TAB 5

Superior Court of Justice, Divisional Court

Citation: Regie des rentes du Quebec v. Commission des regimes de retraite de l'Ontario
Court File No.: 98-DV-183
Date: 2000-07-26

Charbonneau, Sedgwick and Aitken JJ.

Counsel:
Charles Gibson and *Thomas Wallis,* for applicant, la Régie des rentes du Québec.
Alex Turko and *Stan Sokol,* for respondent, la Commission des régimes de retraite de l'Ontario.
Lawrence E. Ritchie and *Christopher P. Naudie,* for intervener, McColl-Frontenac Petroleum Inc.
Anne Sheppard, for intervener, Léo Deschamps.

The judgment of the court was delivered by

CHARBONNEAU J.:—

THE NATURE OF THIS PROCEEDING

[1] In March 1997, the intervener McColl-Frontenac Petroleum Inc. ("McColl-Frontenac") made an application to the Respondent Pension Commission of Ontario ("Commission") under the *Pension Benefits Act,* R.S.O. 1990, c. P.8 (the "Ontario Act"), to obtain the Commission's consent to the withdrawal of the surplus remaining in the Revised Pension Plan (the "Plan") of Leco Inc., a predecessor corporation to McColl-Frontenac. In its decision rendered on June 26, 1997, the Commission approved the payment of the surplus to McColl-Frontenac in accordance with the procedural framework of the Ontario Act and pursuant to its powers as the designated "major authority" under the terms of the Memorandum of Reciprocal Agreement entered into by the Commission, the Applicant and other provincial pension authorities in 1968 (the "Reciprocal Agreement").

[2] The Applicant, the Régie des rentes du Québec (the "Régie"), brings this application for judicial review of the Commission's decision. The Régie says that the Commission ought to have applied Québec pension legislation to Québec members of the Plan and that its decision should be quashed and the matter remitted to the Commission for reconsideration.

GENERAL BACKGROUND TO THE APPLICATION

[3] In March 1997, McColl-Frontenac, as plan sponsor, filed its surplus application with the Commission to obtain its consent to the withdrawal of the surplus. At all material times, the Plan included members in Ontario and Québec, but the majority of members reported to work in Ontario. Accordingly, under the terms of the Reciprocal Agreement, the Plan was registered solely with the Commission in Ontario and the Commission acted as the "major authority" in relation to the Plan.

[4] The Reciprocal Agreement exists to give effect to the mutual delegation of authority between provincial pension authorities where a pension plan covers employees in more than one province. It includes the following provisions:

> AND WHEREAS the said signatories have deemed it desirable that statutory functions and powers in respect of any one pension plan be exercised by one signatory only, acting both on its own behalf and on behalf of any other signatory having statutory functions and powers in respect of such plan;
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> 1.
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> 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);
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> 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.
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> 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.
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> 3. Any authority may except itself from the operation of section 2 in respect of a specific plan by giving written notice to that effect to the major authority (or, if the major authority is the excepting authority, then to all the minor authorities) for such plan; and in such event the excepting authority shall be deemed not to be a participating authority in respect of the such plan.
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> 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.
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> 9. Where a major authority is rulable to exercise a particular power of enforcement available to one of the minor authorities, it shall so advise that minor authority.
>
> 10. Participation by any authority in the foregoing Administrative Arrangement commences upon the date it becomes a signatory to this Memorandum ...

[5] The Régie is a statutory body established under the laws of Québec, and exercises responsibilities for the administration and regulation of pension plans within the Province of Québec. The Régie exercises its functions and powers pursuant to the *Supplemental Pension Plans Act,* R.S.Q., c. R-15.1 (the "Québec Act"). At all material times, since 1981, when the plan's registration was transferred from Québec to Ontario, up to the Commission's decision,

the Commission has acted as the major authority and the Régie has acted as the minor authority in relation to the Plan under the Reciprocal Agreement.

[6] Pursuant to its delegated powers as major authority, at its meeting on June 26, 1997, the Commission approved the payment of the surplus to McColl-Frontenac. It did so in accordance with the provisions of the Ontario Act.

[7] The Plan specifically provided as follows:

> 13.6. The Plan shall be construed and administered in accordance with the laws of the Province of Québec, the Province of Ontario and the rules of the Department of National Revenue.
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> • • • • •
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> 14.2 ... in the event of the termination of the Plan, the Employer shall not be obligated to make any further contributions to the Plan and, if there be any excess to the Plan after the benefits accrued under the Plan have been purchased from an Insurance Company, such excess amount shall be paid to the Employer. It is provided, however, that the provisions of any *Pension Benefits Act* to which the Plan is subject will be applied on termination of the Plan.

[8] The Plan was terminated and wound up as of June 16, 1987. The wind-up report for the Plan indicated the existence of the surplus. On July 22, 1988, the Superintendent of Pensions of Ontario approved the payment of basic benefits to employees in accordance with the wind-up report. The Superintendent communicated to McColl-Frontenac that it might apply to the Commission for withdrawal of the surplus under the terms of the Ontario Act.

[9] The wind-up was effected under the terms of the Ontario Act. From 1987 until the Commission's decision on June 26, 1997, McColl-Frontenac had no dealings or communications with the Régie in relation to the administration and termination of the Plan.

[10] In June 1993, McColl-Frontenac advised the Superintendent that it was proceeding with an application to withdraw the surplus. Pursuant to the procedures established under the Ontario Act, McColl-Frontenac was required to pursue two separate and independent steps:

> (1) An application to the Commission to obtain its consent to the withdrawal of the surplus; and
>
> (2) An application to the Ontario Court (General Division) (now the Superior Court of Justice) to obtain its authorization to the withdrawal of the surplus.

[11] On January 8, 1997, McColl-Frontenac filed a formal notice of the surplus application under step (1) with the Commission. In accordance with the requirements of the Ontario Act, a copy of the Notice was forwarded to members and former members of the Plan in Québec (including Mr. Deschamps). As well, a newspaper notice was published in the Québec press. The Notice disclosed that McColl-Frontenac would be making the surplus application to the

Commission, and indicated that interested persons could make written submissions within 44 days to the Commission at an indicated address.

[12] In February 1997, a number of members (including Mr. Deschamps) wrote the Commission and objected to the distribution of the surplus to McColl-Frontenac. At that time, none of these members disputed the Commission's jurisdiction to apply the Ontario Act procedures to the surplus application or raised the issue of the arbitration procedure provided by the Québec Act for withdrawal of surplus applications.

[13] In March 1997, McColl-Frontenac filed its surplus application. The surplus application specifically disclosed that there were former members of the Plan located in Québec.

[14] On April 23, 1997, Mr. Taillon, an actuarial consultant for Le Syndicat national des employes de Leco Inc. (CSN) ("Union") wrote the Commission on behalf of the Québec members of the Plan and identified a number of objections to the proposed distribution of the surplus to McColl-Frontenac. One of these objections was that, as to the Québec members, the surplus application ought to be determined on the basis of the arbitration procedure under the Québec Act. Mr. Taillon states:

> 1. — The Union represents Québec members and the issue must be settled on the basis of the provisions of the Québec *Supplemental Pension Plans Act* (the SPPA). This law specifically provides that a member may request arbitration if no agreement is reached on surplus distribution. *Please note that it is effectively the intention of the Union to request arbitration to decide who will be entitled to the surplus and what share of that surplus will revert to the* Québec *members* (*see sections 230.1 and following of the SPPA*). [Translation.]

[15] The Régie received a copy of Mr. Taillon's letter from him. Its staff had a number of prior telephone discussions with Mr. Taillon regarding the surplus application in March and April 1997.

[16] The Registrar of the Commission responded to Mr. Taillon's letter on April 24, 1997, stating that the Commission would consider Mr. Taillon's representations, and invited him to submit further documentation. The Registrar did not indicate whether the Commission would apply the arbitration procedure under the Québec Act to the surplus application.

[17] On June 10, 1997, the Registrar of the Commission wrote Messrs. Taillon and Deschamps separately to advise them of the upcoming hearing, and that they were both entitled to make written submissions with respect to the surplus application, and could attend the Commission's meeting on June 26, 1997. These separate letters specifically enclosed a copy of the report prepared by the Superintendent's Staff in relation to the surplus application, dated June 6, 1997. The report expressly noted that Mr. Taillon had previously objected to the surplus application on the ground that "the provisions regarding arbitration under the [Québec Act] were applicable".

[18] On June 26, 1997, the Commission convened its scheduled meeting to consider the surplus application. At the meeting, the Commission rendered its decision, consenting to the

payment of the surplus to McColl-Frontenac.

[19] On that date, Mr. Deschamps wrote the solicitors for McColl-Frontenac to request arbitration under the Québec Act. The letter was copied to the Commission, but it was not received by the Commission until 1:35 RM. on June 27, 1997. The solicitors for McColl-Frontenac only replied to Mr. Deschamps on October 17, 1997.

[20] On July 9, 1997, the Commission transmitted its decision in writing to McColl-Frontenac indicating that it had consented under the Ontario Act to the withdrawal of the surplus by McColl-Frontenac. The letter was copied to Mr. Taillon, Mr. Deschamps and other members of the Plan but not to the Régie, which up to that point had not communicated with the Commission about the surplus application. The Commission did not give written reasons for its decision.

[21] On July 14, 1997, the Régie communicated directly with the Commission by telephone for the first time about this surplus application. The Commission advised the Régie that it had consented to the withdrawal of the surplus over the opposition of the Québec members. The representative of the Régie reported these communications to her supervisor.

[22] On July 17, 1997, the Régie wrote Mr. Deschamps, indicating that it had already been informed of the decision by the Commission, and that the Régie was aware that the members contemplated an appeal. The next day, the Régie wrote the Commission requesting additional information with respect to the Plan and a copy of its decision. The Commission never replied to this letter although the letter raised questions about the applicability to Québec members of the Québec Act and its arbitration procedure to McColl-Frontenac's surplus application

[23] In October 1997, Mr. Deschamps wrote the Régie and requested the intervention of the Régie on the ground that the employer had refused to apply the arbitration procedure. In response to this request, on November 12, 1997, the Régie wrote the Commission. The Régie advised the Commission that it objected to the decision on the ground that the arbitration procedure should have been applied. On or about November 26, 1997, the Régie rendered a decision whereby it purported under section 3 to except itself from the operation of the Reciprocal Agreement in relation to the Plan.

[24] On December 2nd, 1997, the Régie issued a further order rescinding the consent to the distribution of the surplus granted by the Commission earlier as it affected the Québec members of the plan. The Régie wrote to the solicitors for McColl-Frontenac requiring that the surplus application be submitted to arbitration as required by the Québec Act. On December 22nd, McColl-Frontenac brought an application for judicial review in Québec Superior Court challenging this decision by the Régie. This application was dismissed by Madam Justice Julien on November 26, 1998. [See *McColl-Frontenac Petroleum Inc. v.* Québec (Régie *des rentes*) (1998), 20 C.C.P.B. 18.] That dismissal is presently under appeal to the Québec Court of Appeal.

[25] The Ontario Act allows for an appeal to this court within 30 days of the Commission's decision. An appeal was begun in March 1998 in Ontario by Mr. Deschamps and the Union for judicial review of the Commission's decision. This appeal was abandoned in August 1998.

McColl-Frontenac began an application in the Superior Court of Justice for Ontario on November 19, 1997, for the court's authorization to the withdrawal of the surplus in accordance with the requirements of the Ontario Act. On February 10, 1998, the Régie commenced this application in the Divisional Court for judicial review of the Commission's decision dated June 27, 1997. At the request of the parties, McColl-Frontenac's application to the Superior Court of Justice, dated November 19, 1997, was adjourned *sine die* pending the decision of this court on the present application.

THE POSITION OF THE RÉGIE

[26] The position of the Régie may be summarized as follows.

[27] The Ontario Act can only apply to employees in Ontario. The provincial legislature cannot extend its effect beyond its own borders. Only the Québec legislature could pass a law that the legislative regime of another province would apply to employees in Québec. In the particular circumstances of this case, Québec has not done so.

[28] The Reciprocal Agreement only has the effect of delegating the administrative functions and powers of the Régie to the Commission. When deciding the merits of the surplus application, the Commission had to apply Québec law to that portion of the application which affected Québec employees. The standard of review in such a case should be correctness. As to Québec members, the Québec Act only provides for referral of such application to arbitration. The Commission could not make a decision which the Régie itself was not empowered to render under Québec law. Therefore, the decision is clearly incorrect.

[29] Even if the standard of review is patent unreasonableness, by not considering and applying Québec law, the Commission's decision, insofar as it affected the Québec members of the Plan, was patently unreasonable.

[30] Further, the Commission breached the Reciprocal Agreement by not properly informing the Régie of its actions, contrary to section 8.

THE POSITION OF MR. DESCHAMPS

[31] In addition to supporting the position of the Régie, Mr. Deschamps submits that the Commission's decision is patently unreasonable because the Commission failed to transmit written reasons for its decision which it is strictly required to do by section 79(5) of the Ontario Act.

THE POSITION OF MCCOLL-FRONTENAC

[32] McColl-Frontenac first submitted that the application should be dismissed on the following preliminary grounds:

1. The Régie has no statutory or constitutional authority to bring this application;

2. The Régie has no private or public standing to seek judicial review of the decision;

3. The Régie failed to exhaust its alternative remedies prior to seeking judicial review of the decision;

4. The Régie has acted with unreasonable delay in seeking judicial review;

5. The Régie is effectively seeking to circumvent the expired appeal period; and

6. The Régie and Mr. Deschamps have, by their conduct, waived their rights to object to the Commission's procedure.

[33] McColl-Frontenac further submits that the application should be dismissed on its merits on the following grounds:

1. The Commission is a specialized administrative tribunal, and its decisions should be subject to a high level of curial deference. This decision should only be subject to judicial intervention if it is patently unreasonable, which it is not.

2. There is no evidence that the Commission failed to consider the potential application of Québec law.

3. The Commission's decision was reasonable. The decision was consistent with the established understanding and practice within the pension industry, recognized and fostered by provincial pension authorities under the Reciprocal Agreement.

4. In any event, the Commission's decision was correct. The signatories to the Reciprocal Agreement delegated to the major authority by section 2, their "statutory functions and powers", to apply a single uniform procedural framework for the registration, regulation and termination of an inter-provincial pension plan. In this instance, the Commission properly exercised its delegated powers as major authority and determined the surplus application in accordance with the procedural framework of the Ontario Act.

5. In any event, the Commission's decision was correct as a matter of Québec law, since the Québec arbitration procedure did not apply in this particular case because:

(a) The Régie and the intervener Leo Deschamps failed to deliver a formal application for arbitration prior to the decision;

(b) The legal rules governing the determination and allocation of surplus assets of a terminated pension plan constitute "solvency standards" which are subject to a specific exemption under the Québec Act;

(c) The arbitration procedure under the Québec Act can only be applied to surplus assets of a plan that, at termination, covers employees located exclusively in Québec. Under Québec law, a pension surplus cannot be legally apportioned after termination

into discrete amounts of surplus attributable to employees in different provinces.

THE COMMISSION'S POSITION

[34] The Commission takes no formal position on the merits of the application by the Régie nor did it file any additional evidence or material. However, counsel did make the following submissions:

1. The Commission proceeded conscientiously and in good faith on what it understood was the proper practice at that time;

2. Section 79(5) of the Ontario Act should be interpreted to mean that written reasons are only transmitted when written reasons are actually given. Reasons are as a matter of practice only given when the nature of the procedure requires them. There is no positive duty to give reasons in every case;

3. Section 8 of the Reciprocal Agreement does not set out any specific manner how or when a major authority is to "inform" a minor authority as to an exercise of the functions and powers of the minor authority. Section 8 is, however, expressed in the past tense so that it should be interpreted to mean after the function or power has been exercised.

4. In previous cases where the surplus attributable to Québec employees was severed by the Commission and dealt with by arbitration in Québec, for example in The Great-West Life Assurance Company Canadian Agents Pension Plan, a decision made by the Commission on March 26, 1998 (Applicant's Record Vol. I, Tab 4(K), pp. 153-4), the Commission was not asked to adjudicate this issue. Rather the matter proceeded in that fashion because of previous agreement or accommodation between the parties to the plan.

5. A new procedural framework for surplus applications involving employees in more than one province was put in place by the Commission only after this case, at the request of the Régie.

6. The standard of review should be the one established by the Ontario Court of Appeal in *GenCorp Canada Inc.* v. *Ontario* (*Superintendent, Pensions*) (1998), 158 D.L.R. (4th) 497, 503, that the reviewing court will only intervene if the Commission's decision is not reasonable *simpliciter*.

ANALYSIS

THE PRELIMINARY OBJECTIONS

1. Absence of statutory or constitutional authority

[35] Mr. Ritchie correctly points out that a provincial legislature has no constitutional jurisdiction to promulgate legislation intended to operate beyond the territorial limits of the

province. As an extension of this constitutional principle, no provincial court or administrative tribunal established by provincial legislation may operate or extend its process or exercise its statutory functions or powers beyond the territorial limits of the province.

[36] In support of the above principles McColl-Frontenac relies on the cases of *McGuire v. McGuire and Desordi,* [1953] O.R. 328, [1953] 2 D.L.R. 394 (C.A.), and *Ewachniuk* v. *Law Society of British Columbia* (1998), 156 D.L.R. (4th) 1 (B.C.C.A.). In both cases the provincial tribunal was attempting to exercise its functions and powers beyond the provincial territory for which it was created. The question becomes whether in bringing this application the Régie is exercising its regulatory functions and powers?

[37] The functions and powers of the Régie are to regulate pension plans covering Québec employees. By virtue of section 249 of the Québec Act, the Régie may enter into agreements with another provincial pension agency to, among other things, delegate its powers to that agency. When it brings an application in Ontario to have the Commission comply with the terms of the agreement the Régie is not carrying on its regulatory functions. At no time is the jurisdiction of the Commission to hear McColl-Frontenac's application being challenged. The Régie is not trying to substitute itself for the Commission in this matter. In fact it is simply asking that the matter be referred back to the Commission so that the Commission may deal with it in accordance with the Reciprocal Agreement. The Régie is attempting to enforce the terms of the Agreement. Such an action can only be brought against the Commission in Ontario. The right of the Régie to take such action must be necessarily implied from the Agreement itself, and the Commission must be deemed to have accepted this right when it entered into the Agreement.

[38] McColl-Frontenac argues that in any event the Régie has not been given the specific statutory power to bring this action and that without such express authority it lacks legal capacity to do so. McColl-Frontenac relies on the decision of the Supreme Court of Canada in *Director of Investigation and Research* v. *Newfoundland Telephone Co.,* [1987] 2 S.C.R. 466, 45 D.L.R. (4th) 570 *sub nom. Newfoundland Telephone Co. Ltd. v. TAS Communications Systems Ltd.* That case makes it clear that while statutory authority to be a party to legal proceedings is required, that authority may be either expressed or implied. The Québec Act gives the Régie all the powers and capacities of a natural person. Coupled with that it gives the Régie the power to enter into the Reciprocal Agreement. It is a reasonable interpretation of the statute to conclude that the Québec Act at the very least grants the Régie the implied authority to bring this application in order to enforce the Agreement.

2. *Absence of private or public standing*

[39] McColl-Frontenac contends that the Régie is not an aggrieved person nor has it suffered an injury to an identifiable personal interest. As a result thereof it does not have private standing to bring this application. McColl-Frontenac further submits that the Régie does not have public standing because it does not have a genuine interest in the Commission's proceeding and there are other reasonable and effective means by which this particular issue could have been brought before the courts.

[40] As a party to the Reciprocal Agreement, the Régie alleges that the Commission

breached that Agreement. If the Régie were right in its position it would certainly qualify as an aggrieved party. The question raised is certainly a serious and justiciable issue which can only be addressed in the context of an application for judicial review. The Régie was not a party to the surplus application and therefore could not appeal from the Commission's decision. The only way of correcting this particular decision of the Commission, if need be, is by bringing the present application for judicial review. Moreover, counsel for all parties have submitted that the present application is of utmost importance to the pension industry. We are all of the view that the Régie has public standing to bring this application.

3. Alternative remedies, unreasonable delay and waiver

[41] We are all of the view that the evidence does not warrant a dismissal of this application on any of these grounds.

[42] The Régie was aware in general terms that a surplus application was being made and that the plan in question included Québec employees. Moreover it knew as a result of Mr. Taillon's letter, dated April 24, 1997, that the Québec members were asking that the Québec Act apply and that the matter be referred to arbitration. Under the terms of the Reciprocal Agreement, the Régie had delegated to the Commission its functions and powers to deal with this application.

[43] McColl-Frontenac argues that on the basis of the facts of this case, the Régie ought to have excepted itself under paragraph 3 of the Reciprocal Agreement in respect of this particular Plan, before the Commission made its decision, This is not a reasonable position unless it is established that the Régie could have known in advance what the Commission's decision would be. This is not an inference that can be made from the evidence before the court. The Commission did not inform the Régie in advance how it intended to rule on this issue. The Commission did not provide any information about its decision to the Régie until an officer of the Régie called the Commission on July 14th, some 18 days after the hearing.

[44] The notes of that conversation and the subsequent letter of July 18th clearly establishes that there was, to say the least, a breakdown in communication between the two agencies. The two officials would appear to be talking about two different things.

[45] Furthermore, the Commission never replied to the letter of the Régie dated July 18, 1997, although the Régie was asking for relevant information on the very issue before this court. Subsequently, the Régie took steps to except itself under the Reciprocal Agreement and rescinded the order of the Commission. It was not unreasonable for the Régie to then attempt to solicit the co-operation of McColl-Frontenac in an effort to settle the matter without recourse to the courts. In the circumstances there is neither unreasonable delay nor waiver of rights by the Régie.

THE STANDARD OF REVIEW

[46] The Ontario Court of Appeal has recently held that the Commission is an expert and specialized tribunal and that its decisions are generally subject to a "considerable degree of curial deference." A decision by the Commission within its specialized mandate is subject to

review according to a standard of "reasonableness *simpliciter*". Even more recently, the Divisional Court has held that procedural rulings of the Commission in respect of a surplus application are within the tribunal's "particular expertise" and are therefore subject to "considerable deference" on review.

> *GenCorp Canada Inc.* v. *Ontario* (*Superintendent, Pensions*) (1998), 158 D.L.R. (4th) 497 (Ont. C.A.), at pp. 502-505 *C.U.P.E. Local 185* v. *Etobicoke* (*City*) (1998), 17 C.C.P.B. 278 (Ont. Div. Ct.), at pp. 279-80

[47] There is no reason to depart from the application of this standard of review in this case. The Régie does not challenge the jurisdiction of the Commission to deal with the surplus application. Notwithstanding Mr. Ritchie's able argument to the contrary, the evidence overwhelmingly establishes that the Commission made a deliberate choice to apply the Ontario Act to all members of the Plan including Québec members, to the complete exclusion of the procedure provided under the Québec Act. The real issue in this case is whether the Commission's interpretation of the Reciprocal Agreement and hence its decision to apply the provisions of the Ontario Act exclusively was reasonable in all the circumstances.

WAS THE COMMISSION'S DECISION REASONABLE?

[48] McColl-Frontenac makes three submissions on this point.

> 1. The decision is reasonable because it was consistent with the established understanding and practice within the pension industry, recognized and fostered by provincial pension authorities.
>
> 2. The decision is not only reasonable but it is correct. The purpose of the Agreement was to facilitate and harmonize the regulation of inter-provincial pension plans. In order to achieve this aim file parties to the Agreement delegated to the major authority the power to apply a single uniform procedural framework to all aspects of pension regulation including surplus application. The Commission's decision is therefore in accordance with the fundamental purpose and intent of the Reciprocal Agreement.
>
> 3. The decision was not only reasonable but correct since the Québec arbitration procedure did not apply even as a matter of Québec law.

[49] Dealing with the last point first, the submission that a formal request was not made and, therefore, that the arbitration procedure was not triggered is not supported by the evidence. Mr. Taillon's letter clearly indicates that arbitration was being requested. Moreover, under Québec law the evidence does not establish that a specific formal application is required to trigger the arbitration procedure. In any event, in the absence of an agreement between the employer and a requisite number of plan members, arbitration appears to have been the only available procedure under Québec law.

[50] Further, McColl-Frontenac contends the Québec Act specifically exempts the surplus application from arbitration by virtue of the specific exemption for "solvency standards". A reasonable interpretation of the words "solvency standards" cannot be said to include surplus

applications. Regulation of solvency standards mainly arises while a pension plan is ongoing. Surplus applications arise only after a plan has been terminated and wound up.

[51] Finally, McColl-Frontenac submitted expert evidence to the effect that under Québec law a pension surplus cannot be legally apportioned after termination of a plan. That evidence is far from convincing. The evidence of the Régie to the contrary is much more convincing. In addition, this court cannot overlook the decision of Madam Justice Julien who clearly indicates she sees no difficulty with such an apportionment. The evidence reveals that other surpluses have been apportioned after termination, for example The Great-West Life pension plan surplus. See item 4 in paragraph [34] above.

[52] In order to properly deal with the other two grounds raised by McColl-Frontenac, it is necessary to refer more extensively to the sections of the Québec Act and the Ontario Act which grant power to their respective pension authorities to enter into reciprocal agreements. I will also refer to other sections of the Québec Act which specifically exempt certain aspects of interprovincial plans from Québec law and also relevant interpretation bulletins issued by both pension authorities.

[53] Section 249 of the Québec Act states:

> 249. The Régie may enter into agreements according to law with any government, government department, international body or agency of a government or international body for the purposes of this Act.
>
> The *agreements may,* in particular,
>
> (1) where a pension plan is governed both by this Act and by an Act of a legislative body other than the Parliament of Québec, *determine on what conditions and to what extent each Act applies to the plan in respect of the employees referred to in section 1 who are parties to the plan* and prescribe any other rule applicable to the plan;
>
> (2) *determine on what conditions and to what extent this Act applies to benefits or assets transferred from a pension plan governed by this Act to a pension plan governed by an Act of a legislative body other than the Parliament of* Québec,
>
> (3) *provide for the delegation of powers* that this Act confers on the Régie or that an Act of a legislative body other than the Parliament of Québec confers *on a similar* agency.
>
> Every agreement bearing on a matter referred to in the second paragraph must be tabled in the National Assembly within 15 days after the date on which it is entered into if the Assembly is in session or, if not, within 15 days after the opening of the next session or resumption. *The agreement acquires force of law from the time it is tabled in the National Assembly.* [Emphasis added.]

[54] Section 95 of the Ontario Act states:

> 95(1) The Commission may, subject to the approval of the Lieutenant Governor in

Council,

(*a*) *enter into agreements* with the authorized representatives of another province or the Government of Canada to provide *for the reciprocal application and enforcement of pension benefits legislation,* the reciprocal registration, audit and inspection of pension plans and for the inspection of pension plans and for the establishment of a Canadian association of pension supervisory authorities;

(*b*) authorize a Canadian association of pension supervisory authorities to carry out such duties on behalf of the Commission as the Commission may require; and

(*c*) *delegate to a pension supervisory authority or the government of a designated province such functions and powers under this Act as the Commission may determine* and the Commission may accept similar delegations of functions and powers from a pension supervisory authority or the government of a designated province.

(2) Where a pension plan required to be registered in Ontario is registered in a designated jurisdiction, *the Commission by order may limit the application of this Act and the regulations to the pension plan and authorize the application of the law of the designated jurisdiction in respect of the pension plan. 1987, c. 35, s. 96.* [Emphasis added.]

[55] The statutory provisions of the Québec Act and the Ontario Act are broad enough to authorize the Régie and the Commission to enter into an express agreement as to when one or the other, as major authority, will recognize and apply the law of the minor authority. They did not do so in the Reciprocal Agreement. According to the record before the Court, they did not do so prior to the Commission's decision on June 26, 1997. The reasonableness of the Commission's decision on that date, therefore, does not depend on the provisions of the Reciprocal Agreement.

[56] What is also of importance is that sections 21, 53 and 92 of the regulations enacted pursuant to the Québec Act specifically exempts inter-provincial plans from the provisions of the Québec Act dealing with registration, inspection, solvency requirements and investment rules. [See *General Regulation respecting Supplemental Pension Plans,* R.R.Q. 1981, c. R-17, r. 1.] It is reasonable to conclude that only the items specifically mentioned were intended to be exempted.

[57] In a publication providing annotations and comments on the Québec Act, August 1996, the Régie had this to say about reciprocal agreements:

> Pursuant to these agreements it is provided that, in Québec, the law which applies to the pension plan will be applied to the individual rights of workers (*for example, the individual rights of Ontario workers are governed by the law of Ontario*) *while the "collective" aspects of the plan such as registration, inspection, solvency and investments which are subject to sections 21, 53 and 92 of the General Regulation respecting Supplemental Pension Plans* (*these sections are still in effect pursuant to Section 69 of the Regulation*) *— are governed by the law of the place where the greatest number of members work.* To

give effect to these arrangements, *the other provinces who are parties thereto* (as well as the Northwest Territories and Yukon Territory) *have adopted rules similar to those in effect in Québec.* It is therefore incumbent upon the authority responsible for the supervision of pension plans in each province *to apply the appropriate law to each of the members ...* [Translation; emphasis added.]

[58] In its June 1992 information bulletin, the Commission had this to say about reciprocal agreements:

> Currently, the pension benefits legislation of a particular province or territory of Canada applies to members employed in that province or territory. Plans which have employees in various provinces *must therefore apply the laws of more than one jurisdiction to the same plan. The existing Reciprocal Agreement among pension regulators, signed in 1968, requires pension regulators to administer the pension laws of other jurisdictions in relation to those plan members employed in such other jurisdictions.*
>
> Sponsors of multi-jurisdictional plans face the administrative burden and added expense of applying a patchwork of differing (and sometimes contradictory) legislative requirements to various members of the same plan. As a result, *a practice has been established whereby the rules of the jurisdiction of a member's employment are applied to benefit entitlement issues, (e.g. vesting) but the jurisdiction of registration of the plan are applied to administrative issues (such as payment of fees, filing, disclosure, accounting and auditing, etc.).*
>
> The practice of distinguishing entitlement issues from administrative issues has helped to reduce the administrative burden on multi-jurisdictional plans. However, the informal agreement has proved to be inadequate in accounting for differing approaches to benefit and *surplus entitlement* taken by the various provinces. [Emphasis added.]

[59] McColl-Frontenac submits that there was a practice adhered to by both the Régie and the Commission which allowed the Commission to deal with the surplus application solely under the Ontario Act. First of all there is nothing in the interpretation bulletins to support this position. In fact the interpretation bulletin of the Commission is to the contrary since it raises the fact that "the informal agreement has proved to be inadequate in accounting for differing approaches to benefit and *surplus entitlement* taken by the various provinces". In other words, the administrative practice may work when the rules of both provinces are the same but not when they differ. In this particular case the rules differed substantially. In fact, the Régie did not have the power to decide surplus allocation. The Commission could not even rely on the powers delegated to it by the Régie.

[60] McColl-Frontenac placed reliance on an article published in February 1999 by Mr. Martin Rochette the expert who testified on behalf of the Régie on this application. In that article, Mr. Rochette indicates that a general understanding had developed in the industry over the last 30 years to the effect that certain aspects of the administration of a plan, including surplus distribution, would be dealt according to the law of the major authority. However, this statement is qualified by his further statements in the same article that (1) as the law stands "the major authority must apply the law of the minor authority" and (2) "the Régie and the

Commission have more or less endorsed" this practice. It is also noteworthy that in his affidavit and during his cross-examination, Mr. Rochette has steadfastly testified to the effect that the Régie never officially endorsed this practice.

[61] The decision of the Commission is not correct nor is it reasonable. We conclude that the Commission's decision was not reasonable as a result of the cumulative effect of the following:

1. In the absence of specific provisions stating otherwise, either in the reciprocal agreement or in the Québec Act, the Commission knew or ought to have known as a matter of constitutional law that the law of Québec applied to McColl-Frontenac's surplus application in so far as it affected the Québec members.

2. The Plan itself, which was part of the material filed before the Commission, provides that it will be construed and administered in accordance with the laws of Québec and Ontario. It is a reasonable inference from this provision that the rights of Québec members of the Plan would be governed by Québec law.

3. The Reciprocal Agreement clearly does not expressly provide to what extent each Act applies, as could have been provided for in accordance with subsection 249(1) of the Québec Act and subsection 95(1)(*a*) of the Ontario Act.

4. The Commission's own information bulletin of June 1992 calls in question the "administrative practice" of applying only Ontario law as it is said to relate to surplus entitlement, when the laws of the provinces differ.

5. The Commission was advised several months before its decision that the Québec members were requesting that the Québec Act, including the arbitration procedure, apply to the surplus application. Since no written reasons were given by the Commission for its decision, there is no way for the court to know whether this request was considered or was considered and denied.

6. The Commission did not give written reasons for its decision. Courts have said in the past that the existence of" clear and articulate reasons" militates in favour of a finding that a decision is reasonable (see *Gencorp Canada, supra,* at p. 505). In this case, the Commission failed to give any reasons whatsoever for its decision. This fact clearly militates against the reasonableness of the decision. This is so even if the words of section 79(5) may not justify imposing a positive duty on the Commission to provide reasons in every case.

7. In view of the express choice of law provisions of the Plan and the absence of any statutory provision exempting McColl-Frontenac's surplus application from Québec law, the Commission's decision was unreasonable and contrary to law.

CONCLUSION

[62] Accordingly, for all of the above reasons, we allow the application, quash the decision of the Commission of June 26th, 1997, insofar as it affects the Québec members of the Plan and remit the matter to the Commission for reconsideration. We also direct the Commission to provide written reasons for any further decision in this matter.

[63] Order accordingly.

[64] Application granted.