

TAB 7

ACCORD MULTILATERAL DE RECIPROCITE

MEMORANDUM OF RECIPROCAL AGREEMENT

ATTENDU que chaque signataire de cet accord possède des fonctions et pouvoirs statutaires relatifs aux régimes de rentes couvrant des employés de la province de sa juridiction;

ATTENDU que, du fait que certains régimes couvrent des employés de plus d'une province, plus d'un signataire peut posséder des fonctions et pouvoirs statutaires relatifs à un régime de rentes;

ATTENDU que lesdits signataires ont considéré qu'il serait souhaitable qu'un seul signataire exerce tous les pouvoirs statutaires et fonctions relatifs à un même régime de rentes, agissant en son nom et au nom de tout autre signataire possédant des fonctions et pouvoirs relatifs à ce régime;

ATTENDU qu'en conséquence, chaque signataire s'est entendu avec chacun des autres signataires dans le sens énoncé ci-dessus;

EN FOI DE QUOI, et en vertu des ententes ci-haut mentionnées, les signataires de cet accord sont liés par les arrangements administratifs suivants:

1. Interprétation

Dans le présent accord,

- a) "régime" signifie une caisse ou un régime de retraite ou de rentes;
- b) "autorité" signifie une personne ou un organisme possédant des fonctions et pouvoirs statutaires relatifs à l'enregistrement, la capitalisation, la dévolution, la solvabilité, la

WHEREAS each signatory hereto has statutory functions and powers with respect to pension plans covering employees in the jurisdiction represented by such signatory;

AND WHEREAS, by reason of some pension plans covering employees in more than one jurisdiction, more than one signatory may have statutory functions and powers in respect of the same pension plan;

AND WHEREAS the said signatories have deemed it desirable that statutory functions and powers in respect of any one pension plan be exercised by one signatory only, acting both on its own behalf and on behalf of any other signatory having statutory functions and powers in respect of such plan;

AND WHEREAS each signatory has accordingly agreed with each other signatory to the effect hereinafter set forth;

NOW THEREFORE this Memorandum witnesseth that the signatories hereto are, by virtue of the aforementioned agreements, governed by the following administrative arrangement:

1. Interpretation

In this Memorandum,

- a) "plan" means a superannuation or pension fund or plan;
- b) "authority" means a person or body having statutory functions and powers with respect to registration, funding, vesting, solvency, audit, obtaining information, inspec-

- vérification, l'obtention de renseignements, l'inspection, la liquidation et autres aspects des régimes;
- c) "autorité participante" signifie une autorité qui est signataire du présent accord;
- d) "autorité majoritaire" signifie, relativement à un régime, l'autorité participante de la province où la majorité des membres du régime sont employés (il ne sera pas tenu compte dans ce calcul des membres employés dans une province qui n'a pas d'autorité participante);
- e) "autorité minoritaire" signifie, relativement à un régime, l'autorité participante de toute province où un ou plusieurs membres du régime sont employés, mais ne signifie pas l'autorité majoritaire.
2. L'autorité majoritaire de chaque régime exerce à la fois ses propres fonctions et pouvoirs statutaires et les fonctions et pouvoirs statutaires de chaque autorité minoritaire de ce régime.
3. Toute autorité peut s'exclure de l'application de l'article 2 à l'égard d'un régime déterminé en avisant par écrit l'autorité majoritaire d'un tel régime à cet effet (ou bien toutes les autorités minoritaires au cas où l'autorité majoritaire est celle qui s'exclue); et en pareil cas l'autorité qui s'exclue sera considérée comme n'étant plus une autorité participante à l'égard d'un tel régime.
4. Toute autorité participante peut s'exclure de l'application de l'article 2 à l'égard de tous régimes pour lesquels, n'était-ce cette exclusion, elle agirait comme autorité majoritaire; dans ce cas, et seulement aux fins de déterminer l'autorité majoritaire régissant chacun desdits régimes, elle ne sera pas considérée comme autorité participante.
5. Toutes les autorités participantes qui possèdent des fonctions et pouvoirs statutaires à l'égard d'un
- tion, winding up, and other aspects, of plans;
- c) "participating authority" means an authority which is a signatory hereto;
- d) "major authority" means, with respect to a plan, the participating authority of the province where the plurality of the plan members are employed (save that members employed in a province not having a participating authority shall not be counted);
- e) "minor authority" means, with respect to a plan, the participating authority of any province where one or more plan members are employed, but does not include the major authority
2. The major authority for each plan shall exercise both its own statutory functions and powers and the statutory functions and powers of each minor authority for such plan.
3. Any authority may except itself from the operation of section 2 in respect of a specific plan by giving written notice to that effect to the major authority (or, if the major authority is the excepting authority, then to all the minor authorities) for such plan; and in such event the excepting authority shall be deemed not to be a participating authority in respect of such plan
4. Any participating authority may except itself from the operation of section 2, in respect of all plans for which it would, but for such exception, act as the major authority; and in such event it shall, for the purpose only of determining the major authority of each such plan, be deemed not to be a participating authority.
5. All participating authorities having statutory functions and powers in respect of a specific

régime déterminé peuvent s'entendre et considérer l'une d'entre elles comme étant l'autorité majoritaire à l'endroit de ce régime.

plan may concur in deeming one of their number to be the major authority for such plan.

6. Lorsque les circonstances entourant un régime déterminé changent de telle sorte qu'une autorité participante devient, ou cesse d'être, une autorité minoritaire de ce régime, l'autorité majoritaire doit en aviser cette autorité minoritaire.
7. Lorsque les circonstances entourant un régime déterminé changent de telle sorte qu'il en résulte un changement de l'autorité majoritaire, toutes les autorités minoritaires en seront avisées et l'ancienne autorité majoritaire fournira à la nouvelle autorité majoritaire tous documents et renseignements relatifs à ce régime.
8. Une autorité majoritaire agissant en vertu de l'article 2 fournira à chaque autorité minoritaire des renseignements complets concernant l'exercice de toute fonction et de tout pouvoir exercés au nom de cette autorité minoritaire.
9. Lorsqu'une autorité majoritaire est incapable d'exercer un pouvoir dont dispose l'une des autorités minoritaires, elle en avisera cette autorité minoritaire.
10. La participation de toute autorité à l'arrangement administratif qui précède commence à la date où elle signe cet accord (la signature ne doit être apposée qu'avec le consentement de tous les signataires précédents), et elle cesse le 31 décembre 1970, à moins que ladite autorité ne renonce avant cette date à cette terminaison. Cependant, toute autorité peut mettre fin à sa participation à cet arrangement administratif au moyen d'un avis écrit d'un an envoyé en même temps à toutes les autres autorités participantes.
11. Du fait qu'une autorité signe cet accord, elle conclut des accords de réciprocité avec toutes les autres autorités participantes.
6. Where changing circumstances in respect of a specific plan result in a participating authority becoming or ceasing to be, a minor authority for such plan, such minor authority shall be advised accordingly by the major authority.
7. Where changing circumstances in respect of a specific plan result in a change in the major authority for such plan, all minor authorities for such plan shall be advised accordingly, and the former major authority shall deliver all documents and information concerning such plan to the new major authority.
8. A major authority acting pursuant to section 2 shall fully inform each minor authority as to the exercise of any functions and powers exercised on behalf of such minor authority.
9. Where a major authority is unable to exercise a particular power of enforcement available to one of the minor authorities, it shall so advise that minor authority.
10. Participation by any authority in the foregoing Administrative Arrangement commences upon the date it becomes a signatory to this Memorandum (such signature to be affixed only with the consent of all prior signatories), and terminates on the 31st day of December, 1970, unless such authority disclaims such termination prior to that date; provided that any authority may terminate its participation in this Administrative Arrangement by contemporaneous delivery of one year's written notice to the other participating authorities.
11. Execution of this Memorandum by any authority shall evidence its entry into reciprocal agreements with all the other participating authorities.

12. "The Pension Commission of Ontario" est le dépositaire de cet accord jusqu'à ce que toutes les autorités participantes s'entendent sur le choix d'un autre dépositaire; et le dépositaire informera toutes les autorités participantes de la signature de cet accord par une autorité participante subséquentement à la date des présentes.

12. The Pension Commission of Ontario shall be the depository of this Memorandum, until such time as the participating authorities agree to another depository; and the depository shall inform all participating authorities in connection with the execution of this Memorandum by any participating authority subsequent to the date hereof.

EN FOI DE QUOI les autorités soussignées apposent leurs signatures sur le présent accord réciproque:

IN WITNESS WHEREOF the undersigned authorities do hereby execute this Memorandum of Agreement

LA REGIE DES RENTES DU QUEBEC

QUEBEC PENSION BOARD

June 27, 1968 [Signature]
Président de la Régie

June 27, 1968 [Signature]
Chairman of the Board

LA COMMISSION DES RENTES DE L'ONTARIO

THE PENSION COMMISSION OF ONTARIO

June 27, 1968 [Signature]
Président

June 27, 1968 [Signature]
Chairman

LE SURINTENDANT DES RENTES, ALBERTA

THE SUPERINTENDENT OF PENSIONS, ALBERTA

June 27, 1968 [Signature]
Surintendant

June 27, 1968 [Signature]
Superintendent

LE SURINTENDANT DES RENTES, SASKATCHEWAN

THE SUPERINTENDENT OF PENSIONS, SASKATCHEWAN

February 5, 1969 [Signature]
Surintendant

February 5, 1969 [Signature]
Superintendent

LA COMMISSION DES RENTES DU MANITOBA

THE PENSION COMMISSION OF MANITOBA

7/x/76 [Signature]
Président

7/x/76 [Signature]
Chairman

LE SURINTENDANT DES RENTES, NOVA SCOTIA

THE SUPERINTENDENT OF PENSIONS, NOVA SCOTIA

May 3, 1977 [Signature]
Surintendant

May 3, 1977 [Signature]
Superintendent

LE SURINTENDANT DES RENTES,
TERRE NEUVE

February 26, 1986

Smith
Surintendant

Ministre Enseignement supérieur et Travail

juin 1, 1992

Vaughan Blaney

Ministre de la main d'oeuvre, de la
formation et du travail de la Colombie
britannique

FEB. 16, 1994

D. Miller

THE SUPERINTENDENT OF PENSIONS,
NEW FOUNDLAND

February 26, 1986

Smith
Superintendent

Minister Advanced Education and Labour
New Brunswick

June 1, 1992

Vaughan Blaney

Minister of Skills, Training and Labour
of British Columbia

FEB. 16, 1994

D. Miller

TAB 8

FINANCIAL SERVICES TRIBUNAL

Citation: *Victorian Order of Nurses for Canada v. Ontario (Superintendent Financial Services)*,
2009 ONFST 11
Decision No. P0304-2008-1
Date: 2009/07/03

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, c.P.8, as amended by the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c.28 (the "PBA" or the "Act") and the regulations thereunder ("Regulations");

AND IN THE MATTER OF certain partial wind ups of the VON Canada Pension Plan, Registration Number 315937 (the "Plan");

AND IN THE MATTER OF a request for hearing made by the Victorian Order of Nurses for Canada ("VON Canada") in respect of a Notice of Proposal issued by the Superintendent of Financial Services dated February 8, 2008 in relation to the Plan;

AND IN THE MATTER OF a Hearing in accordance with subsection 89(8) of the PBA;

B E T W E E N:

VICTORIAN ORDER OF NURSES FOR CANADA
Applicant

– and –

**SUPERINTENDENT OF FINANCIAL SERVICES, and
ABERDEEN HEALTH & COMMUNITY SERVICES, ACCLAIM
HEALTH, NOVA MONTREAL, NOVA WEST ISLAND, HEALTH
AND HOME CARE SOCIETY OF BRITISH COLUMBIA AND
COMMUNITY & PRIMARY HEALTH CARE – LANARK, LEEDS
& GRENVILLE (the "Six Separate Branches"), and
THE ONTARIO PUBLIC SERVICE EMPLOYEES UNION
("OPSEU"), and THE ONTARIO NURSES UNION ("ONA")**

Respondents

BEFORE:

Florence A. Holden
Vice Chair of the Tribunal and Chair of the Panel

Paul W. Litner
Member of the Tribunal and of the Panel

David A. Short
Member of the Tribunal and of the Panel

APPEARANCES:

For the Applicant:
Mr. Markus F. Kremer and Mr. Christiaan A. Jordaan

For the Superintendent of Financial Services:
Ms. Deborah McPhail

For the Six Separate Branches, Respondent:
Mr. Ian R. Dick, Ms. Susan L. Nickerson and Ms. Natasha Monkman

For Ontario Public Service Employees Union (“OPSEU”), Respondent
Ms. Clio M. Godkewitsch

For Ontario Nurses Association, Respondent
Mr. Jorge Hurtado and Ms. Michelle Dagnino

Hearing Dates:
April 1, 2, 3, 6, and 7, 2009

REASONS FOR DECISION:

1. Background

Between 2003 and 2004, VON Canada declared five partial wind ups of the Plan (the “Partial Wind Ups”) in respect of the following four (separately incorporated) VON Canada branches that became insolvent or bankrupt: the Waterloo-Wellington-Dufferin Branch, the Sudbury Branch, the Eastern Lake Ontario Branch, and the Niagara Branch (collectively, the “Insolvent Branches”).

Broadly stated, the overarching issue before us in this case, is which entities participating in the Plan are an “employer” for purposes of the Plan and the PBA, and as such required to make contributions to fund the Plan, including any funding deficits in relation to the Partial Wind Ups.

2. Nature of the Application:

The Superintendent of Financial Services (“Superintendent”) issued a Notice of Proposal dated February 8, 2008, in respect of the Plan (“Notice of Proposal”) which proposed to:

- a) Order, pursuant to Sections 75 and 87 of the PBA, that VON Canada pay the sum of:
 - i) the total of all payments that under the PBA, Regulations, and the Plan are due or that have accrued and have not been paid into the pension fund for the Plan (“Fund”); and
 - ii) the amount by which:
 - 1. the value of the pension benefits accrued and vested under the Plan, and
 - 2. the value of benefits accrued resulting from the application of section 39(3) and section 74 of the PBA, exceed the value of the assets of the Fund,
 with respect to the Partial Wind Ups; and
- b) Refuse, pursuant to s. 70(5) of the PBA, to approve certain wind up reports filed in respect of the Partial Wind Ups (the “Partial Wind Up Reports”); and
- c) Order, pursuant to s. 88 of the PBA that VON Canada prepare and file new partial wind up reports and update the initial filed Partial Wind Up Reports to address the issues set out in the Notice of Proposal and to reflect VON Canada’s requirement to make additional contributions under the PBA to pay the wind up deficits in relation to the Partial Wind Ups.

Current and former employees of the Six Separate Branches are members and/or former members of the Plan. OPSEU and ONA are certified bargaining agents for certain members and former members of the Plan. Each of the Six Separate Branches, OPSEU and ONA sought and were granted full party status with respect to the Application prior to this hearing.

The Notice of Proposal does not directly address funding obligations with respect to deficits in the Plan associated with current and former employees of the Six Separate Branches.

VON Canada, the Applicant, seeks from the Tribunal an Order:

- a) Declaring that VON Canada is not responsible for funding any deficits accrued in respect of the current or former employees of the Insolvent Branches or any potential solvency deficits in respect of the current or former employees of the Six Separate Branches;
- b) Directing the Superintendent to approve the filed Partial Wind Up Reports relating to the Insolvent Branches; and
- c) Directing the Superintendent to declare the Pension Benefits Guarantee Fund (“PBGF”) to be applicable on the Partial Wind Ups.

3. Issues:

The parties identified and agreed on the following issues to be addressed by the Tribunal for purposes of this hearing and as expressed in the Notice of Hearing dated January 12, 2009 (“Issue(s)”):

- a) Is VON Canada responsible under section 75 of the PBA for any payments into the Plan with respect to the Insolvent Branches?
- b) If the answer to (a) is yes, is VON Canada responsible for any special payments to the Plan for any solvency deficiencies related to employees and former employees of the Six Separate Branches, as of the date each Separate Branch ceased to participate in the Plan?
- c) Given the answer to issues (a) and (b), what, if any, Order should the Superintendent be directed to make with respect to any deficits relating to the Insolvent Branches?

For the reasons that follow, the Tribunal concludes that (i) VON Canada is not the employer of Plan members employed at the Insolvent Branches and thus is not responsible under section 75 of the PBA for any payments into the Plan with respect to the Insolvent Branches and/or their employees under the first Issue (a); and (ii) the Tribunal does not have any jurisdiction to make an order in respect of solvency deficiencies relating to employees and former employees of the Six Separate Branches under the second Issue.

Jurisdictional Issues:

We will deal with the second Issue (b) first as it raises the matter of jurisdiction of this Tribunal.

At a pre-hearing conference in this matter, all parties agreed that the Tribunal had jurisdiction to deal with the Issues described above. However, the Tribunal asked each of the parties at the hearing to make oral submissions as to the jurisdiction of the Tribunal to deal with the second Issue (b) in respect of any special payments owing to the Plan for any solvency deficiencies related to the current employees and former employees of the Six Separate Branches, in view of the fact that this issue was not addressed in the Notice of Proposal although it was included in the Notice of Hearing.

Having carefully considered the submissions made by the parties, the Tribunal has concluded that it does not have the jurisdiction to decide the second Issue (b) as outlined above.

Our conclusion is primarily based on the fact that this Issue was not part of the Superintendent’s original Notice of Proposal; the Six Separate Branches had not originally received the Notice of Proposal of the Superintendent’s proposed order; and most importantly the Six Separate Branches had not been the subject of any order or proposed order by the Superintendent. The Notice of Proposal dealt with Partial Wind Up Reports that were filed only in respect of the Insolvent Branches.

The arguments put forward by the Six Separate Branches focused on attaching liability to VON Canada, not the Insolvent Branches, for any special payments related to the Partial Wind Up deficits and not on its own potential liability for any deficits on wind up in relation to any of its employees. In fact, to our knowledge, there are no declared partial wind ups in respect of the Six Separate Branches.

Section 89 (9) of the Act empowers the Tribunal to direct the Superintendent to carry out or refrain from carrying out the proposed orders, and permits the Tribunal to “take such action as the Tribunal considers the Superintendent ought to take in accordance with this Act and the regulations, and for such purposes, the Tribunal may substitute its opinion for that of the Superintendent.”

Counsel for VON Canada referred the Tribunal to two cases: (i) CBS Canada Co. v. Ontario (Superintendent of Financial Services), a decision of this Tribunal on March 4, 2002 (the “CBS case”) and (ii) a decision of the former Pension Commission of Ontario in a matter between Stelco Inc. v. Superintendent of Pensions, et al. dated March 18, 1993 (the “Stelco case”).

In the *CBS case*, the application of subsection 89 (9) of the Act was considered, and the Tribunal stated that:

“ We are of the opinion that any direction by the Tribunal to the Superintendent to take particular action, in accordance with the Act or regulations, must be closely related to the subject matter of, or the circumstances underlying, the proposal that the Tribunal has directed the Superintendent to carry out or to refrain from carrying out.”¹

Applying this reasoning, the Applicant argued that the Tribunal could find that the second Issue (b) is properly within its jurisdiction on the basis that the underlying subject matter (namely whether VON Canada or each of its former Branches is responsible for paying amounts to the Plan for funding deficits) is “closely related” to the subject matter of the Notice of Proposal, and in fact that the issues are inextricably linked.

However the implications of a decision to accept jurisdiction go beyond the Superintendent’s proposed order in the Notice of Proposal which does not address any partial wind ups attributable to the Six Separate Branches, or any obligations on the Six Separate Branches or VON Canada to make special payments in respect of the participation in the Plan by the Six Separate Branches and its employees.

While we accept that Section 89(9) of the Act confers jurisdiction on the Tribunal to make orders which go beyond simply directing the Superintendent to carry out (or refrain from carrying out) the orders proposed, that jurisdiction is not unlimited, and in our view must be exercised cautiously.

¹ (2002) 34 C.C.P.B. 199 (Financial Services Tribunal), at paragraph 11.

As noted in the *CBS case*, any orders made by the Tribunal under Section 89(9) of the Act must be “closely related” to the subject matter of or the circumstances underlying the Superintendent’s proposed order.

While the issues and subject matter addressed in the Notice of Proposal taken in their broadest sense (which entity is the employer of Plan members and as such is responsible for funding deficits in the Plan) are related to the issues and the subject matter applicable to the Six Separate Branches and their funding obligations in relation to the Plan, in our view the issues and subject matter in the Notice of Proposal (employer funding liabilities in relation to the Insolvent Branches and the Partial Wind Ups) are too far removed from the issues and subject matter in relation to the Six Separate Branches to warrant our taking jurisdiction over the second Issue (b) above. In support of our ruling we note the following:

- The Insolvent Branches and the Six Separate Branches are separate legal entities.
- The timing and circumstances of the withdrawal of the Six Separate Branches from the Plan are very different than the circumstances resulting in the termination of participation by the Insolvent Branches in the Plan.
- The question of which entity is the employer of Plan members is, at least in part, a question of fact which could potentially be different for each employer.
- The employer funding obligations under the PBA and the Regulations are different for ongoing plans (where the obligation is to fund going concern deficits and solvency deficiencies) from those applicable on plan wind up (where the obligation is to fund the Ontario wind up liabilities).
- The Six Separate Branches are not the subject of the proposed orders in the Notice of Proposal, which were confined to the Partial Wind Ups and the Partial Wind Up Reports. In fact, as noted above, we have no evidence that the Superintendent has made or proposed partial wind up orders in respect of the Six Separate Branches.

We are persuaded that, as in the *Stelco case*, the proper course would be for the Superintendent to conduct a preliminary inquiry to determine whether or not an order is appropriate in respect of the Six Separate Branches and its employees, as a pre-condition for holding a hearing under the PBA in respect of the funding obligations of the Six Separate Branches. To adopt the words of the former Pension Commission of Ontario in the *Stelco case*:

“This statutory scheme clearly contemplates that the Superintendent will inquire into a possible wind up before the Commission holds a hearing into the matter. Indeed, if the Superintendent declines to make an order,

*there will be no hearing. In short, the Superintendent must inquire into the matter before it comes before the Commission.*²

In this case, the Superintendent had not proposed to make or to refuse to make an order in respect of the Six Separate Branches that could be the subject of an application for a hearing. Although the Six Separate Branches received notice of this hearing and have an interest in the outcome of this hearing (evidenced in part by their decision to participate as parties in this hearing), we have little indication as to whether the Superintendent has had an opportunity to fully consider these issues and put before the Tribunal all facts necessary for the Tribunal to make a decision in respect of the Six Separate Branches.

We also note that Section 89(9) of the Act only permits the Tribunal to direct the Superintendent to take (or refrain from taking) particular actions, not other parties to the proceeding. What would the Tribunal direct the Superintendent to do in this case? The parties did not in their submissions provide us with any legal authority to support our ability to direct the Superintendent to make any orders or proposed orders against the Six Separate Branches other than by way of a notice of proposal to make an order under the Act. We would be reluctant to direct the Superintendent to take particular actions, such as making a further order under the Act, when the Superintendent has not yet had a chance to consider making such a proposed order in the first instance.

Further, any subsequent proposed order of the Superintendent in relation to the Six Separate Branches, even if directed by the Tribunal, would have to be included in a notice of proposal to the interested parties in accordance with Section 89 of the PBA, which would give the interested parties the right to a (further) hearing before the Tribunal in respect of that proposed order. Consequently, we would have the same result: another potential hearing before the Tribunal.

We note that all parties recognize that the second Issue (b) in this case is linked to any finding we may make on the first Issue (a) and in fact could ultimately be determined by such findings in a separate proceeding. It is however incidental to the determination of the order that we may make under this Application.

We also note that the Superintendent's counsel reluctantly agreed to support the Six Separate Branches in its arguments against jurisdiction by the Tribunal, noting that the Superintendent recognizes that the question as to any liability of the Six Separate Branches for funding deficits, on wind up or otherwise, may come back to the Superintendent and this Tribunal under a future order and application for hearing. If so, this would have the unfortunate consequence of resulting in additional cost to the parties even though the Six Separate Branches by receipt of

² Stelco Inc. and The Superintendent of Pensions and A Group of Persons Represented by Koskie & Minsky ("Gold Group") and A Group of Persons Represented by Stockwood, Spies, Ashby & Craigen ("Craigen Group") and Mr. Neil K. Veinot – a Decision Relation to Neil K. Veinot (March 18, 1993), paragraph 9.

Notice of the Proceedings, clearly understood the issue to be before the Tribunal, but we find that potential outcome a necessary result of our decision.

4. **The Facts:**

The Applicant, the Superintendent and the other Respondents appeared before the Tribunal and each filed written submissions, together with an Agreed Statement of Facts and an Agreed Book of Documents. In addition, the parties introduced at the hearing additional documents and witnesses. The Tribunal has fully reviewed the documents before us, as well as the witness' evidence, the salient portions of which are summarized below.

Based on the evidence before us, the Tribunal finds the following as fact:

- a) The Applicant, VON Canada was founded in 1897. It was continued under the *Canada Corporation Act - Part II* by letters patent dated December 31, 1974. VON Canada is a national health care organization that delivers community health care to thousands of communities across Canada. It is a not-for-profit corporation and a registered charity having charitable number 12948 2496 RR0001. VON Canada now has approximately 13,000 staff and volunteers.
- b) The "Six Separate Branches" consist of Aberdeen Health & Community Services, Acclaim Health, NOVA Montréal, NOVA West Island, Health and Home Care Society of British Columbia and Community & Primary Health Care – Lanark, Leeds & Grenville, jointly acting as Respondents in this matter. At all times, each of the Six Separate Branches has been a separately incorporated not-for-profit corporation. The Six Separate Branches are also registered charities and deliver services similar to those provided by VON Canada. The dates on which the Six Separate Branches were actually incorporated are as follows:

Current Name	Former Name	Date of Incorporation
Aberdeen Health & Community Services	Victorian Order of Nurses, Brant-Norfolk-Haldimand Branch	April 29, 1957
Acclaim Health	Victorian Order of Nurses Halton Branch	January 1, 1973 (amalgamation)
NOVA Montréal	VON Montréal	April 22, 1955
NOVA West Island	VON West Island	June 20, 1956
Health and Home Care Society of British Columbia	Victorian Order of Nurses (VON) British Columbia	April 1, 1971 (amalgamation)
Community & Primary Health Care – Lanark, Leeds &	The Victorian Order of Nurses Lanark, Leeds &	January 19, 1954

Grenville	Grenville Branch	
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- c) OPSEU is the certified bargaining agent for:
- i) up to 124 OPSEU members and former members included in the partial wind up of the Plan effective March 4, 2003 arising out of the bankruptcy and closure of the Waterloo-Wellington-Dufferin Branch; and
 - ii) up to 48 OPSEU members whose employment was terminated as a result of the discontinuation of a significant portion of the business at the Niagara Branch included in the partial wind up of the Plan effective September 30, 2004.

OPSEU also represents a minority of members and former members in the remainder of the Plan. The precise number and identities of OPSEU members at the above-noted Branches who were also Plan members and included in the partial wind ups is solely within the knowledge of VON Canada as the Plan administrator.

- d) ONA advised, by way of letter dated February 6, 2009, that it was their intention to seek party status at this hearing. Full party status was granted prior to this hearing.
- e) The Plan was created effective January 1, 1958 as the continuation of two prior plans established October 1, 1945 and November 1, 1949. The Plan has been amended and restated on a number of occasions. The most recent restatement was effective June, 2002. The Plan is registered with the Financial Services Commission ("FSCO") under registration number 0315937. It is also registered with the Canada Revenue Agency ("CRA") under registration number 0315937.
- f) The Plan is a contributory defined benefit pension plan. Membership in the Plan is available, after a stipulated term of service, to employees of VON Canada, including employees of provincial or local branches (collectively the "Branches" or individually a "Branch") authorized to carry on the objects of VON Canada. It was not until 1993 that the Plan was amended by VON Canada (retroactive to January 1, 1992) to refer explicitly to the Branches.
- g) On September 24 and 25, 1993, VON Canada's Board of Directors (the "BOD") voted to implement amendments to the Plan which included an amendment to require the Branches, along with VON Canada, to remit contributions to the Plan required to amortize any unfunded liability or solvency deficiency that might arise from time to time. The amendments approved by the BOD on September 24 and 25, 1993 were subsequently made effective January 1, 1992

h) The Plan was restated effective January 1, 1992 and provides:

s. 1 “*employee*” means a person employed by *VON*. In this Plan, an *employee* who reports for work at or is paid from a location of the *VON* situated in a given Province of Canada is said to be an *employee* in that Province;...

s. 1 – “*VON*” means the Victorian Order of Nurses for Canada, as incorporated under the Canada Corporations Act – Part II. For purposes of this Plan, *VON* shall also include provincial and local branches authorized to carry on the objects of the *VON*.

s. 5.3 – *VON* CONTRIBUTIONS

Subject to the requirements of the *Pension Benefits Act* and of the *Income Tax Act*, the *VON*, along with participating provincial and local branches authorized to carry on the objects of the *VON*, shall remit to the *Plan* amounts equal to contributions remitted by members in accordance with clauses 5.1(a), (b), (c) and (d). In addition the *VON*, along with participating provincial and local branches authorized to carry on the objects of the *VON*, shall remit contributions which in the opinion of the Actuary are required to amortize any unfunded liability or solvency deficiency, determined in accordance with the provisions of the *Pension Benefits Act*, that may arise from time to time.”

Sections 1 and 18.1, read together, define *VON* Canada as the Administrator of the Plan.

Section 16.5, *VON* LIABILITY, states:

“Subject to the provisions of the *Pension Benefits Act*, the *VON* shall be under no contractual liability for any contributions to the *Fund* in excess of those required under the provision of the *Pension Benefits Act*, and in making such contributions to the *Fund*, it may rely upon the estimates made and obtained by the *Administrator* from the *Actuary*. The *VON*, the investment advisor or the *Actuary* shall not be liable in any manner if the *Fund* shall be insufficient to provide for the payment of all benefits subject to the provisions of the *Pension Benefits Act*. Such benefits shall be payable only from the *Fund* and only to the extent that the *Fund* shall suffice, provided that at the discretion of the *Administrator*, *pension benefits* may be provided by the purchase of an annuity, or annuities from an *insurer*, subject to the rights of a *spouse* upon the

death of a *member* and the *member's* portability rights specified in section 10.3 upon termination of employment.”

There was no evidence put to, or argument made before, the Tribunal that the January 1, 1992 Plan terms were invalid or made unlawfully.

- i) On January 9, 1999, the BOD voted to implement further amendments to the Plan which included an amendment to specify a formula to calculate the contributions required to amortize any unfunded liability or solvency deficiency that might arise based on the ratio of their annual current service contributions to the total annual current services contributions of VON Canada and the Branches. The amendments approved by the BOD on January 9, 1999 were subsequently made effective January 1, 1998.

Section 5.3 was restated as follows:

“5.3 *VON* CONTRIBUTIONS

Subject to the requirements of the *Pension Benefits Act* and of the *Income Tax Act*, the *VON*, along with participating provincial and local branches authorized to carry on the objects of the *VON*, shall remit to the *Plan* amounts equal to contributions remitted by members in accordance with clauses 5.1(a), (b), (c) and (d). In addition the *VON*, along with participating provincial and local branches authorized to carry on the objects of the *VON*, shall remit contributions which in the opinion of the Actuary are required to amortize any unfunded liability or solvency deficiency, determined in accordance with the provisions of the *Pension Benefits Act*, that may arise from time to time. *VON*, along with each participating provincial and local branches shall pay a proportionate share of such payment contributions based on the ratio of their annual current service contributions to the total annual current service contributions of *VON* and the participating provincial and local branches.”

As with the January 1, 1999 amendments, no evidence was put before the Tribunal to suggest that these amendments were unlawful.

- j) In 2000, VON Canada commenced an initiative initially entitled “Strategy 2000” and subsequently entitled “One VON” to bring the activities of the various Branches within a single organization. We accept the uncontradicted evidence of Mr. Richard McConnell, the current Vice President, People and Organization for VON Canada and a witness for the Applicant, that prior to the initiative, VON Canada was an umbrella

organization of about thirty people servicing the local Branches. He indicated that the rationale for the “One VON” initiative was to allow VON Canada to assert stronger national discipline over the Branches and to make the VON organization more competitive on a national scale, in the face of new competition and declining market share.

- k) Mr. McConnell’s evidence was also that VON Canada never paid salaries to employees of the Branches, and could not have any direct contract with any Branch employees without the direct permission of the Branch Executive Director, such as for the purpose of focus group surveys.
- l) The uncontradicted evidence of Ms. Ruth Kitson, the current Executive Director of the Community and Primary Health Care – Lanark, Leeds and Greville, a witness for the Six Separate Branches, was that the One VON initiative was initially voluntary in early 2000. By 2005 it had come to mean that One VON was intended to ensure that monies were used to the best advantage, to best serve the community and to assist VON Canada in retaining its home health care business. Consequently, VON Canada advised the Branches that participation in the initiative was mandatory, and that Branches failing to indicate their intention to participate by the deadline of September 2006 would be required to disassociate themselves from VON Canada.
- m) As part of “One VON”, most but not all Branches transferred their employees, operations and sufficient assets to cover their liabilities to VON Canada on or before October 15th, 2006. The Branches that agreed to join in the “One VON” initiative and that transferred their employees and operations to VON Canada, agreed to guarantee a portion of the Plan deficit corresponding with accrued pension liabilities. The Six Separate Branches and the Carefor Health & Community Services Branch (“Carefor”) did not agree to participate in the One VON initiative or to any transfer of employees, operations and assets to VON Canada.
- n) Prior to October 16, 2006, there were a number of separately-incorporated Branches, including the Six Separate Branches, whose employees were accruing service under the Plan. No employees of the Six Separate Branches have accrued service under the Plan since October 16, 2006. The former employees of the Insolvent Branches who were members of the Plan (the “Affected Employees”) have also ceased to accrue service under the Plan because the Insolvent Branches have ceased to carry on business. All remaining active Plan members, with the exception of Carefor employees, are now employed by VON Canada and continue to accrue service under the Plan in that capacity.
- o) VON Canada was at all times the sole administrator of the Plan. The Plan has never been administered as a multi-employer pension plan (“MEPP”)

within the meaning of the PBA. None of the parties takes the position that the Plan is a MEPP. In accordance with the PBA and the Regulations all required premiums have at all times been paid to the PBGF.

- p) The Plan has, at times, had close to 4,000 active members, including employees of more than 70 separately-incorporated Branches. The current active employees of the Plan are represented by 78 Locals of 18 different unions, which are listed in VON Canada's Request for Hearing, and include the respondents OPSEU and the ONA. All of the unions received notice of these proceedings.
- q) The Fund assets are held pursuant to a trust agreement made as of April 1, 1990, between VON Canada and the Royal Trust Corporation of Canada. The Fund trustee is currently RBC Dexia Investor Services, which is a joint venture between Royal Trust Corporation of Canada and Dexia that was formed in 2006.
- r) Prior to January 1, 2003, all of the filed actuarial valuations for the Plan had demonstrated that the Plan was either fully funded or had a surplus, both on a going concern and on a solvency basis.
- s) The initial actuarial valuation prepared for the Plan as at January 1, 2003 disclosed that the Plan was fully funded on a going concern basis and on a solvency basis, but had a wind up deficit.
- t) When a wind-up deficit arose in the Plan with the January 1, 2003 valuation, VON Canada in consultation with the Plan's actuaries determined that VON Canada and the Branches would pay a "surcharge" on the contributions that they would otherwise have been required to make in order to match employee contributions. The VON Canada BOD approved a resolution to allow VON Canada to pay, from January 1, 2003 to December 31, 2005, commuted values to terminating members at 100% of their entitlements despite the transfer ratio being less than 100%. This VON Canada BOD decision was not disclosed to the Branches until a formal communiqué from VON Canada was released by way of a memorandum to the Branches dated February 13, 2004. VON Canada also amended the Plan to reduce certain benefits in order to decrease the cost of the Plan.
- u) The actuarial valuation of the Plan as of January 1, 2006 revealed a wind-up deficit and a solvency deficit. Effective January 1, 2006, contributions of active plan members, VON Canada and the Branches were further increased in light of the required special payments.
- v) Upon leaving the Plan in 2006, the Six Separate Branches and Carefor stopped all contributions to the Plan.

- w) In October 2006, six months after the April 30, 2006 deadline imposed by VON Canada on the Six Separate Branches to join the One VON initiative, VON Canada advised the Six Separate Branches for the first time in writing that as a result of severing ties with VON Canada the Six Separate Branches would be responsible for funding any solvency deficit associated with their employees or former employees.
- x) As determined in the most recent actuarial valuation for the Plan, prepared as at January 1, 2007, the Plan was fully funded on a going concern basis. Determined on a solvency basis, however, the total unfunded liabilities of the Plan were approximately \$20.3 million as at January 1, 2007 and this figure excludes any assets or liabilities in respect of the Insolvent Branches. The unfunded liabilities incurred in relation to pension benefits accrued by current and former members with the Six Separate Branches represent approximately 9% of this total. Similarly, unfunded liabilities incurred in relation to pension benefits accrued by the current and former members with Carefor represent approximately 9% of this total. The remaining unfunded liabilities as set out in the January 1, 2007 report (approximately 82% of the total) relate to pension benefits accrued by current and former members whose unfunded liability now rests with VON Canada, and excludes any unfunded liabilities related to the Insolvent Branches under their Partial Wind Ups.
- y) Since the departure of the Six Separate Branches and Carefor, VON Canada has been contributing only in respect of employees and former employees of VON Canada and the Branches that joined VON Canada as part of the "One VON" initiative. No contributions have been made in respect of the other members and former members of the Plan, including members of the Six Separate Branches and the Affected Employees of the Insolvent Branches.
- z) Insolvent Branches

As noted above, between 2003 and 2004, VON Canada declared Partial Wind Ups with respect to the Insolvent Branches. Specifically:

The Waterloo-Wellington-Dufferin Branch (the "WWD Branch") became bankrupt and closed effective March 4, 2003. VON Canada voluntarily declared a partial wind up of the portion of the Plan relating to 181 members and former members previously employed at the WWD Branch. The original partial wind up report filed with respect to the WWD Branch disclosed a partial wind up deficit of \$1,506,028 and provided for VON Canada to fund the wind up deficit on a without prejudice basis. No explanation was provided to the Tribunal as to why this amount differed from that indicated in the January 1, 2003 report referred to in paragraph 3

(m) above. A revised partial wind up report was subsequently filed which stated that VON Canada had determined that the WWD Branch was solely responsible for funding the deficit identified in that partial wind up report (the "WWD Deficit"). As at March 4, 2006, the WWD Deficit was \$975,026. To date, no contributions have been made to eliminate the WWD Deficit.

VON Canada filed a proof of claim against the estate in bankruptcy of the WWD Branch, and recovered a portion of its claim in respect of the current service cost contributions payable by WWD Branch. VON Canada's claim in respect of the WWD Deficit was recognized as an unsecured debt by the estate in bankruptcy; however, the estate has not made any payment with respect of the WWD Deficit.

All Plan members affected by the WWD Branch partial wind up who have elected to start their pension since October 19, 2005 have received monthly payments equal to 89% of their pension. No payment of commuted values or purchase of annuities has occurred.

The Victorian Order of Nurses, Sudbury Branch (the "Sudbury Branch") closed effective June 14, 2004 and became bankrupt effective June 23, 2004. VON Canada voluntarily declared a partial wind up of the Plan relating to 113 members and former members previously employed at the Sudbury Branch. The partial wind up report filed with respect to the Sudbury Branch disclosed a partial wind up deficit of \$721,376 and stated that VON Canada had determined that the Sudbury Branch was solely responsible for funding the deficit identified in that partial wind up report (the "Sudbury Deficit"). As at June 14, 2005, the Sudbury Deficit was \$699,550. No employer contributions have been made to fund the Sudbury Deficit.

VON Canada filed a proof of claim against the estate in bankruptcy of the Sudbury Branch, and recovered a portion of its claim in respect of the current service cost contributions payable by the Sudbury Branch. VON Canada's claim in respect of the Sudbury Deficit was recognized as an unsecured debt by the estate in bankruptcy; however, the estate has not made any payment in respect of the Sudbury Deficit.

The Eastern Lake Ontario Branch (the "ELO Branch") experienced a major discontinuance of its business in May of 2004, resulting in the termination of a large number of its employees. VON Canada voluntarily declared a partial wind up with respect to the 73 affected active members of the ELO Branch, effective May 21, 2004. On March 31, 2006, the employment of all remaining active employees at the ELO Branch was terminated, but the employees were transferred to the Kingston Branch, and there was no break in service for those members. The ELO Branch

became bankrupt on June 18, 2006. Effective December 6, 2006, a partial wind up was declared with respect to the 49 inactive former members previously employed by the ELO Branch who had not been included in the previously declared partial wind up relating to the ELO Branch. The two wind up reports stated that VON Canada had determined that the ELO Branch was solely responsible for funding the deficits identified in those partial wind up reports (the "ELO Deficit"). As at June 18, 2006, the ELO Deficit was \$465,551. No employer contributions have been made to fund the ELO Deficit.

VON Canada filed a proof of claim against the estate in bankruptcy of the ELO Branch, and recovered a portion of its claim in respect of the current service cost contributions payable by the ELO Branch. VON Canada's claim in respect of the ELO Deficit was recognized as an unsecured debt by the estate in bankruptcy; however, the estate has not made any payment in respect of the ELO Deficit.

The Victorian Order of Nurses, Niagara Branch (the "Niagara Branch") experienced a major discontinuance of its business due to a loss of a major nursing service contract in 2004. VON Canada voluntarily declared a partial wind up of the Plan effective September 30, 2004 with respect to 60 members of the Plan whose employment at the Niagara Branch had been terminated. The partial wind up report filed with respect to the Niagara Branch disclosed a partial wind up deficiency of \$816,906 and stated that VON Canada had determined that the Niagara Branch was solely responsible for funding the deficit identified in that partial wind up report (the "Niagara Deficit"). As at September 30, 2006 the Niagara Deficit was \$295,684. No employer contributions have been made to fund the Niagara Deficit.

Each of the Insolvent Branches is either bankrupt or insolvent. The Tribunal was advised by the Applicant that the claims by VON Canada against the trustee in bankruptcy for the WWD Branch, the Sudbury Branch and the ELO Branch have been stayed until the outcome of these proceedings have been dealt with by the Tribunal and if necessary, the courts on appeal.

- aa) Carefor entered into an agreement with VON Canada, pursuant to which the liabilities associated with Carefor's current and former employees would be transferred, together with a proportionate share of the Fund's assets, to a successor plan to be established by Carefor. Carefor would then be solely responsible for funding any deficit in the successor plan. The transfer of assets has not yet occurred.

- bb) Each of the Six Separate Branches, the Insolvent Branches and Carefor is, and was at all times, separately incorporated as a not-for-profit corporation. Each Branch had its own by-laws.

Following the implementation of the “One VON” initiative, the Six Separate Branches continued as separately incorporated not-for-profit corporations without using the VON name. All of the Six Separate Branches, with the exception of Health and Home Care Society of British Columbia, ceased to participate in the Plan as of October 16, 2006. Health and Home Care Society of British Columbia ceased to participate in the Plan as of April 19, 2006. As a result, and in accordance with the terms of the Plan, the employees of the Six Separate Branches are no longer eligible to actively participate in the Plan, and ceased to accrue service under the Plan on or before October 16, 2006. Those employees and former employees whose pension entitlements had vested under the Plan on or before October 16, 2006 remain entitled to receive either current or deferred pensions from the Plan. As a result of the employees of the Six Separate Branches ceasing to accrue service by October 16, 2006, or April 19, 2006 in the case of the Health and Home Care Society of British Columbia, the Six Separate Branches now have no current service costs under the Plan.

5. Analysis

We agree with the parties that this case turns on how the term “employer”, as used in sections 55 (2) and 75 (1) of the Act and sections 4(2) and 31(1) of the Regulations (collectively the “Funding Provisions”) should be interpreted. Our finding as to who is the “employer” within the meaning of the Funding Provisions will determine which entity(ies) should be required under the Funding Provisions to fund any funding obligations under the Act, including any deficits attributable to the Partial Wind Ups of the Insolvent Branches (the “PWU Deficits”).

Three possible interpretations of the term “employer”, as used in the Funding Provisions, emerge from the submissions made by the various parties:

- 1) “Employer” could be interpreted to mean “the employer who paid remuneration to the employees to whom the deficits relate”. This is the interpretation advanced by VON Canada.
- 2) “Employer” could be interpreted to mean the one and only “controlling employer” of the Plan. This is the position put forward by the Six Separate Branches, and in the first instance, by the Superintendent, OPSEU and ONA.
- 3) “Employer” could be interpreted to mean “all participating employers jointly and severally”, notwithstanding their separate legal status. This

interpretation is the alternative position put forward by the Superintendent, OPSEU and ONA. The written submission of the Superintendent however limits such joint and several liability to that of VON Canada and the Insolvent Branches for the Partial Wind Ups based on the Plan terms. Both OPSEU and ONA submitted that such joint and several liability was the responsibility of VON Canada and the participating Insolvent Branch in respect of its own employees, and that other Branches had no liability for employees of either the Insolvent Branches or of any other Branches.

Consideration of the Pension Benefits Act (Ontario)

This case turns on how the term “employer”, as used in the Funding Provisions should be interpreted. Whichever entity is determined to be the “employer” of the Affected Members within the meaning of the Funding Provisions should be required to fund the PWU Deficits under the Act.

In our view, the appropriate approach to resolve the Issues is to first turn to the provisions of the Act and Regulations. We reproduce the salient provisions below.

Sections 1, 55 and 75 of the Act provide as follows:

“Definitions

1. (1) In this Act,

...

“employer”, in relation to a member or a former member of a pension plan, means the person or persons from whom or the organization from which the member or former member receives or received remuneration to which the pension plan is related, and “employed” and “employment” have a corresponding meaning; (“employeur”, “employé”, “emploi”) ...”

“55(2) An employer required to make contributions under a pension plan, or a person or entity required to make contributions under a pension plan on behalf of an employer, shall make the contributions in accordance with the prescribed requirements for funding and shall make the contributions in the prescribed manner and at the prescribed times,

- (a) to the pension fund; or
- (b) if pension benefits under the pension plan are paid by an insurance company, to the insurance company that is the administrator of the pension plan.”

“75(1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

- (a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and
- (b) an amount equal to the amount by which,
 - (i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,
 - (ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and
 - (iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,
 exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.”

Section 4(2) of the Regulations provides that:

“Subject to subsection (2.1), an employer who is required to make contributions under a pension plan or, if a person or entity is required to make contributions under the pension plan on behalf of the employer, that person or entity and, if applicable, the members of the pension plan or their representative shall make payments to the pension fund or to an insurance company, as applicable, that are not less than the sum of,

- (a) all contributions, including contributions in respect of any going concern unfunded liability and solvency deficiency and money withheld by payroll deduction or otherwise from an employee, that are received from employees as the employees' contributions to the pension plan;
- (b) all contributions required to pay the normal cost;
- (c) all special payments determined in accordance with section 5; and
- (d) all special payments determined in accordance with sections 31, 32 and 35 and all payments determined in accordance with section 31.1.”

Section 31(1) of the Regulations provides that:

“31. (1) The liability to be funded under section 75 of the Act shall be funded by annual special payments commencing at the effective date of the wind up and made by the employer to the pension fund.” (emphasis ours)

We note that the actual calculation of the payments that must be made to fund a pension plan is governed by sections 4-8, 11 and 12 of the Regulations (with respect to the funding of ongoing plans) and sections 31, 31.1, 32 and 35 of the Regulations (with respect to complete or partial plan wind ups). The quantum of the required payments is not at issue in this case.

First Interpretation of “employer”

As set out above, the PBA contains a statutory definition of “employer” as the person or persons from whom or the organization from which the member or former member receives or received remuneration to which the pension plan is related..

The proper approach to statutory interpretation as articulated by the Supreme Court of Canada, and the one which we see fit to employ in this case, is best summarized in the following passages from *Monsanto*:

“The established approach to statutory interpretation was recently reiterated by Iacobucci J. in Bell ExpressVu Ltd. Partnership v. Rex, [2002] 2 S.C.R. 559, 2002 SCC 42 (S.C.C.), 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.”³

...

The purpose of the Act was well stated in Gencorp Canada Inc. v. Ontario (Superintendent of 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” ...

³ *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* [2004] 3 S.C.R. 152 (“*Monsanto*”), at para. 19. Also see: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27.

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.”⁴ [Emphasis added]

We think that the passages highlighted above best summarize the objects and scheme of the Act that ought to guide the Tribunal in interpreting the Act.

In determining which entity is the employer under the Act, we note that the Act contains a clear and unambiguous definition of “employer”. Under this statutory definition, the only relevant criterion is which person or organization paid remuneration to the Plan members who were Branch employees (“Branch Members”). Counsel for the respondents urged us to accept that determining the identity of the employer for purposes of a pension plan necessarily involves more than simply determining who paid the salary of the employees—it involves a determination of which entity was the employer at common law, as well as a determination of who controlled the participating entities in the plan.

Whether or not it is necessary for us to go beyond the definition of “employer” in the PBA is debatable. Under the reasoning of the Court of Appeal for Ontario in *St. Marys Paper Inc. (Re)*⁵, referred to hereafter as the “*St. Marys case*”, it is sufficient to look merely to the Act without reference to the Plan terms to determine the status of the person from whom the workers received their wages.⁶ In that case Justices Arbour and Osbourne stated:

“Thus, it seems to us that the inquiry must be first, whether the members (or former members) of the plans received remuneration, as they clearly did here, and second, whether the remuneration was remuneration to which the pension plan was related.”⁷

We note that the Applicant also referenced the case of *C.U.P.E Locals 1144 & 1590 v. Ontario (Superintendent of Pensions)* (1998), 20 C.C.P.B. 312 (F.S.T.), also referred to as the “*Sisters of St. Joseph case*”, as standing for the proposition that the Pension Commission of Ontario (the predecessor of the Tribunal) focused on the payment of remuneration as the determinative factor in identifying the employer for PBA purposes:

⁴ *Monsanto*, at para. 13

⁵ *St. Marys Paper Inc. (Re)*, (1994) 19 O.R. (3d) 163 (Ontario Court of Appeal).

⁶ *Ibid*, at page 172.

⁷ *Ibid*, at page 173

“In the panel’s view, none of the three Hospitals controlled bank accounts from which employees’ remuneration was paid, with the result that none of the Hospitals could be considered employers as defined in the Act.”⁸[Emphasis added]

Based on the undisputed evidence before us, at no time did VON Canada pay salaries or other remuneration to individuals employed by the Insolvent Branches or by the other Branches, including the Six Separate Branches, who were members of the Plan. Based on representations by counsel for the Six Separate Branches and OPSEU and the uncontradicted witness evidence of Ms. Kitson, we conclude that on its face and further at common law, each of the Insolvent Branches and the remaining individual Branches was an employer in respect of its own employees under the PBA. Although the Insolvent Branches were not represented, the parties agreed that each Branch employer was responsible for paying its employees remuneration within the ordinary meaning of that term. We also find under the definition of “pensionable earnings” in section 1 of the current Plan terms, that such remuneration was remuneration to which the Plan is related.

This is the analysis mandated by the PBA and, in particular, the statutory definition of “employer”. Applying the analysis used in the *Sisters of St. Joseph* case to the present case, the Branches paid remuneration to their own employees and therefore are their “employers” within the meaning of the PBA. Conversely, VON Canada did not pay remuneration to the Branch Members with the result that VON Canada cannot be considered the “employer” of the Branch Members, as defined in the Act.

Therefore, the application of these two tests is sufficient in our view to make a finding that VON Canada was not an “employer” in respect of Branch employees, including Affected Employees of the Insolvent Branches.

Second Interpretation of “employer”

Although our finding in this regard is determinative of the issue, in response to submissions by counsel, we also considered the definition of “employer” at common law, and the various additional factors which have been considered in relevant case law⁹ as indicia of an employer-employee relationship. We have set out below those factors which support our conclusion that each individual Branch and VON Canada in respect of its own employees was an “employer” within the meaning of section 1 of the PBA.

⁸*C.U.P.E Locals 1144 & 1590 v. Ontario (Superintendent of Pensions)* (1998), 20 C.C.P.B. 312 (F.S.T.) at para. 32.

⁹671122 *Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 at paras. 36-48.

- (a) *Control* (meaning the right to give orders and instructions to the employees regarding the manner in which to carry out their work): On the evidence before the Tribunal, we find that the terms of employment of Branch Members were governed by employment contracts between the members and their Branch and by collective agreements between the Branch and the local unions. Based on the evidence of Ron Mills we find that VON Canada was never a signatory to those individual or collective agreements, although they did provide support, if requested, during negotiations. We do acknowledge that the face page of the 2001 Collective Agreement for members of the Practical Nurses Federation of Ontario employed by the Sudbury Branch identifies “Victorian Order of Nurses” as the employer. However the signature page shows “VON Sudbury Branch” as the employer and the Sudbury Branch is also the signatory on the Letters of Understanding attached to the Agreement. This evidence, similar to that of other sample collective agreements put before us further supports our finding that VON Canada was not the employer or party to the collective agreements before us in evidence.

Further, each Branch developed its own human resources policies. The officers and employees of each Branch reported ultimately to the Executive Director of that Branch. The Executive Director of the Branch reported to, and could only be removed by, the Board of Directors of that Branch. Ultimately, the only control that VON Canada could exercise over the Branches was to withdraw from them the right to operate under the “VON” name. This relationship was akin to a licensing agreement, but bore no resemblance to a relationship in which VON Canada could be deemed to be the employer of the Branch’s employees.

- (b) *Ownership of Tools*: Each Branch maintained its own computer systems, owned or leased its own buildings and other assets, as well as the equipment used by its employees (with the exception of a few computers that in or about 2004 VON Canada acquired and distributed to the Branches).
- (c) *Chance of Profit / Risk of Loss*: The issue of profits does not arise in this case, since VON Canada and the Branches were all not-for-profit corporations that, by definition, were not permitted to retain or distribute profits. However, we find that each Branch received revenues directly from government funding agencies, private contracts and/or donations and used those revenues to fund its activities. Each Branch administered its own payroll. Each Branch developed its own business plans and budgets, made its own decisions as to what services it would offer, and decided

independently whether and to what extent to allocate part of its budget to employee training. The financial relationship between VON Canada and the Branches was arm's length, as demonstrated by the fact that loans extended by VON Canada to the Branches were subject to interest, that services provided by VON Canada to the Branches were paid for through Branch membership fees, and the fact that VON Canada was not responsible to pay the debts of the Insolvent Branches when they went bankrupt.

Based upon the above, it is clear to us that VON Canada was not the employer of Branch employees under the PBA or at common law, and specifically not the employer of the Affected Employees or Branch Members. It should also be noted that if the Branches were also not the employers of the Branch Members for the purposes of the Plan, then there would be no basis upon which the Branch Members could contribute to, and accrue service under, the Plan. Since they did not work for VON Canada, they will have accrued no service under the Plan, unless they worked for some other participating employer, namely one of the Branches.

We also have taken into account the following agreed facts as further indicia of each Branch being the employer of its own Branch employees:

- (d) As at October 15, 2006, each of the Six Separate Branches was party to its own collective agreement with any unions representing the employees that worked in that Branch. VON Canada was not named as a party to those collective agreements. We are not provided with copies of all of the relevant agreements, but note that the collective agreement in effect for OPSEU members as at the partial wind-up of the WWD Branch names OPSEU Local 253 and Victorian Order of Nurses Waterloo-Wellington-Dufferin Branch. The collective agreement in effect for OPSEU members as at the partial wind-up of the Niagara Branch names OPSEU Local 267 and the Victorian Order of Nurses Niagara Branch.
- (e) Each VON Branch made its own decisions as to what services it would offer. Information about the services offered by each VON Branch was communicated to VON Canada for the purposes of maintaining liability insurance. VON Canada was the sole policyholder for the liability insurance, with VON Canada and each of the Branches included as insured parties.
- (f) Each VON Branch developed its own human resources policies. These were often modeled after VON Canada's human resources standards, but were not always identical.

- (g) Most Branches participated in a national group benefits plan administered by VON Canada, but some Branches chose to operate their own group benefits plans for the employees who worked in that Branch. We do not find the offer of a national group benefits plan determinative of any “control” by VON Canada of Branch employees or evidence of an employment relationship with VON Canada.
- (h) Each VON Branch paid regular “branch management fees” to VON Canada in return for which it received certain pooled services from VON Canada. For example, VON Canada provided advice to the VON Branches with respect to labour relations issues. In cases where VON Canada was specifically asked to do so, VON Canada also negotiated collective agreements on behalf of individual Branches. In some circumstances where some Branches could not themselves provide certain services, VON Canada agreed to provide the services. We do not find this serves as indicia of an employer relationship.
- (i) VON Canada at times asserted the exclusive right to determine who could use the “VON” name. As a result, VON Canada could determine which Branches were able to operate as “VON” Branches. Through the “One VON” initiative, VON Canada withdrew the right to use the “VON” name from all of the Branches that did not transfer their employees and operations to VON Canada. In this context, VON Canada performed regular audits of the Branches to ensure that the quality of service offered by the Branches met VON Canada’s standards.
- (j) The Branches had their own by-laws and Board of Directors. We reject the submission of counsel for the Six Separate Branches that the ability of VON Canada to review the by-laws was evidence of “control” by VON Canada over the Branches that constituted employer status. We agree with that same counsel that the by-laws had no status as a contract between VON Canada and the Branch. Further, the Six Separate Branches’ own witness, Ms. Kitson, alluded to at least one instance of having deliberately flouted national policy, which came to the attention of VON Canada, without consequence. Neither she nor the Branch Directors were removed from office. In fact no evidence was put before us to prove that VON Canada ever unilaterally dissolved any Branch, as the “controlling” entity. Consequently we give the by-laws no weight in assessing employer status.

We also wish to address certain additional arguments advanced by counsel for the Respondents with respect to the issue of which entities employed Plan members.

First, we reject the argument that VON Canada acted as the employer of the Insolvent Branches when it declared the Partial Wind Ups. We accept that while it was clear to VON Canada that the Branches were insolvent and that the Superintendent could order a partial wind up; there was no one working at the Branches who could or would be likely to declare the partial wind ups; a partial wind up would be in the best interests of the members; and VON Canada was under the mistaken impression that declaring the Partial Wind Ups was part of its role as Plan administrator and its right under the Plan provisions to amend the Plan. Based on the evidence before us we find that it acted as the Plan administrator based on the Plan provisions that provided that it was the only entity to authorize such a plan amendment.

Secondly, under the terms of the current Plan, section 17.1, the Administrator has the sole right to amend the Plan. The “Administrator” is defined to be VON Canada which for purposes of Plan amendment acted through its BOD. It is a reasonable interpretation to conclude that participation by the Branches in the Plan included consent to the Plan terms, including delegation of the right of amendment. Such participation and delegation would not have prohibited the Branches from exercising their right to declare a partial wind up or discontinue Plan participation and set up a successor plan (as did Carefor upon withdrawal from VON Canada), since those rights would prevail under the Act. The right of Plan amendment exercised by VON Canada did not otherwise in our view make it an employer for purposes of the Act and Funding Provisions.

In any event, none of the parties alleged that the Partial Wind Ups hadn’t been properly declared, which would be the real result of any successful argument that VON Canada had improperly declared the Partial Wind Ups as Plan Administrator. There was no evidence before us that such amendments were declared without proper authority or unlawful. If the respondents were concerned that VON Canada declared the Partial Wind Ups without proper authority under the Plan and the PBA, they could have contested that declaration before the Superintendent. It is telling that they did not do so.

Thirdly, we reject the notion that as the sole signatory under the Trust Agreement, that somehow this fact made VON Canada the only employer under the Plan. There is a requirement under the Act that a registered pension plan have a document that “creates and supports the pension fund”¹⁰ is not determinative in our view of employer status in respect of the Affected Members.

Lastly, the fact that Branch Members were allowed to participate in group insurance policies for which they or their Branch paid does not mean that VON Canada paid them “remuneration”.

¹⁰ Pension Benefits Act, Ontario. S. 9(2)(c).

VON Canada submits that the fact that it never paid remuneration to Branch Members is entirely determinative of the issue before this Tribunal. Since the Insolvent Branches alone paid remuneration to the Affected Employees, only they are required to fund the PWU Deficits. By the same reasoning, each Branch is responsible for funding its own deficits. Under the first test and at common law, we find that VON Canada is not the employer of the Affected Employees.

The PBA contains a clear and unambiguous definition of “employer”. Under this statutory definition, the only relevant criterion is which person or organization paid remuneration to the Branch Members to which the pension plan is related. Only the Branch at which a given employee worked paid remuneration to such employee. VON Canada never did so. While the *St. Marys* and *Sisters of St. Joseph* cases and our findings of fact might be considered on its face determinative of the issue, the Six Separate Branches contended that the PBA only recognizes two types of plans: a Single Employer Pension Plan (SEPP) and a multi-employer pension plan (MEPP), the latter as defined in the Act as:

“a pension plan established and maintained for employees of two or more employers who contribute or on whose behalf contributions are made to a pension fund by reason of agreement, statute or municipal by-law to provide a pension benefits that is determined by service with one or more of the employers, but does not include a pension plan where all the employers are affiliates within the meaning of the Business Corporations Act”.

Under a SEPP, the Six Separate Branches contended that there is only one “employer”, namely the “controlling employer” who bears the liability under the Funding Provisions to fund any obligations under the Act, including the PWU Deficits.

All parties, including VON Canada agreed that it was the administrator for purposes of the PBA. Clause 8(1)(a) of the PBA states that the administrator of a non-MEPP plan can be “the employer or, if there is more than one employer, one or more of the employers”, so there is no compliance issue with VON Canada being the plan administrator. As noted previously, all parties agreed that the Plan had not been administered as a MEPP. It was conceded that the Plan operated with multiple participating Branch employers as well as VON Canada as an employer.

The Tribunal was not asked to consider, in fact the parties vigorously argued against such consideration, whether or not the Plan was in fact a MEPP. To make such a finding of course would leave members outside of the protection of the PBGF, to which VON Canada had remitted contributions for many years. The Superintendent correctly points out that section 86(1) of the *PBA* provides that where money is paid out of the PBGF as a result of the wind up of a pension plan,

the Superintendent has a lien and a charge on the assets of “the *employer or employers* who provided the pension plan [emphasis added].” The Applicant argued that the use of the word “employers” in this section is conclusive evidence that the intention of the Legislature was that there could be non-MEPPs with more than one participating employer for the purposes of the *PBA*. This argument negates the argument of the Six Separate Branches that such plans are not permitted by the *PBA*.

The hearing panel was not presented with any evidence that contributions to the Plan were made by reason of statute or municipal by-law. Ultimately the Tribunal concluded that it had insufficient evidence before it to make a finding that the Plan was a MEPP assessing whether or not contributions were being “made by reason of an agreement”.

The Tribunal was asked to consider the Funding Provisions of the *PBA*, as if the Plan were not a MEPP, but a SEPP. The Superintendent recognized in its submissions that there “is some indication in the *PBA* that a plan can have more than one employer without being a MEPP”. We agree. In fact as a practical matter, the phrase “Single Employer Pension Plan” is somewhat misleading since in practice it could easily include, for example, a single employer plan sponsor that has additional participating affiliated employers in the plan, but that fact alone does not qualify it as a MEPP.

No definition of a “Single Employer Pension Plan” exists under the *PBA*. Much was made by counsel for the respondents as to the use of the phrase “an employer” and “the employer” in sections 55(2) and 75 of the *PBA*, with the corresponding suggestion by the respondents that there could under the second possible interpretation of employer under the Act, namely a single “controlling” employer liable under the Funding Provisions for any solvency deficiency on partial wind up in a SEPP with multiple participating employers. This argument is the basis for the second interpretation of “employer” put before us for consideration.

This approach would require us to read in the word “controlling” in front of “employer” wherever it appears in the Act and to simultaneously read out the statutory definition of “employer”, which clearly and unambiguously defines “employer” as the person or organization that pays remuneration to an employee. As noted earlier, it is a fundamental principle of statutory interpretation that provisions in a statute cannot be “read out” or simply ignored.¹¹

Indeed, the word “controlling” does not appear a single time in the entire *PBA*. The word “control” appears only three times: once in respect to information that is in the “control” of the plan administrator; once in respect of a person who is given “control” over money by the Superintendent; and finally in a provision that

¹¹ Stephane Beaulac, *Handbook on Statutory Interpretation: General Methodology, Canadian Charter and International Law* (Markham, Ontario: LexisNexis, 2008) at 104.

states that a person shall not be deemed to have been given notice of a document where they did not in fact receive it, due to circumstances beyond their “control”¹². Neither word appears a single time in the Regulations. Most importantly, neither word appears in the Funding Provisions. It seems unreasonable for us to interpret the Act in a manner which is contrary to its plain meaning and would cause an imbalance among the interests of participating employers in a SEPP.

The Six Separate Branches relies for this alternative second interpretation of employer as the “controlling employer” on the cases of (i) *Dustbane Enterprises Limited v. Ontario (Superintendent of Financial Services)* (“*Dustbane*”), and (ii) the *Police Assn. of Nova Scotia Pension Plan (Trustees of) v. Amherst (Town)* (“*Amherst*”),¹³ for the proposition that a determination of who controlled the participating entities and the Plan itself determines the “employer” under a SEPP for funding purposes.

We do not agree with this proposition. As discussed above, we find that the Insolvent Branches were the “employers” under the PBA in respect of their own employees who were the subject of the Partial Wind Ups and the Superintendent’s Notice of Proposal.

Dustbane can be distinguished on a number of fronts factually. Most notably, only *Dustbane* not the Distributors was found to be an employer under the Plan and the Pension Commission of Ontario found that the Plan was not a MEPP. By the same token, the *Dustbane* decision is entirely consistent with the statutory definition of “employer”, because it was found that *Dustbane* had paid remuneration to the employees of the Distributors.

Unlike *Dustbane*, VON Canada is not arguing that this Plan is a MEPP to avoid having to make special payments to fully fund the Plan, or to reduce accrued pension benefits, even though it previously administered the Plan as a SEPP. To the contrary, VON Canada has consistently asserted that the Plan is a SEPP, as it has always been administered. Unlike *Dustbane*, we find that VON Canada did not withhold Plan information or documentation from the Branches, instead the evidence suggests that Branches did not specifically request full Plan documentation. Information was disseminated largely by way of memorandums to Branch Executives, by the annual meeting and representation, by some Branches on the VON Canada Board of Directors.

¹² Pension Benefits Act, R.S.O. 1990, c. P.8, sections 24 (7), 99 and 112(2).

¹³ *Dustbane Enterprises Limited v. Ontario (Superintendent of Financial Services)* (2001), 27 C.C.P.B. 1 (FST), aff’d [2002] O.J. 2943 (Div. Ct.) (“*Dustbane*”) C.U.P.E., *Locals 1144 & 1390 v. Ontario (Superintendent of Financial Services)* (1999), 20 C.C.P.B. 312 (PCO) (“*Sisters of St. Joseph*”) *Police Assn. of Nova Scotia Pension Plan (Trustees of) v. Amherst (Town)*, (2008) NSCA 74, 2008 Carswd1431NS431 (WL), leave to appeal to SCC denied [2008] S.C.C.A. No. 442 (“*Amherst*”).

Further, unlike the Distributors in *Dustbane*, there is no evidence before us that the Branches, once deficits arose, were unaware that they had funding obligations. In fact they remitted contributions first in the form of the surcharge of 14% of employer contributions on February 7, 2004, to take effect as of July 1, 2004. The surcharge was paid by the Branches and VON Canada from July 1, 2004 to December 31, 2005. The actuarial valuation of the Plan as of January 1, 2006 revealed a wind-up deficit and a solvency deficit. Effective January 1, 2006, contributions of active plan members, VON Canada and the Branches were further increased in light of the required special payments.

We agree with the following statement from the dissenting judgment in *Dustbane*:

“The Act is remedial intended to ensure that pension benefits which are promised are paid. The purposes of the Act do not; however, prefer payment by one employer rather than the other.”¹⁴

The Six Separate Branches submit that VON Canada has, at all times, exercised total control over both the Plan and the Branches. Based on our findings of fact above we find that VON Canada has not exercised control over the Branches to the extent that it would be an “employer” for PBA purposes in respect of Branch employees. We do find that it did exercise control over the Plan, both as plan sponsor and administrator however this is not, in our view, determinative as to which entity may be an employer under the PBA with related liability for funding obligations under the Funding Provisions.

In its submissions, VON Canada cites the reasoning of the Nova Scotia Court of Appeal in the *Amherst* decision as applicable to the present case. VON Canada submits that the *Amherst* case supports the proposition that excluding participating employers (the towns in that instance), from involvement in administration and key decisions with respect to the pension plan (i.e. amendments) did not affect the participating employers’ statutory funding obligations. We agree.

The *Amherst* decision was decided under Nova Scotia pension legislation, which contains different statutory provisions regarding an employer’s obligation to fund a solvency deficit, and while not binding on this Tribunal is persuasive. The term “Employer” under Nova Scotia pension legislation (the central issue in the *Amherst* case) was defined as “the employer required to make contributions under the pension plan”. However, Six Separate Branches argues that the definition of “employer” under the *PBA* for purposes of a SEPP, as considered in *Dustbane*, is broader and involves an overall assessment of who is the controlling employer in respect of the plan, of which remuneration is only one consideration.

¹⁴ Dissent of K. Bush, paragraph 60.

In the *Amherst* case, the issue before the Court was whether the participating towns were required to make contributions under the pension plan. The Court found that the towns, through signing certain collective agreements requiring them to contribute to the plan, had committed to make payments and were, therefore, “employers” within the meaning of the Nova Scotia legislation. The Court went on to find that the lack of involvement by the towns in the administration and amendment of the pension plan did not overcome the fact that the towns were obliged to contribute to the plan and, therefore, were “employers” within the meaning of the legislation.¹⁵

While dealing with a different legislative definition of “employer” in the *Amherst* case, the Superintendent and the Court still considered the involvement, or lack thereof, of the towns in the administration of the pension plan when determining whether they met that definition.

It should also be noted that in the *Amherst* case, the towns had certain express rights to appoint representatives to the pension committee and trustees, yet failed to do so. This is very different than the case at hand where there is evidence that at least some of the Branches did participate in the Plan’s Pension & Benefits Committee, all Branches had full documentation available to them on request and could withdraw from participation in the Plan by withdrawing from the VON organization and setting up their own plan as was the case for Carefor.

As a corollary to the second interpretation of a “controlling” employer, the Six Separate Branches argued that as the PBA only imposes liability for solvency and wind up deficits on the *single* employer of a SEPP, that single employer must contractually allocate its statutory funding obligation to other entities participating in the plan by way of the plan text or participation agreements. Six Separate Branches argued that VON Canada did not provide for any allocation of its statutory funding obligations under the PBA to the Branches by means of participation agreements. Instead, it amended the Plan effective January 1, 1992 and January 1, 1998 to provide in Section 5.3 a formula to share its funding obligation in respect of any unfunded liability or solvency deficiency. That formula, argued the Six Separate Branches, did not explicitly provide for the Branches to pay wind up deficits, but limited the Branches’ obligation to pay current service costs.

While such an argument may, if true, permit a Branch to claim against VON Canada under the terms of the Plan or contractually for reimbursement or payment of funding deficits on wind-up, it is not an answer under the Act as to who the employer is for funding purposes. In this regard we do not need to rely on the Plan provisions to make a finding of funding liability in respect of the Partial Wind Ups as solely against the Insolvent Branches.

¹⁵ *Amherst*, paras. 27 and 88, and at paras. 66-79.

While the *St. Marys case* can be distinguished from the present circumstances in that in *St. Marys*, the applicant was a trustee in bankruptcy disputing its employer status under the legislation, and the court in that instance did not consider similar facts of multiple participating employers under a single employer pension plan, the court did recognize that the Act and Regulations

*“impose an obligation on an “employer” to ensure that a pension plan is adequately funded, both on an ongoing basis and on a wind up of the plan. This obligation exists quite apart from the particular funding requirements set out in the pension plan itself. This obligation is central to the regulatory scheme established by the PBA. The Act requires that its minimum funding standards be met. It does not allow for special deals which dilute or might eliminate these minimum funding requirements.The employer’s obligations include the obligation to make special payments attributable to the unfunded liabilities of the plan. An employer cannot choose which of its funding obligations in respect of an ongoing pension plan it will honour.”*¹⁶

For purposes of the PBA, we also find under the second argument for the Applicant.

Third interpretation of “employer”

The third argument is that “Employer” under the Act could be interpreted to mean “all participating employers jointly and severally”, notwithstanding their separate legal status. This is the alternative position put forward by the Superintendent, OPSEU and ONA. The written submission of the Superintendent limits such joint and several liability to that of VON Canada and the Insolvent Branches for the Partial Wind Ups based on the Plan terms. Both OPSEU and ONA agreed that such joint and several liability was the responsibility only of VON Canada and the participating Branch in respect of its own employees, not the other Branches.

The Superintendent argues that if the Act contemplates a non-MEPP with more than one employer, and a partial wind up in insolvent circumstances with respect to one of those employers, then the funding obligation on partial windup is the obligation of the plan *as a whole*, and not only or necessarily the employer having the closest connection to the circumstances that caused the partial wind up. The rationale in the context of this argument is “spread the pain funding”, to permit plan members to be able to count on the security of another participating organization. For this counsel relies on the provisions of sections 74 of the Act and s. 31 of the Regulations, which for convenience we repeat:

“75(1) Where a pension plan is wound up in whole or in part, *the employer* shall pay into the pension fund,

¹⁶ Ibid., section 4, paragraph 1.

- (a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and
- (b) an amount equal to the amount by which,
 - (i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,
 - (ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and
 - (iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74, exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.” (emphasis ours)

Section 31 of the Regulations reads:

“31. (1) The liability to be funded under section 75 of the Act shall be funded by annual special payments commencing at the effective date of the wind up and made by **the employer** to the pension fund.” (*emphasis ours*)

These provisions refer to “the employer” whether the Plan is a MEPP or SEPP. The Superintendent argues that under the provision of the *Legislation Act, 2006*,¹⁷ in section 67, “Words in the singular include the plural and words in the plural include the singular”, as support for the view that in the case of a plan with multiple participating employers, that the funding obligations on wind up are of the plan as a whole, with joint and several liability, and that the phrase “the employer shall pay” could be interpreted as “the employers shall pay”.

We disagree with this interpretation. Had that been the case the legislature could have chosen consistently to only use “employer” throughout the Act, when it did not do so. In interpreting the Act, we rely on the principle noted above that, “*the words of an Act are to be read in their entire context and in their grammatical and ordinary sense*”. It is our view that the usage of “the employer” in section 75 is consistent with the definition of an employer that pays remuneration to the member affected by the Partial Wind Ups for whom a pension benefit has

¹⁷ *Legislation Act, 2006*, S. O. 2006, Schedule F.

accrued, and not an employer with no such employment relationship with the member.

As noted previously, the Superintendent points out that section 86(1) of the *PBA* provides that where money is paid out of the PBGF as a result of the wind up of a pension plan, the Superintendent has a lien and a charge on the assets of “the *employer or employers* who provided the pension plan.” [emphasis added] The Superintendent’s argument, if accepted, would mean in this case that if a PBGF payment is made in respect of the PWU Deficit, the Superintendent would have a lien over not only VON Canada’s assets but over the assets of all of the Branches as well. No cases were put before the Tribunal to support the Respondents’ interpretation of the Act in this regard. In fact the claim is only as against VON Canada.

This third interpretation requires one to ignore the statutory definition of “employer.” The Superintendent argued that the use of the word “employers” in this section is conclusive evidence that the intention of the Legislature was that there could be non-MEPPs with more than one participating employer for the purposes of the *PBA*. If, as the Superintendent argues, this provision should be interpreted such that funding on a partial wind up need “not be done by the employer having the closest connection to the partial wind up”, then we would not be able to “cherry-pick” among which participating employers would have liability, which is the position put forth by the Superintendent and Respondents ONA and OPSEU. We think that reading the *PBA* so as to give the Superintendent the ability to “cherry pick” among participating employers under a SEPP as to which is responsible for funding the Plan on a partial wind up is an unreasonable and unsupported interpretation of the legislation. If the legislature had wanted to attach liability to all of the participating employers in a pension plan, whether or not they had any connection to the affected plan members under a wind up, it could have done so explicitly, but did not.

As previously noted, this Tribunal has already decided that it lacked sufficient evidence before it to make a determination as to whether or not the Plan was a MEPP and whether or not the PBGF applies to the Plan. If it is a MEPP, we are of the view that it would be unreasonable to conclude that the Legislature intended there to be more than one employer for some purposes (e.g. PBGF payments), but not for other purposes (e.g. funding) in respect of the same members and events without expressly saying so. If that was the intention, as noted above, we would find both VON Canada and all of the participating Branches would bear joint-and several liability without preference for payment by one over the other.

We do not, however, agree with the Superintendent that s. 86(1) of the *PBA* would give the Superintendent a lien over the assets of all participating employers where a payment has been made out of the PBGF. Since the section applies to both partial and full wind ups, the reference to “the employer or employers”,

when read together with the statutory definition of “employer”, must be read to mean that the lien applies only to the employer or employer who paid remuneration to the members affected by the full or partial wind up. As noted above, given the very different fact situation and issues before the court in *St. Marys* and this case, we do not find *St. Marys* to stand for the proposition of joint and several liability: the court in that case simply did not have a similar fact situation nor did it address its mind to the issue of joint and several liability under a SEPP.

Lastly we turn our attention to the current Plan provisions stated above, which by agreement of all the parties were not explicit with respect to funding obligations on plan wind up. We note however that the funding provisions in Section 5.3 of the 2002 Plan document make all such contributions “Subject to the requirements of the Pension Benefits Act and the Income Tax Act”.

The Plan documents do not prevail over the Act in respect of the Funding Provisions, as parties cannot contract out of their legal obligations under public policy statutes. As a result, even if VON Canada and the Branches had all agreed that the Branches would not have to fund deficits associated with their own employees, that agreement in our view would have no legal effect on the statutory requirement under the Act. We adopt the approach of the Ontario Court of Appeal in the *Gencorp* case referenced in *Monsanto* as noted above which stated that pension standards legislation seeks to strike a delicate balance between the interests of employers and employees”.¹⁸ To provide that balance, employers should not be subject to a “tonteen” approach which leaves the last employer in a SEPP standing holding the bag for all funding obligations.

Finally, we reject the Superintendent’s suggestion that VON Canada as drafter of the Plan documents should be liable as a participating employer for the wind up deficits of the Insolvent Branches by application of the doctrine of *contra proferentum*. VON Canada is not seeking to solely rely on the Plan provisions to restrict any potential liability for solvency deficits or unfunded liabilities under the Partial Wind Ups.

We have concluded that this is not a case where we ought to apply the doctrine of *contra proferentum*. As noted by the court in *Milner, supra*, we only ought to have resort to *contra proferentum* if all other rules of construction first fail to ascertain the meaning of the document. In this case, the Plan provisions are not determinative as to who will fund the wind up deficits: the Act provides a complete answer.

¹⁸ *Monsanto* at para 14.

6. **Decision and Order**

For all of these reasons, the Tribunal finds that VON Canada is not an “employer” under the Act for the purpose of funding obligations related to Branch employees. We therefore order that:

- a) VON Canada is not responsible for funding any statutory funding obligations under the Act with respect to the Partial Wind Ups of the Insolvent Branches; and
- b) The Superintendent shall proceed with the review of the filed Partial Wind Up Reports relating to the Insolvent Branches as quickly as possible.
- c) The Superintendent is directed to make a finding as to the application of the PBGF to the Partial Wind Ups and the related pension benefits of the Affected Employees.

We have not been asked to make an order as to costs in the matter. However, we remain seized of this matter in respect of any written submissions made for costs within 30 days of the date of this decision.

Dated at the City of Toronto this 3rd day of July, 2009.

“Florence Holden”

 Florence A. Holden
 Vice Chair of the Tribunal and Chair of the Panel

“Paul W. Litner”

 Paul W. Litner
 Member of the Tribunal and of the Panel

“David A. Short”

 David A. Short
 Member of the Tribunal and of the Panel

TAB 9

Case Name:
Stelco Inc. (Re)

**IN THE MATTER OF the Companies' Creditors
Arrangement Act, R.S.C., c. C-36, as amended
AND IN THE MATTER OF a proposed plan of compromise or
arrangement with respect to Stelco Inc., and other
Applicants listed in Schedule "A"
APPLICATION UNDER the Companies' Creditors
Arrangement Act, R.S.C. 1985, c. C-36, as amended**

[2005] O.J. No. 1171

75 O.R. (3d) 5

253 D.L.R. (4th) 109

196 O.A.C. 142

2 B.L.R. (4th) 238

9 C.B.R. (5th) 135

138 A.C.W.S. (3d) 222

2005 CarswellOnt 1188

2005 CanLII 8671

Docket: M32289

Ontario Court of Appeal
Toronto, Ontario

S.T. Goudge, K.N. Feldman and R.A. Blair JJ.A.

Heard: March 18, 2005.
Judgment: March 31, 2005.

(79 paras.)

Creditors & debtors law -- Legislation -- Debtors' relief -- Companies' Creditors Arrangement Act -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Civil procedure -- Courts -- Jurisdiction -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Civil procedure -- Courts -- Superior courts -- Inherent jurisdiction -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Corporations and associations law -- Corporations -- Directors -- Appointment or election -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Corporations and associations law -- Corporations -- Directors -- Duties -- Business judgment rule -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Corporations and associations law -- Corporations -- Directors -- Duties -- Fiduciary duties -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Insolvency law -- Proposals -- Court approval -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Administrative law -- Natural justice -- Reasonable apprehension of bias -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Application by two former directors of Stelco for leave to appeal and appeal from the order of their removal from the board of directors. Stelco was engaged in an extensive economic restructuring while under statutory insolvency protection that involved court-appointed capital raising via a competitive bid process. The appellants were involved with two companies that purchased approximately 20 per cent of Stelco's publicly traded shares during the protection period and were subsequently appointed to its board of directors to fill vacancies caused by resignations. As part of the appointment process, the appellants were informed of their fiduciary duties and agreed that their companies would have no further involvement in the competitive bid process. Stelco's employees sought the appellants' removal from the board on the basis that the participation of two major shareholder representatives would tilt the evaluation of the bids in favour of maximizing shareholder value at the expense of bids more favourable to the interests of the employees. The motions judge held that the involvement of the appellants on the board raised an unnecessary risk that their future conduct potentially jeopardized the integrity and neutrality of the capital raising

process, and declared the appointments to be of no force and effect. The judge cited the inherent jurisdiction of the court as the basis for the order. The appellants submitted that the judge had no jurisdiction to make a removal order, and in the alternative, he erred in applying a reasonable bias test to the removal of directors. The appellants further submitted that the judge erred by interfering with the board's exercise of business judgment, and that the facts did not justify the removal order.

HELD: Application for leave and appeal allowed. The judge misconstrued his authority, and made an order that he was not empowered to make. The court had no statutory or inherent authority to interfere with the composition of the board of directors. The judge erred in declining to give effect to the business judgment rule, and was not entitled to usurp the role of the directors and management in conducting the company's restructuring efforts. The record did not support a finding that there was sufficient risk of misconduct to warrant a conclusion of oppression, nor was the level of such risk assessed. There was no statutory principle that envisaged screening the neutrality of the appellants in advance of their appointment to the board of Stelco. Legal remedies were available to the employees of Stelco in the event that the appellants engaged in conduct that breached their legal obligations to the corporation. The applicability of such remedies was dependent on actual misconduct rather than mere speculation. Therefore, an apprehension of bias approach was not appropriate in the corporate law context.

Statutes, Regulations and Rules Cited:

Canada Business Corporations Act ss. 1, 102, 106(3), 109(1), 111, 122(1)(a), 122(1)(b), 145, 145(2)(b), 241, 241(3)(e)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 As Amended, ss. 11, 11(1), 11(3), 11(4), 11(6), 20

Appeal From:

Application for Leave to Appeal, and if leave be granted, an appeal from the order of Farley J. dated February 25, 2005 removing the applicants as directors of Stelco Inc., reported at: [2005] O.J. No. 729.

Counsel:

Jeffrey S. Leon and Richard B. Swan, for the appellants, Michael Woolcombe and Roland Keiper

Kenneth T. Rosenberg and Robert A. Centa, for the respondent United Steelworkers of America

Murray Gold and Andrew J. Hatnay, for the respondent Retired Salaried Beneficiaries of Stelco Inc., CHT Steel Company Inc., Stelpipe Ltd., Stelwire Ltd. and Welland Pipe Ltd.

Michael C.P. McCreary and Carrie L. Clynick, for USWA Locals 5328 and 8782

John R. Varley, for the Active Salaried Employee Representative

Michael Barrack, for Stelco Inc.

Peter Griffin, for the Board of Directors of Stelco Inc.

K. Mahar, for the Monitor

David R. Byers, for CIT Business Credit, Agent for the DIP Lender

The judgment of the Court was delivered by

R.A. BLAIR J.A.:--

PART I - INTRODUCTION

1 Stelco Inc. and four of its wholly owned subsidiaries obtained protection from their creditors under the Companies' Creditors Arrangement Act¹ on January 29, 2004. Since that time, the Stelco Group has been engaged in a high profile, and sometimes controversial, process of economic restructuring. Since October 2004, the restructuring has revolved around a court-approved capital raising process which, by February 2005, had generated a number of competitive bids for the Stelco Group.

2 Farley J., an experienced judge of the Superior Court Commercial List in Toronto, has been supervising the CCAA process from the outset.

3 The appellants, Michael Woollcombe and Roland Keiper, are associated with two companies - Clearwater Capital Management Inc., and Equilibrium Capital Management Inc. - which, respectively, hold approximately 20% of the outstanding publicly traded common shares of Stelco. Most of these shares have been acquired while the CCAA process has been ongoing, and Messrs. Woollcombe and Keiper have made it clear publicly that they believe there is good shareholder value in Stelco in spite of the restructuring. The reason they are able to take this position is that there has been a solid turn around in worldwide steel markets, as a result of which Stelco, although remaining in insolvency protection, is earning annual operating profits.

4 The Stelco board of directors ("the Board") has been depleted as a result of resignations, and in January of this year Messrs. Woollcombe and Keiper expressed an interest in being appointed to the Board. They were supported in this request by other shareholders who, together with Clearwater

and Equilibrium, represent about 40% of the Stelco common shareholders. On February 18, 2005, the Board appointed the appellants directors. In announcing the appointments publicly, Stelco said in a press release:

After careful consideration, and given potential recoveries at the end of the company's restructuring process, the Board responded favourably to the requests by making the appointments announced today.

Richard Drouin, Chairman of Stelco's Board of Directors, said: "I'm pleased to welcome Roland Keiper and Michael Woollcombe to the Board. Their experience and their perspective will assist the Board as it strives to serve the best interests of all our stakeholders. We look forward to their positive contribution."

5 On the same day, the Board began its consideration of the various competing bids that had been received through the capital raising process.

6 The appointments of the appellants to the Board incensed the employee stakeholders of Stelco ("the Employees"), represented by the respondent Retired Salaried Beneficiaries of Stelco and the respondent United Steelworkers of America ("USWA"). Outstanding pension liabilities to current and retired employees are said to be Stelco's largest long-term liability - exceeding several billion dollars. The Employees perceive they do not have the same, or very much, economic leverage in what has sometimes been referred to as 'the bare knuckled arena' of the restructuring process. At the same time, they are amongst the most financially vulnerable stakeholders in the piece. They see the appointments of Messrs. Woollcombe and Keiper to the Board as a threat to their well being in the restructuring process, because the appointments provide the appellants, and the shareholders they represent, with direct access to sensitive information relating to the competing bids to which other stakeholders (including themselves) are not privy.

7 The Employees fear that the participation of the two major shareholder representatives will tilt the bid process in favour of maximizing shareholder value at the expense of bids that might be more favourable to the interests of the Employees. They sought and obtained an order from Farley J. removing Messrs. Woollcombe and Keiper from their short-lived position of directors, essentially on the basis of that apprehension.

8 The Employees argue that there is a reasonable apprehension the appellants would not be able to act in the best interests of the corporation - as opposed to their own best interests as shareholders - in considering the bids. They say this is so because of prior public statements by the appellants about enhancing shareholder value in Stelco, because of the appellants' linkage to such a large shareholder group, because of their earlier failed bid in the restructuring, and because of their opposition to a capital proposal made in the proceeding by Deutsche Bank (known as "the Stalking Horse Bid"). They submit further that the appointments have poisoned the atmosphere of the

restructuring process, and that the Board made the appointments under threat of facing a potential shareholders' meeting where the members of the Board would be replaced en masse.

9 On the other hand, Messrs. Woolcombe and Keiper seek to set aside the order of Farley J. on the grounds that (a) he did not have the jurisdiction to make the order under the provisions of the CCAA, (b) even if he did have jurisdiction, the reasonable apprehension of bias test applied by the motion judge has no application to the removal of directors, (c) the motion judge erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) the facts do not meet any test that would justify the removal of directors by a court in any event.

10 For the reasons that follow, I would grant leave to appeal, allow the appeal, and order the reinstatement of the applicants to the Board.

PART II - ADDITIONAL FACTS

11 Before the initial CCAA order on January 29, 2004, the shareholders of Stelco had last met at their annual general meeting on April 29, 2003. At that meeting they elected eleven directors to the Board. By the date of the initial order, three of those directors had resigned, and on November 30, 2004, a fourth did as well, leaving the company with only seven directors.

12 Stelco's articles provide for the Board to be made up of a minimum of ten and a maximum of twenty directors. Consequently, after the last resignation, the company's corporate governance committee began to take steps to search for new directors. They had not succeeded in finding any prior to the approach by the appellants in January 2005.

13 Messrs. Woolcombe and Keiper had been accumulating shares in Stelco and had been participating in the CCAA proceedings for some time before their request to be appointed to the Board, through their companies, Clearwater and Equilibrium. Clearwater and Equilibrium are privately held, Ontario-based, investment management firms. Mr. Keiper is the president of Equilibrium and associated with Clearwater. Mr. Woolcombe is a consultant to Clearwater. The motion judge found that they "come as a package."

14 In October 2004, Stelco sought court approval of its proposed method of raising capital. On October 19, 2004, Farley J. issued what has been referred to as the Initial Capital Process Order. This order set out a process by which Stelco, under the direction of the Board, would solicit bids, discuss the bids with stakeholders, evaluate the bids, and report on the bids to the court.

15 On November 9, 2004, Clearwater and Equilibrium announced they had formed an investor group and had made a capital proposal to Stelco. The proposal involved the raising of \$125 million through a rights offering. Mr. Keiper stated at the time that he believed "the value of Stelco's equity would have the opportunity to increase substantially if Stelco emerged from CCAA while minimizing dilution of its shareholders." The Clearwater proposal was not accepted.

16 A few days later, on November 14, 2004, Stelco approved the Stalking Horse Bid. Clearwater and Equilibrium opposed the Deutsche Bank proposal. Mr. Keiper criticized it for not providing sufficient value to existing shareholders. However, on November 29, 2004, Farley J. approved the Stalking Horse Bid and amended the Initial Capital Process Order accordingly. The order set out the various channels of communication between Stelco, the monitor, potential bidders and the stakeholders. It provided that members of the Board were to see the details of the different bids before the Board selected one or more of the offers.

17 Subsequently, over a period of two and a half months, the shareholding position of Clearwater and Equilibrium increased from approximately 5% as at November 19, to 14.9% as at January 25, 2005, and finally to approximately 20% on a fully diluted basis as at January 31, 2005. On January 25, Clearwater and Equilibrium announced that they had reached an understanding jointly to pursue efforts to maximize shareholder value at Stelco. A press release stated:

Such efforts will include seeking to ensure that the interests of Stelco's equity holders are appropriately protected by its board of directors and, ultimately, that Stelco's equity holders have an appropriate say, by vote or otherwise, in determining the future course of Stelco.

18 On February 1, 2005, Messrs. Keiper and Woolcombe and others representatives of Clearwater and Equilibrium, met with Mr. Drouin and other Board members to discuss their views of Stelco and a fair outcome for all stakeholders in the proceedings. Mr. Keiper made a detailed presentation, as Mr. Drouin testified, "encouraging the Board to examine how Stelco might improve its value through enhanced disclosure and other steps." Mr. Keiper expressed confidence that "there was value to the equity of Stelco," and added that he had backed this view up by investing millions of dollars of his own money in Stelco shares. At that meeting, Clearwater and Equilibrium requested that Messrs. Woolcombe and Keiper be added to the Board and to Stelco's restructuring committee. In this respect, they were supported by other shareholders holding about another 20% of the company's common shares.

19 At paragraphs 17 and 18 of his affidavit, Mr. Drouin, summarized his appraisal of the situation:

- 17.** It was my assessment that each of Mr. Keiper and Mr. Woolcombe had personal qualities which would allow them to make a significant contribution to the Board in terms of their backgrounds and their knowledge of the steel industry generally and Stelco in particular. In addition I was aware that their appointment to the Board was supported by approximately 40% of the shareholders. In the event that these shareholders successfully requisitioned a shareholders meeting they were in a position to determine the composition of the entire Board.
- 18.** I considered it essential that there be continuity of the Board through the CCAA process. I formed the view that the combination of existing Board members and

these additional members would provide Stelco with the most appropriate board composition in the circumstances. The other members of the Board also shared my views.

20 In order to ensure that the appellants understood their duties as potential Board members and, particularly that "they would no longer be able to consider only the interests of shareholders alone but would have fiduciary responsibilities as a Board member to the corporation as a whole," Mr. Drouin and others held several further meetings with Mr. Woolcombe and Mr. Keiper. These discussions "included areas of independence, standards, fiduciary duties, the role of the Board Restructuring Committee and confidentiality matters." Mr. Woolcombe and Mr. Keiper gave their assurances that they fully understood the nature and extent of their prospective duties, and would abide by them. In addition, they agreed and confirmed that:

- a) Mr. Woolcombe would no longer be an advisor to Clearwater and Equilibrium with respect to Stelco;
- b) Clearwater and Equilibrium would no longer be represented by counsel in the CCAA proceedings; and
- c) Clearwater and Equilibrium then had no involvement in, and would have no future involvement, in any bid for Stelco.

21 On the basis of the foregoing - and satisfied "that Messrs. Keiper and Woolcombe would make a positive contribution to the various issues before the Board both in [the] restructuring and the ongoing operation of the business" - the Board made the appointments on February 18, 2005.

22 Seven days later, the motion judge found it "appropriate, just, necessary and reasonable to declare" those appointments "to be of no force and effect" and to remove Messrs. Woolcombe and Keiper from the Board. He did so not on the basis of any actual conduct on the part of the appellants as directors of Stelco but because there was some risk of anticipated conduct in the future. The gist of the motion judge's rationale is found in the following passage from his reasons (at para. 23):

In these particular circumstances and aside from the Board feeling coerced into the appointments for the sake of continuing stability, I am not of the view that it would be appropriate to wait and see if there was any explicit action on behalf of K and W while conducting themselves as Board members which would demonstrate that they had not lived up to their obligations to be "neutral." They may well conduct themselves beyond reproach. But if they did not, the fallout would be very detrimental to Stelco and its ability to successfully emerge. What would happen to the bids in such a dogfight? I fear that it would be trying to put Humpty Dumpty back together again. The same situation would prevail even if K and W conducted themselves beyond reproach but with the Board continuing to be concerned that they not do anything seemingly offensive to the bloc. The risk to the process and to Stelco in its emergence is simply too great to risk the wait

and see approach.

PART III - LEAVE TO APPEAL

23 Because of the "real time" dynamic of this restructuring project, Laskin J.A. granted an order on March 4, 2005, expediting the appellants' motion for leave to appeal, directing that it be heard orally and, if leave be granted, directing that the appeal be heard at the same time. The leave motion and the appeal were argued together, by order of the panel, on March 18, 2005.

24 This court has said that it will only sparingly grant leave to appeal in the context of a CCAA proceeding and will only do so where there are "serious and arguable grounds that are of real and significant interest to the parties": *Country Style Food Services Inc. (Re)*, (2002) 158 O.A.C. 30; [2002] O.J. No. 1377 (C.A.), at para. 15. This criterion is determined in accordance with a four-pronged test, namely,

- a) whether the point on appeal is of significance to the practice;
- b) whether the point is of significance to the action;
- c) whether the appeal is prima facie meritorious or frivolous;
- d) whether the appeal will unduly hinder the progress of the action.

25 Counsel agree that (d) above is not relevant to this proceeding, given the expedited nature of the hearing. In my view, the tests set out in (a) - (c) are met in the circumstances, and as such, leave should be granted. The issue of the court's jurisdiction to intervene in corporate governance issues during a CCAA restructuring, and the scope of its discretion in doing so, are questions of considerable importance to the practice and on which there is little appellate jurisprudence. While Messrs. Woolcombe and Keiper are pursuing their remedies in their own right, and the company and its directors did not take an active role in the proceedings in this court, the Board and the company did stand by their decision to appoint the new directors at the hearing before the motion judge and in this court, and the question of who is to be involved in the Board's decision making process continues to be of importance to the CCAA proceedings. From the reasons that follow it will be evident that in my view the appeal has merit.

26 Leave to appeal is therefore granted.

PART IV - THE APPEAL

The Positions of the Parties

27 The appellants submit that,

- a) in exercising its discretion under the CCAA, the court is not exercising its "inherent jurisdiction" as a superior court;
- b) there is no jurisdiction under the CCAA to remove duly elected or

- appointed directors, notwithstanding the broad discretion provided by s. 11 of that Act; and that,
- c) even if there is jurisdiction, the motion judge erred:
- (i) by relying upon the administrative law test for reasonable apprehension of bias in determining that the directors should be removed;
 - (ii) by rejecting the application of the "business judgment" rule to the unanimous decision of the Board to appoint two new directors; and,
 - (iii) by concluding that Clearwater and Equilibrium, the shareholders with whom the appellants are associated, were focussed solely on a short-term investment horizon, without any evidence to that effect, and therefore concluding that there was a tangible risk that the appellants would not be neutral and act in the best interests of Stelco and all stakeholders in carrying out their duties as directors.

28 The respondents' arguments are rooted in fairness and process. They say, first, that the appointment of the appellants as directors has poisoned the atmosphere of the CCAA proceedings and, secondly, that it threatens to undermine the even-handedness and integrity of the capital raising process, thus jeopardizing the ability of the court at the end of the day to approve any compromise or arrangement emerging from that process. The respondents contend that Farley J. had jurisdiction to ensure the integrity of the CCAA process, including the capital raising process Stelco had asked him to approve, and that this court should not interfere with his decision that it was necessary to remove Messrs. Woollcombe and Keiper from the Board in order to ensure the integrity of that process. A judge exercising a supervisory function during a CCAA proceeding is owed considerable deference: *Algoma Steel Inc.* (2001), 25 C.B.R. (4th) 194, at para. 8.

29 The crux of the respondents' concern is well-articulated in the following excerpt from paragraph 72 of the factum of the Retired Salaried Beneficiaries:

The appointments of Keiper and Woollcombe violated every tenet of fairness in the restructuring process that is supposed to lead to a plan of arrangement. One stakeholder group - particular investment funds that have acquired Stelco shares during the CCAA itself - have been provided with privileged access to the capital raising process, and voting seats on the Corporation's Board of Directors and Restructuring Committee. No other stakeholder has been treated in remotely the same way. To the contrary, the salaried retirees have been completely excluded from the capital raising process and have no say whatsoever in the Corporation's decision-making process.

30 The respondents submit that fairness, and the perception of fairness, underpin the CCAA

process, and depend upon effective judicial supervision: see *Olympia & York Development Ltd. v. Royal Trust* (1993), 12 O.R. (3d) 500 (Gen. Div.); *Re Ivaco Inc.*, (2004), 3 C.B.R. (5th) 33, at para. 15-16. The motion judge reasonably decided to remove the appellants as directors in the circumstances, they say, and this court should not interfere.

Jurisdiction

31 The motion judge concluded that he had the power to rescind the appointments of the two directors on the basis of his "inherent jurisdiction" and "the discretion given to the court pursuant to the CCAA." He was not asked to, nor did he attempt to rest his jurisdiction on other statutory powers imported into the CCAA.

32 The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: *Babcock & Wilcox Canada Ltd. (Re)*, [2000] O.J. No. 786 (Sup. Ct.) at para. 11. See also, *Re Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at p. 320; *Re Lehndorff General Partners Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.). Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act: see *Re Dylex Ltd.* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), *Royal Oak Mines Inc. (Re)* (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]); and *Westar Mining Ltd. (Re)* (1992), 70 B.C.L.R. (2d) 6 (B.C.S.C.).

33 It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

Inherent Jurisdiction

34 Inherent jurisdiction is a power derived "from the very nature of the court as a superior court of law," permitting the court "to maintain its authority and to prevent its process being obstructed and abused." It embodies the authority of the judiciary to control its own process and the lawyers and other officials connected with the court and its process, in order "to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner." See I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Current Legal Problems* 27-28. In *Halsbury's Laws of England*, 4th ed. (London: Lexis-Nexis UK, 1973 -) vol. 37, at para. 14, the concept is described as follows:

In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a

residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observation of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

35 In spite of the expansive nature of this power, inherent jurisdiction does not operate where Parliament or the Legislature has acted. As Farley J. noted in *Royal Oak Mines*, *supra*, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should not be brought into play" (para. 4). See also, *Baxter Student Housing Ltd. v. College Housing Cooperative Ltd.*, [1976] 2 S.C.R. 475 (S.C.C.) at 480; *Richtree Inc. (Re)*, [2005] O.J. No. 251 (Sup. Ct.).

36 In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in *Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*, [2003] B.C.J. No. 1335 (B.C.C.A.), (2003) 43 C.B.R. (4th) 187 at para. 46, that:

... the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. ... This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above,² rather than the integrity of their own process.

37 As Jacob observes, in his article "The Inherent Jurisdiction of the Court," *supra*, at p. 25:

The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

38 I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise. There is a distinction, however - difficult as it may be to draw - between the court's process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate

actions accompanying them, which are the company's process, on the other hand. The court simply supervises the latter process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose."³ Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

The Section 11 Discretion

39 This appeal involves the scope of a supervisory judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course of the plan negotiating and approval process and, in particular, whether that discretion extends to the removal of directors in that environment. In my view, the s. 11 discretion - in spite of its considerable breadth and flexibility - does not permit the exercise of such a power in and of itself. There may be situations where a judge in a CCAA proceeding would be justified in ordering the removal of directors pursuant to the oppression remedy provisions found in s. 241 of the CBCA, and imported into the exercise of the s. 11 discretion through s. 20 of the CCAA. However, this was not argued in the present case, and the facts before the court would not justify the removal of Messrs. Woolcombe and Keiper on oppression remedy grounds.

40 The pertinent portions of s. 11 of the CCAA provide as follows:

Powers of court

11(1) Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

Initial application court orders

(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days.

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or

proceeding against the company.

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|---|---|
| Other than initial application court orders | <p>(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose.</p> <p>(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);</p> <p>(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and</p> <p>(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.</p> |
| Burden of proof on application | <p>(6) The court shall not make an order under subsection (3) or (4) unless</p> <p>(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and</p> <p>(b) in the case of an order under subsection (4), the applicant also satisfied the court that the applicant has acted, and is acting, in good faith and with due diligence.</p> |

41 The rule of statutory interpretation that has now been accepted by the Supreme Court of Canada, in such cases as *R. v. Sharpe*, [2001] 1 S.C.R. 45, at para. 33, and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21 is articulated in E.A. Driedger, *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) as follows:

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.

See also Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at page 262.

42 The interpretation of s. 11 advanced above is true to these principles. It is consistent with the purpose and scheme of the CCAA, as articulated in para. 38 above, and with the fact that corporate governance matters are dealt with in other statutes. In addition, it honours the historical reluctance of courts to intervene in such matters, or to second-guess the business decisions made by directors and officers in the course of managing the business and affairs of the corporation.

43 Mr. Leon and Mr. Swan argue that matters relating to the removal of directors do not fall within the court's discretion under s. 11 because they fall outside of the parameters of the court's role in the restructuring process, in contrast to the company's role in the restructuring process. The court's role is defined by the "on such terms as may be imposed" jurisdiction under subparagraphs 11(3)(a)-(c) and 11(4)(a)-(c) of the CCAA to stay, or restrain, or prohibit proceedings against the company during the "breathing space" period for negotiations and a plan. I agree.

44 What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in *Lehndorff*, supra, at para. 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors." But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts.

45 With these principles in mind, I turn to an analysis of the various factors underlying the interpretation of the s. 11 discretion.

46 I start with the proposition that at common law directors could not be removed from office during the term for which they were elected or appointed: *London Finance Corporation Limited v. Banking Service Corporation Limited* (1923), 23 O.W.N. 138 (Ont. H.C.); *Stephenson v. Vokes* (1896), 27 O.R. 691 (Ont. H.C.). The authority to remove must therefore be found in statute law.

47 In Canada, the CBCA and its provincial equivalents govern the election, appointment and removal of directors, as well as providing for their duties and responsibilities. Shareholders elect directors, but the directors may fill vacancies that occur on the board of directors pending a further shareholders meeting: CBCA, ss. 106(3) and 111.⁴ The specific power to remove directors is vested in the shareholders by s. 109(1) of the CBCA. However, s. 241 empowers the court - where it finds that oppression as therein defined exists - to "make any interim or final order it thinks fit," including (s. 241(3)(e)) "an order appointing directors in place of or in addition to all or any of the directors

then in office." This power has been utilized to remove directors, but in very rare cases, and only in circumstances where there has been actual conduct rising to the level of misconduct required to trigger oppression remedy relief: see, for example, *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, [2004] O.J. No. 4722.

48 There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment, and removal of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other applicable statute. There is no legislative "gap" to fill. See *Baxter Student Housing Ltd. v. College Housing Cooperative Ltd.*, *supra*, at p. 480; *Royal Oak Mines Inc. (Re)*, *supra*; and *Richtree Inc. (Re)*, *supra*.

49 At paragraph 7 of his reasons, the motion judge said:

The board is charged with the standard duty of "manage[ing], [sic] or supervising the management, of the business and affairs of the corporation": s. 102(1) CBCA. *Ordinarily the Court will not interfere with the composition of the board of directors. However, if there is good and sufficient valid reason to do so, then the Court must not hesitate to do so to correct a problem.* The directors should not be required to constantly look over their shoulders for this would be the sure recipe for board paralysis which would be so detrimental to a restructuring process; thus interested parties should only initiate a motion where it is reasonably obvious that there is a problem, actual or poised to become actual. [emphasis added]

50 Respectfully, I see no authority in s. 11 of the CCAA for the court to interfere with the composition of a board of directors on such a basis.

51 Court removal of directors is an exceptional remedy, and one that is rarely exercised in corporate law. This reluctance is rooted in the historical unwillingness of courts to interfere with the internal management of corporate affairs and in the court's well-established deference to decisions made by directors and officers in the exercise of their business judgment when managing the business and affairs of the corporation. These factors also bolster the view that where the CCAA is silent on the issue, the court should not read into the s. 11 discretion an extraordinary power - which the courts are disinclined to exercise in any event - except to the extent that that power may be introduced through the application of other legislation, and on the same principles that apply to the application of the provisions of the other legislation.

The Oppression Remedy Gateway

52 The fact that s. 11 does not itself provide the authority for a CCAA judge to order the removal of directors does not mean that the supervising judge is powerless to make such an order, however. Section 20 of the CCAA offers a gateway to the oppression remedy and other provisions of the

CBCA and similar provincial statutes. Section 20 states:

The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

53 The CBCA is legislation that "makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them." Accordingly, the powers of a judge under s. 11 of the CCAA may be applied together with the provisions of the CBCA, including the oppression remedy provisions of that statute. I do not read s. 20 as limiting the application of outside legislation to the provisions of such legislation dealing specifically with the sanctioning of compromises and arrangements between the company and its shareholders. The grammatical structure of s. 20 mandates a broader interpretation and the oppression remedy is, therefore, available to a supervising judge in appropriate circumstances.

54 I do not accept the respondents' argument that the motion judge had the authority to order the removal of the appellants by virtue of the power contained in s. 145(2)(b) of the CBCA to make an order "declaring the result of the disputed election or appointment" of directors. In my view, s. 145 relates to the procedures underlying disputed elections or appointments, and not to disputes over the composition of the board of directors itself. Here, it is conceded that the appointment of Messrs. Woolcombe and Keiper as directors complied with all relevant statutory requirements. Farley J. quite properly did not seek to base his jurisdiction on any such authority.

The Level of Conduct Required

55 Colin Campbell J. recently invoked the oppression remedy to remove directors, without appointing anyone in their place, in *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, supra. The bar is high. In reviewing the applicable law, C. Campbell J. said (para. 68):

Director removal is *an extraordinary remedy* and certainly should be *imposed most sparingly*. As a starting point, I accept the basic proposition set out in Peterson, "Shareholder Remedies in Canada"⁵:

SS. 18.172 *Removing and appointing directors to the board is an extreme form of judicial intervention*. The board of directors is elected by the shareholders, vested with the power to manage the corporation, and appoints the officers of the company who undertake to conduct the day-to-day affairs of the corporation. [Footnote omitted.] It is clear that the board of directors has control over policymaking and management of the corporation. *By tampering with a board, a court directly affects the management of the corporation*. If a reasonable balance between

protection of corporate stakeholders and the freedom of management to conduct the affairs of the business in an efficient manner is desired, altering the board of directors should be *a measure of last resort*. The order could be suitable where the continuing presence of the incumbent directors is harmful to both the company and the interests of corporate stakeholders, and where the appointment of a new director or directors would remedy the oppressive conduct without a receiver or receiver-manager. [emphasis added]

56 C. Campbell J. found that the continued involvement of the Ravelston directors in the Hollinger situation would "significantly impede" the interests of the public shareholders and that those directors were "motivated by putting their interests first, not those of the company" (paras. 82-83). The evidence in this case is far from reaching any such benchmark, however, and the record would not support a finding of oppression, even if one had been sought.

57 Everyone accepts that there is no evidence the appellants have conducted themselves, as directors - in which capacity they participated over two days in the bid consideration exercise - in anything but a neutral fashion, having regard to the best interests of Stelco and all of the stakeholders. The motion judge acknowledged that the appellants "may well conduct themselves beyond reproach." However, he simply decided there was a risk - a reasonable apprehension - that Messrs. Woollcombe and Keiper would not live up to their obligations to be neutral in the future.

58 The risk or apprehension appears to have been founded essentially on three things: (1) the earlier public statements made by Mr. Keiper about "maximizing shareholder value"; (2) the conduct of Clearwater and Equilibrium in criticizing and opposing the Stalking Horse Bid; and (3) the motion judge's opinion that Clearwater and Equilibrium - the shareholders represented by the appellants on the Board - had a "vision" that "usually does not encompass any significant concern for the long-term competitiveness and viability of an emerging corporation," as a result of which the appellants would approach their directors' duties looking to liquidate their shares on the basis of a "short-term hold" rather than with the best interests of Stelco in mind. The motion judge transposed these concerns into anticipated predisposed conduct on the part of the appellants as directors, despite their apparent understanding of their duties as directors and their assurances that they would act in the best interests of Stelco. He therefore concluded that "the risk to the process and to Stelco in its emergence [was] simply too great to risk the wait and see approach."

59 Directors have obligations under s. 122(1) of the CBCA (a) to act honestly and in good faith with a view to the best interest of the corporation (the "statutory fiduciary duty" obligation), and (b) to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (the "duty of care" obligation). They are also subject to control under the oppression remedy provisions of s. 241. The general nature of these duties does not change when the company approaches, or finds itself in, insolvency: Peoples Department Stores Inc (Trustee of) v. Wise, [2004] S.C.J. No. 64 (S.C.C.) at paras. 42-49.

60 In Peoples the Supreme Court noted that "the interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders" (para. 43), but also accepted "as an accurate statement of the law that in determining whether [directors] are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment" (para. 42). Importantly as well - in the context of "the shifting interest and incentives of shareholders and creditors" - the court stated (para. 47):

In resolving these competing interests, it is incumbent upon the directors to act honestly and in good faith with a view to the best interests of the corporation. In using their skills for the benefit of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in its best interests by creating a "better" corporation, and not to favour the interests of any one group of stakeholders.

61 In determining whether directors have fallen foul of those obligations, however, more than some risk of anticipated misconduct is required before the court can impose the extraordinary remedy of removing a director from his or her duly elected or appointed office. Although the motion judge concluded that there was a risk of harm to the Stelco process if Messrs Woollcombe and Keiper remained as directors, he did not assess the level of that risk. The record does not support a finding that there was a sufficient risk of sufficient misconduct to warrant a conclusion of oppression. The motion judge was not asked to make such a finding, and he did not do so.

62 The respondents argue that this court should not interfere with the decision of the motion judge on grounds of deference. They point out that the motion judge has been case-managing the restructuring of Stelco under the CCAA for over fourteen months and is intimately familiar with the circumstances of Stelco as it seeks to restructure itself and emerge from court protection.

63 There is no question that the decisions of judges acting in a supervisory role under the CCAA, and particularly those of experienced commercial list judges, are entitled to great deference: see *Algoma Steel Inc. v. Union Gas Limited* (2003), 63 O.R. (3d) 78 (C.A.), at para. 16. The discretion must be exercised judicially and in accordance with the principles governing its operation. Here, respectfully, the motion judge misconstrued his authority, and made an order that he was not empowered to make in the circumstances.

64 The appellants argued that the motion judge made a number of findings without any evidence to support them. Given my decision with respect to jurisdiction, it is not necessary for me to address that issue.

The Business Judgment Rule

65 The appellants argue as well that the motion judge erred in failing to defer to the unanimous

decision of the Stelco directors in deciding to appoint them to the Stelco Board. It is well-established that judges supervising restructuring proceedings - and courts in general - will be very hesitant to second-guess the business decisions of directors and management. As the Supreme Court of Canada said in *Peoples*, supra, at para. 67:

Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making ...

66 In *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289 (C.A.) at 320, this court adopted the following statement by the trial judge, Anderson J.:

Business decisions, honestly made, should not be subjected to microscopic examination. There should be no interference simply because a decision is unpopular with the minority.⁶

67 McKinlay J.A then went on to say:

There can be no doubt that on an application under s. 234⁷ the trial judge is required to consider the nature of the impugned acts and the method in which they were carried out. That does not mean that the trial judge should substitute his own business judgment for that of managers, directors, or a committee such as the one involved in assessing this transaction. Indeed, it would generally be impossible for him to do so, regardless of the amount of evidence before him. He is dealing with the matter at a different time and place; it is unlikely that he will have the background knowledge and expertise of the individuals involved; he could have little or no knowledge of the background and skills of the persons who would be carrying out any proposed plan; and it is unlikely that he would have any knowledge of the specialized market in which the corporation operated. In short, he does not know enough to make the business decision required.

68 Although a judge supervising a CCAA proceeding develops a certain "feel" for the corporate dynamics and a certain sense of direction for the restructuring, this caution is worth keeping in mind. See also *Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*, supra, *Sammi Atlas Inc. (Re)* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.); *Olympia & York Developments Ltd. (Re)*, supra; *Re Alberta Pacific Terminals Ltd.* (1991), 8 C.B.R. (3d) 99 (B.C.S.C.). The court is not catapulted into the shoes of the board of directors, or into the seat of the chair of the board, when acting in its supervisory role in the restructuring.

69 Here, the motion judge was alive to the "business judgment" dimension in the situation he faced. He distinguished the application of the rule from the circumstances, however, stating at para. 18 of his reasons:

With respect I do not see the present situation as involving the "management of the business and affairs of the corporation," but rather as a quasi-constitutional aspect of the corporation entrusted albeit to the Board pursuant to s. 111(1) of the CBCA. I agree that where a board is actually engaged in the business of a judgment situation, the board should be given appropriate deference. However, to the contrary in this situation, I do not see it as a situation calling for (as asserted) more deference, but rather considerably less than that. With regard to this decision of the Board having impact upon the capital raising process, as I conclude it would, then similarly deference ought not to be given.

70 I do not see the distinction between the directors' role in "the management of the business and affairs of the corporation" (CBCA, s. 102) - which describes the directors' overall responsibilities - and their role with respect to a "quasi-constitutional aspect of the corporation" (i.e. in filling out the composition of the board of directors in the event of a vacancy). The "affairs" of the corporation are defined in s. 1 of the CBCA as meaning "the relationships among a corporation, its affiliates and the shareholders, directors and officers of such bodies corporate but does not include the business carried on by such bodies corporate." Corporate governance decisions relate directly to such relationships and are at the heart of the Board's business decision-making role regarding the corporation's business and affairs. The dynamics of such decisions, and the intricate balancing of competing interests and other corporate-related factors that goes into making them, are no more within the purview of the court's knowledge and expertise than other business decisions, and they deserve the same deferential approach. Respectfully, the motion judge erred in declining to give effect to the business judgment rule in the circumstances of this case.

71 This is not to say that the conduct of the Board in appointing the appellants as directors may never come under review by the supervising judge. The court must ultimately approve and sanction the plan of compromise or arrangement as finally negotiated and accepted by the company and its creditors and stakeholders. The plan must be found to be fair and reasonable before it can be sanctioned. If the Board's decision to appoint the appellants has somehow so tainted the capital raising process that those criteria are not met, any eventual plan that is put forward will fail.

72 The respondents submit that it makes no sense for the court to have jurisdiction to declare the process flawed only after the process has run its course. Such an approach to the restructuring process would be inefficient and a waste of resources. While there is some merit in this argument, the court cannot grant itself jurisdiction where it does not exist. Moreover, there are a plethora of checks and balances in the negotiating process itself that moderate the risk of the process becoming irretrievably tainted in this fashion - not the least of which is the restraining effect of the prospect of such a consequence. I do not think that this argument can prevail. In addition, the court at all times retains its broad and flexible supervisory jurisdiction - a jurisdiction which feeds the creativity that makes the CCAA work so well - in order to address fairness and process concerns along the way. This case relates only to the court's exceptional power to order the removal of directors.

The Reasonable Apprehension of Bias Analogy

73 In exercising what he saw as his discretion to remove the appellants as directors, the motion judge thought it would be useful to "borrow the concept of reasonable apprehension of bias ... with suitable adjustments for the nature of the decision making involved" (para. 8). He stressed that "there was absolutely no allegation against [Mr. Woolcombe and Mr. Keiper] of any actual 'bias' or its equivalent" (para. 8). He acknowledged that neither was alleged to have done anything wrong since their appointments as directors, and that at the time of their appointments the appellants had confirmed to the Board that they understood and would abide by their duties and responsibilities as directors, including the responsibility to act in the best interests of the corporation and not in their own interests as shareholders. In the end, however, he concluded that because of their prior public statements that they intended to "pursue efforts to maximize shareholder value at Stelco," and because of the nature of their business and the way in which they had been accumulating their shareholding position during the restructuring, and because of their linkage to 40% of the common shareholders, there was a risk that the appellants would not conduct themselves in a neutral fashion in the best interests of the corporation as directors.

74 In my view, the administrative law notion of apprehension of bias is foreign to the principles that govern the election, appointment and removal of directors, and to corporate governance considerations in general. Apprehension of bias is a concept that ordinarily applies to those who preside over judicial or quasi-judicial decision-making bodies, such as courts, administrative tribunals or arbitration boards. Its application is inapposite in the business decision-making context of corporate law. There is nothing in the CBCA or other corporate legislation that envisages the screening of directors in advance for their ability to act neutrally, in the best interests of the corporation, as a prerequisite for appointment.

75 Instead, the conduct of directors is governed by their common law and statutory obligations to act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (CBCA, s. 122(1)(a) and (b)). The directors also have fiduciary obligations to the corporation, and they are liable to oppression remedy proceedings in appropriate circumstances. These remedies are available to aggrieved complainants - including the respondents in this case - but they depend for their applicability on the director having engaged in conduct justifying the imposition of a remedy.

76 If the respondents are correct, and reasonable apprehension that directors may not act neutrally because they are aligned with a particular group of shareholders or stakeholders is sufficient for removal, all nominee directors in Canadian corporations, and all management directors, would automatically be disqualified from serving. No one suggests this should be the case. Moreover, as Iacobucci J. noted in *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5 (S.C.C.) at para. 35, "persons are assumed to act in good faith unless proven otherwise." With respect, the motion judge approached the circumstances before him from exactly the opposite direction. It is commonplace in

corporate/commercial affairs that there are connections between directors and various stakeholders and that conflicts will exist from time to time. Even where there are conflicts of interest, however, directors are not removed from the board of directors; they are simply obliged to disclose the conflict and, in appropriate cases, to abstain from voting. The issue to be determined is not whether there is a connection between a director and other shareholders or stakeholders, but rather whether there has been some conduct on the part of the director that will justify the imposition of a corrective sanction. An apprehension of bias approach does not fit this sort of analysis.

PART V - DISPOSITION

77 For the foregoing reasons, then, I am satisfied that the motion judge erred in declaring the appointment of Messrs. Woolcombe and Keiper as directors of Stelco of no force and effect.

78 I would grant leave to appeal, allow the appeal and set aside the order of Farley J. dated February 25, 2005.

79 Counsel have agreed that there shall be no costs of the appeal.

R.A. BLAIR J.A.

S.T. GOUDGE J.A. - I agree.

K.N. FELDMAN J.A. - I agree.

* * * * *

Schedule A

[Editor's note: Schedule "A" was not attached to the copy received from the Court and therefore is not included in the judgment.]

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

2 The reference is to the decisions in Dyle, Royal Oak Mines, and Westar, cited above.

3 See paragraph 43, *infra*, where I elaborate on this distinction.

4 It is the latter authority that the directors of Stelco exercised when appointing the appellants to the Stelco Board.

5 Dennis H. Peterson, *Shareholder Remedies in Canada* (Markham: LexisNexis ' Butterworths ' Looseleaf Service, 1989) at 18-47.

6 Or, I would add, unpopular with other stakeholders.

7 Now s. 241.