that we are simply asking questions. But leave no doubt here, Mr. Speaker, on this one. The questions we are asking here are leading to the fact that we are against tax harmonization and Bill 45.

The Member for Cartwright - L'Anse au Clair stood in her place a few minutes ago, and she is opposing it. She is opposing this bill because she knows that it is going to hurt the people in her district, the people who put her

in this seat in the House of Assembly. And there are members on that side of the House who, if they sit back and think about it and look at it, will know that it is going to hurt, in the long term, the people of their districts.

Now, apparently, the Minister of Finance and Treasury Board has stated it is something they are looking at and maybe in three years time - that this is like a pilot project, and I stand to be corrected on that. But, if this is a pilot project, Mr. Speaker, it can be a very, very expensive pilot project for the people of this Province, let me tell you that. What happens when we have all the businesses in this Province putting untold dollars, untold fortunes into converting their equipment, and all of a sudden the system falls apart? And let me tell you, Mr. Speaker, more than likely it will, because it is going to become too costly.

Three or four years down the road when we feel the full impact of it, when the government has to start making up for monies they are planning on getting, but have lost, what are they going to do? Are they going to increase taxes? I hope not, because, I say, it will be to their detriment. Are they going to cut services more than they have cut them already? Is it possible that the government can cut services more than they have over the past five or six years? I cannot see it. I have been speaking to the people in my district and to people all over the Province. The services in this Province -

MR. EFFORD: What would you suggest we do?

AN HON. MEMBER: Get rid of the Cabinet.

MR. J. BYRNE: That should be a good move.

Mr. Speaker, I have to laugh at this, too - I really do. The Minister of Fisheries and Aquaculture is over there asking: What would you do? Whenever a question is asked of the Premier, the response is: What would you do? Whenever a question is asked of the Minister of Health: What would you do? I mean, all of them, Mr. Speaker, ask: What would you do? What would you do? They are the government, Mr. Speaker, and they want us to tell them what their job is! You figure it out, I say to the Minister of Fisheries and Aquaculture, that is what you are being paid for. We are not going to do your job for you. We will do it - when we are on that side of the House, we will do the job, and do it right. And it is coming soon, very soon. Keep on the trail you are on today, I say to the Minister of Fisheries and Aquaculture, and we will do it soon - very, very soon.

The Minister of Fisheries and Aquaculture is interrupting again. I tell the minister not to get too lippy, because I have some pictures we can show him that were recently taken -

MR. EFFORD: At least they are worth looking at.

MR. J. BYRNE: Oh, there is no doubt about that, they are worth looking at, I can guarantee you. They are worth looking at - yes, sir! Do you want to see them?

AN HON. MEMBER: Yes.

MR. J. BYRNE: Okay, I will show you. In due course, everything in due course, Mr. Speaker.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: Losing track? No, I like this going back and forth because it gives me a break, Mr. Speaker.

The Prime Minister of the country was in Newfoundland last night, trying to talk to the Liberal members opposite, and the people of the Province, trying to tell them how good the HST is. And I imagine, Mr. Speaker, that some of those people, some of those members, and some of the ministers, too, came away believing that this is a good thing for the Province. They actually do believe it - but I know there are some over there who do not. When they were trying to push through the privatization of Newfoundland Hydro, when the people got up against it and the opposition rose, there are some over there who backed off it.

The Government House Leader sitting here today - I say to him: You pulled a faster one than the previous Government House Leader, because you are a little bit smarter. Believe that, if that is a possibility.

MR. TULK: What?

MR. J. BYRNE: You are a little bit smarter than the previous Government House Leader.

MR. TULK: Why?

MR. J. BYRNE: Because of the way you are putting this bill through the House. If the previous Government House Leader had done the same thing with the Hydro bill, if he had sneaked it through, people would not know a thing about it. Now, we are getting this one pushed through and the people are being crucified.

MR. TULK: If you do not want Ed Roberts to have a stroke, you call (inaudible) a copy of Hansard for us and he will have (inaudible).

MR. J. BYRNE: Okay.

So, what are they doing now, Mr. Speaker? They are taking this bill and sneaking it through, as I said, a couple of days before Christmas.

MR. EFFORD: You topped the polls, did you not, `Jack'?

MR. J. BYRNE: Pardon?

MR. EFFORD: You topped the polls over there for the best Opposition -

MR. J. BYRNE: On this side of the House, we are all equal, we are all as one, I say to the Minister of Fisheries and Aquaculture.

AN HON. MEMBER: Which one?

MR. J. BYRNE: Which one?

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: We do not have what?

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: I am not talking about money.

MR. SPEAKER: Order, please!

The hon. member's time is up.

MR. J. BYRNE: By leave?

SOME HON. MEMBERS: No leave.

MR. J. BYRNE: Just in conclusion.

SOME HON. MEMBERS: Oh, oh!

MR. SPEAKER: Order, please!

The hon. the Member for St. John's South.

MR. OSBORNE: Thank you, Mr. Speaker.

SOME HON. MEMBERS: Hear, hear!

MR. TULK: I apologize (inaudible) Tory, Mr. Speaker. That is the only way I can get out of it.

MR. OSBORNE: Mr. Speaker, the Government House Leader is talking about apologies. I say to the Government House Leader, the Prime Minister, his federal cousin, was watching TV last Friday and saw me apologize, and said, `Now, there's a smart man.' And he would not apologize, himself, on Friday for the GST.

AN HON. MEMBER: (Inaudible) to do it.

MR. OSBORNE: That is right. He would not apologize on Saturday. He would not apologize on Sunday. Mr. Speaker, he waited until Monday when he could be in St. John's, closer to me, to apologize for the GST. Look at the precedent that I set right here. The Prime Minister of Canada took my lead and apologized. It is about time the Prime Minister realized that he made a mistake, and apologized. At least I did it right away.

MR. EFFORD: Did you tell the Prime Minister you are the last man to let him down?

MR. SPEAKER: Order, please!

MR. OSBORNE: You are the first one I would let down.

SOME HON. MEMBERS: Hear, hear!

MR. OSBORNE: Thank you, Mr. Speaker, for calming down the jungle on the other side, the rabbling panthers.

Mr. Speaker, I am up to talk about a very important issue here, the GST and the HST, and the Minister of Fisheries and Aquaculture over there - it is almost your anniversary, is it not? It was almost a year ago today that you called a press conference yourself to apologize for not having the guts to run against Tobin.

SOME HON. MEMBERS: Hear, hear!

AN HON. MEMBER: That was a rough day for him.

MR. OSBORNE: That was a rough day for him.

Mr. Speaker, we are here to talk about an important issue, an issue in which this government is going to subject the people of our Province, the working poor and the welfare class, to tougher taxes than what they are presently endured to pay.

Mr. Speaker, under the HST -

SOME HON. MEMBERS: Oh, oh!

MR. SPEAKER: Order, please!

MR. EFFORD: You are in conflict, buddy!

MR. J. BYRNE: You are not in your seat.

MR. OSBORNE: Mr. Speaker, I am not the only one here who is in conflict. Not only is the Minister of Fisheries and Aquaculture generally out of order, he is truly out of order now because he is not even in his seat.

AN HON. MEMBER: Ask for protection from the Speaker. He will drive him back into his seat. You ask the Speaker, he will take care of him.

MR. OSBORNE: He is being driven out of the House now.

Mr. Speaker, the HST -

AN HON. MEMBER: (Inaudible).

MR. OSBORNE: I drove him back further than he ever was before. One of these days he will be a backbencher, for sure. He belongs back there, `the minister of wan-a-bees'.

Mr. Speaker, I was just handed something out of the Globe and Mail. It says, `Rock On'. Did you see this? Rock On. It said: `Newfoundlanders will travel to the ends of the earth for a good party, so why not Ottawa?' Did you read this?

AN HON. MEMBER: (Inaudible).

MR. OSBORNE: `And why not the Liberal caucus Christmas bash, the site where, this week, two members of the Newfoundland House of Assembly, Chuck Furey, Minister of Industry, Trade and Technology, and Jim Walsh, a former minister in Clyde Wells' Cabinet, had tongues waging. The buzz at the bar was that the pair might be trying' -

MR. SPEAKER: Order, please!

I remind the hon. member that we are now debating the main motion on Bill 45.

MR. OSBORNE: I am getting to an important issue.

MR. SPEAKER: We are debating the principle of the bill and I ask him to make his comments relevant.

MR. OSBORNE: Thank you, Mr. Speaker.

I was getting to the fact that if the hon. ministers went to Ottawa, they would further impose items on Newfoundlanders such as the HST and subject us to hardship.

Mr. Speaker, there are a number of issues in the tax harmonization that we would like to talk about. We, on this side of the House, I think all Opposition members, including the Independent member and the NDP member, realize that this HST deal is not a good deal for Newfoundland. I believe that all Opposition members feel strongly enough about this HST deal that we are all going to vote against this legislation.

Mr. Speaker, it does not surprise me that all government members will vote in favour of this. I feel that they are almost Tobin automatons, they will do whatever they are told to do by the Premier. The three Liberal premiers, Mr. Speaker, gave a pre-election promise to Mr. Chrétien who is still nervous about the GST and is looking for a way to mask it. He is looking for a way to cover up the GST so that he can come back in the next election and say that he delivered on his promise. But we all know that this is not delivering on his promise, this is just masking the GST.

The Federal Government are still going to get their 7 per cent. They are still getting their GST, Mr. Speaker, by putting this HST through, and this HST will cause the poor to spend a greater percentage of their income on essentials that will cease to be tax exempt. It will cause home heating fuels and electricity to increase in price because of the extra tax burden. By doing this, the working poor and people who are subject to having to resort to social assistance will have to pay more out of pocket. It will cost them more in taxes to heat their homes, for gasoline, for children's clothing, for haircuts and so on.

We have been told over the past number of days that the HST deal is going to put $105 million back into the economy. Mr. Speaker, I find this hard to accept because of the fact that while it is taking $105 million out of our tax revenue on the RST, the government are going to impose a levy on insurances which is going to take away from that $105 million that is going back into the economy. They are going to impose levies on the sale of used cars, the taxes on used cars, which will take money out of that $105 million. So it is not actually $105 million into the economy as we are told, as we are led to believe by government members.

The working class poor and the social assistance recipients in our Province are already going through tough enough times. We do not have to impose the HST on these people and subject them to higher taxes on a number of essential items.

Mr. Speaker, if we truly want our economy to rebound, we cannot impose an HST which is going to cause our housing industry to slow down. We cannot impose an HST which is going to drive the working class poor and the recipients of social assistance out of the Province and increase the rate of out-migration, because these people just cannot afford to stay, and provide a means for themselves to live in Newfoundland and Labrador. We are taxing people out of the Province.

It is quite clear that most people in Atlantic Canada do not want the HST. Nova Scotians do not want it. As a matter of fact, in Nova Scotia and New Brunswick, the HST is referred to as the BS Tax. I would say that that is probably a very accurate statement, the BS Tax. Here it has already been dubbed as the HST, the `horrible sales tax'. When this tax is actually imposed and people are subject to higher taxes on basic essentials, they are going to realize that this tax is not a good tax for Newfoundland and Labrador. As the Member for Cartwright - L'Anse au Clair said, it is not a good tax for her constituents. I am saying it is not a good tax for my constituents. My hon. colleagues on this side of the House have all said it is not a good tax for their constituents.

I would say, Mr. Speaker, it is not a good tax for the constituents of the Province of Newfoundland and Labrador, with the exception of the upper class, who will be the only people really to truly benefit from the HST. The upper class are the people who can afford to buy big ticket items. They are the people who are purchasing new vehicles every couple of years, purchasing big ticket items like skiddoos and so on. So, the HST is for a certain class, and it is going to further draw apart the two classes of people who live in this Province, the wealthy and the not wealthy.

Mr. Speaker, this HST is not a good deal. It places less tax on fur coats and more on children's clothing. Who is really benefitting from this tax? It is not the majority of Newfoundlanders and Labradorians. The Retail Council of Canada says that the cost of conversion will exceed the savings from harmonization. Most businesses cannot absorb the costs without increasing their prices or laying off employees, so how will this improve our economy? How will this spur our economy? You are looking at a potential of further out-migration because of the tax, you are looking at a potential of further lay-offs because businesses have to absorb the cost of implementing the tax, you are looking at a slowdown in the housing industry. It does not add up. How is this going to benefit our economy? How is this going to improve our economy?

The $105 million that we are promised is being put back into the economy is actually being taken away in dribs and drabs, such as the levy on insurances, the taxes on used cars, and I am sure the government will find many other ways to impose levies and further taxes on the people of Newfoundland and Labrador and take that $105 million back in taxes.

Mr. Speaker, the HST will drive up the price of electricity when thousands of consumers have just finished telling the government and the Public Utilities Board and Newfoundland Power that they do not want an increase in utility rates.

The tax harmonization was not an election issue, but it is designed to mask an election promise made by the Prime Minister to scrap the GST. The St. John's Board of Trade says that a hidden tax will make our prices appear too high to tourists who come to spend their tourism dollars to visit our Province, to see our unique way of life here in Newfoundland and Labrador. Most tourists will go home, I would say, having bought fewer items than they initially intended to buy, because with this hidden tax, the tax is marked into the price. The prices of

products in Bangor, Maine, the prices in New Hampshire and the prices in Houston are going to appear to be only 50 per cent of what they are here in Newfoundland and Labrador. The sticker price shock will actually cause a lot of tourists not to buy as much as they intended to buy when they first came to Newfoundland and Labrador.

Mr. Speaker, this tax is not a good tax for Newfoundland and Labrador. This tax will not create great benefit as was promised by the many members on the government side of the House. We will lose our autonomy to set tax rates under this new deal. Ottawa can raise taxes unilaterally. We do not have that option. Any province can veto a tax decrease. We alone do not have the option of decreasing taxes. If our revenue needs increase, we will not be able to get the extra tax revenue from the sales tax, and if our revenue needs decrease, we will not be able to offer a tax break. We will lose our autonomy under the HST.

The finance minister tells of glowing stories about the economy growing to make up for the lost revenue under the HST but the Government Social Advisory Council Committee document says that the next few years are going to bring an economic downturn in Newfoundland and Labrador because of fewer workers, because of fewer people paying taxes, because of more seniors with needs, because of out-migration, a smaller population and because of declining transfers. Both cannot be true. I ask, who is telling the truth here? Both cannot be true. The finance minister is painting a rosy picture to sell this tax harmonization to the people of Newfoundland and Labrador. This is a horrible sales tax. The government is breaking its promise, as an example, to put money saved from education reform back into education and part of the reason, Mr. Speaker, one would suggest, is because the HST is going to leave the Province with a tax revenue crisis.

Mr. Speaker, not only has the Prime Minister of Canada broken the promise to scrap the GST but the education minister and the Government of Newfoundland and Labrador have broken their promise to redirect education savings because of the reform back into education.

Mr. Speaker, to make up for lost revenue, the government is going to have to introduce new taxes on insurance rates and the private sale of vehicles with higher rates than people are now paying. There is no benefit in this tax, Mr. Speaker. This is a rosy painted picture for the people of Newfoundland and Labrador. It is not an accurate picture, it is not a true picture. This tax is a BS tax.

Mr. Speaker, the cost of the extra jobs that is going to be borne by this Province because of the implementation of the tax is a further reason for us not to accept the HST. There are going to be jobs lost. The people who are now working with RST, some of those jobs are going to be lost and Newfoundland is not one of the provinces that are going to pick up jobs because of the new HST deal. Does it not seem ironic? We are signing on to the deal, but the jobs created because of the HST deal will not be coming to Newfoundland. Mr. Speaker, this picture stinks. This tax stinks. This is truly the BS Tax.

We will lose tax processing jobs because of tax harmonization. There is going to be out-migration because of tax harmonization. There is no contingency plan put in place in case the economic and revenue growth that is painted by the members of the government does not occur to the levels projected by the Minister of Finance and Treasury Board. Mr. Speaker, blind faith does not open hospital beds or better our education.

This tax, Mr. Speaker, is not acceptable to most people in this Province. If the government feel that they can introduce this tax, that they can bring it in and put it in place and that most people are going to forget about it, if they think that most people are going to forget that this tax is taking extra money out of their pockets, the working poor and the people on social assistance - if people do not realize right now that this tax is going to cost them more money, they will realize it once it is implemented.

The Chrétien Government in Ottawa had three years to try to get people to forget about their promise to scrap the GST and it did not work. People remember the GST is not gone. The people of this Province will not forget that this tax is going to cost them more money. The Provincial Government may think that by bringing this tax in now they have plenty of time for the people in the Province to forget about the tax, they have plenty of time for the people of the Province to forget that the tax was put in place, by the next election. But as the people of Canada remember, the GST is not scrapped. The people of our Province will remember that this HST is a

horrible sales tax. The people of our Province do not want this tax, and come the next election, they are going to remember that this tax is not acceptable, and it will come back to haunt the Liberal Government of today, Mr. Speaker.

MR. SPEAKER (Barrett): Order, please!

The hon. member's time is up.

MR. OSBORNE: By leave, Mr. Speaker.

MR. SPEAKER: Does the hon. member have leave?

SOME HON. MEMBERS: No leave!

MR. SPEAKER: The hon. member does not have leave.

MR. OSBORNE: A minute to clue up, Mr. Speaker.

AN HON. MEMBER: No, Mr. Speaker.

MR. SPEAKER: The hon. member does not have leave.

MR. OSBORNE: Thank you, Mr. Speaker.

MR. SPEAKER: If the hon. the Minister speaks now he closes the debate.

The hon. the Government House Leader.

MR. TULK: Mr. Speaker, it gives me great pleasure on behalf of the Minister of Finance and Treasury Board, who is away doing business On Her Majesty's Service, and doing his master's duty, to move second reading of Bill No. 45.

MR. SPEAKER: Is it the pleasure of the House that the said bill be now read a second time?

All those in favour, say `Aye'.

SOME HON. MEMBERS: Aye.

MR. SPEAKER: Those against, `Nay'.

SOME HON. MEMBERS: Nay.

MR. SPEAKER: Carried.

AN HON. MEMBER: Division.

MR. SPEAKER: Division.

Division

MR. SPEAKER: Is the House ready for the question?

All those in favour of the motion, please stand.

CLERK: The hon. the Minister of Forest Resources and Agrifoods; the hon. the Minister of Industry, Trade and Technology; the hon. the Minister of Justice and Attorney General; the hon. the Minister of Fisheries and Aquaculture; the hon. the Minister of Municipal and Provincial Affairs; Mr. Walsh; the hon. the Minister of

Mines and Energy; the hon. the Minister of Education; Mr. Lush; Mr. Penney; the hon. the Minister of Works, Services and Transportation; the hon. the Minister of Development and Rural Renewal; the hon. the Minister of Tourism, Culture and Recreation; the hon. the Minister of Government Services and Lands; Mr. Oldford; Mr. Canning; Mr. Smith; Mr. Ramsay; Ms Hodder; Mr. Woodford; Mr. Mercer; Mr. Reid; Ms Thistle; Mr. Sparrow; Mr. Wiseman.

MR. SPEAKER: All those against, please stand.

CLERK: The hon. the Leader of the Opposition; Mr. Hodder; Mr. Shelley; Mr. Edward Byrne; Mr. Fitzgerald; Mr. Jack Byrne; Mr. Osborne; Mr. Ottenheimer; Mr. French; Ms Jones.

Mr. Speaker, twenty-five `ayes' and ten `nays'.

MR. SPEAKER: I declare the motion carried.

On motion, a bill, "An Act To Implement The Comprehensive Integrated Tax Coordination Agreement Between The Government Of Canada And The Government Of Newfoundland And Labrador," read a second time, ordered referred to a Committee of the Whole House on tomorrow. (Bill No. 45)

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker, I understand we are going to break for supper at 6:00 p.m. but I would like, before we do that, to call second reading of a bill, "An Act Respecting Pension Benefits". (Bill No. 46)

Motion, second reading of a bill, "An Act Respecting Pension Benefits". (Bill No. 46)

MR. SPEAKER: The hon. the Minister of Government Services and Lands.

MR. McLEAN: Thank you, Mr. Speaker.

SOME HON. MEMBERS: Hear, hear!

MR. McLEAN: I rise to introduce second reading to a new Act called the Pensions Benefits Act. This Act was originally initiated by the Department of Finance back through the reform process and, Mr. Speaker, the new Act has many positive aspects. It brings our provincial legislation in line with that of other Canadian jurisdictions and provides for the affordability of pensions within the Province and within Canada.

Mr. Speaker, I will just read off a few of the notes from the new Act so that if there is any further discussion and questions we could do it in Committee or third reading - Committee, I guess.

It provides fair and consistent treatment to employees and enhances benefits for members of pension plans. It promotes increased security of pension benefits and assists Newfoundlanders and Labradorians in preparation for retirement.

This Act provides, among other benefits, protection of spouses, including recognition of common-law spouses upon death of a member, and a framework for a division of benefits upon marriage breakdown.

This new bill enables employees to be members of pension plans earlier than previously permitted. It now enables part-time employees to be members of pension plans, as well.

Mr. Speaker, I am just highlighting a few of the items that are brought forward in this new pensions Act. It enables employees to receive benefits under a pension plan after two years of membership.

AN HON. MEMBER: How tall are you, `Ernie'?

SOME HON. MEMBERS: Hear, hear!

AN HON. MEMBER: What kind of shoes do you wear?

MR. McLEAN: I say to the member opposite, I am tall enough and I wear a man-sized shoe.

SOME HON. MEMBERS: Hear, hear!

MR. McLEAN: Mr. Speaker, this new bill also increases provisions to enable terminating plan members to transfer pension benefits upon termination of employment. These are new sections of this Act that were not in the previous one.

This new bill increases spousal protection upon death of a member before and after retirement. It introduces an earlier retirement option at age fifty-five. It recognizes common-law spouses for survivor benefits. This new bill also provides for spouses, following divorce or legal separation, to sever ties with the member and to receive their own pension covering the marriage period.

AN HON. MEMBER: Uh-oh!

SOME HON. MEMBERS: Hear, hear!

MR. McLEAN: He is getting married on New Year's Day, hey? You should have got married last week.

Mr. Speaker, this bill also ensures that benefits be equally cost-shared by employees and employers. It is called a 50 per cent rule, which will be part of the new benefits of this Act.

The new Pension Benefits Act addresses various pension issues in accordance with a national consensus on pension reform, and will serve to encourage employee participation in pension plans in the Province. This new Act brings it in line, certainly, with the other jurisdictions in Canada.

Pension plans are a vital part of the retirement income system for the Province and for Canada. The intent of the Pension Benefits Act is to provide minimum standards for all employer-sponsored pension plans in the Province, and to ensure monies that are allocated by employers and employees for retirement purposes are remitted on time, invested wisely, and used to provide retirement income.

Canada has three pillars in its retirement income system: Old age security, Canada Pension Plan, and employer-sponsored pension plans and personal retirement savings plans. The change in this portion of the population aged sixty-five and over will have a dramatic impact on the ability of government to fund the social security programs now in place. Employer-sponsored pension plans and personal retirement savings plans will continue to play a major role in assisting working Newfoundlanders and Labradorians and their families in preparing for retirement.

Mr. Speaker, the Pension Benefits Act regulates all employer-sponsored pension plans and ensures that monies contributed by both employers and employees are utilized for the purpose of providing retirement incomes.

While the Pension Benefits Act governs approximately 90,000 persons and 240 registered pension plans, the public sector plans, including MHAs, uniformed services, teacher and public service pension plans, will be exempt from the major provisions of the Act because of the funded liability.

Mr. Speaker, I am pleased to be able to introduce to second reading this legislation, which will provide increased pension benefits for workers in the Province.

Thank you, Mr. Speaker.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Speaker.

Mr. Speaker, I am pleased to stand in my place today and say a few words with respect to this Bill 46.

MR. EFFORD: That is a note (inaudible).

MR. J. BYRNE: I just made a few notes as the minister was speaking, I say to the Minister of Fisheries and Aquaculture.

MR. EFFORD: The `Jack' attack.

MR. J. BYRNE: You should always pray that you never have a `Jack' attack, my son.

Mr. Speaker, the minister stood in his place and introduced this bill, and he talked about a lot of positive things coming from this bill, a lot of positive steps and amendments and so on.

MR. EFFORD: (Inaudible).

MR. J. BYRNE: There is no point in your talking to me across the House when I am talking because I cannot hear you, I say to the Minister of Fisheries and Aquaculture, unless you speak up.

Mr. Speaker, he talked about many positive aspects of this proposed legislation. He says now that it is going to be in line with other Canadian jurisdictions, and that very well, in itself, may be a good thing. But it appears to me, this Administration seems to think anything that is good on the mainland, or anything that is operating on the mainland of Canada, is automatically a good thing for the people of Newfoundland and Labrador. In actual fact, in most instances it is a matter of fact that you have to wait and see whether, indeed, it is a good thing for the people of Newfoundland and Labrador, when they are putting in legislation that is comparable to other provinces in the country.

The minister talked about the portability of pensions. Obviously, that can be a good thing for people who are in the pension plans, that they can transfer -

MR. EFFORD: (Inaudible).

MR. J. BYRNE: I can adjourn the debate at any time at all, I say to the Minister of Fisheries and Aquaculture, if he wants.

The portability of pensions can certainly be a good item. It can be a positive thing for the people who are involved in the various pensions that this bill covers and applies to.

The explanatory note of this bill - it is a very thick bill; it is something like the Minister of Fisheries and Aquaculture. This bill would revise the law respecting pension benefits. It is a very short explanation but a very thick, thick bill.

The minister did not go into a lot of detail with respect to the - he said it enhances the benefits.

MR. EFFORD: (Inaudible) clause-by-clause.

MR. J. BYRNE: I say to the Minister of Fisheries and Aquaculture, we will be getting into it clause-by-clause. It may come sooner than you think, and you may be sorry you said that. Every member on this side of the House will probably be speaking to it clause-by-clause. I do not think that the members on the other side of the House will speak to it clause-by-clause, because there are quite a few clauses in this bill. Looking at it now, there are eighty-one clauses, Mr. Speaker. Can you imagine nine people - well nine, for sure, on this side of the House - getting up and speaking? Nine times eighty-one, Mr. Speaker, that would be quite a few speeches, I would say.

SOME HON. MEMBERS: Hear, hear!

MR. J. BYRNE: Now, they may have a calculator on that side of the House who can sit down and figure it out - well, sobeit.

MR. CANNING: You are turning red.

MR. J. BYRNE: Red? Well, it will be the first time I turned red here. The Member for Labrador West would not turn me red, I tell you that, Mr. Speaker.

You saw a prime example yesterday of what I thought of the colour red, especially when it is in print. I wiped off the desk, just like that, the red Liberal book. Mr. Speaker, the Minister of Finance -

MR. H. HODDER: (Inaudible).

MR. J. BYRNE: I do not know where it went. It may have crawled away somewhere, I say to the Member for Waterford Valley.

The minister was quite sincere in introducing this bill, no doubt about it, and he believes that everything is in it, no doubt in my mind. I am wondering, though, if the minister has actually sat down and read this clause-by-clause. I do not know whether he did or not, Mr. Speaker.

Now, the Minister of Fisheries -

MR. McLEAN: (Inaudible).

MR. J. BYRNE: Three times? Well, now, I have to put that on record, Mr. Speaker. The Minister of Government Services and Lands just said he read this bill three times. I have to compliment him. Now, if the Government House Leader is in agreement, I will adjourn debate and come back later and finish off my few words at 7:00 p.m.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: I am not going to do it yet. Now, the Minister of Industry, Trade and Technology - you can thank him. He is the one who had to butt in then and say something.

MR. TULK: `Jack', are you going to adjourn the debate or what?

MR. J. BYRNE: Not yet, no.

MR. TULK: Well, you said you would.

MR. J. BYRNE: I said, if the minister was in agreement I would.

MR. TULK: Well, I am ready.

MR. J. BYRNE: Okay, Mr. Speaker, seeing it is 5:57, I will adjourn debate. I will pick up on the Minister of Industry, Trade and Technology later.

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker, we have agreement that we will have supper and be back at 7:00 p.m.

MR. SPEAKER: It is the agreement that we recess until 7:00 p.m.

Recess

MR. SPEAKER (Penney): Order, please!

The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Speaker.

I will just continue on with a few words, as I adjourned debate on Bill 46, "An Act Respecting Pension Benefits". As I said before, when the minister was on his feet introducing the bill he mentioned a number of points. He did not go into a lot of detail with respect to the bill, itself, but going through it, there are some good things. The minister referred to a few of them. He did not say a lot about them, but he did refer to them.

He talked about clauses in the bill with respect to preparation for retirement. Now, "An Act Respecting Pension Benefits" would be dealing with people's retirement, there is no doubt there. The one factor in the bill, not to get into clause-by-clause at this point - it is only second reading; but there is a clause there that deals with the definition of spouses and common-law spouses. What will happen in due course - there is nothing in the existing legislation, I believe, to actually define spouses or common-law spouses - in actual fact, the pensions now will be, I suppose, if a couple are living together for a certain period of time - I think it may be three years - they could be entitled to a percentage of a person's pension. That is probably a positive thing. I would imagine if a couple wants to spend three years or five years of their time together, they go through a lot of different events in their lives over that period of time and certainly, they should be entitled to that as if they were married. A married couple, of course, if they decide to split up, divorce, or what have you, this bill also addresses the situation with respect to divorce.

The bill also deals with the situation where, if a person is involved in a pension for over two years, I think the minister said, they would be entitled to refunds on the pensions if they decide to end their employment, I would imagine.

Back to divorce, the minister made a few comments on that. The pension covers marriage - well, I cannot read my own writing now, but -

AN HON. MEMBER: But you are making a lot of sense.

MR. J. BYRNE: I am making a lot of sense.

Mr. Speaker, this bill has a lot of potential. The point that the minister made with respect to the situation within Canada itself now, and how the future generations who are going to be requiring their pensions - for example, my parents were entitled to the Canada Pension, the old age pension, and the -

AN HON. MEMBER: Your parents are entitled to Canada Pension?

MR. J. BYRNE: The old age pension, and my father with respect to his own employment pension when he worked with the Federal Government. The way things are going in this day and age, with the way the economy is, and with the `baby boomers', as they are referred to, what is going to happen in the future with pensions in this country? I do not know if there are too many people who can answer that question at this point in time, but it certainly seems that people will have to basically fend for themselves. There is some doubt, too, as to whether the pensions - the Federal Government pensions, the old age pension, or what have you - will be sufficient in the future to cover all of the people who will be making claims on pensions, in particular, I suppose, the `baby boomers'. The `baby boomers' were, and are now at the present stage, Mr. Speaker, paying into pensions - they are paying into all the Federal Government pensions if they are employed, of course. And they will take advantage, hopefully, of drawing on those pensions.

The problem is, now, with the population decrease, certainly the population of Canada. In certain provinces, of course, the population is increasing, but we wonder at this time if, in the future, there will be enough people in the workforce to actually put sufficient money into it to cover the drastic drain on pension schemes in the future.

The minister mentioned about people having to put money aside for their own pensions in registered retirement savings plans. I imagine that is what he was referring to. Of course, there are a lot of private industry pensions

out there also, but it seems to be getting harder and harder all the time now to contribute to registered retirement savings plans. In order to survive these hard times, people seem to be drawing more and more upon their registered retirement savings plans.

The experts will tell you that is not a good thing to do, because, of course, when you withdraw from your registered retirement savings plans, you pay a heavy tax at that time. Also, it adds to your income for the year - if you are lucky enough to have registered retirement savings plans. It adds it to your income, so in actual fact, you may wind up paying higher income tax at the end of the year. You may be having to put a lot more money into the system than you took out to get over the hump. That is the sad part about registered retirement savings plans and the present state of the economy.

The minister spoke on a number of points. He talked about the transfer of pensions on the termination of employment. Now, I think that is a good move, that once a person is employed and wants to transfer his contributions to his pension plan, then he can transfer it. Of course, he would be able to carry the pension money with him. In actual fact, when I worked with the government back in 1983, after seven years - I left in 1983 - I transferred my pension, what little money I had coming to me, into a registered retirement savings plan. That was a good move for me at the time. Obviously, that type of thing is a positive step.

The other point that the minister mentioned was the 50 per cent rule. If I understand him correctly and read this right, the employer now will be required to contribute 50 per cent on any given pension plan. I am not quite familiar with that, but I would take it to say that in the old Act, from what I know, there was no actual definition of what an employer was required to contribute. This now will require employers to contribute 50 per cent.

MR. FUREY: (Inaudible).

MR. J. BYRNE: I would say what? I ask the Minister of industry, Trade and Technology. What did he say?

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: I do not know what he said either - he is usually not that intelligent anyway. Mr. Speaker, I will continue on. The Minister of Industry, Trade and Technology is trying to say a few smart words over there. He very seldom gets on his feet to speak to bills. Only when he gets into Question Period, if he is asked questions, he tries to answer them; but he very seldom answers - he twists it.

AN HON. MEMBER: (Inaudible) only when he is told.

MR. J. BYRNE: Only when he is told. Do you have that much control? I ask the Government House Leader. Do you have much control over the Minister of -

MR. OSBORNE: `Jack', I have to correct you on that. He is one of the better ones for giving answers - most of them over there will not.

MR. J. BYRNE: You think now that is what I wanted to say? The Minister of Industry, Trade and Technology, if he gives an answer well, let us just say they are long-winded answers, for sure. He is very long-winded. He gets up to give an answer and you would not know but he is giving a speech. But at least he is on his feet every now and then speaking to whatever concerns that are presented.

MR. FUREY: (Inaudible) my member.

MR. J. BYRNE: Your member. I listened to what the member had to say. I do not necessarily agree with it, but I listened to what he had to say.

MR. FUREY: You disagree with your colleague, then?

MR. J. BYRNE: We disagree all the time on points of issue. It is a free, open party. We have our own opinions.

MR. FUREY: (Inaudible).

MR. J. BYRNE: What can I say? Well, I would not want you to be going up in that poll too often, I say to the Minister of industry, Trade and Technology, it puts too much pressure on you to stay there.

MR. TULK: Where is that brown envelope we carried over to you?

MR. J. BYRNE: The what?

MR. TULK: That brown envelope. `Roger' pulled that off on me some fast.

MR. J. BYRNE: Who?

MR. TULK: `Grimes'.

MR. J. BYRNE: I have no clue as to what you are talking about. The Government House Leader is trying to accuse his colleague over there now of doing something that I am not quite sure is very professional. But I know there was something that landed on my desk in a white envelope. I opened it up. God knows what was in it, I say to the Government House Leader. I do not know of what he is trying to accuse the Minister of Education, but he is accusing him of something.

Mr. Speaker, back to the 50 per cent rule - before, we got off the topic.

AN HON. MEMBER: Tickets to the Chrétien dinner last night, boy (inaudible).

MR. J. BYRNE: Tickets to the -

MR. FUREY: Do you have those notes read out yet, or what?

MR. J. BYRNE: Oh yes, Mr. Chrétien - the Prime Minister's dinner last night. I just saw him on the news and he said: `Well, I apologize for thinking. I made a mistake about thinking. I made a mistake if I was thinking.' Now, that is the statement the Prime Minister made. So he made a mistake if he were thinking. Thinking - now there you go.

MR. CANNING: (Inaudible).

MR. TULK: You are likely to go up on an air bus there now.

MR. J. BYRNE: The only time, I say to the Member for Labrador West, that I am not thinking, is when I am asleep.

MR. TULK: We will ship you out on an air bus come Christmas.

MR. J. BYRNE: On a what?

MR. TULK: On an air bus.

MR. J. BYRNE: I say to the Government House Leader, he has a lot of bills before this House that he is trying to get through, Mr. Speaker, trying to rush through this House, and he is over there now, trying to prolong my debate, when, here I was, coming in to sit down and not to say too much.

MR. SPEAKER: Order, please! Order, please!

I ask the hon. member to restrict himself to the contents of the bill.

MR. J. BYRNE: Thank you, Mr. Speaker.

I shall restrict myself to the bill.

Now, just to reiterate what I had said earlier, Mr. Speaker, on the minister's comments with respect to this bill, I would imagine what the minister had to say -

MR. SPEAKER: I also ask all hon. members to stop interrupting.

MR. J. BYRNE: Thank you, Mr. Speaker, a very good ruling. Thank you very much.

To reiterate what the minister said with respect to this bill. Of course, what he said would have to be relevant, I would think, Mr. Speaker, and as I said earlier, he talked about the bill being in line with other jurisdictions within Canada. And maybe so, maybe it will be in line with other jurisdictions within Canada. But that does not necessarily mean it is a good thing.

Now, I am starting to speak a little bit slower, because the Minister of Education just came in and he likes me to speak slow so that he can understand what I am saying, Mr. Speaker. So the minister -

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: Pardon?

AN HON. MEMBER: Seventy-eight on a thirty-three speed.

MR. J. BYRNE: There you go.

MR. TULK: Bring that (inaudible) relevant.

MR. J. BYRNE: I have to stick to relevance on this, Mr. Speaker.

In relevance, with respect to this bill, what the Government House Leader is saying is, if I do a good job on the bill, by the results of a certain poll that was done not long ago, I will rise even higher in the polls. That is what he is saying, Mr. Speaker. Therefore, the relevancy is there and I shall try to do my best.

MR. TULK: Could I get a copy of that speech?

MR. J. BYRNE: You can have 1,000 copies, you can have 10,000 copies of this speech, you can have 50,000 copies of this speech, you can have 100,000 copies of this speech, you can have 200,000 copies of this speech, you can have what you want. All you have to do is go outside to Hansard and ask them for X number of copies. Mr. Speaker, the number of copies that the Government House Leader wants of this speech is completely and totally up to himself. He can request it from Hansard and I am sure they will be only too glad to run them off for him; they would even deliver them to his office.

MR. TULK: (Inaudible) a white Christmas.

MR. J. BYRNE: Mr. Speaker, a white Christmas, everyone wants a white Christmas. They were trying to find out if there was a Santa Claus and the post office delivered thousands and thousands of letters to the judge. Well, the Government House Leader can have thousands and thousands and thousands of copies of this speech. And I am doing a good job, Mr. Speaker.

Now, I am going to skip over a few notes that I have here, Mr. Speaker, I do not know how much time I have left.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: Notes, look, look, I say just look. My son, we are only getting warmed up here now.

Mr. Speaker, this bill, "An Act Respecting Pension Benefits", is subject to the approval of the minister. Now, the superintendent is subject to the approval of the minister - or anything that he does. In other bills that went through this House, Mr. Speaker, since we came here, the Expropriation bill, the Thorburn Road Planning Act, a number of other bills, gives him a lot more authority, more authority all the time to the minister of that department. Now, Mr. Speaker, this bill is doing the exact same thing again.

It is getting to the point that a superintendent who is going to be, of course, under the jurisdiction of the minister, cannot do too much without the approval of the minister. Section 6.(2) "The superintendent, subject to the approval of the minister, has the control and supervision of the administration of this Act, and has the following powers and duties: (a) to examine all pension plans and all amendments to those plans that are filed for registration under this Act;" The superintendent has the power to do that, and rightly so, but, it is subject to what the minister says, and if the minister tells him to do one thing or not to do another, well, then, accordingly, he has to dance to the minister's tune.

MR. TULK: Say that again - I did not hear.

MR. J. BYRNE: Say it again? I will say it again. There are some people, Mr. Speaker, who did not hear what I had to say. There are a few points which have to be read out, that the people of the Province should know: what authority the superintendent has, under this bill, Mr. Speaker, and I will get into that in a few minutes.

One of the superintendent's duties is (b) "to register and issue certificates of registration in respect of all pension plans that are filed for registration under this Act and comply with the standards for registration;" Now, Mr. Speaker, that is just what you would expect a superintendent of registration for this Act to be responsible for; that is not a problem. I think most people would agree, that is a regular duty, a common duty of an individual in that position.

Also, he or she has the right (c) "to refuse to register a pension plan that does not comply with this Act;" Now, Mr. Speaker, he/she has the right to refuse a plan that does not comply with this Act, but where are the regulations? What regulations, Mr. Speaker, would be in place to say if the pension plan complies or does not comply with this Act? Will the minister have the authority to say: yes, that it does comply with the Act or it does not comply with the conditions of the Act? Will the minister have the sole authority to say yes, to X company or to whomever, that it complies, or no, it does not comply with the Act? So, Mr. Speaker, will the superintendent have the authority? Will there be regulations in place for the superintendent to make that decision or will the superintendent's decision be overridden by the minister to say, no, it does not comply or, yes, it does comply. So maybe we will have to put in place some regulations to deal with that specific incident.

Also, the superintendent has the right (d) "to carry out periodic or other inspections and audits of registered pension plans;" Quite rightly, that should be within the authority or the jurisdiction of the superintendent - no problem at all, Mr. Speaker.

MR. FUREY: (Inaudible).

MR. J. BYRNE: I say to the Minister of Industry, Trade and Technology, that has happened a few times; I know it happened a few times to me. I almost said something that time. I would say it but it will be taken wrong and negative comments would be made.

MR. FUREY: (Inaudible) a few times like that.

MR. J. BYRNE: Yes, like that. That is the truth, I say to the Minister of Industry, Trade and Technology.

Mr. Speaker, the superintendent has the right (e) "to revoke the registration and cancel" -

AN HON. MEMBER: Your voice is cracking `Jack'.

AN HON. MEMBER: He loses his voice a scattered time.

MR. J. BYRNE: Mr. Speaker, I have at least another six or seven speeches to make tonight on various bills so I had better - I will speak more quietly.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: It is coming. The superintendent has the right, (e), "to revoke the registration and cancel the certificate of registration for a pension plan that ceases to comply with the requirements of this Act;"

Now, back to the previous point I was making: will it be left completely up to the superintendent to make that decision, Mr. Speaker, or will it be up to the minister to make that decision, and/or will there be regulations put in place - or are there regulations in place now - I do not believe there are - but will there be regulations put in place that will guide the superintendent of registration with respect to this Act? Or will there be regulations put in place that will guide the minister to determine if the pension plan should be cancelled? ..."the certificate of registration for a pension plan that ceases to comply with the requirements of this Act;" So who is going to make that decision? another weakness in this bill.

As I said earlier, the minister can have a lot of authority here, too much authority, as do ministers in other departments. Now, the minister or the superintendent has the right, (g) "to assess and collect fees for the registration and annual supervision of pension plans; and" (h) "to perform other functions and duties that the Lieutenant-Governor in Council may assign."

Now, Mr. Speaker, "to assess and collect fees": The question is, what fees? For what services? How much would these fees be? Will there be a certain scale of fees that will be in the regulations, or there will be regulations? Will the minister have the authority to tell the superintendent what fees should be charged, how much the fees should be, when the fees should change? Will it be a yearly change? Will it be like an annual increase automatically to these fees? The minister can have a lot of authority with respect to this bill.

Also, in section 6(4), "The superintendent may place a pension plan under trusteeship and appoint one or more persons to act as trustee of the plan where, in the opinion of the superintendent, it is necessary to do so." In the opinion of the superintendent: Would you not believe again that there should be regulations in place that the superintendent would be required to follow? There is no mention of it here, not that I know of. As I said, what are the guidelines the superintendent will refer to when forming such an opinion? Now, that can be pretty - what would be the right word? -lackadaisical, or it could be pretty well open to his own discretion, or opinion, that these regulations would be put in place; a bit too loose for me, Mr. Speaker.

Also, the superintendent, under section 6(5)(b), can decide where "special circumstances exist." Special circumstances exist: again open to the discretion, to the opinion of the superintendent. Again, as I said earlier, it is under the control of the minister, and the minister can be the god, the minister can be the overruling factor in anything that happens within this bill. We see that in a lot of bills. There is no doubt about it that the minister has a lot of authority. I have no major concern with that, as long as the minister has someone to answer to, and some regulations to guide him. Now, we still do not know what the special circumstances will be.

Again, just to repeat, the minister has the authority to set the special circumstances through the superintendent. So, in actual fact, if you really want to sit back and think about it, something like this could become political. I am not saying it would - that would depend, of course, on the minister in the position at the time, or it could actually depend on the person who is filling the position of superintendent.

Here, also, is a very important point, Mr. Speaker: Section 8.(1) "The minister may" (b) "authorize the Canadian association of pension supervisory authorities to exercise or perform powers and functions of the superintendent".

Now, I say to the minister, this is a very important point and he should be listening to this one. Is this what the minister intends, that in actual fact, the Canadian association of pension supervisory authorities could exercise and perform powers and functions of the superintendent? In actual fact, the powers of the superintendent could

be going outside the Province to guide the enforcement of this Act. So, actually, we could have someone from outside the Province controlling what is going on inside the Province of Newfoundland and Labrador.

Mr. Speaker, it does not make sense to me. Is that what is supposed to happen? I expect, in Committee, we will address that. The minister will probably have to take a look at it. Is the government planning to transfer control over provincial pensions to another pension authority? That is the question I ask the Minister of Government Services and Lands with respect to that section.

Now also, as I mentioned earlier, in Section 10, "The minister may set fees for the administration of this Act." The question, of course, is, what types of fees, the amount of these fees, as I mentioned earlier, and what guidelines are in place for the determination of these fees? Mr. Speaker, these are a few of the concerns, a few of the questions that I have with respect to this bill. I am sure there are people on this side of the House who have more to say.

AN HON. MEMBER: Make it mistake-free.

MR. J. BYRNE: Mistake-free? Who? No one is perfect. There is only one man who is going to walk on water around here and he is - How much time do I have left, Mr. Speaker?

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: Yes, I say to the Minister of Industry, Trade and Technology, that is a good one. It certainly applied to you, no doubt about it. I wish that I had the opportunity that the Minister of Industry, Trade and Technology has had in the past little while - and I am not talking about his winnings either, Mr. Speaker, with the Lotto 649. But he is busy - a busy man all the time.

I may as well continue, Mr. Speaker. This bill allows the pension fund to be maintained by a board, agency, commission or corporation made responsible by an act of Legislature and the administration of the pension fund. Now, why is this clause so broad, I ask you, Mr. Minister? Who knows who will be responsible for a pension fund? What guidelines would the government employ in their determination of what body would be eligible to administer a pension fund? Now that is the point that I have brought up on a number of occasions with respect to the guidelines. It is prevalent throughout this bill, Mr. Speaker, that there are no guidelines for many of these clauses in this bill. There are no guidelines, there are no conditions put forward, with respect to this bill. I think that is something that needs to be addressed, and the minister should address it in Committee.

Also, Mr. Speaker, in section 19(3), "the superintendent may register a pension plan if the superintendent is of the opinion that registration is justified in the circumstances of the plan and the members." Now, what does that say to you? Just what written guidelines are in place for the superintendent when formulating his opinion? Every time I get to anything in this bill it always comes back to guidelines and regulations, of which there are none from my perspective.

I'm going to sit down for a few minutes and see what other members have to say on this bill.

Thank you for your time, Mr. Speaker.

MR. SPEAKER: The hon. the Member for Kilbride.

MR. E. BYRNE: Thank you, Mr. Speaker.

How do you follow an act like that? How do you step into the shoes of the Member for Cape St. Francis after at least his 120th soliloquy and speech in this House in the last three and a half weeks? I was reading Hansard last week and from page 1 to page 15 the Member for Cape St. Francis, on and on and on.

I won't belabour the issue too much. I stand to make a few reference points to the bill, An Act Respecting Pension Benefits, more to what I don't see in the Pension Benefits Act and what I think government should

contemplate seriously over the coming years, and even over the coming weeks. Program review: It is an opportune time. The Minister of Justice is chairing a program review committee that is looking at ways in which we can save government money. I have some suggestions.

AN HON. MEMBER: The Premier saved some last week, didn't he.

MR. E. BYRNE: He saved some, yes. No doubt about it. I have another suggestion for you on how to save some more. I think, Mr. Speaker, what we should be looking at, what isn't in this particular piece of legislation, is reform to the MHA pension act. That is what we need to talk about. Yes we do, indeed we do need to have a chat about reform of the pension act of government members in this House.

Maybe we should start considering a way in which all of can look at limiting liability, forever and a day, of the taxpayer of the Province. Some reforms of pension plans that have gone on across the country have looked at a notion of portability of pension plans or a portable RRSP type of option. When members leave, if they are eligible for pension, no matter if they are eligible or not, whatever contributions are made up until a period of time, personal contributions matched by government, when the day is done, when they are finished sitting in this House and their day is over, that they take that portable RRSP with them; and the taxpayer of the Province is, forever and a day, not on the hook. That is a topic that -

MR. DICKS: Good idea, let's see how it works.

MR. E. BYRNE: Pardon me?

MR. DICKS: Good idea. Let's start with (inaudible) and see how it works.

MR. E. BYRNE: Well, you can start with me. I would have to serve eighteen years consecutively. Let's start with the Minister of Finance and Treasury Board and see how it works. We can start with the Government House Leader and see how it works. We can start with other ministers who are weeks away from reform pension plan and see how it works.

The truth is, Mr. Speaker, there are other areas in terms of pension reform we should look at. The government has control over this, government has the ability to handle it. I had representation from a group of iron workers not so long ago, I think it was back in August or November. About fifty of them came in. In total they represented about 700 to 800 people who worked at the Hibernia site who contributed to a pension plan but who right now - they were permanent workers, they left the site when the type of work that they were scheduled to do was completed, it was over, it was done. Not one of those workers can take their pension plan with them, dealing with one of the particular unions.

It is an important point, because there is a lot of money, a lot of investment, leaving this Province in terms of the administration of pension funds. We aren't talking hundreds of thousands of dollars, we are talking hundreds of millions of dollars.

In one particular case, which I want to just bring to the attention of the House, these forty or fifty people - about forty-five I think came to see me and we met for over an hour-and-a-half - they worked in excess of twelve to eighteen months at the Hibernia site. They were permit workers so to speak. They were part of the union while they were on site. Once their job was completed, their task was completed, the job that they were hired for was completed, they left. But their contributions to the international pension plan that were made here, made possible by jobs here, made possible by the exploration of a resource here, their contributions were made into an international fund that crossed the straits and ended up being administered in Toronto, Boston, New York, Chicago and places like that. That is exactly where those funds ended up.

As I said, we are not talking about hundreds of thousands of dollars, we are talking about hundreds of millions. In one particular case, one worker had worked, I think, seventeen-and-a-half months. His contributions alone for that period were about $24,000 to that pension fund, to the local union which in turn sent most of it to the international union for administration. He is not entitled to get any of that back. He cannot access it right now,

he cannot access it in the future, and when he turns sixty or sixty-five, when according to the plan he should be able to get it, he cannot because he is not a member of the local. Now there were 700 people in that position at least - that's with one local - 700 people in that position who contributed significantly, anywhere between $5,000 and $30,000 each over a period of time; a significant amount of money.

Pension reform, Mr. Speaker, is important. The administration of pensions is important. Affordability of pensions is important. A pension is a right that was achieved through collective bargaining, through pressure upon governments to introduce them, pressure upon management, the corporate world of Newfoundland and Labrador and certainly corporate Canada some fifty years ago; but there are institutions like this that are in trouble right now. If the strain and pressure continues on them, we have to look for other ways. If that particular issue with that one local union were resolved, as an example, those people, if they paid into a pension plan, would be able to get that money back. But nobody seems to be sticking up for them, Mr. Speaker, nobody.

MR. A. REID: (Inaudible).

MR. E. BYRNE: No, I didn't say that. It seems as if nobody is sticking up for them. It seems like that, I said. I am not saying that the Member for Carbonear, for example, has not gone to bat on this issue. I am not saying that any member on the government side or on the Opposition side has not either. What I am saying is, to this point in time I have made several representations to the international union and to the local down there, because they are governed by their own administration, they are governed by their own constitution. It is something that each and every union in Newfoundland and Labrador -

AN HON. MEMBER: They don't have to (inaudible).

MR. E. BYRNE: Go ahead.

AN HON. MEMBER: (Inaudible). What we have to make sure of, before Terra Nova starts and all the other work starts in all of those places, is that there has to be something written in the law that (inaudible). You are absolutely right.

MR. E. BYRNE: Dead on. That is what has to happen. What we are talking about - I mean, this has gone on in excess of thirty years.

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: Yes, exactly. We are talking about multi-billion dollar investment funds, pension funds being administered by people outside of, not only the Province but outside of Canada, that are maintaining satellite offices in Canada just to create the appearance and perception that there is administration of the fund in Canada. That is not true.

The Minister of Municipal and Provincial Affairs is dead on. What needs to happen is a legislative change, a regulatory change, to ensure that that money that has been made or contributed to pension plans as a result of resource exploitation in this Province, as a result of people working in this Province by people in this Province, stays in this Province. I mean, the pooling of resources and the capital that can be made by pooling of resources is an area that we have to really, really think about. We aren't doing enough right now to ensure that.

The administration of pension funds in this particular issue is in trouble. Pension funds across the country are in trouble. It represents the unfunded liability portion with respect to pensions. The teachers' pension plan specifically represents a significant and major problem for this Province, for the teachers, but ultimately for the people of this Province; not just the group that it represents, but our reliability as a government to be able to deal with that problem in the future, to be able to deal with that problem effectively, is really in question. Time is ticking. That is one thing that I don't see in this piece of legislation, or any, I guess, negotiations the Minister of Education is involved in, ongoing, or rolling negotiations with the NLTA over the pension fund contributions.

Mr. Speaker, with respect to the issue raised specifically with the construction industry, there are significant reforms that could be achieved there if government has the will to do it. It certainly has the power to do it. Much more of the administration of pension funds should be able to stay in this Province so we can realize more benefits.

Thank you, Mr. Speaker.

MR. SPEAKER (Barrett): The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

I will make a few comments here pertaining to this particular bill on pension benefits. There are a few particular points here. I was just actually going through some of the details there and looking at a few of the specific notes, and certainly listening to the minister when he introduced the bill.

There are some aspects to it here, I think, that are certainly positive and bring it to light. For example, in the past, under various pension plans, upon termination especially too, there hasn't always been - there have been surpluses in particular plans, I think, and opportunity now to be able to relegate this for the individual into an annuity or whatever avenue is open is an option that is available there. Any surpluses there could be allocated to the specific individual or directed as we see fit. It said it requires an employer to fund at least 50 per cent of the value of the pension benefits upon the member's termination, which is certainly appropriate.

Traditionally, there had to be long periods of time in which members could be vested into a specific plan. Certainly now, whether you are working two, eight, ten, twenty or thirty years, whatever, when you work a certain period of time shouldn't you have the opportunity - and the minimum level set here in reference to this is a two-year period, in which you can contribute. It is only appropriate, if the opportunity is there, that you should have certain benefits accrued. You might work for ten employers for three years each for thirty years and not be eligible for any particular type of pension. At least under this legislation now there is an opportunity, under that provision, that you could have benefits that could accrue to you because you change employers.

Today in society, it isn't uncommon at all to have many different employers. In fact, years ago you probably had one employer for life. Now with the job situation, and certainly working for this government too, as members know too well, there is a good chance you are going to need to be looking for another employer. We have seen a fair number, even in large corporations today. It is not just government. Large corporations today, major corporations in this country, have gone through substantial downsizing, rightsizing I guess, as government likes to call it. What it results in is a lot less people out there working, whether it is for government or larger corporations.

IBM, for example, went through a massive change when thousands and thousands of employees went out the door. To go to another employer for only two or three years, then to another one and maybe there is an opportunity with another company, and you keep jumping companies to take on different jobs, to have the opportunity under pension to be able to carry these and to do transfers to these particular funds, has to be perceived as being fully positive. It is not an age where when you go to work you spend thirty years with the one employer and then retire. That does not happen.

The Minister of Industry, Trade and Technology knows full well, when you are working for him or working for government here, they are going to ensure that your employment is going to be of a short duration, I can tell you. Then the minister who is in charge of this program review is going to ensure that at least another 1,000 people will be out looking for another employer, and they would like to be able to carry their pension benefits over from one to another.

I asked, I think, the Minister of Mines and Energy one day here in the House, and the Premier, and he did not know - I am not sure if he checked on it since - whether people who are retired can take that income that is in the plan due to them and buy annuity for them outside, shall we say, a particular plan. He said: No, he does not

know what I am talking about. I mean, the minister has said that so often: He does not know what I am talking about.

DR. GIBBONS: I don't want to know anything.

MR. SULLIVAN: He is not even interested in knowing anything about it.

DR. GIBBONS: That's right.

MR. SULLIVAN: I asked him one day and he said: No, I am not interfering with Hydro. He said: Arm's length, not interfering. A little chat with the minister: Well, I just told them, he said, don't go collect your money until we have a meeting with you. He told Hydro not to collect it. Now, if that is not arm's length - then I came back and asked him and he said: Well, yes, I asked them to do that. So you are either at arm's length or you are not.

We have seen the Minister of Health, I can tell you, regarding arm's length. He is head first in some areas and the next one, he is arm's length. He has his own standards.

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: Yes, if he had ten arms I would say he would have his tentacles everywhere.

AN HON. MEMBER: He is an octopus.

MR. SULLIVAN: He is an octopus, yes. He has his own ADM involved in writing reports. Can you imagine? And this relates to -

MR. SPEAKER: Order, please!

I think the hon. member just made an unparliamentary remark.

AN HON. MEMBER: What was that? Which one?

MR. SPEAKER: I think it is unparliamentary to refer to an hon. member as an octopus.

SOME HON. MEMBERS: Hear, hear!

MR. SULLIVAN: Okay. Instead of using a metaphor, Mr. Speaker, I will use a simile, is it? The minister, sometimes acts like he is an octopus. I think that would be acceptable. He just acts like he is and that means -

MR. SPEAKER: I ask the hon. member to withdraw.

MR. SULLIVAN: - he is well-armed, he comes prepared.

MR. SPEAKER: Order, please!

I ask the hon. member to withdraw.

MR. SULLIVAN: I withdraw, Mr. Speaker. I withdraw the remark. It is unparliamentary. I certainly did not intend to call the minister one of those eight-tentacle creatures, is it? They have eight tentacles. I would never call the Minister of Health that, not at all. I can tell you, the Minister of Health was probably called worse than what I called him before, but there are better terms. I think he is out trying to do an honest hard-working job to ensure that people under his employ benefit from the pensions that they are hoping to receive in twenty or thirty years' time.

MR. H. HODDER: He's trying?

MR. SULLIVAN: I said, I think.

MR. H. HODDER: Oh, you think, oh.

MR. SULLIVAN: Yes. I would never want to say anything too definitive about the minister.

MR. H. HODDER: I thought you were going to cross to the other side or something.

MR. SULLIVAN: Not at all. I'm trying to keep this relevant to pensions here. I wouldn't dare want to move too far away from the subject at hand, because there are some important aspects here in this that I feel certainly deserve some merit, and those are the minimum requirements established to qualify pensions and to be able to carry that pension forward. I mean, the portability and movement of pensions, I think, is essential in a changing society. That minister, yes, the Minister of Health, the very minister, has seen to it that hundreds and hundreds of people would love to avail of the opportunities provided here in Bill No. 46. Yes, they would love to be able to do it.

More so, Mr. Speaker, a lot of people would prefer that they never have to use some of the provisions here in this act. So, is the minister preparing, and are they preparing, for people now to get out of this pension plan, to move it out into a private area?

In fact, I think section 15, when I look through it, if I remember correctly - I think it is section 15. I have to find this. Section 15 says: "A pension fund shall be maintained by one or a combination of the following: (a) a government" - okay, that is one option - a public service pension plan." While we are on that topic, before I get any farther, the Hydro pension. I understand, Minister of Finance and Treasury Board - maybe I could ask him tomorrow in question period. The bill we approved about a year ago, I say to the minister, that was going to set up a Hydro pension plan, I understand that isn't done yet. You only had a year. So you haven't done anything with that yet?

AN HON. MEMBER: Officials are working on it.

MR. SULLIVAN: Working on it, okay. They are working on it. A year to set up a pension plan and they are still working on it. Are they going to be here next year, or are you going to have new people?

AN HON. MEMBER: We have dedicated officials working on it.

MR. SULLIVAN: Yes. I would say to the minister, if they are a year working on it and we don't know where we are heading, I think you should look for really dedicated officials to work on it, if you could, because we want to see that.

Under section 15(b) it says it can be maintained by "an insurance company under a contract of insurance." That is possible. We can have pension plans. So maybe all this big debt the Premier talks about, who ever heard tell last February of a $9 billion debt in this Province? Anyone ever hear tell of that? No. We have a $5.9 billion direct debt. We only have actually a $6.9 billion debt, excluding unfunded liabilities, when you consider the $1.5 billion sinking fund surpluses that we have there to apply against that debt. So I mean, we get figures out there in the public view that have never been used before. We never heard tell of this back last year and last spring.

It also states under section 15(c) that "a trust in Canada governed by a written trust agreement under which the trustees are (i) a trust corporation referred under the Trust and Loan Corporations Licensing Act" is referred to; and in (ii), "3 or more individuals, at least 3 of whom reside in Canada and at least one of whom is independent of any employer contributing to the pension fund, to the extent the individual is neither a significant shareholder, partner, proprietor..." and so on.

It goes on to say - and I'm just wondering what the intention is in this particular act - in 15(d): "a board, agency, commission or corporation made responsible... for the administration of the pension fund." Are we looking at making major changes, I ask the minister, in the particular pension fund and the administration of the public

sector pension plan? Of course if we do, the employer on an unfunded liability would be responsible for half the unfunded liabilities in that fund, I would assume.

If we apply that to - let's take the Newfoundland and Labrador Teachers' Association fund. My understanding is that the employer would be responsible for more than 50 per cent in this case, which is the government of this Province, because there was an unfunded liability directly applied and committed to be put there of about $250 million by this government initially. Then, after that amount, once the government's share is put in to match what the teachers had put in, that was spent in the general treasury of the Province, then it should be on a shared basis.

Nobody expects government to fund fully. We expect it to be shared on an equal basis, and that is a basic understanding, I think, in those pension plans. It does reiterate here, and it does hold government responsible. There was one, I think, payment made. I'm sure the Minister of Finance and Treasury Board might know this. I think there was one payment made of $20 million or $25 million, I'm not sure, $20 million dollars I think, that was put in that out of $250 million, which means there is another $200-and some million to go in. The unfunded liability in that fund is about $1.5 billion, which means the other $1.25 billion must be shared equally between the government and the employees, or the teachers, retired, current or future teachers, whatever the case may be.

The same with the public service pension plan. The liabilities that are in that plan now would have to be borne equally by, even if you farm it out and sell it out to some other particular third party or corporation, would have to be done in a similar manner. So I think it is important that we look closely at this bill, because there are various provisions. It does give the superintendent - that is in clause 6(2) - control and supervision of the act. The minister can exercise his powers under this act without any written guidelines to that affect under section 6(2) in this act. Very, very extensive powers are given in that particular section.

Mr. Speaker, we do have in this Province a considerable unfunded liability under our pensions. Of course, we get the pension fund tabled here in the House on an annual basis, that highlights really the importance of contributing, and ensure that we get back on a healthy basis in the Province. Because the Minister of Social Services and the government tell us that we are going to have less people working, tell us we are going to have less paying into the plan, we are going to have more people to support, so we are going to need to do something.

The Minister of Finance and Treasury Board tells us that isn't going to happen. He tells us that isn't going to happen. We are going to grow so much, this economy is going to rebound and be so prosperous here, that we are going to have all this extra money we are going to make up, over $150 million on the harmonization, that we will have to make the Province healthy and to be able to contribute and ensure that provisions in Bill No. 46 here, the pension plan act, are carried out in compliance with specific sections of this act.

I received many calls on this issue. I guess I've received five or six, if that is many, over the past year, from people who are into a plan and want to get their pension out and they can't do it because it is locked in and because of the age restrictions. I guess that has advantages, but sometimes there are various areas where the individuals might want to have certain flexibilities in their particular plan. We don't see flexibilities in that end of it, but we do see the vesting and the locking in provisions here under clause 43 which the minister referred to in the particular act. It has locking in provisions there, and they do set minimum standards.

Different plans now have minimum standards, I think, of vesting there. MHAs about five years, I think. What is it in some other plans generally? I think five years now, generally speaking, in most areas. It is down to five. Now this is going to have a provision here, overall, under that aspect, to have a minimum of two years within the plan to give flexibility to move from one area of the plan to the other.

There are a few points there, I say to the minister, on eligibility and vesting. The 50 per cent rule, for example, on contributions is to be expected.

AN HON. MEMBER: The galleries are filling up.

MR. SULLIVAN: If I keep on speaking here, we are going to have a full House here tonight, I say to the Speaker. They are really starting to move here.

AN HON. MEMBER: (Inaudible) public meeting in LaPoile.

MR. SULLIVAN: Yes, there have been meetings there.

There is also reference too in clause 47 right on down to clause 56. It talks about opportunities and benefits. Under the heading of marriage breakdown it says, when a pension plan has to be divvied up - nobody wants to deal with that provision but there is some provision that, when a spouse has an entitlement the opportunity to be able to reap at least some of the benefits accrued or, as being a contributor, I guess, in some way, shape or form, as determined by the courts, there is an opportunity now to be able to have that amount taken out, relegated and used for that purpose, rather than just being draw from the plan on an ongoing basis. It gives an advantage to individuals who want to get rid of the shackles that they are held on, who have to depend on an ongoing plan without flexibility. It does give flexibility between the spouse and the member now, an opportunity to sort of segregate those and make independent decisions as opposed to one being done under the general heading.

Of course, under clause 57, there is surplus entitlement, an ongoing plan upon termination. If there are certain particular surpluses, it outlines in clause 57(2) an opportunity to be able make some provisions to do something about the transfer of those surpluses there upon termination of the plan. That is important, to be able to make those specific provisions. That is number - let me find it here for a moment now.

AN HON. MEMBER: What are you looking for, 46?

MR. SULLIVAN: No, clause 56. I had a little comment there I was going to make on clause 56. No, it is not clause 56, clause 57.

It says: No part of the surplus may be paid by the employer unless (a) the payment is permitted by regulations; and (b) the superintendent consents in writing to the payment.

Basically, that gives permission because sometimes pension plans can be in surplus and there are others, of course - Unfortunately, the Public Service Pension Plan, the Newfoundland and Labrador Teachers Association and the Members of the House of Assembly plans and other plans are not in the situation now where we have tremendous surplus, I say to my colleagues here. I don't think we will have to deal with that situation in our lifetime. I am sure there are pension plans out there that are fully funded and there is more of an emphasis today upon getting a fully-funded plan because for many years we failed to realize the importance of contributing to a plan.

We do not want future generations to have to make up the difference and pay the price for what we do today. We would like to move in the direction and we have, in certain areas, made up that gap by increasing premiums or by the allocations of per cent. I think in the Newfoundland and Labrador Teachers Association it was reduced from 2.2 per cent down to 2 per cent basically. In addition, with increasing premiums, to be able to be allowed to make up some of that unfunded liability, at least stop the slide. We are going to get into a period now in the next while - and there are undergoing similar problems in the Canada Pension Plan - where there have to be significant increases in premiums to be able to make up the shortfall that is occurring.

So, Mr. Speaker, there are some points here certainly of concern. I am sure overall there are some positive elements here and I am sure when we get an opportunity to get to committee we will take a closer look at it. It gives us time to have a more detailed analysis. There are a lot of bills coming on us at one time, very lengthy, and we are getting through them all. These are just some of the points we wanted to make now and any others we can certainly make in due course.

Thank you.

MR. SPEAKER: If the hon. the Minister speaks now, he will close the debate.

The hon. the Minister of Government Services and Lands.

MR. McLEAN: Thank you, Mr. Speaker.

Just a few notes to close off second reading of this bill.

Mr. Speaker, some of the points that have been made on the bill itself and the areas I think of importance are - certainly the portability of pensions is one of the key issues that we need to deal with. A number of other issues that have been brought forward, compared to the last pension benefits act, are the areas of eligibility for memberships, early retirement, spousal benefits and the division of benefits upon marriage break downs, as some of the hon. members have mentioned. The portability of pension benefits and the surplus distribution are all new items for this particular act and certainly such reform issues have served to encourage employee participation in pension plans.

Mr. Speaker, I would also say that the difference between the publicly funded pension plans and this private one, is that the private sector pension plans are required to operate on a fully funded basis. If unfunded liabilities occur, the public benefits bill provides strick payment procedures to eliminate any unfunded liabilities. As a result, a new bill will not impose financial difficulties to private plans since the plans are and have always been required to continually maintain assets in the fund to cover any incurred liabilities.

Mr. Speaker, this act certainly secures the future for people in the Province who are looking to obtain funds from a pension. This act provides enhanced pension benefit coverage for the people of the Province through the increased payments, procedures and conditions, as well as improved investment regulations and monitoring requirements, and the act promotes increased security of pension benefits promised.

Mr. Speaker, in response to the Member for Cape St. Francis, the previous act required that employees pay 9 per cent and the employer pay 1 per cent. In this new bill, it is 50/50. It is a 50 per cent rule.

Mr. Speaker, I would now move second reading of this bill.

On motion, a bill, "An Act Respecting Pension Benefits," read a second time, ordered referred to a Committee of the Whole House on tomorrow. (Bill No. 46)

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker, I am going to move to Order No. 30, Bill No. 30, "An Act Respecting The Good Faith Donation And Distribution Of Food," second reading of a bill. Once Your Honour has read it, I will introduce the bill.

Motion, second reading of a bill, "An Act Respecting The Good Faith Donation And Distribution Of Food". (Bill No. 30)

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker, let me very quickly say, as the Premier said the other day, that really, I guess, this bill is a result of - and I say this in a totally non-partisan fashion - the efforts of the Member for Bonavista South and, of course, the agreement of the Premier and the total agreement on this side, that we should move this bill and move quickly on it.

I think we were prepared, and I think the hon. member will say this is correct when he stands up to speak to this bill, as I suspect he will, that indeed the government was prepared to move fairly quickly to see that this bill was made into law, but we found ourselves at the mercy of the single NDP member in this House who felt that we would in some way be distributing substandard food to people in the Province, and promptly went out and moved that kind of feeling in the public.

I have to say to the Member for Bonavista South, that I wish tonight, really, I could move through this bill, do it by unanimous consent, and put it right through to third reading. Unfortunately, I have to say to him that in the past four or five days I have had a number of calls. I think this afternoon the Member for Virginia Waters distributed a petition from some people who have concerns about what this bill might indeed do. I suspect, and I do not want to second-guess anything here, but I suspect it is largely a result of the kind of stuff that was in the paper over the weekend from the Member for Signal Hill - Quidi Vidi.

What I am proposing to do, what we are proposing to do as a government, is to move second reading of this bill, send it to Committee, let the Social Services Committee of the House deal with it, and when we come back in the spring hopefully we will be in a position that we will have satisfied - and I believe that is all it is, at this point in time - the fears of people out there that we are somehow going to treat other people less than we would treat our own.

MR. SULLIVAN: (Inaudible) our conversation.

MR. TULK: Don't get uptight, now. I am doing something that I do not have to do, so don't get too uptight about it.

Mr. Speaker, having said that -

MR. REID: Withdraw the bill if they don't go along with it.

MR. TULK: No. I say to the Minister of Municipal and Provincial Affairs, that I cannot be that partisan, that I will not do that, that I will not follow the Leader of the Opposition and withdraw this bill because we are in dispute on another bill. I will not do that. I will not make his own member suffer for, shall we say, the sookieness of the Leader of the Opposition. I will not do that. I will try to act above the partisan level of the hon. gentlemen.

SOME HON. MEMBERS: Hear, hear!

MR. TULK: Mr. Speaker, having said that, let me say to the Member for Bonavista South, that I believe he wants to speak on this bill, and when he does I am going to move it into committee - I show him the motion today - and that the Social Services Committee report to the House before March 31, 1997, or in case the House is not open they deposit their report with the Clerk of the Legislature.

MR. SPEAKER: The hon. the Member for Bonavista South.

MR. FITZGERALD: Thank you, Mr. Speaker.

Mr. Speaker, I thank the Government House Leader for allowing this bill to be introduced into the Legislature, and I thank the Premier as well. It was a bill that was brought forward by me some eighteen months ago. It was a bill that I believed in at that time, and I thought it would be providing a great service to many of the people in this Province who have no other choice but to use food banks in order to access food and, I suppose, to fulfil a need, when their pay cheque, whether it is from Social Services, unemployment insurance or a TAGS cheque, doesn't allow them enough money to go out and buy food for their families.

MR. E. BYRNE: You are in agreement with the bill, are you?

MR. FITZGERALD: Yes, I say to the member, I'm in total agreement. I would rather see the bill introduced here and go to Committee and be passed. That is what I would like to see done, Mr. Speaker. In that way we would allow this piece of legislation to become active. It would go through, be proclaimed, and become a piece of legislation that would go on the books and allow people to donate food and, I suppose, to provide a need there now rather than later.

I understand where the member is coming from, I understand the minister's concerns. I know the actions of my wealthy socialist friend who sits to my far right there. I'm aware of the actions of that particular gentleman. It was only the other day, when I was out in the corridors of the House there having a scrum, when the Member for Signal Hill - Quidi Vidi walked around behind the reporters saying: I won't support that bill, I don't believe in double standards, I don't believe in serving rotten food, I don't believe in doing any of this.

It might be unfair to stand her and talk about somebody when they aren't present, but what I had intended to say I'm going to say anyway, Mr. Speaker, and I'm going to say it here right now. If that same member believes this is such a bad piece of legislation, and if that same member believes we in this House believe in double standards, I suggest that he probably change his double standard. We are sitting here with a member in this House -

SOME HON. MEMBERS: Hear, hear!

MR. FITZGERALD: - collecting a full pay cheque from this Assembly by working here as a part-time member.

SOME HON. MEMBERS: Hear, hear!

MR. FITZGERALD: What I say to that same member - and I wish he were here - is let him take his T4 slips at the end of the year and lay them on the Clerk's Table, and I will take mine, Mr. Speaker. Everything that I make over and above the salary that I make as a representative of the people I will donate to the food banks, and what he makes over and above the salary that he makes in this House of Assembly I suggest that he donate to the food bank.

SOME HON. MEMBERS: Hear, hear!

MR. FITZGERALD: Maybe we wouldn't need a piece of legislation like this. It is nothing but shameful for that man to get on with such bull. Nothing but shameful, Mr. Speaker.

AN HON. MEMBER: The champion of the poor and downtrodden.

MR. FITZGERALD: That is exactly what he professes to be, Mr. Speaker. Then he goes out on the airwaves and he talks about how the Opposition will not allow him to respond to ministerial statements. Where is he today? Where is the man today?

SOME HON. MEMBERS: Gone! Gone!

MR. FITZGERALD: Gone! He came in here the other day, and when the Government House Leader passed this bill through first reading he came in and he got all upset again. He said: How come you didn't wait for me to come back? You wouldn't know but the whole House of Assembly revolves around the wealthy socialist to my right. It is ridiculous! Ridiculous!

SOME HON. MEMBERS: Hear, hear!

MR. WALSH: On a point of order, Mr. Speaker.

MR. SPEAKER: Order, please!

The hon. the Member for Conception Bay East and Bell Island, on a point of order.

MR. WALSH: Mr. Speaker, I think it is probably alright for us to have some fun here this evening, but it is probably somewhat unfair for us to be here tonight speaking of a member who is not here, who may very well be out spending some of the $300,000, $400,000 or $500,000 that he made this past week. I don't think it should be done. You should leave the member alone; he is not here to defend himself.

MR. SPEAKER: Order, please!

I ask the hon. member to take his seat for a moment.

To that point of order, it has been ruled in this House on numerous occasions that it is unparliamentary to refer to any hon. member for his presence or absence in the House. The Chair was paying very close attention to what the hon. Member for Bonavista South was saying. He was making reference to a member to his right. He was making reference to a member, a particular member, this other member, but he did not refer specifically to any member by name or by district. So the Chair cannot rule him out of order.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: The hon. the Member for Bonavista South.

MR. FITZGERALD: Thank you, Mr. Speaker.

Mr. Speaker, this is a bill that has received a fair amount of debate in this House already. It received a full evening of debate back eighteen months ago. Things have not changed from that particular time, other than the need for this bill is probably worse now than it was eighteen months ago. It is a bill that is not going to serve rotten food, or adulterated food, to the poor or to the people who are using food banks. It is a bill where we can stand up and say that we do not believe in food banks and we do not believe that this particular bill has any place in the Legislature of this Province.

Well, I do not believe in unemployment insurance, and I do not believe in social services, and I do not believe in food banks, but, Mr. Speaker, the thing is, that we have to deal with reality. We do have food banks, we do have unemployment, and we do have social services.

This is a bill that would simply relieve the liability from grocery stores, from any donors of food to food banks, if it is done in a way that if some litigation appears and it was not intended to intentionally hurt or maim or kill somebody. That is what this bill does. We are not talking about food that is outdated. We are talking about food that probably does not appear in a cosmetic fashion in order to be able to be put on supermarket shelves for marketable purposes. That is all we are talking about. We are not talking about food where the expiry date has disappeared. We are talking about food that may be able to be taken from the supermarket shelves and taken to a food bank and distributed before the `best before' date has expired. That is what we are talking about here, nothing more than that. In fact, we are probably talking about better food than most of us here in this House eat, or the food that we are eating every day. That is what it is.

I have talked to people who are very familiar with this piece of legislation in other jurisdictions in this country. Similar legislation exists in five other provinces; it exists in fifty states south of the border, and there is no reason why we cannot introduce it here. I think when it does become effective, and when it is proclaimed into law, that the giving to our food banks, and the response that we will see, will certainly increase many, many fold to what we are experiencing today.

Mr. Speaker, that is all it is. It is a bill that would provide that and only that, and the great fears and concerns out there are certainly unwarranted.

Thank you.

MR. SPEAKER: The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

I certainly congratulate the Member for Bonavista South who attempted to get this through the House in the last session and it died on the Order Paper. I say now, by referring this to Committee and bringing it back next spring in a new session, with the House being prorogued, it will die on the Order Paper and will have to be

reintroduced again. That is my understanding, that it will die on the Order Paper, which means it will not come up. I say to the Government House Leader, if this goes to Committee and next spring is to be brought back with a new session of the House, the House is prorogued, we would have to bring it back again?

MR. TULK: A point of order, Mr. Speaker.

MR. SPEAKER: The hon. the Government House Leader, on a point of order.

MR. TULK: Let me just say to the hon. gentleman, that when this House closes for Christmas the House is not prorogued.

MR. SULLIVAN: I didn't say that.

MR. TULK: No, no. The House is not prorogued; let me say that to him. We could be here for two weeks before - I know that in most cases most governments prorogue the House, come back one day in February or March and prorogue the House, and then we start a new session.

AN HON. MEMBER: (Inaudible).

MR. SPEAKER: Order, please!

MR. TULK: In this particular case this is not necessary. Let me just say to him, that if the Committee report is back here, as soon as the Committee report is back, I think we will move the bill at least close to unanimously, regardless of whether it is a new session or whether it is a continuation of this one. There will be no hesitation at all, whatsoever.

MR. SPEAKER: Is the hon. the Leader of the Opposition speaking to the point of order?

MR. SULLIVAN: No, not to the point of order, Mr. Speaker.

MR. SPEAKER: There is no point of order. The Government House Leader took advantage of the opportunity for further clarification.

The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

I respond in reference to the Government House Leader when he mentioned that it would come back next spring.

MR. TULK: It will come back, as soon as the committee reports (inaudible).

MR. SULLIVAN: Yes, I know.

The Government House Leader said last spring - that is why I felt it was necessary to indicate that when the House prorogues, which would normally be in March, as an example, and a new session of the House would start with a new Throne Speech, I indicated it would be the second time it would die on the Order Paper and would come back again. I accept the Government House Leader's word that it will come back again.

He did make a point, and I think it is worthy of note, he did indicate that it should go to Committee because the Member for Signal Hill - Quidi Vidi had a concern, and to give it adequate time. He made some reference to it and some petitions -

MR. TULK: On a point of order, Mr. Speaker.

MR. SPEAKER: The hon. the Government House Leader, on a point of order.

MR. TULK: Mr. Speaker, the hon. gentleman can twist and move this around all he likes; I don't care. He can stay there all night at it. The truth of the matter is that I had several representations this weekend after the stuff appeared in the paper from this gentleman over here. I had several representations from people, people I know very well, who are in charitable organizations here in this town that feed people. As a matter of fact, I believe - what is the name of the guy who you used as -

AN HON. MEMBER: (Inaudible).

MR. TULK: Yes, I think there might even be some doubt in his mind now, although he did not call me himself, but having talked to some other people I think there might even -

AN HON. MEMBER: There is no doubt that he is for it.

MR. TULK: Okay, but I know that some of the other people who talked to him have doubt in their mind as to whether we are doing what he said, what the gentleman from Quidi Vidi said. I did commit to those people. I said: We will go back and do this in Committee to allay your fears, and that is what we are doing.

MR. SPEAKER: Is the hon. the Leader of the Opposition speaking to the point of order?

MR. SULLIVAN: No.

MR. SPEAKER: There is no point of order. Again, the Government House Leader is using the opportunity for further clarification.

The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

I certainly do not criticize going to Committee at all, I say to the Government House Leader. In fact, I think it is a process that we could utilize a lot more. If there are concerns out there - I heard Mr. Walters on yesterday. He was very emphatic. He looked at it. He fully endorses it. He represents the Community Food Sharing Association. But there may be other people who are not fully informed and I respect that. I think the Committee is a time to deal with that, and I certainly am very much in favour of bills coming into this House getting put to Committee.

Back to the bill, certainly my colleague from Bonavista South has indicated, and I think, it is a well-intentioned bill. I think at the time he was social services critic and he certainly was dealing with many, many cases. People who he is aware of, as a representative, many of his constituents, too, in situations like all of our constituents, have an opportunity and may benefit from this specific bill.

Some of the concerns out there may be that we may be giving a second-class type of food to people, and that is not the intention. I think anybody who looks at the bill, if someone knowingly does that, or it is not fit for human consumption, there are provisions here to ensure that these people would be liable if they did so. It is there to assist. It will have an opportunity, certainly, over the next while, and if it does not have an opportunity to get back in this session then certainly in the next session, or whenever it happens. I say that the sooner it happens, the better, I think, and that more people can benefit from this.

One of the reasons, I think, my colleague brought it back is that it is coming on the Christmas season and it is an opportunity in a lot of these areas. There are a lot of people out there hurting today, and to have something at this time of the year may entice supermarkets and other large chains to be able to dump some of this extra food on people's tables, to put it out there so that they could have this opportunity.

This is a good time of the year to look at that in a giving spirit, without them having to have the legal repercussions that may be put upon them for putting forth something that they consider - one of the examples

used: maybe the fork of a forklift may go through part of a whole pallet but might only damage but one or two items. These might be discarded, and the rest could be put to good use well within the expiry date.

There are many opportunities there. They use discretion. The Community Food Sharing Association has indicated that. They use discretion. They would never put out food that they do not consider meets the standard there. I felt, with the time of the year - now, anytime it happens is good, but certainly the faster the better. It is an opportunity.

I do certainly congratulate the Premier and the Government House Leader for bringing this bill into the House. I have to congratulate them on that. It is something that my colleague had tried before, but it did not work. It just got put aside. Now they see the need for it, and hopefully we can expedite it in the future as fast as possible so people can benefit from it.

Thank you, Mr. Speaker.

MR. SPEAKER: The hon. the Opposition House Leader.

MR. H. HODDER: Thank you, Mr. Speaker.

I just wanted to rise for a couple of minutes to compliment my colleague, the Member for Bonavista South, and to say to him, through the House, that we appreciate his efforts. I know that he has done a great deal of research on this particular matter. He has consulted with a number of jurisdictions in the United States at the state level and he has consulted with every province in Canada.

Mr. Speaker, I just wanted to say to the House, that the intent of this bill is not that we would ever, ever, offer food that was of any tainted quality. That is not what this bill is about. This bill is about making donations possible, making sure that food that goes to waste in this country is made available to those who need it. Mr. Speaker, if you look at the bill, it makes it quite clear. It says that if any of the food is adulterated, rotten or otherwise unfit for human consumption, it is not to be distributed.

Now, Mr. Speaker, I know some of the corporate people in this Province very well, and I have been associated with food banks through my church and other agencies for a long time. I can assure you that these people will not cause anything to happen that would in any way jeopardise the health or safety of anyone. Mr. Speaker, we also know from all the reports, how extensive poverty is in our country and in our Province. We know that there are more children in Canada today who are hungry than there were five years ago. There are more children in Newfoundland and Labrador today who are hungry than there were five years ago.

Mr. Speaker, what we are saying is that this bill enables us to be able to address this issue, not in a way that would exonerate the Department of Social Services from its responsibilities nor will it preclude the Department of Health from ensuring that food is monitored correctly and that all of the health care concerns are addressed.

So, Mr. Speaker, we commend our colleague from Bonavista South. We say to the government and to the Government House Leader, that this is appreciated, not for me or for members in this House, but appreciated by the children and parents in Newfoundland and Labrador who have genuine needs and know what the real face of poverty is all about, and are happy to be able to address their concerns in this kind of a way.

So, Mr. Speaker, again I want to say to all hon. members, if you read all the literature - I have in front of me here, The Royal Commission on Education, Our Children Our Future, and there is a lot of literature there. I won't get into reading it all nor do I intend to reference it, but it is there.

AN HON. MEMBER: Read it, boy. Read it all.

MR. H. HODDER: My colleagues here are encouraging me to keep speaking, but I do think that we want to note some of the reports, and commend the government and the Premier, as head of the government, in making

this particular piece of legislation possible, and commend them for sending it off to the Social Services Committee for further review.

Thank you very much, Mr. Speaker.

MR. TULK: Nice move. I would have stood up, said five words and sit down.

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker -

MR. SPEAKER: Order, please! Order, please!

If the minister speaks now, he will close the debate.

The hon. the Government House Leader.

MR. TULK: Mr. Speaker, I believe - and I will ask the clerks for clarification - I believe that once we pass this bill in second reading, I am supposed to move a motion.

So, Mr. Speaker, having said that, I too, like the Member for Bonavista South, would wish that we could do this in the spirit of Christmas. I wish that we had had the discussion that we had on Friday, maybe in the first part of November. We would have put it out for ten days to committee and then come back. Unfortunately, we are going to have to bypass this Christmas season, but hopefully next Christmas season this will be in effect to help the people of this Province, especially the children of this Province.

So I will, on that basis, move second reading, Mr. Speaker.

Motion, a bill, "An Act Respecting The Good Faith Donation And Distribution Of Food", read a second time. (Bill No. 30).

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker, I move, pursuant to Standing Order 54.2(1), that the bill entitled, "An Act Respecting The Good Faith Donation And Distribution Of Food," (Bill No. 30), having received second reading, be referred to the Standing Committee on Social Services, and the report of the Committee be tabled in the House before March 31, 1997, or be deposited with the Clerk of the House before that date if the House is not in session.

MR. SPEAKER: It is moved and seconded that the said bill be referred to the Standing Committee on Social Services pursuant to Order 54.2(1).

On motion, a bill, "An Act Respecting The Good Faith Donation And Distribution Of Food," referred to the Standing Committee on Social Services pursuant to Standing Order 54.2(1). (Bill No. 30)

The hon. the Government House Leader.

MR. TULK: Mr. Speaker, Order No. 28 - to long for me to read - Bill No. 51.

Motion, second reading of a bill, "An Act To Amend The Automobile Dealers Act, The Insurance Adjusters, Agents and Brokers Act, The Insurance Companies Act, The Real Estate Trading Act And The Trust And Loan Corporation Licensing Act". (Bill No. 51)

MR. SPEAKER: The hon. the Minister of Government Services and Lands.

SOME HON. MEMBERS: Hear, hear!

MR. McLEAN: Thank you, Mr. Speaker.

Mr. Speaker, this bill is introduced to cut out some red tape. Simply put, it is to do with licensing procedures. In keeping with our regulatory reform initiative, the government will only license individuals and companies when it is considered necessary for protection of the consumer. In future, government will only require that individuals be licensed when there is a qualifying examination required to enter an industry. As a result, government will no longer be licensing individual collectors and automobile sales persons. However, we will continue to license companies in these industries and the companies will be held accountable for the actions of their employees and representatives. Mr. Speaker, we are moving into a more streamlined approach to licensing procedures.

In addition, Mr. Speaker, the requirement to issue an annual license under the acts mentioned will be changed so that a one time license will be issued with annual reporting requirements. We have determined that the expiration of a license in these industries at the end of each year serves no purpose for consumer protection. It is also considered a waste of time and money to be printing new licenses every year. It is more important to receive information on the companies and individuals which we license and to expend more effort in monitoring their compliance with legislation.

Mr. Speaker, we are confident that these initiatives will improve consumer protection and result in a more efficient licensing system.

Thank you, Mr. Speaker.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Speaker.

AN HON. MEMBER: One hour, Jack, one hour.

MR. J. BYRNE: One hour. I don't think, Mr. Speaker, my voice will last for one hour without a break. Maybe fifty-eight minutes or so.

Mr. Speaker, I will state the name of the bill that the Government House Leader couldn't, wouldn't, shouldn't or whatever, Mr. Speaker. Bill 51, "An Act To Amend The Automobile Dealers Act, The Insurance Adjusters, Agents And Brokers Act, The Insurance Companies Act, The Real Estate Trading Act And The Trust And Loan Corporation Licensing Act." Well, Mr. Speaker, just in case somebody didn't get that I probably should repeat it.

Mr. Speaker, basically - I have to agree with the minister - a lot of this bill was addressed in the regulatory reform review that happened under the previous administration, I do believe. The minister mentioned that there is going to be a reduction in red tape. We heard that story before, just the same, when they were talking about the one-stop shopping, when the previous administration talked about consolidating the branch offices of different departments and what have you. They would cut red tape and it would be to the benefit of the public in every way, shape and form. In actual fact, Mr. Speaker, that did not occur. It was not of benefit to the public. As a matter of fact, from what I understand, in some of the centres that were put together by Government Services and Lands there was staff put in those centres and they were actually sent back to the offices where they came from. The situation with respect to cutting red tape never occurred by any stretch of the imagination.

Mr. Speaker, if an individual went in and applied for a piece of land, a building lot approval or what have you, he still had to go to the Department of Works, Services and Transportation, if it was required, he still had to go to the Department of Environment and Lands, and he still had to go to the Department of Health. So the fact that the minister states that this will cut red tape doesn't necessarily mean that it will cut red tape. I just thought I would mention that.

The minister talked about regulatory reform, and I already mentioned that, Mr. Speaker. In actual fact, it was addressed somewhat, and this probably consolidates or helps to bring about the regulatory reform that he was talking about. It remains to be seen, as I said earlier, if it will be of benefit to the public.

Mr. Speaker, this bill also talks about the licensing and the protection of the consumer. Of course, that is the responsibility of any government department on any government level, municipal, provincial and/or federal. The protection of the consumer is all-important. Of course, there have to be steps and measures put in place to protect the consumer at all times. Hopefully this bill will help address the concerns of consumers with respect to the bills, and the actions that are controlled in the bill, or the pieces of legislation that this bill hopes to address.

Mr. Speaker, this bill also deals with the licensing of companies, not individuals. That is, I believe, getting to the point now where, say in the automobile industry, if an individual makes application, through the department, to be licensed to be an automobile sales person he is licensed and goes to work in any given company within the Province, I would assume. This bill now licences the companies and not necessarily the individual. Therefore, when an individual goes to work for the company, the company itself is responsible for the actions of the employee.

Mr. Speaker, I think that is normal procedure in most any business. If I have a company and I have an individual working for me, and that person goes out and breaks the law when he is working for me, when he is doing the work of my company - well actually, the company can be held liable anyway,. So in actual fact I would say that this section or this portion of the bill could actually be cutting red tape, so I could actually agree with the minister on that point.

Also, the minister talks about the licensing and the annual reporting. Now that they are getting away from actually licensing individuals with respect to automobile dealerships and, I suppose, automobile salespersons, the company now would have to report each year. Therefore, the actual licensing of a company wouldn't have to take place each year. The minister may want to address that. I am not quite sure on that point.

Also, when the minister was up on his feet he talked about the fact that licensing people each year, every year, is a waste of time. I suppose, if it is a waste of time it can be a drain on the resources of the department and of the government in general. So, this piece of legislation, although it deals with so many acts, is possibly a positive piece of legislation.

The minister told me that the last bill he put through, or Bill 46, he read three times. I wonder how much he studied this bill, Mr. Speaker. If he is introducing it into the House I am sure he is well informed. He indicates he read it once, so if he read it once I assume he has a peripheral knowledge of what is going on here. I am sure that his staff keep him well informed, give him good notes to inform him of what is going on with respect to this bill.

Of course, Mr. Speaker, as I said earlier, the primary focus of this bill is to eliminate the annual licensing requirements under these acts, all the acts that were mentioned here, in favour of a one-time licence, except where step progression is required for licensing. I think the minister may want to address that when he gets on his feet, what he meant by step progression with respect to the registration being maintained.

Mr. Speaker, this bill also would eliminate licences for direct sellers and automobile persons, and I already addressed that. With respect to the Automobile Dealers Act, this bill removes the definition of a salesperson from the act and subsequent amendments remove all references to salespersons, and deals mostly with the dealerships themselves, the companies and what have you, and that has been addressed.

Mr. Speaker, I am not going to go on for a long time on this bill. I think that the minister has covered it somewhat; he did not get into a lot of detail. There are a few points I will continue to make.

The present act stipulates, when a salesperson ceases to be an employee of a particular dealership, the dealer shall notify the registrar, who upon receipt of this notification, shall terminate the registration of the salesperson. Also, the present act indicates that an automobile dealer shall not retain the services of a salesperson who is not registered under this act. This bill now repeals those sections, and they have already been addressed.

Another area of the bill, Mr. Speaker, repeals subsection 2(f) of the Direct Sellers Act and, through a subsequent clause, changes the definition of `licence' to mean a licence issued to a vendor by eliminating any reference to an individual or a salesperson, and that is basically the same thing that has been going on in the Automobile Dealers Act.

Mr. Speaker, I know there are a few people on this side of the House who may wish to speak to this, hopefully -

MR. OSBORNE: What do you think about the (inaudible)?

MR. J. BYRNE: That is up to the individual, Mr. Speaker.

This bill also has a provision which indicates that the acts of any individual under the vendor's employ who is acting on the vendor's behalf are considered not only to be the individual's acts but also the acts of the vendor. Basically what they are talking about here I think, Mr. Speaker, is the fact that anybody who is acting on behalf of a company or a vendor - the same thing is done under the Automobile Dealership Act - not only the person is liable but the company itself may be held liable for the actions of the individuals in it's employ.

Basically, there is not much more to say on this, Mr. Speaker. I think what I will do is give the Member for St. John's East an opportunity to say a few words.

Thank you, Mr. Speaker.

MR. SPEAKER: The hon. the Member for St. John's East.

MR. OTTENHEIMER: Thank you, Mr. Speaker.

This piece of legislation attempts to consolidate many of the provisions of other acts, as we can see by the name, An Act To Amend The Automobile Dealers Act, The Direct Sellers Act, The Insurance Adjusters, Agents And Brokers Act, The Insurance Companies Act, The Real Estate Trading Act And The Trust And Loan Corporations Licensing Act.

Essentially, Mr. Speaker, the legislation attempts to have a one-time licensing provision with, of course, the provision that there be an annual fee paid by each registrant. So it eliminates the annual licensing requirements under these acts in favour of a one-time license, "except where step progression is required for licensing with registration to be maintained, subject to the filing of annual reports and payment of an annual fee."

Mr. Speaker, I guess it is fair to say that this legislation is really consumer protection oriented. It protects the consumer to ensure that individuals are appropriately registered, that the fees have been paid, and that there is a registry in place so the government at all times is aware of who is acting as an automobile dealer and salesman, who is acting as a direct seller under the direct act, who is an insurance adjuster, an insurance agent, an insurance broker. There will now be a full-fledged registration system on insurance agents, real estate brokers and real estate agents. Essentially, it is a registration program for all these individuals. There is the protection of the consumer, and there is the fact that, I would think, and I guess the minister will agree with me, there is now no longer any need for an annual registration. It is a one-shot deal, on the understanding, of course, that the fee for registration is paid on an annual basis.

AN HON. MEMBER: (Inaudible).

MR. OTTENHEIMER: Pardon me?

AN HON. MEMBER: (Inaudible).

MR. OTTENHEIMER: Okay.

Mr. Speaker, under the Automobile Dealers Act, section 1(2) removes the definition of salespersons from the act, and subsequent amendments remove all references to salespersons as well. Section 4(1) repeals section 8 of

the existing act, and it was this section which provided for the necessity of a salesperson to be registered. So according to section 8(4) of the present act, an application for registration as a salesperson in the former registration had to be accompanied by a written notice given by a registered automobile dealer stating that the applicant, if granted the licence, is authorized to act as a salesperson representing that automobile dealer. Section 4(2) of this bill repeals this provision.

With respect to the Direct Sellers Act, section 17 of the bill repeals section 2(f) of the Direct Sellers Act, and through a substitute clause changes the definition of licence to mean a licence issued to a vendor by eliminating any reference to a salesperson. So in some ways it broadens the definition of certain provisions and terminology in the act.

Mr. Speaker, a few points on the Insurance Adjusters, Agents and Brokers Act. Section 40 of this bill repeals section 12 of the act which prescribed a specific date on which the licence expired. In its place section 12.(1) is substituted, which allows a licence to remain in effect "subject to the filing of annual reports and payment of an annual fee as prescribed by the minister, and subject to the qualifications and the requirements of the Act and regulations until it is either suspended, revoked or cancelled under this Act."

Also, under the Insurance Companies Act there is the appropriate registration for insurance agents and brokers. Under the Real Estate Trading Act there are essentially housekeeping changes, Mr. Speaker, and many of the same changes referred to previously in the other bills.

So, Mr. Speaker, other than the title which the minister referred to earlier, it is legislation which is housekeeping. I support the fact that it is an effort to protect the consumer more and more. It has a unified system of registration for individuals who wish to act as sellers, direct sellers, agents, brokers or traders in this Province. Perhaps what is the most disconcerting thing about this piece of legislation is indeed the title itself.

Thank you, Mr. Speaker.

MR. SPEAKER: The hon. the Minister of Government Services and Lands, if he speaks now he will close the debate.

MR. McLEAN: Thank you, Mr. Speaker.

Just a couple of points. I guess the point of this particular piece of legislation is to try and reform some of the cumbersome procedures that we have been having all along in terms of the licensing of sales persons. Our feeling is that the companies who employ these sales persons should have the responsibility to certainly ensure that the sales persons follow through with the proper procedures in terms of being the employees.

Just a couple of other points, Mr. Speaker. I think the government has to get away from micro-managing these types of companies and stick to the regulatory process and ensure that the companies are acting in the appropriate manner and fashion. We feel that this particular piece of legislation will certainly do that and enhance that.

Mr. Speaker, I move second reading of this bill.

On motion, a bill, "An Act To Amend The Automobile Dealers Act, The Direct Sellers Act, The Insurance Adjusters, Agents And Brokers Act, The Insurance Companies Act, The Real Estate Trading Act And The Trust And Loan Corporation Licensing Act," read a second time, ordered referred to a Committee of the Whole House on tomorrow. (Bill No. 51)

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker, Order 29, second reading of a bill, "An Act Respecting The Newfoundland And Labrador Volunteer Service Medal," Bill No. 29. I would ask the Minister of Municipal and Provincial Affairs to open the debate.

Motion, second reading of a bill, "An Act Respecting The Newfoundland And Labrador Volunteer Service Medal." (Bill No. 29)

MR. SPEAKER: The hon. the Minister of Municipal and Provincial Affairs.

MR. A. REID: Mr. Speaker, for new members who were elected in the last election in February to the House of Assembly, they are probably not aware of this particular bill, but some of us older types remember the Speech from the Throne, 1995. This House announced that it would create a volunteer service medal for people in Newfoundland and Labrador. It was a question of us proceeding then into a new government in February and we agreed, and it was mentioned also in this Speech from the Throne when we opened the House in the spring.

Mr. Speaker, I don't think I need to go into a long dissertation about this volunteer service medal. This is open to anyone in Newfoundland and Labrador and I think if you read the bill you will see that it will be controlled by an independent panel of people in the Province. It won't be a matter that will be taken very lightly. It will be a medal that will have to be deserved and, of course, none of us sitting in the House of Assembly or any politician in the Senate or in the House of Commons will be eligible for it, at least while we are sitting.

I will say that our idea of a medal back some three or four years ago, when we talked about it, at the time Premier Wells had a discussion with a number of people in the Province who had been asking for this and we felt there was a need. There are a number of people who have done exemplary service to the Province, both in the Province and outside, and we are really the only province in Canada that doesn't have some sort of recognition that we can bestow upon Newfoundlanders and Labradorians for special services that they provide to mankind, I guess, both inside the Province and outside.

Mr. Speaker, this shouldn't cause any amount of debate. If I remember correctly, those sitting on the opposite side two years ago, when we first talked about this first, also suggested - I think the Opposition party was in on the discussions with the then-premier, and I think at that particular time we had agreed to do this.

Mr. Speaker, with that said, I leave it open to anyone else who needs to discuss the proposed bill.

MR. SPEAKER: The hon. the Member for Conception Bay South.

MR. FRENCH: Thank you, Mr. Speaker.

I would just like to take a couple of minutes here on this particular piece of legislation. First of all, to compliment the Minister of Municipal and Provincial Affairs for bringing in such a piece of legislation. I agree, Mr. Speaker, that this particular piece of legislation is long overdue, and is something, I guess, that this Province should have had a long time ago.

I guess, from my own background, having been involved with a sporting group for ten years as a provincial president, I saw lots of people who have been involved around this Province, from St. John's right to Labrador, who were not only involved with my particular sport but were involved with everything that took place in their communities; people who would be very deserving of such a medal, Mr. Speaker, who gave freely of their time. A lot of them travelled parts of this Province, not only into the City of St. John's but also to different parts of the mainland, of course always at an expense to themselves, to make their communities and their part of Newfoundland and Labrador a better place in which to live for the people of this Province.

I would like to say, Mr. Speaker, that I certainly won't have any problem supporting such a bill. It will be very interesting to see the medal. I suggest that it be designed as quickly as possible so that we in this House can have the opportunity, of course, to look at it, and the different groups throughout this Province. Off the top of my head I can think of two or three people who, certainly, it won't take me long to do up resumés and put forth recommendations for; when I think of the people in this Province who are in all kinds of sports halls of fames, right throughout this Province and right throughout Canada.

I say that this is long overdue. I'm glad to see it is here. The quicker we can get a suitable medal designed, get it out, get the committee in place, and get on with honouring some of the people in Newfoundland and Labrador, men and women who both deserve such an award, the better.

Thank you.

MR. SPEAKER: The hon. the Opposition House Leader.

MR. H. HODDER: Thank you, Mr. Speaker.

I rise to speak on this particular matter because this matter was addressed in the Throne Speech and we recognize that volunteers in Newfoundland and Labrador perform exemplary services. As the slogan said, on one or two occasions when we had Volunteer Week, `Volunteers indeed are the heart of the community.'

Mr. Speaker, it is an occasion where -

MR. GRIMES: (Inaudible).

MR. H. HODDER: I say to the Minister of Education, if he is interested in prolonging the debate, then maybe he should continue with the trend of thought and the attempt at intimidation that he is doing. I did not intend to speak very long but with encouragement like that I could go on for half an hour very easily, and I do have a half hour. So, I say to the Government House Leader, if he will control his folks over there, then we can get through this particular act, do it properly and show that we truly value the volunteers of Newfoundland and Labrador.

Mr. Speaker, I was saying, the volunteers in our community: What would our communities be if we did not have the volunteers? In the City of Mount Pearl we have a long tradition of recognizing our volunteers. When I occupied the Chair of Mayor, and my successor, we tried our best to make sure that the volunteers in the community were recognized in a variety of ways and so, we organized such things as citizen-of-the-year functions.

Mr. Speaker, every year in Mount Pearl we have people who go out and find those in the community who have performed services that are outstanding. What I like about that kind of function is, very often it is not the political person, it is not the person who is out there on the frontline, but it is often that person, that lady or that gentleman, who spends hours and hours and hours going throughout the community, probably campaigning for the Heart Fund or doing something that makes the community tick.

Mr. Speaker, I can assure you that many people in Mount Pearl today are pleased that somebody cared enough to nominated them for recognition in their own community. I can tell you that when you are nominated and you find yourself receiving a plaque, even if you are not named as the citizen of the year, just to be nominated in itself is a very distinct honour.

So, Mr. Speaker, I say to the government, it is about time that Newfoundland and Labrador come up with the rest of Canada, that we bring in this kind of award and recognize the unsung heroes of our community who are not paid.

I do have a couple of things that I want to note. I wanted to note in section 6, for the minister's attention, if he could direct his attention to section 6 - I just have one little problem with that section, and that is where it says, "Where a person who would be eligible to receive a medal under this Act has died since the recommendation for an award was made public, a medal may be awarded to a relative of the volunteer as prescribed by the regulations." I have a little difficulty with the words `may be awarded'. That indicates that the medal may indeed be received by a person who did not perform the service. I have no difficulty with posthumous awards. In many cases we should look at being able to have awards given posthumously, but that is not what it says. It says that, "... a medal may be awarded to a relative." It may be received by the relative, I say to the minister, but the award should be distinctive to the person to whom the honour is given. I do have a little difficulty with that.

I will be proposing, at Committee stage, an amendment there to make clear that the medal is not to be awarded to somebody other than the person who is being honoured, or in the case of where a person has died, that it is awarded in that person's name posthumously. I would ask him if he would make note of that, and maybe that could be cleared up so that there would be clear language in clause no. 6.

AN HON. MEMBER: Repeat that again. I haven't got it all.

MR. H. HODDER: I do not have it here, but I can certainly consult with the minister on a more adequate sentence, because the language that is here does not lend itself to good legislation and it can be misinterpreted. So I would say to the minister, maybe at Committee stage we might be able to come forward with a change of wording there to more clearly say what is intended. I know what the minister intends, but it does not quite say that here.

Now, Mr. Speaker, my colleague, the Member for Conception Bay South, made note of the work that is done with the sports community in the Province. We would like to see some way in which we could, in this Province, have somewhere where we could go, one of the archives, and see little write-ups on the people who have been awarded the Newfoundland and Labrador Volunteer Service Medal. For example, if we are going to recognize some person, say in Carbonear, it might be interesting to all Newfoundlanders and Labradorians to have a little write-up on that person so we could share that person's contribution to his or her community, and to the Province, have it written down so that everybody could know why that person has been honoured. That kind of literature should be made available and maybe, for example, shared on the internet, on the government's internet page.

We might be able to have a category there for the Newfoundland and Labrador Volunteer Service Medals, and anybody who wanted to find out why a person in Happy Valley - Goose Bay or Marystown or Carbonear had received an award, there would be a little write-up on that person to indicate that this is why it happened. Or the minister might want to consider something like they do in the Sports Hall of Fame. There can be somewhere where we can have these things preserved.

One of the things that we do not want to have happen with this medal is that it be given out to people who, shall we say, have not made substantial contributions. Those who have made substantial contributions, we want to see that they are properly recognized, not only in their own communities but throughout the entire Province. Maybe the minister could consider some ways in which that might be facilitated, because these people and their contributions are the property not just of themselves but the property of all Newfoundlanders and Labradorians.

I think it would be incumbent upon the minister, if he could, to have some way of preserving the contributions, so that when someone is recognized, we can follow it up and then have it appropriately shared with all Newfoundlanders and Labradorians. I will just make one suggestion of maybe having an internet page which might simply be called, `Newfoundland and Labrador Medals', that kind of thing, so then we could have little write-ups on people. You might be very impressed, Mr. Minister, as to how many people would find that very interesting. For those people who are recipients, they themselves would feel a great deal of honour to be recognized in a public manner, not just on one particular day but have their contribution preserved for all posterity.

Mr. Speaker, I thank you for the opportunity to speak and I certainly support the initiative put forward by the hon. the Premier on behalf of the government.

MR. SPEAKER: The hon. the Member for Bonavista South.

MR. FITZGERALD: Thank you, Mr. Speaker.

AN HON. MEMBER: (Inaudible).

MR. FITZGERALD: No, I will get you some after. I need a favour done from you too.

Thank you, Mr. Speaker.

I rise tonight to speak on Bill No. 29, "An Act Respecting The Newfoundland And Labrador Volunteer Service Medal," and I compliment the minister for bringing this bill forward. It is the Premier's bill but the minister introduced it. The minister has done a very good job in this session of the House.

AN HON. MEMBER: Who?

MR. FITZGERALD: The Minister of Municipal and Provincial Affairs has done a very good job. He has brought forward many, many good pieces of legislation. It almost seems like he is house cleaning. He is getting ready to go somewhere, Mr. Speaker, taking care of business. Working overtime, Mr. Speaker, that is exactly what he is doing. I don't know where he is going or who is going to decide where he goes or anything like that, but he is doing a good job with those pieces of legislation that are being brought before this House.

MR. E. BYRNE: (Inaudible) St. John's, Mount Pearl area.

MR. FITZGERALD: Yes, that's a big one. That is a very contentious one, I say to the Member for Kilbride. He is probably not willing to bring that forward because he doesn't want to bring anything forward that would make him any lesser in the eyes of many people who sit in the front benches here. I can understand that; and for obvious reasons, I suppose.

This piece of legislation that is in the Premier's name, Mr. Speaker, is an excellent piece of legislation. There is nobody, I suppose, who knows better than some of us who sit in this House the value of volunteers on this Island and in Labrador today. Far too often our volunteers are criticized, overlooked and taken for granted by the very people who should reach out and tap them on the shoulder and say thank you. Many people don't get involved in doing volunteer work for pats on the back, for thank you letters or letters of recognition but it sure feels good when you are a volunteer, you do something and somebody comes up and just touches you on the shoulder and says thank you. Much as you are not doing it for those two simple words, it certainly feels good, Mr. Speaker.

When we look at these services that volunteers are providing in our fire departments, in our town councils, our Lions Clubs, our Kinsmen Clubs and every other organization right across this Province today, when you look at the services, Mr. Speaker, that those men and women are performing and you consider what it would cost if we had to pay somebody to do even parts of it, it would certainly be a burden on this government. Well, it wouldn't be a burden on the government because there is no way it could afford to pay for such services.

When we think of town councils, Mr. Speaker, not all councils out there today pay their town council members. Not all firemen out there today even get a simple stipend at the end of the year, or a turkey for Christmas, because most municipalities can't afford to bring forward such small gifts, if you would. This is a situation whereby somebody in their wisdom decided they were going to introduce a volunteer service medal. Somebody, Mr. Speaker, decided it was high time that we recognize the services of some of those volunteers, and we provide them with something they can wear to distinguish them, and show they are good community minded people out performing a service that was badly needed in the community.

I compliment the minister for doing that, and it is something that should be done. The minister didn't say if there was a limit as to how many medals were going to be struck, or if there was a limit as to how many medals would be allowed to be distributed, or awarded I guess is the word, each year. That isn't stated. I would imagine that people will submit. There will be a suitable application and there will be an address, and some community leaders or some community organization will probably have to nominate and put forward the reasons as to why that particular person is to be nominated and why they think he should be entitled to receive this honourary award. Mr. Speaker, that is the way it should be done.

We should be very careful in doing some kinds of those things. I was a volunteer firemen for eleven years in my community, and we started out -

AN HON. MEMBER: Are you looking for a medal?

MR. FITZGERALD: No, I'm not looking for a medal. In fact, I was a volunteer all my adult life. This is the only job I've had where I've been doing something to help people and getting paid for it; it is the only job. Up until now I've been a volunteer in my community and in my area for all of my adult life. In fact, I was recognized as the citizen of the year in the area where I lived back in, I think, 1984. I was very proud of that, to be recognized for the things that I enjoy doing, because I did enjoy doing those types of things, and the recognition certainly felt good when somebody came out and bestowed the honour of citizen of the year upon me, Mr. Speaker.

Going back to my fire department days, I say to members who are gathered, we used to select a fireman of the year. Every year somebody would be selected as fireman of the year. You could only pick one. Sometimes there would be seven or eight or nine or ten people, but you could only pick one, and I always had a real problem with that. I always had a real problem with picking somebody out and saying: You are the best. Because to me it seemed like you were belittling or you weren't showing the proper recognition for somebody else who was doing as much as they could, but because of certain circumstances somebody did a little bit more or shone a little bit brighter than somebody else. I had a real problem with that, but I know that isn't the intent here, because we can recognize as many people as we can. We are talking about a much bigger group rather than a close-knit organization where you only pick one person out and nobody else gets recognized. I know that isn't the intent.

Mr. Speaker, it is certainly a good piece of legislation, and it is certainly time that we stood in our place and recognized volunteers for the things that they do, because it hasn't been done before. It has never been done before, Mr. Speaker, other than, as I said, in small groups. When you look at the things that have been acquired - and the Minister of Municipal and Provincial Affairs probably knows more about this than anybody else here in the House, being the Minister of Municipal and Provincial Affairs. When he sees the number of town council offices, the number of fire departments, the number of fire trucks and the amount of equipment, the Lions Clubs, the Kinsmen clubs and the Knights of Columbus clubs that have been built by people coming to his office and his department looking for funding for this and funding for something else - they all come with one thing in mind. They all come for the betterment of their community and to provide a service.

The minister knows full well, when we talk about volunteers, what it means. I think it isn't only in rural Newfoundland. You see volunteers in St. John's or in Kilbride. Wherever you go you see troops of volunteers working and doing good jobs. The Minister of Health should certainly be aware of them as well. In fact, it was only last Thursday night that I left here after question period and drove down to Bonavista to attend a seniors' function there. The Lions Club in Bonavista every year provides a supper for the seniors in the area there. I would suggest there were probably 300 people. There were volunteers that bought the supper and prepared the supper. They went out and asked for donations in order to get the vegetables and the roast beef and all that kind of thing.

That particular night, in addition, Mr. Speaker, to providing a supper for the seniors in the area, there was one lady recognized there by the Lions Club as being the volunteer of the year. It was a young lady who was in Level III this year, and she was recognized for all the time and effort that she is spending at the Golden Heights Manor, in serving meals, in feeding the residents there, in playing games with them and this kind of thing. That to me is not unbelievable, because it happens, but it is certainly exceptional when you see a young lady in Level III, grade XII, going out and donating so much of her time.

AN HON. MEMBER: Where was this, Roger?

MR. FITZGERALD: Down in Bonavista on Thursday night, a Level III student. That is what she was recognized for. Lots of times people get involved in organizations and that because it brings some benefit to them as well as providing a volunteer service. But this one lady, and her name was Susan Russel, she had put in in excess of 700 hours this year doing volunteer work. When you consider somebody who goes to work every day, forty hours a week, a normal working year is probably 2,000 hours. This young lady, in addition to her studies, in addition to going to school and taking part in all the school programs, had spent 700 hours at the Golden Heights Manor doing volunteer work. I doubt very much if the Minister of Health ever sent her a letter of congratulations. I doubt it very much. At least the Minister of Municipal and Provincial Affairs is saying now we are going to recognize some of those people.

I say to the Minister of Health, that down in Bonavista on Thursday night - I travelled down to attend a seniors' function. The Lions Club down in Bonavista provided its annual supper to the seniors there whereby they gathered them all - there were quite a few there from the Golden Heights Manor, and from the Alzheimer's unit from the hospital. This one young lady, Susan Russel, was recognized by the Lions Club there. She is a Level III student at Discovery Collegiate. She was recognized and provided with a little certificate for volunteer services of over 700 hours at the Golden Heights Manor.

AN HON. MEMBER: From Bonavista?

MR. FITZGERALD: She is from Bonavista. Over 700 hours, minister, at the Golden Heights Manor. That is in addition to going to school. That is almost one-half the normal working time that you and I would work by getting up every morning and going to work at a regular job, and working from eight to five every day. That is certainly commendable, to see a young person spend that kind of time with seniors in the community.

AN HON. MEMBER: Susan Russel?

MR. FITZGERALD: Her name is Susan Russel and she is from Bonavista. It is only today, in fact, that I wrote her a little note, but it would be nice if the Minister of Health could recognize her as well, because that is what it takes. We may not be able to go out and pin medals on everyone who does those kinds of things, but the least we can do is recognize their activity in the communities and say thank you. Mr. Speaker, without those people I can assure you that many of the seniors in places like the Golden Heights Manor or The Greenwood Rest Home or the Seaside Lodge or Shirley's Haven, without them, I am afraid they would have to wait a lot longer sometimes for their meals. They would not have the luxury of being able to go and play bingo games and take part in other games, and have outings, Mr. Speaker.

Lots of times they have a bus there in Bonavista and the patients can board the bus and travel up and down the area visiting communities, and it is all done by volunteers, for the most part, coming in and donating their time. We see them here in the hospitals here in St. John's; we see the candy stripers. It goes all the way down the line, or up the line if you would, to counsellors, fire-department members and other service clubs right across this Province. That is what makes a community, Mr. Speaker. It is not the paved roads or the government wharf or the slipway, Mr. Speaker, it is community-minded volunteers who take some pride in where they live, who see a need for a service and come out and offer themselves and provide it. That is what makes the community tick, that is why we are proud to be Newfoundlanders, and that is why, when you talk to people who have to leave this Province to find a job, they leave with a knot in their hearts because they want to come back again and enjoy living in the communities of Newfoundland and Labrador, for this kind of service that is performed by volunteers in our committees.

I compliment the minister for bringing forward this piece of legislation. The Premier's name is on it but I know that the minister fully supports it, as he brought it forward. As I said, minister, when those awards are put forward, lets not say we are only going to strike two this year, let us do it and recognize the people who deserve those awards and be proud to recognize them.

Mr. Speaker, I understand there are other people here who want to speak on this particular bill. I say once again, thank you for such a bill. It is about time that we start recognizing those people. Being a volunteer myself, I know what it would have meant to me if somebody had written me a letter, the minister, or if I had gotten something that I could put here and say: This is in recognition of some of the things I have done.

The Member for Marystown, I am aware of the things with which she has been involved and the many hours of work she has put into her community, from knowing other people down there and hearing from her. I am sure she wouldn't mind standing in her place and speaking for a bill such as this. Mr. Speaker, it is something that should be done and once again, it is time that we recognize those people who are helping our communities and allowing us to live and survive here in Newfoundland.

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker, I move that this House do not adjourn at ten o'clock.

MR. SPEAKER: It is moved and seconded that the House do not adjourn at ten o'clock.

All those in favour, `aye'.

SOME HON. MEMBERS: Aye.

MR. SPEAKER: Against, `Nay'.

Carried.

The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

I would like to rise to make a few comments on this bill. In the Throne Speech, back last winter I guess, I made a few brief comments at the time and the Premier made reference to it also. My colleague for Bonavista South certainly did, I guess, a tremendous job of indicating why and how important it is to have such a volunteer service medal.

My colleague for Waterford Valley did make reference to it, and I'm sure the minister will probably take a look at this in the wording, I think, so I won't beat that point to death there. It states in an earlier section, just to put it in -

MR. TULK: As a matter of fact, Mr. Speaker, just -

MR. SPEAKER: Order, please!

The hon. the Government House Leader.

MR. TULK: I will stand up on a point of order, Mr. Speaker.

MR. SPEAKER: The hon. the Minister of Forest Resources and Agrifoods, on a point of order.

MR. TULK: Just to tell the hon. gentleman, I've just asked the Minister of Municipal and Provincial Affairs if he would get together with the Member for Waterford Valley and see if they can work out something before we move into Committee.

MR. SPEAKER: The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

Certainly I won't comment further there, other than to say that in the context - and I'm sure the Member for Waterford Valley has duly noted. In section 3, it says the government shall award a medal to each person who meets certain qualifications. Then it mentions in another section it can award it to a relative of a person who has met the qualifications. For consistency, I'm sure that an appropriate amendment will me made.

Mr. Speaker, there are many people out in our communities today who are certainly worthy of honour and recognition. I think it is important in this bill that it be reserved for people who exemplify a high level of service, not just meeting, of course, the minimum requirements here, which are: a long-standing resident of the Province, a Canadian citizen, and who has contributed a minimum of ten years above and beyond the call of duty. Every community out there has these people. I'm sure many of my colleagues here in the House are people who have been involved very heavily in community service, in many organizations, giving of their time. People who generally run for political office are people who have been fairly prominent in their community. I know members on both sides of this House have been distinguished in many ways in the community.

I know some of my colleagues, and I'm sure on both sides - I know my colleague from Conception Bay South was citizen of the year, and I'm sure there are other people. I had the opportunity to be the recipient of a Canadian volunteer award, and I know what an honour it was to receive the Canada volunteer award for service in the health care field, bestowed by the federal Department of Health.

It is important, I think, that people who have long-standing service in the community - and in my capacity in the past as being president of a Canadian service organization I had an opportunity to present many particular plaques to people recognizing their long distinguished career, some of those requiring a minimum of ten years of service.

Especially today in times of government cutbacks, it has been said that the volunteer sector is what enables people to be able to get the level of service they can. For many years people expected governments to provide them any service, but today it is more important than ever before to have a strong volunteer sector out in the community. As the motto suggests, Non sibi sed omnibus, or Not for yourself but for others, is an important part in being unselfish, doing it not for your own gain but in the service of others.

We know many people out there today get involved in volunteer organizations because a family member needed that service or because they have kids involved in organizations. But many other people, because of their nature and their community spirit, because they want to see their communities as a better place to live, get involved in such basic volunteer service work, whether it be the hospitals or to visit the seniors homes. It is a typical visit.

I know many individuals make regular visits to the seniors' homes. Many people without families or whose families live far away, they need someone to come in and assist, even for companionship, and an opportunity to provide service there where it is not possible to have a staff that can man those levels and so on with sufficient numbers of people to be able to provide an optimum level of service. Many people just have the opportunity to function with an adequate level of service. So that is very important.

The committee, which is going to be composed of seven members, certainly is well represented here by people who have an understanding. By having a Chairperson who is there for a maximum of three years, up to that limit, it allows a person to be able to set a certain standard of excellence in receiving a medal, that it is not going to be passed out without having the greatest amount of concern and the greatest amount of discretion in the presentation of such a medal. It is not something that we want to become commonplace. We want it to be reserved for those who have a distinguished service, not just those who meet the requirements of a minimum of ten years. It says: ... in an area, who have given service to his or her community beyond his or her normal duties or responsibilities. That can be interpreted to be very general. It can apply probably to 90 per cent of volunteers almost. There has to be a method in which a committee sets its own criteria and standards, within the confines of this legislation, to ensure that people who are recipients of this are people that are very deserving.

Mr. Speaker, I know the Minister of Education is quite entertained there and I think is starting to feel the effects of the hour. It is not my intention to bore him to death.

With that, I will make just a few closing comments. Mr. Speaker, I trust that the appropriate regulations and standards will follow, to ensure that the responsibilities are not lightly discharged, and will duly recognize people who don't normally get recognized within their specific group. Because there are many people out there who are recognized by their own organizations on an ongoing basis. Sometimes many people out there, giving volunteer service, do not have an opportunity to be recognized by any particular organization. I know of people who have received life memberships within various associations and numerous service organizations, but there are many people out there, as my colleague from Bonavista South mentioned, who give a considerable amount of time and there is no one there to recognize them with such a medal.

A Newfoundland and Labrador Volunteer Service Medal is one that can be used especially for those who are out working, as it says, in the motto, `Not for yourself but in the service of others.'

With that, Mr. Speaker, I conclude my remarks on this reading of the bill.

MR. SPEAKER: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Speaker.

Mr. Speaker, it is a pleasure to speak on Bill 29, "An Act Respecting The Newfoundland And Labrador Volunteer Service Medal."

MR. MATTHEWS: It is no pleasure (inaudible).

MR. J. BYRNE: Well, I am thoroughly pleased, if it is no pleasure for the Minister of Health to listen to me. I will say that to you.

MR. MATTHEWS: I'll suffer through it.

MR. J. BYRNE: Well, suffer through it. Don't get too sick, I say to the Minister of Health, don't get too sick. You might have problems getting a bit of health care in the Province. You may get into a bit of trouble trying to get a bit of health care, I say to the Minister of Health.

Mr. Speaker, this bill is a good bill. It is a bill that is going to show appreciation to the people in the Province, the volunteers in the Province of Newfoundland and Labrador. I have stood in this place many times, Mr. Speaker, and spoken of volunteers in this Province, the volunteers that make the world go round, that make this Province spin. I expect that this medal, this award, will be a very prestigious award. It should be a prestigious award. I expect there are going to be people seeking this medal and hoping to get it. It will mean something.

The medal itself will be given to people who have been chosen by a selection committee, which is a very good move, I would say to the minister who is putting this bill forward on behalf of the Premier. It is going to go to a volunteer who has served at least ten years, I suppose, above and beyond the call of duty with respect to his own job, and dealing with volunteers within the Province.

Mr. Speaker, some of the people, I suppose, who would be considered for this award would be the people who served on town councils for over ten years, and there are many of them out there. There are many, many people out there who served on town councils for over ten years. There are people who served as fire chiefs in volunteer fire departments for many years.

AN HON. MEMBER: (Inaudible) keep speaking (inaudible).

MR. J. BYRNE: Well, speak on Jack.

Mr. Speaker, we have volunteers in the fire departments who have been there for over ten years, fifteen or twenty years. So I say to the Minister of Health -

MR. MATTHEWS: I had to come over and listen, Jack, because I love it.

MR. J. BYRNE: I am afraid to say, the Minister of Health said he loves me. I don't know what he means by that. I won't comment on that at all.

Mr. Speaker, there are a lot of volunteer organizations within the Province of Newfoundland and Labrador. There are sports organizations in which we have men and women, and young men and young women, serving on these volunteer sports organizations, such as the minor hockey associations all over the Province. With the minor hockey associations we have coaches who volunteer their time every year, for years and years and years. We have the Hockey Moms, an association that contributed for years to the well-being of the young people in the Province. We have the organizations themselves. We have the minor hockey organizations and the people on the executive, like the president, vice-president, secretary and treasurer, these people; people on the executive of the Northeast Minor Hockey Association in my district.

AN HON. MEMBER: What bill are you speaking on?

MR. J. BYRNE: Bill 29.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: For awhile.

We have other sports organizations, such as the softball organizations throughout the Province, that people serve on for years and years and years, and volunteer their time.

DR. GIBBONS: (Inaudible).

MR. J. BYRNE: It is not? It is not for that? The Minister of Education said it is for those individuals. We are talking about volunteers, now, who go on for years to serve the public of this Province.

We have the various Lions Clubs in the Province. For instance, in Pouch Cove there is a Lions Club, and actually a former president of that club, who is now the district governor, Clayton King, was serving for fourteen years in the Lions Club. In actual fact, he is a former Mayor of Pouch Cove also.

AN HON. MEMBER: Served in every position.

MR. J. BYRNE: Served in every position, too.

AN HON. MEMBER: On the local executive.

MR. J. BYRNE: On the local executive of the Lions Club. He had the Lionesses in Pouch Cove. Also, we have the Kinsmen Clubs in the Province, all over the Province, in a great number of communities. We have a Kinsmen Club in Torbay that just a few years ago was very active and got together and built a senior citizen's complex in Torbay, and there are a number of seniors at that complex at this very moment. That was a great, great success on behalf of the Kinsmen. We have all the volunteers who deal with the Scouts, the Cubs, the Beavers, and those organizations. As I said before, this is a medal that is going to be well appreciated and much sought after, I expect.

Many of these volunteers over the years used their own money and paid their own expenses. Often times they try to operate on fund raising, which most of the volunteer clubs do, of course, but they often times put their own money into these organizations, especially with respect to travel. They put untold hours, days, nights, weeks, months and years into their chosen volunteer organization, and it means a lot to them. I'm sure this bill and the Volunteer Service Medal are going to be well appreciated. It is nice to see that the Premier is a man of his word. I think this was mentioned in the Throne Speech last spring.

It is a good bill, I would say again, Mr. Speaker. What is going to be printed on the medal, Not for yourself but for others, is very good wording to go on the bill. I think the people who receive this will think it is good wording, that they will appreciate it. I know the individuals who will be honoured to be presented with this medal will hang it in a place of honour in their homes, and they will certainly promote this medal; not in the fact that they will be praising themselves, but in the fact that the Province has decided to put forth such a medal to honour the volunteers within the Province of Newfoundland and Labrador.

With that, Mr. Speaker, I am going to sit down and see if anyone else would like to say a few words.

MR. SPEAKER: The hon. the Member for Kilbride.

MR. E. BYRNE: Thank you, Mr. Speaker.

I will make a few brief remarks. I won't belabour the issue too much, probably five or six minutes. This is a piece of legislation that I think every member endorses and supports, because it recognizes achievement and it recognizes sacrifice by community people. The Member for Bonavista South, I believe, summed it all up when he talked about how communities, in rural Newfoundland in particular, were built on voluntarism.

Certainly in my district there are many individuals who have participated in the volunteer sector, who have contributed greatly and left some long-standing achievements. The Goulds Lions Club comes to mind; people who have been involved with that, Barb Howlett, Lioness, Eugene Howlett, who some members on the opposite side know very well, Ron Whitten, Derek Rideout, people who have left a lot with the community. For example, the volunteer fire department in the Goulds. All of its equipment, a vast majority of the equipment that is in it today, is there because of the Lions Club. It is there because of the money it raised, it is there because of the community spirit it demonstrated in building the community.

Recently, as the Minister of Municipal and Provincial Affairs would acknowledge and know, in terms of the arena that went into the Goulds, it was done in large part, or was able to be done largely due to the fact that the Lions Club wrote a $75,000 cheque right off the bat as a contribution to what it believes was a recognized and long-standing need in the community. It took out its checkbook and wrote a $75,000 cheque for that initiative.

In Kilbride, Mr. Speaker, people have been involved with Kinsmen, Lions Clubs, and in particular the recreation commission. People come to mind, like Ed Power who, for over the past twenty years, has been a member of the recreation commission, and has contributed greatly to the development of young people in the area in sporting activities, recreational activities, and many, many more.

I think it is a piece of legislation that we all can endorse and we all can support. I look forward to the speedy delivery of this piece of legislation and to the medals being received and put out by government.

Thank you.

MR. SPEAKER: If the hon. the Minister speaks now he will close the debate.

The hon. the Minister of Municipal and Provincial Affairs.

MR. A. REID: Mr. Speaker, I would like to thank the House for the comments they made.

I will make two final comments and say that I agree with the hon. Member for Waterford Valley, that the word `awarded' should be moved out of Section 6. I am hoping that he is going to come back in committee and make an amendment to that.

I will make a final comment and say to you that this medal is not intended to be struck for thousands of people in the Province. It is going to be a unique medal for only the people who the committee think truly deserve such a distinction. I hope that at the end of the day this does not become something that everybody expects to obtain, Mr. Speaker, like the federal medal that was struck some two years ago which has lost its value in a lot of cases to a lot of people because so many people, at the end of the day, ended up with the medal.

The other question would be, of course, the cost of producing a large number of medals like this. I hope when the Premier and the Executive Council, at the end of the day, appoint the committee that they do consider His Honour, the Lieutenant-Governor now ready to retire, Lieutenant-Governor Russell, because he was another one of the people who convinced the ex-Premier with going ahead with this bill.

With that, I move second reading, Mr. Speaker.

On motion, a bill, "An Act Respecting The Newfoundland And Labrador Volunteer Service Medal," read a second time, ordered referred to a Committee of the Whole House on tomorrow. (Bill No. 29)

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker, Bill No. 32, "An Act Respecting The Protection Of Heritage Animals."

Motion, second reading of a bill, "An Act Respecting The Protection Of Heritage Animals". (Bill No. 32)

MR. SPEAKER: The hon. the Minister of Forest Resources and Agrifoods.

MR. TULK: Mr. Speaker, I am not going to dwell too long on this. Again I am sorry that my -

AN HON. MEMBER: Learned colleague.

MR. TULK: No, he is not my learned colleague. The last fellow used to stand here and say that.

The member who introduced this bill is not here to participate in the debate and I have done it all now tonight. I got up and moved a bill put forward by the Tory Opposition in this House. I am now getting up and moving a bill that was really pushed by a group that is not even a party in this House, not even considered to be a parliamentary group. I can't mention the fact that he is not here, I can't do that; I am not allowed. I am not allowed to do that. Mr. Speaker, here I am moving a bill - now there is only one thing left in this world for me to do.

AN HON. MEMBER: (Inaudible).

MR. TULK: No, no. That is to move something for that so-called - I am not sure if she calls herself an Independent Liberal or what she calls herself - but that Independent who is sitting down there south of Jack. I am sorry, south of the Member for -

AN HON. MEMBER: Cartwright - L'Anse au-Clair.

MR. TULK: Yes, that's where she is from, Cartwright - L'Anse au-Clair.

Mr. Speaker, this bill, I think, has an interest group in this Province. I think it says something for all of us really, although some people will probably belittle the bill somewhat. I say to you that it has been moved because of the - the resolution, I think, had unanimous consent.

Mr. Speaker, this bill is designed to protect certain animals in the Province. If you read clause 3 of the bill it says, "The purpose of this Act is to provide the means for the recognition and protection of heritage animals within the province." In this particular case, Mr. Speaker, what is being proposed here is that we put in place this heritage act to protect animals such as, in this case, the Newfoundland pony.

I also want to say to the House, Mr. Speaker, that it is my intention to include as the first - if the hon. gentlemen opposite would like to hear this. It is not in the bill. I thought there would be some reference to it in the note but there is not. Besides declaring the Newfoundland pony a heritage animal, it is also the intention of the government, after speaking with the minister and the members for Labrador, to declare the Labrador Husky a heritage animal as well over the next little while.

Mr. Speaker, I can say to hon. members that there is a great deal of interest in this bill. As a matter of fact, I am breaking a little bit of a promise to a fellow from out in Gambo who wanted to drive in, I say to the Member for Terra Nova, to see this bill presented in the House. A Mr. Collins - what's his first name?

MR. LUSH: I don't know because there are several.

MR. TULK: There are several. There is a Mr. Collins out there who was going to drive in to see when this bill was read in the House for a second time. So when we get to committee I am going to have to call him and tell him. Maybe what I will do, when we get to third reading, is say: Come in now. I don't know if he is going to be able to come in on Sunday or not, but if he is able to come in on Sunday I think, Mr. Speaker, I will have to call him and say: Third reading of this bill should occur on Sunday and we would appreciate your coming in to see the bill passed into law.

Mr. Speaker, I am not going to dwell on this bill much longer. Everybody in this House knows what it is about.

AN HON. MEMBER: By leave.

MR. TULK: Oh, no, I do not need any leave. I have an hour, I say to the hon. gentleman. I know my rights here. I have an hour to go on with this bill but I think it is totally unnecessary. I think everybody in this House understands what we are trying to do here, and I want to just reiterate -

AN HON. MEMBER: (Inaudible).

MR. TULK: Well, you guys can do what you like. That is up to you.

I just want to reiterate, that this bill is intended to protect certain animals in the Province, and shortly there will be a paper go to Cabinet, once this bill is passed, to make the Newfoundland pony and the Labrador husky heritage animals.

Thank you, Mr. Speaker.

MR. SPEAKER: The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Speaker.

I think it is important that I have a few comments.

MR. MATTHEWS: It is not important for us.

MR. SULLIVAN: No, but I wish the Minister of Health would pony up and we would get our health care system back on track. I do not want to get back to that tentacle approach again, I say to the minister, but there are times when he is head first into it and there are other times when he is arm's length. I cannot find out where the minister is going, backing in, sideways. He is in or he is out. He is in all directions. But I did want to have a few brief comments.

MR. H. HODDER: But there is a part of the pony that reminds you of the minister.

MR. SULLIVAN: Yes, there is so, no doubt about it. There is some resemblance between certain parts of the anatomy of the pony, I say, and somebody responsible for the preservation of the standards in this Province and the health of individuals. I would not dare make direct references other than those of great generalities. I have too much respect for the Minister of Health, as much as I like to taunt him, to make any particular accusations.

MR. H. HODDER: He would make a good tail twister.

MR. SULLIVAN: Yes, it is possible he would.

AN HON. MEMBER: Talking about the back end of the (inaudible).

MR. SULLIVAN: I made no reference - I did not use the word `back', I did not use the word `posterior', but I do say to the minister, it does say under the definition of animal, all non-human vertebrates, so we are not dealing with humans. We are dealing with the phylum Chordata, subphylum Vertebrata, but it excludes humans in that category, I say to the Minister of Health.

I did want to have a few comments and I will keep them brief. I do not want to beat this one to death, as much as people like me.

One of my constituents has several Newfoundland ponies, lives up in Burnt Cove.

AN HON. MEMBER: Name them.

MR. SULLIVAN: There was Donner and Blitzen and Comet - but seriously, if you -

MR. TULK: If you do what you are doing now, it will not do you any good. Don't get carried away. (Inaudible) to your constituents.

MR. SULLIVAN: I will not get carried away. I can say, my constituents know me a lot better than they know the Government House Leader.

I will extend this invitation. Last winter it was not possible because in Bowring Park there was no snow, but the year before in Bowring Parking, in the winter, one of my constituents had sleigh rides with the Newfoundland pony. In the summertime they had those carriage rides. They do weddings there, and they have the carriages and the sleigh in the winter. They have pony rides up in my district in Bay Bulls. They usually set up at the various fairs and folk festivals. He goes to any sports days or special events around and has little Newfoundland pony rides for the young kids especially, and even for the bigger kids, adults and so on. There is an opportunity for horseback riding. He has a whole group of Newfoundland ponies that he treasures, I can tell you, probably every bit as much as he values humans, even though we are dealing with non-human vertebrates in this instance. They are cared for, they are looked after, they are fed on a prescribed schedule. His kids are involved in the process, this man and his wife. In fact, he has gone to great lengths to preserve and contribute to certainly the preservation of the Newfoundland pony, and to use it as a good working pony there. He has established a long reputation.

I say to the minister, it is certainly admirable to see this. We aren't going to do like we did about three, four years ago when we spent two weeks in the House with no legislation and we had talked about, I think, the puffin when we brought in that bill.

AN HON. MEMBER: (Inaudible)?

MR. SULLIVAN: That is back about four years ago.

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: Yes. We had another Government House Leader who wasn't too good at getting business through the House. I must say I'm delighted in this session that we have an assistant to the Government House Leader, the Minister of Municipal and Provincial Affairs, who is tremendous at expediting the business of this House.

AN HON. MEMBER: I will tell you, he is (inaudible).

MR. SULLIVAN: Yes sirree. He made sure that the Government House Leader ponied up, I can tell you. He made sure he did his job, and he did a good job of doing that.

With that, I'm certainly supportive of the preservation of the Newfoundland pony. It has served a long particular use in this Province. In my district there are still several Newfoundland ponies. That is just one of the species identified here. This could be the designation of any heritage animal. I think the Government House Leader referred to the husky -

MR. TULK: The Labrador husky.

MR. SULLIVAN: The Labrador husky. He made reference also to -

MR. TULK: What I would like to do with that is consult with the minister. There is a great deal of talk about the Newfoundland pony, there is no doubt about that. What I want to do is, through the minister and the members for Labrador, consult with the people of Labrador, with the (inaudible) society up there (inaudible).

MR. SULLIVAN: Sure. Because it has played a very important role in life in Labrador, the Newfoundland pony, certainly, more so on the Island portion of this Province. They have had -

MR. TULK: The Newfoundland pony (inaudible).

MR. SULLIVAN: Yes, they have distinctive roles. It was a real workhorse there, pardon the pun. It, I must say, is one that Newfoundlanders are proud of. It is a very dependable animal and one that certainly has earned the right to ensure that it is preserved, and that people, for future generations, will be able to understand and treasure and have access to the history of this pony and the role it played in the development of this Province.

With that, Mr. Speaker, I conclude my remarks on this bill.

MR. SPEAKER: The hon. the Opposition House Leader.

MR. H. HODDER: Thank you, Mr. Speaker.

I too want to join with the Leader of the Opposition. I thank the Minister of Health for his encouragement. I'm delighted when he sidetracks me because I just add on to the minutes. I thought the Minister of Health was interested in getting us out of here tonight. But it is a case of where the Minister of Health is giving us all kinds of encouragement to -

SOME HON. MEMBERS: (Inaudible)!

MR. H. HODDER: I thank the Minister of Health for his encouragement, and the Minister of Education for his encouragement. With that encouragement I will probably be - I was going to be about a minute and a half, but I think now I will take three or five or maybe ten minutes. I've got thirty.

Mr. Speaker, I want to say to the Government House Leader, and it is relative to section 5 -

MR. TULK: Mr. Speaker, I want to just say to the hon. gentleman, on a point of order -

MR. SPEAKER: The hon. the Government House Leader, on a point of order.

MR. TULK: I took some advice one time from the brother of the Member for St. John's Centre. South? Centre?

AN HON. MEMBER: East.

MR. TULK: Whatever.

MR. SULLIVAN: Somewhere down there.

MR. TULK: Somewhere down there. He is a senator now. His advice to me one time, when I was over there as Opposition House Leader and I was trying to get a member over there to sit down - he was sat down next to me and it was late, about 3:00 a.m., you know what was on the go - he said to me: He has a right to speak, and he has a right to speak as long as he wants to speak. You know that, even though I am the Government House Leader. So speak on; three minutes, thirty minutes.

MR. SPEAKER: There is no point of order.

The hon. the Opposition House Leader.

MR. H. HODDER: What a point of order, Mr. Speaker, as the clock ticks, and now the Government House Leader has taken up two minutes. Now I am going to have to speak a little bit longer.

I want to say to the Government House Leader, though, that the Chair has ruled on the point of order.

Section 5.(1) states, "A person shall not, except with the consent of the minister or his or her designate, destroy, interfere with, or dispose of a heritage animal". I want to ask: Does this mean that different heritage animals will enjoy different levels of protection?

MR. TULK: (Inaudible).

MR. H. HODDER: It says here, "A person shall not, except with the consent of the minister or his or her designate, destroy, interfere with, or dispose of a heritage animal". I was wondering what we mean by, "...with the consent of the minister...". Certainly the minister would not be giving his consent to interfere with, to destroy, or to dispose of a heritage animal.

AN HON. MEMBER: (Inaudible).

MR. H. HODDER: If you say, "...except with the consent of the minister...", it might indicate that the minister may, at times, give consent to destroy, interfere with, or dispose of a heritage animal, and therefore different heritage animals might enjoy different levels of protection.

MR. TULK: Mr. Speaker, if I could just...

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: I will not take the hon. gentleman's time, if he needs the thirty minutes, but I just want to say to him that if a minister designated a heritage animal - the Newfoundland Pony Society, in the case of the Newfoundland pony, are the people who are going to see that this animal is protected. It is under their umbrella.

I think if you did anything out of the way with those people, once you had done that, you would be hard put to explain what you are doing. I would not want to be the minister to do it. I think I would be in an awful state politically. I think those people would hammer me politically for having done something with a heritage animal which ought not to be done.

So I suspect what would happen here is that the level of protection, or the level of non-interference that an animal would enjoy, would be protected by the society themselves as opposed to what the minister might or might not want to do.

MR. SPEAKER: The hon. the Opposition House Leader.

MR. H. HODDER: What I wanted to ask the minister was: Supposing, for example, we were to designate a particular animal, let's say the Pine Marten, as a heritage animal, and then we were to look at the Pine Marten's habitat, now that we have designated it as a heritage animal, does that mean that there are certain areas of the Province that we would then have to designate to protect that animal? I know it is under endangered species.

MR. TULK: (Inaudible) type of agreement with the society that you would set up before you did it.

MR. H. HODDER: Okay.

MR. TULK: As the minister, I don't think you can (inaudible) to Newfoundland.

MR. H. HODDER: I also wanted to look at the section that talks about the penalties. The penalties for non-compliance, or for interfering with a heritage animal, are quite steep.

MR. TULK: And so they should be.

MR. H. HODDER: And so they should be. There is no provision, though, for something that happens accidentally. Is there some way in which - I suppose, you have to show some wilfulness or some intent? I'm wondering if the provision for accidentally hurting or destroying a heritage animal is adequately provided for.

MR. TULK: Mr. Speaker, if you look at clause 9: "The minister may prescribe regulations (a) for the preservation, promotion and protection of heritage animals including (i) the terms and conditions under which a heritage animal may be disposed of or destroyed...." (Inaudible) an animal is killed by (inaudible).

MR. H. HODDER: Yes. So there is some leeway built in. Section 9 does permit that to be carried forward, I would agree, under regulations.

MR. TULK: (Inaudible).

MR. SPEAKER: Order, please!

I remind the hon. Opposition House Leader that we are in second reading of the bill which is approval in principle. The Committee of the Whole House is the place to get into specifics of the bill and the exchange across the House.

The hon. the Opposition House Leader.

MR. H. HODDER: Thank you, Mr. Speaker.

The end result of our discussion back and forth would mean we would facilitate matters more expeditiously when we come to Committee of the Whole House on the bill, if it is agreeable to the Government House Leader and to the Chair.

I just have one other concern. That is in, I believe, it is section 6(1)(a). You are talking here about designating "a society to act in the preservation of heritage animals." Reading through it there, that society shall define the characteristics of the class, of the breed, and also prescribe methods for establishing a breed book and all that kind of thing. I wanted to ask the minister: There isn't anything here, though, which says that the government would offer any funding to this heritage society. Without any funding provisions, these societies may be purely voluntary, and I'm wondering if that is the intent of the Ministry, to establish the society and then have it operate purely on a voluntary basis.

MR. TULK: Do you want an answer to that in closing debate?

MR. SPEAKER: If the hon. the Minister speaks now, he will close the debate.

MR. TULK: Close the debate?

AN HON. MEMBER: Do it now.

AN HON. MEMBER: By leave.

MR. SPEAKER: The hon. minister is closing the debate?

MR. TULK: Yes. I understand you want me to answer that question while I'm closing the debate.

AN HON. MEMBER: (Inaudible).

MR. TULK: Okay. Well, I will answer it by leave then, if you will.

Mr. Speaker, if you talk about the Newfoundland Pony Society, for example, that particular group of people, I've had a fair amount of discussion with them, and the truth of the matter is that at this point in time they don't want us. I don't know if I should say, don't want us, but they have never requested that we give funding to them. I would suspect that you would deal with each one on its own merits. I think the important first step is to get the legislation in place, and to see that indeed there is such an act that you can act under.

What we are doing here, what you always do I guess when you put those pieces of legislation in place, is you are opening up government - it doesn't matter about the party - to the, shall I say, upward pressure of people to do certain things about animals. This is a step forward, and I've no doubt that somewhere down the road some government, some minister, will have to deal with a society. I don't know what the society might be; it might be the `Partridge Forever Society,' if you declare that animal a heritage animal. Some society will come forward to a government and say: Look, in order for us to be able to protect this animal - for example, we are helping the Newfoundland Pony Society with community pastures. We have given them, I think, it is - don't hold me to this

- I think it is two that we have turned over to them to put the Newfoundland pony into. That is, I guess, a form of help. Even though it isn't financial dollars, it is a form of help.

I have no doubt that when other people come forward it will have to be worked out on an individual basis with each group of people. What you are doing here is opening up the government and saying: Alright, yes, we now have this heritage bill. Once a society is established, then you come and sit down and negotiate with us.

MR. SPEAKER: The hon. the Opposition House Leader.

MR. H. HODDER: Thank you, Mr. Speaker.

I just wanted to note one other final comment. In section 5 where it says: the minister may, by order, exempt a heritage animal from the application of subsection (1): Again we are talking about the phrase which says: Except with the consent of the minister or his or her designate. For example, section 5, reading clauses (1) and (3) together, does this mean that if you had, for example, a Newfoundland pony that was old and, you know, had obviously major health problems that you would have to apply to the minister to have the animal put down?

MR. TULK: No. What would happen, I would suspect, is that somebody would contact (inaudible).

MR. H. HODDER: Okay. So the provisions of the humane society would still apply and there would be no more bureaucracy than is necessary?

MR. TULK: (Inaudible). The minister would have tremendous pressure (inaudible).

MR. H. HODDER: Mr. Speaker, I thank the minister for the dialogue back and forth. I am not sure if any of my colleagues wish to have a few more comments. If not, then the minister will close the debate.

MR. SPEAKER: If the hon. minister speaks now, he closes the debate.

MR. TULK: I am not going to take any more time of the House. I will just move second reading of this bill.

On motion, a bill, "An Act Respecting The Protection Of Heritage Animals", read a second time, ordered referred to a Committee of the Whole House presently, by leave. (Bill No. 32).

MR. TULK: Mr. Speaker, I move that the House resolve itself into Committee of the Whole to consider certain bills starting with Bill No. 44, "An Act Respecting Judgement Enforcement."

On motion, that the House resolve itself into Committee of the Whole, to consider certain bills, Mr. Speaker left the Chair.

Committee of the Whole

CHAIR (Penney): Order, please!

The hon. the Government House Leader.

MR. TULK: Mr. Chairman, Order No. 16, Bill No. 44, Committee of the Whole on a bill, "An Act Respecting Judgement Enforcement", the Minister of Justice.

CHAIR: Bill No.44, "An Act Respecting Judgement Enforcement."

The hon. the Minister of Justice.

MR. DECKER: I would like to propose an amendment to this bill, Mr. Chairman, Bill No. 44.

AN HON. MEMBER: (Inaudible).

MR. DECKER: Yes. As a result of the Social Services Committee, this amendment was put forward and it is an amendment which I am quite pleased to agree to, Mr. Chairman.

The bill would be amended by renumbering clause 204 as clause 205, and by adding immediately after clause 203 the following: After the expiration of not more than three years after the coming into force of this act, the minister shall refer this act to a Committee for the purpose of undertaking a comprehensive review of the provisions and operation of this act. I so move.

CHAIR: The hon. the Member for St. John's East.

MR. OTTENHEIMER: Thank you, Mr. Chairman.

I wish to speak to this amendment and just indicate, as the minister correctly points out, this is the result of hearings before the Social Services Committee, where it was agreed to by all members of that committee that this amendment would be appropriate to deal effectively with the legislation known as Bill No. 44, the Judgement Enforcement Act.

Mr. Chairman, the reason why this amendment was put forward, and as indicated agreed to by all parties, was that, as can be seen by the legislation, Bill 44, it is comprehensive legislation. It, in fact, unifies and codifies execution law in this Province, and it is the result of many years of effort by what was originally referred to as the Law Reform Commission. The work was finalized presumably by various interest groups including officials from the Department of Justice.

Mr. Chairman, it was felt that where the rights of creditors and debtors are affected, to the extent that they are, in this legislation that really we had to have a mechanism in place whereby a review of the legislation, and the impact that the legislation had on both creditors and debtors, had to be established. It was felt by the committee, upon discussion of the various components of the bill, and having heard some representations as well, it was felt that the minister ought to be in a position, after a period of no greater than three years. that this committee be struck to review the impact and the consequences of the legislation.

The act, as I have indicated, is comprehensive. It contains some 200 clauses, and to deal effectively with it would be perhaps a very difficult task. Therefore, the review committee which will be set, and the review mechanism which is really the subject matter of this amendment, it was felt would be the most appropriate way to deal with the impact of this legislation.

MR. TULK: (Inaudible).

MR. OTTENHEIMER: Yes, and I might add, to the Government House Leader and also to the minister, that this was done with the recommendation as well of the High Sheriff who was present at the committee meetings.

MR. TULK: (Inaudible).

MR. OTTENHEIMER: That, too. The solicitors from the minister's department, who worked diligently in the preparation of this legislation, felt that this review component was appropriate.

I have no difficulty whatsoever in seconding the amendment as put forward by the hon. minister.

On motion, Causes 1 through to 203, carried.

On motion, amendment carried

On motion, Clause 204, as amended, carried.

On motion, Clause 205, carried.

Motion, that the Committee report having passed Bill No. 44, with amendment, carried.

CHAIR: The hon. the Government House Leader.

MR. TULK: Mr. Chairman, the next bill I want to call is Bill No. 26, "An Act To Amend The Labour Standards Act."

CHAIR: Do you want to wait for the minister?

MR. TULK: If you do not mind, Mr. Chairman, I have one minister here. I could move, with the permission of the House, to "An Act To Amend The Urban And Rural Planning Act."

CHAIR: Order, please!

If the hon. Government House Leader would be so kind as to cooperate with the Chair by calling the orders by order number?

MR. TULK: Order No. 19, Bill No. 35, "An Act To Amend The Urban And Rural Planning Act." I believe there is an amendment to that.

CHAIR: Bill No. 35, "An Act To Amend The Urban And Rural Planning Act."

The hon. the Minister of Municipal and Provincial Affairs.

MR. A. REID: Mr. Chairman, I move an amendment to clause 2 of the bill. The bill is amended by striking out the phrase "by the applicant" and by striking out the words "that applicant" and substituting the words "the appellant" in the proposed section 8.1(3). This amendment will ensure that the proposed subsection refers not to the applicant but to the appellant, and is consistent with section 8 of the Act to which the proposed subsection refers.

This was brought forward in second reading and the Clerk at the Table reviewed it, and our legal opinion is that this would follow along the lines of what was put forward by a member of the Opposition. We submit this amendment to Bill No. 35.

CHAIR: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Chairman.

I don't have any problem with that amendment being put forward by the minister but I have a couple of amendments that I would like to put forward myself, Mr. Chairman, with respect to Bill No. 35.

Mr. Chairman, the amendment that I would like to put forward is, that Bill No. 35, "An Act To Amend The Urban And Rural Planning Act", which is now before the House, be amended by deleting in clause 4, the figure "14" and substituting therefore the figure "21".

AN HON. MEMBER: I would like to have a copy.

MR. J. BYRNE: Sure. There are all kinds of copies.

The current act says: the town shall publish notice of a municipal plan hearing at least four weeks beforehand. It also says: the minister has to inform the town of the hearing date at least one month beforehand. This gives the town a week to get the notice in the paper. The bill reduces the four weeks to two weeks and it also reduces the one month to two weeks. That could lead to an impossible situation. If the minister gives the town the minimum notice of two weeks, the town is bound by law to have the notice published in the local paper on the same day. The Act itself says the notice to the town has to be sufficiently far in advance to allow the council a reasonable time to arrange the first publication of the notice required.

This amendment gives the town an extra week's minimum notice, since most (inaudible) weekly.

MR. H. HODDER: On a point of order, Mr. Chairman?

CHAIR: Order, please!

The hon. the Opposition House Leader, on a point of order.

MR. H. HODDER: I just wanted to ask: I understand that we do have the amendment by the hon. the minister now before the Table. We also have, I think, an amendment put forward by my colleague here. Are we going to handle all of the amendments right now, before the Table, and then go through them in sequence at the end, or shall we deal with them in the order which they are passed in? I wanted to address the question to my hon. colleague opposite?

CHAIR: We will call them in the order that they appear in the bill.

MR. TULK: (Inaudible).

MR. H. HODDER: Okay.

The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Chairman.

I certainly have no problem with that. Does the minister understand what I have been saying with respect to that amendment?

MR. A. REID: (Inaudible).

MR. J. BYRNE: Yes, sure. We are in Committee, yes.

CHAIR: The hon. the Minister of Municipal and Provincial Affairs.

MR. A. REID: Just to speak on the hon. member's comment, Mr. Chairman, not to close.

You municipal people, pay attention to what I am saying. The Federation of Municipalities, the administrators and the town councils have asked for the fourteen days. What happens in a local area where there is a local - right now we have to gazette this. This has to be gazetted under the old act. The changes here will allow a council in an area to publish it themselves in their local paper. We have done a survey around the Province and seven days is ample time. We could have gone to seven days - seven days is ample time to publish - but we moved it up to fourteen, which would give them two weeks. All the communities said: Two weeks are plenty for us. You have to remember that a lot of these will not be challenged and they will not be heard, so there is really no need.

The approval process will be speeded up by reducing from one month down to fourteen days the notice period required for the proposed public hearing. This is for public hearings, now, only for public hearings. The notice will now only have to appear in a local newspaper and not in The Newfoundland Gazette which, in itself, would reduce costs to communities, number one, and time because of the long lead period required to have a notice inserted in that publication. The long lead time to get it in the Gazette means it could mean as much as two or three months, the way the system operates now.

If the hearing does not have to proceed because no representations are being made, cancellation can be carried out by the staff in consultation with the municipality, so avoiding any ministerial approval on a routine matter.

What I say to the hon. member - and I can understand and appreciate where he is coming from with moving it to twenty-one - but if you do this, if you move this to twenty-one, you will be going against the wishes of rural municipalities, especially rural municipalities in the Province that have no problem. Anybody living in Baie Verte or Carbonear, or in rural Newfoundland, knows that all we need is a couple of days to give notice to the

newspaper and the next week then it is in the paper. So I plead with the hon. member to at least take my word for it tonight and he can check it himself. If he finds out that I am misleading the House, then come back and say that. But the municipalities and the Federation of Municipalities have recommended the fourteen days so we can speed it up.

I will just give the hon. member an example. We had a problem in Bay Roberts with the town council, who recommended against a permit. It took seven months to get a resolution on that particular problem, and I think that is much too long. All I am saying here, in this particular act, is to give the municipalities themselves the authority and the amount of time they need to do the work themselves rather than have me, as a minister, or my department, tangled up in it, in the bureaucracy, which means at the end of the day it is probably going to take six or seven months to do it.

I ask the member, just think about the fourteen days. Think about the local papers, and how easy it is to get things into the local papers, and I think you will agree then, at the end of the day, that what I am saying is probably the best course of action.

CHAIR: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Chairman.

The minister may be very well correct in what he is saying, but just for point of clarification for myself, if the minister only gives two weeks notice to the town, and the town is required to give two weeks notice, how can that be done?

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: For the notice of the public hearing?

MR. A. REID: I don't give notice to the towns now, the towns have to give notice themselves.

CHAIR: Order, please!

For the sake of Hansard, I would ask that the microphone be turned on in front of the minister.

The hon. the Minister of Municipal and Provincial Affairs.

MR. A. REID: I am not sure what the hon. member is referring to, whether I take a month to give notice. I do not give notice.

AN HON. MEMBER: Councils gives it.

MR. A. REID: Yes, councils gives notice themselves. If there is an appeal registered then it is up to the town council, in this particular act then, to make notices available to the local paper, okay? If there is a change to their plan then it is not a question of me giving notice to the town. The town, then, will have the responsibility themselves to make it known to the public, and they have fourteen days to do that, that there is going to be a change.

We are talking about planning here.

MR. J. BYRNE: Yes.

MR. A. REID: So why would I give a town a month's notice or need a month to give a town notice? If someone from a town comes into my office and says: We are proposing a change to our plan, and there is a motion of council to change the plan, then I will immediately - I won't, because I'm hoping it won't even come back to me - my department will immediately tell the town to advertize that there is a change to the town plan. Anyone

wishing to make a representation to the town plan can come to a hearing. They have fourteen days then to advertize that that hearing is going on. Okay?

MR. J. BYRNE: Fine.

CHAIR: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Chairman.

I take the minister at his word and assume that what he says is correct, and so be it. If the municipalities have no problem with it, I certainly don't have any problem with it. I just wanted to bring that point forth.

AN HON. MEMBER: Are you withdrawing the amendment?

MR. J. BYRNE: I withdraw the amendment.

Mr. Chairman, another amendment to Bill No. 35 is with respect to clause 9. I wish to move the following amendment: That clause 9 of Bill No. 35, "An Act To Amend The Urban And Rural Planning Act," which is now before the House, be amended by inserting in paragraph 124(4)(d) immediately after the word "notice" the words "but only if a condition defined in this act for the rejecting of purchase notice holds."

The bill says, in section 9(1)124.(3)(d), one of the options of a minister is to "reject the purchase notice." There are no qualifications on that phrase in that subsection. The minister's ability to reject a purchase notice must be limited by conditions set out in the act. This amendment says exactly that: The minister shall reject a purchase notice only for conditions spelled out in the act.

To me, it is that the minister just has too much discretion.

CHAIR: The hon. the Minister of Municipal and Provincial Affairs.

MR. A. REID: Mr. Chairman, I'm trying to be nice to this gentleman and I'm having difficulty in accepting - I don't know what he is talking about here. I haven't the foggiest idea.

SOME HON. MEMBERS: (Inaudible)!

CHAIR: Order, please! Order, please!

MR. A. REID: I apologize to the hon. member, but I just don't know what you are talking about. Maybe the Member for Waterford Valley can explain it to me.

CHAIR: The hon. the Member for Cape St. Francis.

MR. GRIMES: Explain it again. Never mind reading off the sheet, explain it to him.

MR. E. BYRNE: Listen to him.

MR. J. BYRNE: Take your time now.

Mr. Chairman, I said - did you get a copy of the amendment?

AN HON. MEMBER: Yes.

MR. J. BYRNE: Okay. It says here: Immediately after the word "notice" the words "but only if a condition defined in this act for rejecting the purchase notice holds."

What we are saying to the minister is that the bill says one of the options of the minister is to reject a purchase notice. There are no qualifications on that phrase in the subsection, and the minister's ability to reject a purchase notice must be limited by conditions set out in the act; not just the complete discretion of the minister.

MR. A. REID: Where are the conditions set out in the act?

MR. J. BYRNE: That is what we asking for, to put conditions in the act.

MR. A. REID: Yes, but I would have to set conditions then and put them in the act.

MR. J. BYRNE: Yes, you would have to.

MR. A. REID: I can't accept that, not tonight. If, Mr. Chairman, the hon. member wishes to change the act as such to accommodate his - he is asking me to change the total act to accommodate this particular section. What I suggest to the hon. member is let me work on this for him, and if we feel we need to change the act to accommodate this then I would propose that we will bring the act back in the spring and do it.

For the time being, I would have to provide the conditions in the act for this particular section to apply. I would have to list the conditions in the original act for this to apply.

CHAIR: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Basically what we are saying to the minister is that at this point in time the minister can reject a purchase notice for whatever reason he wants. There is nothing in the act to say that he has to follow these guidelines.

What we are saying to the minister is that if there is going to be this clause in the act, that they reject a purchase notice only for a condition that will be spelled out in the act. It is not there now. So the minister, if somebody comes forward for a purchase notice, if I want a purchase notice, can say no, and that is it. I want something in the act that is going to say: You are saying no for this reason.

CHAIR: The hon. the Minister of Municipal and Provincial Affairs.

MR. A. REID: Mr. Chairman, I think what the hon. member basically is trying to do is take away the authority, I suppose, under the act, that the minister has.

MR. J. BYRNE: No.

MR. A. REID: For the record, I will read the explanatory note that was provided to me.

The proposed amendments to this particular section, 124, are designed only to clarify the present wording of the section. It is only to clarify what is in the act right now.

What the hon. member is proposing is a change to the act, a complete change to the act. The major change to the act has nothing to do with clarifying at least what is in the act right now. So I am suggesting to the hon. member that if you feel strongly about this, please bring this to me, and the amendment to me, and I will deal with this, and if it is feasible we will change it in the next session. But I cannot stand here tonight and argue back and forth on this particular point and say at the end of the day that I am going to reject this. The municipalities have been waiting for this for years and, as far as I am concerned, this is probably one of the freest pieces of legislation that has come out of the Urban and Rural Planning Act since it was incorporated some thirty years ago. So I think I am being free.

I would suggest to the hon. member that he speak to me tomorrow and that I arrange a meeting with my staff, and I will provide him with the opportunity to change the act come next spring. Let's do that if we think it is worthwhile doing.

Other than that, I am not going to vote in favour of the amendment.

CHAIR: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Mr. Chairman, just to be clear on it, clause 9.(3)(d) of the bill says the minister may reject the purchase notice. It is right in this bill; he may reject the purchase notice, not for any given reasons. He may do it. So that is all this is addressing, not the act but this amendment to this bill itself. Can you see that, on page 6 (d)?

AN HON. MEMBER: I know what you are saying.

MR. J. BYRNE: So that can be amended; there is no problem here.

AN HON. MEMBER: (Inaudible).

CHAIR: Order, please!

Would the hon. the Government House Leader like to be recognized?

MR. TULK: No, I am sorry.

CHAIR: The hon. the Member for Cape St. Francis.

AN HON. MEMBER: I am trying to read (inaudible).

MR. J. BYRNE: And you need to read it, I would say.

To the minister, with respect to this, if the minister is prepared - and he has stated already that he would meet with myself and members of the department to address this concern for the winter session or next spring, I can let that go at this point in time.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: You will?

AN HON. MEMBER: Yes.

MR. J. BYRNE: You understand the point I am making, and you will address it?

CHAIR: The hon. the Minister of Municipal and Provincial Affairs.

MR. A. REID: I will certainly address it, Mr. Chairman. Through experience, I have found that without somebody at the end of the day having the authority to judge whether you should or you shouldn't - and there is nothing in the Urban and Rural Planning Act that gives anyone that authority other than the minister. On several occasions, since I have been minister, even though it has been recommended by commissioners to do things, I have rejected the commissioners' reports and gone contrary to the commissioners' reports for various reasons.

Now I will say quite honestly to the member: You cannot do that unless you have some backing from your staff, and somebody has to have authority to accept or reject the purchase notice, and in this particular case, it is the minister. Now if it is not going to be the minister, then somewhere in the Act it will have to identify someone who will have the authority.

AN HON. MEMBER: Designate somebody.

MR. A. REID: Yes, designate somebody to either reject or accept the purchase notice. So, if it is not the minister who is going to be?

MR. J. BYRNE: There have to be reasons. You just can't say no.

MR. A. REID: Why not?

AN HON. MEMBER: Based on what, Art?

MR. J. BYRNE: Based on what, what criteria?

MR. A. REID: Well, always based on recommendations from the urban and rural planning people in your department and in most cases from your town council, in most cases -

AN HON. MEMBER: (Inaudible).

MR. A. REID: Pardon me?

AN HON. MEMBER: (Inaudible).

CHAIR: Order, please! Order, please!

MR. E. BYRNE: Shouldn't it set out in a general way what those conditions or criteria would be?

MR. A. REID: It is pretty difficult when you are talking of purchase notices. Now, you are talking about purchasing a piece of property. Councils have a tendency sometimes to want to purchase pieces of property around this Province for no legitimate reason. I had one last year who wanted to purchase a piece of property because they wanted to dig a well in the middle of the piece of property, and I had no other choice, even though everybody recommended that I do it, I had no other choice but to turn it down because it did not make any sense.

Now, I could have taken that, I suppose, and asked the magistrate to decide on it, or a judge, but then the community that is doing this, it would cost them a fortune. So, at the end of the day, somebody is going to have to have the authority to make that decision. Let me go back and say, just to stop the argument on it, that I will address it and I will provide the opportunity for the hon. member to come with me and we will sit down with the urban and rural planning people, discuss it and get it ready for the spring.

CHAIR: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Mr. Chairman, the minister referred to the purchase notice of a municipality wanting to buy a piece of land to put a well on it. Isn't this also the reverse situation if there is a piece of land zoned -

MR. A. REID: Yes.

MR. J. BYRNE: - and the individual cannot utilize that land for the purposes he or she wants to utilize it? Then he goes to the municipality and requires those people to purchase it,and the minister can say no to it? That is the point I am trying to make, that you can then say no outright, without any reason. That is what I want addressed and if you are going to address that for me I withdraw it at this point in time.

CHAIR: Has the hon. member withdrawn his amendment?

MR. J. BYRNE: For now, yes, Mr. Chairman.

CHAIR: Shall clause 1 carry?

MR. J. BYRNE: I would like to say a few words, Mr. Chairman.

CHAIR: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Mr. Chairman, with respect to Bill No. 35, amendment to the Urban And Rural Planning Act, there are three basic problems. We addressed them somewhat previously but I want to say a few more words about this bill, Bill No. 35.

It gives the minister new power to impose fees for appeals, Mr. Chairman. Now, that is not something that was there before, that if an individual wants to appeal a decision of a municipality or what have you, that a fee could be set out to that individual. Now, Mr. Chairman, what would that appeal be, and how much would the appeal be, Mr. Chairman? Is there a maximum and a minimum?

MR. A. REID: (Inaudible).

MR. J. BYRNE: Is that in the bill, I say to the minister?

MR. A. REID: No, it is in the regulations.

MR. J. BYRNE: That is in the regulations. So the $100, that is the maximum? I say to the minister, would that be the maximum?

MR. A. REID: That is the fee.

MR. J. BYRNE: That is the fee.

MR. A. REID: There is no maximum and no minimum. The proposed fee is $100 per appeal.

MR. J. BYRNE: Per appeal. I didn't see that in the bill anywhere when I -

MR. A. REID: No, it is in regulations, it isn't in the bill.

MR. J. BYRNE: In regulations. The Minister of Municipal and Provincial Affairs says it is $100 for an appeal. That isn't something I thought was there.

It also gives the minister power to set an even shorter period of notice for public hearings. You have already dealt with that, Mr. Chairman, so we are going to address that over the winter months and maybe bring it back in the spring sitting. It gives the minister new power to use his own discretion in deciding whether to purchase land, and that is the point that we were just on about.

There are a number of other concerns that I'm going to try and highlight here now, Mr. Chairman. The new act says that someone appealing a decision of an authorized administrator under this act must also now submit a fee. Who is the authorized administrator? I expect the authorized administrator is going to be the municipality, as one would expect, but not necessarily so. Also, the authorized council is also empowered to establish fees that may be charged to a person who makes an appeal. Mr. Minister, is that also set out in the regulations that it is just $100 for the municipality also?

MR. A. REID: Yes, it will include both the appellant and the municipality or vice versa.

MR. J. BYRNE: Mr. Chairman, clauses 3, 4, 5 and 6 of this bill reduce the time of notice for public hearings. We have also addressed that, so that should be okay in due course.

The minister may reject the purchase notice. Again, that is something I addressed earlier, so I'm not going to get into it.

I don't know if anybody else wants to speak to this bill, but I will tell you, I've said what I'm going to say on it at this point in time.

A bill, "An Act To Amend The Urban And Rural Planning Act." (Bill No. 35)

On motion, clause 1 carried.

CHAIR: Shall clause 2 carry?

There was an amendment to clause 2.

On motion, amendment carried.

On motion, clause 2 as amended, carried.

On motion, clauses 3 through 9, carried.

Motion, that the Committee report having passed the bill with amendment, carried.

CHAIR: The hon. the Government House Leader.

MR. TULK: Mr. Chairman, my absent friend has returned. Bill No. 26, "An Act To Amend The Labour Standards Act."

CHAIR: Order No. 18, Bill No. 26, "An Act To Amend The Labour Standards Act."

The hon. the Minister of Environment and Labour.

MR. K. AYLWARD: Thank you, Mr. Chairman.

We introduced the bill a few days ago. The bill is a follow-up to the Labour Standards Act which made some recommendations the past year to the Department of Environment and Labour. Part of those recommendations included an increase to the minimum wage which we carried out earlier in the fall.

The two amendments we are talking about here would see a section added to increase paid vacation leave up to three weeks after fifteen years of service, recognizing seniority of workers in a workplace. Presently two weeks and 4 per cent entitlement is what a worker is entitled to. This would expand it to three weeks vacation, or six weeks vacation pay after fifteen years. So, it is an expansion of that benefit for workers.

Clause 4 would expand entitlement to bereavement leave to include –

CHAIR: Order, please!

There is an unacceptable level of noise in the chamber. The Chair is having some difficulty hearing what the minister is saying. I ask for cooperation from all members.

MR. K. AYLWARD: Clause 4 would expand entitlement to bereavement leave to include leave upon the death of a grandchild. Right now that clause does not include leave upon the death of a grandchild. This is an expansion of that definition of bereavement leave.

So those are two amendments to the Labour Standards Act we are proposing there today, and we are looking at some further recommendations to look forward to in the Spring session. Again, it is a follow-up to the increase in the minimum wage.

Thank you.

CHAIR: The hon. the Member for Kilbride.

MR. E. BYRNE: Mr. Chairman, as was noted in debate in second reading on Bill 26, we have no serious problems with this piece of legislation. It expands benefits to workers and expands the notion of bereavement to grandparents.

I move that we move this piece of legislation through committee.

A bill, "An Act To Amend The Labour Standards Act." (Bill No.26)

On motion, clauses 1 through 4, carried.

Motion, that the committee report having passed the bill without amendment, carried.

CHAIR: The hon. the Government House Leader.

MR. TULK: Mr. Chairman, the next order I gave to the Opposition House Leader today was Committee of the Whole on a bill, "An Act To Amend The Physiotherapy Act." (Bill No. 49). I think there was an amendment that was proposed to that by - who was it? It was the health critic. I think the minister is going to explain why it is not necessary to accept the amendment anyway.

CHAIR: Bill No. 49, "An Act To Amend The Physiotherapy Act."

The hon. the Minister of Health.

MR. MATTHEWS: Thank you, Mr. Chairman.

We discussed Bill 49 briefly when we went through second reading. This bill and the structure of the amendments that are put forward in this bill have been on the basis of extensive consultation with the physiotherapists in the Province, and it would be, in my judgement, inappropriate to amend it in any fashion without going back to them for appropriate consultations. I am not at all certain that the amendment would represent their points of view or represent a position they would want to have incorporated in it.

For that reason I would move, Mr. Chairman, that the bill be moved through committee without the amendment having been put, and if it has been put not be passed.

CHAIR: The hon. the Opposition House Leader.

MR. H. HODDER: Thank you, Mr. Speaker.

With regard to Bill No. 49, the Physiotherapy Act, there was some discussion, I say to the hon. minister, a few days ago when the bill was first introduced. It was indicated by the Government House Leader that there would be some consultation and we on this side agreed to withdraw the amendment and to have further consultation with the physiotherapy society. We have done that and we are now satisfied that the bill, as written, represents the view points of the physiotherapists and their society in the Province, and we recommend that the bill be passed in Committee as written, or the amendment to the bill be passed as written.

A bill, "An Act To Amend The Physiotherapy Act." (Bill No. 49)

On motion, clause 1, carried.

Motion, that the Committee report having passed the bill without amendment, carried.

MR. TULK: Mr. Chairman, Bill No. 50 - there is no need of getting the Minister of Finance and Treasury Board in here.

CHAIR: Bill No. 50, Order No. 25, "An Act To Amend The Liquor Control Act And The Liquor Corporation Act."

The hon. the Opposition House Leader.

MR. H. HODDER: Mr. Chairman, we on this side believe we can proceed with this. I do understand the Leader of the Opposition has a few comments he wishes to make, but I don't believe (inaudible).

AN HON. MEMBER: They said it would never be done! They said it would never be done!

CHAIR: Order, please! Order, please!

SOME HON. MEMBERS: (Inaudible)!

CHAIR: Order, please!

The hon. the Government House Leader.

MR. TULK: Mr. Chairman, I know it is a rare occasion when you see the Member for Port de Grave, the Minister of Fisheries and Aquaculture, on the other side of the House, but we are trying to do something here, so I would ask if you would call order. I'm trying to hear the hon. gentleman.

CHAIR: The hon. the Opposition House Leader.

MR. H. HODDER: Mr. Chairman, I agree that the Minister of Fisheries and Aquaculture is out of order more often than he is in order.

To the Government House Leader, we believe we can proceed with this act without the necessity of having the Minister of Finance and Treasury Board present in the Chamber.

CHAIR: Shall clause 1 carry?

The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Chairman.

I would like to preface it by saying, I can see that the Minister of Fisheries and Aquaculture is getting pretty comfortable on our side of the House. That started last Wednesday night. He got so comfortable last Wednesday, he enjoyed our company so much, he makes more than frequent visits to our side of the House. I have to say it again, we do have proof, we do have photographs.

MR. EFFORD: (Inaudible) watch your back.

MR. SULLIVAN: Don't worry, this is the last job he wants as leader. He had his chance in January, I say to him, and he didn't want it. Don't you worry!

SOME HON. MEMBERS: Hear, hear!

MR. SULLIVAN: I won't have to worry about my back from the Minister of Fisheries and Aquaculture, I can assure you. No sir! In fact, I don't have to worry about anybody. If anybody wants to sneak up behind me, come right ahead, I would say to the Government House Leader.

SOME HON. MEMBERS: (Inaudible).

MR. SULLIVAN: I might be gone in a week, but I'm not one who looks over my shoulder, I say to the minister. I only look back if I want to go that way, so I keep focusing, looking ahead, I would say to the Government House Leader.

I don't really feel comfortable with the Minister of Fisheries and Aquaculture here, I say, Mr. Chairman, but there are a couple of points I wanted to make on this bill. I made reference to it before, and I'm sure the Minister of Finance and Treasury Board is aware of these. There is concern over what happens under a privatized liquor

commission with the same particular act, the same responsibility now, people are going to have in the licensing, the inspection, grants, possession, sale, delivery of alcoholic beverages, which is under the control aspect; and the corporation act that has profiting, marketing, the business plans, the regulating their stores, and so on.

We have liquor sales, liquor marketing, and we have liquor controls, all under the one. The same people we have out going to regulate, to promote it and market it, are going to be asked to control it and to enforce it. Wouldn't that be basically - it says in the Explanatory Notes: "Clause 1 of this Bill would amend the definition of `board' in the Liquor Control Act to reflect the creation of a single board to administer both the Liquor Control Act and the Liquor Corporation Act." In other words, the same people now who are governed under two separate Acts. The corporation, as I mentioned, whose job is to promote and market the set business plan to ensure that we get certain profits, and considerable ones at that, I might add, well up in the tens of millions, $70-some million, I believe, back to this Province, and then, we are going to have the one board that is going to go out and put controls on it. What kinds of controls are we going to get? Are we going to have a lack of control? More profits? More promotion? Less enforcement? More sales? Is there a potential conflict in the responsibilities of putting this under the one? Is it a step forward to reaching privatization, basically, in this? And are the interests of the public going to be protected sufficiently under the specifics there, when we have all of these grouped under the one?

If not - if they are, is there going to be some agency of the Crown that is going to be able to have responsibility for the control aspect of this, that is going to be separate? Of course, government and the corporation, under the Act, has a responsibility to set out its plan, in fact, to earmark what profit it wants returned to the government, and set its prices in accordance with that, and its level of taxation - and then turn around to the same board? So there must be, if there is privatization of the liquor commission - which the minister is pursuing, and for which he is going to great lengths, I might add, sending people across the country, to Alberta - I understand they have a contingency in Alberta, finding out how they do things there.

Has the minister - and maybe he can get back to me, certainly, at another time - looked at that aspect of it, how that is done in Alberta, how those controls and marketing aspects are being regulated there? Is there going to be a free-for-all with unlimited controls on the sale and enforcement aspect? And the same people who are out enforcing it and trying to ensure that the rules are adhered to, and that consumption is within a specified period, are they out pushing it and marketing?

That is very similar to a piece of legislation I saw here in the House before - that the now Minister of Fisheries and Aquaculture brought in - the .05, which, while it promotes responsible driving, the police officer becomes a judge and a jury. That is one of the few pieces of legislation I am aware of - I do not know if there are any others - in which a single piece of legislation in this Province is without an appeal mechanism. When the police officer says, `You are at .05' you have no right of appeal. You are convicted on the spot. You pay your money, you lose your licence for twenty-four hours, and there is not a court in the land to which you can appeal to have this corrected. That is a very regressive piece of legislation. The .05 is not the point I would be debating. The point I would be debating is no mechanism to appeal and say: Look, at least there could be something wrong. It might not be calibrated properly. The machine might have been off, and you should not have been .05, and now there is not an appeal in the land, and that is wrong. That is basically wrong. It is an infringement on the rights of individuals to defence through appeal within the system.

AN HON. MEMBER: What about the Highway Traffic Act?

MR. SULLIVAN: Well, under the Highway Traffic Act, I say to the minister, you can go to court. You can go to a court on a ticket, and challenge that in court, and have your day in court, but on .05 you do not have your day in court. The police officer is the judge and the jury. I would like to know, and maybe the minister can point it out, what other legislation is there in that area under which we do not have the right at least to say: I want my day in court.

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: No, I am talking about the control of liquor now.

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: No, but it is on the topic and that is not -

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: No, it is not. I wandered off a little bit, I admit that, but when I talked about the control of liquor being under the same board as the marketing of liquor, that particular aspect does raise a concern for people.

Now, this legislation would not normally be in question. If privatization is the avenue taken, the legislation could be bad. If it is not, it may not, in itself, be harmful. But the potential is there for that, and when the government is pursuing it, enough to go to great lengths to send a delegation to other provinces to look at how they privatized their liquor corporations, it must be the intent of government to be looking in that direction, I say to the minister. Once again, I say, the Liquor Control Division is responsible for licensing. It does inspections of facilities to see that they adhere to the regulations: Are you operating at the proper hours? Do you have the proper facilities there for dispensing of alcoholic beverages in your facility, whether it may be in store, that has a beer license, whether -

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: Well, at least there is one person being entertained here. I cannot guarantee there is a second one, I say to the minister.

Now, maybe while the Premier is here, it may be an opportunity, I say to the minister - the Premier's party was so bad the other night, the Minister of Fisheries and Aquaculture came back to our party and had a tremendous time.

MR. EFFORD: Oh, I had a good time wherever.

MR. SULLIVAN: I can tell you, he livened up our party, and the Minister of Government Services and Lands and the Member for Torngat Mountains, I think, can attest to that. They saw him with their own eyes, I can tell you and -

MR. ANDERSEN: Can you remember?

MR. SULLIVAN: Oh yes, I sure can. I have a long memory, I say to the member. How good, I am not so sure, but a long memory. Even if I had a bad memory, I say to the Member for Torngat Mountains, I would remember the Minister of Fisheries and Aquaculture; and everybody else in the room would, even if they had a bad memory. And just in case our memory fail, we do have some photographs in case the need arises. Now, I do not intend to put them on public display, I say to the minister, but I intend every now and then to show them to the minister just to ensure he stays in check and he does -

MR. EFFORD: (Inaudible) show him how to have a good party!

PREMIER TOBIN: (Inaudible).

MR. SULLIVAN: Yes, he sure did, and Premier, he said to me in the House last week: `I had to come back. Your party was so dull I had to come back and liven it up.' `You sure did that!' I said to the minister. He really had a rousing party. Nobody went home very early. I know when I went at a quarter-to-one, I looked over my shoulder, one of the few times I do, I say to the minister - and that is because the minister was at the party - and he was still there. I am not sure if he locked up, I cannot say, but we -

MR. H. HODDER: No, no, but this year we did not have to change the locks like we did before.

MR. SULLIVAN: Back to Bill No. 50, I say to the minister. Sometimes I just stray off the topic and -

MR. WISEMAN: (Inaudible).

MR. H. HODDER: No, `the legal beagle' from Topsail -

MR. SULLIVAN: I do not think we should get into that legal aspect now - the beagle. Everybody needs a beagle, I suppose - not everybody needs a legal beagle, I say to the member.

AN HON. MEMBER: What member?

MR. SULLIVAN: I am glad you asked that, I say to the member. I have been asking the same question since the House started. And the people of Topsail were asking: What member?

Seriously, back to the bill and the point I want to reiterate because I think it is important. I want to reiterate: In the specific bill, how is the same board supposed to regulate - especially if it is a privatized liquor corporation - the inspection, the licensing, the standards you have for dispensing alcoholic beverages, the regulation of it in your stores - and the same board is going to come out and govern? Without government control, out in a privatized state, basically, there have to be some mechanisms. Then, the marketing aspect and the business plan, the promotion, the return back to government, how is that going to be done under the one board?

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: I am talking about clause 1 of the bill, which says: "Paragraph 2(d) of the Liquor Control Act...", and so on. I say to the minister, from the Explanatory Notes, `Clause 1 of this Bill would amend the definition of "board"....' The board will be defined in the Liquor Control Act to reflect the creation of a single board to administer both the Liquor Control Act and the Liquor Corporation Act. Now, we are going to have the same board. And he was asking which section I was referring to.

The point I am making is: Does the minister have a concern that in a privatized corporation, the board that would be responsible for marketing - I think the Minister of Government Services and Lands, with whom I have been speaking, he was asking the question there and has been following.

MR. TULK: (Inaudible).

MR. SULLIVAN: Yes, I know.

MR. TULK: Oh, he was asking you (inaudible)?

MR. SULLIVAN: Yes. Maybe he will discuss it with the Minister of Finance and Treasury Board. The same board responsible now to market the product, to push the sales of the product, to get it out in the public to try to increase sales as much as possible, get a return - that is the job of marketing a product - is the same board now that is going to put the clamps on operating hours, on licenses, inspections, and those specific areas. Is there a potential conflict in the operations there, and how does government intend to deal with those specific areas?

AN HON. MEMBER: (Inaudible) regulation (inaudible).

MR. SULLIVAN: Pardon?

AN HON. MEMBER: (Inaudible) by regulation (inaudible).

MR. SULLIVAN: Okay, then, you would deal with regulation, but regulations certainly follow from the enactment here. But still the regulations are being governed under one specific act or board as dealing with it in a private setting. What happens if it is privatized and out in the private domain, the public? How can government get its teeth and claws into regulation? Would it set up sort of a Crown agency then, I ask the minister, that is going to have a degree of control over that? Would they have an agency to deal with that?

These are just some of the potential concerns, not necessarily ones that would be evident under the current structure, but they are concerns where, when you move it away from government control, there are certain public interests that would need to be served. I think we need to ensure that is addressed. Maybe the minister has plans and mechanisms to deal with that, but I feel it sufficient to air those particular points here and to hopefully, during the course of the bill, have them addressed in some manner.

Thank you, Mr. Chairman.

On motion, clauses 1 through 12, carried.

Motion, that the Committee report having passed the bill without amendment, carried.

CHAIR: The hon. the Government House Leader.

MR. TULK: Bill No. 39, entitled, "An Act To Amend The Freedom Of Information Act And The Privacy Act".

CHAIR: The hon. the Member for St. John's East.

MR. OTTENHEIMER: Thank you, Mr. Chairman.

With respect to Bill No. 39, An Act To Amend The Freedom Of Information Act And The Privacy Act, I wish to propose amendments. I can give copies to the Clerk. I have two amendments here.

Mr. Chairman, I have provided copies to the hon. the minister and the Government House Leader. Basically, what these amendments do, is they set up a regime for both Acts, both the Privacy Act and the Freedom of Information Act. It obviously amends both section 1 which deals with the Freedom of Information Act and section 2 which deals with the Privacy Act. Both are worded almost identically, so I will not repeat the two, but I wish to review one in some detail by simply indicating as follows:

The Freedom of Information Act is amended by adding immediately after section 10 the following section:

Section 10.1(1) will now become: "The Minister of Justice shall appoint three members of the public who together shall constitute a committee, and

(a) this committee shall be the same as a committee convened under the Privacy Act to consider the release of information regarding the criminal history of an individual."

Subsection (b), Mr. Chairman: "This committee shall convene from time to time as directed by the minister."

Subsection (c): "A committee member shall be bound by an oath or affirmation not to reveal any action or negligence to any person or group, any part or the whole of the contents of the information that is the prescribed subject matter for the deliberations of the committee, except to provide a report referred to in subsection 3 to the minister."

Under subsection (d): "A committee member shall ensure any notes on the deliberations on a matter are destroyed in a secure manner forthwith upon the completion of those deliberations."

Subsection 2 in the amendment: Where,

(a) "a person referred to in section 4 requests in writing of the appropriate minister the release of information regarding the criminal history of an individual;" or (b) "the request referred to in (a):

(i) identifies to the exclusion of all others the individual regarding whom the information is being sought,

(ii) states the nature of the criminal activity regarding which the information is being sought, and

(iii) states the reason or reasons that, in the opinion of the person making the request, it is in the public interest to disclose to the public the information being requested;

(c) the criminal activity stated in the request is of a nature that, in the opinion of the minister, it is in the public interest to disclose, and disclosing such information is consistent with the intent of the Release of High Risk Offender Information Protocol."

I say to members opposite, Mr. Chairman, that is the basis of the amendment, that there is consistency with the High Risk Offender Information Protocol.

And (d) "the information is not currently at the disposal of the public after having been disclosed by the minister under subsection (5),

the minister shall obtain by secure means the requested criminal history and shall cause to be convened a meeting of the committee referred to in subsection (1) and shall provide to the committee by secure means copies of the request and the criminal history."

Subsection (3) states: "The committee, after being called together and provided with a request and a criminal history referred to in subsection 2 by the minister,

(a) shall meet in a secure place to review and discuss the contents of the request and the criminal history, the copies of which shall be secured at all times between deliberations and after the last deliberation returned to the minister;"

Subsection (b): shall be bound in the deliberations and decision by the terms and intent of the Release of High Risk Offender Information Protocol;"

And (c): "shall decide by majority vote whether it is reasonable to conclude, based on the criminal history, that the individual poses a danger to the public and whether to release to the public any or all of the criminal history of the individual is consistent with the release of High Risk Offender Information Protocol; and the decisions of the committee on these matters shall be binding on the actions of the minister in this regard;"

Under section (d) in the amendment: "shall, after having made a decision, provide forthwith by secure means to the minister

(i) the request and the criminal history provided by the minister to the committee, and

(ii) the details of the criminal history that shall be released to the public."

Under subsection 4: "Forthwith after receiving a decision of the committee on a matter and at least two days prior to the release of any information by a minister regarding the criminal history of an individual and forthwith after the minister receives the report of the decision of the committee on this matter, the minister shall inform or shall make every reasonable effort to inform that individual of the nature of the information regarding that individual that shall be released and the date on which the information shall be released."

Section 5: "The minister shall release all of and only that information that the committee provides to the minister for release, and shall distribute that information in a reasonable manner, and the information so released shall be considered public information."

Subsection 6: "A minister shall not release information under this Act regarding the criminal history of an individual except where the conditions of this section are satisfied and except where the release of this information is consistent with the terms and intent of the Release of High Risk Offender Information Protocol."

We see here, Mr. Chairman, an attempt in this legislation being consistent with the federal legislation which, of course, is the intent of this provincial legislation to begin with. But what is important here, under subsection (7): "Subsection 10(1) does not apply in respect of the release of information under section 10.1."

Section 8: "The Minister shall, subject to the approval of the Lieutenant-Governor in Council, fix the fees to be paid to the members of each board."

Subsection 9: "Where the terms of this Act are satisfied, no action lies against the minister or a member of the committee or the committee as a whole as a result of

(a) the provision by the minister to the committee of information,

(b) the deliberations of the committee,

(c) the decision of the committee,

(d) the report of the committee, or

(e) the disclosure of information regarding the criminal history of an individual that follows upon the release of information by the minister.

Mr. Chairman, that is subsection 1, and it deals specifically with an amendment to the Freedom of Information Act. Subsection 2 is the specific reference to the Privacy Act, and is essentially the same wording as what was read earlier with respect to the Freedom of Information Act.

The purpose of this amendment, Mr. Chairman, is to take all of the decision-making power, all of the authority, all of the discretion, from the minister. It sets up an independent committee which can deal with these features with respect to the release of names of individuals being consistent with and in accordance with the release of the High Risk Offender Information Protocol, the information which was released some while ago by the Minister of Justice.

I would ask that these amendments be given due consideration. I understand that my colleague, the Member for Waterford Valley, is going to speak to this amendment, as well.

Thank you, Mr. Chairman.

CHAIR: The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Chairman.

I just had some comments pertaining to this and my colleague just went thorough the Freedom Of Information Act amendment and also the amendment to the Privacy Act. They are parallel amendments and they have a great degree of merit, I say, Mr. Chairman, because they are taking decisions, basically, from the minister and putting them with three members of the public who form a committee. I think it is important that this three-member committee would be able to take a look at the release of this information regarding the criminal history of an individual. It is very important, Mr. Chairman, and a very serious matter as that information can be very confidential. Great discretion should be used in putting this out in the public forum. Of course, the minister would have the authority to convene this committee from time to time at the minister's discretion, to ensure that information can be duly looked at by an independent committee where they could then make a decision, rather than the minister being empowered to make such a decision.

The members of the committee in this responsible position, of course, would be bound by an oath or an affirmation not to reveal by action or negligence, any of the contents that that member has been privy to in reaching a decision. I think it is important to ensure that somebody other than the minister would have an opportunity to assess this information. It gives it sort of an independent aspect, still called at the convenience of the minister. In subsection 10.1(1) subsection (d), it says: the member "shall ensure any notes on the deliberations on a matter are destroyed in a secure manner forthwith upon the completion of those deliberations." Because, when decisions are made, it is important that this information that was privy to that committee should stay in the committee and should be destroyed forthwith when a decision is rendered.

If the committee should at such time again have to deal with other individuals, they would be disposed in similar manner to see that all steps are taken to ensure that the privacy of individuals is adhered to. It is important that all the information is requested - this is part of subsection 2 - whereas the person referred to in section 4, request in writing, the appropriate minister, the release of information regarding the history, the request referred to must identify to the exclusion of all others, the individual, regarding whom the information is being sought, the nature of the activity that is being sought, of course, in rendering its decision and the reason or reasons that, in the opinion of the person who makes that request, it is in the public interest to disclose information being requested. It is not every instance that is important, that information be disclosed to the public and confidential information - I think it is something that should be looked at in a committee because many decisions and particular aspects of government are referred to a committee.

In fact, there is a police complaints commission set up to look at specific complaints not just to be determined by the minister or by the Chief of Police or by other committees, but by somebody who is independent and can assess these. In this case, we do have in the police complaints commissioner, an independent person who could render that. This committee, which would function similarly, basically a three person committee, would be assembled when the need arises to deal with this specific request. It is not something that should be just left to the whim of a minister. We think it is very, very important and it should be carefully weighed with as much discussion and thought as possible in rendering a decision. It is consistent with the intent of the release, it says, of High Risk Offender Information Protocol, and this cannot be at the disposal of the public after having been disclosed by the minister under Subsection 5.

Mr. Chairman, it is very important that utmost care be used in releasing because somebody's reputation and the right as an individual to be able to pursue a livelihood after a period of time or when they have served a particular period of time, whether it be incarceration or whatever, for a particular offence. There is such a thing as rehabilitation and the right of individuals not to release to the public such information. There are occasions, too, where the release of this information is important and that is why the minister should not, at his whim or disposal, be able to make decisions. I know the minister may have advice within his or her department, but it is important, I think, that a committee be out there that would look in great detail at the repercussions.

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: That is correct, he does, but when you have three people out there in the community in the court of public opinion - well, if we look at how the Police Complaints Commission works, I mean, that is effective, that has an arm's length process, and that enables decisions to be made on complaints. We can still have one made here on the release of information. When we talk about arm's length we have seen examples with the Minister of Health and how in parallel situations we have had head-first involvement and then we had arm's length when dealing with one board. We have seen ministers in one board being head-first, and then in others they are at arm's length.

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: When it is convenient for a minister to do so, but at least a committee that is appointed, that is taken from the public out there, and can weigh the pros and cons of releasing information that is very important to ensure the integrity of the system and the individual, and important, too, I say to the minister, very important, to protect the public. And if they are going to be advantaged by the release of information - information that is confidential - sometimes it is in the public interest to release that information. At other times it is important to weigh the information, and sometimes it is not in the best interest of the individual and is not going to, in ways, unduly put the public at any risk. Then there has to be great discretion used, because we do not want to see cases where the public are put at risk. So we have a responsibility to look at it in a very non-partisan manner to ensure that these particular rights are preserved and there is an opportunity to do so.

My colleague, the Member for St. John's East, opposed these amendments to the Freedom of Information Act And The Privacy Act. It is a very good amendment and it does not in any way change. It does not in any way take away from the intent of this legislation. In fact, it strengthens this legislation, I say to my colleague. It does

not take from it, it does not detract. In fact it would build extra public confidence out there and put extra teeth in this legislation by enabling a committee to exercise this.

If it were something that was going to deviate from the intent of this Act it would be something different, but these amendments are directly in line with the intent of the legislation, and amendments that I think are important and that members of this House should seriously look at supporting because they are only going to ensure that there is a greater discretion used by a committee over which the minister has control of the time and placement.

The Minister of Education must have the most head nods, I would say, in this House in its history. He does about 150 a day. When he nods this way I assume he has gone to sleep but he is still going lateral. He is still nodding laterally, so he is still alert and listening. When he gets into a vertical nod I will sit down, I say to the minister, and conclude my remarks. While he is still smiling he must be really enjoying it. I assume that you are going to support this proposed legislation.

I am sure the Minister of Justice would support anything that would add public credibility to decision-making, something that goes a little bit deeper than the minister went in his legislation, to give certain rights to a committee to make decisions that are, after all - amendments by my colleague, the critic for Justice - going to ensure that the best interests of the public are protected, and also the individuals, and the right of that particular person to have someone use the utmost discretion in determining whether information should be revealed to the public.

That is a very serious issue, that you can never go to extreme limits to use good judgement. Sometimes by giving a minister powers to do something - many times I have seen ministers use their discretion that has not been very good discretion and judgement. We do not have to go too far -

CHAIR: Order, please!

There is an agreement here that we would limit the debate at this stage to ten minutes. The hon. member can speak as many times as he wishes but there must be an intervening speaker, and your ten minutes are up.

MR. SULLIVAN: With leave for a minute, maybe I will not get up anymore.

AN HON. MEMBER: Okay, (inaudible).

MR. SULLIVAN: No, someone else is waiting to speak, so I will sit down, Mr. Chairman.

CHAIR: The hon. the Minister of Justice.

MR. DECKER: Mr. Chairman, I thank hon. members for the time they put into considering this amendment.

MR. H. HODDER: (Inaudible).

CHAIR: Order, please!

This is Committee stage and -

MR. H. HODDER: (Inaudible) you do not close debate.

AN HON. MEMBER: Of course, you do not close debate.

CHAIR: That happens in second reading only, I point out to the hon. member.

MR. DECKER: Will someone take the hon. the Opposition House Leader outside and teach him the rules of the House, Mr. Chairman?

CHAIR: The hon. the Minister of Justice.

MR. DECKER: I recognize the sincerity of hon. members opposite who put forward this amendment; however, the reason we are amending these Acts has to do with releasing information when high-risk offenders are being released from prison. What this amendment would do is put in place a very complicated, convoluted system which would delay getting information to the committee.

If I could just explain to members what happens: the word comes down that John Doe is about to be released from prison and there is a good chance that John Doe will re-offend. Now, there is no time to waste. We have to have a system where we can move quickly. We have put the protocol committee in place which is given the information that John Doe is being released, and given the information of what John Doe has done, and then the committee decides whether or not to make this information available to the public.

If we were to accept this amendment, we would have to put another committee in place, Mr. Chairman, and then there is, I think, a two-day waiting period for the committee to report back to the minister and so on and so forth. By that time, the high-risk offender could be out and there could be another victim. So, you know, notwithstanding the fact that I recognize the sincerity of members opposite, it is just not practical for us at this time to accept this amendment; therefore, I will be asking my colleagues to vote against it.

However, I will tell hon. members opposite that over the winter, I will review some of the things they have put forward and we will consider it, but in the meantime, we do not have time to waste, Mr. Chairman -

AN HON. MEMBER: You could be gone then.

MR. DECKER: If I am gone then, Mr. Chairman, my successor will do it. The King is dead. Long live the King.

Thank you, Mr. Chairman.

MR. FITZGERALD: `Decker', you will be driving the big, white limousine, retired after this.

CHAIR: The hon. the Opposition House Leader.

MR. H. HODDER: Thank you, Mr. Speaker.

First of all, I want to compliment my colleague, the Member for St. John's East on his research and his knowledge of these matters. The Minister of Justice, when someone gets a chance to read it to him - he has admitted that he does not have time to read it now, and it will take him a couple months to read it, and then, of course, he will have to get someone else to explain it to him. Our problem is that we have no guarantee the Minister of Justice is even going to be here when the next session opens. All kinds of rumours abound that the Minister of Justice may be - or there might be a new Minister of Justice by that time.

Mr. Chairman, what the amendment basically says is that we believe the issue of the release of information is so important that the minister should consult with three members of the public who shall form a committee. We are not talking about people who are untrained in these matters, we are talking about people who have extensive knowledge of the legal system and who have the proper background to be able to render decisions relative to the release of information on any particular person.

Mr. Chairman, the general thrust of this amendment put forward to the government, I do believe finds support in the population and it is certainly, you know, the correct thing to do because none of us want to run the risk of having our young people, or anybody for that matter, particularly our young people, potentially exposed to risks that we can prevent. Therefore, knowledge within the community is essential if we are going to ensure that people who have a tendency to, shall we say, be involved in violent crime - yes, they have a right to be released to society if they have served their time, and all prisoners do get out of prison unless they happen to be criminally insane or whatever. Consequently, what we are doing is trying to have a system in place which gives

both the people in the community and the prisoner, shall we say, respectful rights of each other. Therefore, this particular amendment would assure that there would not be any arbitrary decisions on the part of the minister, we would have the community at large to be participants in the decision-making.

I accept the fact that the Minister of Justice said that he is going to look at these matters. I know that he has to consult with the legal people within his department and the people who would write the legislation for the government. That is to be expected. We do not put forward these amendments, and, in particular, this amendment, you know, in haste. There has been a great deal of thought and some consultation has occurred, and we are certainly saying that we believe we could have a little different approach that would not take away from the substance of the government's initiative but would again, leave the decision-making not so much exclusively with the minister but would allow for more of a collective decision by people within the community. That is the intent and, of course, as the member has said, it would apply to both the Freedom of Information Act And The Privacy Act.

We commend this information to the minister and ask him, if he cannot support it today, whether he would take it under advisement and then, potentially, if there is some way, you might want to come back for amendments later on after giving it consideration. We would ask members again today, when the vote is called, if they will support the amendment put forward by my colleague. Again, we will be understanding, given the nature of how amendments are put forward in the House, to the position that is taken by the hon. the Minister of Justice.

Mr. Speaker, I believe we have one more speaker from this side, so I will yield to my colleague if he wishes to make a further comment.

CHAIR: The hon. the Member for Kilbride.

MR. E. BYRNE: Thank you, Mr. Chairman.

I stand to support the amendment put forward by my colleague, the Member for St. John's East. Certainly, his background, not only as a lawyer, certainly brings added credibility and weight to what the member has asked for. The minister's explanation frankly does not - that over the next little while, maybe over Christmas, he will have his officials have a look at it and report back. There are some legitimate concerns that have been raised by the member. I do not think the minister has answered them correctly.

The Freedom Of Information Act, the proposed amendment, for example, just to read it for the record, as is done: that "The Minister of Justice shall appoint three members of the public who together shall constitute a committee...' It goes on, Mr. Chairman, to say: 10.1(1)(a) "this committee shall be the same as a committee convened under the Privacy Act to consider the release of information regarding the criminal history of an individual," - a very legitimate amendment, I would suggest to government and to the Minister of Justice. There does not seem to be anything wrong with that. The minister can, at any time, if accepting this amendment, could appoint a committee of his choosing that would deal at arm's length with such information.

It goes on to say, (b) "this committee shall convene from time to time as directed by the minister," so the minister will direct the committee. There may be a number of requests before the committee for the release of information. The committee, at the discretion of the minister, will be called to deal with matters that the minister sets forth. So the minister is in control certainly of when the committee meets, who sits on the committee but not necessarily deciding what information will or will not be released. It is a very detailed amendment. It goes on to say, (c) "a committee member shall be bound by an oath or affirmation not to reveal by action or negligence to any person or group any part or the whole of the contents of the information that is prescribed subject matter for the deliberations of the committee, except to provide a report referred to in subsection (3) to the minister." (d) " a committee member shall ensure any notes on the deliberations on a matter are destroyed in a secure manner forthwith upon the completion of those deliberations." That can be done right with the minister. It can be done right after the committee deliberates, because what we are talking about, Mr. Chairman, is the freedom of information and what we are allowed to have access to or not to have access to.

The amendment goes on to say, Mr. Chairman - and it is very detailed again, but it is important that we reiterate it, discuss it further - it goes on to say that (2) "Where," (a) "a person referred to in section (4) requests in writing of the appropriate minister the release of information regarding the criminal history of an individual, the request referred to in (a) identifies to the exclusion of all others the individual regarding whom the information is being sought.

I would suggest to my colleagues in the House that would be, I guess, a basic principle upon which the law refers in this matter and something that would be absolutely required. It states the nature of the criminal activity regarding which the information is being sought. It states the reason or reasons that, in the opinion of the person making the request, it is in the public interest to disclose to the public the information being requested.

There have been times, Mr. Chairman, certainly within the last several months -

MR. EFFORD: The Chairman is not even listening.

MR. E. BYRNE: Neither is the Minister of Fisheries and Aquaculture.

MR. EFFORD: You have that right.

MR. E. BYRNE: And the Member for Kilbride really does not care if the Minister of Fisheries and Aquaculture is listening or not, or if the Chairman is listening or not. I have a few minutes to say a few words and I will continue to say them.

As I was going to say, Mr. Chairman, there have been many occasions, not many, but certainly some more high-profile situations, where information was not released possibly that should have been released, or information was released that should not have been released to the public. Many communities have been affected by certainly criminal activity, all communities, by criminals coming back in, and that maybe information on re-entry of some people should have been outlined in a more detailed fashion to the community.

It goes on to say: The minister shall obtain by secure means the requested criminal history, and shall cause to be convened a meeting of the committee referred to in subsection (1) and shall provide to the committee by secure means copies of the requested criminal history. That is pretty standard. The committee, after being called together and provided with a request and a criminal history referred to in subsection (2) by the minister - and this is very important - (a) shall meet in a secure place - fair enough - shall be bound in their deliberations and decision by the terms and intent of the release of high-risk offender information protocol.

It goes on to say: The committee shall decide by majority vote whether it is reasonable to conclude, based on the criminal history, that the individual poses a danger to the public, and whether the release to the public of any or all of the criminal history of the individual is consistent with the release of high-risk offender information protocol, and the decisions of the committee on these matters shall be binding on the actions of the minister and in this regard shall, after having made the decision, provide forthwith by secure means to the minister.

This is where this amendment makes sense, that it removes from the minister the actual decision-making process relating to this. It removes from the minister, and ultimately through government, any notion, whether perceived or real, of political tampering. It sets out clearly for a committee to decide. The minister has the obligation and the right to appoint; the minister has the obligation and the right to call the meetings, when they will occur, but the minister and government will be bound by the decisions of this committee.

It is a very common-sense approach, a very realistic approach and, I would say to the government, a very inclusive approach, because the minister and government have an opportunity to bring forward people from the community who have experience, tangible experience - not political experience but tangible experience - relating to this matter. It could be individuals from the John Howard Society, I would suggest. It could be a respected member from the Bar. It could be a respected member from rehabilitative services. But the reality is that it sets in motion a process by which government has to, and the minister in particular, live by the decisions set forth by that committee.

Mr. Chairman, I contend that the minister's response is really nothing more than saying: We will have a look at it. The reality is we can move this amendment now, the House can pass it -

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: Go ahead. What one are you referring to?

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: In terms of it being too rushed?

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: Well, let's compare apples (audible) -

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: Good point. If we were comparing apples to apples. I mean, this is - we moved, yes, to some extent.

Mr. Chairman, I believe that the amendment put forward has been put forward by somebody with credibility, somebody who has a tremendous legal experience, and somebody who has given some thought to this, somebody who in a profession has dealt with this on a day-to-day basis. I would suggest that the amendment is more than reasonable.

With that, Mr. Chairman, I will sit down. Thank you.

CHAIR: The hon. the Member for Bonavista South.

MR. FITZGERALD: Thank you, Mr. Chairman.

I rise to add a few words to Bill No. 39, "An Act To Amend The Freedom Of Information Act And The Privacy Act."

Here again we are seeing the situation whereby there is an amendment brought forward, and the Government House Leader seems like he is afraid to entertain an amendment because he might find himself back here again saying that the amendment that was brought forward is wrong or it isn't written in legislative terms or whatever. It makes you wonder why we go through this process by sitting here in the House and rushing a piece of legislation through. You see amendments brought forward, good amendments from reputable people. We aren't talking about some layman who wrote up a resolution to a legal bill. We are seeing an amendment brought forward by somebody who is quite familiar with the legalities of bringing forward amendments. In fact, probably much more familiar than the minister who introduced it.

The Government House Leader seems to be reluctant to entertain it in case, Mr. Chairman, we find ourselves back here having to make changes again. I say that isn't the way it should be. If there is a piece of legislation brought forward in this House, and if there is an amendment to be brought forward, and if it makes more sense than the bill the way it is presented here, then why shouldn't we entertain an amendment?

AN HON. MEMBER: (Inaudible) a week ago (inaudible)?

MR. FITZGERALD: Because it wasn't called, Mr. Chairman. This is the process that we go through. We come here 2:00 in the afternoon and sometimes we know what is being called, and other times we don't. We don't decide on the operation of this House, I say to members opposite. Members opposite decide the operation of the House, members opposite decide what pieces of legislation are going to be introduced, how it is going to be introduced, what the debate is going to be, and when the House closes. This is all done by members opposite. When we bring forward an amendment to a piece of legislation, then it seems that the whole thing is stifled for

the simple reason that we don't have time to deal with it. I'm not so sure that is the way this Legislature should work.

The bill, "An Act To Amend The Freedom Of Information Act And The Privacy Act," is amended by adding immediately after section 12 the following section: That the Minister of Justice shall appoint three members of the public who together shall constitute a committee. Mr. Chairman, what the Member for St. John's East is asking for here, what his suggestion is, is that we not put all the powers of deciding what information is to be released and what information is to be made available only with the Minister of Justice.

What he is saying is that the Minister of Justice should put forward a committee. The committee should be the same as a committee convened under the Freedom Of Information Act, to consider the release of information regarding the criminal history of an individual. Mr. Chairman, those three people can be appointed by the Minister of Justice. It is a situation whereby three reputable people will be making a decision on what information is released regarding a person who is released from incarceration into the community, and the people in the community deserve to know exactly that. What they are doing, Mr. Chairman, is taking some of the power I suppose away from the minister again, and putting it into the hands of a committee; and I don't think that is too much to ask.

This is being put forward, Mr. Chairman, because we have some concerns that this power will be bestowed on some of the members opposite, especially the ministers opposite.

This committee shall convene from time to time as directed by the minister. Here again, the minister is in control. He will decide when the committee is convened and he will decide the times that they meet, which is the way that it should be. That is exactly what we are suggesting, that is what the amendment states, that is what we are saying, and the Minister of Fisheries and Aquaculture agrees with it as he shouts across the House.

A committee member shall be bound by an oath, by affirmation not to reveal, by action or negligence, to any person or group, any part or the whole of the contents of the information that is prescribed subject matter for the deliberations of the committee, except to provide a report referred to in subsection 3 to the minister, and a committee member shall insure any notes on the deliberations on a matter described in a source manner forthwith upon the completion of those deliberations.

Mr. Chairman, maybe it is the situation that this particular amendment is probably twenty times longer than the bill. Maybe, that is why the Government House Leader decides that it is too much to deal with at this particular time. It might be too cumbersome to deal with at twelve o'clock at night. Mr. Chairman, as I said, it is not our wish to be sitting here at this time but it is our responsibility to bring forward an amendment such as this because we think that it makes sense.

Where, in the opinion of the Minister of Justice, the disclosure of information regarding the criminal history of an individual is in the public interest, the minister shall make in writing a request for the release of information. Not too much to ask for, Mr. Chairman. If there is a good committee in place, then what is wrong with the minister, if he needs information, to request that information by writing? The request referred to in (a) shall: 1, Identify to the exclusion of all others, the individual regarding whom the information is being sought, state the nature of the criminal activity regarding which the information is being sought; and 3, state the reason or reasons, that in the opinion of the minister, if it is in the public's interest to disclose to the public the information being requested and explain how disclosing such information is consistent with the intent of the release of high-risk offender information protocol.

The minister shall obtain by secure means the requested criminal history and shall cause to be convened a meeting of the committee referred to in subsection 1, and shall provide to the committee by secure means copies of the request and a criminal history. The committee, after being called together and provided with the request and the criminal history referred to in subsection 2 by the minister - 3(a) clearly states - shall meet in a secure place to review and discuss the contents of the request and the criminal history. Copies of which shall be secured at all times between deliberations and after the last deliberation returned to the minister. Mr. Chairman, once

again all the information that is obtained by the committee will go back to the minister and be at the minister's disposal.

Mr. Chairman, 3(b): shall be bound in their deliberations and decisions by the terms and intent of the Release of High Risk Offender Information Protocol.

Subsection 3(c), Mr. Chairman: shall decide by majority vote whether it is reasonable to conclude, based on the criminal history, that the individual poses a danger to the public and whether to release to the public any or all of the criminal history of the individual is consistent with the Release of High Risk Offender Information Protocol; and the decisions of the committee on these matters shall be binding on the actions of the minister in this regard.

Mr. Chairman, 3(d): shall, after having made a decision, provide forthwith by secure means to the minister (i) the request and the criminal history provided by the minister to the committee, and (ii) the details of the criminal history that shall be released to the public.

Mr. Chairman, this committee will certainly worked through the direction of the Minister of Justice, but what it will do will be include three individuals who will be putting forward those suggestions, putting forward the information, making the information available to the people in the community, whatever they deem fit rather than just what the Minister of Justice wants them to hear or what he decides to put forward.

Mr. Chairman, (4): Forthwith after receiving a decision of the committee on a matter and at least two days prior to the release of any information by a minister regarding the criminal history of an individual and forthwith after the minister receives the report of the decision of the committee on this matter, the minister shall inform or shall make every reasonable effort to inform that individual of the nature of the information regarding that individual that shall be released and the date on which the information shall be released.

CHAIR: Order, please!

The hon. member's time is up.

The hon. the Member for Cape St. Francis.

SOME HON. MEMBERS: Hear, hear!

MR. J. BYRNE: Mr. Chairman, I am certainly pleased to stand in my place again tonight to support the amendment put forward by the Member for St. John's East. The strange thing about Bill 39 - well it is not really strange at all, I would say. It is commonplace now in this Legislature, in this sitting of the House, that we give more authority to the minister. We saw it given to the Minister of Fisheries.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: It used to be. Actually, I could tell you a good story about that. My hair used to be as white as the driven snow, but I can't tell you about it because you will only make fun and it is a very serious story.

Anyway, Mr. Chairman -

AN HON. MEMBER: Do you have it dyed, Jack? Do you dye it?

MR. J. BYRNE: Dye it? I don't dye it.

Mr. Chairman, this amendment that has been put forward by the Member for St. John's East, as I said earlier. The minister is trying to get more authority in this bill, Bill 39, just as the Minister of Fisheries tried to get more authority in the Fish Inspection Act, just as the Minister of Government, Services and Lands is trying to get more authority. The Minister of Fisheries and Aquaculture is at it again. I have to say this, I was trying not to say it, I was trying to keep it back and not say it, but I have to say to the Minister of Fisheries and Aquaculture: You

know something, if he woke up this morning and he had two clues, the people of the Province would realize that he had doubled his intelligence overnight; doubled his intelligence overnight, with two clues.

SOME HON. MEMBERS: (Inaudible).

MR. J. BYRNE: The Minister of Fisheries and Aquaculture can count to ten? You are doing a good job. You can count to ten.

MR. EFFORD: Backwards.

MR. E. BYRNE: And he can manage it backwards, I say, Minister.

Mr. Chairman, Bill No. 39 tries to do a number of things. The Member for St. John's East is trying to address some of the authority that has been given to the minister. Of course, one of the things that the bill does is allow someone to make a freedom of information request for information on a criminal history of any person. Anybody can go in and ask for the freedom of information and look for information on the criminal history of any given individual. Presumably, upon the request the minister or designate would review the criminal history documents and form an opinion about the merits of releasing it. Can you imagine, Mr. Chairman, one individual having the authority to do that?

The amendment that was being put forward by the Member for St. John's East certainly addresses that. The member is proposing that government appoint a committee, I think it is a three-member committee, to address that, to look at the request, to study the request of the individual or groups who are looking for the criminal history of an individual.

The three-member committee - of course, three minds are better than one. Certainly, Mr. Chairman, when we speak of certain ministers, I suppose - and we never know who is going to be the minister. The present minister may very well be capable of deciding if the information should be released, to review the information, to look at the individuals who are requesting the information, and to make a decision if it should or should not be released. That doesn't necessarily mean to say that any future minister may be of the same type or of the same stature, whatever the case may be. The Member for St. John's East is trying to address that concern.

Mr. Chairman, something else that this bill is trying to do is allow the minister and any and all of his or her designates to have access to the criminal histories of individuals. Not a very good idea, I don't think. Why should the Minister of Justice have the authority to look at anybody's file, say, without a proper review by a proper committee?

MR. McLEAN: (Inaudible).

MR. J. BYRNE: That is right, I say to the Minister of Government Services and Lands.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: It is like this, I say to the Government House Leader, he is wondering if I work at an airport, or if I've ever worked at an airport. Mr. Chairman, on a night like tonight, when we are sitting at 11:46 in the evening discussing legislation that should have been brought forth back in October, when there would have been lots of time given to all members of the House to properly discuss the matters that are being put forward, rather than being rammed and forced and pushed through the House of Assembly at 11:46 p.m., a few days before Christmas Eve, the minister is talking about me working elsewhere. Maybe sometimes I would like to work elsewhere, but I'm doing the job that I'm here to do.

MR. McLEAN: (Inaudible).

MR. J. BYRNE: What is the Minister of Government Services and Lands' problem?

MR. McLEAN: (Inaudible) in your hands.

MR. J. BYRNE: In my hands? Copious notes. I thank God for copious notes, Mr. Chairman.

The bill that is being put forward in this House, Bill 39, puts no limitations on the searches for criminal history information. Therefore, the minister and his designate can go and look for the criminal history of any individual. The question which begs to be answered is: Why would the minister want it? Now, often times it could be quite legitimate and he should have access to it, Mr. Chairman, but it should have to go before a committee first, as the Member for St. John's East proposes. We may have an individual looking for this information for negative reasons, to put it bluntly. He may be wanting the information to use against an individual. I do not think that one individual, such as the minister or his designate, should have the authority to do that.

Mr. Chairman, this bill puts no limits on the release of criminal history information other than if, in the opinion of the minister or his or her designate, it is in the public interest to disclose it. So, we have here again a person within the Department of Justice, and it may not even be within the Department of Justice, the minister or his designate, who may say it is okay to release such information. Again, the amendment that is being put forward by the Member for St. John's East certainly addresses that concern with respect to putting a three member committee in place.

Also, Mr. Chairman, this bill, Bill 39, puts no limits on the kinds of criminal history and information a minister or designate can release. So in actual fact the information that could be released, or in the opinion of the minister or his or her designate should be released, there is no limit on it. There is no limit to the type of information that can be released.

SOME HON. MEMBERS: Oh, oh!

MR. J. BYRNE: A great way to get attention in the House of Assembly is to just stop talking then everybody listens. I will just stand for ten minutes and let everybody listen.

Mr. Chairman, as I said earlier, the bill puts no limits on how - here is a very good point - the criminal history of information is released. An individual can request the information on the criminal history of any individual and you might see it plastered on the internet, you might see it plastered on the television, you might see it on posters, anywhere, Mr. Chairman. You might see it on a poster in a town hall somewhere. So again the amendment of the Member for St. John's East will address that.

The Minister of Justice says that maybe we could review this. Let us have it and we will look at it over the Winter months and come back in the Spring session and address it. I heard that before. I heard it here, I think, twice tonight, the same reply to an amendment: Well, we will look at it over the Winter months. Of course, the reason why we get that answer is to speed up the passage of this legislation, so that we will not have to deal with the amendment and admit, I suppose, Mr. Chairman, that the amendment that is being put forward is a good amendment, a legitimate amendment, a logical amendment, and it makes sense. It certainly makes sense when you get people on this side of the House standing up and speaking to it.

Another point that the bill addresses, Mr. Chairman -

CHAIR: Order, please!

The hon. member's time is up.

AN HON. MEMBER: By leave.

AN HON. MEMBER: No leave.

CHAIR: The hon. member does not have leave.

The hon. the Member for St. John's East.

MR. OTTENHEIMER: Thank you, Mr. Chairman.

I have two amendments on Bill No. 39, Mr. Chairman, that I would like to submit. To move the following: that Clause 1 of Bill 39, "An Act To Amend The Freedom Of Information Act And the Privacy Act," which is now before the House be amended by adding in Paragraph 10(2)(f) immediately after the word "disclose" the words - and I open the quotation - "however a minister shall not release information regarding the criminal history of an individual except where the release of this information is consistent with the terms and the intent of the Release of High Risk Offender Information Protocol."

Mr. Chairman, what this amendment does is make sure that the provincial legislation is consistent with the federal legislation with respect to the high risk offender information protocol. That is the purpose of this legislation.

When this bill was introduced, Mr. Chairman, by the Minister of Justice and the Attorney General some while ago, it was being done to allow provincial legislation to run concurrent with federal legislation. So all this amendment is saying is that it be consistent with the terms and the intent of the release of high risk offender information protocol.

Clause 2 of Bill 39, "An Act To Amend The Freedom Of Information Act And The Privacy Act", which is now before the House, be amended by renumbering section 13 as subsection 13(1) and adding immediately thereafter the following subsection: "(2) Notwithstanding subsection (1), a minister shall not release information regarding the criminal history of an individual except where the release of this information is consistent with the terms and intent of the release of High Risk Offender Information Protocol."

So this section essentially accomplishes the same thing, Mr. Chairman. It ensures that information being released be consistent with the federal legislation concerning the release of information and the identity of high-risk offenders.

Mr. Chairman, it is important that the identity of individuals and that civil rights and civil liberties protection be uppermost in the minds of government and government officials, through the minister and the minister's office, at all times.

The first amendment that is being submitted puts in place a committee which is independent, which acts outside of the power of the minister. What these amendments do is ensure that any information be consistent with the protocol which was outlined earlier by the Minister of Justice. Mr. Chairman, I would ask that these amendments be given due consideration.

Thank you, Mr. Chairman.

CHAIR: Shall the amendment to clause 1 carry?

AN HON. MEMBER: (Inaudible).

CHAIR: Before I recognize the hon. the Leader of the Opposition, my understanding is that we are debating an amendment to the Freedom of Information Act. There are two amendments. Is it the intent that the amendment be voted on first, and then if that is defeated that the second one - we need some clarification at the Chair.

MR. SULLIVAN: Mr. Chairman, when the first amendment is passed, the second one becomes redundant.

CHAIR: Okay.

MR. SULLIVAN: In the unfortunate incident that number one is not passed, number two then would be the one that -

CHAIR: We have two amendments on the go right now.

MR. TULK: A point of order, Mr. Chairman.

CHAIR: The hon. the Government House Leader.

MR. TULK: A point of order, Mr. Chairman.

I would like, if I could -

SOME HON. MEMBERS: Oh, oh!

CHAIR: Order, please!

The Chair is trying to -

MR. TULK: I am on a point of order on the amendments.

CHAIR: I am not talking about the hon. member; I am talking about his colleagues.

I said, "Order, please!" to your hon. colleagues, not to you.

MR. TULK: As I understood it, he just moved another amendment.

On a point of order, Mr. Chairman.

CHAIR: Yes, that is what I am saying. You are on a point of order, but I am asking your hon. members to be quiet so I can hear what the hon. member is saying.

MR. TULK: Oh, this crowd?

CHAIR: Yes.

MR. TULK: Mr. Chairman, on a point of order. I understand that we -

SOME HON. MEMBERS: (Inaudible).

CHAIR: Order, please! Order, please!

MR. TULK: I'm having problems keeping track of the amendments here.

AN HON. MEMBER: You have that much paper on the go, it is wonder you can see it.

CHAIR: Order, please! Order, please!

Can we hear what the hon. Government House Leader has to say.

MR. TULK: There was a four-page amendment that was proposed to a bill that was two paragraphs long. Now I understand we have a couple of more here somewhere, another amendment here somewhere. Are we saying if we defeat this one, the first one, that the second one then comes into play, or are we saying that if we pass the first one the second one is redundant? A redundant amendment?

CHAIR: The hon. the Member for St. John's East.

MR. OTTENHEIMER: Thank you, Mr. Chairman. The purpose of the -

CHAIR: On the point of order?

MR. OTTENHEIMER: Yes. Just to respond to the hon. Government House Leader. The first two amendments, if in fact the amendments are defeated, we would then go to the second two amendments. If the first two amendments are accepted, the second two amendments are withdrawn; as simple as that.

MR. TULK: Mr. Chairman, if I could, to that point of order?

CHAIR: The hon. the Government House Leader.

MR. TULK: I would suggest to the Chair - and I think I'm correct - that before we can entertain the second one, if that is the case, then we will have to defeat or pass, whatever we are going to do as a Legislature, the first one. The hon. gentleman has already proposed a second one. How do you know what the House is going to do?

SOME HON. MEMBERS: (Inaudible).

CHAIR: Order, please! Order, please!

The Chair just wants to clarify. The Chair interrupted the hon. Member for St. John's East because the Chair wanted to clarify the intent of the amendments, and the Chair would like to see that we would dispose of the first amendment before we debate the second amendment. As the night draws on it is going to be much more difficult to keep these things clear, and the Chair has to keep it clear in terms of what we are doing here.

SOME HON. MEMBERS: (Inaudible).

CHAIR: Order, please! Order, please!

I think we should vote on this first amendment and then we can go on and debate the second amendment. Or if the first amendment is passed, of course we will pass the clause of the bill and move on.

The hon. the Opposition House Leader.

MR. H. HODDER: Yes, Mr. Chairman. The -

MR. SHELLEY: We can't help it if they can't keep up with us.

CHAIR: Order, please! Order, please!

The hon. Member for Baie Verte - I would like to hear what the Opposition House Leader has to say.

MR. H. HODDER: If I could, what I would propose would be that we would move to the amendment, have the vote, and then we will see what the House decides. Then, when you call clause 1 again for approval, the Member for St. John's East can then stand in his place and move a further amendment if that is necessary. I think that was what was generally discussed with the Chair a few moments ago when the Member for Lewisporte was in the Chair.

CHAIR: The hon. the Government House Leader.

MR. TULK: Mr. Chairman, may I make a suggestion? We have agreed to break at 12:00 or 12:30 p.m. Perhaps the Chair would like, during the recess period, to go out and then come back and give us some clear direction as to what we should do?

CHAIR: The Chair is clear what he wants to do right now.

SOME HON. MEMBERS: Hear, hear!

CHAIR: The hon. the Government House Leader.

MR. TULK: The truth of the matter is, that you now have in front of you two amendments that have been moved.

CHAIR: Yes.

MR. TULK: They have been moved. One, I say to you, is out of order because the first amendment has not been dealt with.

CHAIR: That is what the Chair is interrupting about.

MR. TULK: So it is out of order.

CHAIR: The Chair is clear and wants to vote on the first amendments.

MR. TULK: Is the first one out of order?

AN HON. MEMBER: No.

MR. TULK: Is the second one out of order?

CHAIR: No, the second one is not out of order but will get rid of the first one.

SOME HON. MEMBERS: Oh, oh!

MR. SPEAKER: Order, please!

The Chair is not prepared to argue the points with hon. members.

All those in favour of the amendment to clause 1, `aye'.

SOME HON. MEMBERS: Aye.

CHAIR: Those against, `nay'.

SOME HON. MEMBERS: Nay.

CHAIR: Amendment to clause 2.

All those in favour of the amendment, `aye'.

SOME HON. MEMBERS: Aye.

CHAIR: Those against, 'nay'.

SOME HON. MEMBERS: Nay.

CHAIR: I declare the amendments defeated.

The hon. the Member for St. John's East will propose his amendments.

MR. OTTENHEIMER: Thank you, Mr. Chairman.

MR. TULK: Mr. Chairman, on a point of order.

CHAIR: The hon. the Government House Leader.

MR. TULK: I have to say to you that we just defeated two amendments?

CHAIR: Yes.

MR. TULK: Go on, Mr. Chairman, go on.

CHAIR: Order, please!

As has been directed by the Government House Leader, the agreement was that we break at 12:00 midnight now that the Chair is clear.

Recess

CHAIR: Order, please!

Clause 1.

The hon. the Member for St. John's East.

MR. OTTENHEIMER: Thank you, Mr. Chairman.

Just continuing on with the second pair, I guess, of amendments with respect -

MR. GRIMES: One at a time. Don't confuse us.

MR. OTTENHEIMER: There are two pairs, I say to the Minister of Education, and that is why there is confusion. There are two amendments to section one -

AN HON. MEMBER: The first pair was defeated.

MR. OTTENHEIMER: That is right, they are gone. Now we are dealing with the second pair, I say to the minister, Mr. Chairman.

Again the wording is identical because we are dealing with two different acts. We are dealing with the Freedom of Information Act and we are dealing with the Privacy Act: "Notwithstanding subsection (1), a minister shall not release information regarding the criminal history of an individual except where the release of this information is consistent with the terms and intent of the Release of High Risk Offender Information Protocol."

Mr. Chairman, I've already discussed the relevance of these amendments and why these amendments are being put forward. Again, just for clarification, being put forward to allow any release of information or any release of a person's identity to be consistent with the federal regulation with respect to the release of High Risk Offender Information Protocol.

Thank you, Mr. Chairman.

CHAIR: The hon. the Opposition House Leader.

MR. H. HODDER: Mr. Chairman, we again want to draw the attention of the hon. House to the amendments put forward by my colleague. Again, the intent is that we would give, I guess you could call it, greater clarity to the powers of the minister. We wanted again to go and say to the government that it should be reconsidering some of those matters. Because in clause 1 what the amendment is saying is: "a minister shall not release information regarding the criminal history of an individual except where the release of this information is consistent with the terms and intent of the Release of High Risk Offender Information Protocol," which is a federal piece of information.

Mr. Chairman, we highly commend this matter to the Minister of Fisheries and Aquaculture, knowing that he doesn't understand it, and that he probably isn't following the matter.

The same thing is true with clause 2 of Bill No. 39. Again we are asking the government to consider this kind of a constraint on the powers of the minister, saying that the information be released would be only when it was consistent with the intent and the terms contained in the Release of High Risk Offender Information Protocol.

Again, we are cognizant of the rights of the community to know, and we are cognizant as well of the rights of the individual who is the offender. We believe we should say to the government that we should be very careful about releasing information. We agree with the thrust of what the government is doing. We are simply saying that the minister should have some constraints on him or her as to the manner in which the information is released to the public.

The prior amendments which the government members did not accept talk about having a committee that would guide the minister in that matter. For whatever reason the members of the House said no, and that is their right. I mean, parliament means that we bring forward our suggestions as an Opposition, and it is a right of the government to say: No, thank you, we don't want to do that. That is all part of democracy. Anyway, we have a right to bring forward those amendments and we shall continue to bring forward amendments to all pieces of legislation as the evening unfolds and as the day unfolds or tomorrow unfolds, whatever.

So, Mr. Chairman, we do want to again say to the members of the House that we are supporting the intent. We want to have some restraint on the power of the minister.

With that, Mr. Chairman, I will sum up in case my colleagues want to have a word.

CHAIR: The hon. the Premier.

SOME HON. MEMBERS: Hear, hear!

PREMIER TOBIN: Mr. Chairman, I rise to express my support for the initiative being put forward by the government. I have just a brief presentation and that is to pay tribute to the Table officers, Mr. Chairman, including yourself, who have sat here with such quiet dignity and such close and scrupulous attention to every word being uttered. Mr. Chairman, we know that there is an obligation by those who sit around the Table to that.

What I really wanted to do is to draw the attention of the House to the presence in the press gallery of the best journalist who has ever covered -

SOME HON. MEMBERS: Hear, hear!

PREMIER TOBIN: - the workings of the House of Assembly.

Mr. Chairman, I have taken note that Mr. Scott Chafe of VOCM has carefully and scrupulously covered every single word uttered by the Opposition House Leader. Now this is clearly a tribute to the elegance of the Opposition House Leader, but more importantly, a tribute to the diligence in the sense of responsibility of Mr. Scott Chafe. Mr. Chairman, let the House show its appreciation for this extraordinary service for the people.

SOME HON. MEMBERS: Hear, hear!

CHAIR: All those in favour of the amendment, `aye'.

SOME HON. MEMBERS: Aye.

CHAIR: All those against, `nay'.

SOME HON. MEMBERS: Nay.

CHAIR: I declare the amendment defeated.

On motion, clause 1, carried.

MR. H. HODDER: On a point of order, Mr. Chairman.

CHAIR: The hon. the Opposition House Leader.

MR. H. HODDER: Mr. Chairman, there is some confusion with that vote. When it was called, there were all kinds of ayes and nays. I am not sure of your decision but I do accept it.

CHAIR: Order, please!

The Chair declared the amendment defeated and has passed clause 1.

Amendment to clause 2.

All those in favour of the amendment, `aye'.

SOME HON. MEMBERS: Aye.

CHAIR: Against, `Nay'.

SOME HON. MEMBERS: Nay.

CHAIR: I declare the amendment defeated.

On motion, clause 2, carried.

A bill, "An Act To Amend The Freedom Of Information Act And The Privacy Act." (Bill No. 39)

Motion, that the Committee report having passed the bill without amendment, carried.

CHAIR: The hon. the Government House Leader.

MR. TULK: Mr. Chairman, Order 21, Bill No. 38, "An Act To Amend The City Of St. John's Act (No.2)."

CHAIR: Shall clause 1 carry?

The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Chairman.

I want to say a few words on Bill 38, "An Act To Amend The City Of St. John's Act."

MR. GRIMES: (Inaudible).

MR. J. BYRNE: What's you problem over there now? Are you looking forward to the amendments, I say to the Minister of Education?

MR. GRIMES: (Inaudible).

MR. J. BYRNE: Yes, I do.

MR. GRIMES: Well, get on with it then.

MR. J. BYRNE: In due course.

MR. GRIMES: (Inaudible).

AN HON. MEMBER: Go home, boy. You don't have to stay here.

MR. J. BYRNE: The Minister of Education is very testy. You will not be missed very much if you decide to leave, I say to the Minister of Education. You can leave any time you feel like it. So be it, and goodbye.

CHAIR: Order, please!

I remind hon members that we are debating the clause by clause study of the bill and I ask hon. members to restrain from shouting across the House. I would like to listen to the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Chairman.

I propose to move the following amendment: That Clause 2 of Bill 38 - I am going to read this slow because the Minister of Education has a hard time understanding - "An Act To Amend The City Of St. John's Act (No. 2)," which is now before the House be amended by (1) deleting in subsection 402.3(4) the word "Fees" and substituting therefor the following: "Subject to Subsection 402.3(4.1), fees"; and (2) adding immediately after subsection (4) the following subsection: "(4.1) -

CHAIR: Order, please!

Are all these amendments to Clause 2?

MR. J. BYRNE: This is just an amendment.

CHAIR: Is it an amendment to Clause 2?

MR. J. BYRNE: It is an amendment to -

CHAIR: All the amendments are here?

MR. J. BYRNE: Yes.

CHAIR: All to clause 2?

MR. J. BYRNE: Yes.

CHAIR: Okay.

MR. J. BYRNE: Anyway: "(4.1) A municipal authority in a municipality that is or has at any time been served by the regional fire service of this region of the Province may inform the regional fire service committee and the city and the minister of (a) its intent to be served by the regional fire service; and (b) its dissatisfaction with the fee rate determined by the regional fire service committee, and the minister shall forthwith appoint an arbitrator who shall consult with the municipal authority and the city and the committee for a period of one month after which the arbitrator shall determine a fee rate for the municipal authority and the period of time during which the fee structure shall apply, and the decision of the arbitrator shall be binding on the municipal authority and on the city and on the committee, and shall constitute the contract referred to in subsection (3) between the municipal authority and the city." It is seconded by the hon. Member for Bonavista South.

CHAIR: The Chair would like to have a copy of the amendment.

MR. J. BYRNE: I passed the copies.

Mr. Chairman, this amendment deals with the municipality that is or has been associated with the regional fire committee and intends for the same municipalities who use the services of the regional fire committee and who have dissatisfaction with the rate determined - those are any municipalities that were previously involved that are not now involved with the St. John's Regional Fire Committee. I just want to know if that is in order and then we will continue to debate it.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: Okay, Mr. Chairman.

This has been a situation with the St. John's Regional Fire Authority, Mr. Chairman, for a number of years with a few of the municipalities in and around St. John's. I have spoken to it many times in the House of Assembly. It is a situation which I have tried to get straightened out on numerous occasions, and the various municipalities have been quite concerned.

I should start at the beginning, I suppose. It is going to take some time to actually explain everything that went on over the years, Mr. Chairman. Basically, the most recent history is that the Mayor of Logy Bay - Middle Cove - Outer Cove, myself, the minister and a member from the Premier's office had a meeting to discuss the situation. At that meeting it was basically discussed that if we could get an arbitrator put in place to set the rates that would be charged to the small Town of Logy Bay - Middle Cove - Outer Cove, it would be a positive thing for that town.

Mr. Chairman, the minister agreed that he would be interested in receiving a letter from the Town of Logy Bay - Middle Cove - Outer Cove and, on December 5, the Mayor of Logy Bay - Middle Cove - Outer Cove wrote to the minister and proposed -

SOME HON. MEMBERS: Oh, oh!

MR. J. BYRNE: This is a very serious situation.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: What did he say?

MR. E. BYRNE: Is there any truth (inaudible) you took a Dale Carnegie course (inaudible).

MR. J. BYRNE: I am not sure who made that statement.

MR. EFFORD: I did!

MR. J. BYRNE: Well, if the Minister of Fisheries and Aquaculture made it, I don't see him on his feet too often. I am sure he did not take any Dale Carnegie course; I can guarantee you that. I can guarantee you that he did not take any Dale Carnegie course.

AN HON. MEMBER: He took it and failed it.

MR. J. BYRNE: He took it and failed it. That is what happened.

Mr. Chairman, the Mayor of Logy Bay - Middle Cove - Outer Cove -

MR. EFFORD: (Inaudible).

MR. E. BYRNE: (Inaudible). We have the pictures of the Christmas party. If he takes out that book (inaudible), you take out the pictures from the Christmas party. Tell him. Take out the pictures, Jack.

MR. J. BYRNE: We have some fine pictures of the minister; I can guarantee you that. The minister made a comment the other day that he would not bring that book out any more, but we will produce the pictures in due course. I am being sidetracked now from this very serious situation.

The Mayor of Logy Bay - Middle Cove - Outer Cove wrote to the minister on the concerns that we talked about, and he again addressed the opportunity, if there was a possibility that we could have an arbitrator. Then, of course, on December 10, I was dropped off a letter, I think by the Minister of Municipal and Provincial Affairs, which was signed by the Mayor of St. John's and signed by the Mayor of Mount Pearl, basically rejecting the idea of an arbitrator.

Now the City of St. John's, of course, from the beginning were opposed to the idea of an arbitrator. The Mayor of Logy Bay - Middle Cove - Outer Cove, on a number of occasions, Mr. Chairman, proposed that an arbitrator be appointed, but the City of St. John's opposed that and it was a (inaudible) thing for them. The rates for fire-fighting services in the Town of Logy Bay - Middle Cove - Outer Cove increased from $15,000 a year to $130,000 a year, and that seemed to be an abnormally high rate to pay for fire-fighting services.

Now, back in 1992, Mr. Chairman, the town of Logy Bay - Middle Cove - Outer Cove made a presentation to the regional committee on fire fighting and they brought up a lot of points with respect to the rate that was being charged. Some of the concerns, again, that were addressed at that point in time were the services that would be provided. The cost recovery formula was a factor that the municipalities, at that time, were having a problem with, Mr. Chairman.

Now, Mr. Chairman, one of the factors that was involved with respect to the municipalities in the town of Logy Bay - Middle Cove - Outer Cove, of course, is the fact that they are so far away from a fire hydrant. There is no water and sewer within the town, Mr. Chairman, and the closest fire department -

CHAIR: Order, please!

The hon. member's time is up.

MR. EFFORD: No leave.

AN HON. MEMBER: No leave.

MR. EFFORD: Oh, give him leave, give him leave.

CHAIR: The hon. the Opposition House Leader.

MR. H. HODDER: Mr. Chairman, I don't necessarily share the same viewpoint but -

CHAIR: Before the hon. member speaks, the amendment is in order.

MR. H. HODDER: - I would enjoy the opportunity to be convinced and I give the member a chance to say all over again, in the next ten minutes, exactly what he said in the last ten minutes.

CHAIR: Order, please!

I remind the hon. members about repetition.

The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Mr. Chairman, you don't have to worry about repetition in the next ten minutes because I have about a good fifty or sixty minutes of straightforward facts with no repetition.

Now again, Mr. Chairman, the cost recovery formula was a very important factor that the towns disagreed with. Another factor that the towns had a problem with was the business tax. The city of St. John's has large amounts of revenues from the businesses within the city of St. John's. The question at that point in time, Mr. Chairman, was if in fact the businesses were paying their fair share for the fire fighting services, when you compare it to what the town of Logy Bay - Middle Cove - Outer Cove was receiving?

Now the five towns involved at the time, Mr. Chairman, were the Town of Logy Bay - Middle Cove - Outer Cove, the Town of Paradise, the Town of Portugal Cove - St. Phillips, the Town of Petty Harbour, the City of St. John's and the City of Mount Pearl. Of course the new formula that was brought in, Mr. Chairman, that was never approved by Cabinet, that never became a legal formula because it was not approved by Cabinet, was based on the assessed value of properties within the municipalities. Mr. Chairman, when the assessed values were put in place the Town of Logy Bay - Middle Cove - Outer Cove went from $15,000 to $130,000. Again,

the Town of Logy Bay - Middle Cove - Outer Cove felt that the service they were getting was not equivalent to the amount of money that they were paying.

Now, the Town of Portugal Cove - St. Phillips - all of us, all five towns, had a meeting with the then Premier and I remember sitting at the table and the Premier -

AN HON. MEMBER: You fellows should never have told him that.

AN HON. MEMBER: It's your mistake. It's your own fault. We haven't been able to get him to shut up since.

MR. J. BYRNE: I am speaking, Mr. Chairman, to this bill because it has been a pet peeve of mine from the beginning, since this was introduced. The St. John's Regional Fire Department and the five towns had a meeting back in '92, I believe it was, with the then Premier, Mr. Wells. The Premier, at that meeting, turned to me and asked: Why should the cost recovery formula not be based on assessed value only? I explained to him, Mr. Chairman, as I explained to the minister, as I explained in this House before, why the cost recovery formula should not be based on assessed value. He turned to his minister - there is no point of the Minister of Fisheries trying to yap across the House because I am not listening to him. I cannot hear him above my own voice so he might as well sit down, be quite, pay attention, and be ready to hear a lot more from this side of the House tonight.

Mr. Chairman, the five towns met with the Premier. He turned to his minister and said: Mr. Minister, if that is the case tell the mayor it is not going to happen, that the formula will not be based on the assessed value.

SOME HON. MEMBERS: Oh, oh!

CHAIR: Order, please!

I ask the hon. Minister of Fisheries -

AN HON. MEMBER: Name him, Mr. Chairman, name him.

CHAIR: Order, please!

I ask the hon. Member for Cape St. Francis to take his seat until we have established order in the House.

AN HON. MEMBER: That could take a while, Mr. Chairman.

CHAIR: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Chairman.

Now, when you look at the cost recovery formula, Mr. Chairman, based on assessed value, within the City of St. John's there are all the federal and provincial government buildings that I think are not really taken into consideration to the extent that they should be when you are looking at the assessed value within the Town of Logy Bay -Middle Cove - Outer Cove. Apparently a deduction of 15 per cent of the total operating cost is applied for the Province's contribution to cover fire protection; 15 per cent, when you look at the cost of the assessed value of the buildings in the City of St. John's.

If you look at the Confederation Buildings, if you look at the hospitals within the city, if you look at what used to be the Philip Building down there which is now a government building, when all of these buildings within the City of St. John's are taken into consideration certainly it should reduce the amount that the Town of Logy Bay - Middle Cove - Outer Cove should have to pay.

AN HON. MEMBER: (Inaudible)

MR. J. BYRNE: Yes, I saw that. I have that letter here and I referred to it.

AN HON. MEMBER: What is it?

MR. J. BYRNE: A letter from both cities.

Now, Mr. Chairman, with respect to the potential for major fires. Why the Town of Logy Bay - Middle Cove - Outer Cove has a problem with this is because of the simple fact that they still do not have the same potential for major fires as the City of St. John's and the City of Mount Pearl have. In the Town of Logy Bay - Middle Cove - Outer Cove, as with the other municipalities that were involved, the smaller towns, there is no row housing, there is no –

MR. MATTHEWS: (Inaudible)

MR. J. BYRNE: I am trying to do something for the Town of Logy Bay - Middle Cove - Outer Cove, I say to the Minister of Health. I am trying to get a fair rate charged to the municipality of Logy Bay - Middle Cove - Outer Cove for fire fighting services. That is all I am trying to do, and that is all I have ever done, I say to the Minister of Health. I have not even gotten into the study that was done for the volunteer fire department yet. I have not even gotten into that, Mr. Chairman.

The potential for major fires within the Town of Logy Bay - Middle Cove - Outer Cove is not nearly as great as in both cities. Therefore, there is certain equipment that is on standby all the time for major fires that could occur within the cities of St. John's and Mount Pearl. That is not a major potential in the Town of Logy Bay - Middle Cove - Outer Cove, therefore they should not have to pay the same percentage based on the assessed value, Mr. Chairman. Now, that is one point, but there is another aspect.

MR. MATTHEWS: Are you certain?

MR. J. BYRNE: Big time serious. Yes, I am serious.

MR. MATTHEWS: Are you certain? I did not say serious.

MR. J. BYRNE: Oh, certain. Definitely certain. Sure I'm certain.

In Logy Bay - Middle Cove - Outer Cove, or in the smaller municipalities, we don't have multi-storey buildings such as the various hotels in the city. We don't have row housing, like we saw a major fire in on, was it Military Road, where one house caught fire and probably a dozen burned. We had the CLB Armoury -

MR. MATTHEWS: Show some leadership and move a motion to include it all in the City of St. John's. Then Harvey will second it and he will add Mount Pearl to it. That will solve all your problems.

MR. J. BYRNE: I say to the Minister of Health, you must live in the City of St. John's, do you? That was tried. I mean, the previous Minister of Municipal and Provincial Affairs tried to put forward regional fire-fighting on the northeast Avalon. What they did was they named four or five towns within the legislation, and the cities of Mount Pearl and St. John's. It was explained at that point in time, Mr. Chairman, that it could not work, that it would not work.

I remember attending a meeting, Mr. Chairman, in the City of St. John's. I was, as a mayor, chairman. I was a chairman, a committee member. All the mayors were members. We were at the City of St. John's committee discussing fire-fighting and the services. We were discussing the services, and what happened? The then-deputy mayor made a statement that what would happen is we would discuss the concerns of the smaller municipalities and then we would do what was best for the City of St. John's. Therefore, that is what the problem was, and that was inherent in the St. John's regional fire-fighting.

I've disagreed with the mayor of St. John's on this, I disagreed with the previous mayor on this. I can't stand up here now in the House of Assembly and agree to something that I disagreed with before I became an MHA. That

would be hypocritical. I'm only saying the same thing today as I said back in 1992, and I'm going to continue to say it, and I'm saying it. I'm putting a motion forth.

MR. GRIMES: (Inaudible).

MR. J. BYRNE: I say to the Minister of Education, if that one is not adopted I have another one I'm going to speak to, Mr. Chairman.

Also, Mr. Chairman, with respect to the City of St. John's, if you look at the dangerous materials that are stored within the boundaries of the cities of St. John's and Mount Pearl.

AN HON. MEMBER: Jack, have they got a fire department out there now?

MR. J. BYRNE: No.

Mr. Chairman, dangerous materials within -

AN HON. MEMBER: Are they looking for a fire department?

MR. J. BYRNE: I am getting into that.

With respect to dangerous materials, Mr. Chairman, there are dangerous materials stored within the cities of St. John's and Mount Pearl. There may be some within -

CHAIR: Order, please!

The hon. member's time is up.

MR. J. BYRNE: - the smaller municipalities but not near the quantity that will be stored within -

CHAIR: Order, please!

The hon. member's time is up.

MR. EFFORD: No leave!

CHAIR: The hon. the Member for Kilbride.

MR. E. BYRNE: Thank you, Mr. Chairman.

MR. A. REID: (Inaudible).

MR. E. BYRNE: The Chairman recognized the Member for Kilbride.

MR. A. REID: The custom is that you go back and forth across the House.

MR. E. BYRNE: I'm sorry. If you would like to speak to it.

CHAIR: The hon. the Minister of Municipal and Provincial Affairs.

MR. A. REID: I have no intention of -

CHAIR: Order, please!

The Chair apologizes, but hon. members sometimes stand, and they stand not to speak. In this case, we will recognize the hon. the Minister of Municipal and Provincial Affairs.

MR. A. REID: Mr. Chairman, I guess I will have to concede to my hon. colleague for Cape St. Francis. I will have to give in to him once and for all, I suppose, and let him feel like he is winning the battle. Because he is standing alone in this House tonight with no support in his own caucus, and certainly no support on this side of the House, as it relates to the fire-fighting service.

What I will do is I will give in and I will make a statement here tonight that if Logy Bay - Middle Cove - Outer Cove doesn't want to be part of the fire service of St. John's and Mount Pearl, then they can create their own. If they want to go off on their own and buy their own fire truck, and have their own service, I think I will give in and let them do it. Now, don't you think that is the gracious thing for us to do as a department?

SOME HON. MEMBERS: Hear, hear!

MR. A. REID: If Logy Bay doesn't want to be part of the service, then I say: Do what everyone else did, except Mount Pearl and St. John's, and back out. Buy your own fire truck and look after your own fire fighting. Now, I cannot do much more than that.

SOME HON. MEMBERS: Hear, hear!

CHAIR: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Chairman.

The Minister of Municipal and Provincial Affairs just stood in his place and said something that he knows -

AN HON. MEMBER: That you cannot accept.

MR. J. BYRNE: We can't accept the very great cost to the people of Logy Bay - Middle Cove - Outer Cove, that was heaped upon them by this administration and the previous administration.

The minister knows that the Mayor of Logy Bay - Middle Cove - Outer Cove met with him last week, or a couple of weeks ago, and talked about a volunteer fire department. He has already done that with respect to the legislation. The fact of the matter is that when he changed the legislation to allow the municipalities to withdraw from the St. John's Regional Fire Department, that Portugal Cove - St. Phillips had their own fire hall down there and are well on their way to having a fire department, that Paradise out there, with the population they have, could afford a volunteer fire department. He knows that. He knows that in Logy Bay - Middle Cove - Outer Cove, with 2,000 people, the rate jumped from $15,000 to $130,000 a year for a service that was the same service given to them for an amount of money that was being asked for by municipal affairs. They increased it from $15,000 to $30,000. They went from $30,000 to $45,000 on their own, without a cost recovery formula in place, a legal cost recovery formula.

So for the minister to stand in his place here now and make those statements is being a bit - I will not say the word. He is trying to be a bit smart at this point in time, and this is a very serious issue for 2,000 people.

The Town of Logy Bay - Middle Cove - Outer Cove has had a person come in and study the cost of putting in a volunteer fire department, and the minister has already given them permission in writing to borrow over $300,000 to put in their own volunteer fire department. What he is not telling you is how much it is costing the people of the Town of Logy Bay - Middle Cove - Outer Cove, that it is increasing from $15,000 to $130,000.

The City of St. John's made an offer that they would reduce it by $30,000 a year. This is based on the assessed value, Mr. Chairman, and what happened in the last assessment is that the assessments within the Town of Logy Bay - Middle Cove - Outer Cove went up from 40 per cent to 60 per cent because municipal affairs had waited ten years to do an assessment on the properties within the Town of Logy Bay - Middle Cove - Outer Cove. So, in actual fact, the bill can be anywhere, up to $150,000, for the same service they were getting ten years ago. We do not have a fire hydrant in the town. Kent's Pond is the closest fire department. If Kent's Pond is out, Kenmount has to respond to a fire in Logy Bay - Middle Cove - Outer Cove.

I had a meeting with the Premier and told him that if we had a fire in Doran's Lane in Outer Cove, if a house caught fire down there, it would burn to the ground; and within months we had a fire down there and the house burned to the ground. That is how serious this situation is. The minister can get up and be as smart as he wants to be, but it is not fun. This is a serious situation. I am tired of talking to the minister and trying to do something with this legislation. The answer we get when we send it off to the minister is a letter dropped off to me, signed by the two mayors of the cities that are going to be responsible for the fire-fighting service within the area. What do you expect them to sign, I say to the minister? There are 2000 people in the town of Logy Bay - Middle Cove - Outer Cove.

MR. A. REID: Well, talk to the two mayors instead of talking to us and (inaudible)

MR. J. BYRNE: It was the government that brought this legislation in. It was the government that gave the service to both cities, and they did not ask for it, I say to the minister. It was given to them. They were told to take it. So it is not the City of Mount Pearl and the City of St. John's. They were put in a situation where they had no choice. So it is up to the minister and this government to address and resolve the situation.

AN HON. MEMBER: Put the question.

MR. J. BYRNE: Put the question! I am not near finished on this yet, Mr. Chairman. I will keep it going all night.

Now, Mr. Chairman, the situation is this, again, that -

AN HON. MEMBER: (Inaudible)

MR. J. BYRNE: Unless you are deaf you certainly heard it before, I can guarantee you that.

MR. FITZGERALD: You are doing a good job, Jack.

MR. J. BYRNE: When I got sidetracked, Mr. Chairman, I was on dangerous materials.

MR. A. REID: Why did they agree with it? Why (inaudible) signed an agreement to do this the way we have done it, exactly the way we have done it?

MR. J. BYRNE: Who signed it?

AN HON. MEMBER: Logy Bay, he said.

MR. A. REID: (Inaudible) fire fighting since last January. Not one (inaudible) since last January.

MR. J. BYRNE: Now, you have to be accurate with respect to what you are saying, Mr. Chairman. What happened was that the towns agreed upon a formula to pay back to the City of St. John's the arrears that were based upon a cost recovery formula. The towns did agree on that, the arrears, how much they would pay back, and the towns have been paying that, but they have not been paying the rate that has been charged for 1996 which is the same basically as was for the cost recovery formula. That was never changed. We can talk about an agreement being signed but the agreement that was signed was for arrears. That is what was agreed upon, Mr. Chairman, nothing more, nothing less. So therefore, Mr. Chairman, that will address that point.

Now, to get back to the dangerous materials, Mr. Chairman. As I said, in the City of St. John's there is a much larger quantity of dangerous materials stored and there has to be certain equipment on standby in case there is a fire because of certain gases that could come forward, I suppose, Mr. Chairman. It is not likely to happen in the Town of Logy Bay - Middle Cove - Outer Cove. It is not likely to happen in Torbay. It is possible but not probable. It is more probable within the City of St. John's and the City of Mount Pearl. That is something we are paying for that maybe we should not have to pay for.

Also, Mr. Chairman, there are the rescue units. Based on an assessed study of Logy Bay - Middle Cove - Outer Cove we are utilizing the rescue units 1.18 per cent of the actual responses. So we feel that that is not a case to be made for the city, that we would have to pay for the standby cost for the rescue units.

MR. MATTHEWS: Well, what do you want?

MR. J. BYRNE: I say to the Minister of Health, all we want is a reasonable rate. The Town of Logy Bay - Middle Cove - Outer Cove agreed, all the towns agreed to binding arbitration. Let's put something in place and put binding arbitration there, and we will agree to it. If it is $50,000 or $150,000, we would be forced to pay it. But, who said no to that? The City of St. John's said no binding arbitration. How much more reasonable can a group get, I say to the Minister of Health? We agreed to binding arbitration.

Another factor is the response time. We all know how important it is for a response time for fire-fighting equipment to get to a fire. The response time, Mr. Chairman, of course within the far reaches of Logy Bay - Middle Cove - Outer Cove, is much longer than in most areas of the City of St. John's. If a fire happens, and hopefully it doesn't, the response time, say, to Elizabeth Avenue - because where all the fire departments are situated the response time within the city is quicker than the response time into Logy Bay - Middle Cove - Outer Cove. Hopefully, Mr. Chairman -

CHAIR: Order, please!

The hon. member's time is up.

The hon. the Member for Bonavista South.

MR. MATTHEWS: Bonavista is going to pay for it now, Jack.

MR. FITZGERALD: Thank you, Mr. Chairman.

No, I say to the hon. Minister of Health, Bonavista is not going to pay for it, but what the member is asking for here I don't think is unreasonable. What he is asking for, Mr. Chairman, is a fair charge for fire-fighting. He is talking about 2,000 people living in Logy Bay - Middle Cove - Outer Cove and he is witnessing a bill that went from $15,000 a year to well in excess of $100,000 a year. That isn't acceptable, I say to the Minister of Health, in Bonavista, it isn't acceptable in Twillingate, and it certainly isn't acceptable in Logy Bay - Middle Cove - Outer Cove.

Mr. Chairman, it is another situation where you see the big Cities of St. John's and Mount Pearl, laying the heavy hand on the smaller communities in the outlying area. It is another example where you see the big city coming forward and saying: Yes, we will provide you with fire protection but we won't charge you -

AN HON. MEMBER: Inaudible!

MR. E. BYRNE: I will tell you in a few minutes what St. John's loses. I am going to tell you all about a new part of St. John's and what it hasn't got since amalgamation, and we will see if you are so smart then with your tongue.

AN HON. MEMBER: (Inaudible) looking after the crowd down there.

MR. E. BYRNE: Absolutely not! Don't be ridiculous, boy! We will talk about it in a few minutes.

AN HON. MEMBER: Inaudible.

MR. E. BYRNE: We will talk about it in a few minutes.

MR. FITZGERALD: That is the so-called crowd, Minister, that keeps your city going.

MR. E. BYRNE: Paid for by the community, I say to the Member for Twillingate & Fogo, paid for by the community.

MR. FITZGERALD: That is the so-called crowd, Mr. Chairman, who keep the City of St. John's going. Those are the people you find at the shopping centres. Those are the people who come here and spend their money. Those are the people who keep your fair city going today.

What those people are asking for, what the 2,000 residents are asking for, is a fair charge for fire-fighting services. It isn't enough that there is no fire department located in this particular area. The response has now to come from St. John's. We are going to be going out there now, if the minister allows this piece of legislation to go through, and charge them almost 500 per cent to what they were charged last year, and that isn't right in anybody's books, Mr. Chairman. If we are going to go there and charge this particular town for fire-fighting services, then let's charge them a rate they can afford, let's charge them a rate which is acceptable to the people there.

They know, Mr. Chairman, what the service is worth. They know, and I don't think they objected to paying the fee that was there before. They probably wouldn't object to paying twice the amount they were paying before, but it is certainly unreasonable to expect to charge 2,000 people, living outside city limits, without any responding fire department in close vicinity of their particular area, $120,000 a year. Mr. Chairman, that is unreasonable and I certainly concur with the member when he expresses his concerns.

With that, Mr. Chairman, I will pass it back to the member again. I did want to express a view on this particular piece of legislation and I commend the member for speaking out for his constituents and putting their concerns forward in this House. That is why he was sent here and he will do nothing less than that tonight, and I am sure that before the night is over, that at least the minister will know the feelings of those people out there and know how wrong this piece of legislation is.

CHAIR: The hon. the Member for Kilbride.

MR. E. BYRNE: Thank you, Mr. Chairman.

MR. MATTHEWS: (Inaudible).

MR. E. BYRNE: Don't be ridiculous, I say to the Minister of Health. If you want to sit down and learn something, sit down and keep your mouth shut for ten minutes, you might learn something.

The reality of what this member is saying here right now is that he should be supportive. What he is asking for, on behalf of the people in the towns affected, is a fair and legitimate service; that's all. He has talked about binding arbitration. Why did the rest of the city involved in the regional fire services plan opt out? I know as a member who represents a "new part of this city", the fighting and scratching that we had to do just to get a composite crew in the Goulds. We had fire insurance companies come in and say that they would not provide fire insurance to parts of the district because there wasn't a reasonable fire service available, yet it was part of the City of St. John's. The minister knows that, it was part of the City of St. John's. We had fire insurance companies come in and say they would not and could not provide fire insurance because if a house burned down, they did not have a certain degree of comfort that a legitimate fire service will be able to respond in time. That, sir, happened to people who pay taxes to the City of St. John's -

MR. MATTHEWS: Do you want your constituents to pay for fire fighting? I will send a copy of Hansard.

MR. E. BYRNE: No, what I support, I say to the minister - send a copy of Hansard to my constituents?

AN HON. MEMBER: Yes.

MR. E. BYRNE: I will pay for the postage if you send it and anything that comes from you to my constituents, I am sure they are going to take a second look.

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: Pardon me?

AN HON. MEMBER: Your money and my time (inaudible).

MR. E. BYRNE: My money and your time. The problem is, that with your money, you spend no time in the Province minister, that is half the problem.

The reality is, Mr. Chairman, what people are asking for is fair and legitimate services. The Minister of Health says: You want the people of St. John's to pay for your services. No. This member has indicated clearly, up front, openly and honestly, that what the people in the affected area said is that they would be part of the agreement. If consensus or agreement could not be reached amongst all the partners to that agreement, send it to binding arbitration. It is a fair process, a process each and every one of us has to live by.

I support the member in his efforts to try to get a fair and legitimate fire service for the people in his town. I went through it for the last three years and the people of the Goulds did too.

CHAIR: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Chairman.

Now, the Minister of Health is over there yapping away. Let me tell you something: From the comments that he has made, I would say he knows as little about fire-fighting within the northeast Avalon region as he does about the Department of Health, what is going on in the Department of Health and what is going on within hospitals in this Province.

AN HON. MEMBER: He knows more about fire-fighting in St. Petersburg, Florida than he knows what is going on here.

MR. J. BYRNE: Yes, that is right. He knows more about fire-fighting in St. Petersburg, Florida than he knows about what is going on here.

MR. J. BYRNE: Yes, that is right. He knows more about fire-fighting in St. Petersburg, Florida, than about what goes on around here, Mr. Chairman. He has made a statement with respect to the services, and wants the members and the people of St. John's to pay for the services down there. It is because of them that the area is going broke. I will let him know that the Town of Logy Bay - Middle Cove - Outer Cove is in the black, have been in the black since they started, and the minister can confirm it. They have been in the black. They owe no money. The only money they owe is on the principle that they are being charged too much -

MR. MATTHEWS: (Inaudible).

MR. J. BYRNE: The Town of Logy Bay - Middle Cove - Outer Cove, they do not owe any money.

MR. MATTHEWS: What do you expect? You cannot but owe money if you do not pay your bills.

MR. J. BYRNE: Here he is trying to be smart instead of listening to reason. Listen now. The situation and reality of it is that what money they owe - they pay for everything they have, Mr. Chairman. They have buildings down there that they built, a small town of 2,000. They pay their bills. They owe no money to Municipal and Provincial Affairs. All the money they owe, they owe on principle and they refuse to pay it until they get something worked out. Not only that, I would not doubt but that they have the money set aside. But on principle alone they have a good point.

With respect, the Minister of Health asked the question: Why do they not set up their own? The Town of Logy Bay - Middle Cove - Outer Cove went to Torbay, which has a volunteer fire department, and asked Torbay would it respond. They would actually buy a fully-equipped fire truck for the Town of Logy Bay - Middle Cove

- Outer Cove. That is that they offered it, but the Town of Torbay came back and said they could not do it, it could not respond because it was a volunteer department, and because of the topography of the area it would take too long for them to respond. That is the point we are bringing up with respect to the City of St. John's. It may take too long for the City of St. John's to respond.

Now, Mr. Chairman, when the City of St. John's responds, hopefully, when they are called upon, they would respond from Kent's Pond and not have to respond from Kenmount. If that is the case, once they get to the town of Logy Bay - Middle Cove - Outer Cove there are no fire hydrants in that area for them to access. So we are not getting the same service as the people in the cities of Mount Pearl and St. John's. Therefore, how can you expect us to pay the same rate, I ask the ministers opposite?

AN HON. MEMBER: You are not being charged the same rate! You are misleading this House. You are not being charged the same rate!

MR. J. BYRNE: Mr. Chairman, the minister says I am misleading the House and they are not being charged the same rate. They are being charged the rate on the assessed value of the property within the town.

AN HON. MEMBER: Less 20 per cent!

MR. J. BYRNE: I already addressed that, if the minister had been listening.

AN HON. MEMBER: You had better address it again.

MR. J. BYRNE: Quite clearly, the Town agreed they would drop it by 20 per cent, which worked out to be $30,000 a year, on the $130,000 that was being charged. But when you look at the new assessments that were done last year, the rates increased up to 40 per cent to 50 per cent, the assessed value, so it went up from $130,000 to $150,000 again, Mr. Chairman. Let us be quite clear on that. They are still being charged the same total amount. In the budget for 1992, the rate for fire-fighting went up by 850 per cent.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: I am getting him convinced, yes.

Now, Mr. Chairman, for the Town of Logy Bay - Middle Cove - Outer Cove to pay that rate, an increase of 50 per cent to 60 per cent of the mill rate would have to be implemented to cover the cost of fire-fighting. Mr. Chairman, that seems to be quite high. The actual cost of fire-fighting for our town would take - now, there is a factor. The actual cost of fire-fighting for the town of Logy Bay - Middle Cove - Outer Cove would be 25 per cent of the budget. I wonder does 25 per cent of the budget for the city of Mount Pearl and the city of St. John's go for fire-fighting costs within the cities? I think not, Mr. Chairman.

CHAIR: Order, please!

The level of noise in the House is absolutely unacceptable. If it does not stop, I will ask the member to take his seat until such time as the level of decorum is acceptable to the Chair.

The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Chairman.

Now, for the town to cover the cost of fire-fighting, their mil rate would have to be eight to nine mils. That does not sound too high, really, when you compare it to some of the other rates in the city of St. John's, but -

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: Nine mils.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: Yes, but - the Minister of Health is at it again - the town does not have water and sewer, does not have sidewalks, does not have engineering services, does not have the same fire-fighting, so the Town pay their way on everything they have down there, I say to the minister. I would say it has been the attitude of this Administration and the previous Administration, that the towns not take on things they cannot afford. However, we have many municipalities in this Province in the situation today where they are overloaded and their debt is too high. The Town of Logy Bay - Middle Cove - Outer Cove was acting quite reasonably and quite responsibly in not taking on things they could not handle, and things they do not need.

Let us do some comparative costs on the similar-sized towns in the Northeast Avalon. This is based on the 1992 figure. Logy Bay - Middle Cove - Outer Cove are asked to pay $130,000. For the Town of Witless Bay, in 1992, it was $10,000. The Town of Bay Bulls is hardly worth mentioning, but they were paying $2,500 to Witless Bay for protection. The Town of Flatrock was paying $9,000 to the Town of Torbay. We approached Torbay but they could not service us because they were servicing Flatrock and the Town of Torbay; $9,000 as compared to $130,000. The Town of Pouch Cove, with a population of 2,000, back in 1992 paid $30,000; and the Town of Logy Bay - Middle Cove - Outer Cove had a population of l,800, which is closer to 2,000 now. That $30,000 is the figure they quoted me in 1992, compared to $130,000 for the Town of Logy Bay - Middle Cove - Outer Cove. Again, is that reasonable? Is it fair? Bauline, $4,500; the Town of Torbay, back in 1992 - when our cost would have been $130,000, which was being charged by the regional fire-fighting committee - with a population of over twice the population of Logy Bay - Middle Cove - Outer Cove, was paying $33,000. They now tell me that is up to $60,000 to $70,000 for 1992. The Town of Logy Bay - Middle Cove - Outer Cove, I am sure, would not have a problem with $60,000 or $70,000, even with half the population of Torbay. I am sure they would not have a problem with $80,000. I am sure they would go along with that, but to go with $130,000 is just not reasonable to expect.

Mr. Chairman, those are some of the things that the Town of Logy Bay - Middle Cove - Outer Cove has been saying over the past four years. The point, too, of course, is that the cost recovery formula was never approved by Cabinet. Now, the minister has changed legislation and allowed the municipalities to go out on their own and set up their own fire departments. The Town of Logy Bay - Middle Cove - Outer Cove have taken a look at that, Mr. Chairman, and this is what they have come up with.

CHAIR: Order, please!

The hon. member's time is up.

The hon. the Member for Baie Verte.

MR. SHELLEY: Thank you very much, Mr. Chairman.

I am glad to get up to support my colleague and make a point simply to the Minister of Health who keeps blabbering across the House all night. My colleague right now, Mr. Chairman, is speaking on behalf of his constituents, I say to the minister. That is what he is doing exactly and he is looking for a bit of fairness and balance. Let binding arbitration settle the whole case so that it is done through a proper procedure. People in his district hear this member speak on their behalf and ask for what they think is rightfully theirs, that is what they are doing. And I would say that it could be worked out, I say to the minister, if he would only give it the opportunity.

The member has made some very legitimate points. He has obviously thought this out. Not just today, Mr. Chairman, but over the months, even the last couple of years, the member has continued to raise these points and he has made some good, fair and reasonable points. He does not say that it has to be all settled in one clump, but he does say it is something that could be worked out so that his constituents do get fair service and have fair input as to who pays what bills. But, Mr. Chairman, for the minister to blabber across the House about rural Newfoundland and how the City of St. John's are carrying rural Newfoundlanders - I think it is exactly the opposite. And for the minister to say - and we can check Hansard later when we get copies of it - that the

member's constituents are not paying their bills. Did the minister say that the member's constituents in Outer Cover were not paying their bills? How does he know what their finances are? The member has made some legitimate points, so I say I support -

MR. E. BYRNE: (Inaudible) muzzle the Minister of Health now, it is about time.

MR. SHELLEY: I think the muzzle has started in the House and it is a smart thing for the House Leader to do that, Mr. Chairman.

I agree with the Member for Cape St. Francis. He made some very legitimate points, raising concerns on behalf of his constituents, and I think he should continue to do so.

CHAIR: The hon. the Member for Conception Bay South.

MR. FRENCH: Mr. Speaker, I had not intended to speak on this bill at all. As a matter of fact, I was going to let my colleague go, but after listening to the Minister of Health for the past twenty minutes sit there and refer to rural communities and who should pay whose bill - the minister knows absolutely nothing, zilch, zilch, about volunteer fire departments. If we ran over him in CBS with the fire truck he would not know what hit him. If we ran over him at high noon with our fire truck, he would not know what struck him because he knows absolutely nothing about volunteer fire departments. Now, I will not get into volunteer fire departments with him tonight because if I did I would keep him here for the next two weeks and he would never get a chance to pay his taxes in Florida because he would be still here going around my district with me with the volunteer fire department in Conception Bay South and a volunteer fire department in the town of Holyrood.

Now, Mr. Chairman, who should pay for this? I think that this member has a right to stand in this House of Assembly and fight for the rights of his constituents. I believe, as my first time being in here, that it was the constituents of my district who put me in here, it will be my constituents who can take me out. I believe that the member has a right to stand in here and if it is a 500 per cent increase that they are looking for, then I think that is morally wrong. I believe that the town should pay for their fire protection. I have absolutely no problem with that, and I do not think the member has any problem with that, none whatsoever, but I think there has to be some fairness and some balance to this so that these people can work out a formula whereby everybody comes to a suitable conclusion on the amount of money that should be paid, and I am not so sure we are doing it here.

I disagree with my colleague here, who was at one time the mayor of Mount Pearl, and I disagree with my colleague across the House who was also the mayor of Mount Pearl. You have to remember that there was a time when both of these municipalities, when they were going to go in with St. John's or Mount Pearl, they screamed murder, and now they are out on their own and, of course, large municipalities like to swallow up the smaller ones. When I was a municipal councillor in my district and they were going to put us in with the City of St. John's, I was running around to these meetings screaming blue murder, as well.

I believe that the member has a right to come here. I think it is wrong, the percentage of increase they are trying to put on Logy Bay - Outer Cove - Middle Cove. I think there has to be a solution and there should be a solution. I think they should pay for fire protection the same as we all have to pay for fire protection but I do not agree with the amount and the increases that have gone on.

Thank you.

CHAIR: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Chairman.

Now, to continue. I want to make it quite clear, and I have said it before in the House of Assembly, that in no way, by any stretch of the imagination would I be questioning the abilities and the professionalism of the fire department itself. That is not the question. The debate is with the cities, the service being supplied, and the amount being charged. Simply put, that is it, Mr. Chairman.

With respect to volunteer fire departments for the town of Logy Bay - Middle Cove - Outer Cove, the Town recently had a study done by a person who was quite capable of doing this. It was November 5 that it was given to the Town, and some of the things it dealt with was the geography of the area, the training, the recruitment for the volunteer fire department, the fire prevention program, capital expenditures and estimates of the fire station, the annual operating expenditures, communications, and the conclusion, Mr. Chairman. Of course, the amounts that would be set aside to do this, the budget itself worked out to be, the fire department, the facility itself, would cost a total of $431,320.

Now, some of the equipment that would be required would be a 625-gallon-per-minute pumper and equipment, $158,000, a four-wheel drive $35,000, breathing apparatus, portable pumps, nozzles, all this equipment would cost $276,700. They had an estimate of $100,000 to build the fire station itself. Communications would be another $46,000, training aids and what have you, $6,120 for a total of $431,000. To operate that facility for a year would cost approximately $36,700. Now, that may be a bit low and some people are questioning that, but the description and the budget involved Mr. Chairman, is quite detailed and covers everything from fund-raising to mileage, license fees, gasoline, electricity, first-aid supplies and what have you, so, Mr. Chairman, that is what it will cost the Town.

Now, the Town could go ahead, I suppose, and borrow half-a-million dollars on the authority of the Minister of Municipal and Provincial Affairs and pay it off over a ten-year period and have a volunteer fire department but, the people in the town are wondering, you know, if in fact it would make sense to do that. We had a public meeting and there were a lot of questions and concerns raised, so the Town is planning on getting back with a more detailed breakdown of the cost of putting in a volunteer fire department. So, Mr. Chairman, the Town of Logy Bay - Middle Cove -Outer Cove did look at a volunteer fire department. They also did a response time and the total responses in 1994 and 1995, and responses from January to September of 1996 - and this is very interesting, Mr. Chairman - the total responses in 1994 was thirteen responses and the cost per response would have been $10,769. Now, what did they respond to? Because, that may not seem to be outrageous if there were major fires, $10,769, Mr. Chairman. But they responded to one chimney fire, one garbage fire, one rescue, a false alarm, a forest and brush fire, a vehicle, one of a smell of smoke, three medical and two structure fires, and the total would have been $140,000 for that. Now, is that logical and reasonable, I ask you, Mr. Chairman? I do not think so.

In 1995, they had twenty-three responses at a cost of $6,068 per response. They had three chimney fires, three alarm bells, two rescues, six medical where the ambulance went out or whatever and took someone to the hospital, a forest brush fire, two; one vehicle fire, structure, four, and a motor vehicle accident, one. Now, Mr. Chairman, that is not reasonable by any stretch of the imagination. With respect to January 1 to September 23, 1996, Mr. Chairman, they had twelve responses, at basically $8,750 per response. In that period, they had one chimney fire, one garbage fire, two rescues, one false alarm, two structure fires, a motor vehicle accident and a forest and brush fire, and that was to the end of September, 1996 and, Mr. Chairman, that is the type of thing that has been happening in the Town of Logy Bay - Middle Cove - Outer Cove.

This report that was done for the Town is quite detailed and certainly gives you some comparisons as to what a volunteer fire department can do for the Town and at what cost. Mr. Chairman, as I said earlier, I have spoken a number of times in this House on this. I have had meetings with various ministers, I had meetings with the previous Premier, and I honestly believe that the Town is not being treated fairly with respect to the amount of money they would have to pay for fire-fighting costs. I want to reiterate that the Town are willing to go to binding arbitration and are willing to pay their bills, Mr. Chairman, always have been. There is not a bill owed by the Town for anything else other than for fire-fighting. So, Mr. Chairman, this is only a reasonable request. I do not know how the minister could address it. I think he has responded - I have not seen the letter to the Town of Logy Bay - Middle Cove - Outer Cove. I would imagine it is along the lines of the letter that was distributed here tonight, signed by the mayors of St. John's and Mount Pearl.

This is an opportunity, Mr. Chairman, in which I wanted to get up again and say what had happened with respect to fire-fighting in the Northeast Avalon. Hopefully, the minister can do something to resolve the situation. I do

not know what his closing comments will be, and I do not know if I can add any more. I have pretty well said what I had to say.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: You are looking good over there. It is a good seat for you, I say to the....

Yes. I think I have said what I am going to say on this bill, and hopefully, in the near future, we can have this resolved to the benefit of everybody concerned.

Thank you, Mr. Chairman.

On motion, clause 1 carried.

CHAIR: Shall the amendment to clause 2 carry?

All in favour, please say `Aye'.

SOME HON. MEMBERS: Aye!

CHAIR: Opposed, nay.

SOME HON. MEMBERS: Nay!

AN HON. MEMBER: Division, Mr. Chairman.

CHAIR: Call in the members.

Division

CHAIR: Is the House ready for the question?

SOME HON. MEMBERS: Yes.

CHAIR: All in favour of the amendment, signify by standing.

SOME HON. MEMBERS: Hear, hear!

CLERK: The hon. the Leader of the Opposition, Mr. Shelley, Mr. Edward Byrne, Mr. Fitzgerald, Mr. Jack Byrne, Mr. French.

CHAIR: All against the amendment, please stand.

SOME HON. MEMBERS: Hear, hear!

CLERK: The hon. the Minister of Forest Resources and Agrifoods, the hon. the Minister of Justice and Attorney General, the hon. the Minister of Fisheries and Aquaculture, the hon. the Minister of Municipal and Provincial Affairs, Mr. Walsh, the hon. the Minister of Finance and Treasury Board, the hon. the Minister of Mines and Energy, the hon. the Minister of Education, Mr. Lush, Mr. Barrett, Mr. Langdon, the hon. the Minister of Works, Services and Transportation, the hon. the Minister of Environment and Labour, the hon. the Minister of Development and Rural Renewal, the hon. the Minister of Health, the hon. the Minister of Tourism, Culture and Recreation, the hon. the Minister of Government Services and Lands, Mr. Oldford, Mr. Andersen, Mr. Canning, Mr. Smith, Mr. Ramsay, Mr. Woodford, Mr. Mercer, Mr. Reid, Ms Thistle, Mr. Sparrow, Mr. Wiseman, Mr. Osborne, Mr. Ottenheimer, Ms Jones.

AN HON. MEMBER: Bring back Harvey now. We want Harvey back.

CLERK: Mr. Chair, six ayes and thirty-one nays.

CHAIR: I declare the amendment defeated.

On motion, clauses 2 and 3, carried.

A bill, "An Act To Amend The City Of St. John's Act (No. 2)." (Bill No. 38)

Motion, that the Committee report having passed the bill without amendment, carried.

CHAIR: The hon. the Government House Leader.

MR. TULK: Mr. Chairman, Order No. 17, Committee of the Whole on a bill, "An Act To Amend The Expropriation Act," Bill No. 33.

CHAIR: Bill No. 33, "An Act To Amend The Expropriation Act".

The hon. the Member for Conception Bay South

MR. FRENCH: Thank you, Mr. Chairman.

MR. EFFORD: (Inaudible).

MR. FRENCH: Sit back, John, and relax. I am relaxed tonight, boy; two big pieces of pizza. Tim Horton's donuts make the Minister of Health happy. I am full now and ready to roll; good now for another couple of hours.

AN HON. MEMBER: A small drink.

MR. FRENCH: A small drink will keep you going for tonight.

I must say, Mr. Chairman, I would like to congratulate my two members. They certainly showed some backbone which I cannot say about some on the other side.

Anyway, I will now get into the -

MR. TULK: (Inaudible).

MR. EFFORD: (Inaudible).

CHAIR: Order, please! Order, please!

AN HON. MEMBER: It is just as well for me to resign now, isn't it? Just as well for me to resign right now.

CHAIR: Order, please!

I ask the hon. member to take his seat.

The Chair will recognize the hon. Member for Conception Bay South when there is a level of decorum in the Chamber that is acceptable.

The hon. the Member for Conception Bay South.

MR. FRENCH: Thank you, Mr. Chairman.

I would like to take the time tonight, Mr. Chairman, to discuss the bill on Expropriation, Bill No. 33. As well, Mr. Chairman, as I go through tonight I will probably need a bit of direction from the Chair. Under clause 2 I

have some amendments to move. So, if it is in order -

MR. GRIMES: Don't feel obligated.

MR. FRENCH: Oh, I don't feel obligated, Minister of Education, not in the least. I have a sleeping bag for you; so when you get a little bit tired let me know. I will make sure you are covered over and tucked in for an hour or so. We will be doing Education about six o'clock, you will be well-rested by then.

AN HON. MEMBER: That early?

MR. FRENCH: Well maybe. It might be eight or it might be nine.

MR. EFFORD: (Inaudible).

MR. FRENCH: I say to the Minister of Fisheries and Aquaculture, if I could haul it over his head, maybe we would not find him anymore.

I would like to move some amendments here, Mr. Chairman. Clause 2 of Bill No. 33 -

SOME HON. MEMBERS: Hear, hear!

AN HON. MEMBER: (Inaudible).

MR. FRENCH: I hope this does not go into my ten minutes, Mr. Chairman.

MR. TULK: On a point of order, Mr. Chairman.

CHAIR: The hon. the Government House Leader, on a point of order.

MR. TULK: We just had a very important piece of legislation that passed through this Legislature and some of his hon. colleagues stood up and voted against their colleagues, which they had a right to do. We were led to believe that when the hon. gentleman came back, we should give him a chance to put himself on the record, where he stood on that amendment.

Mr. Chairman, I want to say to the hon. gentleman, now that he is back in the House, we are willing to give him leave to stand up and say: Here I stand, four square, either for or against this amendment.

SOME HON. MEMBERS: Oh, oh!

MR. H. HODDER: Mr. Chairman, to that point of order. On the condition that we begin the debate all over again, then I will make a decision (inaudible).

CHAIR: Order, please! Order, please!

The Chair has not recognized the member yet.

SOME HON. MEMBERS: Oh, oh!

CHAIR: Order, please! Order, please!

I will ask the hon. member to take his seat.

SOME HON. MEMBERS: Oh, oh!

CHAIR: The hon. the Member for Conception Bay East & Bell Island. Does he wish to speak to the point of order?

MR. WALSH: (Inaudible), Mr. Chairman.

CHAIR: Point of order.

MR. WALSH: Mr. Chairman, what the Government House Leader is suggesting is not without precedent in this House of Assembly. As a matter of fact, the then-government, who are the people on that side, were sitting on this side when the hon. Leo Barry, the Member for Mount Scio - Bell Island, was unable to return to the Chamber in time for a division vote, and in actual fact was given permission by leave of his own request to cast his vote so that the House would know for posterity's sake how he voted. So precedent has been set, and the hon. Member for Waterford Valley could certainly take advantage of that precedent.

CHAIR: The hon. the Opposition House Leader.

MR. H. HODDER: Thank you, Mr. Chairman.

CHAIR: Do you wish to speak to this point of order?

MR. H. HODDER: I don't want to get dragged into this kind of situation, but I remember very important bills here on education reform, on Term 17, when certain members were absent from the House, and when they came back they never asked to vote. There is no rule here that says that a member should or is obliged to vote. If I had been here I would have voted, but the vote is called, it is over with, let's get on with it.

SOME HON. MEMBERS: (Inaudible)!

CHAIR: Order, please! Order, please!

If hon. members will allow, the Chair will rule on the point of order, but the Chair is not prepared to rule until such time as it can be heard.

The Standing Orders of the House require that everybody who is present in the Chamber at the time that the vote is called must vote. Nobody can abstain from voting. The hon. Opposition House Leader has been extended the courtesy of having his vote recorded if he so wishes, but the Chamber and the Chair cannot require him to do so.

The Chair has already recognized the hon. the Member for Conception Bay South.

MR. FRENCH: Thank you, Mr. Chairman.

I hope all of that wrangling didn't come out of my ten minutes. If it did, I'm up.

Now then, I would like to move some amendments.

CHAIR: I would remind the hon. member that he can speak to the debate as often as he wishes.

MR. FRENCH: Okay. Thank you, Mr. Chairman.

I would like to move some amendments: That Clause 2 of Bill 33, An Act To Amend The Expropriation Act, which is now before the House be amended by adding in subsection 19(2) immediately following the word "minister" the words "or -

SOME HON. MEMBERS: (Inaudible).

CHAIR: Order, please! Order, please!

The Chair is having some difficulty. The hon. member is trying to present an amendment to the House. If other members are not interested in hearing what the amendment is, maybe they could leave the Chamber so that the Chair could hear.

The hon. the Member for Conception Bay South.

MR. FRENCH: Thank you, Mr. Chairman.

That Clause 2 of Bill 33, An Act To Amend The Expropriation Act, which is now before the House be amended by adding in subsection 19(2) immediately following the word "minister" the words "or by the owner of land expropriated or detrimentally affected by the expropriation".

Would you want the explanations now or after? You want them now, I guess.

CHAIR: Is this amendment all to the same clause?

MR. FRENCH: Yes, Mr. Chairman. Most of them are to clause 2. There are several to clause 2, so I would like to move them first.

SOME HON. MEMBERS: (Inaudible).

MR. FRENCH: Yes, I have three, Mr. Chairman, to clause 2.

CHAIR: The hon. member can continue. The Chair will rule on the admissibility of the amendment when he sees it in print.

MR. FRENCH: Thank you, Mr. Chairman.

As well, Mr. Chairman: That clause 2 of Bill 33, An Act To Amend The Expropriation Act, which is now before the House be amended by adding immediately following subsection 19(2), the following subsection: "(3) Where the circumstances in either paragraph (1)(a) or paragraph (1)(b) hold, the minister shall make an application under subsection (2) forthwith."

CHAIR: Order, please!

The Chair must ask for clarification. Is this amendment to clause 2?

MR. FRENCH: Yes, Sir.

CHAIR: Clause 2?

MR. FRENCH: Yes, Mr. Chairman, yes.

CHAIR: I would repeat the question and ask the hon. member one more time. Is he absolutely certain this is to clause 2?

MR. FRENCH: Yes they are, yes, both to clause 2.

CHAIR: Very well. I would ask the hon. member to continue.

MR. FRENCH: So I have two amendments, Mr. Chairman, for clause 2.

AN HON. MEMBER: Excuse me for a second. You are going through all these. I am going to give them a copy now. Where are you at right now?

MR. FRENCH: But there are only two amendments.

AN HON. MEMBER: Clause 5.

MR. FRENCH: No, it says clause 2.

AN HON. MEMBER: It is clause 5 in the bill.

MR. FRENCH: Oh, clause 5 in the bill?

AN HON. MEMBER: (Inaudible).

MR. FRENCH: No she didn't. No, boy, not on this one.

AN HON. MEMBER: Do you want me to give him a copy of all the amendments?

MR. FRENCH: Yes, give him a copy of those.

AN HON. MEMBER: Every one of them, is what I'm asking you.

MR. FRENCH: Yes, give them all to him.

AN HON. MEMBER: Explanation and everything.

MR. FRENCH: Yes, give them all.

CHAIR: Order, please! Order, please!

I will ask the hon. member one more time if he would like to have a look at the bill and look at his amendment, and ask him one more time if it is, in fact, clause 2 or clause 5 that he is reading the amendment to.

MR. TULK: On a point of order, Mr. Chairman.

CHAIR: The hon. the Government House Leader, on a point of order.

MR. TULK: Mr. Chairman, the hon. gentleman seems to have so many pages over there in his hand that he doesn't know what he has. If he wants to take a minute, we are going to be very lenient and give him one minute to clear up the confusion over there. We know they are all gone tizzy over there, gone here, there and everywhere, as a result of their House Leader pulling the carpet out from under them, leaving them, running away from a vote. Just imagine, a House Leader running away from a vote. So, Mr. Chairman, we are prepared to give them a minute. Now, it is 2:04 a.m. We are prepared to give them a minute.

CHAIR: Order, please!

There is no point of order. If the hon. member needs a minute to get his notes in order, that is fine; he can have that by leave.

The hon. the Member for Conception Bay South.

MR. FRENCH: The numbers I have here are different. So those two amendments that I moved are to clause 5.

AN HON. MEMBER: (Inaudible) clause 2?

MR. FRENCH: No.

AN HON. MEMBER: (Inaudible).

MR. FRENCH: Harvey, do you want to do that? Because I also have some amendments to what I consider to be clause 11, John. You had better make sure it is clause 11.

Do you want to let those two go?

AN HON. MEMBER: (Inaudible).

MR. FRENCH: You might even agree, you know. You might give them a chance.

CHAIR: Order, please!

It really does not matter. The Chair will call the clauses in numerical order anyway.

MR. TULK: Yes, when we get to clause 5 you move the amendment.

MR. FRENCH: Okay.

MR. TULK: Call clause 2, 3 or 4, whatever it is.

On motion, clauses 1 through to 4, carried.

CHAIR: Shall clause 5 carry?

The hon. the Member for Conception Bay South.

MR. FRENCH: Thank you.

Do you now have copies? Do you wish me to read those again, Mr. Chairman?

CHAIR: If the hon. member wishes to read them into the record, that is fine.

MR. FRENCH: The first one is: "An Act To Amend The Expropriation Act", which is now before the House be amended in subsection 19(2) immediately following the word "minister" the words "or by the owner of land expropriated or detrimentally affected by the expropriation".

As well: That clause 5 of the bill, "An Act To Amend The Expropriation Act", which is now before the House be amended by adding immediately following subsection 19(2), the following subsection: "(3) Where the circumstances in either paragraph 1(a) or paragraph 1(b) hold, the minister shall make an application under subsection (2) forthwith."

SOME HON. MEMBERS: Oh, oh!

CHAIR: Order, please!

The Chair is rapidly losing patience. If nobody else in this hon. Chamber wants to hear the amendments that the hon. member is presenting, the Chair does.

The hon. the Member for Conception Bay South.

MR. FRENCH: Thank you, Mr. Chairman.

The first one there amends clause 5 and adds reference to the owner of the land to be expropriated. The bill says only the minister can refer a disputed expropriation to the Public Utilities Board for a decision. This amendment also gives the owner the right so that the owner, he or she, can refer the matter to the PUB for a decision.

If, Mr. Chairman, we are going to go to the Public Utilities Board to have expropriations determined, then this particular clause, clause 5, with 19(2) that we have added, will now give the land owner the opportunity which is not in the act, the opportunity, if they so desire, to send the expropriation to the Public Utilities Board.

AN HON. MEMBER: (Inaudible) to vote.

MR. FRENCH: Oh, I don't care how you are voting. You are going to be here for another couple of hours anyway. Sit back, relax, take it easy.

As well, Mr. Chairman, in clause 5 we have added subsection (3). The bill does not say the minister has to refer a disputed matter to the PUB right away. He or she could delay that particular purpose, and that would leave the land owner exposed, of course. This amendment says the minister must immediately refer the matter forthwith to the Public Utilities Board for discussion. We would like to put in these two particular amendments, so that when we do, we at least give the landowner some protection. We also give the landowner the right to refer the matter to the Public Utilities Board, because before we could set up a board under this particular piece of legislation. We are not going to do that any more. We are going to allow the minister only to refer to the Public Utilities Board and we think that is wrong, Mr. Chairman, and that in actual fact this clause here gives the landowner the same right I guess, as it would give the minister. If the minister can refer then why can't the owner of the land?

Again, the same thing –

MR. FITZGERALD: I can't hear a word here, Mr. Chairman.

CHAIR: Order, please!

It has been several times, since the hon. Member for Conception Bay South stood to address the amendments, that the Chair has asked for order in the House. The ruling of the Chair seems to be adhered to for not more than about two or three seconds. So I am going to ask one more time that we have quiet, silence, in the House so that the Chair can at least hear what the hon. member is saying. If other members are not interested, I will ask them to leave and if they will not leave because I asked them, then I will see to it that they leave.

The hon. the Member for Conception Bay South.

MR. FRENCH: Thank you, Mr. Chairman.

So that is why, Mr. Chairman, I move these two particular amendments, to give protection to the owner of the land. I hope the minister has a copy so that she can review this. I don't think it makes such a great difference but I think it should be added for the protection of the landowner, to cover him or her under this particular piece of legislation.

Having said that, Mr. Chairman, I will sit down and will allow one of my colleagues to go next.

CHAIR: The hon. the Member for Baie Verte.

MR. SHELLEY: Thank you very much, Mr. Chairman.

I am glad to rise on this particular bill, Mr. Chairman. As a matter of fact, I have been waiting all night to get to a very substantial bill in this House this evening. I would say to most hon. members in the House, this is one of the most substantial bills that have come to this House this evening. There are some very good points, as a matter of fact, Mr. Chairman, although there was a mistake with the number, as to what clause it was. Overall it is a very important bill. There are a lot of good points and there has been a lot of good research done on this particular one. We are going to make a couple of points on this particular bill. Mr. Chairman there was some good research done by my colleague, by the critic.

Mr. Chairman, the stated intention of the bill is basically to have the PUB and not the arbitration board determine the compensation paid to the landowner. Right away this caused them to question some very important things as far as the landowner is concerned and how he can be covered. Under the old act, failure of the minister and the landowner to agree on the compensation of the expropriated land meant an arbitration board was appointed in that particular case. Under this bill the board is the PUB and the PUB is more likely to do that. What it does is it takes away from and intimidates the landowner in this particular situation. It moves it into the hands of the PUB. So, Mr. Chairman, that is one of the points.

The second point to be made, and my colleague has already alluded to it a couple of times now, is that the minister decides whether it is referred to the board or not. What has happened here is all of a sudden the minister is dictating and there is no more arbitration. There is no more using an arbitrator and using fairness and balance. It now seems as if the minister takes over everything. The minister decides, in this particular bill, whether to refer it to the board or not. The landowner no longer has a rep on the decision-making board. That is another point brought out in this bill that sort of strikes you. There is no rep when the land is in dispute.

Mr. Chairman, this bill raises the cost of the process and intimidates the landowner. What landowner is going to come forward if he knows he has to spend a undue amount? The expenses now are not just a small amount, but we are now talking about increased charges to the landowner that are obviously going to intimidate that person to begin with, so that the minister has the upper hand. The fairness and balance, arbitration, using both sides, and cooperating, all those things that did go on are now out the window, Mr. Chairman. That is what happens in this bill. There are some very serious concerns that have been put together by my colleagues here.

Of course, there is intimidation of landowners when the minister offers nothing. If the minister has made no award offer prior to referring a claim to the PUB for a decision, the PUB decides which party pays the cost. The minister has the power to send the matter to the PUB without first offering any compensation whatsoever. Mr. Chairman, that is not fairness.

I know the minister has made comments to the fact that this may be an archaic system and something that should be changed. I think it is only PEI and Newfoundland now that have this particular system. I could be corrected on that, but I think it is only PEI and Newfoundland now that have this particular system, our old act. Mr. Chairman, there may be changes that are possible. Nobody disputes that and improvements can certainly be made.

My point is: Are these the right ways to change this, Mr. Chairman? It seems as if the minister dictates exactly who goes where. If the landowner, as is his right, decides that the compensation is not fair, what happens? The minister decides if it goes to the PUB or not. He is the one who can refer it to the PUB for recommendations, and that is not fair. What is happening now is a dictatorship.

Not only that, but as we have already mentioned, the bill raises the cost of the process and intimidates landowners into accepting the minister's offer. In Section 34 - and it is still the case - if the board does not award the landowner more than the minister offered, the landowner must pay all costs, expenses and fees incurred in the award process, Mr. Chairman. While the old process involved three arbitrators and one scenographer this bill will drive up the cost.

Section 34.2, specifics: The expenses include the cost of councils, engineers, evaluators, stenographers, accountants and other assistants employed by the board, as well as salaries and expenses of the members of the board while employed at that hearing. I do not know what the exact cost is. I do not know if we done some calculations on that, but it is somewhere in the area of $15,000. Now, what landowner is not going to be intimidated by that and turned off from even trying to raise his case, if he has to pay that cost to start with? So, the intimidation factor is there and it is also the factor that is going to make him shy away from this process, that he has to foot the bill for God knows how much, according to the bill now, Mr. Chairman.

So, while I agree that the system we now have is archaic and that some changes that can be made, are they made in the right direction? I would ask the minister to look at some of the suggestions and the amendments made. There may be some very good ones there that the minister might want to accept. I say to the Government House Leader, there are some very good points. There are five major ones and they mostly deal with clauses 5 and 11 in this bill. I think they can be addressed and maybe even worked out by the minister if he is -

MR. TULK: (Inaudible).

MR. SHELLEY: Oh! I say to the Government House Leader, I have heard this said several times tonight. Mr. Chairman, I had no intention of being here tonight and I don't think any member did. This should have been addressed in the House today, maybe, and debated. Maybe tomorrow it could be debated or maybe the House

should have been brought back in October so that we could deal with, Mr. Chairman. Instead, what are we doing? Instead, we are here at the last minute, just a week before Christmas, trying to rush these bills through. We have not even gotten into HST and the education reform, and here we are trying to rush through, Mr. Chairman.

I make note to the minister, the Minister of Education and the people that have criticized this tonight, that, yes, there was some trash legislation, as the Government House Leader said the other night. That is what he said.

MR. TULK: A real charade, my son.

MR. SHELLEY: I agree with you, it is a real charade. You are absolutely right, it is a charade. We should not be dealing with this very serious piece of legislation at 2:19 a.m.

AN HON. MEMBER: (Inaudible).

MR. SHELLEY: But the homework is done on it, Mr. Chairman. It is too bad -

MR. TULK: No, the homework is not done on it (inaudible).

MR. SHELLEY: Yes it was, I say to the Government House Leader, it certainly was. The homework was done on it and the points are there. Now whether they came to the floor tonight or whether they came 2:00 this afternoon is up to the Government House Leader. We should have been back here in October dealing with these bills, the HST and so on, instead of waiting until the last minute to bring them in.

Mr. Chairman, we can stand here and argue all night or until the wee hours of the morning with the minister. The truth is, the House should have been opened in October. I had no problem sitting back when some of my colleagues made some good points tonight on some other minor legislation.

MR. TULK: (Inaudible).

MR. SHELLEY: Mr. Chairman, who has the floor? I will get a point in as soon as the Government House Leader quiets down a little bit.

Mr. Chairman, I say to the minister now, who is responsible for this bill, the truth is this is one of the most substantive pieces of legislation to come before this House today. It is. It is certainly a lot more substantive than all the foolishness that went on with the bill just before that - I can say that - the one that the Member for Cape St. Francis

MR. J. BYRNE: (Inaudible).

MR. SHELLEY: I am talking about substantive in comparison to this.

CHAIR: Order, please!

I ask that the hon. member be afforded the opportunity to make his case without interruption.

MR. SHELLEY: Thank you very much, Mr. Chairman, I appreciate it.

I will say, in seriousness - and it is hard to be serious at 2:20 a.m. but I am serious about this - this is one of the bills, one of the pieces of legislation, that we studied, all of us as a Caucus, and brought up five or six points on. I still say, if the minister looks at them, they are legitimate points. Out of all the bills that we discussed here tonight I would say that it is the most substantive piece of legislation offered here in this session.

Mr. Chairman, when you talk about expropriation of land and the ability of the landowner to put forward a fair case and to have his case heard, I think it is a fair thing. The six points brought forward are something that I would ask the minister - although it is the wee hours of the morning and it is hard to be serious, I suppose, at this

time, when people are getting edgy and so on. We can't rush this piece of legislation. I think that every member in this House owes it to themselves -

AN HON. MEMBER: (Inaudible)?

MR. SHELLEY: Who's bill is it? Judy's bill. The minister -

AN HON. MEMBER: (Inaudible).

MR. SHELLEY: I know. It is 2:20 a.m., so you can miss that too. The Minister for Development and Rural Renewal.

This particular bill is very important. There are some very serious concerns. Every member in the House should, Mr. Chairman, take notice of the amendments that we put forward, take them very seriously, consider some of the suggestions made by my colleague. There was some very good homework done on this particular bill, and it is very serious.

I would just read through, very briefly, some of the points we made. They mostly involve clauses 5 and 11. Those were the biggest - we believe, anyway, some of the most important points are made in clauses 5 and 11. Quite simply, Mr. Chairman -

CHAIR: Order, please!

The hon. member's time is up.

MR. SHELLEY: Okay, Mr. Chairman. I will get a chance to make a few more points again in a second.

CHAIR: The hon. the Member for St. John's South.

MR. OSBORNE: Thank you, Mr. Chairman.

Just a few brief words I would like to say regarding "An Act To Amend The Expropriation Act". I guess the stated intention of the bill was to have the Public Utilities Board and not an arbitration board determine the compensation paid to landowners when property is to be expropriated. If you look closely at clauses 5 and 11 of this bill, as my hon. colleague, the Member for Conception Bay South mentioned a little earlier - and he is submitting amendments to these - we find some flaws that we would like to address.

First of all, compensation is set by the Public Utilities Board and not an arbitration board. Under the old Act, a failure of the minister and landlord to agree on compensation for the expropriated land means that an arbitration board would be appointed in that particular case. The minister would appoint an arbitrator, the landlord would appoint an arbitrator, and there would be a third arbitrator, or trial judge, appointed as well. In addition, there would be a stenographer.

Under the new Act the board will be the Public Utilities Board, and the Public Utilities Board is probably more costly and less swift, since it is already bogged down with other responsibilities. So, Mr. Chairman, we see that this is one major flaw under "An Act To Amend The Expropriation Act".

Another is the fact that the minister would decide whether to refer to the Board. The decision is up to the minister on whether or not the minister would decide at all to refer to the Public Utilities Board. Under the old Act, if the minister and landlord could not agree on compensation, then the appointment of an arbitration board becomes automatic. Under the bill, the minister is given the power to make the application to the Board, and it therefore stands to reason that he will have a choice of whether or not, and when, to refer the matter to the Public Utilities Board. The landowner has no such power to apply to the Public Utilities Board, only the minister.

This, I believe, is another serious flaw. It leaves the landowner at a disadvantage and gives the minister more powers. The minister can decide whether or not he is going to send it, and actually when he would send it, to the Public Utilities Board. There is no power of that nature given to the landowner.

Mr. Chairman, those are a couple of the flaws. A third one: the landowner no longer has a rep on the decision-making board. This is a very serious concern that we, on this side of the House, have. It seems like the new bill is taking powers away from the landowner and giving more powers to the minister. And, in this particular case, the landowners have nobody else to turn to, other than the minister, in the event of a dispute.

Under the old Act, one of the three members of the decision-making board is on the board at the landowner's request. He is a landowner's arbitrator. The landowner's arbitrator can veto the minister's choice of the third arbitrator, and the award decision of any two arbitrators is final.

Mr. Chairman, under this bill, the Public Utilities Board decides, and the landowner has no say in the composition of the board, which can be as small as one commissioner, nor does the landowner have a rep on that board. He must hire and pay for independent legal counsel.

Mr. Chairman, in the event of a disagreement between the landowner and the minister, it can become very costly to the landowner now to fight the decision by the minister on what compensation is, whereas in the previous bill, there was certain protection set out for the landowner. That is not the case under the new bill.

There is no rep when land is in dispute. Under the old Act, when the ownership of land is in dispute, or the owner cannot be found, the minister is obliged to appoint an arbitrator to represent the missing landowner. There is no one on the Public Utilities Board to represent the missing landowner, so who, in this case, will make a case and defend the rights of the missing or disputed landowner now?

All throughout the new bill, "An Act To Amend The Expropriation Act", every point in clauses 5 and 11 basically abolishes the landowner's rights and gives further rights to the minister. As I have mentioned, if there is a dispute between the landowner and the minister, the landowner would have absolutely no recourse other than to hire legal counsel and go to the Public Utilities Board. It is a very serious matter, actually.

This bill raises the cost of the process and intimidates landowners into accepting the minister's offer, and that is a very true fear that landowners will face. In the event of the smelter or by-pass roads and so on, landowners almost have no choice but to accept the offer of the minister because it would be so costly to hire legal counsel and go through the Public Utilities Board to fight the decision of the minister. As a result, landowners who do not have the financial resources to fight the decision of the minister are therefore intimidated by this new process.

It is still the case that if the board does not award the landowner more than the minister offered, the landowner must pay all costs. Expenses and fees incurred in the award process must be paid by the landowner. While the old process involved just three arbitrators and a stenographer, this bill will drive up costs.

Section 32 (2) specifies that expenses include, "...costs of counsel, engineers, valuators, stenographers, accountants and other assistants employed by the board, as well as the salaries and expenses of the members of the board while employed in and about the hearing."

Mr. Chairman, this new bill, "An Act To Amend The Expropriation Act", has several flaws, as far as I can see; not flaws in the printing or the way the intended legislation is written, but flaws in the fact that the landowner has far fewer rights. There is nobody to stand up for or to represent the landowner on the Public Utilities Board, and the cost of the landowner fighting his case becomes much more expensive. The Public Utilities Board could be frivolous in commissioning more input than is warranted.

Mr. Chairman, the government could be mean-spirited, commissioning expensive input to increase costs and intimidating landowners who fear they will not get an increase and would have to pay costs, and this is basically

the full impact of the new bill, the fact that the landowner is going to incur much more cost in order to fight for his rights.

CHAIR: Order, please!

The hon. member's time is up.

MR. OSBORNE: By leaver, Mr. Chairman?

CHAIR: Does the hon. member have leave?

SOME HON. MEMBERS: Yes.

CHAIR: The hon. the Member for St. John's South, by leave.

MR. OSBORNE: Thank you, Mr. Chairman.

I can see, in the wee hours of the morning, the government is becoming very compassionate to our causes.

AN HON. MEMBER: They are worn down.

MR. OSBORNE: They are worn down.

The government may spare no expense in beefing up council to convince the Public Utilities Board not to increase the award while the landowner may not be able to afford to compete. Mr. Chairman, we, on this side of the House, are very compassionate towards the landowner. We feel that the landowner here has fewer rights than under the old Act. And the cost of fighting to get a fair market evaluation, in some cases, for land that is being expropriated, that cost would probably intimidate some landowners to just accept the minister's offer. I am sure that this is, in a nutshell, what the minister is looking for here.

The bill intimidates landowners even when the minister offers nothing. The minister has made no award offer prior to referring a claim to the Public Utilities Board for decision. The Public Utilities Board decides which party pays the costs. The minister has the power to send the matter to the Public Utilities Board without first offering any compensation. I cannot imagine it, but that is a fact.

The landowner, Mr. Chairman, knows the Public Utilities Board could award all costs to him and he could end up with no compensation from the government to offset the expenses. The landowner might be persuaded to accept nothing for the land rather than face the risk of paying the Public Utilities Board costs and get nothing.

You can call this, Mr. Chairman, persuasion by implicit threat. The stark reality here is that the landowner has far fewer rights while the minister has more rights. The landowner in this particular case, has very few rights as far as fighting the minister's decision on an award is concerned, and, Mr. Chairman, the stark reality, unfortunately, is that in many cases the landowner will feel intimidated into accepting the minister's offer without going to the Public Utilities Board. The landowner will feel intimidated, even if it is a very low offer, even if the government are just expropriating without any reimbursement to the landowner.

Mr. Chairman, many landowners will feel intimidated to just accept the minister's offer as opposed to the threat of having to bear all the costs of the Public Utilities Board.

MR. GRIMES: Tell us a few jokes now.

MR. OSBORNE: I cannot, I say to the Minister of Education, because the Minister of Fisheries is not here.

Mr. Chairman, I guess the stark reality is that we, on this side of the House, feel very compassionate towards the landowners, and this new bill is going to take away the rights of the landowners and, in fact, give more powers

to the minister. The minister will have more rights. The minister can actually expropriate land, with little or no compensation to the landowner.

MR. TULK: There is only one way to (inaudible) gets up and states his position on that and then we will close her down.

MR. OSBORNE: Then, otherwise, I will be here until six o'clock.

SOME HON. MEMBERS: Oh, oh!

MR. OSBORNE: Mr. Chairman, we, on this side of the House, feel that there is a need to introduce amendments to this Act in order to protect landowners. Mr. Chairman, under almost every Act that is being introduced, the ministers of this present Administration are requiring more power for themselves. In many cases, I think the present Administration is giving ministers too many powers and too much control.

Mr. Chairman, unfortunately, the rights of the landowner in many cases, in this particular bill, are not looked after. The rights of the landowner are not taken into consideration. This gives so much power to the minister and his department that they can expropriate land and the landowners are almost powerless. That is the reality under this new bill. And, unfortunately, if this bill gets passed in its present form, what are we going to do to protect the rights of the landowners? The minister is empowered here with too much control, the landowners have very few rights, and may be faced with all costs.

Having said that, Mr. Chairman, I will pass to one of my colleagues because I know we all want to speak on this particular bill.

Thank you, Mr. Chairman.

CHAIR: The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Chairman.

I feel I have an obligation to comment on those amendments moved by my colleague, the Member for Conception Bay South. In fact, I think they are very sensible amendments, and if the minister pays attention he will see why. I just want to outline that clause 5, section 19.(1) of the Act, says that the minister - and I think it is a very, very important amendment, and I will tell you why, but first I will put it into the proper context.

It says: "Where (a) the minister and the owner of land expropriated or detrimentally affected by the expropriation cannot agree on the amount of compensation to be paid for the expropriated land or on account of being detrimentally affected;

(b) the owner cannot be found or there is a doubt as to the ownership of the land; or

(c) for another reason the minister considers it expedient

the amount of compensation to be paid shall be fixed by the board."

It goes on to mention, and here is where the amendment is:

"(2) An application to fix compensation under subsection (1) shall be made by the minister."

So an application to fix compensation can be made by the minister. Why could it not - and this is what the amendment says - Why could it not be made by the owner of the land that is being expropriated or that is detrimentally affected by the expropriation? Now, if it is going to the Board, why should the minister, if a person feels he is unduly affected by that expropriation, should not that individual out there be allowed to put it to the Board, also, to render a decision? That is all the amendment states and I think that is fair game.

Where the circumstances in either paragraph 1 (a) if somebody is detrimentally affected or in 1(b) where the owner cannot be found or there is doubt as to who owns the land, it says: "The minister shall make an application under subsection 2 forthwith." We are saying: If it is in doubt, the minister `shall', not has the choice to do it, he shall make it, because it is only fair that if people are affected by this, they should have an opportunity to have their day in court. Why should they be subjected - and this is referring to other clauses - to a very expensive process where they will have to pay the full cost of it?

Some of the other amendments that will be coming up, in clause 11, for example, that we will be dealing with, I am sure my colleague, the Member for Conception Bay South, has some very sensible ones to put forth and they are not outlandish by any stretch of the imagination, they are just saying: Why should the minister be the only person who can refer it to the Public Utilities Board to render a decision? If you are unjustly affected by this, why can you not make application to have it heard? That is not too much to expect.

Now, there are many people out there today who have not been given the appropriate compensation for expropriated land, and there has been a process in place whereby arbitration, an arbitration board -

MR. GRIMES: The corner of your collar is sticking out.

MR. SULLIVAN: Okay. If it really bothers you, I say to the minister, I will leave the collar out but I will put the coat out farther, okay?

MR. GRIMES: Okay. It is distracting.

MR. SULLIVAN: I am sorry about that.

MR. GRIMES: I have to pay attention to what you say.

MR. SULLIVAN: I guess it will be well-turned up by twelve or two o'clock or five tomorrow, I say to the minister. I might even go back for a change later on today.

AN HON. MEMBER: Today. Two o'clock tomorrow.

MR. SULLIVAN: So we will not have tomorrow today, I guess, in parliamentary terms, right? There will not be tomorrow today. We may have tomorrow tomorrow, but we will not have tomorrow today? Okay, that makes sense in parliamentary language but, try telling that to somebody out there in the real world - not in here in a little bubble, out in the real world, and accurately so, probably, they will think that politicians are a bit crazy. I mean, you cannot blame them.

MR. GRIMES: The most sensible thing you have said since you have been Leader of the Opposition.

MR. SULLIVAN: Thank you, because I always value the advice of the Minister of Education. His word is as good as anybody's in this Province, it is a bond, an honour that everybody knows what he means. The little package he carried under his arm up to Ottawa, with the Premier, that said: We need this, we have one of the worst education systems in Canada. `We need this for the young people in the Province,' that is what the Premier said. And the minister ran up with his little folder that said: Savings will be redirected -

CHAIR: Order, please!

I remind the hon. member that he is debating "An Act To Amend The Expropriation Act".

MR. SULLIVAN: Thank you, Mr. Chairman.

We would not want to expropriate the Minister of Education. We would not want to do that at all. And even if we did it, I think the government should be justly rewarded for that expropriation. He would be a tremendous loss over there. He is one of the few people who can stay serious in a matter of levity here, I must say. The minister managed to keep his composure.

In this Act, it is only proper that people who are unjustly affected by the expropriation of land should be able to have certain rights to make a referral to a board instead of just the minister -

MR. E. BYRNE: `Loyola', the Minister of Fisheries and Aquaculture looks like he did the other night at the Christmas party.

MR. SULLIVAN: No sir, the Minister of Fisheries and Aquaculture does not look like he did the other night at the Christmas party. It is a different Minister of Fisheries and Aquaculture. It is a complete transformation, I say. Maybe he is at the embryonic stages of his aquaculture, I do not know, but he is certainly not

CHAIR: Order, please!

I remind the hon. member again that we are debating "An Act To Amend The Expropriation Act", and I would ask him to keep his debate relevant to the content of the Act.

MR. SULLIVAN: If we wanted to expropriate, it is possible that you may want to expropriate an aquaculture area in this Province. If that has happened, do you not think the people who have the property that is being expropriated should get fair compensation?

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: You can have it all.

I am sure the minister would not want to expropriate valuable property that people spent their lifetime putting money into, or the minister -

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: That is not what you said last Wednesday. They were your buddies, I can tell you.

AN HON. MEMBER: God forgive you!

MR. SULLIVAN: Yes, maybe God forgive you. God forbid the people who do not get just compensation for expropriated land. What is wrong, with people whose land is affected, having a representative sitting on a board, to appoint a person to sit on an arbitration board? What is wrong with that? I ask the minister. I think it is important that the compensation - under the old Act, if there is a dispute, the compensation to be fixed shall be made by an arbitration board, it says, and the minister shall appoint an arbitrator and shall notify a landlord in writing that a board is to be appointed. It is going to change now. Under the new Act, in clause 5.19.(2), "An application to fix compensation under subsection (1) shall be made by the minister."

What happens? The current Act where we have an arbitration where an individual can have representation - it is automatically represented if there is a dispute over the compensation.

CHAIR: Order, please!

The hon. member's time is up.

SOME HON. MEMBERS: No leave!

AN HON. MEMBER: Oh, we should give him some leave.

CHAIR: The hon. the Member for Bonavista South.

MR. FITZGERALD: Thank you, Mr. Chairman.

I rise tonight to speak on the amendment as put forward by my colleague, the Member for Conception Bay South, on Bill 33, "An Act To Amend The Expropriation Act."

Mr. Chairman, here is another situation where the government of the day has brought forward a piece of legislation that is certainly not in the best interest of the residents of this Province. Mr. Chairman, up until now, if a piece or a parcel of land was to be expropriated, the minister would appoint a person to a board. The landowner would appoint somebody to a board and together they would agree on a chairman of that particular board. Together they would agree on a chairman and the landowner would bring forward his opinions and his arguments as to why he thought a piece of land was worth a set fee.

Now, Mr. Chairman, the government of the day, the minister of the day, decides that we are not going to deal with this anymore. We are not going to give the landowners a right to go and appear before an arbitration board. We are going to go now and put this in the Public Utilities Board, bring it under their jurisdiction, and by doing that we are also going to make sure that the landowner, if he does not accept the price as put forward by the minister's department, then we will make him responsible for paying the full fees as well. The fees and the costs of travel, the fees and costs of the meetings of the Public Utilities Board, the fees and costs of a stenographer. Mr. Chairman, this is all going to be passed back to the landowner, if the landowner's argument is lost. I ask the government: Where is the fairness of that? Many, many times in this Province, we see a piece of land that is expropriated. It may be a small section of land to improve a section of roadway. It may be a section of land to widen an intersection, but by taking that particular piece of land, then maybe two or three building lots may be lost in the meantime. So it is not only the value of a piece of land that is being taken to carry out a change in a government - some direction from government, like a roadway or an intersection, but by doing that and offering the landowner fair compensation for the small section of land that is taken, many, many times a much larger section of land may be deemed unsuitable then for a building lot or for other purposes for which this land was intended, or could be used for.

A prime example, I suppose, of what could happen is the road that is being put through over on the West Coast now. The bypass road on the back of the Deer Lake area there. Mr. Chairman, it was only a few weeks ago or a month ago where - I think it was shown on television - the road construction crew had just about wiped out a section of land there to the point that the home-owners house and the land was probably of very little resale value because of the acts of this particular construction company. This particular landowner went to plead to government to buy her house and land because she was being harassed with flying rock every time they would blast. The road was going right on the back of her property, on the back of her house.

AN HON. MEMBER: Where?

MR. FITZGERALD: Over on the West Coast. I am not exactly sure where it was. Maybe the Member for Humber Valley knows what I am referring to. It was probably in his district. It was in a show that was on the television news probably a month-and-a-half ago.

MR. FITZGERALD: Was it in your district?

AN HON. MEMBER: That was in my district.

MR. WOODFORD: Strawberry Hill (inaudible).

MR. FITZGERALD: Down by Strawberry Hill? Was that the new bypass road that was going in over in Pasadena?

AN HON. MEMBER: Yes.

MR. FITZGERALD: Right, that was the section of land. It was on the news. It was on Here and Now. Most people must have seen it. That was a prime example of people having a concern about this piece of legislation now. Here, a lady went and pleaded to government to offer her a fair value for her property because she was harassed so much with the construction company and with the fear of what would happen once that road was

opened up and traffic started going back and forth. The government of the day turned their back and said, `No, we do not want the land.' We do not mind if the rocks are coming down through your roof and going in through your windows. They just walked away from it, and that is wrong.

If people are going to go out there today and take possession of a piece of land, then they should offer and supply a fair market value for the piece of land they are buying, for the piece of land they are expropriating; not only, as I referred to, the section of land that they use, but if they are destroying or changing the value of a greater section of land because they want this small area to do what government deems necessary, then they should give them the value of the complete piece of land.

Today, if this piece of legislation is allowed to pass, if the property owner is not satisfied with the value that is offered by government, then they have to have a pretty heavy back pocket, I say to members opposite, in order to go and probably take a chance on spending $10,000 or $12,000 or $15,000 and lose the case, lose the battle. They might end up with the unfair value that was offered in the first place having to be accepted just to pay legal fess.

The way that this particular -

AN HON. MEMBER: (Inaudible).

MR. FITZGERALD: I saw that. Thank you very much; we have a new errand boy.

Mr. Chairman, that is the unfairness of this Act. Before, it was a fair process whereby the landowner would put forward a representative, the government or his department would put forward a representative, and there would be a chairman who would be agreed to by both parties. That was fair, and the ruling would have had to be accepted. The ruling was binding, and a fair value - or at least I did not hear anybody say that the way the process worked was unfair. I do not know why the government want to change it. I fear that I know. I fear that I know the reason why government wants to bring in this piece of legislation.

AN HON. MEMBER: Why?

MR. FITZGERALD: When you look at some of the things that they are doing now around rural Newfoundland, you are looking at bypass roads that they are talking about putting in. There is talk of one going by Clarenville. There is talk of another going by Gander to bypass the businesses. That is a story in itself. It is a situation where the Town of Gander does not want a bypass road, I can assure you. It is a situation where the Town of Clarenville does not want a bypass road, because they see what has happened. The Minister from Labrador nods his head. He is looking for a road. He does not want it to bypass anything. He wants to route it through all the communities. I fear, Minister, that a lot of your people may be affected by this particular bill. Once you get into - hopefully you will, and I believe you will - once you get into your Trans-Labrador Highway, you are going to see a lot of people having to come back and then go through the courts or through the Public Utilities Board, and have to go by the rules of this particular bill.

CHAIR: Order, please!

The hon. member's time is up.

MR. FITZGERALD: That will be the time when people are going to come to you and talk about the unfairness. They are going to come and ask why you did not stand in your place here in this House at 2:57 in the morning -

CHAIR: Order, please!

MR. FITZGERALD: Mr. Speaker, I will rise again.

CHAIR: The hon. the Member for St. John's South.

MR. OSBORNE: Thank you, Mr. Chairman.

MR. GRIMES: Why did you ask for leave the last time if you were going to get up again?

MR. OSBORNE: I thought of something else I wanted to say.

MR. GRIMES: Well, that is for the birds.

MR. OSBORNE: There are two important clauses here that we must keep in mind, clauses 5 and 11. Clause 5 repeals sections 19 and 20 and replaces them with new appeals processes with the Public Utilities Board instead of an arbitration board, and many protections for the landowners are eliminated. Clause 11 repeals subsections 34.(2), 34.(3), and 34.(4), and replaces them with new clauses that will cost the person appealing a lot of money.

Mr. Chairman, this is the reason why we, on this side of the House, are so intent on debating this for many, many hours, if need be, because we feel it is very discriminatory that the landowners are going to have their rights taken away while, at the same time, they are going to have to bear the costs, and potentially a lot of money, to fight the decision of the minister on the expropriation of their land and what value they are going to get for their land.

Just some further specific details on clauses 5 and 11, Mr. Chairman. Under the current Act, when the minister and the owner of the land impacted by expropriation cannot agree on compensation, or where the owner is in doubt or missing, or for any other reason the minister considers appropriate, the amount of compensation shall be fixed by an arbitration board. Under the new Act, in the same circumstances, the amount of compensation shall be fixed by the Public Utilities Board, so right here, it is quite clear that the rights of the landowner are taken away.

Under the current Act, when there is a dispute, the compensation to be fixed shall be made by the arbitration board and the minister shall appoint an arbitrator and shall notify in writing the landowner that the board is to be appointed. That is the current section 20.3. Under the new Act, an application to fix compensation shall be made by the minister - this is the new section 19.2, and it is the case that under the current Act, the appointment of an arbitration board becomes automatic when there is a dispute over compensation, but that is not the case with the new bill.

Is it the case that under the new Act, the minster has the choice of whether and when to make application to the Public Utilities Board to resolve this matter? I mean, really, when you think about it, the minister can decide when he wants to send it, and whether or not he is even going to send it, to the Public Utilities Board. The landowner has absolutely no say in the matter at all. So, Mr. Chairman, I find it very discriminatory towards the landowner and very unfair to the landowner that under the new Act, not only does he have no say and does not have the ability to appoint an arbitrator on his behalf, but his case may not even be heard, it may just be cut and dried. The Act gives the aggrieved person no power to demand or speed up a Public Utilities Board hearing.

Mr. Chairman, throughout this entire new bill, "An Act To Amend The Expropriation Act", we see, especially through clauses 5 and 11, that the rights of the landowner are taken away and the rights of the minister are actually increased. Clearly, the Public Utilities Board process can be far more expensive than that of a three-member, one-stenographer, temporary board. The Public Utilities Board can increase the cost by commissioning frivolous input and the government can act in a mean-spirited way to increase costs at no great risk to itself but at great risk to the landowner.

Mr. Chairman, the new process, unlike the current one, allows the government to beef up its council and spare no expense to try to win the expropriation case. The potentially unlimited cost would serve as a deterrent to anybody considering to challenge the government's compensation offer. Mr. Chairman, unless the board's award is greater than that offered by the government, the aggrieved person must pay all costs and expenses.

The new subsection 34.5, Mr. Chairman, which is the same as the current subsection 4, is even more ominous, given the new process. If the government makes no offer for the land prior to expropriation, the board

determines which party pays the cost. The minister, without providing any compensation offer, which a landowner would almost certainly object to, could order the Public Utilities Board hearing. The cost, which could become borne by the person whose land is up for expropriation, could be quite high.

Under sections 21, 23, 24 and 25 to be repealed. Under the current Act, section 21, the minister, subject to Cabinet, sets board member fees but these would now be determined under the Public Utilities Board legislation. Under the current Act, section 23, the board has civil court power to call witnesses, demand evidence, subpoena documents and administer oaths. The Public Utilities Board can do this, as well, under subsections 63, 93, 96 and 98.

Mr. Chairman, it is quite clear here that the rights of the landowner are taken away, while the rights of the minister are further enshrined. While the current Act, section 24, sets fees for hearing witnesses, is there such a provision in the new Act for the Public Utilities Board's legislation? Provision for a stenographer in the current section 25 is taken care of elsewhere under the new scheme Public Utilities Board, section 97. The new Act does away with three provisions of the current Act, 32.2, which states that the board shall include in the award its findings on all questions of law, and the amount of compensation and the awards. Section 32.3, the award to arbitrators shall be considered to be the award of the board; section 32.4, the board may correct in an award a clerical mistake or error arising from an accidental slip or omission.

The minister's defence of this new bill, Mr. Chairman, is that the arbitration board system is archaic and only Newfoundland and PEI still have it. Mr. Chairman, another defence of the minister for this new bill is that the arbitrators see themselves as advocates and failed to work together co-operatively to find a solution. A third defence by the minister, of this new bill, Mr. Chairman, is that the arbitrators are appointed for a single case and this prevents the development of arbitration expertise.

Mr. Chairman, it is quite clear that this new bill is designed for the protection of the minister and the minister's department and takes away the protection of the landowners. It is quite clear that the intent of this new bill is to make it easier to expropriate land and, in actual fact, to make it more difficult for the landowner to fight the expropriation pay out.

CHAIR: Order, please!

The hon. member's time is up.

MR. OSBORNE: Thank you, Mr. Chairman.

CHAIR: The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Chairman.

I want to say a few words on Bill No. 33, on the amendment put forward by the Member for Conception Bay South.

Mr. Chairman, again with respect to this bill, as in similar situations with other bills that have been going through this House of Assembly is the fact that this bill is giving undue authority to the minister, which is, as I said, not necessary. Under the old act, of course, the failure of the minister and landowner to agree on compensation for expropriation, basically means an arbitration board was appointed for that particular case. Usually there are three people appointed and one person is appointed by the landowner.

Mr. Chairman, with respect to this bill, the board is going to be the PUB, and the PUB is probably more costly and less swift since it is already bogged down with other responsibilities. So, what we may have here is a case where a piece of land is being expropriated and a value being put on it, and it is being questioned, of course, by the landowner or the property owner. He or she may not be satisfied with the price being put forward, if indeed, Mr. Chairman, there is a price put forward. Then, it would have to go to the PUB. How long, Mr. Chairman, might that be? Would it put undue delays on the government for instance, if they were trying to do some sort of

project whereby they needed to acquire the property in question very rapidly, in a very urgent situation? If it went to the PUB, they may have to wait for the PUB to be called together to address the concerns and the value put on the property. Whereas, of course, Mr. Chairman, the arbitration board would be appointed fairly quickly, I would imagine. It would basically depend upon the minister and the landowner getting together and agreeing upon the board that would be appointed, and then they would sit down in a very timely fashion, I say to you, Mr. Chairman, and address the concerns of the individual.

Of course, the concerns may not involve only the price, I suppose, that would be set for the land, the assessed value by the department, but it could deal with the amount of land that is being taken. The property owner could very well think, Mr. Chairman, that the amount of land being taken is excessive and that the government or the municipality, whatever, may not need the amount of land that is being expropriated. So that is a concern, I suppose, aside from the value of the land itself. That is a point that would have to be addressed, Mr. Chairman, by the PUB.

Also, Mr. Chairman, the minister would have the authority to decide if it is referred to the board or not. That is another authority and power that would be given to the minister, that he would decide if, in fact, it should be referred to the board. Under this bill the minister is given the power to make application to the board, and it therefore stands to reason that he will have the choice of whether and when to refer the matter to the PUB. The landowner has no such power to apply to the PUB. So here is a situation, again, where the minister is given the authority, more power than is required -

MR. GRIMES: That is enough.

MR. J. BYRNE: Not at all, I say to the Minister of Education, not enough yet on this piece of legislation. This is a very important piece of legislation, Mr. Chairman, a very controversial piece of legislation, I say to the Minister of Education, and it has to be addressed. That is why we are on this side of the House, to address the concerns and to bring forward the concerns of the public with respect to any legislation that comes before this House.

Mr. Chairman, we are on our feet at 3:12 a.m. to address the concerns of the public, the people of this Province, when it comes to this bill, Bill 33, which is to address the expropriation of properties within the Province.

As I said, the bill itself is very controversial and, as I said earlier, the landowner has no power, as the minister has, to refer it to the PUB. So, in fact, if the minister decides to refer it to the PUB he can, and if the property owner decides that they want to refer it to the PUB, he or she cannot do that. In actual fact that is an unfairness inherent in this bill, Mr. Chairman. Some of the amendments that are being put forward by the Member for Conception Bay South will help, certainly, to address the unfairness in this bill.

Mr. Chairman, we have seen a number of bills go through this House during this winter sitting which are being put before the House a few days before Christmas, that are being rushed and forced through the House of Assembly when, indeed, the House could have been opened much earlier. The legislation that is being put forward, the bills that are being put forward, could have had plenty of debate, not in a rushed fashion and not requiring the Opposition to be sitting in the House of Assembly at 3:00 a.m. trying to address legislation going through this House.

Also, Mr. Chairman, with respect to this legislation, the landowner no longer has a rep on the decision-making board. Previously, with respect to the legislation, or the Expropriation Act, the landowner could appoint a person to the board and have some basically some equal say on what is happening with respect to his piece of land, or the piece of land that is being expropriated, or his property that is being expropriated, for whatever reason the government or the municipality may or may not want it. So the landowner does not have the same right as the minister does to do such a thing.

Under the old act, of course, one of the three members of the decision-making board is the landowner's arbitrator. The landowner's arbitrator can veto the minister's choice of the third arbitrator - but that will not be the case in the future - and the award decision of any two arbitrators is final.

Under this bill, the PUB decides, and the landowner has no say in the composition of that board, nor does the landowner have a rep on the board, and he must hire and pay for independent legal counsel.

In actual fact, before now, a person could actually appeal the appraisal of his property and appoint an individual to the board, but now he may have to hire legal counsel to make his case for him. That, in effect, will possibly deter the landowner or the property owner from appealing. If we have a piece of property within the municipality or wherever, and it is not assessed at a very high value, Mr. Chairman, it may be the government's intention to basically deter the individual from applying to have an appeal heard, because the cost may be excessive to the individual. If he has to hire legal counsel, in actual fact it may not be sensible, or it may prove fearful for the individual to appeal his estimate which would be given to him by the government.

Mr. Chairman, actually the minister doesn't even have to put a value on the piece of land itself, or the property. The problem with this is, if indeed it goes to the PUB and the PUB does not set the same value on the land as the owner sets on it - say he valued it at $10,000 and the PUB comes out with $9,999. The individual may have to foot the full cost of the appeal. The appeal itself could be excessive, because now the PUB could require or want to hire lawyers. They may want to hire engineers or other consultants, appraisers, or what have you, to make their case for them, or the government might want to do that, and the individual could end up paying the full cost.

Now, if we have a piece of land that could be valued at $40,000, $50,000 or $100,000, who knows, and the costs are excessive, it will certainly be a deterrent to the applicant or to the individual, Mr. Chairman, to appeal the value of the land. That in itself is certainly a deterrent. As I said earlier, Mr. Chairman, this bill raises the cost of the process and intimidates landowners into accepting the minister's offer.

Section 34(2) specifies that expenses "...include costs of counsel, engineers, valuators, stenographers, accountants and other assistants employed by the board as well as the salaries and expenses of the members of the board while employed in and about the hearing." The PUB could be frivolous in commissioning more input than is warranted, and who would really know that until after the fact? It could be after the fact.

CHAIR (Barrett): Order, please!

The hon. member's time is up.

MR. J. BYRNE: Thank you, Mr. Chairman.

CHAIR: The hon. the Member for St. John's South.

MR. OSBORNE: Thank you, Mr. Chairman.

I realize that I have spoken on this a couple of times previously, but I feel so strongly about protecting the rights of landowners in this Province that I feel compelled to stand and speak on it again.

Mr. Chairman, there are some serious concerns that we, the members of the Opposition, have with this particular piece of legislation, "An Act To Amend The Expropriation Act." Most particularly, we feel that the rights of the landowner must be taken into consideration. This is particularly the case with clauses 5 and 11 of the bill. This is the reason we are putting forth amendments on clauses 5 and 11 of the bill. We feel very strongly that we must look out for and protect the rights of the landowners in the case of land expropriation.

There must be some reason the government is putting forth this piece of legislation now. I don't know. Is it for the land in Argentia for the smelter, is it for mining development, is it for the transshipment facility, or the by-pass road from the Goulds? That is a question we don't know the answer to, but for some reason the government is giving itself more power in this new bill to expropriate land from innocent landowners, and the landowners will have few rights to fight with regard to the amount that the government is offering in compensation for the expropriation of the land.

I really find it appalling, Mr. Chairman, that most members on the other side of the House will vote for this legislation, and will vote down the amendments. They will vote to give the government more power to expropriate land and less power to the landowners. Mr. Chairman, it is unbelievable! I think that, even at this early hour, 3:20 in the morning, if the members of the government, the members on the other side of the House, were to listen to their consciences and really consider the landowners, they would vote in favour of our amendments before they voted in favour of the bill.

Mr. Chairman, if the land is expropriated the landowners have very few rights. Instead of having an arbitrator represent them now, they actually have to pay legal counsel to represent them on the Public Utilities Board, instead of a three-member arbitration committee. Under the old system, the government would have an arbitrator, the landowner would have an arbitrator, and there would be a third, independent arbitrator, and you would only need two of the three to settle on an amount that the landowner would get for the expropriation of his land.

Mr. Chairman, it is unfortunate that under this new bill that right of the landowner is taken away. The landowner here is put at a loss, and it is because of the government, because of the new bill, "An Act To Amend The Expropriation Act," Bill No. 33.

If the land is to be expropriated, right now the landowner, under the present system, can get an arbitrator at no cost to him, unless indeed the three-member board decides that the amount the landowner is getting in compensation is less than or the same as what the government initially offered. Under the new system, Mr. Chairman, the landowner has to pay for legal counsel, for stenographers and for surveyors. The landowner would have to bear all costs, not only the minor costs under the old clauses, but there would be much more cost to the landowner if this new bill was passed.

MR. FUREY: What's your point?

MR. OSBORNE: I say to the Minister of Industry, Trade and Technology, who has joined our clerical staff around the centre table, my point is that it is now a deterrent to the landowners. It gives more power to the government. It is a deterrent to the landowners to actually fight with regard to the amount that they are receiving in compensation under the expropriation. The landowners will more than likely decide that because of the high cost, in the event they lose, that they aren't going to fight expropriation. The government can take their land for much less than what they would offer under the old act.

The landowners, Mr. Chairman, are put at a disadvantage. Under the new legislation, they would be put at a disadvantage; so much so that a lot of them will just decide not to fight the expropriation of their land. They will just accept whatever it is the government is offering, because of the fact that they are afraid they will have to pay all costs associated with fighting it.

Unfortunately, Mr. Chairman, under this new system, under the new legislation, the landowner would have to pay for civil court witnesses, subpoena documents, administered oaths and so on, as well as his own legal counsel. There is no provision in the new act for legislation to protect the landowner in the event of an expropriation. Even a stenographer would have to be paid for by the landowner, if indeed he was awarded less, or even the same, through the board under the new legislation.

Mr. Chairman, it is a deterrent for landowners to stand up and protect themselves, it is a deterrent for landowners to stand up for what is right, and it is a deterrent for landowners to expect to get their full and fair share, something that this government promised: a full and fair share. This new legislation would be a deterrent to landowners to get their full and fair share for their land. Mr. Chairman, that is a crime. I do not know how we could pass legislation without providing protection for the people of Newfoundland and Labrador so that they can get their full and fair share.

It is unfortunate, Mr. Chairman, that the government has promised a full and fair share during an election campaign. They have repeated that promise many times over since the election, and unfortunately this new legislation will not give landowners their full and fair share. It takes it away. It diminishes their rights as

landowners. It gives the government further rights, more rights under the Expropriation Act, and the government can actually expropriate land now for very little, and in some cases nothing, because the landowners are deterred from fighting for their rights because they are afraid that they are going to have to pay all the legal costs, stenographer costs, the cost of the Public Utilities Board, the whole shot. Mr. Chairman, I find it appalling.

With that, Mr. Chairman, I am going to let one of the other members of my caucus speak on this act.

Thank you very much.

CHAIR: The hon. the Opposition House Leader.

MR. H. HODDER: Thank you very much, Mr. Chairman.

AN HON. MEMBER: The man who ran, the man who wouldn't vote.

Are you up to vote now?

MR. H. HODDER: Am I up to vote now? When the question is called, -

MR. TULK: A point of order, Mr. Chairman.

CHAIR: Order, please!

The hon. the Government House Leader, on a point of order.

AN HON. MEMBER: He ran away.

MR. TULK: Yes, what was the number of that bill?

CHAIR: Order, please!

MR. TULK: On a point of order, Mr. Chairman, the hon. gentleman just now -

MR. GRIMES: Bill 39.

MR. TULK: Bill 39?

MR. GRIMES: Yes. Call it that, anyway.

MR. TULK: "An Act To Amend The City Of St. John's Act (No. 2)", Bill 38. The hon. gentleman was out. He ducked out, he slithered out, and now he is back. We want to know now if he wants to record his vote so that he will be known in posterity.

CHAIR: There is no point of order.

The hon. the Opposition House Leader.

MR. H. HODDER: Thank you very much, Mr. Chairman.

I certainly appreciate the protection that the Chair gives me in these matters. Certainly, I acknowledge that I was away from the House for about ten minutes, and at that time there was a vote called.

AN HON. MEMBER: (Inaudible).

MR. H. HODDER: If the Minister of Industry, Trade and Technology had to record all of the votes that were taken in his absence, we would be here for a full week.

Mr. Chairman, I want to take this opportunity to make a few comments on the bill that we are now considering which, of course, is Bill No. 33. Under this particular bill we have the effect, of course, of the minister having the right to expropriate land without what we would consider due process and protection for the landowner. The question we ask is: Why would you do this now?

You know, when we look at the developments that are taking place in the Province, as my colleague from Bonavista South said just now, if we look at the situation of the land that would be needed, for example, in the Goulds area, and the implications this bill would have for landowners who might have to give up land for the Goulds Bypass or the bifurcation road as it used to be called a few years ago, we have concerns. The old process was to have an arbitrator appointed by the minister, an arbitrator appointed by the landowner and then having an independent third party make the decisions. We have had that process in the Province for a long time, and turning it all over to the Public Utilities Board is fraught with risks.

So, we say to the government that we are concerned that the landowners in the Goulds will not be adequately protected. We are concerned that landowners in Gander, when they put the road and change the route of the highway to Gander, that this expropriation may very well negatively impact on people who would be required to give up their land.

So, Mr. Chairman, what we are saying is that we are concerned with the ordinary person. There used to be a fair process, and we want some more guarantees that the public utilities process will be fair, but we don't see those guarantees in this particular piece of legislation.

That is not to say that the Public Utilities Board of itself is an unfair group, but we don't see built in legislation protections for the small person, the individual, the landowner. So, I would say to the House that the difficulty we have is when you switch that process over, we ask the question: Who is going to pay the expenses for the landowner? Who is going to pay the legal costs? Who is going to pay the cost of the engineering studies? Who is going to pay the cost of all of the expenses associated with having appraisals done. When we find that there may not be, in some cases, any representative at all for the landowner, we have concerns. The difficulty we have with this particular piece of legislation, the Expropriation Act, is we ask: Why?

Has this act been brought in so we can have a process that we will get land for industrial sites? Is that why it is brought in now? Is it brought in because we have new highways being built, and the present process does not work fast enough for the government? Is it being brought in because we feel that the Public Utilities Board would be fairer to the government? Certainly, we are not convinced it would be fair to the individual landowner. So, Mr. Chairman, we say that the individual landowner is not adequately guaranteed fair representation.

Then we have the issue where there is a missing landowner. In other words, in some cases we cannot identify who the landowner is or we can't make contact with that landowner. In this particular case, under the old process, when the landowner could not be found the minister was obliged to appoint an arbitrator who would represent the missing landowner. In the new act, however, there is no one on the Public Utilities Board to represent that missing landowner. So, who will make the case for and who will defend the missing landowner? We have some difficulties with that particular aspect of the bill as well.

Then we have the issue of the costs that are involved. We know that the bill says the landowner must pay all costs, expenses and fees incurred in the award process if the board does not award the landowner more than the minister offered. In other words, this process that we are now going to embark upon is a process that intimidates the landowner: You better accept what the minister offers because if you don't accept it and you go through the Public Utilities Board and happen not to be successful in getting more money, then you are going to pay all the expenses. We're saying, is that fair? Is it fair that we should say to a landowner: If you don't accept what the minister is offering you, if you challenge it and you want to seek some kind of an independent arbitration on this - then we say to the government opposite, we ask the basic question: Is that a fair process? Is it fair to say to landowners: If we happen to not award in your favour then you are going to have to pay all the expenses associated with the appeal? In the old process that was not the case. In the new process we know now that there would be an incentive for the Public Utilities Board not to award any higher cost than have already been offered by the minister or by the Crown.

Now, we don't think that the Public Utilities Board will be frivolous in making their decisions. We don't think that they would deliberately go out and say: Well, we can't award the landowner anything because then we won't be able to charge the landowner the cost, but we do acknowledge that the Public Utilities Board has to operate within its budget. Therefore, awarding cost might be a way of being able to keep within their budgetary structure.

Mr. Chairman, government of itself could be - I won't say they would be - they could be very mean-spirited. They could commission expensive input to increase costs and they could, directly or indirectly, intimidate landowners to accept what they have offered. Therefore we say that that kind of process there is not an adequate process.

So, Mr. Chairman, I just wanted to say to all hon. members, that there are some risks in this particular piece of legislation. We have concerns about ordinary Newfoundlanders and Labradorians who will be intimidated, who will be frustrated, who will be on the minister's steps time after time after time to try to see if they can get a fair approach, a reasonable approach, an honest approach, an approach that would say that it meets the qualities of integrity.

So we have great fears of what is going to happen. So, Mr. Chairman, for the benefit of the ordinary person, for the benefit of the person who inherits a piece of land, for the person who has paid off a piece of land with his or her mortgage over twenty-five years or thirty years and now find themselves having their property taken, their lifesavings in jeopardy - we are saying we are going to turn all that over to a Public Utilities Board and they are going to make a decision as to what the cost is going to be. We say: Is that fair? Are there guarantees here that protect the individual?

On all of those questions we have concerns. We have concerns that the process is not guaranteed to be reasonable and that it intimidates the landowners, in particular in cases where the minister, for example, might offer what might appear to be a reasonable award but the person may feel that, well, we have some questions as to whether we will appeal it. Then, when they look at all the costs involved, and the potential risk, if they have to spend $10,000 to present a case and run the risk of not winning anything, then they might be hesitant.

CHAIR: Order, please!

The hon. member's time is up.

MR. H. HODDER: This is nothing more than a process to frustrate the ordinary Newfoundlander and Labradorian.

CHAIR: Order, please!

The hon. the Member for Baie Verte.

MR. SHELLEY: Mr. Chairman, I am glad to get up for the second time now to make some comments on this. There are some very, very good points. The ministers opposite must be listening because they are so concerned, and have interrupted so often on all the points that were made by my colleagues thus far in this debate. The Minister of Education is now ready to admit, that, as a matter of fact they do have some very good points and that they raised some very serious concerns that the government and minister should consider, Mr. Chairman.

It is a real shame that the minister is not in her seat to hear this. I hope she is listening outside. It is now 3:40 in the morning and maybe she is having a little nap outside. I ask her Cabinet colleagues, her ministers in Cabinet, if they would make sure she knows about these points. I know the Minister of Education, the House Leader and the Minister of ITT have been listening very closely and they are starting to agree with us. At 3:40 in the morning they are starting to realize that there are some legitimate points being made here. As a matter of fact, Mr. Chairman, they make a lot of sense.

We have raised six very serious points and it is the most substantive piece of legislation we have talked about since entering this House at 2:00 p.m. today.

MR. GRIMES: We have already heard it.

MR. SHELLEY: Well, we are going to tell you again because it is just starting to sink in. The Minister of Education is making a good point and I agree with him, he has heard it already. So if he has heard it already it means it made sense to him and it is starting to sink in. I think if we keep at it, maybe by 4:30 a.m. or so the Minister of Education, the Minister of Industry, Trade and Technology and so on will be nodding their heads and saying: You know what, they are absolutely right and they are making some very good points.

MR. SULLIVAN: Why do they have advertisements showing the same thing over and over again?

MR. SHELLEY: So it will finally sink in. The first time you see an advertisement on a car you do not buy that car right away, you wait until you see it over and over and over. Just like the energizer, not the copper top, you do it over and over and over until it sinks in.

Mr. Chairman, my colleagues here are going to ask that the Minister of Education and the Minister of ITT make sure they go in and wake up the Minister of Development and Rural Renewal, who put forward this bill, and make sure she knows the points that we put forward here tonight.

We will list them again, six very good points. I will list them and talk about each one specifically.

AN HON. MEMBER: Table them.

MR. SHELLEY: We will table them. There is lots of time to table them. We have some more amendments yet, more amendments that make sense, Mr. Chairman. We have just touched the tip of the iceberg with this so far. We are getting more energy as we go. We are so encouraged and so enthusiastic about what we are doing, and encouraged that so many members are paying attention to our points, that maybe it is going to strike home. Maybe, Mr. Chairman, around 6:00 a.m. or when the sun is just coming up over Signal Hill, the light is going to hit the ministers and they are going to come to life. They are going to say: We have seen the light and we agree with the Opposition. They have made some good points. We are going to go out and wake up the Minister of Development and Rural Renewal and tell her: You had better go in and listen to the Opposition. They are making some very good points. I've seen the light. Just like the advertisement, we have to keep going and going until the Minister of ITT just nods and says: Yes, you are right, I agree, you are making some very good points.

Mr. Chairman, seriously, the first time we read this bill, our caucus members, everybody said the same thing, that there are some serious concerns here. It is too bad this had to come 3:00 in the morning, that it didn't come -

AN HON. MEMBER: What do you mean 3:00 a.m.? It's 3:45 a.m.

MR. SHELLEY: Three forty-five in the morning, whatever, Mr. Chairman. It is too bad it had to come then because it is a serious bill. I hope the minister responsible comes back to the House while we are debating this so we can make the points to her, and instead of making a joke of it and making light of it that she take it seriously.

Mr. Chairman, the Minister of Education is on his way out now to wake up the Minister of Development and Rural Renewal. He is about to tell her - he agreed with me, in just four minutes' speaking. In just four minutes' speaking, the Minister of Development and Rural Renewal -

MR. SULLIVAN: Works, Services and Transportation.

AN HON. MEMBER: You don't even know what bill you are talking about.

MR. TULK: A point of order, Mr. Chairman.

CHAIR: The hon. the Government House Leader, on a point of order.

MR. SHELLEY: I am sorry! The Minister of Works, Services and Transportation.

MR. TULK: You have it right.

MR. SHELLEY: Yes, there are two females (inaudible).

MR. TULK: I won't make a point of order, Mr. Chairman, but I do want him to be correct. I know he is tired.

MR. SHELLEY: Mr. Chairman, I would like to remind the Government House Leader that it is 3:45 in the morning, but that the Minister for Government Services and Lands looked over at me and said: It is the minister of rural development. Didn't he?

AN HON. MEMBER: (Inaudible).

MR. SHELLEY: Yes, I know. Did you hear what I said? It is late. Anyway, the Minister of Government Services and Lands said: No, it is the -

AN HON. MEMBER: (Inaudible).

MR. SHELLEY: It is your mistake, right?

AN HON. MEMBER: (Inaudible).

MR. SHELLEY: No, it isn't here.

MR. H. HODDER: Are you saying that you confused that minister with the Minister of Works, Services and Transportation?

MR. SHELLEY: Yes, he told me. I was referring to the Minister of Works, Services and Transportation earlier.

MR. H. HODDER: I tell you, it is late.

MR. SHELLEY: Actually, the Minister of Government Services and Lands told me it was the minister of rural development. So I stand corrected with the minister. No problem. We can handle that at 3:45 in the morning, Mr. Chairman.

I would say the Minister of Education just went out to wake up the Minister of Works, Services and Transportation to tell her we are making some very good points on this. He is going to let her know, and he is going to give a wake-up call to the entire Cabinet.

Not only the rest of the legislation that we talked about here tonight, we had the Member for Bonavista South put forward a motion that the government finally saw the light after eighteen months, because he brought it forward eighteen months ago, and bang! It took eighteen months to do that, so we don't mind taking tonight and tomorrow morning to get this point through.

Hopefully, Mr. Chairman, it is a brighter government now. There are some changes over there, not a lot, but there are some positive changes, some new members that look very promising, I should say. Maybe they see the light on these particular amendments and suggestions from the Opposition more quickly than they saw what the Member for Bonavista South brought forth.

There are some good points, Mr. Chairman. We mentioned six of those that they should look at. Mostly they have to do with clauses 5 and 11. Now the amendments are in clause 11. Basically, the intention of the bill is to have the PUB and not arbitration boards determine the compensation paid to the landowner when property is

expropriated. That is the whole gist of clause 5. That is what happens there. In clause 11, of course, they also make significant changes.

Six of the points are: That compensation is set by the Pub now, not arbitration boards. The minister decides whether to refer to the board or not, and I will make a comment about that in a second. The landowner no longer has a rep on the decision making board. Right away you can see how it is moving away from the person who has their land taken away and the rights they should have, right on back to the minister. We are going to dictate everything to you now. You don't have any decision making. We don't want anybody representing you. The government is going to tell you how much you pay and where you go from there. Forget about the person who just lost their land, or just had their land expropriated. We are going to leave everything in the minister's hands. You have no say any more. That is what happened here.

There is no rep when the land is in dispute. The bill raises the cost of the process and intimidates the landowners into accepting the minister's offer. Mr. Chairman, now the landowner, whose land is in dispute, is going to have to pay for the stenographers, the administration, and so on. I do not know if we have a final figure on what it would cost for an appeal to be covered. Was that $15,000 to $20,000? It could be different, with administration, stenographers, and different things.

Very simply, Mr. Chairman, a person who feels that he has just cause for arguing about how much he was allocated for the land is going to be turned off right away. It almost like blackmail. We don't want you arguing with us. We will tell you what to do. As a matter of fact, if you want to argue with us you are going to have to pay for it. That is what they are doing here. It is nothing short of intimidation on behalf of the government, that when a person has land expropriated from them, they have to face the minister. The minister will tell them where to go from there, and they refer the land. The bill intimidates the landowners even when the minister offers nothing. If the minister does not offer anything, where does the landowner go? If we have a minister who is arrogant enough, and there could be a great chance of that, especially if there is a shuffle over there -

AN HON. MEMBER: He won't even refer it.

MR. SHELLEY: No. When the shuffle comes, Mr. Chairman, and we do end up with a very arrogant minister - and God knows who that could be - if they decide that they do not like this person or, for whatever personal reason, decide not to offer anything for the land, the landowner then has to decide if he is going to hire legal counsel, if he is going to pay $15,000 or $20,000 -

CHAIR: Order, please!

The hon. member's time is up.

MR. SHELLEY: Already, Mr. Chairman? How fast that went.

CHAIR: The hon. the Member for Conception Bay East and Bell Island.

MR. WALSH: Thank you, Mr. Chairman.

Mr. Chairman, I do not intend to take up a whole lot of time. As we all know, it is 3:50 a.m., and fortunately for us at this point in time, we understand maybe that one of the local radio stations, VOCM, may be carrying the debate of the House of Assembly.

SOME HON. MEMBERS: Hear, hear!

MR. WALSH: I think, Mr. Chairman, what is regrettable to all of us is that they did not start carrying debate in this House of Assembly at 2:00 this afternoon. The reason I say that is because we have spent fourteen hours here listening to, in most cases, the same speech nine times, being repeated time after time after time by each of the individuals on the other side. Now, parliamentary procedure permits them to do that, to stand up one after the other and speak, and there is no problem in doing that with any piece of legislation. But, Mr. Chairman, it

reminds me of putting nine people in a room and trying to decide what station you are going to listen to or what television program you are going to watch. The first person says: Let's watch channel 3, and the second person says: Let's watch channel 3; and the third person says: Let's watch channel 3, and the fourth person says: Let's watch channel 3. After awhile, we all know what channel we are going to watch. We all know we are going to listen to speech after speech after speech. The sad part about it -

MR. E. BYRNE: A point of order, Mr. Chairman.

CHAIR: The hon. the Member for Kilbride, on a point of order.

MR. E. BYRNE: Mr. Chairman, I understood that we were debating Bill 33, "An Act To Amend The Expropriation Act." I have not heard anything from the Member for Conception Bay East and Bell Island yet dealing with that piece of legislation.

MR. SULLIVAN: He is not getting a good reception on Channel 3.

AN HON. MEMBER: No, that is for sure. He is not coming through here at all.

MR. H. HODDER: Change the channel.

CHAIR: Order, please!

To that point of order, I remind the hon. the Member for Conception Bay East & Bell Island that we are debating an amendment to the Expropriation Act and I would ask him to be relevant.

AN HON. MEMBER: You are out of order in more ways than one.

MR. WALSH: Thank you, Mr. Chairman.

I could carry on a little longer but I guess that is yet one more example, when someone is trying to make a point in the House of Assembly, about the fact that we are being delayed here at a cost of some $6,000 an hour, listening to the kind of rhetoric we have heard from other speakers earlier and the kind of rhetoric we will probably hear for the next two or three hours. But I am glad, Mr. Chairman, that the people of the Province have an opportunity, at 4:00 a.m., to hear exactly how Her Majesty's Loyal Opposition are treating the House of Assembly, and indeed, treating the way the money can be expropriated and spent in the Province.

CHAIR: Order, please!

I remind the hon. member to be relevant.

The hon. the Member for Kilbride.

MR. E. BYRNE: Thank you, Mr. Chairman.

I am not sure if the Member for Conception Bay East & Bell Island was in the room at all tonight, just like the Member to my far right. The reality is, Mr. Chairman, it is too bad that VOCM is not carrying us live each and every day, because they would understand then that the only people who stand up and speak in this House of Assembly are the nine members in Opposition!

SOME HON. MEMBERS: Hear, hear!

MR. E. BYRNE: The Member for Conception Bay East & Bell Island wants to talk about the same bills over and over. He has heard the same speech nine times. Let me remind him, we have dealt with Bill 44 today. We have dealt with Bill 26. We have dealt with Bill 35, Bill 49, Bill 50, Bill 39, Bill 38 and we are now dealing with Bill 33.

MR. SULLIVAN: And second readings on five more.

MR. E. BYRNE: And second readings on five more bills - not the same speech, I would suggest to the member and all members, on each and every bill. These members came here tonight, each and every one of us came here tonight prepared to move amendments dealing with what we saw as legitimate amendments to pieces of legislation. That is what we are here for - exactly what we are here for. With respect to the Expropriation Act, it is very important.

The Member for Conception Bay East & Bell Island believes that VOCM is taping us live. I have no idea if they are or not. I hope they are, because clearly, it is the only time, if there is a live debate, that we will see any member on the government side, particularly in the back benches, stand up and say anything about anything on any given day.

The Expropriation Act, Mr. Chairman, is an important piece of legislation. The change that government is introducing in this Act will have significant impact on people when it comes to government expropriating land from landowners, it is as simple as that. A very tangible example is the Goulds Bypass Road in my district. Right now, government is negotiating with landowners.

Now, it is really interesting that four weeks ago I met with the deputy minister dealing with this issue and landowners had come to me; we met with officials from the department to work out what they felt would be a fair process because they were not sure what - they were sure that what they were being offered was not what they wanted. What they were being offered per acre of land was not what it was worth. But they wanted to know what would happen in the event that - government's offer, on the one hand, they did not agree with and their counter-offer, if government did not agree with it, what would happen then? Under the old regime, under the regime that now exists before this piece of legislation is proclaimed into law, what would happen is simply this: an independent arbitrator would be appointed. There would be a landowner rep, a rep from Government Services, an independent chairperson, and the landowner and the department would have to agree that whatever the decision was would be final and binding.

A fair process. It does not cost the landowner a single penny to go through that process, to work out a disagreement with government. Now, if the Member for Conception Bay East & Bell Island thinks this is insignificant and is not worth debating, well, he is sadly wrong. Because I say to the people in my district that it is worth debating. Because what will happen to those people who are coming before government right now is that it will cost them thousands of dollars, not only in lost land prices, but thousands of dollars out of their back pockets to go and fight big, bad government. That is exactly what is going to happen.

In putting it over to the Public Utilities Board to make the Public Utilities Board decide, the landowner, or people who own land, those people who cannot even afford it - it could be an acre of land, it could be twenty acres of land; whatever the case may be - people who do not have disposable cash and disposable income in their pockets, they are going to be required at their own expense to come forward to the Public Utilities Board, at the risk that the Public Utilities Board may render a judgement that the entire cost of the process could be borne by them. That is exactly what is happening here.

When I spoke to the deputy minister about it, that is not exactly what he told me. This legislation was not even tabled in the House. The House, in fact, was not even called back to sit. I left that meeting saying, this is too clean, this is too smooth. Something else is going on here. For the last several months government, particularly the Department of Works, Services and Transportation, has negotiated with property owners - people who own homes who are sitting on a fifty foot, seventy-five foot frontage, 150-foot back, because it is very easy to attach a value to it. It is a three-bedroom home, single detached dwelling. It may be worth $100,000 - very easy to attach a value to that. But they have not been dealing with landowners on the Ruby Line who are going to lose twenty acres of farmland, some of which has just come out of the agricultural freeze, which ups the value of it. A lot of it has.

Now when this piece of legislation was tabled in the House, I knew why they were delaying. I knew exactly why they were delaying. But that is only one reason. There are many other things happening across the Province.

AN HON. MEMBER: (Inaudible).

MR. E. BYRNE: Exactly. I do not expect him to care about the people in my district. That is my job. But I do expect him, and I guess his own constituents can expect him, to care about what happens to them if land is taken from them. If he believes this is insignificant, maybe you should stand up outside the political rhetoric, I say to the member, and tell us what representations you have made to government, what representations you have made to the minister, what meetings you have had to suggest a better option than what is being suggested in Bill No. 33. Because the option that is now being proposed does not work. It works for one person and one person only. It works for government.

Government may come in right now and say to a landowner: We are going to offer you $10 an acre. That is our final offer. If you don't like it, appeal it. That is going to put the onus and the burden upon landowners, property owners, to go to the PUB no matter where they live in the Province. They could come from Labrador, they could come from St. Anthony, they could come from Burgeo. But the onus and the burden will be on them to come to the PUB at their own expense, with the danger that the entire process - at the end of the day the Public Utilities Board can say: No, we deny the application that you made before us. But we also say to you, in bringing forward the application, that all costs associated with this hearing will be borne by you and those people who are with you.

If that is a definition of fairness and a definition of how government treats people, then I do not buy that definition. If the Member for Conception Bay East & Bell Island wants to get up and accuse us of continuous rhetoric and of becoming politically frivolous, let him do so, because we heard nothing from him tonight - he did not speak to this piece of legislation. If he wants to stand up and put on the table some concrete proposals that would effectively deal with the issue at hand, then let him do it. But we have not heard it yet, I have to say, Mr. Chairman. And I hope VOCM is listening and the people of the Province are listening, because you will never hear him do it. With that, I will sit down.

Thank you.

CHAIR: The hon. the Member for Conception Bay South.

MR. FRENCH: Thank you, Mr. Chairman.

I hope, too, the people of Newfoundland and Labrador are listening. What we have proposed here tonight are two very simple amendments. We are still held up on these two particular amendments. Why somebody would have any problem with these amendments is beyond me. Why I should have been running around here at four o'clock this afternoon passing out amendments, I have no idea. We came here tonight prepared to debate this and if the Minister of Education wishes to go home, he does not have to stay, he can leave. So can I, and when I get around to when my time comes to leave, later on tonight, I will leave. We did not have the bill two or three months ago, I say to the Minister of Education.

AN HON. MEMBER: (Inaudible) have the bill two weeks ago, Minister.

MR. FRENCH: That is right, and now, all of a sudden, we have this Act. Is it brought in for the Goulds bypass? Do we want to do the people in the Goulds out of their money? Is that why we brought this in? Then, I hope the people of Newfoundland and Labrador are listening. What this first amendment says, and says quite clearly, is that we also give the owner of the property the right to appeal the decision to the PUB. We do not agree with it going to the PUB but if we have to have that, then at least give the landowner some protection and some rights under this piece of legislation.

Mr. Chairman, the other amendment to this bill: The bill does not say that the minister has to refer the disputed matter to the PUB. So, again, all we are asking for here is that the minister would put this bill immediately. That is what we are asking for, two very simple things in these two particular amendments. Why they are not being accepted, I have absolutely no idea.

AN HON. MEMBER: You do not know if they are accepted or not.

MR. FRENCH: Oh, I know they are not accepted. The minister is not here. I have heard your House Leader say they are not acceptable, and they are not going to be acceptable. So we are going to keep talking about these two amendments that have been moved, and as I said, the longer we are here - if we are here all night, sobeit. It really does not bother me if I am here all night. I am sure it does not bother the Minister of Education.

AN HON. MEMBER: Put it to a vote and find out (inaudible).

MR. FRENCH: Well, sure we will. When we are finished speaking we will gladly put it to a vote and we will see then what happens. We will see where you stand. We will see where your backbone is if you have the nerve to get up and vote against your own legislation. We will see if you have that nerve, and I doubt very much that you will. I doubt that there is anybody over there who is going to stand up because there is no backbone, there is - oh, he is awake! He finally woke up! He was out sleeping! He is awake! Good, good. I hope you had your bottle, I hope you are alright. It is good to see you back in here after having a nice little nap for yourself, I say to the Member for Burgeo & LaPoile. I am glad to see that he came back with us. He was out rounding them up for awhile but somebody told me he fell asleep on them.

Mr. Chairman, those two amendments. Why they will not be passed, I have no idea of knowing. But anyway, sobeit. I will sit down now, and if anybody else wishes to get up, they certainly can.

CHAIR: The hon. the Member for Bonavista South.

MR. FITZGERALD: That was a good contribution, Mr. Chairman, an excellent speech by the Member for Conception Bay South. I found out that we were not on the radio, and I say to the Member for Conception Bay East & Bell Island, that was another feeble attempt of a wasted speech. After calling his two supporters out in the district to tune in, it was not even carried. The Member for St. John's West just moved at least fifteen points ahead of the member in his bid for the federal election. He has no worry about defeating Bonnie Hickey in the federal election. He does not have a chance.

It is 4:05 in the morning. I do not know how long the Government House Leader intends to keep us here, but I can assure him that if I am here much longer he will not be getting a wedding gift from me. I will make that known right here now that the set of pillow cases will be taken back. The set of pillow cases will be carried back to the store, I say to the Government House Leader. If he has no more respect for the members of this House than to sit them here all night, then I will not be supplying a wedding gift to the Government House Leader.

SOME HON. MEMBERS: Hear, hear!

AN HON. MEMBER: I agree with you; I am taking back my gift, too.

MR. TULK: (Inaudible).

MR. FITZGERALD: The pillow slips is what I talked about and they are going back, you are not getting that.

Mr. Chairman, the Minister of Education has sat here in his seat all night and has contributed absolutely nothing other than to be interrupting and throwing barbs across the House. I think it is about time you named the member and let him go home and enjoy a nice sleep and let the people's House get on with its business.

There is only one member I see on the opposite side who will stand in his place and represent his people. There is only one member I can see on the opposite side who, when the chips are down for the constituents in his district, that he will get up and represent them - only one I have seen in this House so far.

MR. MATTHEWS: (Inaudible).

MR. FITZGERALD: No, it is not you. You are the fellow who carries out the polls. You are the poll man from St. John's North, I say, and it certainly is not you. It is the member sitting down there, the Member for Torngat

Mountains, the only member in this House sitting on the opposite side who will stand in his place and represent his people.

SOME HON. MEMBERS: Hear, hear!

MR. FITZGERALD: I firmly believe that. The three pieces of char you gave me, Sir, I hope to enjoy it tomorrow. It really looks good and I am sure I will enjoy it over Christmas. God bless you!

SOME HON. MEMBERS: Hear, hear!

MR. FITZGERALD: I might do that.

SOME HON. MEMBERS: Hear, hear!

MR. FITZGERALD: Thank you. There will be no sharing with the Member for St. John's North, no sharing of char, I can guarantee you that. But anything else I have -

AN HON. MEMBER: (Inaudible) brought in the food bill.

SOME HON. MEMBERS: Hear, hear!

MR. FITZGERALD: That was for the needy, I say to the minister. If I was at a food bank, that was for the needy. The minister, with condominiums in Florida, and condominiums in Toronto, and a mansion up in Cowan Heights, driving a Jaguar and a Cadillac, and a 4-wheel drive in his driveway, I certainly would not class him as a poor person. In fact, I was going to have a private chat with the Member for St. John's North, and I was going to make a request. I have not done it yet but I will do it right now, and I will do it publicly. Next year, we are going to experience a big event in my district. We are going to have a Royal visit. We are having a Royal visit in my district next year, and I hope to be part of that. I hope to be there, even though I am not a monarchist. I was going to ask the minister if I could borrow some of his jewellery to wear for those three days. For those three days, I would like to borrow some of the Minister of Health's jewellery, some of his gold, his gold tie-clips and his cuff-links and his necklaces, and all of that.

AN HON. MEMBER: She does not know about it yet, but I have bangles for the wife for Christmas.

MR. FITZGERALD: I do not want any bangles, I say to the hon. member. I certainly do not want any bangles.

Mr. Chairman, we are debating a very serious bill here tonight, the expropriation of land. It is obvious why this particular bill was brought in at this time, I suppose, before the House closes for the winter recess. It is a bill that government wants, and the government needs it for obvious reasons. It is an expropriation bill, so why do they want it? I guess they are going to go expropriating some land.

AN HON. MEMBER: (Inaudible) all over.

MR. FITZGERALD: And it is going to be all over. The Member for Kilbride knows about what is happening in his district, with a new road going there. The members from Labrador are well aware of what is happening down there. We are well aware of what is happening in Argentia, all positive things, the building of roads and the building of smelters and refineries, all positive things that will happen and create employment. They need this bill whereby they can go out and expropriate people's land, people's prized possessions, and go and offer them a paltry sum of money and say: Either take this or walk away from it, and here is your option: If you do not take what we offer you, then the alternative is to take it before the Public Utilities Board, and we will tell you approximately what the cost is going to be. It will probably cost you $10,000 or $12,000. We are going to offer $20,000 for your land. It is worth $50,000, but that is all we are going to offer you, so you make up your mind whether you want to take a chance on losing that. Because we control the Public Utilities Board. Even though they are supposed to operate at arm's length from government, we control them. We appoint the people to the board, and the decisions that this board will bring in are the decisions you will have to live by.

We have seen what the Public Utilities Board has done in the past. We have seen some of the decisions that they have brought in in the past. We have seen the way that they ruled when Newfoundland Power went before them for rate increases. We have seen what has happened when the insurance companies have gone before them for rate increases. Never, or very seldom, have those increases not been granted. When you see an insurance company, or Newfoundland Power, or the telephone company, or some of the cable companies, going before the CRTC or the Public Utilities Board, whatever the case might be, usually they have their homework done, and when they go and look for a raise they usually come out getting pretty close to what they wanted. But the consumer is always the person who is left holding the bag. The consumer is always the person, Mr. Chairman, who is left paying the bill.

This is what is going to happen with this expropriation Act, "An Act To Amend The Expropriation Act", Bill No. 33. The amendments that the Member for Conception Bay South has put forward are good amendments to that particular bill. It will give some protection to landowners out there who might be faced with expropriation. It will certainly make it much more palatable than what the government and the Minister of Works, Services and Transportation are putting forward. All we are asking is to treat everybody fairly. Nobody seemed to have complained and nobody seemed to have had any problem with the way it was operating before, whereby there was equal representation there.

The minister would appoint a member, the landowner would appoint a member, and there would be a chairperson put forward with the consensus of both parties. That seemed to have worked very well. When there was a decision made, I have not heard too many complaints of what happened after, that there were appeals and people were unhappy with the decision that was made. It worked because you had people on that particular board who had the respect of the people who were coming forward and looking for a fair return for their property.

Now I fear that is not going to happen. Now it is going to be the heavy hand of government reaching out and saying: This is what your land is worth, this is what we will give you. Take it and shut up, or else you can come back and you can go through the process of -

CHAIR (Penney): Order, please! Order, please!

The hon. member's time is up.

AN HON. MEMBER: By leave!

AN HON. MEMBER: (Inaudible) carry on.

MR. FITZGERALD: No, I do not want to carry on.

CHAIR: The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Chairman.

The Member for Bonavista South is not carrying on at all, I say. He is talking about something very factual, and I think there were very legitimate amendments made here.

When you look at the nature of the amendments, I say with all sincerity, the nature of those amendments are not unusual amendments at all. I think they are quite representative of people who may be unjustly treated and subjected to very high costs on a dispute mechanism that is in place. What has been wrong with the current system? Has it not been working properly? Have there been grave concerns with getting settlements under the current system of arbitration, that we needed to move into a very expensive one for a landowner, where it restricts the right of that landowner to seek a dispute mechanism to resolve it to his satisfaction?

That is not in the provisions under the proposed amendments to this Act, and it was there before, and it is not too much to expect. Under the old Act, if there was a failure by the minister or the landowner to agree on

compensation for any land that was expropriated, it would go to an arbitration board to rule on that particular case. The minister could appoint an arbitrator, the landowner could have a representative there, a third person could be agreed upon and, of course, as mentioned earlier, too, a stenographer to record the proceedings of that particular committee. And the board would come back with a solution, at least an arbitration ruling, on the specific price that person should get for his land.

Now, that is not what is in this new bill, it is not what is in this amendment. Because under this new bill, it says the board now becomes the Public Utilities Board. And the Public Utilities Board can be very expensive. We just saw an example recently of the cost that was incurred in this government to fight on behalf of consumers. We are taking a situation now and we are throwing a cost back on consumers and asking the consumer to pay the cost of going to the Public Utilities Board to fight for something they feel is appropriate, and getting fair compensation for their land.

It is not always swift either, I might add, with the Public Utilities Board. They may have a fair number of matters to discuss, there could be a backlog in getting a settlement on their land and it could be a very slow process, and that could be cumbersome, too, for landowners who have land in dispute.

Now, under the old Act, and that is section 19.(2), if the minister and the landowner cannot agree on compensation, then the appointment of an arbitration board becomes automatic, under the current provisions of section 19.(2). But, under this bill, the minister is given the power now to make application to the board, and it therefore stands to reason that he will have the choice of whether, and when, the minister wants to refer the matter to the Public Utilities Board. It is not an automatic matter, it is a matter of choice if the minister sees fit, if the minister wants to do it, or when the minister wants to do it. That is in the proposal and the landowner does not have the power to apply to the Public Utilities Board. The landowner now, also does not have a representative representing him, putting forth those concerns, and normally, in cases, it is pretty typical in many appeal processes that the person who is affected, has the potential to be affected in a negative way by the decision, has the right to have a representative there.

We hear of many instances of boards operating that have a representative for a consumer or for an appellant, who have an opportunity to be represented. This is not the case with the Public Utilities Board - and it takes away from landowners, their rights to have this representation and I do not feel that is appropriate. Also, when the land is in dispute, there is no representative, of course, because under the old Act - and I referred to that to some extent earlier - when the ownership of land is in dispute or as it says in 19.(1) subsection (b) "the owner cannot be found or there is doubt as to the ownership of the land," the minister then is obliged to appoint an arbitrator to represent the missing landlord.

There is no one on the PUB to represent the missing landowner in this case, so, who is going to make the case for, or defend the rights of the missing or the disputed landowner in this instance? Of course, the provision is not here. Now, this bill has the effect of raising the costs of the processes and it could intimidate landowners in accepting a minister's offer. When you look at the cost - they may have to pay thousands and thousands of dollars to take a case to the Public Utilities Board and then have to pay all the costs associated with the Public Utilities Board - it could be a disincentive, and a person might have to take what he can get. Because we are putting into place now a system that is going to make it difficult for the landowner to take a chance to move forward. And it is not appropriate that a landowner should be put in such a predicament where the landowner is behind the eight ball when he wants to present a case to the Public Utilities Board or to the normal arbitration board, as would be the case before. This could be called a form or coercion or persuasion or intimidation of people out there who may feel that what is offered is not a fair price for their land.

My colleague, the Member for Kilbride, made reference to instances where a person may feel he is being unjustly awarded and may have to settle and take something that would be less than they could have achieved, under an arbitration that would not have been costly to the person affected.

The purpose of the board should be to get fair compensation for the landowner. But the cards are stacked against the landowner in this instance, and it makes it more difficult and costly for the landowner to go through a dispute mechanism. Not only that, it does not have the option, in instances, because the minister can decide if it

should get to that stage. And that is why the amendments in clause 5, section 19.(2), moved by my colleague, the Member for Conception Bay South, just added a simple addition to number two to say: "An application to fix compensation under subsection (1) shall be made by the minister", and we have added: "or by the owner of the land expropriated or detrimentally affected by the expropriation." Why should not an application be made by the person who is detrimentally affected by the decision? Why should we have the minister be the one who can make application to fix compensation under subsection (1) in section 19, which is shown here in clause 5 of this Act?

The second amendment that was moved relates to, by adding in a subsection 3, section 19 in the bill, "where, the circumstances in either paragraph 1(a) or 1(b) hold, the minister shall make an application under subsection 2 forthwith." In other words, where the circumstances under paragraph 1(a) pertains to the minister and the owner of the land expropriated or detrimentally affected by the expropriation, if they cannot agree on the terms of the compensation to be paid for the land or, on account of being detrimentally affected, in one instance, and secondly, in (b) "the owner cannot be found or there is doubt as to the ownership of the land", we are saying the amount of compensation shall be fixed by the board and, of course, an application to this shall be done by the minister.

Now, it is only appropriate that fair compensation should be given and that can only be done when there is a fair process - a process that does not subject the landowner to a high risk in being told a certain value and that is being upheld. Not only will he get a lower value than he feels it is worth, he also will have to pick up the costs associated with it if he is not successful in obtaining a fair price. Now, we are moved into people being unfairly treated in a user-pay system - a completely user-pay system, transferring the cost from government for certain services down upon the person availing of these services. If we start using the same scenario, do we use the same scenario in health care if you avail of the system?

CHAIR: Order, please!

The hon. member's time is up.

MR. SULLIVAN: Thank you, Mr. Chairman.

Shall clause 5 carry?

The hon. the Member for St. John's East.

MR. OTTENHEIMER: Thank you, Mr. Chairman.

Bill No. 33, "An Act To Amend The Expropriation Act," has tonight sparked exciting debate on this side of the House, and I notice that members opposite are listening intently to the words of wisdom being espoused by my colleagues to my left and to my right.

MR. TULK: You are halucinating because (inaudible).

MR. OTTENHEIMER: I think I probably am, nevertheless, it is exciting debate. At 4:25 in the morning I would agree with you, nevertheless it is exciting debate.

SOME HON. MEMBERS: Hear, hear!

MR. OTTENHEIMER: Section No. 5, subsections 19 and 20 of the Act are repealed and the following substituted: "19.(1) Where the minister and the owner of land expropriated or detrimentally" -

AN HON. MEMBER: (inaudible).

MR. OTTENHEIMER: No. 5.

- "affected by the expropriation cannot agree on the amount of compensation to be paid for the expropriated land or on account of being detrimentally affected; (b) the owner cannot be found or there is doubt as to the ownership of the land; or (c) for another reason the minister considers it expedient, the amount of compensation to be paid shall be fixed by the board."

I guess, Mr. Chairman, it is this whole issue of the board and the role that the board will play as it affects expropriation and as it affects property owners within our Province. Because the intention of this bill is to have the Public Utilities Board, and not the traditional route of arbitration boards, determine the compensation paid to the landowner when property is expropriated. We have had a traditional method of arbitration whereby when expropriation proceedings took place before an arbitration board, a position would be made by both property owners and their representatives, or counsel, and that would then be refuted by government and government solicitors, and obviously, a board would make a decision as to what the fair market value would be and would be payable to a property owner and landowner.

Of course, the purpose of this legislation is to change the whole context of expropriation procedures in the Province and essentially allow the Public Utilities Board to have that power to determine the compensation paid to a landowner when property is expropriated. If you look at clause 5, there are some changes that are worthy of some review and consideration, Mr. Chairman, and they include the following: that compensation is set by the Public Utilities Board and not an arbitration board. So it gives significant power, I would suggest, to the Public Utilities Board, to essentially make all decisions as it relates to the rights of property owners and landowners within our Province.

The minister in question will decide whether to refer it to the board in the first place, and in this case we are talking about the Minister of Works, Services and Transportation, so there is ministerial power and authority to make the decision as to whether or not there should be a reference to the board for determination on the issue of expropriation.

Mr. Chairman, the landowner no longer has a representation on the decision-making board, and this is significant, because under the expropriation procedures there were always provisions in the legislation to have direct input on the arbitration board by the landowner rep and, of course, this will be significantly altered when we look at the new provisions with respect to the decision-making powers of the board.

Also, there is no representation when land is in dispute. The bill raises the cost of process and intimidates landowners into accepting the minister's offers. The issue of cost is a significant issue, Mr. Chairman, because there is clearly a disincentive to a property owner to even pursue an issue or to bring an issue forward to the Public Utilities Board, because it seems to me that there is a penalty provision. If there is an arbitration or an expropriation issue being presented to the Public Utilities Board, and if, in fact, the applicant is not successful, well, the cost implications are then carried over to the applicant. That seems to me to be most unfair, and as I said, acts as a disincentive.

There are more comments I wish to make on this particular piece of legislation in the not-too-distant future.

Thank you, Mr. Chairman.

CHAIR: The hon. the Opposition House Leader.

MR. H. HODDER: Mr. Chairman, I believe, after some discussion with the Government House Leader, we have agreement that we will -

SOME HON. MEMBERS: (Inaudible).

CHAIR: Order, please! Order, please!

The Chair is trying to determine what -

AN HON. MEMBER: (Inaudible).

CHAIR: Order, please!

MR. H. HODDER: Thank you, Mr. Chairman.

I do believe, after some discussion with my colleague across the way, the Government House Leader, we have an agreement to have a short recess that will be for about ten to fifteen minutes - not less than ten but not more than fifteen - in order that we might be able to caucus with our colleagues.

MR. TULK: Mr. Chairman, the hon. gentleman wishes to have a discussion with his caucus. As a matter of fact, I encourage that, I have no problem with it. Sure, we will reconvene at not later than 4:45 a.m.

CHAIR: The House will recess until not later than 4:45 a.m.

Recess

CHAIR: Order, please!

For the benefit of hon. members, there are two amendments to clause 5, and we will vote on them individually. The first one is:

"That clause 5 of Bill 33, An Act To Amend The Expropriation Act, which is now before the House, be amended by adding in subsection 19.(2) immediately following the word `minister' the words `or by the owner of land expropriated or detrimentally affected by the expropriation.'"

All in favour of the amendment, please say `aye'.

SOME HON. MEMBERS: Aye!

CHAIR: Opposed, `nay'.

SOME HON. MEMBERS: Nay!

CHAIR: I declare the amendment defeated.

The second amendment reads:

"That clause 5 of Bill 33, An Act To Amend The Expropriation Act, which is now before the House be amended by adding immediately following subsection 19.(2), the following subsection: `(3) Where the circumstances in either paragraph (1)(a) or paragraph (1)(b) hold, the minister shall make an application under subsection (2) forthwith.'"

All in favour of the amendment.

SOME HON. MEMBERS: Aye!

CHAIR: Opposed.

SOME HON. MEMBERS: Nay!

CHAIR: I declare the amendment defeated.

On motion, clauses 5 through 10 carried.

CHAIR: Clause 11 has an amendment which has been read into the record.

All in favour of the amendment.

MR. SULLIVAN: Mr. Chairman.

CHAIR: The hon. the Leader of the Opposition.

MR. SULLIVAN: Mr. Chairman, were both amendments read into the record, or just one in clause 11.

CHAIR: The Chair has the following amendment: That clause 11 of Bill 33, "An Act To Amend The Expropriation Act", which is now before the House, be amended by (1) deleting in subsection 34(3) the word "greater" and substituting therefore the words "not less"; and (2) deleting in subsection 34(4) the words "does not exceed" and substituting the words "is less than".

MR. SULLIVAN: Thank you, Mr. Chairman.

CHAIR: Is there another amendment other than this?

AN HON. MEMBER: (Inaudible).

CHAIR: Well, do you wish to vote on this one?

MR. SULLIVAN: Yes, I do. Well I will speak on it first and then we could move the amendment after we have dealt with that one.

CHAIR: The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Chairman.

It still does not detract from the right to move an amendment that we consider to be a substantial amendment, that is going to make some changes in it, I say to the minister. If it is defeated, well so be it. It is not going to deny the democratic right to make an amendment. We have moved an amendment that the word "greater" be deleted and the words "not less" be substituted in subsection 34(3). It would now read, with that amendment: Where the compensation awarded by the board in a case is greater than the sum that the minister offered in writing for the land that was expropriated or detrimentally affected, the minister shall pay costs and all expenses..."

We are moving too: ....awarded by the board in a case that is not less than the sum that the minister offered in writing which certainly makes a substantial difference in the way that it is viewed; because there have to be certain rights to the landowner, the person who has property, the right to be able to put a mechanism in place whereby if a certain figure is not appropriate or where somebody is detrimentally affected by it, there should be an avenue open upon the setting of that figure where it is less than the sum that they are offered in writing.

If the compensation awarded in the case is greater than that, it says: The minister shall pay the costs. So in other words, why should individuals have to pay a substantial cost there? Granted, we don't advocate that landowners should be free from all basic costs involved in the process. That is not what is being advocated here, but on the other hand, they should not be restricted in their ability to be able to at least have the minister or the Crown pay some of the costs associated with this.

Mr. Chairman, I have no further comment on that amendment. We do have another amendment to make, if you wish to deal with this amendment.

CHAIR: All in favour of the amendment, `aye'.

SOME HON. MEMBERS: Aye.

CHAIR: Opposed, `nay'.

SOME HON. MEMBERS: Nay.

CHAIR: I declare the amendment defeated.

The hon. the Leader of the Opposition.

MR. SULLIVAN: Mr. Chairman, I move the following amendment: That clause 11 of Bill 33, "An Act To Amend The Expropriation Act", which is now before the House be amended by deleting in subsection 34(5) the words "party designated by the board" and substituting therefore the word "minister".

That would now read, Mr. Chairman: Where in respect of land expropriated or detrimentally affected no sum was offered before expropriation, costs and all expenses in connection with the hearing held by the board shall be paid by the minister. "By the party designated by the board" is the current wording that is in the amendment to the act. It is fairly significant, I say to the minister, fairly significant.

Overall, the purpose of the basic amendments moved is to give, certainly, some rights, minimal cost, to a person who feels that the land might be expropriated and there is not a sufficient price tag on that land. It is only fair that they should have an opportunity, as we alluded to earlier, to have the right in that case not to be at the minister's discretion, and also that they not be left picking up the total cost pertaining to it.

Since there is no arbitration ruling now, it is going to a board, and there could be considerable cost. If there were going to be more minimal costs - in an arbitration there would be a reduced level of cost. It would not be as financially burdensome upon the individual in that case, and then you could look at whether there are certain costs they should pick up in the process.

We are not saying that the Province has to pay outright for basically every, single thing, just because something is appealed or they may wish to bring it to the Public Utilities Board; but at least they should have the right to be able to have some of the costs covered, because the Public Utilities Board can be a very expensive process. There could also be delays in the process and the landowner whose land was expropriated could be incurring costs. These cases would not necessarily incur lower costs in arbitration, but there could be differences of thousands and thousands of dollars in the process. It is a high risk for the landowner to take, and there could be extra coercion, persuasion, pressures and so on to get a settlement that might not be fair.

Mr. Chairman, I propose and certainly speak in favour of that amendment.

CHAIR: All in favour of the amendment, `aye'.

SOME HON. MEMBERS: Aye.

CHAIR: Opposed, `nay'.

SOME HON. MEMBERS: Nay.

CHAIR: I declare the amendment defeated.

On motion, clauses 11 through 15, carried.

A bill, "An Act To Amend The Expropriation Act." (Bill No. 33)

Motion, that the Committee report having passed the bill without amendment, carried:

CHAIR: The hon. the Government House Leader.

MR. TULK: Mr. Chairman, Committee of the Whole on a bill, "An Act To Amend The Lands Act," Bill No. 22.

CHAIR: Bill No. 22, "An Act To Amend The Lands Act."

Shall clause 1 carry?

The hon. the Member for Cape St. Francis.

MR. J. BYRNE: Thank you, Mr. Chairman.

There is just one point I want to bring to the minister's attention. Basically, I suppose, it should be an amendment, which I was going to put forward, that calls for Bill 22, "An Act To Amend The Lands Act", which is now before the House to be amended by deleting the parenthesis and the letter `d'.

The reason for that is that on March 20, 1996, the government introduced Bill 1, the Regulatory Reform Act. Clause 39 of that bill stated: Paragraph 41(d) of the Lands Act is repealed. So you are basically asking for something that does not exist.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: Basically, the amendment is that clause 4 of Bill 22, "An Act To Amend The Lands Act", which is now before the House be amended by deleting the parenthesis and the letter `d'.

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: It has already been deleted, I say to the minister, for your own information if you want to deal with it here. Did you get what I said?

AN HON. MEMBER: (Inaudible).

MR. J. BYRNE: On March 20, 1996, the government introduced Bill 1, the Regulatory Reform Act. Clause 39 of the bill stated: Paragraph 41(d) of the Lands Act is repealed. That bill passed through committee stage on June 17, 1996 without amendment, and was given third reading and Royal Assent. On June 18, 1996 it became law. So section 41(d) is not in the act any more anyway. It is only housekeeping.

MR. TULK: If I could, Mr. Chairman, I would like to ask a question.

CHAIR: The hon. the Government House Leader.

MR. TULK: If, indeed, that contention is true. Is that in fact true, what the hon. gentleman is claiming?

AN HON. MEMBER: Well, I do not know. I mean, it is certainly possible.

CHAIR: The hon. the Government House Leader.

MR. TULK: Mr. Chairman, let me just say to the hon. gentleman, if I could, the point is though, if it is deleted it is deleted, so that it is gone and the bill will be changed accordingly.

CHAIR: The hon. the Minister of Government Services and Lands.

MR. McLEAN: Thank you, Mr. Chairman.

Just a couple of clarifications. When we went through second reading, the hon. Member for Cape St. Francis asked a question about the amending of section 6, where we increased the levels from twenty hectares to a maximum of 100, and we did not really clarify it for him which section was included to determine that 100 was the maximum. If he looks at section 8, it determines that 100 have to go to the Lieutenant-Governor in Council anyway; so that clarifies that.

In relation to section 41(d), 41(d) might have been repealed earlier but is repealed now anyway because sections (a) (b) (c) and (d) of the Act are repealed and you are only left with 41(e) which refers back to section 8, which indicates that 100 hectares are the maximum.

CHAIR: The hon. the Government House Leader.

MR. TULK: I understand the law clerk said it is repealed, so it is repealed.

On motion, clauses 1 through 4, carried.

A bill, "An Act To Amend The Lands Act." (Bill No. 22)

Motion, that the Committee report having passed the bill without amendment, carried:

CHAIR: The hon. the Government House Leader.

MR. TULK: Mr. Chairman, Order 14, Committee of the Whole on a bill, "An Act To Amend The Fish Inspection Act", Bill No. 21.

CHAIR: Bill No. 21, "An Act To Amend The Fish Inspection Act."

On motion, clauses 1 and 2, carried.

Motion that the Committee report having passed the bill without amendment, carried:

MR. TULK: Mr. Chairman, I move that the Committee rise and report progress on the bills.

On motion, that the Committee rise, report progress and ask leave to sit again. Mr. Speaker returned to the Chair.

MR. SPEAKER (Snow): The hon. the Member for Lewisporte.

MR. PENNEY: Mr. Speaker, the Committee of the Whole have considered the matters to them referred, have directed me to report Bill Nos. 26, 49, 50, 39, 38, 33, 22 and 21 passed without amendment and Bill Nos. 44 and 35 with amendments, and ask leave to sit again.

MR. SPEAKER (Snow): The Chairman of the Committee of the Whole reports that it has considered the matters to it referred and has directed him to report having passed Bill Nos. 26, 49, 50, 39, 38, 33, 22 and 21 without amendments.

On motion, report received and adopted, bills ordered read a third time on tomorrow.

MR. SPEAKER: The Chairman of the Committee of the Whole also reports that it has considered the matters to it referred and has directed him to report having passed Bill Nos. 44 and 35 with some amendments.

On motion, report received and adopted.

On motion, amendments to Bill No. 44 and 35 read a first and second time, bills ordered read a third time on tomorrow.

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker, Order No. 2.

Could I ask the Opposition House Leader, if he has any problems with Order Nos. 2 through 13? Because if I could, I would just call Order Nos. 2 through 13 as third reading.

MR. H. HODDER: (Inaudible)?

MR. TULK: Yes, from Order No. 2 down to Order No. 13.

While he is thinking that over, let me call Order No. 2, third reading of a bill, "An Act To Amend The Registered Nurses Act."

On motion, a bill, "An Act To Amend The Registered Nurses Act," read a third time, ordered passed and its title be as on the Order Paper. (Bill No. 23)

MR. TULK: Do you have any trouble with them? I will call them all?

AN HON. MEMBER: No, call them individually. (Inaudible).

MR. TULK: Okay. Order No. 3, third reading of a bill, An Act To Amend The Portability Of Pensions Act (No.2), Bill No. 28.

On motion, a bill, "An Act To Amend The Portability Of Pensions Act (No.2)," read a third time, ordered passed and its title be as on the Order Paper. (Bill No. 28)

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Order No. 4, third reading of a bill, An Act To Amend The City Of St. John's Act, Bill No. 25.

On motion, a bill, "An Act To Amend The City Of St. John's Act," read a third time, ordered passed and its title be as on the Order Paper. (Bill No. 25)

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Order No. 5, third reading of a bill, An Act To Amend The Assessment Act And The St. John's Assessment Act, Bill No. 36.

On motion, a bill, "An Act To Amend The Assessment Act And The St. John's Assessment Act," read a third time, ordered passed and its title be as on the Order Paper. (Bill No. 36)

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Order Nos. 6 to 13, Mr. Speaker.

On motion, the following bills read a third time, ordered passed and their titles be as on the Order Paper:

A bill, "An Act To Amend The St. John's Municipal Elections Act." (Bill No. 37)

A bill, "An Act To Amend The City Of Mount Pearl Act." (Bill No. 41)

A bill, "An Act To Amend The City Of Corner Brook Act." (Bill No. 40)

A bill, "An Act Respecting A Provincial College." (Bill No. 47)

A bill, "An Act To Amend The Dental Act." (Bill No. 31)

A bill, "An Act To Provide Firefighters With Protection From Personal Liability." (Bill No. 43)

A bill, "An Act To Amend The Jury Act." (Bill No. 24)

A bill, "An Act To Amend The Municipalities Act." (Bill No. 42)

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker, I move that the House resolve itself into Committee of the Whole to consider Bill No. 27 and maybe (inaudible).

On motion, that the House resolve itself into Committee of the Whole, Mr. Speaker left the Chair.

Committee of the Whole

CHAIR: Order, please!

The hon. the Government House Leader.

MR. TULK: Mr. Chairman, Order No. 23, "An Act Respecting Education," Bill No. 27.

CHAIR: Bill No. 27, "An Act Respecting Education."

Shall clause 1 carry?

The hon. the Member for St. John's East.

MR. OTTENHEIMER: Thank you, Mr. Chairman.

With respect to Bill 27, "An Act Respecting Education", there are a couple of amendments which I would like to present, if I may.

Mr. Chairman, the first refers to Section 3(5)(b), dealing with denominational education commission. Under Section 3(5)(b) the amendment - and there is a copy of the amendment which has just been passed around - is as follows: Paragraph 3(5)(b) of the bill is deleted and the following substituted: Denominational Education Commission under "3(5)(b) develop and support religious education courses.' The explanatory note which accompanies the amendment, Mr. Chairman, is that: This amendment more clearly defines religious education to mean the subject of religious education.

It is simply meant for clarification purposes because the way the existing wording is, if we look at paragraph 3(5)(b) it says: develop and support programs in religious education. By simply adding the words "religious education courses", Mr. Chairman, from a clarification point of view, it simply makes it clear that we are talking specifically about the course in religious education as opposed to religious education generally. Again, it is for clarification purposes, but nevertheless it is an amendment which is perhaps worthy of some note.

I don't know if there is any response that the minister would like to make at this time on that point, before I get to the other amendment.

CHAIR: The hon. the Minister of Education.

MR. GRIMES: Thank you, Mr. Chairman.

In response to the proposed amendment, I am just a little surprised, I guess, that the hon. member would present it in this form. We have already exchanged information on several other amendments that will be moved, some suggested by the member opposite, others from the denominational representatives, others from the teachers association, and so on.

Mr. Chairman, this very minor change in wording, one way or another, means nothing. I cannot see why you would agree to this change now when we have had no prior notice of it, after the fact that we have been dealing with this issue for a couple of weeks.

The hon. member did a great job of proposing some amendments that we discussed in detail with legal council. All the stakeholders in education, to my knowledge, the denominational education councils whose prime function it is to develop religious education programming, the teachers association, the home and school federation, and the school trustees all looked at this legislation and saw nothing wrong with the wording as it is in Section 3(5)(b). So I cannot see any purpose in changing it just for the sake of changing a few words, when everybody else who has looked at it thinks it is fine the way it is.

CHAIR: The hon. the Member for St. John's East.

MR. OTTENHEIMER: Mr. Chairman, Paragraph 6(a) and (d) of the Bill are amended by deleting the word "equipment" and substituting the word "renovation."

The purpose for this amendment, Mr. Chairman, is again one of clarification. The authority for equipment is provided to school boards through Section 102 of Bill No. 48, and it is from that point of view that this amendment is suggesting the deletion of the word "equipment" and substitution for the word "renovation." Again, for clarification purposes, maybe the minister would respond to that amendment. That is Paragraph 6(a) and (d).

CHAIR: The hon. the Minister of Education.

MR. GRIMES: Thank you, Mr. Chairman.

Again, we had that information checked as a result of representation and questions raised by the hon. member in terms of debate at second reading, and again all of the stakeholders in education, to my knowledge, are quite comfortable with the language that is there. They understand that in terms of the work of the construction board, erection and extension from school boards cover off any possibilities with respect to the rest.

In Sections (e) and (f), Mr. Chairman, it covers off the other possibilities of developing policies for preventative maintenance repair and reconstruction of buildings, and so on, and that those issues are dealt with there.

The equipment of schools, as we discussed at second reading, is the whole notion of having the board deal with basic lab materials such as desks and basic supply of equipment other than consumables, such as a fundamental supply of Bunsen burners, beakers, test tubes, and things of that nature; and this language is necessary.

The maintenance of schools is a different issue that is covered in a different section and it is not appropriate to put into sections (a) and (d).

CHAIR: The hon. the Member for St. John's East.

MR. OTTENHEIMER: Mr. Chairman, a third amendment being brought forward: 1. Section 10 of Bill No. 27 is amended to become Section 11. I have copies here I can distribute.

"11. The Act or section of this Act shall come into force on a date to be proclaimed by the Lieutenant-Governor in Council."

Section 10 of the bill would read as follows: - and, Mr. Chairman, this should come as no surprise. It is an issue that has been debated in this House for the past week. It has been presented by the Leader of our party and by myself as critic, and it has been responded to on numerous occasions by the minister.

Section 10 of the bill would now read as follows: Resource Recovery "10. That resources realized from reductions in duplication of school boards, administrative offices, schools and transportation systems through the enactment of the Education Act, 1996 shall be devoted to improving the quality of teaching and learning."

Mr. Chairman, this particular amendment is all-encompassing. It is clearly recognition of the fact that it is the position of members on this side of the House that funding in education, or savings from reduced expenses, I guess, in education, and reform measures that have taken place and are in the process of taking place, that any

cost recovery would be redirected to schools and classrooms in this Province. As indicated, it has been a position of this party in recent weeks. It has been debated frequently in this House. The minister has responded to this particular issue on numerous occasions.

We will simply restate our position, I would say, that there has been a position maintained by the previous government, I would suggest, and certainly the present government as well with respect to its obligation, to ensure that any funds available as a result of measures taken dealing with the issue of school reform would be redirected to ongoing educational programs and classrooms in this Province.

Mr. Chairman, as indicated, this particular amendment is all-encompassing. It is one which has been dealt with at some length. We take pride, I might add, in presenting this amendment at this time, and having section 10 of the bill now read: And recognizing a provision for resource recovery with respect to this particular provision of the Education Act.

CHAIR: The hon. the Minister of Education.

MR. GRIMES: Thank you, Mr. Chairman.

I recognize fully the political debate with respect to the issue of whether or not there was a commitment of some sort to maintain funds from any efficiencies within education for the purpose of improving the quality of teaching and learning, but that is exactly where it needs to remain, Mr. Chairman, as a political debate. It has been a political debate now for a week or more in the last little while and it will probably be a political debate into the future. I think even the members opposite in moving it recognize that there is absolutely no place for this in legislation.

It is nowhere else in the country, it is nowhere else in the world. It doesn't exist in the universe, Mr. Chairman, that we know of, that you would, on a specific item in one part of a budget in one department, put something in legislation saying that under no circumstances could you alter the budget. It isn't appropriate. We won't be supporting it. We fully expect that there will be other opportunities to fully debate politically the question of whether or not there was a commitment to keep funding in education but it certainly won't be supported as a piece of legislation.

While I am speaking, Mr. Chairman, I might also briefly indicate that there is an amendment to clause 8(1), which the table has and which the hon. member opposite has, with respect to clarifying the date between the abolition of the current denominational councils and the existence and working of the new commission. The new clause 8(1), that the table has, will certainly be supporting that amendment, that: When the commission is established but, in any event, not later than twenty-one days after the commencement of this Act, a denominational education council, established under Section 4 of the former Act is abolished; so that the current 8(1) would be deleted and replaced by this new 8(1) that will be moved by the House Leader on behalf of the government when you get through the final clauses.

So we will support an amendment in clause 8 but we will not be supporting the amendment proposed in clause 10.

CHAIR: The hon. the Member for St. John's East.

MR. OTTENHEIMER: Thank you, Mr. Chairman.

Mr. Chairman, the thrust behind the resource recovery provision obviously is that as the result of -

SOME HON. MEMBERS: Oh, oh!

CHAIR: Order, please!

The Chair is having some difficulty hearing the hon. member.

The hon. the Member for St. John's East.

MR. OTTENHEIMER: Thank you, Mr. Chairman.

The wording under section 10, as has being proposed, Mr. Chairman, deals with resources realized from reductions in duplication of school boards, administrative officers, schools and transportation systems. Mr. Chairman, it is the changes and reforms which have taken place in the recent past which have obviously resulted in significant savings to this government, and it is time that this government looked closely and clearly at where these savings ought to be redirected.

We have seen example after example, Mr. Chairman, whether it be in the recent report with respect to special needs children, whether it is the discontinuation of public examinations, whether it is the cancellation of a kindergarten program which was certainly widely acclaimed by those individuals who were involved in the pilot program. We see program after program being slashed, being cancelled and being postponed. Mr. Chairman, the purpose for redirection of funds is obviously to recognize that our education system, the children of this Province, need to rely on the fact that savings which have been realized, as a result of the reforms over the past little while, could be certainly put in their direction for their benefit, both short-term and long-term.

Mr. Chairman, this piece of legislation under Bill 27 deals primarily with the denominational education commission. Most of the changes and most of the amendments which the hon. minister has referred to deal specifically with the Schools Act as opposed to the Education Act. The Education Act is more of a constitutional nature, in that it recognizes the denominational education commission, the financial structure and of course the school construction board is also envisaged. The duties of the school construction board are outlined under section 6 and obviously there is the regulatory regime which is referred to in section 7.

Most of the discussion that members on this side had with respect to this whole educational school debate, Mr. Chairman, will be reserved for a number of amendments which will be put forward pursuant to various provisions and sections of the Schools Act.

Other than the three amendments which have been put forward concerning Bill 27, there are no further comments which I wish to make at this time. I do not know if my colleague, the Leader of the Opposition, has a comment which he would wish to make, or the Opposition House Leader.

Thank you, Mr. Chairman.

CHAIR: The hon. the Opposition House Leader.

MR. H. HODDER: Thank you very much, Mr. Chairman.

I just want to rise and make a few comments relative to Bill 27, which has been introduced by my colleague from St. John's East, and to say that there are certain parts of Bill 27 for which we certainly have a great deal of support. We believe that the general thrust of the bill is okay. We certainly commend the government for initiatives on the Province-wide construction board, the reduction of the number of school boards, and that kind of thing. However, my colleague has concerns, as do the people of Newfoundland and Labrador, over the fact that the efficiencies that will be achieved by the school boards will not result in that money in some cases, according to the minister, being redirected toward the classrooms of the Province.

Mr. Chairman, the amendments that we have brought forward would make it a commitment of the minister that any of the monies to be saved by changes in the denominational education committees - and we know that denominational education committees across this Province have hundreds of thousands of dollars. In fact, two years ago the denominational education committees were costing the Province nearly $1 million. We believe that kind of money should be redirected to the classrooms.

The Member for St. John's East, in making his amendments on Bill 27 and Bill 48, wants to bring to the minister's attention the fact that there were commitments that were made, and that there were statements made

by the then Premier of the Province and by the then Minister of Education. They have been documented in the public press, and they have been shown to the minister. There are quotations in Hansard which show that any efficiencies would be directed towards making the total funding available for education in this Province more readily accessible to children and to the classrooms of our students. However, in the last few days we have listened with some concern as the minister has said: No, no, a commitment was not a commitment. Consequently, we have real concerns about that kind of statement.

I say to the hon. the minister, he has done a good job in trying to skate around that issue, but certainly many people in this Province are not convinced by his statements. They knew when they went out to participate in the public meetings, they knew when they participated in the referendum, and we all knew when we stood here - in my case, I took a very strong position on Term 17. The whole thrust of that was that we could not have four competing school systems, that we could not have buses crossing each other's paths, that we would have children going to the nearest school, that we would have, where possible, larger schools, and where not possible we would have more money to be put into small schools in some of the parts of the Province where it isn't possible to have larger schools, because of the size of the population and distance from the nearest other school.

We were committed to all of that. We were told that the whole purpose was to improve the quality of learning. Our greatest fear now is that, now that we have taken out of education in the last two years about $50 million, and we anticipate that there will be substantial savings - if you listen to what the royal commission on education said about savings in buses, and listen to what the Minister of Education said two years ago about savings in restructuring buses, one would believe there are literally tens of millions of dollars we could have that could be redirected toward children with learning disabilities. We know there will never ever be enough money to address all the needs of all the children. But now that we are going to achieve efficiencies, and putting it in the context of where we were, shall we say, two years ago, I would have anticipated now that we would be able to address the issues that Dr. Patricia Canning noted in her report on special matters.

We know that many of the initiatives in the royal commission have not been acted upon. We know that the minister shelved his kindergarten program. There was a great deal of thought, research and commitment that went into that kindergarten program. Last year the minister said: I don't have the money. So a $1 million program was simply put on the shelf. We are now saying to the minister, when you bring in those efficiencies, yes we should do it. I support reform. I have been consistent ever since I've come to this House about the issues of reform, have been a very strong proponent of it, very strong proponent of change at both the administration level, but more importantly to make sure that we are able to have real change happen at the classroom level.

Mr. Chairman, if we are going to spend the same old dollars and we are going to spend the dollars in the same manner we are now spending them, then we have to ask ourselves, what was the real purpose of the education reforms.

When I spoke first on this matter in the House I said two things. I said: First of all, the churches of this Province were motivated by power, they were motivated by position, and the government was motivated by it's stressing the financial considerations. I haven't changed from that. Now that the minister, in the last few days, has said that he isn't going to redirect his money towards children, then we have to say that the whole purpose of reform was not for betterment of education, but was merely for the financial considerations we now see self-evident.

I say to this House, that when we talk about educational reform we talk about it in terms of the classrooms. We spent the last years talking about it in terms of its organizational structure, but if it isn't going to be translated into more dollars and better learning programs than the whole purpose, the whole philosophy, is at risk.

What we are saying to the minister today is that my colleague for St. John's East, the critic for this caucus on education, has put forward an amendment. He has reminded the government, and the minister in particular, of the commitments that were made. We believe these commitments were substantial, and that they cannot be excused by saying: If you understood that, then that is not what we meant. Consequently, what I am saying to the minister is, be careful we do not betray the trust that was given to the government when we voted for the referendum in the affirmative, and be careful lest we fail to really put the money at the classroom level. Because that is where the action is, that is where we need to put money - into early childhood education. We need to put

it into early intervention programs. We need to address the issues that Dr. Patricia Canning identified, and which Dr. Len Williams identified in his report. If we do not, then we have not really fulfilled the mandate given to the government in the referendum, or indeed we have not really fulfilled the mandate the government told the people would be the main thrust of its education reform.

I say to my colleagues opposite, there is a price to be paid when politicians say one thing and do something else; and, on this issue, that is what has been the focus in the public press in the last few days. With these comments, Mr. Chairman, I will yield and see if any other of my colleagues wishes to have a comment.

CHAIR: The hon. the Leader of the Opposition.

MR. SULLIVAN: Thank you, Mr. Chairman.

I, too, want to make a few comments on Bill No. 27. I feel strongly that in Bill No. 27, as in Bill No. 48, there was a commitment given that, with the restructuring of the boards, with the restructuring of the school system, money would go back into the education system, regardless of what the minister or this government may say. The Education Referendum: A Decision on the Future of Education in Newfoundland and Labrador, was sent out to every household in this Province. Everybody had an opportunity to read what is stated in it.

It says: Restructuring is only one step in a much broader program of reform. It continues: It is necessary because we need to reduce duplication of service, decrease the number of decision-making bodies, and make the system more accountable to the public. Making the system more efficient will allow resources to be put to better use in improving teaching and learning.

It was sold to the people of the Province back on September 5 1995 on the basis that money would go back to improve teaching and learning in the classrooms of our Province. That is what the people of the Province were told, and it is something for which this government should be held responsible. When they presented this, they knew our deficit situation. It did not increase. We went through a year with a small surplus in 1995-1996, and we wound up this year with only $14-point some million. So we are in the same basic fiscal situation in this Province that we were when the commitment was made and the brochure was circulated to all the households in the Province.

Furthermore, I told the Premier I would go to Ottawa on conditions, certain conditions I stipulated before I would go, and he agreed in this House to follow those conditions. Here is what he took to Ottawa and here is what was presented to the people, in these two sentences: Significant savings would be realized annually from the administrative changes, student transportation efficiencies, and school consolidation which will result from the education reform process. The proposed reforms will provide the opportunity to redirect these savings to the classroom level for the benefit of our students.

That was stated in a package that was sold to the House of Commons, that was sold to the Senators, and sold to the people generally, in a package prepared by this government to promote and sell the concept of reform in the Province. It was an agreement, a promise of what they would do, and they reneged on that promise. The Premier, here in the House of Assembly on May 23, stood in his place and said: `We have to pay the bills today, we have to find efficiencies.' It is no longer acceptable against that backdrop that we should sustain excess bureaucracy at a time when we need our dollars to go to work in the classrooms of Newfoundland and Labrador, not in the administrative rooms of Newfoundland and Labrador.

Mr. Chairman, this government sold a bill of goods to the people under certain pretence, the same as Jean Chrétien sold to the people on GST, the same, basic thing - the same as Sheila Copps who admitted it, even though before admitting it, she had to do a poll to see whether she would be re-elected. She did a poll, and they told her, in Hamilton East, she would have been elected without any problem; that is what the poll stated when it was publicly released. And then she decided she did not tell the truth so she resigned and said they did not abolish it - `I will run again,' and that is easy enough when you know you are going to be re-elected.

The Minister of Finance came out on a commitment and he apologized and said: he might have basically -

CHAIR: Order, please! Order, please!

I remind the hon. member, we are debating "An Act Respecting Education", we are in Committee of the Whole, and debate should be relevant to the clauses of the bill.

MR. SULLIVAN: I am talking about giving a commitment. The commitment given to the people of this Province is similar and parallels the commitment given by Prime Minister Chrétien in the last election. I will go back to the specifics again of the brochure this government circulated to the people of this Province, a brochure that every householder in the Province received. It indicated making the system more efficient, saying: It will allow resources to be put to better use in improving teaching and learning. That is what was indicated and there are other things in this brochure, too.

The Premier of the Province was very apt to tell the people in Ottawa, the Senators and the House of Commons - and he carried a brochure that he passed out to the media which said: Significant savings are going to be realized annually from the administrative changes, student transportation efficiencies and school consolidations which will result from the Education Reform process. He said: The proposed reforms will provide the opportunity to redirect `these savings', not some of these savings, not some savings, to redirect `these savings' from administrative changes, from student transportation efficiencies and school consolidations, to redirect these savings to the classroom level for the benefit of our students. That is there in the package government prepared and distributed to try to sell this program, to convince the people of this Province, the Senators and also the people of the House of Commons to support this. Because we are going to put the money back into the system, that is what we told the people of Newfoundland and Labrador we are going to do, that is what we told the Senators and the House of Commons to get it through there, and that is what the Premier said here, in the House of Assembly back in May. That is the commitment he gave but he is going back on his word.

The Minister of Education is going back on a covenant, an agreement when they sold this package to the people of the Province, and that undermines the basic premise upon which people voted in the referendum. People voted on the referendum in this Province, Mr. Chairman, they voted because they thought their children in the schools today would have access to a better education that would come from increased efficiencies by having no duplication of buses, by not having too many boards, by not having too many schools or too many administrative buildings in the Province because we could use these dollars to enhance educational opportunities for our children in the Province, and now, we are being told by the Premier, by the Minister of Education, very blatantly told: `We never said that,' when it is here in print all over the place for people to read. And that is not fulfilling a commitment that they gave the people of this Province; they are reneging on a commitment to the people of this Province. Paul Martin gave a commitment and he came back and apologized, saying he was wrong. He said it was not basically truthful. Sheila Copps, even though it was after her poll, made a similar statement that parallels what the Premier of the Province has indicated here.

Since education bills were called here, we spent less than two hours on those two bills in second reading, and we have spent less than an hour - a half hour, fifteen or twenty minutes on this. We have spent about two hours on two very important bills on the future of this Province. We moved it through in jig-time in July and we have expedited this process every way possible. I am going to stand, and I am going to have my say on a matter that I believe is important to the children of our Province. I spent twenty years in a classroom in the Province and I put the interest of the children first. But when people stand up and tell us something and sell it to the people and it is not worth the paper it is written on because it undermines the process, it may not have legal repercussions but it certainly has moral and ethical repercussions on the people of this Province by backing down on concrete direct things.

The Premier even went a bit further than that, he went to the extreme. I will not even mention again what he said in Ottawa in the Liberal caucus, but the Minister of Industry, Trade and Technology certainly knows what I am talking about. We had an exchange the other day on it. What he said about the education system in this Province I would not repeat - to sell it in Ottawa -

AN HON. MEMBER: (Inaudible).

MR. SULLIVAN: No, not the Minister of Industry, Trade and Technology, at all - the Premier of this Province, and what he said to try to sell a package, how desperate our people were, to run down our education professionals in this Province, to sell a package to them in Ottawa. We did not need to do that. I have great respect for the professional people in this Province in the education system. I went to Ottawa and, where necessary, I stated the belief - the Minister of Education was there - and occasionally, I say to the minister, I had to correct the Premier in the caucus.

(Inaudible) ask the Minister of Education - I said: `No Premier, that is not correct. That is not my interpretation.' The NDP caucus, for example, we were allowed to meet with them; and I went to indicate what I considered to be facts, not to over-exaggerate and sell something. I said from day one that the people here in this Province had the opportunity on February 22, and the people who opposed it had their say, and they passed up the opportunity. We had a referendum initially, and then when we had an election and it did not become an issue in this election, people had their chance, the Premier of this Province had a mandate to proceed after February 22. I agreed with it and I supported it on that basis, not solely on the referendum. I think it was manipulated to a degree because this House closed and we could not debate the question and we could not participate in the process. We were shut out of the process and I resented that and I voted against it.

It may not have been the best question put to the people. It may not have been the best amendment for Term 17, and I took offence to it, that as a member of the Legislature I did not have an opportunity to come here. When Quebec called their legislature, the people participated democratically in the question that was put to them. That is only a fair request from people here. We were not treated democratically - it was not put through.

I turned a blind eye to the antics that the Premier used to sell it. I sold it because I believed in it and not because I wanted to sensationalize and criticize the system of education here in our Province.

CHAIR: Order, please!

The hon. member's time is up.

MR. SULLIVAN: By leave, Mr. Chairman.

A minute would be fine, or I could get up again. If I could have a minute, I will wrap up and I will not speak again.

CHAIR: The hon. the Leader of the Opposition, by leave.

MR. SULLIVAN: In conclusion, Mr. Chairman, they have not played the game on this from day one. The finger has been pointed at everybody else but the real culprits in the system. It has been pointed at the Senators in Ottawa - and I do not have any sympathy for the Senators. I do not believe we should have a Senate, the way it is structured. I am not an admirer of the Senate, but fingers were pointed in the wrong direction at people there.

We all know that the Liberals have more members in the Senate than the PCs, and if you cannot win it with your own majority there, you have a problem. In the House of Commons, there are only ten people, basically, outside the Liberals, who went against it. All the rest were Liberals, 75 per cent. Granted, there may not be many others there, but there are a lot of Bloc and a lot of Reform, a couple of PCs and a few NDPs in the House of Commons. You look at the vote there, and look at the Senate. It was not defeated for those reasons. There was too much sensationalism on this issue, and trying to make a political issue out of something that is near and dear to the people of the Province.

The people in my district voted 62 per cent or 63 per cent against it, but the people in my district want it, and I think they would make a choice that they would select the best possible education for their children, regardless of whether it is uni-denominational, whether it is interdenominational, whether it is non-denominational, whatever the case may be. I think a majority of the people would make a decision in the best interest of their children, regardless of denomination. That is my personal feeling.

As education critic I said, back in 1993 - and I will finish with this - that I believe in neighbourhood schools. I quoted it. I have the clip in there to show it. I believe in the rights of parents to choose where their kids can go to school, and they should have priority in the neighbourhood that the parent so desires.

I disagreed with the government when they made a decision out in Corner Brook, just before becoming education critic, when they, by not exercising their power, the Minister of Education forced kids to go across the city of Corner Brook to another school out of their neighbourhood. They did not exercise their powers. Under section 61, I believe, in the Schools Act, they had the power to do that. It is not right. They are setting it under a false pretence, basically, and the children of this Province are the ones who have been paying the price.

Thank you, Mr. Chairman.

On motion, clauses 1 and 2 carried.

AN HON. MEMBER: Clause 3.

CHAIR: All in favour of the amendment to clause 3, please say `aye'.

SOME HON. MEMBERS: Aye.

CHAIR: Opposed, `nay'.

SOME HON. MEMBERS: Nay.

CHAIR: I declare the amendment defeated.

On motion, clauses 3 through 5, carried.

AN HON. MEMBER: Clause 6.

CHAIR: All in favour of the amendment to clause 6, proposed by the hon. the Member for St. John's East, please say, `aye'.

SOME HON. MEMBERS: Aye.

CHAIR: Opposed, `nay'.

SOME HON. MEMBERS: Nay.

CHAIR: I declare the amendment defeated.

On motion, clauses 6 and 7, carried.

CHAIR: Shall clause 8 carry?

MR. GRIMES: Mr. Chairman.

CHAIR: The hon. the Minister of Education and Training.

MR. GRIMES: Thank you, Mr. Chairman.

The Table has an amendment to clause 8, and I believe members opposite have an amendment to clause 8, deleting the current subclause 8.(1) and substituting the following as per the tabled amendment. The new 8.(1) would read: `When the commission is established, but in any event, not later than twenty-one days after the commencement of this Act, a denominational education council established under section 4 of the former Act is abolished.

On motion, amendment carried.

On motion clause 8, as amended, carried.

On motion, clause 9 carried.

CHAIR: There is an amendment to clause 10 presented by the Member for St. John's East.

All in favour of the amendment, please say, `aye'.

SOME HON. MEMBERS: Aye.

CHAIR: Those against, `nay'.

SOME HON. MEMBERS: Nay.

CHAIR: I declare the amendment defeated.

On motion, clause 10, carried.

A bill, "An Act Respecting Education." (Bill No. 27)

Motion, that the Committee report having passed the bill with amendments, carried.

CHAIR: The hon. the Government House Leader.

MR. TULK: Mr. Chairman, Order No. 22, "An Act To Revise The Law Respecting The Operation Of Schools In The Province". (Bill No. 48)

CHAIR: Bill No. 48, "An Act To Revise The Law Respecting The Operation Of Schools In The Province".

The hon. the Member for St. John's East.

MR. OTTENHEIMER: Thank you, Mr. Chairman.

Mr. Chairman, this bill, Bill 48, "An Act To Revise The Law Respecting The Operation Of Schools In The Province" is comprehensive legislation - legislation which has been debated at length in this House in second reading, in particular, approximately ten days ago.

Mr. Chairman, there has been much debate on much of the subject matter contained within Bill 48 over the past several days. We are dealing, in particular, with areas such as student rights and rights of parents, obligations of teachers, obligations of school boards, the issue of a francophone board, for example, and property issues, uni-denominational designation, interdenominational designation and so on. It is a piece of legislation that contains, in its draft form, some 121 clauses. I am looking forward, Mr. Chairman, to debating, at Committee stage, each clause on a clause-by-clause basis, because there are implications which are important when we closely analyze and assess each clause individually. There are implications for the students, teachers and administrators, and indeed, the public at large. It is legislation which has to be carefully reviewed. I look forward to doing that at the Committee stage.

There are a few provisions on which I would like to take some time right now, Mr. Chairman, and give some particular attention to. For example, under section 6, it states, "(1) A parent of a student may provide, at home or elsewhere, instruction for that student where the student is excused from attending a school under paragraph 5(c)." Then it states, "(2) A student who is excused from attending school under paragraph 5(c) shall be enrolled under section 15." There are certainly implications, Mr. Chairman, from what is meant by home instruction, under what conditions home instruction may take place and what exemptions that may exist for children who wish to be or parents who wish to educate their children in this particular way.

Clause 7, Mr. Chairman, indicates how approval and in what manner approval may be given. It states, " The period for which a student may be excused from attending a school under paragraph 5(c) (a) shall be valid for no longer than a school year; and (b) may be renewed upon application to the director each school year." That particular section, in my view, Mr. Chairman, does not provide specifics or details as to how that discretion by the school board director is to be exercised. There is no indication, Mr. Chairman, upon review of this section, how this provision may be reviewed or renewed upon application and again, the manner in which this review is done.

Under student records, Mr. Chairman, 12.(1), we see that, "A student record shall be maintained for each student in the manner required by a policy directive of the minister." It is interesting to review the provisions of this section - to be very careful, and in fact to scrutinize, I guess, exactly how the rights of young people are protected. There are provisions that when a person exceeds the age of nineteen, that person obviously, as an adult, is free to request information with respect to school records, and obviously, a parent or guardian will be charged with that responsibility prior to age nineteen.

Also, under section 12.(6), if I may read it: "Without the written permission of the parent of a student, or the student if the student is 19 years of age or older... (b) a person shall not be required to give evidence respecting the content of the student record in a trial, inquiry, examination, hearing or other proceeding."

I would suggest the wording of this particular provision is somewhat conflicting, and it is just poor sentence structure. It is difficult to follow. When we look at clause (b) and read it right after clause (a), it is clearly simply an example of inconsistent wording in the draft legislation.

Under section 13 there is discussion of fees. Section 13(1) states that "A fee shall not be imposed upon a student or parent of a student with respect to the enrolment or attendance of that student or a program or course of study undertaken by that student in a public school." The minister has indicated there is indeed being contemplated by the department at this present time, an enlarged system of busing whereby school fees will be assessed. This seems to conflict, I say to the minister, with section 13, which makes it clear that fees shall not be imposed. So there is somewhat of an inconsistency, I would suggest, in section 13.

With respect to section 14, I understand there is an amendment that will be put forward by the hon. minister dealing with the issue of a student authorization under a Canadian visitor's visa, and that inconsistency and conflict in the wording appears to be corrected by the amendment being put forward by the minister.

Under Part II, the section for Parents, it states under section 16 that "A parent shall ensure that his or her child attends school unless the child is excused from attendance under this Act." It appears, too, that this particular provision under section 17(1), where it states that "A parent who neglects or refuses to enrol his or her child in school or does not ensure that his or her child attends school is guilty of an offence." Under section 17, it appears that this inconsistency in the legislation, or question that could be raised, is also being corrected by a proposed amendment, in that there is now a qualification with respect to exactly what is meant by a parent who neglects or refuses to enrol his or her child, in that there is a qualification or a limitation or an interpretation which will assist all parties in trying to have some greater understanding as to what is meant by section 17 of the bill.

Section 18 states that there is a duty to report. It is a troublesome section, I say to the minister, because this is a duty to the public at large. Section 18(1) states that "A person who has reason to believe that (a) a child who is required to be enrolled under section 15 is not enrolled; or (b) a child who is receiving instruction under section 6 is not receiving instruction in accordance with this Act, shall report that belief to the director for the district in which that child resides."

The difficulty with this is that there is a duty on the public at large, an onus on a member of the public to insist that a child who is clearly absent from his or her obligation to attend school, there is a duty on a member of the public to report that belief to the director of the school board. The concern that I have and the question that I raised to the minister in debate on second reading is, well, what are the limitations, Mr. Chairman? When is it that this duty to report is absolute? Is it possible that a person may be further penalized or reprimanded for

simply not following through with his or her obligation to report to the director of a school board the fact that a child is not attending school as he or she is required to do?

So, Mr. Chairman, that particular provision is somewhat troublesome. I am somewhat disappointed that there appears to be no attempt by the minister to correct this inconsistency. It is an area of concern, I would suggest, not only for educators, students or parents but, indeed, all members of the public who are confronted with the fact that there is a legal obligation, Mr. Chairman -

MR. TULK: No leave.

MR. OTTENHEIMER: Time up, Mr. Chairman?

CHAIR: Time up.

MR. OTTENHEIMER: No leave, Mr. Government House Leader? You are sure?

Thank you, Mr. Chairman.

CHAIR: The hon. the Government House Leader.

MR. TULK: Mr. Chairman, I give notice that I will on tomorrow move, pursuant to Standing Order 50, that the debate on Bill No. 48, entitled, "An Act To Revise The Law Respecting The Operation Of Schools In The Province," standing in the name of the hon. the Minister of Education, shall not be further adjourned and that further consideration of any resolution or resolutions, clause or clauses, section or sections, schedule or schedules, preamble or preambles, title or titles or whatever else might be related to debate in Committee of the Whole House respecting Bill No. 48, shall be the first business of the Committee when next called by the House and shall not be further postponed. That is called the hobnailed boots.

Mr. Chairman, I move that the Committee rise, report progress and ask leave to sit again.

On motion, that the Committee rise, report progress and ask leave to sit again, Mr. Speaker returned to the Chair.

MR. SPEAKER (Snow): The hon. the Member for Bellevue.

MR. BARRETT: Mr. Speaker, the Committee of the Whole have considered the matters to them referred, have directed me to report Bill No. 27 with amendments, and ask leave to sit again.

On motion, report received and adopted, Committee ordered to sit again on tomorrow.

On motion, amendments to Bill No. 27 read a first and second time, ordered read a third time on tomorrow.

MR. SPEAKER: The hon. the Government House Leader.

MR. TULK: Mr. Speaker, I have another little motion here which I have to move sooner or later, either now or at some time today when we get into private members' -

MR. E. BYRNE: No, put it back in your pocket, boy.

MR. TULK: No, no, it is just as well to move it now as move it at 2:00 p.m.

Mr. Speaker, I give notice that I will on tomorrow move, pursuant to Standing Order 50, that the debate on Bill No. 45 entitled, "An Act To Implement the Comprehensive Integrated Tax Coordination Agreement between the Government of Canada and the Government of Newfoundland and Labrador", standing in the name of the hon. the Minister of Finance and Treasury Board shall not be further adjourned and that further consideration of any resolution or resolutions, clause or clauses, section or sections, schedule or schedules, preamble or preambles, title or titles or whatever else might be related to debate in Committee of the Whole House respecting Bill No.

45, shall be the first business of the Committee when next called by the House and shall not be further postponed. That is the second boot.

Having given notice of that, Mr. Speaker, I move that the House adjourn until 2:00 p.m. tomorrow. The parliamentary day being tomorrow, the calendar day being today. Mr. Speaker, I move that the House adjourn.

On motion, the House at its rising adjourned until tomorrow, at 2:00 p.m.

TAB 30

Case Name:

Textron Financial Canada Ltd. v. Beta Limitee/Beta Brands Ltd.

Between
Textron Financial Canada Limited, Applicant, and
Beta Limitee/Beta Brands Limited, Respondent, and
Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 242G, and
Mintz & Partners Limited

[2007] O.J. No. 4001

37 C.B.R. (5th) 107

2007 CarswellOnt 6705

12 P.P.S.A.C. (3d) 46

Court File No. 06-CL-6820

Ontario Superior Court of Justice

L.C. Leitch J.

Heard: July 19, 2007.
Judgment: October 18, 2007.

(48 paras.)

Commercial law -- Personal property -- Security interests -- Priorities -- Secured creditor with perfected purchase-money security interest in inventory and proceeds of company in receivership had priority over lien by employees regarding vacation pay owing -- Personal Property Security Act, ss. 1, 30, 33.

Creditors and debtors law -- Security -- Liens -- Priorities -- Secured creditor with perfected purchase-money security interest in inventory and proceeds of company in receivership had priority over lien by employees regarding vacation pay owing.

Insolvency law -- Property of bankrupt -- Trust property -- Where company had no obligation to hold vacation pay separate from other assets for benefit of employees, no actual trust created that would survive company's bankruptcy -- Bankruptcy and Insolvency Act, ss. 136, 244.

Insolvency law -- Claims -- Priorities -- Secured creditor with perfected purchase-money security interest in inventory and proceeds of company in receivership had priority over lien by employees regarding vacation pay owing.

Insolvency law -- Creditors -- Secured creditors -- Secured creditor with perfected purchase-money security interest in inventory and proceeds of company in receivership had priority over lien by employees regarding vacation pay owing.

Insolvency law -- Receivers, managers and monitors -- Appointment of -- Receiver's appointment did not crystallize interests of claimants in assets of company in receivership such that subsequent bankruptcy would not determine priorities -- Bankruptcy and Insolvency Act, s. 67(1).

Labour law -- Labour relations -- Employees -- Vacations and holidays -- Vacation pay -- Secured creditor with perfected purchase-money security interest in inventory and proceeds of company in receivership had priority over lien by employees regarding vacation pay owing -- Employment Standards Act, s. 40.

Motion by Union for declaration its claim on account of vacation pay ranked in priority to claims of secured creditors of Beta Brands in and to Beta's accounts and inventory and proceeds -- Textron, secured creditor of Beta, and Sun Beta, unsecured creditor, opposed motion -- Textron held security interest over all present and future property of Beta pursuant to security agreement dated December 17, 2004 -- Notice of security interest registered on November 18, 2004 -- Textron sent default letter and statutory notice to Beta on November 24, 2006 -- Beta was in negotiations with Bremner for sale of Beta's assets -- Textron entered into forbearance agreement to facilitate sale -- Pursuant to agreement, Textron agreed to forbear enforcement of security and to provide Beta with financing to manufacture inventory required to complete sale -- Receiver over property of Beta appointed January 3, 2007 -- Judge found Textron had valid, perfected security over Beta's property -- Union members, employees of Beta, were owed substantial amounts including vacation pay estimated at $559,000 -- Union had opposed appointment of Receiver, taking position purpose of receivership was to avoid substantial obligations for termination and severance pay -- Receiver authorized by January 5, 2007 order to sell Beta's bakery division and certain finished goods to Bremner -- Employment of all Union members terminated shortly thereafter -- Receiver authorized to sell other assets by another order on April 12, 2007 -- Receiver successfully collected some accounts receivable -- Interim distribution order granted on March 1, 2007, pursuant to which Receiver established vacation pay reserve of $550,000 -- Order set out that creation of reserve was not admission funds were held separate and apart for employees -- Bankruptcy petition issued July 17, 2007 -- HELD: Motion dismissed -- Priority determined based on chronological order in which respective interests arose with first in time having priority -- Textron was granted security over

assets of Beta in 2004 -- No evidenced showed vacation pay claimed by Union members was accrued prior to 2004 -- Although Union established lien, lien did not have priority over Textron's security interest -- Although Beta deemed to hold vacation pay accruing for employees in trust, priority of deemed trust not established by Employment Standards Act -- Under Personal Property Security Act, only purchase-money security interest had priority over deemed trust -- Textron's interest in Beta's inventory and proceeds was purchase-money security interest -- Bankruptcy of Beta created result in which vacation pay claims of employees ranked subordinate to claims of secured creditors and ranked in priority to claims of Beta's unsecured creditors -- No actual trusty existed, as Beta did not hold funds separate and apart for vacation pay and was not obliged to do so -- No actual trust in favour of employees survived bankruptcy -- Appointment of Receiver did not crystallize priorities such that subsequent bankruptcy would not affect priorities -- New legislation providing relief for employees in this situation was not yet proclaimed into force.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 67(1), s. 136, s. 244

Employment Standards Act, S.O. 2000, c. 41, s. 40(1), s. 40(2)

Personal Property Security Act, R.S.O. 1990, c. P.1, s. 1(1), s. 30(7), s. 30(8), s. 33, s. 33(1)(a), s. 33(1)(b)

Wage Earner Protection Program Act, S.C. 2005, c. 47

Counsel:

E. Patrick Shea, for Textron Financial Canada Limited.

Steven Weisz, for Sun Beta, LLC.

Duncan Grace - solicitor for the moving party, the Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 242.

[Editor's note: A corrigendum was released by the Court November 13, 2007; the correction has been made to the text and the corrigendum is appended to this document.]

1 L.C. LEITCH J.:-- The Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 242G ("Local 242G") brings a motion for a declaration that its claim on account of vacation pay ranks in priority to the claims of the secured creditors of Beta Limitee/Beta Brands Limited ("Beta Brands") in and to Beta Brands accounts and inventory and any and all proceeds derived or to be derived therefrom. The motion is opposed by the applicant, a secured

creditor of Beta Brands and Sun Beta LLC, an unsecured creditor of Beta Brands and a participant in the applicant's secured loan to Beta Brands.

Background Facts

2 The applicant holds a security interest over all of the present and future personal property of Beta Brands including, without limitation, Beta Brands' inventory and accounts pursuant to a security agreement dated December 17, 2004, which was amended August 29, 2005, and June 20, 2006. Notice of this security interest was registered under the *Personal Property Security Act*, R.S.O. 1990, c. P.1 (the "PPSA") on November 18, 2004. All secured creditors of Beta Brands that had registered financing statements against Beta Brands prior in time to the applicant's registration subordinated their interests to the applicant.

3 A default letter and a statutory notice under section 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B.3 (the "BIA") were sent by the applicant's counsel to Beta Brands' counsel on November 24, 2006. Beta Brands was then in negotiations with Bremner Food Group Inc. ("Bremner") respecting a sale of its assets. The applicant entered into a forbearance agreement with Beta Brands dated December 13, 2006, to facilitate the sale to Bremner. The applicant agreed to forbear enforcement of its security on certain terms and conditions and to provide financing to Beta Brands to manufacture inventory required to complete the sale to Bremner.

4 On January 3, 2007, pursuant to the order of Lax J., Mintz & Partners Limited (the "Receiver") was appointed the interim Receiver and Receiver of Beta Brands' property, which included accounts receivable and inventory. Lax J. found that the applicant has valid, perfected security over the property of Beta Brands.

5 As of January 3, 2007, the members of Local 242G were owed substantial amounts including an amount on account of vacation pay estimated at $559,000. Local 242G had opposed the appointment of the Receiver. As noted by Lax J., Local 242G submitted that the "true purpose" of the receivership "was to avoid or eliminate the contractual and/or legislative obligations for severance and termination pay, which are substantial" (*Textron Financial Canada Ltd. v. Beta Ltee/Beta Brands Ltd.*, [2007] O.J. No. 84 at para. 10 (S.C.J.)).

6 By order dated January 5, 2007, the Receiver was authorized to sell Beta Brands' bakery division and certain finished goods inventory to Bremner. Local 242G also participated at the hearing that led to that order. The employment of all members of Local 242G was terminated shortly thereafter.

7 The Receiver was authorized to sell other assets by a further order dated April 12, 2007. The Receiver successfully collected some accounts receivables of Beta Brands.

8 A bankruptcy application in respect of Beta Brands and an affidavit of verification were executed by the applicant on February 20, 2007. It is clear from the Sixth Report of the Receiver that there were communications relating to a bankruptcy proceeding in February 2007 in which Local 242G participated; however, no bankruptcy application was issued.

9 An interim distribution order was granted on consent on March 1, 2007. Pursuant to that order, the Receiver established a vacation pay reserve of $550,000.00. As set out in the interim distribution order, the creation of this reserve "shall not constitute an admission or otherwise evidence that funds necessary to satisfy any liability of Beta Brands for Outstanding Vacation Pay were or are held separate and apart in trust or otherwise" (at para. 2). The order also provided that the reserve was deemed to have been drawn from the proceeds of distribution of Beta Brands' inventory and the collection of receivables.

10 At the hearing of this motion, the applicant's counsel advised that a second bankruptcy petition was issued July 17, 2007, dated July 12, 2007, and an affidavit of verification was sworn July 12, 2007.

11 It is clear that Local 242G has diligently pursued relief on behalf of its members and that there has been an ongoing "dispute" regarding their vacation pay from the outset of the receivership which predates any bankruptcy application.

Statement of Issues

12 This motion raises the following issues:

1. Are the former employees of Beta Brands entitled to a statutory lien in respect of vacation pay that ranks in priority to the applicant's security interest in Beta Brands inventory and accounts?
2. Are the former employees of Beta Brands entitled to a deemed trust in respect of vacation pay that ranks in priority to the applicant's security interest in Beta Brands inventory and accounts?
3. Will the bankruptcy of Beta Brands have the effect of reversing or nullifying the priority that such statutory lien or deemed trust has in respect of vacation pay?
4. If the bankruptcy of Beta Brands will reverse or nullify the priority of any lien or deemed trust in respect of vacation pay, is it appropriate for the court to order a distribution to Local 242G's members prior to the bankruptcy application in respect of Beta Brands being determined?
5. If a distribution is ordered, what procedure should be put in place to determine the quantum of the vacation pay owing to Beta Brands' former employees?

The Statutory Lien Issue

13 Section 40(2) of the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "*ESA*") establishes a statutory lien with respect to vacation pay. Section 40(2) of the *ESA* provides as follows:

> (2) An amount equal to vacation pay becomes a lien and charge upon the assets of

> the employer that in the ordinary course of business would be entered in books of account, even if it is not entered in the books of account.

14 Although s. 40(2) of the *ESA* provides the employees with a statutory lien in respect of their vacation pay, there is nothing in the *ESA* which establishes priority of that lien in respect of the other relevant security interests. As such, priority will be determined based on the chronological order in which the respective interest arose with the first in time having priority. The applicant was granted security over the assets and property of Beta Brands in 2004. There is no evidence that the vacation pay claimed by Local 242G on behalf of Beta Brands' former employees was accrued prior to 2004. Thus, it appears that the statutory lien does not have priority over the security interest of the applicant.

15 As a result, although Local 242G can establish a statutory lien in accordance with s. 40(2) of the *ESA*, that lien does not have priority over the applicant's security interest granted in 2004.

The Deemed Trust Issue

16 Section 40(1) the *ESA* "deems" Beta Brands to have held vacation pay in "trust" for the employees of Beta Brands. That section provides as follows:

> Every employer shall be deemed to hold vacation pay accruing due to an employee in trust for the employee whether or not the employer has kept the amount for it separate and apart.

17 The section "deems" the vacation pay owing to Beta Brands' former employees to be held "separate and apart." Thus, there is no question that the employees have a deemed trust in respect of their vacation pay held by Beta Brands. It is important to note that such a trust has been described as "a legal fiction" (see *Ivaco, infra* at para. 46).

18 The critical question is whether this deemed trust ranks in priority to the applicant's security interest in Beta Brands' inventory and accounts.

19 There is nothing in s. 40(1) of the *ESA* that establishes priority of the deemed trust. Guidance on this point comes from the *PPSA.*

20 Section 30(7) of the *PPSA* provides the following:

> 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*.

21 Section 30(8) of the *PPSA* provides that subsection (7) does not apply to a perfected purchase-money security interest in inventory or its proceeds.

22 A contentious issue on this motion is whether the applicant has a perfected purchase-money security interest in Beta Brands' inventory or its proceeds. There is no dispute that the applicant's security interest was perfected. If the applicant's interest in Beta Brands' inventory is a purchase-money security interest then the deemed trust in favour of Beta Brands employees will be subordinate to the applicant's security interest.

23 A purchase-money security interest (a "PMSI") is defined in s. 1(1) of the *PPSA* as follows:

> "purchase-money security interest" means,
>
> (a) a security interest taken or reserved in collateral, other than investment property, to secure payment of all or part of its price,
> (b) a security interest taken in collateral, other than investment property, by a person who gives value for the purpose of enabling the debtor to acquire rights in or to the collateral, to the extent that the value is applied to acquire the rights, or
> (c) the interest of a lessor of goods under a lease for a term of more than one year;

24 Local 242G takes the position that there is no evidence which suggests that the applicant's security interest is a PMSI in inventory or its proceeds. Local 242G points out that portions of the applicant's advances were operating loans, while acknowledging that the forbearance agreement contemplated funding for purposes of an inventory build. The applicant is of the view that they do, in fact, have such a security interest on the basis that it advanced all funds to produce the inventory, there were no other operating lenders, and the proceeds from the sale of that inventory are traceable.

25 Local 242G also advances the proposition that when the agreement of purchase and sale with Bremner was signed, all of the assets of Beta Brands were converted to an account and thus, the applicant would lose the benefit of a PMSI. As Local 242G points out, the Ontario Court of Appeal in *Re Huxley Catering Limited; Irving A. Burton Limited v. Canadian Imperial Bank of Commerce* (1982), 2 P.P.S.A.C. 22 concluded that at p. 23:

> Accordingly, from the moment the contract for sale was made by Huxley Catering Limited the right to the purchase money was a chose in action that was capable of being assigned.

This contract for sale was made before Huxley Catering Ltd. made an assignment in bankruptcy. As a result, the bank was entitled to the purchase money pursuant to its assignment of book debts and the proceeds were not available to the Trustee in Bankruptcy for distribution to all creditors.

26 Section 33 of the *PPSA* sets out the requirements that must be complied with in order for a PMSI in inventory or its proceeds to have priority over any other security interest in the same

collateral. There is no dispute that the applicant's security interest was perfected at the time Beta Brands obtained possession of the inventory as required by subsection 33(1)(a). Although the applicant did not give notice in writing to every other secured party who has registered a financing statement in which the collateral is classified as inventory before the date of registration by the applicant as required by subsection 33(1)(b), I agree with the applicant's counsel that notice to such creditors was not required to obtain priority because the applicant had the benefit of subordination agreements from such creditors.

27 It seems to me that the applicant has a PMSI in Beta Brands' inventory and its proceeds based upon its position set out above. Therefore, s. 30(7) would not be applicable and the deemed trust would not rank in priority to the applicant's PMSI in inventory and its proceeds. I appreciate the perspective of Local 242G that the evidentiary foundation for the PMSI is limited and indeed, the applicant took the position that it was unnecessary to determine whether it had a PMSI in inventory and its proceeds because the applicant was prepared to ground its opposition to the motion on the applicability of the priority rules in bankruptcy. As a result, the main issue on this motion was whether the priority of the deemed trust can prevail in these circumstances where a bankruptcy application was signed and an affidavit of verification sworn, after the Receiver was appointed but remained outstanding. I will now turn to consideration of the impact of bankruptcy on the deemed trust.

The Impact of Bankruptcy on the Deemed Trust

28 The law is well established that the change in priorities that is created by the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*") supersedes the priorities established by the relevant provincial legislation. Section 136 of the *BIA* establishes the priority of claims on a bankruptcy. Application of this provision creates a result in which the vacation pay claims of Beta Brands' former employees characterized as either a lien or a trust ranks subordinate to the claims of Beta Brands' secured creditors, but would have priority over the claims of Beta Brands' unsecured creditors. The *ESA* as provincial legislation cannot alter priorities established by the *BIA.* Thus, the priority in respect of the deemed trust established by s. 30(7) of the *PPSA* (assuming the applicant did not have a PMSI in inventory and its proceeds) would not be effective in a bankruptcy (see *British Columbia v. Henfrey Samson Belair Ltd.* (1989), 75 C.B.R. (N.S.) 1 (S.C.C.) and *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453). Local 242G quite properly acknowledged that if the priority rules in bankruptcy are relevant, then s. 30(7) of the *PPSA* is inoperative.

Will the Trust relating to the Vacation Pay be Excluded Property on Bankruptcy?

29 As discussed more fully below, the position of Local 242G is that the priority rules in bankruptcy have no relevance on this motion. The alternative position is that even if those priority rules apply, Local 242G's claim to vacation pay would be effective against a trustee in bankruptcy because the Receiver was obliged to create a reserve for vacation pay as part of its fiduciary

obligations.

30 I will deal first with the alternative position of Local 242G. Local 242G relies on the provisions of s. 67(1) of the *BIA*, which defines property to exclude property that the bankrupt holds in trust. Thus, Local 242G submits that even if the priority rules under the *BIA* apply, the deemed trust would still have priority by virtue of the definition of property in s. 67(1) of the *BIA*. To fit within this exception, the trust must satisfy the requirements of the general law of trusts (described in *Re Ivaco, infra* at para. 39 as "the three certainties of a common law trust: certainty of intent; certainty of subject matter; and certainty of object") and the trust property must be kept separate and apart, and be traceable (see *British Columbia v. Henfry, supra*).

31 The position of Local 242G is that the Receiver knew vacation pay was owed when it was appointed and when it terminated the employment Local 242G's members. Although Local 242G does not suggest on this motion that the Receiver is personally liable for vacation pay, it asserts that the Receiver knowing there was a priority dispute had the obligation to set aside moneys to answer the employees' claims to vacation pay in the event that their claims were found to have priority. To put it more simply, Local 242G says that the Receiver should have established a separate fund to which the deemed trust could attach and thus be excluded from Beta Brands' property upon bankruptcy. According to Local 242G, the interim distribution order in regard to vacation pay merely confirmed what the Receiver was already obliged to do - identify and segregate property or proceeds to satisfy the vacation pay liability thereby creating a trust that is not excluded property in the event of a bankruptcy.

32 The applicant's position, supported by Sun Beta, is that Beta Brands held no property in trust that can be excluded from the impact of bankruptcy - in other words, there is no actual trust that can survive the bankruptcy of Beta Brands. They note that Beta Brands did not actually segregate any assets separate and apart in respect of vacation pay and that the terms of the interim distribution order limited the significance of the creation of the reserve for vacation pay. They also take the position that it is important that the Receiver maintain the status quo. Thus, in their view, Local 242G's proposition is inconsistent with the Receiver's obligations and is unworkable because a Receiver ought not to determine priorities of competing complainants absent a specific statutory requirement such as was before the court in *TCT Logistics, infra* discussed in more detail below.

33 Despite the able argument of counsel for Local 242G, I cannot accept the propositions he advanced. Beta Brands did not hold any funds separate and apart for vacation pay and was not obliged to do so. Therefore, there can be no actual trust in favour of the former employees that survives a bankruptcy. The interim distribution order required the Receiver to establish a reserve for the vacation pay pending a determination of the employees' entitlement in priority to the rights of Beta Brands' secured creditors. The order specifically provided that the reserve was not an admission or other evidence that the vacation pay was being held separate and apart from Beta Brands' assets and property. I disagree with Local 242G that the Receiver, knowing there was a priority dispute, was obliged to create a segregated fund for vacation pay. The Receiver's obligation

cannot exceed what the debtor was obliged to do. The Receiver "stands in the shoes of the debtor, and is furthermore acting as an officer of the court" as the Court of Appeal noted in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.* (2005), 7 C.B.R. (5th) 202 (Ont. C.A.) at 216. In that case, the legislation in issue required the debtor to maintain a segregated fund to satisfy the trust obligation in issue and the Receiver was similarly obliged to do so. Here Beta Brands was under no such obligation in relation to vacation pay. It was not required to, and did not, maintain a separate fund on account of vacation pay. Thus there is no segregated fund for the Receiver to maintain and preserve and the Receiver is under no obligation to create such a fund.

Are the Priority Rules in Bankruptcy Relevant?

34 I will turn next to the issue of whether the priority rules in bankruptcy are relevant on this motion. Local 242G asserts that the court has an obligation to determine priority issues based on the facts as they exist at the time the rights of the competing complainants came into conflict. I am urged to focus on when the priority issue crystallized and determine the priority dispute as at that date.

35 Local 242G emphasizes that its dispute regarding the vacation pay has been clear from "day one," and it made every possible effort to collect vacation pay from that day. Local 242G's position on this motion is grounded on the fact that when the dispute regarding the vacation pay arose a bankruptcy proceeding was not pending, nor had a bankruptcy occurred. The position of Local 242G is that the employees ought not to be deprived of their vacation pay because there might be a bankruptcy.

36 The applicant's position, again supported by Sun Beta LLC, is that the appointment of the Receiver does not crystallize the date on which priorities are determined and until a bankruptcy proceeding is effectively abandoned or denied, the court should not order a distribution to creditors whose claims would be subordinated by the bankruptcy.

37 Local 242G relies on *Sperry Inc. v. Canadian Imperial Bank of Commerce* (1985), 50 O.R. (2d) 267 (C.A.) for its position that the priority issues should be determined when the priority dispute crystallized (which Local 242G asserts is the date the Receiver was appointed, and thus a date when there was no application in bankruptcy). The issue in *Sperry* was the priority of the security interests of Sperry Rand Inc. and the Canadian Imperial Bank of Commerce in the unpaid inventory of W.J. Allinson Farm Equipment & Supplies Limited. The Court of Appeal found that neither Sperry nor the bank had registered or perfected their security interests, with the result that Sperry's security interest had priority under s. 35(1)(c) of the *Personal Property Security Act*, R.S.O. 1980, c. 375 (now see R.S.O. 1990, c. P.10, s. 30(1)(4)) as the first security interest attached. After making that determination, the Court of Appeal went on to express its views "on different bases for coming to the same conclusion" (*Sperry, supra*, at 278). The Court said, in *obiter*, "that it would be reasonable to conclude that the priority issue between the parties should be resolved as of the time when their respective security interest came into conflict" (*Sperry, ibid*).

38 This principle was adopted by the Ontario Court of Appeal in *Ontario Dairy Cow Leasing Ltd. v. Ontario Milk Marketing Board*, [1993] O.J. No. 464 where it concluded, "The priority issue between the parties must be resolved as of the time when their respective security interests came into conflict" (at para. 4).

39 The principle in *Sperry* that a priority dispute is addressed as at the date the conflict arose was also adopted by Mr. Justice Killeen in *Canadian Imperial Bank of Commerce v. Melnitzer (Trustee of)*, [1993] O.J. No. 3021 (Gen. Div.), aff'd [1997] O.J. No. 4634 (C.A.) [*Melnitzer*]. At para. 194 of his reasons, Killeen J. concluded that once "808756 Ontario rights came into conflict' with those of other creditors on August 3 when the Receiver, Coopers & Lybrand, took over control of the assets [...] under the rule laid down in *Sperry Inc. v. CIBC* 808756 Ontario's then unperfected interest [was] prevented from acquiring a higher status by later acts such as the August 29 registration."

40 Local 242G also relies on the decision in *Toronto-Dominion Bank v. Usarco Ltd.*, [1991] O.J. No. 1314, 1991 CarswellOnt 540 (Gen. Div.). The decision in *Usarco* dealt with deemed trust provisions in the *Pension Benefits Act*, S.O. 1987, c. 35. In that case, a bankruptcy petition was filed, dated January 5, 1990. As a term of an adjournment, the Receiver undertook to "hold $500,000 collected since November 7, 1991 (sic) from the proceeds of accounts receivable and inventories of Usarco until the return of the motion [...]" (*Usarco, supra*, at para. 8).

41 By the date of judgment on August 2, 1991, no further action had been taken on the petition in bankruptcy. The bank indicated that no such move would be made until certain real property was sold, but without providing any likely timetable. The pension administrator argued that the deemed trust had been converted to a true trust by virtue of the Receiver having separated the funds pursuant to the undertaking, or by virtue of notice. Mr. Justice Farley found that "it would be inappropriate for the Bank to put all proceedings involving Usarco (including this motion by the Administrator) into suspended animation while the Bank determined if, as and when it wished to take action" (*Usarco, supra*, at para. 9). He ordered the Receiver to pay out the amounts covered by the deemed trust provisions in the *Pension Benefits Act, supra*.

42 Local 242G submits that while *Usarco* was distinguished in *Re Ivaco Inc.*, [2006] CarswellOnt. 6292 (C.A.), a case relied on by the applicant, the principles underlying the reasoning in *Usarco* were not commented on and should be applied here where the circumstances are even more compelling because the priority dispute arose before the bankruptcy application began.

43 The applicant submits that the decision in *Usarco* is also distinguishable on its facts on this motion, and relies on the principles established in *Ivaco* in support of its position. In *Ivaco* deemed trust provisions in the *Pension Benefits Act*, R.S.O. 1990, c. P.8 were again considered. Proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*], had run their course, and an application under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*] was pending. The court found that there was no requirement to segregate the amounts of the deemed trust under the *CCAA*, and that there was no gap between the *CCAA* and the *BIA* that would allow

an order to pay out the deemed trust amounts. The Court of Appeal noted that provinces cannot directly alter priorities under the *BIA*, and in *Ivaco* refused to allow them to do so indirectly.

44 While I agree with Local 242G that, according to *Sperry*, priorities as between competing security interests are determined when they come into conflict, I do not agree that priorities are "crystallized" or frozen on the date a Receiver is appointed such that the subsequent occurrence of a bankruptcy is not relevant to the court's analysis. It seems to me that it was key to the conclusion of Killeen J. in *Melnitzer* that the receivership order, by its terms, "effectively prevented 808756, or any other creditor, from improving its priority position thereafter" (*supra*, at para. 189). The receivership order made by Lax J. January 3, 2007 does not contain terms and provisions of a similar nature. Indeed, paragraph 5 of the order, as the applicants' counsel points out, permits the filing by creditors of any registration to preserve or protect a security interest and the registration of a claim for lien and the order specifically contemplates that any party may apply to amend or vary it.

45 I agree with the applicant and Sun Beta that the facts on this motion are distinct from those considered by the court in *Usarco*. In *Usarco* the bankruptcy application had been effectively abandoned, and it was arguable that the funds were actually segregated and held in trust by the Receiver. As the court in *Ivaco* observed in distinguishing the case, "in *Usarco* the petitioning creditor was not proceeding with its bankruptcy petition because its principal had died, and no other creditor took steps to advance the petition. Thus, unlike in this case, in *Usarco* it was unclear whether bankruptcy proceedings would ever take place" (*Ivaco, supra*, at para. 67). For similar reasons, I find the facts on this motion different from those considered in *Usarco.* A bankruptcy application in respect of Beta Brands was signed by the applicant on February 20, 2007, and a further petition was issued just prior to the hearing of this motion. Although the first application was not proceeded with it cannot be said that it has been "effectively abandoned" and, indeed, a further petition was issued.

46 The *Ivaco* case established that the court should not exercise its discretion to order distribution of pension amounts where a bankruptcy application is pending and the effect of bankruptcy will be to subordinate the claim for pension amounts to claims of the secured creditors. In *Ivaco*, the court noted at paragraph 64 that "where a creditor seeks to petition a debtor company into bankruptcy at the end of CCAA proceedings, any claim under a provincial deemed trust must be dealt with in bankruptcy proceedings [...]. Were it otherwise, creditors might be tempted to forgo efforts to restructure a debtor company and instead put the company immediately into bankruptcy. That would not be a desirable result."

47 The facts on this motion are in line with those before the court in *Ivaco* where the creditors were actively seeking to petition the debtor company into bankruptcy. The principles established in *Ivaco* support a determination that this court should not exercise its discretion to order distribution of vacation pay where a bankruptcy application is to be heard and the effect of the bankruptcy will be to subordinate the claim for vacation pay. As a result this motion by Local 242G must be

dismissed.

48 The following words of the Court of Appeal at para. 69 of *Ivaco* with respect to pension claimants are equally applicable to the claims of Local 242G's members in relation to their vacation pay:

> Because the federal legislative regime under the CCAA and the BIA determines the claims of creditors of an insolvent company, if the rights of pension claimants are to be given priority, Parliament, not the courts, must do so.

Indeed as noted in *Ivaco* at para. 69, "Parliament has at least signalled its intentions to do so" by passage of the *Wage Earner Protection Program Act*, S.C. 2005, c. 47, which, as the court noted, had not then been proclaimed in force. As of this date, this legislation still has not been proclaimed. This legislation, which defines "wages" to include vacation pay, would establish a program to enable individuals to collect "wages" from employers who are bankrupt or subject to a receivership. Regrettably for the members of Local 242G, without such legislation that would give their claim priority, the declaration they seek cannot be granted.

L.C. LEITCH J.

* * * * *

Corrigendum
Released: November 13, 2007

Counsel information corrected to "Steven Weisz, for Sun Beta, LLC".

N° / 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 QUÉBEC IRON MINING ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC.,

Petitioners

- and -

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, BLOOM LAKE RAILWAY COMPANY LIMITED, WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED

Mises-en-cause

- and -

FTI CONSULTING CANADA INC.

Monitor

- and -

MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL & NEIL JOHNSON

REPRESENTATIVES-Mis-en-cause

- and -
UNITED STEELWORKERS, LOCAL 6254, UNITED STEELWORKERS, LOCAL 6285
- and -
MORNEAU SHEPELL
- and -
HER MAJESTY IN RIGHT OF NEWFOUNDLAND & LABRADOR, AS REPRESENTED BY THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS
- and -
THE ATTORNEY GENERAL OF CANADA, ACTING ON BEHALF OF THE OFFICE OF SUPERINTENDENT OF FINANCIAL INSTITUTIONS
- and –
REGIE DES RENTES DU QUEBEC

Mis-en-cause

ORIGINAL

BOOK OF AUTHORITIES in support of

ARGUMENTATION OUTLINE OF THE REPRESENTATIVES
of the Salaried Employees and Retirees in response to the Monitor's Amended Motion for Directions with respect to Pension Claims

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