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Our File No. 09-1426

August 21, 2009

Via Courier
SERIVCE LIST

Dear Sirs/Mesdames:

Re: IN THE MATTER of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

AND THE MATTER of a Plan of Compromise or Arrangement of INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and NOVAR INC.

Please find enclosed the Book of Authorities of the Moving Party United Steelworkers (Motion Returnable August 28, 2009), served on you pursuant to the *Rules of Civil Procedure*.

Sincerely,

Darrell Brown

Darrell Brown
DB:er/cope 343

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Court File No. CV-09-8122-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

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

AND IN THE MATTER of a Plan of Compromise or Arrangement of INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and NOVAR INC.

the Applicants

BOOK OF AUTHORITIES
of the Moving Party United Steelworkers
(Motion Returnable August 28, 2009)

August 20, 2009

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Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)

Monsanto Canada Inc., appellant;
v.
Superintendent of Financial Services, respondent.
And between
Association of Canadian Pension Management, appellant;
v.
Superintendent of Financial Services, respondent, and Attorney General of Canada, National Trust Company, Nicole Lacroix, R. M. Smallhorn, D. G. Halsall, S. J. Galbraith, S. W. (Bud) Wesley, Canadian Labour Congress and Ontario Federation of Labour, interveners.

[2004] 3 S.C.R. 152

[2004] S.C.J. No. 51

2004 SCC 54

File No.: 29586.

Supreme Court of Canada

Heard: February 16, 2004;
Judgment: July 29, 2004.

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

(51 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Catchwords:

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

[page153]

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

Summary:

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

Held: The appeal should be dismissed.

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

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

The scheme of the *Pension Benefits Act* and of the regulations also supports the ordinary and grammatical meaning of s. 70(6). Delaying the distribution would not be consonant with the provisions that make distribution [page154] of surplus assets an intended part of the wind-up process, whether the wind-up is in whole or in part. In addition, the statutory scheme makes an important distinction between continuing plans and winding-up plans. The interpretation of s. 70(6) herein proposed is consistent with the logic of this aspect of the statutory scheme and the legislature's choice to treat partial wind-ups in the same manner as full wind-ups.

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

Cases Cited

Discussed: Schmidt v. Air Products Canada Ltd., [1994] 2 S.C.R. 611; referred to: Barrie Public Utilities v. Canadian Cable Television Assn., [2003] 1 S.C.R. 476, 2003 SCC 28; Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc., [2001] 2 S.C.R. 100, 2001 SCC 36; Voice Construction Ltd. v. Construction & General Workers' Union, Local 92, [2004] 1 S.C.R. 609, 2004 SCC 23; Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982 [page155]; Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247, 2003 SCC 20; Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825; National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324; GenCorp Canada Inc. v. Ontario (Superintendent, Pensions) (1998), 158 D.L.R. (4th) 497; Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817; Dr. Q v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226, 2003 SCC 19; Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748; Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, 2002 SCC 42; R. v. Campbell, [1999] 1 S.C.R. 565; Firestone Canada Inc. v. Ontario (Pension Commission) (1990), 1 O.R. (3d) 122.

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O. Reg. 708/87, ss. 7a [ad. O. Reg. 100/88, s. 1], 7c [ad. O. Reg. 412/90, s. 1].

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History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (2002), 62 O.R. (3d) 305, 220 D.L.R. (4th) 385, 166 O.A.C. 131, 29 B.L.R. (3d) 18, 21 C.C.E.L. (3d) 11, 32 C.C.P.B. 248, [2002] O.J. No. 4407 (QL), affirming a decision of the Superior Court of Justice (Divisional Court) (2001), 198 D.L.R. (4th) 109, 144 O.A.C. 204, 10 C.C.E.L. (3d) 257, 27 C.C.P.B. 82, [2001] O.J. No. 963 (QL), setting aside the order of the Financial Services Tribunal (2000), 3 B.L.R. (3d) 99, 50 C.C.E.L. (2d) 303, 23 C.C.P.B. 148. Appeal dismissed.

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

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

The judgment of the Court was delivered by

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

2 In particular, does s. 70(6) of the Ontario *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("Act"), require the distribution of a proportional share of actuarial surplus when a defined benefit pension plan is partially wound up? The Superintendent of Financial Services answered this question in the affirmative. She refused to approve the partial wind-up report of the appellant, Monsanto Canada Inc. ("Monsanto"), for failing to provide for the distribution of surplus assets related to the part of the Pension Plan [page158] being wound up. A majority of the Financial Services Tribunal ("Tribunal") disagreed with the Superintendent and ordered her to approve the report: (2000), 3 B.L.R (3d) 99. The majority held that s. 70(6) provides no more than a right to participate in surplus distribution when, if ever, the Plan fully winds up. The Ontario Divisional Court overturned the Tribunal on appeal ((2001), 198 D.L.R. (4th) 109) and the Court of Appeal agreed ((2002), 62 O.R. (3d) 305). Monsanto and the Association of Canadian Pension Management now appeal to this Court. The appeal, for the reasons that follow, should be dismissed.

I. Facts

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

4 One of the bases for the Superintendent's refusal to approve Monsanto's report was the failure to provide for the distribution of this surplus on partial wind-up, in accordance with s. 70(6) of the Act. This [page159] is the only ground still in issue before this Court as the other bases for refusal were not pursued on this appeal. Also noteworthy is the fact that this matter is preliminary to the question of surplus entitlement, which is not affected by this decision and will need to be determined at a later date.

II. Issue

5 The only issue in this appeal is whether the Tribunal properly interpreted s. 70(6) of the Act as not requiring distribution of the actuarial surplus on a partial plan wind-up. Thus, the analysis must proceed in two stages. First, the appropriate standard of review of the Tribunal's decision must be determined. Second, the Tribunal's interpretation of s. 70(6) must be measured against this standard. All of the relevant legislative provisions are annexed at the end of these reasons.

III. Standard of Review

6 The courts below found, and the appellants and respondent agreed, that the appropriate standard of review of the Tribunal's decision was reasonableness. However, the standard of review is a question of law, and agreement between the parties cannot be determinative of the matter. An evaluation of the four factors comprising the pragmatic and functional approach is required to decide the appropriate level of deference this Court should grant in reviewing the decision.

A. *Privative Clause*

7 The legislature did not enact a privative clause to insulate the Tribunal's jurisdiction. To the contrary, s. 91(1) of the Act provides for a statutory right of appeal to the Divisional Court. While not determinative, this factor suggests that the legislature intended less deference to be afforded to the Tribunal on judicial review (*Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28, at para. 11; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, 2001 SCC 36, at para. 27).

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B. *Nature of the Problem*

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

C. *Relative Expertise*

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

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

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11 On the other hand, the Tribunal does not have specific expertise in this area. The Tribunal is a general body that was created under the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28 ("*FSCOA*"), s. 20, to replace the specialized Pension Services Commission. It is responsible for adjudication in a variety of "regulated sector[s]" (*FSCOA*, s. 1), including co-operatives, credit unions, insurance, mortgage brokers, loans and trusts, and pensions (*FSCOA*, s. 1). In addition, the nature of the Tribunal's expertise is primarily adjudicative. Unlike the former Pension Services Commission or the current Financial Services Commission, the Tribunal has no policy functions as part of its pensions mandate (see *FSCOA*, s. 22). As noted in *Mattel Canada, supra*, and in *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, involvement in policy development will be an important consideration in evaluating a tribunal's expertise. Lastly, in appointing members to the Tribunal and assigning panels for hearings, the statute advises that, to the extent practicable, expertise and experience in the regulated sectors should be taken into account (*FSCOA*, ss. 6(4) and 7(2)). However, there is no requirement that members necessarily have special expertise in the subject matter of pensions. The Tribunal is a small entity of

6 to 12 members which further reduces the likelihood that any particular panel would have expertise in the matter being adjudicated (*FSCOA*, s. 6(3)).

12 Overall, there is little to indicate that the legislature intended to create a body with particular expertise over the statutory interpretation of the Act. The Tribunal would not have any greater expertise than the courts in construing s. 70(6). Thus, this factor also suggests a lower amount of deference is required to be given to the Tribunal's decisions on the issue of statutory interpretation.

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D. *Purposes of the Legislation and the Provision*

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

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

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

15 Here, however, the Tribunal assumes a different role and function in relation to the statutory purpose of the particular provision at issue. The determination of the meaning of s. 70(6) is not "polycentric" in nature. In other words, s. 70(6) does not grant the Tribunal broad discretionary powers nor a range of policy-laden remedial choices that involve the balancing of multiple sets of interests of competing constituencies (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 56; *Pushpanathan, supra*, at para. 36; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at paras. 30-31) [page163]. Moreover, the issues raised in s. 70(6) are legal in nature, rather than economic, broad, specialized, technical or scientific in such a way as to substantially deviate from the normal role of the courts (*Dr. Q, supra*, at para. 31; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at paras. 48-49). Therefore, this factor also seems to indicate less deference be accorded to the Tribunal's interpretation.

E. *Conclusion on the Standard of Review*

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

IV. Statutory Interpretation of Section 70(6)

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

> **70**... .
>
> (6) On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.

18 The appellants argue that the effect of the provision is to afford Affected Members a vested right, as of the effective date of partial wind-up, to participate in surplus distribution when, if ever, the Plan fully winds up, assuming they are so entitled under the Plan agreement. In contrast, the respondent contends that s. 70(6) requires that the distribution of the surplus actually occurs on the effective date of the partial wind-up. The main area of [page164] contention between the parties is the import of the last phrase: "on the effective date of the partial wind up".

19 The established approach to statutory interpretation was recently reiterated by Iacobucci J. in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

I will examine each of these factors in turn, beginning first with the background context.

A. *Historical Context*

20 Pension plans have a long history in Canada, first appearing in the late 19th century. However, it was not until after the Second World War that the development of pension plans flourished in tandem with the economic growth and prosperity of the era (see *Report of the Royal Commission on the Status of Pensions in Ontario* (1980), vol. I, at p. 35; R. L. Deaton, *The Political Economy of Pensions: Power, Politics and Social Change in Canada, Britain and the United States* (1989), at p. 79). In the early days, pensions were commonly regarded as gratuitous rewards for long and faithful service, subject to the discretion and financial health of the employer (see *Report of the Royal Commission on the Status of Pensions in Ontario, supra*, at p. 2; *Mercer Pension Manual* (loose-leaf ed.), at p. 1-9). However, particularly as pensions became a more familiar sight at the collective bargaining table, a competing conception as an enforceable employee right developed (see E. E. Gillese, "Pension Plans and the Law of Trusts" (1996), 75 *Can. Bar Rev.* 221, at pp.

226-27; Deaton, *supra*, at pp. 122-23). The enactment of minimum standards legislation in Ontario, first in 1963 and again in 1987, "considerably expanded the rights of plan members. It altered, again, the power balance between employers and employees [page165] in the matter of pensions" (Gillese, *supra*, at p. 228).

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

22 If, in a given year, the assets of the fund, evaluated as a going concern, are found to be insufficient to cover the current service cost, there is said to be an "unfunded liability" and the employer will be called upon to make up the deficit through contributions (see, generally, s. 4(1) of the *Pension Benefits Act* General Regulations, R.R.O. 1990, Reg. 909). If the plan is underfunded on wind-up, then [page166] benefits will be reduced, subject to the application in Ontario of the Pension Benefits Guarantee Fund (ss. 77 and 84(1) of the Act). In contrast, if the value of the assets are greater than originally estimated, the fund is said to have a surplus, being "the excess of the value of the assets of a pension fund related to a pension plan over the value of the liabilities under the pension plan" (s. 1 of the Act). The surplus is considered "actuarial" because it has not yet been concretely realized through the liquidation of assets and the payment of liabilities.

23 Consequently, in the 80s, the surplus issue became a hotly contested one. Employers claimed the surplus as the result of their assumption of risk, while employees maintained that the fund, including the surplus, represented deferred wages belonging to them. It was in this context that the legislature re-enacted s. 70(6) as part of the *Pension Benefits Act, 1987*, S.O. 1987, c. 35, virtually unchanged from the previous version introduced in 1969 (O. Reg. 103/66, s. 11, as am. by O. Reg. 91/69, s. 3; see Legislative Assembly of Ontario, *Hansard -- Official Report of Debates*, 33rd Parl., January 13, 1986 to June 25, 1987). Also at this time, definitions of "partial wind up" and "surplus" were included in the scheme. Concurrently, a moratorium was placed on surplus withdrawals from ongoing plans in 1986 (R.R.O. 1980, Reg. 746, s. 21(2), as am. by O. Reg. 31/87), which was extended to plans on wind-up in 1988 (O. Reg. 708/87, s. 7a (added by O. Reg. 100/88)). The surplus sharing regulation was enacted to replace the moratorium (O. Reg. 708/87, s. 7c (added by O. Reg. 412/90)), requiring that no payments be made from the surplus of a pension plan that is being wound up in whole or in part unless it is (a) made to or for the benefit of members, former members or persons other than the employer who are entitled to payments; or (b) made to the employer with the written agreement of a prescribed number of members (R.R.O. 1990, Reg. 909, s. 8(1)). This regulation, designed to encourage agreement and sharing between employers and employees, ceases to have effect after December 31, 2004 (Reg. 909, s. 8(3)).

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

B. *Grammatical and Ordinary Sense*

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

26 Where the disagreement lies is with regard to the timing of distribution following a partial wind-up of a plan in which there is an actuarial surplus. The respondent reasons that, since (i) s. 70(6) requires the rights and benefits on a partial wind-up to not be less than those available on full wind-up, and (ii) all parties agree that surplus distribution would occur on a full wind-up (Court of Appeal judgment, at para. 43; see also s. 79(4)), then (iii) s. 70(6) must require surplus distribution on a partial wind-up. In contrast, the appellants argue that, at most, s. 70(6) requires the vesting of the right to participate in surplus distribution in a potential future full wind-up because it is only on final wind-up that an actual, rather than actuarial, surplus can exist. In my opinion, the former interpretation accords [page168] better with the ordinary and grammatical meaning of the section.

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

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

29 Third, the appellants' proposed interpretation, as adopted by the majority of the Tribunal, in effect reads out this last phrase of the provision. In my opinion, without the phrase "on the effective date of the partial wind up", it may have been open to read s. 70(6) as only vesting rights to be ex-

ercised on full wind-up. However, the presence of this phrase confirms that rights and benefits are not only measured but also realized on the effective date of partial wind-up.

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

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

C. *Scheme of the Act*

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

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

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

33 Second, the statutory scheme makes an important distinction between continuing plans and winding-up plans. The partial wind-up falls, for all purposes, in the latter group, even though there is a remaining [page170] part of the Plan that continues to exist. Under the scheme, in evaluating rights and procedural requirements, partial wind-up is treated the same as a full wind-up, which coincides with the purpose and effect of s. 70(6). For instance, in s. 78(1) the general rule is established that "[n]o money may be paid out of a pension fund to the employer without the prior consent

of the Superintendent." Sections 79(1) and 79(3) then provide for exceptions to this rule depending on whether the application for payment is being made with regard to a plan that is continuing or one that is winding up. As with the additional conditions set out in the regulations (Reg. 909, ss. 8 to 10 and 25 to 28.1), it is much more difficult to justify surplus withdrawal from a continuing plan than from a plan winding up in whole or in part. The interpretation of s. 70(6) herein proposed is consistent with the logic of this aspect of the statutory scheme and the legislature's choice to treat partial wind-ups in the same manner as full wind-ups. As a result, a partial wind-up requires a full wind-up to notionally occur for the purposes of evaluating the pro rata share of the assets and liabilities related to the partial wind-up, followed by the continuation of the remainder of the Plan.

34 Lastly, in this statutory scheme, the role of s. 70(6) appears to be as a residual deeming provision reflecting the legislature's intent of assuring that rights on partial wind-up are not less than those available on full wind-up, whether granted under the Act or under the terms of the Pension Plan. In almost every section where wind-up is mentioned, the legislature has already clarified that it is referring to wind-up "in whole or in part". This is the case when referring to grow-in rights (s. 74(1)) and immediate vesting rights (s. 73(1)(b)). These are special rights that members affected by a wind-up acquire but that ordinary retirees or individuals leaving employment do not. Provisions regarding the procedural requirements on wind-up similarly specify application on wind-up both "in whole or in part" (see, e.g., ss. 68 to 70). One of the rare instances in the Act where both are not expressly included is with regard to transfer rights on wind-up, which only mentions "wind up" (s. 73(2)). The appellants seem to agree, [page171] correctly in my opinion, that those rights would still have effect on partial wind-up even though it is not explicitly mentioned. Presumably, this must result from the application of s. 70(6), and controverts any sort of *expressio unius est exclusio alterius* logic for s. 73(2).

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

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

D. *Object of the Act*

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

38 The Act is public policy legislation that recognizes the vital importance of long-term income security. As a legislative intervention in the administration of voluntary pension plans, its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and [page172] others entitled to receive benefits under private pension plans (see *GenCorp, supra*; *Firestone Canada Inc. v. Ontario (Pension Commission)* (1990), 1 O.R. (3d) 122 (C.A.), at p. 127). This is especially important when, as recognized by this Court in *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, at p. 646, it

is remembered that pensions are now generally given for consideration rather than being merely gratuitous rewards. At the same time, the voluntary nature of the private pension system requires the interventions in this area to be carefully calibrated. This is necessary to avoid discouraging employers from making plan decisions advantageous to their employees. The Act thus seeks, in some measure, to ensure a balance between employee and employer interests that will be beneficial for both groups and for the greater public interest in established pension standards.

39 Employers often argue that the risk and responsibility of a defined benefit plan are borne by the employer and, thus, it should be allowed the control and flexibility to manage the plan as it sees fit. It is contended that requiring distribution of surplus weighs the balance too heavily in favour of the employees and will result in funds being contributed to according to less cautious actuarial estimates, fewer defined benefit plans, and fewer private pension plans overall. While important considerations, these arguments are unpersuasive. First, the requirement of distribution is value-neutral to the question of entitlement, which must be determined separately under the provisions of the Plan and the Act. Second, the statutory scheme protects against underfunding by requiring employers and administrators to follow accepted actuarial practice in their valuations (Reg. 909, s. 16). Lastly, the provision of pensions serves a number of labour market functions which benefit the corporate sector, including attracting a labour supply, reducing turnover, improving morale, increasing productivity and efficiency, promoting loyalty to the corporation, and so on (Deaton, *supra*, at p. 119). In short, there are many reasons for employers to maintain pension plans [page173] and a construction of s. 70(6) that is in accordance with the terms of the statute is unlikely to disrupt the balance between employer and employee interests.

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

41 By contrast, if Affected Members are required to await a full wind-up at some indeterminate future date to share in the distribution of surplus, it would place them in a worse position than continuing employees. Affected Members are placed in a significantly different position from continuing employees because they have just lost their jobs, their level of pensionable earnings are reduced, and they will rarely be able to replicate the same level of benefits elsewhere. Since pension plans are theoretically intended to be indeterminate in nature, Affected Members may no longer be reachable if a full wind-up occurs. It makes sense for the Affected Members to be subject to the risks of the Plan while they are a part of it, but not after they have been terminated from it. This same rationale would equally apply to future Affected Members if another partial [page174] wind-up occurs and to all members at the time of a full wind-up, so that each group would bear the consequences of market forces at the time of their termination from the Plan. This seems to be the fairest distribution of risk and in accordance with the object of the Act.

42 There are also policy and practical reasons supporting an interpretation requiring distribution upon partial wind-up. A surplus is, in effect, a windfall because it was not within the expecta-

tions of either the employer or the employees when the regime was implemented. The employer contributes to the fund as much as is necessary to match the funding target of the Plan on a going concern basis, taking into consideration actuarial estimates and assumptions. The basic expectation of the employees when joining the Plan is to receive periodic pension benefits on retirement. The fluctuation in the value of the assets is essentially the result of unforeseen market performance or plan experience. As discussed earlier, the most equitable solution is to distribute the fortunes of favourable markets at the time Affected Members are terminated. In this way, the windfall is related to their actual time and participation in the plan rather than being subject to the experience of a plan of which they are no longer a part.

43 Moreover, the increasingly mobile nature of labour should be recognized. When a group of employees is terminated and that part of the Plan is wound up, those accounts should generally be settled concurrently. The Affected Members should be able to know their status at the time of their termination so as to arrange their affairs accordingly and not be indefinitely tied to an employer that laid them off. On the flip side, if Affected Members only have a right to surplus distribution on full wind-up, assuming they are so entitled to receive it, they may no longer be alive to realize their right when, if ever, a full wind-up occurs. Even if they are, they may be difficult to locate or contact. As a practical matter, it is at the time of termination that [page175] their right to surplus, if any, is most needed, considering they have just lost their jobs and their source of regular income.

44 Furthermore, the argument that actuarial surplus is notional and thus too unreliable to justify the liquidation of any Plan assets is unconvincing. Although the assessment of an actuarial surplus is of necessity an estimate, it does not follow that the distribution of surplus would be unsound. Actuarial estimates of pension values are used for many purposes, including the sale of corporations or divisions of corporations, the division of matrimonial property, and the taking of contribution holidays by employers. Further, while the actuarial assumptions at play can vary, some uniformity can be found by requiring particular methods of valuation for certain purposes. For instance, the regulations prescribe that a "going concern valuation" (defined in Reg. 909, s. 1(2)) be used for valuing continuing pension plans (see, e.g., Reg. 909, s. 13(1) or 26). In contrast, a "solvency valuation" or "wind-up valuation" can be used when plans are actually or notionally wound up. This is in line with the different purposes underlying the regulation of continuing as opposed to winding up plans. In the former, the main concern is capital regulation to ensure adequate contribution levels based on estimates of current service costs to maintain fund integrity. In the latter, for wind-ups in whole or in part, the main concern is severing the terminated part of the Plan and ensuring Affected Members receive their legal entitlements, if any, as beneficiaries through the distribution of assets related to the part of the Plan being wound up.

45 Lastly, distribution upon partial wind up is consistent with the trust principles outlined in *Schmidt, [page176] supra*, regarding surplus entitlement and contribution holidays. Although that case dealt with a situation of entitlement to surplus on a full wind-up, which is not in issue here, the appellants placed much weight on the distinction made by Cory J. between actual and actuarial surplus. Cory J. held at pp. 654-55 that:

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

...

> When the plan is terminated, the actuarial surplus becomes an actual surplus and vests in the employee beneficiaries. [Emphasis added.]

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

47 Section 70(6) was enacted to ensure that Affected Members on partial wind-up are not in a worse position than a future full wind-up group. This requirement of equity provided by s. 70(6) is in relation to other rights provided for under the Act. As far as the distribution of surplus is concerned, the object of the Act and s. 70(6) strongly promote an interpretation that requires this [page177] distribution to occur at the time of the partial wind-up rather than later.

V. Conclusion

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

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

50 The vital importance of pension schemes in the modern labour market is evident. Pension funds are a significant asset for employers and an invaluable nest egg for an aging workforce. Legislative schemes that establish minimum standards and [page178] ensure the protection of employee benefits are an element of sound financial and social policy. The facilitation and encouragement of pension plan participation advance the interests of employees, employers, and the public. As part of the legislature's statutory structure that aims to accommodate the interests of ongoing and termi-

nated employees, it enacted s. 70(6) to require actual distribution of the pro rata share of actuarial surplus on plan wind-up, be it full or partial.

51 The appeal is dismissed with costs.

APPENDIX

Statutory Provisions

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

1. In this Act,

...

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

...

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

...

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

...

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

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

(a) the Superintendent;

[page179]

(b) each member of the pension plan;
(c) each former member of the pension plan;
(d) each trade union that represents members of the pension plan;
(e) the advisory committee of the pension plan; and
(f) any other person entitled to a payment from the pension fund.

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

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

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

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

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

(a) there is a cessation or suspension of employer contributions to the pension fund;
(b) the employer fails to make contributions to the pension fund as required by this Act or the regulations;
(c) the employer is bankrupt within the meaning of the *Bankruptcy and Insolvency Act* (Canada);
(d) a significant number of members of the pension plan cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer or as a result of the reorganization of the business of the employer;
(e) all or a significant portion of the business carried on by the employer at a specific location is discontinued;
(f) all or part of the employer's business or all or part of the assets of the employer's business are [page180] sold, assigned or otherwise disposed of and the person who acquires the business or assets does not provide a pension plan for the members of the employer's pension plan who become employees of the person;
(g) the liability of the Guarantee Fund is likely to be substantially increased unless the pension plan is wound up in whole or in part;
(h) in the case of a multi-employer pension plan,

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

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

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

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

(a) the assets and liabilities of the pension plan;
(b) the benefits to be provided under the pension plan to members, former members and other persons;
(c) the methods of allocating and distributing the assets of the pension plan and determining the priorities for payment of benefits; and
(d) such other information as is prescribed.

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

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

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

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

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

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

(a) the employment of each member of the pension plan affected by the winding up shall be deemed to have been terminated on the effective date of the wind up;
(b) each member's pension benefits as of the effective date of the wind up shall be determined as if the member had satisfied all eligibility conditions for a deferred pension; and
(c) provision shall be made for the rights under section 74.

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

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

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

[page182]

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

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

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

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

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

(a) the Superintendent is satisfied, based on reports provided with the application, that the pension plan has a surplus;
(b) the pension plan provides for the withdrawal of surplus by the employer while the pension plan continues in existence, or the applicant satisfies the Superintendent that the applicant is otherwise entitled to withdraw the surplus;
(c) where all pension benefits under the pension plan are guaranteed by an insurance company, an amount equal to at least two years of the employer's current service costs is retained in the pension fund as surplus;
(d) where the members are not required to make contributions under the pension plan, the greater of,

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

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

is retained in the pension fund as surplus;

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

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

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

are retained in the pension fund as surplus; and

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

...

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

(a) the Superintendent is satisfied, based on reports provided with the application, that the pension plan has a surplus;
(b) the pension plan provides for payment of surplus to the employer on the wind up of the pension plan;
(c) provision has been made for the payment of all liabilities of the pension plan as calculated for purposes of termination of the pension plan; and
(d) the applicant and the pension plan comply with all other requirements prescribed under other sections of this Act in respect of the payment of surplus money out of a pension fund.

(4) A pension plan that does not provide for payment of surplus money on the wind up of the pension plan shall be construed to require that surplus money accrued after the 31st day of December, 1986 shall be distributed proportionately on the wind up of the pension plan among members, former members and any other persons entitled [page184] to payments under the pension plan on the date of the wind up.

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

1. Any pension in respect of employment in Ontario.
2. Any deferred pension in respect of employment in Ontario to which a former member is entitled, if the former member's employment or membership was terminated before the 1st day of January, 1988 and the former member was at least forty-five years of age and had at least ten years of continuous employment with the employer, or was

a member of the pension plan for a continuous period of at least ten years, at the date of termination of employment.

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

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

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

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

1... .

(2) In this Part,

...

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

4. (1) Every pension plan shall set out the obligation of the employer or any person required to make contributions on behalf of an employer, to contrib-

ute both in respect of the normal cost and any going concern unfunded actuarial liabilities and solvency deficiencies under the plan.

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

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

(i) the employer,
(ii) the collective bargaining agent of the members of the plan or, if there is no collective bargaining agent, at least two-thirds of the members of the plan, and
(iii) such number of former members and other persons who are entitled to payments under the pension plan on the date of the wind up as the Superintendent considers appropriate in the circumstances.

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

(a) the payment would have been permitted by this section as it read immediately before the 18th day of December, 1991; and
(b) notice of proposal to wind up the pension plan was given to the Superintendent of Pensions before December 18, 1991.

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

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

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

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

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

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

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

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

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

(a) by indexing the benefits in accordance with a formula based upon increases in the annual Consumer Price Index;
(b) by providing an annual percentage increase in the amount of the benefits or an annual increase of a specified dollar amount; or
(c) by a combination of the methods described in clauses (a) and (b).

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

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

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

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

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

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

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

(ii) in the case of a proposed payment of money that is surplus out of a continuing pension [page188] plan to the employer, the employer has obtained the consent of 90 per cent of the former members who are in receipt of a pension payable from the pension fund, whose consent is required by subsection 10(2).

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

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

13. (1) Within sixty days after the date of establishment of a plan, the administrator shall submit a report on the basis of a going concern valuation that sets out,

(a) the normal cost, in the first year during which the plan is registered and the rule for computing the normal cost in subsequent years up to the date of the next report;
(b) an estimate of the normal cost, in the subsequent years up to the date of the next report;
(c) where applicable, the estimated aggregate employee contributions to the pension plan during each year up to the date of the succeeding report;
(d) the past service unfunded actuarial liability, if any, under the pension plan as at the date on which the plan qualified for registration;
(e) the special payments required to liquidate the past service unfunded actuarial liability in accordance with section 5;
(f) any other going concern unfunded liability;
(g) the special payments required to liquidate any going concern unfunded liability referred to in clause (f);

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(j) where the plan provides for an escalated adjustment, whether and to what extent,

(i) liability for the future cost of the adjustment has been included in the determination of any going concern unfunded actuarial liability, or
(ii) the cost for the escalated adjustment is included in the normal cost.

(1.1) The report shall also set out, on the basis of a solvency valuation,

(a) whether there is a solvency deficiency;

(b) if there is a solvency deficiency, the amount of the solvency deficiency and the special payments required to liquidate it in accordance with section 5;
(c) whether the transfer ratio is less than one; and
(d) if the transfer ratio is less than one, the transfer ratio.

16. (1) An actuary preparing a report under section 70 of the Act or under section 3, 5.3, 13 or 14 shall use methods and actuarial assumptions that are con-

sistent with accepted actuarial practice and with the requirements of the Act and this Regulation.

(2) An actuary preparing a report under section 4 shall use his or her best effort to meet the standards set out in subsection (1).

(3) The person preparing a report referred to in subsection (1) or (2) shall certify that it meets the requirements of subsection (1) or (2), as the case may be.

(4) The person preparing a report referred to in subsection (2) shall disclose in the report any respect in which the report does not meet the standards set out in subsection (1).

25. (1) The following information is prescribed for the purposes of a notice respecting an application under subsection 78(2) of the Act:

1. The name of the pension plan and its provincial registration number.
2. The valuation date of the report provided with the application and the amount of surplus in the pension plan.
3. The surplus attributable to employee and employer contributions.
4. The amount of surplus withdrawal requested.

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5. A statement that submissions in respect of the application may be made in writing to the Superintendent within thirty days after receipt of the notice.
6. The contractual authority for surplus withdrawals.
7. Notice that copies of the report and certificates filed with the Superintendent in support of the surplus request are available for review at the offices of the employer and information on how copies of the report may be obtained.

(2) The employer shall file a copy of the notice required by subsection 78(2) of the Act before transmitting it to the persons required by that subsection.

...

(4) An application by an employer for the consent of the Superintendent to a payment from a continuing pension plan under subsection 78(1) of the Act shall be accompanied by a certified copy of the notice referred to in subsection (1), a

statement that subsection 78(2) of the Act has been complied with, details as to the classes of persons who received notice and the date the last notice was distributed.

(5) An application referred to in subsection (1) shall be accompanied by a current report prepared on the basis of a going concern valuation demonstrating that a surplus as determined in accordance with section 26 exists and that there are no special payments required to be made to the pension fund.

26. (1) For purposes of determining surplus in a continuing pension plan,

(a) the value of the assets of the pension plan shall be calculated on the basis of the market value of the investments held by the pension fund plus any cash balances and accrued or receivable items; and
(b) the value of the liabilities of the pension plan shall be the greater of the calculation of,

(i) the going concern liabilities, or
(ii) the solvency liabilities.

(2) For purposes of subclauses 79(1)(d)(ii) and 79(1)(e)(ii) of the Act, the liabilities of the pension plan shall be calculated as the solvency liabilities.

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28... .

(5) A notice required under subsection 78(2) of the Act for a plan that is being wound up shall contain,

(a) the name of the pension plan and its provincial registration number;
(b) the valuation date of the report provided with the application and amount of surplus in the pension plan;
(c) the surplus attributable to employee and employer contributions;
(d) the amount of surplus withdrawal requested;
(e) a statement that submissions may be made in writing to the Superintendent within thirty days of receipt of the notice;
(f) the contractual authority for surplus reversion; and
(g) notice that copies of the wind up report filed with the Superintendent in support of the surplus request are available for review at the offices of the employer and information on how copies of the report may be obtained.

(6) An application by an employer for the consent of the Superintendent to a payment from a pension plan that is being wound up shall be accompanied by a certified copy of the notice referred to in subsection (5), a statement that subsection 78(2) of the Act has been complied with, the date the last notice was distributed and details as to the classes of persons who received notice.

28.1 (1) This section applies if there is a surplus on the wind up of a pension plan in whole or in part.

(2) The administrator of the pension plan shall give to each person entitled to a pension, deferred pension or other benefit or to a refund in respect of the pension plan a statement setting out the following information:

1. The name of the pension plan and its provincial registration number.
2. The member's name and date of birth.
3. The method of distributing the surplus assets.
4. The formula for allocating the surplus among the plan beneficiaries.

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5. An estimate of the amount allocated to the person.
6. The options available to the person concerning the method for distributing the amount allocated to the person and the period within which any election respecting the options must be made.
7. The method of distribution that will be used, if an election is not made within the specified period.
8. The name and details of the person to be contacted with respect to any questions arising out of the statement.
9. Notice that the allocation of surplus and the options available for distributing it are subject to the approval of the Superintendent and of the Canada Customs and Revenue Agency, and may be adjusted accordingly.

(3) *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28

1. In this Act,

...

"regulated sector" means a sector that consists of,

(a) all co-operative corporations to which the *Co-operative Corporations Act* applies;
(b) all credit unions, caisses populaires and leagues to which the *Credit Unions and Caisses Populaires Act, 1994* applies;
(c) all persons engaged in the business of insurance and governed by the *Insurance Act*;
(d) all corporations registered or incorporated under the *Loan and Trust Corporations Act*;
(e) all mortgage brokers registered under the *Mortgage Brokers Act*; or
(f) all persons who establish or administer a pension plan within the meaning of the *Pension Benefits Act* and all employers or other persons on their behalf who are required to contribute to any such pension plan;

6. (1) There is hereby established a tribunal to be known in English as the Financial Services Tribunal and in French as Tribunal des services financiers.

...

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(3) In addition to the chair and the two vice-chairs, the Lieutenant Governor in Council shall appoint at least six persons, and not more than 12, as members of the Tribunal for the length of time not exceeding three years that the Lieutenant Governor in Council specifies and may reappoint any member to the Tribunal.

(4) In appointing members to the Tribunal, the Lieutenant Governor in Council shall, to the extent practicable, appoint members who have experience and expertise in the regulated sectors.

7. (1) A matter referred to the Tribunal may be heard and determined by a panel consisting of one or more members of the Tribunal, as assigned by the chair of the Tribunal.

(2) In assigning members of the Tribunal to a panel, the chair shall take into consideration the requirements, if any, for experience and expertise to enable the panel to decide the issues raised in any matter before the Tribunal.

20. The Tribunal has exclusive jurisdiction to,

(a) exercise the powers conferred on it under this Act and every other Act that confers powers on or assigns duties to it; and
(b) determine all questions of fact or law that arise in any proceeding before it under any Act mentioned in clause (a).

21... .

(4) An order of the Tribunal is final and conclusive for all purposes unless the Act under which the Tribunal made it provides for an appeal.

22. For a proceeding before the Tribunal, the Tribunal may,

(a) make rules for the practice and procedure to be observed;
(b) determine what constitutes adequate public notice;
(c) before or during the proceeding, conduct any inquiry or inspection that the Tribunal considers necessary; or
(d) in determining any matter, consider any relevant information obtained by the Tribunal in addition to evidence given at the proceeding, if the Tribunal first informs the parties to the proceeding of the additional information and gives them an opportunity to explain or refute it.

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Solicitors for the appellant the Association of Canadian Pension Management: Blake, Cassels & Graydon, Toronto.

Solicitor for the respondent: Ministry of the Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitors for the intervener the National Trust Company: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the intervener Nicole Lacroix: Barnes, Sammon, Ottawa.

Solicitors for the interveners the Canadian Labour Congress and the Ontario Federation of Labour: Sack Goldblatt Mitchell, Toronto.

Solicitors for the interveners R. M. Smallhorn, D. G. Halsall, S. J. Galbraith and S. W. (Bud) Wesley: Koskie Minsky, Toronto.

cp/e/qw/qllls

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended AND IN THE MATTER of a Plan of Compromise or Arrangement of INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and NOVAR INC.

Court File No. CV-09-8122-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at TORONTO

BOOK OF AUTHORITIES OF THE MOVING PARTY UNITED STEELWORKERS

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