Court File No. CV-15-11192-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C-43, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF VICTORIAN ORDER OF NURSES FOR CANADA, VICTORIAN ORDER OF NURSES FOR CANADA – EASTERN REGION AND VICTORIAN ORDER OF NURSES FOR CANADA – WESTERN REGION

Applicants

BOOK OF AUTHORITIES OF THE APPLICANTS
(Re motion returnable July 14, 2016)

June 30, 2016

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Court File No. CV-15-11192-00CL

ONTARIO
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IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

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Applicants

INDEX

Tab 1

Court File No. CV-09-8247-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	FRIDAY, THE 26th DAY OF
	)	
JUSTICE CAMPBELL	)	AUGUST, 2011

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP

Applicants

-and-

THE TORONTO-DOMINION BANK, in its capacity as agent for secured lenders holding first lien security and THE BANK OF NEW YORK MELLON, in its capacity as agent for secured lenders holding second lien security

Respondents

ORDER

THIS MOTION, made by Grant Forest Products Inc. ("**GFPI**"), Grant Alberta Inc., and Grant Forest Products Sales Inc. (the "**Remaining Applicants**"), for *inter alia* an order in the form attached as Schedule "A" to the notice of motion of the Remaining Applicants dated April 15, 2011 (the "**Notice of Motion**") *inter alia*: (i) abridging and validating the timing and method of service of this Motion Record so that the Motion is properly returnable; (ii) authorizing GFPI to take steps required in accordance with the *Pension Benefits Act* (Ontario) (the "**PBA**") to initiate a wind-up of the two registered defined benefit pension plans of which GFPI is plan administrator namely: #0992537 - Pension Plan for Executive Employees of GFPI and #1053008 Pension Plan for the Salaried Employees of GFPI – Timmins Plant (the "**Timmins**

Salaried Plan") (collectively the "**DB Plans**") and authorizing GFPI to work with the Superintendent of Financial Services and the Financial Services Commission of Ontario to appoint a replacement plan administrator of the DB Plans; (iii) authorizing and directing Ernst & Young Inc. in its capacity as court-appointed Monitor of the Remaining Applicants (the "**Monitor**"), until further court order, to hold back from any distribution to creditors of GFPI an amount which is estimated to be the amount necessary to satisfy the wind-up deficits of the DB Plans; (iv) extending, until November 30, 2011, the Stay Period, as defined by the Order of the Honourable Mr. Justice Newbould made in these proceedings on June 25, 2009 (the "**Initial Order**") and as previously extended until August 31, 2011; and (v) approving the twenty-first report to Court (the "**Twenty-First Report**") of the Monitor, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Twenty-first Report, the affidavit of Hap Stephen sworn August 10, 2011, the affidavit of Hap Stephen sworn August 24, 2011 and on hearing submissions of counsel for GFPI, the Monitor, Financial Services Commission of Ontario, Peter Grant Sr. and the Second Lien Lenders, and no one appearing for any other person on the service list, although properly served as appears from the affidavits of Laura Bowles-Dove sworn August 10 and 17, 2011 and the affidavit of Jane Dietrich sworn August 24, 2011, filed:

1. **THIS COURT ORDERS** that the timing and method of service and filing of the notice of motion and GFPI's motion record are hereby abridged so that this motion is properly returnable today.

2. **THIS COURT ORDERS** that GFPI is hereby authorized to take steps required in accordance with the PBA to initiate a wind-up of the Timmins Salaried Plan and GFPI is authorized to work with the Superintendent of Financial Services and the Financial Services Commission of Ontario to facilitate the appointment of a replacement plan administrator of the Timmins Salaried Plan. For greater certainty, nothing in this Order shall fetter a replacement administrator's discretion, subject to the requirements of the PBA, whether to wind-up the Timmins Salaried Plan.

3. **THIS COURT ORDERS** that the Monitor is hereby authorized and directed, until further Court Order, to hold back from any distribution to creditors of GFPI an

amount of $191,245.00 which is estimated to be the amount necessary to satisfy the wind-up deficit of the Timmins Salaried Plan. For greater certainty nothing in this order affects or determines the priority or security of the claims against these funds.

4. **THIS COURT ORDERS** that with respect to the Remaining Applicants, the Stay Period as defined by the Initial Order, be and is hereby extended to November 30, 2011.

5. **THIS COURT ORDERS** that the Twenty-First Report and the activities of the Monitor as set out therein be and are hereby approved.

6. **THIS COURT ORDERS** that the preamble to paragraph 10 of the Initial Order be and is hereby, as of the date of this Order, deleted and replaced with the following, "*10. **THIS COURT ORDERS** that, the Remaining Applicants are hereby prohibited, without the prior written approval of Bank of New York Mellon as agent for the Second Lien Lenders and the Monitor, or further order of this Court from:*" and subparagraphs 10(a) to (o) of the Initial Order remain unchanged.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

AUG 26 2011

PER/PAR:

Court File No: CV-09-8247-00CL

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP (the "Applicants")

-and-

THE TORONTO-DOMINION BANK, in its capacity as agent for secured lenders holding first lien security and THE BANK OF NEW YORK MELLON, in its capacity as agent for secured lenders holding second lien security (the "Respondents")

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO
(Commercial List)

ORDER
(August 26, 2011)

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Tab 2

Indexed as:

Century Services Inc. v. Canada (Attorney General)

Century Services Inc. Appellant;
v.
Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada Respondent.

[2010] 3 S.C.R. 379

[2010] 3 R.C.S. 379

[2010] S.C.J. No. 60

[2010] A.C.S. no 60

2010 SCC 60

2010 CarswellBC 3419

72 C.B.R. (5th) 170

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

296 B.C.A.C. 1

326 D.L.R. (4th) 577

409 N.R. 201

[2011] 2 W.W.R. 383

File No.: 33239.

Supreme Court of Canada

Heard: May 11, 2010;
Judgment: December 16, 2010.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

(136 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Catchwords:

Bankruptcy and Insolvency -- Priorities -- Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada -- Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) -- Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency -- Procedure -- Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts -- Express trusts -- GST collected but unremitted to Crown -- Judge ordering that GST be held by Monitor in trust account -- Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

[page380]

Summary:

The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("*ETA*") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("*BIA*"). However, s. 18.3(1) of the *CCAA* provided that any statutory deemed trusts in favour of the Crown did not operate under the *CCAA*, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the *CCAA* chambers judge, a payment not exceeding $5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the *BIA*. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the *ETA* to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the *CCAA* to continue the stay against the Crown's claim. Second, the Court

of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by [page381] Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event, [page382] recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and

economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

[page383]

No express trust was created by the chambers judge's order in this case because there is no certainty of object inferrable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the *CCAA* established above, because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a *CCAA* or *BIA* provision explicitly confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakeable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

[page384]

Per Abella J. (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not

amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(*f*) of the *Interpretation Act*, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

[page385]

Cases Cited

By Deschamps J.

Overruled: *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737; **distinguished:** *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; **referred to:** *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659; *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4) 192; *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII); *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720; *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4) 219; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513; *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106; *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282; *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134; *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9; *Air Canada, Re* (2003), 42 C.B.R. (4) 173; *Air Canada, Re*, 2003 CanLII 49366; *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4) 158; *Skydome Corp., Re* (1998), 16 C.B.R. (4) 118; *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4) 144; *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4) 236; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25; *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108.

By Fish J.

Referred to: *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737.

By Abella J. (dissenting)

Ottawa Senators Hockey Club Corp. (Re) (2005), 73 O.R. (3d) 737; *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663.

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An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and [page386] the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, S.C. 2005, c. 47, ss. 69, 128, 131.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 67, 81.1, 81.2, 86 [am. 1992, c. 27, s. 39; 1997, c. 12, s. 73; 2000, c. 30, s. 148; 2005, c. 47, s. 69; 2009, c. 33, s. 25].

Canada Pension Plan, R.S.C. 1985, c. C-8, s. 23.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11 [am. 2005, c. 47, s. 128], 11.02 [ad. *idem*], 11.09 [ad. *idem*], 11.4 [am. *idem*], 18.3 [ad. 1997, c. 12, s. 125; rep. 2005, c. 47, s. 131], 18.4 [*idem*], 20 [am. 2005, c. 47, s. 131], 21 [ad. 1997, c. 12, s. 126; am. 2005, c. 47, s. 131], s. 37 [ad. 2005, c. 47, s. 131].

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[page388]

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith JJ.A.), 2009 BCCA 205, 98 B.C.L.R. (4) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, reversing a judgment of Brenner C.J.S.C., 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

Counsel:

Mary I. A. Buttery, *Owen J. James* and *Matthew J. G. Curtis*, for the appellant.

Gordon Bourgard, *David Jacyk* and *Michael J. Lema*, for the respondent.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ. was delivered by

1 DESCHAMPS J.:-- For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency [page389] Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

2 Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides

that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

[page390]

4 On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of $305,202.30 be held by the Monitor in its trust account.

5 On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, 270 B.C.A.C. 167). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and [page391] that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

8 Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

9 This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?
(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?
(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

[page392]

3. Analysis

10 The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite ... any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

11 In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 *Purpose and Scope of Insolvency Law*

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain [page393] a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

13 Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute -- it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms

for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either [page394] the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

15 As I will discuss at greater length below, the purpose of the *CCAA* -- Canada's first reorganization statute -- is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors [page395] Arrangement Act*, [1934] S.C.R. 659, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected -- notably creditors and employees -- and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

18 Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make [page396] the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, at 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a [page397] flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, [page398] rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, s. 25; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

25 Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

[page399]

3.2 *GST Deemed Trust Under the CCAA*

26 The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the

reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims [page400] largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as added by S.C. 1997, c. 12, s. 126).

29 Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bankr. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

30 Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at s.2).

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property [page401] held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

32 Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

33 In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by

the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

[page402]

34 The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

> **222...** .
>
> ...
>
> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed ... .

35 The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

36 The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, [page403] subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

> **37.** (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

38 An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

> **18.3** ...
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*... .

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

[page404]

39 Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

> **18.4** ...
>
> ...
>
> (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution ... .

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

40 The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize [page405] conflicts, apparent or real, and resolve them when possible.

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (Alta. Q.B.); *Gauntlet*).

42 The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

> The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, [page406] the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source

deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists [page407] in those Acts carving out an exception for GST claims.

46 The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

47 Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

[page408]

48 Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

[page409]

50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

51 Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough [page410] contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

54 I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding [page411] the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed

trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA*'s override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

56 My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

[page412]

3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

58 *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282 , at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by [page413] staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

[page414]

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Ct. (Gen. Div.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4th) 144 (S.C.); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see *Metcalfe & Mansfield*). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA*'s supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) What are the sources of a court's authority during *CCAA* proceedings? (2) What are the limits of this authority?

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent

jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against [page415] purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the [page416] matter, ... subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus, in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* -- avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all [page417] stakeholders are treated as advantageously and fairly as the circumstances permit.

71 It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

[page418]

74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

75 The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA* the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament ... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as [page419] the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

77 The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be [page420] lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition [page421] to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

81 I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 *Express Trust*

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of

the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29, especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008 sufficient to support an express trust.

[page422]

85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus, there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008 denying the Crown's application to enforce the trust once it was clear [page423] that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

89 For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

The following are the reasons delivered by

FISH J. --

I

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). [page424] And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

[page425]

II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* -- or explicitly preserving -- its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), where s. 227(4) *creates* a deemed trust:

> (4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

> (4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed
>
> > (*a*) to be held, from the time the amount was deducted or withheld by the person, separate and [page426] apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...
> >
> > ...
>
> ... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* ... .

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

> (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.
>
> (3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* ... .

102 Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

[page427]

103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) of the *CCAA* and in s. 67(3) of the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust -- or expressly provide for its continued operation -- in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

> **222.** (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a [page428] security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

...

> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and InsolvencyAct*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> > (*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...
> >
> > ...
>
> ... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust [page429] provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit -- rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada [page430] be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

114 ABELLA J. (dissenting):-- The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

115 Section 11[1] of the *CCAA* stated:

> **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.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

[page431]

> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> (*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

> and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

116 Century Services argued that the *CCAA*'s general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

> **18.3** (1) ... [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory [page432] interpretation: Does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act*... . The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from [page433] various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended

that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

[page434]

122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an

> insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

[page435]

125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> ... the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ... :
>
> > The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the [page436] legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222 (3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services

argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(*f*)). It directs that new enactments not be construed as [page437] "new law" unless they differ in substance from the repealed provision:

> **44.** Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> ...
>
> (*f*) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an "enactment" as "an Act or regulation or any portion of an Act or regulation".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

> **37.** (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

131 The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to re-order the provisions of this Act". During second reading,

the Hon. Bill Rompkey, then the Deputy Leader of the Government in the [page438] Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.
>
> (*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request [page439] for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

* * * * *

APPENDIX

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) [Powers of court] 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.

...

(3) [Initial application court orders] 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.

(4) [Other than initial application court orders] 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,

[page440]

(*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);

(*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.

...

(6) [Burden of proof on application] The court shall not make an order under subsection (3) or (4) unless

(*a*) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(*b*) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) [Her Majesty affected] An order made under section 11 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,
(ii) the refusal of a proposed compromise by the creditors or the court,
(iii) six months following the court sanction of a compromise or arrangement,

[page441]

(iv) the default by the company on any term of a compromise or arrangement, or
(v) the performance of a compromise or arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) [When order ceases to be in effect] An order referred to in subsection (1) ceases to be in effect if

(*a*) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,
(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, [page442] as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or
(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that

subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person [page443] and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined

in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same [page444] effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) [Deemed trusts] Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

[page445]

18.4 (1) [Status of Crown claims] In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

(3) [Operation of similar legislation] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and [page446] in respect of any related interest, penalties or other amounts.

20. [Act to be applied conjointly with other Acts] 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.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

11. [General power of court] Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

11.02 (1) [Stays, etc. -- initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

> (*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> (*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 any action, suit or proceeding against the company.

(2) [Stays, etc. -- other than initial application] A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

> (*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

[page447]

> (*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 any action, suit or proceeding against the company.

(3) [Burden of proof on application] The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

...

11.09 (1) [Stay -- Her Majesty] An order made under section 11.02 may provide that

> (*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than
>
> (i) the expiry of the order,
> (ii) the refusal of a proposed compromise by the creditors or the court,
> (iii) six months following the court sanction of a compromise or an arrangement,
> (iv) the default by the company on any term of a compromise or an arrangement, or
>
> (v) the performance of a compromise or an arrangement in respect of the company; and
>
> (*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income [page448] Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum
>
> (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
> (ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

> (*a*) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the [page449] collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection [page450] 3(1) of the *Canada Pension Plan* and the provincial legislation

establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

[page451]

37. (1) [Deemed trusts] Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to

ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

> (*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or
>
> (*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured [page452] creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

(3) [Extension of trust] Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

> (*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept

separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

[page453]

(*a*) property held by the bankrupt in trust for any other person,

(*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(*b*.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) [Deemed trusts] Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) [Exceptions] Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld

under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

[page454]

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) [Exceptions] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

[page455]

(ii)

> is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

Appeal allowed with costs, ABELLA J. *dissenting.*

Solicitors:

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Attorney General of Canada, Vancouver.

1 Section 11 was amended, effective September 18, 2009, and now states:

> **11.** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

2 The amendments did not come into force until September 18, 2009.

Tab 3

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	

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 that 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:

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[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 law[9] 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.

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[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.

[9] *671122 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 use 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 in 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.

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[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 & 1590 v. *Ontario (Superintendent of Financial Services)* (1999), 20 C.C.P.B. 312 (PCO) ("*Sisters of St. Jospeph*")

Police Assn. of Nova Scotia Pension Plan (Trustees of) v. *Amherst (Town)*, (2008) NSCA 74, 2008 Carswell 43 INS 431 (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 unsupportable 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 statures. 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 4

2016 AGREEMENT RESPECTING MULTI-JURISDICTIONAL PENSION PLANS

The signatories of this Agreement are as follows:

The governments of

BRITISH COLUMBIA, herein acting and represented by the Minister of Finance;

NOVA SCOTIA, herein acting and represented by the Minister of Finance and Treasury Board;

ONTARIO, herein acting and represented by the Minister of Finance;

QUEBEC, herein acting and represented by the Minister of Finance and the Minister responsible for Canadian Relations and the Canadian Francophonie; and

SASKATCHEWAN, herein acting and represented by the Minister of Justice and Attorney General.

RECITALS

I. Each signatory to this Agreement represents a legislative jurisdiction in Canada and is authorized by the laws of the signatory's jurisdiction to sign this Agreement.

II. A pension plan may be subject to the pension legislation of more than one jurisdiction and may be subject to the supervision of more than one jurisdiction's pension supervisory authority, by reason of the nature or place of the plan members' residence or employment or the nature of the business, work or undertaking of the members' employer.

III. Pension plans that are subject to the pension legislation of more than one jurisdiction play a significant role in providing retirement income to many Canadians. To establish an efficient and transparent regulatory environment for such plans, the parties to this Agreement deem it desirable to specify the rules that apply to such plans and allow, to the extent provided for in this Agreement, a single pension supervisory authority to exercise with respect to any such pension plan all of the supervisory and regulatory powers to which such plan is subject.

IV. The laws of the jurisdictions whose governments are party to this Agreement allow for the incorporation of rules for pension plans enacted by Canadian legislative jurisdictions or as otherwise set out in this Agreement, as well as the reciprocal application of legislative provisions and administrative powers by the pension supervisory authorities concerned.

V. Therefore, the parties to this Agreement agree as follows:

PART I
GENERAL PROVISIONS

SECTION 1.
DEFINITIONS & SCHEDULES
Definitions

1. (1) For the purposes of this Agreement, unless the context indicates a different meaning:

"active member" means, in relation to a pension plan, a person who:

(a) is accruing benefits under the plan; or

(b) is no longer accruing benefits under the plan, but who is deemed by the terms of the plan or the pension legislation that would apply to the person if this Agreement did not exist to have the same status as an active member of the plan as a person determined under clause (a); ("participant actif")

"pension legislation" means, in relation to a jurisdiction, the legislation identified in Schedule A in respect of that jurisdiction and any subordinate legislation made under that legislation, all as amended or substituted from time to time; ("loi sur les régimes de retraite")

"pension plan" means, in respect of a jurisdiction, any plan that is subject to the jurisdiction's pension legislation; and ("régime de retraite")

"pension supervisory authority" means the government ministry, department or agency of a jurisdiction that has supervisory or regulatory powers with respect to pension plans under the pension legislation of the jurisdiction. ("organisme de surveillance")

Schedules

(2) The following attached Schedules form part of this Agreement:

(a) Schedule A – Pension Legislation; and

(b) Schedule B – Matters Covered by Incorporated Legislative Provisions.

SECTION 2.
APPLICATION

General application

2. (1) Subject to subsection (2) and section 26, this Agreement applies to any pension plan that would, if this Agreement and any other agreement respecting the supervision of pension plans did not exist, be subject to registration with a pension supervisory authority under the pension legislation of more than one jurisdiction that is subject to this Agreement.

Restriction

(2) This Agreement does not apply to a pension plan if the pension supervisory authority that would be designated as the major authority for the plan under this Agreement is not subject to this Agreement.

Plan provision not effective

(3) This Agreement applies in respect of a pension plan despite any conflicting provision in any document that creates or supports the pension plan.

PART II
MAJOR AUTHORITY

SECTION 3.
DETERMINATION OF THE MAJOR AUTHORITY

One major authority

3. (1) One pension supervisory authority having jurisdiction over a pension plan shall be the major authority for the plan.

Plurality of active members

(2) Except as provided in sections 5 and 26, the major authority for a pension plan shall be the pension supervisory authority of the jurisdiction with the plurality of active members of the plan, as determined in accordance with subsection (3) and considering only those jurisdictions whose pension legislation would, if this Agreement and any other agreement respecting the supervision of pension plans did not exist, require the plan to be registered with the pension supervisory authority of that jurisdiction.

Determination of plurality

(3) The jurisdiction that, among those referred to in subsection (2), has the plurality of active members of a pension plan shall be determined using the most recent periodic information return that has been filed with a pension supervisory authority in relation to the plan's fiscal year end, or if an application to register a new pension plan is received by a pension supervisory authority, determined using the information set out in the application, and on the following basis:

(a) in respect of a provincial jurisdiction, the number of active members of the plan who are employed in that provincial jurisdiction and who would be subject to that jurisdiction's pension legislation if this Agreement and any other agreement respecting the supervision of pension plans did not exist; and

(b) in respect of the federal jurisdiction, the number of active members of the plan who are employed in "included employment" within the meaning of that jurisdiction's pension legislation, where the plan is subject to that jurisdiction's pension legislation.

Equal number of active members

(4) Where the major authority for a pension plan cannot be determined by applying subsections (2) and (3) because two or more jurisdictions have authority over an equal number, greater than zero, of active members of the plan, the major authority for the plan shall be, of those jurisdictions, the authority whose main office is in closest proximity to the main office of the administrator of the plan. For the purposes of this subsection:

(a) the main office of a pension supervisory authority is the office from which the authority conducts most of its supervisory activities; and

(b) the main office of the pension plan administrator is the office from which the plan administrator described in the text of the pension plan conducts most of the plan's administration.

Status as major authority

(5) A pension supervisory authority that becomes the major authority for a pension plan in accordance with this Agreement shall remain the major authority for the plan until the authority loses its status as major authority in accordance with this Agreement.

Minor authorities

(6) Once a pension supervisory authority becomes the major authority for a pension plan, any other pension supervisory authority to which this Agreement extends and that has supervisory or regulatory powers with respect to the plan becomes a minor authority for the plan.

New pension plan registration

(7) Where a pension supervisory authority receives an application to register a pension plan, that authority shall determine whether it is the major authority for the plan within the meaning of this Agreement, and if necessary and as soon as possible thereafter, that authority shall notify the plan administrator as to the relevant authority with which the plan should or may be registered and shall notify the relevant authority about the plan to be registered.

SECTION 4.
ROLE OF THE MAJOR AUTHORITY

Interpretation

4. (1) For the purposes of this section:

(a) a decision includes an order, direction, approval or, if specific recourse is provided, a proposal to make such a decision; and

(b) recourse includes the right to request a hearing, review, reconsideration or appeal.

Role of major authority

(2) The major authority for a pension plan shall:

(a) supervise and regulate the plan in accordance with this Agreement, and on behalf of each of the minor authorities for the plan as required by this Agreement;

(b) subject to subsection (3) and section 9, exercise, with respect to the plan and as required by this Agreement, the functions and powers necessary to carry out this Agreement conferred on the minor authority by the pension legislation of the minor authority's jurisdiction;

(c) apply and enforce any rules specified in this Agreement that are not part of the pension legislation of a jurisdiction; and

(d) determine any matter or question related to the application of this Agreement to the plan in accordance with this Agreement and the procedural provisions of the pension legislation of the major authority's jurisdiction.

Exceptions

(3) Despite clause (b) of subsection (2):

(a) where the major authority for a pension plan and a minor authority for the plan agree that a particular function or power conferred by the pension legislation of the minor authority's jurisdiction shall be exercised in respect of the plan by the minor authority, only such minor authority may exercise such function or power in respect of the plan;

(b) where the major authority for a pension plan and a minor authority for the plan agree that a particular decision concerning the application of provisions of the pension legislation of the minor authority's jurisdiction shall be made in respect of the plan by the minor authority, only such minor authority may make such decision in respect of the plan; and

(c) where pension legislation confers on a pension supervisory authority the power to order or otherwise require the splitting of the assets and liabilities of a pension plan, only such authority may make a decision concerning the exercise of that power with respect to the liabilities of a plan that are subject to such pension legislation and the assets of the plan related to the funding of those liabilities.

Decisions and recourse

(4) Any decision that may be made by the major authority for a pension plan that applies the provisions of the pension legislation of a minor authority's jurisdiction as described in clause (b) of subsection (1) of section 6 is subject to the following rules:

(a) the decision shall be made under the procedural provisions of the pension legislation of the major authority's jurisdiction that would have applied if the matter had arisen under that legislation;

(b) the decision shall be deemed to have been made by the minor authority under the procedural provisions of the pension legislation of the minor authority's jurisdiction that would have applied if the minor authority had made the decision;

(c) when the decision is issued by the major authority, it shall include notice to any person receiving the decision as to:

(i) the provisions of the pension legislation of the minor authority's jurisdiction that were applied in formulating the decision that is made;

(ii) the recourse provided, if any, from the decision under the pension legislation of the minor authority's jurisdiction, including the body before whom such recourse may be exercised;

(iii) the time limit under the pension legislation of the minor authority's jurisdiction for exercising such recourse; and

(iv) where the pension legislation of the minor authority's jurisdiction does not provide for recourse from the decision, any recourse from the decision provided under any other legislation of that jurisdiction, including the body before whom such recourse may be exercised and the time limit for exercising such recourse; and

(d) the right to recourse from the decision shall be determined under the pension legislation or other legislation of the minor authority's jurisdiction as though the decision had been made under the procedural provisions of that legislation.

Continued role of major authority

(5) Exercise of a recourse from a decision referred to in this section does not have the effect of preventing or releasing the major authority from continuing to fulfill its responsibilities with respect to the pension plan as set out in subsection (2).

Enforcement of decisions

(6) The major authority shall enforce any decision referred to in this section once that decision is no longer open to any further recourse, as well as any decision resulting from such recourse that is no longer open to any further recourse.

Communication with major authority

(7) A person shall be entitled to communicate with the major authority for a pension plan in the same manner that the person would be entitled to communicate with a pension supervisory authority under the legislation that would apply to the person if this Agreement did not exist.

Representative

(8) Where a person having any rights or benefits under a pension plan has designated another person or an association that represents people with rights or benefits under the plan to act on his or her behalf with respect to the major authority for the plan, such authority shall, to the extent permitted by law, communicate with that other person or association and, upon request, provide that other person or association with the information and documents to which the person is entitled.

SECTION 5.
LOSS OF MAJOR AUTHORITY STATUS

Loss of major authority status

5. (1) The major authority for a pension plan shall lose its status in that regard on the date described in subsection (2) where, according to the most recent periodic information return that has been filed with the major authority in relation to the plan's fiscal year end, the number of active members of the plan employed in relation to the major authority's jurisdiction, as determined under subsection (3) of section 3 as of the plan's fiscal year end, is:

(a) for the third consecutive fiscal year, less than the number of active members who were employed in relation to any other jurisdiction or jurisdictions;

(b) less than 75% of the number of active members who were employed in relation to any other jurisdiction; or

(c) equal to zero and there are active members of the plan employed in relation to any other jurisdiction.

Date of loss of major authority status

(2) The major authority for a pension plan loses its status in that regard:

(a) in the case provided for in clause (a) or (b) of subsection (1), five days prior to the end of the first plan fiscal year that begins after the date on which the major authority received the information referred to in the relevant clause; and

(b) in the case provided for in clause (c) of subsection (1), upon the later of the fifth day before the end of the current plan fiscal year during which the major authority received the information referred to in that clause or of the expiry of the period of six months beginning on the date the major authority received the information.

New major authority

(3) When the major authority for a pension plan loses its status in that regard in accordance with subsection (2), the pension supervisory authority for the jurisdiction having, as determined in accordance with subsection (1), the plurality of active members of the plan becomes the plan's new major authority if that new major authority is subject to this Agreement.

Equal number of active members

(4) Where the new major authority for a pension plan cannot be determined in accordance with subsection (3) because two or more jurisdictions have authority over an equal number, greater than zero, of active members of the plan, the major authority for the plan shall be, of those jurisdictions, the authority whose main office is in closest proximity to the main office of the administrator of the plan. For the purposes of this subsection:

(a) the main office of a pension supervisory authority is the office from which the authority conducts most of its supervisory activities; and

(b) the main office of the pension plan administrator is the office from which the plan administrator described in the text of the pension plan conducts most of the plan's administration.

Transitional rules

(5) Where the major authority for a pension plan loses its status in that regard in accordance with this section:

(a) all matters related to the plan that are pending before the major authority on the day preceding its loss of status as major authority shall be continued before that authority;

(b) all matters related to the plan that concern a decision, order, direction or approval proposed or made by the major authority and pending before any administrative body or court on the day preceding the loss of the major authority's status as major authority shall be continued before such body or court;

(c) for every matter in respect of which the major authority referred to in clause (a) or the administrative body or court referred to in clause (b) has proposed or made a decision, order, direction or approval to which the pension legislation or other legislation applying on the day preceding the replacement of the major authority provides a right of recourse:

(i) such right shall be maintained so long as the period provided for exercising that right has not expired; and

(ii) such recourse may be brought before the administrative body or court provided for by the legislation giving entitlement thereto;

(d) for any matter related to the plan not described in clauses (a) to (c) that occurred while the major authority was the major authority for the plan and that related to the provisions of the pension legislation of the major authority's jurisdiction in respect of a matter referred to in Schedule B:

(i) the major authority may, even after it loses its status in that regard for the plan, conduct an examination, investigation or inquiry into the matter in accordance with the pension legislation of the major authority's jurisdiction to determine whether compliance with that legislation was met, and in such case, the matter shall remain subject to that major authority; and

(ii) where the matter constitutes an offence under the pension legislation of the major authority's jurisdiction, the offence may be prosecuted by the competent authority in that jurisdiction, and in such case, the matter shall remain subject to that major authority; and

(e) all matters referred to in clauses (a) to (d) shall remain subject to the pension legislation or other legislation that, under this Agreement, applied to such matters on the day preceding the loss of the major authority's status as major authority.

Notice by major authority

(6) Where the major authority for a pension plan receives from the administrator of the plan the information described in clauses (a), (b) or (c) of subsection (1), it shall:

(a) as soon as possible after receipt of the information, notify the pension plan administrator and each minor authority for the plan of the date on which, pursuant to subsection (2), it will lose its status as major authority for the plan and, if applicable, the pension supervisory authority that shall become the new major authority for the plan; and

(b) as soon as possible after the plan's new major authority assumes its functions, provide to such new major authority all relevant records, documents or other information that it has concerning the plan.

Notice by new major authority

(7) The pension supervisory authority that replaces another authority as major authority for a pension plan shall, as soon as possible after assuming its functions, inform the pension plan administrator and each of the plan's minor authorities of the date on which it assumed the functions of major authority.

Notice by plan administrator

(8) The administrator of a pension plan that receives from the plan's major authority notice of the information provided for in clause (a) of subsection (6) or in subsection (7) shall:

(a) in respect of the information provided for in clause (a) of subsection (6), transmit such information to each employer that is party to the plan and any collective bargaining agent that represents any person who has rights or benefits under the plan within 90 days after such notice; and

(b) in respect of the information provided for in subsection (7), transmit such information to each employer that is party to the plan and any person who has rights or benefits under the plan who is entitled to receive an annual statement of the person's benefits, no later than the expiry of the period for providing such persons with their next annual statements of benefits.

PART III
APPLICABLE LAW

SECTION 6.
APPLICABLE LEGISLATION

Applicable pension legislation

6. (1) While a pension supervisory authority is the major authority for a pension plan in accordance with this Agreement:

(a) the provisions of the pension legislation of the major authority's jurisdiction in respect of matters referred to in Schedule B apply to the plan instead of those of the corresponding provisions of the pension legislation of any minor authority's jurisdiction that would apply to the plan if this Agreement did not exist; and

(b) subject to the provisions of this Agreement, the provisions of the pension legislation of each jurisdiction that are applicable to the plan under the terms of such legislation apply to the plan in respect of matters not referred to in Schedule B.

Funding rule exceptions

(2) Despite clause (a) of subsection (1):

(a) where the pension legislation of a minor authority's jurisdiction would, if this Agreement did not exist, require the funding of a benefit provided in relation to a pension plan with respect to persons having rights under the plan who are subject to that legislation:

(i) subject to subclause (ii), funding shall be required in respect of that benefit with respect to those persons, even if funding for that benefit would not be required under the pension legislation of the major authority's jurisdiction; and

(ii) funding of the benefit described in subclause (i) shall be required in a manner consistent with, and to the extent determined by, the requirements under the pension legislation of the major authority's jurisdiction applicable to the funding of other benefits that are provided in relation to the plan and that are required to be funded in relation to the plan under that legislation;

(b) where the pension legislation of a minor authority's jurisdiction would require, for the purposes of this clause, that an additional liability be established and funded in relation to a pension plan with respect to persons having rights under the plan who are subject to that legislation:

(i) subject to subclause (ii), such liability shall be required to be established and funded, even if such liability would not be required to be established, and such funding would not be required, under the pension legislation of the major authority's jurisdiction; and

(ii) funding of the liability described in subclause (i) shall be required in a manner consistent with, and to the extent determined by, the requirements under the pension legislation of the major authority's jurisdiction applicable to the funding of benefits that are provided in relation to the plan and that are required to be funded in relation to the plan under that legislation; and

(c) subject to subsection (4), when a pension supervisory authority becomes the major authority for a pension plan in accordance with this Agreement, if the funding of any benefit provided under the plan has been based on actuarial valuation reports filed in respect of the plan with a pension supervisory authority, the funding of those benefits shall continue to be subject to the pension legislation that applied immediately before the major authority assumed its functions in respect of the plan until such time as a new actuarial valuation report is due to be filed in respect of the plan with the major authority in accordance with the pension legislation of the major authority's jurisdiction.

Definitions

(3) For the purposes of subsection (4):

"alternative funding arrangement" means a fund or financial instrument that is described in the pension legislation of a jurisdiction and is permitted under that legislation to supplement, support or otherwise satisfy the funding requirements for a pension plan under that legislation, where in the absence of such fund or financial instrument additional contributions would be required to be made to the pension fund of the plan in order to satisfy the funding requirements for the plan under that legislation; ("instrument financier")

"new major authority" means a pension supervisory authority that becomes the major authority for a pension plan in accordance with this Agreement; and

"prior authority" means a pension supervisory authority with which a pension plan is registered immediately before a pension supervisory authority becomes the major authority for the plan in accordance with this Agreement.

Alternative funding arrangement exceptions

(4) Despite clause (a) of subsection (1), when a pension supervisory authority becomes the new major authority for a pension plan, if the pension legislation of the prior authority's jurisdiction permitted the use of an alternate funding arrangement, but the pension legislation of the new major authority's jurisdiction does not permit the use of that alternate funding arrangement, then:

(a) if, no later than thirty-five days before the new major authority becomes the major authority for the plan, the administrator of the plan provides notice to both the new major authority and the prior authority that it intends to file an actuarial valuation report with the new major authority with a valuation date that coincides with the fiscal year end of the plan that immediately follows the new major authority becoming the major authority for the plan, then the following rules shall apply with respect to the funding of the plan:

(i) the alternative funding arrangement may continue to be used until thirty days after the valuation report is due to be filed with the new major authority;

(ii) no later than thirty days after the valuation report is due to be filed with the new major authority, an amount equal to the lesser of the value of the alternative funding arrangement or the amount required to make the plan fully funded on a solvency basis shall be deposited into the pension fund of the plan by an employer that is party to the plan; and

(iii) if the amount described in subclause (ii) has not been deposited by an employer into the pension fund of the plan within the thirty day timeframe described in that subclause, an amount equal to the full value of the alternative funding arrangement shall be immediately deposited into the pension fund of the plan by an employer that is party to the plan; and

(b) if the administrator of the plan does not provide the notice described in clause (a), then the following rules shall apply with respect to the funding of the plan:

(i) no later than thirty days before the new major authority becomes the major authority for the plan, an amount equal to the lesser of the value of the alternative funding arrangement or the amount required to make the plan fully funded on a solvency basis shall be deposited into the pension fund of the plan by an employer that is party to the plan; and

(ii) until the time a new actuarial valuation report described in clause (c) of subsection (2) is filed with the new major authority respecting the plan, an amount equal to the lesser of the value of any subsequent alternative funding arrangement that would have been required to have been obtained in relation to the plan under the pension legislation of the prior authority's jurisdiction, or the amount that would be required to make the plan fully funded on a solvency basis, shall be deposited into the pension fund of the plan by an employer that is party to the plan instead of obtaining the subsequent alternative funding arrangement, at or before the time the alternative funding arrangement would have been required to have been obtained in relation to the plan under the pension legislation of the prior authority's jurisdiction and in accordance with the last actuarial valuation report that had been filed with the prior authority in respect of the plan.

SECTION 7.
DETERMINATION OF BENEFITS BY FINAL LOCATION
Deemed applicability of pension legislation

7. For the purposes of determining the benefits accrued by a person under a pension plan, the person's entire benefit accrual shall be deemed to have been subject to the pension legislation that applied to the person:

(a) at the time the person's benefits were determined, if the person was still accruing benefits under the plan at that time; or

(b) at the time the person ceased accruing benefits under the plan, if the person was no longer accruing benefits under the plan at the time the person's benefits were determined.

SECTION 8.
PENSION PLAN INVESTMENTS
Deadline for compliance

8. Despite any other provision of this Agreement, any investment by a pension plan that is held on the date a pension supervisory authority becomes the major authority for the plan and that, although it complies with the pension legislation that applied to the plan on the day preceding that date, does not comply with the pension legislation that applies to the plan's investments from that date, shall be brought into compliance with the latter legislation within five years from that date.

SECTION 9.
PENSION BENEFITS GUARANTEE FUND
Pension benefits guarantee fund

9. Subject to sections 10 to 17, this Agreement shall not affect the application or administration of the Pension Benefits Guarantee Fund set out under the pension legislation of Ontario or any similar fund established under any other pension legislation.

PART IV
PENSION PLAN ASSET ALLOCATION INTO JURISDICTIONAL PORTIONS

SECTION 10.
APPLICABLE SITUATIONS
Applicable situations

10. The assets of a pension plan shall be allocated into portions in accordance with this Part when:

(a) the plan is amended so that part of the liability of the plan to pay benefits or other amounts to persons so entitled under the plan is transferred to a different pension plan, and where, as part and in consideration of that transfer of liability, part of the assets of the plan are transferred to the different plan;

(b) a pension supervisory authority orders or otherwise requires the splitting of the assets and liabilities of the plan, as described in clause (c) of subsection (3) of section 4;

(c) the plan has more than one participating employer and an employer withdraws from the plan, and pension legislation requires that the rights and benefits accrued under the plan be divided into groups, one of which consists of the rights and benefits of persons affected by the withdrawal, and that those persons may elect to have their rights and benefits under the plan be paid forthwith;

(d) the plan is being wound up in part;

(e) the plan is being fully wound up; or

(f) a situation not described in clauses (a) to (e) occurs and assets of the plan related to a jurisdiction are to be paid to an employer that participates in the plan in accordance with the pension legislation of that jurisdiction.

SECTION 11.
ALLOCATION OF ASSETS
Allocation into portions

11. (1) For the purposes of this Part, the assets of a pension plan shall be allocated into portions as of the date of allocation, each portion being related to the liability for benefits and other amounts accrued under the plan, and any additional liability referred to in clause (b) of subsection (2) of section 6 respecting the plan, that is subject to a jurisdiction's pension legislation, as determined in accordance with this section.

Standard allocation methodology

(2) Subject to section 12, the portion of a pension plan's assets that is subject to a jurisdiction's pension legislation as of the date of allocation shall be equal to the sum of the amounts referred to in section 13 as of the date of allocation, determined with respect to the benefits and other amounts described in section 13 that are subject to that jurisdiction's pension legislation and applying the requirements of sections 14 to 16.

Other allocation methodology

(3) The major authority for a pension plan may permit the assets of the plan to be allocated into the portions described in subsection (1) in a manner other than that required by subsection (2) or section 12 if:

(a) the allocation of the plan's assets is made in relation to any situation described in section 10 other than the full wind up of the plan and a Fellow of the Canadian Institute of Actuaries certifies that:

(i) the liabilities of the plan that are related to the plan assets to be allocated into the portions described in subsection (2) do not exceed those assets on either a solvency basis or a going concern basis; and

(ii) the allocation of the assets of the plan described in subclause (i) will not differ materially from an allocation of those assets conducted in accordance with subsection (2); or

(b) the allocation of the plan's assets is made in relation to a situation described in clause (d) of section 10, no pension legislation that applies to the plan assets to be allocated into the portions described in subsection (2) requires the distribution of any plan assets related to the wound up part of the plan that remain after all liabilities related to the wound up part of the plan have been settled and a Fellow of the Canadian Institute of Actuaries certifies that the liabilities of the plan related to the wound up part of the plan do not exceed the plan assets related to the wound up part of the plan on either a solvency basis or a going concern basis immediately before the partial wind up of the plan.

SECTION 12.
PLAN WITH MORE THAN ONE PARTICIPATING EMPLOYER
Plan with more than one participating employer

12. (1) This section applies to a pension plan that has more than one participating employer and, in accordance with the pension legislation of the major authority's jurisdiction:

(a) the following are determined and accounted for separately in respect of an employer that participates in the plan, as if a separate pension plan was established within the plan in respect of that employer:

(i) the assets and liabilities of the plan;

(ii) the contributions payable in relation to the plan;

(iii) the benefits and other amounts owing under the plan; and

(iv) the expenses payable in relation to the plan;

(b) the liabilities of the plan related to the employer described in clause (a) are determined with reference to only the benefits and other amounts owing to a person in relation to that person's employment with that employer; and

(c) among the contributions payable in relation to the plan by the employer described in clause (a), those that are required to be paid under the applicable pension legislation in relation to benefits and other amounts currently accruing by active members of the plan are determined only with reference to active members employed by that employer.

Allocation of assets into employer shares

(2) For the purposes of an asset allocation under this Part involving a pension plan described in subsection (1), the assets of the plan that have been determined and accounted for separately in relation to an employer as of the date of allocation shall be allocated to that employer as an employer share if the plan characteristics described in clause (a) of subsection (1) respecting the employer:

(a) have been determined and accounted for separately since the start of the employer's participation in the plan; or

(b) began to be determined and accounted for separately at a date subsequent to the start of the employer's participation in the plan, and the initial determination and accounting of the assets of the plan respecting that employer was consistent with, and conducted on the basis of, an allocation of the assets of the plan in accordance with the requirements of this Part and in relation to a situation other than that described in clause (c), (d) or (e) of section 10.

Allocation of employer shares into portions

(3) Any employer share allocated in accordance with subsection (2) shall be further allocated into portions in the manner provided for in section 11, and used in the manner provided for in section 17, as if the employer share consisted of the assets of a separate pension plan for that employer.

Allocation of remaining assets into portions

(4) For the purposes of an asset allocation under this Part involving a pension plan described in subsection (1), any assets of the plan not allocated to an employer share in accordance with subsection (2) shall be allocated into portions in the manner provided for in section 11, and used in the manner provided for in section 17, without considering the liabilities described in clause (b) of subsection (1) related to an employer for which an employer share has been allocated under this section.

SECTION 13.
DETERMINATION OF PORTIONS FOR ASSET ALLOCATION
Determination of portions

13. (1) The assets of a pension plan that are to be allocated into portions in accordance with subsection (2) of section 11 shall be allocated into portions as of the date of allocation in accordance with the levels of priority of allocation set out in this section.

Contributions and similar amounts

(2) First, allocate assets of the pension plan equal to the sum of the following contributions and amounts, to the extent that such contributions and amounts are still credited to the account of a person having benefits under the plan on the date of allocation:

(a) any contributions paid into the pension fund of the plan and any amounts that the person had elected to transfer into the pension fund of the plan, other than contributions and amounts used to fund benefits that are not determined solely as a function of amounts credited to the account of the person; and

(b) any interest attributable to contributions or amounts described in clause (a).

Core liabilities

(3) Second, allocate assets of the pension plan equal to the sum of the following liability amounts, provided that the pension legislation that would govern those liabilities if this Agreement did not exist would require them to be funded on a solvency basis:

(a) the value of benefits under the plan that are being paid on a regular and periodic basis to any person on the date of allocation, whether or not the benefit is payable for the lifetime of the person, and determined taking into account:

(i) any periodic increase in the benefits, based on any index, rate or formula provided for in the plan; and

(ii) any related benefits that are payable due to the death of the person;

(b) the value of lifetime benefits accrued under the plan by any person who, on the date of allocation, is entitled to receive payment of the benefits on that date or a later date, but who is not in receipt of payment of the benefits as of the date of allocation, determined:

(i) using the earliest age at which all such persons are entitled to payment of unreduced lifetime benefits, without reference to any other requirements or conditions under the terms of the plan or any applicable pension legislation;

(ii) taking into account any post-retirement periodic increase in the lifetime benefits, based on any index, rate or formula provided for in the plan; and

(iii) taking into account any related benefits that are payable due to the death of the person, whether such death occurs before or after the person starts receiving payment of lifetime benefits under the plan and determined at the age described in subclause (i);

(c) in respect of any person who has been required to make contributions under the plan, the amount by which the contributions made by the person plus any interest attributable to those contributions exceeds the amount representing 50% of the value of the benefits payable to the person under the plan, subject to the following requirements:

(i) the contributions, interest and value of the benefits shall be calculated as of the date of allocation and consistent with either the pension legislation that governs the benefits or the terms of the plan, whichever produces a larger excess amount; and

(ii) any such excess amount already determined in relation to a person before the date of allocation shall not be included, whether or not such previously determined excess amount has been refunded to the person; and

(d) any unpaid part of the value of the benefits payable under the plan to a person who had elected before the date of allocation to be paid the value of the person's benefit entitlements under the plan, as well as any interest attributable to that unpaid part.

Other liabilities whose funding is required

(4) Third, allocate assets of the pension plan equal to the sum of the following liability amounts:

(a) the value of benefits accrued under the plan, other than those referred to in subsection (3), by any person who, on the date of allocation, is entitled to receive payment of the benefit on that date or a later date, but who is not in receipt of payment of the benefit as of the date of allocation, provided that the pension legislation that would govern the benefits if this Agreement did not exist would require that such benefits be funded on a solvency basis; and

(b) subject to subsection (5), the value of the additional liability referred to in clause (b) of subsection (2) of section 6.

Assets related to additional liability

(5) Where the assets of the pension plan that are allocated to a portion under subsections (2), (3) and (4) in the absence of the requirements of this subsection exceed the value of benefits and other amounts accrued under the plan that are related to that portion:

(a) the value calculated for clause (b) of subsection (4) shall be reduced by the excess amount referred to in this subsection; and

(b) the assets of the plan not allocated to a portion due to the application of clause (a) may be allocated to other portions in accordance with subsection (4).

Balance of assets

(6) Fourth, for the purposes of an asset allocation in any situation other than that described in clause (c), (d) or (e) of section 10:

(a) any assets of the pension plan remaining after the allocations made in accordance with subsections (2) to (4) shall be sequentially allocated to the portion or portions with the lowest going concern ratio, until the going concern ratio of that portion equals the going concern ratio of the portion with the next highest going concern ratio;

(b) the sequential allocation of the plan's assets described in clause (a) shall be made until all portions have the same going concern ratio or no assets remain to be allocated, whichever occurs first;

(c) if, after applying the sequential allocation of assets described in clauses (a) and (b), the going concern ratio of each portion is lower than 1.0, any assets of the pension plan yet to be allocated shall be allocated to the portions so that the going concern ratios of all portions remain the same, until the going concern ratio of each portion reaches 1.0 or no assets remain to be allocated, whichever occurs first;

(d) for the purposes of clauses (a), (b) and (c), the going concern ratio of a portion shall be calculated by using the assets of the pension plan allocated to the portion in accordance with this section and the going concern liabilities of the plan that are subject to the jurisdiction's pension legislation applicable to that portion, other than assets and liabilities related to contributions and amounts described in subsection (2); and

(e) any assets of the pension plan remaining after the allocations made in accordance with clauses (a), (b) and (c) shall be allocated pro rata to the total of the going concern liabilities determined for each portion.

Balance of assets for certain asset allocations

(7) Fourth, for the purposes of an asset allocation in a situation described in clause (c), (d) or (e) of section 10:

(a) allocate assets of the pension plan equal to the value of benefits accrued under the plan, other than those referred to in subsections (2), (3) or (4), to which persons are entitled under the plan as of the date of allocation; and

(b) any assets of the pension plan remaining after the allocations made in accordance with subsections (2) to (5) and clause (a) shall be allocated pro rata to the total of the values determined for each portion in applying subsections (2) and (3) and clause (a) of subsection (4).

SECTION 14.

RULES OF APPLICATION

Alternative funding arrangements

14. (1) For the purposes of this Part, the assets of a pension plan include any alternative funding arrangement described in section 6 that exists in relation to the plan at the time the assets of the plan are allocated into portions in accordance with this Part.

Determining value of benefits and assets

(2) For the purposes of sections 11 to 13, except subsection (6) of section 13, the value of the benefits and other amounts payable under a pension plan and the assets of the plan shall be determined as if the pension plan were wound up on the date of allocation.

Deemed solvency funding requirement

(3) If, at the time the assets of a pension plan are allocated into portions in accordance with this Part, a liability amount related to the plan or a benefit under the plan that is subject to a jurisdiction's pension legislation would not, if this Agreement did not exist, be required to be funded on a solvency basis due to a temporary suspension under that legislation of a requirement under that legislation that would otherwise require the funding of such liability amount or benefit on a solvency basis, the liability amount or benefit shall be deemed to be one that is required by that legislation to be funded on a solvency basis for the purposes of subsection (3) of section 13 and clause (a) of subsection (4) of section 13.

Additional deemed solvency funding requirement

(4) If, on the date as of which the assets of a pension plan are allocated into portions in accordance with this Part, the pension legislation of a government that is party to this Agreement has been amended after January 1, 2014, to permanently remove a requirement that some or all of the benefits and liability amounts under a pension plan be funded on a solvency basis, then that pension legislation shall be deemed, for the purposes of subsection (3) of section 13 and clause (a) of subsection (4) of section 13, to require that those benefits and liability amounts that are the subject of the amendment to the pension legislation and that have been accrued under the plan before the date that the amendment to the pension legislation has come into effect must be funded on a solvency basis.

SECTION 15.
REDUCTION METHOD
Reduction method

15. (1) Subject to subsection (2), to the extent that a value or amount referred to in subsection (3) or (4) of section 13 relates to benefits arising from the application of a provision of a pension plan or of pension legislation that came into effect less than five years before the date of allocation, such value or amount shall, for the purposes of subsection (3) or (4) of section 13, be reduced:

(a) by 100%, if the period from the date that the provision of the pension plan or pension legislation came into effect to the date of allocation is less than one year;

(b) by 80%, if the period is one year or more, but less than two years;

(c) by 60%, if the period is two years or more, but less than three years;

(d) by 40%, if the period is three years or more, but less than four years; and

(e) by 20%, if the period is four years or more, but less than five years.

Exception to reduction method

(2) The major authority for a pension plan may permit the assets of the plan to be allocated into the portions described in subsection (2) of section 11 without applying the requirements of subsection (1) if a Fellow of the Canadian Institute of Actuaries certifies that the liabilities of the plan that are related to the plan assets to be allocated into the portions described in subsection (2) of section 11 do not exceed those assets on a solvency basis.

SECTION 16.
INSUFFICIENCY OF ASSETS
Insufficiency of assets

16. If, at one of the levels of priority of allocation established by section 13, the assets of a pension plan that have yet to be allocated to a portion described in subsection (2) of section 11 are less than the total value of the benefits and other amounts that rank equally in that level of priority of allocation, the available plan assets shall be allocated to the portions pro rata to the total value of the benefits and other amounts that rank equally in that level of priority of allocation.

SECTION 17.
USE OF ASSETS FOLLOWING ALLOCATION
Use of allocated assets

17. (1) Where an asset allocation for a pension plan is made under this Part in any situation other than that described in clause (c), (d) or (e) of section 10, each portion of the assets of the plan allocated in accordance with sections 11 to 16 shall be utilized in conformity with the pension legislation applicable to the benefits and other amounts related to that portion.

Use of allocated assets for certain asset allocations

(2) Where an asset allocation for a pension plan is made under this Part in a situation described in clause (c), (d) or (e) of section 10, each portion of the assets of the plan allocated in accordance with sections 11 to 16 shall be utilized, in conformity with the pension legislation applicable to the benefits and other amounts related to that portion, to satisfy payment of those benefits and other amounts arising from the wind up of the plan or the withdrawal of the employer, as the case may be. In addition, any remaining assets related to that portion shall be distributed in accordance with that pension legislation, if so required under that legislation. No assets of the plan allocated to one portion shall be utilized to satisfy payment of the benefits and other amounts related to another portion on the wind up of the plan or the withdrawal of the employer, as the case may be.

Use of remaining allocated assets

(3) Where a situation described in clause (c) or (d) of section 10 occurs and the assets of a pension plan that have been allocated to a portion in accordance with sections 11 to 16 have been utilized to fully satisfy payment of the benefits and other amounts related to that portion that arise from the partial wind up of the plan or the withdrawal of the employer, as the case may be, and any other assets related to that portion have been distributed as required by the pension legislation applicable to the benefits and other amounts related to that portion, any remaining assets related to that portion shall remain in the pension fund of the plan and be commingled with the other assets therein.

PART V
RELATIONS BETWEEN AUTHORITIES

SECTION 18.
COOPERATION
Reciprocal obligations

18. The pension supervisory authorities that are subject to this Agreement shall:

(a) provide to each other any information required for the application of this Agreement or pension legislation, and if requested, may provide other information which is reasonable in the circumstances;

(b) assist each other in any matter concerning the application of this Agreement or pension legislation as is reasonable in the circumstances, particularly with respect to subsection (7) of section 4, and may act as agent for each other;

(c) upon the request of such an authority, transmit to that authority any information on steps taken for the application of this Agreement and amendments to pension legislation, to the extent that such amendments affect the application of this Agreement;

(d) notify each other of any difficulty encountered in the interpretation or in the application of this Agreement or pension legislation; and

(e) seek an amicable resolution to any dispute that arises between them with respect to the interpretation of this Agreement.

PART VI
EXECUTION AND COMING INTO FORCE OF AGREEMENT

SECTION 19.
EXECUTION AND COMING INTO FORCE
Effective date

19. This Agreement shall come into force:

(a) on July 1, 2016, in respect of the governments of British Columbia, Nova Scotia, Ontario, Quebec and Saskatchewan; and

(b) on the date unanimously agreed to by all parties to this Agreement in respect of a government on behalf of which this Agreement is signed after July 1, 2016.

SECTION 20.
ADDITIONAL PARTIES
Unanimous consent

20. (1) A government may become party to this Agreement with the unanimous consent of the parties to this Agreement.

Effects

(2) This Agreement shall enure to the benefit of and be binding upon a government that becomes party to this Agreement, the government's jurisdiction and the jurisdiction's pension supervisory authority as of the date referred to in section 19.

SECTION 21.
WITHDRAWAL
Written notice

21. (1) A party to this Agreement may withdraw from this Agreement by giving written notice to all other parties to this Agreement. Such notice shall be signed by a person authorized by the laws of the withdrawing party's jurisdiction to sign this Agreement.

Waiting period

(2) The withdrawal shall take effect on the first day of the month following expiry of a period of three years following the date on which the notice was transmitted. The withdrawal shall affect only the withdrawing party, and this Agreement shall remain in force for all other parties to this Agreement.

Minor authority

(3) Where, upon expiry of the three year period referred to in subsection (2), the pension supervisory authority for the withdrawing party's jurisdiction acts as a minor authority with respect to a pension plan, the major authority for the plan shall provide, upon request, that minor authority with copies of all relevant records, documents and other information concerning the plan in the major authority's possession.

Major authority

(4) Where, upon expiry of the three year period referred to in subsection (2), the pension supervisory authority for the withdrawing party's jurisdiction acts as the major authority for a pension plan, such authority shall:

(a) determine which pension supervisory authority, if any, shall become the new major authority for the plan in accordance with section 3 as of the effective date of the withdrawal; and

(b) provide the new major authority for the plan referred to in clause (a), as soon as possible after such authority assumes its functions, with all relevant records, documents and other information in its possession concerning the plan.

Notice by major authority

(5) The pension supervisory authority that becomes a pension plan's new major authority in accordance with subsection (4) shall, as soon as possible after assuming its functions, inform the plan administrator and each of the plan's minor authorities of the date on which it assumed the functions of major authority.

Notice by plan administrator

(6) The administrator of a pension plan that receives from the plan's new major authority notice of the information provided for in subsection (5) shall transmit such information:

(a) to each employer that is party to the plan and any collective bargaining agent that represents any person who has rights or benefits under the plan within 90 days after such notice; and

(b) to any person who has rights or benefits under the plan who is entitled to receive an annual statement of the person's benefits under the plan, no later than the expiry of the period for providing such persons with their next annual statements of benefits.

Decisions and recourse

(7) Despite sections 4 and 6, where a pension supervisory authority becomes a pension plan's new major authority in accordance with subsection (4):

(a) all matters related to the plan that are pending before a prior major authority on the day preceding the new major authority's assumption of its functions under this Agreement shall be continued before that prior major authority;

(b) all matters related to the plan that concern a decision, order, direction or approval proposed or made by a prior major authority and pending before any administrative body or court on the day preceding the new major authority's assumption of its functions under this Agreement shall be continued before such body or court;

(c) for every matter in respect of which the prior major authority referred to in clause (a) or the administrative body or court referred to in clause (b) has proposed or made a decision, order, direction or approval to which the pension legislation or other legislation applying on the day preceding the new major authority's assumption of its functions under this Agreement provides a right of recourse:

(i) such right shall be maintained so long as the period provided for exercising that right has not expired; and

(ii) such recourse may be brought before the administrative body or court provided for by the legislation giving entitlement thereto;

(d) for any matter related to the plan not described in clauses (a) to (c) that occurred before the new major authority's assumption of its functions under this Agreement and that related to the provisions of the pension legislation of a prior major authority's jurisdiction in respect of a matter referred to in Schedule B:

(i) the prior major authority may, even after it loses its status as major authority for the plan, conduct an examination, investigation or inquiry into the matter in accordance with the pension legislation of the prior major authority's jurisdiction to determine whether compliance with that legislation was met, and in such case, the matter shall remain subject to that prior major authority; and

(ii) where the matter constitutes an offence under the pension legislation of the prior major authority's jurisdiction, the offence may be prosecuted by the competent authority in that jurisdiction, and in such case, the matter shall remain subject to that prior major authority; and

(e) all matters referred to in clauses (a) to (d) shall remain subject to the pension legislation or other legislation that applied to such matters on the day preceding the new major authority's assumption of its functions under this Agreement.

SECTION 22.
AMENDMENT
Unanimous consent

22. This Agreement may be amended with the unanimous written consent of each of the parties to this Agreement.

SECTION 23.
COUNTERPARTS
Execution in counterparts

23. This Agreement or any amendment to this Agreement may be executed in counterparts.

SECTION 24.
EXECUTION IN ENGLISH AND IN FRENCH
Authentic texts

24. This Agreement and any amendment to this Agreement shall be executed in the English and French languages, each text being equally authoritative.

PART VII
IMPLEMENTATION AND TRANSITIONAL PROVISIONS

SECTION 25.
REPLACEMENT
Prior agreements

25. Subject to sections 27 and 28, as of the date referred to in section 19, this Agreement replaces the agreement entitled "Memorandum of Reciprocal Agreement" and any similar agreement respecting the application of pension legislation to pension plans that has been made between the governments that are party to this Agreement or between the departments or agencies of such governments.

SECTION 26.
TRANSITION
Preliminary measure

26. (1) Where this Agreement comes into force on a date referred to in section 19, and on that date a pension plan first becomes subject to this Agreement:

(a) if the plan is registered with only one pension supervisory authority and that authority is subject to this Agreement on that date, that authority shall become the major authority for the plan as of that date;

(b) if the plan is registered with more than one pension supervisory authority and each of those authorities is subject to this Agreement on that date, the major authority for the plan shall be, of those authorities, the authority of the jurisdiction with the plurality of active members of the plan, as determined in accordance with subsection (3) of section 3 and considering only those jurisdictions whose pension legislation would, if this Agreement and any other agreement respecting the supervision of pension plans did not exist, require the plan to be registered with the pension supervisory authority of that jurisdiction; and

(c) if the plan is registered with more than one pension supervisory authority and not all of those authorities are subject to this Agreement on that date, this Agreement shall not apply to the plan until such time as all of the authorities with which the plan is registered are subject to this Agreement, at which time the requirements of clause (b) shall apply to the plan.

Equal number of active members

(2) Where the major authority for a pension plan cannot be determined by applying clause (b) of subsection (1) because two or more jurisdictions have authority over an equal number, greater than zero, of active members of the plan, the major authority for the plan shall be, of those jurisdictions, the authority whose main office is in closest proximity to the main office of the administrator of the plan. For the purposes of this subsection:

(a) the main office of a pension supervisory authority is the office from which the authority conducts most of its supervisory activities; and

(b) the main office of the pension plan administrator is the office from which the plan administrator described in the text of the pension plan conducts most of the plan's administration.

Notice by major authority

(3) The pension supervisory authority that becomes a pension plan's major authority in accordance with this section shall, as soon as possible after assuming its functions, inform the plan administrator and each of the plan's pension supervisory authorities of the date on which it assumed the functions of major authority.

Decisions and recourse

(4) Despite sections 4 and 6, where a pension supervisory authority becomes a pension plan's major authority in accordance with this section:

(a) all matters related to the plan that are pending before a pension supervisory authority on the day preceding the major authority's assumption of its functions under this Agreement shall be continued before that pension supervisory authority;

(b) all matters related to the plan that concern a decision, order, direction or approval proposed or made by a pension supervisory authority and pending before any administrative body or court on the day preceding the major authority's assumption of its functions under this Agreement shall be continued before such body or court;

(c) for every matter in respect of which the pension supervisory authority referred to in clause (a) or the administrative body or court referred to in clause (b) has proposed or made a decision, order, direction or approval to which the pension legislation or other legislation applying on the day preceding the major authority's assumption of its functions under this Agreement provides a right of recourse:

(i) such right shall be maintained so long as the period provided for exercising that right has not expired; and

(ii) such recourse may be brought before the administrative body or court provided for by the legislation giving entitlement thereto;

(d) for any matter related to the plan not described in clauses (a) to (c) that occurred before the major authority's assumption of its functions under this Agreement and that related to the provisions of the pension legislation of a pension supervisory authority's jurisdiction in respect of a matter referred to in Schedule B:

(i) the pension supervisory authority may, even after the major authority assumes its functions under this Agreement for the plan, conduct an examination, investigation or inquiry into the matter in accordance with the pension legislation of that authority's jurisdiction to determine whether compliance with that legislation was met, and in such case, the matter shall remain subject to that pension supervisory authority; and

(ii) where the matter constitutes an offence under the pension legislation of the pension supervisory authority's jurisdiction, the offence may be prosecuted by the competent authority in that jurisdiction, and in such case, the matter shall remain subject to that pension supervisory authority; and

(e) subject to sections 27 and 28, all matters referred to in clauses (a) to (d) shall remain subject to the pension legislation, other legislation and agreements referred to in section 25 that applied to such matters on the day preceding the major authority's assumption of its functions under this Agreement.

New party to this Agreement after July 1, 2016

(5) Despite sections 4 and 6, if this Agreement comes into force after July 1, 2016, in respect of a government that was not party to this Agreement before that date, and a pension plan is, on the date this Agreement comes into force in respect of that party, already subject to this Agreement:

(a) the major authority for that plan shall inform the plan administrator and each of the plan's pension supervisory authorities of the date on which this Agreement came into force in respect of that party, as soon as possible after that date;

(b) all matters related to the plan that are pending before a pension supervisory authority on the day preceding the date this Agreement comes into force in respect of that party shall be continued before that pension supervisory authority;

(c) all matters related to the plan that concern a decision, order, direction or approval proposed or made by a pension supervisory authority and pending before any administrative body or court on the day preceding the date this Agreement comes into force in respect of that party shall be continued before such body or court;

(d) for every matter in respect of which the pension supervisory authority referred to in clause (b) or the administrative body or court referred to in clause (c) has proposed or made a decision, order, direction or approval to which the pension legislation or other legislation applying on the day preceding the date this Agreement comes into force in respect of that party provides a right of recourse:

(i) such right shall be maintained so long as the period provided for exercising that right has not expired; and

(ii) such recourse may be brought before the administrative body or court provided for by the legislation giving entitlement thereto;

(e) for any matter related to the plan not described in clauses (b) to (d) that occurred before the date this Agreement came into force in respect of that party and that related to the provisions of the pension legislation of a pension supervisory authority's jurisdiction in respect of a matter referred to in Schedule B:

(i) the pension supervisory authority may, even after the date this Agreement comes into force in respect of that party, conduct an examination, investigation or inquiry into the matter in accordance with the pension legislation of that authority's jurisdiction to determine whether compliance with that legislation was met, and in such case, the matter shall remain subject to that pension supervisory authority; and

(ii) where the matter constitutes an offence under the pension legislation of the pension supervisory authority's jurisdiction, the offence may be prosecuted by the competent authority in that jurisdiction, and in such case, the matter shall remain subject to that pension supervisory authority; and

(f) all matters referred to in clauses (b) to (e) shall remain subject to the pension legislation, other legislation and agreements referred to in section 25 that applied to such matters on the day preceding the date this Agreement came into force in respect of that party.

PART VIII
FINAL AND SPECIAL PROVISIONS

SECTION 27.
REPLACEMENT OF 2011 AGREEMENT
2011 agreement

27. As of July 1, 2016, this Agreement replaces the agreement entitled "Agreement Respecting Multi-jurisdictional Pension Plans" which came into force on July 1, 2011, in respect of the governments of Ontario and Quebec. The application of that agreement is limited to matters referred to in section 28.

SECTION 28.
ADDITIONAL TRANSITIONAL RULE
Pending matters under 2011 agreement

28. Despite section 27, any matter related to a pension plan that was subject to the agreement entitled "Agreement Respecting Multi-jurisdictional Pension Plans" on June 30, 2016, and that was still pending on that date before the Financial Services Commission of Ontario, Retraite Québec, an administrative body or a court continues to be subject to the requirements of that agreement.

SECTION 29.
WITHDRAWAL FROM AGREEMENT
Written notice to other parties

29. (1) Despite section 21, a party to this Agreement may withdraw from this Agreement by giving written notice to all other parties to this Agreement on or after January 1, 2019, and before April 1, 2019. Such notice shall be signed by a person authorized by the laws of the withdrawing party's jurisdiction to sign this Agreement.

Effective date of withdrawal

(2) The withdrawal shall take effect on July 1, 2019. The withdrawal shall affect only the withdrawing party, and this Agreement shall remain in force for all other parties to this Agreement.

SCHEDULE A
PENSION LEGISLATION

Alberta

1. *Employment Pension Plans Act*, S.A. 2012, c. E-8.1.

British Columbia

2. *Pension Benefits Standards Act*, S.B.C. 2012, c. 30.

Manitoba

3. *The Pension Benefits Act*, C.C.S.M., c. P32.

New Brunswick

4. *Pension Benefits Act*, S.N.B. 1987, c. P-5.1.

Newfoundland and Labrador

5. *Pension Benefits Act, 1997*, S.N.L. 1996, c. P-4.01.

Nova Scotia

6. *Pension Benefits Act*, S.N.S. 2011, c. 41.

Ontario

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

Quebec

8. *Supplemental Pension Plans Act*, C.Q.L.R., c. R-15.1.

Saskatchewan

9. *The Pension Benefits Act, 1992*, S.S. 1992, c. P-6.001.

Federal jurisdiction

10. *Pension Benefits Standards Act, 1985*, R.S.C. 1985 (2nd supp.), c. 32.

SCHEDULE B
MATTERS COVERED BY INCORPORATED LEGISLATIVE PROVISIONS

SECTION 1.
MAJOR AUTHORITY'S PENSION LEGISLATION

Major authority's pension legislation

1. The pension legislation applicable to a pension plan shall be the pension legislation of the jurisdiction of the major authority for the plan in the following areas of pension legislation:

Registration of pension plans

1. Legislative provisions respecting:

   (a) the duty of the pension plan administrator to ensure that the plan complies with the applicable pension legislation;

   (b) requirements that a pension plan be registered with the authority;

   (c) prohibitions against administering a pension plan not registered with the authority;

   (d) the pension plan registration process (including the filing of required forms and documents, the form in which such documents must be filed, the contents of documents and filing deadlines);

   (e) whether registration of a plan is proof of compliance with the applicable pension legislation; and

   (f) the authority's power to refuse or revoke the registration of a plan due to non-compliance with the applicable pension legislation.

Registration of pension plan amendments

2. Legislative provisions respecting:

   (a) requirements that pension plan amendments, or amendments to prescribed pension plan documents, be registered with the authority;

   (b) the amendment registration process (including the filing of required forms and documents, the form in which such documents must be filed, the contents of documents and filing deadlines);

   (c) whether registration of an amendment is proof of compliance with the applicable pension legislation;

(d) the authority's power to refuse or revoke the registration of a plan amendment due to non-compliance with the pension legislation applicable to the plan under clause (a) of subsection (1) of section 6 of the Agreement;

(e) the ability of the administrator to administer the amended plan if it does not comply with the applicable pension legislation; and

(f) requirements for notice of registration of the amendment to be provided to active members or other persons, the form and content of the notice and deadlines for providing such notice.

Pension plan administrators

3. Legislative provisions respecting:

(a) requirements that a pension plan be administered by an administrator;

(b) who may be an administrator; and

(c) the right of active members or other persons to establish an advisory committee to advise the administrator, and requirements respecting such an advisory committee.

Pension plan administrators' duties

4. Legislative provisions respecting:

(a) requirements that the pension plan administrator or the trustee, custodian or holder of the pension fund:

(i) administer the pension plan or pension fund in accordance with the applicable pension legislation and the plan terms;

(ii) stand in a fiduciary relationship to active members or other persons;

(iii) hold the pension fund in trust for the active members or other persons;

(iv) act honestly, in good faith and in the best interests of the active members or other persons;

(v) exercise the care, diligence and skill of a prudent person;

(vi) invest the pension fund in accordance with the applicable pension legislation, the pension plan's written investment policies, in the best interests of the active members or other persons or in a reasonable and prudent manner; and

(vii) hold an annual or periodic meeting with the active members or other persons;

(b) requirements that persons involved in the administration of a pension plan or pension fund:

(i) employ all knowledge and skill they possess by reason of their business or profession;

(ii) familiarize themselves with their fiduciary duties and obligations; and

(iii) possess the skills, capability and dedication required to fulfill their responsibilities and seek advice from qualified advisors where appropriate;

(c) conflict of interest requirements for persons involved in the administration of a pension plan or pension fund;

(d) requirements for the selection, use and supervision of the administrator's agents or advisors, and requirements for such agents or advisors;

(e) requirements that the employer or trustee provide information to the administrator; and

(f) requirements respecting to the payment of expenses related to the pension plan.

Pension plan records

5. Legislative provisions respecting:

(a) how long any person must retain information related to the pension plan; and

(b) requests by the plan administrator for information necessary for the administration of the pension plan.

Funding of ongoing pension plans (not in the case of full or partial plan wind up)

6. Legislative provisions respecting:

   (a) requirements for contributions made to the pension fund (including the type or form of contributions, the manner in which they must be made and deadlines for making them);

   (b) minimum plan funding and solvency levels (including plan funding and solvency levels related to pension plan amendments and the use of plan assets for the funding of plan amendments);

   (c) the ability to take contribution holidays;

   (d) requirements for actuarial valuation reports to be filed with the authority in respect of pension plans (including the form and content of such reports, filing deadlines and actuarial standards to be applied in preparing such reports);

   (e) requirements for refunds of contributions to employers, active members or other persons;

   (f) restrictions on the amount of the commuted value of a person's benefit entitlements under a pension plan that can be transferred out of the pension fund of the plan where the plan is not fully funded on a solvency or going concern basis;

   (g) who may be the trustee, custodian or holder of the pension fund; and

   (h) requirements for the provision of information between administrators and the trustees, custodians or holders of pension funds with respect to contributions, and for notice to the authority of contributions not remitted when due.

Pension fund investments

7. Legislative provisions respecting:

   (a) requirements for the investment of the pension fund (including limitations on investments and requirements that pension fund assets to be held in the name of the pension plan);

   (b) requirements that the administrator prepare a written investment policy, requirements for such a policy (including the form and content of the policy, whether it must be filed with the authority and the deadline for filing) and requirements regarding to whom such a policy must be provided; and

(c) requirements in situations where active members or other persons direct the investment of their contributions (including the minimum number and type of investment options offered, the education and advice available to active members or who may provide the advice).

Pension fund assets

8. Legislative provisions respecting:

(a) requirements for pension fund assets to be held by specified fund holders under a specified type of agreement;

(b) requirements for contributions to be remitted to the pension fund;

(c) requirements that the pension fund be held separate and apart from the employer's assets and deeming the pension fund to be held in trust for the active members or other persons;

(d) an administrator's lien and charge on the employer's assets equal to the amounts deemed held in trust; and

(e) the administrator's duty to take immediate action (including court proceedings) to obtain outstanding contributions.

Provision of information

9. Legislative provisions respecting:

(a) requirements for documents and information to be filed by the administrator or any other person with the authority, including:

(i) periodic information returns;

(ii) actuarial information for defined benefit plans;

(iii) financial statements (including audited financial statements); and

(iv) the form and content of the documents and information, who must prepare them and filing deadlines;

(b) requirements for the following documents and information to be provided by the administrator, including the form and content of the documents and information, who must prepare them and deadlines for providing them:

(i) pension plan summaries for active members or employees entitled to join the plan; and

(ii) annual or periodic statements for active members or other persons; and

(c) requirements for the inspection of pension plan documents in the possession of the administrator, authority or other persons (including who is entitled to inspect the documents and information, how often, where and at what cost).

Plan membership

10. Legislative provisions respecting:

(a) pension plans being for one or more classes of employees; and

(b) the ability of the employer to establish separate plans for full-time and part-time employees.

Appointment of pension plan administrator

11. Legislative provisions respecting:

(a) the ability of the authority to appoint itself or another person as administrator of a pension plan and rescind the appointment; and

(b) the powers of an appointed administrator.

SECTION 2.
MAJOR AUTHORITY'S POWERS

Major authority's powers

2. Where the pension legislation of the major authority's jurisdiction applies to a pension plan in accordance with section 1 of this Schedule, the following areas of the pension legislation of the major authority's jurisdiction shall, for the purposes of the plan and all jurisdictions that are subject to this Agreement in respect of the plan, also apply in respect of the application of the pension legislation described in section 1 of this Schedule:

Powers of examination, investigation or inquiry

1. All powers of examination, investigation or inquiry given to the major authority.

Orders, directions, approvals or decisions

2. The issuance of, or proposal to issue, orders, directions, approvals or decisions by the major authority, and any modification as may be made to such an order, direction, approval or decision by the authority, an administrative body or a court.

Reconsideration or review

3. The rights of the plan or a person affected by an order, direction, approval or decision of the major authority, an administrative body or a court to have the order, direction, approval or decision reconsidered or reviewed by the authority, an administrative body or a court.

Offences and penalties

4. The offences and penalties that may be applied where the plan or a person is found to have contravened the terms of the applicable pension legislation.

2016 AGREEMENT RESPECTING MULTI-JURISDICTIONAL PENSION PLANS

IN WITNESS WHEREOF,
the undersigned, being duly authorized by
the Lieutenant Governor in Council for British Columbia, has signed
this 2016 Agreement Respecting Multi-jurisdictional
Pension Plans.

Signed at Victoria BC,

the 16 day of May, 2016.

(original signed by)
Michael de Jong
Minister of Finance

2016 AGREEMENT RESPECTING MULTI-JURISDICTIONAL PENSION PLANS

IN WITNESS WHEREOF,
the undersigned, being duly authorized by
the Governor in Council for Nova Scotia, has signed
this 2016 Agreement Respecting Multi-jurisdictional
Pension Plans.

Signed at Halifax,

the 19 day of May, 2016.

(original signed by)
Randy Delorey
Minister of Finance and Treasury Board

2016 AGREEMENT RESPECTING MULTI-JURISDICTIONAL PENSION PLANS

IN WITNESS WHEREOF,
the undersigned, being duly authorized by
the Lieutenant Governor in Council for Ontario, has signed
this 2016 Agreement Respecting Multi-jurisdictional
Pension Plans.

Signed at Toronto,

the 18 day of May, 2016.

(original signed by)
Charles Sousa
Minister of Finance

2016 AGREEMENT RESPECTING MULTI-JURISDICTIONAL PENSION PLANS

IN WITNESS WHEREOF,
the undersigned, being duly authorized by
the Government of Quebec, have signed
this 2016 Agreement Respecting Multi-jurisdictional
Pension Plans.

Signed at Québec,

the 17th day of May, 2016.

(original signed by)
Carlos J. Leitão
Minister of Finance

Signed at Quebec,

the 18th day of May, 2016.

(original signed by)
Jean-Marc Fournier
Minister responsible for Canadian Relations
and the Canadian Francophonie

2016 AGREEMENT RESPECTING MULTI-JURISDICTIONAL PENSION PLANS

IN WITNESS WHEREOF,
the undersigned, being duly authorized by
the Lieutenant Governor in Council for Saskatchewan, has signed
this 2016 Agreement Respecting Multi-jurisdictional
Pension Plans.

Signed at Regina,

the 16 day of May, 2016.

(original signed by)
Gordon Wyant
Minister of Justice and Attorney General

Tab 5

ACCORD MULTILATERAL DE RECIPROCITE

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

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

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

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

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

1. Interprétation

Dans le présent accord,

a) "régime" signifie une caisse ou un régime de retraite ou de rentes;

b) "autorité" signifie une personne ou un organisme possédant des fonctions et pouvoirs statutaires relatifs à l'enregistrement, la capitalisation, la dévolution, la solvabilité, la

MEMORANDUM OF RECIPROCAL AGREEMENT

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

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

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

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

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

1. Interpretation

In this Memorandum,

a) "plan" means a superannuation or pension fund or plan;

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

vérification, l'obtention de renseignements, l'inspection, la liquidation et autres aspects des régimes;

c) "autorité participante" signifie une autorité qui est signataire du présent accord;

d) "autorité majoritaire" signifie, relativement à un régime, l'autorité participante de la province où la majorité des membres du régime sont employés (il ne sera pas tenu compte dans ce calcul des membres employés dans une province qui n'a pas d'autorité participante);

e) "autorité minoritaire" signifie, relativement à un régime, l'autorité participante de toute province où un ou plusieurs membres du régime sont employés, mais ne signifie pas l'autorité majoritaire.

2. L'autorité majoritaire de chaque régime exerce à la fois ses propres fonctions et pouvoirs statutaires et les fonctions et pouvoirs statutaires de chaque autorité minoritaire de ce régime.

3. Toute autorité peut s'exclure de l'application de l'article 2 à l'égard d'un régime déterminé en avisant par écrit l'autorité majoritaire d'un tel régime à cet effet (ou bien toutes les autorités minoritaires au cas où l'autorité majoritaire est celle qui s'exclue); et en pareil cas l'autorité qui s'exclue sera considérée comme n'étant plus une autorité participante à l'égard d'un tel régime.

4. Toute autorité participante peut s'exclure de l'application de l'article 2 à l'égard de tous régimes pour lesquels, n'était-ce cette exclusion, elle agirait comme autorité majoritaire; dans ce cas, et seulement aux fins de déterminer l'autorité majoritaire régissant chacun desdits régimes, elle ne sera pas considérée comme autorité participante.

5. Toutes les autorités participantes qui possèdent des fonctions et pouvoirs statutaires à l'égard d'un

tion, winding up, and other aspects, of plans;

c) "participating authority" means an authority which is a signatory hereto;

d) "major authority" means, with respect to a plan, the participating authority of the province where the plurality of the plan members are employed (save that members employed in a province not having a participating authority shall not be counted);

e) "minor authority" means, with respect to a plan, the participating authority of any province where one or more plan members are employed, but does not include the major authority

2. The major authority for each plan shall exercise both its own statutory functions and powers and the statutory functions and powers of each minor authority for such plan.

3. Any authority may except itself from the operation of section 2 in respect of a specific plan by giving written notice to that effect to the major authority (or, if the major authority is the excepting authority, then to all the minor authorities) for such plan; and in such event the excepting authority shall be deemed not to be a participating authority in respect of such plan

4. Any participating authority may except itself from the operation of section 2, in respect of all plans for which it would, but for such exception, act as the major authority; and in such event it shall, for the purpose only of determining the major authority of each such plan, be deemed not to be a participating authority.

5. All participating authorities having statutory functions and powers in respect of a specific

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

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

6. Lorsque les circonstances entourant un régime déterminé changent de telle sorte qu'une autorité participante devient, ou cesse d'être, une autorité minoritaire de ce régime, l'autorité majoritaire doit en aviser cette autorité minoritaire.

6. Where changing circumstances in respect of a specific plan result in a participating authority becoming or ceasing to be, a minor authority for such plan, such minor authority shall be advised accordingly by the major authority.

7. Lorsque les circonstances entourant un régime déterminé changent de telle sorte qu'il en résulte un changement de l'autorité majoritaire, toutes les autorités minoritaires en seront avisées et l'ancienne autorité majoritaire fournira à la nouvelle autorité majoritaire tous documents et renseignements relatifs à ce régime.

7. Where changing circumstances in respect of a specific plan result in a change in the major authority for such plan, all minor authorities for such plan shall be advised accordingly, and the former major authority shall deliver all documents and information concerning such plan to the new major authority.

8. Une autorité majoritaire agissant en vertu de l'article 2 fournira à chaque autorité minoritaire des renseignements complets concernant l'exercice de toute fonction et de tout pouvoir exercés au nom de cette autorité minoritaire.

8. A major authority acting pursuant to section 2 shall fully inform each minor authority as to the exercise of any functions and powers exercised on behalf of such minor authority.

9. Lorsqu'une autorité majoritaire est incapable d'exercer un pouvoir dont dispose l'une des autorités minoritaires, elle en avisera cette autorité minoritaire.

9. Where a major authority is unable to exercise a particular power or enforcement available to one of the minor authorities, it shall so advise that minor authority.

10. La participation de toute autorité à l'arrangement administratif qui précède commence à la date où elle signe cet accord (la signature ne doit être apposée qu'avec le consentement de tous les signataires précédents), et elle cesse le 31 décembre 1970, à moins que ladite autorité ne renonce avant cette date à cette terminaison.
Cependant, toute autorité peut mettre fin à sa participation à cet arrangement administratif au moyen d'un avis écrit d'un an envoyé en même temps à toutes les autres autorités participantes.

10. Participation by any authority in the foregoing Administrative Arrangement commences upon the date it becomes a signatory to this Memorandum (such signature to be affixed only with the consent of all prior signatories), and terminates on the 31st day of December, 1970, unless such authority disclaims such termination prior to that date; provided that any authority may terminate its participation in this Administrative Arrangement by contemporaneous delivery of one year's written notice to the other participating authorities.

11. Du fait qu'une autorité signe cet accord, elle conclut des accords de réciprocité avec toutes les autres autorités participantes.

11. Execution of this Memorandum by any authority shall evidence its entry into reciprocal agreements with all the other participating authorities.

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

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

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

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

LA REGIE DES RENTES DU QUEBEC

June 27,1968 _____
Membre de la Régie

QUEBEC PENSION BOARD

June 27,1968 _____
Member, Board

LA COMMISSION DES RENTES DE L'ONTARIO

June 27,1968 _____
Président

THE PENSION COMMISSION OF ONTARIO

June 27,1968 _____
Chairman

LE SURINTENDANT DES RENTES, ALBERTA

June 27,1968 _____
Surintendant

THE SUPERINTENDENT OF PENSIONS, ALBERTA

June 27,1968 _____
Superintendent

LE SURINTENDANT DES RENTES, SASKATCHEWAN

February 5,1969 _____
Surintendant

THE SUPERINTENDENT OF PENSIONS, SASKATCHEWAN

February 5, 1969 _____
Superintendant

LA COMMISSION DES RENTES DU MANITOBA

7/x/76 _____
Président

THE PENSION COMMISSION OF MANITOBA

7/x/76 _____
Chairman

LE SURINTENDANT DES RENTES,
NOVA SCOTIA

May 3, 1977 _____ Surintendant

THE SUPERINTENDENT OF PENSIONS,
NOVA SCOTIA

May 3, 1977 _____ Superintendent

LE SURINTENDANT DES RENTES,
TERRE NEUVE

February 26, 1986 _____ Surintendant

THE SUPERINTENDENT OF PENSIONS,
NEW FOUNDLAND

February 26, 1986 _____ Superintendent

Ministre Enseignement supérieur et Travail

Juin 1, 1992 _____

Minister Advanced Education and Labour
New Brunswick

June 1, 1992 _____

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

FEB. 16, 1994 _____

Minister of Skills, Training and Labour of British Columbia

FEB. 16, 1994 _____

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF VICTORIAN ORDER OF NURSES FOR CANADA

Court File No: CV-15-11192-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE APPLICANTS
(Re Motion July 14, 2016)

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Lawyers for Victorian Order of Nurses for Canada