TAB 1

2007 CarswellOnt 7891

Ed Mirvish Enterprises Ltd. v. Stinson Hospitality Inc.

IN THE MATTER OF THE BANKRUPTCY OF STINSON HOSPITALITY INC., DOMINION CLUB OF CANADA CORPORATION, THE SUITES AT 1 KING WEST INC. and 2076564 ONTARIO INC. (Appellants)

AND IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENTS ACT, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF STINSON HOSPITALITY INC. and DOMINION CLUB OF CANADA CORPORATION

ED MIRVISH ENTERPRISES LIMITED and 1 KING WEST INC. (Applicants / Respondents) and STINSON HOSPITALITY INC. and DOMINION CLUB OF CANADA CORPORATION and HARRY STINSON (Respondents / Appellants)

Ontario Court of Appeal

M. Moldaver, J. Simmons, E.E. Gillese JJ.A.

Heard: December 4, 2007
Judgment: December 7, 2007
Docket: CA C47773

Proceedings: affirming *Ed Mirvish Enterprises Ltd. v. Stinson Hospitality Inc.* (2007), 2007 CarswellOnt 6045, 36 C.B.R. (5th) 149 (Ont. S.C.J.)

Counsel: Thomas McRae, Arthur O. Jacques for Appellants / Respondents, Stinson Hospitality Inc., Dominion Club of Canada Corporation, Harry Stinson

Joseph Latham for court appointed monitor of Stinson Hospitality Inc., Dominion Club of Canada Corporation, Ira Simth Trustee & Receiver Inc.

Patricia M. Conway, Jeffrey C. Carhart for Respondent / Applicants, Ed Mirvish Enterprises Limited, 1 King West Inc.

Mark H. Arnold for Toronto Standard Condominium Corporation No. 1703, Johan Demeester

Christopher E. Reed for Trustee

Subject: Insolvency

Bankruptcy and insolvency --- Assignments in bankruptcy -- Types of assignors -- Corporations -- Power of officers to make assignment

Director of four companies voluntarily assigned companies in receivership into bankruptcy -- Motion brought on urgent basis for annulment of voluntary assignments in bankruptcy was granted -- Assignments into bankruptcy of four companies were annulled -- Motion judge concluded that assignments into bankruptcy of companies should be annulled under s. 181 of Bankruptcy and Insolvency Act because leave to file assignments had not been obtained as required by motion judge's prior order appointing receiver -- Director and companies appealed -- Appeal dismissed -- There was no error in motion judge's conclusion -- Prior order referred to "Proceeding" as meaning "proceeding or enforcement process in any court or tribunal" -- Section 49 of Act provides that assignment is inoperative until it is filed with official receiver -- Section 12(2) of Act deems official receiver in each bankruptcy division to be officer of court -- Court file number was generated when assignments in bankruptcy were filed -- Given these factors, motion judge did not err in concluding that assignment in bankruptcy made by each of four companies constituted "Proceeding" within meaning of prior order -- No issue of paramountcy arose -- Questions of whether director retained residual power to pass resolution to voluntarily assign companies into bankruptcy or whether bankruptcy of companies would amount to abuse of process or be improper for other reasons were not determined by motion judge and were not subject of appeal.

Bankruptcy and insolvency --- Assignments in bankruptcy -- Procedure on assignment

Director of four companies voluntarily assigned companies in receivership into bankruptcy -- Motion brought on urgent basis for annulment of voluntary assignments in bankruptcy was granted -- Assignments into bankruptcy of four companies were annulled -- Motion judge concluded that assignments into bankruptcy of companies should be annulled under s. 181 of Bankruptcy and Insolvency Act because leave to file assignments had not been obtained as required by motion judge's prior order appointing receiver -- Director and companies appealed -- Appeal dismissed -- There was no error in motion judge's conclusion -- Prior order referred to "Proceeding" as meaning "proceeding or enforcement process in any court or tribunal" -- Section 49 of Act provides that assignment is inoperative until it is filed with official receiver -- Section 12(2) of Act deems official receiver in each bankruptcy division to be officer of court -- Court file number was generated when assignments in bankruptcy were filed -- Given these factors, motion judge did not err in concluding that assignment in bankruptcy made by each of four companies constituted "Proceeding" within meaning of prior order -- Leave requirement did no more than permit court supervising receivership to control its own process and did not restrict director's ability to make assignment in bankruptcy where that step was otherwise proper -- No issue of paramountcy arose.

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 12(2) -- considered

s. 49 -- considered

s. 181 -- referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 106 -- referred to

APPEAL from judgment reported at *Ed Mirvish Enterprises Ltd. v. Stinson Hospitality Inc.* (2007), 2007 CarswellOnt 6045, 36 C.B.R. (5th) 149 (Ont. S.C.J.).

***Per curiam*:**

1 The motion judge concluded that the assignments into bankruptcy of the corporate appellants should be annulled under s. 181 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "Act") because leave to file the assignments had not been obtained as required by paragraph 11 of the motion judge's prior order of August 24, 2007 appointing a receiver. We see no error in the motion judge's conclusion. In particular, we reject the appellants' argument that the term "Proceeding" as it appears in paragraph 11 of the August 24, 2007 order does not apply to an assignment in bankruptcy.

2 Paragraph 10 of the August 24, 2007 order refers to a "Proceeding" as meaning a "proceeding or enforcement process in any court or tribunal". Section 49 of the Act provides that an assignment is inoperative until it is filed with the official receiver. Section 12(2) of the Act deems the official receiver(s) in each bankruptcy division to be an officer(s) of the court. Significantly, it is apparent from the Certificates of Appointment issued by the official receiver in this case that a court file number was generated when the assignments in bankruptcy were filed. Given these factors, the motion judge did not err in concluding that the assignment in bankruptcy made by each of the corporate appellants constituted a "Proceeding" within the meaning of paragraph 11 of the August 24, 2007 order.

3 The appellants also argued that since the August 24, 2007 order was made under a provincial statute (s. 106 of the *Courts of Justice Act*, R.S.O. 1990, C. 43) the requirement to obtain leave to file an assignment in bankruptcy as set out in paragraph 11 of the order is of no force and effect because of the paramountcy of federal bankruptcy legislation.

4 We reject this argument. The leave requirement does no more than permit the court supervising the receivership to control its own process and does not restrict the appellants' ability to make an assignment in bankruptcy where that step is otherwise proper. Accordingly, no issue of paramountcy arises.

5 The appeal is therefore dismissed with costs to the respondent Mirvish on a partial indemnity scale fixed at $12,500.00 inclusive of disbursements and applicable G.S.T.

6 Nothing in these reasons should be taken as expressing an opinion on the question of whether the appellant Harry Stinson retains the residual power as the sole director of the appellant corporations to pass a resolution to voluntarily assign the corporate appellants into bankruptcy or on any questions concerning whether the bankruptcy of the corporate appellants would amount to an abuse of process or be improper for other reasons. These issues were not determined by the motion judge and were not the subject of this appeal.

Appeal dismissed.

TAB 2

[2006] W.D.F.L. 3681, 56 C.C.P.B. 1, 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, **83 O.R. (3d) 108**, 275 D.L.R. (4th) 132, 26 B.L.R. (4th) 43

2006 CarswellOnt 6292

Ivaco Inc., Re

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

AND IN THE MATTER OF A Plan or Plans of Compromise or Arrangement of Ivaco Inc. and the Applicants listed in Schedule "A"

Ontario Court of Appeal

J. Laskin, M. Rosenberg, J. Simmons JJ.A.

Heard: February 22, 2006
Judgment: October 17, 2006
Docket: CA C44455

Proceedings: affirming *Ivaco Inc., Re* (2005), 2005 CarswellOnt 3445, 47 C.C.P.B. 62, 12 C.B.R. (5th) 213 (Ont. S.C.J. [Commercial List])

Counsel: Frederick L. Myers, Jason Wadden for Appellant, Superintendent of Finance Services (Ontario)

Andrew Hatnay for Respondent, Quebec Pension Committee of Ivaco Inc.

Jeffrey S. Leon, Richard B. Swan for Respondent, National Bank of Canada

Dan V. MacDonald for Respondent, Bank of Nova Scotia

Geoff R. Hall for Respondent, QIT-Fer et Titane Inc.

Robert W. Staley, Evangelia Kriaris for Respondent, Informal Committee of Noteholders

Peter F.C. Howard for Monitor, Ernst & Young Inc.

Subject: Insolvency; Estates and Trusts; Family; Property; Corporate and Commercial; Civil Practice and Procedure

[2006] W.D.F.L. 3681, 56 C.C.P.B. 1, 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, **83 O.R. (3d) 108**, 275 D.L.R. (4th) 132, 26 B.L.R. (4th) 43

Bankruptcy and insolvency --- Property of bankrupt -- Trust property -- General principles

Pension funds -- I Inc. and related companies, collectively I Group, had established various registered pension plans for their employees -- I Group became insolvent in 2003, and obtained protection under Companies' Creditors Arrangement Act ("CCAA") -- To facilitate restructuring of I Group, order was issued suspending unpaid past-service payments and special contributions I Group had been making to certain underfunded pension plans -- Restructuring was unsuccessful -- I Group's assets were sold -- Superintendent brought unsuccessful motion for order directing that portions of sale proceeds be used to satisfy unpaid pension obligations, which companies are deemed to hold in trust for beneficiaries of pension plans under Pension Benefits Act ("PBA") or, alternatively, for order segregating this amount in separate account -- Some of I Group's financial creditors brought partially successful motions for order lifting stay under CCAA and petitioning I Group into bankruptcy -- Stay was lifted, and bankruptcy petitions were allowed to proceed -- Superintendent appealed from dismissal of its motion -- Appeal dismissed -- Motions judge did not err in law in refusing to order immediate payment of amount of deemed trusts under PBA or in refusing to segregate that amount -- Combination of wording of s. 57 of PBA, paragraph 4 of pension stay order, and limited role of Monitor refuted Superintendent's argument that funds should have been segregated -- CCAA itself did not require motions judge to execute deemed trusts -- Because Federal legislative regime under CCAA and Bankruptcy and Insolvency Act determines claims of creditors of insolvent company, if rights of pension claimants are to be given greater priority, Parliament, not courts, must do so.

Pensions --- Payment of pension -- Bankruptcy or insolvency of employer -- Registered plans

I Inc. and related companies, collectively I Group, had established various registered pension plans for their employees -- I Group became insolvent in 2003, and obtained protection under Companies' Creditors Arrangement Act ("CCAA") -- To facilitate restructuring of I Group, order was issued suspending unpaid past-service payments and special contributions I Group had been making to certain underfunded pension plans -- Restructuring was unsuccessful -- I Group's assets were sold -- Superintendent brought unsuccessful motion for order directing that portions of sale proceeds be used to satisfy unpaid pension obligations, which companies are deemed to hold in trust for beneficiaries of pension plans under Pension Benefits Act ("PBA") or, alternatively, for order segregating this amount in separate account -- Some of I Group's financial creditors brought partially successful motions for order lifting stay under CCAA and petitioning I Group into bankruptcy -- Stay was lifted, and bankruptcy petitions were allowed to proceed -- Superintendent appealed from dismissal of its motion -- Appeal dismissed -- Motions judge did not err in law in refusing to order immediate payment of amount of deemed trusts under PBA or in refusing to segregate that amount -- Combination of wording of s. 57 of PBA, paragraph 4 of pension stay order, and limited role of Monitor refuted Superintendent's argument that funds should have been segregated -- Because Federal legislative regime under CCAA and Bankruptcy and Insolvency Act determines claims of creditors of insolvent company, if rights of pension claimants are to be given greater priority, Parliament, not courts, must do so -- Motions judge did not err in exercising his discretion to lift stay under CCAA and permit bankruptcy petition to proceed -- Superintendent's unfairness argument was not accepted.

Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders -- Stay of petition -- General principles

I Inc. and related companies, collectively I Group, had established various registered pension plans for their employees -- I Group became insolvent in 2003, and obtained protection under Companies' Creditors Arrangement Act ("CCAA") -- To facilitate restructuring of I Group, order was issued suspending unpaid past-service payments and special contributions I Group had been making to certain underfunded pension plans -- Restructuring was unsuccessful -- I Group's assets were sold -- Superintendent brought unsuccessful motion for order directing that portions of sale proceeds be used to satisfy unpaid pension obligations, which companies are deemed to hold in trust for beneficiaries of pension plans under Pension Benefits Act ("PBA") or, alternatively, for order segregating this amount in separate account -- Some of I Group's financial creditors brought partially successful motions for order lifting stay under CCAA and petitioning I Group into bankruptcy -- Stay was lifted, and bankruptcy petitions were allowed to proceed -- Superintendent appealed from dismissal of its motion -- Appeal dismissed -- Motions judge did not err in exercising his discretion to lift stay under CCAA and permit bankruptcy petition to proceed -- Motion judge's order lifting stay was discretionary order, and appellate review of discretionary order under CCAA is justified only for error in principle or unreasonable exercise of discretion -- Superintendent's unfairness argument was not accepted -- Numerous conditions supported motions judge's decision to lift stay and permit bankruptcy petitions to proceed -- Motions judge would have gone beyond his role as referee in CCAA proceedings if he had given effect to Superintendent's claim.

Bankruptcy and insolvency --- Practice and procedure in courts -- Orders -- Miscellaneous issues

I Inc. and related companies, collectively I Group, had established various registered pension plans for their employees -- I Group became insolvent in 2003, and obtained protection under Companies' Creditors Arrangement Act ("CCAA") -- To facilitate restructuring of I Group, order was issued suspending unpaid past-service payments and special contributions I Group had been making to certain underfunded pension plans -- Restructuring was unsuccessful and I Group's assets were sold -- Superintendent brought unsuccessful motion for order directing that portions of sale proceeds be used to satisfy unpaid pension obligations, which companies are deemed to hold in trust for beneficiaries of pension plans under Pension Benefits Act ("PBA") or, alternatively, for order segregating this amount in separate account -- Some of I Group's financial creditors brought partially successful motions for order lifting stay under CCAA and petitioning I Group into bankruptcy -- Stay was lifted, and bankruptcy petitions were allowed to proceed -- Motions judge made ancillary order to facilitate bankruptcy petitions, which ordered that head offices of two I Group companies be transferred from cities in Quebec to Toronto -- Superintendent appealed from ancillary order on basis that motions judge lacked jurisdiction under CCAA to make such order or, alternatively, improperly exercised his discretion in doing so -- Appeal dismissed -- Motions judge did not err in ordering that head offices of companies in question be transferred from Quebec to Toronto -- Argument that CCAA did not give motions judge jurisdiction to order transfer was accepted, but it was also accepted that transfer was not made to facilitate CCAA restructuring; instead, it was made to facilitate future bankruptcy proceedings -- Nonetheless, motions judge did not need to resort to CCAA because he had express authority to order transfer under Canada Business Corporations Act ("CBCA") -- Section 191 of CBCA gives court express authority to order transfer of head office of company that is subject to order under CCAA -- Motions judge properly exercised his discretion in ordering transfer.

Cases considered by *J. Laskin J.A.*:

Abraham v. Canadian Admiral Corp. (Receiver of) (1998), 2 C.B.R. (4th) 243, 1998 CarswellOnt 1475, 158 D.L.R. (4th) 65, (sub nom. *Abraham v. Canadian Admiral Corp. (Receivership)*) 109 O.A.C. 36, 39 O.R. (3d) 176, 37 C.C.E.L. (2d) 276, 19 C.C.P.B. 1, 13 P.P.S.A.C. (2d) 334 (Ont. C.A.) -- referred to

Air Canada, Re (2003), 43 C.B.R. (4th) 1, 66 O.R. (3d) 257, 229 D.L.R. (4th) 687, 174 O.A.C. 201, 2003 CarswellOnt 2925 (Ont. C.A.) -- referred to

Algoma Steel Inc. v. Union Gas Ltd. (2003), 169 O.A.C. 89, 39 C.B.R. (4th) 5, 2003 CarswellOnt 115, 63 O.R. (3d) 78 (Ont. C.A.) -- referred to

Bank of Montreal v. Scott Road Enterprises Ltd. (1989), 36 B.C.L.R. (2d) 118, 73 C.B.R. (N.S.) 273, [1989] 4 W.W.R. 566, 57 D.L.R. (4th) 623, 1989 CarswellBC 337 (B.C. C.A.) -- referred to

Beatrice Foods Inc., Re (1996), 43 C.B.R. (4th) 10, 1996 CarswellOnt 5598 (Ont. Gen. Div. [Commercial List]) -- referred to

[2006] W.D.F.L. 3681, 56 C.C.P.B. 1, 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, **83 O.R. (3d) 108**, 275 D.L.R. (4th) 132, 26 B.L.R. (4th) 43

British Columbia v. Henfrey Samson Belair Ltd. (1989), 1989 CarswellBC 711, [1989] 1 T.S.T. 2164, 75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 34 E.T.R. 1, [1989] 5 W.W.R. 577, 59 D.L.R. (4th) 726, 97 N.R. 61, 38 B.C.L.R. (2d) 145, 2 T.C.T. 4263, 1989 CarswellBC 351 (S.C.C.) -- considered

Dallas/North Group Inc., Re (1999), 17 C.B.R. (4th) 56, 1999 CarswellOnt 4720, 46 O.R. (3d) 602 (Ont. Gen. Div.) -- referred to

General Chemical Canada Ltd., Re (2005), 51 C.C.P.B. 297, 2005 CarswellOnt 7306, C.E.B. & P.G.R. 8179 (Ont. S.C.J.) -- considered

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2005), (sub nom. *TCT Logistics Inc. (Bankrupt), Re)* 194 O.A.C. 360, 2005 CarswellOnt 636, 7 C.B.R. (5th) 202, 74 O.R. (3d) 382 (Ont. C.A.) -- distinguished

Harrop of Milton Inc., Re (1979), 1979 CarswellOnt 185, 92 D.L.R. (3d) 535, 29 C.B.R. (N.S.) 289, 22 O.R. (2d) 239 (Ont. Bktcy.) -- referred to

Husky Oil Operations Ltd. v. Minister of National Revenue (1995), 1995 CarswellSask 739, 1995 CarswellSask 740, 188 N.R. 1, 24 C.L.R. (2d) 131, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, [1995] 10 W.W.R. 161 (S.C.C.) -- referred to

Ivaco Inc., Re (2004), 2004 CarswellOnt 3561 (Ont. S.C.J. [Commercial List]) -- referred to

Lambert, Re (2002), (sub nom. *Lambert (Bankrupt), Re)* 162 O.A.C. 132, 216 D.L.R. (4th) 330, 2002 CarswellOnt 2659, 36 C.B.R. (4th) 256, (sub nom. *Buth-na-bodhiaga Inc. v. Lambert)* 60 O.R. (3d) 787 (Ont. C.A.) -- referred to

Royal Crest Lifecare Group Inc., Re (2004), 2004 CarswellOnt 190, 181 O.A.C. 115, 46 C.B.R. (4th) 126, (sub nom. *Canadian Union of Public Employees, Locals 1712, 3009, 2225-05, 2225-06 & 2225-12 v. Ernst & Young Inc. (as trustee for Royal Crest Lifecare Group Inc.))* 2004 C.L.L.C. 220-014, (sub nom. *C.U.P.E., Locals 1712, 3009, 2225-05, 2225-06, 22512 v. Royal Crest Lifecare Group Inc. (Trustee of))* 98 C.L.R.B.R. (2d) 210 (Ont. C.A.) -- referred to

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) -- distinguished

Toronto Dominion Bank v. Usarco Ltd. (1991), 42 E.T.R. 235, 1991 CarswellOnt 540 (Ont. Gen. Div.) -- distinguished

United Maritime Fishermen Co-op., Re (1988), 68 C.B.R. (N.S.) 170, 1988 CarswellNB 20, 87 N.B.R. (2d) 333, 221 A.P.R. 333 (N.B. Q.B.) -- referred to

Statutes considered:

Bank Act, S.C. 1991, c. 46

s. 427 -- referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally -- referred to

s. 11(3) -- referred to

s. 11(4) -- referred to

s. 43(5) -- referred to

s. 43(7) -- referred to

s. 67(1)(a) -- referred to

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

s. 109(1) -- referred to

s. 173 -- referred to

s. 173(1)(b) -- considered

s. 191 -- considered

s. 191(1) -- considered

s. 191(1)(c) -- considered

s. 191(2) -- considered

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

Generally -- considered

s. 2 "debtor company" -- referred to

s. 11 -- referred to

s. 11.7(1) [en. 1997, c. 12, s. 124] -- referred to

s. 11.7(3) [en. 1997, c. 12, s. 124] -- referred to

s. 13 -- referred to

[2006] W.D.F.L. 3681, 56 C.C.P.B. 1, 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, **83 O.R. (3d) 108**, 275 D.L.R. (4th) 132, 26 B.L.R. (4th) 43

Pension Benefits Act, 1987, S.O. 1987, c. 35

Generally -- referred to

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

Generally -- referred to

s. 57 -- referred to

s. 57(3) -- considered

s. 57(4) -- considered

s. 57(5) -- considered

Wage Earner Protection Program Act, S.C. 2005, c. 47

Generally -- referred to

Regulations considered:

Truck Transportation Act, R.S.O. 1990, c. T.22

Load Brokers, O. Reg. 556/92

s. 15 -- referred to

s. 15(2) -- referred to

APPEAL by Superintendent from judgment, reported at *Ivaco Inc., Re* (2005), 2005 CarswellOnt 3445, 47 C.C.P.B. 62, 12 C.B.R. (5th) 213 (Ont. S.C.J. [Commercial List]), dismissing Superintendent's motion for order.

***J. Laskin J.A.*:**

A. Introduction

1 This appeal arises out of a priorities dispute between two groups of creditors of an insolvent company, Ivaco Inc., and its related group of companies. The dispute is over the sale proceeds of the assets of Ivaco. On one side of the dispute are the employees and retirees in Ivaco's underfunded non-union pension plans. They claim under the deemed trust and lien provisions of Ontario's *Pension Benefits Act*, R.S.O. 1990, c. P.8, ss. 57(3), (4) ("PBA"), and seek to recover unpaid contributions to the plans outside of bankruptcy. On the other side of the dispute are Ivaco's financial and trade creditors. They wish to put Ivaco into bankruptcy in order to take advantage of the scheme of distribution under the federal *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"). The dispute arises because provincial deemed trusts do not, by virtue of that legislative designation, enjoy priority under the federal bank-

ruptcy statute.

2 Ivaco and its related group of companies (collectively "the Companies") became insolvent in 2003. In September 2003, the Companies sought and obtained court-ordered protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). All claims of creditors were stayed. A later order stayed the Companies' obligation to pay the outstanding past service contributions and special payments to the non-union pension plans. (Past service contributions are monies due to fund benefits or benefit enhancements for pension members' past service; special payments are extraordinary payments made because a pension plan is underfunded).

3 The main purpose of CCAA proceedings is to facilitate the restructuring of an insolvent company so that it may stay in business. The Companies, however, were unable to restructure. In late 2004, virtually all of their assets were sold. All that remains is a pool of money: the proceeds of sale. All that remains to be done is to distribute this pool of money among the creditors.

4 The Superintendent of Financial Services, representing the employees and retirees, brought a motion for an order that part of the sale proceeds be used to satisfy the unpaid past service and special contributions, which the Companies are deemed to hold in trust for the beneficiaries of the pension plans under the PBA. Alternatively, the Superintendent sought an order segregating this amount in a separate account. The Quebec Pension Committee ("QPC"), the administrator of the largest non-union plan, supported the Superintendent's motion. Two of the Companies' lenders, the Bank of Nova Scotia and the National Bank, brought motions for an order lifting the stay under the CCAA and petitioning the Companies into bankruptcy.

5 Farley J., who had supervised these CCAA proceedings for over two and a half years, heard all three motions. By order dated July 18, 2005 he dismissed the Superintendent's motion and partly granted the banks' motions. He lifted the stay and permitted the bankruptcy petitions to proceed, but he did not put the Companies into bankruptcy.

6 The Superintendent appeals. She argues that the motions judge erred either in law or in the exercise of his discretion. The Superintendent submits that the motions judge erred in law by failing to order immediate payment of the amount of the deemed trusts or in failing to segregate this amount. The Superintendent contends that the PBA legally required that the deemed trusts for unpaid past service contributions and special payments be executed or protected before bankruptcy.

7 Alternatively, the Superintendent submits that the motions judge erred by exercising his discretion to lift the stay under the CCAA and permit the bankruptcy petitions to proceed without first protecting the claims of the pension beneficiaries. The Superintendent contends that the motions judge exercised his discretion on a wrong principle because he ignored the unfairness and prejudice to the Companies' most vulnerable creditors.

8 The Superintendent also appeals an ancillary order made by the motions judge. To facilitate the bankruptcy petitions, the motions judge ordered that the head offices of two of the Companies be transferred from cities in Quebec to Toronto. The Superintendent and the QPC submit that the motions judge had no jurisdiction under the CCAA to do so, or alternatively, improperly exercised his discretion in doing so.

9 This court granted leave to appeal under s. 13 of the CCAA. The court also stayed the two orders in favour of the banks pending the disposition of the appeal.

B. Relevant Facts and Chronology

a) The Companies

10 Six related corporations were granted protection under the CCAA: Ivaco Inc., Ivaco Rolling Mills Ltd. ("IRM"), Ifastgroupe Inc., Docap (1985) Corporation, Florida Sub One Holdings Inc. and 3632610 Canada Inc. Four of these corporations -- Ivaco, IRM, Ifastgroupe and Docap -- established the non-union pension plans in issue on this appeal.

11 Ivaco, IRM and Ifastgroupe ceased operations after their assets were sold. Only Docap now has any operating assets. Its assets consist mainly of inventory and accounts receivable that have not yet been sold. Docap is a small entity. Neither restructuring it nor selling it as a going concern seems a viable option. The National Bank, Docap's principal secured creditor, wishes to put the company into bankruptcy and liquidate its assets.

b) The non-union pension plans

12 The Companies had both a unionized and non-unionized workforce. They established various registered pension plans for their employees. These included four non-union plans: the Ivaco Salaried Plan, which is registered in Quebec and has both Quebec and Ontario members, the Designated Employees Plan, the Ingersoll Plan and the Docap Plan, all registered in Ontario.

13 The QPC administers the Ivaco Salaried Plan, which is the largest of the four plans. Ivaco formerly administered the other three plans. However, the Superintendent appointed PricewaterhouseCoopers Inc. as administrator of the Designated Employees Plan and the Ingersoll Plan. A former Ivaco employee administers the Docap Plan for Ivaco.

c) The initial stay under the CCAA

14 After their operations became financially troubled, the Companies sought and were granted protection from their creditors under the CCAA. On September 16, the motions judge granted a comprehensive stay of all creditor claims up to that time. He appointed Ernst & Young Inc. as Monitor. As a result of the stay, debts of the Companies existing on the date of the initial stay order have not been paid.

15 During the CCAA proceedings the Companies continued to pay the wages and benefits of all active employees. The Companies also continued to pay their current contributions to their various pension plans.

d) The pension stay order

16 When the Companies began CCAA proceedings, the non-union pension plans were underfunded. Before the initial stay order the Companies had been making both special payments and past services contributions to rectify this underfunding. Under the PBA, past service contributions accrue daily and are to be paid monthly.

17 Early in the CCAA proceedings, the Monitor concluded that the Companies would jeopardize their ability to restructure if they were required to continue making past service contributions and special payments. Because of the magnitude of these payments, the creditors would not agree to permit the DIP (debtor in possession) loan to be used for funding the pension plans. In their view, and in the view of the Monitor, doing so would imperil the possibility of restructuring. Relying on the Monitor's opinion, the Companies sought, and on November 28, 2003, were granted a pension stay order.

18 The motions judge relieved the Companies from making past service contributions or special payments to the

underfunded non-union pension plans during the CCAA stay. No interested party, including both the Superintendent and the QPC, opposed the order. All parties thought that relieving the Companies from making these payments would assist their restructuring efforts. The Companies still remained obligated to make current contributions to the non-union plans.

19 Paragraph 4 of the pension stay order stipulated that none of the Companies would incur any obligation because of the failure to make these past service contributions and special payments during the stay period:

> THIS COURT ORDERS that none of the Applicants or Partnerships, or their respective officers or directors shall incur any obligation, whether by way of debt, damages for breach of any duty, whether statutory, fiduciary, common law or otherwise, or for breach of trust, nor shall any trust be recognized, whether express, implied, constructive, resulting, deemed or otherwise, as a result of the failure of any person to make any contribution or payments other than current cost contribution obligations ("Current Contributions") during the Stay Period that they might otherwise have become required to make to any pension plans maintained by an Applicant or Partnership.

20 Paragraph 5 of the pension stay order expressly recognized that statutory deemed trust, liens or other charges may arise because the Companies were relieved from paying past service contributions but that they would not have priority over the charges in the initial stay order:

> THIS COURT ORDERS that if any claim, lien, charge or trust arises as a result of the failure of any Person to make any contribution or payment (other than Current Contributions) during the Stay Period that such Person might otherwise have become required to make to any pension plans maintained by an Applicant or Partnership but for the stay provided for herein, no such claim, lien, charge or trust shall be recognized in this proceeding or in any subsequent receivership, interim receivership or bankruptcy of any of the Applicants or Partnerships as having priority over the claims of the Charges as set out in the Amended and Restated order.

21 Paragraph 6 of the order recognized that the pension stay did not compromise the Companies' obligations under their non-union pension plans:

> Nothing in this Order shall be taken to extinguish or compromise the obligations of the Applicants and Partnerships, if any, regarding payments under the Pension Plans.

e) The sale to Heico

22 As the Companies were unable to restructure, they began to pursue a second option: selling their assets in a going concern sale. On August 18, 2004, the motions judge approved the sale of the assets of Ivaco, Ifastgroupe and IRM to the Heico Companies. As part of the transaction, the purchaser hired the Companies' unionized workforce and assumed the Companies' obligations to their unionized pension plans. The purchaser also hired almost all of the Companies' non-unionized workforce, but it was unwilling to assume the Companies' obligations to the four non-union pension plans. These obligations remained with the Companies.

23 Nonetheless, the Monitor supported the sale. In the Monitor's view, the sale gave the creditors and workers greater recovery and benefits than they would obtain in either a bankruptcy or a liquidation. Again, no party, including both the Superintendent and the QPC, opposed the sale.

24 The motions judge made two orders -- on August 18, 2004 [2004 CarswellOnt 3561 (Ont. S.C.J. [Commercial

List])] and November 30, 2004 -- vesting the assets in the purchaser. These orders expressly preserved all claims that might have been made against the assets by providing that these claims could be made against the sale proceeds. In accordance with these orders, the Monitor is holding the sale proceeds in various trust accounts.

25 In December 2004, Ivaco, IRM and Ifastgroupe wound-up their non-union pension plans. Under the PBA, they are obligated to fund the wind-up liabilities of these plans.

f) The pension claims

26 The Companies' non-union pension plans have been severely underfunded and the deficit has increased during the stay period. At the beginning of the CCAA proceedings in September 2003, unpaid past service contributions to the non-union plans totalled about $1.4 million and the solvency deficiency amounted to approximately $11.1 million. By December 2004 these figures had grown to approximately $11.6 million and $29.1 million respectively. They continued to grow while the pension stay order remained in place.

27 The potential loss of benefits for each pensioner is significant. Counsel for the Superintendent advised the court that the average pensioner in the non-union plans is sixty-seven years old and earns a pension of $14,000 per year. These pensioners will receive their full pension only if the full wind-up deficit is paid. For example, if the plans do not recover the past service contributions suspended by the pension stay order, the average monthly pension will be reduced by 26 per cent from approximately $1,200 to $888. If only unpaid contributions are recovered, and not the full solvency deficiency, the average pension will be reduced by 17 per cent to $996 monthly.

g) The claims of the financial creditors

28 The outstanding claims of the financial creditors of the Companies are also significant. We were told that the sale proceeds of the Companies' assets are insufficient to satisfy all claims, and are certainly insufficient to satisfy the unsecured claims.

29 The Bank of Nova Scotia was the lender to IRM. By October 2003, IRM owed the Bank about $40 million. IRM had ceased to meet its liabilities generally as they became due, and had given notice to its creditors that it had suspended payment of its debts. On October 3, 2003 the Bank issued a petition for a receiving order against IRM. The issuance of the petition was permitted by the initial stay order, but that proceeding was otherwise stayed. The order under appeal lifted the stay and permitted the Bank of Nova Scotia to proceed with its petition.

30 The National Bank lent money to Ivaco, Ifastgroupe and Docap. As of March 2005 it had a secured claim against Ivaco for $17 million,[FN1] and against Docap for $55,622 U.S. and $4.2 million Canadian. It also had an unsecured claim against Ifastgroupe for $45.5 million Canadian. Ifastgoupe is also indebted to La Caisse for $14.9 million.

31 A large number of other creditors also have claims against the Companies: Ivaco has 792 creditors with claims totalling $554.9 million; Docap has 82 creditors with claims totalling $111.1 million; and Ifastgroupe has 645 creditors with claims totalling $253.3 million.

C. Analysis

a) What is in issue on this appeal

32 The scope of this appeal is quite narrow. There are three issues:

> 1) Did the motions judge err in law in failing to order immediate payment of the amount of the deemed trusts under the PBA or in failing to segregate this amount in a separate account?
>
> 2) Did the motions judge err in the exercise of his discretion by lifting the stay and permitting the bankruptcy petitions to proceed, without protecting the claims of the pension beneficiaries?
>
> 3) Did the motions judge err in law or in the exercise of his discretion by ordering the transfer of Ivaco's and Ifastgroupe's head offices from Quebec to Toronto?

b) What is not in issue on this appeal

33 There are also three issues raised by the parties that do not need to be decided on this appeal: (1) whether, outside of bankruptcy, the deemed trusts under the PBA have priority over the Bank of Nova Scotia's security under s. 427 of the *Bank Act*, S.C. 1991, c.46; (2) whether the Superintendent can show "sufficient cause" under s. 43(7) of the BIA to deny the application for a bankruptcy order; and, (3) whether the deemed trusts under the PBA also meet the requirements for a common law trust and thus on bankruptcy should be excluded from the property of the Companies under s. 67(1)(a) of the BIA.

34 On my view of the appeal, the first of these issues does not have to be resolved. It may become relevant at the bankruptcy hearing, and, if so, should be dealt with by the bankruptcy judge. See *Abraham v. Canadian Admiral Corp. (Receiver of)* (1998), 39 O.R. (3d) 176 (Ont. C.A.). The second and third issues, I assume, will be dealt with at the hearing of the bankruptcy petitions. Admittedly, the motions judge made some observations on these two issues. However, he also said, at para. 20 of his reasons, that he was not deciding either one:

> However, in the circumstances, I do not find it appropriate to allow (indeed direct) that there be an assignment in bankruptcy on a "voluntary basis" as there is the s. 43(7) issue to be determined. Similarly with respect to the balance of declarations requested by the National Bank, while I have made some general observations as to reversing priorities, it would not be appropriate to determine with finality the priorities of various claims on the record before me at this time.

35 In their written and oral submissions, the Superintendent and the QPC argued that some of the motions judge's general observations on these issues were wrong. I do not propose to consider these arguments because, as the motions judge recognized, they should be addressed at the hearing of the bankruptcy petitions. Instead, I will make a few brief observations of my own.

36 In my view, the motions judge appropriately considered what would likely happen at the bankruptcy hearing. He did so because the likely implications of lifting the stay were relevant considerations to the exercise of his discretion.

37 The motions judge observed, at para. 14, that the discretion to refuse to make a bankruptcy order under s. 43(7) typically is exercised in two categories of cases: where the petitioner has an ulterior motive in seeking the order, or where the order would not serve any meaningful purpose. This observation reflects the current state of the case law under s. 43(7). See for example *Dallas/North Group Inc., Re* (1999), 46 O.R. (3d) 602 (Ont. Gen. Div.); *Lambert, Re* (2002), 60 O.R. (3d) 787 (Ont. C.A.). Although the motions judge added that the Superintendent's claim does not appear to come within either category, he left the final determination of that question for the bankruptcy judge.

38 The motions judge also observed, at para. 11 of his reasons, that a provincially created deemed trust does not by that fact alone enjoy priority under the BIA. This is not a contentious proposition. In a series of cases, the Supreme Court of Canada has repeatedly said that a province cannot, by legislating a deemed trust, alter the scheme of priorities under the federal statute. See for example *British Columbia v. Henfrey Samson Belair Ltd.* , [1989] 2 S.C.R. 24 (S.C.C.); *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.). Indeed, it is this jurisprudence that undoubtedly prompted the Superintendent's original motion and appeal to this court.

39 The motions judge also correctly observed, at para. 11 of his reasons, that a provincial deemed trust will retained its priority in bankruptcy only if it also meets the three attributes -- the three certainties -- of a common law trust: certainty of intent; certainty of subject matter; and certainty of object. Only a trust that has these three attributes is a "true trust" that will be exempt from the bankrupt's estate under s. 67(1)(a) of the BIA. See for example *Henfrey Sampson, supra*. Whether the Superintendent can establish a true trust for unpaid past service contributions, even though the proceeds of the Heico sale have been commingled, will be decided at the bankruptcy hearing.

40 I now turn to the issues that do arise on this appeal.

c) Did the motions judge err in law in failing to order immediate payment of the amount of the deemed trusts or in failing to segregate this amount?

41 The Superintendent's principal submission is that the motions judge erred in law in failing to order payment of the amount of the deemed trusts before bankruptcy or in failing to order the Monitor to segregate this amount during the CCAA proceedings. The submission that the motions judge was legally required to order payment or segregation of the amount of the deemed trusts was not advanced before him. The Superintendent advanced this submission for the first time in this court. I do not agree with it.

42 I will deal first with whether the motions judge should have required the Monitor, Ernst & Young, to segregate the amount of the deemed trusts. The Superintendent contends that the Companies, and in their place the Monitor, had a statutory and fiduciary obligation to segregate. As the Monitor was an officer of the court, the motions judge should have compelled it to fulfill these duties. This contention faces three obstacles: the language of the PBA; the terms of the pension stay order; and the status and role of the Monitor.

43 The deemed trusts for unpaid past service and special contributions are found in ss. 57(3) and (4) of the PBA. Subsection (3) is the basic provision that creates a deemed trust for unpaid employer contributions. Subsection (4) stipulates that on the wind up of a pension plan, employer contributions accrued but not yet due because of the timing of the wind up are also deemed to be held in trust:

> s. 57(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.
>
> s. 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.

44 At para. 11 of his decision, the motions judge said that both unpaid contributions and wind-up liabilities are

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

45 Under s. 57(5) of the PBA the plan administrator has a lien and charge on the assets of the employer for the amount of any deemed trust. The lien and charge permit the administrator to enforce the deemed trust.

> s. 57(5) The administrator of the pension plan has a lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust under subsections (1), (3) and (4).

46 The Superintendent argues that these provisions required the Companies, and in their place the Monitor, to keep the unpaid contributions in a separate account. However, the language of s. 57 does not require the employer to hold the contributions separately. A "deemed trust" is, in a sense, a legal fiction. Outside of bankruptcy it does create a priority for pension contributions, a priority that would not exist but for the designation. Yet, as I have already said, 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.

47 The Superintendent argues that the pension stay order supports her position because para. 5 the order, *supra*, recognized that a deemed trust for unpaid contributions may arise during the stay period and that para. 6 of the stay order, *supra*, did not compromise the Companies' obligation to make these contributions. This argument fails to take account of para. 4 of the pension stay order. Paragraph 4 stipulates that during the stay the Companies will not incur any obligation -- statutory, fiduciary or otherwise -- for failing to make contributions to the plan. In my view, the Superintendent's argument amounts to an impermissible collateral attack on para. 4 of the pension stay order.

48 The Superintendent also tries to buttress her position by arguing that the Monitor stands in the shoes of the Companies, and like the Companies, has a fiduciary duty to the pension beneficiaries. I disagree.

49 The Monitor was appointed under s. 11.7(1) of the CCAA to "monitor the business and financial affairs" of the Companies, and was given the functions set out in s. 11.7(3) of that statute: to examine the Companies' property, report to the court on the Companies' business and financial affairs and keep the creditors informed. Although the motions judge gave the Monitor additional powers, they were limited. The Monitor was given authority to deal with day-to-day administrative matters, to finalize the sale to Heico and to receive and control the proceeds of sale. I do not think it can be fairly said that the Monitor "stands in the shoes of the Companies".

50 Equally important, the Monitor does not owe a fiduciary duty to the pension beneficiaries. The Superintendent's attempt to impose an obligation on the Monitor to segregate the contributions to the non-union plans depends at least on establishing that the Monitor acts as a fiduciary of the employees in those plans. Both the role of the Monitor and the initial stay order preclude the Superintendent's assertion.

51 Pension plan administrators do owe a fiduciary duty to plan members. See E.E. Gillese, *The Fiduciary Liability of the Employer as Pension Plan Administrator* (Toronto: The Canadian Institute, November 18, 1996, pp. 1-25). But the Monitor was not given that role. It is not an administrator of any of the four non-union plans. Indeed, the Superintendent never asked the court to give the Monitor responsibility for administering these plans.

52 Moreover, para. 59 of the initial stay order expressly states that the Monitor is not to be considered either a successor or related employer.

> THIS COURT ORDERS that nothing in this Order shall result in the Monitor being or being deemed or considered to be a successor or related employer, sponsor or payor with respect to any Applicant or any employees or former employees of any Applicant under any legislation, including ... the *Pension Benefits Act* (Ontario) ... or under any other provincial or federal legislation, regulation or rule of law or equity applicable to employees or pensions, or otherwise.
>
> [Emphasis added].

As the Monitor was neither a plan administrator nor a successor employer, it can owe no fiduciary duty to the members of the four plans.

53 Therefore, the combination of the wording of s. 57 of the PBA, para. 4 of the pension stay order and the limited role of the Monitor, refute the Superintendent's segregation argument. The Superintendent, however, submits that two cases, the decision of this court in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.* (2005), 74 O.R. (3d) 382 (Ont. C.A.) [hereinafter *TCT Logistics*] and an earlier decision of the motions judge in *Usarco Ltd.*, *supra*, support the argument for segregation. In my view, both cases are distinguishable.

54 In *TCT Logistics*, this court held that an interim receiver, who was both an officer of the court and stood in the shoes of the debtor, had a statutory duty under the legislation then in force, s. 15 of the *Load Brokers Regulation*, O.Reg. 556/92 (passed under the *Truck Transportation Act*, R.S.O. 1990, c. T.- 22) to hold carriers' fees that it had collected in a separate trust account. *TCT Logistics* and this case differ in three critical ways.

55 First, the interim receiver in *TCT Logistics*, was not just an officer of the court, it stood in the place of the debtor company. Here, although the Monitor is an officer of the court, it does not stand in the place of the Companies. For the reasons outlined in para. 49 its role is far more limited.

56 Second, in *TCT Logistics* the court order authorized the interim receiver to hold the carriers' fees in a separate bank account until entitlement to that money was decided. Here, the pension stay order prohibited the Companies from making any past service or special contributions during the stay period.

57 Third, and perhaps most important, the applicable legislation in *TCT Logistics*, s. 15(2) of the *Load Brokers Regulation* required the debtor company to maintain a separate trust account and to keep the fees it collected for the carriers in that account. Here, s. 57 of the PBA does not similarly require an employer to keep its unpaid contributions in a separate trust account. Moreover, in *TCT Logistics*, despite s. 15(2) of the Regulation, this court held that the carrier fees previously collected by the debtor company lost their character as trust money because they had been commingled with other funds. *TCT Logistics* thus does not support the Superintendent's position.

58 In *Usarco Ltd.*, *supra*, at para. 16, Farley J. commented that the deemed trust provisions of the PBA "implied a fiduciary obligation on the part of Usarco", and that "a trustee in bankruptcy stepping into the shoes of Usarco must deal with that fiduciary obligation". These comments do not apply to this case. The Monitor here, unlike the trustee in bankruptcy in *Usarco Ltd.*, did not step into the shoes of the debtor. Thus, *Usarco Ltd.* does not assist the Superintendent.

59 For these reasons, I reject the Superintendent's argument that the motions judge was required in law to order the segregation of the amount of the deemed trusts during the CCAA proceeding. I now turn to the Superintendent's other submission: that the motions judge was required in law to order that the amount of the deemed trust be paid at the end of the CCAA proceedings, but before bankruptcy.

60 The CCAA itself did not require the motions judge to execute the deemed trusts. The Superintendent cannot point to any section of the statute where a legal obligation to order payment of the past service contributions can be found. Moreover, in 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. See for example *United Maritime Fishermen Co-op., Re* (1988), 68 C.B.R. (N.S.) 170 (N.B. Q.B.), at 173.

61 The Superintendent's submission that the motions judge was required to order payment of the outstanding contributions rests on the proposition that a gap exists between the CCAA and the BIA in which the provincial deemed trusts can be executed. This proposition runs contrary to the federal bankruptcy and insolvency regime and to the principle that the province cannot reorder priorities in bankruptcy.

62 The federal insolvency regime includes the CCAA and the BIA. The two statutes are related. A debtor company under the CCAA is defined in s. 2 by the company's bankruptcy or insolvency. Section 11(3) authorizes a thirty-day stay of any current or prospective proceedings under the BIA, and s. 11(4) authorizes an extension of the initial thirty-day period. During the stay period, creditor claims and bankruptcy proceedings are suspended. Once the stay is lifted by court order or terminates by its own terms, simultaneously the creditor claims and bankruptcy proceedings are revived and may go forward.

63 For the Superintendent's position to be correct, there would have to be a gap between the end of the CCAA period and bankruptcy proceedings, in which the pension beneficiaries' rights under the deemed trusts crystallize before the rights of all other creditors, including their right to bring a bankruptcy petition. That position is illogical. All rights must crystallize simultaneously at the end of the CCAA period. There is simply no gap in the federal insolvency regime in which the provincial deemed trusts alone can operate. That is obviously so on the facts in this case because the Bank of Nova Scotia had already commenced a petition for bankruptcy, which was stayed by the initial order under the CCAA. Once the motions judge lifted the stay, the petition was revived. In my view, however, the situation would be the same even if no bankruptcy petition was pending.

64 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. The CCAA and the BIA create a complementary and interrelated scheme for dealing with the property of insolvent companies, a scheme that occupies the field and ousts the application of provincial legislation. 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.

65 Also, giving effect to the Superintendent's position, in substance, would allow a province to do indirectly what it is precluded from doing directly. Just as a province cannot directly create its own priorities or alter the scheme of distribution of property under the BIA, neither can it do so indirectly. See *Husky Oil*, *supra*, at paras. 32 and 39. At bottom the Superintendent seeks to alter the scheme for distributing an insolvent company's assets under the BIA. It cannot do so.

66 The Superintendent relies on one authority in support of its position: the decision of the motions judge in *Usarco Ltd.*, *supra*. In that case, although a bankruptcy petition had been brought, Farley J. nonetheless ordered the receiver to pay to the pension plan administrator the amount of the deemed trusts under the PBA. However, the facts in *Usarco Ltd.* differed materially from the facts in this case.

67 In Usarco Ltd., CCAA proceedings did not precede the bankruptcy petition. Moreover, in Usarco Ltd. 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 Ltd. it was unclear whether bankruptcy proceedings would ever take place.

68 Recently in *General Chemical Canada Ltd., Re* (Ont. S.C.J.), Campbell J. relied on this distinction, followed the motions judge's decision in the present case and refused to order payment of the amount of the deemed trusts under the PBA. He wrote at para. 35:

> To conclude otherwise (absent improper motive on the part of Company or a major creditor) would be to negate both CCAA proceedings and bankruptcy proceedings by preventing creditors from pursuing a process of equitable distribution of the debtor's property as they believe it to be when making their decisions.

I agree. The factual differences between General Chemical Canada Ltd. and this case on the one hand, and Usarco Ltd. on the other, render Usarco Ltd. of no assistance to the Superintendent on this appeal.

69 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 greater priority, Parliament, not the courts, must do so. And Parliament has at least signalled its intention to do so. Last year it passed the *Wage Earner Protection Program Act*, S.C. 2005 c.47. That Act would amend the BIA and give special priority to unpaid pension contributions of a bankrupt employer. This statute, however, has not been proclaimed in force. That it was passed perhaps shows that under the existing legislative regime, claims like that of the Superintendent must fail. I would reject this ground of appeal.

d) Did the motions judge err in the exercise of his discretion by lifting the stay and permitting the bankruptcy petitions to proceed?

70 In my view, the motions judge's order lifting the stay was a discretionary order. He summarized his reasons for rejecting the Superintendent's position and exercising his discretion to allow the bankruptcy petitions to proceed at para. 18 of his decision:

> In the end result I do not see that the Superintendent has made a compelling case to the effect that the petitions in bankruptcy should not be allowed to proceed in the ordinary course. I have reached that conclusion by weighing the factors pro and con as discussed above, including the relative benefits to all stakeholders (including workers and pensioners) to maintaining the CCAA proceedings (with the benefit of the suspension of past contributions as per the unopposed and un-reconsidered order of November 28, 2003), the fact that no reorganization is now possible as all Ivaco Companies (except Docap) have ceased operations and are without operational assets and that the Ivaco Companies are now essentially in a distribution of proceeds mode.

71 Appellate review of a discretionary order under the CCAA is limited. See *Air Canada, Re* (2003), 66 O.R. (3d) 257 (Ont. C.A.) at para. 25; *Royal Crest Lifecare Group Inc., Re* (2004), 46 C.B.R. (4th) 126 (Ont. C.A.) at para. 23; *Algoma Steel Inc. v. Union Gas Ltd.* (2003), 63 O.R. (3d) 78 (Ont. C.A.) at para. 16. Appellate intervention is justified only for an error in principle or the unreasonable exercise of discretion. The Superintendent submits that the motions judge exercised his discretion improperly -- on a wrong principle -- because he ignored the "unfair and prejudicial" effects of his order on the Companies' most vulnerable class of creditors: the pension beneficiaries. I disagree.

72 The Superintendent argues that the motions judge's order was unfair to the pension beneficiaries in three related ways. First, she points out that the pension beneficiaries agreed to a stay of the past service contributions to keep the Companies afloat, which in turn permitted the going concern sale to Heico. That sale greatly enhanced the return to the creditors. The Superintendent contends that now permitting the bankruptcy petitions to proceed, which would potentially deprive the pension beneficiaries of their rights, produces an unfair outcome.

73 Undoubtedly, and regrettably, the pension beneficiaries stand to suffer from the insolvency of the Companies. However, the Superintendent's argument implicitly assumes that the pension beneficiaries alone made sacrifices to maximize the recovery for all creditors. The motions judge rejected this assumption, which he said at para. 2 of his reasons, "somewhat overstates the situation". The motions judge accurately concluded:

> [O]ther stakeholders (such as the financial and trade creditors) as a result of the stay also contributed to the financial stability of the Ivaco Companies, fragile as their financial situation was, by not being paid interest as such became due nor for pre-filing indebtedness which was due.

In short, all creditors gave up something to permit the Companies to stay in business so that they could either reorganize or sell their assets in a going concern sale.

74 Second, the Superintendent contends that the motions judge's order undermined his earlier pension stay order, which had expressly preserved the pension beneficiaries' deemed trust rights. I do not accept this contention. Although the pension stay order did not take away these deemed trust rights, it did not provide that the deemed trusts would be paid out of any sale proceeds. Instead, para. 4 of the pension stay order provided that the Companies would not incur any obligation because of their failure to pay past service contributions during the stay period. Moreover, even though the Superintendent and the QPC knew that a petition for bankruptcy (by the Bank of Nova Scotia) was pending when they agreed to the pension stay order, they did not ask that the order be conditional on payment of the amount of the deemed trusts when the stay was lifted.

75 The third aspect of unfairness on which the Superintendent relies is that the motions judge's order fails to take account of the law's "special solicitude" for pensioners. Certainly provincial pension legislation has shown this solicitude. It has recognized the importance of ensuring that retirees have income security. Thus, it has legislated statutory trusts and liens to protect their pension claims. But federal insolvency law has not shown the same solicitude. It does not accord the claims of "sympathetic" creditors more weight than the claims of "unsympathetic" ones. Subject to specified exceptions, the BIA aims to distribute a bankrupt debtor's estate equitably among all of the estate's creditors. There are undoubtedly compelling policy reasons to protect pension rights in an insolvency. But, as I have said, it is for Parliament, not the courts, to do so.

76 Therefore, I do not accept the Superintendent's unfairness argument. Also, in my view, numerous considerations supported the motions judge's decision to lift the stay and permit the bankruptcy petitions to proceed. These considerations include the following:

- The CCAA proceedings are spent. There are no entities to reorganize and no further compromises can be negotiated between the Companies and their creditors. There remains only a pool of money to distribute. The BIA is the regime Parliament has chosen to effect this distribution.

- The petitioning creditors have met the technical requirements for bankruptcy. And their desire to use the BIA to alter priorities is a legitimate reason to seek a bankruptcy order. See for example *Bank of Montreal v. Scott Road Enterprises Ltd.* (1989), 57 D.L.R. (4th) 623 (B.C. C.A.), at 627, 630-631; *Harrop of Milton Inc., Re* (1979), 22 O.R. (2d) 239 (Ont. Bktcy.), at 244- 245.

◦ The Superintendent and the QPC agreed to the CCAA process. They recognized that it benefitted the pension claimants. Thus, they did not oppose either the pension stay order or the sale to Heico. They did not ask to have the deemed trusts satisfied or an amount to satisfy them set aside, though they knew that bankruptcy was pending. They likely recognized that if they had insisted on a segregation order, the other creditors may not have agreed to the sale. It is now too late for the Superintendent and the QPC to ask for relief that they never sought during the entire CCAA process.

◦ The motions judge would have gone beyond his role as a referee in the CCAA proceedings if he had given effect to the Superintendent's claim. The Superintendent wants to jump ahead of all the other creditors by obtaining an extraordinary payment at the end of a long CCAA process. If the motions judge had ordered this payment, he would have upset the ground rules that all stakeholders agreed to and that he supervised for over two years.

77 The motions judge took into account the likely result of the Superintendent's claims if the Companies are put into bankruptcy. He recognized that bankruptcy would potentially reverse the priority accorded to the pension claims outside bankruptcy. Nonetheless, having weighed all the competing considerations, he exercised his discretion to lift the stay and permit the bankruptcy petitions to proceed. In my view, he exercised his discretion properly. I would not give effect to this ground of appeal.

e) Did the motions judge err by ordering the transfer of Ivaco and Ifastgroupe's head offices from Quebec to Toronto?

78 Ivaco's head office was in Montreal; Ifastgroupe's head office was in Marieville, Quebec. The motions judge ordered that these head offices be transferred to Toronto. He did so in the light of s. 43(5) of the BIA, which states that an application for a bankruptcy petition shall be filed in the court having jurisdiction in the judicial district of the locality of the debtor. The Superintendent, supported by the QPC, submits that the motions judge had no jurisdiction to make this order, or that he improperly exercised his discretion in doing so. I disagree with both submissions.

79 The Superintendent and the QPC contend that the CCAA does not expressly authorize a judge to transfer the location of the head office of a debtor company. And, although a judge in CCAA proceedings has inherent jurisdiction to control the court's processes, the judge does not have a similar jurisdiction to do what the motions judge did here: control the debtor Companies' or the creditors' processes. See *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 38.

80 I accept the Superintendent's and the QPC's contention that the CCAA did not give the motions judge jurisdiction to order the transfer. I also accept that the transfer was not made to facilitate a restructuring under the CCAA. Instead it was made to facilitate future bankruptcy proceedings. Nonetheless, in my view, the motions judge did not need to resort to the CCAA because he had express authority to order the transfer in s. 191 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. Sections 191(1) and (2) provide:

s. 191(1) In this section, "reorganization" means a court order made under;

(a) section 241;

(b) the *Bankruptcy and Insolvency Act* approving a proposal; or

> (c) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors.

> s. 191(2) If a corporation is subject to an order referred to in subsection (1), its articles may be amended by such order to effect any change that might be lawfully be made by an amendment under section 173.

81 The applicable section here is section 191(1)(c). The stay order is an order under an Act of Parliament, the CCAA, that affects the rights among the Companies, its shareholders and its creditors. See *Beatrice Foods Inc., Re* (1996), 43 C.B.R. (4th) 10 (Ont. Gen. Div. [Commercial List]). Therefore, as both Ivaco and Ifastgroupe were subject to an order under s. 191(1)(c) of the CBCA, under s. 191(2) each of its articles may be amended to effect any change that might be made by an amendment under s. 173. Section 173(1)(b) of the statute permits a corporation to change the location of its head office:

> s. 173(1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to
>
> .....
>
> (b) change the province in which its registered office is situated;

82 On my reading of the statute, s. 191 is a stand-alone section that gave the motions judge authority to order the transfer. Provided a corporation is subject to an order under s. 191(1), its articles may be amended. The amending order under s. 191(2) need not serve the purpose of the triggering statute in s. 191(1), in this case the CCAA. If Parliament had wanted to limit amendments to those that would facilitate a reorganization, it could have said so. Thus, the combination of ss. 191(1)(c), 191(2) and 173(1)(b) gave the motions judge the jurisdiction to order the transfer of Ivaco and Ifastgroupe's head offices from Quebec to Toronto. Resort to the CCAA was unnecessary.

83 The Superintendent and the QPC rely on this court's decision in *Stelco Inc., Re* in support of their argument. However, that case differs from the present case in a material way. In *Stelco Inc., Re* the issue was whether a motions judge in CCAA proceedings could order the removal of two members of the company's board of directors under s. 109(1) of the CBCA. The power to remove directors is vested in the shareholders. Blair J.A. held that the motions judge could not rely on the court's discretion under s. 11 of the CCAA to override or supplant the specific power in s. 109(1) of the CBCA. The discretion under s. 11 must be used to control the court's processes, not the company's processes.

84 By contrast, in the present case, s. 191 of the CBCA gives the court express authority to order the transfer of the head office of a company that is subject to an order under the CCAA. Thus, to make a transfer order, the court need not rely on its discretion under s. 11 of the CCAA.

85 However, the jurisdiction in s. 191(2) is discretionary, as evidenced by the use of the word "may". Therefore, the remaining question on this ground of appeal is whether the motions judge properly exercised his discretion in ordering the transfer. I think that he did.

86 Ivaco and Ifastgroupe had not actively carried on business since the sale of their assets to Heico was completed in December 2004. The Monitor holds the proceeds of the sales in bank accounts in Toronto. Because of the lengthy and complex CCAA proceedings, the Ontario Superior Court -- Commercial List is familiar with the affairs of Ivaco

and Ifastgroupe. Having all the issues common to all the Companies administered at the same time before the court familiar with these issues will facilitate the most efficient, consistent and just administration and distribution of their estates.

87 The QPC, in particular, objects to these head office transfers. It argues that the motions judge's order will enable the creditors to defeat a future motion to transfer to the Quebec Superior Court the question whether the Companies participating in the Ivaco Salaried Plan are "solidarily liable", that is jointly and severely liable, under Quebec law for satisfying the obligation to fund the plan.

88 The underpinning of the QPC's argument is as follows: the "solidarily liable" provision is unique to Quebec law and therefore should be decided by a Quebec court. Whether the Quebec or the Ontario Superior Court presides over this future motion will turn on the application of the *forum conveniens* principle. One relevant factor in assessing the *forum conveniens* is the residence or place of business of the parties. According to the QPC, transferring Ivaco's and Ifastgroupe's head offices to Toronto will tip the scales in favour of the Ontario Superior Court hearing the "solidarily liable" motion.

89 It seems to me that this is a weak argument. The QPC has not yet brought this motion. When it does, the Ontario Superior Court can assess the relevant considerations affecting the appropriate forum. Now, however, the motions judge's transfer order just makes good sense. He, therefore, exercised his discretion properly. I would not give effect to this ground of appeal.

D. Conclusion

90 The motions judge did not err in law in refusing to order the immediate payment of the amount of the deemed trusts under the *Pension Benefits Act* or in refusing to segregate that amount. Nor did he err in exercising his discretion to lift the stay under the CCAA and permit the bankruptcy petitions to proceed. Finally, the motions judge did not err in ordering that the head offices of Ivaco and Ifastgroupe be transferred from Quebec to Toronto. Accordingly, I would dismiss the Superintendent's appeal.

91 If the parties cannot agree on the costs of the appeal, they may make written submissions to the court. These submissions should be delivered within 30 days of the release of these reasons.

***M. Rosenberg J.A.*:**

I agree.

***J. Simmons J.A.*:**

I agree.

Appeal dismissed.

FN1. Taking into account a $12 million distribution to the National Bank permitted by the motions judge in December 2004.

END OF DOCUMENT

TAB 3

50 C.B.R. (5th) 58

2009 CarswellOnt 374

Bank of Nova Scotia v. Huronia Precision Plastics Inc.

The Bank of Nova Scotia (Applicant) v. Huronia Precision Plastics Inc. (Respondent)

Ontario Superior Court of Justice [Commercial List]

Morawetz J.

Heard: November 4, 2008
Judgment: January 26, 2009
Docket: CV-08-7722-00CL

Counsel: Sam Rappos, for Applicant, Bank of Nova Scotia

A'Amer Ather, for Canada Revenue Agency

Chris Burr, for Maxium Financial Services Inc.

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax -- Miscellaneous; Insolvency

Tax --- Goods and Services Tax -- Collection and remittance -- GST held in trust

Bank brought motion for order permanently lifting order for stay of proceedings against company to allow bank to bring application for bankruptcy order against company -- Canada Revenue Agency ("CRA") also brought motion in which it sought order directing receiver to pay CRA GST debt of $63,164.17, and in event that court permitted lifting of stay, order permitting CRA to take necessary steps to protect its priority position over GST held in trust -- Vesting order provided that receiver would distribute holdback of $130,000 after payment to CRA of amount of GST claim to extent that it was found to attach to net proceeds in priority to interest of bank -- Bank's motion granted; CRA's dismissed -- Issue was whether CRA had priority with respect to amounts over bank according to s. 222 of Excise Tax Act -- Bank would have ability to nullify GST deemed trust by bringing application for bankruptcy order -- Desire for bank to alter priorities was legitimate reason to seek bankruptcy -- Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax --- General principles -- Priority of tax claims in bankruptcy proceedings

Bank brought motion for order permanently lifting order for stay of proceedings against company to allow bank to bring application for bankruptcy order against company -- Canada Revenue Agency ("CRA") also brought motion in which it sought order directing receiver to pay CRA GST debt of $63,164.17, and in event that court permitted lifting of stay, order permitting CRA to take necessary steps to protect its priority position over GST held in trust -- Vesting order provided that receiver would distribute holdback of $130,000 after payment to CRA of amount of GST claim to extent that it was found to attach to net proceeds in priority to interest of bank -- Bank's motion granted; CRA's dismissed -- Issue was whether CRA had priority with respect to amounts over bank according to s. 222 of Excise Tax Act -- Bank would have ability to nullify GST deemed trust by bringing application for bankruptcy order -- Desire for bank to alter priorities was legitimate reason to seek bankruptcy.

Cases considered by Morawetz J.:

Ivaco Inc., Re (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) -- followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally -- referred to

s. 2 "bankrupt" -- considered

s. 43 -- pursuant to

s. 67(2) -- considered

s. 67(3) -- considered

Excise Tax Act, R.S.C. 1985, c. E-15

Pt. IX [en. 1990, c. 45, s. 12(1)] -- referred to

Pt. IX, Div. II [en. 1990, c. 45, s. 12(1)] -- referred to

s. 222 [en. 1990, c. 45, s. 12(1)] -- referred to

s. 222(1) [en. 1990, c. 45, s. 12(1)] -- considered

s. 222(1.1) [en. 1993, c. 27, s. 87(1)] -- considered

MOTION for order permanently lifting order for stay of proceedings against company; MOTION for order directing receiver to pay Canada Revenue Agency amount of $63,164.17.

***Morawetz J.*:**

1 The Bank of Nova Scotia ("BNS") seeks an order permanently lifting the stay of proceedings provided for in paragraph 9 of the order of September 17, 2008 (the "Appointment Order") as against Huronia Precision Plastics Inc. ("Huronia") for the purposes of permitting BNS to bring an application for a bankruptcy order against Huronia pursuant to s. 43 of the *Bankruptcy and Insolvency Act* ("*BIA*"); and authorizing and directing Zeifman Partners Inc. ("Zeifman" or the "Receiver"), the court appointed Receiver of Huronia to consent, on behalf of Huronia, to BNS's application for a bankruptcy order.

2 The Canada Revenue Agency ("CRA") has also brought a motion in which it seeks an order directing the Receiver to pay to CRA immediately, the amount of $63,164.17; and in the event that this court permits a lifting of the stay to permit BNS to apply for the bankruptcy order, a lifting of the stay to permit CRA to take the necessary steps to protect its priority position.

3 The Appointment Order was made September 17, 2008. The Receiver subsequently brought a motion returnable September 30, 2008 seeking an order vesting certain equipment in Magna Closures Inc. ("Magna") and directing that the net proceeds of the sale would stand in the place of the equipment.

4 The order was granted on September 30, 2008 (the "Vesting Order") and paragraph 9 of the Vesting Order provides:

> 9. THIS COURT ORDERS that notwithstanding paragraph 30 of the Appointment Order, the Receiver shall withhold from the net proceeds of the Purchased Assets the total sum of $130,000 (the "Holdback") pending resolution of the claim asserted by Canada Revenue Agency ("CRA") respecting possible pre-receivership GST arrears said to be owing by the Debtor (the "GST Claim"). The Receiver shall distribute the Holdback, or any balance thereof after payment to CRA of the amount of the GST Claim <u>to the extent that it is found to attach to the net proceeds in priority to the interest of Maxium and BNS</u>, to Maxium and BNS in accordance with their respective proportionate entitlements to the net proceeds under the terms of the Bill of Sale or as otherwise agreed upon by them, upon the consent of CRA, Maxium and BNS or a further order of this Court.
>
> [emphasis added]

5 Subsequent to the granting of the Vesting Order, CRA informed BNS and Maxium that CRA's claim for GST for the period prior to the Appointment Order was $63,164.17.

6 Pursuant to ss. 222(1) of the *Excise Tax Act* ("*ETA*"), persons who have collected GST amounts but have not remitted them to CRA, as and when required to do so by the *ETA*, are deemed to hold those amounts in trust for the Crown.

7 The one notable exception to the priority granted to the deemed trust is that it is subject to s. 222(1.1) of the *ETA*, which provides that s. 222(1) does not apply, at or after the time a person becomes bankrupt (within the meaning of the *BIA*), to any amounts that, before that time, were collected or became collectable by the person as or on account of tax under Division II of the *ETA*.

8 Section 67(2) of the *BIA* provides that all deemed trusts created by federal or provincial legislation for Her Majesty are rendered invalid except those that would be valid in the absence of such legislation and except those set out in s. 67(3) of the *BIA*. The deemed trust under the *ETA* is not listed in s. 67(3), nor, in my view, is it analogous to the deemed trusts that are set out in that section.

9 Counsel for BNS submits that it is clear that the *ETA* specifically contemplates that the priority afforded to the Crown under s. 222 of the *ETA* can be extinguished and reversed on the occurrence of a bankruptcy. Further, both the *ETA* and the *BIA* recognize that any priority that CRA could potentially have with respect to the Holdback in the amount of the GST Claim would be reversed upon the bankruptcy of Huronia.

10 CRA submits that it has priority over BNS with respect to the Holdback pursuant to the provisions of the *ETA* and since BNS has acceded to CRA's priority as a result of paragraph 9 of the Vesting Order, BNS should not be permitted to bring an application for a bankruptcy order to disrupt CRA's priority to which it acceded.

11 Counsel for BNS submits that at no time prior to or after the issuance of the Vesting Order did it accede to the CRA having an interest in the Holdback in the amount of GST Claim in absolute priority to BNS.

12 In my view, absent the wording of paragraph 9 of the Vesting Order, BNS would have the ability to reverse the priority of the GST Claim by bringing an application for a bankruptcy order.

13 The Court of Appeal decision in *Ivaco Inc., Re*, [2006] O.J. No. 4152 (Ont. C.A.) stands for the proposition that it is not improper to seek a bankruptcy order for the purpose of reversing a statutory priority. In this case, it would be to reverse the priority position of CRA. Further, the timing of BNS's action has no bearing on the validity of the action being sought as there are no such time limitations imposed under s. 222(1.1).

14 It seems to me that the issue to consider is whether paragraph 9 of the Vesting Order operates so as to support the position put forth by CRA. In my view, the paragraph is clear where it provides that the Receiver "shall distribute the Holdback, or any balance thereof, after payment to the CRA of the amount of the GST Claim *to the extent that it is found to attach to the net proceeds in priority to the interest of* ... [Maxium and BNS]". [emphasis added]

15 I agree with the submission of counsel to BNS that paragraph 9 reflects that any distribution of the Holdback to CRA is dependent on a determination as to whether the GST Claim attaches to the Holdback in priority to the interest of BNS.

16 In its factum, counsel to CRA, at paragraph 24 states that the Receiver's obligation to pay the deemed trust portion of the GST was made explicit and that the obligation to pay CRA was not otherwise qualified by any conditions. I disagree. The emphasized portion of paragraph 9 has to be given a common sense interpretation which, in this case, takes into account that, at the time of the issuance of the Vesting Order, there was an outstanding issue with respect to the priority of the interest of Maxium and BNS.

17 CRA also made the submission that the Receiver had certain obligations and responsibilities as set out in paragraph 9 of the Vesting Order which specifically qualifies the Receiver's rights as set out in the Appointment Order. Counsel for CRA submitted that the relevant portion of the Vesting Order specifically speaks to payment to CRA and, as of the date of the hearing of this motion, with Huronia not being bankrupt, the Receiver is under an obligation to pay CRA the amount of its deemed trust claim. I do not read paragraph 9 in such a way that it supports this submission. At the time of the granting of the Vesting Order, the issue of priority with respect to the interest of Maxium and BNS had not been determined with finality. It follows that the payment obligation to CRA had not been triggered.

18 Paragraph 9 does not, in my view, direct the Receiver to distribute the Holdback to CRA forthwith upon the CRA providing evidence to the Receiver with respect to the amounts owing by Huronia for the period prior to the issuance of the Appointment Order. If it did, the emphasized words in paragraph 9 would serve no purpose.

19 Finally, with respect to the request of BNS to lift the stay for the purpose of bringing an application for a bankruptcy order against Huronia and authorizing the Receiver to consent to such application, I am satisfied that the desire for BNS to use the *BIA* to alter priorities is a legitimate reason to seek a bankruptcy (see *Re Ivaco Inc.*) and the timing of the BNS's action has no bearing on the validity of this request.

20 Consequently, it follows that the motion of BNS is granted and an order shall issue lifting the stay of proceedings against Huronia for the purpose of permitting BNS to bring the application for bankruptcy order and authorizing the Receiver to consent to such application on behalf of Huronia.

21 In these circumstances, it also follows that no order is to be made directing the Receiver to make payment to CRA, nor is the stay to be lifted to enable CRA to take steps to protect its position. The motion of CRA is dismissed.

22 If the parties are unable to agree on costs, brief written submissions, to a maximum of three pages, may be filed within 20 days.

Order accordingly.

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TAB 4

1970 CarswellOnt 74

Develox Industries Ltd., Re
Re Develox Industries Limited
Ontario Supreme Court, In Bankruptcy
Houlden J.
Judgment: May 21, 1970

Counsel: C. H. Morawetz, Q.C., for trustee.

J. Brownlie, for applicant.

R. M. Loudon, for the petitioning creditor.

Subject: Corporate and Commercial; Insolvency

Annulling receiving order -- Conflicting rights between chattel mortgagee and landlord -- Whether petition filed for improper purpose -- Right of creditor to bring application -- The Bankruptcy Act, R.S.C. 1952, c. 14, s. 138.

A chattel mortgagee, valuing his security, filed a petition for a receiving order on 4th May 1970. A receiving order was made on 13th May 1970. On the morning of 13th May and before the trustee had an opportunity to interfere, the landlord's bailiff, who had previously distrained for arrears of rent, sold certain assets, and the trustee demanded that the bailiff pay to him the amount received from the sale.

On an application by the landlord to have the receiving order annulled, held, the application must be dismissed. The petition had not been filed for an improper purpose. This was a situation where two creditors with conflicting legal remedies had done everything in their power to enforce the remedy given to them by law. There was nothing improper in what the chattel mortgagee had done.

It was also alleged by the applicant that the petitioning creditor did not have a proper debt.

Held, the Court could not enquire into that question on this application.

If the trustee should see fit at a later date to disallow the petitioning creditor's debt, and if that disallowance should be upheld by the court, then an application might be brought to rescind the receiving order.

Semble, an application to rescind or annul a receiving order should be made only by the debtor, the petitioning creditor or the trustee. To permit any creditor to bring such an application would be an abuse to the process of the court.

Annotation

As the learned Bankruptcy Judge pointed out, this case is probably the result of our law as laid down in the case of *Re Polycoating & Films Ltd.*, [1965] 2 O.R. 698, 8 C.B.R. (N.S.) 163, 51 D.L.R. (2d) 673 (C.A.), which decided that if a tenant becomes bankrupt, the claim of the landlord loses its priority and ranks subsequent to the claim of a chattel mortgagee as a secured creditor.

The landlord suggested that it was improper for the chattel mortgagee to file a petition for a receiving order, obtain a receiving order and thus gain priority over the landlord. However, it appears that the action taken by the chattel mortgagee in this case was not any more improper than the action taken by the chattel mortgagee in the cose of *John Forsyth Co. v. Thorburn*, [1964] 1 O.R. 450, 6 C.B.R. (N.S.) 192, 42 D.L.R. (2d) 692.

As His Lordship pointed out, when a person or corporation adjudged bankrupt is hopelessly insolvent and ought to be in bankruptcy, it would appear not to be proper for any creditor (because he is aggrieved) to bring an application to have the bankruptcy annulled. Of course, if the trustee sees fit to disallow the claim of the petitioning creditor, and that disallowance is upheld by the court, an application might be brought to rescind the receiving order. In this connection reference may be had to the provisions of s. 94(5) of the Bankruptcy Act, which permits the court to expunge a proof upon the application of a creditor if the trustee declines to interfere. However, if the bankrupt is hopelessly insolvent, it is quite likely that a rescission of the receiving order might be answered with a voluntary assignment in bankruptcy, in which case very little would be gained by the aggrieved creditor.

***Houlden J.* (orally):**

1 This is an application to annul or rescind the receiving order made in this bankruptcy on 13th May 1970. The application is undoubtedly the result of the provisions of our law as to the rights of a landlord vis-a-vis the rights of a chattel mortgagee.

2 The landlord who is applying to have the receiving order set aside had arrears of rent dating back to 21st December 1969. If there had been no bankruptcy, the claim of the landlord would have had priority over the claim of the chattel mortgagee.

3 In the case of *Re Polycoating & Films Ltd.*, [1965] 2 O.R. 698, 8 C.B.R. (N.S.) 163, 51 D.L.R. (2d) 673, the Court of Appeal for Ontario decided that if a tenant becomes bankrupt, the claim of the landlord loses its priority and ranks subsequent to the claim of a chattel mortgagee as a secured creditor.

4 The landlord on 16th April distrained for arrears of rent and realizing its position instructed the bailiff to proceed with disposal of sufficient assets to pay the arrears of rent, with the sale to take place as quickly as the law permitted. On 4th May the chattel mortgagee applied to me for an interim injunction, which I granted, with the injunction to be in force until 11th May 1970, restraining the landlord from disposing of the assets seized by the bailiff. The application to continue the injunction was heard by Wilson J. and he dismissed it after reserving the matter until 12th May.

5 The chattel mortgagee on 4th May 1970 had filed a petition for a receiving order with the petition returnable on Thursday, 14th May. On 13th May the petitioning creditor obtained from the debtor a consent to an immedi-

ate receiving order and on 13th May 1970 the Registrar in bankruptcy granted the receiving order. The landlord's bailiff disposed of certain assets on the morning of 13th May, and the trustee has demanded that the bailiff pay to him the amount received from the sale. The landlord wishes to have the receiving order rescinded so that he may retain the moneys in the hands of the bailiff. Counsel for the landlord concedes that if this application is dismissed the moneys must be paid to the trustee.

6 The first submission of the applicant is, that the petition was filed for an improper purpose, i.e. to defeat the priority of the landlord and to permit the chattel mortgagee to rank ahead of the landlord. There has been considerable argument before me as to whether or not the landlord has the status to bring this application. The applicable section of the Bankruptcy Act, R.S.C. 1952, c. 14, is s. 138(1) but the section does not state who can bring the application. Rule 79, which also deals with the application, states that copies must be served upon the petitioning creditor and the trustee, but again gives no indication as to who should bring the application.

7 In view of the disposition which I propose to make of this application, I do not have to give a definite answer to this question. However, it would seem to me that the application to rescind or annul a receiving order should be by the debtor, the petitioning creditor or the trustee. In my view, to permit any creditor to bring such an application would be an abuse to the process of the court. For the purpose of this application I will assume that the landlord has the necessary status to ask that the receiving order be annulled or rescinded.

8 The question then is whether the petition has been filed for an improper purpose? It seems to me that in this situation we have two creditors with conflicting legal remedies and both have done everything in their power to enforce the remedy given to them by law. The situation is very similar to that which arose in *John Forsyth Co. v. Thorburn*, [1964] 1 O.R. 450, 6 C.B.R. (N.S.) 192, 42 D.L.R. (2d) 692. In that case, a chattel mortgagee knowing that his chattel mortgage was invalid, seized and sold in order to avoid an attack on its security. The Court held that there was nothing improper in the action which had been taken by the chattel mortgagee. Similarly, in this case I can find nothing improper in what the chattel mortgagee has done. It is not similar to the situation where a petition is filed to get rid of a trade competitior or for some other purpose which the courts have held to be improper. The chattel mortgagee has merely been attempting to assert the rights given to it by law.

9 The second ground of attack is that the petitioning creditor did not have a proper debt and counsel for the landlord has referred me to certain of the material which was filed, which might indicate doubt about the amount owing to the petitioning creditor.

10 I can see no basis on which the Court can inquire into that question on this application. If the trustee should see fit at a later date, as was done *Re Collings*, [1936] O.W.N. 409, 17 C.B.R. 390, [1936] 4 D.L.R. 28, to disallow the petitioning creditor's debt, and if that disallowance should be upheld by the Court, then an application might be brought to rescind the receiving order. However, I can see no reason at the present time why the petition should be set aside. The debtor company appears to be clearly insolvent and it has consented to the making of the receiving order. In my opinion, the receiving order should stand.

11 In the result, the application will be dismissed. The costs of all parties in the circumstances should be payable out of the estate.

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TAB 5

C
1978 CarswellBC 280

Gasthof Schnitzel House Ltd. v. Sanderson
RE GASTHOF SCHNITZEL HOUSE LTD. and SANDERSON
British Columbia Supreme Court
Ruttan J.
Heard: January 20, 1978
Judgment: February 14, 1978
Docket: Vancouver No. 603/76

Counsel: I.G. Nathanson, for trustee.

H.M. Suiker, for First Canadian Land Corporation Limited.

Subject: Corporate and Commercial; Insolvency; Property

Bankruptcy --- Assignments in bankruptcy -- Annulment of assignment -- By creditor.

Bankruptcy --- Priorities of claims -- Claims by landlord -- Landlord's right of distraint.

Landlord and Tenant --- Distress -- Levying distress -- Sale -- Purchase by landlord.

Distress -- Distress by landlord -- Property of bankrupt seized -- Subject to claims of secured creditors -- Sale by landlord to its parent company -- Sale null and void -- Trustee entitled to possession of chattels -- Bankruptcy not annulled -- The Bankruptcy Act, s. 51.

An application was made by the trustee for an order pursuant to s. 51 of the Bankruptcy Act that the money realized from a distress levied by a landlord be paid to the trustee. The landlord brought an application to have the bankruptcy annulled on the ground that the assignment in bankruptcy had been filed for an improper purpose, namely, to defeat the landlord's right to priority over certain secured creditors.

Held:

The assignment in bankruptcy should not be set aside and the trustee was entitled to the proceeds from the sale of the assets. The fact that the insolvent debtor filed the assignment as a result of the urging of the secured creditors, who were jockeying for legal remedies, did not mean that the assignment was invalid.

Although the sale was completed and the proceeds of sale paid to the landlord prior to the time of the filing of the assignment, the landlord was not entitled to retain the proceeds of sale. The sale was null and void because the landlord was the wholly owned subsidiary of the purchaser which had the effect of the landlord selling to himself. The mask of corporate organization was used to hide the identical interests of the purchaser and the vendor.

Cases considered:

Distinguished:

Howell v. Listowell Rink & Park Co. (1886), 13 O.R. 476 (C.A.).

Applied:

Shore & Grant v. Wilson Bros. (1916), 23 B.C.R. 33, 35 D.L.R. 293 (C.A.).

Barlow v. Breeze, [1917] 1 W.W.R. 270, 31 D.L.R. 280 (B.C.C.A.).

Re Develox Indust. Ltd., [1970] 3 O.R. 199, 14 C.B.R. (N.S.) 132, 12 D.L.R. (3d) 579

Statute considered:

Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 31(3), (4), (5), 41(1), 51, 151(1).

Rule considered:

Bankruptcy R. 105.

Application to require landlord to pay proceeds of distress sale to trustee. Cross-application to annul bankruptcy.

***Ruttan J.*:**

1 Two opposing motions have been filed in this bankruptcy.

2 The first one made on behalf of the trustee moves for an order pursuant to s. 51 of the Bankruptcy Act, R.S.C. 1970, c. B-3, that the money realized from the distress levied by the First Canadian Land Corporation Limited (the debtor's landlord) be paid to the trustee.

3 The second motion, by the said First Canadian Land Corporation Limited, applies for an order pursuant to s. 151(1) of the Bankruptcy Act that the assignment for the general benefit of the creditors as filed herein on 22nd November 1976 be annulled.

4 What exists here is a conflict between two creditors, or two classes of creditors, each seeking with the use of conflicting legal remedies to secure priority in payment of its claim.

5 It is common ground that the landlord who distrains for rent due, by seizing and selling his tenant's assets before his tenant becomes bankrupt, has priority over the claims of secured creditors: see s. 50(1) of the Bankruptcy Act. If, however, before he completes his distraint the tenant becomes bankrupt, either by action of a petitioning creditor or by voluntary assignment, the claim of the landlord loses its priority and ranks subsequent to the claim of secured creditors.

6 The situation here is very similar to the one that faced Houlden J. (as he then was) in *Re Develox Indust. Ltd.*, [1970] 3 O.R. 199, 14 C.B.R. (N.S.) 132, 12 D.L.R. (3d) 579. There the petitioning secured creditor had expedited the granting of his application for a receiving order by obtaining the consent of the debtor, so that he could block a sale on behalf of the debtor's landlord of certain assets. The receiving order granted to the petitioning creditor and the sale of assets by the landlord took place on the same morning. The landlord applied to have the receiving order rescinded, so that he could retain the moneys in the hands of his bailiff. His application was on the ground that the petition had been filed for an improper purpose, i.e., to defeat the landlord's priority and permit the chattel mortgage to rank ahead of the landlord's distraint.

7 So here the landlord applies to have the assignment in bankruptcy set aside as null and void. The ground here alleged is that the proceedings were not for the "general benefit of the creditors of the debtor Gasthof", but for the sole benefit of the two major secured creditors, the Federal Business Development Bank and Admark Ltd., and that the trustee appointed was trustee in effect only for the secured creditors, and the assignment was not properly filed, since the Official Receiver did not fill in the name of the trustee or inquire as to the wishes of the interested creditors as to who should be appointed trustee. The name of the proposed trustee was already filled in when the assignment was lodged, with the Official Receiver, all of this contrary to s. 31(3), (4) and (5) of the Bankruptcy Act.

8 However the landlord himself does not have the general interests of the creditors in mind, since he too, as in the *Develox* case, had commenced a sale by distraint and faces the loss of his priority if the assignment in bankruptcy is ruled valid. Accordingly the landlord has an alternative submission that in any event his sale was completed before the assignment was made, and seeks an order for payment accordingly.

9 So whether the motion of the trustee or that of the landlord is granted, there will be no obvious benefit for the general body of creditors.

10 As stated above, the name of the proposed trustee was already inserted when the assignment was presented to the Official Receiver. From the material filed, it is apparent that the Official Receiver did not inquire of any of the creditors of the said debtor as to whether they wished the said Henry Longstaff to be trustee. However, with the assignment there was filed Form 31, i.e., the preliminary statement of affairs of the bankrupt. As that form sets out, the total assets of the bankrupt did not exceed $16,000 or $17,000, and the two secured creditors had claims by way of debentures amounting to $330,000. These two creditors certainly have not complained about the appointment of Longstaff as trustee, or about his successor Sanderson; indeed they expedited the bankrupt's application. I can hardly class the application as one of a sham assignment, since the most interested creditors are consenting to the appointment and to the assignment in bankruptcy.

11 I do not condone the custom that is said to obtain in the bankruptcy registries of by-passing the Official Receiver and merely getting him to rubber-stamp the appointment of a trustee. Such a procedure may well lead to abuse and fraud. In the present case, however, it is obvious, as was the situation in the *Develox* case, that the debtor is hopelessly insolvent and that he has consented to an assignment in bankruptcy that is entirely justified. That the secured creditors have urged on the filing of this assignment by the bankrupt does not mean that the application is for an improper purpose. Both parties have merely been jockeying for position, each hoping to enforce the legal remedies given to them by law. In the circumstances I see no reason why the assignment should be set aside or declared null and void, and I will allow it to stand. In the circumstances, and pursuant to R. 105, I

direct that the assignment in bankruptcy is not rendered void, but shall stand in full force and effect as from the date of the assignment, 22nd November 1976.

12 I turn to consider the claim of priority by reason of distraint filed by the landlord.

13 I find first of all that the sale was completed by exchange of the cheque at 11:45 in the forenoon of the same day that the assignment was made at 12:15 p.m. The distraining process was therefore "completely executed by payment to the creditor": s. 50(1).

14 But the trustee challenged the sale as a nullity, on the ground that there was no valid sale to an independent purchaser, since the purchasing company is identical to the landlord, and the landlord in effect was purchasing his own goods, and therefore the sale must be declared void.

15 There is no doubt that a sale on distraint in which the real purchaser is the landlord is an illegal sale. The landlord cannot occupy the dual position of seller and buyer: see the decisions of our own Court of Appeal of *Shore & Grant v. Wilson Bros.* (1916), 23 B.C.R. 33, 35 D.L.R. 293 (C.A.); and *Barlow v. Breeze*, [1917] 1 W.W.R. 270, 31 D.L.R. 280 (B.C.C.A.).

16 In the present case, the parties to the sale were the landlord as distrainor, i.e., the First Canadian Land Corporation Limited, and as purchaser V.M. Prescott Ltd. Both these parties are registered companies, and both are set out on the bill of sale as having principal places of business in the province of British Columbia, although a search of the Companies Office shows that V.M. Prescott Ltd. has its registered office in the city of Edmonton, in the province of Alberta. The president of both companies is V.M. Prescott, and as president and authorized signing officer he signed and affixed the seal of both the vendor and purchaser to the agreement for sale. In addition to Mr. Prescott as president, Lorraine Prescott is the only other officer of the First Canadian Land Corporation Limited, and the same two parties are president and secretary respectively of V.M. Prescott Ltd. They are also the sole directors of each company.

17 The shareholders of the First Canadian Land Corporation Limited are Victor Prescott in respect of one share, Lorraine Prescott in respect of one share, and V.M. Prescott Ltd. in respect of 700 shares. The shareholders of V.M. Prescott Ltd. are with respect to 510 shares V.M. Prescott and 505 shares L. W. Prescott. T. Jackson and E. E. Bishop each hold one share in V.M. Prescott Ltd., these gentlemen being barristers in the firm of Bishop and McKenzie. Thus Victor and Lorraine Prescott between them hold all but two issued shares of V.M. Prescott Ltd., the purchaser in this sale by distraint, and the said V.M. Prescott Ltd. owns all but two shares of the landlord distrainor, First Canadian Land Corporation Limited.

18 Mr. Suiker submits that the sale is a legitimate one between two separate legal entities, transacting at arm's length, and must therefore be considered a valid sale, no fraud being shown and good consideration in the form of a cheque having been transferred from the purchaser to the vendor before the assignment in bankruptcy. He relies upon the authority of *Howell v. Listowell Rink & Park Co.* (1886), 13 O.R. 476 (C.A.). In that case one Hay, who was the president of the defendant, an incorporated company, being a skating rink, and who was also a member of an incorporated gas company purchased the goods at the sale for the gas company. The judge at the trial charged the jury that Hay was both seller and buyer and that the sale was void.

19 On appeal it was held that this was a misdirection, and Cameron C.J. said this at pp. 494-95:

> The sale was a sale by an entity, distinct in law from the membersq of the gas company, though the latter were, as individual corporators, a part of that entity. The sale was not a sale in any sense by the purchaser; and, in the absence of fraud, the bid by him increased the price of the goods, and thus benefitted the plaintiff, whose goods were sold; and as the gas company and the rink company were two distinct entities, the rink company was not selling to themselves when they sold through their bailiff the plaintiff's goods to the gas company. And the reason why a landlord cannot buy goods sold at his own instance is that a man cannot be seller and buyer both; and when such a sale takes place the property in the goods still remains in the tenant, and he has a right to maintain an action against his landlord if he claims to exercise any dominion over the goods sold in consequence of the sale ...
>
> There being a sale and a purchaser, who is not the seller, I do not think any relationship between the seller and the purchaser short of the latter being the agent of the former to make the purchase, will avoid the transaction at the instance of the person whose goods are sold.

20 In that case Hay bought the goods on behalf of the gas company of which he and his brother were sole proprietors. But there is no evidence that he controlled the plaintiff company, the rink company, or was acting except as agent of the gas company. There was no evidence that the gas company was identified with and was the alter ego of the rink company.

21 But here the landlord is a wholly owned subsidiary of the purchaser. Prescott took instructions only from himself, both as purchaser and as vendor. The mask of corporate organization is being used to hide the identical interests of the purchaser and vendor. The landlord was selling to himself, and that is not permitted. The sale is therefore null and void, and I direct that the chattels which formed the subject matter of the sale be turned over to the trustee.

22 The trustee will have his costs of the motions.

Application of trustee granted. Application to annul assignment in bankruptcy dismissed.

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TAB 6

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Public's Own Market (Prince George) Ltd., Re.
Re PUBLIC'S OWN MARKET (PRINCE GEORGE) LTD.
British Columbia Supreme Court, In Bankruptcy
Hardinge L.J.S.C.
Heard: August 22, 1984
Judgment: September 28, 1984
Docket: Prince George No. B2791/84

Counsel: D. Mulroney, for applicant.

P. Warner, for respondent trustee in bankruptcy.

T. Matte, for other respondents.

Subject: Corporate and Commercial; Insolvency

Bankruptcy --- Priorities of claims -- Claims by landlord -- Landlord's right of distraint.

Preferred creditors -- Landlord and tenant -- Loss of priority over third parties -- Bankruptcy intervening before distress completed -- Bankrupt's security crystallizing on appointment of receiver and taking priority -- No improper conduct -- Landlord's application to annul bankruptcy dismissed.

The applicant, the landlord of the bankrupt, sought to have the bankrupt's assignment into bankruptcy set aside as distress proceedings undertaken by the landlord were not completed before the assignment in bankruptcy took effect. Alternatively, the landlord sought to have the proceeds of sale of the bankrupt's assets form part of the estate available for distribution to unsecured creditors. The bank, a secured creditor, promoted the bankruptcy for the purpose of reversing the priorities between its security and the landlord's right of distress.

Held:

Application dismissed.

There was no improper conduct on the part of the bank, its solicitors or the directors of the bankrupt. The bank's floating charge against all the stock in trade of the bankrupt crystallized on the date that the receiver was appointed. Therefore, there was nothing against which the landlord could levy distress when he sought to do so nine days later.

Cases considered:

Gasthof Schnitzel House Ltd. and Sanderson, Re, 27 C.B.R. (N.S.) 75, [1978] 2 W.W.R. 756 (B.C.S.C.) -- followed

Koprel Ent. Ltd., Re (1978), 27 C.B.R. (N.S.) 22 (B.C.S.C.) -- followed

Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 107, 112, 151(1).

Application to annul bankruptcy or to have proceeds from sale of assets form part of estate available for distribution to unsecured creditors.

***Hardinge L.J.S.C.*:**

1 The applicant Francana Real Estate Ltd. seeks to have the assignment of Public's Own Market (Prince George) Ltd. into bankruptcy set aside or, in the alternative, a declaration that the proceeds of the sale of certain of the bankrupt's assets form a part of the estate of the bankrupt available for distribution to the unsecured creditors including the applicant.

2 The applicant was the landlord of the bankrupt. As such it claims to be owed approximately $32,000 by way of rent, part of which is claimed to be owed pursuant to a lease entered into between the landlord and the bankrupt on 16th January 1976. The remainder of the landlord's claim is said to arise out of an unwritten month-to-month tenancy.

3 Prior to the bankruptcy the bankrupt was engaged in the business of selling household furniture and appliances through a retail sales outlet in Prince George. As is common with such businesses it needed working capital. In order to raise the required capital it obtained a loan from the Royal Bank of Canada. To secure the repayment of the loan the bank obtained a debenture from the bankrupt. The debenture created a floating charge on all the assets of the bankrupt and authorized the bank to appoint a receiver of the bankrupt's assets in the event of default. Default occurred and on 10th July 1984 the bank appointed the trustee to be its receiver. Thereupon the bank's charge crystallized.

4 On 17th July 1984 the trustee (who was then acting in its capacity as receiver under the bank's debenture) was advised of the landlord's claim for rent. In the meantime the trustee had arranged to conduct a sale of the bankrupt's stock of furniture and appliances. The sale was scheduled to take place a few days later. The solicitor for the landlord, in an attempt to secure the payment of the arrears in rent, attempted to negotiate a settlement of his client's claim with the solicitors for the bank. In order, as the solicitor for the applicant at any rate believed, to give the trustee some time to consider the claim for rent, it was agreed the landlord would not take any action by way of distress against the bankrupt's moveable assets prior to 9:00 a.m. on 19th July 1984.

5 Unknown to the solicitor for the landlord the period of grace was used not to consider the merits of its claim but to prepare an assignment into bankruptcy. The assignment was filed in the office of the official receiver, bankruptcy administration, at 11:00 a.m. on 19th July 1984. The same company that had up to the time of the filing of the assignment been performing the duties of receiver on behalf of the bank was named trustee of the estate of the bankrupt. This situation may have created a conflict of interest but counsel agreed that is not a matter

which I need decide on this application.

6 At about 9:15 a.m. on the date of the assignment the solicitor for the landlord was informed that the assignment had in fact been perfected by filing. In an attempt to protect his client's interests in case the information he had been given should be incorrect, he attended at the bankrupt's place of business accompanied by two representatives of the landlord at about 10:10 a.m. the same day. One of the landlord's representatives then proceeded to levy distress pursuant to a distress warrant. Distress was levied in the presence of a representative of the trust- ee.

7 It is not disputed that although the preliminary steps required to levy distress for arrears of rent were carried out before the assignment in bankruptcy took effect, the receipt in the office of the official receiver of the assignment effectively prevented anything further being done to complete the distress proceedings. The trustee proceeded to sell the stock in trade (including those articles against which the landlord had levied distress) by public auction. However, sufficient funds were set aside out of the proceeds of the sale to satisfy the landlord's claim in the event the bankruptcy should be set aside or the landlord declared to be entitled to rank at least as an unsecured creditor in respect of such funds.

8 Counsel for the landlord advanced ingenious arguments in an attempt to pursuade me that the assignment in bankruptcy should be set aside as being made for a fraudulent purpose, or alternatively, to declare that the landlord is a preferred creditor in relation to the realized value of the goods against which distress had been levied. I am not satisfied that either order should be made.

9 Section 151(1) of the Bankruptcy Act, R.S.C. 1970, c. B-3, authorizes the court to annul a bankruptcy. The section does not specify the circumstances in which such a drastic step should be taken. It merely provides that, "Where, in the opinion of the court ... an assignment ought not to have been filed, the court may by order annul the bankruptcy". Here there is no doubt but that the company was insolvent. Even if, as was alleged, the decision of the directors to file an assignment into banruptcy could result in a benefit to them in their capacity as guarantors of the company's indebtedness to the bank, that alone does not make the assignment fraudulent.

10 The facts in the present case bear a significant degree of similiarity to those in *Re Gasthof Schnitzel House Ltd. and Sanderson*, 27 C.B.R. (N.S.) 75, [1978] 2 W.W.R. 756 (B.C.S.C.). There the landlord had levied distress against a tenant's goods and had proceeded to realize the value of the goods. The trustee brought a motion to require the landlord to pay the proceeds of the distress sale to him and the landlord brought a counter-motion to have the bankruptcy annulled. Ruttan J. held that the fact that this insolvent debtor filed the assignment as a result of the urging of secured creditors, who were jockeying for legal remedies, did not mean the assignment was invalid. Legg J. reached the same conclusion in *Re Koprel Ent. Ltd.* (1978), 27 C.B.R. (N.S.) 22 (B.C.S.C.), where he said at p. 25:

> It is clear from the authorities cited to me by counsel for the trustee that it is not improper for a creditor in the position of Kolosi, whose rights to the chattels here conflict with a distraint against the same chattels asserted by the receiver-manager of International, to promote a bankruptcy in order to defeat the priority otherwise afforded the distraint of a landlord and permit a security holder in the position of Kolosi to rank ahead of the landlord. This is the combined effect of ss. 107(1)(*f*) and 112 of the Bankruptcy Act.

The facts in the present case are so similar to those in the two cases cited above that I can find no basis on which I could grant an order annulling the bankruptcy. There was no improper conduct on the part of the bank, its solicitor or the directors of the bankrupt.

11 The alternative submission of counsel for the landlord is that the act of levying distraint before bankruptcy against the bankrupt's stock in trade had the effect, qua those goods, of removing them for the chattels of the bankrupt to which the bank's security could attach. Accordingly, he submitted that the money realized from the sale of the distrained goods should be distributed by the trustee in accordance with the scheme of distribution set out in s. 107 of the Act.

12 It was conceded that the alternative submission on behalf of the landlord was novel. No authority was cited to substantiate the submission. The short answer to the proposition seems to be that the bank's floating charge against all the stock in trade of the bankrupt crystallized on 10th July 1984 when the receiver was appointed. Therefore there was nothing against which the landlord could levy distress when it purported to do so nine days later. Further, even if a similar argument was not raised in the *Re Gasthof Schnitzel House Ltd.* and *Re Koprel Ent. Ltd.* cases, supra, or the various authorities considered in them, to give effect to the proposition counsel has advanced in the present case would be tantamount to reaching a conclusion diametrically opposed to that reached in the earlier cases. That is not something I am persuaded I should do.

13 The application is dismissed with costs to the trustee.

Applications dismissed.

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TAB 7

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Koprel Enterprises Ltd., Re
RE KOPREL ENTERPRISES LTD.
British Columbia Supreme Court
Legg J. [in Chambers]
Heard: March 1 and 3, 1978
Judgment: March 8, 1978
Docket: Vancouver No. 719/77

Counsel: D. Bellwood, for trustee

R. Hordo and J.F. McLeod, for Kolosi Investments Ltd.

W.M. Swanson, for Royal Bank of Canada and Guaranty Trust Company of Canada.

K.R. Benson, for Morrison.

Subject: Corporate and Commercial; Insolvency

Distress by landlord -- Property of bankrupt seized -- Subject to debenture held by secured creditor -- Right of trustee to possession -- The Bankruptcy Act, s. 51(4).

A receiver and manager relying on his rights as a landlord seized property belonging to the bankrupt. The trustee of the bankrupt estate brought an application pursuant to s. 51(4) of the Bankruptcy Act to require the receiver-manager to deliver the property under seizure to him. The receiver defended the application on various grounds, including the ground that the trustee had no right to the property because it was subject to a debenture held by a secured creditor of the bankrupt who would have the ultimate benefit of the application.

Held:

The trustee was entitled to possession of the property. It is not improper for a secured creditor to promote a bankruptcy in order to permit the security holder to rank ahead of the landlord and, thus, defeat the priority otherwise afforded to the distraint of a landlord. The trustee did not admit that he was intervening on behalf of the secured creditor and reserved the right to challenge the validity and effect of the debenture held by the secured creditor.

Cases considered:

Distinguished:

Re Custom Cresting Ltd. (1975), 19 C.B.R. (N.S.) 282 (Ont.).

Re King George Billiard Hall, 5 C.B.R. 465, [1925] 1 W.W.R. 172, (sub nom. Hamilton v. Oakes) [1925] 2 D.L.R. 514 (Alta.).

Followed:

Re Develox lndust. Ltd., [1970] 3 O.R. 199, 14 C.B.R. (N.S.) 132, 12 D.L.R. (3d) 579.

Re Polycoating & Films Ltd., [1965] 2 O.R. 698, 8 C.B.R. (N.S.) 163, 51 D.L.R. (2d) 673 (C.A.).

Re Gasthof Schnitzel House Ltd., post p. 75, [1978] 2 W.W.R. 756 (B.C.).

Statute considered:

Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 12(5), 16(1), 51(2), and (4), 107(1)(f), 112.

Application to require landlord to deliver property of the bankrupt seized under a distress to the trustee of the bankrupt estate.

***Legg J.*:**

1 This is an application on behalf of the trustee in bankruptcy of Koprel Enterprises Ltd. ("Koprel") for an order pursuant to ss. 12(5), 16(1), 51(2) and (4) of the Bankruptcy Act, R.S.C. 1970, c. B-3, that W.B. Morrison, receiver-manager of International Plaza Ltd. ("International"), deliver certain property of Koprel, now in his hands, to the trustee.

2 Initially a preliminary objection was taken by Mr. Swanson acting for Guaranty Trust Company of Canada ("Guaranty Trust") and Royal Bank of Canada ("Royal Bank") on the grounds that Gould J. had made an order on 7th December 1976 in a foreclosure action brought by Guaranty Trust and the Royal Bank against International and a number of other defendants, including Koprel, in which Morrison, the receiver-manager of International, was directed to not dispose of the chattels of Koprel seized by the receiver-manager under a distress effected by the receiver-manager on 30th November 1976 without first obtaining the leave of "the Court" (meaning the Supreme Court of British Columbia).

3 During the course of argument on the preliminary objection, I was advised that Mr. Hebenton, a barrister and solicitor, had been appointed as special referee in the foreclosure proceedings to conduct an inquiry into a number of matters concerning the goods and chattels which are the subject of this application, including what claims affect the goods and in whom the goods and claims are vested. It was submitted that this application brought by the trustee should be brought in the foreclosure proceedings.

4 Although I did not uphold the preliminary objection, I did consider that this application should be initially referred to Gould J. because several applications concerning these chattels had already been canvassed before him in the foreclosure proceedings. However, Gould J. was not available to hear this application until late in April and I therefore proceeded with it.

5 The background circumstances to this application are that International holds a ground lease of some Crown property leased to it by the federal government. It built a hotel on the property which it sublet to Koprel, which operated the hotel and supplied some of the chattels needed for this purpose. Koprel got into financial difficulty (as did International under the debenture issued to Guaranty Trust and the Royal Bank) and was in default under its sublease from International. The receiver-manager of International, Morrison, having entered and taken possession of the hotel premises under the order of Gould J. of 7th December 1976, then levied a landlord's distress upon all goods and chattels in the hotel premises. I was told that this distress extended not only to goods thought to belong to Koprel as tenant but also included goods of other parties, including International.

6 I am advised by counsel that Mr. Hebenton, the special referee, has yet to make his report and recommendations in response to the directions contained in the order of Gould J. made 27th June 1977.

7 It is common ground that the bankruptcy proceedings herein were promoted by Kolosi Investments Ltd. ("Kolosi"). Kolosi is a financier of Koprel and holds a debenture issued by Koprel. A receiver-manager has been appointed by Koprel (R.R. Gourlay). Counsel for the trustee candidly states that the bankruptcy proceedings were promoted by Kolosi in order to subordinate the right to possession under the distraint levied by Morrison to the rights of Kolosi under the debenture issued by Koprel.

8 It is clear from the authorities cited to me by counsel for the trustee that it is not improper for a creditor in the position of Kolosi, whose rights to the chattels here conflict with a distraint against the same chattels asserted by the receiver-manager of International, to promote a bankruptcy in order to defeat the priority otherwise afforded the distraint of a landlord and permit a security holder in the position of Kolosi to rank ahead of the landlord. This is the combined effect of ss. 107(1)(*f*) and 112 of the Bankruptcy Act. It was held in *Re Develox Indust. Ltd.*, [1970] 3.O.R. 199, 14 C.B.R. (N.S.) 132, 12 D.L.R. (3d) 579 (per Houlden J.), that a petition in bankruptcy which had the effect of defeating a landlord's priority under a distress had not been filed for an improper purpose by a chattel mortgagee as a secured creditor. That decision follows the decision of *Re Polycoating & Films Ltd.*, [1965] 2 O.R. 698, 8 C.B.R. (N.S.) 163, 51 D.L.R. (2d) 673 (C.A.). The decision of Houlden J. in *Develox* was followed by Ruttan J. of this court in *Re Gasthof Schnitzel House Ltd.*, post p. 75, [1978] 2 W.W.R. 756.

9 The goods of which the trustee in bankruptcy seeks possession are not all the goods against which the receiver-manager has levied a distress. The goods in issue here are a variety of chattels which are detailed in Ex. A to the affidavit of Lorne Pellegrin. They consist of beer glasses, cutlery, bed-frames, mattresses, television sets and other items of furniture and furnishings used throughout the hotel.

10 In his affidavit Pellegrin deposes that the receiver-manager, Morrison, has disputed Koprel's ownership to *some* of the goods determined to have been located on the hotel premises as at 6th December 1976 and has also disputed whether *some* of these goods should be classified as chattels or trade fixtures or fixtures. His affidavit states, however, that Ex. A lists goods that have "never, to the best of my knowledge, been the subject of any dispute of the kind referred to ... that is, as to their ownership by Koprel or their classification as chattels". The affidavit of Mr. Ridgeway, a solicitor who acts for Guaranty Trust and the Royal Bank, states however that, contrary to the facts set forth in Pellegrin's affidavit, the goods referred to in Ex. A to Pellegrin's affidavit, in the possession of the receiver-manager, Morrison, are the subject of the order of Gould J. He says that these assets are not the assets of Koprel and that the ownership or characterization of these goods is in dispute. Mr. Ridge-

way refers to a letter dated 26th January 1978, written by him to the trustee in bankruptcy, in which he details his grounds for stating that these goods are not the assets of Koprel.

11 As that letter details the position taken by the Royal Bank and Guaranty Trust in opposition to the trustee here, I turn to each of the grounds stated by Mr. Ridgeway and make my comment in answer to them:

12 (a) The receiver-manager's right of distress has displaced any possession in the goods which Koprel or its trustee in bankruptcy might otherwise be entitled to, or, as a result of the distress, those goods are not the property of the bankrupt.

13 The goods listed in Ex. A to Pellegrin's affidavit upon which distraint has been levied are claimed to be Koprel's goods. Pellegrin says that he has identified certain goods which were purchased by Koprel (see para. 2 of his affidavit). He says further that he has gone over the quantities of the goods with Mr. Boyko, the representative of Morrison, and that as a result of his checking and his discussions with Boyko the goods listed in Sched. A are those about which, to the best of his knowledge, there is no dispute.

14 Mr. Ridgeway's statement in his letter is a broad statement. I read him to say that the right of distress has converted the goods levied upon by the receiver into goods in which the landlord now has title (rather than a right of distress). I do not agree with that interpretation. That position appears to me to be contrary to the decisions in *Re Develox, Re Polycoating & Films Ltd.* and the *Gasthof Schnitzel House* decision (all supra).

15 (b) It is stated that Koprel waived any rights to possession of the goods that it might have by not moving to enforce the same in a timely fashion; that Koprel made no demands for the re-delivery of the goods after the distress and that a demand for the possession of the goods was made only on behalf of Koprel by the receiver-manager of its assets appointed by Kolosi.

16 I am unable to accept those criticisms as a ground for rejecting the application of the trustee here. In my opinion, even if what is asserted is so, that does not defeat the claim of the trustee.

17 (c) It is submitted that the only right in respect of those goods, including the right to possession, lies either with the creditors of Koprel who have security in the goods, or in Mr. Morrison as receiver and manager of International, the distraining entity.

18 I do not accept that statement as ground for refusing the trustee's application here. By s. 51(4) of the Bankruptcy Act, the trustee has a right to require delivery of possession of the bankrupt's goods "under seizure for rent".

19 (d) It is further stated by Mr. Ridgeway that the receiver-manager of International is in no position to deliver up the goods because such delivery would be contrary to the order of Gould J.; that the goods have not been satisfactorily identified; that the delivery of the goods will not benefit the estate of Koprel generally as opposed to benefiting a secured creditor.

20 As to the point that the delivery of the goods here to the trustee would be contrary to the order of Gould J., I say first that I would not have entertained this application had I not first conferred with my brother Gould and ascertained that because of his unavailability he thought it proper that I hear this application.

21 Gould J.'s order was that the chattels would not be "disposed of" by the receiver-manager without leave of "this Court". I do not consider that by granting the trustee's application here I am acting contrary to Gould J.'s order.

22 As to the satisfactory identification of the goods, it appears to me that they are identified in great detail by what is set out in Ex. A.

23 As to the point raised by Mr. Ridgeway that the estate of Koprel generally will not be benefited by the delivery-up of the goods and chattels but that the only benefit which will accrue will be the benefit of Koprel, I have also considered that statement of Mr. Ridgeway together with the submissions made by Mr. Swanson when he elaborated on that position at the hearing before me.

24 He submitted that the goods in question here do not belong to the bankrupt, Koprel, but belong to Kolosi by virtue of the terms of Kolosi's debenture. He relies upon the decision in *Re Custom Cresting Ltd.* (1975), 19 C.B.R. (N.S.) 282 (Ont.). I see a distinction between the facts in the case at bar and the facts in that case, however. In that case the issue is whether at the date of bankruptcy the remainder of the term of a lease constituted an asset of the bankrupt at the time of the assignment in bankruptcy. Henry J. held that the question of whether a lease continued to be in existence and therefore an asset of the bankrupt was not one to be determined in bankruptcy proceedings but was a matter of property and civil rights regulated by the laws of the province and to be determined in the ordinary courts of the province. He accordingly dismissed the claim of the trustee.

25 I do not consider that case applicable here. The goods of which the trustee seeks possession in the case at bar are in existence. The question before me is whether the trustee is entitled to possession of them as against the receiver-manager, Morrison. Section 51(4) of the Bankruptcy Act confers jurisdiction to make the order applied for here.

26 As to the matter of the goods belonging to Kolosi rather than Koprel, I note that the terms of the debenture held by Kolosi are not set out in the material before me. I assume, however, for the purposes of this application, that any goods of Koprel are charged under the provisions of the debenture either specifically or by way of a floating charge which has crystallized. However, Koprel may have some equity in these goods, depending upon the amount owing under the debenture. In my opinion the trustee in bankruptcy is entitled to claim possession to whatever goods belong to Koprel subject to any right that Kolosi may have to such goods.

27 In his submission counsel for Guaranty Trust and the Royal Bank relied upon *Re King George Billiard Hall*, 5 C.B.R. 465, [1925] 1 W.W.R. 172, (sub nom. *Hamilton v. Oakes)* [1925] 2 D.L.R. 514 (Alta.). He submitted that the debtor here has no beneficial interest in the goods and that the trustee is not entitled to intervene solely for the purpose of assisting one secured creditor (Kolosi) as against another secured creditor (Guaranty Trust-Royal Bank).

28 In the *King George Billiard Hall* case it was admitted that the trustee was intervening on behalf of the secured creditor.

29 In the case at bar the trustee does not admit that position and throughout the proceedings before me has stated that he reserved to himself the right to challenge the validity and effect of the debenture held by Kolosi.

30 In the case at bar the affidavits indicate that the value of the chattels in issue here, when taken with other chattels of the debtor, may be sufficient to satisfy the amount due under the debenture of Kolosi. That issue will have to be determined later by the trustee in bankruptcy after Kolosi values its security and after the trustee in bankruptcy determines whether he accepts the debenture held by Kolosi as a valid and effective security.

31 Accordingly I allow the application and direct that the receiver-manager, Morrison, deliver up possession of the goods mentioned in Ex. A to the affidavit of Lorne Pellegrin to the trustee in bankruptcy.

32 Counsel for the trustee in bankruptcy advised me at the end of his submission that the trustee would be satisfied with, and be able to act upon, a written acknowledgment from the receiver-manager acknowledging that the trustee was entitled to possession of the goods in question. There will be judgment accordingly. If there is any difficulty in giving effect to this order, counsel may speak to the matter again.

33 I wish to add that I was at first reluctant to make this order without learning from the special referee appointed in the foreclosure proceedings whether he had any recommendation to make with regard to the chattels in question here. During the course of his argument counsel for Guaranty Trust and the Royal Bank advised me that he intended to submit to the special referee that the goods in question here had become the property of International as landlord's fixtures (and therefore the property of Guaranty Trust and the Royal Bank). When that argument was tested in discussion with reference to items listed in Ex. A (e.g., cutlery) counsel wisely did not pursue that argument further. Counsel further submitted that he intended to argue before the special referee that the goods in question here were the property of Guaranty Trust and the Royal Bank by virtue of certain provisions in the security documents charging the assets and undertakings of International.

34 The wording of the security documents upon which counsel relied was not in evidence before me on this application. I therefore considered it unnecessary to refer any questions to the special referee for his recommendation.

35 The trustee in bankruptcy will have his costs of this application against Guaranty Trust and the Royal Bank. The matter of the costs of the receiver-manager, Morrison, and of Kolosi may be spoken to if counsel cannot agree as to the disposition of these parties' costs.

Application granted.

END OF DOCUMENT

TAB 8

Case Name:

Lloyd v. Imperial Oil Ltd.

Between
Eric S. Lloyd, Ian C. Murdoch, H.G. Dreyer, Bernard C. Chung, Dale D. Eirich, Norman Douglas Willson, Cameron Ernest Palmer, Colin Lokken Laberge, James A. Coroon, Robert W.W. Hamilton, John Macdonald, Gregory Donald Jones, Brian Evan Dodd, Wayne Biegler, Gilles Fournier, Peter Weir, Roger A. Gallant, Murray Lytle and George Thomas on Behalf of Themselves and Representatives of Certain Other Persons Having Claims Against Imperial Oil Limited, Plaintiffs, and
Imperial Oil Limited, Defendant

[2008] A.J. No. 695

2008 ABQB 379

68 C.C.P.B. 223

[2008] 9 W.W.R. 502

93 Alta. L.R. (4th) 321

445 A.R. 32

2008 CarswellAlta 857

Docket: 9701 11181

Registry: Calgary

Alberta Court of Queen's Bench
Judicial District of Calgary

N.C. Wittmann A.C.J.Q.B.

Heard: January 21-24, 28-29, 31, February 1 and 4-5, 2008.

Judgment: June 18, 2008.

(116 paras.)

Civil litigation -- Civil procedure -- Estoppel -- Availability -- Estoppel by record (res judicata) -- Res judicata as a bar to subsequent proceedings -- Jurisdiction -- Alberta -- Action by the plaintiffs for damages for breach of their pension plan, for breach of the Employment Pension Plans Act, for breach of fiduciary duties owed by the defendant as plan administrator and trustee and for breach of the duty of good faith owed by it as an employer, dismissed -- Action was brought after the defendant amended the plan and thereby deprived the plaintiffs of benefits thereunder -- Action was dismissed because of res judicata based on a 1995 decision of the Pension Commission of Ontario -- On the merits, the plan and the Act were not violated and no fiduciary duties or duty or good faith was breached when the amendment was made.

Pensions and benefits law -- Private pension plans -- Administration of pensions -- Variation or amendment of plan -- Jurisdiction -- Alberta -- Action by the plaintiffs for damages for breach of their pension plan, for breach of the Employment Pension Plans Act, for breach of fiduciary duties owed by the defendant as plan administrator and trustee and for breach of the duty of good faith owed by it as an employer, dismissed -- Action was brought after the defendant amended the plan and thereby deprived the plaintiffs of benefits thereunder -- Action was dismissed because of res judicata based on a 1995 decision of the Pension Commission of Ontario -- On the merits, the plan and the Act were not violated and no fiduciary duties or duty or good faith was breached when the amendment was made.

Tort law -- Negligence -- Duty and standard of care -- Fiduciary duty -- Action by the plaintiffs for damages for breach of their pension plan, for breach of the Employment Pension Plans Act, for breach of fiduciary duties owed by the defendant as plan administrator and trustee and for breach of the duty of good faith owed by it as an employer, dismissed -- Action was brought after the defendant amended the plan and thereby deprived the plaintiffs of benefits thereunder -- Action was dismissed because of res judicata based on a 1995 decision of the Pension Commission of Ontario -- On the merits, the plan and the Act were not violated and no fiduciary duties or duty or good faith was breached when the amendment was made.

Tort law -- Employer's liability -- Action by the plaintiffs for damages for breach of their pension plan, for breach of the Employment Pension Plans Act, for breach of fiduciary duties owed by the defendant as plan administrator and trustee and for breach of the duty of good faith owed by it as an employer, dismissed -- Action was brought after the defendant amended the plan and thereby deprived the plaintiffs of benefits thereunder -- Action was dismissed because of res judicata based on a 1995 decision of the Pension Commission of Ontario -- On the merits, the plan and the Act were not violated and no fiduciary duties or duty or good faith was breached when the amendment was made.

Action by the plaintiffs for damages for breach of their pension plan, for breach of the Employment Pension Plans Act, for breach of fiduciary duties owed by the defendant Imperial Oil Limited as plan administrator and trustee and for breach of the duty of good faith owed by Imperial as an employer. Plaintiffs were members and representatives of a class of individuals employed by Imperial as of July 31, 1991 and whose employment was subsequently terminated. Shortly before the termination Imperial amended the pension plans that it administered for its employees. Plaintiffs claimed they would have been eligible to receive a pension if not for the amendment. Plaintiffs were terminated for reasons of efficiency of Imperial's operations and each had 10 or more years of service with the employer. Amendment required the employee to be eligible to retire within five years of the date of termination. Result was that an employee who had 10 years of service was only eligible when he attained the age of 50 as of the date of termination since the minimum eligible retirement age was 55. Former employees of Imperial challenged the amendment in Ontario. In 1995 the Pension Commission of Ontario decided that the amendment did not violate the Ontario Pension Benefits Act. It did not consider the validity of the amendment under the Pension Plans Act. This decision was not appealed.

HELD: Action dismissed. The plaintiffs had the opportunity to challenge the amendment before the Commission under a different provision of the pension plan and under the Pension Plans Act and they declined to do so. The issue of breach of fiduciary duty was argued, considered and decided by the Commission. The plaintiffs were estopped from raising these issues now. Court declined to exercise its residual discretion to decline to apply estoppel. The plaintiffs could have appealed the Commission's decision but did not do so. A contrary decision from the Court would put the plaintiffs in a different position from plan members who resided in Ontario. It would force Imperial to have to comply with a contrary judgment. Complications would arise if one pension plans was subject to multiple interpretations in different jurisdictions. The plaintiffs' claims were therefore res judicata. Court also considered the claim on the merits and found that the pension plan, s. 56(1) of the Pension Plans Act and fiduciary duties and the duty of good faith were not violated. The plan did not allow the amendment to reduce benefits which accrued to members. Benefits did not yet accrue to the plaintiffs because they did not meet the eligibility requirements at the time of the amendment. Those requirements were a minimum of 10 years' service and termination for efficiency purposes. None of the plaintiffs had been terminated. s. 56(1) provided that an amendment could not reduce a person's benefits. This provision did not prevent an employer from altering or removing an ancillary benefit once it was included in a plan. The Pension Plans Act always allowed employers to amend pension plans in a manner that would reduce ancillary benefits for which the eligibility requirements had not been met. When Imperial exercised its amendment power it was not subject to a fiduciary duty to plan members. It also did not act as trustee or as the plan administrator. The Commission distinguished between an employer acting as plan sponsor and as plan administrator. Distinction was well recognized and applied regardless of the origins of the employer's fiduciary duty. Imperial acted as employer and as plan sponsor and within the scope of the authority granted to it under the pension plan. The fact that Imperial acted in its self interest when it made the amendment did not cause it to breach its duty of good faith where the outcome of this action was consistent with the scope of the plan. The plan and the applicable legislation allowed Imperial to make amendments.

Statutes, Regulations and Rules Cited:

Employment Pension Plans Act, S.A. 1986, c. E-10.5, s. 6(5), s. 56, s. 56(1), s. 56(1)(c), s. 81(1)(a), s. 81(1)(c)

Employment Pension Plans Amendment Act, S.A. 1992, c. 13, "pension

Employment Standards Act, R.S.O. 1990, c. E.14, Pension Benefits Act, R.S.O. 1990, c. P.8, s. 14, s. 14(1)(c), s. 22, s. 22(1), s. 22(4), s. 26(1), s. 87(1), s. 87(2)(a), s. 89(2), s. 91, s. 91(1)

Counsel:

R. Craig Steele and K.A. McHugh, for the Plaintiffs.

Brett Ledger and Tamara R. Prince, for the Defendant.

Reasons for Judgment

N.C. WITTMANN A.C.J.Q.B.:--

Introduction

1 The Plaintiffs are members and representatives of a class of individuals who were employed by the Defendant, Imperial Oil Limited or its subsidiary Esso Resources Canada Limited (collectively, "Imperial"), as of July 31, 1991 and whose employment was subsequently terminated. Not long before these terminations took place, Imperial made an amendment to the pension plans it administered for its employees. The Plaintiffs, as a class of individuals, allege that they would have been eligible to receive a pension pursuant to the terms of the pension plan but for the amendment. The Plaintiffs were terminated for reasons of the efficiency of Imperial's operations and each had 10 or more years of service with his employer. The amendment to the pension plans clearly stated that an additional condition of eligibility, not expressed in the pension plans prior to the amendment, was that the employee had to be eligible to retire within five years of the date of termination. The net effect of the amendment was to make an employee who would be otherwise expressed as being eligible with only 10 years of service to be eligible only when he had attained the age of 50 as of the date of his termination, the minimum eligible retirement age being age 55.

2 The Plaintiffs contend that, in making the amendment, Imperial breached the terms of the pension plans and the provisions of the *Employment Pension Plans Act*, S.A. 1986, c. E-10.5 ("EPPA") and breached fiduciary duties owed by Imperial as plan administrator and trustee and the duty of good faith owed by Imperial as employer.

3 The Statement of Claim was filed on August 1, 1997. Numerous interlocutory proceedings followed, including a motion brought by Imperial to set aside service or stay the proceedings entirely on the basis that the issues had been adjudicated by the appropriate Ontario pension authorities. That motion was dismissed on April 23, 1999, and an appeal to the Court of Appeal was dismissed on December 9, 1999, with leave to appeal to the Supreme Court of Canada denied in October 2000.

4 In 2001, Imperial applied to strike portions of the then Amended Amended Statement of Claim that purported to make the action a representative action. After a hearing, portions of the Statement of Claim were certified as a representative action on May 9, 2001. An Amended Amended Amended Statement of Claim was filed on January 17, 2002.

5 In May 2003, the Case Management Judge determined that the procedure to be followed in this matter, to the extent practicable, was that set out in *Pauli v. Ace Inc. Insurance*, 2002 ABQB 715

whereby, with a few exceptions, the procedural rules set out in the Alberta Law Reform Institute, Class Actions (Final Report No. 85) were to govern. As a result, a Litigation Plan was approved on June 17, 2004. The Litigation Plan outlines the common issues that are to be determined during the course of this trial. Some of those issues were discarded by the Plaintiffs prior to trial. Should the Plaintiffs be successful in respect of the remaining issues, this trial will be followed by individual trials for the determination of the individual issues set out in the Litigation Plan.

Issues

1. Are the Plaintiffs' claims res judicata?
2. Did Imperial breach the terms of the pension plans?
3. Did Imperial breach the provisions of the *Employment Pension Plans Act*?
4. Did Imperial as administrator and/or trustee of the of the pension plans owe a fiduciary duty and, if so, did Imperial breach that duty?
5. Did Imperial owe the Plaintiffs a duty of good faith as employer and, if so, did Imperial breach that duty?

Amendment and Terminations

6 In 1989, Imperial acquired Texaco Canada Inc. ("Texaco"). Following the merger of these two large integrated oil and gas companies, Imperial employed approximately 15,000 people, and there were a number of redundancies. Consequently, in 1990 Imperial initiated a voluntary downsizing program. The goal of the program was to reduce Imperial's workforce by 3300 employees.

7 Imperial gave a number of undertakings to Investment Canada in connection with the merger. The undertakings are attached to correspondence dated January 5, 1989 from R.J. Patton of Imperial to Mr. G.H. Dewhirst, Vice President, Investment Canada. The Plaintiffs contend that Imperial gave an undertaking that it would not proceed with any involuntary terminations for a two-year period following the merger, but there is no indication of this in the January 5, 1989 letter. Instead, the written undertaking provided by Imperial indicates that, with respect to terminations, Imperial undertook:

> To offer continuing employment to all Texaco employees. Where facilities are closed, affected employees will have a choice of staying with Imperial or if they choose not to accept continued employment with Imperial, will be entitled to an equitable severance package. Where assets are sold, affected employees will be transferred to the purchaser.

8 The voluntary downsizing program closed on or about February 28, 1991, with approximately 2800 employees agreeing to leave Imperial by the end of 1991. This number was 500 employees short of the program goal. Imperial's Compensation, Organization and Executive Development Committee ("the COED Committee") was the management committee responsible for employee matters, including the voluntary downsizing and employee "rebalancing" programs. With the failure to meet the desired workforce reduction target by way of the voluntary program, the COED committee began to set the stage for involuntary terminations. Internal newsletters to staff from management from February to July 1991 contained repeated references to further workforce reductions, but during this period it appears that Imperial was engaged in workforce rebalancing, and did not proceed with a large number of involuntary terminations.

9 On August 20, 1991, upon the recommendation of the COED Committee, Imperial's Board of Directors passed a resolution to amend section 4.3 of the Imperial Oil Retirement Plan (1988) and the Texaco Pension Plan of McColl-Frontenac Inc. (collectively, "the Pension Plan"), effective as of August 1,1991 ("the Amendment"). Prior to that time, section 4.3 of the Imperial Plan provided:

> A member with ten (10) or more years of service whose employment is terminated by the company and who is eligible for a termination annuity under section 4.1 may retire under section 2.2(a) and receive a pension calculated under section 3A.2 in lieu of a termination annuity under section 4.1 if the Members employment is terminated for reasons deemed by the company to be for maintaining or improving the efficiency of its operations; provided, however, that the date of retirement for the purpose of receiving payment of such pension shall not be effective until the last day of the month in which the Member attains age 55 and further provided that the estimate of the members Canada/Quebec Pension Plan Retirement Benefit and the amount of pension currently being paid under the Old Age Security Act as referred to in section 3A.1(a) and (b) shall be as the month of such member termination.

The amended section 4.3. read as follows:

> A member with ten (10) or more years of service whose employment is terminated by the company and who is eligible for a termination annuity under section 4.1 **and who will be eligible to retire under section 2.2 within five (5) years of the date of terminating employment**, may retire under section 2.2(a) and receive a pension calculated under section 3A.2 in lieu of a termination annuity under section 4.1 if the Members employment is terminated for reasons deemed by the company to be for maintaining or improving the efficiency of its operations; provided, however, that the date of retirement for the purpose of receiving payment of such pension shall not be effective until the last day of the month in which the Member attains age 55 and further provided that the estimate of the members Canada/Quebec Pension Plan Retirement Benefit and the amount of pension currently being paid under the Old Age Security Act as referred to in section 3A.1(a) and (b) shall be as the month of such member termination. [Emphasis added]

10 As a result of the Amendment, plan members with ten or more years of service would now have to be aged 50 or older at the time of termination to receive an enhanced early retirement annuity. It is worth noting that until 1988, s. 4.3 was a discretionary provision, but was amended in 1990 to remove Imperial's discretion, as a result of changes in the Ontario pension legislation.

11 The Alberta Superintendent of Pensions and the Ontario Pension Commission are parties to a reciprocal agreement ("the Reciprocal Agreement") for the enforcement, regulation and application of provincial pension regulations. Under the terms of the Reciprocal Agreement, the province where the plurality of plan members are employed is deemed the "major authority" and the jurisdiction where the plan is registered. While the substantive rights of plan members remain subject to the laws of the province where members are employed, the major authority regulates the administration of the plan. The major authority in respect of the Pension Plan was Ontario. Consequently, it was to the Pension Commission of Ontario that Imperial sent a certified copy of the director's resolution authorizing the Amendment on September 20, 1991, and it was the Pension Commission of Ontario that would determine whether the Amendment would be registered.

12 Imperial's motivation for making the Amendment is in issue in this trial. Some insight may be obtained from a review of the internal memoranda whereby the Amendment was recommended to the Board of Directors by the COED Committee. The COED memorandum dated August 1, 1991 described the rationale for the Amendment:

> The Imperial Oil Retirement Plan text was completely revised during 1990 and duly filed with the regulatory authorities in December 1990 in compliance with the Ontario Pension Benefits Act changes.
>
> Section 4.3 of the prior plan text gave the company discretion to determine eligibility, and the company exercised that discretion generally by limiting access to the provisions of the section to employees who were terminated within five years of early retirement.
>
> The Ontario Pension Benefits Act deems a company discretion to be exercised in favour of the employee in these circumstances. Therefore, the discretionary language was removed in the revised plan text since the company had a control over the application of Section 4.3 by declaring any necessary employee terminations as being for the purpose of maintaining or improving the efficiency of operations.
>
> With the increased volume of involuntary terminations being considered in 1991, both from workforce rebalancing efforts and outsourcing, and with these terminations generally being contemplated for the purpose of maintaining or improving the efficiency of operations, much broader access to section 4.3 could occur than was intended. The proposed amendment will provide certainty.

13 The economic climate for large integrated oil and gas companies in 1991 was not favourable. Imperial Oil suffered its first-ever quarterly loss in the second quarter of 1991. According to Imperial's 1991 Annual Report to Shareholders, the world price of oil in 1991 averaged US $20 a barrel and Imperial received an average selling price $1.38 per thousand cubic feet for natural gas in 1991.

14 By the end of October, 1991, Esso Resources Canada Limited, a wholly owned subsidiary of Imperial, was advising employees that it would not hit its cost cutting target through the voluntary downsizing program. In December 1991, Arden Haynes, Imperial's Chairman and Chief Executive Officer, delivered a videotaped message to employees wherein he announced that Imperial would likely show an operating loss for 1991 and said that this was the worst performance for the company in his 40 years of service. On January 27, 1992, Imperial delivered a presentation to its majority owner, ExxonMobil Inc., advising that it had identified an additional 1700 employees to be terminated, 1400 in 1992 and 300 in 1993.

15 On February 4 1992, Imperial held employee meetings across the country to announce further terminations. A corresponding press release announced Imperial's intention to reduce staffing levels by 1700 employees. Between February 4, 1992 and July 30, 1995 Imperial terminated 794 employees in Alberta. A number of the representative Plaintiffs and members of the class in this action were terminated in February and March 1992, for efficiency reasons. Those terminated employees

who had 10 or more years of service with Imperial found upon their termination that under the Amendment they were not eligible for enhanced early retirement benefits unless they were 50 years or age or older at the time of their termination. The representative Plaintiffs fall within that category.

Proceedings in Ontario

16 In the spring of 1992, a number of involuntarily terminated Imperial employees formed a committee called "Entitlement 55" (later, "Entitlement 55 + 10") ("Entitlement 55") to explore means of recourse in respect of the Amendment.

17 On July 15 1992, Ian Murdoch, a former Imperial employee residing in Calgary, began correspondence with Emilian Groch, the Superintendent of Pensions for the Province of Alberta, on behalf of what he called the Calgary chapter of Entitlement 55. He asked Mr. Groch to review the Amendment and surrounding circumstances. Mr. Groch sought further information from the Pension Commission of Ontario and, on October 15, 1992, he wrote to the Pension Commission of Ontario advising that it was his view that there was a serious question of whether the Amendment was in compliance with s. 56(1) of the EPPA and that it should be refused registration.

18 In Ontario, Entitlement 55 took steps to challenge the Amendment. On October 28 1992, Mark Zigler, an Ontario lawyer, wrote to the Pension Commission of Ontario, indicating that he was the solicitor for Entitlement 55 and a large number of other persons who were former employees of Imperial. Mr. Zigler wrote that it was the position of his clients that the Amendment violated s. 14 of the Ontario *Pension Benefits Act,* R.S.O 1990, c. P.8 ("PBA"). He did not raise the issue of s. 56(1) of the EPPA. On March 3, 1993, D. Ross Peebles, the Superintendent of Pensions for the Province of Ontario, wrote to Mr. Zigler and to Imperial, requesting further submissions in respect of the Amendment, which had not yet been registered.

19 In further submissions, Mr. Zigler reiterated his argument that the Amendment was invalid under s. 14 of the PBA, and argued that the Amendment was also invalid under s. 22 of that Act and under s. 11.1 of the Pension Plan itself. No submissions were made in respect of the EPPA or fiduciary duties arising at common law. He also attached a list of the 268 former employees of Imperial he represented, which included 11 of the named Plaintiffs in this action.

20 On May 7, 1993, Mr. Peebles issued his decision. He concluded that the Amendment was not void pursuant to s. 14 of the PBA, but found that the Amendment was adverse pursuant to s. 26(1) of the Act and that Imperial had to provide notice and an explanation to members of the Plan and invite further comments, which would be made to Imperial and Mr. Peebles. On June 29, 1994 Mr. Peebles issued more detailed reasons, addressing Mr. Zigler's arguments with respect to s. 14 and s. 22 of the PBA, and s. 11.1 of the Pension Plan. On July 13, 1994, the Amendment was registered.

21 Entitlement 55 sought to challenge the decision of the Superintendent before the Pension Commission of Ontario, ("the PCO") pursuant to sections 87(1) and 89(2) of the PBA. In response, Imperial challenged the jurisdiction of the PCO to review the Superintendent's decision. On April 28, 1995 the PCO issued a preliminary decision, concluding that it had jurisdiction under s. 87(1) of the PBA to review the Superintendent's decision. Thereafter, Entitlement 55 and Imperial provided detailed written submissions to the PCO, and a hearing on the merits took place before a 3-member panel of the PCO on May 23 and 24, 1995. *Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)* (1995), 18 C.C.P.B. 198 (the "PCO Decision") was issued on August 3, 1995.

22 At para. 14 of the PCO Decision, the issues were described as follows:

> In legal terms, the question is whether the Amendments are void and of no effect. At the hearing, a number of issues were abandoned by the Entitlement 55 Group leaving only the following to be decided:
>
> 1. Are the Amendments void pursuant to clause 14(1)(c) of the Pension Benefits Act ("the Act")?
> 2. Did Imperial Oil contravene subs. 22(4) of the Act by virtue of passing the Amendments?
> 3. If the answer to either issue #1 or #2 is "yes", what orders should the Commission make.

23 The PCO concluded that termination for efficiency reasons was an eligibility requirement under s. 14(1)(c) of the PBA and, as such, at the time of the Amendment, the employees who were later terminated had not met all of the eligibility requirements necessary to receive s. 4.3 benefits and s. 14(1)(c) did not operate to bar the Amendment. With respect to s. 22(4) of the PBA, the PCO concluded that Imperial was not acting in its capacity as administrator when it passed the Amendment and therefore s. 22 did not apply to its actions.

24 The review application was dismissed by the PCO. Though an appeal to the Divisional Court of Ontario was available to Entitlement 55 pursuant to s. 91 of the PBA, no appeal from the decision was taken.

Res Judicata

25 Imperial sought to set aside service and to obtain a permanent stay of this action on the basis that it was res judicata because of the proceedings before the PCO. That application was dismissed by O'Byrne J. of this Court on April 23 1999; Imperial appealed. The appeal was dismissed December 9, 1999: *Imperial Oil Limited v. Lloyd*, 2000 ABCA 7, [1999] A.J. No. 1573. Coté J.A. held, at paras. 3-4:

> The main argument of the appellant/defendant is that the first half of the Statement of Claim is res judicata because the plaintiffs have already failed in the same claim before various statutory Ontario pension tribunals. However, we have the gravest doubts whether there is res judicata because:
>
> (a) the Ontario Pension Benefits Act does not appear to us to allow the Superintendent or Commission to decide a number of important types of claim which are raised by the Statement of Claim, and there is no res judicata unless the previous tribunal had jurisdiction over the subject matter;
> (b) the Commission in fact said it had no power to decide some of these questions;
> (c) the appellant/defendant itself, in its written argument before the Ontario Pension Commission, objected to its lack of jurisdiction on at least one issue;
> (d) the various plaintiffs appear to have had different degrees of connection with the Ontario proceedings and the people who brought them.

> The very best that can be said for the appellant/defendant is that there is doubt about whether there is res judicata as to all the claims or all the plaintiffs. We incline to the view that there is no res judicata, but the doubt precludes summary disposition of the suit on that ground.

26 At para. 9, Cote J.A. held that res judicata could be raised by Imperial in the Statement of Defence and at trial, but this issue could not be heard in chambers or in any interlocutory proceeding.

Recent Developments in Res Judicata: *Danyluk* and *Boucher*

27 The law of res judicata, its application to the decisions of administrative tribunals, and in particular the PCO, has developed since the decision of the Court of Appeal. In *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 the Supreme Court of Canada considered the claim of a terminated employee to $300,000 in unpaid commissions and the employer's contention that the employee was estopped from bringing the action because of an earlier failed attempt to claim the commissions under Ontario's *Employment Standards Act*, R.S.O. 1990, c. E.14. Binnie J. described the doctrine of res judicata and its application to the decisions of administrative tribunals at paras. 20-21:

> The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel per rem judicatem with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation ... The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel) ... Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it.
>
> These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided. (Citations omitted.)

28 The three-part test of issue estoppel, which was confirmed by Binnie J. in *Danyluk*, is whether:

1. The same question has been decided;
2. The judicial decision which is said to create the estoppel was final; and,
3. The parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

29 The application of the doctrine of res judicata to a decision of Ontario's Superintendent of Pensions was the issue before the Supreme Court in *Boucher v. Stelco*, [2005] 3 S.C.R. 279. In that case, an action was brought in the province of Quebec, by residents of that province who were members of a pension plan registered in the province of Ontario. In 1997, Ontario's Superintendent of Pensions had approved the partial wind up of the pension plan, but because of differences in the Ontario and Quebec legislation, the Superintendent concluded that early retirement benefits were payable to some Ontario members of the plan, but not to the members resident in Quebec. The Quebec members were notified of the Superintendent's decision but did not appeal or initiate proceedings in Ontario. Instead, they brought an action before the Quebec Superior Court to obtain early retirement benefits on the basis that the pension plan was subject to Ontario law.

30 In considering the application of the doctrine of res judicata to a decision of the Superintendent of Pensions, Lebel J. noted, at paras. 32-33

> At this stage of proceedings, from the perspective of Quebec law, the problem is one of res judicata. The three necessary elements of identical cause, object and parties are present ... The Superintendent had jurisdiction to make the decision. The Quebec action implicitly requires a review of the question of the right to pension benefits, on which the Superintendent has already ruled. Moreover, the appellants were parties to the process before the Superintendent. The content of the wind up report and the benefit calculations were sent to them, and it was open to them to raise any objections they might have had. Lastly, the principle of res judicata applies not only to decisions of courts, but also to the decisions of administrative tribunals and bodies ... In the instant case, the main debate between the parties thus concerns a question that was already settled by the Superintendent of Pensions, since this action cannot succeed unless his decision is varied or quashed.
>
> Insofar as a decision of an administrative body created by the Ontario legislature is in issue, in a case within that body's jurisdiction under Ontario law, the common law rules governing issue estoppel lead to the same result regarding the admissibility of the action.

31 It is particularly significant that Lebel J. concluded that the aggrieved Quebec employees had been parties to the Ontario proceedings on the basis that they had been given notice and an opportunity to raise objections, though they did not do so.

32 The decisions in *Danyluk* and *Boucher* suggest that there is a strong preference for parties to avail themselves of the administrative process, particularly in the context of pensions, which are subject to a complex regulatory scheme and fall within the jurisdiction of highly expert tribunals. These decisions are consistent with the approach taken by the Supreme Court in *Buschau v. Rogers Communications Inc.*, [2006] 1 S.C.R. 973, which also concerned pensions, though not res judicata. In *Buschau* the Court considered an attempt by plan members to invoke the rule in *Saunders v. Vautier*, [1835-42] All E.R. Rep. 58, to terminate a pension trust. In the course of considering the applicability of the common law rule in the context of pension plans, Deschamps J., writing for the majority, pointed out at para. 35 that while pension legislation is not a complete code, where recourse is available to plan members under the Act, they should use it. The Supreme Court did not reinvent the principles of res judicata in *Danyluk* and *Boucher*, but in those decisions, and in *Buschau*, it has

emphasized the importance of the doctrine, its applicability to administrative tribunal decisions and the relatively comprehensive nature of the regulatory scheme. It is in this context that the doctrine of res judicata must be considered.

Issue Estoppel and Cause of Action Estoppel

33 Cause of action estoppel and issue estoppel are described differently, as Binnie J. noted in *Danyluk* at para. 24:

> The description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into the litigation") ...

34 In *Grandview (Town) v. Doering*, [1976] 2 S.C.R. 621, the Supreme Court identified four criteria that must be present before cause of action estoppel will apply:

1. There is a final decision of a court of competent jurisdiction;
2. The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action;
3. The cause of action in the prior action must not be separate and distinct; and
4. The basis of the cause of action and the subsequent action was argued, or could have been argued in the prior action if the parties had exercised reasonable diligence.

35 Whether the claim of res judicata is based upon issue estoppel or cause of action estoppel, the rules should not be mechanically applied and the court must still determine whether, as a matter of discretion, the estoppel ought to be applied: *Danyluk*, at para. 33.

36 The Plaintiffs point out, and the Court of Appeal recognized, that some of the issues in the case at bar were not before the PCO. The issue of the validity of the Amendment under s. 11.1 of the Pension Plan was withdrawn by Entitlement 55 prior to the PCO hearing, and no submissions were made in respect of validity under the EPPA. Nor did the PCO expressly consider fiduciary duties arising at common law, duties arising out of the law of trusts or the employer's duty of good faith. Though several of the criteria for res judicata under issue estoppel or cause of action estoppel are functionally similar, where, as here, causes of action have been raised that were not directly before the tribunal, it is appropriate to consider the issues in the context of cause of action estoppel.

A Final Decision by a Court of Competent Jurisdiction

37 Section 91(1) of the PBA allowed for an appeal to the Divisional Court of Ontario, but no appeal was taken. The decision of the PCO was final. For the purpose of the first criterion in *Grandview*, the PCO is a "court".

38 The Plaintiffs contend that the PCO did not have jurisdiction over a number of the claims made here, and the Court of Appeal clearly rejected Imperial's application to strike portions of the Statement of Claim on these grounds, pointing out that Imperial had challenged the jurisdiction of the PCO to hear the appeal from the decision of the Superintendent and noting that the PCO itself had said that it had no power to hear certain questions.

39 Imperial's challenge to the jurisdiction of the PCO was made on the basis that the PCO could not hear an appeal of a decision to register an amendment. The PCO concluded in its decision of April 28, 1995 that it did possess the requisite jurisdiction. The jurisdictional challenge was not concerned with the scope of that tribunal's jurisdiction to consider common law claims such as breach of trust or breach of fiduciary duty, nor did it concern the ability of the PCO to consider and apply Alberta legislation.

40 The issues placed before the Superintendent, and thereafter the PCO, were whether the Amendment complied with the PBA and the regulations thereunder. Under s. 87(2)(a) of the PBA, the Superintendent has jurisdiction to make an order if the Superintendent is of the opinion that the pension plan is not being administered in accordance with its own terms. Therefore, the question of whether the Amendment violated s. 11.1 of the Pension Plan is one that properly fell within the scope of PCO jurisdiction, as did the question of the whether the Amendment was in compliance with s. 14(1)(c) and s. 22(4) of the PBA. By virtue of s. 2 of the Reciprocal Agreement, it is clear that the PCO also had jurisdiction to exercise the statutory functions of Alberta's Superintendent of Pensions, and therefore the issue of compliance with s. 56(1) of the EPPA could properly have been put to the PCO, though it was not.

41 That leaves the issue of the jurisdiction of the PCO to address duties arising at common law. Imperial points out that administrative tribunals are frequently called upon to interpret sources of law other than their enabling statutes. The power of the PCO and the Financial Services Tribunal to do so has been confirmed on a number of occasions by the courts of Ontario. In *Ontario Hydro v. Kelly* (1998), 39 O.R. (3d) 107 (Gen. Div.), MacPherson J. considered the power of the PCO to interpret provisions of the *Power Corporation Act*, and held, at p. 117:

> ... Tribunals quite regularly interpret not only their "home statutes" but also many other sources of relevant law, including the Constitution, the common law and other statutes. When they step onto this broader stage, the standard of review of their decision may move away from the deference end of the spectrum. However, that fact does not disentitle tribunals from interpreting these other sources of law, provided they are necessary to the decision the tribunals must make ...

42 In *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* (2002), 62 O.R. (3d) 305 (C.A.); aff'd: [2004] 3 S.C.R. 152, the Ontario Court of Appeal implicitly recognized the jurisdiction of the Financial Services Tribunal (successor to the PCO) to apply the common law doctrine of reasonable expectations by finding that the tribunal's decision in this regard must be scrutinized, on judicial review, on a standard of correctness. In *Nolan v. Ontario (Superintendent of Financial Services)*, 2007 ONCA 416, the Ontario Court of Appeal applied a standard of reasonableness in reviewing a decision of the Financial Services Tribunal interpreting a number of trust agreements and considering a claim of breach of trust.

43 There is a difference, however, between considering and interpreting common law sources in the exercise of the tribunal's statutory function, and having jurisdiction to consider and decide upon common law claims not arising under the statute. In *Communications, Energy and Paperworkers Union of Canada v. Superintendent of Pensions and CWA/ITU Pension Plan (Canada) Board of Trustees* (7 June 1999), PCO Index No. XDEC-45 (PCO), the PCO considered an objection to its jurisdiction to consider common law fiduciary duties, and held:

> In this Panel's view, the provisions of sections 19 and 22 of the Act impose statutory obligations that are enforceable by the Commission independent of causes of action in tort, fiduciary or trust law. The role of the Commission is to apply those sections as the evidence and the facts demand but not to usurp the role of the Courts under other statutes and the common law. Proof of breach of tort, fiduciary or trust law is proof of breach of sections 19 and 22 of the Act but not, in our view, a separate inquiry giving rise to claims outside the scope of the statute. It is not for the panel to speculate on circumstances where the Commission may find that a plan administrator complied with the provisions of the Act, in the face of evidence establishing breach of the administrator's common law fiduciary duties to the Plan and its members ...

44 This suggests that the PCO itself does not consider its jurisdiction to extend to strictly common law claims. The question that arises in the context of these proceedings is whether, for the purposes of res judicata, the issue of breach of fiduciary duty under the PBA is truly distinct from breach of fiduciary duty at common law. I will return to this issue below.

Same Parties, or in Privity With the Parties Before the PCO.

45 There was direct participation by many of the Plaintiffs in this action in the proceedings before the PCO. The evidence establishing this direct participation includes Mr. Murdoch's claim of privilege over his correspondence to Mr. Zigler, Mr. Zigler's client list which includes 31 of the Represented Plaintiffs in this action and Mr. Zigler's correspondence to the PCO.

46 Many of the Plaintiffs were members of Entitlement 55. The March 23, 1992 "partial list" of clients provided by Mr. Zigler to the PCO includes the names of 12 of the representative Plaintiffs in this action. That does not include Mr. Murdoch, who indicated at trial that the omission of his name from that list was an oversight. At least 31 of the Represented Plaintiffs in this action are on Mr. Zigler's client list. Mr. Murdoch admitted on cross-examination that he functioned as a "go-between" for the Ontario and Alberta members of Entitlement 55.

47 Mr. Murdoch testified that he wrote to Mr. Zigler in October 1994 about s. 56 of the EPPA. He has claimed privilege over that letter, which clearly suggests that Mr. Zigler was representing his interests as counsel in the proceedings before the PCO. It also suggests that Mr. Zigler was aware of the Alberta legislation and consciously elected not to raise the issue with the PCO. The absence of a retainer agreement between Mr. Zigler and any of the Plaintiffs does not establish that Mr. Zigler did not act as their counsel. Both Mr. Murdoch and Mr. Lloyd testified that they both sent money to Mr. Zigler to cover his fees in respect of the PCO proceedings.

48 Even in the absence of the representative Plaintiffs' membership in Entitlement 55 and communication with Mr. Zigler, the test for privity would be met. In *Danyluk*, Binnie J. held, at para. 60:

> The concept of "privity" of course is somewhat elastic. The learned editors of J. Sopinka, S.N. Lederman and A.W. Bryant in the Law of Evidence in Canada (2nd ed. 1999), at p. 1088 say, somewhat pessimistically, that "[it] is impossible to be categorical about the degree of interest which will create privity" and that determinations must be made on a case-by-case basis.

49 In Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2nd ed. (Toronto: Butterworths, 2004) the learned author surveys a number of decisions of Canadian courts and sets out, at p. 77, a number of definitions arising out of issue estoppel cases, including:

> ... A person who is privy in interest to a party in an action and has notice of that action is equally bound by the findings in that action. A privy is a person who has a right to participate with a party in the proceeding or who has a participatory interest in its outcome ... To determine whether a person has a participatory interest in the outcome of the proceeding is to determine whether the outcome could affect the liability of that person.

50 One of the more frequently cited definitions of privity in the context of issue estoppel may be found in *Gleeson v. J. Wippell & Co. Ltd.*, [1977] 3 All E.R. 54, at p. 60 where Megarry V.C. defined it as:

> ... a sufficient degree of identification between the two to make it just to hold that the decision to which one was a party should be binding in proceedings to which the other is party.

51 By virtue of paragraph 2 of the Reciprocal Agreement, Ontario had jurisdiction over the administration of the Pension Plan. In the exercise of that jurisdiction, the Superintendent of Pensions, on May 7, 1993, ordered Imperial to transmit to each Pension Plan member notice of the Amendment. That notice was provided by letter dated November 30, 1993, and Plan members were further advised that they could submit written comments to the attention of the Superintendent of Pensions. On January 31, 1995, the PCO issued a notice of the March 2, 1995 hearing to all members and former members of the Plan, including the Plaintiffs.

52 The issue before the Superintendent and the PCO, which was whether the Amendment could be registered, clearly affected the interests of Ontario and Alberta plan members. Given the authority of the PCO to consider the legality of the Amendment under both the Ontario and Alberta statutes, there is no question that Alberta and Ontario members had a privity of interest in the outcome of the proceedings before the PCO.

The Cause of Action in the Prior Action was not Separate and Distinct.

53 In *The Doctrine of Res Judicata in Canada*, this element of the test is described, at p. 144:

> Whether the cause of action in the first proceeding is the same as that sought to be enforced in the second proceeding does not depend upon technical considerations but upon matters of substance, that is, whether they are in substance identical.

54 In *Danyluk*, Binnie J. defined cause of action for the purposes of res judicata at para. 54:

> A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court ... Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. It is ap-

> parent that different causes of action may have one or more material facts in common.

55 The PCO considered the issue of Imperial's fiduciary obligations, as imposed by the PBA, in its capacity as administrator of the Pension Plan. Section 22(1) of the PBA imports a fiduciary standard of care for administrators in the administration of a pension plan. The PCO considered s. 22(1) but concluded that, in making the Amendment, Imperial was acting as employer rather than administrator, affirming what has come to be known as the "two hats" principle.

56 The distinction between the fiduciary obligations imposed upon plan administrators by statute and those arising at common law is briefly discussed by Ari N. Kaplin in *Pension Law*, (Toronto: Irwin Law, 2006) at p. 331:

> While the distinction may be a fine one, the duties of care owed by an administrator under the PBA are "statutory obligations" that are enforceable by the Superintendent and are "independent of causes of action in tort, fiduciary and trust law." The relevance of the distinction between the extent of an administrator's so-called "statutory" and "common law" fiduciary duties goes more to the remedy and the forum in which a person alleging a breach of the duty seeks to obtain the remedy, than it does to the qualitative content of the duty.

57 In *Communications, Energy and Paperworks Union of Canada*, the PCO declined to "speculate on circumstances where the Commission may find that a plan administrator complied with the provisions of the Act in the face of evidence establishing breach of the administrator's common law fiduciary duties ...". It seems unlikely that a such a circumstance could occur. As Kaplan notes in *Pension Law*, at p. 333:

> ... it is generally recognized that the fiduciary standards imposed upon pension plan administrators are higher than those required of trustees at common law because it is assumed that a person of ordinary prudence would be more diligent when dealing with the property of another than they would be in dealing with their own property.

58 In the context of res judicata and the Plaintiffs' claim in respect of common law fiduciary duty, the question is whether, notwithstanding that the common law fiduciary duty is characterized in *Pension Law* as "independent," there is a meaningful distinction between the scope of the fiduciary duties imposed upon the administrator under the PBA, and the duties arising at common law. I do not believe that the duties are distinguishable. In either case, the questions that arise are: (a) whether Imperial was acting in its capacity as plan administrator when it made the Amendment and; (b) if so, whether Imperial failed to act in the utmost good faith and loyalty to plan members. Neither the content of the duty, nor the facts establishing whether it arose and whether it was breached, are different in the statutory or common law context. In short, the fiduciary duty imposed by the statute is indistinguishable from any fiduciary duty that may arise at common law. Under the circumstances, it is reasonable to conclude that the legislatures of Alberta and Ontario intended the issue of breach of fiduciary duty to be considered and determined by the statutory tribunal.

The Basis of the Cause of Action Was Argued, or Could Have Been Argued.

59 In considering s. 14(1)(c) and s. 22(4) of the PBA, the PCO heard argument in respect of the fiduciary duty imposed upon Imperial by virtue of its position as administrator, and it heard argument concerning the nature of an ancillary benefit and eligibility requirements.

60 The PCO did not consider s. 56 of the EPPA, but it is clear that s. 56 could have been argued. Similarly, it is clear that the PCO could have heard argument in respect of s. 11.1 of the Pension Plan.

61 Imperial contends that the PCO considered the application of a fiduciary duty, both statutory and common law, and that the PCO could have considered the good faith and trust claims raised herein, had they been put before the PCO. In respect of fiduciary duty, while it appears from the PCO's reasons that it did not distinguish between the statutory fiduciary duty and a general fiduciary duty arising at common law or under equitable principles, I am satisfied that there is no meaningful distinction between these duties in the context of this proceeding, and as such, the general issue of fiduciary duties having been decided, the question is res judicata.

62 The allegation of breach of a duty of good faith was not raised before the PCO. As I will discuss further in these Reasons, the breach of a duty of good faith is a somewhat idiosyncratic cause of action in the pension context, but the duty has been recognized in more than one jurisdiction and it has been distinguished from the more frequently considered fiduciary duty arising under the statute and principles of equity. I am not satisfied that the issue was placed squarely before the PCO, nor can I conclude that the PCO had jurisdiction to hear this issue.

Res Judicata: Conclusion

63 The Plaintiffs had the opportunity to challenge the Amendment under s. 11.1 of the Pension Plan and under s. 56 of the EPPA before the PCO and they declined to do so. The issue of breach of fiduciary duty was argued, considered and decided by the PCO. Subject to the exercise of the residual discretion to apply estoppel, I am satisfied that the Plaintiffs are estopped from raising those issues now.

64 In *Boucher*, the Supreme Court declined to exercise its residual discretion to decline to apply estoppel. The reasons for doing so, at paras. 34-35 are directly pertinent to the case at bar:

> Also, in my view, the facts of the instant case would not justify the courts in exercising their residual discretion to decline to apply estoppel. Not only the appellants' failure to make use of the usual means of redress - appeal or judicial review - but also the situation in which any other decision would place the respondent, militates against this. Stelco could find itself in the strange position of having to comply with the Superintendent's decision under Ontario law while at the same time being required to execute a Quebec judgment to the contrary, at least with regard to former plan members from Quebec. As the intervener points out, such a result could call into question the benefit calculations for all the retirees and the measures taken to ensure the plan's solvency.
>
> The situation in which the respondent could find itself if the principles of res judicata or issue estoppel were not applied illustrates the danger of a collateral attack and of the failure to avail oneself in a timely manner of the recourses against decisions of administrative bodies or courts of law that are available in the Cana-

> dian legal system. The stability and finality of judgments are fundamental objectives and are requisite conditions for ensuring that judicial action is effective and that effect is given to the rights of interested parties. Modern adjective law and administrative law have gradually established various appeal mechanisms and sophisticated judicial review procedures, so as to reduce the chance of errors or injustice. Even so, the parties must avail themselves of those options properly and in a timely manner. Should they fail to do so, the case law does not in most situations allow collateral attacks on final decisions (*City of Toronto*, at paras. 33-34), which Arbour J. likened to a form of abuse of process (at para. 34) (see also: *Quebec (Attorney General) v. Laroche*, [2002] 3 S.C.R. 708, 2002 SCC 72, at paras. 73-76). In the case at bar, the type of action brought by the appellants necessarily entailed an impermissible collateral attack on the Superintendent's decision, as can be seen from the analysis regarding res judicata. Consequently, the action was inadmissible.

65 The Plaintiffs could have elected to appeal the decision of the PCO, but did not. A contrary decision now, from this Court, would put the Plaintiffs in a different position from plan members resident in Ontario. Like the respondent in *Boucher*, Imperial would be put in the strange position of having to comply with a judgment of this Court that is directly contrary to the PCO decision binding Imperial and plan members in Ontario. There are reasons why the provinces of Alberta and Ontario, among others, are party to the Reciprocal Agreement, and one of those reasons is to avoid the inequities and complications that would arise if one pension plan was subject to multiple interpretations in different jurisdictions.

66 The Plaintiffs' claims that Imperial breached the provisions of the EPPA and that it breached an express or implied, statutory or common law fiduciary duty are res judicata.

The Plaintiffs' Challenge to the Amendment

67 In the event that I am wrong with respect to the foregoing, it is appropriate to consider the Plaintiffs' claim on the merits. The claim is that the Amendment breached s.11.1 of the Pension Plan, breached s. 56(1) of the EPPA and violated a fiduciary duty and a duty of good faith owed by Imperial to the Plaintiffs.

Breach of s. 11.1

68 Section 11.1 of the Pension Plan provides:

> <u>11.1 Continuation and Amendment of Plan</u>
>
> The Company reserves the right to amend or discontinue this Plan, in whole or in part in its sole discretion. Except as otherwise required or permitted by law, any amendment to or termination of this Plan shall not operate to reduce the benefits which have accrued under this Plan prior to the date of such amendment or termination to the Members or to any individual who is in receipt of benefits under this Plan to the extent that the assets of the Trust Fund are sufficient to provide such accrued benefits.

69 The Plaintiffs contend that the Amendment operated to reduce benefits which had accrued to them, in breach of s. 11.1. Expert evidence was heard at trial with respect to the meaning, in the pension context, of the word "accrued".

70 Don Tettmar is the President of DT&A Human Resources and Actuarial Consulting. He is a consulting actuary with 35 years of experience in employee benefits including drafting pension plans and legislative compliance. He was called by the Plaintiffs and qualified to give opinion evidence on employee benefits pertinent to pension plans, pension plan regulation and administration.

71 It was Mr. Tettmar's opinion that ancillary benefits such as those provided under s. 4.3 of the Plan are benefits which accrue notwithstanding the fact that the eligibility requirements for the ancillary benefit have not yet been met by the plan member. He pointed out that, from an actuarial perspective, a pension plan loaded with ancillary benefits is considerably more valuable than one which is not. It was his opinion that enhanced early retirement benefits would be viewed by actuaries as accrued and that actuaries would value them "if there is a reasonable chance of their occurrence." He pointed to the projected unit credit actuarial cost method, which he said was the most common method used by actuaries to determine funding levels for pension benefits in Canada, and said that this method of valuation would include ancillary benefits based on projected highest average earnings.

72 Malcolm Hamilton, consulting actuary with Mercer (Canada) Limited, and the expert called by Imperial, disagreed with Mr. Tettmar's opinion that an ancillary benefit could be said to have accrued before the member meets the eligibility criteria. It was Mr. Hamilton's opinion that an accrued benefit is one that can at any given time be calculated precisely because it depends upon the years of service already rendered and the earnings already received. This must be distinguished from a projected benefit, which is the amount the member would receive at retirement, based upon earnings and service to the date of retirement. Ancillary benefits do not accrue because they cannot be calculated precisely until the member meets the eligibility criteria. For this reason, according to Mr. Hamilton, no actuary would assign any value to the benefit itself. This appears consistent with the *Instruction Guide for Plan Administrators* prepared by the Office of the Superintendent of Financial Institutions Canada, which defines an ancillary benefit as "any benefit over and above the basic pension benefit that requires certain conditions be fulfilled such as years of service, employer consent or age before it can begin to accrue."

73 In *Dinney v. Great-West Life Assurance Co.* (2005), 252 D.L.R. (4th) 660 (Man. C.A.), Scott C.J.M. held, at paras. 30-32:

> In their submissions, all counsel used the words"accrued right" and "vested right" interchangeably. In my opinion, they were correct in so doing. The word "accrue" means:
>
>> Derived from the Latin, "ad" and "creso," to grow to. In past tense, in sense of due and payable; vested. It means to increase; to augment; to come to by way of increase; to be added as an increase, profit, or damage. Acquired; falling due; made or executed; matured; occurred; received; vested; was created; was incurred.
>>
>> [Black's Law Dictionary, 6th ed., s.v. "accrue"]

> An accrued right is defined in Black's Law Dictionary, ibid., as a "matured cause of action, as legal authority to demand redress," and according to the same authority rights are "vested" when the
>
> > ... right to enjoyment, present or prospective, has become property of some particular person or persons as present interest; mere expectancy of future benefits, or contingent interest in property founded on anticipated continuance of existing laws, does not constitute "vested right."
>
> When used in the context of "rights," the words "accrue" or "vested" refer to rights that have matured. For example, a cause of action "accrues" when an action can be maintained. Dillon v. Board of Pension Com'rs of City of Los Angeles, 18 Cal. (2d) 427, 116 P. (2d) 37, 39; income "accrues" to a taxpayer when he has a fixed or unconditional right to receive it. Black's Law Dictionary, ibid., s.v. "accrue, taxation."

74 *In C.A.S.A.W., Local 1 v. Alcan Smelters and Chemicals Ltd.,* [2001] B.C.J. No. 934 (C.A.), 2001 BCCA 303, the court considered an amendment to a pension plan that would delete overtime pay from the calculation of highest average earnings. Levine J.A. held that the amendment did not adversely affect the right to benefits which had accrued, holding, at para. 26:

> In my view, a plain reading of the words "right to benefits which had accrued" prior to January 1, 1990, is that the appellants had a right to have their pension benefit calculated taking into account their highest average earnings, including overtime earned prior to January 1, 1990. They had no right to any benefits resulting from anything that occurred after that date, whether those things were additional earnings, service, contributions or anything else that had not yet occurred.

75 I prefer Mr. Hamilton's approach to the question of accrual over that of Mr. Tettmar for a number of reasons. First, I am not convinced that Mr. Tettmar's analysis, which is focussed upon the valuation process, is the appropriate one. Pension administrators are obligated to ensure that the pension is appropriately funded, and ancillary benefits will necessarily form a part of that calculation, but I am not satisfied that this should have a bearing on how one assesses the entitlement of plan members. Moreover, Mr. Hamilton's interpretation is consistent with the definition of accrual set out and applied in *Dinney* and *C.A.S.A.W.* It is also consistent with the description of accrual in *Pension Law* at p. 218-219:

> All pension plans must provide that pension benefits accrue, that is be earned by or for the benefit of an employee in a "gradual and uniform" manner ... The gradual and uniform rule applies only to the accrual of basic pension benefits and not to ancillary benefits such as early retirement windows.

76 Though the PCO was not asked to consider the meaning of the term "accrued" (the argument that the Amendment was void under s. 11.1 having been withdrawn by Entitlement 55), the decision of the PCO nevertheless contains an enlightening discussion of the distinction between entitlements available to plan members but not yet exercised, and benefits which are subject to eligibility re-

quirements. The PCO concluded, at para. 22, that under the Plan, both the 10 year service requirement and termination for efficiency reasons were eligibility requirements. This did not render s. 14(1)(c), which precludes an amendment to reduce the commuted value of an ancillary benefit for which a member has met all eligibility requirements, meaningless, because (at para. 24):

> [S]ome unreduced early retirement benefits become available at the members option once the member has reached certain age and service requirements. The member may elect not to exercise his or her rights but continue to work. All eligibility requirements having been met, because of the section an employer could not amend the plan so as to take away that employee's right to take early retirement with an unreduced pension. The difference between this type of provision and s. 4.3 is that the event triggering payment is the election by the member to retire early. The decision to retire early is not an eligibility requirement but a decision to act upon a right.

77 Similarly, in *Patrick v. Telus Communications Inc.*, [2005] B.C.J. No. 2607 (C.A.), 2005 BCCA 592, the British Columbia Court of Appeal considered an amendment to a pension plan that would change the criteria for early retirement. The plan prohibited any amendment that would "affect the rights of any Member ... to any benefit or pension to which he may previously have become entitled ...".

78 The ancillary benefit provided by s. 4.3 was contingent upon eligibility requirements and did not begin to accrue until a plan member met those requirements. The eligibility requirements at the time of the Amendment were (a) a minimum of ten years service and; (b) termination by Imperial for efficiency purposes. None of the Plaintiffs had been terminated at the time of the Amendment. As such, the Amendment did not reduce benefits which had accrued to the Plaintiffs and was therefore not in violation of s. 11.1.

Breach of s. 56 of the *Employment Pension Plans Act*, S.A. 1986, c. E-10.05.

79 Prior to 2000, Section 56(1)(a) of the EPPA (now, s. 81(1)(a)) provided:

> 56(1) An amendment to a pension plan, or, where one plan has been adopted in place of another, the plan so adopted, may not reduce
>
> (a) a person's benefits in respect of employment on or after the initial qualification date and before the effective date of the amendment or the adoption of the other plan ...

At the time of the Amendment, "pension" was defined in the EPPA to mean:

> a series of payments that continues for the life of a former member, whether or not it is thereafter continued to any person;

"Benefit" was defined to mean:

> a pension or any other benefit under a pension plan, and included a return of contributions and any payment in a series of payments that constitutes a benefit.

80 In July, 1992, the EPPA was amended by the *Employment Pension Plans Amendment Act*, S.A. 1992, Chap. 13. By virtue of that amendment, a modification was made to the definition of "pension":

> ... a series of payments that continues for the life of a former member, whether or not it is thereafter continued to any person, **and includes any benefits that are ancillary to those payments and future rights to any such payments or ancillary benefits.** (emphasis supplied)

The 1992 amendment to the legislation was deemed to come into force as of January 1, 1987.

81 In 1999, s. 56(1)(c) (now s. 81(1)(c) was added to the EPPA. It provides:

> 56(1) An amendment to a pension plan, or, where one plan has been adopted in place of another, the plan so adopted, may not reduce
>
> (c) the amount of the commuted value of an ancillary benefit for which a member or former member has met all the eligibility requirements under the plan necessary to exercise the right to receive the benefit.

82 The parties disagree about the proper interpretation of this legislative history. Imperial contends that the 1992 amendment could not operate to interfere with its vested right to amend the pension plan under s. 11.1 and, as such, the applicable definition of pension is one which makes no reference to ancillary benefits. Imperial further contends that the 1999 amendment, which more clearly stipulated that an amendment may not reduce an ancillary benefit *for which all eligibility requirements have been met*, was made only for clarification purposes and did not effect a change in the law. The Plaintiffs, on the other hand, contend that the applicable definition of pension includes ancillary benefits as per the 1992 amendment, and that from 1987 (effectively) to 1999, the EPPA prohibited amendments that would affect eligibility for ancillary benefits.

83 It is not necessary to determine whether the 1992 amendment to the legislation interfered with a vested right to amend the Pension Plan. The outcome, even if one assumes that the 1992 amendment was in force at the time of the Amendment, is the same.

84 In *Monsanto*, the Supreme Court of Canada described the PBA, at para. 38, as legislation that "seeks to ensure a balance between employee and employer interests that will be beneficial for both groups." The same can be said of the EPPA, which offers basic protection to plan members but also authorizes employers, as plan sponsors, to make changes to pension plans.

85 The interpretation advanced by the Plaintiffs would fundamentally restrict the ability of plan sponsors to make amendments to pension plans in a manner that is not supported by the plain language of the Act (prior to or after the 1992 amendment), or by an interpretation that takes into account the purpose and scheme of the legislation. It would mean that, even with respect to an ancillary benefit for which no plan member has met any of the eligibility criteria, that benefit could not be reduced or removed. It would effectively freeze all ancillary benefits at their high water marks. Employers could never amend pension plans in a manner that would operate to their benefit.

86 In referring to "any benefits that are ancillary to those payments", in the amendment made in 1992, the Legislature included in the scope of the protection of the Act those additional benefits to which a plan member has a current right, ie. ancillary benefits earned and currently payable. In referring to "future rights to any such payments or ancillary benefits", the Legislature ensured that an employer could not interfere with the payment of an ancillary benefit for which the plan member has a "future right", ie. ancillary benefits for which the eligibility requirements had already been met but were not yet payable. In my view, the Legislature did not put employers in a position where they could never alter or remove an ancillary benefit, once included in a pension plan. This would be inconsistent with the purpose of the Act on the whole, which is to balance the interests of plan members and sponsors.

87 At all relevant times, the EPPA has allowed employers to amend pension plans in a manner that would reduce ancillary benefits for which the eligibility requirements have not been met.

Breach of Fiduciary Duty and Breach of Trust

88 Because the issues of breach of fiduciary duty and breach of trust obligations in this case turn on the capacity in which Imperial was acting when it made the Amendment, and because the Plaintiffs have not distinguished between fiduciary and trust arguments, it is appropriate to consider these issues together.

89 Section 6(5) of the EPPA provides:

> 6(5) While acting in the capacity of administrator, the administrator stands in a fiduciary capacity in relation to member, former members and others entitled to benefits.

90 Imperial has admitted that it owed a fiduciary duty to all plan members when acting in its capacity as administrator. It denies that it was acting in the capacity of administrator (or trustee) when it made the Amendment.

91 A good deal of evidence was heard at trial with respect to Imperial's motives for making the Amendment. Before considering the issue of the capacity in which Imperial was acting, it is appropriate to briefly review this evidence.

92 It is clear that Imperial was aware, as early as February 1991, that some further involuntary terminations might become necessary to meet its restructuring targets. The Plaintiffs and Imperial disagree about whether, at the time of the Amendment, Imperial anticipated the need for a large-scale involuntary termination program. The documentary evidence suggests that Imperial's assessment of the scale of further terminations developed over time.

93 The minutes of the February 18, 1991 COED meeting show the Committee considering a variety of options depending on the outcome of the voluntary program. The need for further terminations and what was at that time the proposed amendment to the pension plan were both issues considered at an April, 1991 meeting of the COED Committee, though it appears at that time that the Committee anticipated the potential only for a "targeted reduction of a relatively small number" of employees.

94 The May 13, 1991 corporate newsletter indicated that Imperial was still $40 million short of meeting its target of a $120 million reduction in overhead costs, and salaries were clearly understood to form a substantial portion of those costs; however, COED committee minutes from June and July 1991 indicate that there were as few as 200 surplus positions. The minutes of the July 22, 1991 COED meeting indicate that the resource division's $7 million shortfall in cost reductions "should not be made up by a second wave' of involuntary staff reductions in 1991." An August 23, 1991 letter from Doug Baldwin, President and CEO of Esso Resources Canada Limited, indicated that staff levels would by reduced by 3% to 4.5% per year to 1995.

95 Through the autumn of 1991, it appears that Imperial contemplated further staff reductions, but not on a massive scale. The 1991 Corporate Plan that was presented to Imperial's Board of Directors indicated a potential difference in staffing numbers between 1991 and 1992 of 434. This number was revised in the November 7, 1991 presentation of the Corporate Plan to Exxon Mobil to 262.

96 It is not clear exactly when Imperial's assessment of the need for further staff reductions changed, but the evidence supports the conclusion that this occurred late in 1991, after Imperial's board passed the Amendment and in the wake of very poor third quarter results for the company for that year. In stark contrast to the figures discussed in COED meetings over the spring and summer of 1991, a study prepared by S.J. Walker and presented to the COED committee on December 9, 1991 proposed a total workforce reduction of 1965 employees. A presentation to Exxon Mobil on January 27, 1992 indicated that a discussion of more significant workforce reductions commenced the previous November, and that a discussion over "the last several weeks" led to the identification of 1700 employees to be terminated.

97 This conclusion is supported by the testimony of Imperial's witnesses: Brian MacIntyre, Ron Brenneman, Patrick Levins, Ross Nisbet and Dan Baldwin all testified that they were not aware of a formal involuntary termination program until approximately December 1991. Their evidence was unequivocal in this regard and was not contradicted.

98 Mr. Nisbet, who was himself terminated at the age of 49 and was not, as a result of the Amendment, entitled to claim under s. 4.3, testified that Imperial's intent in making the Amendment was to remedy a situation created by a 1990 amendment to the Plan, which brought the Plan in line with Ontario legislation but removed Imperial's discretion under s. 4.3. Mr. Levins and Mr. Brenneman testified that the need to amend s. 4.3 was not motivated by financial considerations. Similarly, Mr. MacIntyre and Mr. Nisbet testified that there were no discussions connecting s. 4.3 to Imperial's finances. This evidence was not contradicted.

99 Both the Plaintiffs and Imperial rely upon the COED topic summary of August 1, 1991, which states:

> With the increased volume of involuntary terminations being considered in 1991, both from workforce rebalancing efforts and outsourcing, and with these terminations generally being contemplated for the purpose of maintaining or improving the efficiency of operations, much broader access to Section 4.3 could occur than was intended. The proposed amendment will provide certainty.

100 Viewed in the context of Imperial's awareness of the need for further terminations as of August 1991, this suggests no more than that Imperial's motivation for the Amendment was to provide certainty as the restructuring process went forward. Though it is clear that Imperial was not acting in the best interests of plan members when it made the Amendment, I am satisfied that Imperial was not motivated by the prospect that the Amendment would yield significant savings in the event of a large number of involuntary terminations.

101 In the context of the Ontario legislation, the PCO took the view that Imperial was not acting in a fiduciary capacity when it made the Amendment. The Plaintiffs contend that the "two hats" doctrine espoused by the PCO is inconsistent with the law relating to fiduciary duties in this province.

102 The PCO held, at paras. 30-33:

> The Act recognizes that an employer may wear "two hats" in respect of pension plans. Indeed, s. 8 specifically states that an employer may be an administrator. In that way, it acknowledges that an employer may play two roles and it is self evident that the two roles may come into conflict from time to time.
>
> To illustrate how the Act uses the words "administrator" and "employer" differently throughout the Act, consider s. 78 and s. 79 of the Act. Those provisions enable an employer to seek and receive surplus pension funds. Clearly, an administrator would be in a conflict of interest position if it sought the return of surplus funds for an employer. The Act makes it clear that it is the employer who seeks the refund of surplus funds under s. 78 and 79. In s. 19, on the other hand, it is the administrator who is charged with the obligation to ensure that "the pension plan and fund are administered in accordance with the Act and the regulations". There are many, many other instances where the Act shows that the legislature chose between the words "administrator" and "employer". This leads us to the conclusion that, at least in the first instance, when the word "administrator" is used in s. 22, it is used to mean the person or body administering the fund and who stands in a special fiduciary relationship with the plan members courtesy of the fiduciary standard of care set out in s. 22(1).
>
> Is there anything in the provisions of s. 22 which would lead us to a contrary view, that is, to the view that the word "administrator" is used in s. 22 simply as a shorthand to cover all those persons and bodies that s. 8 permit to act as administrator? Not in our view. The section is aimed at setting out the standards, powers and duties, of those who wear the mantle of administrator.
>
> We are of the view that an employer plays a role in respect of the pension plan that is distinct from it role as administrator. Its role as employer permits it to make the decision to create the pension plan, to amend it and to wind it up. Once the plan and fund are in place, it becomes an administrator for the purposes of the management of the fund and administration of the plan. If we were to hold than an employer was an administrator for all purposes once a plan was established, of what use would a power of amendment be? An employer could never use the power to amend the plan in a way that was to its benefit, as opposed to the benefit of the employees. Section 14 presupposes this power is with an employer as it created parameters round the exercise of a power of amendment.

103 The decision of the PCO is described in *Pension Law*, at p. 338:

> *Imperial Oil* is an important case because it recognizes that structural conflicts of interest are explicit in the PBA and must be tolerated. This is especially true given that pension plans are so often administered by a single employer. Under

> the "two hats" principle, when an employer acts in a capacity qua administrator, the employer is subject to the statutory and common law fiduciary standards imposed on plan administrators. However, when an employer acts qua employer, it likely does not owe employees a statutory duty of care.

104 The "two hats" principle has recently been affirmed by the Ontario courts. In *OMERS Sponsors Corp. v. OMERS Administration Corp.*, [2008] O.J. No. 425 (Gen. Div.), Archibald J. held at paras. 38-39:

> In a traditional single employer pension plan, the employer is both plan sponsor and plan administrator. These distinct roles give rise to separate duties.
>
> In its role as plan sponsor, the employer decides whether to establish a plan and on its funding design. As plan sponsor, the employer owes no fiduciary duties to the plan members. In deciding whether to establish or terminate a plan, in defining the categories of employees who are eligible for membership, and in determining what benefits will be offered, the sponsor may act in its own interests and may prefer the company's interests over those of the employees.

105 In *Sutherland v. Hudson's Bay Co.*, [2007] O.J. No. 2979 (Sup. Ct.), Wilton-Siegel J. held, at para. 310, that *Imperial Oil* states the law of Ontario in respect of the issue of the statutory fiduciary duty arising under the PBA and, as a result, the employer was not subject to a statutory fiduciary duty when it made amendments to a pension plan allowing it to use surplus funds to fund contribution holidays. Wilton-Siegel J. went on to consider whether the employer in its capacity as sponsor was subject to a "general fiduciary duty" distinct from the duty arising under the statute. He concluded that it was not, but held at para. 320:

> ... I conclude that, in the exercise of powers under the Plan in its capacity as the employer, HBC is subject to an implied duty of good faith that requires it to exercise such powers for a valid purpose, being a purpose which is consistent with the expectations regarding the scope and nature of the Plan at the time of its creation.

106 Similar reasoning has prevailed in other jurisdictions and in the context of other pension legislation. In *Association provincial des retraites d'Hydro-Quebec v. Hydro-Quebec*, [2005] Q.J. No. 1644, 2005 QCCA 304, the Quebec Court of Appeal considered the right of the employer to amend a pension plan in a manner that would allow it to use surplus funds to increase benefits to active members but not to retirees. Though the applicable legislation provided that the employer was trustee in respect of the pension funds, the Court concluded that the employer should not be held to a fiduciary standard in respect of all of its actions, at para. 88:

> It should be noted that not all of Hydro-Quebec's actions should be evaluated according to the standard of fiduciary duty. In reality the respondent wears a number of different hats and changes them to suit the circumstances. Accordingly, when sitting around the negotiating table with the unions representing 95% of its employees, it acts in its capacity as employer, not as trustee of the fund ...

107 The two hats doctrine was implicitly recognized in British Columbia in *Patrick v. Telus Communications Inc.*, 2006 BCSC 854, [2006] B.C.J. No. 1243, aff'd: 2007 BCCA 200, where Rice J. concluded that an employer who was also plan administrator was not subject to a fiduciary duty when granting or withholding consent for early retirement, or when changing its policies governing the granting of consent.

108 A plan sponsor exercising its power of amendment in respect of a pension plan is not subject to a fiduciary duty to plan members. Nor is it acting as trustee. The distinction between an employer acting as plan sponsor and plan administrator made by the PCO is now well recognized and applies regardless of whether the administrator's fiduciary duty arises out of the statute, under equitable principles or under the law of trusts. Imperial was not acting as administrator or trustee when it made the Amendment. It was acting as employer and plan sponsor and within the scope of the authority granted to it under the terms of the Pension Plan.

Breach of Duty of Good Faith

109 In *Sutherland*, Siegel J. held that the employer owed a duty of good faith when exercising its power of amendment. The duty of good faith in the context of the exercise of the power of amendment to a pension plan was also recognized by the British Columbia Court of Appeal in *Buschau v. Rogers Communications Inc.*, [2004] B.C.J. No. 297 (C.A.), 2004 BCCA 80; var'd: [2006] 1 S.C.R. 973, where Newbury J.A. held, at para. 60:

> The powers of amendment and termination given to the employer, moreover, must be exercised in good faith ... Although the power may not be a fiduciary one, it is one that must be exercised by the employer in good faith vis-a-vis the existing Members.

110 In *Sutherland*, Siegel J. concluded that the amendment had to be made for a proper purpose, but that standard does not mean that the employer was required to concentrate exclusively upon the effect of the amendment on plan members, or that the plan must be interpreted to resolve any disputes in favour of plan members. Instead, Siegel J. concluded, at para. 324, that the test for proper purposes is "... consistency with the reasonable expectations for the scope and nature of the Trust fund at the time of its creation." This accords with the reasoning of the Browne-Wilkinson V.C. in *Imperial Group Pension Trust Ltd. and Others v. Imperial Tobacco Ltd. and Others*, (1991) 1 W.L.R. 589, wherein it was held at p. 598 that an implied obligation of good faith was owed by an employer in the exercise of its rights and powers, but it remained open for the employer "to look after its own interests, financially and otherwise, in the future operations of the [pension] scheme."

111 To the extent that Imperial was subject to a duty of good faith in the exercise of its power of amendment, that duty did not require it to act solely in the best interests of plan members. As Siegel J. pointed out in *Sutherland*, at para. 325:

> I also do not see any basis for the plaintiffs' position that the intention of [the employer] in making an amendment will, on its own, give rise to a breach of the duty of good faith in circumstances where the result of the proposed action is otherwise consistent with the scope and purposes of the Plan.

112 In his separate concurrence to the decision of the majority in *Buschau*, Bastarache J. wrote, at para. 103, that the content of a duty of good faith must be determined on the basis of the applicable statute and the terms and conditions of the plan itself:

> ... Any termination of the Plan and amendments to it must be examined on the basis of its terms and conditions, in consideration of the applicable provisions of the PBSA. What would constitute an abuse of the employer's power or would otherwise offend community standards of reasonableness in the contemplated use of the Premier Plan assets for the benefit of present and future employees ... must be determined on that basis alone ...

113 The fact that Imperial may have acted in self interest did not of itself result in a breach of a duty of good faith where the outcome of Imperial's action was otherwise consistent with the scope of the Pension Plan. Imperial was entitled to amend the Pension Plan under the terms of the Pension Plan itself and under the applicable Ontario and Alberta legislation. Nowhere in the Plan or in the legislation is Imperial precluded from making amendments in its own interests. It is worth pointing out that s. 26 of the PBA requires the administrator to provide notice to plan members of amendments which the Superintendent concludes are adverse, which presupposes an entitlement on the part of the employer to make such amendments. I have already concluded that Imperial's motive in making the Amendment was to provide certainty as the restructuring process went forward and address the removal of Imperial's discretion as a result of changes to the Plan in 1990.

114 Even if Imperial was motivated by financial self-interest, there is no evidence that Imperial was acting in an underhanded manner or for some collateral purpose. I do not see how Imperial, acting in its capacity as employer and exercising its right to amend in accordance with the terms of the Pension Plan and the applicable legislation, could be said to have been acting in bad faith.

Conclusion

115 The Plaintiffs' claims that Imperial breached the terms of the Pension Plan, breached s. 56 of EPPA and breached a fiduciary duty to the Plaintiffs in making the Amendment are res judicata by virtue of the August, 1995 decision of the Pension Commission of Ontario. Moreover, the Plaintiffs have failed to establish that Imperial breached the terms of the Pension Plan, s. 56 of the EPPA or a fiduciary duty or duty of good faith in making the Amendment. The Plaintiffs' claim is dismissed.

Costs

116 Costs may be spoken to, if necessary.

N.C. WITTMANN A.C.J.Q.B.

cp/e/qlmxm/qlprp/qljxl/qlcas/qlhcs/qlcas/qlaxw/qlced

TAB 9

Case Name:
OMERS Sponsors Corp. v. OMERS Administration Corp.

Between
OMERS Sponsors Corporation, Applicant, and
OMERS Administration Corporation, Respondent

[2008] O.J. No. 425

65 C.C.P.B. 187

2008 CarswellOnt 561

164 A.C.W.S. (3d) 340

Court File No. 07-CV-341228PD1

Ontario Superior Court of Justice

T.L. Archibald J.

Heard: January 21, 2008.
Judgment: February 6, 2008.

(61 paras.)

Pensions and benefits law -- Private pension plans -- Legislation -- Interpretation -- Two statutory corporations applied successfully for a declaration that the applicant might legally require the respondent under s. 27 of the Ontario Municipal Employees Retirement System Act, 2006 to reimburse it for the categories of costs set out in a joint protocol, that the respondent might legally reimburse the applicant for those costs, and the respondent could provide technical and administrative support as set out in the joint protocol -- This interpretation of the categories of costs and support in the joint protocol best accorded with a proper reading of the overall scheme and purpose of the Act -- Ontario Municipal Employees Retirement System Act, 2006

The two statutory corporations in this action, which were charged by statute with the governance of the OMERS Pension Plans (a contributory defined benefit pension plans providing benefits to approximately 372,000 members employed in the municipal sector) applied for a declaration that: (1) the applicant SC might legally require the respondent under s. 27 of the Ontario Municipal Employees Retirement System Act to reimburse it for the categories of costs set out in the joint protocol; (2) that the respondent might legally reimburse the SC for those costs; and (3) the respondent could provide technical and administrative support as set out in the joint protocol -- HELD: The declaration issued as sought -- Based on an analysis of the OMERS Act, 2006 and the Pension Benefits Act and the common law, the court found the joint protocol was legally valid -- The categories of costs requiring reimbursement to the SC were appropriate -- The categories of technical and administrative support to be provided by the AC and the SC, when required, were reasonable and appropriate -- The governance model of the OMERS Pension Plans differed significantly from the traditional sponsor/administrator employer's role typically found in pension plans -- Taken together, and within the context of the common law and the overall OMERS Act, 2006, and in light of the statutory duties of the parties, the joint protocol sets out categories of expenses and support that might properly and lawfully be paid out of the OMERS Pension Funds -- This interpretation of the categories of costs and support in the joint protocol best accorded with a proper reading of the overall scheme and purpose of the Act -- It recognized the important roles of each statutory corporation in the governance of the OMERS Pension Plans -- It reduced duplicative costs -- It reduced the burden of the levy -- It accorded with the plain language of the sections, the legislative framework including the Pension Benefits Act, and the common law -- In light of the unique nature of the governance structure of the OMERS Pension Plans, and mindful of the duties owed by both parties to the members of the OMERS Pension Plans, the court was of the view that the categories of expenses and support outlined in Schedule "A" to the joint protocol might be paid and provided legitimately from the OMERS Pension Fund.

Statutes, Regulations and Rules Cited:

Ontario Municipal Employees Retirement System Act, 2006, S.O. 2006, c. 2, s. 16, s. 24, s. 25(2), s. 27, s. 28, s. 34, s. 35 (2)

Pension Benefits Act, R.S.O. 1998, c. P-8

Counsel:

Allan Rock, Q.C., Freya Kristjanson, and Amanda Darrach, for the Applicant.

Jeff Galway and Jeremy Forgie, for the Respondent.

T.L. ARCHIBALD J.:--

A) Introduction

1 The Applicant OMERS Sponsors Corporation ("SC") is a statutory corporation created under the *Ontario Municipal Employees Retirement System Act, 2006,* S.0. 2006, c. 2 ("*OMERS Act, 2006*"). The Respondent OMERS Administration Corporation ("AC") is a statutory corporation which was continued under the *OMERS Act, 2006*. The two corporations are charged by statute with the governance of the OMERS Pension Plans. They are contributory defined benefit pension plans that provide benefits to approximately 372,000 members employed in the municipal sector.

2 The respective roles of the two corporations are set out in the *OMERS Act, 2006*. Section 27 provides that the AC is to reimburse the SC for costs that in the opinion of the AC may lawfully be paid out of the OMERS Pension Funds. Sections 35(2)(c) and 35(2)(d) provide that the AC can provide technical and administrative support to the SC. The *OMERS Act, 2006* does not specify the nature of such costs or support. The SC and the AC have established a Joint Protocol regarding the categories of costs and support to be provided by the AC to the SC in accordance with the Act.

3 The SC and AC bring this application for a declaration that:

(a) the SC may, pursuant to section 27 of the *OMERS Act, 2006*, lawfully require the AC to reimburse it for the categories of costs set out in the Joint Protocol;

(b) the AC may, pursuant to section 27, lawfully reimburse the SC for those costs; and

(c) the AC can provide, pursuant to section 35, technical and administrative support to the AC as set out in the Joint Protocol.

4 Based on an analysis of the *OMERS Act, 2006*, the *Pension Benefits Act*, R.S.O. 1998, c. P.8, and the common law, I conclude that the Joint Protocol is legally valid. The categories of costs requiring reimbursement to the SC are appropriate. Equally, the categories of technical and administrative support to be provided by the AC to the SC, when required, are reasonable and appropriate.

B) The Facts

(a) The OMERS Pension Plans

5 The facts are taken from Marianne Love's affidavit of October 4, 2007 and Jennifer Brown's affidavits of October 16, 2007 and January 10, 2008. Ms. Love is the co-chair of the SC. Ms. Brown is the Senior Vice-President, Pensions, of the AC. The facts were unchallenged by any party.

6 OMERS is one of the largest pension plans in Canada. The OMERS Pension Plans provide pension benefits to current and former employees of more than 900 municipal governments, school boards (non-teaching staff), police and fire departments, children's aid societies, electrical utilities, transportation commissions, libraries, public health and housing units, and other local agencies throughout Ontario.

7 Approximately 80% of the OMERS active members are represented by some 35 unions and bargaining agents. The remaining 20% of active members are management, union exempt, or are otherwise unaffiliated.

8 Prior to June 2006, the OMERS Pension Plans were governed pursuant to the *Ontario Municipal Employees Retirement System Act, 1961-1962*, and the *OMERS Act, 1990.* The Province of Ontario was the sponsor of the OMERS Pension Plans. The Province was responsible for issues such as plan design and changes to contribution rates. The OMERS Board was made up of 13 members with representatives from participating employers, plan members, and the government, all of whom were appointed by the Ontario government. The OMERS Board was the administrator of the Pension Plan.

9 On June 30, 2006, the *OMERS Act, 2006* was proclaimed. The SC was created as a new corporation without share capital, and the OMERS Board was renamed the AC and continued as a corporation without share capital. The governance of the OMERS Pension Plans was assumed by these two statutory corporations. Each of the SC and the AC were given separate duties with regard to the governance of the OMERS Pension Plans. The government is no longer part of the governance structure.

(b) Role of the SC

10 The SC is made up of fourteen Members who act as a board of directors for that corporation. The Members are appointed by sponsor groups who participate in the OMERS Pension Plans. Seven Members are appointed by employers and seven by plan members. In most cases, decisions require majority approval. Some key decisions require a super-majority of votes (see ss. 26 and 33(2)).

11 Section 24 of the *Act* provides that the objects of the SC are the following:

(a) to make decisions about the design of benefits to be provided by, and contributions to be made to, the OMERS Pension Plans; and
(b) to perform such other duties as may be provided under this Act.

12 Subsection 16(1) further provides that the SC shall determine the terms and conditions of the OMERS Pension Plans, subject to the restrictions set out in the statute. In particular, the SC may amend the OMERS Pension Plans, including the contribution rates (ss. 18 and 25).

13 The OMERS governance structure differs from typical private or public sector pension plans. The SC, as sponsor, has no other purpose than to participate in the governance of the OMERS Pension Plans. Its membership is equally divided between employers and unions. Its members serve as directors of the SC Corporation and are subject to the fiduciary duties that accompany that role. By contrast, in a typical single-employer pension plan, the employer serves as both plan sponsor and administrator.

(c) Role of the AC

14 As provided in section 34 of the *OMERS Act, 2006,* the AC's objects are: (1) to act as administrator of the OMERS pension plans and as trustee of the pension funds; (2) to advise and assist the SC; and (3) to act as agent of the administrator of other pension plans and to manage other pension funds in accordance with agreements authorized by section 29.

15 Effective June 29, 2009, the composition of the AC and the method of choosing its members (who effectively function as a board of directors) will be specified by the by-laws of the SC (section 33(1)). A member of either the AC or SC is not permitted to hold office in the other corporation (sections 23(3) and 33(4)).

16 The initial appointments to the AC were made by the Lieutenant Governor in Council for terms up to three years, with subsequent appointments up to June 29, 2009 to be made directly by employers, employer associations, employee associations and retiree associations. Currently, the AC board comprises seven employer and seven plan member representatives.

17 As plan administrator, the AC acts as a fiduciary in determining which expenses are to be paid out of the plan. The *Pension Benefits Act* stipulates that a pension plan administrator must exercise the care, diligence, and skill that a person of ordinary prudence would exercise in dealing with the property of another person (s. 22(1)). The administrator must also use all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business, or calling, ought to possess (s. 22(2)). This standard of care signifies that the AC must act reasonably and prudently in considering a request from the SC that certain SC costs should be paid from the OMERS Pension Plan funds.

(d) Reimbursement of Costs and Provision of Support by the AC to the SC

18 The *OMERS Act, 2006* requires that the AC reimburse the SC, upon the SC's request, for any expenses which may lawfully be paid out of a pension fund. Section 27 provides:

> The Sponsors Corporation may require the Administration Corporation to reimburse

> it from any pension or other fund for any of its costs that in the opinion of the Administration Corporation may lawfully be paid out of the fund.

19 The legislation also allows the AC to provide the SC with reasonable support, both technical and administrative, as set out in section 35(2):

> 35(2) For furthering its objects and without limiting the generality of subsection (1), the Administration Corporation may,
>
> ...
>
> (c) provide reasonable technical support to the Sponsors Corporation, including, without limitation, providing actuarial advice and cost estimates, estimates of the impact of changes to the OMERS pension plans or other changes on contribution rates and advice with respect to any administrative or other issues arising out of proposed changes to the pension plans;
>
> (d) provide reasonable administrative support to the Sponsors Corporation.

(e) <u>The Section 28 Levy Power</u>

20 The second source of funding for the SC is the imposition of a fee upon employers who participate in an OMERS pension plan and employees who are members of an OMERS pension plan, pursuant to section 28 of the Act.

> 28(1) The Sponsors Corporation may, by by-law, require the employers who participate in an OMERS pension plan and the members of an OMERS pension plan to pay a fee for the purpose of funding any of the Sponsors Corporation's costs that may not lawfully be paid out of a pension fund.

For convenience, I will refer to fees collected under s. 28 as the "levy."

21 The s. 28 levy is payable only by participating employers and active employees. The legislature identified two specific circumstances in which the SC's costs must be paid by the levy (section 28(2)):

> i. expenses relating to the statutory "supplementary decision-making mechanisms" described in s. 26 of the Act.

Section 26 provides that the SC is to make decisions by majority vote except where a super-majority vote is required for certain key changes, such as a change in benefits, that are listed in section 26(2). The supplementary decision-making mechanism is mediation or arbitration unless the SC, by bylaw, establishes alternate mechanisms. The s. 26 mechanism is therefore engaged when the Members are unable to form the required consensus.

> ii. "the expenses incurred for collecting or administering" the levy.

If the AC collects the levy on behalf of the SC, then the SC "shall reimburse" the AC for costs of collection (s. 28(5)). The SC "shall establish a separate fund for fees collected under the levy, and the money in the fund may only be spent for the purpose of funding the SC's costs that "may not lawfully be paid out of a pension plan", and for no other purpose. (s. 28(6) and (7)).

(f) Government Start-up Funding

22 In addition to the statutory sources of funding, the Ministry of Municipal Affairs and Housing committed to provide the SC with interim start-up funding under a Transfer Agreement. The last instalment of the funds will be received by the SC in June 2008. The Transfer Agreement will expire on March 31, 2009.

23 As a condition of the interim start-up funding, the Ministry required the SC to establish a mechanism for self-funding for the long term. The Ministry identified four components of a sustainable self-funding model. They are as follows:

(a) the levying mechanism pursuant to s. 28;
(b) an enabling by-law to institute the levy;
(c) the reimbursement of SC costs and technical and administrative support to be provided by the AC as set out in the Joint Protocol; and
(d) an Application to the Ontario Superior Court of Justice to confirm the lawfulness of the Joint Protocol.

(g) Development of the Joint Protocol

24 The OMERS legislation does not set out the kinds of expenses which may "lawfully" be paid out of a pension fund, or what support can be construed as being "appropriate" in the context of the governance structure.

25 The SC and the AC decided that in order to ensure the good governance of the OMERS Pension Plans, they would work cooperatively to determine what categories of expenses and support could be paid and provided from the OMERS Pension Fund pursuant to sections 27 and 35 of the *Act.* The combined efforts of the two corporations produced the Joint Protocol, which is attached to this judgment. The SC and AC were assisted in the negotiations by a government-appointed facilitator, Mr. Martin Teplitsky. The Joint Protocol was approved by both the SC and the AC Boards in June, 2007.

(h) Types of Costs To be Reimbursed Under Joint Protocol

26 Schedule "A" to the Joint Protocol sets out those costs which in the opinion of the SC and the AC may properly be reimbursed, and the types of support which may properly be provided. The main criterion employed by the SC and AC in developing the Joint Protocol was whether an item was necessary for the administration of the OMERS Pension Plans, including for plan governance.

27 The categories of costs incurred by the SC which are authorized to be paid by the AC under the Joint Protocol include,

(a) SC education and development related to plan governance;
(b) Cost estimates of proposed plan changes;
(c) Establishment of conditions for employer participation;

(d) Facilities and technical, administrative, and secretarial support for SC meetings;
(e) Meeting expenses of SC members (travel, remuneration, and business expenses);
(f) Arrangement of the annual SC audit and auditor's fees;
(g) Preparation, printing, and distribution of SC's annual report;
(h) Directors and Officers and fiduciary insurance; and
(i) Communications with plan members.

28 Schedule A to the Protocol goes on to outline the types of support that the AC can provide to the SC: facilities and technological support for SC meetings, assistance with the preparation of the SC annual report, assistance with SC education and development, support in connection with SC requests for cost estimates in respect of proposed plan changes, support in establishing conditions for the participation and termination of participation in the pension plans by employers, support in arranging director and officer and fiduciary insurance, and support in the SC's communications with members and employers.

29 The SC has prepared an operating budget for the calendar year 2007. While much of the 2007 Budget was maintained through the use of provincial funds pursuant to the Transfer Agreement, if the provincial funds were not available and the SC were to rely solely on the self-funding model, the total budget would have been funded as follows:

(a) 61% of the budget represented costs stipulated under the Joint Protocol, for which the SC would require reimbursement from the AC;
(b) 17% of the budget represented the value of technical and administrative support under sections 34 and 35 of the *OMERS Act, 2006*;
(c) 22% of the budget represented costs funded by levy pursuant to s. 28 of the *OMERS Act, 2006*;

(i) Shareholders' Notice Program of this Application

30 On Friday, October 12, 2007, counsel for the SC and the AC brought a motion in the Superior Court of Justice for directions with regard to the appropriate notice to be given to the members and sponsors of the OMERS Pension Plans, along with all other potentially interested parties. An Order was issued which provided for the following Notice:

(a) **Service on Sponsors (Employers and Unions/Bargaining Agents)**: The Notice of Application, a one page Special Notice, and a copy of the Order were served on (i) each designated OMERS contact person at each participating employer, and (ii) the central office of each of the 35 unions and bargaining agents (completed on October 23, 2007). In total, 952 packages of these materials were mailed in accordance with the Order;
(b) **Mailing to Active Members of Plans**: The Special Notice together with the OMERS Newsletter were mailed to active members at their last known address or distributed to active members by their Participating Employers. In total, 246,890 English version newsletters were sent or distributed to active members, and 5,385 newsletters were mailed to active members on disability waiver. The English version was mailed between October 29 and 31, 2007. The French version was mailed to 4,727 members or provided to their Participating

Employers on November 7-8, 2007;

(c) **Mailing to Other Members of Plans (retirees, inactives, deferred vesteds):** The Special Notice was included in newsletters and mailed to all other OMERS Pension Plans members and to the designated OMERS contact person at each Participating Employer (completed between October 30-31, 2007 for English newsletters, and, for French newsletters, due to a delay in translation, on November 7, 2007). In total, 96,555 newsletters were mailed to English-speaking retirees, and 735 newsletters were mailed to French-speaking retirees. In addition, 26,195 newsletters were mailed to English-speaking inactive and deferred vested members, and 609 newsletters to French-speaking inactive and deferred vested members;

(d) **Participating Employers**: The Special Notice was included in the OMERS newsletters for Participating Employers.

(d) **Newspaper Publication:** The Special Notice was published (in English in the national edition of the Globe and Mail, Wednesday October 24, and Saturday October 27, 2007; and in the Montreal Gazette, Wednesday October 24, and Saturday October 27, 2007; and in French in La Presse on Wednesday October 24 and Saturday, October 27, 2007); and

(e) **Website Posting:** The Notice of Application, the supporting affidavits, the Special Notice, and a copy of the Order were posted on the AC website on October 19, 2007.

31 The AC received a total of sixteen telephone calls with inquires regarding this matter. The AC also received two emails. The AC responded to all of the inquiries. No follow-up to any of these communications has been received by either the AC or the SC.

32 The Order provided that any Participating Employer, Union, or Plan Member could participate as a full party in this application by serving a Notice of Application on or before December 14, 2007. As of January 10, 2008, no Notice of Appearance had been filed with the Court in this matter. The SC and the AC have no knowledge of any objector.

33 The SC and the AC have complied with the notice ordered by the Superior Court of Justice. The breadth and service of the Notice is also sufficient to permit me to adjudicate upon this application.

C) The Legal Issues

34 The SC and the AC submit that since the SC will incur the expenses and support requirements in the Joint Protocol in the discharge of its statutory duties, including plan governance, and the expenses and support are required in the public interest, they may properly be paid out of the fund pursuant to ss. 27 and 35 of the *OMERS Act, 2006*. This submission is based on the statutory nature of the plans and their unique governance structure.

35 In interpreting the provisions of the *OMERS Act, 2006*, including the question of whether a cost is one which may be "lawfully" paid out of the pension fund, a Court must consider the Act in the context of the OMERS Pension Plans text, the *Pension Benefits Act* and the common law applicable to the payment of expenses from pension funds.

36 Both the SC and AC submit that the governance model of the OMERS Pension Plans differs significantly from the traditional sponsor/administrator employer's role typically found in pension plans. Generally, the common law is permissive with regard to the payment of administrative expenses from a pension fund where the applicable legislation and the plan documents allow for their payment. As the

Pension Benefits Act does not speak directly to the issue of the types of expenses which may be paid out of a pension fund (other than the expenses of an administrator or an agent thereof), the court must look to the context and language of the entire *OMERS Act, 2006*.

37 Taken together, and within the context of the common law and the overall *OMERS Act, 2006*, and in light of the statutory duties of the SC and the AC, the SC and AC submit that the Joint Protocol sets out categories of expenses and support that may properly and lawfully be paid out of the OMERS Pension Funds. I agree entirely with these submissions.

(a) The Traditional Roles of Sponsors and Administrators in Pension Plans

38 In a traditional single employer pension plan, the employer is both plan sponsor and plan administrator. These distinct roles give rise to separate duties.

39 In its role as plan sponsor, the employer decides whether to establish a plan and on its funding design. As plan sponsor, the employer owes no fiduciary duties to the plan members. In deciding whether to establish or terminate a plan, in defining the categories of employees who are eligible for membership, and in determining what benefits will be offered, the sponsor may act in its own interests and may prefer the company's interests over those of the employees. See *Imperial Oil Limited v. Ontario (Superintendent of Pensions)* (1995), 18 C.C.P.B. 198 (P.C.O.) at para. 31 and *Sutherland v. Hudson's Bay Company* (2007), 61 C.C.P.B. 171 (Ont. Sup. Ct.) per Siegel J. at paras. 310-311.

40 Once the pension plan is established, the employer makes the following decisions as plan administrator:

(a) the enrolment of members;
(b) the calculation and payment of benefits under the plan; and
(c) the investment of the assets of the plan.

In its role as administrator, the employer is a fiduciary. The duty of care is confirmed in s. 22 of the *PBA.* Since the administrator must act in the best interests of the plan, its expenses may lawfully be paid out of the fund.

41 Unlike an employer, the SC has no independent corporate interests beyond fulfilling its statutory duties and ensuring the health and viability of the OMERS Pension Plans. Although the SC is composed of employer and plan member appointees, as directors of the SC Corporation, the Members owe fiduciary duties to the SC Corporation and must act in its best interests. In the context of the overall Act, the only interests of the SC would appear to be the proper governance of the OMERS Pension Plans.

42 The SC has significant statutory duties related to the governance of the Plan. By statute, it is assigned certain duties that traditionally are performed by the administrator. For example, under sections 30 and 31, the SC is required to hire auditors and to publish annual reports on its activities. Under section 25(2) of the Act, the SC may decide on the timing of the filing of a valuation report under the *Pension Benefits Act*, which is traditionally an administrator's function.

(b) Payment of Expenses at Common Law

43 In *Kerry (Canada) Inc. v. DCA Employees Pension Committee* (2007), 86 O.R. (3d) 1, the Ontario Court of Appeal considered the issue of payment of expenses in a traditional single employer plan. The Court determined that the *Pension Benefits Act*, the common law, and the plan text should be examined to determine whether pension plan expenses may be properly paid from the pension fund (paras. 54-65).

44 The Court held that where there is no governing legislative provision, expenses relating to the administration of a pension plan may properly be paid out of a pension fund where the pension documents (the plan text and the trust in Kerry) reasonably permit them to be paid out. Expenses relating to sponsor functions such as the establishment of a pension plan and the costs associated with plan design would not be properly paid out of a pension fund (see paras. 56-58). See also *Hockin v. Bank of British Columbia* (1995), 123 D.L.R. (4th) 538 (B.C.C.A.) at paras. 57-59.

45 The essential point is the manner in which the SC/AC arrangement differs from the traditional single employer plan, taking OMERS out of the ambit of *Kerry* and permitting sponsor expenses to be paid out of the fund.

(c) Payment of Expenses Under the *Pension Benefits Act*

46 The Ontario *Pension Benefits Act* does not speak directly to the issue of the payment of expenses from a pension fund. except for subsections 22(9) and 22(11). It does, however, allow the administrator to be reimbursed for any expenses which it incurs that are related to the administration of the pension fund, subject to the requirements of common law and the pension plan text. Section 22(9) provides that:

> The administrator of a pension plan is not entitled to any benefit from the pension plan other than pension benefits, ancillary benefits, a refund of contributions and fees and expenses related to the administration of the pension plan and permitted by the common law or provided for in the pension plan.

47 This section suggests that where the SC carries out functions that would normally be fulfilled by the plan administrator, its expenses may be paid out of the plan.

(d) The Text of the Plan and the *OMERS Act, 2006*

48 The provisions of the OMERS Pension Plans allow for the payment of expenses to the SC from the OMERS Pension Funds by reference to the *OMERS Act, 2006*:

> The benefits payable under this Plan, the expenses of the Administration Corporation that constitute fees and expenses of administering this Plan, and costs of the Sponsors Corporation described in section 27 of the *OMERS Act, 2006* shall be paid out of the Fund.

(OMERS Primary Pension Plan Text, s. 2(4), Amended and Restated as of April 30, 2007; OMERS Supplementary Pension Plan text, s. 3(4)).

49 The interpretation of the plan is therefore an exercise in statutory interpretation according to Driedger's often-cited modern approach. 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. See e.g. *Bell ExpressVu Ltd. Partnership v. Rex,* [2002] 2 S.C.R. 559 at p. 580.

50 A review of Hansard indicates that the *OMERS Act, 2006* was enacted to eliminate the Ontario government's involvement as sponsor and to establish a system of plan governance that gave equal participation to municipal employers and unions (Ontario, Legislative Assembly, *Official Report of Debates (Hansard),* 152 (1 June 2005) at 7348-9 (Hon. John Gerretsen)).

51 Unlike a traditional employer or sponsor, the SC has no funds of its own. Its only sources of funds are reimbursement under s. 27 for costs and the provision of "in kind" services by the AC under s. 35, and (ii) money collected by the levy upon employers and active employees under s. 28. Whatever may not be paid out of the plan must be funded by the levy. I also note that s. 27 is titled "Recovery of Costs" and that s. 28 is titled "Fees to Fund Other Activities."

52 Under s. 28, the SC may by by-law collect fees for those costs "that may not be lawfully paid out of a pension fund." The only example of an expense that must be paid with s. 28 funds are expenses relating to the "supplementary decision-making mechanisms" in s. 26. The supplementary decision-making process is reserved for those situations where the Members of the SC are unable to form the required consensus. In other words, the costs are incurred to sort out separate stakeholder interests. This is the situation which most closely reflects collective-bargaining type disputes, which under a typical pension plan cannot be charged to the plan because they are associated with distinct employer/employee interests rather than the best interests of the plan as a whole.

53 I further note that only employers and active employees are required to contribute to a s. 28 levy. Retired members, former members, beneficiaries, and former participating employers are not required to contribute to the levy under s. 28. Using the levy for costs relating to the good governance of the plan as a whole could create an unequal burden among the beneficiaries of the OMERS Pension Plans. From my perspective, that would not appear to be the legislature's intention unless there was express language to support such an interpretation.

D) Analysis of the Joint Protocol

54 I conclude that the SC and the AC have devised appropriate categories of expenses and support as set out in the Joint Protocol. The Joint Protocol ensures that expenses and support not related to the good governance of the OMERS Pension Plans are not to be paid from the OMERS Pension Fund. For example, expenses or support related to the recruitment of Members of the SC are not eligible for the payment of expenses or the provision of support, as those are related to activities of individual sponsor groups rather than the SC as a whole in performing its governance role. (Schedule "A", Item 8 of Joint Protocol).

55 The Joint Protocol provides that in interpreting s. 27, expenses incurred by the SC in the interests of the OMERS Pension Plans as a whole, the governance of the Plans, and for the purpose of carrying out statutorily mandated duties, will be reimbursed by the AC. The categories of reimbursable costs agreed upon in Schedule A are directed at assisting the SC to perform its statutory duties. For example, costs incurred in connection with the SC's meetings (e.g. facilities and technological support, administrative/secretarial support, member remuneration and travel expenses) are costs that the SC must incur in the course of fulfilling its statutory objects. Similarly, costs relating to SC education and development, and expenses incurred in costing proposed plan changes, are all costs directly associated with the SC's performance of its duties.

56 The Joint Protocol permits sponsor-type expenses, relating to plan design and governance, to be paid out of the fund. This is a departure from the traditional model of pension plan design. However, the structure of the SC makes such a departure appropriate. The membership of the SC provides equal representation of employers and plan members. The SC Members owe duties to the SC Corporation. The SC, in turn, has statutory duties under the *OMERS Act, 2006*. I am satisfied that the SC is charged with acting in the best interests of the Plan as a whole and, therefore, may be reimbursed and supported by plan funds when it works in that capacity.

57 From my perspective, the costs in the Joint Protocol are costs that may be "lawfully" paid from the fund. Those costs that relate to sorting out separate stakeholder interests rather than the interests of the Plan as a whole will be met by the s. 28 levy.

58 Provided that the SC's costs requests are reasonable and are otherwise in accordance with the AC's Policy in respect of SC requests for reimbursement or support, the AC will have acted prudently and in a manner consistent with its statutory and fiduciary duties in reimbursing the SC for these costs out of the OMERS pension plan funds.

59 In the Joint Protocol, a similar interpretation is given to the reasonable technical and administrative support to be furnished by the AC to the SC where the support is not in the interests of the stakeholders as a whole. For example, item one of Schedule A refers to technical and administrative support to assist the SC with its meetings. As is noted in the column headed "Rationale" in Schedule A, given that facilities and technical support already exist with the AC, it is reasonable to make these facilities/services available to the SC to avoid duplication of costs. The types of AC support contemplated in Schedule A to the Protocol come within these statutory provisions.

E) Conclusion

60 In my view, this interpretation of the categories of costs and support in the Joint Protocol best accords with a proper reading of the overall scheme and purpose of the Act. It recognizes the important roles of each statutory corporation in the governance of the OMERS Pension Plans. It reduces duplicative costs. It reduces the burden of the levy. It accords with the plain language of the sections, the legislative framework including the *Pension Benefits Act*, and the common law.

61 In light of the unique nature of the governance structure of the OMERS Pension Plans, and mindful of the duties owed by both the SC and the AC to the members of the OMERS Pension Plans, I am of the view that the categories of expenses and support outlined in Schedule "A" to the Joint Protocol may be paid and provided legitimately from the OMERS Pension Fund.

T.L. ARCHIBALD J.

* * * * *

PROTOCOL

BETWEEN:

OMERS SPONSORS CORPORATION (SC)

- and -

OMERS ADMINISTRATION CORPORATION (AC)

WHEREAS pursuant to Section 27 of the *Ontario Municipal Employees Retirement System Act of 2006* (the "Act"), the SC may require the AC to reimburse it for any of its costs that in the opinion of the

AC may lawfully be paid out of the pension funds relating to the OMERS pension plans (the "Funds");

AND WHEREAS pursuant to Section 17 of the Act, AC is the administrator of the OMERS pension plans and the Funds and is subject to the requirements of the *Pension Benefits Act* (Ontario) (the "PBA");

AND WHEREAS pursuant to Section 28(1) of the Act, the SC may levy employers who participate in an OMERS pension plan and the members to fund any SC costs which may not lawfully be paid out of a Fund;

AND WHEREAS pursuant to Section 35(2)(c) and (d) of the Act, the AC may provide reasonable technical and administrative support to the SC;

AND WHEREAS the parties wish to establish a protocol to continue their cooperative approach to these issues and to ensure that each is fulfilling its statutory obligations with respect to reimbursements, levies and providing technical and administrative support;

The SC and AC have agreed to proceed as follows:

1. Annexed as Schedule "A" is a list of categories which the SC and AC, after consultation with their respective solicitors believe are either appropriate or inappropriate for reimbursement or for the provision of technical or administrative support. A brief rationale is also included.
2. SC and AC agree to approach the Financial Services Commission of Ontario ("FSCO") with a view to obtaining any confirmation or acknowledgement of the propriety of Schedule "A" that FSCO is able to provide pursuant to the PBA.
3. If FSCO does not provide any acknowledgement or confirmation, or if such confirmation or acknowledgement is not acceptable to AC or SC, AC and SC together will apply to the Superior Court of Ontario for its opinion and interpretation of (1) AC's authority and responsibility under the Act and the PBA relating to the reimbursement of costs by AC to SC and the provision of technical and administrative support by AC to SC; and (2) SC's entitlement to reimbursement of costs and provision of technical and administrative support from AC in accordance with the general outline of the cost and support items contained in Schedule "A".
4. SC will submit its claims for reimbursement or support to the AC with reasonable particulars and supporting documentation.
5. If the AC, in its opinion, declines to reimburse or provide any requested support, then the parties will consult and endeavour to resolve their differences.
6. Failing resolution with respect to a particular request, AC and SC, may apply to the Superior Court of Ontario for its opinion and interpretation relating to the specific request for reimbursement or provision of support, as applicable. Subject to this paragraph 6, AC and SC shall share equally the costs of any such court application. AC may in its discretion and subject to the Act and the PBA elect to have all of the costs relating to such court application paid by AC.
7. The SC will use available government funding to the extent possible for its costs. In the event that the issue of its entitlement to reimbursement and support

is not finally determined prior to depleting its funding, AC agrees to provide reimbursement pursuant to Schedule "A".

8. The AC will advise the SC immediately if there is any challenge to any reimbursement or support already provided by the AC to the SC and the parties will cooperate in addressing this issue. If there is a final binding determination by either FSCO or a court of competent jurisdiction that the reimbursement or support provided was inappropriate or not permitted under the Act or the PBA ("Adverse Determination"), SC will return to the AC any reimbursement made or the fair value of any support provided together with interest from the date of reimbursement or the date the support was provided, as applicable, at a rate equal to the rate of return earned in the applicable Fund over such period. The provisions of this paragraph 8 shall survive the termination of this Protocol.
9. This Protocol may be amended by written agreement between AC and SC.
10. Following the application of the parties to FSCO and the Superior Court of Ontario as set out in paragraphs 2 and 3 of this Protocol, the Protocol may be terminated by either party in accordance with the Act by giving the other party seventy five (75) days prior written notice.

Dated at Toronto this 27th day of June, 2007.

* * * * *

Schedule "A"

Examples of AC's Determination of Support and Expense Reimbursement Requests by SC

Item	Eligible for Payment by AC	Eligible for support to be carried out by AC	Rationale
1. Meetings of the SC: facilities and technological support	Yes	Yes	Presumes that AC is providing the support, not a third party. Facilities and technological support already exist for AC; reasonable and appropriate to provide to SC to avoid unreasonable duplication

			of costs.
2. Meetings of the SC: administrative/ secretarial support	Yes	No	Secretarial support would be provided by third party to avoid a real or perceived conflict of interest.
	Payment would be considered to be for the benefit of the administration of the Plan and support prudent administration as it encourages effective record keeping of SC matters.		
3. Arranging annual audit of SC: auditor's fees	Yes	No	Payment would be considered to be for the benefit of the administration of the Plan and support prudent administration also supports accountability.
4. Preparing SC annual report: printing and distribution	Yes	Yes	Payment would be considered to be for the benefit of the administration of the Plan and support prudent administration also supports accountability.
5. SC education/ development related to pension plan governance	Yes	Yes	Payment would be considered to be for the benefit of the administration of the Plan and support prudent

			administration.
			Training and education improves governance, attendance at conference (either as a participant or speaker) benefits the Plan profile/confidence
6. SC request cost estimates of proposed plan changes	Yes	Yes	Payment would be considered to be for the benefit of the administration of the Plan and support prudent administration.
7. Establish conditions for participation in the pension plans with associated employers and termination of participation in the pension plans by employers	Yes	Yes	Payment would be considered to be for the benefit of the administration of the Plan and support prudent administration.
8. Recruiting SC members	No	No	Individual sponsor group responsibility. Constitutes a reimbursement to a sponsor group rather than SC as the sponsor group bears the responsibility of identifying and nominating the appropriate candidate.

9. Recruiting AC members	No	No	As in 8 above
10. Meetings of the SC: member remuneration and travel and business expenses	Yes	No	SC Meetings that are required for effective pension plan governance, e.g.:

* to receive reports from AC;
* to perform plan governance tasks such as decision on frequency of valuation filings

11. Development of initial SC by-laws: legal costs	No	No	Not required for plan administration; required for sponsor role. Legitimate one-time start-up cost to be paid by current sponsor.
12. Recruiting members of advisory committees	No	No	As in 9 above
13. Legal costs required for dispute resolution re: specified changes	No	No	Section 28(2) of the OMERS Act, 2006 prohibits such costs to be paid for by Plan.
14. Obtain independent advice which is duplicative of advice already provided by the AC (e.g. cost estimates, valuation).	No But AC	No	Substantially reduces duplication of effort.

	will consider costs where warran- ted on case by case basis		
15. D&O and Fiduciary Insurance and related advisory services	Yes	Yes	The AC will consider costs, subject to further discussion and negotiations with insurers and related advisory consultants
16. Communications with plan members, sponsors, public, web support, etc., except for communication on matters prior to a final decision by the SC	Yes	Yes	Required for effective plan governance, to ensure public and member confidence in plan as a whole and accountability

cp/e/qlkxl/qlpwb/qlbrl/qlmzp

TAB 10

Case Name:
Sutherland v. Hudson's Bay Co.

Between
Ronald Sutherland and John Scott on their own behalf and on behalf of the current members, retirees and other beneficiaries of the defined benefit component of the Dumai Pension Plan, CCRA Registration Number 0358572 (formerly, the Simpsons, Limited Supplementary Pension Plan) who were members of the Simpsons, Limited Supplementary Pension Plan as of January 1, 1988,
Plaintiffs, and
Hudson's Bay Company, Royal Trust Corporation, and Investors Group Trust Co. Ltd., and Pamela Bhikhari, John English, Gerald v. Garossino, Edward E. Shier, Hellen Frizzel, Gale Ritchie and Angela Hosmar,
Defendants

[2007] O.J. No. 2979

60 C.C.E.L. (3d) 64

61 C.C.P.B. 171

159 A.C.W.S. (3d) 893

2007 CarswellOnt 4866

Court File No. 02-CV-233990CP

Ontario Superior Court of Justice

H.J. Wilton-Siegel J.

Heard: January 15-17, February 6, 7 and 19-21, 2007.
Judgment: July 31, 2007.

(373 paras.)

Pensions and benefits law -- Pensions -- Administration of pensions -- Surplus funds -- Variation or amendment of plan -- Class action by plaintiffs, former Simpsons employees, against Hudson's Bay Co. -- Contributory defined benefit pension plan had been established for Simpsons employees -- HBC, successor to Simpsons under the plan, added a defined contribution section to plan and added Kmart and Zellers employees -- Plaintiffs claimed HBC not entitled to make those amendments and not entitled to use surplus to fund contribution obligations for defined contribution section -- Action dismissed -- Given the scope and purpose of the plan when created, amendments were proper as was HBC's use of *surplus to fund contributions for both sections of plan.*

Class action by the plaintiffs, who were former employees of Simpsons, Limited (Simpsons), against the defendant, Hudson's Bay Company (HBC). Simpsons established a contributory defined benefit pension plan for its employees in 1971 (the Plan). The Trust Fund was established at this time to hold the assets of the Plan. After a corporate reorganization, HBC received all of the assets of Simpsons and assumed all of its liabilities, and accordingly exercised all of the rights and obligations of Simpsons with respect to the Plan. In 1994 and 1998, HBC added employees of Zellers and Kmart to the Plan, respectively. Zellers and Kmart employees became members of a new defined contribution section of the Plan. Since 1994, HBC had used surplus from the Trust Fund to fund contribution holidays in respect of the employer contribution obligations under the Plan in relation to both the defined benefits section and the defined contribution section. The plaintiffs argued that HBC was not permitted to make the amendments in 1994 and 1998 and that the amendments were invalid. Further, the plaintiffs argued that the use of the surplus to take contribution holidays in respect of obligations under the defined contribution section of the Plan constituted a breach of trust. The issues before the court included whether the assets of the Trust Fund were impressed with a trust, and if so, in favour of which beneficiaries; whether the 1994 and 1998 amendments were valid; whether the use of the surplus of the Trust Fund to fund HBC's obligations under the defined contribution section of the Plan amounted to a breach of trust; and, whether the 1994 and 1998 amendments constituted a breach of a fiduciary obligation or other equitable obligation.

HELD: Action dismissed. The assets of the Trust Fund were impressed with a trust in favour of the members of both the defined contribution section and the defined benefit section of the Plan. HBC, however, was not a beneficiary of the Trust Fund. There were not separate trusts for the defined benefit section and the defined contribution section. The 1994 and 1998 amendments which brought Zellers and Kmart employees into the Plan were valid. Looking at the terms of the original Plan, the court found that the Zellers and Kmart employees were properly included under the Plan given the reasonable expectations regarding the scope and purpose of the Plan at the time it was created, bearing in mind the long-term nature of pension plans. Members of the Plan included future Simpsons employees, as per the definition of "company". Further, any successor of Simpsons was included under the definition of "company". Thus, the class of potential members under the Plan was broad and took into account a variety of corporate developments that could have occurred over Simpsons' corporate life. Similarly, the court interpreted "benefit", as used in the Exclusive Benefits Provisions, broadly as well. "Benefit" included benefits provided under the Plan as amended from time to time. HBC's use of the surplus to fund its obligations under the defined contribution section was valid and did not amount to an abuse of trust or breach of fiduciary duty. While the assets of the Trust Fund could not be used for something other than the exclusive "benefit" of members of the Plan, using the surplus for contribution holidays did not constitute an encroachment upon a pension trust fund or a reduction of accrued benefits. Finally, the 1994 and 1998 amendments did not amount to a breach of fiduciary or any other obligation. The amendments were made for a proper purpose as they introduced new members to the Plan who fell within the class of potential members contemplated by the Plan at the time of its creation.

Statutes, Regulations and Rules Cited:

Pension Benefits Act, R.S.O. 1990, c. P.8, s. 22(4)

Counsel:

Mark Zigler, Alfred Esterbauer and Robyn Matlin, for the Plaintiffs.

Neil Finkelstein, Jeff W. Galway and Anne Glover, for the Defendants Hudson's Bay Company and

Investors Group Trust Company Limited.

Laura C. Young, for the Defendants Pamela Bhikhari and Gale Ritchie, Representative Defendants for the Members of the Zellers Inc. and Kmart Canada Co. Pension Groups.

Warren S. Rapoport and Nika Robinson, for the Defendants John English, Gerald V. Garossino and Edward E. Shier, Representative Defendants for Members of the Hudson's Bay Company Pension Plan and the Hudson's Bay Company Executive Pension Plan.

Kevin O'Brien, for the Defendant Royal Trust Corporation.

REASONS FOR JUDGMENT

1 **H.J. WILTON-SIEGEL J.**:-- In this class action proceeding, the plaintiffs allege that the defendant The Hudson's Bay Company ("HBC" or the "defendant") has breached its obligations to the members of a contributory defined benefit pension plan established by Simpsons, Limited ("Simpsons") in 1971 (the "Plan"). In 1994, HBC, as the successor to Simpsons under the Plan, added a defined contribution section to the Plan and introduced employees of its wholly owned subsidiaries Zellers Inc. ("Zellers") and Kmart Canada Co. ("Kmart") to the Plan. The plaintiffs allege that HBC was not entitled to make these amendments to the Plan nor was it entitled to utilize surplus in the trust fund established in respect of the Plan (the "Trust Fund") to fund contributions in respect of these employees. The action raises important issues relating to the utilization of pension fund surpluses within corporate groups.

Background

2 The following summarizes the relevant corporate history and sets out the relevant provisions of the applicable Plan documentation.

Summary Description of the Proceeding

3 Simpsons created the Plan and established the Trust Fund in 1971. Effective January 1, 1988, HBC decided that any employees hired by Simpsons after that date would be eligible to join an HBC pension plan and therefore closed the Plan to new membership. In 1991, in a corporate reorganization, HBC received all of the assets of Simpsons and assumed all of its liabilities. As a result, since that time HBC has exercised all of the rights, and assumed all of the obligations of Simpsons, in respect of the Plan.

4 In 1994, HBC exercised the amending power under the Plan to re-open the Plan to approximately 8,000 employees of Zellers who became members of a defined contribution section added to the Plan at that time on a "going-forward basis". The defined contribution section of the Plan mirrored a similar section in the Zellers pension plan (the "Zellers Plan") under which the Zellers employees accrued benefits prior to that time. In 1998, HBC further amended the Plan to introduce employees of Kmart to the Plan on the same basis, initially numbering approximately 7,000.

5 Since 1994, HBC has used surplus in the Trust Fund to fund contribution holidays in respect of the employer obligations under the defined contribution section of the Plan as well as under the defined benefit section. The plaintiffs do not dispute HBC's right to take contribution holidays in respect of the defined benefit section. However, they allege that the amendments to the Plan in 1994 and 1998 were invalid and that the taking of contribution holidays in respect of HBC's obligations under the defined

contribution section of the Plan constituted a breach of trust.

1971 Plan Text

6 Effective as of December 28, 1971, Simpsons established a non-contributory defined benefit pension plan for its employees named the "Simpsons, Limited, Supplementary Pension Plan" (the "Plan"). The Plan was originally established as a supplement to the Simpsons Profit Sharing Retirement Fund pursuant to a document dated April 11, 1972 (the "1971 Plan Text").

7 Under the Plan, Simpsons was both the Plan sponsor and the administrator. For the purposes of the Plan, "Company" was defined to include Simpsons, Limited, its successors, designated subsidiaries and associated companies:

> 1.03 "Company" shall mean Simpsons, Limited and its successors and shall for the purposes of this Plan include such of its wholly-owned subsidiary companies and associated companies as shall have been designated for this purpose by the board of directors of the Company and its and their respective successors.

8 Pursuant to section 1.08, a "Member" was an employee who met the eligibility requirements of the Plan. The eligibility requirements set out in section 3.01 of the 1971 Plan Text provided that "[e]ach Employee of the Company is eligible to become a Member of this Plan on the effective date if he is then a member of the Profit Sharing Fund". "Employee" is defined in section 1.06 to be "a regular full-time or part-time employee of the Company who is employed on a permanent basis."

9 The contributory obligations of Simpsons were set out in section IV:

> 4.02 The Company will pay to the Trustee such amount as in the opinion of the Actuary will be sufficient to cover the current service costs of the benefits to be provided hereunder.
>
> 4.03 The Company will also pay to the Trustee such special payments determined by the Actuary to be necessary to fund unfunded past service or other benefits or to make up experience deficiencies, subject to and in compliance with the requirements of applicable laws.

The plaintiffs acknowledge that, in accordance with the applicable case law in this area, this language was sufficient to permit Simpsons to take contribution holidays in respect of its obligations to fund the defined benefit pension plan established in 1971. No objection has therefore been raised regarding the contribution holidays taken by HBC in respect of these obligations.

10 Amendment and termination of the Plan were addressed in section XVI of the 1971 Plan Text as follows:

> 16.01 While it is the intention of the Company to maintain the Plan in force indefinitely, the right to amend, suspend or discontinue the Plan, either in whole or in part, is necessarily reserved by the Company in the event that future conditions, in the opinion of the Company, warrant such action, which conditions may include, without limiting the generality of the foregoing, changes in pensions, profit sharing plans, retirement income benefits or similar benefits provided by the Company or by or pursuant to any law, regulation or other governmental authority.
>
> 16.02 Amendment to or suspension of all or part of the Plan shall not operate to

> reduce any benefits which have accrued under the Plan prior to the date of such amendment or suspensions, as the case may be, to Members of the Plan. In the event that the Plan is terminated, no part of the assets of the Plan shall revert to the benefit of the Company until provision has been made for all pensions and other benefits in respect of service up to the date of such termination to Members of the Plan and for all benefits to former employees and pensioners.

11 Section 13.01 of the 1971 Plan Text contemplated the establishment of a trust fund for the purposes of the Plan:

> 13.01 The Company will establish a Trust Fund for the purposes of the Plan by the execution of a Trust Agreement with individual Trustees at least three of whom shall be residents of Canada and one of whom is independent of the Company, or with a company or companies resident in Canada and licensed to carry on a trust business in the Province of Ontario ... A copy of the Plan will be attached to such Trust Agreement which shall thereby be made part of the Plan.

By virtue of the last sentence of section 13.01, the terms of the Trust Agreement were incorporated into the Plan.

1971 Trust Agreement

12 The assets of the Plan have been held in the Trust Fund, which was established pursuant to a trust agreement between Simpsons and Canada Permanent Trust Company dated December 28, 1971 (the "1971 Trust Agreement").

13 Article 1 of the 1971 Trust Agreement incorporated the 1971 Plan Text as follows:

> The Plan as annexed and exhibited hereto, and as amended from time to time, shall form part of this Agreement to the same extent as if all of its provisions were fully set forth herein and the definitions and meanings of words and terms as used in the Plan shall have the same meanings herein unless the context indicates otherwise.

Accordingly, the terms of the Plan were also incorporated into the Trust Agreement.

14 Article 2(a) of the 1971 Trust Agreement states:

> The Company by this Agreement establishes with the Trustee a fund (herein called the "Trust Fund") comprising all cash and property acceptable to the Trustee now and hereafter received by it in trust for the purposes of the Plan, together with all proceeds, investments, reinvestments and income and profits arising therefrom less all payments, deductions and withdrawals therefrom authorized hereunder.

15 After providing authorization to the trustee to pay certain amounts out of the Trust Fund, the 1971 Trust Agreement sets out the following qualification in a clause that follows article 2(c):

> ... ALWAYS PROVIDED that no part of the Trust Fund may be used for, or diverted to any purposes other than those connected with the exclusive benefit of members of the Plan and their beneficiaries.

This clause in the 1971 Trust Agreement, and its counterpart in the 1984 Trust Agreement (defined below), are herein referred to collectively as the "Exclusive Benefit Clause".

16 The 1971 Trust Agreement granted Simpsons the power to amend the provisions of the Trust Agreement in the following terms:

> Article 11 The Company shall have the right at any time or [sic] by or pursuant to a resolution of its Board of Directors to change or modify by amendment any of the provisions of, and to terminate, this Agreement provided it shall first have given written notice of such amendment or termination to the Trustee and provided that:
>
> (i) if any such amendment appears to the Trustee to affect the rights, duties or responsibilities of the Trustee, the Trustee may assent to such amendment by executing an agreement supplementary hereto or, failing to assent, the Trustee shall resign as provided in Article 9 hereof.
>
> (ii) such change, modification or termination [of the Trust Agreement] shall not authorize or permit or result in any part of the corpus or income of the Trust Fund being used for or diverted to purposes other than for the benefit exclusively of mebers [sic] of the Plan and their beneficiaries and for the payment of fees, expenses, taxes and other assessments as provided in Article 2 hereof unless with the approval of the Minister of National Revenue and such other governmental authority having governmental jurisdiction over the Plan or Fund.

Section 11(ii) in the 1971 Trust Agreement, and its counterpart in the 1984 Trust Agreement, are herein referred to collectively as the "Amendment Proviso". The Exclusive Benefit Clause and the Amendment Proviso are collectively referred to in these Reasons as the "Exclusive Benefit Provisions".

17 Article 12 of the 1971 Trust Agreement provided that, in the event of a discontinuance of the Plan, "the Trustee shall dispose of the Trust Fund as directed in writing by the Company and in accordance with the provisions of the Plan".

1976 and 1984 Amendments

18 Effective January 1, 1976, the Simpsons Profit Sharing Retirement Fund was terminated and the Plan was amended to require member contributions. Plan members have contributed a portion of their pay into the Trust Fund since that time. In addition, the Plan was renamed the "Simpsons, Limited Employees' Pension Plan" and was restated (as restated, herein referred to as the "1976 Plan Text"), although without any amendments that are significant for this proceeding. In particular, section 16.02 of the 1971 Plan Text was retained, although split into two sections with the first sentence appearing as section 17.02 and the second sentence included in a new paragraph numbered as section 17.03. No amendment was made at this time to the 1971 Trust Agreement, which continued to govern the Trust Fund established in respect of the Plan.

19 In 1979, HBC acquired all of the shares of Simpsons, which thereby became a wholly owned subsidiary of HBC. The acquisition did not affect the operation of the Plan, which continued unamended. Accordingly, employees of Simpsons continued to be eligible to participate in the Plan.

20 Effective January 1, 1984, pursuant to a trust agreement among HBC, Simpsons and Investors Group Trust Co. Ltd. ("Investors Group") (the "1984 Trust Agreement"), Simpsons appointed Investors Group the trustee and custodian for the Plan, as well as for a separate Simpsons retirement security plan and the Simpsons profit sharing retirement fund, and HBC appointed Investors Group the trustee and custodian for the HBC pension plan (the "HBC Plan"). As a result, Investors Group became the trustee and custodian of the Trust Fund, which was kept separate from the property of the two other Simpsons plans, and the trustee and custodian of a separate trust fund for the HBC Plan. Apart from substituting Investors Group for Canada Permanent Trust Company as the trustee of the Trust Fund, the 1984 Trust Agreement did not otherwise amend the 1971 Trust Agreement in any manner that is significant for this proceeding. In particular, the provisions of articles 1, 2, 11, and 12 of the 1971 Trust Agreement were restated in substantially the same form.

21 The 1984 Agreement governed the arrangements relating to the Trust Fund until 1998 when the trustee was changed and amendments were made to the Trust Agreement, as described below. In the interests of simplicity, as the 1984 Trust Agreement governed the Trust Fund during the period of the 1994 and 1998 Amendments to the Plan that give rise to the principal issues in this proceeding, the 1984 Trust Agreement is also referred to in these reasons as the "Trust Agreement", and references herein to particular sections of the Trust Agreement are references to the relevant sections in the 1984 Trust Agreement.

1988 Simpsons Plan Amendments

22 Effective September 29, 1991, pursuant to a corporate reorganization, the business and assets of Simpsons were transferred to HBC, which also assumed all of the liabilities of Simpsons, including all of the Simpsons employees who were transferred at the same time. The transferred assets included the rights of Simpsons under the Plan. Simpsons Limited continues to exist as a corporate entity as of the date of trial but has neither assets nor employees. After the date of this transfer, all amendments to the Plan were effected by resolution of the board of directors of HBC (the "Board") or pursuant to authority delegated by the Board.

23 Pursuant to a resolution of the Board dated November 6, 1987, HBC decided to cause Simpsons close the Plan to new employees effective January 1, 1988. Thereafter, new employees of Simpsons were eligible to participate only in the HBC Plan. Pursuant to a resolution of the Board dated November 4, 1991, the Plan was amended and restated effective January 1, 1988 to give formal effect to the Plan closure, which was re-stated in the resolution, as well as to incorporate amendments to the Plan made since 1981 and to comply with pension reform legislation enacted in 1987 in Ontario. The amended and restated Plan effective January 1, 1988 (the "1988 Plan Text") included a number of amendments that are relevant for this proceeding.

24 The 1998 Plan Text distinguishes between the "Employer", which is defined as Simpsons and any successor thereto, and the "Company", which is defined as HBC. "Employee" continued to be defined as an employee of Simpsons. Under the 1988 Plan Text, "Employee" is defined as "a Regular Full-Time Employee or Regular Part-Time Employee on the Canadian payroll of the Employer, unless the Employee is eligible to be a member of another pension plan sponsored by the Employer, the Company or any other associated company".

25 The 1988 Plan Text includes several references to the closure of the Plan and the rights of non-member employees:

> 1.01 ... This restatement of the Plan is effective January 1, 1988. The terms of the Plan as restated apply to Members who retire, terminate employment or die on or after January 1, 1988. For Members who retired, terminated employment or died prior to January 1, 1988, reference should be made to the provisions of the Plan in effect at the relevant date.
>
> 1.02 ... Effective January 1, 1988, the Plan is amended and restated as set out herein to, among other things ... (c) limit membership to Employees who were Members of the Plan as of January 1, 1988.

> Employees who were not Members of the Plan but who were eligible to join the [HBC] Plan on December 31, 1987 were provided with an opportunity to join the [HBC] Plan on a defined benefit basis. Employees who did not join the [HBC] Plan by January 1, 1988 and all other Employees of the Company and the Employer shall be eligible to join the [HBC] Plan and accrue pension benefits on a defined contributions basis in accordance with the provisions of Part C of the [HBC] Plan. Employees who were Members of the Plan on January 1, 1988 will not be eligible to join the [HBC] Plan but will continue to accrue pension benefits in accordance with the terms of the Plan, as amended from time to time.
>
> 3.01 Each Employee who was not a Member of the Plan on January 1, 1988, shall be eligible to join the [HBC] Plan, as amended from time to time, once he has completed the eligibility requirements therein. No Employee who is not a Member of the Plan on January 1, 1988 shall become a Member of this Plan after January 1, 1988.

26 Section 4.03(a) of the 1988 Plan Text continued the obligation of Simpsons to fund the employer contributions under the Plan:

> The Employer shall make such contributions to the Pension Fund as are certified by the Actuary as being necessary to provide the normal cost of benefits currently accruing to Members in accordance with the provisions of the Plan and to province [sic] for the proper amortization of any unfunded liability or experience deficiency pursuant to the requirements of the [*Pension Benefits Act (Ontario)*], after taking into account the assets of the Pension Fund, the required contributions of the Members, and such other factors as may be deemed relevant.

27 The 1988 Plan Text included the following new provisions with regard to surplus assets while the Plan is ongoing:

> 12.04 If, at any time while the Plan continues in existence the Actuary certifies that the assets of the Pension Fund exceed the actuarial liabilities of the Plan in respect of the benefits of the Members, then
>
> (a) such excess or any portion of such excess, not attributable to Member contributions, may be used by the Employer to reduce its contribution obligations under the terms of the Plan, or
>
> (b) such excess or a portion of such excess, not attributable to Member contributions, may, with the prior consent of the Pension Commission of Ontario, be refunded to the Employer.

28 The following provisions addressed the amendment and termination of the Plan:

> 14.01 The Company intends to maintain the Plan indefinitely, but reserves the right to amend or discontinue the Plan either in whole or in part.
>
> 14.02 No amendment shall operate to reduce the defined benefits which have accrued to any Member or to any individual entitled to benefits under the Plan to date of such amendment.

Accordingly, as of January 1, 1988, HBC had the power of amendment and termination of the Plan.

29 In addition, section 14.04 purported to amend the previous language regarding the entitlement to Plan surplus on the termination of the Plan to provide expressly that, after making provisions for all pension benefits payable under the Plan, the Company was entitled to any remaining surplus in the Trust Fund.

1994 Plan Text

30 HBC acquired the shares of Zellers Inc. ("Zellers") in 1978. Since that time, HBC has been the administrator of the Zellers Pension Plan (the "Zellers Plan"), which included a defined contribution pension plan that required on-going funding contributions by the employer to a separate trust fund.

31 Pursuant to a resolution of the executive committee of the Board dated March 1, 1994 (the "1994 Board Resolution"), the Plan was amended to, among other things, add a new defined contribution section and extend the Plan to cover all Zellers employees who were members of the defined contribution section of the Zellers Plan, and former employees of Woodwards Limited. These employees were covered on a basis identical to the defined contribution sections of the Zellers Plan and the HBC Plan, respectively. In addition, the name of the Plan was changed to the "Dumai Pension Plan" to reflect the fact that it now included Members who were not employees of Simpsons. These amendments were effective on a retroactive basis to January 1, 1994. Effective as of this date, therefore, these employees, although remaining employed by Zellers, became members of a newly created defined contribution section of the Plan having individual accounts for each Member, as described below.

32 The 1994 Board Resolution also delegated authority to the Director, Pension and Insurance of HBC to approve revised Plan documents giving effect to these amendments, which required changes to the membership and eligibility provisions of the Plan as well as the addition of the provisions of the new defined contribution section to the Plan. Pursuant to this authority, the Plan was amended and restated in the form of a Plan agreement dated March 20, 1998 having retroactive effect to January 1, 1994 (the "1994 Plan Text"). Although the 1994 Plan Text changed the name of the Plan to the Dumai Pension Plan, I will continue to refer to the Dumai Pension Plan as the Plan throughout these reasons for simplicity.

33 Under the 1994 Plan Text, all substantive references to Simpsons have been deleted and all rights and obligations as both Plan sponsor and administrator run in favour of the "Company", which continues to be defined as HBC. Similarly, "Employee" is defined as "a Full-Time Employee or Part-Time Employee on the Canadian payroll of the Company with the Company, unless the Employee is eligible to be a member of another pension plan sponsored by the Company or any other associated company". However, in addition, "Employee" is defined to include "an employee on the Canadian payroll of any Zellers Inc. stores set out in [an] Appendix ... to the Plan". This is understood to mean an employee on the Canadian payroll of Zellers working at one of the stores listed in the appendix.

34 The 1994 Plan Text restated the Plan in three parts. Part A contains provisions applicable to all Members. Part B contains provisions applicable to Members accruing benefits under the defined benefit section of the Plan. Part C applies to Members accruing benefits under the defined contribution section of the Plan.

35 Section 2.26 defines a "Member" to be a member who accrues benefits under either the defined benefit section or the defined contribution section:

> 2.26 "Member" means an Employee who completes the conditions for membership set out in Article 3 of Part A of the Plan. The term "Member" shall mean both a Member who accrues benefits under Part B of the Plan (referred to as a "Part B

Member"), [sic] a Member who accrues benefits under Part C of the Plan (referred to as a "Part C Member"). A Member shall be considered an Active Member until:

(a) his period of Continuous Service is terminated by reason of death, retirement or termination of employment; or
(b) he no longer satisfies the definition of Employee for purposes of the Plan.

I have adopted a similar terminology in these Reasons for Judgment so that a reference herein to a "Member" of the Plan is a reference to a Member of either the defined benefit section or the defined contribution section of the Plan in accordance with the applicable Plan Text.

36 Sections 3.01 and 3.02 deal with the continuation of the Simpsons employee Members and the introduction of the Zellers employee Members, respectively, and section 3.03 contemplates additional Zellers employees becoming Members of the Plan:

> 3.01 Each Employee who was a Member on December 31, 1993 shall continue to be a Member and to accrue pension benefits under the terms of the Part B.
>
> 3.02 Each Full-Time and Part-Time Employee who was a Member of Part C of the Zellers Plan on December 31, 1993 shall become a Member and start accruing pension benefits under the terms of Part C of the Plan effective January 1, 1994.
>
> 3.03(a)(i) Each Regular Full-Time Employee who was hired before January 1, 1994 in a province other than the province of Quebec and who was not a member of the Zellers Plan on December 31, 1993 shall become a Member and start accruing pension benefits under the terms of Part C of the Plan on the first day of the month coincident with or next following completion of 2 years of Continuous Service or attainment of age 30, if earlier.

37 Sections 4.02 replaces section 4.03(a) of the 1988 Plan Text and an additional section dealing explicitly with the right of HBC to take contribution holidays has been added:

> 4.02 Subject to Article 4.03 of Part A the Company shall make such contributions to the Trust Fund, based on the advice of the Actuary, where required after taking into account the assets of the Trust Fund and all other relevant factors in each Plan Year.
>
> 4.03 If at any time while the Plan continues in existence the Actuary certifies that the assets of the Trust Fund exceed the actuarial liabilities of the Plan in respect of benefits defined in the Plan, such surplus assets, or any portion of such assets, may be used by the Company to reduce its contribution obligations subject to any limitations prescribed under the Act.

As described below, the plaintiffs argue that these provisions in combination with section 2.03 of Part C are invalid to the extent they purport to permit contribution holidays to be taken in respect of HBC's obligations under the defined contribution section of the Plan.

38 Section 13.07 of the 1994 Plan Text expressly permits HBC to withdraw on-going surplus from the Plan. It also reaffirms the use of any such surplus by way of contribution holidays by HBC. It replaces section 12.04 of the 1988 Plan Text (the parties are unable to explain the need for both 13.07(a) and (b)). The plaintiffs also argue that these provisions are invalid to the extent they purport to permit HBC to take contribution holidays in respect of its obligations to fund the defined contribution section of the Plan.

39 The 1994 Plan Text also contains provisions respecting amendment and termination of the Plan, as well as reversion of surplus to the Company on the termination of the Plan, that do not substantively change the corresponding provisions in the 1988 Plan Text.

40 Finally, the 1994 Plan Text contains the following provision regarding the use of the Trust Fund, for which there is no corresponding provision in any of the previous versions of the Plan:

> 13.03 The Trust Fund shall be used exclusively for the payment of benefits under the Plan. No person shall have interest in, or right to, any of the assets of such Trust Fund except as may be provided in the Plan and the Funding Agreement.

I have proceeded on the basis that this provision neither modifies nor supplements the Exclusive Benefit Provisions in any material respect.

41 Neither the 1994 Board Resolution nor the 1994 Plan Text required approval under the *Pension Benefits Act* R.S.O. 1990, c. P-8 (the "Act") as neither involved a transfer of assets.

1998 Amendment to the Plan

42 HBC acquired the shares of Kmart Canada Co. ("Kmart") effective February 27, 1998. Since that date, HBC has also been the administrator of the Retirement Plan for Executives of Kmart Canada Co. - Kmart Canada Cie. (the "Kmart Plan"), which is also a defined contribution pension plan that requires on-going funding contributions by the employer to a separate trust fund.

43 Pursuant to a resolution of the executive committee of the Board dated April 30, 1998 (the "1998 Board Resolution"), the Plan was amended to cover the Kmart employees who were members of the Kmart Plan "under eligibility, contribution and benefits provisions that are identical to the defined contribution provisions of [the Kmart Plan] ". This amendment was effective on a retroactive basis to February 28, 1998. It is understood that the effect of the amendment was that, as of that date, the Kmart employees became Members of a newly created second defined contribution section of the Plan in the same manner as the Zellers employees had become Members of the Plan in 1994.

44 Pursuant to a further resolution of the Board dated January 17, 2000, the Plan was amended to implement amendments that gave effect to the 1998 Board Resolution retroactively to February 28, 1998, by making changes to the membership and eligibility provisions of the Plan and by adding a second defined contribution section, as Part D to the Plan, that governed the Kmart members of the Plan (the amendment to the Plan is herein referred to as the "1998 Plan Amendment"). Accordingly, among other changes, section 2.08 of the Plan was amended effective February 28, 1998 to add a provision that defined the "Company" to include Kmart and section 2.26 was amended to provide that, as of that date, "Member" included a Kmart Member accruing benefits under Part D of the Plan.

45 The 1998 Plan Amendment also did not require approval under the Act as no transfer of assets was involved.

46 Part D of the Plan had a very short active life. By approximately August 1998, all Kmart stores had been either closed or converted to Zellers stores and the Kmart employees were either transferred to Zellers or terminated. Kmart employees who became employees of Zellers moved from Part D of the Plan to Part C of the Plan with the result that there have ceased to be any Members of Part D of the Plan. It is understood that approximately 7,000 Kmart employees became employees of Zellers but, of these, approximately 2,200 were subsequently terminated. For the sake of simplicity, the defined contribution sections of the Plan are referred to collectively in these Reasons as the "defined contribution section" inasmuch as, given this history, only Part C of the Plan, established in respect of the Zellers employees, is significant for the issues in this proceeding.

47 In these Reasons for Judgment, the amendments to the Plan implemented by the 1994 Plan Text and the 1998 Plan Amendment are collectively referred to as the "1994 and 1998 Amendments".

1998 Trust Agreement

48 Pursuant to an agreement effective November 1, 1998 between Royal Trust Corporation of Canada ("Royal Trust") and HBC (the "1998 Trust Agreement"), Royal Trust was appointed the trustee of the Trust Fund and the 1984 Trust Agreement was amended and restated insofar as it pertained to the Trust Fund. The following provisions of the 1998 Trust Agreement are relevant for the issues in this proceeding.

49 Although the 1998 Trust Agreement retains a definition of "Plan" which refers to the 1994 Plan, as amended from time to time, it does not include a provision, similar to article 1 of the 1984 Trust Agreement, incorporating the provisions of the Plan into the 1998 Trust Agreement.

50 Section 2.1 contemplates the establishment of the Trust Fund in conjunction with the Plan without distinguishing between the defined benefit and defined contribution sections of the Plan:

> 2.1 All assets as have been paid or delivered, or caused to or shall be paid and delivered by the Company from time to time to the Trustee and acceptable to the Trustee, together with any earnings, profits and increments thereon and assets from time to time substituted therefor, shall constitute the Trust Fund established in conjunction with the Plan and shall be held by the Trustee in trust, and applied by the Trustee in the manner and for the purposes provided in this Trust Agreement.

51 The 1998 Trust Agreement omits a provision comparable to the Exclusive Benefit Clause and the amending power in section 8.1 was revised to delete the Amendment Proviso:

> 8.1 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 this Trust Agreement by notice thereof in writing delivered to the Trustee, provided that no such amendment which affects the rights, duties or responsibilities of the Trustee may be made without its consent.

52 Section 8.2 provides that HBC may terminate or revoke the Trust Agreement at any time. Section 8.3 adds a provision not found in the 1984 Trust Agreement that addresses any surplus in the Trust Fund on termination of the Plan or the 1998 Trust Agreement:

> 8.3 In the event of termination of the Plan, in whole or in part, or the termination of this Trust Agreement, any assets remaining in the Trust Fund, after the satisfaction of all liabilities under the Plan and subject to any regulatory or judicial approvals or orders required under applicable laws, shall remain in the Plan or revert to the Company, as determined by the Company.

53 Lastly, section 8.4 constitutes an express power in favour of HBC, subject to regulatory approval, to merge the Trust Fund with any other trust fund or pension fund and continue as one fund without termination of the Trust Fund, and with or without a requirement to maintain a separate accounting in respect of each merging fund.

54 The 1998 Trust Agreement was not in place at the time the 1994 and 1998 Amendments were made to the Plan introducing the Zellers and Kmart employees, respectively, (the 1998 Plan Amendment was finalized later but its content did not depart from the approval given by the 1998 Board Resolution). It is, therefore, not relevant to the determination of the validity of those amendments. The 1998 Trust Agreement is, however, relevant to the allegation that HBC breached its statutory obligations subsequent to the effective date of the 1998 Amendments by taking contribution holidays in respect of its obligations under the defined contribution section of the Plan.

Additional Plan Amendments in 1999

55 Pursuant to a resolution of the executive committee of the Board dated March 15, 1999, the Plan was further amended, among other things, to include amendments to Part B of the Plan that increased the amount of pension benefits to certain retirees, and spouses and beneficiaries of certain former Members under the Plan. This amendment is referred to as the "1999 Plan Amendment". In addition, the 1999 Plan Amendment substituted the following definition of the Company:

> 2.08 "Company" means the Governor and Company of Adventurers of England Trading into Hudson's Bay, hereinafter referred to as the Hudson's Bay Company, and any associated or affiliated company authorized by the Board of Directors of Hudson's Bay Company to participate in the Plan. For the purposes of the Plan, Zellers Inc., a subsidiary of the Hudson's Bay Company, has been designated a participating employer in the Plan. Where any reference in the Plan is made to any action to be taken, consent or approval to be given, discretion or decision to be exercised by the Company, "Company" means Hudson's Bay Company acting through its Board of Directors for the purposes of the Plan.

The benefit increases in the 1999 Plan Amendment, and a cost of living increase implemented in 2001 in respect of retirees, are the only increases granted under the Plan by HBC.

Plan Mergers

56 Since 1999, HBC has engaged in a process of merging the Plan with the Zellers Plan, the Kmart Plan and the HBC Plan. This process has been conducted in three stages. I have summarised the steps for the sake of completeness. However, I do not think that the mergers present any additional issues in this trial.

Partial Merger with Zellers Plan

57 The first step involved a partial merger of the Plan and the defined contribution section of the Zellers Plan. The merger was effected by a resolution of the pension committee of the Board dated January 19, 2000, which amended the Plan effective December 31, 1999 to incorporate the account balances of the Zellers employee Members that had accumulated in the defined contribution section of the Zellers Plan in respect of the period prior to January 1, 1994. Accordingly, assets representing the account balances of the relevant Zellers employee Members were transferred to the Trust Fund effective December 31, 1999, to be held in the individual accounts of each such employee.

58 As the merger involved a transfer of assets from the Zellers Plan to the Plan, the consent of the Superintendent under the Act was required pursuant to section 81(4) of the Act. HBC has obtained this consent.

Merger with Kmart Plan

59 The next step involved the merger of the Plan and the Kmart Plan. The merger was effected by a resolution of the pension committee of the Board dated December 13, 2000, which amended the Plan effective January 1, 2000 to merge the Kmart Plan with the Plan. The resolution contemplates that the Kmart Plan is "to continue as this [Plan], and the assets and liabilities of the Kmart Plan become assets and liabilities of [the] Plan". While the language of this resolution differs from that of the resolution merging the defined contribution section of the Zellers Plan and the Plan, the effect was intended to be the same.

60 As this merger also involved a transfer of assets from the Kmart Plan to the Plan, the consent of the Superintendent under the Act is required pursuant to section 81(4) of the Act. To date, HBC has not obtained this consent.

61 HBC did not authorize a specific amendment to the Plan to give effect to this merger in the manner of the resolution merging the Zellers Plan with the Plan. However, on July 4, 2003, pursuant to authority delegated to him by the two merger resolutions, the Director, Benefits Administration of HBC approved an amended and restated Plan text to be effective retroactively to January 1, 2000 (the "2000 Plan Text"). The 2000 Plan Text incorporates the amendments necessary to merge both the Zellers Plan and the Kmart Plan with the Plan.

62 The 2000 Plan Text defines the "Company" in the following manner:

> 2.09 "Company" means Hudson's Bay Company, and any associated or affiliated company authorized by the Board of Directors of Hudson's Bay Company to participate in the Plan. For the purposes of the Plan, Zellers Inc., a subsidiary of Hudson's Bay Company, has been designated a participating employer in the Plan, effective January 1, 1994. Effective February 28, 1998, "Company" includes Kmart Canada Co. - Kmart Canada Cie and its successor companies.

Merger with the HBC Plan and the Zellers Plan

63 The final step in the merger of the three pension plans was the merger of the Plan with the Zellers Plan (apart from the defined contribution section that had been merged in the first stage), the HBC Plan and a further HBC pension plan for executives (the "HBC Executive Plan") (collectively, the "Merging Plans"). This was accomplished by a resolution of the Board of HBC dated November 29, 2001, which provided that the merger was to be effective as of January 1, 2002. The resolution provided that the Merging Plans were to continue as the HBC Plan (the "Merged Plan") and that, subject to regulatory approval, the assets and liabilities of each of the Merging Plans were to become assets and liabilities of the Merged Plan. The resolution contemplates that HBC will be the plan sponsor and administrator of the Merged Plan and that Zellers would be a participating employer. The resolution addressed all existing rights of members of the Merging Plans by stipulating that, from January 1, 2002, all members of the Merging Plans shall continue to accrue benefits under the Merged Plan on the same terms and conditions as their respective Merging Plans prior to the merger and shall retain all rights and entitlements under the Merged Plan with respect to service prior to that date.

64 As this merger also involves a transfer of assets from the Merging Plans to the Merged Plan, the consent of the Superintendent under the Act is required pursuant to section 81(4) of the Act. To date, HBC has not obtained this consent. Accordingly, although an amended and restated text of the HBC Plan constituting the Merged Plan has been approved by HBC to be effective January 1, 2002, it is understood that the Plans continue to be administered separately without any co-mingling of the assets of the Trust Fund with the assets of the pension fund trusts established for the other Merging Plans. Consistent with this approach, separate financial statements are still prepared for each component of the

Merged Plan.

Administrative and Investment Arrangements

65 The administrative and investment arrangements involving the assets of the defined contribution section of the Plan are relevant for several of the issues addressed below. I will describe the limited information relating to these arrangements before the Court, dealing first with the arrangements between February 28, 1994 and August 1, 2001 and then with the new arrangements implemented with effect as of the later date.

Period from February 28, 1994 to August 1, 2001

66 There is limited evidence regarding the administrative arrangements pertaining to the defined contribution sections of the Plan after their establishment in 1994 and 1998.

67 At January 1, 1994, Investors Group was the trustee of the Trust Fund under the 1984 Trust Agreement. As trustee, Investors Group received all contributions to the Trust Fund. While the 1976 Plan Text was silent with respect to investment decision-making, the 1984 Trust Agreement contemplated that the trustee was to invest the Trust Fund in accordance with the directions of investment managers engaged by the Company. The implication is that the Company retained the power of investment decision-making in the Plan in respect of the Trust Fund.

68 Subsequent to 1984, HBC resolved to consolidate the investment of the assets of the Trust Fund together with the assets of the trust funds for certain HBC and Zellers pension plans. To this end, HBC, Simpsons and Zellers entered into a master trust agreement effective January 1, 1988, pursuant to which the trust funds of certain pension plans of those companies were invested under pooled fund arrangements directed by investment managers, subject to a trust of which Investors Group was the trustee. Accordingly, as of January 1, 1994, most if not all of the assets of the Trust Fund were held by Investors Group and invested pursuant to the terms of the master trust agreement, although the financial statements of the Plan suggest that some portion of Trust Fund assets continued to be invested pursuant to investment manager direction directly in other pooled fund Trusts.

69 These arrangements continued after the 1994 and 1998 Amendments. Accordingly, after January 1, 1994, the assets of the Trust Fund comprised contributions to both the defined benefit section, received in respect of former Simpsons employees, and the defined contribution section, received in respect of Zellers employees. All such funds were invested pursuant to the master trust agreement, or pursuant to the direction of investment managers appointed by HBC, without distinction between contributions received in respect of the defined contribution section of the Plan and the remaining assets in the Trust Fund.

70 The substitution of Royal Trust for Investors Group in 1998 and the execution of the 1998 Trust Agreement did not change these arrangements. The 1998 Trust Agreement refers to a single "Plan" and a single "Trust Fund" throughout the document. No specific reference is made to either the defined contribution section or the defined benefit section of the Plan. No provisions are included that would treat any portion of the assets in the Trust Fund differently from the remaining assets for such purposes. The 1998 Trust Agreement does, however, address the issue of investment decision-making in article 5.3, by reserving a right to HBC to appoint investment managers for the Trust Fund.

71 Accordingly, for the purposes of this proceeding, all assets of both sections of the Plan were held by the Trustee, with the exception of certain monies held by Sun Life Assurance Company of Canada ("Sun Life") described below. Each Member of the defined contribution section had an account to which amounts representing the employer and employee contributions, as well as investment income thereon, were credited. As discussed below, however, there is no evidence that such accounts were segregated in some manner. Instead, the evidence is that, until a Member retired, the Trustee held the assets backing the amounts credited to a Member's account, in the name of the Trustee, together with the remaining assets in the Trust Fund and invested all the assets collectively.

72 On retirement, a Member of the defined contribution section is, however, entitled to remove assets equal in value to the credit in his or her account, representing his or her total entitlement under the Plan. These assets are physically transferred to the retired Member or are used to fund a pension annuity payable to such retired Member. Thereafter, such assets are, therefore, no longer available to satisfy HBC's obligations under either section of the Plan.

Arrangements Implemented Effective August 1, 2001

Standard Life Arrangements

73 In 2001, HBC implemented arrangements to the manner in which the contributions referable to the defined contribution section were invested. The purpose of these arrangements was to offer investment options to the Members of the defined contribution section with respect to the monies credited to the notional accounts of such Members under the Plan.

74 These arrangements took the form of an insurance policy issued by The Standard Life Assurance Company and The Standard Life Assurance Company of Canada (collectively "Standard Life"), which took effect as of August 1, 2001 (the "Standard Life Policy"). At the same time, HBC, Royal Trust and Standard Life entered into an agreement made as of the same date, (the "Direction and Agency Agreement"), and a further agreement (the "Service and Fee Agreement"), under which Royal Trust appointed Standard Life as its agent and service provider for the purposes of providing administrative and other services relating to the defined contribution section of the Plan.

75 Accordingly, since August 1, 2001, assets of the Trust Fund having a value equal to the aggregate entitlement of the Members under the defined contribution section of the Plan have been invested by Standard Life, pursuant to the Standard Life Policy, in pooled funds established by Standard Life to conduct this aspect of its business. An initial transfer of funds was made in 2001. On an on-going basis, the employer and employee contributions, including Trust Fund assets representing HBC's contribution taken by way of contribution holidays, are transferred monthly to Standard Life for investment under the Standard Life Policy. The remaining assets of the Trust Fund have continued to be invested by Royal Trust pursuant to the master trust arrangements described above.

76 The legal relationships pertaining to the Standard Life arrangements are not developed in any detail in the documentation before the Court. The Standard Life Policy is issued in favour of Royal Trust as the trustee of the Trust Fund. Section A, item 4 of the Standard Life Policy contemplates that investment instructions regarding the funds received by Standard Life will come from Royal Trust rather than the Members of the Plan, although the Members are to provide beneficiary designations directly to Standard Life. The Direction and Agency Agreement recites in a recital and in section 4.01(a) that the Standard Life Policy is to be held by Royal Trust as an asset of the Trust Fund. HBC submits that section 4.01(a) also provides that Standard Life is to hold all monies received by it as assets of the Trust Fund but the meaning of section 4.01(a) is subject to dispute given its structure. Both the Direction and Agency Agreement and the Service and Fee Agreement do, however, establish an agency relationship for the purposes of the custodial and administrative services contemplated therein.

Sun Life Arrangements

77 A similar arrangement existed in respect of Kmart employees from the effective date of the 1998

Plan Amendment to August 1, 2001 under the following circumstances. Under the Kmart Plan prior to 1988, Kmart employees were offered investment options in respect of the contributions to their pension accounts. These investment arrangements were implemented by means of an insurance policy issued by Sun Life similar in effect to the Standard Life Policy.

78 In order to continue these arrangements after the effective date of the 1998 Plan Amendment, Sun Life issued a new policy (the "Sun Life Policy") effective March 1, 1998 in favour of HBC. After the effective date of the 1998 Plan Amendment, all contributions under Part D of the Plan (the defined contribution section of the Plan established in respect of Kmart employees) were invested by Sun Life pursuant to the Sun Life Policy in pooled funds established by Sun Life to conduct this aspect of its business.

79 These Sun Life arrangements did not, however, involve material amounts of funds because they were of very limited duration. They pertained only to contributions after March 1, 1998 made in respect of Kmart employees until the employees were either terminated or became Zellers employees (in which event, as mentioned, they became members of Part C of the Plan). In almost all cases, I understand this occurred by August 1998. In 2001, when the investment arrangements described above were entered into with Standard Life, the arrangements with Sun Life were terminated and the monies held by it were transferred to Standard Life.

80 The only document before the Court with respect to the Sun Life arrangement is an unsigned copy of the Sun Life Policy issued in favour of HBC. It contemplates that all monies received by Sun Life would be invested in certain identified pooled funds. It addressed the liability of Sun Life to HBC under the Sun Life Policy in the following manner:

> The liability of Sun Life to [HBC] hereunder varies in amount depending upon the net market value of the assets of each fund as so determined from time to time, and shall be a proportionate part thereof. Such proportionate part shall be arrived at by reference to notional 'units' of each fund, as set out below ... It is expressly understood and agreed that such units represent simply a means of measuring the liability of Sun Life to the Policyholder in respect of a fund to which contributions under this policy have been directed, and that they have no independent existence or other significance whatsoever.

The Sun Life Policy also contemplates that all instructions regarding payments to Members of the Plan will be provided by HBC to Sun Life.

Additional Factual Background

Plaintiff's Former Employee Witnesses

81 Two retired former Simpsons employees testified on behalf of the plaintiffs.

John Scott

82 John Scott started working at Simpsons in 1970 and, with one layoff shortly thereafter, worked for 34 years at the downtown Toronto Simpsons store as a lamp changer and electrician's helper. He became a Member of the Plan in 1971 and has been receiving a pension under the Plan since his retirement in 2004.

83 He was given only limited information regarding changes to the Plan. Mr. Scott testified that he was aware that his contributions were paid into a trust fund that was invested but was not aware that

Simpsons also paid into the Plan. He does not believe he was ever given, or shown, a copy of the Plan, the Trust Agreement or any other Plan documentation.

84 As a Member of the Plan, Scott received a pension statement annually, which set out his accrued and estimated pension entitlement and information regarding the financial position of the Plan. He acknowledged that, beginning in 1994, the statement reflected the name change for the Plan and included a sentence reading: "The eligibility conditions of the plan have also been amended to provide for participation by certain other employees under this name". Scott testified that he understood that this meant that "other employees were added into the Plan that [he] "wasn't aware of", but he did not know that these were Zellers employees.

85 Apart from these annual statements, he remembers being given only four documents regarding the Plan over the period that he worked at Simpsons and the Bay. The first document was a booklet distributed in 1984 that described employee retirement benefits in some detail. The second was a letter in 1992 describing the option to convert his pension to a defined contribution section of the HBC Plan, which option he declined. He also remembered an information session for employees regarding this option. The third document was an information package regarding the Plan, which he believes he received with his pay envelope during 1994. Among other things, this information package advised of the name change to the Dumai plan effective January 1, 1994 and of the closure of the Plan since December 31, 1987. It did not advise that, at the date of receipt of the information package, the Zellers employees had been introduced as Members of the Plan and was, therefore, incorrect. Lastly, he received a letter dated December 29, 2000 advising of the merger of the Plan with the Kmart Plan, which indicated for the first time that the Kmart employees had become Members of the Plan. This prompted a number of employees who were previously unaware that any Kmart employees were Members of the Plan to request a meeting with a representative of the human resources department of HBC. Later, when rumours began to circulate that Zellers employees were also Members of the Plan, the same representative met with Scott and others and confirmed that fact.

86 Scott's evidence, therefore, is to the following effect. He learned of the name change and closure of the Plan in 1994. He did not learn of the other amendments made effective January 1, 1988, or of the introduction of the Zellers and Kmart employees into the Plan, until 2000. He also did not know that Simpsons and HBC took contribution holidays after 1985, including contribution holidays in respect of the defined contribution obligations of HBC under the Plan, until a meeting with the plaintiffs' legal counsel that was convened by employees after the membership of the Zellers and Kmart employees in the Plan became a matter of public knowledge.

Ronald Sutherland

87 Ronald Sutherland also joined Simpsons in 1970 and worked for 29 years at the Sherway Gardens Simpsons store in various departments as a sales person. He became a Member of the Plan in 1971 and has been receiving a pension under the Plan since he retired in 1999.

88 Mr. Sutherland was also given very limited information regarding the Plan. He does not believe he was ever given a copy of the Plan, the Trust Agreement or any other Plan documentation. He remembers receiving the 1984 document distributed by Simpsons describing employee retirement benefits and the letter in 1992 describing the conversion option. He does not recall receiving the 1994 information package regarding the Plan and he retired before the letter describing the merger of the Plan with the Kmart Plan was sent out to employees in December 2000.

89 Mr. Sutherland also received an annual pension statement. He acknowledged receiving the 1994 annual statement that included the sentence cited above regarding the introduction of new Members. At that time he understood from this wording that HBC had introduced other employees to the Plan, but it is clear that he did not pay any attention to what this signified.

90 Mr. Sutherland's evidence is similar to that of Mr. Scott with the exception that he does not remember seeing or receiving the information package distributed in 1994 and therefore did not learn that the Plan was closed effective January 1, 1988 until much later in connection with this litigation. In addition, Mr. Sutherland says that he did not know specifically that Zellers and Kmart employees had become Members of the Plan until after his retirement. He also testified that he did not know of the Plan surplus while he worked at Simpsons.

HBC Witnesses

William McColl

91 William McColl joined HBC in 1960 as an assistant controller. From the outset he was responsible for the HBC Plan, becoming the director of pensions and insurance of HBC in the 1980's. He became responsible for the Plan by the mid-1980's after HBC acquired Simpsons and continued to have that responsibility until his retirement in 1996.

92 Mr. McColl testified that HBC began to consider a re-design of the Plan in 1986 as part of a larger exercise involving all of the pension plans of HBC and its subsidiaries. He indicated that the re-design contemplated a rationalization of the plans for its various employees by merging them into a single plan to achieve the following objectives: (1) to provide similar benefits to retail employees in each of the HBC operating companies to the extent possible, (2) to facilitate the transfer of employees between the HBC operating companies, and (3) to reduce costs by simplifying the pension administration and management functions through consolidation. Although the original re-design contemplated a defined benefit plan, Mr. McColl testified that by 1987 HBC had decided to implement a defined contribution plan, largely for cost-related reasons but also to avoid an adverse impact on the Zellers employees.

93 Mr. McColl testified that in September 1987 HBC decided to implement the re-designed plan effective January 1, 1988 for all HBC and Simpsons employees as well as new Zellers employees after that date. However, implementation of this re-design was deferred after the stock market crash in October 1987, which reduced the attractiveness of defined contribution plans. Instead, in November 1987, a decision was taken to put all employees of Simpsons hired after January 1, 1988 in a defined contribution section of the HBC Plan, thereby closing the Plan to new Members (it also appears that new Zellers employees were put in a new defined contribution section of the Zellers Plan). Mr. McColl testified that HBC did not intend to close the Plan permanently when the Plan was closed or when the amendments effective January 1, 1988 were made. He said it was always the intention to merge all of the plans in the manner contemplated by the re-design, but HBC was advised that this was not feasible in 1987 when the Plan was closed. Mr. McColl testified that revision of the Plan was considered again in 1991, when the concern for a regulatory mandated wind-up was first raised, but no action was taken until 1994.

94 Mr. McColl testified that the decision in March 1994 to open the Plan to Zellers employees was taken on the advice of the actuarial consultants to HBC, who raised again the risk that the Ontario pension regulator might require a wind-up of the Plan if the number of active members continued to decline. He said this advice was received after an earlier decision had been taken by the Board on December 21, 1993 to put the defined contribution members of the Zellers Plan and the former employees of Woodwards Limited into a defined contribution section of the HBC Plan. He acknowledged that notice of the re-opening of the Plan to Zellers employees, and the establishment of the defined contribution section of the Plan, had not been given to Members of the Plan apart from the one sentence in the 1994 annual pension statement referred to above. He testified that HBC had taken the position during the 1990's that the surplus in the Plan would not be used to increase pensions under the Plan because the pension benefits of retired Members included post-retirement health benefits that were not granted to HBC and Zellers employees.

William Chinery

95 William Chinery is an actuary who worked for Mercer Human Resources Consulting from 1982 until 1995, becoming, over time, a principal and then a partner. For much of this time, he advised HBC on pension matters as the partner responsible for the HBC relationship.

96 Mr. Chinery testified with regard to his understanding of the motivation of HBC in the re-design of its pension plans commencing in 1986. He testified that HBC's reasons included (1) ease of administration through simplification of the number of plans; (2) reduction of costs, which included both a reduction in administrative costs and use of pension plan surplus, where possible, to fund pension service costs; (3) a preference for a defined contribution plan on the part of some employees, particularly those who were part-time or of shorter duration and who considered that such a plan gave greater flexibility; and (4) a desire that, with the consolidation of its businesses, all employees of HBC and its subsidiaries should have the same pension arrangements. He added that HBC representatives also expressed a desire to treat employees fairly. With respect to the Plan, in particular, he also confirmed that HBC wished to control the destiny of the Plan and the potential to access the surplus in the Plan, rather than have the Ontario pension regulator require a winding-up of the Plan based on limited and declining membership.

97 Mr. Chinery was not, however, a direct participant in the deliberations of the board of directors of HBC or of its senior management. For this reason, I have not placed great reliance on his testimony except insofar as it confirms evidence otherwise before the Court.

Expert Witnesses

Jill Wagman

98 The plaintiffs' actuarial expert was Jill Wagman, an actuary who manages the Toronto pension practice for Eckler Partners. Her report was based on a review of the Plan and available actuarial reports, the annual financial statements for the Plan, and the annual filings for the Plan with the Ontario regulatory authorities.

99 Ms. Wagman calculated that, in the aggregate, approximately $111 million of surplus assets were applied in satisfaction of HBC's obligations under the defined contribution section of the Plan during the period January 1, 1994 to December 31, 2006.

100 Ms. Wagman projected the Plan surplus under two scenarios: (1) use of the surplus to pay HBC's employer contributions in respect of both sections of the Plan and (2) restriction of the use of surplus to payment of HBC's contributions under the defined benefit section. She calculated that under scenario (1) the surplus would be extinguished within 25 years and that under scenario (2) the surplus would grow indefinitely.

101 The projection under scenario (1) was based on an annual 4% increase in the aggregate payroll for Members of the defined contribution section of the Plan which, over time, would result in pension service costs exceeding projected investment returns at the assumed 6% annual rate of return. Changes to these assumptions and actuarial experience would accelerate or defer this 25-year period depending upon which assumptions were affected. The projection under scenario (2) proceeded on the basis that, without inclusion of the payroll costs of the Members of the defined contribution section and with projected investment returns at the assumed 6% annual rate of return, the expected annual investment income earned on the surplus would far exceed the annual cost of the defined benefit section of the Plan.

102 Ms. Wagman testified that when a member retires from a defined contribution plan, the member's account balance is typically transferred out of the pension plan to an individual tax-sheltered arrangement or an annuity is purchased from an insurance company to pay a pension to the Member.

103 Ms. Wagman acknowledged that it was not unusual for a pension plan to have members in both a defined contribution section and a defined benefit section. She also acknowledged that, in such circumstances, it was often the case that a plan surplus would be used to fund the pension service costs of the members of both sections.

104 Ms. Wagman also expressed the view that any application of assets in the Trust Fund in satisfaction of defined contribution obligations reduced the assets in the Trust Fund available to support the defined benefit pension obligations. However, as was the case with Mr. Hamilton's views described below, her testimony and her report do not constitute legal opinions and are not supported by any legal evidence on these issues. The same is true of her related conclusion that, in the event the Plan were wound-up while in deficit, the deficit would be borne by Members of the defined benefit section only.

Malcolm Hamilton

105 The defendants' expert was Malcolm Hamilton, an actuary, who is a partner in Mercer Human Resources Consulting. Mr. Hamilton's evidence was of a general nature with respect to operational aspects of pension plans under various circumstances, based on his personal experience. He did not directly contradict any of the testimony of Ms. Wagman in respect of any issues that are material in this proceeding. He testified that he had seen surplus used to fund the employer's obligations in respect of a defined contribution section of a plan having both a defined contribution and a defined benefit section. However, he acknowledged on cross-examination that he was not offering any legal opinions on the validity of the various approaches to the use of surplus by employers described in his report or on the legal position of the members of a pension plan that has such a structure in the event of a plan deficit on winding-up. Accordingly, I did not rely upon Mr. Hamilton's evidence to any significant degree in reaching the conclusions expressed in these Reasons.

Factual Determinations

106 The parties have agreed in an Agreed Statement of Facts, among other things, that:

1. since 1985, Simpsons and HBC have used the surplus from the Plan to fund current employer service costs in respect of all Members of the Plan, including the Members of the defined contribution section;
2. between January 1, 1994 and December 31, 2006, approximately $111 million of Plan surplus, including related investment income, was applied toward such employer pension service costs; and
3. as at January 1, 1988, there were 2004 active Members of the Plan, 269 deferred vested Members and 2,475 retirees. Of the 2004 active Members at that date, 158 remained in active status at December 31, 2005 and a further 40 Members were actively employed by HBC and have suspended status under the Plan.

In addition, there is no dispute that the actuarial valuation for the Plan as of December 31, 2006 reflects a surplus calculation of $161,170,000 on an on-going basis.

107 Based on the evidence of the witnesses at trial, and the other documentary evidence produced at trial, I make the following additional findings of fact that are relevant in the determination of the common issues for trial.

108 First, HBC had been engaged since 1986 in an effort to re-design the pension plan arrangements pertaining to its employees and the employees of its wholly-owned subsidiaries. In respect of the Plan, the exercise had three principal objectives - to convert the defined benefit plan arrangements into a defined contribution plan to the maximum extent possible, to merge the Plan with the other plans of HBC and its subsidiaries, and to retain and utilize the surplus in the Plan. The stock market crash in October 1987 deferred implementation of the re-design in respect of Members at that time until 1992, when the Members were offered a conversion option into a defined contribution section of the HBC Plan.

109 Second, the Plan closure in 1988 was intended as part of an overall plan to merge both the business and the pension plan of Simpsons with that of HBC. The purpose of the Plan closure was to require new employees of Simpsons to join the defined contribution section of the HBC Plan. There was no intention to confer any benefit upon the Members of the Plan. The Members of the Plan at that time did not give any consideration for the Plan closure and were not informed of the Plan closure until they received the 1994 information package. While it is probable that HBC's expectation at the time of the closure of the Plan was that the merger of the pension plans within the HBC corporate group would involve consolidation under the HBC Plan, no final decisions were taken in this regard. Accordingly, there is no evidence that the Plan closure was intended to be permanent and irrevocable.

110 Third, the Plan was re-opened in 1994 out of a concern that, without new Members, the number of active Members could fall so low that the Ontario pension regulator might force a wind-up of the Plan, with a consequent loss of HBC's ability to access surplus assets in the Trust Fund for the purpose of satisfying its pension-related obligations. This was a principal reason for the decision to make the 1994 and 1998 Amendments to the Plan and, thereby, to introduce the Zellers and Kmart employees as Members of the Plan.

111 Fourth, the Members of the Plan were advised in the annual pension statements sent to them in each of the years from 1994 to 2001 that the eligibility conditions of the Plan had been amended to permit participation by other employees. However, HBC did not specifically identify the Zellers employees as the new Members. In addition, HBC did not inform the Members of the creation of the defined contribution section of the Plan, nor did it inform them of the membership of the Kmart employees at the time of their introduction to the Plan. In fact, the information package distributed to Members of the Plan in 1993 incorrectly stated that the Plan was closed and a document used in connection with an information session conducted for Simpsons employees in 1995 misleadingly stated a number of Members of the Plan that omitted the Zellers employees (although it is technically correct as the number is expressed to be calculated as of December 31, 1993).

112 Information with respect to the participation of the Kmart employees was only provided with the letter dated December 29, 2000 advising of the merger of the Plan with the Kmart Plan. Although the Zellers employees had been advised by a letter in June 1994 of their transfer to the Plan effective January 1, 1994, HBC did not advise the Members of the Plan of this change until some time after 2000, when rumours began circulating with respect to the membership of these parties in the Plan. In addition, at no time prior to 2000 were the Members of the Plan advised that Simpsons or HBC had taken, and were continuing to take, contribution holidays and, in particular, that HBC had a practice of taking contribution holidays in respect of its obligations under the defined contribution section of the Plan using surplus in the Trust Fund.

Common Issues

113 Pursuant to an order dated May 16, 2003, of Cullity J. in this action, the certified common issues for the Class are as follows:

(1) Are the assets (the "Assets") in respect of the defined benefit component of the Plan impressed with a trust? If so, who are the beneficiaries of the trust under the Plan?

(2) Was the HBC amendment to the Plan effective January 1, 1994 to permit Zellers employees to participate in the Plan on a defined contribution basis a valid amendment?

(3) Was the HBC amendment to the Plan effective February 28, 1998 to permit Kmart employees to participate in the Plan on a defined contribution basis a valid amendment?

(4) If the Assets are impressed with a trust as described in question 1 above, was HBC entitled to utilize any part of the assets to meet its funding obligations with respect to:

(i) Zellers employees brought into the Plan effective January 1, 1994, or;

(ii) Kmart employees brought into the Plan effective February 28, 1998,

or has HBC committed a breach of trust or breach of fiduciary duty in so doing?

(5) Did HBC commit any breach of trust or any breach of fiduciary duty by causing a transfer of the liabilities of certain members of the Plan, together with a pro-rata share of the assets, to other pension plans sponsored by HBC, such as the Hudson Plan and the Hudson Bay Company Executive Plan?

(6) If the Trust Assets are impressed with a trust as described in paragraph 1 above, did the defendants Royal Trust Corporation and/or Investors Group Trust Company Limited commit a breach of trust or breach of fiduciary duty by permitting the use of any of the assets for the purpose as set out in paragraphs 4 and 5 above?

(7) What is the appropriate remedy if breaches of trust or fiduciary duty as described above took place? Should such remedy include:

(i) return of assets to the trust fund described in paragraph 1; or

(ii) repayment of assets improperly used, with interest, directly to the class in the form of damages resulting from the partial revocation of the Plan trust?

(8) If the class is entitled to damages, how are such damages to be allocated among class members? What is the basis for calculation of any interest with respect to payments to the class?

(9) Is this a case for punitive damages, and if so, in what amount?

(10) Should any injunctive relief be granted, and if so, on what terms?

114 Since the date of the order of Cullity J., the claim in respect of the transfers described in issue #5 has been settled, the claim for punitive damages contemplated by issue #9 has been withdrawn, and the issue contemplated by issue #6 has been adjourned on consent pending completion of this trial. In addition, the parties agree that issue #8 will be addressed in a subsequent proceeding depending upon the outcome of this trial.

Positions of the Parties

115 The following is a brief overview of the guiding principles behind the positions of the parties. I have addressed the detailed arguments of the parties in support of their respective positions in the analysis of the issues below.

The Plaintiffs

116 The plaintiffs' position is based on three main propositions:

1. By virtue of the inclusion of the Exclusive Benefit Provisions in the Trust Agreement, the Trust Fund is an "exclusive benefit trust", which they describe as an irrevocable trust whose assets must be used solely for the benefit of its members;
2. Because of the closure of the Plan, the Members of the Plan at the time of the 1994 and 1998 Amendments were the Members of the Plan as of January 1, 1988 as it existed at that time, i.e., the Members of the defined benefit section of the Plan; and
3. HBC's power to amend the Plan is subject to the restriction that any amendment that affects the Trust Fund must be for the exclusive benefit of the Members of the Plan at the time of such amendment. This proposition is grounded both in contract, based on the characterization of the Trust as an "exclusive benefit trust", and, in particular, on the Exclusive Benefit Provisions, and on a fiduciary duty that the plaintiffs argue is imposed on HBC by virtue of its position as the administrator of the Plan.

117 The plaintiffs submit that the 1994 and 1998 Amendments are invalid because they are not for the exclusive benefit of the Members of the Plan.

118 The plaintiffs' principal argument is that the Amendments improperly benefited HBC by permitting it to use the surplus in the Trust Fund by taking contribution holidays to fund its obligations in respect of the defined contribution section of the Plan. They say that, in doing so, HBC is doing indirectly what it cannot do directly, namely using or diverting assets from the Trust Fund for its own benefit.

119 In the alternative, the plaintiffs also argue that the 1994 and 1998 Amendments improperly benefited the Zellers and Kmart employees. This argument focuses on the establishment of the defined contribution section of the Plan, rather than the contribution holidays taken by HBC. The plaintiffs submit that the effect of the 1994 and 1998 Amendments, or the administrative and investment arrangements pertaining to the Plan, was to benefit the Members of the defined contribution section of the Plan to the detriment of the Members of the defined benefit section.

The Defendant HBC

120 The defendant's principal position can be summarized in two main propositions:

1. While HBC approaches the Plan and the Trust Agreement as a single document, it argues that the only restriction on its power to amend the Plan is the requirement that accrued benefits to the date of the amendment cannot be reduced. Because they satisfied this requirement, it says that the 1994 and 1998 Amendments to add the Zellers and Kmart employees were therefore valid as a

matter of the law of contract; and

2. For the purposes of the Exclusive Benefit Provisions, "members" of the Plan means Members of the Plan as the Plan may be validly amended from time to time, that is, on an *ex post facto* basis. In their view, because the Zellers and Kmart employees validly became Members of the Plan, the use of the on-going surplus in the Trust Fund to fund the employer contributions in respect of such Members was also valid.

121 More particularly, HBC argues that the Zellers and Kmart employees qualified as "members" of the Plan for purposes of the Exclusive Benefit Provisions because they were introduced by a valid amendment or, alternatively, because they were within the class of persons contemplated by the term "members" as properly interpreted under the Plan documentation. Under either approach, HBC says that the use of Trust Fund assets to fund pension service costs in respect of these persons is properly characterized as the use of assets of the Trust Fund for the exclusive benefit of "members" of the Plan as that term is used in the Exclusive Benefit Provisions. On this basis, it denies that it breached any provision of the Trust Agreement in taking contribution holidays for this purpose.

122 In addition, HBC denies that it is subject to any fiduciary duty in the exercise of its power of amendment of the Plan. While HBC also denies that it is subject to a duty to act in good faith, it submits, in the alternative, that if such a duty exists, it has discharged this duty in respect of the 1994 and 1998 Amendments based on compliance with the Exclusive Benefit Provisions and its interpretation of the term "members" described above.

Analysis and Conclusions

Principal Issues

123 The determination of the common issues in this proceeding requires consideration of the following five principal issues:

1. are the assets of the Trust Fund impressed with a trust and, if so, in favour of which beneficiaries?
2. were the amendments comprising the 1994 and 1998 Amendments valid under the principles of the law of contract?
3. given the investment and administrative arrangements established in respect of the defined contribution section of the Plan, did the taking of contribution holidays using the surplus in the Trust Fund to fund HBC's obligations in respect of that section of the Plan give rise to a breach of trust?
4. were the 1994 and 1998 Amendments invalidated by virtue of a breach of a fiduciary obligation of HBC or other equitable obligation?
5. what is the appropriate remedy if the actions of HBC contemplated by questions 2 or 3 above constituted a breach of trust in respect of the Trust Fund?

I will address each in turn.

Conclusions

124 The principal question addressed in this litigation is HBC's ability to take contribution holidays using surplus assets in the Trust Fund to satisfy its contribution obligations in respect of the defined contribution section of the Plan. Determination of this question, however, involves consideration of a number of important issues raised by the plaintiffs. The following is a brief summary of the principal conclusions reached below regarding the issues addressed in these Reasons for Judgment.

125 First, because the Plan expressly incorporates the provisions of the Trust Agreement, any amendment to the Plan must satisfy the provisions of the Exclusive Benefit Provisions as well as section 16.02 of the Plan. In addition, any amendment must be for a proper purpose, which is described in the case law as a duty of good faith. HBC is not, however, subject to a classic fiduciary obligation in the exercise of its power of amendment under the Plan.

126 Second, the test for compliance with both the Exclusive Benefit Provisions and the duty of good faith is whether the amendment is consistent with the purposes of the Trust Fund. To establish such purposes, it is necessary to determine the original expectations for the nature and scope of the Plan, based on the explicit wording of the Plan, the implicit assumptions reasonably derived from the business context in which the Plan was established, and the reasonably foreseeable future contingencies that the Plan would have to accommodate.

127 Third, the taking of contribution holidays using the assets of the Trust Fund to fund HBC's obligations under the defined contribution section of the Plan does not, *per se*, constitute the application of the Trust Fund assets to something other than the exclusive benefit of the Members of the Plan. The provisions of the 1994 and 1998 Amendments permitting such contribution holidays, and the actions of HBC in taking such contribution holidays, must however, satisfy the contractual requirements of the Exclusive Benefit Provisions and the requirements of the duty of good faith.

128 In each case, the applicable test is whether the assets of the Trust Fund are being used for purposes that are consistent with the expectations at the time of the creation of the Plan for the scope and nature of the Plan. Applying that principle, such contribution holidays are not offensive provided (1) the contribution holidays are taken in respect of Members of the Plan and for the purposes of providing benefits that are consistent with the purposes of the Plan and (2) the manner in which the Plan is structured and the contribution holidays are taken does not remove assets from the Trust Fund to establish a separate trust fund for the defined contribution section, and does not establish a meaningful preference or priority in favour of the Members of the defined contribution section relative to the Members of the defined benefit section.

129 Fourth, applying this standard to the 1994 and 1998 Amendments, the class of "members of the Plan" for the purposes of the Exclusive Benefit Provisions is broader than the Members at the time of the 1994 and 1998 Amendments. It includes individuals who were potential Members as contemplated from the time of creation of the Plan. Based on the definition of "Company" in the Plan, Zellers and Kmart employees qualify as "members of the Plan".

130 Fifth, using the same test, the permitted uses of the Trust Fund extend to payment of any benefits provided under the Plan from time to time. On this basis, the payment of pension benefits under the defined contribution section of the Plan is a permitted use.

131 Sixth, the evidence before the Court does not contradict HBC's position that the 1994 and 1998 Amendments have been structured to maintain a single trust fund, with the result that all assets of the Trust Fund are available to support payment of pensions under both sections of the Plan. In addition, the plaintiffs have not demonstrated that the 1994 and 1998 Amendments established a preference or priority in favour of the Members of the defined contribution section of the Plan.

132 Lastly, the plaintiffs have also failed to establish that the administrative and investment arrangements pertaining to the defined contribution section of the Plan resulted in the establishment of a separate trust fund in favour of the defined contribution section or granted a preference or priority to the

Members of the defined contribution section of the Plan to the detriment of the Members of the defined benefit section of the Plan.

133 Based on the foregoing, I conclude that the 1994 and 1998 Amendments, and the taking of contribution holidays in respect of HBC's obligations under the defined contribution section of the Plan, are valid as a matter of the law of contract and do not contravene HBC's duty of good faith.

Are The Trust Fund Assets Impressed with a Trust?

134 The first common issue is whether the assets in respect of the Plan are impressed with a trust. The parties do not dispute the existence of a trust, only the identities of the beneficiaries thereof on the termination or winding-up of the Plan. The plaintiffs submit that the Trust Fund is a trust for the exclusive benefit of the Members of the Plan at the time of the 1994 and 1998 Amendments, which, by virtue of the closure of the Plan effective January 1, 1988, means the Members as of that date. HBC argues (1) that it is unnecessary to determine this issue in order to address the remaining common issues in this proceeding and (2) that, in any event, it is entitled to the surplus in the Plan upon termination of the Plan and, as such, is also a beneficiary.

135 As mentioned, the plaintiff's position in respect of a number of issues proceeds from the characterization of the Trust Fund as an "exclusive benefit trust". One of the features of such a trust, according to the plaintiffs, is that the members of the pension plan are entitled exclusively to the benefit of any surplus assets in the plan upon termination or winding-up of the pension plan. In addition, as discussed in greater detail below, a significant issue is whether the 1994 and 1998 Amendments had the result of creating a separate trust fund for the benefit of the Members of the defined contribution section of the Plan. Both of these issues involve a consideration of the beneficiaries of the Trust Fund. Accordingly, I think that the Court is required to address this issue in order to answer the remaining common issues.

136 The parties have framed this issue quite succinctly. HBC acknowledges that the issue must be addressed in the context of the provisions of the 1971 Plan Text. The provisions inserted in subsequent amendments to the Plan text and Trust Agreement providing for HBC's entitlement to surplus on the termination of the Plan are only effective to the extent that they make explicit what was implicit in the provisions of the 1971 Plan Text and the Trust Agreement.

137 The plaintiffs argue that the inclusion of the Exclusive Benefit Provisions in the Trust Agreement mandates a conclusion that the Trust Fund is for the exclusive benefit of the Members of the Plan. They argue that these provisions override any provisions in the Trust Agreement and the Plan text to the contrary or, alternatively, that in the event of conflict, equity requires that these provisions should prevail over any provisions to the contrary in the Plan text.

138 HBC submits that article 12 of the Trust Agreement and section 16.02 of the 1971 Plan Text, collectively, provide that it is entitled to any surplus on termination of the Plan and that the Exclusive Benefit Provisions can be read individually on a basis that does not conflict with these provisions. It suggests that the Exclusive Benefit Clause pertains only to withdrawals of surplus while the Plan is on-going and that the Amendment Proviso should be interpreted to mean "to the extent not otherwise permitted by the Plan".

139 HBC relies on the decision in *Ventra Group* v. *Ontario (Pension Commission)*, [1990] O.J. No. 3133; (1990), 35 C.C.E.L. 64 (Ont. Ct. J. (Gen. Div.)), in which Abbey J. held that a provision in a pension plan dealing with surplus assets overrode a more general counterpart to the Exclusive Benefit Clause, also in the relevant pension plan, in the context of a winding-up of the pension plan. That decision did not, however, address a conflict between provisions in a pension plan and provisions in the related trust agreement. Nor was there any real conflict between the two provisions of the pension plan considered in *Ventra*. It does not assist HBC's position on this issue.

140 Of greater relevance is the decision of Sirois J. in *Lear Siegler Industries Ltd.* v. *Canada Trust Co.*, [1988] O.J. No. 1931; (1988), 66 O.R. (2d) 342 (H. Ct. J.). The documentation in *Lear Siegler* was substantially similar to the documentation in the current proceeding. In that case, the trust agreement provided that the trust agreement and the plan text were to be read together. The trust agreement contained a provision comparable to the Exclusive Benefit Clause and it appears that it also included another provision comparable to the Amendment Proviso, although the text of that provision is not set out. Sirois J. concluded that these provisions precluded the payment of surplus assets to the employer. Sirois J. also found that there was an apparent conflict between the trust agreement and the pension plan because two provisions of the trust agreement, read together with a provision in the plan text, could be interpreted to provide that any surplus on termination would revert to the employer. Consistent with a later statement of Cory J. in *Schmidt v. Air Products of Canada Ltd.* (1994), 115 D.L.R. (4th) 631 (S.C.C.) at 656, Sirois J. held that, in such circumstances, the provisions of the trust agreement must prevail.

141 I think the reasoning in *Lear Siegler* is persuasive in the present proceedings. Article 12 of the Trust Agreement and section 16.02 of the 1971 Plan Text can be read collectively to provide that HBC is entitled to any surplus on termination of the Plan. It is possible to reconcile the Exclusive Benefit Clause with these provisions on the basis that it relates only to withdrawal of surplus while the Plan is on-going. However, it is impossible to reconcile the Amendment Proviso and these provisions. The Amendment Proviso specifically addresses termination of the Plan, in addition to amendments to the Plan. It constitutes a clear statement that, on termination, the Trust Fund is not to be used for purposes other than the exclusive benefit of the Members. The Court must interpret these provisions in a manner that gives effect to both the Amendment Proviso and the provisions relied upon by HBC. The interpretation of HBC - that it operates "to the extent not otherwise permitted by the Plan" -gives no scope for the independent operation of the Amendment Proviso. It would render the Amendment Proviso redundant. The Amendment Proviso must apply to termination of the Plan if it is to have any effect.

142 Accordingly, I conclude that there is a conflict between the provisions of the Trust Agreement and the Plan respecting the entitlement of HBC to any surplus assets in the Trust Fund upon the winding-up or other termination of the Plan. In these circumstances, equitable principles require that the provisions of the Trust Agreement must prevail. I therefore find that on termination of the Plan, the Members are entitled to any surplus assets remaining in the Trust Fund after provision for any liabilities of the Plan.

143 HBC argues that it is also a beneficiary of the Trust. However, it is clear from *Air Products* at pages 654-684 that HBC's ability to take contribution holidays while the Plan is on going does not constitute an interest in the surplus. Given the finding that it does not have any entitlement to surplus on termination of the Plan, HBC has no equitable interest in the Trust Fund. On this basis, HBC is not a beneficiary of the Trust Fund.

144 I do not, however, agree with the plaintiffs that the beneficiaries of the Trust Fund are limited to the Members of the defined benefit section of the Plan as of January 1, 1988. For the reasons set out below, I conclude that the beneficiaries of the Trust Fund include the Members of both the defined contribution section of the Plan and the defined benefit section.

Contractual Validity of the 1994 and 1998 Amendments

145 The issue addressed in this section is whether the 1994 and 1998 Amendments complied with the

Plan documentation as a matter of contract law. However, before considering this issue I have set out my approach to the interpretation of the scope of the power of amendment under the Plan, as it informs the conclusions reached below.

Approach to Construction of the Plan and Trust Agreement

146 In this section, I will set out my conclusions on three questions relating to the scope of the power of amendment that establish the framework for the determination of the issues in this proceeding:

1. is the power of amendment in the Plan documentation subject to any restriction apart from preservation of the accrued benefits of the Members?
2. if the answer to question #1 is in the affirmative, what is the principle to be applied in assessing compliance with the Exclusive Benefit Provisions?
3. what were the reasonable expectations of the employer and Plan Members at the time of creation of the Plan regarding the scope and nature of the Plan?

Incorporation of the Trust Agreement into the Plan Documentation

147 The 1994 and 1998 Amendments made amendments to the Plan, but not the Trust Agreement, adding new Members, establishing defined contribution sections of the Plan, and extending the contribution holiday provisions to include obligations in respect of the defined contribution section. Disregarding for the moment the issue of the Plan closure after January 1, 1988, the issue of the validity of the 1994 and 1998 Amendments involves the interplay between the membership, contribution holiday and amendment provisions of the Plan, and the Exclusive Benefit Provisions of the Trust Agreement. The specific issue for the Court is the extent to which these latter provisions of the Trust Agreement inform and, in particular, limit or constrain HBC's power to amend the Plan to implement the Amendments.

148 HBC's principal argument is that there are no limitations or restrictions on its power of amendment under the Plan, apart from the express provisions of section 16.02 of the 1971 Plan Text and the successor provisions in later versions of the Plan, which required that no amendment could reduce accrued benefits of Members to the date of the amendment. HBC argues that it was, therefore, entitled to amend the Plan to include the Zellers and Kmart employees as Members of the Plan. It also argues that, as a result of such amendment, the requirements of the Exclusive Benefit Provisions were satisfied because the Trust Fund continued to be used for the exclusive benefit of validly constituted Members of the Plan.

149 The plaintiffs argue that any amendments that affect the assets in the Trust Fund must also comply with the Exclusive Benefit Provisions of the Trust Agreement. On the basis of their interpretation of these provisions, the plaintiffs argue further that the power of amendment is restricted to making amendments that benefit the Members of the Plan as of January 1, 1988, being the Members of the defined benefit section of the Plan.

150 I agree with the plaintiffs' interpretation of the Plan documentation that any amendment affecting the assets of the Trust Fund must satisfy the Exclusive Benefit Provisions. The basis for this conclusion is the determination that the provisions of the Plan require that it be read to incorporate the Trust Agreement, at least to the extent of the Exclusive Benefit Provisions.

151 Section 13.01 of the 1971 Plan Text and section 14.01 of the 1976 Plan Text provided that "the Trust Agreement shall ... be made part of the Plan". The consequence of these provisions is that the Plan text and the Trust Agreement must be read together in respect of actions taken under the Plan. This requires that any amendment affecting the use of the Trust Fund must satisfy the requirements of the Exclusive Benefit Provisions of the Trust Agreement in addition to the requirements of the Plan respecting preservation of accrued benefits.

152 HBC treats the process of compliance with these provisions as sequential. If the test of compliance with the Exclusive Benefit Provisions is administered on an *ex post facto* basis, as suggested by HBC, the 1994 and 1998 Amendments will automatically satisfy the requirements of the Exclusive Benefit Provisions by virtue of satisfaction of the Plan requirements respecting accrued benefits. The approach of HBC, however, is inconsistent with the fact that the provisions of the 1971 Plan Text and the Trust Agreement require that the two agreements be read together. If this principle of interpretation is applied, I think it necessarily follows that any amendment must satisfy the requirements of the Plan and the Trust, i.e. the Exclusive Benefit Provisions, simultaneously.

153 I would note that section 13.01 of the 1971 Plan Text was not continued in the 1988 Plan Text, which instead included a provision in section 15.12(b) that any provision of any funding agreement that was inconsistent with the terms of the Plan shall, to the extent of the inconsistency, be of no force or effect. Accordingly, since 1988, the Plan documentation purports to separate the Plan text and the Trust Agreement. If this separation were effective in respect of the amendments considered in this proceeding, HBC's position might well be supportable as a matter of the law of contract.

154 However, I do not think that this separation is effective for the following reason. By making the Trust Agreement part of the Plan from its inception, the power of amendment was subject to the constraint that any exercise thereof must not contravene the provisions of the Exclusive Benefit Provisions. The Exclusive Benefit Provisions therefore provide protection to the Members that HBC's powers under the Plan will be exercised in a manner that is consistent with the original purpose and scope of the Plan and Trust Agreement, read together. Accordingly to be effective, any amendment purporting to exclude the operation of the Exclusive Benefit Provisions in respect of subsequent amendments to the Plan would require, at a minimum, express language to such effect. Such language was lacking in the 1988 Plan Text. More significantly, to the extent that any such amendment has the effect of broadening HBC's powers of amendment, I think the amendment would be invalid because it contravenes the very provisions it purports to delete.

155 I would also add that, if I am wrong in reaching the conclusion that the amendments made in the 1988 Plan Text could not validly terminate the provisions of section 13.01 of the 1971 Plan Text and 14.01 of the 1976 Plan Text incorporating the Trust Agreement into the Plan, I am of the opinion that in the circumstances of this proceeding the equitable principles addressed below would impose a duty of good faith having the same scope as the Exclusive Benefit Provisions.

Applicable Principles in Assessing Compliance with the Exclusive Benefit Provisions

156 The Trust Agreement provided in article 2 that the Trust Fund was established for the purposes of the Plan. Similarly, as mentioned, the Exclusive Benefit Provisions require that the Trust Fund be used for the exclusive benefit of Members of the Plan and their beneficiaries. Based on the determination above, the meaning of "exclusive benefit of members of the Plan", as used in the Exclusive Benefit Provisions, is pivotal.

157 The plaintiffs' submit that in respect of any amendment the concept of "the benefit of members of the Plan" is to be determined by reference to the Plan as it exists immediately prior to the amendment and to the membership of the Plan at such time. On this basis and by virtue of the closure of the Plan, they submit that the concept of "the benefit of members of the Plan" must refer to the benefit of the members of the defined benefit section of the Plan as of January 1, 1988.

158 HBC relies on article 1 of the Trust Agreement to argue that the "Plan" referred to in the Exclusive Benefit Provisions means the Plan as amended from time to time. It submits that "members" in the Exclusive Benefit Provisions means the Members of the Plan as amended from time to time, in reliance on its view of the unrestricted power of amendment that has been rejected above. Alternatively, it submits that "members" means the Members who fall within the class of potential Members contemplated under the Plan at the time of its creation. Similarly, it says that the concept of "the benefit of members of the Plan" refers to the benefits under the Plan as they may exist from time to time, including benefits in respect of any defined contribution pension plan that may be added to the Plan.

159 I agree with the plaintiffs that "exclusive benefit of members of the Plan" as used in the Exclusive Benefit Provisions must be interpreted on the basis of the Plan documentation at the time of the 1994 and 1998 Amendments. However, I do not think that the conclusion that the plaintiffs draw from this interpretation is warranted as a matter of the law of contract.

160 The plaintiffs' approach treats the reference to the Plan in the Trust Agreement as a reference to the Plan as it exists at the time of consideration of any particular action and disregards the Plan as it may legally exist in the future. I think this is too narrow. The interpretation of the Plan documentation, including the Trust Agreement, at any particular time should be approached by addressing the intention of the settlor at the time of creation of the Plan and establishment of the Trust, rather than at a later time when the particular circumstances of a proposed amendment or other action may colour the perspective. Accordingly, the intention of the Trust Agreement should be construed as of the time of creation of the Plan in 1971.

161 In addition, I would add that insofar as the plaintiffs appear to argue at some point that the mere presence of the Exclusive Benefit Provisions requires a restrictive definition of the scope of the amendment power, I think the argument is circular. The presence of the Exclusive Benefit Provisions cannot inform their interpretation, as the plaintiffs suggest. Instead, it is necessary to look to the Plan documentation as a whole and the business context in which the Plan was created to define these terms.

162 Accordingly, I conclude that the interpretation of the Exclusive Benefit Provisions must be informed by the original expectations regarding the purpose and scope of the Plan at the time Simpsons established the Plan, including the concept of membership and the nature of benefits to be supported. Amendments to the Plan that modify the Plan within the framework established in the original Plan documentation do not contravene the Exclusive Benefit Provisions. Conversely, amendments to the Plan that attempt to extend the benefit of the Trust Fund beyond the original purpose and scope of the Plan and the Trust Agreement would breach the Exclusive Benefit Provisions. In particular, amendments that purported to introduce new Members of the Plan who did not fall within the class of Members originally contemplated for the Plan would contravene the Exclusive Benefit Provisions. Similarly, amendments that are intended to allow the Trust Fund to be used to provide benefits that are not within the class of benefits contemplated by the Trust Agreement would not satisfy the requirement of the Exclusive Benefit Provisions.

Expectations regarding Scope and Nature of the Plan over its Expected Life

163 Before considering the validity of the 1994 and 1998 Amendments, it is therefore necessary to consider the reasonable expectations regarding the scope and purpose of the Plan at the time of its creation. The two specific questions addressed in this section are (1) the scope of the class of potential Members of the Plan contemplated at the time of the creation of the Plan and (2) the scope of the benefits intended to be supported by the Trust Fund. This exercise requires a review of the relevant provisions of the Plan documentation, particularly the 1971 Plan Text and the Trust Agreement, as well as a consideration of the business context in which the Plan was created.

164 In conducting this exercise, as mentioned above, an important consideration to be borne in mind is the long-run nature of pension plans and the need to interpret pension plans on the basis that pension plan documentation is generally intended to accommodate corporate developments during, and often after, the corporate life of the original plan sponsor. This reality was identified by Deschamps J. in *Buschau* v. *Rogers Communications Inc.*, [2006] S.C.J. No. 28 ("*Buschau #3*") in his comment that "[a] plan is also seen as being, if not a permanent instrument, at least a long-term one. However, the participation of any individual member is ephemeral: members come and go, while plans are expected to survive the flow of employees and corporate reorganizations" (at para. 34).

165 Because, in common with most other pension plans, the Plan was expected to have a long and indefinite life at the time of its creation, the principles set out in the 1971 Plan Text and the Trust Agreement are general in nature and do not address directly a number of the issues presented in this proceeding. That should not, however, suggest that a restrictive interpretation should be applied in respect of specific issues where the Plan documentation is silent. On the contrary, I think that the Plan documentation should be interpreted on the basis that the governing principles of the Plan were intended to be sufficiently flexible to accommodate substantial change to the pension arrangements from time to time. To this end, I think the Court should infer from the general language in the Plan documentation an intention to provide flexibility to the Plan sponsor to amend or alter the Plan provided the original purposes of the Plan - to provide pension benefits to its employees - are satisfied.

Definition of Membership in the Plan

166 This section addresses the scope of the class of potential Members in the Plan as set out in the Plan documentation. The further issue of whether the class of Members, while possibly much broader initially, was closed effective January 1, 1988 is addressed later.

167 The starting point is the definition of "Company" in section 1.03 of the 1971 Plan Text, and corresponding provisions of the 1976 Plan Text. The following non-exhaustive enumeration of four categories of potential Members illustrates the breadth of the class of potential Members that could reasonably have been expected at the time of the creation of the Plan based on the wording of the Plan and reasonably foreseeable corporate developments.

168 First, the Plan included all future employees of Simpsons as potential Members of the Plan. This provided for new Members through the organic growth of Simpsons.

169 Second, as Cory J. states in *Schmidt* at para. 643, a settlor of a trust may reserve any power to itself it wishes, including the power to change the beneficiaries of the trust, provided it does so at the time of creation of the trust. In the definition of "Company", Simpsons specifically reserved to itself the power to include employees of wholly owned subsidiaries and associated companies as Members of the Plan by means of a designation by its board of directors, without the need for an amendment to the Plan. This provision recognized that there was no necessary reason why Simpsons would restrict its business to a single entity.

170 It is, however, much broader in scope. Under this aspect of the definition, the Plan contemplates, as potential Members, employees of any company acquired by Simpsons in the future including acquisitions by way of a reorganization within a corporate group. The definition also includes employees of companies under common ownership with Simpsons through inclusion of employees of designated associated corporations and, in doing so, does not restrict the ownership structure giving rise to the associated relationships to that existing in 1971.

171 Third, the definition of the "Company" included any successor of Simpsons. Together with the power to designate, this provision expanded the class of potential Members of the Plan to include the employees of the subsidiaries and associated corporations of any such successor to Simpsons in respect of the Plan. The larger the corporate group of companies controlled by the successor, the larger the number of potential Members of the Plan. As discussed below, this aspect of the definition is directly relevant to this proceeding.

172 Fourth, as the discussion of the merger cases below indicates, the employees of any corporation with which Simpsons might subsequently be amalgamated were also potential Members of the Plan. Any such employees would, upon the amalgamation, become Simpsons employees entitled to membership in the Plan by operation of the law of amalgamation, except to the extent express provisions were made to the contrary at the time of the amalgamation.

173 In addition, it is noteworthy that nothing in the Plan documentation requires that any of these potential Members of the Plan must be employed in a business similar to that of Simpsons' business at the time of creation of the Plan.

174 In summary, from the outset, the class of potential Members of the Plan, when examined carefully, was very broad and, in particular, accommodated numerous corporate developments that might reasonably be expected to occur over the course of the corporate life of Simpsons.

Concept of "Benefit" in the Exclusive Benefit Provisions

175 The second question addresses the scope of permitted purposes of the Trust Fund. The Amendment Proviso requires, among other things, that any modification of the Trust Agreement shall not permit or result in any part of the corpus or income of the Trust Fund being used for, or diverted to, purposes other than the exclusive benefit of the Members of the Plan. The Exclusive Benefit Clause expresses a similar restriction in respect of the purposes to which the Trust Fund assets may be put. The general nature of the language of these provisions raises the issue of the breadth of the permissible uses of the Trust Fund.

176 This requires an interpretation of the meaning of the term "benefit" as that term is used in the Exclusive Benefit Provisions. Does it refer only to benefits under the defined benefit section of the Plan established in the 1971 Plan Text? Or, alternatively, does it refer to benefits of any kind payable under the Plan as amended from time to time?

177 The plaintiffs argue that the Exclusive Benefit Provisions require the Court to construe the reference to "benefit" in these Provisions as a reference to benefits in respect of the defined benefit plan established in the 1971 Plan Text. I do not agree for the following five reasons.

178 First, I agree with the defendants that the reference to the Plan in the Exclusive Benefit Provisions must be a reference to the Plan as amended from time to time. Article 1 provides that the Plan as amended from time to time shall form part of the Trust Agreement as if all of its provisions were fully set forth therein and, for clarity, states that the definitions and meanings used in the Plan text are to have the same meanings in the Trust Agreement unless the context provided otherwise. In the absence of an indication in the wording of the Exclusive Benefit Provisions that the concept of "Plan" therein is narrower than the reference in Article 1 to the Plan as amended from time to time, I think the Court should presume an intention of consistent usage. Accordingly, in the absence of a definition of the term "benefit" in the Trust Agreement, I also think that, as used in the Exclusive Benefit Provisions, "benefit" must refer to the benefits provided under the Plan as amended from time to time.

179 Second, the term "benefit" is unqualified in the Exclusive Benefit Provisions. It does not refer to specific categories of benefits. Nor is it restricted to specific types of pension benefits. It could also include any other non-pension benefit that may be incorporated into the Plan at a later date. This flexibility points to an intention that the term "benefits" should be interpreted broadly to encompass any benefits provided for under the Plan as amended from time to time.

180 Third, given the expectation that the Plan and therefore the Trust Agreement could have a very long life, I do not think it is reasonable to conclude that either Simpsons or its employees expected, at the time of the of the creation of the Plan and the Trust Agreement, that the purposes for which the Trust Fund would be used would be limited to purposes related to the defined benefit plan established at that time. On the contrary, it is much more reasonable to conclude that these parties would have expected that, while the disposition of the assets to the Trust Fund was irrevocable, the actual use of the funds could be subject to considerable change in accordance with changes to the benefits provided under the Plan.

181 As a particular example, I do not think the parties would have expected that the Exclusive Benefit Provisions would have precluded inclusion of a separate defined benefit plan for another class of eligible Members having different terms and conditions reflective of the nature of their employment with Simpsons. Similarly, I do think that it would have been expected that the Provisions would have prohibited a simple conversion under which a defined contribution section was established into which existing Members could convert voluntarily. There is nothing in the Trust Agreement that evidences an intention to prevent current Members from choosing to receive their pension benefits on a different basis on a "going-forward" basis and quantifying their accrued pension benefits at the time of the conversion. However, if the Exclusive Benefit Provisions do not prevent amendments giving effect to a different defined benefit plan or to such a conversion, I think it follows that the interpretation of "benefit" in the Exclusive Benefit Provision must be sufficiently broad to include any form of pension benefit into which an existing Member might voluntarily convert his or her entitlement under the Plan during the life of the Plan.

182 Fourth, it if had been intended that the Exclusive Benefit Provisions were to restrict the use of the assets in the Trust Fund to uses that benefited the Members of the Plan in respect of a particular category or categories of benefits under the Plan, it would have been necessary to provide a principle in the Trust Agreement for distinguishing between qualifying and non-qualifying benefits. The absence of any such principle therefore reinforces the conclusion that the restriction in the Exclusive Benefit Provisions does not limit use of the Trust Fund to purposes related to the defined benefit pension plan established in 1971.

183 Lastly, as mentioned above, the plaintiffs cannot rely upon the presence of the Exclusive Benefit Provisions in the Trust Agreement to support their conclusions when it is the terms of the Exclusive Benefit Provisions themselves that require interpretation. The determination of this issue requires an interpretation of the term "benefit", as used in the Exclusive Benefit Provisions, based on the construction of the Trust Agreement as an entirety.

184 In addition, while there is no case law in Canada directly on this issue, a similar issue was raised in *Barclays Bank Plc* v. *Barclays Pension Funds Trustees Limited, John M. Holmes, The Pension Ombudsman,* [2000] WL 1881262, [2001] O.P.L.R. 37, [2000] Pens. L.R. 339 (Ch. D.), the facts of which are dealt with in greater detail below. In that decision, the main purpose of the trust fund was expressed to be "the provision of pensions on retirement ... for employees and former employees ..." The trust fund was originally established in respect of a defined benefit pension plan and was amended later to include a defined contribution section, giving rise to the litigation. Neuberger J. held that pension benefits received on a defined contribution basis were also contemplated by the excerpted provision.

185 Based on the foregoing analysis, I think a similar conclusion is warranted in the present circumstances. In fact, it is arguable that the reference to "benefits" in the Exclusive Benefit Provisions renders the permitted uses of the Trust Fund even broader than the purposes of the trust fund in *Barclays Bank*, inasmuch as it is not expressly restricted to "pensions on retirement" and could, therefore, also include any other benefits payable pursuant to the Plan.

186 I am also influenced by the following additional practical consideration. In this proceeding, the issue is presented as a stark contrast between a defined benefit plan and a defined contribution plan. There is no dispute that a defined contribution plan is qualitatively different from the defined pension plan originally supported by the Trust Agreement. However, between these two polar cases - a defined contribution plan and a defined benefit plan - there are also hybrid plans. The plaintiffs' interpretation of the Exclusive Benefit Provisions provides no basis for distinguishing which, if any, hybrid plans would entitle the members thereof to the benefits of the Trust Fund and which would not, based solely on the type of benefit provided. Nor does it provide a basis for distinguishing among various versions of defined benefit plans. The implication of the plaintiffs' position appears to be that only a defined benefit plan that is substantially similar to the plan established in 1971 is contemplated by the Trust Agreement. For the reasons set out above, I do not think this is a reasonable inference.

187 In summary, I conclude that the purposes for which the assets in the Trust Fund may be used pursuant to the Exclusive Benefit Provisions are, in effect, purposes to support the payment of all benefits payable under the Plan as it exists from time to time.

Validity of the 1994 and 1998 Amendments Under the Law of Contract

188 As the applicants note, the 1994 and the 1998 Amendments implemented the following amendments to the Plan:

1. a change in the definition of "Member", which also involved a re-opening of the Plan in 1994;
2. the addition of Zellers and Kmart in the definition of "Employer";
3. a waiver of the one-year eligibility requirements for the Zellers and Kmart employees;
4. the establishment of defined contribution sections of the Plan; and
5. the extension of the provisions respecting contribution holidays to include employer contributions regarding the Zellers and Kmart employees under the defined contribution sections of the Plan.

The applicants argue that, looked at as an entirety, this package of amendments amounts to a use or diversion by HBC of the surplus assets in the Trust Fund rather than a use of the Trust Fund for the exclusive benefit of the Members.

189 In this section, I propose to address the contractual ability of HBC to make each of these amendments under the Plan and to take contribution holidays in respect of its obligations under the defined contribution section.

190 While the principal issues are interrelated in the plaintiffs' argument, I will separate and deal with four distinct issues in order to identify more clearly the specific contractual issues presented in this action: (1) the validity of the introduction of the new Members; (2) the validity of the re-opening of the Plan; (3) the validity of the inclusion of a defined contribution section of the Plan; and (4) the validity of the extension of the contribution holiday provisions to obligations in respect of the defined contribution section.

191 As set out above, I agree with the plaintiffs that neither the power of amendment of the Plan nor the power to take contribution holidays can be exercised in a manner that has the result of using the Trust Fund assets for purposes not contemplated by the Exclusive Benefit Provisions. However, based on the approach to the interpretation of these provisions also set out above, I do not agree with the plaintiffs that the 1994 and 1998 Amendments has this result.

Introduction of Zellers and Kmart Employees as Members of the Plan

192 This section addresses the validity of the amendments that (1) changed the definition of "Member"; (2) changed the definition of "Employer"; and (3) waived the eligibility requirements in respect of the Zellers and Kmart employees. Collectively, these amendments introduced the Zellers and Kmart employees as new Members of the Plan.

193 For the reasons set out above, I have concluded that HBC has the power to amend the Plan documentation to include new Members provided that, in doing do so, it satisfies the requirements of the Exclusive Benefit Provisions. This requires that the new Members fall within the class of potential Members of the Plan as contemplated in the original Plan documentation. Based on the elaboration of this class set out above, the Zellers and Kmart employees fell within the class of potential Members of the Plan contemplated at the time of creation of the Plan.

194 Upon the completion of the internal corporate reorganization in 1991, HBC became the successor to Simpsons under the Plan documentation. The plaintiffs acknowledge this result in their agreement that, as a result of the reorganization, HBC currently "stands in the shoes of Simpsons" under the Plan. Each of Zellers and Kmart are wholly owned subsidiary corporations of HBC, as well as associated corporations of Simpsons using the ordinary, rather than statutory, meaning of that term. Under the Plan, because Zellers and Kmart were wholly-owned subsidiaries as well as associated companies of Simpsons, HBC had the power to designate these corporations to include their respective employees as Members of the Plan, subject only to consideration of the effect of the amendments constituting the 1988 Plan Text which are addressed in the next section. Accordingly, the class of potential Members of the Plan for the purposes of the Exclusive Benefit Provisions includes the Zellers and Kmart employees.

195 Based on the foregoing, I conclude that HBC had the contractual power under the Plan to introduce these employees as Members of the Plan pursuant to the 1994 and 1998 Amendments.

Re-Opening of the Plan in 1994

196 Before proceeding, it is necessary to address the issue of the re-opening of the Plan in 1994, which was a necessary pre-condition to adding the new Members to the Plan. In doing so, HBC relied upon the power to amend the Plan rather than the power to designate wholly owned subsidiaries contained in the definition of the Company. However, I see no substantive difference between these two powers for the reasons set out below. Accordingly, I conclude that HBC had the power to amend the Plan to re-open it as part of the 1994 and 1998 Amendments to introduce the Zellers employees and Kmart employees, respectively, into the Plan.

197 As set out above, the 1988 Plan Text implemented the closure of the Plan effective January 1, 1988. Prior to this amendment, HBC could have used the power of designation to amend the Plan to include the Zellers and Kmart employees as Members without contravening the Exclusive Benefit Provisions. After this amendment, however, the definition of "Company" excluded any reference to designation of subsidiaries or associated corporations of the Company.

198 The effect of this amendment was to delete the power of HBC to designate subsidiaries for purposes of the Plan. The plaintiffs argue that by closing the Plan in this manner, HBC also renounced the power to amend the Plan to re-open it to new Members. I do not agree with this proposition as a matter of the law of contract.

199 The substantive effect of the amendments to introduce the Zellers and Kmart employees into the Plan was the restoration of the power of designation coupled with the exercise thereof. I do not think that it can be validly argued that the amendments in the 1988 Plan Text prevented HBC from restoring the power of designation by a later amendment, provided that, in doing so, HBC did not expand the class of potential Members beyond that previously contemplated. The existing Members gave no consideration nor did they alter their financial positions in any adverse manner as a result of the Plan closure. The plaintiffs' witnesses were not even aware of the closure of the Plan until 1994, in the case of Mr. Scott, and sometime after 1999, in the case of Mr. Sutherland. There is, therefore, no basis in the law of contract for a claim by the Members of the defined benefit section against HBC for either breach of contract or estoppel in respect of the amendments that re-opened the Plan. As set out above, I have also found that HBC did not intend to confer a benefit on the existing Members of the Plan by closing the Plan to new Members.

200 On the basis of the foregoing, I conclude that HBC retained the contractual power to re-open the Plan to new Members by exercising the power of amendment under the Plan notwithstanding the closure effective January 1, 1988.

201 Given such conclusion, I see no contractual basis for invalidating the use of the power of amendment to re-open the Plan and to introduce the Zellers and Kmart employees. As the amendments introduced employees who fell within the contemplated class of potential Members, the amendments did not contravene the Exclusive Benefit Provisions for the reasons set out above.

Inclusion of a Defined Contribution Section of the Plan

<u>Definition of the Issue</u>

202 The plaintiffs do not dispute HBC's power under the Plan to amend the Plan to add a separate defined contribution section for individuals who qualify as Members under the Plan. However, they argue that, given the terms of the Trust Fund, while HBC had the power to amend the Plan to create a defined contribution section, it could only do so by establishing a separate trust fund pursuant to a separate trust agreement to hold the assets supporting pension benefits payable under the defined contribution section of the Plan. If, however, the establishment of the defined contribution section of the Plan either required or resulted in the creation of a separate trust fund in respect of that section, then any assets transferred to the separate trust fund out of the Trust Fund by way of contribution holidays taken by HBC would contravene the Exclusive Benefit Provisions.

203 Therefore, the principal question concerning the validity of the amendments to include the defined contribution section is whether the amendments achieved the result of maintaining the Trust Fund as a fund for the purposes of supporting both the defined contribution section and the defined benefit section of the Plan.

204 The determination of this issue requires consideration of two questions:

1. is there any contractual or other legal restriction, other than equitable principles which are addressed later in these Reasons, preventing the establishment of a defined contribution section of the Plan for which the Members' assets are held by the Trust Fund, rather than a separate trust fund?
2. if the answer to question #1 is in the negative, did the 1994 and 1998 Amendments achieve this result?

I will address each question in turn.

205 Before proceeding, I note that this section does not address the separate, although closely related, issue of the entitlement of HBC to take contribution holidays in respect of its obligations under the defined contribution section of the Plan using assets of the Trust Fund. I have separated the discussion of these two issues to bring into relief the different considerations pertaining to each. The present discussion addresses the issue of whether Members of the defined contribution section of the Plan, as well as Members of the defined benefit section of the Plan, can each have an interest in the assets in the same trust fund, in this case the Trust Fund established under the Trust Agreement. It is a pre-condition to HBC's entitlement to take contribution holidays in respect of its obligations under the defined contribution section that the defined contribution section of the Plan shall have been validly established on this basis. The discussion in the next section addresses the extent to which HBC, as a third party to the Trust Fund, is entitled to take contribution holidays to fund its obligations in respect of the defined contribution section, accessing the surplus assets of the Trust Fund on an on-going basis for such purposes.

Is there a Legal Prohibition Against Creation of a Defined Contribution Section Without the Creation of a Separate Trust Fund?

206 In this section, I propose to address the following two issues raised by the plaintiffs in their submissions:

1. do the terms of the Plan documentation, in particular the Exclusive Benefit Provisions, preclude the establishment of a defined contribution section on the basis described above? and
2. is the establishment of a defined contribution section on such basis precluded by common law principles because of the presence of an "exclusive benefit trust"?

Operation of the Plan Documentation

207 For the reasons set out above, I have concluded that the concept of "benefit" in the Exclusive Benefit Provisions should be interpreted to include any benefits payable under the Plan from time to time. It follows that there is no reason in principle why, under the Plan documentation, HBC could not amend the Plan to incorporate a defined contribution section whose members are also entitled to the benefit of the Trust Fund, provided the members fall within the class of potential Members contemplated by the Plan. Because the Zellers and Kmart employees do fall within such class, I conclude that the establishment of the defined contribution section of the Plan, structured so that the Trust Fund supports both sections of the Plan, did not contravene the Exclusive Benefit Provisions.

208 The issue and the reasoning leading to this conclusion are most clearly presented in the context of the following hypothetical situation. If prior to the reorganization of Simpsons' business, Simpsons had chosen to amend the Plan to add a defined contribution section for the sole purpose of providing defined contribution pensions to any existing Members who chose to convert their pensions from the defined benefit section, would the amendments have contravened the Exclusive Benefit Provisions? The plaintiffs argue that such amendments would have contravened the Exclusive Benefit Provisions because the Trust Fund is dedicated to providing pension benefits to the Members of the defined benefit section of the Plan. I do not agree with this position on the basis of the following reasoning.

209 If the Members of the defined contribution section of the Plan immediately after the hypothetical conversion had been limited to former Members of the defined benefit section, I do not think that there could be any issue regarding the validity of such an amendment. In such circumstances, the identity of the Members of the Plan would not have changed, only the nature of their pension benefits. However, the provision of defined contribution pension benefits is within the permissible purposes for the Trust Fund as envisaged at the time of creation of the Plan. Such an amendment to the Plan would therefore have satisfied the Exclusive Benefit Provisions.

210 If, at a later date following such hypothetical conversion, Simpsons had decided to make all new employees of Simpsons Members of the defined contribution section of the Plan, rather than the defined benefit section, I also see no basis on which such action could have been challenged. It is impossible to distinguish between the converting Members and the new Members on the basis of the principles applied above. Each class of employee qualifies for status as a Member under the terms of the Plan. Based on the analysis set out earlier, use of the Trust Fund to support pension benefits for each class of employee under the defined contribution section of the Plan is consistent with the purposes of the Trust Fund.

211 Conceptually, the Zellers employees and the Kmart employees are in the same position as the hypothetical new Simpsons' employees in the preceding paragraph. They are new Members of the Plan who fall within the class of potential Members of the Plan and who are required to join the defined contribution section of the Plan.

212 On the basis of the foregoing, I conclude that if HBC had the power under the Plan documentation to add a defined contribution section to the Plan to provide a conversion option to existing Members, it also had the power to introduce the Zellers and Kmart employees as Members of the defined contribution section of the Plan on the basis that the assets of the Trust Fund were available to support pensions under each section of the Plan.

Applicable Case Law

213 The plaintiffs, however, rely on a number of cases involving pension plans for which the plan documentation contains language similar to the Exclusive Benefit Provisions and in which the courts have held that surplus assets in the related pension fund trust on termination of the trust were held for the exclusive benefit of the members of the pension plan, rather than the employer. The plaintiffs call these pension plans "exclusive benefit trusts". The plaintiffs submit that these decisions stand for the general principle that on-going surplus in an exclusive benefit trust cannot be used directly or indirectly for the benefit of any person other than the members of the related pension plan. They say the Plan is such an "exclusive benefit trust".

214 As an application of this principle, they say that, if the trust is an "exclusive benefit trust" established in respect of a pension plan, it is a breach of trust to purport to amend the beneficiaries of the trust to introduce members of a defined contribution section of the plan. On this basis, the plaintiffs submit that, because the Trust Fund is an "exclusive benefit trust", the provisions of the 1994 and 1998 Amendments establishing the defined contribution section of the Plan constituted a breach of trust and are, therefore, invalid insofar as they purport to expand the beneficiaries of the Trust Fund to include the Zellers and Kmart employees as Members of the Plan rather than to create a separate trust fund to support payment of benefits to such Members. This argument is addressed in this section. They also argue that the provisions of the 1994 and 1998 Amendments providing for contribution holidays to fund obligations in respect of the defined contribution section are also invalid insofar as they purport to allow HBC to access surplus assets of the Trust Fund to fund contribution holidays. As mentioned, this argument is addressed in the next section.

215 The merger cases upon which the plaintiffs rely are discussed in the next section of these Reasons as they deal more directly with the issue of the validity of contribution holidays. However, the conclusions drawn in that section are equally applicable to the issue of the validity of the arrangements pertaining to the defined contribution section of the Plan addressed herein. In summary, I do not think that these authorities support the plaintiffs' assertion that the exercise of HBC's power of amendment to create a defined contribution section whose Members were also entitled to the benefit of assets in the Trust Fund constituted a breach of the Exclusive Benefit Provisions. More specifically, I do not think that these authorities require, as a matter of law, either (1) that HBC establish a separate trust fund in respect of the defined contribution section of the Plan or (2) that the 1994 and 1998 Amendments be construed, as a matter of law, to result in the creation of such a separate trust fund.

216 In contrast, there are two decisions that directly address the issue of whether a defined contribution section can be added to a pension plan on a basis under which the members of the defined contribution section are entitled to the benefit of the same pension plan trust fund as the members of a pre-existing defined benefit section of the pension plan. They both conclude that such arrangements are legally permissible.

217 In a decision released after the hearing in the present proceeding, the Court of Appeal addressed the circumstances of a defined contribution section that was established as the vehicle for providing pensions to new employees and any existing employees who chose to convert their pensions from the defined benefit section into the defined contribution section. The Court of Appeal found that the arrangements maintained a single pension plan with two classes of members entitled to the benefit of a single trust fund: see *Nolan* v. *Ontario (Superintendent of Financial Services)*, [2007] O.J. No. 2176 ("*Kerry #2*"). This constitutes an express confirmation that a single trust fund can support the entitlement of separate classes of membership in a single pension plan. The earlier decision of the Divisional Court in *Nolan* v. *Ontario (Superintendent of Financial Services)*, [2006] O.J. No. 960, (2006), 52 C.C.P.B. 1 (Div. Ct.) ("*Kerry #1*"), upon which the plaintiffs rely, is not persuasive on this issue not only because of the reversal of the Court of Appeal but also because, as addressed below, it turns on the finding of fact that there were separate trust funds for the two sections of the relevant pension plan.

218 The issue was also raised directly in *Barclays Bank, supra*. In that decision, amendments were made to a defined benefit pension plan to add a defined contribution section for purposes similar to those in *Kerry*. In reaching his decision on whether the amendments created a single trust fund for the two sections of the pension plan or separate trust funds, Neuberger J. expressed the view at para. 54 that, as a matter of general law, there was no intrinsic reason why a single trust fund could not be established in respect of a pension plan having both a defined benefit and a defined contribution section. He observed that there are many types of private trusts that have been created for various purposes that involve different classes of beneficiaries having an interest in the same fund. In his view, with which I agree, the issue as to whether a single trust fund was accomplished in any given situation is fact specific, depending entirely on the text of the relevant documentation. My conclusions with respect to the factual circumstances of the present matter are addressed in the next section.

219 Based on the foregoing, I conclude that (1) there is no support in the case law for the plaintiffs' proposition that the assets of an "exclusive benefit trust" may not be used for the benefit of members of a defined contribution section added to a pension plan previously structured solely as a defined benefit plan, and (2) more generally, there is judicial support for, and no legal principle prohibiting, amendments to a pension plan that establish a defined contribution section that exists together with a defined benefit section, with the same trust fund supporting the payment of benefits under each section of the plan.

Do the 1994 and 1998 Amendments Achieve Continuation of a Single Trust Fund in Respect of the Plan?

220 The remaining question is whether, as a contractual matter, the 1994 and 1998 Amendments achieved the intended result of entitling the Members of the defined contribution section of the Plan to the benefit of the Trust Fund or whether they had the effect of establishing a separate trust fund for the benefit of the Members of the defined contribution section. The plaintiffs have also raised a related, but separate question, of whether the administration of the investment accounts of the Members of the defined contribution section, or the arrangements pertaining to the investment of the assets allocated in respect of such accounts, resulted in the creation of a separate trust fund. This separate question is dealt with in a later section.

221 There is nothing in the 1994 and 1998 Amendments that purports to establish a separate trust fund to receive contributions in respect of the defined contribution section of the Plan. The issue for the Court is, therefore, whether the Amendments had this result given the context in which they were implemented.

222 In *Barclays Bank*, Neuberger J. identified a number of provisions that indicated that the amendments had been drafted to constitute a single trust fund in respect of two pension schemes. I think the same result has been achieved in the present proceeding based on the wording of the 1994 and 1998 Amendments. For this purpose, the following provisions of the 1994 Plan Text are relevant.

223 First, no amendments were made to the Trust Agreement at the time of the 1994 and 1998 Amendments. All references to the Plan continued to refer to the Plan as a collectivity without distinction between the defined benefit section and the defined contribution section of the Plan. Similarly, all of the assets of the Trust Fund are held by the Trustee and are invested collectively by the Trustee. There is also nothing in the Trust Agreement or the Plan that suggests that the claims of a Member of either section of the Plan are limited to a subset of assets in the Trust Fund. In addition, the corresponding references to the Trust Fund in the Plan refer to a single Trust Fund, including the definition of Pension Fund in section 2.28 and the provisions relating to the Trust Fund in Article 13. From the absence of wording that reflects a distinction between the two sections of the Plan in the Trust Agreement, or in references to the Trust in the Plan text, I think it is reasonable to infer an intention that (1) the Trust Fund was to remain a single fund and (2) the Trust Fund assets were to be available to satisfy obligations under both sections of the Plan.

224 Second, there are numerous references to a single "Plan" in the 1994 Plan Text. For example, sections 1.05, 1.06 and 1.07 refer to the Plan in the singular. Similarly, the Plan is structured to provide that the members of either section of the Plan are also "Members" of the Plan. Accordingly, Part A, which establishes the general framework for eligibility, membership, retirement benefits, death benefits, disability benefits and beneficiary entitlement, applies to the Members of both the defined contribution and the defined benefit sections making no distinction between the two sections except to the extent of the different benefits payable under the sections of the Plan. The approach to these issues in the Plan is significantly tighter than the approach adopted in the pension plan documentation in *Kerry* described below which, in any event, the Court of Appeal held in *Kerry #2* constituted a single pension plan and trust fund.

225 Third, the termination provisions in section 15.03 of the Plan do not contemplate different treatment for Members of the two sections of the Plan. The Plan does not purport to rank the claims of the Members of either section ahead of the claims of the Members of the other section in such circumstances. To the contrary, rather than establishing a regime in the event of a Plan insolvency or a winding-up, section 15.03(d) provides that any reduction of benefits shall be in the manner prescribed by the Act.

226 Fourth, the provisions of Part A of section 4.02 of the Plan contemplate contribution holidays without drawing a distinction between the Company's obligations under the defined benefit section and the defined contribution section of the Plan.

227 In addition, for the reasons set out below, there is nothing in the manner of the administration of the investment accounts of the Members of the defined contribution section that flows from the 1994 and 1998 Amendments and results in the creation of a separate trust fund in favour of such Members. While I have treated this as a separate issue, the determination reached below on this issue is also supportive of the conclusion that the Trust Fund supports both sections of the Plan.

Conclusion

228 For the foregoing reasons, I am of the opinion that HBC had the contractual power under the Plan to amend the Plan pursuant to the 1994 and 1998 Amendments to establish the defined contribution section of the Plan, to which the Zellers and Kmart employees were introduced as Members. I am also of the opinion that the legal effect of the 1994 and 1998 Amendments is that a single trust, the Trust Fund established under the Trust Agreement, supports both the defined benefit section and the defined contribution section of the Plan.

Contribution Holidays to Fund Defined Contribution Obligations

229 Based on the determination in the preceding section, if HBC had paid into the Trust Fund the employer contributions required in respect of the defined contribution section of the Plan, there would have been no issue regarding compliance with the Exclusive Benefit Provisions. However, the 1994 and 1998 Amendments also added the provisions of Part A sections 4.02 and 4.03 and of Part C section 2.03 to the Plan (and its counterpart in Part D, section 3.03, in respect of Kmart employees prior to their transfer to membership under Part C of the Plan), which collectively grant HBC the right to take contribution holidays using surplus assets in the Trust Fund in respect of its payment obligations as the employer under the defined contribution section of the Plan.

230 Therefore, in this section, I address the contractual issue of whether the making of such amendments, and the taking of contribution holidays pursuant to such provisions, contravened the Exclusive Benefit Provisions. These two aspects of the issue raise the same questions and are, therefore, determined by the same analysis, subject to the additional issue addressed later in these Reasons in respect of the administrative and investment arrangements pertaining to the defined contribution section.

231 The plaintiffs allege that the taking of contribution holidays under the Plan to fund HBC's contributions to the defined contribution section of the Plan contravenes the Exclusive Benefit Provisions because the Trust Fund was established for the exclusive benefit of the Members of the defined benefit section of the Plan and cannot be used indirectly by HBC for its own purposes.

232 In approaching this issue, I have addressed the following questions:

1. are the provisions of the Plan regarding contribution holidays in respect of the defined contribution section of the Plan invalid as a matter of general principles of the law of contract? and
2. did the 1994 and 1998 Amendments, and the taking of contribution holidays, contravene the Exclusive Benefit Provisions?

Are the Provisions Respecting Contribution Holidays Invalid?

233 The conceptual framework for the analysis of contribution holidays was articulated by Cory J. in *Schmidt, supra,* at 654 and 656 [emphasis added]:

> ... 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.
>
> ... 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.
>
> 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.
>
> 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.

234 These statements make it clear that contribution holidays do not constitute either an encroachment upon a pension trust fund or a reduction of accrued benefits. They also confirm that an entitlement to surplus on termination of a pension plan is not a prerequisite to an employer's right to take contribution holidays if the pension plan language otherwise permits contribution holidays. On the basis of the foregoing, HBC is *prima facie* entitled to take contribution holidays to satisfy its obligations under the Plan in respect of both the defined benefit section and the defined contribution section.

235 The plaintiffs argue, however, that HBC is not entitled to take contribution holidays in respect of its obligations under the defined contribution section based on the characterization of the Trust Fund as an "exclusive benefit trust". They argue that, notwithstanding the general principles in *Schmidt*, the use of the assets in an "exclusive benefit trust" for contribution holidays is prohibited as a use of funds by the employer or, alternatively, that contribution holidays constitute a prohibited "cross-subsidization" of the defined contribution section of the Plan using assets in the Trust Fund. On either theory, they say that, even if the Zellers and Kmart employees were validly introduced as Members of the Plan, the taking of contribution holidays using surplus assets in the Trust Fund contravenes the Exclusive Benefit Provisions because such actions constitute the use of Trust Fund assets to benefit HBC rather than the Members of the defined benefit section.

236 In *Kerry #2*, the Court of Appeal concluded that the employer was entitled to take contribution holidays in respect of its obligations under the defined contribution section of the pension plan using the assets of the trust fund. I think the conclusion in *Kerry #2* applies to the issue in this proceeding as well. However, as the decision in *Kerry #2* was released after these Reasons for Judgment were substantially completed, and as the decision of the Court of Appeal does not address a number of the arguments raised by the plaintiff in this proceeding, I have retained the following discussion which addresses the submissions made to the Court at the hearing of this proceeding.

Merger Cases

237 The first argument of the plaintiffs is more general than the second. They argue that there is a common law principle that the assets of an "exclusive benefit trust" cannot be used directly or indirectly for purposes other than the provision of benefits to members of the related pension plan. As a contractual matter, they say this principle is embodied in the Exclusive Benefit Provisions. They submit that the application of this principle prohibits the taking of contribution holidays by an employer using the assets of an "exclusive benefit trust" because it is not a member of the pension plan. In support of their position, the plaintiffs rely on certain decisions dealing with the merger of pension plans and related trust funds.

238 There are two problems with this position. First, the principle asserted by the plaintiffs is directly addressed in the italicized statement of Cory J. in *Schmidt* set out above. In this context, I can see no distinction in principle between contribution holidays taken in respect of obligations under the defined benefit section of the Plan and contribution holidays taken in respect of the defined contribution section. I would note that the Catalytic pension trust in *Schmidt*, about which Cory J. directed these comments, appears to have satisfied the plaintiff's definition of an "exclusive benefit trust".

239 Second, I do not think that the authorities relied upon by the plaintiffs support the principle that they assert. They submit that the 1994 and 1994 Amendments constitute a merger of the Plan with the Zellers and Kmart Plans and that the decisions upon which they rely establish that an "exclusive benefit trust" may only be merged with another pension plan if the trust continues intact and a separate trust fund is established for the members of the merging plan. However, when examined in greater detail, the decisions relied upon by the plaintiffs exhibit considerably greater flexibility than they suggest. In particular, consistent with *Schmidt,* the decisions indicate that, subject to respecting any rights of members of a plan to surplus on termination of the plan, the law countenances the use of assets of pension trust funds after a merger for purposes of funding an employer's obligations in respect of the merging pension plans even if one of the trust funds qualifies as an "exclusive benefit trust".

240 To illustrate this point, I propose first to address the decision in *Heilig et al.* v. *Dominion Securities Pitfield Ltd. et al.* (1989), 67 O.R. (2d) 577 (Ont. C.A.), as it informs an important aspect of the reasoning below, and then to consider the cases relied upon by the plaintiffs.

241 In *Heilig*, the Court of Appeal addressed an "amalgamated plan" after an amalgamation of two companies, A.E. Ames & Co. Ltd. ("Ames") and Dominion Securities Limited ("DS"). Both amalgamating corporations had established defined benefit pension plans for their employees and related trust funds to which to all contributions were paid. The funds appear to satisfy the requirements of an "exclusive benefit trust" as defined by the plaintiffs. The contractual provisions of the pension plans of the two amalgamating corporations were substantially similar. The only substantial difference between the two plans was the provision in the Ames plan that any surplus should never revert to the company. The amalgamated company had agreed to incorporate this provision into the continuing plan so that the rights of the members of the Ames plan to surplus on termination were preserved. While it is not made explicit, it appears that the continuing plan was the DS pension plan. The members of the Ames plan therefore became members of the DS plan and the trust funds of the pension plans of the two amalgamated corporations were commingled after the amalgamation. The issue for the Court of Appeal was whether the merger of the plans, as described above, constituted a termination of the Ames plan. Grange J.A. writing for the Court of Appeal held that the amalgamation and merger did not terminate the Ames plan.

242 The decision is significant in two respects that contradict the plaintiffs' position regarding an "exclusive benefit trust".

243 First, Grange J.A. upheld the pension plan merger arrangements even though they had the effect of extending the benefit of surplus entitlement to the DS employees. Grange J.A. does not set out his reasoning for this determination. However, I think the conceptual answer is to be found in the interaction between the law of amalgamation and the operation of the membership provisions of the Ames plan. As a result of the amalgamation, the members of the DS plan became eligible to become members of the Ames plan, and vice versa, with the result that, if DS had chosen to introduce the DS employees to the Ames plan, the members of the Ames plan would have had to share any surplus in the Ames plan with the members of the DS Plan. The same result was achieved in *Heilig* through amendment of the provisions of the continuing DS plan to which the Ames employees were introduced as members. Under either option, however, the decision lies with the amalgamated corporation and the entitlement to any surplus on termination was not restricted to the members of the Ames plan at the time of the amalgamation.

244 Second, although it may be obiter because there is no indication that the DS plan was in a deficit position, Grange J.A. also held that the surplus in the defined benefit plan of one of the amalgamating corporations could be used to fund a deficit in the defined benefit plan of the other amalgamating corporation:

> For myself, I see no reason why the two pension plans of merging companies cannot be merged into one continuing plan just as the two companies amalgamate into one continuing company. Certainly, there can be no loss of benefit for the beneficiaries of either plan without their consent. But that does not happen in the merger of plans such as that in the case at bar. It is a defined benefit plan and the benefits remain. *It makes no difference that one plan may be in surplus and other not.* There is no obligation for an employer contribution until actuarial figures require it. The merger is not unlike the situation resulting from an expansion of the company staff and a large influx of new members to the plan [emphasis added].

245 On this basis, provided the rights of the members of both plans are preserved on the merger of the pension plans, including the rights to surplus on termination, absent unusual wording in the merging plans, an amalgamated corporation may merge the pension plans of the amalgamating corporations and co-mingle the assets of the related funds to eliminate funding obligations in respect of a pension plan of one of the amalgamating corporations that was in deficit. *Heilig* therefore indicates that an employer can use surplus assets (1) to cure an existing deficit in one of the merging plans and (2) to satisfy contribution obligations in respect of the employees of the other merging plan on a prospective basis.

246 Accordingly, *Heilig* contradicts the broad proposition of the plaintiffs that the assets of an exclusive benefit trust can only be used in an on-going context for the benefit of the members of the pension plan and, in particular, cannot, through a merger of pension plans and the related trust funds, be used by an employer to satisfy its funding obligations. More generally, *Heilig* also demonstrates that, even in the case of an "exclusive benefit trust", there is no absolute right on the merger of pension plans to keep the assets of the trust separate from the assets of other merging plans. In such circumstances, the employer has a choice - to extend the benefit of the entitlement to surplus on termination to all members of the continuing plan or to administer the trust funds separately. If it chooses the former, it does not contravene the Exclusive Benefit Provisions.

247 The plaintiffs rely on the following three cases, which they say, in effect, contradict the principle in *Heilig*. For the reasons set out below, I do not think that any supports the proposition put forward by the plaintiff but are, instead, consistent with these principles inferred from *Heilig*.

248 In *Aegon Canada Inc.* v. *ING Canada Inc.* (2003), 38 C.C.P.B. 1 (Ont. C.A.), the Court of Appeal considered circumstances resulting from a "merger" of two pension plans, following an amalgamation of the two plan sponsors. As a condition of obtaining consent to the merger, the merged corporation ("NN Life") gave an undertaking to the Pension Commission of Ontario ("PCO") that it would keep the assets of one of the pension plans (the "Halifax Life plan") separate from the assets of the other plan (the "NN Life plan"). The PCO imposed this condition because the Halifax Life plan documentation provided that the members of the plan were entitled to any surplus in the event of its termination.

249 The specific facts in *Aegon* distinguish that decision from *Heilig* and from the facts in the present proceeding in several respects. First, despite the alleged "merger", the two pension plans were administered separately. The decision in *Aegon* turned on the fact that there were two separate pension plans and pension plan trusts and, therefore, the assets of the two plans could not be consolidated for purposes of calculating the solvency position of the NN Plan. In these circumstances, it is not disputed that the assets of the Halifax Life plan could not be used to fund the employer's obligations under the NN Life plan. However, this conclusion results from NN Life's decision to keep the pension plans separate, not from the presence of an "exclusive benefit trust".

250 Second, the decision is silent on two important considerations. *Heilig* suggests that NN Life could have avoided the administration of two separate plans if it had extended the benefits of the Halifax Life plan to all members of the merged NN Life plan. There is, however, no indication that this option was considered and, if so, rejected by NN Life. It is possible that NN Life was not prepared to "top up" the benefits to the NN Life employees in this manner. However, for this reason, there is nothing in the *Aegon* decision that contradicts the conclusion from *Heilig* that NN Life could have used the surplus funds of the Halifax Life plan in this manner to satisfy the solvency obligations of NN Life in respect of the NN Plan, which was in deficit, despite the presence of the exclusive benefit language relied upon by the plaintiffs. In addition, there is also nothing in the decision that suggests that the continuing corporation would have been prohibited from accessing the surplus in the Halifax Life plan by introducing NN Life members to the Halifax Life plan. Under either of these arrangements, the employer could have accessed the surplus assets in the Halifax Life plan to fund its pension obligations.

251 In summary, the circumstances in the *Aegon* proceeding, as well as the actual decision, demonstrate that the prohibition against the use of the assets of the Halifax Life pension plan trust was far from absolute and resulted entirely from the decision of NN Life to proceed after the amalgamation to administer both plans under the umbrella of a merged plan in the manner contemplated in its undertaking to the PCO.

252 In *Sulpetro Ltd. Retirement Plan Fund (Trustee of)* v. *Sulpetro Ltd. (Receiver-Manager)* (1990), 66 D.L.R. (4th) 271; varying 57 D.L.R. (4th) 120; leave to appeal to S.C.C. refused, [1990] S.C.C.A. No. 247, 72 D.L.R. (4th) vii, the Alberta Court of Appeal addressed the entitlement to surplus in a pension plan the ("CanDel pension plan") that was terminated upon the insolvency of Sulpetro Ltd. The plaintiffs say the provisions of the trust fund pertaining to the CanDel pension plan qualified it as an "exclusive benefit trust". Sulpetro Ltd. had previously undergone two amalgamations as a result of which, in the amalgamated Sulpetro Ltd., there were three historic employee groups and three pension plans with different benefits and related pension trusts. The Court found that the members of the CanDel plan were entitled under that plan to any surplus existing on termination of the plan but that the members of the two other plans were not so entitled. The court was therefore required to address the legal significance attached to the actions of amalgamated Sulpetro Ltd. in establishing a merged plan for all employees on a "going-forward" basis and co-mingling the trust funds of all three historic plans in support of its obligations under the merged plan.

253 The Alberta Court of Appeal held that Sulpetro Ltd. was legally able to merge the three pension plans but was prohibited from merging the assets of the CanDel plan with the assets of the two other plans as this would have extinguished the members' rights to any surplus on termination. It also held that the CanDel plan did not terminate on the relevant amalgamation but, instead, continued thereafter "... in the form of the New Sulpetro plan and trust agreement". I understand this to mean that the terms of the CanDel plan were amended to be the terms of the merged Sulpetro Ltd. pension plan but that the assets of the CanDel plan should have been segregated in a separate trust fund.

254 It appears from the discussion regarding the position of the two other employee groups that the issue in *Sulpetro* would not have arisen if the merged Sulpetro Ltd. pension plan and trust agreement had provided that all members of the merged plan were entitled to any surplus on termination. In addition, the merged Sulpetro Ltd. pension plan had a surplus on termination that apparently exceeded the surplus attributable to the CanDel plan. It is therefore quite possible that Sulpetro Ltd. never had recourse to the assets to fund any of its obligations. In any event, the decision does not address Sulpetro's entitlement to use assets pertaining to the CanDel plan for contribution holidays or otherwise. In addition, because the issue of surplus entitlement only arose after the insolvency of amalgamated Sulpetro Ltd., the decision does not address the right of Sulpetro Ltd. to access the surplus in the notional CanDel pension plan trust by introducing new members into the CanDel pension plan on or after the amalgamation in the manner discussed above.

255 In summary, therefore, *Sulpetro* does not address the circumstances and issues that would give rise to the rule propounded by the plaintiffs. Moreover, I think it is entirely consistent with the principles elaborated above with respect to *Heilig*, which negate the existence of any such rule.

256 Lastly, in *Buschau et al.* v. *Rogers Communications Inc. et al.* (2000), 195 D.L.R. (4th) 257 (B.C.C.A.) ("*Buschau #1*"), the British Columbia Court of Appeal considered the legal consequences of a purported merger involving four pension plans on the right of members of one of the plans (the "Premier Plan") immediately prior to the merger to invoke *Saunders* v. *Vautier* (1841), 4 Beav. 115, 49 E.R. 282 (Eng. Rolls Ct.), aff'd (1841), 41 E.R. 482, 1 Cr. & Ph. 240 (Ch. D.) to terminate the related trust fund. The Premier Plan had been closed since 1984 but the employer refused to terminate the trust fund, increase benefits payable under the pension plan, or distribute bonus payments. The British Columbia Court of Appeal found that the members' rights, including their rights to any surplus on termination, continued after the merger. The basis of the decision was that these rights of the members of the Premier Plan were protected through a continuation of the trust in equity rather than a co-mingling of the trust rights and assets with the trust rights and assets of the trust funds related to the other pension plans that were merged with the Premier Plan. The decision in *Buschau #1* was, however, ultimately rendered moot by the determination of the Supreme Court in *Buschau #3* that the rule in *Saunders* v. *Vautier* is not available to members of a pension plan trust.

257 The plaintiffs say that the trust fund relating to the Premier Plan qualified as an "exclusive benefit trust". Even if true, *Buschau #1* does not support the principle the plaintiffs put forward. It is limited to a consideration of the survival of rights under a trust fund to terminate that trust.

258 In *Buschau #1*, as in *Sulpetro* and *Aegon*, the employer gave no consideration to extending the entitlement to surplus on termination to all members of the merged plan. The employer also gave no consideration to re-opening the Premier Plan to new members to access the surplus until after commencement of the litigation, which the Court held was too late. Because the decision does not address these issues, it cannot be said to demonstrate that no use may be made of the assets in an "exclusive benefit trust" to benefit persons other than members of the related pension Plan. In addition, because the case addressed survival of rights under *Saunders* v. *Vautier* which requires a closed trust, *Buschau #1* presents a unique legal issue having negligible precedential value. It is inconceivable that such rights could, as a practical matter, be co-mingled with similar rights of members of any other merged plan unless those persons were introduced as new members of the Premier Plan, which did not occur.

259 Based on the foregoing analysis of the *Aegon, Sulpetro* and *Buschau #1* decisions, I conclude there is no support in these decisions for the proposition, which is central to the plaintiffs' position in this case, that the assets of an "exclusive benefit trust" cannot be used by an employer to take contribution holidays because such use is directly or indirectly for purposes other than the provision of benefits to members of the related pension plan. They also do not demonstrate a legal prohibition against merging "exclusive benefit trusts". In particular, they do not expressly state that a pension plan for which surplus entitlement rests with the members cannot be merged with another pension plan. The cases merely indicate that any such merger must protect this entitlement.

Cross-Subsidization Cases

260 The plaintiffs' second argument is that the case law demonstrates a prohibition against "cross-subsidization" of a pension plan using the trust fund assets of an "exclusive benefit trust". However, each of the three decisions relied upon by the plaintiffs turns on the determination that the relevant documentation gave rise to separate pension plans and separate trust funds. Where it is found that two separate funds exist, there is no principle that can support "cross-subsidization" in the form of payment of the pension benefits of one group of beneficiaries by using assets in a trust fund intended to fund the pension benefits of a separate group of beneficiaries. The authorities relied on by the plaintiffs do not, however, address the present circumstances in which a single pension plan, having separate defined contribution and defined benefit sections, is supported by a single trust fund. Accordingly, I do not think they support the proposition put forward by the plaintiffs.

261 The decision in *Aegon* has been discussed above. In that decision, the employer gave the PCO an undertaking to keep the assets of the Halifax Life pension plan trust fund segregated from the assets of the NN Life pension plan trust fund. Accordingly, as a matter of trust law, the assets of the Halifax Life plan were not available to fund the obligations of NN Life in respect of the NN Life plan. The decision, therefore, does not demonstrate that an employer has no ability to access surplus assets in a single trust fund established in respect of two sections of a pension plan, by cross-subsidization or otherwise.

262 Second, in *Kemble* v. *Hicks*, [1999] WL 982442, [1999] O.P.L.R., [1000] Pens. L.R. 287 (Ch. D.), the court considered a defined benefit pension plan to which a defined contribution section had been added, at which time the existing members were provided with a conversion option. The court considered the validity of a contribution holiday taken out of surplus assets in a trust established in respect of the defined benefit pension plan to fund the employer's obligations in respect of the defined contribution section. The court concluded that the defined contribution section was a separate scheme from the defined benefit plan, rather than part of the same overall fund or scheme. On this basis, it concluded that the defined benefit members of the plan "improperly and unfairly subsidized" the defined contribution members "because the surplus remained held on the trusts of the [defined benefit] scheme".

263 The decision does not set out the plan and trust documentation in sufficient detail to allow an assessment of the basis on which the court concluded that the surplus assets were held in trust exclusively for the members of the defined benefit section of the pension plan. However, it is clear that the decision turned on the court's determination that the amendments to the pension plan, including the specific payment obligations in respect of employer contributions to the defined contribution plan, did not maintain the trust as a single fund in favour of the members of both the defined benefit and defined contribution pension plans. Because the opposite determination has been made above in the present matter, the decision in *Kemble* is not applicable in addition to not being technically binding on this

Court. In addition, it should be noted that in *Barclays Bank* Neuberger J. distinguished *Kemble* on the basis that the actual wording of the contribution holiday provision did not effectively permit contribution holidays in respect of the defined contribution section of the pension plan.

264 Lastly, the applicants rely on the decision of the Divisional Court in *Kerry #1, supra*. The Divisional Court upheld a decision of the Ontario Financial Services Tribunal (the successor to the PCO) that denied consent to a proposed amendment that would have entitled the employer to take contribution holidays using surplus assets in the pension plan trust fund to fund the employer's obligations in respect of the defined contribution plan. The Divisional Court found that the proposed amendments to the pension plan would violate the trust agreement pertaining to the pension plan trust fund because the amendments contemplated using the trust fund "for purposes other than for the exclusive use of benefit of the [defined benefits section] members".

265 As mentioned above, however, the Court of Appeal reversed the Divisional Court in *Kerry #2* and held that (1) the arrangements constituted a single pension plan and trust fund and (2) the employer was entitled to take contribution holidays using the assets of the trust fund in respect of its obligations under the defined contribution section of the pension plan. The decision of the Court of Appeal indicates that the arrangements in *Kerry* did not constitute a prohibited "cross-subsidization" of a separate pension plan using the assets of an "exclusive benefit trust. It therefore contradicts the plaintiffs' position. Even on its own terms, however, the decision of the Divisional Court in *Kerry #1* does not assist the plaintiffs.

266 The Divisional Court suggested that *Aegon* articulated a general rule against "cross-subsidization" in rejecting the Tribunal's conclusion that the employer could rectify the invalidity of the amendments by designating the members of the defined contribution section to be "beneficiaries of the trust in respect of the Fund in [the defined benefit section of the Plan]":

> The "remedy" proposed by the Tribunal conflicts with the principles set out in *Aegon Canada Inc.* v. *ING Canada* (2003), 34 C.C.P.B. 1 (Ont. Sup.Ct. per Lane J.) at para. [43] and affirmed by the Ont. C.A.: at (2003), 38 C.C.P.B. 1 and in several other appellate decisions, which hold that an employer, in similar circumstances, may not amend a pension plan to permit an employer to "cross-subsidize" its contribution obligations toward employees participating in one part of a single registered pension plan by using the assets of a trust fund *held exclusively for members participating under another part of the same plan*. The remedy proposed by the Tribunal would merge, co-mingle and expose the liabilities and assets of Part 2 members to and with the trust assets of Part 1 members, who are the exclusive beneficiaries of the Trust Fund (at para. 73) [emphasis added].

267 It is clear from this passage that the prohibition against "cross-subsidization" proceeds from a determination that the assets of the trust fund in the particular circumstances in *Kerry* were held for the exclusive benefit of the members of the defined benefit section. It is also is clear that the Divisional Court concluded that the amendments to create the defined contribution section of the plan created two separate pension plans and two separate trust funds:

> In our view, the Tribunal erred when it held that "we don't have two funds in relation to a single pension plan. Rather, we have one pension fund" (p. 11). *The 2000 Plan text, no matter what language is employed, clearly creates two (2) funds.* The Appellants, who elected to stay in Plan 1, as they were entitled to do, are or have contributed to the DBP and have a beneficial interest in all of the funds in the Plan. The DCP, Part 2, fund is completely separate and funded separately. The Plan 2 DCP employees have no connection to the Part 1 DBP plan and cannot legitimately be

> given a beneficial interest in the fund on the DBP side. *Here, there are in law, two (2) pension plans, two (2) pension funds and two (2) classes of members* (at para. 72) [emphasis added].

268 As in *Kemble* v. *Hicks*, the decision does not set out the plan and trust documentation, including the proposed amendments, in sufficient detail to provide guidance as to the language upon which the Divisional Court relied in reaching its conclusion and the related conclusion that the proposed amendments created two separate pension plans rather than one overall plan. However, in the present proceeding, the Court was also provided with some additional materials from the court file for the *Kerry* proceeding. These materials reveal that, while the investment arrangements pertaining to the defined contribution section appear to be substantially similar to the investment arrangements with Standard Life addressed below, the provisions in the Plan documentation depart from the approach adopted in the 1994 and 1998 Amendments.

269 The pension plan document in *Kerry* evidences an intention to separate the assets in the trust fund that are referable to the defined benefit section of the plan from those that are referable to the defined contribution section of the plan. For example, the definition of "Pension Fund" in the *Kerry* pension plan segregates the applicable fund into two separate funds. This distinction is carried forward into the provisions dealing with a plan wind-up, which provide separate treatment in respect of assets attributable or credited to the members of the two sections of the plan. In addition, section 16.04 of the pension plan in *Kerry* provides that members of each section of the pension plan shall have recourse only to the assets in the part of the pension trust fund segregated to fund benefits in respect of pension entitlements of members of that section.

270 The Divisional Court's statement must therefore be understood in the context of its finding that there are separate pension plans, trusts and classes of members. In that context, it is an accurate statement of the principles of trust law as they apply to pension plans. It is not, however, an endorsement of the plaintiffs' proposition, which addresses the significantly different situation of a single trust fund supporting benefits payable under two different sections of a pension plan.

Conclusion

271 Based on the foregoing, I do not believe that there is any general principle in the case law that prohibits the contribution holidays taken by HBC after the 1994 and 1998 Amendments in respect of its obligations under the defined contribution section of the Plan.

Did the Contribution Holidays Contravene the Exclusive Benefit Provisions?

272 The question remains, however, whether the action of taking the contribution holidays contravened the Exclusive Benefit Provisions. This question has been addressed by the plaintiffs (1) solely on the basis of the legal relationships established by the 1994 and 1998 Amendments, and (2) alternatively, also taking into consideration the actual manner of administration and investment of the contributions to the defined contribution section of the Plan. I will address each in turn.

273 Addressing the question solely on the basis of the legal relationships established by the 1994 and 1998 Amendments, I do not think that HBC's actions in taking contribution holidays using surplus assets in the Trust Fund can, logically, constitute a breach of the Exclusive Benefit Provisions or other Plan documentation. The issue of whether assets are removed from the Trust Fund when contribution holidays are taken is entirely determined by the conclusions that (1) the Members of the defined contribution section of the Plan were within the class of potential Members of the Plan; (2) the provision of defined contribution pension benefits was within the scope of the purposes for which the Trust Fund was established; and (3) the 1994 and 1998 Amendments did not establish a separate trust fund having a purpose restricted to funding defined contribution pension benefits. While not binding on the Court, it is also noteworthy that Neuberger J. reached a similar conclusion in *Barclays Bank*.

274 The second issue raised by the plaintiffs is whether the manner in which the contribution holidays were implemented gave rise to a breach of the Exclusive Benefit Provisions, given the administrative and investment arrangements pertaining to the defined contribution section,. Any such breach must be in respect of the removal of assets from the Trust Fund. This issue is part of the larger question of whether the administration of the investment accounts of the Members of the defined contribution section, or the investment arrangements pertaining to the assets allocated in respect of such accounts, resulted in the removal of assets from the Trust or the establishment of a preference or priority in favour of the Members of that section that contravened the Exclusive Benefit Provisions. This larger issue is addressed below.

275 However, for the purposes of the present issue, the conclusion reached below - that the plaintiffs have failed to establish that the manner of implementing the contribution holidays taken in respect of HBC's obligations under the defined contribution section resulted in a removal of assets from the Trust Fund - is also supportive of the conclusion that the taking of contribution holidays did not contravene the Exclusive Benefit Provisions or other Plan documentation.

Conclusion

276 Based on the foregoing, I conclude that the 1994 and 1998 Amendments granting HBC the right to take contribution holidays in respect of its obligations under the defined contribution section, and its actions in taking such contribution holidays, are valid as a matter of the law of contract and, in particular, did not contravene the Exclusive Benefit Provisions.

Do the Administrative and Investment Arrangements Create a Breach of Trust?

The Plaintiffs' Two Submissions

277 This section addresses the issue of whether the administration of the defined contribution section, based on the structure established by the Trust Agreement and the administrative and investment arrangements entered into in respect of the Members' investment accounts, gave rise to a breach of trust.

278 The plaintiffs make two submissions in respect of the legal consequences of the manner of administration of the defined contribution section of the Plan.

279 The plaintiffs' principal submission is that the administration and investment of the defined contribution section of the Plan requires that all contributions be placed in individual accounts of the Members of the section outside the Trust Fund. They argue that this aspect of the Plan structure has the result that HBC's contributions by way of contribution holidays were also removed from the assets of the Trust Fund, thereby giving rise to a breach of Trust.

280 The plaintiffs' second submission is that the 1994 and 1998 Amendments, together with the administrative and investment arrangements pertaining to the defined contribution section of the Plan, established a legal priority or preference in favour of the Members of that section to the detriment of the Members of the defined benefit section. The plaintiffs argue that any such priority or preference contravenes the Exclusive Benefit Provisions because it does not benefit the Members of the Plan at the time of the 1994 and 1998 Amendments. While this position was not fully developed, I believe the plaintiffs' argument is that HBC's power of amendment did not extend to implementation of the 1994 and 1998 Amendments in the face of such contravention and, therefore, both the establishment of the defined contribution section, and the taking of contribution holidays in respect of HBC's obligations in respect thereof, were invalid.

281 The difference between the two arguments is as follows. The first argument sees a breach of trust arising based on the existence of a separate trust fund for the Members of the defined contribution section. The contravention of the Plan documentation takes the form of the transfer of assets out of the Trust Fund on behalf of persons who are not Members for the indirect use of HBC, which was also not a Member of the Plan. The second argument proceeds on the basis that HBC could only have implemented the arrangements pertaining to the defined contribution section by providing a legal priority or preference to the Members of the defined contribution section within the Trust Fund, which they argue also contravened the Exclusive Benefit Provisions and was therefore invalid.

Analysis of the Plaintiffs' Submissions

282 The limited facts before the Court relating to the administrative and investment arrangements at the time of the 1994 and 1998 Amendments, and the new arrangements put in place in 2001, have been set out above. As the administrative and investment arrangements pertaining to the defined contribution section of the Plan were changed effective August 1, 2001, I will address the plaintiffs' two submissions, first, in the context of the arrangements existing prior to that date and, then, on the basis of the arrangements pertaining after August 1, 2001, which I believe continue to operate.

283 The onus lies on the plaintiffs to establish the factual basis for their submissions on a balance of probabilities. As discussed below in greater detail, this onus is more difficult to satisfy in the present proceeding because of the relatively modest amount of relevant evidence before the Court.

Arrangements During the Period January 1, 1994 to August 1, 2001

284 The plaintiffs' first submission requires a finding either that the manner of administration of the individual accounts of the Members of the defined contribution section, or the arrangements pertaining to the investment of assets in respect such accounts, during this period, involved the removal of assets from the Trust Fund. However, the evidence regarding the administrative and investment arrangements contemplated for the defined contribution section at the time of the 1994 and 1998 Amendments does not support such a finding.

285 With respect to the administration of the Member investment accounts, there is no evidence before the Court that establishes, on a balance of probabilities, that the assets paid into the Trust Fund after January 1, 1994 in respect of the defined contribution section were administered separately from the assets contributed in respect of the defined benefit section. While the Trustee kept notional accounts for each Member of the defined contribution section of the Plan, representing the Members' pension entitlements under the Plan, there is no evidence that funds or other assets were deposited into separate accounts for the administration of such accounts, or were otherwise removed from the Trust Fund for such purpose. For this reason, there is also no evidence that the taking of contribution holidays by HBC in respect of its obligations under the defined contribution section of the Plan resulted in the removal of any assets from the Trust Fund.

286 Similarly, during this period, it is clear that all of the assets of the Trust Fund were invested by the Trustee on a collective basis, principally if not exclusively through the mechanism of the master trust agreement described above. Under these arrangements, all invested assets remained assets of the Trust Fund subject to the provisions of the Trust Agreement. There is also no evidence that any assets were allocated to the investment accounts of the Members of the defined contribution section for investment in a different manner from the remaining assets of the Trust Fund. Accordingly, there is no basis for a finding that these investment arrangements gave rise to a breach of trust through the removal of assets of the Trust Fund.

287 The plaintiffs' second position requires a finding that the legal effect of the 1994 and 1998 Amendments, together with the administrative and investment arrangements pertaining to the defined contribution section of the Plan, was the establishment of a priority or preference in favour of the Members of this section to the detriment of the Members of the defined benefit section.

288 This issue requires a consideration of the Members' rights in the event of a winding-up of the Plan in a deficit situation. There is, however, no specific contractual provision in either the Plan or the Trust Agreement that supports the plaintiffs' position that the Members of the defined contribution section would be protected in the event of an insolvency of the Plan at the expense of the Members of the defined benefit section. As mentioned, section 15.03(d) of the 1994 Plan Text provides that any reduction of benefits on an insolvency of the Plan shall be in accordance with the Act. However, I am not aware of any provision of the Act that addresses the priority of claims of differing sections of a pension plan in such event. No case law or statutory provision addressing such rights and obligations including, in particular, the Members' rights in the event of a Plan deficit on a winding-up, was provided to the Court. Nor was there any formal legal argument or expert legal evidence before the Court addressing the relevant rights and obligations of the Members or the trustee under the Plan or the Trust Agreement. The only evidence on these issues was the conflicting testimony of Mr. Wagman and Mr. Hamilton, both of whom acknowledged they were not providing legal opinions. The issue therefore falls to be determined solely on the basis of the rights and obligations set out in the 1994 Plan Text, as amended by the 1998 Plan Agreement, and the Trust Agreement and the 1998 Trust Agreement, as applicable, during this period.

289 Based on this evidence, I conclude that there is no support for the plaintiffs' submission that, in the event of the insolvency of the Plan during the period, the entitlement of the Members of the defined contribution section would have been protected at the expense of the Members of the defined benefit section. More generally, there is no evidence that the legal effect of the 1994 and 1998 Amendments was to confer any preferential right or priority in respect of the assets of the Trust Fund upon the Members of the defined contribution section to the detriment of the Members of the defined benefit section. The one exception to this conclusion is the right of a retired Member of the defined contribution section, so long as the Plan is on-going, to transfer assets representing the balance in his or her investment account to an individual tax-sheltered arrangement or to apply it toward the purchase of a pension annuity. However, such a right does not constitute a breach of trust inasmuch as the assets are being applied directly toward the payment of pension benefits of a retired Member of the Plan.

Arrangements after August 1, 2001

290 In this section, I will consider the evidence regarding the legal consequences of the administrative and investment arrangements pertaining to the defined contribution section of the Plan in respect of the Zellers employees, for the period commencing August 1, 2001, and for the Kmart employees, in respect of similar obligations in effect during the period March 1, 1998 to August 1, 2001.

291 The issue is of some importance in view of the evidence of both expert actuarial witnesses in this trial that such arrangements are not uncommon. I note, as well, that similar investment arrangements were involved in the *Kerry* action. In addition, while the documentation is not set out in the decision, similar arrangements appear to have been involved in *Kemble* v. *Hicks* but not in *Barclays Bank*.

292 The administration and investment of assets in respect of the defined contribution section did not change after August 1, 2001 in any respect that is material for this proceeding except to the extent of the arrangements added by the Standard Life Policy. In particular, neither the Direction and Agency Agreement nor the Service and Fee Agreement bear on the issue of whether these arrangements resulted in a transfer of assets out of the Trust Fund.

293 With respect to this period, the plaintiffs' first argument again requires a finding that the administrative and investment arrangements after August 1, 2001, principally the Standard Life Policy, created a separate trust fund in respect of the defined contribution section of the Plan and thereby resulted in transfers out of the Trust Fund as contribution holidays were taken.

294 The plaintiffs' position is based largely on the fact that monies representing the entitlement of Members of the defined contribution section as of August 1, 2001 were physically transferred from Royal Trust to Standard Life and that, further monies have been transferred to Standard Life, or were transferred to Sun Life, as contribution holidays are or were taken by HBC on an on-going basis. The plaintiffs argue that, given the nature of the investment arrangements with these parties, such transfers constitute payments out of the Trust Fund. They submit that to the extent such transfers involved contribution holidays, they therefore constitute, or constituted, a diversion of the assets of the Trust Fund for the benefit of HBC.

295 Based on the evidence before the Court, I conclude that there is no basis for a finding that either (1) the transfer of assets to Standard Life effective August 1, 2001 at the commencement of the investment arrangements under the Standard Life Policy, or (2) the transfer of assets to Standard Life and Sun Life on account of contribution holidays taken by HBC, resulted in the transferred assets ceasing to be assets of the Trust Fund. The following four considerations are relevant to this conclusion.

296 First, the documentation provided to the Court in respect of these arrangements does not establish that the Members of the defined contribution section were the beneficial owners of the monies received by Standard Life or Sun Life. Insofar as the documentation addresses the issue of entitlement to the monies paid to Standard Life or Sun Life, it provides that the policyholder is Royal Trust in the case of the Standard Life Policy, or HBC in the case of the Sun Life Policy. One consequence of this structure is that any claim to enforce either Policy, including a claim for the return of all monies paid to these insurance companies, must be made by Royal Trust or HBC, respectively, rather than by the Members of the Plan in their individual capacities.

297 Second, in the case of the Standard Life arrangements, the documentation includes an express statement that the Standard Life Policy is to be held by Royal Trust as an asset of the Trust Fund. Accordingly, there is no substantive difference between the investment of the Trust Fund in pooled funds through the vehicle of the Standard Life Policy or the Sun Life Policy and the investment of the remaining Trust Fund assets in pooled funds through the vehicle of the master trust agreement, by which the remaining assets of the Trust Fund have been invested since 1988 as described above. I have disregarded as irrelevant for this purpose the one possible beneficial exception that investments made through the vehicle of the Policies may be entitled to the benefit of an insurance industry compensation scheme in the event of the insolvency of Standard Life.

298 Third, there are no provisions in either the 1998 Trust Agreement, or the limited documentation pertaining to these investment arrangements involving Standard Life and Sun Life, that contemplate any form of legal separation of the assets received and held by Standard Life or Sun Life from the remaining assets of the Trust Fund, apart from the physical possession by Standard Life and Sun Life.

299 Fourth, there is no expert opinion evidence, or case law, regarding the effect of an insolvency of Standard Life or Sun Life on the value of a Member's entitlement if there were less than complete recovery under the relevant insurance policy. On the basis of the documentation before the Court, I see no reason why any deficit would not be satisfied out of any surplus assets in the Trust Fund.

300 The plaintiffs' second argument requires a finding that the Standard Life Policy, and related agreements, or the Sun Life Policy, established a priority or preference in favour of the Members of the defined contribution section in respect of claims against the Trust Fund in the event of a winding-up of the Plan while in deficit.

301 The evidence before the Court on this issue is limited to the Standard Life Policy, and related documentation, and the Sun Life Policy. There are no contractual provisions of such documentation that bear on the issue of a priority or preference in favour of the Members of the defined benefit contribution section. There is also no case law before the Court that establishes that, in the event of an insolvency of HBC and an overall deficit of assets relative to pension liabilities, claims under the defined contribution section of the Plan would be treated differently from claims under the defined benefit section by virtue of the existence of the Standard Life Policy, or Sun Life Policy, as applicable, and the legal relationships established thereunder. As mentioned above, there was also no formal legal argument or expert legal evidence, if admissible, on this issue. Similarly, there is no evidence or case law establishing the position that the claims of the Members of the defined contribution section would be treated differently in the event of an insolvency of Standard Life.

302 The evidence before the Court is, therefore, insufficient to establish any legally effective preference or priority in favour of the Members of the defined contribution section in the event of a winding-up of the Plan or otherwise. More significantly, I do not think that the establishment of the arrangements with Standard Life by the acquisition of the Standard Life Policy, and execution of the related agreements by the trustee, could effect such a result. The creation of a preference or priority in favour of a class of beneficiaries under the Trust Fund in respect of claims against the Trust Fund would require a specific amendment to the Trust Agreement or the 1998 Trust Agreement, which did not occur.

303 Accordingly, I conclude that the plaintiffs have failed to establish that the arrangements contemplated by the Standard Life Policy and the Sun Life Policy displace the *pari passu* treatment of claims by all Members of the Plan in respect of the assets in the Trust Fund, including any proceeds realized in respect of the Standard Life Policy.

Conclusions

304 Based on the foregoing, I conclude that neither the 1994 and 1998 Amendments nor the administrative and investment arrangements pertaining to the defined contribution section of the Plan had the legal result of either (1) removing assets from the Trust Fund or (2) creating a preference or priority in favour of the Members of the defined contribution section in respect of claims against the Trust Fund. Accordingly, there is no support in the structure of these administrative and investment arrangements for either of the plaintiffs' submissions that such arrangements gave rise to a breach of trust by HBC or otherwise invalidated the 1994 and 1998 Amendments as an unauthorized exercise by HBC of its power of amendment under the Plan.

Qualification

305 It may be that, when examined in greater detail with the benefit of more complete evidence, the administrative or investment arrangements of a pension plan could present legal concerns, including concerns regarding the right of an employer to take contribution holidays out of assets otherwise used to support a defined benefit pension plan. However, the circumstances, if any, under which such concerns may arise are not addressed in these Reasons for Judgment and these Reasons are not to be taken as an endorsement of the plaintiffs' assertion that a legal basis exists for such a claim. The conclusion in these Reasons is limited to a determination that the plaintiffs have failed to demonstrate the factual pre-conditions to their arguments on a balance of probabilities.

Validity of the 1994 and 1998 Amendments under Equitable Principles

306 I concluded above that the 1994 and 1998 Amendments, and the taking of contribution holidays to fund HBC's obligations in respect of the defined contribution section of the Plan, were properly authorized as a contractual matter and, in particular, did not contravene the Exclusive Benefit Provisions. This section addresses whether HBC is subject to equitable obligations that either supplement or override the principles of the law of contract in the determination of the validity of the 1994 and 1998 Amendments and the taking of such contribution holidays.

Issues

307 The plaintiffs submit that HBC is subject to a fiduciary duty by virtue of (1) its position as the administrator of the Trust Fund and (2) the status of the Trust Fund as "an exclusive benefit trust". They submit that this duty imposes a requirement on HBC to prefer the interests of the Members of the Plan to its own self-interest. In particular, they argue that HBC is prohibited from making any amendments to the Plan that would adversely affect the interests of the Members of the Plan, at the time of the amendments, in the assets of the Trust Fund. On this basis, the plaintiffs assert that, even if the 1994 and 1998 Amendments are valid under the law of contract, they contemplate an improper use or diversion of the assets of the Trust Fund and, therefore, constitute a breach of HBC's fiduciary obligations that invalidates the Amendments. I will address each of these arguments in turn.

Is HBC Subject to a Statutory Fiduciary Duty?

308 The plaintiffs argue that section 22(4) of the *Pension Benefits Act* imposes a statutory fiduciary obligation on HBC by virtue of its role as the administrator of the Plan. Subsection 22(4) provides as follows:

> 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.

The plaintiffs submit that this fiduciary obligation extends to the exercise of the power of amendment of the Plan and, therefore, prohibits any amendment that would adversely affect the interests of the Members of the Plan at the time of any such amendment in the assets of the Trust Fund.

309 The plaintiffs' position is not, however, supported by the wording of the Act or the case law in this area. The issue was addressed in *Imperial Oil v. Superintendent of Pensions* (1995), 18 C.C.P.B. 198 (P.C.O.). In that decision, at paras. 32-34, the PCO concluded that section 22(4) of the Act did not apply to an employer that amended the provisions of a pension plan to impose more stringent eligibility requirements. The decision was based on the express distinction in the Act between the "administrator" and the "employer" of a pension plan:

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

310 I believe that *Imperial Oil* states the law in Ontario in respect of this issue. Therefore, under the Act, in exercising the power of amendment under the Plan, HBC is not acting as the administrator of the Plan. Accordingly, while it is subject to any contractual constraints set out in the Plan documentation relating to the exercise of the power of amendment, it is not subject to any additional or overriding fiduciary obligations emanating from its other role as the administrator of the Plan.

311 The issue was also raised in *Buschau #3* in the decision of Bastarache J. As discussed below, his comments suggest that any fiduciary obligations of the employer in that case in respect of the re-opening of the pension plan were grounded in a statutory obligation set out in section 8(10)(b) of the *Pension Benefits Standards Act (Canada)*, R.S.C. 1985, c. 32 (2d Supp.), rather than in equitable principles.

312 However, the applicable provision of the *Pension Benefits Standards Act (Canada)* approaches the issue of the liability of an employer differently than section 22(4) of the *Pension Benefits Act* in two respects. On the one hand, it imposes an obligation on the employer in circumstances in which it is not acting as an administrator. On the other, it requires a finding of the existence of a "material conflict of interest", thereby necessitating a consideration of whether the employer's conduct constituted an abuse of its power of amendment or otherwise offended community standards of reasonableness. Because of the different statutory approach, *Buschau #3* is not relevant to the determination of whether section 22 (4) of the Act imposes a statutory fiduciary obligation on HBC in the exercise of its power of amendment under the Plan.

313 Based on the foregoing, I conclude that, in the exercise of its power of amendment under the Plan, HBC is not subject to a statutory fiduciary obligation under the Act by virtue of its role as the administrator of the Plan.

Is HBC Subject to a Fiduciary Duty under Equitable Principles?

314 The plaintiffs also argue that HBC is subject to a general fiduciary duty in the exercise of the amending power. The principal basis for this assertion is that the Trust Fund is an "exclusive benefit trust". Based on the review of the case law below, I conclude that, in exercising the power of amendment under the Plan, HBC is not subject to a fiduciary obligation. However, these authorities indicate that HBC is subject to a duty not to exercise the power to amend the Plan for an improper purpose, which duty is generally described as a duty to act in good faith.

315 In support of their position, the plaintiffs cite a number of decisions including the following: *Huus* v. *Ontario (Superintendent of Pensions)* (2002), 58 O.R. (3d) 380 (C.A.); *Buschau #1, supra*; *Bathgate* v. *National Hockey League Pension Society* (1994), 16 O.R. (3d) 761 (C.A.); *Re Courage Group's Benefits Schemes*, [1987] All E.R. 528 (Ch. D.); and *Anova Inc. Employee Retirement Pension Plan (Administrator of)* v. *Manufacturers Life Insurance Co.* (1994), 121 D.L.R. (4th) 162 (Ont. Ct. (Gen. Div.)).

316 I do not think that any of these cases supports the proposition that a plan sponsor exercising a power of amendment in respect of pension plan documentation is subject to a fiduciary obligation in favour of the pension plan members. The only decision that suggests that fiduciary obligations are imposed on a plan sponsor is the decision of German J. in *Anova*. However, for the reasons set out below, I do not think German J. actually contemplated a classic fiduciary obligation in that decision.

317 The case law in this area does, however, indicate that, in exercising its powers under pension plan documentation, a plan sponsor is subject to an implied duty not to act with a view to furthering an improper purpose. The plan sponsor must act with a view to preserving the trust fund for the benefit of the persons for whose benefit it was established, or, more generally, must act with a view to furthering the original purposes of the Trust Fund and not for any other purpose which is, by definition, an improper purpose. This duty is often expressed as a duty of good faith: see *Imperial Group Pension Trust Ltd.* v. *Imperial Tobacco Ltd.,* [1991] 1 W.L.R. 589; *Re Courage Group, supra;* and *Anova, supra.*

318 In *Imperial Group*, the court held that it was an improper purpose to coerce members to abandon their existing rights under a pension plan, including the right to the surplus on termination of the Plan. In *Re Courage Group*, the court held, in effect, that it was an improper purpose to retain plan surplus on the sale of corporations that were the participating employers in respect of the relevant pension plan. The decision addresses principally the scope of the power of substitution in circumstances in which the proposed party was not a successor in interest as in the present case. The factual circumstances were therefore quite different from the present proceedings. However, the decision does demonstrate that the sale of surplus would be prohibited as a breach of the duty of good faith.

319 In *Anova,* German J. held that it was an improper purpose to grant enhanced pension benefits to certain individuals in their capacities as shareholders rather than as employees. In her reasons for finding that the amendments were invalid, German J. specifically described the duty that she had in mind as a duty to act fairly towards all members of the pension plan:

> The granting of the enhanced benefits was made to the respondents in their capacity as shareholders, not as employees, and this was the retirement pension plan for employees of B.D. Wait Co. Limited. Two of the respondents were not even employed at the time. The grant was void ab initio according to equitable principles. The interest that the company had in selling the business does not outweigh their *duty to act fairly towards all employees* (at para. 61) [emphasis added].

German J. held that the amendments in that case were invalid because they were made for an improper purpose that was unrelated to the purposes of the pension plan, namely the withdrawal of surplus. The decision neither requires nor relies upon a classic fiduciary obligation in order to invalidate the grant of the enhanced pension benefits.

320 Based on these decisions, I conclude that, in the exercise of powers under the Plan in its capacity as the employer, HBC is subject to an implied duty of good faith that requires that it exercise such powers for a valid purpose, being a purpose which is consistent with the expectations regarding the scope and nature of the Plan at the time of its creation. The application of this principle to a proposed amendment is straightforward. If a proposed amendment purports to provide benefits to parties who are not within the contemplated class of members of the Plan, the amendment constitutes an unauthorized gift of trust property and is clearly invalid. The principle is illustrated in *Anova* and, more indirectly, in *Re Courage Group*.

321 The question remains, however, as to the breadth of this duty of good faith. Specifically, in the context of the 1994 and 1998 Amendments to the Plan, is the duty of good faith any broader than the contractual obligations constituted by the Exclusive Benefit Provisions?

322 The plaintiffs' position appears to be that the duty of good faith is broader in two respects. First, they argue that the duty of good faith requires that the provisions of the Plan, including, in particular, the provisions respecting amendment of the Plan, be interpreted in such a manner that any issues between HBC and the Members are to be resolved in favour of the existing Members of the Plan. Second, the plaintiffs argue that HBC has breached its obligations of good faith even if the taking of contribution holidays would not otherwise contravene the Plan documentation, including the Exclusive Benefit Provisions, because HBC's purpose in making the 1994 and 1998 Amendments included accessing on-going surplus in the Fund in respect of its defined contribution obligations to the Zellers and Kmart employees under the Zellers Plan and the Kmart Plan.

323 I do not see any basis in any authorities presented by the plaintiffs for the proposition that the duty of good faith requires that the Plan and the Trust Agreement be interpreted to resolve any disputes between HBC and the Members in favour of the existing members of the Plan at the time of any amendments under consideration. The concept of proper purposes is not so narrow. The cases referred to above require that an amending power in a pension plan be exercised in good faith and, in particular, for proper purposes.

324 These decisions also demonstrate the principle that the test for proper purposes is consistency with the reasonable expectations for the scope and nature of the Trust Fund at the time of its creation. Accordingly, I think that the test of permissible purposes for the exercise of the powers reserved to HBC under the Plan in its capacity as the employer is the same under the duty of good faith as under the Exclusive Benefit Provisions. As a corollary, I therefore reject the plaintiff's argument that application of the duty of good faith to the exercise of the power of amendment requires exclusive concentration on the effect on the existing Members of the Plan at the time of the amendments.

325 I also do not see any basis for the plaintiffs' position that the intention of HBC in making an amendment will, on its own, give rise to a breach of the duty of good faith in circumstances where the result of the proposed action is otherwise consistent with the scope and purposes of the Plan. This issue is addressed below in the context of contribution holidays where it has particular relevance.

326 There is one other aspect of the duty of good faith that requires a brief mention. The plaintiffs argue that it is a breach of the duty of good faith to re-open a closed pension plan if the related trust fund is an "exclusive benefit trust". This is also addressed below.

Application of the Duty of Good Faith to the 1994 and 1998 Amendments

327 In this section, I will address whether any of the amendments enumerated above breached the duty of good faith that HBC owes as the Plan sponsor, based on the analysis of the scope of this duty set out above.

Introduction of Zellers and Kmart Employees as Members of the Plan

328 Based on the foregoing analysis of the scope of the duty of good faith, I conclude that HBC did not breach this duty in introducing the Zellers and Kmart employees as Members of the Plan pursuant to the 1994 and 1998 Amendments to the Plan. The standard to be applied is whether the 1994 and 1998 Amendments were made for a proper purpose. The test of proper purpose is whether the effect of the amendments is consistent with the original expectations regarding the nature and scope of the Plan at the time of its creation. The 1994 and 1998 Amendments introduced new Members to the Plan who fell within the class of potential Members contemplated for the Plan at the time of its creation.

Re-Opening of the Plan in 1994

329 A similar analysis applies in respect of the re-opening of the Plan to new Members pursuant to the 1994 Amendments. The test is whether the Plan was re-opened for an improper purpose. Given that the Plan was re-opened for the purpose of introducing new Members who fell within the class of potential Members contemplated for the Plan, and to provide pension benefits that were also within the concept of "benefits" contemplated to be supported by the Trust Fund, HBC's actions satisfied this test.

330 In addition, as set out above under "Additional Factual Background - Factual Determinations", there is no evidence that HBC intended to confer a benefit upon the Members of the Plan by closing the Plan as of January 1, 1988. The Plan closure was directed to making new employees of Simpsons

members of the HBC Plan for the corporate reasons outlined above. The re-opening of the Plan was, therefore, not for the improper purpose of rescinding a benefit that HBC had conferred on the Members in closing the Plan. Nor is there any basis for an equitable claim based on detrimental reliance.

331 There are four additional matters to be considered.

332 First, in view of the Plan closure, in substance, the amendment to re-open the Plan involved the restoration to HBC of the power of designation that had previously existed in the definition of "Company" in the Plan text. To the extent that the power of amendment was exercised for the limited purpose of restoring a power that had been unilaterally and voluntarily removed by HBC from the 1988 Plan Text, I do not think that such exercise can be characterized as being directed toward an improper purpose.

333 Second, the plaintiffs argue that the fact that HBC re-opened the Plan to avoid a possible mandatory wind-up being ordered by the Ontario pension authorities constitutes an improper purpose. There is no question that this was an important, if not the principal, consideration for HBC. However, I do not think it is a valid basis for alleging breach of the duty of good faith. If there is no legal prohibition to re-opening the Plan, the purpose of maintaining control over the future of the Plan, and the ability to access surplus, cannot, by itself, constitute an improper purpose. If there were a breach of a duty of good faith in such circumstances, it would pertain instead to the purposes for which the assets in the Trust Fund are intended to be used.

334 Third, the plaintiffs rely upon the decision of the British Columbia Court of Appeal in *Buschau* v. *Rogers Communications Inc.*, [2004] B.C.J. No. 297 (B.C.C.A.) at para. 61, in which the British Columbia Court of Appeal held that re-opening of the particular pension plan gave rise to a breach of the employer's duty of good faith. However, for two reasons, I do not think that this decision stands for the proposition that a closed plan, even if it is an "exclusive benefit trust", can never be re-opened to add new Members without breaching an employer's duty of good faith.

335 First, the circumstances of this decision are unique, and therefore distinguishable, in two respects. The Court of Appeal appears to have concluded that the employer's attempt to re-open the plan constituted bad faith because it was only undertaken after the members of the plan had commenced legal proceedings to terminate the plan. The Court, therefore, proceeded on an assumption, rather than a conclusion, that the plan had been irrevocably closed. In addition, the particular claim asserted - the right to *Saunders* v. *Vautier* the trust - requires that the trust be irrevocably closed. At its best, therefore, I think this case suggests that there may be special circumstances in which intervening actions by the beneficiaries of a pension plan trust render the employer's actions in re-opening the pension plan a breach of the employer's duty to act in good faith.

336 Second, and more fundamentally, the decision in *Buschau #3*, which reversed the decision of the British Columbia Court of Appeal on the essential issue of the right of the plan members to *Saunders* v. *Vautier* the trust, also casts doubt on the conclusion that re-opening the pension plan contravened a common law duty of good faith. In that decision, Bastarache J. expressly overruled the finding of bad faith at para. 103 and, in doing so, stated that the employer's power of amendment was not foreclosed by closure of the plan:

> It seems clear to me that the conclusion of the Court of Appeal on the issue of good faith is premised on its earlier decision that the amendment would deprive the beneficiaries of the Premier Trust of their right to terminate it under the rule in *Saunders v. Vautier.* I have found that the respondents cannot terminate the Trust pursuant to *Saunders v. Vautier* ... The decision regarding bad faith cannot stand where it is without a foundation. I am of the view that RCI's powers of amendment

> were not forfeited or estopped because of the closure of the Plan. Any termination of the Plan and amendments to it must be examined on the basis of its terms and conditions, in consideration of the applicable provisions of the [*Pension Benefits Standards Act, Canada*].

337 The remaining judges on the Supreme Court panel, while silent on the issue of good faith, also held that *Saunders* v. *Vautier* did not apply to a pension plan and agreed with Bastarache J. that the issue of the termination of the Plan, and the employer's duties including any duty relative to re-opening the Plan, were governed exclusively by the *Pension Benefits Standards Act (Canada)*. Accordingly, the decision does not support the plaintiffs' assertion that HBC was prevented from re-opening the Plan in the circumstances of this proceeding because the re-opening of a pension plan constitutes a breach of a duty of good faith.

338 Fourth, the plaintiffs argue that the 1994 and 1998 Amendments constituted an unlawful merger of the Zellers and Kmart Plans with the Plan rather than a re-opening of the Plan. They argue that the transfer of liabilities for future defined contribution costs of Zellers and Kmart employees to the Plan, without a concurrent contribution or transfer of assets in an offsetting amount, constitutes an unlawful merger and, therefore, a breach of trust. As a practical matter, it is, of course, impossible to transfer offsetting assets in respect of liabilities extending indefinitely into the future. Setting that aside, for the reasons discussed below, I do not agree that the Amendments constituted a merger of the Plan with the defined contribution sections of the Zellers and Kmart Plans.

Inclusion of a Defined Contribution Section of the Plan

339 Based on the foregoing analysis of the scope of the duty of good faith, I also conclude that HBC did not breach this duty by establishing a defined contribution section by amendments pursuant to which the Trust Fund supported the payment of benefits under both the defined contribution section and the defined benefit section of the Plan. Again, the standard is whether the amendments were made for a proper purpose.

340 In reaching this conclusion, I have considered the following two possibilities:

1. that HBC breached its duty of good faith by using the assets for the improper purpose of benefiting persons who were not intended to benefit from the Trust Fund - namely Members of the defined contribution section of the Plan who were employees of Zellers or Kmart; and
2. that HBC breached its duty of good faith by structuring the administrative and investment arrangements pertaining to the defined contribution section of the Plan to provide preferential or priority rights to the Members thereof to the prejudice of the Members of the defined benefit section of the Plan.

I will consider each possibility in turn.

341 For the reasons set out above, I believe that the original purpose of the Trust Fund was to support payment of whatever pension benefits were payable under the Plan from time to time, including defined contribution pension benefits. In addition, the Zellers and Kmart employees who became Members of the defined contribution section of the Plan were included within the class of potential Members contemplated under the Plan at the time of its creation. The purpose of the defined contribution section of the Plan is therefore consistent with the original expectations for the Plan. There is, therefore, no basis for concluding that HBC breached its duty of good faith by amending the Plan to benefit persons who were not intended to benefit from the Trust Fund.

342 There is also no evidence before the Court supporting a finding that the purpose of the 1994 and 1998 Amendments establishing the defined contribution section was to prefer the Members of this section of the Plan in some manner over the Members of the defined benefit section. My determinations regarding the purpose and legal effect of the 1994 and 1998 Amendments have been set out above. There is no evidence that the purpose, or the legal effect, of such Amendments, or the administrative and investment arrangements pertaining to the defined contribution section, was to provide the Members of the defined contribution section with a legally meaningful preference in respect of the assets of the Trust Fund or a priority of their claims against the assets of the Trust Fund over the claims of the Members of the defined benefit section. There is also no evidence that the purpose, or the legal effect, of the 1994 and 1998 Amendments, or such administrative and investment arrangements, extended to the removal of assets from the Trust Fund for the benefit of Members of the defined contribution section of the Plan prior to termination of an individual's membership in the Plan.

343 In the absence of any such evidence, there is no basis for a finding that HBC breached its duty of good faith in structuring the Plan to include a defined contribution section entitled to the benefit of the assets in the Trust Fund together with the defined benefit section.

344 The plaintiffs make two further allegations of bad faith.

345 First, they suggest that HBC breached its duty of good faith in taking action to avoid a winding-up of the Plan, which would have resulted in payment of some, if not all, of the surplus to the Members of the defined benefit section of the Plan. There is, however, no legal principle, or contractual covenant in the Plan documentation, that required HBC to adopt a course of action that involved payment of any of the surplus to the Members of the Plan. The failure to consider such a course of action cannot constitute a breach of its duty of good faith.

346 Second, the plaintiffs suggest that these Amendments constituted the first step of a merger of the Plan with the Zellers Plan and the Kmart Plan. They allege that HBC initially implemented only the first stage of the merger to avoid the need for regulatory approval. They argue that this course of action was also improper and therefore a breach of the duty of good faith.

347 I think the simple answer to this argument is that the 1994 and 1998 Amendments are "stand-alone" documents that must be addressed on their own and, on this basis, do not constitute a merger and were not made for an improper purpose. There is no necessary connection between the 1994 and 1998 Amendments and the mergers of the Plan with the HBC Plan, the Zellers Plan and the Kmart Plan. No merger occurred until these later steps were taken. HBC could have deferred the later actions indefinitely. In addition, there is nothing improper in HBC's decision to limit changes to the Plan to changes that did not require regulatory approval. Such action does not constitute a breach of its duty of good faith.

Contribution Holidays to Fund Defined Contribution Obligations

348 This section considers whether HBC breached its duty of good faith in either implementing the 1994 and 1998 Amendments, because they contemplated contribution holidays in respect of HBC's obligations under the defined contribution section of the Plan, or in taking such contribution holidays.

349 From *Schmidt* it is clear that there is nothing improper *per se* about the use of surplus assets by an employer to fund contribution holidays. In the present circumstances, the contribution holidays are being taken in respect of the provision of pension benefits to Members of the Plan that are consistent with the original purpose and scope of the Plan. I therefore see no basis for a finding that the 1994 and 1998 Amendments are invalid as a breach of the duty of good faith or that the taking of such contribution holidays constituted a breach of trust.

350 As mentioned above, the plaintiffs argue that, because the Trust Fund is an "exclusive benefit trust", the taking of contribution holidays constitutes a breach of trust because it cannot be demonstrated to have been for the exclusive benefit of the Members of the defined benefit section of the Plan. They base this argument on the finding that HBC's intention in taking the contribution holidays was to access the surplus in the Trust Fund, which they say is an improper purpose. They argue that the presence of this intention, or the fact that HBC was able to access the surplus, contravenes the duty of good faith, even if the contribution holidays are taken in respect of obligations to Members and in respect of pension benefits that fall within the purposes for which the Trust Fund was established. A variant of this argument is that HBC breached its duty of good faith because the 1994 and 1998 Amendments had the purpose of using the surplus to take contribution holidays rather than to enhance the benefits of the Members.

351 In its essence, the plaintiffs' argument is that use of the surplus for the purpose of contribution holidays is a "benefit" to HBC which contravenes its duty of good faith. There is, however, no support for the plaintiffs' argument in any of the authorities cited to the Court. More significantly, the plaintiffs' proposition is contradicted by the statement of Cory J. in *Schmidt*, which expressly recognizes that the taking of contribution holidays does not constitute the application of monies to something other than the exclusive benefit of the employees. Although the dictum of Cory J. addressed a single pension plan and related trust fund, I see no reason, in principle, for distinguishing that case from the present circumstances.

352 Given this conceptual approach to contribution holidays, the use of surplus to fund contribution holidays cannot, by itself, constitute an improper purpose. Whether or not a breach of the duty of good faith occurs when contribution holidays are taken is dependant upon whether the benefits funded using the surplus assets of the Trust Fund are consistent with the purposes of the Plan and the Trust Fund.

353 In addition, as HBC was under no legal obligation to enhance the benefits payable to Members, the argument that the Amendments were for an improper purpose because they failed to use the surplus for such purposes must also fail.

354 Accordingly, as I have found that a defined contribution section of the Plan of which the Zellers and Kmart employees are Members is consistent with the purposes of the Plan and the Trust Fund, I conclude that neither the exercise of HBC's power of amendment to include the provisions of the 1994 and 1998 Amendments that permitted contribution holidays, nor the taking of contribution holidays by HBC to fund its obligations in respect of the defined contribution section of the Plan, contravened its duty of good faith.

Conclusion

355 Based on the foregoing, I conclude that neither the enactment of the 1994 and 1998 Amendments nor their implementation, including the taking of contribution holidays to fund its obligations under the defined contribution section of the Plan, breached any fiduciary or other equitable obligation owed by HBC to the plaintiffs in respect of the Trust Fund.

Remedies

356 The plaintiffs seek an injunctive order in respect of any continuing breach of trust by HBC that has the effect of diverting assets from the Trust Fund in satisfaction of HBC's obligations under the defined contribution section of the Plan. They also seek an order directing an accounting of any assets of the Trust Fund that have been so diverted requiring HBC to pay damages or equitable compensation to the plaintiff class directly for the sums so diverted, with the quantum of damages to be determined at a separate hearing. HBC submits that, if the Court were to find that it was not permitted to satisfy its contribution obligations in respect of the Zellers and Kmart employees from the Trust Fund, the only permissible remedy is an order requiring restitution to the Trust Fund.

357 In view of the determinations made with respect to the other common issues in this proceeding, it is unnecessary to address this issue. However, I will briefly set out my conclusions on this issue in case I have erred in reaching the conclusions on the remainder of the common issues.

358 The plaintiffs make two arguments in support of their position.

359 First, they say the Plan is over funded for purposes of Canadian income tax legislation and is unable to reduce its excess surplus in accordance with such legislation. The second, and more important argument, is that, assuming the Plan is closed, the vast majority of the Members are retired and may not live to receive the surplus, including any restitutionary payment made to the Trust Fund in respect of this proceeding, if they must wait until a termination of the Plan.

360 While I am in agreement with the plaintiffs that equitable principles are flexible and that considerations of fairness must inform the remedy where a breach of trust has been established, I am of the opinion that there is no basis for the remedy suggested by the plaintiffs in the circumstances of this proceeding.

361 The evidence before the Court with respect to the tax consideration raised by the plaintiffs does not establish that any of the plaintiffs personally have suffered any tax-related loss as a result of the alleged breach of trust by HBC or will suffer any adverse financial consequences if a restitutionary payment were made to the Trust Fund. Nor does it establish with certainty that the Trust Fund will suffer any adverse tax consequences or, for that matter, that any adverse tax consequences that may result from over funding would be avoided if any payment ordered in this proceeding were paid to the plaintiff class. In these circumstances, I do not see how the Court can take the plaintiffs' allegations regarding the tax position of the Trust Fund into consideration in addressing the appropriate remedy for a breach of trust by HBC.

362 With respect to the second argument, the Trustee, on behalf of the Members of the Trust Fund, is the only party entitled to receive back any assets paid to, or otherwise used by, HBC in breach of trust.

363 The law is well settled that the appropriate remedy in respect of a defaulting trustee is an order restoring the estate as nearly as possible to the position it would have occupied had the breach not occurred. In the usual case, this requires restitution to the estate of the assets received in breach of trust. The principle is clear from the statement of Lord Browne-Wilkinson in *Target Holdings Ltd.* v. *Redferns*, [1969] A.C. 421 at 434 (H.L.) that "the basic rule is that a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss". In the case of the wrongful payment of trust monies, the appropriate remedy is therefore the return of such monies to the Trust Fund.

364 The plaintiffs' mistaken characterization of a payment to the plaintiffs as equitable damages or equitable compensation reinforces this conclusion. Restitution and compensation are distinguished from each other by the nature of the payment to be made by a party found to have breached a fiduciary obligation and, in certain circumstances, by the manner of determination of the quantum of such payment. The two concepts do not, however, contemplate different recipients of any such payment. In particular, compensation or equitable damages are not a means by which beneficiaries of a trust, who are not entitled to terminate the trust in their own right, are entitled to receive a payment in respect of a breach of trust.

365 Payment of surplus assets of the Plan to Members of the Plan can, therefore, only be justified by evidence that the Members have been personally deprived of an amount to which they are entitled under the Plan. However, prior to termination of the Plan, the entitlement of the Members is limited to receipt of their pension benefits in accordance with the terms of the Plan. The Plan does not permit payments of surplus to the Members while the Plan is on-going. The Members of the Plan are only entitled to receive any surplus assets in the Trust Fund upon termination and winding-up of the Trust Fund.

366 In seeking to, in effect, intercept any payment owing to the Trust Fund, the plaintiffs seek to do indirectly what they cannot do directly - receive a portion of the surplus assets of the Trust Fund prior to a termination of the Trust. The issue is, in my opinion, even clearer after *Buschau #3*, in which the Supreme Court indicated that termination of a pension plan trust fund is governed solely by the applicable pension legislation in respect of such trust fund.

367 The only decision brought to the attention of the Court in which this issue has been raised is *Potter* v. *Bank of Canada* (2006), 52 C.C.P.B. 147 (Ont. Sup. Ct. J.), in which E. MacDonald J. ordered that pleadings seeking relief in the form of direct payments to members of a pension trust fund be struck. In that decision, E. MacDonald J. commented, among other things, that (1) the order sought by the pleadings amounted to a variation of trust, which was beyond the jurisdiction of the court in the absence of a variation application; and (2) that the effect of such an order would be to put the beneficiaries of the trust fund in a better position than they would have occupied if the breach had not occurred and, as such, would constitute a windfall. I am in entire agreement with the principles articulated in *Potter* and the conclusions reached by E. MacDonald J.

368 Since the hearing in this proceeding, the Court of Appeal has released its decision in the appeal of *Potter* at [2007] O.J. No. 1174; (2007), 156 A.C.W.S. (3d) 26. In rejecting the appeal, Goudge J.A., speaking for the Court, confirmed that, in the circumstances of a breach of trust involving monetary assets of a fund, the law provides that the appropriate remedy is restitution and that direct payments to the beneficiaries of the trust do not serve the requirements of fairness and justice.

369 Accordingly, if it had been necessary to address an appropriate remedy in the present proceeding, I would have granted an injunctive order in the manner contemplated by the plaintiffs' prayer for relief but would have ordered restitution to the Trust Fund in the amount of the assets determined to have been used or diverted by HBC in breach of trust rather than a payment to the plaintiff class directly.

370 I would note as well that the plaintiffs devoted considerable effort to adducing evidence that HBC breached its obligations to disclose to Members of the Plan certain of the significant developments respecting the Plan described above. The plaintiffs acknowledge that the alleged breaches of such obligations do not constitute a basis for invalidating the 1994 and 1998 Amendments. However, they suggest that breach of such disclosure obligations would be a factor to be taken into consideration regarding the appropriate remedy if the Court were to find that the 1994 and 1998 Amendments, or the taking of contribution holidays, contravened the Exclusive Benefit Provisions or a fiduciary duty or other equitable obligation of HBC.

371 In view of the plaintiffs' concession that the alleged breaches of HBC's disclosure obligations, even if established, would not invalidate the 1994 and 1998 Amendments, which I think is entirely appropriate, I make no determination regarding whether any such breaches have occurred. In addition, I am doubtful that any such breaches would support an order for direct payment to the beneficiaries as a remedy for a breach of trust. However, in view of the determinations reached above in these Reasons, it is unnecessary to reach a conclusion as to whether any such actions, if established, would be a relevant consideration in fashioning an appropriate remedy for breach of trust involving monetary assets of a trust fund and I decline to do so.

Conclusions

372 Based on the foregoing, the answers to the common issues to be addressed at this trial are as follows:

> (1) Are the Assets in respect of the defined benefit component of the Plan impressed with a trust? If so, who are the beneficiaries of the trust under the Plan?

Answer: The assets of the Trust Fund are impressed with a trust in favour of the Members of the Plan from time to time including, at the present time, the Members of both the defined benefit section and the defined contribution section of the Plan. There is no separate or distinct trust fund whose beneficiaries are limited to the Members of the defined contribution section of the Plan. HBC is not a beneficiary of the Trust Fund.

> (2) Was the HBC amendment to the Plan effective January 1, 1994 to permit Zellers employees to participate in the Plan on a defined contribution basis a valid amendment?

Answer: Yes.

> (3) Was the HBC amendment to the Plan effective February 29, 1998 to permit Kmart employees to participate in the Plan on a defined contribution basis a valid amendment?

Answer: Yes.

> (4) If the Assets are impressed with a trust as described in question 1 above, was HBC entitled to utilize any part of the assets to meet its funding obligations with respect to:
>
> (i) Zellers employees brought into the Plan effective January 1, 1994, or
> (ii) Kmart employees brought into the Plan effective February 28, 1998,
>
> or has HBC committed a breach of trust or breach of fiduciary duty in so doing?

Answer: HBC was entitled to apply the assets of the Trust Fund to meet its funding obligations in respect of both the Zellers employees brought into the Plan effective January 1, 1994 and the Kmart employees brought into the Plan effective February 28, 1998 and has not committed a breach of trust or a breach of fiduciary duty in so doing.

(5) What is the appropriate remedy if breaches of trust or fiduciary duty as described above took place? Should such remedy include:

(iii) return of assets to the trust fund described in paragraph 1; or
(iv) repayment of assets improperly used, with interest, directly to the Class in the form of damages resulting from the partial revocation of the Simpsons Plan trust?

Answer: If breaches of trust or fiduciary duty as described above had taken place, the appropriate remedy would be restitution of the monies improperly taken by HBC to the Trust Fund.

(6) If the class is entitled to damages, how are such damages to be allocated among class members? What is the basis for calculation of any interest with respect to payments to the class?

Answer: In view of the answer to the preceding question, no answer is given to this question.

(7) Should any injunctive relief be granted, and if so, on what terms?

Answer: No.

Costs

373 The parties shall have 30 days from the date of these reasons to make written submissions with respect to the disposition of costs in this matter, and a further 15 days from the date of receipt of another party's submission to provide the Court with any reply submission they may choose to make. Any such submissions seeking costs shall include the costs outline required by Rule 57.01(6) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended. To the extent not reflected in the costs outline, such submissions shall also identify all lawyers on the matter, their respective years of call, and rates actually charged to the client, and shall include supporting documentation as to both time and disbursements.

H.J. WILTON-SIEGEL J.

cp/e/ln/qlgxc/qllkb/qltxp/qlltl

TAB 11

C.E.B. & P.G.R. 8179, 51 C.C.P.B. 297

2005 CarswellOnt 7306

General Chemical Canada Ltd., Re

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **GENERAL CHEMICAL** CANADA LTD.

AND IN THE MATTER OF THE APPLICATION OF **GENERAL CHEMICAL** CANADA LTD.

HARBERT DISTRESSED INVESTMENT FUND, L.P. and HARBERT DISTRESSED INVESTMENT MASTER FUND, LTD. (Applicants) and **GENERAL CHEMICAL** CANADA LTD. (Respondent)

Ontario Superior Court of Justice

C. **Campbell** J.

Heard: November 18, 2005
Judgment: December 14, 2005
Docket: 05-CL-5712, 05-CL-6160

Counsel: Steven Weisz, Karen Park for General Chemical Canada Ltd.

Robert Staley, Lisa Knorst, Mark Laugesen for Harbert Distressed Investment Fund, L.P.

Deborah Grieve, Domenico Magisano for Ministry of the Environment

Mark Bailey for Superintendent of Financial Services

Clifton Prophet, Massimo C. Starnino for General Chemical Canada Holding Inc.

Ashley Taylor, Jessica Bookman for PricewaterhouseCoopers Inc. -- Monitor

Lewis Gottheil for CAW-Canada

Ian Wallace for Sherway Consulting (Windsor) Ltd.

C.E.B. & P.G.R. 8179, 51 C.C.P.B. 297

John Leslie for Pollard Highway Products

Subject: Insolvency; Corporate and Commercial

Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders -- Stay of petition -- Pending outcome of other proceedings

Restructuring of debtor company under Companies' Creditors Arrangement Act failed because prospective purchaser of assets on going concern basis would not assume environmental liabilities -- Debtor applied for receiving order under Bankruptcy and Insolvency Act -- Superintendent of Financial Services brought motion for stay pending determination of its priority and order for immediate payment of past pension plan contributions -- Minister of Environment brought motion to appoint interim receiver to oversee compliance with its orders prior to sale of assets or assignment in bankruptcy -- Motions dismissed -- It would be unfair to secured creditor to grant either motion -- Moving parties agreed to forgo claims in order to pursue plan of arrangement -- Moving parties knew that pressing claims then would likely prevent sale of assets -- Arrangement was pursued in good faith and considered reasonable by all parties -- Refusing relief sought did not bring bankruptcy process into disrepute.

Cases considered by C. Campbell J.:

Graphicshoppe Ltd., Re (2005), 2005 CarswellOnt 7008 (Ont. C.A.) -- referred to

Ivaco Inc., Re (2005), 2005 CarswellOnt 3445, 47 C.C.P.B. 62, 12 C.B.R. (5th) 213 (Ont. S.C.J. [Commercial List]) -- followed

King (Township) v. Rolex Equipment Co. (1992), 23 R.P.R. (2d) 313, 8 O.R. (3d) 457, 90 D.L.R. (4th) 442, 9 C.E.L.R. (N.S.) 1, 1992 CarswellOnt 216 (Ont. Gen. Div.) -- referred to

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1991), 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44, 1991 CarswellAlta 315 (Alta. C.A.) -- referred to

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 1068, 11 C.B.R. (4th) 122 (Ont. Gen. Div. [Commercial List]) -- followed

Strathcona (County) v. PriceWaterhouseCoopers Inc. (2005), 2005 ABQB 559, 2005 CarswellAlta 1018, 13 C.B.R. (5th) 145, 256 D.L.R. (4th) 536, 12 M.P.L.R. (4th) 167, 47 Alta. L.R. (4th) 138 (Alta. Q.B.) -- referred to

Toronto Dominion Bank v. Usarco Ltd. (1991), 42 E.T.R. 235, 1991 CarswellOnt 540 (Ont. Gen. Div.) -- distinguished

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 47(1) -- referred to

C.E.B. & P.G.R. 8179, 51 C.C.P.B. 297

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

Generally -- referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 101 -- referred to

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

Generally -- referred to

s. 22 -- referred to

s. 58(3) -- referred to

s. 58(4) -- referred to

MOTIONS by Superintendent of Financial Services and Minister of Environment for stay of application by company for receiving order under Bankruptcy and Insolvency Act and for appointment of receiver.

C. Campbell J.:

1 Several motions were heard together, all in connection with a failed restructuring pursuant to the *Companies Creditor Arrangement Act* ("CCAA.")

2 Since the extension order under the CCAA was to expire on November 18, 2005 at midnight and any extension thereof was opposed by General Chemical Canada Ltd. ("the Company"), its major secured creditor and the prospective purchaser of assets, all motions were heard in a compacted time frame.

3 The anticipated sale of all of the assets on a going concern basis failed, since the prospective purchaser was not prepared to assume liability for environmental liabilities associated with a soda ash settling basin facility.

4 Harbert Distressed Investment Fund, L.P. and related entities ("Harbert" or "the Secured Creditor") sought a receiving order pursuant to s. 47(1) of the *Bankruptcy and Insolvency Act.*, R.S.C. 1985 c. B-3 ("BIA") to appoint PricewaterhouseCoopers Inc. ("PWC") as interim receiver of the undertakings and property of the Company.

5 The Secured Creditor and the Company also sought an order vesting the assets in the interim receiver for the purpose of sale to it, approval for which was sought on expiration of CCAA extension on November 18, 2005.

6 The Company sought a declaration in respect of its bankruptcy to be effective November 18, 2005 on its filing on November 22, 2005.

7 The Superintendent of Financial Services ("the Superintendent") sought to impose restraint on the Company making an assignment in bankruptcy until determination of the trust status of unpaid pension plan contributions. The

relief sought by the Superintendent was supported by the Canadian Auto Workers Union ("CAW-Canada") and opposed by the Company and the Secured Creditor.

8 The Ministry of the Environment ("MOE") sought the appointment of a receiver, the purpose of which was to enable the Company to comply with environmental orders prior to any sale of assets or assignment under the BIA. The position taken by both the Superintendent and the MOE is supported by CAW-Canada.

9 The Superintendent and the MOE oppose the appointment of the Interim Receiver proposed by the Company, its parent General Chemical Canada Holding Inc. ("Holding"), and the Secured Creditor, being the purchaser of certain assets supported by PricewaterhouseCoopers Inc. ("PWC" or "the Monitor.")

10 The basis of the opposition is that both the Superintendent and the MOE urge determination of the respective rights of those Ministries while the Company is in CCAA and before what is expected to be an assignment in bankruptcy. In particular, the MOE seeks extension of the CCAA proceeding on the appointment of an interim receiver over all the lands and undertaking of the Company, not just those lands that are sought to be covered in the Company's application.

11 In a companion motion to its opposition, the Superintendent sought payment of unremitted employer pension contributions to the Company's pensions plans.

12 At its essence, the position of the Superintendent is that notwithstanding the initial CCAA order, the Company is required to perform the duties of a pension plan administrator set out in the *Pension Benefits Act* ("PBA") and is a fiduciary in respect of plan members pursuant to s. 22 of the PBA.

13 The Initial CCAA Order granted by Farley J. on January 19, 2005 provided for a stay of proceedings but in doing so, specifically permitted the Company to make pension plan payments.

14 The Company responded to a request for information from the Office of the Superintendent that in accordance with its financial projections, the Company simply did not "have the financial resources to make special payments under the plan."

15 The Company took the position that "the Initial Order provides for current service costs of continuing employees to be paid, thus responding to the concern that accruing benefits of active employees do not prejudice the financial plans for inactive employees."

16 The following paragraphs from the Superintendent's factum set out its state of knowledge:

> 18. Based on this exchange of correspondence, FSCO [Superintendent] staff understood that the Applicant's assessment of its financial position in January 2005 indicated that there were insufficient assets available to make special payments to the pension plans. FSCO [Superintendent] staff also understood that current service contributions for the employees who continued employment after January 14, 2005 (the "retained employees") were being made to the funds for the pension plans.
>
> 19. FSCO [Superintendent] staff were advised by representatives of the Applicant at various points during the *CCAA* restructuring process that efforts were being made to market the assets of the Applicant with a view to completing a sale of all or part of the Applicant's assets on a going concern basis. The Superintendent was also advised that no decisions in respect of the pension plans would be made until the bids submit-

ted by prospective purchasers were assessed and there were discussions with the CAW. In fact, the Applicant entered into a conditional Asset Purchase Agreement on July 7, 2005.

17 The Superintendent had understood that current service (as opposed to past unpaid) contributions would be made. While funds had been set aside, they were not paid. The Court understands they have now been made as part of this proceeding.

18 As a result of the Superintendent's understanding that the Company did not have the financial resources to make the required pension plan contribution at the time the Initial Order was granted, it did not actively pursue the remedies now sought.

19 It would now appear that the issue of current service contributions is resolved and the issue raised by the Superintendent relates only to past contributions not made. The main reason that current contributions are no longer an issue, is that unknown to the Superintendent, cash reserves increased during the time from the Initial Order.

20 The motion request on behalf of the Superintendent supports the appointment of a Receiver to enable pension contribution payments to be made prior to the assignment in bankruptcy proposed by the Company.

21 The Superintendent urges that there is no pressing requirement to have a bankruptcy prior to the payment of pension claims. More importantly, the Superintendent submits it would be unfair and inequitable to permit secured creditors to utilize the bankruptcy procedures to compound what is alleged to be the Company's breach of statutory and fiduciary duties.

22 The following paragraphs from the factum of the Superintendent set out the position of his office. Footnotes are omitted:

> [34] The amounts owing to the Pension Plans on account of the unpaid contributions are subject to a deemed trust in favour of the pension beneficiaries. Under subsection 57(3) of the *PBA*, the Applicant is deemed to hold in trust, for the benefit of the members and former members of the pension plans, an amount of money equal to the contributions due but not paid into the Pension Plans.
>
> [35] "Contributions" owing by an employer include those amounts owing on account of both current service contributions and in respect of special payments. Contributions owing by an employer accrue on a daily basis.
>
> [36] The deemed trusts provided for by subsections 57(3) and (4) give the pension claims priority over secured claims and all unsecured claims against the Applicant. Monies held in trust are not the property of the trustee and are not subject to attachment by creditors. Subsection 30(7) of the *Personal Property Security Act* ("PPSA") reinforces this by providing, that pension beneficiaries have priority over any other security interests in accounts and inventory.
>
> [37] Section 57(5) of the *PBA* provides that the Applicant in its capacity as administrator of the Pension Plans has a lien and charge on the Applicant's assets in the amount equal to the deemed trusts under subsections 57(3) and (4).

23 The Superintendent relies on the decision of Farley J. in *Toronto Dominion Bank v. Usarco Ltd.*, [1991] O.J. No. 1314 (Ont. Gen. Div.) for the proposition that the deemed trust provisions of ss. 58(3) and 58(4) of the PBA

applied in that case with pension plan contributions which were to have been made were not. In that case the security interest of the bank in the situation of a failed but not proceeded with bankruptcy petition was held to be subordinate to the interest of the beneficiaries of the deemed trust, which extended to the amount owing but unpaid on pension contributions.

24 That case can be distinguished. In *Usarco*, the motion by the plan administrator was made in objection to the secured creditors' appointment of a receiver to sell and dispose of assets. The issue before this Court involves a CCAA proceeding that has been ongoing for some months. The motion before the Court is not to avoid the payment of pension obligations. In any event, the payments that have become due during the CCAA proceedings have now been paid.

25 The second decision the Superintendent seeks to distinguish is *Ivaco Inc., Re*, [2005] O.J. No. 3337 (Ont. S.C.J. [Commercial List]), where the Court considered whether or not to grant an order (requested also by the Superintendent) requiring the payment of contributions to pension plans that were maintained by debtor. Certain of the secured creditors had filed motions seeking certain relief with a view to moving the debtor towards bankruptcy. The Court in *Ivaco Inc.* refused to order the immediate payment of pension plan contributions.

26 The basis on which the Superintendent in counsel's factum seeks to factually distinguish *Ivaco Inc.* has largely disappeared with the failed CCAA process and now the request to make an assignment in bankruptcy. See para 32

27 I accept that genuine issues in law continue to exist with respect to the priority to be accorded unpaid pension issues in the course of CCAA proceedings in the face of impending bankruptcy or after an assignment in bankruptcy. The fact that leave to appeal has been granted by the Court of Appeal for Ontario in *Ivaco Inc.* attests to this problem. The recent decision of the Court of Appeal in *Graphicshoppe Ltd., Re* [2005 CarswellOnt 7008 (Ont. C.A.)] (unreported, December 5, 2005, docket C42864 and M32603) attested to the difficulties of tracing.

28 In the circumstances of this case, I have concluded that the reasoning of Farley J. in *Ivaco Inc.* is directly applicable to these facts.

29 The following factual findings support the conclusion I have reached.

> [1] There is no suggestion that the CCAA proceedings initiated at the beginning of 2005 were anything but proper and appropriate. There is no suggestion by any party, including the Superintendent, that they were initiated for an improper purpose.
>
> [2] During the course of the year, all parties, including the Superintendent, believed that it was reasonable to pursue a "going concern" realization of assets.
>
> [3] The improvement in cash flow of the Applicant was thought by it to be kept by it to support a "going concern" transaction.
>
> [4] While the Superintendent did not have details of the improvement in cash flow, it did not seek to monitor that situation and did not seek to burden any potential "going concern" transaction by imposing a term such as that now sought.
>
> [5] The proximate cause of the failure of the "going concern" sale and of the CCAA proceedings was the position of the MOE in respect of environmental liabilities. [This finding should not be taken as

any criticism of the MOE.]

[6] The motion to appoint a receiver, the sale of assets to a willing purchaser and the assignment into bankruptcy by the Company were a reasonable and appropriate response by those entities following the position taken by the MOE and not for any improper purpose.

30 While I do accept the submission on behalf of the Superintendent that the Court does have discretion as to the content and terms of a receiving order, I do not conclude that the Court's discretion should be exercised in the manner sought by the Superintendent.

31 The Superintendent did have the opportunity to seek the kind of relief it now seeks, but did not, expecting as did other parties that a "going concern" sale would succeed. The Superintendent must be taken to have been aware that an insistence on the relief it now seeks and a determination in its favour might well be fatal to a "going concern" sale.

32 I do not accept, as submitted, that the result that deprives the Superintendent of a determination with respect to priority prior to a voluntary assignment in bankruptcy brings the bankruptcy process into disrepute.

33 One can understand and accept the belief of all involved that a "going concern" sale would eliminate the issue of the need to deal with priorities. There remains the genuine issue within the bankruptcy of the Company that enables the Superintendent to pursue the same remedy and does operate to preserve fairness of process.

34 I agree with the conclusions reached by Farley J. in *Ivaco Inc.*, particularly those at paragraphs 16 to 19, which read as follows:

[16] Given the limited role of the Monitor as indicated above I do not see that the Monitor in fact, law and fairness can be considered a fiduciary to the pension beneficiaries in the nature of an administrator of the Salaried Plans.

[17] Pursuant to s. 57(3) and (4) of the *Pension Benefits Act*, what is the responsibility? It is that the employer (the Ivaco Companies) be deemed to hold the pension funding monies in trust for the pension beneficiaries. However there is no provision in that legislation that the monies be paid out to the pension plan at any particular time. As discussed above, those deemed trusts may be defeated, in the sense of being inoperative to give a priority, in the event of a bankruptcy. The BIA does not contain any provision that the priority position is maintained in a bankruptcy; rather the case law is to the contrary: see *Henfrey* at p. 741; *Bassano* at pp. 201-202; *IBL* at pp. 143-4.

[18] In the end result I do not see that the Superintendent has made a compelling case to the effect that the petitions in bankruptcy should not be allowed to proceed in the ordinary course. I have reached that conclusion by weighing the factors pro and con as discussed above, including the relative benefits to all stakeholders (including workers and pensioners) to maintaining the CCAA proceedings (with the benefit of the suspension of past contributions as per the unopposed (and un-reconsidered) order of November 28, 2003, the fact that no reorganization is now possible as all Ivaco Companies (except Docap) have ceased operations and are without operational assets and that the Ivaco Companies are now essentially in a distribution of proceeds mode.

[19] However, to allow sufficient time for consideration of appeal, no action or step is to be taken with respect to dealing with the bankruptcy for at least 60 days from the release of these reasons. Of course it will

be within the context of those bankruptcy proceedings that priorities will be determined if there is a bankruptcy, keeping in mind that s. 43(7) of the BIA may be raised at the hearing of the petition.

35 To conclude otherwise (absent improper motive on the part of the Company or a major creditor) would be to negate both CCAA proceedings and bankruptcy proceedings by preventing creditors from pursuing a process of equitable distribution of the debtor's property as they believe it to be when making their decisions. The Superintendent is not for either CCAA or bankruptcy a secured creditor of which other creditors are aware.

36 On the above basis, the motion of the Superintendent to in effect restrain a voluntary assignment by limiting the authority of the Receiver and preserving the status quo is dismissed. An order setting aside current services contributions to be paid for the purposes of the Pension Plans is granted as agreed to by the Company.

Position of the MOE

37 The effect of the relief sought by the MOE is similar to that sought by the Superintendent. The MOE seeks to appoint its own receiver pursuant to s. 101 of the *Courts of Justice Act* to take effect immediately on the expiration of the CCAA proceedings.

38 The purpose of the Receivership sought by the MOE is to avoid the soda ash settling basin ("SASB") facility of the Company being "abandoned as an orphan site to be cared for remediation at the expense of the taxpayers of Ontario," a result suggested that may be inevitable if the Company is permitted to file in bankruptcy.

39 I accept the submissions on behalf of the MOE that environmental legislation comprises important public welfare statutes designed to protect the air, land and water of the Province for all members of the public. I accept that the MOE has standing to assist the Court with whom and under what circumstances a Receiver should be appointed. As I understand the position of the MOE, it is not the entity that is proposed by the Applicant that is objected to as Receiver, but rather what will be the mandate of any Receiver appointed.

40 I also accept that the state of the law at present raises (as it does in the issues raised by the Superintendent) genuine issues that involve the constitutional interplay between the provincial environmental legislation and federal bankruptcy and insolvency law.

41 Cases referred to by counsel for the MOE illustrate the unsettled state of the law. See *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, [1991] 5 W.W.R. 577 (Alta. C.A.); *Strathcona (County) v. PriceWaterhouseCoopers Inc.*, 2005 CarswellAlta 1018 (Alta. Q.B.); *King (Township) v. Rolex Equipment Co.*, [1992] O.J. No. 810 (Ont. Gen. Div.)

42 I have concluded in the case before me for much the same reason given above, that the relief sought by the MOE should not be granted in this case. Like the Superintendent, the MOE did not intervene at an earlier time in the CCAA proceeding to insist that the Company or any prospective purchaser be obligated to comply. Presumably, the MOE knew that to do so while a "going concern" transaction was beign sought might impair it. This did turn out to be the case.

43 To now impair a sale of assets transaction that would maximize the benefit to creditors by postponing bankruptcy until environmental issues are addressed would in my view at this stage be unfair. I accept that the rights of the MOE within bankruptcy may be less than if they had been actively pursued and enforced while the Company was in CCAA. The creditor process of the CCAA was allowed to proceed on the expectation of all, including the MOE, that a workable deal could be achieved. That has not turned out to be the case.

44 I have concluded that there is no improper conduct or motive on the part of any of the parties to the CCAA process, including the MOE. To now permit in effect a pre-emptive position to the MOE by postponing bankruptcy would do a disservice to the creditors of the Company, including the principal secured creditor that participated for a legitimate purpose in a permitted restructuring process.

45 Any claim for in effect priority on the part of the MOE should in my view be dealt with in the bankruptcy rather than extraordinary relief that pre-empts the legitimate position of creditors who have proceeded in a totally legitimate fashion albeit in their own interests but with no impropriety.

46 The MOE did have during the course of the CCAA the opportunity to put forward its position, which in this situation brought about its failure. As noted above, I voice no criticism of the MOE for its position, but if it could not have successfully imposed a remedial situation during the course of CCAA it should not now be enabled to prevent an entirely legitimate result for creditors from taking place.

47 Since the concern raised by the MOE is to what the Receiver may do (which actions I have accepted), their objection to PricewaterhouseCoopers Inc. as receiver does not prevail. Like Farley J. in *Royal Oak Mines Inc., Re* , [1999] O.J. No. 1369 (Ont. Gen. Div. [Commercial List]), I find no fault with the Receiver proposed by the MOE but have concluded simply that given the history and what is to be done, PWC is to be preferred.

48 The relief sought by the MOE is therefore dismissed.

49 As a result of the decision reflected in these reasons, orders issued all dated November 18, 2005:

> 1. Pursuant to s. 47(1)a of the BIA appointing PricewaterhouseCoopers as interim receiver of certain assets of the Company pursuant to the terms of the Order signed in Court File No. 05-CL-6160.
>
> 2. Vesting certain assets in the Receiver for the purpose of sale to Harbert Distressed Investment Fun on the terms and conditions as more particularly set out in the Order signed and dated November 18, 2005 in Court File No. 05-CL-6160.
>
> 3. Declaring that the Company General Chemical Canada Ltd. has made an effective assignment in bankruptcy as of November 18, 2005 by filing at the office of the Office of the Official Receiver in London, Ontario on November 22, 2005 in accordance with the Order signed on November 18, 2005 in Court File No. 05-CL-5712.

50 It would not appear that costs in respect of these motions are appropriate. If, however, any party is of the view that costs should be awarded, they may make written submissions within two weeks and the response of any party opposing should be received within one week following.

Motions dismissed.

END OF DOCUMENT

TAB 12

12 P.P.S.A.C. (3d) 46, 37 C.B.R. (5th) 107

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Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.

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

Ontario Superior Court of Justice

L.C. Leitch R.S.J.

Heard: July 19, 2007
Judgment: October 18, 2007[FN*]
Docket: 06-CL-6820

Counsel: E. Patrick Shea for Textron Financial Canada Limited

Steven Weisz for Sun Beta LLC

Duncan Grace for Moving Party, Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 242

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure

Bankruptcy and insolvency --- Priorities of claims -- Preferred claims -- Wages and salaries of employees -- Priority over other creditors

Creditor had registered security interest over inventory and accounts of debtor -- At time of appointment of receiver, debtor owed vacation pay to its employees -- Creditor petitioned for bankruptcy and application was outstanding -- Interim distribution order directed receiver to hold reserve for vacation pay -- Union brought motion for declaration that employees' claim had priority over creditor's -- Motion dismissed -- Vacation pay was deemed to be held in trust by s. 40(1) of Employment Standards Act, 2000 -- Priority given by s. 30(7) of Personal Property Security Act probably did not apply as creditor had perfected purchase-money security interest in inventory and its proceeds -- In any event, priorities established by provincial legislation were superseded by those created by s. 136 of Bankruptcy and Insolvency Act ("BIA") -- Vacation pay reserve was not excluded property under BIA -- Debtor did not in fact hold those funds in trust and receiver had no obligation to do so -- Priorities were not crystallized on date receiver was appointed -- Court was bound to apply priorities under BIA unless application was abandoned.

12 P.P.S.A.C. (3d) 46, 37 C.B.R. (5th) 107

Cases considered by L.C. Leitch R.S.J.:

British Columbia v. Henfrey Samson Belair Ltd. (1989), 1989 CarswellBC 711, [1989] 1 T.S.T. 2164, 75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 34 E.T.R. 1, [1989] 5 W.W.R. 577, 59 D.L.R. (4th) 726, 97 N.R. 61, 38 B.C.L.R. (2d) 145, 2 T.C.T. 4263, 1989 CarswellBC 351 (S.C.C.) -- referred to

Canadian Imperial Bank of Commerce v. Melnitzer (Trustee of) (1993), 23 C.B.R. (3d) 161, 1 E.T.R. (2d) 1, 6 P.P.S.A.C. (2d) 5, 1993 CarswellOnt 251 (Ont. Bktcy.) -- considered

Canadian Imperial Bank of Commerce v. Melnitzer (Trustee of) (1997), 1997 CarswellOnt 4609, 50 C.B.R. (3d) 79 (Ont. C.A.) -- referred to

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2005), (sub nom. TCT Logistics Inc. (Bankrupt), Re) 194 O.A.C. 360, 2005 CarswellOnt 636, 7 C.B.R. (5th) 202, 74 O.R. (3d) 382 (Ont. C.A.) -- considered

Husky Oil Operations Ltd. v. Minister of National Revenue (1995), 1995 CarswellSask 739, 1995 CarswellSask 740, 188 N.R. 1, 24 C.L.R. (2d) 131, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, [1995] 10 W.W.R. 161 (S.C.C.) -- referred to

Irving A. Burton Ltd. v. Canadian Imperial Bank of Commerce (1982), 17 B.L.R. 170, 2 P.P.S.A.C. 22, 134 D.L.R. (3d) 369, 1982 CarswellOnt 165, (sub nom. Huxley Catering Ltd., Re) 41 C.B.R. (N.S.) 217, 36 O.R. (2d) 703 (Ont. C.A.) -- considered

Ivaco Inc., Re **(2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43** (Ont. C.A.) -- followed

Ontario Dairy Cow Leasing Ltd. v. Ontario (Milk Marketing Board) (1993), 4 P.P.S.A.C. (2d) 269, 1993 CarswellOnt 655 (Ont. C.A.) -- considered

Sperry Inc. v. Canadian Imperial Bank of Commerce (1985), 50 O.R. (2d) 267, 17 D.L.R. (4th) 236, 8 O.A.C. 79, 55 C.B.R. (N.S.) 68, 4 P.P.S.A.C. 314, 1985 CarswellOnt 167 (Ont. C.A.) -- considered

Textron Financial Canada Ltd. v. Beta Ltee/Beta Brands Ltd. (2007), 2007 CarswellOnt 89, 27 C.B.R. (5th) 1 (Ont. S.C.J.) -- referred to

Toronto Dominion Bank v. Usarco Ltd. (1991), 42 E.T.R. 235, 1991 CarswellOnt 540 (Ont. Gen. Div.) -- distinguished

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally -- referred to

s. 67(1) -- referred to

s. 136 -- referred to

s. 244 -- referred to

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

Generally -- referred to

Employment Standards Act, 2000, S.O. 2000, c. 41

Generally -- referred to

s. 40(1) -- considered

s. 40(2) -- considered

Pension Benefits Act, 1987, S.O. 1987, c. 35

Generally -- referred to

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

Generally -- referred to

Personal Property Security Act, R.S.O. 1980, c. 375

s. 35(1)(c) -- referred to

Personal Property Security Act, R.S.O. 1990, c. P.10

Generally -- referred to

s. 1(1) "purchase-money security interest" -- referred to

s. 30(7) -- considered

s. 30(8) -- referred to

s. 33 -- referred to

s. 33(1)(a) -- referred to

s. 33(1)(b) -- referred to

12 P.P.S.A.C. (3d) 46, 37 C.B.R. (5th) 107

Wage Earner Protection Program Act, S.C. 2005, c. 47

Generally -- referred to

MOTION by union for declaration that claim for employees' vacation pay had priority over claim of secured creditor.

L.C. Leitch R.S.J.:

1 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 (Ont. S.C.J.) at para. 10).

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 Inc., Re***, *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 *Irving A. Burton Ltd. v. Canadian Imperial Bank of Commerce* (1982), 2 P.P.S.A.C. 22 (Ont. C.A.) 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 (S.C.C.)). 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 ***Ivaco Inc., Re***, *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. Henfrey Samson Belair Ltd.*, *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 Inc.*, *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 (Ont. 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 Inc.* 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 Inc.*, *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 Inc.*, *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 (Ont. C.A.) 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 Inc.* 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 (Ont. Bktcy.), aff'd [1997] O.J. No. 4634 (Ont. 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 CarswellOnt 540 (Ont. Gen. Div.). The decision in *Usarco Ltd.* 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 Ltd.*, *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 Ltd.*, *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 Ltd.* was distinguished in *Ivaco Inc., Re*, **2006 CarswellOnt 6292** (Ont. C.A.), a case relied on by the applicant, the principles underlying the reasoning in *Usarco Ltd.* 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 Ltd.* is also distinguishable on its facts on this motion, and relies on the principles established in ***Ivaco Inc., Re*** in support of its position. In ***Ivaco Inc., Re*** 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 Inc., Re*** refused to allow them to do so indirectly.

44 While I agree with Local 242G that, according to *Sperry Inc.*, 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 (Trustee of)* 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 Ltd.* In *Usarco Ltd.* 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 Inc., Re*** observed in distinguishing the case, "in *Usarco Ltd.* 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 Ltd.* it was unclear whether bankruptcy proceedings would ever take place" (***Ivaco Inc., Re***, *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 Inc., Re*** 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 Inc., Re***, 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 Inc., Re*** where the creditors were actively seeking to petition the debtor company into bankruptcy. The principles established in ***Ivaco Inc., Re*** 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 Inc., Re*** 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 Inc., Re*** 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.

Motion dismissed.

FN*. A corrigendum issued by the court on November 13, 2007 has been incorporated herein.

TAB 13

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ted LeRoy Trucking Ltd. (Re),*
2009 BCCA 205

Date: 20090507
Docket: CA036474

In the Matter of the *Companies' Creditors Arrangement Act*,
R.S.B.C. 1985, c. C-36

and

In the Matter of the *Business Corporations Act*, R.S.B.C. 2002, c. 57

and

In the Matter of Ted LeRoy Trucking Ltd. and 383838 B.C. Ltd.

Between:

The Attorney General of Canada on behalf of
Her Majesty the Queen in right of Canada

Appellant

And

Ted LeRoy Trucking Ltd., 383838 B.C. Ltd., Century Services Inc.
and PricewaterhouseCoopers Inc. in its capacity as Monitor

Respondents

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice D. Smith

D.W. Jacyk and K.K. Khalsa	Counsel for the Appellant
M.I.A. Buttery and M.J.G. Curtis	Counsel for the Respondent, Century Services Inc.
Place and Date of Hearing:	Vancouver, British Columbia March 30, 2009
Place and Date of Judgment:	Vancouver, British Columbia May 7, 2009

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Madam Justice D. Smith

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

[1] Her Majesty the Queen in right of Canada (the "Crown") appeals from an order dismissing its application on the eve of the bankruptcy of Ted LeRoy Trucking Ltd. (the "Debtor Company") to have funds being held in trust paid to the Receiver General for Canada.

[2] The Debtor Company commenced proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"), on December 14, 2007. As is typical in *CCAA* proceedings, the Debtor Company obtained an order staying all proceedings while it attempted to restructure its financial affairs, and an accounting firm was appointed as Monitor.

[3] The Debtor Company owed the Crown, pursuant to the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the "*ETA*"), in respect of goods and services tax ("GST") collected by the Debtor Company from third parties. The aggregate amount collected in reporting periods preceding the *CCAA* filing, but not remitted to the Receiver General, was the sum of $305,202.30.

[4] The *ETA* provides the Crown with rights to enforce payment of unremitted GST collections. One example, which is not in issue on this appeal, is the right given to the Minister of Finance under s. 317 to issue a form of garnishment called a requirement to pay.

[5] The enforcement right given to the Crown in issue on this appeal is contained in s. 222 of the *ETA*, and is commonly referred to as the "deemed trust" provision.

Subsection (1) provides that all amounts collected on account of GST are deemed to be held by the person collecting them in trust for the Crown until they are remitted to the Receiver General. Subsection (3) creates a deemed trust in respect of the property of the person collecting the GST, as follows:

> (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.

[6] The Debtor Company had been authorized by the court to conduct sales of its redundant equipment, and it applied on April 29, 2008 for court approval of the distribution of the sale proceeds. The Debtor Company proposed that, subject to a holdback of the $305,202.30 owed to the Crown on account of GST, an amount not exceeding $5 million be paid to Century Services, the major secured creditor of the Debtor Company. Over the objection of the Crown, which wanted the monies paid

directly to it, the chambers judge agreed with the Debtor Company's proposal and ordered that the Monitor hold the sum of $305,202.30 in its trust account pending further order of the court. No appeal was taken by the Crown from this order.

[7] The Debtor Company eventually came to the realization that it could not successfully reorganize its financial affairs. It applied on September 3, 2008 for court approval of the distribution of further sale proceeds and for leave to assign itself into bankruptcy. The Crown applied on the same day for an order that the monies held in trust by the Monitor be paid to the Receiver General. The chambers judge heard the Debtor Company's application first and granted it. He then heard and dismissed the Crown's application.

[8] The reasoning of the chambers judge in dismissing the Crown's application was as follows (2008 BCSC 1805):

> [5] I recognize that the funds collected by the petitioners pre-filing were the subject [of] the deemed trust provisions in the legislation. Monies were collected by the petitioner from third parties on behalf of Canada and they were not paid over to Canada. However, the triggering date was the date of the *CCAA* filing. Under the existing *CCAA* law, the court is required to maintain the status quo amongst the parties as of that date. At the date of the first day order the outstanding GST monies were owed but had not been remitted and remained in the possession of the petitioner.
>
> [6] In my view the amounts that were segregated were done to facilitate an ultimate payment of the GST monies which were owing pre-filing, but only if a viable plan emerged at the conclusion of the *CCAA* process. That has not happened. The reality is there will never be a plan in this case, but merely a sale of assets under the *BIA* as well as under the *CCAA* continued stay. That being so, it seems to me that the Crown has simply lost its preference under the provisions of the *BIA* and that that is simply a consequence of the way in which this restructuring has ended. It is no different than if the petitioner had filed under the *BIA* at the outset. The Crown is simply in the position that it

> is entitled to be in under the *BIA*. It will have the rights that Parliament has chosen to confer upon it under that legislation.

[9] It was agreed between the parties that two additional pieces of information could be admitted on this appeal. The first is that the Debtor Company did make an assignment in bankruptcy on September 4, 2008, and the Monitor was named the trustee in bankruptcy, as well as being appointed receiver under the security held by Century Services. The second is that the Monitor invested the $305,202.30 sum in a term deposit when the monies were received from the Debtor Company and that, on or after September 4, the term deposit plus interest thereon ($308,245.15) was paid into the general trust account of the trustee/receiver, which contained other funds.

[10] Before discussing the decision of the chambers judge, I will provide a backdrop by reviewing general principles of the *CCAA* and outlining the introduction of the provisions of the *CCAA* dealing with Crown claims. I will also briefly make reference to the nature of the deemed trust provision in favour of the Crown.

[11] Much has been written about the purpose of the *CCAA* and the stay provisions of s. 11 of the Act. One of the most often cited passages is the following paragraph from *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1990), 4 C.B.R. (3d) 311 at 315, 51 B.C.L.R. (2d) 84 (C.A.):

> [10] The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A., the Court is called upon to play a kind of supervisory role to

> preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the Court under s. 11.

[12] Similar comments were made in *Re Royal Oak Mines Inc.* (1999), 6 C.B.R. (4th) 314 at 317, 96 O.T.C. 272 (Ont. Ct. Jus. (Gen. Div.)):

> [7] Section 11 of the CCAA is the provision of the Act embodying the broad and flexible statutory power invested in the court to "grant its protection" to an applicant by imposing a stay of proceedings against the applicant company, subject to terms, while the company attempts to negotiate a restructuring of its debt with its creditors. It is well established that the provisions of the Act are remedial in nature, and that they should be given a broad and liberal interpretation in order to facilitate compromises and arrangements between companies and their creditors, and to keep companies in business where that end can reasonably be achieved: ... [citations omitted]

[13] When the use of the *CCAA* was resurrected in the late 1980s and early 1990s after a period of dormancy, there was uncertainty as to whether the Crown was bound by orders made in *CCAA* proceedings. There were a number of conflicting decisions, including *Re Fine's Flowers Ltd.* (1993), 108 D.L.R. (4th) 765, 22 C.B.R. (3d) 1 (Ont. C.A.), where it was held that the *CCAA* did not bind the Crown. This undermined the utility of the *CCAA* and, as a result, several provisions were added to the *CCAA* in the 1997 round of amendments to the Act (S.C. 1997, c. 12). The most important of these provisions was s. 21, which specifically provides that the *CCAA* is binding on the Crown.

[14] Parliament simultaneously enacted several other provisions in the *CCAA* dealing with specific Crown claims and rights of enforcement. Section 11.4 was added to provide that a stay order can stay the garnishment rights of the Crown under s. 224(1.2) of the *Income Tax Act* and similar provisions in the *Canada Pension Plan* and the *Employment Insurance Act* (and comparable provisions under provincial legislation), provided that, among other things, the debtor company remains current in respect of amounts due to the Crown after the date of the stay order. Section 18.2 was added to provide that if an order does stay the provisions referred to in s. 11.4, no compromise or arrangement shall be sanctioned by the court unless it provides for payment in full to the Crown within six months of the amounts outstanding at the date of the stay order that could have been garnished in the absence of the stay order or unless the Crown consents. Other additions dealt specifically with environmental claims (s. 11.8(3) to (9)), workers' compensation (s. 18.4), and registered security held by the Crown (s. 18.5).

[15] The addition to the Act of particular importance to this matter is s. 18.3(1) dealing with deemed trusts in favour of the Crown:

> 18.3(1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

Subsection (2) of s. 18.3 provides that subsection (1) does not apply to the deemed trust provisions in certain sections of the *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* (as well as similar provincial legislation). Subsection (2) does not mention s. 222 of the *ETA*.

[16] Provisions virtually identical to ss. 18.3(1) and (2) are also contained in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"), (namely, ss. 67(2) and (3)). That is why, generally speaking, deemed trusts in favour of the Crown are not effective in a bankruptcy situation, with the result that the Crown ranks in priority behind secured creditors in respect of the unremitted amounts giving rise to the deemed trusts.

[17] The Supreme Court of Canada considered the nature of the deemed trust under s. 227(4.1) of the *Income Tax Act* (which is identical in material respects to s. 222(3) of the *ETA*) in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720. The issue in that case was whether the Crown could claim against accounts receivable that were factored by the taxpayer to a third party after the deemed trust had come into existence as a result of the failure of the taxpayer to make required remittances. In holding that the Crown could not claim against the factored accounts receivable, Mr. Justice Iacobucci likened the deemed trust to a floating charge:

> [40] In my view, the scheme envisioned by Parliament in enacting ss. 227(4) and 227(4.1) is that the deemed trust is in principle similar to a floating charge over all the assets of the tax debtor in the amount of the default. As noted above, the trust has priority from the time the source deductions are made, and remains in existence as long as the default continues. However, the trust does not attach specifically to any particular assets of the tax debtor so as to prevent their sale. As such, the debtor is free to alienate its property in the ordinary course, in which case the trust property is replaced by the proceeds of sale of such property.

[18] Mr. Justice Iacobucci also commented at para. 27 that the deemed trust in s. 227(4.1) of the *Income Tax Act* had been strengthened by amendments in 1998 in response to the court's earlier decision in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, 143 D.L.R. (4th) 385. The deemed trust provision of the *ETA* was similarly strengthened in 2000 (S.C. 2000, c. 30, s. 50) by the enactment of the present versions of ss. 222(1) and (3). One of the changes from the previous deemed trust provision in the *ETA* was the inclusion of the opening phrase of subsection (3): "Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), ..."

[19] In *Re Ottawa Senators Hockey Club Corp.* (2005), 6 C.B.R. (5th) 293, 73 O.R. (3d) 737 (C.A.), the Ontario Court of Appeal was called upon to reconcile s. 18.3(1) of the *CCAA* and s. 222(3) of the *ETA* in view of the fact that they both contained clauses with "notwithstanding" language. In that case, the Ottawa Senators Hockey Club Corporation commenced a *CCAA* proceeding but when negotiations on a restructuring proposal foundered, its assets were sold to a third party. The sale was approved by an order made in the *CCAA* proceeding. At issue was whether the deemed trust under s. 222(3) of the *ETA* was to be recognized, enabling the Crown to recover the unremitted GST out of the sale proceeds in priority to the claims of secured creditors.

[20] Relying on the principles of statutory interpretation flowing from the facts that s. 18.3(1) of the *CCAA* was enacted earlier and was more specific than s. 222(3) of the *ETA*, the court held that s. 222(3) was to be given preference. The result was that the deemed trust for GST survived in a *CCAA* proceeding; the Crown was

entitled to be paid the amount of the unremitted GST from the sale proceeds before any of the sale proceeds were distributed to secured creditors.

[21] In the present case, the Crown relies heavily on *Ottawa Senators* and says that the chambers judge did not have a discretion to ignore the legislative will expressed in s. 222(3) of the *ETA*. With great respect to the chambers judge, I agree. It is also my view that there was an actual or express trust that should have been recognized by the chambers judge.

[22] While the chambers judge had the authority to stay the Crown's right to enforce the s. 222(3) deemed trust during the period in which the Debtor Company attempted to reorganize its financial affairs, it is my view that, after the restructuring efforts came to an end, the chambers judge did not have a discretion to ignore the deemed trust under s. 222 of the *ETA* or the express trust that was created in favour of the Crown when the Debtor Company paid the funds into the trust account of the Monitor.

[23] At the time of the hearing of the application, the chambers judge was acting under the *CCAA*. There was no longer any purpose under the *CCAA* to prevent the Crown from exercising its rights under the deemed trust or from receiving the funds being held in trust. The chambers judge was being asked to make a decision on the disposition of the funds being held in trust by the Monitor. Under the statutory regime in existence on that day, the Crown was entitled to rely on the deemed trust and the express trust. There was no reason to delay the decision and, as in *Ottawa Senators*, the funds should have been ordered to be paid to the Crown. The effect

of the chambers judge's decision was to apply the scheme of distribution under the *BIA* before that Act had become engaged by the bankruptcy of the Debtor Company. In my opinion, the chambers judge did not have the discretion to decide whether the pre-bankruptcy or post-bankruptcy scheme of distribution should be preferred. He was bound to apply the scheme of distribution in effect at the time he was asked to deal with the funds.

[24] It is my view that an express trust was created once the chambers judge made his order of April 29, 2008 and the $305,202.30 sum was paid into the trust account of the Monitor. In my opinion, the common law requirements for a trust (being certainty of intent, subject matter and object) were all met. There is no doubt that the monies were intended to be held in trust and that the investment of the funds in a term deposit kept them identifiable.

[25] It may be argued that there was not sufficient certainty of object because the April 29 order stipulated that the funds were to be held in trust pending further order of the court, and the court could have ordered the funds to be paid to someone other than the Receiver General. It is my view there was sufficient certainty of object for two reasons. The first is the wording of the order itself:

> 2. the Monitor shall, pending further Order of the Court, hold the sum of $305,202.30 in its trust account in respect of the amount owing by [the Debtor Company] to the Canada Revenue Agency for pre-filing Goods and Services Tax.

The funds were being held in trust for the pre-filing GST, which was owed to the Crown.

[26] Secondly, after the payments were made pursuant to the April 29 order, I am of the view that the court did not have the option of ordering the payment of the trust funds to any person other than the Receiver General. The closing words of s. 222(3) of the *ETA* provide that the Crown has a deemed trust covering the proceeds of the property of the person who collected the GST and that "the proceeds of the property shall be paid to the Receiver General in priority to all security interests". The court could not have authorized a payment to a secured creditor out of the proceeds from the sale of assets of the Debtor Company without ensuring payment of the GST to the Receiver General. Otherwise, the court would be sanctioning a breach of trust because it would be authorizing payment of proceeds covered by the deemed trust to a secured creditor in direct contravention of the closing phrase of s. 222(3). Hence, after the payment of the majority of the sale proceeds was made to Century Services, the court was required to ultimately order that the sum put aside on account of GST be paid to the Receiver General.

[27] An express trust was found in the somewhat analogous circumstances of *Alnav Platinum Group Inc. v. APM Delstar Inc.*, 2001 ABQB 930, 32 C.B.R. (4th) 1. There, a secured creditor had acted on its security and had collected accounts receivable owing to the debtor company. The amounts collected included GST. The amount collected exceeded the amount owed to the secured creditor and it paid the surplus to a receiver appointed at the instance of another secured creditor. The first secured creditor and the receiver entered into a "Proceeds Agreement" that referred to "Pre-Receivership G.S.T.", and the Alberta Queen's Bench ordered that the sum relating to GST claims be paid by the receiver into a separate account. On a

subsequent application after the debtor company had been adjudged bankrupt, the court held that an express trust had been created and that the funds were to be paid to the Crown.

[28] In the same fashion that the Crown relies on the decision in *Ottawa Senators*, Century Services relies heavily on two decisions, *Minister of National Revenue v. Points North Freight Forwarding Inc.*, 2000 SKQB 504, 24 C.B.R. (4th) 184, and *Re Ivaco Inc.* (2006), 275 D.L.R. (4th) 132, 25 C.B.R. (5th) 176 (Ont. C.A.).

[29] In *Points North*, a stay had been granted under the *CCAA* and the Crown applied to amend the stay order to allow it to exercise its garnishment rights under s. 317(3) of the *ETA*. Mr. Justice Barclay held that despite the fact that s. 11 of the *CCAA* does not mention the garnishment provision of the *ETA* (while mentioning similar provisions in other federal statutes), it was nevertheless intended by Parliament that an order under s. 11 of the *CCAA* can stay the enforcement rights of the Crown under s. 317(3) of the *ETA*. Century Services particularly relies on the following paragraph from *Points North*:

> [14] I agree with counsel for the respondents that there is no actual conflict as an order under s. 11 merely suspends the Crown's right under s. 317 of the *Excise Tax Act* as the Court deems necessary in order to allow the debtor to submit a proposal. The Crown's rights are not taken away, they are merely suspended. If the proposal is rejected by the creditors or the stay of proceedings is lifted, the Crown is then in a position to exercise its full rights under s. 317.

[30] I do not quarrel with the proposition that an order under s. 11 of the *CCAA* can stay the enforcement rights of the Crown. However, when the restructuring efforts have come to an unsuccessful end, the Crown is then in a position to

exercise its rights under the deemed trust. In addition, the s. 11 stay powers do not permit the court to authorize a breach of the deemed trust for the benefit of another creditor.

[31] The facts in *Ivaco* do have some similarity to the case at bar. The debtor company was not able to restructure under the *CCAA* and its assets were sold. Two secured creditors brought motions to have the *CCAA* stay lifted so that they could petition the debtor company into bankruptcy. The Ontario Superintendent of Financial Services made a concurrent motion for an order that part of the sale proceeds be paid to satisfy unpaid pension contributions which were deemed by s. 57 of the *Pension Benefits Act*, R.S.O. 1990, c. P.8, to be held in trust for the employees.

[32] The Ontario Court of Appeal upheld the decision of the motions judge dismissing the Superintendent's application and allowing the bankruptcy petitions to proceed. The court rejected the Superintendent's arguments that the motions judge was required to order the segregation of the amount of the deemed trusts during the *CCAA* proceedings and that the motions judge was required in law to order that the amount of the deemed trusts be paid at the end of the *CCAA* proceeding but before bankruptcy.

[33] In my opinion, *Ivaco* is distinguishable on a number of bases. In the case at bar, funds had previously been paid into a trust account in respect of GST, but no funds had been earmarked in *Ivaco*. Here, I have found an express trust in favour of the Crown, while the Superintendent in *Ivaco* was relying only on the deemed trust.

The deemed trust under s. 57 of the *Pension Benefits Act* is not as strong as the deemed trust under s. 222 of the *ETA* in several respects. Section 57 does not specify any property of the debtor company to be held in trust but, rather, s. 57(3) provides that the administrator of the pension plan has a lien and charge on the assets of the debtor company. Also, s. 57 does not contain "notwithstanding" language or a requirement similar to the one in s. 222(3) that "proceeds of the property shall be paid to the Receiver General in priority to all security interests".

[34] I find of interest one of the comments made by Mr. Justice Laskin in rejecting the Superintendent's second argument, where he said the following:

> [60] The CCAA itself did not require the motions judge to execute the deemed trusts. The Superintendent cannot point to any section of the statute where a legal obligation to order payment of the past service contributions can be found. Moreover, in 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. See for example *Re United Maritime Fishermen Co-op* (1988), 68 C.B.R. (N.S.) 170 (N.B. Q.B.) at 173.

In the context of the present case, the chambers judge did have authority to order the funds to be paid out of the Monitor's trust account because they were paid into the trust account pending further order of the court. It was clearly contemplated that there would be an order in the *CCAA* proceedings directing the payment of the funds out of the trust account.

[35] Mr. Justice Laskin's comments are of interest because he questioned whether the motions judge had any authority to make further orders once restructuring was

not possible and the *CCAA* proceedings were spent. In the case at bar, once restructuring possibilities had been exhausted and the *CCAA* proceedings were spent, there was no reason to prevent the Crown from exercising its rights in relation to the funds being held in trust. The distinction in this regard between *Ivaco* and this case is that the motions judge in *Ivaco* was being asked to execute the deemed trusts, while the chambers judge in this case was simply being asked to release monies that were being held in a trust account in respect of GST.

[36] The final point I wish to address is Century Services' argument that public policy favours its position because insolvent companies should be encouraged to attempt to restructure rather than to file for bankruptcy. Century Services relies on the following two sentences from *Ivaco*:

> [64] ... 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.

The chambers judge in this case appears to have agreed with this public policy argument because he stated in para. 6 of his reasons for judgment that the result of dismissing the Crown's application was no different than if the Debtor Company had filed under the *BIA* at the outset.

[37] I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here,

Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*.

[38] For these reasons, I would allow the appeal and order that the funds paid into the trust account of the Monitor, together with interest earned thereon, be paid to the Receiver General.

D. Tysoe JA

The Honourable Mr. Justice Tysoe

I agree:

The Honourable Madam Justice Newbury

I agree:

The Honourable Madam Justice D. Smith

TAB 14

75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 97 N.R. 61, [1989] 5 W.W.R. 577, 38 B.C.L.R. (2d) 145, 34 E.T.R. 1, 59 D.L.R. (4th) 726, [1989] 1 T.S.T. 2164, 2 T.C.T. 4263, J.E. 89-1098

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British Columbia v. Henfrey Samson Belair Ltd.

R. IN RIGHT OF BRITISH COLUMBIA v. HENFREY SAMSON BELAIR LTD. et al.

Supreme Court of Canada

Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ.

Heard: April 21, 1989
Judgment: July 13, 1989
Docket: No. 20515

Counsel: W.A. Pearce and J.G. Pottinger, for appellant.

W.G. Baker, Q.C., and G.E. Parson, for respondent.

J.M. Mabbutt, Q.C., for intervener Attorney General of Canada.

J.E. Minor and T. Macklem, for intervener Attorney General for Ontario.

Y. de Montigny and M. Aubé, for intervener Attorney General of Quebec.

R.M. Endres, for intervener Attorney General of Nova Scotia.

R. Burns, for intervener Attorney General for New Brunswick.

W.G. McFetridge and D.D. Blevins, for intervener Attorney General of Manitoba.

R.C. Maybank, for intervener Attorney General for Alberta.

W.G. Burke-Robertson, Q.C., for intervener Attorney General of Newfoundland.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts; Provincial Tax

75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 97 N.R. 61, [1989] 5 W.W.R. 577, 38 B.C.L.R. (2d) 145, 34 E.T.R. 1, 59 D.L.R. (4th) 726, [1989] 1 T.S.T. 2164, 2 T.C.T. 4263, J.E. 89-1098

Taxation --- Provincial and territorial taxes -- General taxation principles -- Priority of tax claims in bankruptcy proceedings.

Bankruptcy --- Priorities of claims -- Claims of Crown -- Provincial -- General.

Secured creditors -- Priorities -- Debentures -- Statutory trust for provincial sales tax -- Bankrupt commingling sales tax collected with own assets -- Receiver applying all assets to debenture holder's indebtedness -- Province claiming statutory trust under Social Service Tax Act having priority under Bankruptcy Act -- Statutory trust not conforming to principles of general trust law after property converted -- Province only having claim secured by statutory charge or lien -- Claim falling within s. 107(1)(j) of Bankruptcy Act.

Property of bankrupt -- Trust property -- Definition of "trust" to be applied for purposes of exemption under Bankruptcy Act being within sole legislative competence of federal government.

T. collected provincial sales tax in the course of its business operations as required by the British Columbia Social Service Tax Act. T. failed to remit the tax collected and mingled it with its other assets. A secured creditor placed T. into receivership pursuant to its debenture and T. subsequently made an assignment in bankruptcy. The receiver sold T.'s assets and applied the full proceeds to reducing the secured creditor's indebtedness. The province claimed s. 18 of the Act created a statutory trust over the assets of T. equal to the amount of the sales tax collected but not remitted and that it had priority over the secured creditor and all other creditors. The chambers judge held the Act did not create a trust and the province did not have priority. The Court of Appeal held the Act did create a statutory trust, but that the province did not have priority as the Bankruptcy Act did not confer priority on such a trust. The province appealed. At issue was whether the statutorily created trust was a trust within s. 47 of the Bankruptcy Act or merely a Crown claim under s. 107(1)(j) of the Bankruptcy Act.

Held:

Appeal dismissed.

Per MCLACHLIN J. (LAMER, WILSON, LA FOREST, L'HEUREUX-DUBÉ JJ. concurring): The words of s. 47(a) of the Bankruptcy Act in their ordinary sense evidence the intention to permit removal from the distribution scheme established by the Bankruptcy Act of property which can be specifically identified, under general principles of trust law, as not belonging to the bankrupt. Section 107(1)(j) deals with claims, such as tax claims, not established under general principles of law but secured by the Crown's personal preference through legislation. This interpretation of s. 47(a) and s. 107(1)(j) avoids any conflict between the sections and conforms to the principle that provinces cannot create priorities under the Bankruptcy Act by their own legislation. Practical policy considerations also support this interpretation of the Bankruptcy Act.

Section 18 of the Social Service Tax Act deems a statutory trust at the moment the tax is collected. At that moment the trust property is identifiable, the trust meets the requirements for a trust under general principles of law and the money is exempt from distribution to creditors under s. 47(a). However, the identifiability is soon lost as the tax money becomes mingled with other money and is converted to other property so that it is no longer traceable and there is no longer a trust under general principles of law. Although s. 18(1)(b) of the Social Service Tax Act deems all tax collected to be held separate from the collector's other money, assets or estate, in reality the statutory trust bears little resemblance to a true trust after conversion of the property. It is for this reason that s. 18(2) provides for the unpaid tax to form a lien and charge on the entire assets of the collector.

Whether the province's interest under s. 18 is a trust within the meaning of s. 47(a) or a claim of the Crown under s.

107(1)(j) depends on the facts of a particular case. Here, no specific property impressed with a trust could be identified; accordingly, the province's claim could not fall under s. 47(a). As the province had a claim secured only by a charge or lien, s. 107(1)(j) would apply.

Further, although provinces could define "trust" for matters within their own legislative competence, the definition of trust which is operative for purposes of exemption under the Bankruptcy Act, must be that of the federal Parliament.

Per CORY J. (dissenting): The sales tax money collected by a vendor never belongs to the vendor. The vendor is simply the conduit for payment of the sales tax to the province and, in every sense of the word, the vendor is a trustee of the money collected. The statutory requirements concerning the keeping of records and accounts by the vendor emphasize the trust nature of the arrangement between the vendor as tax collector and the province. While the provinces cannot create priorities under the Bankruptcy Act by their own legislation, the Bankruptcy Act does not prohibit a province from creating a deemed trust or lien. Section 18 does not create a priority, but protects those funds which at the moment they were paid were truly trust funds. It is also not certain that the validity of a trust must be determined exclusively on the basis of common law.

The statutory trust created by s. 18 is validly constituted as it conforms to the three certainties required of a trust in equity: that is, certainty of intention, certainty of subject matter and certainty of object. The statute establishes certainty of intention and object, and provides a clear formula for establishing the trust property. The traceability of the property is a separate issue and the statute provides for a deemed tracing remedy. This has the advantage over a privately constituted trust of 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 does not negate the trust or take it outside policies previously enunciated by the Supreme Court of Canada.

Since the sales tax collected never at any time became the property of the bankrupt, it fell within s. 47(a) and was not subject to distribution under s. 107(1). As there is no conflict between ss. 18, 47(a) and 107(1)(j), the doctrine of federal paramountcy of legislation does not apply and s. 18 prevails. The appeal should therefore be allowed.

Cases considered:

Considered by majority:

Deloitte Haskins & Sells Ltd. v. W.C.B., [1985] 1 S.C.R. 785, 55 C.B.R. (N.S.) 241, [1985] 4 W.W.R. 481, 38 Alta. L.R. (2d) 169, 19 D.L.R. (4th) 577, 63 A.R. 321, 60 N.R. 81 -- applied

Dep. Min. of Revenue (Que.) v. Rainville, [1980] 1 S.C.R. 35, (sub nom. Re Bourgault; Dep. Min. of Revenue of Que. v. Rainville) 33 C.B.R. (N.S.) 301, 105 D.L.R. (3d) 270, (sub nom. Bourgault's Estate v. Dep. Min. of Revenue of Que.) 30 N.R. 24 -- applied

Phoenix Paper Prod. Ltd., Re (1983), 44 O.R. (2d) 225, 48 C.B.R. (N.S.) 113, 3 D.L.R. (4th) 617, 1 O.A.C. 215 (C.A.) -- distinguished

Considered in dissent:

Dauphin Plains Credit Union Ltd. v. Xyloid Indust. Ltd., [1980] 1 S.C.R. 1182, 33 C.B.R. (N.S.) 107, [1980] 3 W.W.R. 513, [1980] C.T.C. 247, (sub nom. Dauphin Plains Credit Union Ltd. v. R.) 80 D.T.C.

6123, 108 D.L.R. (3d) 257, 3 Man. R. (2d) 283, 31 N.R. 301 -- considered

Deloitte Haskins & Sells Ltd. v. W.C.B., [1985] 1 S.C.R. 785, 55 C.B.R. (N.S.) 241, [1985] 4 W.W.R. 481, 38 Alta. L.R. (2d) 169, 19 D.L.R. (4th) 577, 63 A.R. 321, 60 N.R. 81 -- considered

Dep. Min. of Revenue (Que.) v. Rainville, [1980] 1 S.C.R. 35, (sub nom. Re. Bourgault; Dep. Min. of Revenue of Que. v. Rainville) 33 C.B.R. (N.S.) 301, 105 D.L.R. (3d) 270, (sub nom. Bourgault's Estate v. Dep. Min. of Revenue of Que.) 30 N.R. 24 -- considered

Deslauriers Const. Prod. Ltd., Re, [1970] 3 O.R. 599, (sub nom. A.G. Can. v. Perlmutter) 14 C.B.R. (N.S.) 197, 13 D.L.R. (3d) 551 (C.A.) -- considered

Diplock's Estate, Re; Diplock v. Wintle, [1948] Ch. 465, [1948] 2 All E.R. 318, affirmed (sub nom. Min. of Health v. Simpson) [1951] A.C. 251, [1950] 2 All E.R. 1137 (H.L.) -- referred to

F.B.D.B. v. Que. (Comm. de la santé et de la securité du travail), [1988] 1 S.C.R. 1061, 68 C.B.R. (N.S.) 209, 50 D.L.R. (4th) 577, 14 Q.A.C. 140, 84 N.R. 308 -- referred to

John M.M. Troup Ltd. v. Royal Bank, [1962] S.C.R. 487, 3 C.B.R. (N.S.) 224, 34 D.L.R. (2d) 556 [Ont.] -- referred to

Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161, 18 B.L.R. 138, 138 D.L.R. (3d) 1, 44 N.R. 181 [Ont.] -- applied

Royal Trust Co. v. Tucker, [1982] 1 S.C.R. 250, 12 E.T.R. 257, 40 N.R. 361 [Que.] -- referred to

Statutes considered:

Bankruptcy Act, R.S.C. 1985, c. B-3

s. 67(a)

s. 136(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)

75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 97 N.R. 61, [1989] 5 W.W.R. 577, 38 B.C.L.R. (2d) 145, 34 E.T.R. 1, 59 D.L.R. (4th) 726, [1989] 1 T.S.T. 2164, 2 T.C.T. 4263, J.E. 89-1098

Construction Lien Act, S.O. 1983, c. 6

s. 7

Employment Standards Act, S.A. 1988, c. E-10.2

s. 113

Health Insurance Act, R.S.O. 1980, c. 197

s. 18

Insurance Act, R.S.A. 1980, c. I-5

s. 124(1)

Insurance Act, R.S.O. 1980, c. 218

s. 359

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 [repealed and substituted by the Financial Administration Act, S.B.C. 1981, c. 15, s. 71]

ss. 22-28 [now Pt. 7]

Social Service Tax Act, R.S.B.C. 1979, c. 388

s. 5 [am. 1981, c. 29, s. 6]

s. 6 [am. 1981, c. 15, s. 159]

s. 8 [am. 1981, c. 29, s. 7]

s. 9 [am. 1981, c. 29, s. 8]

s. 10 [am. 1981, c. 29, s. 9]

75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 97 N.R. 61, [1989] 5 W.W.R. 577, 38 B.C.L.R. (2d) 145, 34 E.T.R. 1, 59 D.L.R. (4th) 726, [1989] 1 T.S.T. 2164, 2 T.C.T. 4263, J.E. 89-1098

s. 18 [am. 1980, c. 10, s. 119; c. 52, s. 4; 1982, c. 39, s. 7; 1983, c. 6, s. 32; 1985, c. 32, s. 6]

s. 27 [am. 1980, c. 52, s. 5; 1981, c. 29, s. 15; 1985, c. 32, s. 9; c. 75, s. 27]

Regulations considered:

Alberta Health Care Insurance Act, R.S.A. 1980, c. A-24

Health Insurance Premiums Regulation, Alta. Reg. 217/81

Social Service Tax Act, R.S.B.C. 1979, c. 388 --

Social Service Tax Act Regulations, B.C. Reg. 84/58 Div. 5

Authorities considered:

Driedger, Construction of Statutes, 2nd ed. (1983), p. 105.

Hardy, Crown Priority in Insolvency (1986), pp. 107-108.

Waters, Law of Trusts in Canada, 2nd ed. (1984), pp. 119-22, 1037ff.

Words and phrases considered:

"trust"

"property held by the bankrupt in trust for any other person"

"property of the bankrupt"

Annotation

The question whether a "deemed" trust created by the provincial legislature is a trust within the meaning of s. 67 of the Bankruptcy Act, R.S.C. 1985, c. B-3, or is entitled to priority only under the provisions of s. 136 of the Bankruptcy Act has been a matter of controversy between several provincial appellate courts. For instance, the courts in Nova Scotia (*Dir. of Lab. Standards (N.S.) v. Trustee in Bankruptcy* (1981), 38 C.B.R. (N.S.) 253, 126 D.L.R. (3d) 417, 47 N.S.R. (2d) 446, 90 A.P.R. 446 (C.A.)) and the appellate courts in British Columbia (*R. v. C.I.B.C.* (1983), 50 C.B.R. (N.S.) 116; *A.G. Can. v. Samson Belair Ltd.*, 55 C.B.R. (N.S.) 114, [1985] 3 W.W.R. 651, 61 B.C.L.R. 24, 17 D.L.R. (4th) 544, leave to appeal to S.C.C. refused 55 C.B.R. (N.S.) xxvii, 62 B.C.L.R. xli, 17 D.L.R. (4th) 544n, 61 N.R. 78) held that provincial "deemed" trusts fell within the provisions of s. 136 of the Bankruptcy Act, while the courts in Ontario, culminating with the case of *Re Phoenix Paper Prod. Ltd.* (1983), 44 O.R. (2d) 225, 48 C.B.R. (N.S.) 113, 1 O.A.C. 215, 3 D.L.R. (4th) 617 (C.A.), held the opposite, namely, that a "deemed" statutory trust created by the province falls within s. 67 of the Bankruptcy Act and therefore has priority over other preferred creditors such as the trustee. The judgment of the Supreme Court of Canada in the case of *R. v. Henfrey Samson Belair Ltd.* now settles this question in an authoritative manner.

75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 97 N.R. 61, [1989] 5 W.W.R. 577, 38 B.C.L.R. (2d) 145, 34 E.T.R. 1, 59 D.L.R. (4th) 726, [1989] 1 T.S.T. 2164, 2 T.C.T. 4263, J.E. 89-1098

The law is now quite clear: the provisions of s. 67 of the Bankruptcy Act should be confined to trusts arising under general principles of law (namely, that the res must be identifiable or traceable) while s. 136 applies to claims not established by general law but secured "by Her Majesty's personal preference" through legislation. As the court stated, this conclusion is supported by the wording of ss. 67 and 136 of the Bankruptcy Act, by the jurisprudence of the Supreme Court of Canada, and by policy considerations.

However, the court made it clear that at some stage the "deemed" trust may still meet the requirements for a trust under the principles of trust law because, at some point, the trust property may still be identifiable or traceable. But once the trust property is mingled with other funds and converted to other property, it can no longer be traced and at this point there is no longer a trust under general principles of law. In the latter case, s. 67 of the Bankruptcy Act no longer applies.

It is interesting that the court considered practical policy considerations when it stated at p. 19 as follows:

"The difficulties of extending [s. 67] 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 scheme for the distribution of the bankrupt's assets".

C.H. Morawetz, Q.C.

Appeal from judgment of B.C.C.A., 65 C.B.R. (N.S.) 24, [1987] 4 W.W.R. 673, 13 B.C.L.R. (2d) 346, 40 D.L.R. (4th) 78, dismissing appeal from judgment of Meredith J., 61 C.B.R. (N.S.) 59, 5 B.C.L.R. (2d) 212, denying province's claimed priority over secured creditor in bankruptcy proceedings.

***Cory J.* (dissenting):**

1 I have read with great interest the compelling reasons of my colleague Justice McLachlin. Unfortunately I cannot agree that s. 47(*a*) [now s. 67(*a*)] of the Bankruptcy Act, R.S.C. 1970, c. B-3 [now R.S.C. 1985, c. B-3], does not apply in this case [appeal from 65 C.B.R. (N.S.) 24, [1987] 4 W.W.R. 673, 13 B.C.L.R. (2d) 346, 40 D.L.R. (4th) 728]. If s. 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 British Columbia Social Service Tax Act

2 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.

3 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 the 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 receive remuneration for the service they provide to the government by collecting the tax.

4 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 Service 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 15 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.

5 The requirements concerning the keeping of records and accounts emphasize the trust nature of the arrangement. They provide that books of accounts 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 purchases. Section 27 of the Act provides wide powers for the inspection of these records.

6 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 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*);

(*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*).

7 It can be seen that the moneys collected by a vendor such as Tops Pontiac Buick Ltd. ("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 business and provided for a regulated means of record keeping and inspection. The 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.

8 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.

9 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 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 s. 18 create a valid trust?

10 The question may be phrased more precisely by asking: If, as the chambers judge found [61 C.B.R. (N.S.) 59 at 60, 5 B.C.L.R. (2d) 212], 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 [now s. 136] 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 purchases, 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 261, 12 E.T.R. 257, 40 N.R. 361 [Que.].

11 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, 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,

75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 97 N.R. 61, [1989] 5 W.W.R. 577, 38 B.C.L.R. (2d) 145, 34 E.T.R. 1, 59 D.L.R. (4th) 726, [1989] 1 T.S.T. 2164, 2 T.C.T. 4263, J.E. 89-1098

s. 7; Business Corporations Act, S.A. 1981, c. B-15, s. 191(1); Employment Standards Act, S.A. 1988, c. E-10.2, s. 113; Insurance Act, R.S.A. 1980, c. I-5, s. 124(1); Real Estate Agents' Licensing Act, R.S.A. 1980, c. R-5, s. 14; and Health Insurance Premiums Regulation, Alta. Reg. 217/81.

12 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*, [1962] S.C.R. 487 at 494, 3 C.B.R. (N.S.) 224, 34 D.L.R. (2d) 556 [Ont.], 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.

13 Section 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 Const. Prod. Ltd., [1970] 3 O.R. 599, (sub nom. *A.G. Can. v. Perlmutter)* 14 C.B.R. (N.S.) 197, 13 D.L.R. (3d) 551 (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 creation of a trust and making those moneys the property of the Minister.

From this he drew the following conclusion at pp. 602-603:

> 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 Indust. Ltd.*, [1980] 1 S.C.R. 1182 at 1198, [1980] 3 W.W.R. 513, 33 C.B.R. (N.S.) 107, [1980] C.T.C. 247, (sub nom. *Dauphin Plains Credit Union Ltd. v. R.)* 80 D.T.C. 6123, 108 D.L.R. (3d) 257, 3 Man. R. (2d) 283, 31 N.R. 301, who stated: "I find the reasoning in *Deslauriers* wholly persuasive."

14 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.

15 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 191, 18 B.L.R. 138, 138 D.L.R. (3d) 1, 44 N.R. 181 [Ont.], 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 are being told to do inconsistent things"; compliance with one is defiance of the other.

16 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.

17 It is true that this court has in *Deloitte Haskins & Sells Ltd. v. W.C.B.*, [1985] 1 S.C.R. 785, 55 C.B.R. (N.S.) 241, [1985] 4 W.W.R. 481, 38 Alta. L.R. (2d) 169, 19 D.L.R. (4th) 577, 63 A.R. 321, 60 N.R. 81, 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 purchases for payment to the province. I do not think that the decision in *Deloitte Haskins & Sells v. W.C.B.* can be taken to have altered the meaning of the words "property of the bankrupt" contained in s. 47 of the Bankruptcy Act.

18 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 & Sells v. W.C.B.*, the lien portion of the deemed trust section should probably be held to be ineffective on the bankruptcy of the trustee. Nonetheless at pp. 107-108 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 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 subsection 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 of 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.

19 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 object. It is con-

ceded 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 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]

20 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.

21 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.

22 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 moneys can be traced "either as a 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; Diplock v. Wintle*, [1948] Ch. 465 at 521, [1948] 2 All E.R. 318 at 347, per Lord Green M.R.; affirmed (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 at p. 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 *Dep. Min. of Revenue (Que.) v. Rainville* , [1980] 1 S.C.R. 35, (sub nom. *Re Bourgault; Dep. Min. of Revenue of Que. v. Rainville)* 33 C.B.R. (N.S.) 301, 105 D.L.R. (3d) 270, (sub nom. *Bourgault's Estate v. Dep. Min. of Revenue of Que.)* 30 N.R. 24; *Deloitte Haskins & Sells v. W.C.B.*, supra; and *F.B.D.B. v. Que. (Comm. de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061, 68 C.B.R. (N.S.) 209, 50 D.L.R. (4th) 577, 14 Q.A.C. 140, 84 N.R. 308. It would thus seem that the statutory trust complies with the requirements of a valid trust that would be recognized in equity.

75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 97 N.R. 61, [1989] 5 W.W.R. 577, 38 B.C.L.R. (2d) 145, 34 E.T.R. 1, 59 D.L.R. (4th) 726, [1989] 1 T.S.T. 2164, 2 T.C.T. 4263, J.E. 89-1098

23 If as stated in *Dep. Min. of Revenue (Que.) v. Rainville* mechanics' liens or construction liens may be recognized, although it would be impossible to trace the funds of the subcontractors in the commingled accounts of the general contractor, so too should the statutory trust pertaining to sales tax be recognized.

24 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.

Disposition

25 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 *Dep. Min. v. Rainville, Deloitte Haskins & Sells v. W.C.B.*, and *F.B.D.B. v. Que. (Comm. de la santé et de la sécuritié du travail)*, for the following reasons:

(a) The sums constituting the trust were never the property of the bankrupt, but were transferred from purchases of vehicles to the provincial Crown, for whom Tops acted as trustee, in satisfaction of an obligation incurred by those purchases;

(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 *Re Bourgault, Deloitte Haskins & Sells* and *F.B.D.B.*;

(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.

26 I would therefore answer the constitutional question as follows:

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.

27 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."

75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 97 N.R. 61, [1989] 5 W.W.R. 577, 38 B.C.L.R. (2d) 145, 34 E.T.R. 1, 59 D.L.R. (4th) 726, [1989] 1 T.S.T. 2164, 2 T.C.T. 4263, J.E. 89-1098

***McLachlin J. (Lamer, Wilson, La Forest, L'Heureux-Dubé* and *Gonthier JJ.* concurring)::**

28 The issue on this appeal [from 65 C.B.R. (N.S.) 24, [1987] 4 W.W.R. 673, 13 B.C.L.R. (2d) 346, 40 D.L.R. (4th) 728] 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 [now R.S.C. 1985, c. B-3].

29 Tops Pontiac Buick Ltd. ("Tops") 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 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.

30 The province contends that the Social Service Tax Act creates 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.

31 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.

32 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*);
> >
> > (*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 The province argues that s. 18(1) creates a trust within s. 47(*a*) [now s. 67(*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.

34 The respondents, on the other hand, submit 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. They submit that the province's claim to the tax money is in fact a debt falling under s. 107(1)(*j*) [now s. 136(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

35 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*).

36 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.

37 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.

75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 97 N.R. 61, [1989] 5 W.W.R. 577, 38 B.C.L.R. (2d) 145, 34 E.T.R. 1, 59 D.L.R. (4th) 726, [1989] 1 T.S.T. 2164, 2 T.C.T. 4263, J.E. 89-1098

38 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.

39 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 *Dep. Min. of Revenue (Que.) v. Rainville*, [1980] 1 S.C.R. 35, (sub nom. *Re Bourgault; Dep. Min. of Revenue of Que. v. Rainville)* 33 C.B.R. (N.S.) 301, 105 D.L.R. (3d) 270, (sub nom. *Bourgault's Estate v. Dep. Min. of Revenue of Que.)* 30 N.R. 24. 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.

40 If s. 47(*a*) and s. 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 *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.

41 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 & Sells Ltd. v. W.C.B.*, [1985] 1 S.C.R. 785, 55 C.B.R. (N.S.) 241, [1985] 4 W.W.R. 481, 38 Alta. L.R. (2d) 169, 19 D.L.R. (4th) 577, 63 A.R. 321, 60 N.R. 81. As Wilson J. stated at p. 806:

> ... the issue in *Re Bourgault* 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 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 effect of permitting the provinces to determine priorities on a bankruptcy, a matter within exclusive federal jurisdiction.

While *Deloitte, Haskins & Sells Ltd. v. W.C.B.* 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.

42 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.

43 Practical policy considerations also recommended 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 scheme for the distribution of the bankrupt's assets.

44 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.

45 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.

46 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 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 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.

47 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.

48 The province, however, argues that it is open to it to define "trust" however it pleases, property and civil rights

75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 97 N.R. 61, [1989] 5 W.W.R. 577, 38 B.C.L.R. (2d) 145, 34 E.T.R. 1, 59 D.L.R. (4th) 726, [1989] 1 T.S.T. 2164, 2 T.C.T. 4263, J.E. 89-1098

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 & Sells Ltd. v. W.C.B.*

49 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 inter est 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, supplemented by a lien and charge over all the bankrupt's property under s. 18(2).

50 The province relies on *Re Phoenix Paper Prod. Ltd.* (1983), 44 O.R. (2d) 225, 48 C.B.R. (N.S.) 113, 3 D.L.R. (4th) 617, 1 O.A.C. 215, 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 Prod. 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 & Sells v. W.C.B.*, and the affirmation in that case of the line of authority which the Ontario Court of Appeal rejected.

51 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

52 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.

53 I would dismiss the appeal, with costs.

Appeal dismissed.

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TAB 15

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GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.

In the Matter of an Application under s. 47(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 and s. 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43

GMAC Commercial Credit Corporation - Canada (Applicant / Respondent to Motion below / Respondent in Appeal / Appellant in C38656) and TCT Logistics Inc. (Respondent / Moving Parties In Motion below / Appellant in C38655) and Travelers Transportation Services Inc., Travelers Holdings Wallaceburg Limited, SGT 2000 Inc., Scott-Woods Transport Inc., SLH Transport Inc., Manitoulin Transport Inc., G. Zavitz Ltd., Bison Diversified Inc., C.W. Henderson & Barat Management Service Inc., Canco Transportation Services Inc., Boarder Carriers Inc., HPD Transport Ltd., Gapco Transport Ltd., The BLM Group Inc., Kenmore Transportation Inc., Portage Cartage & Storage Ltd., Bradley Equipment & Transportation Systems Inc. (Respondents to Motion below / Respondents in Appeal)

Ontario Court of Appeal

Doherty, Laskin, Feldman JJ.A.

Heard: May 5, 6, 2004
Judgment: February 18, 2005
Docket: CA C38655, C38656

Proceedings: reversing in part *GMAC Commercial Credit Corp.- Canada v. TCT Logistics Inc.* (2002), 2002 CarswellOnt 2754, 61 O.R. (3d) 85, 36 C.B.R. (4th) 231 (Ont. S.C.J. [Commercial List])

Counsel: J.T. Porter for Appellant, GMAC Commercial Credit Corp.

Frederick L. Myers, Nando De Luca for Appellants, TCT Logistics, by their Interim Receiver KPMG Inc.

Gerard V. Thompson, Charlie Chang for Respondents, Travelers Transportation Services Inc. et al (the Carriers)

Subject: Insolvency; Estates and Trusts; Family; Property; Contracts; Torts

Bankruptcy and insolvency --- Property of bankrupt -- Trust property -- General principles

T Inc. and its related companies operated freight brokerage and warehousing business in Canada and United States -- Under general security agreement, G Corp. held comprehensive security over all of T Inc.'s assets, including its accounts receivable -- In 2001, T Inc. began to default on its obligations to G Corp., and on January 24, 2002, K Inc. was appointed interim receiver over all assets and undertakings of T Inc. -- Order dated February 22, 2002, authorized interim receiver to file assignment in bankruptcy and K Inc. became trustee in bankruptcy on February 25, 2002 -- G Corp. and carriers disputed priority over two separate funds of T Inc. -- First fund consisted of carriers' funds collected by T Inc. prior to January 24, 2002, and commingled with T Inc.'s own funds ("first fund") -- Second fund consisted of accounts receivable of T Inc. collected by K Inc., carriers' portion of which had been placed into separate bank account pursuant to court orders ("second fund") -- Carriers' claim was based on s. 67(1)(a) of Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA") and s. 15 of Load Brokers, O. Reg. 556/92 under Truck Transportation Act, R.S.O. 1990, c. T.22 ("Load Brokers Regulation") -- Carriers' position was that, under Load Brokers Regulation, all funds owed to carriers by T Inc. were subject of deemed trust under s. 67(1)(a) of BIA -- Motion judge held that first and second funds were excluded from security interest of G Corp. and from bankrupt estate pursuant to s. 67(1)(a) of BIA -- G Corp. and K Inc. appealed -- Appeal allowed in part -- Jurisprudence excluded statutory deemed trusts from ambit of s. 67(1)(a) of BIA with exception of certain deemed trusts in favour of Crown -- Consequently, even if s. 15 of Load Brokers Regulation created deemed trust, deemed trust would not be trust within meaning of s. 67(1)(a) of BIA -- First fund lost its character as trust fund when it was not segregated and was commingled with other T Inc. funds -- As result, first fund was not subject to trust under s. 15 of Load Brokers Regulation -- Security interest of G Corp. had priority over first fund -- Second fund collected by K Inc., which was not commingled with other funds, was held in trust for carriers and was payable to them -- Second fund had priority over security interest of G Corp.

Bankruptcy and insolvency --- Priorities of claims -- Secured claims -- Forms of secured interests -- Miscellaneous securities

T Inc. and its related companies operated freight brokerage and warehousing business in Canada and United States -- Under general security agreement, G Corp. held comprehensive security over all of T Inc.'s assets, including its accounts receivable -- In 2001, T Inc. began to default on its obligations to G Corp., and on January 24, 2002, K Inc. was appointed interim receiver over all assets and undertakings of T Inc. -- Order dated February 22, 2002, authorized interim receiver to file assignment in bankruptcy and K Inc. became trustee in bankruptcy on February 25, 2002 -- G Corp. and carriers disputed priority over two separate funds of T Inc. -- First fund consisted of carriers' funds collected by T Inc. prior to January 24, 2002, and commingled with T Inc.'s own funds ("first fund") -- Second fund consisted of accounts receivable of T Inc. collected by K Inc., carriers' portion of which had been placed into separate bank account pursuant to court orders ("second fund") -- Carriers' claim was based on s. 67(1)(a) of Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA") and s. 15 of Load Brokers, O. Reg. 556/92 under Truck Transportation Act, R.S.O. 1990, c. T.22 ("Load Brokers Regulation") -- Carriers' position was that, under Load Brokers Regulation, all funds owed to carriers by T Inc. were subject of deemed trust under s. 67(1)(a) of BIA -- Motion judge held that first and second funds were excluded from security interest of G Corp. and from bankrupt estate pursuant to s. 67(1)(a) of BIA -- G Corp. and K Inc. appealed -- Appeal allowed in part -- Jurisprudence excluded statutory deemed trusts from ambit of s. 67(1)(a) of BIA with exception of certain deemed trusts in favour of Crown -- Consequently, even if s. 15 of Load Brokers Regulation created deemed trust, deemed trust would not be trust within meaning of s. 67(1)(a) of BIA -- First fund lost its character as trust fund when it was not segregated and was commingled with other T Inc. funds -- As result, first fund was not subject to trust under s. 15 of Load Brokers Regulation -- Security interest of G Corp. had priority over first fund -- Second fund collected by K Inc., which was not commingled with other funds, was held in trust for carriers and was payable to them -- Second fund had priority over security interest of G Corp.

Carriers --- Contract of carriage -- Carriage of goods -- Miscellaneous issues

T Inc. and its related companies operated freight brokerage and warehousing business in Canada and United States -- Under general security agreement, G Corp. held comprehensive security over all of T Inc.'s assets, including its accounts receivable -- In 2001, T Inc. began to default on its obligations to G Corp., and on January 24, 2002, K Inc. was appointed interim receiver over all assets and undertakings of T Inc. -- Order dated February 22, 2002, authorized interim receiver to file assignment in bankruptcy and K Inc. became trustee in bankruptcy on February 25, 2002 -- G Corp. and carriers disputed priority over two separate funds of T Inc. -- First fund consisted of carriers' funds collected by T Inc. prior to January 24, 2002, and commingled with T Inc.'s own funds ("first fund") -- Second fund consisted of accounts receivable of T Inc. collected by K Inc., carriers' portion of which had been placed into separate bank account pursuant to court orders ("second fund") -- Carriers' claim was based on s. 67(1)(a) of Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA") and s. 15 of Load Brokers, O. Reg. 556/92 under Truck Transportation Act, R.S.O. 1990, c. T.22 ("Load Brokers Regulation") -- Carriers' position was that, under Load Brokers Regulation, all funds owed to carriers by T Inc. were subject of deemed trust under s. 67(1)(a) of BIA -- Motion judge held that first and second funds were excluded from security interest of G Corp. and from bankrupt estate pursuant to s. 67(1)(a) of BIA -- G Corp. and K Inc. appealed -- Appeal allowed in part -- Jurisprudence excluded statutory deemed trusts from ambit of s. 67(1)(a) of BIA with exception of certain deemed trusts in favour of Crown -- Consequently, even if s. 15 of Load Brokers Regulation created deemed trust, deemed trust would not be trust within meaning of s. 67(1)(a) of BIA -- First fund lost its character as trust fund when it was not segregated and was commingled with other T Inc. funds -- As result, first fund was not subject to trust under s. 15 of Load Brokers Regulation -- Security interest of G Corp. had priority over first fund -- Second fund collected by K Inc., which was not commingled with other funds, was held in trust for carriers and was payable to them -- Second fund had priority over security interest of G Corp.

Cases considered by *Feldman J.A.*:

British Columbia v. Federal Business Development Bank (1987), 17 B.C.L.R. (2d) 273, [1988] 1 W.W.R. 1, 65 C.B.R. (N.S.) 201, 43 D.L.R. (4th) 188, 1987 CarswellBC 517 (B.C. C.A.) -- considered

British Columbia v. Henfrey Samson Belair Ltd. (1989), 75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 34 E.T.R. 1, [1989] 5 W.W.R. 577, 59 D.L.R. (4th) 726, 97 N.R. 61, 38 B.C.L.R. (2d) 145, 2 T.C.T. 4263, [1989] 1 T.S.T. 2164, 1989 CarswellBC 351, 1989 CarswellBC 711 (S.C.C.) -- followed

Deloitte, Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board) (1985), [1985] 1 S.C.R. 785, 19 D.L.R. (4th) 577, [1985] 4 W.W.R. 481, 60 N.R. 81, 38 Alta. L.R. (2d) 169, 63 A.R. 321, 55 C.B.R. (N.S.) 241, 1985 CarswellAlta 319, 1985 CarswellAlta 613 (S.C.C.) -- referred to

Giffen, Re (1998), 45 B.C.L.R. (3d) 1, 155 D.L.R. (4th) 332, 222 N.R. 29, 1998 CarswellBC 147, 1998 CarswellBC 148, [1998] 1 S.C.R. 91, (sub nom. *Giffen (Bankrupt), Re)* 101 B.C.A.C. 161, (sub nom. *Giffen (Bankrupt), Re)* 164 W.A.C. 161, 1 C.B.R. (4th) 115, [1998] 7 W.W.R. 1, 13 P.P.S.A.C. (2d) 255 (S.C.C.) -- referred to

Husky Oil Operations Ltd. v. Minister of National Revenue (1995), [1995] 10 W.W.R. 161, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, 188 N.R. 1, 24 C.L.R. (2d) 131, 1995 CarswellSask 739, 1995 CarswellSask 740 (S.C.C.) -- referred to

Québec (Commission de la santé & de la sécurité du travail) c. Banque fédérale de développement (1988), 84 N.R. 308, [1988] R.D.I. 376, 50 D.L.R. (4th) 577, 14 Q.A.C. 140, 68 C.B.R. (N.S.) 209, 1988 CarswellQue 142, (sub nom. *Federal Business Development Bank v. Québec (Comm. de la santé & de la sécurité du travail))* [1988] 1 S.C.R. 1061, 1988 CarswellQue 31 (S.C.C.) -- referred to

Quebec (Deputy Minister of Revenue) c. Rainville (1979), (sub nom. *Quebec (Deputy Minister of Revenue) v. Bourgeault (Trustee of))* [1980] 1 S.C.R. 35, (sub nom. *Bourgeault, Re)* 33 C.B.R. (N.S.) 301, (sub nom. *Bourgeault's Estate v. Quebec (Deputy Minister of Revenue))* 30 N.R. 24, (sub nom. *Bourgault, Re)* 105 D.L.R. (3d) 270, 1979 CarswellQue 165 (S.C.C.) -- referred to

Royal Bank v. Sparrow Electric Corp. (1997), 193 A.R. 321, 135 W.A.C. 321, [1997] 2 W.W.R. 457, 46 Alta. L.R. (3d) 87, 208 N.R. 161, 143 D.L.R. (4th) 385, 44 C.B.R. (3d) 1, [1997] 1 S.C.R. 411, (sub nom. *R. v. Royal Bank)* 97 D.T.C. 5089, 12 P.P.S.A.C. (2d) 68, 1997 CarswellAlta 112, 1997 CarswellAlta 113 (S.C.C.) -- considered

Ward-Price v. Mariners Haven Inc. (2001), 2001 CarswellOnt 1514, 199 D.L.R. (4th) 68, 42 R.P.R. (3d) 39, 57 O.R. (3d) 410, 159 O.A.C. 117 (Ont. C.A.) -- referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 67(1)(a) -- considered

s. 67(2) -- considered

s. 67(2) [en. 1992, c. 27, s. 33] -- considered

s. 67(3) -- considered

s. 67(3) [en. 1992, c. 27, s. 33] -- considered

Employment Standards Act, 2000, S.O. 2000, c. 41

s. 40 -- referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally -- referred to

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

s. 57 -- referred to

Personal Property Security Act, R.S.O. 1990, c. P.10

Generally -- referred to

7 C.B.R. (5th) 202, [2005] W.D.F.L. 1542, 194 O.A.C. 360, 74 O.R. (3d) 382, 137 A.C.W.S. (3d) 247

s. 4(1)(b) -- referred to

s. 11 -- referred to

s. 30(7) -- considered

s. 30(8) -- referred to

Truck Transportation Act, R.S.O. 1990, c. T.22

Generally -- referred to

Regulations considered:

Truck Transportation Act, R.S.O. 1990, c. T.22

Load Brokers, O. Reg. 556/92

Generally

s. 4

s. 4(b)

s. 4(c)

s. 4(d)

s. 5

s. 15

APPEAL by secured creditor and trustee in bankruptcy of judgment reported at *GMAC Commercial Credit Corp.-Canada v. TCT Logistics Inc.* (2002), 2002 CarswellOnt 2754, 61 O.R. (3d) 85, 36 C.B.R. (4th) 231 (Ont. S.C.J. [Commercial List]) with respect to priorities over bankrupt's assets.

***Feldman J.A.*:**

Introduction

1 TCT Logistics Inc. and its related companies ("TCT") were in the business of warehousing and transporting goods by truck. An interim receiver was appointed for TCT on January 24, 2002, and an order for bankruptcy was made on February 22, 2002. The dispute in this case is between the secured creditor of TCT and the carriers who were contracted to transport individual loads. Contrary to the requirements of a regulation under the *Truck Transportation Act*, R.S.O. 1990, c. T.22, TCT did not maintain a separate trust account for the monies it received from its

customers for the portion of its invoices that related to the charges of each carrier. The issue in this case is whether, despite that non-compliance, those funds are trust funds within the meaning of s. 67(1)(a) of the *Bankruptcy and Insolvency Act*, R.S. 1985, c. B-3 ("*BIA*") and therefore are not property of the bankrupt for distribution to creditors in the bankruptcy and take priority over the secured creditor's general security over all of the assets of TCT.

Facts

2 TCT operated a freight brokerage and warehousing business in Canada and the United States. Under a general security agreement, GMAC Commercial Credit Corporation -- Canada ("GMAC") held comprehensive security over all of TCT's assets, including its accounts receivable. In 2001, TCT began to default on its obligations to GMAC, and on January 24, 2002, KPMG Inc. ("KPMG") was appointed interim receiver over all the assets and undertaking of TCT. At that date, TCT owed GMAC over $71 million.

3 The interim receiver discovered that carriers were not being paid, even though TCT had received payment on its invoices for the carried loads. TCT's cheques were being returned for insufficient funds. Furthermore, the interim receiver encountered significant difficulties collecting accounts receivable of approximately $2.5 million. Carriers began contacting customers directly seeking to collect their fees, and customers refused to pay TCT because they did not want to pay twice. In one case, a carrier seized a customer's goods, which were later released under court order. An order dated February 22, 2002 authorized the interim receiver to file an assignment in bankruptcy; it became trustee in bankruptcy on February 25, 2002.

4 Following the appointment of the interim receiver, a dispute arose between the secured creditor, GMAC, and the carriers regarding priority entitlement to amounts referable to services performed by the carriers and invoiced to customers as part of TCT's freight transportation services to those customers. The amounts fell into two categories: (1) amounts already collected by TCT before January 24, 2002 but not paid to the carriers, and (2) accounts receivable for services rendered by TCT but not collected as of January 24, 2002.

5 To facilitate the operation of the receivership and bankrupt estate, the interim receiver obtained two court orders, one for TCT's freight brokerage business and one for its warehousing business. Those orders did three things: (1) they prevented carriers from pursuing customers directly for payment of amounts that had already been collected by TCT as of January 24, 2002; (2) they compelled the customers to pay amounts owing to TCT as of January 24, 2002 to the interim receiver; and (3) they authorized the interim receiver to hold the funds relating to carriers' services in a separate bank account, pending determination of the right to those funds. The orders also provided that they were effectively standstill provisions only and would not affect the rights of the carriers or of GMAC to the funds.

6 Pursuant to these orders, the interim receiver brought a motion to determine the priority entitlement between the secured creditor and the carriers to the funds it was collecting and holding and to the funds collected by TCT prior to the interim receivership but not paid to the carriers.

7 The carriers' claim to priority was based on s. 67(1)(a) of the *BIA* and s. 15 of Reg. 556/92 under the *Truck Transportation Act* (the "Load Brokers Regulation").

8 Section 67(1)(a) of the *BIA* provides:

> 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...

9 Section 15 of the Load Brokers Regulation provides:

> 15. (1) Every load broker shall hold in trust, for the benefit of the carriers to whom the load broker is liable to pay carriage charges, all the money the load broker receives from consignors and consignees in respect of the carriage of goods by carriers except,?
>
> (a) money in excess of the carriage charges; and?
>
> (b) interest on money held by the load broker for less than thirty days.?
>
> (2) Every load broker shall,?
>
> (a) maintain an account designated as a trust account in a bank, trust corporation or credit union authorized to carry on business and located in Ontario;?
>
> (b) keep the money held by the load broker as a trustee under subsection (1) separate from money that belongs to the load broker;?
>
> (c) deposit the money held by the load broker as a trustee under subsection (1) in the trust account without delay after its receipt; and?
>
> (d) disburse the money held by the load broker as a trustee under subsection (1) only to persons for whom the money is held in trust and who are entitled to such payment.?

10 The carriers' position was that under this regulation, funds owed to carriers by load brokers were the subject of a deemed trust and therefore under s. 67(1)(a) of the *BIA*, they were not part of the bankrupt estate. The secured creditor's position, supported by the interim receiver, was that the regulation did not impose a deemed trust and that the most the regulation did was impose an obligation on TCT to hold the carriers' monies in trust. However, TCT breached that obligation, because it did not segregate the carriers' funds. There was therefore no "deemed" trust, and no trust attached, either under the terms of the regulation or under the common law. Furthermore, they argued that the security interest of GMAC attached to the accounts receivable as soon as those accounts were created. No trust could attach to the proceeds of the accounts receivable, as the accounts were already encumbered by that security interest.

11 The motion judge held that both the amounts collected by TCT prior to January 24, 2002 that were owed to carriers and the amounts collected by the interim receiver and held in a segregated account were trust funds held for the carriers and were excluded from the security interest of GMAC and from the bankrupt estate pursuant to s. 67(1)(a) of the *BIA*. The motion judge found that the regulation imposed a deemed trust on the funds, and that although the company did not physically segregate the funds, their computer accounting program identified the funds that were collected to be paid to the carriers, which was sufficient to maintain the integrity of the funds as trust funds.

12 The secured creditor and interim receiver appeal that order.

Issues

(1) Does s. 15 of the Load Brokers Regulation create a deemed trust such that funds in the deemed trust are excluded from the estate of a bankrupt under s. 67(1)(a) of the *BIA*?

(2) Did the motion judge make a palpable and overriding error of fact or an error of law in concluding that keeping accounting records that tracked the funds that were to be held in trust was sufficient segregation to establish a trust?

(3) How does the trust obligation imposed by s. 15 of the Load Brokers Regulation affect the security interest of GMAC in the accounts receivable?

(4) Regardless of the practice that had been employed by TCT prior to the interim receivership, was the interim receiver obliged to comply with s. 15 of the Load Brokers Regulation when collecting accounts receivable, and hold the carriers' funds in trust?

Analysis

Issue 1 Does s. 15 of the Load Brokers Regulation Create a Deemed Trust?

13 Section 15 of the Load Brokers Regulation imposes an obligation on a load broker to hold in trust the monies it receives from its customers that are referable to the carriers' fees portion of its load brokers invoice. If the effect of s. 15 of the Load Brokers Regulation is to make all funds invoiced or collected in respect of carriers' fees "trust funds" within the meaning of s. 67(1)(a) of the *BIA*, then those funds would not be property of the bankrupt divisible among creditors, and would be payable to the carriers.

14 One of the requirements of a valid trust under general trust law is that the trust property must be identified as being held in trust, and not co-mingled with other property owned by the trustee. However, both federal and provincial legislation have created deemed trusts, where the legislation provides that the funds are deemed to be trust funds even if they are not segregated from other funds. Although many of these are deemed trusts in favour of the Crown for taxes collected, others are trusts in favour of other groups such as employees in respect of vacation pay or pension amounts (see, for example, *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 40; and the *Pension Benefits Act*, R.S.O. 1990, c. P.8, s. 57).

15 A consistent series of cases from the Supreme Court of Canada has addressed the effect of provincial statutory deemed trusts in a bankruptcy: *Quebec (Deputy Minister of Revenue) c. Rainville* (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Deloitte, Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board)*, [1985] 1 S.C.R. 785 (S.C.C.); *Québec (Commission de la santé & de la sécurité du travail) c. Banque fédérale de développement*, [1988] 1 S.C.R. 1061 (S.C.C.); *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 (S.C.C.); *Husky Oil Operations Ltd. v. Minister of National Revenue* , [1995] 3 S.C.R. 453 (S.C.C.); and *Giffen, Re*, [1998] 1 S.C.R. 91 (S.C.C.). These cases hold that because bankruptcy is a matter under federal jurisdiction, provincial statutory deemed trusts that do not conform to general trust principles cannot operate to reorder the priorities in a bankruptcy. Therefore, although such deemed trusts are effective in accordance with the provincial legislation when a person or business is solvent and operating (see, *e.g.*, *Ward-Price v. Mariners Haven Inc.* (2001), 57 O.R. (3d) 410 (Ont. C.A.)), upon bankruptcy the funds that are subject to a deemed trust, but are not held in accordance with general trust principles, will not be excluded from the property of the bankrupt under s. 67(1)(a) of the *BIA* and will be distributed in the priority prescribed by the *BIA*.

16 Following the decisions of the Supreme Court in the first four cases cited above, the *BIA* was amended in 1992 by the addition of ss. 67(2) and (3), to deal specifically with certain statutory deemed trusts in favour of the Crown:

S.C. 1992, c.27, s. 33. Subsections 67(2) and (3) address only the question of when deemed trusts in favour of the Crown will be regarded as trusts under s. 67(1)(a). Subsection 67(2) confirms that statutory deemed trusts in favour of the Crown do not come within s. 67(1)(a), while s. 67(3) creates some limited exceptions. These provisions today read as follows:

> 67(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.[FN1]

17 One of the submissions made by the carriers and accepted by the motion judge was that s. 15 of the Load Brokers Regulation creates a "deemed trust" in favour of the carriers, and that therefore the funds collected by TCT or by the interim receiver in respect of the carriers' fees are trust funds within the meaning of s. 67(1)(a) of the *BIA*. In my view, the legal conclusion of this submission is wrong in law, and the motion judge erred by accepting it. Based on the consistent line of cases from the Supreme Court of Canada referred to above that excludes statutory deemed trusts from the ambit of s. 67(1)(a), and the limited exceptions in s. 67(3) carved out only for certain deemed trusts where the trust funds are held for the Crown, I conclude that, even if s. 15 creates a deemed trust, any such deemed trust would not be a trust within the meaning of s. 67(1)(a) of the *BIA* and therefore it would not be excluded from property of the bankrupt for the purpose of determining distribution priorities under the *BIA*. It is therefore unnecessary for the court to decide whether, besides creating an obligation on load brokers to hold carriers' fees in trust, s. 15 can be characterized as creating a "deemed trust" for any other purpose.

Issue 2 Did TCT Hold the Carriers' Funds in Trust?

18 TCT would invoice the customer for all services provided, usually adding its own fee onto the fee invoiced by the carrier. When the funds were received, they were deposited into one account, and the carrier was paid from that account. The funds received were not segregated. However, TCT maintained a computerized accounting system that recorded the receipt and payment of the carriers' fees. The motion judge found that the computer system met the

trust requirements of s. 15 of the Load Brokers Regulation and that the effect of the system was to segregate the carriers' funds, even though the actual funds received were co-mingled in one account with other company money. She stated:

> As I have earlier noted, I am satisfied on the answers of Denise Cardy that the load broker's computer accounting records effectively did segregate the money in question, even though the actual monies on deposit in the load broker's account may have been co-mingled with other company monies (para. 30).

19 With respect to the motion judge, in my view, this conclusion was not open to her in law, and is contrary to the Supreme Court cases referred to above. Once the purported trust funds are co-mingled with other funds, they can no longer be said to be "effectively segregated" for the purpose of constituting a trust at common law. For example, in *British Columbia v. Henfrey Samson Belair Ltd.*, *supra*, the funds involved were sales taxes collected on behalf of the province for which full accounting records were maintained. Cory J., in dissent, concluded at pp. 44-45 that because the statute provided a formula for establishing the trust property and because the vendor in that case clearly identified the subject-matter when each sale was made, the funds initially impressed with the trust remained identifiable and therefore "certainty of subject matter does indeed exist" (the three trust certainties being intention, object and subject matter). However, the majority found to the contrary. McLachlin J. (as she then was) held that once the funds were co-mingled they were no longer identifiable and therefore no longer subject to the trust. She explained at p. 34:

> 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.

20 In my view, the facts in this case regarding how the funds were held and accounted for are not distinguishable from the *Henfrey Samson Belair* case, and consequently, the legal result must also be the same. The funds relating to the carriers' fees collected by TCT prior to January 24, 2002 lost their character as trust funds when they were not segregated and were co-mingled with other TCT funds.

Issue 3 Did the GMAC Security Attach to TCT's Accounts Receivable Including the s. 15 Trust Funds?

21 GMAC held general security over all the property, assets, and undertaking of TCT, including accounts receivable, under a General Security Agreement. Both GMAC and the interim receiver argued that because GMAC's security attached to TCT's accounts receivable before any funds were received by TCT, the security attached before the statutory trust obligation was imposed by s. 15 of the Load Brokers Regulation. They rely on the decision of the Supreme Court of Canada in *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), which held that the deemed trust in favour of the Crown in respect of employee source deductions under the *Income Tax Act* was subject to the security interest of the secured creditor in inventory, because the deemed trust only attached to the company's interest in the inventory after the inventory was already subject to the creditor's security interest.

22 If this argument is correct, the effect is to emasculate the trust imposed for the benefit of carriers by s. 15 of the Load Brokers Regulation in all cases where the operations of the load broker are financed so that its assets and undertaking are subject to a lender's secured interest. This would, I believe, cover many, if not most substantial business operations in Ontario. Furthermore, the effect would be to thwart the intention of the legislature in imposing the trust obligation for the benefit and protection of carriers.

23 In my view, the result in the *Sparrow* case does not apply to the trust imposed by the Load Brokers Regulation. In *Sparrow*, the majority rejected the theory of the minority that the security of the secured creditor was subject to an implied license that allowed the debtor to sell its inventory in the ordinary course of business and to use the proceeds to pay wages and payroll deductions. However, in distinguishing the case of *British Columbia v. Federal Business Development Bank* (1987), 43 D.L.R. (4th) 188 (B.C. C.A.) ("*FBDB*"), the majority acknowledged that such an implied license would extend to "legal incidents" of the sale of the inventory such as the collection and remittance of sales tax, something which must be done in order to make sales.

24 Iacobucci J., who wrote for the majority in *Sparrow*, distinguished the *FBDB* decision in the following passage at paras. 102-103:

> My colleague also relies on comments made in *FBDB*. In that case, the British Columbia Court of Appeal said, after having disposed of the appeal on another ground, that a licence to sell inventory carries with it a requirement that the licencee should satisfy obligations incurred in "dealing with the stock in the ordinary course of business": *FBDB*, *supra*, at p. 40.
>
> Because the obligation to set aside provincial sales taxes is a "legal incident" of the sale of inventory, a lien for unpaid sales taxes comes within the scope of the licence and so is excepted from any security interest that is subject to it: *idem.*
>
> As I understand the comments in *FBDB*, a licence to sell inventory permits the satisfaction of obligations out of the proceeds only to the extent of the "legal incidents" of the sale. In itself, this greatly limits the scope of the theory. Because the payment of wages, except perhaps to the sales agent, is not a "legal incident" of the sale of inventory, deduction of income taxes from wages does not come within the scope of the licence. This alone would appear sufficient to distinguish *FBDB* from the instant appeal.

25 In the same way, in order to carry on business in Ontario, a load broker must comply with the trust obligations in s. 15 of the regulation, and must collect, hold in trust, and pay to the carriers their fees. That trust obligation is a legal incident of the provision of load brokerage services and therefore would be subject to the implied license accorded by the secured lender.

26 This approach is also consistent with the business intent of the lending relationship between the secured lender and the debtor company. The General Security Agreement provides that it is to be governed by and construed in accordance with the laws of Ontario and of Canada where applicable. The business of the debtor is as a load broker. If it did not comply with the Load Brokers Regulation and with the law generally, the debtor would lose its load brokerage certificate and could not thereafter legally carry on business in Ontario.[FN2] The lender's security would be in immediate jeopardy if it precluded the debtor from carrying on its business by preventing it from holding the carriers' fees in trust for their benefit.

27 In oral argument, counsel for GMAC suggested that, conceptually, what may occur is that the security attaches to the accounts receivable of the debtor company when they are created (s. 11 of the *Personal Property Security Act*, R.S.O. 1990, c. P.10), but the security becomes unattached when the carriers' funds are received and the trust obliga-

tion is imposed. The security later reattaches if the funds are co-mingled by the load broker with its own funds.[FN3]

28 This analysis accords with an alternative analysis suggested by Iacobucci J. in *Sparrow* when discussing the *FBDB* case. He suggested at para. 104:

> ... the sales taxes that were at issue in *FBDB* were not against the value of the inventory. Rather, they were superadded to the underlying value, which is to say that they were calculated on the basis of the sale price of the inventory. Thus, the sales taxes that attend a sale of inventory represent something over and above the value of the inventory. Because a bank's charge is against the *inventory*, it does not extend so far as the sales taxes generated by a sale of inventory. [Original emphasis.]

In other words, the security interest may not attach to the sales taxes collected on the sale of inventory. In the same way in this case, the security interest cannot attach to the portion of the funds that is to be kept in a separate trust account in accordance with s. 15 of the Load Brokers Regulation, which are then distinct from the accounts receivable to which the secured creditors' interest attaches.

29 On either analysis, in my view, the security interest of GMAC is subject to the trust mandated by s. 15, so long as the debtor carries out the trust obligation.

30 Before leaving this issue, I note the interim receiver and secured creditor's argument is given some force by ss. 30(7) and (8) of the *PPSA*, *supra*, which provide:

> 30(7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.
>
> (8) Subsection (7) does not apply to a perfected purchase-money security interest in inventory or its proceeds.

Subsection 30(7) addresses the priority of deemed trust beneficiaries under two Ontario statutes over the interest of secured creditors in accounts. Applying the interpretive maxim *expressio unius est exclusio alterius*, because the *PPSA* has not similarly provided that carrier beneficiaries under the Load Brokers Regulation have priority over secured creditors of the load broker, the argument that the secured creditor has priority takes on more credence.

31 However, having noted these provisions, I do not find them determinative of the issue. The *PPSA* only applies to consensual agreements (see Jacob S. Ziegel & David L. Denomme, *The Ontario Personal Property Security Act: Commentary and Analysis*, 2nd ed. (Toronto: Butterworths, 2000) at 48 *et seq.* and 71-72); it does not apply to statutory trusts, which are non-consensual. Ziegel and Denomme, at p. 81 of their text, point out that s. 4(1)(b) of the *PPSA*, which provides that the Act does not apply to statutory deemed trusts except under s. 30(7), seems "to have been added out of an abundance of caution". I would add that the same can be said of s. 30(7) (subject to ss. (8)). As the trust imposed by s. 15 of the Load Brokers Regulation is non-consensual, the Act does not apply to that trust.

32 I agree with the motion judge's rejection of the argument that the GMAC security takes priority over the trust.

Issue 4 Was the Interim Receiver Obliged to Hold the Carriers' Funds it Collected After January 24, 2002 in Trust?

33 We are dealing on this appeal with two separate funds of money collected during two different time periods. The first is the carriers' funds collected by TCT prior to January 24, 2002 and co-mingled with TCT's own funds. The second is the pre-January 4, 2002 accounts receivable of TCT collected by the interim receiver, the carriers' portion of which has been placed into a separate bank account pursuant to court orders.

34 With respect to the second fund, the secured creditor and the interim receiver submit that the creditor's and the carriers' rights were fixed as of January 24, 2002, and that because the interim receiver stands in the shoes of TCT, it is bound to continue the practice of depositing the receipts into one account and not segregating the carriers' fees in a separate account. They also rely on the fact that the subsequent court orders, by their terms, did not affect established rights.

35 I agree that the subsequent court orders have no substantive effect on the legal rights of any of the parties. However, I do not agree with the submission that those rights are frozen upon bankruptcy. What is frozen on bankruptcy is the ability for creditors to make or to enforce any claims against a debtor, as all proceedings must be taken by the trustee: see *Giffen, Re*, [1998] 1 S.C.R. 91 (S.C.C.) at para. 39. What are also frozen at the date of bankruptcy are the secured creditor's rights in the accounts receivable.

36 However, in the regime created by s. 15 of the Load Brokers Regulation, the security interest in the accounts receivable and in the funds when they are received is different. It is upon receipt of the carriers' fees that the trust obligation is imposed on the load broker. Contrary to the argument of the interim receiver and the secured creditor, as the interim receiver stands in the shoes of the debtor, and is furthermore acting as an officer of the court, it is incumbent on the interim receiver (as it was on TCT), irrespective of the subsequent court orders, to comply with the regulation as funds are received, and to hold the carriers' portion of the collected accounts in trust for the carriers. There is no estoppel preventing the interim receiver from complying with the law.

37 As discussed above, if the funds are not co-mingled with other corporate funds, the security interest of GMAC is subject to the interest of the trust beneficiaries in the trust funds.

Conclusion

38 The appeal is allowed in part. The carriers' portion of the pre-January 24, 2002 accounts receivable collected by the interim receiver is held in trust for the carriers and is payable to them. The pre-January 24, 2002 accounts that were collected by TCT and co-mingled with other TCT monies lost their character as trust funds, and therefore they are subject to the security interest of the secured creditor.

Costs

39 As the carriers were successful on the major issue, costs are payable to the respondents fixed in the amount of $15,000, plus disbursements and G.S.T.

***Doherty J.A.*:**

I agree.

***Laskin J.A.*:**

I agree.

Appeal allowed in part.

FN1. Further amendments followed in 1996, 1997 and 1998: S.C. 1996, c.23, s. 168; S.C. 1997, c.12, s. 59; S.C. 1998, c.19, s. 250).

FN2. See ss. 4 and 5 of the Load Brokers Regulation, *supra*. Section 5 states: "The Registrar may cancel or suspend a load brokerage certificate for failure to comply with the requirements of the Act or this Regulation." Section 4(b) states: "The Registrar may refuse to issue or renew a load brokerage certificate if, (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on a load brokerage service in accordance with the law and with integrity and honesty ..." Sections 4(c) and (d) give the Registrar of Motor Vehicles discretion to refuse to issue or renew a certificate if the misconduct is that of an officer, director, controlling shareholder, or partner.

FN3. This analysis formed part of the argument in Issue No. 4 that upon bankruptcy, the rights of the secured creditor in the accounts receivable are frozen and the trust cannot take effect.

END OF DOCUMENT

TAB 16

12 C.B.R. (5th) 213, [2005] W.D.F.L. 3789, 47 C.C.P.B. 62

2005 CarswellOnt 3445

Ivaco Inc., 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 OR PLANS OF COMPROMISE OR ARRANGEMENT OF IVACO INC. AND THE APPLICANTS LISTED IN SCHEDULE "A"

Ontario Superior Court of Justice [Commercial List]

Farley J.

Heard: June 13-15, 2005
Judgment: July 18, 2005
Docket: 03-CL-5145

Counsel: Andrew J. Hatnay (Ontario Agent) for Quebec Pension Committee of Ivaco Inc.

Fred Mayers, Susan Rowland for Superintendent of Financial Services

Geoff R. Hall for QIT-Fer et Titane Inc.

Jeffrey S. Leon, Sheryl E. Seigel, Richard B. Swan for National Bank of Canada

Daniel V. MacDonald for Bank of Nova Scotia

Robert W. Staley, Kevin J. Zych, Evangelia Kriaris for Informal Committee of Noteholders

Stephanie Fraser for Pension Benefit Guaranty Company

Peter F.C. Howard, Ashley John Taylor for Ernst & Young Inc., the Court-Appointed Monitor

Subject: Insolvency; Estates and Trusts; Family; Property; Corporate and Commercial

Bankruptcy and insolvency --- Property of bankrupt -- Trust property -- General principles

Pension funds -- I Inc. had established various registered pension plans for their employees -- I Inc. later suspended its past-service payments into plans so that it would have sufficient cash to continue operating until conclusion of sale of its business as going concern to H Inc. -- Sale became liquidating proceeding under Companies' Creditors Arrangement Act, which subjected assets to deemed trust in favour of pension beneficiaries -- Several of I Inc.'s creditors petitioned to have proceedings transformed into proceedings under Bankruptcy and Insolvency Act, where deemed trust would cease -- Superintendent brought motion for order directing that portions of I Inc.'s sale of its business be distributed to fund pension plans -- Motion dismissed -- After taking interests of all stakeholders into account, superintendent had not made compelling case for altering bankruptcy proceedings from their normal course.

Pensions --- Payment of pension -- Bankruptcy or insolvency of employer -- Registered plans

I Inc. had established various registered pension plans for their employees -- I Inc. later suspended its past-service payments into plans so that it would have sufficient cash to continue operating until conclusion of sale of its business as going concern to H Inc. -- Sale became liquidating proceeding under Companies' Creditors Arrangement Act, which subjected assets to deemed trust in favour of pension beneficiaries -- Several of I Inc.'s creditors petitioned to have proceedings transformed into proceedings under Bankruptcy and Insolvency Act, where deemed trust would cease -- Superintendent brought motion for order directing that portions of I Inc.'s sale of its business be distributed to fund pension plans -- Motion dismissed -- After taking interests of all stakeholders into account, superintendent had not made compelling case for altering bankruptcy proceedings from their normal course.

Cases considered by Farley J.:

ABN Amro Bank N.V. v. BCE Inc. (2003), 44 C.B.R. (4th) 1, 2003 CarswellOnt 2890 (Ont. S.C.J. [Commercial List]) -- considered

AEVO Co. v. D & A Macleod Co. (1991), 7 C.B.R. (3d) 33, 4 O.R. (3d) 368, 1991 CarswellOnt 206 (Ont. Bktcy.) -- referred to

Bank of Montreal v. Scott Road Enterprises Ltd. (1989), 36 B.C.L.R. (2d) 118, 73 C.B.R. (N.S.) 273, [1989] 4 W.W.R. 566, 57 D.L.R. (4th) 623, 1989 CarswellBC 337 (B.C. C.A.) -- referred to

Bassano Growers Ltd. v. Price Waterhouse Ltd. (1998), 1998 CarswellAlta 555, (sub nom. Bassano Growers Ltd. v. Diamond S Produce Ltd. (Bankrupt)) 216 A.R. 328, (sub nom. Bossano Growers Ltd. v. Diamond S Produce Ltd. (Bankrupt)) 175 W.A.C. 328, 66 Alta. L.R. (3d) 296, 6 C.B.R. (4th) 199 (Alta. C.A.) -- referred to

Beverley Bedding Corp., Re (1982), 40 C.B.R. (N.S.) 95, 1982 CarswellOnt 147 (Ont. Bktcy.) -- referred to

Black Brothers (1978) Ltd., Re (1982), 41 C.B.R. (N.S.) 163, 1982 CarswellBC 480 (B.C. S.C.) -- referred to

British Columbia v. Henfrey Samson Belair Ltd. (1989), 75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 34 E.T.R. 1, [1989] 5 W.W.R. 577, 59 D.L.R. (4th) 726, 97 N.R. 61, 38 B.C.L.R. (2d) 145, 2 T.C.T. 4263, [1989] 1 T.S.T. 2164, 1989 CarswellBC 351, 1989 CarswellBC 711 (S.C.C.) -- referred to

British Columbia v. National Bank of Canada (1994), 99 B.C.L.R. (2d) 358, [1995] 2 W.W.R. 305, 119 D.L.R. (4th) 669, 30 C.B.R. (3d) 215, 6 E.T.R. (2d) 109, 52 B.C.A.C. 180, 86 W.A.C. 180, 1994 CarswellBC 639, 2 G.T.C. 7348 (B.C. C.A.) -- referred to

Bulut v. Brampton (City) (2000), 2000 CarswellOnt 1063, 185 D.L.R. (4th) 278, 48 O.R. (3d) 108, 15 P.P.S.A.C. (2d) 213, (sub nom. Bulut v. Sun Life Assurance Co. of Canada) 131 O.A.C. 52, 16 C.B.R. (4th) 41 (Ont. C.A.) -- referred to

Christian Brothers of Ireland in Canada, Re (2004), 2004 CarswellOnt 574, 69 O.R. (3d) 507, 49 C.B.R. (4th) 12 (Ont. S.C.J. [Commercial List]) -- referred to

Continental Casualty Co. v. MacLeod-Stedman Inc. (1996), 141 D.L.R. (4th) 36, [1997] 2 W.W.R. 516, 13 C.C.P.B. 271, 43 C.B.R. (3d) 211, 113 Man. R. (2d) 212, 131 W.A.C. 212, 1996 CarswellMan 537, C.E.B. & P.G.R. 8318 (headnote only) (Man. C.A.) -- referred to

Deloitte, Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board) (1985), [1985] 1 S.C.R. 785, 19 D.L.R. (4th) 577, [1985] 4 W.W.R. 481, 60 N.R. 81, 38 Alta. L.R. (2d) 169, 63 A.R. 321, 55 C.B.R. (N.S.) 241, 1985 CarswellAlta 319, 1985 CarswellAlta 613 (S.C.C.) -- referred to

Harrop of Milton Inc., Re (1979), 22 O.R. (2d) 239, 92 D.L.R. (3d) 535, 29 C.B.R. (N.S.) 289, 1979 CarswellOnt 185 (Ont. Bktcy.) -- referred to

Hunt v. T & N plc (1993), [1994] 1 W.W.R. 129, 21 C.P.C. (3d) 269, (sub nom. Hunt v. Lac d'Amiante du Québec Ltée) 37 B.C.A.C. 161, (sub nom. Hunt v. Lac d'Amiante du Québec Ltée) 60 W.A.C. 161, (sub nom. Hunt v. T&N plc) 109 D.L.R. (4th) 16, 85 B.C.L.R. (2d) 1, (sub nom. Hunt v. Lac d'Amiante du Québec Ltée) 161 N.R. 81, (sub nom. Hunt v. T&N plc) [1993] 4 S.C.R. 289, 1993 CarswellBC 1271, 1993 CarswellBC 294 (S.C.C.) -- considered

Husky Oil Operations Ltd. v. Minister of National Revenue (1995), [1995] 10 W.W.R. 161, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, 188 N.R. 1, 24 C.L.R. (2d) 131, 1995 CarswellSask 739, 1995 CarswellSask 740 (S.C.C.) -- referred to

I.B.L. Industries Ltd., Re (1991), 76 D.L.R. (4th) 439, 2 O.R. (3d) 140, 4 C.B.R. (3d) 301, 1991 CarswellOnt 180 (Ont. Bktcy.) -- referred to

Kenwood Hills Development Inc., Re (1995), 30 C.B.R. (3d) 44, 1995 CarswellOnt 38 (Ont. Bktcy.) -- referred to

New Brunswick v. Peat Marwick Thorne Inc. (1995), 37 C.B.R. (3d) 268, 170 N.B.R. (2d) 373, 435 A.P.R. 373, 1995 CarswellNB 114 (N.B. C.A.) -- referred to

Toronto Dominion Bank v. Usarco Ltd. (1991), 42 E.T.R. 235, 1991 CarswellOnt 540 (Ont. Gen. Div.) -- distinguished

Unisource Canada Inc. v. Hongkong Bank of Canada (1998), 1998 CarswellOnt 5122, 43 B.L.R. (2d) 226, 14 P.P.S.A.C. (2d) 112 (Ont. Gen. Div.) -- referred to

Unisource Canada Inc. v. Hongkong Bank of Canada (2000), 2000 CarswellOnt 893, 15 P.P.S.A.C. (2d) 95, 131 O.A.C. 24 (Ont. C.A.) -- referred to

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530 (B.C. S.C.) -- considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally -- considered

s. 2(1) -- considered

s. 42 -- referred to

s. 43(7) -- considered

s. 136(1) -- considered

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

Generally -- considered

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

Generally -- referred to

s. 57(3) -- considered

s. 57(4) -- referred to

s. 57(5) -- considered

Régimes complémentaires de retraite, Loi sur les, L.R.Q. 1989, c. 38

Generally -- referred to

s. 11 -- referred to

MOTION by superintendent of financial services for order directing that portion of sale of insolvent business be distributed to its pension plans.

Farley J.:

1 As argued, the Superintendent of Financial Services (Ontario) moved as follows. Paragraphs 1 and 87 of the Superintendent's factum stated:

> 1. The Superintendent of Financial Services ("Superintendent") brings this motion for an Order directing the Monitor to distribute part of the proceeds of sale of the businesses of Ivaco Inc. ("Ivaco") and certain of its subsidiaries to four non-union pension plans in order to protect the interests of a vulnerable group of persons -- the pension beneficiaries.
>
> Alternatively, the Superintendent seeks an Order that an amount sufficient to satisfy the claims in respect of the non-union pension plans be held in segregated trust accounts for the benefit of the pension beneficiaries pending the payment of the claims.
>
> 87. For the foregoing reasons, the Superintendent respectfully requests that this Honourable Court make an order
>
> > (a) directing the Monitor to pay into the Non-Union Plans the amounts owing in respect of the unpaid contributions and the Companies' wind-up liabilities;
> >
> > (b) alternatively, to the extent that any amount claimed by the Superintendent is not paid under paragraph (a), an order directing the Monitor to segregate into a separate trust sufficient funds to pay such claim;
> >
> > (c) in the further alternative, to the extent that any amounts in (a) or (b) are not paid or segregated, to delay the granting of a bankruptcy order until all pension liabilities of the Companies are finally determined and paid.

2 The Superintendent's factum also stated at para. 2:

> 2. Ivaco, Ivaco Rolling Mills Ltd. ("IRM"), Ifastgroupe Inc. ("Ifastgroupe") and Docap (1985) Corporation ("Docap") (being four of the Applicants, and collectively, the "Companies") had established various registered pension plans for their employees in Ontario. Under the provisions of the *Pension Benefits Act*, the Companies were required to make contributions to pension plans on a monthly basis, and under the terms of the Initial Order granted in these proceedings, the Applicants were entitled to make such contributions. However, the Companies claimed that unless they suspended payment of certain pension contributions, they would not have sufficient cash to continue operations until a sale of the Applicants' business could be concluded. On this basis, they obtained an order of this Honourable Court to permit them to suspend payments of certain pension contributions that became due after the Initial Order. Thus, apart from the DIP lender, which has been repaid in full out of the sale proceeds, the pensioners were the only creditors who provided a source of financing to the applicants so that a going concern sale could be concluded.

With respect, it would appear to me that the last sentence of para. 2 somewhat overstates the situation. What was suspended by the November 28, 2003 order (which was not opposed by any interested party, including salaried employees, salaried pensioners or pension regulators or overseers including the Superintendent -- and as to which no one has utilized the come-back provisions, certainly on any timely basis or on any direct basis) was that the Ivaco Companies would not have to pay any past service contributions for any of the 16 affected pension plans including the four Salaried (i.e. Non-Union) Plans which were not assumed by the purchaser in the Heico sale transaction which closed as of December 1, 2004.

3 The November 28, 2003 order provided:

Pension Payments

3. THIS COURT ORDERS that notwithstanding any other provision of the Amended and Restated Order, the Applicants and Partnerships (as defined in the Amended and Restated Order) shall not make any past service contributions or special payments to funded pension plans maintained by an Applicant or Partnership (the "Pension Plans") during the Stay Period, pending further Order of this Court.

4. THIS COURT ORDERS that none of the Applicants or Partnerships, or their respective officers or directors shall incur any obligation, whether by way of debt, damages for breach of any duty, whether statutory, fiduciary, common law or otherwise, or for breach of trust, nor shall any trust be recognized, whether express, implied, constructive, resulting, deemed or otherwise, as a result of the failure of any person to make any contribution or payments other than current cost contribution obligations ("Current Contributions") during the Stay Period that they might otherwise have become required to make to any pension plans maintained by an Applicant or Partnership.

5. THIS COURT ORDERS that if any claim, lien, charge or trust arises as a result of the failure of any Person to make any contribution or payment (other than Current Contributions) during the Stay Period that such Person might otherwise have become required to make to any pension plans maintained by an Applicant or Partnership but for the stay provided for herein, no such claim lien, charge or trust shall be recognized in this proceeding or in any subsequent receivership, interim receivership or bankruptcy of any of the Applicants or Partnerships as having priority over the claims of the Charges as set out in the Amended and Restated Order.

6. Nothing in this Order shall be taken to extinguish or compromise the obligations of the Applicants and Partnerships, if any, regarding payments under the Pension Plans.

Even if the "priorities are reversed" with a bankruptcy, this does not affect paragraph 6 of the Order; the claims would be unsecured, not extinguished or compromised.

4 The overstatement would appear to me to be that other stakeholders (such as the financial and trade creditors) as a result of the stay also contributed to the financial stability of the Ivaco Companies, fragile as their financial situation was, by not being paid interest as such became due nor for pre-filing indebtedness which was due. On the other hand, notwithstanding that past service contributions could be characterized as functionally a pre-filing obligation, legally the obligation pursuant to the applicable pension legislation is a "fresh" obligation.

5 Current pension obligation payments continued to be paid throughout the period subsequent to the November 28, 2003 order.

6 While originally initiated as a restructuring CCAA proceeding with a filing under the CCAA on September 16, 2003, the emphasis rather soon thereafter functionally became a two track exercise, namely either a restructuring or a sale (and in the latter case it was hoped that it would be a sale as a going concern rather than a piecemeal liquidation).

7 The Heico deal was a sale as a going concern with the purchaser assuming the unionized worker pension plans

(but not the Salaried Plans) and with all workers (unionized and non-unionized) being taken on except for 5 non-unionized workers (one active and 4 inactive). In the periods (i) September 16, 2003 to November 28, 2003 and (ii) then to December 1, 2004, all unionized and non-unionized workers continued to be paid their wages and pensioners continued to be paid their pensions at full entitlement rates.

8 It does not appear to be disputed that the Heico deal on a going concern basis maximized the value of the enterprise both for the creditors and, with the assumption of the unionized workers and virtually all non-unionized workers plus the assumption of the unionized worker pension plans, for the workers. It is unfortunate, but a realistic fact of life in these circumstances that the Salaried Plans were not assumed; the deficit in the Salaried Plans now being estimated at approximately $23 million which, according to present actuarial assumptions, may impact those pensions by 20% to 50%, according to the Pension Committee of Ivaco Inc.; however, the Superintendent's submissions were that the past contributions recovery would result in a pension reduction of 17% (and without recovery of the past contributions, the reduction would be 26%), notwithstanding the approximately $11 million increase in the Salaried Plans during the 14 $^{1}/_{2}$ month period to December 1, 2004. Part of this deficiency will be picked up by the Ontario Pension Benefits Guarantee Fund ("PBGF") (recognizing that not all of the Salaried Plan beneficiaries are covered by the Ontario legislation). The PBGF payment would entitle the Superintendent to a subrogated charge against any then existing assets of the Ivaco Companies.

9 The Ivaco Companies are still involved in the CCAA proceedings. It cannot be reasonably disputed that it is not reasonably possible for the Ivaco Companies to be restructured. In pith and substance what has happened is that there has been a liquidating CCAA proceeding.

10 The National Bank, the Bank of Nova Scotia, the Informal Committee of Noteholders, and a very major trade creditor, QIT -- Fer et Titane Inc., wish to have the proceedings transformed into BIA proceedings. It would not appear to me that there has been any conduct alleged to have been taken by any of these BIA desirous parties which would be considered "inequitable" in the sense of *Bulut v. Brampton (City)* (2000), 48 O.R. (3d) 108 (Ont. C.A.); *Christian Brothers of Ireland in Canada, Re* (2004), 69 O.R. (3d) 507 (Ont. S.C.J. [Commercial List]). See also *Unisource Canada Inc. v. Hongkong Bank of Canada* (1998), 43 B.L.R. (2d) 226 (Ont. Gen. Div.), affirmed (2000), 15 P.P.S.A.C. (2d) 95 (Ont. C.A.); *AEVO Co. v. D & A Macleod Co.* (1991), 4 O.R. (3d) 368 (Ont. Bktcy.).

11 While in a non-bankruptcy situation, the Ivaco Companies' assets are subject to a deemed trust on account of unpaid contributions and wind up liabilities in favour of the pension beneficiaries by s. 57(3) of the *Pension Benefits Act* (Ontario), in a bankruptcy situation, the priority of such a statutory deemed trust ceases unless there is in fact a "true trust" in which the three certainties of trust law are found to exist, namely (i) certainty of intent; (ii) certainty of subject matter; and (iii) certainty of object. For these three certainties to be met, the trust funds must be segregated from the debtor's general funds. See *British Columbia v. Henfrey Samson Belair Ltd.* (1989), 59 D.L.R. (4th) 726 (S.C.C.); *British Columbia v. National Bank of Canada* (1994), 119 D.L.R. (4th) 669 (B.C. C.A.); *Bassano Growers Ltd. v. Price Waterhouse Ltd.* (1998), 6 C.B.R. (4th) 199 (Alta. C.A.); *I.B.L. Industries Ltd., Re* (1991), 2 O.R. (3d) 140 (Ont. Bktcy.); *Continental Casualty Co. v. MacLeod-Stedman Inc.* (1996), 141 D.L.R. (4th) 36 (Man. C.A.). There is no evidence that any of the "required" funds have been segregated or earmarked for the pension beneficiaries; nor did the Superintendent make such a request as a condition of the Heico deal being closed. Since there has been no such segregation, the deemed statutory trusts would not be effective as trusts upon the happening of a bankruptcy: see *Henfrey* at p. 141.

12 An administrator's lien pursuant to s. 57(5) of the *Pension Benefits Act* (Ontario) would also be ineffective in a bankruptcy. Section 2(1) of the BIA provides that a "secured creditor" includes a person who holds a lien (i.e. a "true lien") on a debt which is actually owing. Even though provincial legislation may deem something to be a lien, that deeming does not make it a s. 2(1) BIA "lien": see *New Brunswick v. Peat Marwick Thorne Inc.* (1995), 37 C.B.R. (3d) 268 (N.B. C.A.). While provincial legislation may validly affect priorities in a non-bankruptcy situation, once

bankruptcy has occurred s. 136(1) of the BIA determines the status and priority of claims: see *Deloitte, Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board)* (1985), 19 D.L.R. (4th) 577 (S.C.C.); *Husky Oil Operations Ltd. v. Minister of National Revenue* (1995), 128 D.L.R. (4th) 1 (S.C.C.).

13 The Superintendent relies on my earlier decision of *Toronto Dominion Bank v. Usarco Ltd.* (1991), 42 E.T.R. 235 (Ont. Gen. Div.). However this case is distinguishable in that while there was a bankruptcy petition outstanding at the time of the motion, no one was pressing it forward. The petitioner had died and the bank as the major creditor of Usarco only wished to proceed with a bankruptcy once the property was sold (which property had environmental problems of a significant nature). I indicated at pp. 2 and 4:

> While it is possible for the bank to be substituted or added as a petitioner in the Gold bankruptcy petition ... it has not moved to do so. It is now approximately a year and a half since the Gold Petition. The bank will not move in respect of a petition until the Hamilton property is sold. It is unclear when this might happen; no likely timetable was established. In my view, 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.

Rather in the present case with the Ivaco Companies there are major creditors who wish to proceed forthwith -- and for the reason that such a bankruptcy will enhance their position (i.e. the pension deficit claims will become unsecured and rank *pari passu* with the other unsecured claims). See also *Usarco* at p. 5 where I observed:

> One of the primary purposes of a bankruptcy proceeding is to secure an equitable distribution of the debtor's property amongst the creditors; although another purpose may be for creditors to avail themselves of provisions of the BA which may enhance their position by giving them certain priorities which they would not otherwise enjoy.

See also *Black Brothers (1978) Ltd., Re* (1982), 41 C.B.R. (N.S.) 163 (B.C. S.C.); *Bank of Montreal v. Scott Road Enterprises Ltd.* (1989), 73 C.B.R. (N.S.) 273 (B.C. C.A.); *Beverley Bedding Corp., Re* (1982), 40 C.B.R. (N.S.) 95 (Ont. Bktcy.); *Harrop of Milton Inc., Re* (1979), 22 O.R. (2d) 239 (Ont. Bktcy.). Once a creditor has established the technical requirements of s. 42 of the BIA for granting a bankruptcy order and the debtor is unable to show why a bankruptcy order ought not to be granted, a bankruptcy order should be made: see *Kenwood Hills Development Inc., Re* (1995), 30 C.B.R. (3d) 44 (Ont. Bktcy.). A court has the discretion to refuse such an order pursuant to s. 43(7) with the onus being on the debtor to show sufficient cause why the order ought not to be granted. While in the present case, the Ivaco Companies as debtors have not objected to the proposed bankruptcy proceedings, they are not functionally in a position to do so as they are rudderless in this respect (the officers and directors have abandoned ship by resigning some months ago and the Monitor's increased powers not extending to this -- see the order of December 17, 2004, which in respect of anything which may be considered touching the pension plan issues, *only* relates to, in effect a safekeeping of the Heico sale proceeds and other assets of the Ivaco Companies). However for the purposes of this motion, I think it fair to treat the Superintendent as the "champion" of the Ivaco Companies' interests in this issue in a surrogate capacity.

14 Allow me to observe that the usual situation of invoking a s. 43(7) discretion is where (i) the petitioner has an ulterior motive in pursuing the petition (such as eliminating a competitor or inflicting harm on the debtor (together with its officers, directors, shareholders and/or other creditors) as a revenge tool) or (ii) there is no meaningful purpose to be served by the bankruptcy as there are no assets and no alleged bad conduct to be investigated. What the Superintendent has submitted in opposition to the request to proceed in bankruptcy mode is not of this nature. Nor is this type of situation of the nature envisaged at para. 12 of *Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.) at p. 241 where Tysoe J. stated:

> 12. Section 11 of the CCAA has received a very broad interpretation. The main purpose of s. 11 is to preserve the status quo among the creditors of the company so that no creditor will have an advantage over other creditors while the company attempts to reorganize its affairs. The CCAA is intended to facilitate reorganizations involving compromises between an insolvent company and its creditors and s. 11 is an integral aspect of the reorganization process.

There is no such reorganization possible under the existing circumstances. Rather the compromise of claims may be adequately effected under the BIA regime (as opposed to the submission of the Superintendent to appoint an interim receiver to operate under the CCAA proceedings). It would seem to me that those claims which have already been resolved under the CCAA proceeding could be "transferred" as resolved claims into a BIA proceeding.

15 The Superintendent has not paid out any amount under the PBGF and thus has not effected nor perfected its status as a subrogee.

16 Given the limited role of the Monitor as indicated above I do not see that the Monitor in fact, law and fairness can be considered a fiduciary to the pension beneficiaries in the nature of an administrator of the Salaried Plans.

17 Pursuant to s. 57(3) and (4) of the *Pension Benefits Act*, what is the responsibility? It is that the employer (the Ivaco Companies) be deemed to hold the pension funding monies in trust for the pension beneficiaries. However there is no provision in that legislation that the monies be paid out to the pension plan at any particular time. As discussed above, those deemed trusts may be defeated, in the sense of being inoperative to give a priority, in the event of a bankruptcy. The BIA does not contain any provision that the priority position is maintained in a bankruptcy; rather the case law is to the contrary: see *Henfrey* at p. 741; *Bassano* at pp. 201-202; *I.B.L. Industries Ltd., Re* at pp. 143-4.

18 In the end result I do not see that the Superintendent has made a compelling case to the effect that the petitions in bankruptcy should not be allowed to proceed in the ordinary course. I have reached that conclusion by weighing the factors pro and con as discussed above, including the relative benefits to all stakeholders (including workers and pensioners) to maintaining the CCAA proceedings (with the benefit of the suspension of past contributions as per the unopposed (and un-reconsidered) order of November 28, 2003, the fact that no reorganization is now possible as all Ivaco Companies (except Docap) have ceased operations and are without operational assets and that the Ivaco Companies are now essentially in a distribution of proceeds mode.

19 However, to allow sufficient time for consideration of appeal, no action or step is to be taken with respect to dealing with the bankruptcy for at least 60 days from the release of these reasons. Of course it will be within the context of those bankruptcy proceedings that priorities will be determined if there is a bankruptcy, keeping in mind that s. 43(7) of the BIA may be raised at the hearing of the petition.

20 While the Superintendent in effect griped about the machinations concerning certain "corporate" actions or steps to be taken concerning the Ivaco Companies to "prepare" them for a bankruptcy proceeding, I do not find that these mechanical steps as outlined in paragraphs 2-5 of the National Bank motion as being improper -- but rather that these mechanical steps merely recognize the exposure and experience of the Superior Court of Justice (Ontario) to this situation. I have the similar view as to paragraphs 7-8. However, in the circumstances, I do not find it appropriate to allow (indeed direct) that there be an assignment in bankruptcy on a "voluntary basis" as there is the s. 43(7) issue to be determined. Similarly with respect to the balance of declarations requested by the National Bank, while I have made some general observations as to reversing priorities, it would not be appropriate to determine with finality the priorities of various claims on the record before me at this time.

21 With respect to the Pension Committee of Ivaco Inc.'s motion to transfer the issue of whether the Ivaco Companies are obliged on a solidary basis for the obligations of each other for amounts owing to the Salaried Plan pursuant to s. 11 of the *Supplemental Pension Plans Act* (Quebec), I have the following observations. I do not rule out the possibility of requesting the Quebec Superior Court to determine this issue. However I do not find it necessary or desirable to make that decision at the present time. It would make sense to do so once it has been determined whether the Ivaco Companies are bankrupt or not (in the latter case one would conclude that likely the CCAA proceedings would be supplemented by an interim receivership) as different factors may come into functional play depending on that outcome.

22 In the interim, I would note the following. Canadian courts have a good deal of experience in dealing with foreign law on a proven basis. There is an issue of extraterritorial application of the SPPA. When provincial legislation purports to have an extraterritorial effect, the courts of the enacting province do not have exclusive jurisdiction to determine the constitutional validity or scope of the legislation: see J. Walker, ed., *Castel & Walker: Canadian Conflict of Laws*, 6th ed., Vol. 1 (Toronto: Butterworths, 2005) at 2:7.

23 This constitutional question would appear to arise incidentally to the ordinary course of these proceedings here in Ontario over which this Court has properly assumed jurisdiction -- and such jurisdiction has not been challenged since the start of these proceedings on September 16, 2003. See *Hunt v. T & N plc*, [1993] 4 S.C.R. 289 (S.C.C.) where La Forest J. observed at pp. 308-10:

> In determining what constitutes foreign law, there seems little reason why a court cannot hear submissions and receive evidence as to the constitutional status of foreign legislation. There is nothing in the authorities cited by the respondents that goes against this proposition. Quite the contrary, *Buck v. Attorney-General*, [1965] 1 All E.R. 882 (C.A.), holds only that a court has no jurisdiction to make a declaration as to the validity of the constitution of a foreign state. That would violate the principles of public international law. But here nobody is trying to challenge the constitution itself. The issue of constitutionality arises incidentally in the course of litigation. The distinction is clearly made by Lord Diplock in *Buck*, at pp. 886-87:
>
> > The only subject-matter of this appeal is an issue as to the validity of a law of a foreign independent sovereign state, in fact, the basic law prescribing its constitution. The validity of this law does not come in question incidentally in proceedings in which the High Court has undoubted jurisdiction as, for instance, the validity of a foreign law might come in question incidentally in an action on a contract to be performed abroad. The validity of the foreign law is what this appeal is about; it is nothing else. This is a subject-matter over which the English courts, in my view, have no jurisdiction.
>
> Similarly in *Manuel v. Attorney General*, [1982] 3 All E.R. 786 (Ch. D.), while it was asserted that the courts of one country should not pronounce on the validity of a statute of another, the case where the question arises merely incidentally is expressly excepted.
>
> The policy reasons for allowing consideration of constitutional arguments in determining foreign law that incidentally arises in the course of litigation are well founded. The constitution of another jurisdiction is clearly part of its law, presumably the most fundamental part. A foreign court in making a finding of fact should not be bound to assume that the mere enactment of a statute necessarily means that it is constitutional. Formal determination of constitutionality is often purely fortuitous. It is often dependent on there happening to be parties interested in challenging the statute. This is unlikely to happen where, as in this case, most of the parties affected are outside the enacting jurisdiction. In this case, the Quebec statute has never been challenged by Quebec litigants because it does not arise in normal litigation in the province, and

> in extraprovincial litigation. Quebec defendants benefit while Quebec plaintiffs are normally unaffected. Why should a litigant not be able to argue constitutionality in the course of litigation that directly raises the issue? As a practical matter, it is not much more difficult to determine constitutionality than any other aspect of foreign law.

He went on to state at pp. 314-15:

> It may, no doubt, be advanced that courts in the province that enacts legislation have more familiarity with statutes of that province. It must not be forgotten, however, that courts are routinely called to apply foreign law in appropriate cases. It is thus only the fact that a constitutional issue is raised that differentiates this case. But all judges within the Canadian judicial structure must be taken to be competent to interpret their own Constitution. In a judicial system consisting of neutral arbiters trained in principles of a federal state and required to exercise comity, the general notion that the process is unfair simply is not legally sustainable, all the more so when the process is subject to the supervisory jurisdiction of this Court.
>
> This approach is even more persuasive where, as here, the issue relates to the constitutionality of the legislation of a province that has extraprovincial effects in another province. That is especially true where the constitutionality of the other province's legislation has never been challenged in the other province's courts, and where moreover, as here, such a challenge is unlikely. Where the violation is as much a violation against the Constitution of Canada, then the superior courts which must legitimately face the issue should be able to deal with the question. Against this position, it was observed that most of the parties interested in the question as interveners would be in the province whose statute is impugned. That may be, but where the alleged violation relates to extraterritorial effect, many of the interested parties are also outside Quebec. Above all, it is simply not just to place the onus on the party affected to undertake costly constitutional litigation in another jurisdiction.

24 The Ivaco Companies initiated the CCAA proceedings in Ontario; no party has questioned the appropriateness of their so doing. Under these circumstances one would have to consider that there should be an onus on the Pension Committee to demonstrate that Quebec is clearly the more appropriate forum on all aspects of the issue as framed. See *ABN Amro Bank N.V. v. BCE Inc.* [2003 CarswellOnt 2890 (Ont. S.C.J. [Commercial List])] (April 30, 2003) a decision of mine at para. 26. This motion is dismissed.

25 Orders accordingly.

Motion dismissed.

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