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
(Re: Pension Matters)
(returnable August 30, 2016)

August 25, 2016

GOLDBLATT PARTNERS LLP
Barristers & Solicitors
20 Dundas Street West, Suite 1100
Toronto, ON, M5G 2G8

Darrell Brown LSUC# 29398U
Tel: 416-979-4050
Fax: 416-591-7333

Lawyer for certain members of the United Nurses of Alberta

INDEX

INDEX

BOOK OF AUTHORITIES

18. *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] SCR 559.

19. *Downtown Eatery v. Alouche,* 2001 CanLii 8538 (ON CA).

20. *USWA v. SAAN Stores Ltd*, 2001 CanLii 9299 (ON LRB).

Tab 1

REVIEW OF ONTARIO'S SOLVENCY FUNDING FRAMEWORK FOR DEFINED BENEFIT PENSION PLANS

A Consultation Paper

Ministry of Finance
July 2016

Ontario

Table of Contents

Introduction and Mandate

Over the last several years, sponsors of defined benefit single employer pension plans (DB SEPPs) have faced funding pressures associated with persistently low interest rates.

To assist plan sponsors following the 2008 global recession, the Ontario government provided temporary solvency funding relief in 2009 and again in 2012. The intention was to provide sponsors with additional time to fulfil their obligations during unfavorable economic conditions.

However, low interest rates have persisted and many plan sponsors continue to face challenges stemming from their solvency funding obligations under Ontario's *Pension Benefits Act* (PBA). The successive rounds of temporary solvency relief indicate a review of existing pension funding rules would be useful to ensure that they are appropriate for different economic conditions, including those currently affecting the pension system.

While pension funding obligations can be challenging for plan sponsors, they play an important role in providing pension plan beneficiaries with a secure level of benefit.

Recognizing the different interests involved, the 2015 *Ontario Economic Outlook and Fiscal Review* announced the government's plan to:

- Extend the temporary solvency relief, provided in 2009 and 2012, for an additional three years to assist private sector plan sponsors; and
- Review the current solvency funding framework.

The stated purpose of the solvency funding review is to develop "a balanced set of solvency funding reforms that would focus on plan sustainability, affordability and benefit security, and take into account the interests of pension stakeholders – including sponsors, unions, members and retirees." Further temporary solvency relief measures are intended to provide plan sponsors with flexibility as the funding review proceeds.

The 2016 *Ontario Budget* announced further details of the solvency funding review, including the appointment of David Marshall, former president and CEO of the Workplace Safety and Insurance Board to lead the solvency funding review, as well as the government's intention to establish a Stakeholder Reference Group (SRG). These measures are intended to ensure that any reforms to the existing solvency funding framework are balanced and informed by a broad range of stakeholder opinions.

The SRG has now been established. Working with this group and David Marshall, significant consultation with stakeholders, including sponsors, unions, retirees, the broader public sector and experts, has begun to take place.

It should be noted that the focus of this consultation is the reform of funding rules for defined benefit (DB) plans. In 2015, the Ministry of Finance (MOF) released a consultation paper outlining a potential framework for target benefit multi-employer pension plans (TB MEPPs). It is anticipated that most specified Ontario multi-employer pension plans (SOMEPPs) would become TB MEPPs and their current temporary solvency funding exemption would become permanent. Multi-employer pension plans (MEPPs) that do not become TB MEPPs would be required to fund according to the general rules applicable to DB pension plans in Ontario. As a result of these linkages, the DB solvency funding review and the framework for TB MEPPs are being developed in parallel.

How to Participate

The Ministry of Finance is seeking feedback from all interested parties on how best to revise the funding framework for DB pension plans in Ontario.

While some parts of this paper are of a more technical nature, comments at any level of detail are welcome.

Feedback on issues relating to the funding of DB pension plans can be submitted to pension.feedback@ontario.ca or mailed to:

Solvency Funding Review
Pension Initiatives Unit, Pension Policy Branch
Ministry of Finance
7 Queen's Park Crescent
5th Floor, Frost Building South
Toronto, ON M7A 1Y7

Submissions must be received by September 30, 2016.

Context for Solvency Funding Review

Current Pension Landscape

Workplace pension plans, and DB pension plans in particular, are an integral part of Ontario's retirement income system. They provide employers with a tool to attract and retain talent, while giving employees a valuable source of retirement income.

At the end of 2015, there were 1,527 DB pension plans registered in Ontario with 3.5 million members (total of active, former, and retired members). This includes:

- 1.2 million members of 1,440 DB SEPPs (including over 1,000 plans continuing to accrue DB benefits);
- 950,000 members of 77 multi-employer pension plans (MEPPs); and
- 1.3 million members of 10 jointly-sponsored pension plans (JSPPs).

Over the last number of years, both the number of DB plans in Ontario and percentage of Ontario workers with membership in DB plans have been on the decline. In particular, over the last decade, the number[1] of plans included in the Financial Services Commission of Ontario's (FSCO) annual *Report on the Funding of Defined Benefit Pension Plans in Ontario* has decreased by 25 per cent. In addition, over approximately the same period, the percentage of Ontarians covered by a DB plan has decreased from 29 per cent to 23 per cent. Finally, as noted in the 2015 *Ontario Long-Term Report*, some employers are following a global trend of switching from DB pension plans to defined contribution plans.

While there are many factors contributing to these trends, the 2008 global recession, the prolonged period of declining interest rates, and recent volatile asset returns have all highlighted the expense and complexity of sponsoring a DB pension plan. As a result, solvency funding has come under increased scrutiny and many stakeholders have called for reform.

In particular, the following concerns have been raised:

1. **Contribution Volatility:** For plans with significant exposure to equity markets, solvency funding may result in volatile contribution requirements because the liabilities are derived from long term bond yields which can change independently of equity returns. Contribution stability allows plan sponsors to more reliably plan the budgetary allocations required by their pension plans. If required contributions are not stable, plan sponsors may conclude they cannot afford the required contributions.

[1] This number differs from the total number of Ontario registered pension plans and excludes:
- Designated plans, as defined in the *Income Tax Act*.
- Plans where members are no longer accruing future DB or defined contribution benefits.
- Seven large public sector plans.
- Plans that have been wound up or are in the process of winding up.

2. **Procyclical Contribution Requirements:** An economic climate characterized by depressed asset values and low interest rates will generally result in higher solvency funding requirements, which can often occur at times when plan sponsors are already dealing with the negative effects of the economy.

3. **High Cost of Benefit Security:** Solvency funding assumes that a DB pension plan will wind up on a specified date; however, plan sponsors often view a pension plan as a long-term investment in their employees. Even for financially sound companies, large solvency deficiencies divert capital that could otherwise be invested in the business and may impede business transactions.

4. **Complexity and Lack of Transparency:** The current funding regime can be difficult to understand; plan beneficiaries are often unclear on the financial state of their pension and may believe, incorrectly, that their benefit is completely guaranteed. While the goal of Ontario's funding regime is to promote benefit security, it does not fully guarantee that there would be no possibility of benefit reductions when pension plans wind up as a result of an insolvent sponsor.

5. **Surplus Issues:** Large solvency contributions may later lead to a significant solvency surplus in the plan when market conditions (e.g., higher interest rates) change. Concerns over large surpluses may discourage sponsors from making more than the minimum required contributions or may even lead them to discontinue their plans.

In the current environment characterized by rapidly maturing DB pension plans, de-risking has become an important consideration for pension plan management. De-risking, and in particular, annuity purchase buyouts, are discussed in more detail later in this paper.

The temporary solvency relief provided by the government for DB pension plans in 2009 and 2012 helped to address some of the challenges associated with the economic conditions at the time. To some degree, the temporary relief has worked. According to FSCO, by the end of 2013, the solvency position of Ontario pension plans had improved significantly. While the solvency position has since deteriorated, it is still higher than the levels immediately after the 2008 global recession.

Ontario's Pension Funding Requirements

The PBA includes minimum funding requirements for pension plans registered in Ontario. The rules are intended to ensure a pension plan has sufficient assets to deliver the pension benefits on an ongoing basis and to protect pension benefits in situations that involve employer insolvency or bankruptcy.

Minimum funding rules are important because in the event an employer sponsor becomes insolvent with an underfunded DB pension plan, plan beneficiaries may not receive their full pension entitlement. While the likelihood of an employer becoming insolvent and having an underfunded DB pension plan in a given year is low, the impact of such an event, should it occur, on pension plan beneficiaries can be severe.

The PBA minimum funding rules include two types of funding valuations to determine contribution requirements and whether a DB pension plan is sufficiently funded.

- The first, called **going concern funding**, assumes that the pension plan sponsor continues indefinitely. The plan's normal cost, or the cost of the benefits earned under the plan in the year following the valuation date, is calculated on a going concern basis. Any going concern funding deficiencies must be eliminated through payments made over a period of 15 years, starting no more than one year after the valuation date.

  In order to calculate going concern funding requirements, an actuary selects best estimate assumptions. In making these assumptions, it is a common practice to look at a plan's past experience, and make adjustments to reflect the actuary's own judgment about the future, with input from the plan sponsor. Actuarial standards provide actuaries with broad discretion; setting assumptions is a subjective process.

  In any actuarial valuation, the most important assumption is the interest rate assumption. For a going concern valuation, the interest rate is generally based on the assumed long-term average return of the pension fund.

- The second funding valuation, called **solvency funding**, is intended to calculate the funding required to pay for benefits if the plan were to wind up on the valuation date. Any funding deficiencies are to be eliminated through payments made over five years, starting no more than one year after the valuation date. To determine solvency funding requirements, an actuary has less discretion in selecting assumptions and must use interest rates based on long-term bond yields. A solvency valuation is an objective assessment of the level of benefit security exhibited by a pension plan at a given point in time and adds a degree of rigour to funding requirements.

Solvency valuations and going concern valuations tend to alternate as the driver of pension costs as conditions in financial markets change. For example, during much of the 1990s, when higher interest rates and stronger investment returns were prevalent, solvency funding requirements were quite low. If going concern valuations had not been in place, plans would have had smaller contribution requirements and therefore lower asset values. This would have left many plans in much worse shape when funding requirements were driven much more by solvency valuations after the year 2000. The requirement for dual valuations may explain why DB pension plans have performed better in Canada than their counterparts in other countries.

Prior to 1988, DB pension plans registered in Ontario were only subject to going concern funding requirements. In 1988, regulations under the PBA were introduced to require pension plans to meet solvency funding requirements in addition to going concern funding requirements – a significant change to Ontario's pension funding rules. Solvency funding was introduced primarily to improve funding standards and to provide an early warning of potential funding deficiencies that could jeopardize the security of members' benefits. At the time, going concern funding requirements permitted future indexation to be excluded from the calculation of liabilities. For consistency, Ontario also made the decision to exempt indexation from its new solvency funding requirements.

In 1992, the government modified solvency funding requirements to strike a better balance between funding requirements and benefit security. The amendments maintained the principle of solvency valuation as an important protection for pension benefits, but allowed additional benefits payable on wind up (e.g., certain early retirement benefits) to be excluded from the solvency funding.

Other steps were taken to ease the impact of solvency funding requirements. Plan administrators were permitted to choose to "smooth" or average interest rates and assets over a period of up to five years when calculating solvency funding requirements. The choice could be used to minimize the plan's solvency funding obligations. In addition, the effective dates of actuarial valuations could be chosen at the discretion of the plan administrator, which could have the effect of reducing contribution requirements.

The importance of solvency funding was recognized in the 2008 Report of the Expert Commission on Pensions, *A Fine Balance*. In particular, the Expert Commission argued that, for Ontario DB SEPPs, there was a strong case for continuing the present funding rules (p. 74, Recommendation 4–13). However, the Report of the Expert Commission was written prior to the 2008 global recession and should be considered in light of the changed economic conditions experienced since its release, including the prolonged period of low long-term interest rates.

Despite the various modifications made to Ontario's solvency funding rules over the years, many plan sponsors have found solvency funding requirements particularly onerous since the 2008 economic downturn, compared to previous periods when equity returns were stronger and long term interest rates were higher.

Broader Public Sector (BPS)[2]

Unlike many other jurisdictions, the pension funding rules under the PBA are of general application to both private and public sector plans.

Employer-sponsored DB SEPPs are common in the BPS. As such, the same funding challenges faced by private sector pensions are also placing significant pressure on most BPS plan sponsors. For this reason, BPS plans were not precluded from the temporary solvency relief measures introduced in 2009. In addition, in 2011, the government provided further temporary solvency funding relief to Ontario's BPS in exchange for employers and employees exploring changes that would improve the long-term sustainability of their pension plans.

In 2011, the government permanently exempted six JSPPs in the BPS from solvency funding requirements, as recommended in the Report of the Expert Commission. While there are no stated criteria for exempting these JSPPs from solvency funding requirements, most of these plans are large MEPPs.

In 2012, the government indicated its support for the joint sponsorship model for Ontario's BPS pension plans. To that end, Bill 14, the *Building Opportunity and Securing Our Future Act (Budget Measures), 2014,* made amendments to the PBA to facilitate the transfer of assets from employer-sponsored DB SEPPs to JSPPs and allow employer-sponsored DB SEPPs to be merged with or converted to JSPPs. These legislative amendments, along with the final regulations, were proclaimed on November 1, 2015.

In a JSPP, plan members share responsibility for funding benefits, which could include the requirement to fund a going concern liability or solvency deficiency. Fundamental to the conversion of DB SEPPs to JSPPs has been the question of the solvency status of plans and funding requirements, since plan members must understand the funding responsibilities they are agreeing to assume.

While the focus of this solvency funding review is on funding rules for DB SEPPs, the implications of any changes in this area may extend more broadly to other types of plans. In light of this, the government is seeking feedback from all plans on potential changes in DB pension plan funding requirements.

---

[2] This term is intended to apply to "Public sector pension plans" as defined under subsection 1(5) of the PBA. Note that this would include plans sponsored directly by the government.

Pension Benefits Guarantee Fund (PBGF)

In 1980, the Ontario government established the Pension Benefits Guarantee Fund (PBGF), which is intended to ensure that a minimum pension benefit level will be paid to members in the event of employer insolvency. With a few exceptions, members of DB SEPPs are covered by the PBGF, which protects the first $1,000 of a plan beneficiary's monthly pension.

The PBGF is administered by FSCO and is funded by assessments paid by employer sponsors of eligible DB pension plans. While the PBGF generally has had sufficient assets to fulfill its obligation to protect the first $1,000 of a retiree's monthly pension, there have been some instances where the government has provided financial assistance to the PBGF in the form of a loan or a grant to ensure the PBGF was able to satisfy claims.

The PBGF is unique to Ontario; no other jurisdiction in Canada has an equivalent program. However, it is important to note that the PBGF's parameters, including the $1,000 guarantee were established in 1980 and based on a system of funding rules which were developed over 25 years ago.

Given the importance of the PBGF to benefit security, any reforms to Ontario's funding rules should consider the future role of the PBGF, the level of benefit guarantee and how the assessments supporting the operation of the fund would be determined.

Solvency Funding Review Objectives

As noted in the 2016 Budget, the government recognizes that this review should lead to the development of a balanced set of solvency funding reforms and take into account the interests of pension stakeholders. The following discussion is intended to articulate the various objectives that the solvency funding review is attempting to balance.

Benefit Security

Pension benefits are a form of deferred compensation. For those with the opportunity to participate, a DB plan is an integral part of their retirement savings plan. A pension benefit is considered fully secure if the pension plan has sufficient assets to ensure its payment. Funding requirements should play an important role in providing individuals who have accrued benefits while working with a level of benefit security. Solvency funding is generally considered the most effective way to protect accrued pension benefits. As indicated above, a limited level of protection of pension benefits for some plan beneficiaries has been provided by the PBGF.

Affordability & Sustainability

To the extent possible, a funding framework should be designed to make contributions to pension plans affordable and to ensure contributions made to the plan will be sufficient to pay out accrued benefits over the long-term.

From the sponsor's perspective, the pension plan can be considered unaffordable if the required contributions place significant pressure on the business. Such pressure can weaken the plan sponsor's commitment to the pension plan. A pension plan is sustainable if, over the long term, it has sufficient assets to meet its obligations. This requires sufficient funding, but if a sponsor considers contribution requirements to be unaffordable, the plan may not be sustainable.

The actual cost of a pension plan depends on the level of benefits the plan pays, the amount of investment and administrative expenses paid by the plan, and the investment income earned on the plan's assets. The cost of a pension plan can be reduced only by lowering benefit levels and expenses or increasing investment income. In DB plans, future accruals may be reduced, but the sponsor has an obligation to provide accrued benefits.

Pension Coverage

The government's goal is to strengthen retirement security for Ontarians. On June 20, 2016, the federal government and provinces, with Ontario playing a leadership role, reached a historic agreement-in-principle to enhance the Canada Pension Plan (CPP). Consistent with the current CPP, the enhanced CPP will, once fully implemented, be a mandatory public pension plan that will provide secure benefits that will be predictable, portable, indexed to inflation and paid for life.

In addition to mandatory savings programs, voluntary savings vehicles such as workplace pension plans are an important source of retirement income for Ontarians. Pension plans also contribute to the economic and social well-being of the province by investing their funds, increasing the purchasing power of pension beneficiaries, and reducing the reliance of older Ontarians on tax-supported income supplements and needs-related, in-kind benefits.

Consideration should be given to how to encourage current DB plan sponsors to maintain existing workplace pension plans as well as whether it is possible to encourage employers to establish new workplace pension plans. However, increasing or maintaining pension coverage by impairing benefit security may not be desirable. Weaker legislated funding requirements also translate to increased risk for the PBGF, an area of interest to the government.

The reform proposals contained in this paper recognize that maintaining the voluntary employment pension system will depend on the ability of such a system to respond to the changing needs of employers and employees. This involves the competing objectives of providing adequate benefits for plan beneficiaries and appropriate funding rules for plan sponsors.

Transparency

Transparent funding rules are important for all stakeholders for different reasons. Clear funding obligations allow plan sponsors to understand their obligations and may reduce regulatory burden. Reduced complexity also better positions plan beneficiaries to understand the state of their pension plan, to assess the risk that may exist, and to make informed decisions.

Any reform measures undertaken should strive to increase the transparency of the funding rules to all interested parties.

Balancing Stakeholder Interests

A robust regulatory regime should balance the often competing interests of DB pension plan stakeholders. For example:

- **Active employees** are concerned with their plans' providing sufficient retirement income, the ease with which their benefits can be transferred from one employer plan to another and their continued employment and corresponding wage levels.
- **Retirees** are concerned with the financial strength of their plan and its ability to continue to provide pensions that maintain their purchasing power.
- **Former members** are concerned with their plan's ability to provide sufficient retirement income as well as purchasing power when they start receiving a pension at a future date.
- **Employer sponsors** are concerned with the cost of providing pension benefits and the rules governing how that cost must be met.

Various professionals, including actuaries, accountants, administration professionals, and pension lawyers have an interest in the regulatory regime within which they practice. Input from these groups is important to ensure that the new funding regime does not cause concerns from an actuarial, legal, or accounting perspective.

The objectives outlined above should be balanced against each other in developing any package of funding reforms. For example, relaxing solvency funding requirements may reduce benefit security for members, but concerns of sponsors about the current requirements may reduce DB plan coverage, which is also undesirable. This consultation is intended to encourage stakeholders to comment on ways to balance these varied interests.

Approaches and Options for Solvency Funding Reform

There are numerous options to reforming Ontario's funding framework for DB plans. This section consolidates the possible options into two general approaches:

A. Maintaining the requirement to fund on both going concern and solvency bases, while modifying solvency funding requirements.

B. Enhancing going concern funding requirements while eliminating current solvency funding requirements.

Each approach is described in detail below. Under each approach, there are a number of options; these are not intended to be mutually exclusive. The paper attempts to outline some of the potential benefits of each option without indicating a preferred approach or option(s).

At the end of this section, additional reform measures to enhance benefit security are considered. These measures could be put in place in conjunction with any of the funding reforms outlined in the paper.

Approach A – Modified Solvency Funding Rules

The underlying objective of solvency funding – to ensure a pension plan has sufficient assets to pay the benefits accrued in the event an employer sponsor becomes insolvent – is sound. However, as discussed earlier, the current economic conditions have highlighted the practical challenges to solvency funding.

Approach A maintains the principle of solvency funding for DB plans and considers possible modifications to existing requirements to address issues identified by stakeholders, including the current economic reality of prolonged low long-term interest rates. This approach generally assumes that existing exclusions from solvency funding (e.g., indexation) would remain in place.

Options for Modifying Solvency Funding Rules

It may be desirable to implement one or a combination of the following options in order to balance their impacts and the varied interests of stakeholders.

Option 1: Average Solvency Ratios

Description

In 2010, the federal government modified its solvency funding regime, requiring pension plans to fund a deficiency derived from an average solvency ratio as opposed to a solvency deficiency identified in any one year. In addition, valuation reports for federally registered pension plans are required to be filed on an annual basis unless the plan is very well funded (i.e. the solvency ratio is 120 per cent or greater). The average solvency ratio is not to be used for other purposes (e.g., disclosure in the annual member statements).

Under this option, a pension plan would calculate the average solvency ratio over three years. The average solvency ratio and the solvency liabilities on the valuation date would then be used to calculate the deficiency to be funded. One fifth of this deficiency would be required to be funded each year. A variation on this method would be to permit plan sponsors to fund according to the lower of the average solvency ratio and the actual solvency ratio on the valuation date.

Rationale

Using average solvency ratios or the lower of the average solvency ratio and the actual solvency ratio on a valuation date would result in less volatile contribution requirements, a significant concern for plan sponsors. To the extent that contribution volatility causes sponsors to close their plans, this option may encourage plan sponsors to continue their DB plans. The use of average solvency ratios would serve to moderate the impact of fluctuations in asset values and interest rates on solvency payments.

This option also enhances transparency by ensuring that all pension plans are funded using the same methodology and plan administrators are not able to employ different methodologies, depending on which results would produce lower solvency funding contributions.

Option 2: Lengthened Amortization Period

Description

The PBA currently requires solvency deficiencies to be amortized over five years. The period of time over which solvency deficiencies must be amortized could be lengthened (e.g., to 10 years).

Rationale

Increasing the amortization period would both reduce the size of solvency payments for underfunded pension plans and moderate volatility.

Option 3: Consolidation of Solvency Deficiencies

Description

Under the current rules, if a plan has a solvency deficiency at a valuation date, a schedule is established and the deficiency must be amortized over five years, beginning within one year from the valuation date. At the next valuation date, assuming a solvency deficiency is identified, another five year schedule is established. Instead of requiring plan sponsors to have different schedules of solvency payments, solvency deficiencies could be consolidated (i.e. "fresh start") and re-amortized at each valuation.

Rationale

Allowing for a "fresh start" at each valuation date would increase transparency by simplifying Ontario's funding rules, making it easier to understand how pension plans are funded. Similar to Option 2, it would also reduce the size of solvency payments for underfunded pension plans and moderate volatility, addressing concerns of plan sponsors.

Option 4: Funding a Percentage of the Solvency Liability

Description

Rather than targeting full funding on a solvency basis, the target could be reduced from 100 per cent to a certain percentage of the solvency liability, reducing solvency payments.

To mitigate the effects of decreased benefit security associated with this option, the $1,000 guarantee provided through the PBGF could be increased. Adjustments would have to be made to the PBGF assessment formula to reflect the larger role the PBGF would be expected to play. However, because the PBGF pools risk, the higher PBGF assessment would likely result in a reduction to the total pension expenditure for the sponsor.

Rationale

This option would address the sponsors' concerns regarding large solvency payments while continuing to provide a degree of benefit security with a link to solvency funding, in a transparent manner.

Increasing PBGF coverage would allow employer sponsors to pool the risk of insolvency among many employers, instead of each having to bear the risk separately. Given that few employers are at risk of insolvency at a particular time, this may provide benefit security while moderating employer contributions.

Option 5: Solvency Funding for Certain Benefits Only

Description

Under this option, normal retirement benefits would be funded on a going concern basis only.

As in Option 4, in order to maintain benefit security in the absence of solvency funding, the guarantee provided by the PBGF could be increased to cover a larger proportion of a pension benefit (i.e., increase the $1,000 PBGF guarantee). Plans offering certain additional benefits, such as subsidized early retirement benefits, could be required to fund such benefits on both going concern and solvency bases. Expanding the PBGF guarantee for only normal retirement benefits would prevent plans with less generous benefits from subsidizing those with richer benefits.

An alternative to this option would be to require the normal retirement benefits to be funded on both going concern and solvency bases. The additional benefits would be funded on a going concern basis only, with additional benefit security provided by the PBGF.

Rationale

This option provides an opportunity to lower contribution volatility and costs for sponsors while pooling risks that DB sponsors face. These impacts would increase the affordability and sustainability of their plans while maintaining a high degree of benefit security for plan beneficiaries.

Option 6: Solvency Reserve Accounts (SRAs)

Description

The intent of solvency funding is to protect against the short-term risk of an underfunded plan winding up with an insolvent employer. If the solvency contributions that were made to reduce this risk are no longer needed because of favourable experience, it may be possible to allow the sponsor to withdraw some surplus through the use of SRAs.

An SRA is a separate account within a pension plan fund established to hold payments made in respect of a solvency deficiency.

Before such withdrawals would be permitted, a sufficient level of surplus would be needed so that future experience losses would be less likely to put benefits at risk.

With the consent of the Superintendent of Financial Services, employer withdrawals up to a prescribed maximum could be made from the SRA when the solvency position exceeded a certain threshold in excess of 100%. These employer withdrawals could be made irrespective of a plan's provisions.

Rationale

Plan sponsors have expressed concern over large surpluses that could result from high solvency contribution requirements. SRAs address this concern by permitting surplus amounts, subject to certain restrictions, to be withdrawn. This option also balances stakeholder interests by addressing plan sponsors' concerns while maintaining the benefit security provided by solvency funding.

Option 7: Letters of Credit (LOCs)

Description

Currently in Ontario, LOCs obtained from a financial institution can be used to cover solvency special payments for up to 15% of solvency liabilities. A higher limit on the use of LOCs could be considered.

Rationale

In effect, a LOC is a promise to pay the fund an agreed sum in certain circumstances, such as if the plan sponsor fails to renew the LOC prior to its expiration date or fund a deficit on plan wind up. LOCs, while expensive to obtain, are similar to SRAs in that they balance stakeholder interests by addressing sponsor concerns regarding large contribution requirements while maintaining the benefit security provided by solvency funding. In addition, for sponsors who prepare financial statements in accordance with international accounting standards, LOCs could reduce the impact of minimum funding requirements on accounting disclosures.

Questions for Consideration

1. What are the advantages and disadvantages of maintaining but modifying solvency funding requirements?

2. Which option or combination of options would be most effective in balancing the different interests of plan sponsors, unions, members and retirees?

3. Is there an appropriate solvency funding level below 100% which could be required? For example, should pension plans only be required to fund on a solvency basis to 80%?

4. If solvency funding requirements are modified, what changes to the PBGF would help maintain benefit security without placing onerous requirements on plan sponsors?

5. If solvency funding requirements are maintained in a modified way, what would be an appropriate limit on the use of LOCs?

Approach B – Eliminate Current Solvency Funding Rules and Strengthen Going Concern Funding

Some stakeholders have expressed concerns with the premise of solvency funding; that is, to fund a pension plan assuming the pension plan will wind up on the valuation date.

Going concern funding assumes a pension plan will continue indefinitely. Sponsors of DB pension plans often view a pension plan as a long-term investment in their employees and see going concern funding as a more appropriate funding methodology. In addition, stakeholders have expressed particular concern with the volatile and procyclical nature of solvency funding.

It should be noted that while going concern funding is based on accepted actuarial principles, it can be a confusing concept and frequently misunderstood. Statements such as "a plan is fully funded on a going concern basis" may create a misconception among plan beneficiaries that the accrued benefits are secure even if the plan sponsor were to become insolvent. The going concern liability, even if strengthened, does not represent the real cost of paying out the promised benefits for plan beneficiaries at a given time. For these reasons, eliminating solvency funding requirements should be accompanied by strengthened going concern funding requirements.

Approach B considers relying on strengthened going concern funding requirements for DB pension plans as the basis for establishing contributions requirements. An enhanced going concern approach to funding would reduce the financial burden on many plan sponsors as well as result in less volatility. To the extent that plan sponsors are closing DB plans due to cost and volatility, an enhanced going concern approach would encourage current plan sponsors to maintain their existing workplace pension plans.

Solvency valuations could continue to play a role with respect to transparency and disclosure, given such valuations provide valuable information to the regulator and plan beneficiaries; plans could continue to be required to provide solvency valuations and disclose transfer ratios in all filed valuation reports and perhaps more.

Options for Enhanced Going Concern Funding

The following measures could be considered to enhance going concern funding requirements. Similar to Approach A, it may be desirable to implement one or a combination of the following options in order to balance the varied interests of stakeholders.

Option 1: Require a Funding Cushion (Provision for Adverse Deviation)

Description

In the absence of solvency funding, one way to strengthen going concern funding is to require the funding of a cushion, also referred to as a reserve or Provision for Adverse Deviation (PfAD). A PfAD is a required asset amount in excess of a plan's liabilities that must be funded before the plan may take action (e.g., benefit improvements) that could weaken the plan's funded position. A PfAD is typically expressed as a percentage of a plan's liabilities.

While a PfAD would reduce the risk of a plan being underfunded in a wind-up, a PfAD is not a replacement for or equivalent to solvency funding.

The PfAD could be calculated based on the extent to which a plan's investment strategy is inconsistent with its demographic profile. This would link a plan's funding requirements to the investment risk to which it is exposed. For example, a mature plan with a large proportion of retirees and greater equity exposure would exhibit a high degree of asset/liability mismatch and therefore require a greater PfAD.

Other factors that could be used to calculate the PfAD could include:

- The benefit provisions (e.g., a final average plan or one with generous early retirement benefits may require a larger PfAD than a flat benefit plan or one with modest early retirement benefits);
- Plan maturity and demographics;
- The plan's interest rate assumptions (e.g., the PfAD could be increased if an aggressive rate of return relative to some benchmark is assumed); and
- The financial strength of the sponsoring entity.

A PfAD could be used to determine:

- When plans might make changes, by requiring a plan to be more than fully funded before allowing any action that could weaken its funded position (e.g. reduce contributions, increase benefits, or withdraw surplus).
- The filing frequency of actuarial reports. For example, a plan could be required to file annual valuations if its assets were less than its liabilities plus its PfAD; otherwise the plan could file valuation reports once every three years.

Rationale

A PfAD can increase benefit security by increasing the assets accumulated in a pension plan, mitigating risks associated with benefit reductions on wind up due to sponsor insolvency. Currently such risks are managed through solvency funding requirements.

A PfAD can also protect plan beneficiaries against the risks associated with actuarial assumptions, benefit improvements, and investment strategies.

Option 2: Shortened Amortization Period

Description

Special payments to fund any going concern unfunded liability could be amortized over a period shorter than the current 15 years.

Rationale

A shortened amortization period would increase contribution requirements and thereby help to improve benefit security.

Option 3: Restrictions on Return on Investment Assumptions

Description

As discussed earlier, actuaries have considerable discretion when selecting assumptions and methods for a going concern valuation of a DB pension plan. The interest rate is typically the most significant assumption in determining the liabilities and current service cost in a going concern valuation.

Regulations could require the Superintendent to periodically set a maximum best estimate interest rate. The best estimate rate chosen by the actuary would not be permitted to exceed this maximum rate.

The approach used by the Superintendent to set the maximum interest rate should not be unduly influenced by short-term financial market volatility and interest rate fluctuations underlying the pricing of fixed income securities. Also, the maximum interest rate could apply to a plan with investments that include no more than a certain percentage of fixed income securities. For plans with a greater exposure to fixed income securities, the maximum interest rate may have to be decreased accordingly.

Another option for determining funding requirements would be to use an interest rate employed in calculating pension obligations on an accounting basis. Under international accounting standards, pension obligations must be valued with an interest rate based on high-quality long-term corporate bonds. This rate could be used to help determine the interest rate for valuing going concern liabilities on a funding basis.

Rationale

Restrictions on the interest rate assumption would be a transparent way to prevent overly aggressive assumptions relating to the rate of return on investments that can be expected by a plan. Requiring more conservative assumptions also enhances benefit security by preventing plan sponsors from relying too heavily on investment returns in order to fund the accrued benefits.

Option 4: Solvency Trigger for Enhanced Funding

Description

Under this approach, solvency could continue to play a role in funding by using a plan's solvency position to determine whether additional funding is needed or if the plan would be allowed to take an action that would weaken its funded position. For example, if a plan fell below a certain threshold of solvency (e.g., 80%), additional funding requirements such as a lump sum contribution could be triggered.

Rationale

Requiring certain actions to be taken if a plan's solvency position falls below a prescribed threshold is an acknowledgement that, irrespective of the funding method, ensuring a specified level of benefit security is paramount. Requiring measures to be taken if a plan were to fall below the threshold would also improve transparency for pension stakeholders.

Option 5: Enhance the PBGF

Description

In the absence of solvency funding, it is likely that plans would have lower asset values on wind up. In the event of a wind-up involving an insolvent employer, the PBGF could be required to fund larger claims. As a consequence, PBGF assessments would likely need to be increased in order to reduce the risk to the PBGF.

The PBGF assessment calculation could also be more sophisticated. For example, consideration could be given to not only the funded status of the plan, but also to other factors such as the extent to which a plan's investment strategy is consistent with its demographic profile. For example, a mature plan with a large proportion of retirees and greater equity exposure would exhibit a high degree of asset/liability mismatch and therefore require a larger assessment to be paid to the PBGF.

The current level of protection provided by PBGF could also be increased. However, coverage could not be increased without appropriately increasing PBGF assessments.

Rationale

Increased assessments to fund the PBGF as well as increased coverage by the PBGF would increase benefit security, which would be particularly beneficial in the absence of solvency funding. In addition, this option allows plan sponsors to pool the risk of employer insolvency among many employers.

An enhanced going concern funding regime complemented by increased PBGF coverage balances stakeholders' interests and could reduce overall costs for plan sponsors, potentially encouraging current plan sponsors to maintain their existing workplace pension plans.

Questions for Consideration

1. What are the advantages and disadvantages of eliminating solvency funding requirements and introducing enhanced going concern funding requirements?

2. Which combination of the options described above would best moderate contribution levels and volatility while providing some degree of benefit security?

3. Are there any other restrictions that could be placed on actuarial assumptions (e.g., salary projection rate for final average plans or mortality assumptions)?

4. Are there other measures to enhance going concern requirements that should be considered?

5. Should a plan's funding requirements be linked through a PfAD to their investment strategies to prevent excessive risk taking?

Additional Complementary Reform Measures

As noted earlier, in a balanced package of reforms, there may be several additional changes that could be introduced along with either Approach A or B described above. A number of these measures would help to balance reforms that could reduce the security of plan beneficiaries' benefits.

1. Annual Valuation Reports

Description

Currently, subject to certain limitations, plan administrators have discretion to choose the effective dates of actuarial valuations which can affect contribution requirements. In addition, pension plans with a solvency funding ratio of greater than 85% are only required to file valuations every three years.

It may be desirable to require pension plans to file actuarial valuation reports annually on consistent dates, irrespective of the funded position of the plan disclosed in the last filed report. Actuarial reports could be required to disclose both going concern and solvency financial positions regardless of any reforms made to the existing funding rules.

Rationale

Establishing set annual valuation dates would increase transparency as well as benefit security. While pension plans that are more than 85% funded on a solvency basis are permitted to file valuations every three years, they may also choose to file a valuation report earlier in order to coincide with favourable economic conditions so as to reduce contribution requirements.

Annual valuations would also provide plan beneficiaries with more regular and accurate information regarding the funded status of their plan.

2. Written Policies

Description

Currently, all pension plans are required to establish and file with FSCO a Statement of Investment Policies and Procedures (SIP&P). Pension plans could also be required to establish and file with FSCO policies related to governance and funding.

Rationale

In addition to promoting benefit security by requiring a disciplined approach to funding, these policies would also provide transparency to plan beneficiaries regarding the governance and operation of their plan.

3. Commuted Values

Description

Commuted value (CV) refers to the lump sum value today of an individual's future pension payments. Standards established by the Canadian Institute of Actuaries prescribe the actuarial methods and assumptions for calculating the CV. In particular, they set out the interest rate and mortality assumptions necessary to do these calculations.

Under the PBA, when an individual terminates employment, there is a requirement to pay 100% of plan member's CV. In order to protect the benefits of the remaining members, the CV could be modified to provide an appropriate termination benefit that balances the best interests of the plan beneficiaries with individuals' portability rights.

For example, the CV could be modified to pay individuals electing to leave the plan an amount that is more reflective of the underlying risk associated with the pension benefit. This could be accomplished by appropriately increasing the interest rate used to calculate the CV.

Rationale

Modifying the CV payout rules would have a direct impact on costs and could directly impact the affordability of plans for sponsors. This option could also help balance the interests of retirees and non-retirees.

4. Restrictions on Contribution Holidays and Benefit Improvements:

Description

The Expert Commission on Pensions proposed that restrictions on contribution holidays and funding benefit improvements be introduced to help strengthen pension plan funding. The government consulted on specific proposals regarding contribution holidays and funding benefit improvements in 2015, but has not adopted any new regulations pending the outcome of the solvency funding review.

Currently, contribution holidays are only permitted if a plan has sufficient surplus on a going concern basis and if there is no solvency deficiency. Contribution holidays could be permitted only if a PfAD (on a going-concern or solvency basis) is fully funded. Furthermore, plan administrators could be required to file annual statements confirming eligibility to continue a contribution holiday.

Restrictions could also be put in place regarding plans' ability to improve benefits. At present, there are no restrictions on benefit improvements beyond the regular funding requirements. In situations where a plan's going concern funded ratio is less than a given percentage, there could be a requirement to immediately fund the portion of a benefit improvement below the threshold and the balance over a period shorter than the amortization period for other funding deficiencies.

Rationale

Restrictions on contribution holidays would prevent plan sponsors from continuing contribution holidays when funded positions have deteriorated since the last filed actuarial valuation report. Enhanced funding requirements for benefit improvements would promote benefit security by making sure that such improvements would not erode a plan's funded position. It would also increase transparency in the collective bargaining process by requiring the more immediate recognition of the cost of a negotiated benefit increase.

5. Administrator Discharge for Annuity Buyouts

Description

Annuity buyouts refer to situations where a plan administrator makes a one-time payment to an insurance company in respect of one or more plan beneficiaries in return for an annuity. By purchasing annuities, plan administrators are able to transfer certain responsibilities of the plan, including the payment of pension benefits, to the insurance company.

Currently, plan administrators retain the pension obligations of the beneficiaries for whom they purchase buyout annuities, unless members elect to transfer their CV out of the plan or annuities are purchased during a plan wind up. These obligations include continued payments to the PBGF, disclosure requirements, and responsibility to make pension payments in the event the insurer becomes insolvent. As such, these continuing obligations make buy-out annuities less attractive to plan administrators.

In order to allow for wider use of buyout annuities, the government could amend the PBA to discharge plan administrators from their obligations if the administrator purchases annuities from insurance companies and certain conditions are met.

Rationale

Annuities provided by insurance companies could provide greater benefit security for the plan beneficiaries. This is because insurance companies have more stringent capital requirements than pension plans. By the nature of their business, they are better focused on managing risk, and in the event of an insurer's insolvency, annuity insurance, through Assuris (an organization that provides specified levels of protection against loss of benefits due to the financial failure of a member Canadian insurance company), provides greater coverage than the PBGF.

Providing a discharge for plan administrators from their obligations if the administrator purchases annuities from insurance companies and certain conditions are met would allow plan administrators to pursue de-risking strategies by transferring certain funding risks associated with interest rates and investment returns to insurance companies. This could mitigate contribution volatility.

6. The PBGF

Description

As described under Approaches A and B above, changes to PBGF coverage could be pursued regardless the Approach selected. The modification to solvency funding rules under both Approach A and B could result in plans having fewer assets to pay benefits. To maintain benefit security, level of benefit guaranteed by PBGF could be increased from the current $1,000. A corresponding adjustment to the PBGF assessment formula would be required to protect the PBGF.

Rationale

Simultaneously reducing funding requirements and increasing the level of benefit guaranteed by the PBGF (in conjunction with adjustments to the PBGF assessment formula) would allow employers to maintain benefit security and reduce overall costs by pooling the risk of employer insolvency among many employers. This may promote, or at least help maintain, the number of individuals covered by a DB pension plans.

Questions for Consideration

1. Which of these measures would be appropriate to help provide balance to a package including one of the two approaches described above? What other measures, if any, could be considered in a balanced reform package?

2. To what extent would annual valuations, and funding and governance policies help to protect benefits if solvency funding requirements are modified or removed?

3. Should restrictions be placed on annuity buyouts that result in a discharge to the administrator? For example, before a discharge is given should a certain funded level be attained? Should buyouts be for retirees and/or former members only?

4. Should recipients of buyout annuities retain their membership status for the purpose of sharing a surplus from a future wind-up?

5. What changes to the PBGF would be needed if solvency funding is replaced by enhanced going concern requirements?

6. Would employers be willing to pay higher PBGF assessments for lower funding requirements?

Next Steps

The consultation paper solicits written feedback from stakeholders, but is not intended to be the only mechanism of consultation. Consultations with the SRG, other stakeholders and subject matter experts will continue throughout the summer and fall.

It is anticipated that any proposed funding reforms will be made available for public feedback in fall 2016. Following stakeholder feedback, necessary legislative or regulatory amendments would be drafted.

Appendix – Solvency Funding Review – Principles and Options

Guiding Principles

1. Benefit Security
2. Affordability and Sustainability
3. Pension Coverage
4. Transparency
5. Balancing Stakeholder Interests

Index of Options

Adjustments to Actuarial Methods, Assumptions and Definitions

1. Provision for Adverse Deviations (see Approach B, Option 1)
2. Prescribe interest rate assumption and possibly other assumptions & methods (see Approach B, Option 3)
3. Average solvency ratio (see Approach A, Option 1)
4. Basis used to calculate commuted values (see Additional Measures, Option 3)

Funding Options

1. Modified amortization period for solvency deficiencies including "fresh start" (see Approach A, Option 2 and Approach A, Option 3)
2. Modified amortization period for going concern unfunded liabilities (see Approach B, Option 2)
3. Conditions for contribution holidays (see Additional Measures, Option 4)
4. Exemption from funding on a solvency basis for certain benefits (see Approach A, Option 5)
5. Funding a percentage of the solvency liabilities (see Approach A, Option 4)
6. Solvency trigger for enhanced funding (see Approach B, Option 4)

Additional funding required for benefit improvements (see Additional Measures, Option 4)

1. Increase limit for Letters of Credit (see Approach A, Option 7)
2. Solvency Reserve Account (see Approach A, Option 6)
3. Administrator discharge for annuity buyouts (see Additional Measures, Option 5)

Modification to the Pension Benefits Guarantee Fund (PBGF)

1. Increase PBGF premium (see Approach B, Option 5 and Additional Measures, Option 6)
2. Increase $1,000 PBGF cap (see Approach B, Option 5 and Additional Measures, Option 6)

Enhanced Disclosure Requirements

1. Annual valuation reports (see Additional Measures, Option 1)
2. Written policies (see Additional Measures, Option 2)

Glossary

Accrued pension benefit

Amount of pension in a defined benefit pension plan that a member or retired member is entitled to receive. The pension being paid to a retired member is the retired member's accrued pension. A member's accrued benefit is the amount of pension the member would receive based on the years of plan membership at a given date.

Actuarial valuation report

A report prepared by an actuary that determines the financial status of a pension plan at a certain date of calculation and the required contributions for a period of time after the date of calculation. Defined benefit pension plans are required to file a valuation report at least once every three years with the regulator. For most defined benefit pension plans, annual valuation reports are required if the solvency funding level falls below a certain threshold.

Commuted value

The lump sum value of a member's accrued benefits as specified by regulation. In a defined benefit plan, the commuted value of a member's benefits is calculated according to standards set by the Canadian Institute of Actuaries.

Contribution Holiday

The use of surplus to reduce required contributions for normal costs by employers and/or members.

Defined benefit pension plan

A pension plan that provides its members with a pension on retirement given by formula, usually based on a flat dollar benefit per year of service or a percentage of salary and length of service.

Defined contribution pension plan

A pension plan in which members accumulate savings in investment accounts that are later used to provide income in the member's retirement. The monthly pension is unspecified.

Going concern funding

This method of pension valuation for a defined benefit plan assumes the plan will continue indefinitely and its assets must be sufficient to meet its liabilities (i.e., the pension benefits) as they come due in the future.

Indexation

In relation to pensions, this is the amount that the monthly pension payment may be increased from one year to the next to provide inflation protection. If indexation is provided, it is often based on the increase in the cost of living as calculated by Statistics Canada.

Jointly Sponsored Pension Plan (JSPP)

A pension plan in which the employer(s) and the members must share responsibility for the funding – including funding for any shortfalls – and governance. JSPPs may be either a MEPP or a SEPP. A JSPP must provide defined benefits to plan members. Benefit reductions, except in wind-up situations, are prohibited. The regulations to the PBA list certain JSPPs that are exempt from solvency funding requirements.

Multi-employer pension plan (MEPP)

A pension plan to which two or more non-affiliated employers make contributions. Members are employed by one of the participating employers, which are usually in the same economic sector.

Normal cost

The ongoing cost to fund the benefits that members are accruing in a pension plan, calculated by an actuary.

Pension Benefits Act (PBA)

The Ontario legislation that establishes minimum standards for registered pension plans.

Pension Benefits Guarantee Fund (PBGF)

A special fund that was established by the Ontario government in 1980 to "top up" the first $1,000 per month of certain defined benefits for members in Ontario if the plan is wound up and funding requirements cannot be met (e.g., the employer sponsor is bankrupt).

Single-employer pension plan (SEPP)

A pension plan covering workers employed by a single employer or by employers that are affiliated.

Specified Ontario Multi-Employer Pension Plan (SOMEPP)

Until August 31, 2017, a MEPP can be a SOMEPP and, as a consequence, have a solvency funding exemption, if the administrator files an election and the MEPP satisfies criteria in s. 6.0.2 of Regulation 909 under the PBA.

Solvency funding

This method of valuation for a defined benefit plan assumes the plan is being wound up as of the valuation date so that its assets will have to be used immediately to meet its existing liabilities. Solvency funding requirements are meant to help ensure that the plan assets could fund all liabilities if the plan were to wind up.

Surplus

Plans are considered to be in "surplus" if they have more assets than required to meet their anticipated obligations on both a going concern and a solvency basis, based on actuarial valuation reports. It should be noted that the amount of surplus remains "notional" (determined by actuarial assumptions) until a plan is actually wound up, at which time, the surplus, if any, is crystallized.

Target benefit pension plan

A pension plan whose goal is to provide its members with a specified monthly pension on retirement, but is funded with fixed contributions and can address funding shortfalls by reducing accrued benefits.

Tab 2

Rogers Communications Incorporated *Appellant*

v.

Sandra Buschau, Sharon M. Parent, Albert Poy, David Allen, Eileen Anderson, Christine Ash, Frederick Scott Atkinson, Jaspal Badyal, Mary Balfry, Carolyn Louise Barry, Raj Bhamber, Evelyn Bishop, Deborah Louise Bissonnette, George Boshko, Colleen Burke, Brian Carroll, Lynn Cassidy, Florence K. Colbeck, Peter Colistro, Ernest A. Cottle, Ken Dann, Donna de Freitas, Terry Dewell, Katrin Dolemeyer, Elizabeth Engel, Karen Engleson, George Fierheller, Joan Fisher, Gwen Ford, Don R. Fraser, Mabel Garwood, Cheryl Gervais, Rose Gibb, Roger Gilodo, Murray Gjernes, Daphne Goode, Karen L. Gould, Peter James Hadikin, Marian Heibloem-Reeves, Thomas Hobley, John Iannantuoni, Vincent A. Iannantuoni, Ron Inglis, Mehroon Janmohamed, Michael J. Jervis, Marlyn Kellner, Karen Kilba, Douglas James Kilgour, Yoshinori Koga, Martin Kosuljandic, Ursula M. Kreiger, Wing Lee, Robert Leslie, Thomas A. Lewthwaite, Holly Li, David Liddell, Rita Lim, Betty C. Lloyd, Rob Lowrie, Che-Chung Ma, Jennifer MacDonald, Robert John MacLeod, Sherry M. Madden, Tom Makortoff, Fatima Manji, Edward B. Mason, Glenn A. McFarlane, Onagh Metcalfe, Dorothy Mitchell, Shirley C. T. Mui, William Neal, Katherine Sheila Nimmo, Gloria Paiement, Lynda Pasacreta, Barbara Peake, Vera Piccini, Inez Pinkerton, Dave Podworny, Doug Pontifex, Victoria Prochaska, Frank Radelja, Gale Rauk, Ruth Roberts, Ann Louise Rodgers, Clifford James Roe, Pamela Mamon Roe, Delores Rose, Sabrina Roza-Pereira, Sandra Rybchinsky, Kenneth T. Salmond, Marie Schneider, Alexander C. Scott, Inderjeet Sharma, Hugh Donald Shiel, Michael Shirley, George Allen

Rogers Communications Incorporated *Appelante*

c.

Sandra Buschau, Sharon M. Parent, Albert Poy, David Allen, Eileen Anderson, Christine Ash, Frederick Scott Atkinson, Jaspal Badyal, Mary Balfry, Carolyn Louise Barry, Raj Bhamber, Evelyn Bishop, Deborah Louise Bissonnette, George Boshko, Colleen Burke, Brian Carroll, Lynn Cassidy, Florence K. Colbeck, Peter Colistro, Ernest A. Cottle, Ken Dann, Donna de Freitas, Terry Dewell, Katrin Dolemeyer, Elizabeth Engel, Karen Engleson, George Fierheller, Joan Fisher, Gwen Ford, Don R. Fraser, Mabel Garwood, Cheryl Gervais, Rose Gibb, Roger Gilodo, Murray Gjernes, Daphne Goode, Karen L. Gould, Peter James Hadikin, Marian Heibloem-Reeves, Thomas Hobley, John Iannantuoni, Vincent A. Iannantuoni, Ron Inglis, Mehroon Janmohamed, Michael J. Jervis, Marlyn Kellner, Karen Kilba, Douglas James Kilgour, Yoshinori Koga, Martin Kosuljandic, Ursula M. Kreiger, Wing Lee, Robert Leslie, Thomas A. Lewthwaite, Holly Li, David Liddell, Rita Lim, Betty C. Lloyd, Rob Lowrie, Che-Chung Ma, Jennifer MacDonald, Robert John MacLeod, Sherry M. Madden, Tom Makortoff, Fatima Manji, Edward B. Mason, Glenn A. McFarlane, Onagh Metcalfe, Dorothy Mitchell, Shirley C. T. Mui, William Neal, Katherine Sheila Nimmo, Gloria Paiement, Lynda Pasacreta, Barbara Peake, Vera Piccini, Inez Pinkerton, Dave Podworny, Doug Pontifex, Victoria Prochaska, Frank Radelja, Gale Rauk, Ruth Roberts, Ann Louise Rodgers, Clifford James Roe, Pamela Mamon Roe, Delores Rose, Sabrina Roza-Pereira, Sandra Rybchinsky, Kenneth T. Salmond, Marie Schneider, Alexander C. Scott, Inderjeet Sharma, Hugh Donald Shiel, Michael Shirley, George Allen

Short, Glenda Simoncioni, Norm Smallwood, Gilles A. St. Dennis, Geri Stephen, Grace Isobel Stone, Mari Tsang, Carmen Tuvera, Sheera Waisman, Margaret Watson, Gertrude Westlake, Robert E. White, Patricia Jane Whitehead, Aileen Wilson, Elaine Wirtz, Joe Wuychuk, Zlatka Young and National Trust Company *Respondents*

and

National Trust Company *Appellant*

v.

Sandra Buschau, Sharon M. Parent, Albert Poy, David Allen, Eileen Anderson, Christine Ash, Frederick Scott Atkinson, Jaspal Badyal, Mary Balfry, Carolyn Louise Barry, Raj Bhamber, Evelyn Bishop, Deborah Louise Bissonnette, George Boshko, Colleen Burke, Brian Carroll, Lynn Cassidy, Florence K. Colbeck, Peter Colistro, Ernest A. Cottle, Ken Dann, Donna de Freitas, Terry Dewell, Katrin Dolemeyer, Elizabeth Engel, Karen Engleson, George Fierheller, Joan Fisher, Gwen Ford, Don R. Fraser, Mabel Garwood, Cheryl Gervais, Rose Gibb, Roger Gilodo, Murray Gjernes, Daphne Goode, Karen L. Gould, Peter James Hadikin, Marian Heibloem-Reeves, Thomas Hobley, John Iannantuoni, Vincent A. Iannantuoni, Ron Inglis, Mehroon Janmohamed, Michael J. Jervis, Marlyn Kellner, Karen Kilba, Douglas James Kilgour, Yoshinori Koga, Martin Kosuljandic, Ursula M. Kreiger, Wing Lee, Robert Leslie, Thomas A. Lewthwaite, Holly Li, David Liddell, Rita Lim, Betty C. Lloyd, Rob Lowrie, Che-Chung Ma, Jennifer MacDonald, Robert John MacLeod, Sherry M. Madden, Tom Makortoff, Fatima Manji, Edward B. Mason, Glenn A. McFarlane, Onagh Metcalfe, Dorothy Mitchell, Shirley C. T. Mui, William Neal, Katherine Sheila

Short, Glenda Simoncioni, Norm Smallwood, Gilles A. St. Dennis, Geri Stephen, Grace Isobel Stone, Mari Tsang, Carmen Tuvera, Sheera Waisman, Margaret Watson, Gertrude Westlake, Robert E. White, Patricia Jane Whitehead, Aileen Wilson, Elaine Wirtz, Joe Wuychuk, Zlatka Young et Compagnie Trust National *Intimés*

et

Compagnie Trust National *Appelante*

c.

Sandra Buschau, Sharon M. Parent, Albert Poy, David Allen, Eileen Anderson, Christine Ash, Frederick Scott Atkinson, Jaspal Badyal, Mary Balfry, Carolyn Louise Barry, Raj Bhamber, Evelyn Bishop, Deborah Louise Bissonnette, George Boshko, Colleen Burke, Brian Carroll, Lynn Cassidy, Florence K. Colbeck, Peter Colistro, Ernest A. Cottle, Ken Dann, Donna de Freitas, Terry Dewell, Katrin Dolemeyer, Elizabeth Engel, Karen Engleson, George Fierheller, Joan Fisher, Gwen Ford, Don R. Fraser, Mabel Garwood, Cheryl Gervais, Rose Gibb, Roger Gilodo, Murray Gjernes, Daphne Goode, Karen L. Gould, Peter James Hadikin, Marian Heibloem-Reeves, Thomas Hobley, John Iannantuoni, Vincent A. Iannantuoni, Ron Inglis, Mehroon Janmohamed, Michael J. Jervis, Marlyn Kellner, Karen Kilba, Douglas James Kilgour, Yoshinori Koga, Martin Kosuljandic, Ursula M. Kreiger, Wing Lee, Robert Leslie, Thomas A. Lewthwaite, Holly Li, David Liddell, Rita Lim, Betty C. Lloyd, Rob Lowrie, Che-Chung Ma, Jennifer MacDonald, Robert John MacLeod, Sherry M. Madden, Tom Makortoff, Fatima Manji, Edward B. Mason, Glenn A. McFarlane, Onagh Metcalfe, Dorothy Mitchell, Shirley C. T. Mui, William Neal, Katherine Sheila

Nimmo, Gloria Paiement, Lynda Pasacreta, Barbara Peake, Vera Piccini, Inez Pinkerton, Dave Podworny, Doug Pontifex, Victoria Prochaska, Frank Radelja, Gale Rauk, Ruth Roberts, Ann Louise Rodgers, Clifford James Roe, Pamela Mamon Roe, Delores Rose, Sabrina Roza-Pereira, Sandra Rybchinsky, Kenneth T. Salmond, Marie Schneider, Alexander C. Scott, Inderjeet Sharma, Hugh Donald Shiel, Michael Shirley, George Allen Short, Glenda Simoncioni, Norm Smallwood, Gilles A. St. Dennis, Geri Stephen, Grace Isobel Stone, Mari Tsang, Carmen Tuvera, Sheera Waisman, Margaret Watson, Gertrude Westlake, Robert E. White, Patricia Jane Whitehead, Aileen Wilson, Elaine Wirtz, Joe Wuychuk, Zlatka Young and Rogers Communications Incorporated *Respondents*

Nimmo, Gloria Paiement, Lynda Pasacreta, Barbara Peake, Vera Piccini, Inez Pinkerton, Dave Podworny, Doug Pontifex, Victoria Prochaska, Frank Radelja, Gale Rauk, Ruth Roberts, Ann Louise Rodgers, Clifford James Roe, Pamela Mamon Roe, Delores Rose, Sabrina Roza-Pereira, Sandra Rybchinsky, Kenneth T. Salmond, Marie Schneider, Alexander C. Scott, Inderjeet Sharma, Hugh Donald Shiel, Michael Shirley, George Allen Short, Glenda Simoncioni, Norm Smallwood, Gilles A. St. Dennis, Geri Stephen, Grace Isobel Stone, Mari Tsang, Carmen Tuvera, Sheera Waisman, Margaret Watson, Gertrude Westlake, Robert E. White, Patricia Jane Whitehead, Aileen Wilson, Elaine Wirtz, Joe Wuychuk, Zlatka Young et Rogers Communications Incorporated *Intimés*

INDEXED AS: BUSCHAU *v.* ROGERS COMMUNICATIONS INC.

Neutral citation: 2006 SCC 28.

File No.: 30462.

2005: November 15; 2006: June 22.

Present: McLachlin C.J. and Bastarache, LeBel, Deschamps, Fish, Abella and Charron JJ.

RÉPERTORIÉ : BUSCHAU *c.* ROGERS COMMUNICATIONS INC.

Référence neutre : 2006 CSC 28.

N° du greffe : 30462.

2005 : 15 novembre; 2006 : 22 juin.

Présents : La juge en chef McLachlin et les juges Bastarache, LeBel, Deschamps, Fish, Abella et Charron.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Pensions — Pension plan — Trust — Termination — Pension plan indicating that trust surplus to be distributed amongst remaining pension plan members in event of termination — Pension plan and trust agreement not providing for termination of trust by pension plan members — Whether members can rely on rule in Saunders v. Vautier to terminate trust — Whether recourse available to members under federal pension benefits standards legislation — Pension Benefits Standards Act, 1985, R.S.C. 1985, c. 32 (2nd Supp.), s. 29(2), (11).

The individual respondents are members of a pension plan ("Plan"). The Plan and the trust were

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Pensions — Régime de retraite — Fiducie — Cessation — Régime de retraite indiquant que, en cas de cessation, le surplus de la fiducie sera réparti entre les participants au régime de retraite restants — Régime de retraite et convention de fiducie ne prévoyant pas que les participants au régime de retraite peuvent mettre fin à la fiducie — Les participants peuvent-ils invoquer la règle de Saunders c. Vautier pour mettre fin à la fiducie? — Ont-ils un recours en vertu de la loi fédérale sur les normes de prestation de pension? — Loi de 1985 sur les normes de prestation de pension, L.R.C. 1985, ch. 32 (2e suppl.), art. 29(2), (11).

Les personnes intimées sont des participants à un régime de retraite (« régime »). Le régime et la fiducie

established in 1974 as a defined benefit plan funded solely by the employer for the benefit of employees of a company that RCI acquired in 1980. It provided that, in the event of termination, the surplus remaining in the trust was to be distributed amongst the remaining members, but neither the trust agreement nor the Plan provided, at any time, for termination of the trust by employees. The Plan developed a large actuarial surplus. In 1981, RCI amended the Plan so that any surplus funds remaining on termination would revert to RCI and, in 1984, it closed the Plan to new employees. RCI began taking contribution holidays the following year and was refunded $968,285 from the surplus. In 1992, it merged the Plan retroactively with other RCI pension plans. The Plan members initiated a first action against RCI and the Court of Appeal concluded (1) that the merger was valid but did not affect the existence of the Plan trust as a separate trust; and (2) that the members were at liberty to institute proceedings to terminate the trust based on the rule in *Saunders v. Vautier*, to the extent that it was applicable. According to that rule, the terms of a trust can be varied or the trust can be terminated if all beneficiaries of the trust, being of full legal capacity, consent. The court also concluded that the members retained the right to distribution of the surplus upon termination. Relying on the common law rule, the members initiated a second action and succeeded in obtaining order terminating the Plan. The Court of Appeal set aside a part of the chambers judge's decision, finding that a court did not have the power under the *Trust and Settlement Variation Act* to consent on behalf of contingent *sui juris* beneficiaries. The court found that, provided that all the required consents were obtained, the members will be at liberty to invoke the common law rule. It also found that RCI could not amend the Plan to permit the addition of new members. Since questions could arise concerning the "mechanics" of the termination, the trustee would have to satisfy itself that all the conditions and all statutory requirements had been met.

Held: The appeal should be allowed.

Per LeBel, Deschamps, Fish and Abella JJ.: The members of the Plan cannot invoke the rule in *Saunders v. Vautier* to terminate the trust. That rule is not easily incorporated into the context of employment pension plans. Such plans are heavily regulated. The *Pension Benefits Standards Act, 1985* ("*PBSA*") deals

des employés d'une compagnie dont RCI a fait l'acquisition en 1980 ont été établis en 1974 sous la forme d'un régime à prestations déterminées capitalisé uniquement par l'employeur. Ce régime prévoyait que, en cas de cessation, le surplus de la caisse en fiducie serait réparti entre les participants restants, mais la convention de fiducie et le régime n'ont jamais prévu que les employés pourraient mettre fin à la fiducie. Le régime en est venu à afficher un important surplus actuariel. En 1981, RCI a modifié le régime de manière à ce que tout surplus qui resterait au moment de la cessation lui revienne et, en 1984, elle a fermé le régime aux nouveaux employés. RCI a commencé à s'accorder des périodes d'exonération de cotisations l'année suivante et a obtenu le remboursement de la somme de 968 285 $ provenant du surplus. En 1992, elle a fusionné le régime rétroactivement avec d'autres régimes de retraite de RCI. Les participants au régime ont intenté une première action contre RCI et la Cour d'appel a conclu (1) que la fusion était valide mais n'avait aucun effet sur la fiducie qui continuait d'exister comme une entité distincte, et (2) qu'il était loisible aux participants d'entamer des procédures destinées à mettre fin à la fiducie en se fondant sur la règle de *Saunders c. Vautier*, dans la mesure où elle pouvait s'appliquer. Selon cette règle, il est possible de modifier les modalités d'une fiducie ou de mettre fin à la fiducie si les bénéficiaires de la fiducie ayant la pleine capacité juridique y consentent tous. La cour a aussi décidé que les participants conservaient le droit à la répartition du surplus en cas de cessation. Invoquant la règle de common law, les participants ont intenté une deuxième action et ont réussi a obtenir une ordonnance mettant fin au régime. La Cour d'appel a annulé une partie de la décision de la juge en chambre, statuant que la *Trust and Settlement Variation Act* n'habilitait pas une cour à consentir au nom d'éventuels bénéficiaires juridiquement autonomes. La cour a décidé que les participants seraient libres d'invoquer la règle de common law pourvu que le consentement de tous les participants et bénéficiaires ait été obtenu. Elle a ajouté que RCI ne pouvait pas modifier le régime pour permettre l'adhésion de nouveaux participants. Étant donné que des questions pouvaient se poser au sujet du « processus » de cessation, la fiduciaire devrait s'assurer que toutes les conditions et toutes les exigences légales ont été respectées.

Arrêt : Le pourvoi est accueilli.

Les juges LeBel, Deschamps, Fish et Abella : Les participants au régime ne peuvent invoquer la règle de *Saunders c. Vautier* pour mettre fin à la fiducie. Cette règle ne s'intègre pas facilement au contexte des régimes de retraite d'employeurs. Ces régimes sont fortement réglementés. La *Loi de 1985 sur les normes de*

extensively with the termination of plans and the distribution of assets, and it is clear from this explicit legislation that Parliament intended its provisions to displace the common law rule. To the extent that the *PBSA* provides a means to reach the distribution stage, it should prevail over the common law. Moreover, a pension trust is not a stand-alone instrument. In this case, the trust is explicitly made part of the Plan. It cannot be terminated without taking into account the Plan for which it was created and the specific legislation governing the Plan. The conclusion that the common law rule does not generally apply to traditional pension funds is reinforced by the fact that the *PBSA* provides mechanisms that protect members from inappropriate conduct by plan administrators. [2] [27-33]

The *PBSA* is not a complete code, but when it provides recourse to pension plan members, they should use it. Here, the members of the Plan want the trust fund to be collapsed and distributed directly to them, but the available recourse is subject to the provisions of the *PBSA*. The Superintendent of Financial Institutions, who is responsible for the application of the *PBSA*, is in a position to deal with issues relating to termination or winding up. He can rule on questions of both fact and law, and all parties can make appropriate recommendations to him. He is also in the best position to monitor the orderly termination of the Plan in accordance with the *PBSA*, which is a condition precedent to distribution. Because all contributions ceased in 1984, the Superintendent could consider the Plan terminated under s. 29(2), which is not limited to solvency issues, and could decide whether the facts warrant winding up the part of the RCI pension plan that relates to the Plan pursuant to s. 29(11) of the *PBSA*, which would have the effect of terminating the trust. Contribution holidays, although legitimate for funding purposes, can nevertheless be considered illegitimate if they hide an improper refusal to terminate a plan. Determining the validity of a reason given for not terminating a pension plan lies with the Superintendent and properly falls within his s. 29(2)(*a*) power. Whether RCI can amend the Plan to open it to new members is a question best left to the Superintendent. [2] [29] [35-36] [44-57]

Per McLachlin C.J. and Bastarache and Charron JJ.: The rule in *Saunders v. Vautier* does not apply in the circumstances of this case, and any application

prestation de pension (« *LNPP* ») traite abondamment de la cessation des régimes et de la répartition de l'actif, et il ressort clairement de ce texte législatif explicite que le législateur a voulu que ses dispositions supplantent la règle de common law. Dans la mesure où elle prévoit un moyen de parvenir à l'étape de la répartition, la *LNPP* doit primer la common law. De plus, une fiducie de retraite n'est pas un instrument distinct. En l'espèce, la fiducie fait explicitement partie du régime. On ne peut y mettre fin sans tenir compte du régime pour lequel elle a été créée et de la loi particulière qui s'applique à ce régime. La conclusion que la règle de common law ne s'applique pas généralement aux caisses de retraite traditionnelles est renforcée par le fait que la *LNPP* établit des mécanismes de protection des participants contre la conduite répréhensible des administrateurs du régime. [2] [27-33]

La *LNPP* n'est pas un code exhaustif, mais lorsqu'elle offre un recours aux participants à un régime de retraite, ceux-ci devraient l'exercer. En l'espèce, les participants au régime veulent mettre fin à la caisse en fiducie et souhaitent que l'actif de la caisse soit réparti entre eux directement, mais le recours dont ils disposent est assujetti aux dispositions de la *LNPP*. Le surintendant des institutions financières, qui est responsable de l'application de la *LNPP*, est en mesure de traiter les questions de cessation ou de liquidation. Il peut trancher à la fois des questions de fait et des questions de droit, et les parties peuvent lui faire des recommandations appropriées. Il est aussi le mieux placé pour assurer la cessation ordonnée du régime conformément à la *LNPP*, qui est une condition préalable de la répartition. Étant donné qu'on a arrêté complètement de payer des cotisations en 1984, le surintendant pourrait considérer qu'il a été mis fin au régime en vertu du par. 29(2), qui ne porte pas uniquement sur des questions de solvabilité, et pourrait décider si les faits justifient la liquidation de la partie du régime de retraite de RCI qui concerne le régime conformément au par. 29(11) *LNPP*, ce qui aurait pour effet de mettre fin à la fiducie. Bien qu'elles soient légitimes aux fins de capitalisation, les périodes d'exonération de cotisations peuvent néanmoins être jugées illégitimes si elles cachent un refus injustifié de mettre fin à un régime. Il appartient au surintendant, conformément au pouvoir que lui confère l'al. 29(2)*a*), de déterminer la validité d'une raison donnée pour ne pas mettre fin à un régime de retraite. Il est de son ressort de décider si RCI peut modifier le régime de manière à l'ouvrir à de nouveaux participants. [2] [29] [35-36] [44-57]

La juge en chef McLachlin et les juges Bastarache et Charron : La règle de *Saunders c. Vautier* ne s'applique pas en l'espèce et toute demande relative à la cessation

regarding the termination of the Plan and the trust must be dealt with in accordance with the terms of the Plan and the provisions of the *PBSA*. [100]

The *PBSA* is a comprehensive statutory scheme which contains detailed provisions for the termination of pension plans and the distribution of plan assets. It recognizes that employers are generally, as in the case at bar, entitled to terminate a pension plan, but it also empowers the Superintendent of Financial Institutions to terminate such plans in specified situations, including those referred to in s. 29. The Superintendent's supervisory focus is primarily on matters affecting the solvency or the financial condition of a pension plan. There is no provision in the *PBSA* for plan beneficiaries to terminate a pension plan or for any party to terminate a trust under which pension fund contributions are held as security for the payment of plan benefits prior to, and independent of, the termination of the plan. Beneficiaries may request that the Superintendent exercise his discretionary power under s. 29(2), but he does not have a general discretion to terminate pension plans and may comply with such a request only where the stipulated pre-conditions are met. In the instant case, none of the statutory grounds for termination of the Plan are present. The words "suspension or cessation of employer contributions" in respect of the Superintendent's power to terminate a pension plan under s. 29(2)(*a*) must be construed as referring to an employer's failure to make required contributions; they do not extend to contribution holidays where the employer is relieved from making contributions by reason of a surplus in the plan. [79-88]

Because the Plan members have only a contingent interest in the trust surplus, the rule in *Saunders v. Vautier* cannot be invoked to terminate the trust. It requires that beneficiaries seeking early termination possess the sum total of vested, not contingent, interests in the trust corpus. The members do not have absolute entitlement to the surplus until the Plan and trust are terminated. Furthermore, the common law rule also requires the consent of all parties who have an interest in the trust property. Since both the *PBSA* and the Plan include survivor rights, those rights cannot be overridden by the consent of present Plan members and other beneficiaries, or by the courts. Nor can s. 1(b) of the *Trust and Settlement Variation Act* assist in this respect. The court does not have the power to consent on behalf of current spouses and common law partners who are of

du régime et de la fiducie doit être examinée conformément aux modalités du régime et aux dispositions de la *LNPP*. [100]

La *LNPP* est un régime législatif complet qui comporte des dispositions détaillées régissant la cessation des régimes de retraite et la répartition de leur actif. Il reconnaît que les employeurs ont généralement le droit de mettre fin à un régime de retraite, comme c'est le cas en l'espèce, mais il habilite également le surintendant des institutions financières à mettre fin à ces régimes dans des situations précises, y compris celles mentionnées à l'art. 29. La supervision assurée par le surintendant porte principalement sur les questions touchant la solvabilité ou la situation financière d'un régime de retraite. Aucune disposition de la *LNPP* ne permet aux bénéficiaires d'un régime de mettre fin à un régime de retraite ou à quiconque de mettre fin à une fiducie en vertu de laquelle des cotisations à une caisse de retraite sont détenues à titre de garantie du versement des prestations du régime, avant la cessation du régime et indépendamment de celle-ci. Les bénéficiaires peuvent demander au surintendant d'exercer le pouvoir discrétionnaire que lui confère le par. 29(2), mais celui-ci n'a aucun pouvoir discrétionnaire général de mettre fin à des régimes de retraite et ne peut répondre favorablement à une telle demande que si les conditions préalables énoncées sont remplies. Aucune des raisons, prévues par la Loi, de mettre fin au régime n'existe en l'espèce. L'expression « la suspension ou l'arrêt de paiement des cotisations patronales », en ce qui concerne le pouvoir de mettre fin à un régime de retraite que l'al. 29(2)*a*) confère au surintendant, doit être interprétée comme désignant le défaut de l'employeur d'effectuer les cotisations requises; elle ne vise pas les périodes d'exonération de cotisations pendant lesquelles l'employeur est dispensé d'effectuer des cotisations en raison de l'existence d'un surplus dans le régime. [79-88]

Du fait que les participants au régime ont seulement un intérêt éventuel dans le surplus de la fiducie, la règle de *Saunders c. Vautier* ne peut pas être invoquée pour mettre fin à la fiducie. Cette règle exige que les bénéficiaires qui sollicitent la cessation anticipée possèdent tous les intérêts dévolus et non éventuels dans le capital de la fiducie. Les participants n'ont un droit absolu au surplus qu'une fois qu'il a été mis fin au régime et à la fiducie. De plus, la règle de common law exige aussi le consentement de toutes les parties ayant un intérêt dans les biens en fiducie. Étant donné que la *LNPP* et le régime incluent tous les deux les droits de survivant, ces droits conférés par la loi ne peuvent être écartés ni par le consentement des participants au régime et autres bénéficiaires actuels, ni par les tribunaux. L'alinéa 1b) de la *Trust and Settlement Variation Act* n'est pas plus

full legal capacity, nor can consent be given on behalf of unascertainable future spouses and common law partners, since the termination of the Plan would presumably not be in their best interests. [90] [98-99]

Trust law cannot in the present case prevail over the contract and the governing legislation. Applying the rule in *Saunders v. Vautier* would contradict the reasonable contractual expectations of the parties, since the terms of the Plan do not give rise to a reasonable expectation that the trust could be terminated by the members over RCI's objections so that the members might obtain the surplus. Such a result would permit members of a pension plan to vary its terms without the employer's consent. Applying the common law rule would disregard the employer's unique role in respect of the Plan and the trust, circumvent the terms of the contract at the root of the trust, and make the legislative framework irrelevant. In particular, applying it would disregard s. 29(9) and permit the termination of the Plan and the trust without the involvement of the employer as plan administrator, and without the Superintendent's approval. Finally, introducing the rule in *Saunders v. Vautier* into the private pension system would disrupt the fair and delicate balance between the interests of the employer and employees, and would be contrary to the legislative objective of encouraging the establishment and maintenance of private pension plans. [92-94] [97]

A court has no authority to assign the responsibilities of the administrator and the Superintendent to the trustee contrary to the legislative scheme, under which a process for terminating a pension plan has been established. [95]

RCI's powers of amendment were not forfeited or estopped because of the closure of the Plan. Any termination of the Plan and any amendments to it must be examined in light of to the applicable provisions of the Plan and the *PBSA*. In the special context of pension plans, employers who administer such plans on behalf of their employees must always act in accordance with the spirit, purpose and terms of the plans, and in such a way as to ensure the protection of employees' pension benefits, not to reduce, threaten or eliminate them. [102-103]

Cases Cited

By Deschamps J.

Not followed: *Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482; **referred to:** *Schmidt v. Air Products*

utile à cet égard. La cour n'a pas le pouvoir de consentir au nom des époux et conjoints de fait actuels qui ont la pleine capacité juridique, ni en celui de futurs époux et conjoints de fait non identifiables, étant donné que la cessation du régime ne serait probablement pas dans leur intérêt. [90] [98-99]

En l'espèce, le droit des fiducies ne peut pas l'emporter sur le contrat et la loi applicable. L'application de la règle de *Saunders c. Vautier* irait à l'encontre des attentes contractuelles raisonnables des parties étant donné que les modalités du régime ne permettent pas aux participants de s'attendre raisonnablement à ce qu'en dépit des objections de RCI ils puissent mettre fin à la fiducie de manière à pouvoir toucher le surplus. Un tel résultat permettrait aux participants à un régime de retraite d'en modifier les modalités sans le consentement de l'employeur. L'application de la règle de common law ne tiendrait pas compte du rôle unique que l'employeur joue à l'égard du régime et de la fiducie, contournerait les clauses du contrat à l'origine de la fiducie et ferait perdre toute pertinence au cadre législatif. En particulier, son application ne tiendrait pas compte du par. 29(9) et permettrait de mettre fin au régime et à la fiducie sans la participation de l'employeur en tant qu'administrateur du régime et sans l'approbation du surintendant. Enfin, l'introduction de la règle de *Saunders c. Vautier* dans le système des régimes de retraite privés romprait le juste et délicat équilibre entre les intérêts de l'employeur et ceux de l'employé, et contreviendrait à l'objectif législatif consistant à encourager l'établissement et le maintien de régimes de retraite privés. [92-94] [97]

Un tribunal n'a pas le pouvoir d'assigner à la fiduciaire les responsabilités de l'administrateur et du surintendant contrairement au régime législatif qui a établi un processus de cessation de régime de retraite. [95]

RCI n'a pas été déchue de ses pouvoirs de modification ni empêchée de les exercer en raison de la fermeture du régime. La cessation et la modification du régime doivent être examinées en fonction des dispositions applicables du régime et de la *LNPP*. En raison du contexte particulier des régimes de retraite, l'employeur qui gère un tel régime pour le compte de ses employés doit toujours en respecter l'esprit, l'objet et les modalités et se comporter de manière à préserver les prestations de retraite des employés et non de manière à les réduire, à les compromettre ou à les éliminer. [102-103]

Jurisprudence

Citée par la juge Deschamps

Arrêt non suivi : *Saunders c. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482; **arrêts mentionnés :** *Schmidt*

Canada Ltd., [1994] 2 S.C.R. 611; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, 2004 SCC 54; *Huus v. Ontario (Superintendent of Pensions)* (2002), 58 O.R. (3d) 380.

By Bastarache J.

Not followed: *Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482; **referred to:** *Halifax School for the Blind v. Chipman*, [1937] S.C.R. 196; *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, 2004 SCC 54; *Imperial Group Pension Trust Ltd. v. Imperial Tobacco Ltd.*, [1991] 2 All E.R. 597.

Statutes and Regulations Cited

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), ss. 56(1), 146(8), 147.1(11), (13).

Income Tax Regulations, C.R.C. 1978, c. 945, ss. 8501(1), 8502.

Office of the Superintendent of Financial Institutions Act, R.S.C. 1985, c. 18 (3rd Supp.), Part I.

Pension Benefits Standards Act, S.C. 1966-67, c. 92, s. 12.

Pension Benefits Standards Act, 1985, R.S.C. 1985, c. 32 (2nd Supp.), ss. 2(1) "termination", "winding-up", 5, 7.4, 8(3), (10), 9(1), 9.2, 11(1), (2), 11.1, 12, 22, 29.

Pension Benefits Standards Act, 1985, S.C. 1986, c. 40.

Pension Benefits Standards Regulations, 1985, SOR/87-19, rr. 6 to 10, 16, 24.

Trust and Settlement Variation Act, R.S.B.C. 1996, c. 463, s. 1.

Trustee Act, R.S.B.C. 1996, c. 464, s. 86.

Authors Cited

Canada. Office of the Superintendent of Financial Institutions. *Guidelines to Administrators for Plan Terminations*, November 25, 1992 (rev. July 1, 1993) (online: http//:www.osfi-bsif.gc.ca/app/DocRepository/1/eng/pension/guides/92-11-15b_e.html).

Deaton, Richard Lee. *The Political Economy of Pensions: Power, Politics and Social Change in Canada, Britain and the United States*. Vancouver: University of British Columbia Press, 1989.

Gillese, Eileen E. "Pension Plans and the Law of Trusts" (1996), 75 *Can. Bar Rev.* 221.

Hayton, David J. *Underhill and Hayton Law Relating to Trusts and Trustees*, 14th ed. London: Butterworths, 1987.

c. Air Products Canada Ltd., [1994] 2 R.C.S. 611; *Monsanto Canada Inc. c. Ontario (Surintendant des services financiers)*, [2004] 3 R.C.S. 152, 2004 CSC 54; *Huus c. Ontario (Superintendent of Pensions)* (2002), 58 O.R. (3d) 380.

Citée par le juge Bastarache

Arrêt non suivi : *Saunders c. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482; **arrêts mentionnés :** *Halifax School for the Blind c. Chipman*, [1937] R.C.S. 196; *Schmidt c. Air Products Canada Ltd.*, [1994] 2 R.C.S. 611; *Monsanto Canada Inc. c. Ontario (Surintendant des services financiers)*, [2004] 3 R.C.S. 152, 2004 CSC 54; *Imperial Group Pension Trust Ltd. c. Imperial Tobacco Ltd.*, [1991] 2 All E.R. 597.

Lois et règlements cités

Loi de 1985 sur les normes de prestation de pension, S.C. 1986, ch. 40.

Loi de 1985 sur les normes de prestation de pension, L.R.C. 1985, ch. 32 (2e suppl.), art. 2(1) « cessation », « liquidation », 5, 7.4, 8(3), (10), 9(1), 9.2, 11(1), (2), 11.1, 12, 22, 29.

Loi de l'impôt sur le revenu, L.R.C. 1985, ch. 1 (5e suppl.), art. 56(1), 146(8), 147.1(11), (13).

Loi sur le Bureau du surintendant des institutions financières, L.R.C. 1985, ch. 18 (3e suppl.), partie I.

Loi sur les normes des prestations de pension, S.C. 1966-67, ch. 92, art. 12.

Règlement de 1985 sur les normes de prestation de pension, DORS/87-19, art. 6 à 10, 16, 24.

Règlement de l'impôt sur le revenu, C.R.C. 1978, ch. 945, art. 8501(1), 8502.

Trust and Settlement Variation Act, R.S.B.C. 1996, ch. 463, art. 1.

Trustee Act, R.S.B.C. 1996, ch. 464, art. 86.

Doctrine citée

Canada. Bureau du surintendant des institutions financières. *Lignes directrices à l'intention des administrateurs sur la cessation des régimes de pension*, 25 novembre 1992 (rév. 1er juillet 1993) (en ligne : http//:www.osfi-bsif.gc.ca/app/DocRepository/1/fra/retraite/guides/92_11_15b_f.html).

Deaton, Richard Lee. *The Political Economy of Pensions : Power, Politics and Social Change in Canada, Britain and the United States*. Vancouver : University of British Columbia Press, 1989.

Gillese, Eileen E. « Pension Plans and the Law of Trusts » (1996), 75 *R. du B. can.* 221.

Kaplan, Ari N. *Pension Law.* Toronto: Irwin Law, 2006.
Nachshen, Gary. "Access to Pension Fund Surpluses: The Great Debate". In Meredith Memorial Lectures 1988, *New Developments in Employment Law.* Cowansville: Yvon Blais, 1989, 59.
"Pension Underfunding Still Widespread, Yet . . ." *Business & Legal Reports*, October 1, 2003 (online: http://comp.blr.com/display.cfm?id=150239).
Rienzo, Douglas. "Trust Law and Access to Pension Surplus" (2005), 25 *E.T.P.J.* 14.
Waters, Donovan W. M., Mark R. Gillen and Lionel D. Smith, eds. *Waters' Law of Trusts in Canada*, 3rd ed. Toronto: Thomson Carswell, 2005.

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Low and Thackray JJ.A.) (2004), 24 B.C.L.R. (4th) 85, 236 D.L.R. (4th) 18, [2004] 5 W.W.R. 10, 6 E.T.R. (3d) 236, 193 B.C.A.C. 258, 316 W.A.C. 258, 39 C.C.P.B. 247, [2004] B.C.J. No. 297 (QL), 2004 BCCA 80, and (2004), 27 B.C.L.R. (4th) 17, 239 D.L.R. (4th) 610, [2004] 7 W.W.R. 218, 9 E.T.R. (3d) 221, 197 B.C.A.C. 279, 323 W.A.C. 279, [2004] B.C.J. No. 991 (QL), 2004 BCCA 282, with supplementary reasons (2004), 35 B.C.L.R. (4th) 248, 241 D.L.R. (4th) 766, [2005] 2 W.W.R. 67, 197 B.C.A.C. 279 at 287, 323 W.A.C. 279 at 287, [2004] B.C.J. No. 1321 (QL), 2004 BCCA 369, reversing decisions of Loo J. (2002), 100 B.C.L.R. (3d) 327, 44 E.T.R. (2d) 177, 30 C.C.P.B. 167, [2002] B.C.J. No. 865 (QL), 2002 BCSC 624, and (2003), 13 B.C.L.R. (4th) 385, [2003] 7 W.W.R. 341, 35 C.C.P.B. 199, [2003] B.C.J. No. 1025 (QL), 2003 BCSC 683, granting an application for termination of a pension plan. Appeal allowed.

Irwin G. Nathanson, Q.C., and *Stephen R. Schachter, Q.C.*, for the appellant/respondent Rogers Communications Inc.

Jennifer J. Lynch and *Joanne Lysyk*, for the appellant/respondent National Trust Co.

John N. Laxton, Q.C., and *Robert D. Gibbens*, for the respondents Sandra Buschau et al.

Hayton, David J. *Underhill and Hayton Law Relating to Trusts and Trustees*, 14th ed. London : Butterworths, 1987.
Kaplan, Ari N. *Pension Law.* Toronto : Irwin Law, 2006.
Nachshen, Gary. « Access to Pension Fund Surpluses : The Great Debate ». Dans Conférences Commémoratives Meredith 1988, *Le Contrat de travail : problèmes et perspectives.* Cowansville : Yvon Blais, 1989, 59.
« Pension Underfunding Still Widespread, Yet . . . », *Business & Legal Reports*, 1er octobre 2003 (en ligne : http://comp.blr.com/display.cfm?id=150239).
Rienzo, Douglas. « Trust Law and Access to Pension Surplus » (2005), 25 *E.T.P.J.* 14.
Waters, Donovan W. M., Mark R. Gillen and Lionel D. Smith, eds. *Waters' Law of Trusts in Canada*, 3rd ed. Toronto : Thomson Carswell, 2005.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Newbury, Low et Thackray) (2004), 24 B.C.L.R. (4th) 85, 236 D.L.R. (4th) 18, [2004] 5 W.W.R. 10, 6 E.T.R. (3d) 236, 193 B.C.A.C. 258, 316 W.A.C. 258, 39 C.C.P.B. 247, [2004] B.C.J. No. 297 (QL), 2004 BCCA 80, et (2004), 27 B.C.L.R. (4th) 17, 239 D.L.R. (4th) 610, [2004] 7 W.W.R. 218, 9 E.T.R. (3d) 221, 197 B.C.A.C. 279, 323 W.A.C. 279, [2004] B.C.J. No. 991 (QL), 2004 BCCA 282, avec motifs supplémentaires (2004), 35 B.C.L.R. (4th) 248, 241 D.L.R. (4th) 766, [2005] 2 W.W.R. 67, 197 B.C.A.C. 279, p. 287, 323 W.A.C. 279, p. 287, [2004] B.C.J. No. 1321 (QL), 2004 BCCA 369, qui a infirmé des décisions de la juge Loo (2002), 100 B.C.L.R. (3d) 327, 44 E.T.R. (2d) 177, 30 C.C.P.B. 167, [2002] B.C.J. No. 865 (QL), 2002 BCSC 624, et (2003), 13 B.C.L.R. (4th) 385, [2003] 7 W.W.R. 341, 35 C.C.P.B. 199, [2003] B.C.J. No. 1025 (QL), 2003 BCSC 683, qui a accueilli une demande de cessation d'un régime de retraite. Pourvoi accueilli.

Irwin G. Nathanson, c.r., et *Stephen R. Schachter, c.r.*, pour l'appelante/intimée Rogers Communications Inc.

Jennifer J. Lynch et *Joanne Lysyk*, pour l'appelante/intimée la Compagnie Trust National.

John N. Laxton, c.r., et *Robert D. Gibbens*, pour les intimés Sandra Buschau et autres.

The judgment of LeBel, Deschamps, Fish and Abella was delivered by

1 DESCHAMPS J. — The 112 respondents are pension plan members who have been litigating for over 10 years to gain access to their pension trust fund. This case is about whether and how the fund can be distributed to them.

2 By 2002, the plan for which the trust was created, the Premier pension plan ("Plan"), had a surplus evaluated at $11 million. The Supreme Court and the Court of Appeal for British Columbia accepted the members' arguments and found that the trust used to fund the Plan ("Trust" or "Premier Trust") could be collapsed under the common law rule in *Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482 (Ch. D.). According to that rule, the terms of a trust can be varied or the trust can be terminated if all beneficiaries of the trust, being of full legal capacity, consent. For the reasons that follow, I am of the view that the common law rule does not apply to the Trust in the case at bar. The context and the purpose of pension plans do not generally lend themselves well to the common law rule. Moreover, a pension trust is not a stand-alone instrument. The Trust is explicitly made part of the Plan. It cannot be terminated without taking into account the Plan for which it was created and the specific legislation governing the Plan. Any recourse available to the members here is subject to the provisions of a federal statute, the *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.) ("*PBSA*"). In my view, the Superintendent of Financial Institutions ("Superintendent"), who is responsible for the application of the *PBSA*, is in a position to resolve the impasse that the members would face if the interpretation suggested by my colleague Bastarache J. were adopted.

3 In order to explain the particular context in which the termination of the Trust is sought, a few

Version française du jugement des juges LeBel, Deschamps, Fish et Abella rendu par

LA JUGE DESCHAMPS — Les 112 intimés sont des participants à un régime de retraite (« participants ») qui, depuis 10 ans, tentent par voie judiciaire d'avoir accès à leur caisse de retraite détenue en fiducie. Il s'agit, en l'espèce, de décider si l'actif de la caisse peut être réparti entre eux, et de quelle façon il peut l'être.

Dès 2002, le régime pour lequel la fiducie a été créée, à savoir le régime de retraite de Premier (« Régime »), affichait un surplus évalué à 11 millions de dollars. La Cour suprême et la Cour d'appel de la Colombie-Britannique ont retenu les arguments des participants et ont conclu qu'il pouvait être mis fin à la fiducie utilisée pour la capitalisation du Régime (« fiducie » ou « fiducie de Premier »), en application de la règle de common law établie dans *Saunders c. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482 (Ch. D.). Selon cette règle, il est possible de modifier les modalités d'une fiducie ou de mettre fin à la fiducie si les bénéficiaires de la fiducie ayant la pleine capacité juridique y consentent tous. Pour les motifs qui suivent, j'estime que la règle de common law ne s'applique pas à la fiducie en cause dans la présente affaire. En général, le contexte et l'objet des régimes de retraite ne se prêtent pas bien à l'application de la règle de common law. De plus, une fiducie de retraite n'est pas un instrument distinct. La fiducie fait explicitement partie du Régime. On ne peut y mettre fin sans tenir compte du régime pour lequel elle a été créée et de la loi particulière qui s'applique à ce régime. En l'espèce, tout recours ouvert aux participants est assujetti aux dispositions d'une loi fédérale, à savoir la *Loi de 1985 sur les normes de prestation de pension*, L.R.C. 1985, ch. 32 (2e suppl.) (« *LNPP* »). Selon moi, le surintendant des institutions financières (« surintendant »), qui est responsable de l'application de la *LNPP*, est en mesure de dénouer l'impasse dans laquelle les participants se trouveraient si l'interprétation préconisée par mon collègue le juge Bastarache était retenue.

Pour expliquer le contexte particulier dans lequel la cessation de la fiducie est demandée, il

facts will have to be elicited to situate the dispute between the members and their former employer. Then, to explain why the common law rule does not apply, it will be useful to briefly review pension plans in general and the Plan itself. Finally, I will comment on the relevant provisions of the *PBSA* that would allow the members to make a proper request to the Superintendent.

I. Facts

The Plan was established in 1974 for the employees of Premier Communication Ltd. It provides for defined benefits and is funded by the employer only. It states that the company expects to continue the Plan indefinitely, but that in the event of termination, the surplus remaining in the trust fund is to be distributed amongst the remaining members:

GENERAL RULE SEVEN – AMENDMENT OR TERMINATION OF PLAN

. . .

2. While the Company expects to continue the Plan indefinitely, it must and does reserve the right to terminate the Plan, if, at any time in the future, conditions should arise that indicate the necessity of such action.

   In the event of the termination of the Plan, the benefits being paid to Retired Members will be continued as provided for under the terms and provisions of the Plan. The balance of assets remaining in the Trust Fund, after all liabilities to Retired Members have been satisfied, will be distributed by the Committee among the remaining Members on the basis required under the provisions of Section 12 of the Pension Benefits Standards Act.

In 1980, Rogers Cablesystems Inc. (which later became Rogers Communications Inc. ("Rogers")) acquired Premier Communication Ltd. In September 1983, the Plan's actuary was of the view that a surplus evaluated at approximately $800,000 could be used to improve benefits for members. On April 12, 1984, the actuary actually

sera nécessaire de relater quelques faits permettant de situer le litige opposant les participants à leur ancien employeur. Ensuite, afin d'expliquer pourquoi la règle de common law ne s'applique pas, il sera utile d'examiner brièvement la question des régimes de retraite en général et le Régime lui-même. Enfin, je formulerai des observations sur les dispositions de la *LNPP* qui permettraient aux participants de présenter une demande légitime au surintendant.

I. Les faits

Le régime des employés de Premier Communication Ltd. a été établi en 1974. Il s'agit d'un régime à prestations déterminées capitalisé uniquement par l'employeur. Il prévoit que la compagnie s'attend à ce qu'il subsiste indéfiniment, mais que, en cas de cessation, le surplus de la caisse en fiducie sera réparti entre les participants restants : 4

[TRADUCTION]

SEPTIÈME RÈGLE GÉNÉRALE – MODIFICATION OU CESSATION DU RÉGIME

. . .

2. Bien que la compagnie s'attende à ce que le régime subsiste indéfiniment, elle doit se réserver, et par les présentes se réserve, le droit de mettre fin au régime si jamais des conditions commandent d'y mettre fin.

   En cas de cessation du régime, les prestations versées aux participants retraités seront maintenues conformément aux modalités et aux dispositions du régime. Après que toutes les dettes envers les participants retraités auront été acquittées, le comité répartira entre les autres participants l'actif restant de la caisse en fiducie, conformément aux dispositions de l'article 12 de la Loi sur les normes de prestation de pension.

En 1980, Rogers Cablesystems Inc. (devenue par la suite Rogers Communications Inc. (« Rogers ») fait l'acquisition de Premier Communication Ltd. En septembre 1983, l'actuaire du Régime estime qu'un surplus évalué à environ 800 000 $ peut servir à bonifier les prestations des participants. Le 12 avril 1984, l'actuaire recommande effectivement 5

recommended improvements to the benefits. The actuary was replaced on May 22, 1984. On July 1, 1984, the Plan was closed to future employees. On July 11, 1984, Rogers asked the then trustee, Canada Trust, for a refund of part of its contributions. Canada Trust required a legal opinion before doing so. On October 31, 1984, Canada Trust was replaced by National Trust. On July 15, 1985, Rogers requested that the new trustee, National Trust, refund $968,285 to it, which National Trust did. By December 31, 1986, Rogers had also taken contribution holidays evaluated at $842,000. In December 1992, Rogers amended the Plan to merge it retroactively with four other pension plans in the Rogers Communications Inc. Pension Plan ("RCI Plan"). The views of the employees with respect to such a merger were known to Rogers, as can be seen from an internal memorandum dated July 16, 1990:

> It is clear that [the Premier employee representative] is not in favour of folding the Premier Plan into the RCI plan unless we can show clear benefit (unlikely scenario).

6 The long-term goal pursued by Rogers with respect to the Plan is stated in another internal memorandum dated April 22, 1993:

> You asked for an update on the status of the Premier Pension Plan. As you are aware, our objectives related to this plan were (i) to get at the surplus the plan had and (ii) minimize our administration (i.e. eliminate an audited statement and an annual regulatory filing, etc.).
>
> We were able to accomplish the objectives above by the amalgamation of all of the defined benefit plans into one plan. Therefore, the need to do anything further was redundant.

7 The members initiated the litigation against Rogers in 1995. They requested the return of the trust funds paid to Rogers in 1985 and a declaration that the funds belonged to them. The trial judge dismissed the claim on most of the issues ((1998), 54 B.C.L.R. (3d) 125). The members appealed. The Court of Appeal found that trust law imports its

de bonifier les prestations. Cet actuaire est remplacé le 22 mai 1984. Le 1er juillet 1984, le Régime est fermé aux futurs employés. Le 11 juillet 1984, Rogers demande à la fiduciaire d'alors, Canada Trust, de lui rembourser une partie de ses cotisations. Canada Trust estime devoir bénéficier d'un avis juridique avant de le faire. Le 31 octobre 1984, Canada Trust est remplacée par la Compagnie Trust National (« Trust National »). Le 15 juillet 1985, Rogers demande à la nouvelle fiduciaire, Trust National, de lui rembourser 968 285 $, ce que fait Trust National. Dès le 31 décembre 1986, Rogers s'accorde également des périodes d'exonération de cotisations évaluées à 842 000 $. En décembre 1992, Rogers modifie le Régime pour le fusionner rétroactivement avec quatre autres régimes de retraite dans le régime de retraite de Rogers Communications Inc. (« régime de RCI »). Comme l'indique une note de service interne datée du 16 juillet 1990, Rogers connaît le point de vue des employés au sujet de cette fusion :

> [TRADUCTION] Il est clair que [le représentant des employés de Premier] n'est pas en faveur de la fusion du régime de Premier avec le régime de RCI, à moins que nous puissions démontrer l'existence d'un avantage évident (ce qui est peu vraisemblable).

L'objectif à long terme que Rogers poursuit quant au Régime est exposé dans une autre note de service interne datée du 22 avril 1993 :

> [TRADUCTION] Vous avez demandé de faire le point sur le régime de retraite de Premier. Comme vous le savez, nos objectifs concernant ce régime étaient (i) d'avoir accès au surplus du régime et (ii) de réduire au minimum notre gestion (c'est-à-dire éliminer un état financier vérifié et un dépôt annuel réglementaire, etc.).
>
> Nous avons pu atteindre les objectifs susmentionnés en combinant tous les régimes à prestations déterminées en un seul régime. En conséquence, toute autre mesure devenait superflue.

Les participants entament les procédures judiciaires contre Rogers en 1995. Ils demandent la restitution des fonds en fiducie qui ont été versés à Rogers en 1985 et un jugement déclarant que ces fonds leur appartiennent. Le juge de première instance rejette leur demande à presque tous égards ((1998), 54 B.C.L.R. (3d) 125). Les participants

own rules that apply in addition to, and in precedence over, the law of contract and the rules of construction of contracts. To this extent and in view of Rogers' concession that the merger was not complete as regards the Plan, members of the Plan retained rights that were distinct from those of members of the other plans that had been merged with it in the RCI Plan. The Court of Appeal concluded that the merger of the Plan with the RCI Plan was valid but did not affect the existence of the Trust as a separate trust. The members were also at liberty to institute proceedings to terminate the Trust based on the rule in *Saunders v. Vautier* or on the *Trust and Settlement Variation Act*, R.S.B.C. 1996, c. 463, to the extent that either may be applicable. The Court of Appeal held that the employer's withdrawal of substantial funds from the surplus in 1985, which was admitted to have been in breach of trust, had been properly repaid to the trustee. Thus, the Plan's members retained the right to distribution of the surplus upon termination ((2001), 83 B.C.L.R. (3d) 261, 2001 BCCA 16 ("*Buschau No. 1*"), at paras. 63-68). This Court denied leave to appeal that decision, [2001] 2 S.C.R. vii.

interjettent appel. La Cour d'appel conclut que le droit des fiducies fait intervenir ses propres règles qui s'appliquent en sus du droit des contrats et des règles d'interprétation des contrats et qui les priment. Dans cette mesure et compte tenu du fait que Rogers a concédé que la fusion n'était pas complète quant au Régime, les participants au Régime conservent des droits distincts de ceux des participants aux autres régimes qui ont été fusionnés avec le leur dans le régime de RCI. La Cour d'appel statue que la fusion du Régime avec le régime de RCI est valide, mais qu'elle n'a aucun effet sur la fiducie qui continue d'exister comme une entité distincte. Il est également loisible aux participants d'entamer des procédures destinées à mettre fin à la fiducie en se fondant soit sur la règle de *Saunders c. Vautier* soit sur la *Trust and Settlement Variation Act*, R.S.B.C. 1996, ch. 463, dans la mesure où l'une ou l'autre peut s'appliquer. La Cour d'appel décide que les sommes importantes que l'employeur a retirées du surplus en 1985, retrait que celui-ci a admis avoir fait en violation d'une obligation fiduciaire, ont été dûment remboursées à la fiduciaire. Ainsi, les participants au Régime conservent le droit à la répartition du surplus en cas de cessation ((2001), 83 B.C.L.R. (3d) 261, 2001 BCCA 16 (« *Buschau n^o 1* »), par. 63-68). Notre Cour refuse l'autorisation d'appeler de cette décision, [2001] 2 R.C.S. vii.

In 2001, the members applied to the Supreme Court of British Columbia for an order terminating the Plan. Loo J. ordered termination on the basis that the rule in *Saunders v. Vautier* was applicable and that s. 1(b) of the *Trust and Settlement Variation Act* provided the court with the jurisdiction to consent on behalf of those missing beneficiaries who were *sui juris* ((2002), 100 B.C.L.R. (3d) 327, 2002 BCSC 624). Rogers appealed. 8

En 2001, les participants demandent à la Cour suprême de la Colombie-Britannique de rendre une ordonnance mettant fin au Régime. La juge Loo ordonne la cessation pour le motif que la règle de *Saunders c. Vautier* s'applique et que l'al. 1b) de la *Trust and Settlement Variation Act* donne à la cour compétence pour consentir au nom des bénéficiaires juridiquement autonomes manquants ((2002), 100 B.C.L.R. (3d) 327, 2002 BCSC 624). Rogers interjette appel.

The Court of Appeal found that the members were at liberty to invoke the rule in *Saunders v. Vautier* provided that the consents of all members and beneficiaries had been obtained. It set aside a part of the chambers judge's decision based on the *Trust and Settlement Variation Act*, finding that a court did not have the power to consent on behalf of contingent *sui juris* beneficiaries. However, it 9

La Cour d'appel conclut que les participants sont libres d'invoquer la règle de *Saunders c. Vautier* pourvu que le consentement de tous les participants et bénéficiaires ait été obtenu. Elle annule une partie de la décision que la juge en chambre a rendue en se fondant sur la *Trust and Settlement Variation Act*, statuant qu'une cour n'a pas le pouvoir de consentir au nom d'éventuels bénéficiaires

provided the members with an opportunity to show that all the required consents had been obtained ((2004), 24 B.C.L.R. (4th) 85, 2004 BCCA 80 ("*Buschau No. 2*")). After receiving additional evidence and representation, the Court of Appeal found that the rule in *Saunders v. Vautier* could operate to terminate the trust. It recognized that questions could arise concerning the "mechanics" of the termination, but it was of the opinion that the trustee would have to satisfy itself that "[all] the conditions have been met and that all statutory requirements — including the payment of applicable taxes — have been complied with" before distributing the trust assets ((2004), 27 B.C.L.R. (4th) 17, 2004 BCCA 282 ("*Buschau No. 3*"), at para. 17). Rogers and the trustee appealed to this Court.

10 Rogers submits that the rule in *Saunders v. Vautier* does not apply. National Trust does not take issue with the Court of Appeal's order inasmuch as it determines the rights of Rogers or of the members. However, the trustee claims that the order places it in an untenable position by devolving upon it the authority and legal responsibility to give effect to and administer the termination of the Premier Trust, although this authority is not provided for by the terms of the Trust or by statute. The members maintain that the rule in *Saunders v. Vautier* applies but argue, in the alternative, that Rogers should terminate the Plan pursuant to its fiduciary duty under the *PBSA*. At the end of the hearing before this Court, the parties were asked to provide their views on the application of the *PBSA* to the termination of a plan by the Superintendent. Rogers takes the position that the Superintendent does not have the right to terminate the Plan because his role is limited to solvency issues. The members submit that the Superintendent has a discretionary power and that, as a result, they do not have a clear recourse. In their view, the rule in *Saunders v. Vautier* is not ousted by the *PBSA*.

11 It is clear from the history of the litigation that some of the issues are now *res judicata*. One of

juridiquement autonomes. Toutefois, elle donne aux participants la possibilité de démontrer que tous les consentements requis ont été obtenus ((2004), 24 B.C.L.R. (4th) 85, 2004 BCCA 80 (« *Buschau n^o 2* »)). Après avoir obtenu des éléments de preuve et des observations supplémentaires, la Cour d'appel décide que la règle de *Saunders c. Vautier* peut être appliquée pour mettre fin à la fiducie. Elle reconnaît que des questions peuvent se poser au sujet du [TRADUCTION] « processus » de cessation, mais elle estime que la fiduciaire doit s'assurer que [TRADUCTION] « [toutes] les conditions ont été remplies et toutes les exigences légales — dont le paiement des taxes applicables — ont été respectées » avant de répartir l'actif de la fiducie ((2004), 27 B.C.L.R. (4th) 17, 2004 BCCA 282 (« *Buschau n^o 3* »), par. 17). Rogers et la fiduciaire interjettent appel devant notre Cour.

Rogers soutient que la règle de *Saunders c. Vautier* ne s'applique pas. Trust National ne conteste pas l'ordonnance de la Cour d'appel dans la mesure où elle détermine les droits de Rogers ou des participants. La fiduciaire fait cependant valoir que cette ordonnance la place dans une situation intenable en lui transférant le pouvoir et la responsabilité juridique de mettre en œuvre et de gérer la cessation de la fiducie de Premier, bien que ce pouvoir ne soit prévu ni par les modalités de la fiducie ni par la loi. Les participants maintiennent que la règle de *Saunders c. Vautier* s'applique, mais ils allèguent subsidiairement que Rogers devrait mettre fin au Régime conformément à l'obligation fiduciaire qui lui incombe en vertu de la *LNPP*. À la fin de l'audience devant notre Cour, les parties ont été invitées à présenter leur point de vue concernant l'application de la *LNPP* à la cessation d'un régime déclarée par le surintendant. Rogers est d'avis que le surintendant n'a pas le droit de mettre fin au Régime parce que son rôle se limite aux questions de solvabilité. Les participants affirment que le surintendant a un pouvoir discrétionnaire de sorte qu'ils ne disposent d'aucun recours clair. Selon eux, la *LNPP* n'écarte pas la règle de *Saunders c. Vautier*.

L'historique du litige montre clairement que certaines questions ont acquis le statut de chose jugée.

them is that the merger of the Plan with the RCI Plan did not affect the Trust. As the Court of Appeal noted at the time, this peculiar situation may present some conceptual difficulties (*Buschau No. 1*, at para. 66). Nonetheless, these facts must be interpreted with the help of the general principles of pension law. For this reason, it will be useful to review some background information concerning pension plans in general and the Plan in particular.

II. Pension Plans in General

Pension plans have a complex history and constitute a response to a multitude of needs. As R. L. Deaton puts it:

> . . . [employee] benefits [initially] served multiple purposes, including attracting a labour supply and reducing turnover, serving as an investment in human capital by improving morale, increasing productivity and efficiency by rationalizing the human element in the work process, promoting loyalty to the firm, preventing or forestalling unionization, preventing government intervention with respect to compulsory social insurance, maximizing the tax position of certain benefits by increasing non-taxable compensation to employees, minimizing the cost per unit of benefit through group arrangements, thereby compensating for imperfect individual knowledge of insurance markets, and creating a favourable corporate public relations image.
>
> (*The Political Economy of Pensions: Power, Politics and Social Change in Canada, Britain and the United States* (1989), at pp. 119-20)

He adds that in recent years many sophisticated employers have adopted a compensation approach based on the "total value of labour remuneration, wages and fringes having become interchangeable costs" (p. 122). Thus, what some may still view as a gratuitous reward for employees remains a powerful long-term human resources management tool as well as an undeniable benefit for aging employees. Employees rightly see their pension benefits as part of their overall compensation. How important pension benefits are to employees, and how sensitive employees are about such benefits, is even clearer

L'une d'elles veut que la fusion du Régime avec le régime de RCI n'ait eu aucun effet sur la fiducie. Comme la Cour d'appel l'a fait remarquer à l'époque, cette situation particulière peut présenter des difficultés conceptuelles (*Buschau n^o 1*, par. 66). Néanmoins, ces faits doivent être interprétés à l'aide des principes généraux du droit régissant les régimes de retraite. C'est pourquoi il sera utile d'examiner certains renseignements de base concernant les régimes de retraite en général et le Régime en particulier.

II. Les régimes de retraite en général

L'histoire des régimes de retraite est complexe : ces régimes répondent à une multitude de besoins. Comme le dit R. L. Deaton : 12

> [TRADUCTION] . . . les avantages sociaux [des employés] visaient [au départ] des objectifs multiples, dont attirer la main d'œuvre et réduire le roulement du personnel, constituer un investissement dans le capital humain en améliorant le moral, augmenter la productivité et le rendement par la rationalisation de l'élément humain dans les méthodes de travail, promouvoir la loyauté envers l'entreprise, empêcher ou prévenir la syndicalisation, empêcher l'intervention gouvernementale concernant l'assurance sociale obligatoire, maximiser l'exemption fiscale de certains avantages en accroissant la partie non taxable de la rémunération des employés, réduire le coût unitaire des avantages grâce à des mesures collectives et suppléer ainsi aux lacunes de la connaissance individuelle des marchés de l'assurance, et enfin créer une image favorable de l'entreprise auprès du public.
>
> (*The Political Economy of Pensions : Power, Politics and Social Change in Canada, Britain and the United States* (1989), p. 119-120)

L'auteur ajoute que, au cours des dernières années, de nombreux employeurs avertis ont adopté un mode de rétribution fondé sur [TRADUCTION] « la valeur totale de la rémunération du travail, les salaires et les avantages sociaux étant devenus des coûts interchangeables » (p. 122). Par conséquent, ce que d'aucuns peuvent encore percevoir comme une gratification destinée aux employés demeure un puissant outil de gestion à long terme des ressources humaines ainsi qu'un avantage indéniable pour les employés qui vieillissent. Les employés ont raison de considérer leurs prestations de retraite comme

in the present context of corporate mergers and acquisitions.

13 Pension benefits also serve broader social goals, which were recognized by the Court of Appeal (*Buschau No. 2*, at para. 47), citing approvingly E. E. Gillese (now a justice of the Ontario Court of Appeal), "Pension Plans and the Law of Trusts" (1996), 75 *Can. Bar Rev.* 221, at pp. 232-34. Together with government programs and individual savings, pension plans provide an aging population with invaluable financial support. In recognition of the social value of such an investment, pension contributions receive special tax treatment. The social component of private pension plans plays a crucial role in an era in which public pension programs have not yet been reformed to ensure adequate funding (see Deaton, at pp. 136-37, for an outline of the increase in contributions that would be required to conform to international standards). Courts do not make social policy, but the social role of pension plans might prove relevant when it comes time to decide whether the rule in *Saunders v. Vautier* can be employed to terminate a pension trust.

14 In Canada, defined benefit plans are usually funded in one of two ways: the funds are either held by an insurance company or held in trust (D. Rienzo, "Trust Law and Access to Pension Surplus" (2005), 25 *E.T.P.J.* 14; G. Nachshen, "Access to Pension Fund Surpluses: The Great Debate", in Meredith Memorial Lectures 1988, *New Developments in Employment Law* (1989), 59, at p. 64). In an insured plan, the insurance company receives an agreed payment and, bearing the risk of a shortfall, undertakes to pay the pension benefits to the members. When a plan is funded through a trust, the employer contracts with a trust company. The trust company holds and invests the pension contributions, subject to instructions under the trust agreement. The contributions are generally adjusted following an

une composante de leur rémunération globale. L'importance que les prestations de retraite revêtent pour les employés et la mesure dans laquelle celles-ci leur tiennent à cœur sont encore plus évidentes dans le présent contexte où il est question de fusions et d'acquisitions de sociétés commerciales.

Les prestations de retraite visent aussi des objectifs sociaux généraux que la Cour d'appel (*Buschau n^o 2*, par. 47) a reconnus en citant avec approbation E. E. Gillese (maintenant juge à la Cour d'appel de l'Ontario), « Pension Plans and the Law of Trusts » (1996), 75 *R. du B. can.* 221, p. 232-234. Conjugués aux programmes gouvernementaux et à l'épargne individuelle, les régimes de retraite procurent un soutien financier inestimable à une population vieillissante. En reconnaissance de la valeur sociale de cet investissement, les cotisations de retraite bénéficient d'un traitement fiscal particulier. Le volet social des régimes de retraite privés joue un rôle crucial à une époque où les programmes de retraite publics n'ont pas encore été réformés pour en assurer une capitalisation suffisante (voir Deaton, p. 136-137, pour un aperçu de l'augmentation des cotisations qui serait nécessaire pour respecter les normes internationales). Les tribunaux n'établissent pas des politiques sociales, mais le rôle social des régimes de retraite pourrait se révéler pertinent lorsqu'il s'agit de décider si la règle de *Saunders c. Vautier* peut être utilisée pour mettre fin à une fiducie de retraite.

Au Canada, la capitalisation des régimes à prestations déterminées se fait généralement de deux façons : les fonds sont soit détenus par une compagnie d'assurances, soit détenus en fiducie (D. Rienzo, « Trust Law and Access to Pension Surplus » (2005), 25 *E.T.P.J.* 14; G. Nachshen, « Access to Pension Fund Surpluses : The Great Debate », dans Conférences Commémoratives Meredith 1988, *Le Contrat de travail : problèmes et perspectives* (1989), 59, p. 64). Dans le cas d'un régime assuré, la compagnie d'assurances reçoit un paiement convenu et, au risque de subir un déficit, elle s'engage à verser les prestations de retraite aux participants. Dans le cas d'un régime capitalisé au moyen d'une fiducie, l'employeur conclut un contrat avec une société de fiducie. Cette société de fiducie

evaluation by an actuary who determines the level of funding needed to meet the solvency requirement under the applicable legislation. Here, the Plan is and always has been funded through a trust, so the discussion can be limited to trust-related issues.

détient et investit les cotisations de retraite conformément aux directives fondées sur la convention de fiducie. Les cotisations sont généralement ajustées à la suite d'une évaluation effectuée par un actuaire qui détermine le niveau de capitalisation nécessaire pour respecter la norme de solvabilité prescrite par la loi applicable. En l'espèce, le Régime est, et a toujours été, capitalisé au moyen d'une fiducie, de sorte que l'analyse peut être limitée aux questions de fiducie.

A defined benefit plan can fall into deficit or accumulate a surplus. Pension underfunding is a cause for concern. Almost 70 percent of major corporate pension plans were in deficit positions in the late 1970s. In the early 1980s, however, the situation reversed. Surpluses were generated by high levels of investment earnings coupled with lower wage increases and widespread layoffs, while employer contributions were left in the funds as employees forfeited their future pension rights: Deaton, at pp. 133-34, and Nachshen, at pp. 66-67. The situation reverted to one of deficits in the late 1990s. The magnitude of the underfunding problem has only recently started to emerge in legal commentaries ("Pension Underfunding Still Widespread, Yet . . .", *Business & Legal Reports*, October 1, 2003 (online)). However, a surplus or deficit position reflects only a snapshot of a fund at a specific point in time. Since a pension plan is usually viewed as an ongoing instrument, time and sound actuarial advice are supposed to allow for secure funding while preventing the unnecessary accumulation of surpluses. Although the existence of deficits or surpluses is not an anomaly since actuaries cannot perfectly predict the future, in an ideal world, each plan would always be funded to the exact amount required to discharge its obligations.

15 Un régime à prestations déterminées peut afficher un déficit ou un surplus. La sous-capitalisation des régimes est une source de préoccupation. Près de 70 pour 100 des régimes de retraite des grandes sociétés affichaient un déficit vers la fin des années 1970. Cependant, au début des années 1980, il y a eu un revirement de situation. Des revenus de placement importants conjugués à de faibles augmentations des salaires et de nombreuses mises à pied, alors que les cotisations des employeurs étaient laissées dans les caisses et que les employés perdaient leurs droits futurs à une pension, ont engendré des surplus : Deaton, p. 133-134, et Nachshen, p. 66-67. À la fin des années 1990, les déficits sont réapparus. Ce n'est que récemment que des articles de doctrine ont commencé à faire état de l'ampleur du problème de la sous-capitalisation (« Pension Underfunding Still Widespread, Yet . . . », *Business & Legal Reports*, 1er octobre 2003 (en ligne)). Toutefois, l'existence d'un surplus ou d'un déficit représente seulement l'état dans lequel se trouve une caisse à un moment donné. Étant donné qu'un régime de retraite est habituellement perçu comme un instrument permanent, le temps et les conseils actuariels judicieux sont censés permettre une capitalisation suffisante tout en empêchant l'accumulation inutile de surplus. Bien que l'existence d'un déficit ou d'un surplus ne soit pas une anomalie du fait que les actuaires ne sont pas en mesure de prédire l'avenir avec une exactitude parfaite, dans un monde idéal, chaque régime disposerait toujours de la capitalisation dont il a exactement besoin pour s'acquitter de ses obligations.

Surpluses have not always been dealt with explicitly in pension plans or pension trusts. In *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, the

16 Les régimes de retraite ou les fiducies de retraite n'abordent pas toujours explicitement la question des surplus. Dans l'arrêt *Schmidt c. Air Products*

Court, dealing with issues relating to the distribution of a surplus, held that "when a trust is created, the funds which form the corpus are subjected to the requirements of trust law. The terms of the pension plan are relevant to distribution issues only to the extent that those terms are incorporated by reference in the instrument which creates the trust" (p. 639). The Court also stated that "[w]hen a pension fund is impressed with a trust, that trust is subject to all applicable trust law principles" (p. 643 (emphasis added)). It is thus necessary to determine which trust law principles *are applicable* before considering how they apply.

17 Before termination of a plan, a surplus is only an actuarial concept. While the plan is in operation, individuals entitled to the surplus assets do not have a specific interest in them. A pension surplus can be used to justify a contribution holiday if this is permitted by the plan, but the surplus can also disappear if investment earnings are lower than anticipated. Since pension plans are usually established for indefinite terms, issues relating to surpluses are not usually relevant to plan members while the plan is in operation. As the Court said in *Schmidt*, "[t]he right to any surplus is crystallized only when the surplus becomes ascertainable upon termination of the plan" (p. 654). Entitlement is determined by consulting the Plan, the Trust agreement (*Schmidt*, at p. 639) and the relevant legislation (*Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, 2004 SCC 54, at para. 39).

18 Pension plans are heavily regulated. At this juncture, it is worth looking at the legislative scheme applicable to the issue.

III. The *Pension Benefits Standards Act, 1985*

19 The complex statutory and regulatory framework to which pension plans are subject cannot be overlooked. Recognizing the economic and social

Canada Ltd., [1994] 2 R.C.S. 611, la Cour a statué, au sujet de questions liées à la répartition d'un surplus, que « lorsqu'une fiducie est créée, le fonds qui forme le capital est assujetti aux exigences du droit des fiducies. Les modalités du régime de retraite ne sont alors pertinentes quant aux questions de répartition, que dans la mesure où elles sont insérées par renvoi dans l'acte qui crée la fiducie » (p. 639). La Cour a ajouté que « [l]a caisse de retraite assujettie à une fiducie est soumise à tous les principes applicables du droit des fiducies » (p. 643 (je souligne)). Il est donc nécessaire de déterminer quels principes du droit des fiducies *sont applicables* avant d'examiner la façon dont ils s'appliquent.

Avant la cessation d'un régime, un surplus n'est qu'un concept actuariel. Pendant que le régime est en vigueur, les personnes ayant éventuellement droit au surplus ne peuvent se réclamer d'un droit précis sur celui-ci. Le surplus d'une caisse de retraite peut servir à justifier une période d'exonération de cotisations si le régime le permet, mais il peut aussi disparaître si les revenus de placement se révèlent moins élevés que prévu. Étant donné que les régimes de retraite sont normalement établis pour une période indéterminée, les questions de surplus sont habituellement dénuées d'intérêt pour les participants pendant que le régime est en vigueur. Comme la Cour l'a affirmé dans l'arrêt *Schmidt*, « [l]e droit à tout surplus n'est cristallisé que lorsque celui-ci devient vérifiable à la cessation du régime » (p. 654). Pour déterminer la teneur de ce droit, il faut consulter le régime, la convention de fiducie (*Schmidt*, p. 639) et la loi applicable (*Monsanto Canada Inc. c. Ontario (Surintendant des services financiers)*, [2004] 3 R.C.S. 152, 2004 CSC 54, par. 39).

Les régimes de retraite sont fortement réglementés. À ce stade, il convient d'examiner le régime législatif applicable à la question en litige.

III. La *Loi de 1985 sur les normes de prestation de pension*

On ne saurait passer sous silence le cadre législatif et réglementaire complexe qui régit les régimes de retraite. Reconnaissant l'importance

importance of pension plans, Parliament and the vast majority of provincial and territorial legislatures have adopted legislation regulating them. The first federal pension benefits standards legislation came into force on March 23, 1967 (S.C. 1966-67, c. 92). The current statute, the *PBSA*, was initially enacted in 1986 (S.C. 1986, c. 40). Under it, an important role of control and supervision is assigned to the Superintendent (see A. N. Kaplan, *Pension Law* (2006), for analysis on the analogous role of the Superintendent under the Ontario legislation). The Superintendent administers the *PBSA*, collects information and conducts studies concerning pension plans and their operation (s. 5). Strict investment and solvency standards are imposed on plan administrators (s. 9(1) and *Pension Benefits Standards Regulations, 1985*, SOR/87-19, rr. 6 to 10), who must also file documents and information required by the *PBSA* (ss. 7.4 and 12). A plan administrator also acts as a trustee for the employer, the members of the plan, and any persons entitled to pension benefits. The Superintendent can issue a direction of compliance if he is of the view that an administrator or an employer is pursuing a course of conduct that is contrary to sound financial practices, or that a pension plan is not being administered in accordance with the *PBSA* (s. 11(1) and (2)). If the Superintendent's direction is not complied with, the pension plan's registration may be revoked (s. 11.1). The Superintendent also plays a key role at the termination and distribution stage (ss. 9.2 and 29, and rr. 16 and 24). For example, his consent must be obtained before a surplus can be distributed (r. 16(2)(*d*)). Guidelines and instruction guides are published by the Superintendent to assist in the administration and termination of plans and trusts. Specific attention is paid to the rights of beneficiaries upon a request for distribution of a surplus. The *Guidelines to Administrators for Plan Terminations* make it clear that a delay in winding up will not be accepted simply because the administrator prefers to manage the funds.

économique et sociale des régimes de retraite, le Parlement et la vaste majorité des législatures provinciales et territoriales les ont réglementés par voie législative. La première loi fédérale sur les normes de prestations de pension est entrée en vigueur le 23 mars 1967 (S.C. 1966-67, ch. 92). La loi actuelle, la *LNPP*, a été adoptée pour la première fois en 1986 (S.C. 1986, ch. 40). Elle attribue au surintendant une importante fonction de contrôle et de surveillance (voir A. N. Kaplan, *Pension Law* (2006), pour une analyse de la fonction analogue du surintendant nommé en vertu de la loi ontarienne). Le surintendant assure l'application de la *LNPP*, recueille des renseignements et procède à des études relatives aux régimes de pension et à leur fonctionnement (art. 5). L'administrateur d'un régime est tenu de respecter des normes rigoureuses en matière de placement et de solvabilité (par. 9(1) *LNPP*, et art. 6 à 10 du *Règlement de 1985 sur les normes de prestation de pension*, DORS/87-19 (« Règlement »)). Il doit également déposer les documents et renseignements requis par la *LNPP* (art. 7.4 et 12). L'administrateur d'un régime joue également le rôle de fiduciaire de l'employeur, des participants au régime et de toute personne ayant droit à des prestations de retraite. Le surintendant peut donner une directive s'il estime qu'un administrateur ou un employeur adopte une attitude contraire aux bonnes pratiques du commerce, ou que la gestion d'un régime de retraite n'est pas conforme à la *LNPP* (par. 11(1) et (2) *LNPP*). L'agrément du régime de retraite peut être révoqué en cas de non-conformité à la directive du surintendant (art. 11.1 *LNPP*). Le surintendant joue aussi un rôle essentiel à l'étape de la cessation et de la répartition (art. 9.2 et 29 *LNPP*, et art. 16 et 24 du Règlement). Il faut notamment obtenir son consentement avant de répartir un surplus (al. 16(2)*d*) du Règlement). Le surintendant publie des lignes directrices et des guides d'instruction utiles pour gérer les régimes et les fiducies et y mettre fin. Une attention particulière est accordée aux droits des bénéficiaires en cas de demande de répartition d'un surplus. Les *Lignes directrices à l'intention des administrateurs sur la cessation des régimes de pension* prévoient clairement que l'administrateur ne peut pas retarder la liquidation uniquement parce qu'il préfère gérer la caisse de retraite.

20 In essence, the Superintendent plays a crucial role in the protection of beneficiaries. Although most of his interventions relate to supervision of the solvency requirements, he also acts as a gatekeeper for the distribution of a pension fund. The Superintendent has unique duties and responsibilities *vis-à-vis* beneficiaries that may make it possible to avoid resorting to a common law rule that was designed for an environment totally different from that of pension law.

IV. The Rule in *Saunders v. Vautier*

21 The common law rule in *Saunders v. Vautier* can be concisely stated as allowing beneficiaries of a trust to depart from the settlor's original intentions provided that they are of full legal capacity and are together entitled to all the rights of beneficial ownership in the trust property. More formally, the rule is stated as follows in *Underhill and Hayton Law Relating to Trusts and Trustees* (14th ed. 1987), at p. 628:

> If there is only one beneficiary, or if there are several (whether entitled concurrently or successively) and they are all of one mind, and he or they are not under any disability, the specific performance of the trust may be arrested, and the trust modified or extinguished by him or them without reference to the wishes of the settlor or the trustees.

According to D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 1175, the rule was developed in the 19th century and originated as an implicit understanding of Chancery judges that the significance of property lay in the right of enjoyment. The idea was that, since the beneficiaries of a trust would eventually receive the property, they should decide how they intended to enjoy it.

22 The members argue that this rule allows them to terminate the Trust fund even though the employer, upon agreeing to the Trust, stated that only he could terminate it. The terms of the Plan and its

Essentiellement, le surintendant joue un rôle crucial dans la protection des bénéficiaires. Bien que la plupart de ses interventions visent à assurer le respect des normes de solvabilité, il joue également un rôle de gardien en ce qui a trait à la répartition de l'actif d'une caisse de retraite. Il a envers les bénéficiaires des obligations et des responsabilités exceptionnelles qui peuvent permettre d'éviter le recours à une règle de common law qui a été conçue pour s'appliquer dans un contexte totalement différent de celui du droit régissant les régimes de retraite.

IV. La règle de *Saunders c. Vautier*

On peut dire succinctement que la règle de common law de *Saunders c. Vautier* permet aux bénéficiaires d'une fiducie de déroger aux intentions initiales du disposant pourvu qu'ils aient la pleine capacité juridique et qu'ils possèdent ensemble tous les droits de propriété bénéficiaire sur les biens en fiducie. Plus formellement, la règle est définie ainsi dans *Underhill and Hayton Law Relating to Trusts and Trustees* (14e éd. 1987), p. 628 :

> [TRADUCTION] S'il n'y a qu'un seul bénéficiaire, ou s'il y en a plusieurs (peu importe qu'ils puissent exercer leurs droits concurremment ou successivement) qui sont unanimes, et qu'aucun n'est frappé d'incapacité juridique, l'exécution des obligations de la fiducie peut être interrompue et il peut y avoir modification ou extinction de la fiducie par le(s) bénéficiaire(s) sans égard à la volonté du disposant ou des fiduciaires.

Selon D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3e éd. 2005), p. 1175, la règle a été établie au XIXe siècle et découle d'une conception implicite des juges de la Cour de la Chancellerie selon laquelle la propriété trouve son sens dans le droit de jouissance. On considérait que, puisque la propriété serait attribuée en fin de compte aux bénéficiaires de la fiducie, il appartenait à ces derniers de décider de quelle façon ils voulaient en jouir.

Les participants allèguent que cette règle leur permet de mettre fin à la caisse en fiducie même si, en concluant la convention de fiducie, l'employeur a dit être le seul à pouvoir y mettre fin. Les

Trust fund are the key to the analysis. I will now turn to them.

V. The Plan and Its Trust Fund

The Plan, as stated in 1974, provided for the assets to be held in accordance with the terms of a Trust agreement. A committee known as the Retirement Committee was appointed by the company to administer the Plan. All employees hired after January 1, 1974 were required to become members of the Plan, while the other employees were eligible to join it under certain conditions (General Rule Two). The benefits were not to exceed the maximum permitted under the prevailing legislation and were payable upon retirement (the normal retirement age was 65 years). Although entitled to make additional contributions, employees were not required to contribute to the regular funding of the Plan (Special Rule Four (1)). The employer's contribution was calculated by the actuary appointed under the Plan (General Rule Four (2)). Benefits were to be paid to the member for the remainder of his or her life and then to the member's beneficiary for any remaining portion of a "guaranteed period". A lump sum could be paid, but only to a member, if the benefit was less than $10 per month, and even so this was at the Retirement Committee's discretion. The committee could decide all matters in respect to the operation, administration and interpretation of the provisions of the Plan (General Rule Six (12)). The company had the right to amend the Plan provided that the amendment did not affect rights acquired or benefits earned as at the date of the amendment. Upon termination, benefits were to be paid as provided for in the Plan, and the balance of assets remaining in the trust fund, after all liabilities had been satisfied, were to be distributed by the Committee among the remaining members on the basis of s. 12 of the former *Pension Benefits Standards Act* (General Rule Seven).

The Trust agreement was entered into for the specific purpose of creating a Trust fund for the Plan. The fund was to be held and administered for

modalités du Régime et de sa caisse en fiducie jouent un rôle essentiel dans l'analyse. Je vais maintenant les examiner.

V. Le Régime et sa caisse en fiducie

Le Régime défini en 1974 prévoyait que l'actif serait détenu conformément à une convention de fiducie. La compagnie a créé un comité, appelé le comité de retraite, qui était chargé de gérer le Régime. Tous les employés embauchés après le 1er janvier 1974 devaient adhérer au Régime, alors que les autres employés pouvaient le faire à certaines conditions (Deuxième règle générale). Les prestations ne devaient pas excéder le maximum autorisé par la loi en vigueur et étaient payables lors de la retraite (l'âge normal de la retraite étant fixé à 65 ans). Même s'ils avaient le droit de verser des cotisations supplémentaires, les employés n'étaient pas tenus de contribuer à la capitalisation régulière du Régime (Quatrième règle spéciale, section 1). Les cotisations de l'employeur étaient calculées par l'actuaire nommé conformément au Régime (Quatrième règle générale, section 2). Les prestations devaient être payées au participant jusqu'à la fin de ses jours, puis au bénéficiaire du participant pendant le reste d'une [TRADUCTION] « période garantie ». Une somme forfaitaire pouvait être versée, mais seulement à un participant, si la prestation était inférieure à 10 $ par mois, et même là, au gré du comité de retraite. Le comité pouvait trancher toute question relative à l'application et à l'interprétation des dispositions du Régime (Sixième règle générale, section 12). La compagnie avait le droit de modifier le Régime dans la mesure où cela ne portait pas atteinte aux droits acquis ou aux prestations accumulées à la date de la modification. À la cessation, les prestations devaient être payées conformément aux dispositions du Régime, et, après que toutes les dettes aient été acquittées, le comité devait répartir entre les autres participants l'actif restant de la caisse en fiducie, conformément à l'art. 12 de l'ancienne *Loi sur les normes des prestations de pension* (Septième règle générale).

23

La convention de fiducie a été conclue dans le but précis de doter le Régime d'une caisse de retraite en fiducie. La caisse devait être détenue et gérée

24

the benefit of employees and of beneficiaries under the Plan. The trustee was to follow directions given by the company. The company also had the right to terminate the Trust agreement (art. V(2)).

25 Rogers purported to amend the Plan to give itself the right to the surplus in 1992, but the Court of Appeal found (*Buschau No. 1*, at para. 59) that the amendments had not affected the members' rights; its judgment in that case is now binding on the parties.

26 Thus, neither the Trust agreement nor the Plan provides for termination of the Trust by employees. The members consequently rely on the rule in *Saunders v. Vautier*. Does it apply? Like my colleague Bastarache J., I conclude that it does not. My reasons are slightly different, however.

VI. Non-Application of the Rule in *Saunders v. Vautier*

27 There are many reasons why the rule is not easily incorporated into the context of employment pension plans.

28 First, pension plans are heavily regulated. The *PBSA* regulates the termination of a plan and the distribution of the fund and the trust assets. I accept the following comment of the Court of Appeal (*Buschau No. 2*, at para. 47):

> It must be acknowledged that the application of the rule in *Saunders v. Vautier* to pension trusts does involve different and more complicated factors, financial and legal, than an ordinary legacy or gift in trust. As already noted, pension trusts are part of the complex of rights and obligations (not only equitable, but also contractual and statutory) between employers and employees, and obviously serve broad societal and economic purposes.

However, the Court of Appeal's order (*Buschau No. 3*) defies the application of the *PBSA* because it allows for the operation of the rule in *Saunders v.*

pour le compte des employés et des bénéficiaires assujettis au Régime. Le fiduciaire devait suivre les directives de la compagnie. Cette dernière avait aussi le droit de mettre fin à la convention de fiducie (art. V(2)).

En 1992, Rogers a voulu modifier le Régime pour s'accorder le droit au surplus, mais la Cour d'appel a décidé (*Buschau n^o 1*, par. 59) que les modifications ne portaient pas atteinte aux droits des participants; cette décision lie maintenant les parties.

Ainsi, ni la convention de fiducie ni le Régime ne prévoient que les employés peuvent mettre fin à la fiducie. En conséquence, les participants invoquent la règle de *Saunders c. Vautier*. S'applique-t-elle? À l'instar de mon collègue le juge Bastarache, je conclus que non, mais pour des raisons légèrement différentes.

VI. L'inapplication de la règle de *Saunders c. Vautier*

La règle ne s'intègre pas facilement au contexte des régimes de retraite d'employeurs pour de nombreuses raisons.

Premièrement, les régimes de retraite sont fortement réglementés. La *LNPP* régit la cessation d'un régime et la répartition de l'actif de la caisse et de la fiducie. Je souscris à l'observation suivante de la Cour d'appel (*Buschau n^o 2*, par. 47) :

> [TRADUCTION] Il faut reconnaître que l'application de la règle de *Saunders c. Vautier* aux fiducies de retraite met effectivement en cause des facteurs différents et plus complexes, tant financiers que juridiques, que lorsqu'il s'agit d'un legs ou d'une donation ordinaire en fiducie. Comme nous l'avons vu, les fiducies de retraite font partie de l'ensemble complexe des droits et obligations (non seulement reconnus en *equity*, mais également prévus par le droit des contrats et la loi écrite) entre employeurs et employés et répondent, de toute évidence, à des besoins sociaux et économiques généraux.

L'ordonnance de la Cour d'appel (*Buschau n^o 3*) va cependant à l'encontre de la *LNPP* parce qu'elle permet l'application de la règle de *Saunders c.*

Vautier without regard to the obligations to report to the Superintendent and to provide for the payment of pension benefits before distribution of the trust fund. The *PBSA* deals extensively with the termination of plans and the distribution of assets. It is clear from this explicit legislation that Parliament intended its provisions to displace the common law rule. To the extent that it provides a means to reach the distribution stage, the *PBSA* prevails over the traditional rule in *Saunders v. Vautier.*

Vautier sans égard aux obligations de rendre compte au surintendant et de prévoir le versement de prestations de retraite avant la répartition de l'actif de la caisse en fiducie. La *LNPP* traite abondamment de la cessation des régimes et de la répartition de l'actif. Il ressort clairement de ce texte législatif explicite que le législateur a voulu que ses dispositions supplantent la règle de common law. Dans la mesure où elle prévoit un moyen de parvenir à l'étape de la répartition, la *LNPP* prime la règle traditionnelle de *Saunders c. Vautier.*

Second, a family or testamentary trust is generally a stand-alone instrument. It does not usually depend on any other instrument for its operation. No indirect effect results from the application of the rule in *Saunders v. Vautier* in such cases. In contrast, a pension trust serves only as a vehicle for holding and managing the funds required by the pension plan. In the instant case, the Trust agreement is expressly "made a part of the Plan" (art. I(1)) and the Plan is attached to that agreement (preamble to the Trust agreement). The Trust agreement is therefore dependent on the Plan for which it was created. The Premier Trust cannot be collapsed without regard to the Plan itself. The two instruments are therefore indissociable. This particular situation was not dealt with in *Schmidt*, which focussed on the distribution of trust assets, not the termination of a trust agreement that had been expressly made part of a plan. In the case at bar, despite the link between the Plan and the Trust agreement, the judgment of the Court of Appeal purports to authorize the members to resort to the rule in *Saunders v. Vautier*, but does not provide for termination of the Plan. And yet, termination of the Plan in accordance with the prevailing *PBSA* is a condition precedent to distribution. This awkward juridical status illustrates why the common law rule is not an easy fit in the pension law context.

29 Deuxièmement, une fiducie familiale ou testamentaire est généralement un instrument distinct. Son fonctionnement ne dépend généralement d'aucun autre instrument. L'application de la règle de *Saunders c. Vautier* n'a aucun effet indirect dans ces cas. Par contre, une fiducie de retraite ne sert que de moyen de détenir et de gérer les fonds requis par le régime de retraite. En l'espèce, il est prévu expressément que la convention de fiducie [TRADUCTION] « fait partie du régime » (art. I(1)) et le Régime est joint à cette convention (préambule de la convention de fiducie). La convention de fiducie est donc subordonnée au régime pour lequel elle a été conclue. On ne peut pas mettre fin à la fiducie de Premier sans tenir compte du Régime lui-même. Par conséquent, les deux instruments sont indissociables. Cette situation particulière n'a pas été examinée dans l'arrêt *Schmidt*, qui portait sur la répartition d'un actif en fiducie et non sur la cessation d'une convention de fiducie faisant expressément partie d'un régime de retraite. En l'espèce, malgré le lien qui existe entre le Régime et la convention de fiducie, l'arrêt de la Cour d'appel est censé autoriser les participants à recourir à la règle de *Saunders c. Vautier*, mais il ne prévoit pas la cessation du Régime. Pourtant, la cessation du Régime conformément à la *LNPP* en vigueur est une condition préalable de la répartition. Cette situation juridique incongrue montre pourquoi la règle de common law ne s'inscrit pas facilement dans le contexte du droit régissant les régimes de retraite.

Third, employers establish plans because it is in their interest to do so. Under normal circumstances, they have the right not to have their management decisions disturbed. In contrast, the common

30 Troisièmement, les employeurs établissent des régimes parce qu'ils ont intérêt à le faire. Dans des circonstances normales, ils ont droit à ce que leurs décisions administratives soient respectées. Par

law trust allows no room for the settlor's interest. Although the particular circumstances of this case may lead to the conclusion that the employer no longer has a legitimate interest in the continuation of the Plan, a blanket statement that the employer has no interest conflicts with the usual expectations of parties to a pension plan.

31 Fourth, gift or legacy trusts are gratuitous, and accelerating the date of the beneficiaries' entitlement has no broad social consequences. Pension trusts funds, however, are no longer generally viewed as being gratuitous: either employees contribute directly or their entitlement is regarded as remuneration deferred until the date of their retirement. The capital of the pension trust fund cannot be distributed without defeating the social purpose of preserving the financial security of employees in their retirement by allowing them to receive periodic payments until they die.

32 Thus, this case amply demonstrates the difficulties associated with applying the rule in *Saunders v. Vautier* to a pension trust. The Court of Appeal issued an order stating that the members were at liberty to invoke the rule in *Saunders v. Vautier*. All the reporting and approval mechanisms that must precede termination by virtue of the *PBSA* were disregarded. They were treated as issues relating merely to "mechanics" (*Buschau No. 3*, at para. 17). According to the Court of Appeal, the Premier Trust may be collapsed without regard to its purpose of providing a means to defer income. No order was made to provide for annuities as required by the *PBSA*. Moreover, while the Court of Appeal held that the Premier Trust may be terminated pursuant to the rule in *Saunders v. Vautier*, no corresponding provision was made for terminating the trustee's obligations to the members under the merged RCI Plan.

33 I therefore conclude that the impediments to applying the rule in *Saunders v. Vautier* are

contre, la fiducie de common law ne fait aucune place à l'intérêt du disposant. Bien que les circonstances particulières de la présente affaire puissent mener à la conclusion que l'employeur n'a plus d'intérêt légitime dans le maintien du Régime, une déclaration générale selon laquelle l'employeur n'a aucun intérêt va à l'encontre des attentes normales des parties à un régime de retraite.

Quatrièmement, les donations ou legs en fiducie sont des libéralités, et le fait de rapprocher la date à laquelle les bénéficiaires peuvent exercer leur droit n'a aucune conséquence sociale générale. Toutefois, les droits dans les fiducies de retraite ne sont plus généralement considérés comme des libéralités : les employés peuvent cotiser directement ou encore leur droit est considéré comme une rémunération différée jusqu'à la date de leur départ à la retraite. Le capital de la caisse de retraite en fiducie ne peut pas être réparti sans contrecarrer l'objectif social consistant à assurer la sécurité financière des employés retraités en leur permettant de recevoir des versements périodiques jusqu'à la fin de leurs jours.

La présente affaire démontre donc amplement les difficultés que présente l'application de la règle de *Saunders c. Vautier* à une fiducie de retraite. La Cour d'appel a rendu une ordonnance déclarant que les participants étaient libres d'invoquer la règle de *Saunders c. Vautier*. Tous les mécanismes d'établissement de rapports et d'obtention d'approbations qui doivent précéder la cessation en vertu de la *LNPP* ont été passés sous silence. Ils ont été considérés comme de simples questions de « processus » (*Buschau n^{o} 3*, par. 17). Selon la Cour d'appel, il peut être mis fin à la fiducie de Premier sans égard à son objectif consistant à donner un moyen de différer un revenu. Contrairement à ce qu'exige la *LNPP*, aucune ordonnance prévoyant le versement d'une rente n'a été rendue. De plus, bien que la Cour d'appel ait conclu qu'il peut être mis fin à la fiducie de Premier en application de la règle de *Saunders c. Vautier*, elle n'a pas prévu comment prendraient fin les obligations de la fiduciaire envers les participants aux termes du régime fusionné de RCI.

Je conclus donc que les obstacles à l'application de la règle de *Saunders c. Vautier* sont nombreux.

numerous. The rule is not easily applicable to pension trusts and not even the length of time elapsed since the beginning of the proceedings can allow the members to bend the rule to fit it to their case. I do not exclude the possibility that the common law rule might apply to very small pension plans, the kind offered to a few officers of a corporation, but in general the fit is wrong. The conclusion that the common law rule does not generally apply to traditional pension funds is reinforced by the fact that the *PBSA* provides mechanisms that protect members from inappropriate conduct by plan administrators. Since my colleague Bastarache J. does not share my opinion on this point, I feel that I should elaborate on it.

Il n'est pas facile d'appliquer cette règle aux fiducies de retraite et même le temps écoulé depuis le début des procédures ne saurait permettre aux participants de la dénaturer pour qu'elle s'applique à leur cas. Je n'écarte pas la possibilité que la règle de common law s'applique à de petits régimes de retraite, comme ceux offerts à quelques dirigeants d'une société mais, en général, elle ne s'y prête pas. La conclusion que la règle de common law ne s'applique pas généralement aux caisses de retraite traditionnelles est renforcée par le fait que la *LNPP* établit des mécanismes de protection des participants contre la conduite répréhensible des administrateurs du régime. Étant donné que mon collègue le juge Bastarache ne partage pas mon opinion sur ce point, je me dois de préciser ma pensée.

VII. Members' Recourse

I have already noted that neither the Plan nor the Trust agreement grants members a direct right to terminate the Plan. There is a reason for this. Historically, employers created plans for their own purposes, without much input from employees. Of course, plans benefited employees, but they were essentially human resources management tools. Where possible, employers stated terms that allowed them to control the operation of the plans, thereby protecting their interests. Employer control is tempered, in a unionized context, by undertakings resulting from collective agreements and, outside of the collective bargaining context, by individual contracts of employment. However, wording reserving the employers' right to terminate is still common. A plan is also seen as being, if not a permanent instrument, at least a long-term one. However, the participation of any individual member is ephemeral: members come and go, while plans are expected to survive the flow of employees and corporate reorganizations. In an ongoing plan, a single group of employees should not be able to deprive future employees of the benefit of a pension plan. Thus, members often have only a passive and limited right with regard to employer decisions concerning the future of their plan and trust fund. However, they are not left without recourse should the employer infringe the *PBSA* or their plan. They

VII. Le recours des participants

34 J'ai déjà fait remarquer que ni le Régime ni la convention de fiducie ne confère aux participants un droit direct de mettre fin au Régime. Cela s'explique. Historiquement, les employeurs établissaient des régimes pour répondre à leurs propres besoins, sans que les employés aient beaucoup à dire. Certes, ces régimes étaient avantageux pour les employés, mais ils constituaient essentiellement des outils de gestion des ressources humaines. Lorsque cela était possible, les employeurs énonçaient des modalités qui leur permettaient de contrôler le fonctionnement des régimes et de protéger ainsi leurs intérêts. Dans un milieu de travail syndiqué, le contrôle exercé par l'employeur est tempéré par des engagements résultant de conventions collectives, et en dehors du contexte de la négociation collective, par des contrats de travail individuels. Toutefois, la formulation qui réserve à l'employeur le droit de cessation est encore courante. Un régime est aussi considéré comme un instrument, sinon permanent, tout au moins à long terme. Par ailleurs, la participation individuelle d'un employé est éphémère : des participants arrivent et d'autres partent; on s'attend néanmoins à ce que les régimes survivent aux roulements de personnel et aux réorganisations d'entreprise. Dans un régime en vigueur, un seul groupe d'employés ne devrait pas pouvoir priver d'un régime de retraite

can alert the Superintendent and trigger action if and when required.

35 The *PBSA* is not a complete code. However, when recourse is available to plan members, they should use it. Termination is dealt with explicitly in the *PBSA*. When asked to submit representations on the remedies afforded by the *PBSA*, the members took the position that the remedy afforded by the statute could not cover all their claims. They also stated that the Superintendent could have intervened on his own.

36 This answer is not satisfactory. The members wanted the Trust fund to be collapsed and distributed directly to them. A trust can in fact be automatically terminated and distributed in this way pursuant to the rule in *Saunders v. Vautier*. As mentioned above, however, such a distribution does not accord with the terms of the Plan and with the spirit of the social scheme, the purpose of which is to provide periodic payments during members' lifetimes, not to distribute the capital in a lump sum. Moreover, the members' position is not compatible with the *PBSA* and it puts them at risk of attracting undesirable tax consequences (*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), ss. 56(1), 146(8), 147.1(11) and (13); *Income Tax Regulations*, C.R.C. 1978, c. 945, ss. 8501(1) and 8502). Also, the Superintendent can hardly be expected to be familiar with details of the management of a particular pension plan. The members could have asked him to step in.

37 A clear illustration of the Superintendent's potential role can be found in the facts that gave rise to the members' original action. In 1985, the trustee, at Rogers' request, transferred close to $1 million

les futurs employés. Par conséquent, les participants n'ont souvent qu'un droit passif et limité relativement aux décisions que l'employeur prend au sujet de l'avenir de leur régime et de leur caisse en fiducie. Cependant, ils ne sont pas dépourvus de recours si jamais l'employeur enfreint la *LNPP* ou leur régime. Au besoin, ils peuvent demander au surintendant d'intervenir.

La *LNPP* n'est pas un code exhaustif. Toutefois, lorsque les participants au régime disposent d'un recours, ils devraient l'exercer. La *LNPP* traite expressément de la cessation. Lorsqu'on leur a demandé de présenter des observations sur les recours offerts par la *LNPP*, les participants ont prétendu que le recours prévu par la Loi ne pouvait pas s'appliquer à toutes leurs demandes. Ils ont ajouté que le surintendant aurait pu intervenir de son propre chef.

Cette réponse n'est pas satisfaisante. Les participants voulaient mettre fin à la caisse en fiducie et souhaitaient que l'actif de la caisse soit réparti entre eux directement. En fait, il est possible de mettre fin automatiquement à une fiducie et d'en répartir l'actif de cette manière conformément à la règle de *Saunders c. Vautier*. Toutefois, comme je l'ai déjà mentionné, une telle répartition n'est pas conforme aux modalités du Régime et à l'esprit du projet social qui vise à assurer des versements périodiques aux participants au cours de leur vie, et non à répartir le capital sous la forme d'une somme forfaitaire. De plus, le point de vue des participants n'est pas compatible avec la *LNPP* et il les expose à des conséquences fiscales non souhaitables (*Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5^{e} suppl.), par. 56(1), 146(8), 147.1(11) et (13); *Règlement de l'impôt sur le revenu*, C.R.C. 1978, ch. 945, par. 8501(1) et art. 8502). En outre, on ne peut guère s'attendre à ce que le surintendant ait une connaissance détaillée de la gestion d'un régime de retraite particulier. Les participants auraient pu lui demander d'intervenir.

Les faits à l'origine de la première action des participants illustrent bien le rôle que le surintendant peut jouer. En 1985, la fiduciaire a transféré à Rogers, à la demande de cette dernière, près de un

to Rogers out of the Plan's Trust fund. Rogers eventually acknowledged that the transfer was improper and reimbursed the amount in the course of that initial proceeding. However, the members could have asked the Superintendent to exercise his powers under the *PBSA*.

Under s. 8(3) of the *PBSA*, plan members can object to an administrator's conduct if it is in breach of its fiduciary duty to them. Also, under s. 8(10), an employer who is an administrator is forbidden to put itself in a material conflict of interest. The Superintendent could have directed Rogers to return the money to the Trust (s. 29(11) and s. 11(1) of the *PBSA*).

Here, the members claim to be entitled to distribution of the surplus. For them to be entitled to distribution, the Plan must first be terminated. Since the Plan does not provide for them to terminate it, the Superintendent could order a distribution if he were faced with circumstances falling within the parameters of the *PBSA*.

Is that the case? I mentioned earlier that clauses allowing employers to control terminations are common. However, the traditional pension plan analysis does not apply in the instant case. Rogers conceded that the 1992 amendments entitling it to any surplus on termination were "invalid as against the [members]" (*Buschau No. 1*, at para. 38). The Court of Appeal found (*Buschau No. 1*, at paras. 63 and 66) that the merger was incomplete as regards the Plan and that the members retained rights that were distinct from those of members of the other plans that were merged in the RCI Plan. *Buschau No. 1* is now binding on Rogers. Although the members do not have a specific interest in the surplus before termination, the findings in *Buschau No. 1* limit Rogers' rights to use it.

One circumstance that could justify delaying the termination of the Plan (as incompletely merged with the RCI Plan) and the incidental distribution of the Premier Trust fund would be if Rogers had a

million de dollars provenant de la caisse en fiducie du Régime. Rogers a fini par reconnaître l'illégitimité de ce transfert et a remboursé la somme au cours de cette première action. Cependant, les participants auraient pu demander au surintendant d'exercer les pouvoirs que lui confère la *LNPP*.

38 Aux termes du par. 8(3) *LNPP*, les participants au régime peuvent s'opposer à la conduite d'un administrateur si elle constitue un manquement à l'obligation fiduciaire qu'il a envers eux. De même, le par. 8(10) interdit à l'employeur qui est l'administrateur de se trouver dans un conflit d'intérêts sérieux. Le surintendant aurait pu enjoindre à Rogers de remettre l'argent dans la fiducie (par. 29(11) et 11(1) *LNPP*).

39 En l'espèce, les participants soutiennent qu'ils ont droit à la répartition du surplus. Pour qu'ils aient droit à la répartition, il doit d'abord y avoir cessation du Régime. Étant donné que le Régime ne prévoit pas qu'ils peuvent y mettre fin, le surintendant pourrait ordonner une répartition s'il était en présence d'une situation qui s'inscrit à l'intérieur des paramètres de la *LNPP*.

40 Est-ce le cas? J'ai déjà mentionné que les clauses qui permettent aux employeurs de contrôler les cessations sont courantes. Cependant, l'analyse traditionnelle des régimes de retraite ne s'applique pas en l'espèce. Rogers a concédé que les modifications de 1992 lui donnant droit à tout surplus en cas de cessation étaient [TRADUCTION] « inopposables aux [participants] » (*Buschau n^o^ 1*, par. 38). La Cour d'appel a conclu (*Buschau n^o^ 1*, par. 63 et 66) que la fusion était incomplète quant au Régime et que les participants conservaient des droits distincts de ceux des participants aux autres régimes qui avaient été fusionnés dans le régime de RCI. L'arrêt *Buschau n^o^ 1* lie désormais Rogers. Bien que les participants ne possèdent pas de droit précis sur le surplus avant la cessation, les conclusions de l'arrêt *Buschau n^o^ 1* limitent le droit de Rogers de l'utiliser.

41 La cessation du Régime (fusionné de manière incomplète avec le régime de RCI) et la répartition consécutive de l'actif de la caisse en fiducie de Premier pourraient être retardées si Rogers avait le

right to amend the Plan to open it to new members. However, the possibility of reopening the Plan is problematic and has been commented on by the courts below.

42 In the second action, the chambers judge interpreted the Court of Appeal's conclusion in *Buschau No. 1* concerning the distinct right of the Plan members to the surplus as preventing Rogers from using its power to amend the Plan to reopen it to new members. Dealing with Rogers' argument that the rule in *Saunders v. Vautier* could not apply because it had the right to amend, the chambers judge found, in her 2002 reasons, that Rogers could not use its amending power to do what it could not do through a merger (at para. 29):

> The Court of Appeal could only have granted liberty to the Members to terminate the trust on the basis that the trust was closed and that no further beneficiaries would be added. In my view, based on the evidence before me, the first time RCI gave any thought to reopening the Plan to allow new members was in response to efforts by the Members to terminate the Plan and have the surplus paid to them. For these reasons, RCI's argument that the rule cannot apply because it may amend the Plan to allow new members, must fail.

43 The Court of Appeal left this finding undisturbed (*Buschau No. 2*, at para. 61):

> The particular circumstances of this case make it impossible in my view that RCI could now exercise its right to "re-open" the Plan to new Members, entitling them to share with the existing Members in the benefits of the Trust, including the surplus. The Plan was declared closed in 1984 and as the Chambers judge found, "the first time RCI gave any thought to re-opening . . . was in response to efforts by the Members to terminate the Plan and have the surplus paid to them." Any move now to re-open the Plan to other RCI employees would, given what has gone on before, rightly be regarded as no different from the stratagem adopted by RCI some years ago to avail itself of the benefit of the actuarial surplus in the Premier Trust — the purported "merger" of the Plan with other plans that were not in surplus positions. A similar result would ensue: because of its breach of trust or obligation of good faith, the

droit de modifier le Régime de manière à l'ouvrir à de nouveaux participants. Toutefois, la possibilité de rouvrir le Régime pose un problème et a fait l'objet d'observations de la part des tribunaux d'instance inférieure.

Dans la seconde action, la juge en chambre a considéré que la conclusion de la Cour d'appel, dans l'arrêt *Buschau n^o 1*, selon laquelle les participants au Régime possèdent un droit distinct au surplus, empêchait Rogers d'exercer son droit de modifier le Régime de manière à le rouvrir à de nouveaux participants. Quant à l'argument de Rogers selon lequel la règle de *Saunders c. Vautier* était inapplicable en raison de son droit de modifier, la juge en chambre a conclu, dans ses motifs de 2002, que Rogers ne pouvait pas exercer son droit de modification pour faire ce qu'elle ne pouvait pas faire au moyen d'une fusion (par. 29) :

> [TRADUCTION] La Cour d'appel ne pouvait permettre aux participants de mettre fin à la fiducie que si la fiducie était fermée et qu'aucun autre bénéficiaire n'était ajouté. Selon moi, d'après la preuve qui m'a été présentée, c'est en réaction aux démarches des participants visant à mettre fin au régime et à obtenir le surplus que RCI a songé pour la première fois à rouvrir le régime à de nouveaux participants. C'est pourquoi il faut rejeter l'argument de RCI selon lequel la règle est inapplicable parce qu'elle peut modifier le régime de manière à l'ouvrir à de nouveaux participants.

La Cour d'appel n'a rien changé à cette conclusion (*Buschau n^o 2*, par. 61) :

> [TRADUCTION] J'estime que les circonstances particulières de la présente affaire empêchent RCI d'exercer maintenant son droit de « rouvrir » le régime à de nouveaux participants et de leur permettre de partager avec les participants existants les prestations accumulées dans la fiducie, y compris le surplus. Le régime a été déclaré fermé en 1984 et, comme l'a dit la juge en chambre : « c'est en réaction aux démarches des participants visant à mettre fin au régime et à obtenir le surplus que RCI a songé pour la première fois à rouvrir ». Toute initiative qui viserait maintenant à rouvrir le régime à d'autres employés de RCI serait, compte tenu de ce qui s'est passé antérieurement, considérée à bon droit comme un autre stratagème de RCI semblable à celui qu'elle a employé, il y a quelques années, pour bénéficier du surplus actuariel de la fiducie de Premier — la prétendue « fusion » du régime avec d'autres régimes qui n'affichaient pas un

employer would be required to account to the existing Members as if the Plan had not been re-opened.

surplus. On arriverait à un résultat similaire : parce qu'il a manqué à son obligation de fiduciaire ou à son obligation d'agir de bonne foi, l'employeur serait tenu de rendre compte aux participants existants comme si le régime n'avait pas été rouvert.

If Rogers could amend the merged RCI Plan to open it to new members, it is questionable whether the Premier Trust fund could be used to fund benefits owed to new members without infringing the judgment that is binding on Rogers. Using the Premier Trust fund to fund benefits for new members or to fund benefits owed to members of a merged plan have been considered analogous by the courts below. I do not need to give a definite answer on the possibility of amending the Plan because, except to the extent that Rogers is bound by *Buschau No. 1*, the matter is best left to the Superintendent. 44

Si Rogers pouvait modifier le régime fusionné de RCI de manière à l'ouvrir à de nouveaux participants, il n'est pas certain que la caisse en fiducie de Premier pourrait servir à capitaliser les prestations dues aux nouveaux participants sans enfreindre le jugement qui lie Rogers. Les tribunaux d'instance inférieure ont considéré que l'utilisation de la caisse en fiducie de Premier pour capitaliser des prestations destinées à de nouveaux participants ou pour capitaliser des prestations dues aux participants d'un régime fusionné revenait au même. Je n'ai pas à me prononcer de manière définitive sur la possibilité de modifier le Régime car, sauf dans la mesure où Rogers est liée par l'arrêt *Buschau n^o^ 1*, cela est du ressort du surintendant.

The members can ask the Superintendent to partially terminate the RCI Plan insofar as it relates to the Plan. The Superintendent can assess the facts and deal with any new arguments Rogers or the members may raise. He is in the best position to monitor the orderly termination of the part of the RCI Plan that relates to the members. 45

Les participants peuvent demander au surintendant de mettre fin en partie au régime de RCI dans la mesure où il a trait au Régime. Le surintendant peut apprécier les faits et examiner tout nouvel argument que Rogers ou les participants peuvent avancer. Il est le mieux placé pour assurer la cessation ordonnée de la partie du régime de RCI qui concerne les participants.

If the Superintendent decides that Rogers cannot amend the Plan to open it to new members, there may be no point in continuing the Plan if pension benefits can be provided by a third party such as an insurance company through annuities of the kind provided for upon termination of any plan under the *PBSA*. 46

Si le surintendant décide que Rogers ne peut pas modifier le Régime de manière à l'ouvrir à de nouveaux participants, il ne servira peut-être à rien de maintenir le Régime si un tiers, telle une compagnie d'assurances, peut verser les prestations de retraite sous forme de rentes comme celles versées à la cessation d'un régime fondée sur la *LNPP*.

The Superintendent could consider the Plan terminated because all contributions ceased in 1984. He could find that this cessation is, in the circumstances, a *termination* as that word is defined in the *PBSA*: 47

Le surintendant pourrait considérer qu'il a été mis fin au Régime, parce qu'on a arrêté complètement de payer des cotisations en 1984. Il pourrait conclure que cet arrêt de paiement constitue, dans les circonstances, une *cessation* au sens de la définition énoncée dans la LNPP :

2. (1) In this Act,

. . .

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

. . .

"termination", in relation to a pension plan, means the cessation of crediting of benefits to plan members generally, and includes the situations described in subsections 29(1) and (2);

According to the guidelines issued by the Office of the Superintendent, winding up must not be delayed without the Superintendent's consent, and the administrator wanting to manage the fund is not an acceptable reason for delay. Moreover, the trust Fund, according to its terms, must be administered for the benefit of the employees and the beneficiaries, not the employer.

48 It is up to the Superintendent to decide whether the circumstances surrounding the cessation of the contribution make the definition of "termination" mentioned above applicable and whether the delay in winding up is justified (s. 11.1).

49 If the cessation is a termination and if the delay is not justified, the Superintendent can direct that the plan be wound up in part in accordance with s. 29(11), which reads as follows:

29. . . .

(11) Where the whole of a pension plan has been terminated and the Superintendent is of the opinion that no action or insufficient action has been taken to wind up the plan, the Superintendent may direct the administrator to distribute the assets of the plan in accordance with the regulations made under paragraph 39(*j*), and may direct that any expenses incurred in connection with that distribution be paid out of the pension fund of the plan, and the administrator shall forthwith comply with any such direction.

50 It is also possible that the Superintendent could exercise his power of termination. Section 29(2)(*a*) provides as follows:

29. . . .

(2) The Superintendent may declare the whole or part of a pension plan terminated where

(*a*) there is any suspension or cessation of employer contributions in respect of all or part of the plan members;

51 Obviously, not every cessation of contributions will result in a direction by the Superintendent.

« cessation » Cessation d'un régime de pension dans le cas où il n'est plus porté de droits à prestation en faveur des participants et dans les cas visés par les paragraphes 29(1) et (2).

Selon les lignes directrices du Bureau du surintendant, la liquidation ne doit pas être retardée sans le consentement du surintendant, et la volonté de l'administrateur de gérer la caisse n'est pas une raison acceptable de la retarder. De plus, la caisse en fiducie doit, selon ses propres modalités, être gérée pour le compte des employés et des bénéficiaires, et non pour le compte de l'employeur.

Il appartient au surintendant de décider si les circonstances entourant l'arrêt de paiement des cotisations rendent applicable la définition de la notion de « cessation » mentionnée ci-dessus et si le retard mis à procéder à la liquidation est justifié (art. 11.1).

Si l'arrêt de paiement constitue une cessation et si le retard n'est pas justifié, le surintendant peut enjoindre de liquider en partie le Régime conformément au par. 29(11), dont voici le texte :

29. . . .

(11) Le surintendant peut, après la cessation totale d'un régime de pension, s'il est d'avis qu'aucune mesure n'a été prise en vue de sa liquidation ou que celles qui l'ont été sont insuffisantes à cette fin, enjoindre à l'administrateur de répartir les actifs du régime conformément aux règlements pris au titre de l'alinéa 39*j*) et ordonner que toutes dépenses afférentes à cette distribution soient payées sur le fonds de pension; l'administrateur doit se conformer sans délai à ces directives.

Le surintendant pourrait également exercer son pouvoir de cessation. L'alinéa 29(2)*a*) prévoit ceci :

29. . . .

(2) Le surintendant peut, dans les cas suivants, déclarer la cessation totale ou partielle d'un régime de pension :

a) la suspension ou l'arrêt de paiement des cotisations patronales relativement à plusieurs ou à l'ensemble des participants;

Il est évident que tout arrêt de paiement des cotisations ne donnera pas nécessairement lieu à des

Such a direction is not, however, restricted to cases in which the trust fund no longer meets the solvency requirements. The Superintendent's power in relation to solvency issues is governed by s. 29(2)(*c*), which reads as follows:

> (*c*) the Superintendent is of the opinion that the pension plan has failed to meet the prescribed tests and standards for solvency in respect of funding referred to in subsection 9(1) [proper funding].

Since s. 29(2)(*c*) deals with solvency requirements, s. 29(2)(*a*) must cover circumstances in which the cessation of contributions does not put the funding of a plan at risk.

Just as mergers of plans and trust funds can properly be approved when the circumstances demonstrate their legitimacy, they can be objected to if they violate statutory, trust or plan provisions. Contribution holidays, although legitimate for funding purposes, can nevertheless be considered illegitimate if they hide an improper refusal to terminate a plan. Determining the validity of a reason given for not terminating a plan lies with the Superintendent and properly falls within his s. 29(2)(*a*) power.

Most of the facts that the members presented to the courts in their quest to have the rule in *Saunders v. Vautier* applied could have been submitted to the Superintendent. I do not need to deal with the members' allegations that Rogers acted in bad faith, which the lower court judges stopped short of finding. Rogers did indeed attempt to appropriate the surplus. Its resistance to the actuary's recommendation to improve employee benefits, its replacement of the less malleable actuary and trustee, the internal notes, and the improper amendments to the Plan amply demonstrate that Rogers did what it could to get at the surplus. However, past conduct is relevant only if it helps to answer the forward-looking question: is there any legitimate purpose in keeping the Plan or should it be terminated and wound up? The Superintendent can rule on questions of both fact and law, and all parties can make

directives du surintendant. Cependant, des directives ne sont pas seulement données dans les cas où la caisse en fiducie n'est plus conforme aux normes de solvabilité. Le pouvoir du surintendant quant aux questions de solvabilité est régi par l'al. 29(2)*c*), qui se lit ainsi :

> *c*) le surintendant est d'avis que le régime n'est pas conforme aux critères et normes de solvabilité réglementaires, relativement à la capitalisation prévue au paragraphe 9(1) [capitalisation suffisante].

Puisque l'al. 29(2)*c*) traite des normes de solvabilité, il s'ensuit que l'al. 29(2)*a*) doit viser des circonstances où l'arrêt de paiement des cotisations ne compromet pas la capitalisation d'un régime.

52 Tout comme elles peuvent être approuvées à juste titre lorsque les circonstances en démontrent la légitimité, les fusions de régimes et de caisses en fiducie peuvent être contestées si elles contreviennent aux dispositions d'une loi, d'une fiducie ou d'un régime. Bien qu'elles soient légitimes aux fins de capitalisation, les périodes d'exonération de cotisations peuvent néanmoins être jugées illégitimes si elles cachent un refus injustifié de mettre fin à un régime. Il appartient au surintendant, conformément au pouvoir que lui confère l'al. 29(2)*a*), de déterminer la validité d'une raison donnée pour ne pas mettre fin à un régime.

53 La plupart des faits que les participants ont présentés aux tribunaux en tentant de faire appliquer la règle de *Saunders c. Vautier* auraient pu être soumis au surintendant. Je n'ai pas à examiner les allégations des participants voulant que Rogers ait agi de mauvaise foi, lesquelles n'ont pas été retenues par les juges des tribunaux d'instance inférieure. Rogers a effectivement tenté de s'approprier le surplus. Sa résistance à la recommandation de l'actuaire de bonifier les prestations des employés, son remplacement de l'actuaire et de la fiduciaire moins influençables, les notes de service internes et les modifications illicites du Régime montrent amplement que Rogers a fait ce qu'elle pouvait pour avoir accès au surplus. Toutefois, la conduite antérieure n'est pertinente que si elle aide à répondre à la question qui se pose pour l'avenir : Y a-t-il un intérêt légitime à conserver le Régime

appropriate recommendations to him. The provisions of the *PBSA* and the regulations concerning the duties of the employer are well within the Superintendent's interpretative jurisdiction.

54 Rogers argues that the Superintendent's role is limited to solvency issues. This position disregards his supervisory role with respect to the protection of members and beneficiaries. It also overlooks s. 29(2)(*a*), which does not mention solvency and which must cover a more diverse set of circumstances than s. 29(2)(*c*), a provision that deals solely with solvency issues.

55 The Superintendent's broad power under s. 29(2) is clear. It was given judicial consideration in *Huus v. Ontario (Superintendent of Pensions)* (2002), 58 O.R. (3d) 380 (C.A.). In that case, the employer intended to consolidate a number of plans in Canada and the United States. It asked the Superintendent for permission to transfer the assets of a plan which had a surplus of $4.2 million. The employees asked, based on a provision of the Ontario *Pension Benefits Act*, R.S.O. 1990, c. P.8 (s. 69(1)(a)), similar to s. 29(2)(*a*) of the *PBSA*, that their pension plan be wound up on the basis that the employer had ceased contributing to the pension plan about 20 years before the consolidation application. The facts are strikingly similar to those in the instant case. The Ontario Court of Appeal affirmed the Divisional Court's decision, stating that due to the failure to consider the employees' request for a partial wind up prior to, or in conjunction with, the decision on the transfer application, the Superintendent's consent to the transfer was unreasonable. The following note from the reasons is worth mentioning (at para. 31, note 5):

> I note in passing that none of the appellants takes the position that a wind-up order can flow only from an application by the employer. Although s. 68 of the [*Pension Benefits Act*] envisions a wind-up process

ou faudrait-il y mettre fin et le liquider? Le surintendant peut trancher à la fois des questions de fait et des questions de droit, et les parties peuvent lui faire des recommandations appropriées. Le surintendant a toute la compétence voulue pour interpréter les dispositions de la *LNPP* et du Règlement qui portent sur les obligations de l'employeur.

Rogers affirme que le rôle du surintendant se limite aux questions de solvabilité. Ce point de vue ne tient pas compte de son rôle surveillance en matière de protection des participants et des bénéficiaires. Il passe également sous silence l'al. 29(2)*a*), qui ne parle pas de solvabilité et qui doit viser un ensemble plus diversifié de circonstances que l'al. 29(2)*c*), lequel porte uniquement sur des questions de solvabilité.

Le pouvoir général que le par. 29(2) confère au surintendant est clair. Il a fait l'objet d'un examen judiciaire dans l'arrêt *Huus c. Ontario (Superintendent of Pensions)* (2002), 58 O.R. (3d) 380 (C.A.). Dans cette affaire, l'employeur voulait fusionner un certain nombre de régimes au Canada et aux États-Unis. Il a demandé au surintendant l'autorisation de transférer l'actif d'un régime qui affichait un surplus de 4,2 millions de dollars. Se fondant sur une disposition de la *Loi sur les régimes de retraite* de l'Ontario, L.R.O. 1990, ch. P.8 (l'al. 69(1)a)), semblable à l'al. 29(2)*a*) *LNPP*, les employés demandaient que leur régime de retraite soit liquidé parce que l'employeur avait cessé d'y cotiser environ 20 ans avant la demande de fusion. Les faits ont une ressemblance frappante avec ceux de la présente affaire. La Cour d'appel de l'Ontario a confirmé la décision de la Cour divisionnaire, en affirmant qu'en raison de l'omission d'examiner la demande de liquidation partielle présentée par les employés avant la décision sur la demande de transfert ou en même temps que celle-ci, le consentement du surintendant au transfert était déraisonnable. Il vaut la peine de reproduire la remarque suivante tirée des motifs de jugement (par. 31, note 5) :

> [TRADUCTION] Je remarque, en passant, qu'aucun des appelants ne prétend qu'un ordre de liquidation peut seulement découler d'une demande de l'employeur. Bien que l'art. 68 de la [*Loi sur les régimes de retraite*]

initiated by the employer, s. 69 is not limited in this fashion. Indeed, the steps the Superintendent took in this case, to be discussed below, indicate that the Superintendent regarded it as his duty to deal with a wind-up request from the respondent retirees.

envisage un processus de liquidation enclenché par l'employeur, l'art. 69 n'est pas ainsi limité. En effet, les démarches du surintendant en l'espèce, qui seront analysées plus loin, montrent qu'il s'estimait tenu d'examiner une demande de liquidation présentée par les retraités intimés.

I agree with the Ontario Court of Appeal, and it is my view that the Superintendent's power under s. 29(2)(*a*) of the *PBSA* becomes almost a duty when employees ask him to act. His power must be exercised in conformity with the remedial purpose of the provisions of the *PBSA*. 56

Je partage l'avis de la Cour d'appel de l'Ontario et j'estime que le pouvoir que l'al. 29(2)*a*) *LNPP* confère au surintendant devient presque une obligation lorsque des employés lui demandent d'agir. Il doit exercer son pouvoir conformément à l'objet réparateur des dispositions de la *LNPP*.

In the case at bar, the contributions ceased in 1984 and the Plan has since been closed. The Superintendent can review all the circumstances and decide whether the facts warrant winding up the part of the RCI Plan that relates to the Plan, which would have the effect of terminating the Trust. He can take into account the findings of fact made in the judgment that are binding on the parties. 57

En l'espèce, les cotisations ont cessé en 1984 et le Régime est depuis fermé. Le surintendant peut examiner l'ensemble des circonstances et décider si les faits justifient la liquidation de la partie du régime de RCI qui concerne le Régime, ce qui aurait pour effet de mettre fin à la fiducie. Il peut tenir compte des conclusions de fait du jugement qui lient les parties.

Although the appeal is allowed, Rogers' arguments have not prevailed. As a result, the members should not be required to pay Rogers' costs. In addition, Rogers should bear the trustee's costs. The Court of Appeal's order as to costs should however be left undisturbed. 58

Bien que le pourvoi soit accueilli, les arguments de Rogers n'ont pas été retenus. Par conséquent, les participants ne devraient pas être tenus de payer les dépens de Rogers. De plus, Rogers devrait payer les dépens de la fiduciaire. Par ailleurs, il n'y a pas lieu de modifier l'ordonnance de la Cour d'appel quant aux dépens.

For these reasons, I would allow the appeal, order Rogers to pay National Trust's costs in this Court and set aside the order of the Court of Appeal with the exception of the order as to costs, which I would affirm. 59

Pour ces motifs, je suis d'avis d'accueillir le pourvoi, d'ordonner à Rogers de payer les dépens de Trust National devant notre Cour et d'annuler l'ordonnance de la Cour d'appel, sauf l'ordonnance relative aux dépens, qui est confirmée.

The reasons of McLachlin C.J. and Bastarache and Charron JJ. were delivered by

Version française des motifs de la juge en chef McLachlin et des juges Bastarache et Charron rendus par

BASTARACHE J. —

LE JUGE BASTARACHE —

1. Introduction

1. Introduction

This appeal concerns a decision of the British Columbia Court of Appeal holding that the respondents Sandra Buschau et al. ("respondents") are 60

Le présent pourvoi porte sur une décision dans laquelle la Cour d'appel de la Colombie-Britannique a statué que les intimés Sandra Buschau et autres

entitled to terminate an ongoing employee pension trust by invoking the rule in *Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482 (Ch. D.), a 19th century doctrine that arose in connection with the postponement of gifts in private trusts. The rule was considered by this Court in *Halifax School for the Blind v. Chipman*, [1937] S.C.R. 196, where, at p. 215, in concurring reasons (for himself and Rinfret J.), Crocket J. addressed the origins and rationale of the rule in these terms:

> It is true that in *Saunders* v. *Vautier*; *Gosling* v. *Gosling*; *Wharton* v. *Masterman*, and other cases, to which we were referred by the appellant's counsel, where there were absolute vested gifts of real estate and capital funds, entitling the donees to complete ownership and possession at a future event, the courts disregarded express directions of the testators to accumulate the rents and income in the meantime. . . .
>
> Various reasons have been ascribed for its [the rule's] establishment. Lindley, L.J., in *Harbin* v. *Masterman*, which went to the House of Lords on appeal under the name of *Wharton* v. *Masterman*, above cited, described it as "a remarkable exception" to "the general principle that a donee or legatee can only take what is given him on the terms on which it is given." He explained it as follows:
>
> > Conditions which are repugnant to the estate to which they are annexed are absolutely void, and may consequently be disregarded. . . .
> >
> > Herschell, L.C. said:
> >
> > The point seems, in the first instance, to have been rather assumed than decided. It was apparently regarded as a necessary consequence of the conclusion that a gift had vested, that the enjoyment of it must be immediate on the beneficiary becoming *sui juris*, and could not be postponed until a later date unless the testator had made some other destination of the income during the intervening period.
> >
> > Lord Davey said:
> >
> > The reason for the rule has been variously stated. It may be observed, however, that the Court of

(« intimés ») ont le droit de mettre fin à une fiducie de régime de retraite d'employés en invoquant la règle établie dans *Saunders c. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482 (Ch. D.), une règle du XIX^e^ siècle liée au report de donations dans des fiducies d'intérêt privé. Notre Cour a examiné cette règle dans l'arrêt *Halifax School for the Blind c. Chipman*, [1937] R.C.S. 196, où, à la p. 215, dans des motifs concordants rédigés en son propre nom et en celui du juge Rinfret, le juge Crocket en a expliqué les origines et la raison d'être en ces termes :

> [TRADUCTION] Il est vrai que dans les affaires *Saunders* c. *Vautier*, *Gosling* c. *Gosling* et *Wharton* c. *Masterman*, ainsi que dans d'autres affaires qui nous ont été mentionnées par l'avocat de l'appelante, où il était question de donations sans réserve et dévolues de biens immeubles et de fonds d'immobilisations qui conféraient aux donataires le droit à la pleine propriété et à la pleine possession à la survenance d'un événement futur, les tribunaux n'ont pas tenu compte des directives expresses des testateurs prescrivant l'accumulation des loyers et des revenus dans l'intervalle. . .
>
> Diverses raisons ont été énoncées pour expliquer [l']établissement [de la règle]. Dans l'affaire *Harbin* c. *Masterman*, portée en appel devant la Chambre des lords sous l'intitulé *Wharton* c. *Masterman*, précité, le lord juge Lindley a qualifié cette règle d'« exception remarquable » au « principe général voulant qu'un donataire ou un légataire ne puisse accepter ce qui lui est donné ou légué qu'aux conditions auxquelles on lui fait la donation ou le legs en question ». Il s'est ainsi expliqué :
>
> > Les conditions qui sont incompatibles avec la succession à laquelle elles se rattachent sont frappées de nullité absolue et peuvent donc être écartées. . .
> >
> > Le lord chancelier Herschell a dit ceci :
> >
> > Au départ, on semble avoir supposé plutôt que décidé qu'il en était ainsi. On a apparemment considéré que c'était une conséquence nécessaire de la conclusion qu'une donation avait été dévolue, que la bénéficiaire de cette donation devait en jouir aussitôt qu'il devenait juridiquement autonome et que la jouissance de la donation ne pouvait pas être reportée à une date ultérieure, sauf si le testateur avait affecté les revenus à d'autres fins dans l'intervalle.
> >
> > Lord Davey a affirmé ce qui suit :
> >
> > La raison d'être de la règle a été énoncée de différentes façons. Cependant, on peut constater que la

> Chancery always leant against the postponement of vesting or possession, or the imposition of restrictions on the enjoyment of an absolute vested interest. [Footnotes omitted.]

The Court of Appeal relied on the judgment of this Court in *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, as holding that the rule in *Saunders v. Vautier* was applicable to pension trusts, based on the finding in *Schmidt* that pension trusts are "classic" trusts which are subject to "all applicable trust law principles" ((2004), 24 B.C.L.R. (4th) 85, 2004 BCCA 80 ("*Buschau No. 2*"), at para. 52). The appellant employer, Rogers Communications Inc. ("RCI"), now appeals that decision of the Court of Appeal, arguing that the respondents cannot invoke the rule in *Saunders v. Vautier* to terminate the pension trust. The respondents' purpose in seeking to terminate the pension trust was to crystallize and obtain the actuarial surplus, to which they would not otherwise be entitled unless the pension plan was terminated in some other way, such as by the employer pursuant to the terms of the Plan. A previous decision of the Court of Appeal had determined that despite the amendments to the trust made by RCI, the respondents retained the right to any actual surplus upon termination ((2001), 83 B.C.L.R. (3d) 261, 2001 BCCA 16 ("*Buschau No. 1*")). It should also be noted that the pension plan itself provided that any surplus remaining upon termination after payment of the defined benefits would be distributed among the plan members.

The decision of the Court of Appeal also raises questions regarding the nature and content of an employer's obligation of good faith in a pension plan setting. In particular, it asks to what extent an employer is entitled to act in its own interests in the administration of a pension plan, consistent with its obligation to act in good faith. In *Buschau No. 2*, the Court of Appeal held that RCI's good faith obligation would preclude an amendment to re-open the Rogers Communications Inc. pension plan ("RCI Plan"), which was closed to new members in 1984.

> Cour de la Chancellerie a toujours été défavorable au report de la dévolution ou de la possession à plus tard, ou à l'imposition de restrictions à la jouissance d'un droit absolu et dévolu. [Renvois omis.]

61 La Cour d'appel a considéré que la règle de *Saunders c. Vautier* s'appliquait aux fiducies de retraite en raison de la conclusion tirée par notre Cour dans l'arrêt *Schmidt c. Air Products Canada Ltd.*, [1994] 2 R.C.S. 611, selon laquelle les fiducies de retraite sont des fiducies « classiques » assujetties « à tous les principes applicables du droit des fiducies » ((2004), 24 B.C.L.R. (4th) 85, 2004 BCCA 80 (« *Buschau n^o 2* »), par. 52). L'employeur appelant, Rogers Communications Inc. (« RCI »), se pourvoit maintenant contre cette décision de la Cour d'appel en soutenant que les intimés ne peuvent invoquer la règle de *Saunders c. Vautier* pour mettre fin à la fiducie de retraite. En cherchant à mettre fin à la fiducie de retraite, les intimés entendaient cristalliser et toucher le surplus actuariel auquel ils n'auraient pas droit par ailleurs, sauf s'il était mis fin à la fiducie d'une autre façon, comme, par exemple, sur l'initiative de l'employeur conformément aux modalités du régime. Dans une décision antérieure, la Cour d'appel avait décidé que, malgré les modifications apportées à la fiducie par RCI, les intimés avaient conservé le droit à tout surplus réel en cas de cessation ((2001), 83 B.C.L.R. (3d) 261, 2001 BCCA 16 (« *Buschau n^o 1* »)). Il importe également de souligner que le régime de retraite lui-même prévoyait que tout surplus qui resterait au moment de la cessation, après le versement des prestations déterminées, serait réparti entre les participants au régime.

62 La décision de la Cour d'appel soulève également des questions concernant la nature et le contenu de l'obligation d'un employeur d'agir de bonne foi dans le contexte d'un régime de retraite. Plus particulièrement, elle soulève la question de savoir jusqu'à quel point un employeur peut agir dans son propre intérêt en gérant un régime de retraite, en conformité avec son obligation d'agir de bonne foi? Dans l'arrêt *Buschau n^o 2*, la Cour d'appel a conclu que l'obligation de bonne foi de RCI empêcherait de rouvrir, par voie de modification, le régime de retraite de Rogers Communications Inc. (« régime de RCI »), qui a été fermé à de nouveaux participants en 1984.

63 National Trust Co., trustee of the pension trust under consideration in the main case (the "Trust"), also appeals the Court of Appeal's decision. It asks this Court to overturn the order made in the supplementary reasons of the Court of Appeal issued on May 18, 2004, wherein that court ordered National Trust to "tur[n] over the Trust assets, after the payment of all necessary debts and expenses, to the petitioners" ((2004), 27 B.C.L.R. (4th) 17, 2004 BCCA 282 ("*Buschau No. 3*"), at para. 16). National Trust argues that the effect of the decision of the Court of Appeal is to devolve upon it the authority and legal responsibility to give effect to and administer the termination of the Trust, an authority it says it does not possess under the terms of the RCI Plan or any applicable statute. National Trust argues that it is in no position to reconcile the decision of the court with the various legislative standards and requirements applicable to the termination of the Plan and Trust. It asks this Court to reverse the decision to impose on it duties and responsibilities it is not authorized to undertake pursuant to the Trust agreement, such duties and responsibilities belonging to the employer RCI or the Superintendent of Financial Institutions ("Superintendent"), pursuant to the applicable legislation and/or the terms of the Plan.

La Compagnie Trust National (« Trust National »), fiduciaire de la fiducie de retraite (« fiducie ») examinée dans le dossier principal, interjette également appel contre la décision de la Cour d'appel. Elle demande à notre Cour d'infirmer l'ordonnance dans laquelle la Cour d'appel lui a enjoint, dans des motifs supplémentaires déposés le 18 mai 2004, de [TRADUCTION] « remet[tre] l'actif de la fiducie aux requérants une fois acquittées toutes les dettes et dépenses nécessaires » ((2004), 27 B.C.L.R. (4th) 17, 2004 BCCA 282 (« *Buschau n^o 3* »), par. 16). Trust National fait valoir que la décision de la Cour d'appel a pour effet de lui transférer le pouvoir et la responsabilité juridique de mettre en œuvre et de gérer la cessation de la fiducie, pouvoir qu'elle affirme ne pas avoir en vertu des modalités du régime de RCI ou de toute loi applicable. Elle soutient qu'elle n'est pas en mesure de concilier la décision de la cour avec les différentes normes et exigences législatives qui s'appliquent à la cessation du régime et de la fiducie. Trust National demande à notre Cour d'infirmer la décision de lui imposer des obligations et des responsabilités qu'elle ne peut pas assumer selon la convention de fiducie et qui incombent à l'employeur RCI ou au surintendant des institutions financières (« surintendant »), selon les dispositions législatives applicables ou les modalités du régime, ou les deux à la fois.

2. Background

64 RCI and respondents both provided a description of the events leading to the present appeal to establish the factual background for dealing with this case. I reproduce here the essence of their descriptions. It must be noted however that there is some disagreement concerning, in particular, the actual number of members in the Plan and the role played by the trustee National Trust, also an appellant.

2. Contexte

En vue d'établir le contexte factuel de la présente affaire, RCI et les intimés ont respectivement fourni une description des événements à l'origine du présent pourvoi. Je reproduis ici l'essentiel de leurs descriptions. Il faut cependant souligner l'existence d'un certain désaccord au sujet notamment du nombre réel de participants au régime et du rôle joué par la fiduciaire Trust National, une autre partie appelante.

65 The corporate predecessor of RCI established the Premier Pension Plan as a non-contributory defined benefit plan in January 1974 by means of two documents, a trust agreement and a plan document. Eventually, as a result of corporate acquisitions and mergers, the Premier Plan was one of

En janvier 1974, la société remplacée par RCI a mis sur pied le régime de retraite de Premier, un régime non contributif à prestations déterminées, au moyen de deux documents, soit une convention de fiducie et un document relatif au régime. À la suite d'acquisitions et de fusions de sociétés, le

several pension plans administered by RCI for the benefit of employees of RCI and its corporate affiliates.

Membership in the Premier Plan was compulsory for all full-time employees over the age of 25 having completed one year of service. In 1984, RCI amended the Premier Plan to close it to employees hired after July 1, 1984. The following year, RCI withdrew $968,285 from the Plan surplus and began taking contribution holidays on the recommendation of their actuary, T.I. Benefits. In 1992, RCI merged the Premier Plan with four other RCI plans by amending the plan documents to create a common plan text. No steps were taken to amend the separate Premier Trust agreement or formally merge the Premier Trust with the trusts established for the other RCI plans, but the amendments provided that any surplus funds remaining on termination would revert to RCI instead of the members. The respondents say that the merger was a device to use the Premier Plan surplus to compensate for deficits in some of the other merged plans.

Pursuant to the provisions of the *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.) ("*PBSA*"), and the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), the merged pensions plan (the RCI Plan) was registered with the Superintendent and the Canada Customs and Revenue Agency.

The respondents sued RCI in 1995 seeking various forms of relief, including a declaration that the merger of the Premier Plan with other plans forming the RCI Plan was unlawful and the return of the money taken out of the Trust. This action came to trial in 1998 and the merger was held to be lawful. The trial judge found that the members were entitled to the benefits they were promised under the original Plan, including the right to any surplus existing on termination of the merged plan: (1998), 54

régime de Premier a fini par devenir l'un des nombreux régimes de retraite que RCI gérait pour le compte de ses employés et de ceux de ses filiales.

66 L'adhésion au régime de Premier était obligatoire pour tous les employés à temps plein âgés de plus de 25 ans et comptant une année de service. En 1984, RCI a modifié le régime de Premier de manière à le fermer aux employés embauchés après le 1er juillet 1984. L'année suivante, sur recommandation de son cabinet d'actuaires, T.I. Benefits, RCI a retiré la somme de 968 285 $ du surplus du régime et a commencé à s'accorder des périodes d'exonération de cotisations. En 1992, RCI a fusionné le régime de Premier avec quatre autres de ses régimes en modifiant les documents relatifs à ces régimes de manière à créer un texte de régime commun. Aucune mesure n'a été prise en vue de modifier la convention de fiducie distincte relative au régime de Premier ou de fusionner officiellement la fiducie de Premier avec celles établies pour les autres régimes de RCI. Cependant, les modifications prévoyaient que tout surplus qui resterait au moment de la cessation reviendrait à RCI plutôt qu'aux participants. Les intimés affirment que la fusion était un moyen d'utiliser le surplus du régime de Premier pour compenser les déficits de certains autres régimes fusionnés.

67 Conformément aux dispositions de la *Loi de 1985 sur les normes de prestation de pension*, L.R.C. 1985, ch. 32 (2e suppl.) (« *LNPP* »), et de la *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.), le régime de retraite issu de la fusion (le régime de RCI) a été agréé auprès du surintendant et de l'Agence des douanes et du revenu du Canada.

68 En 1995, les intimés ont intenté contre RCI une action dans laquelle ils sollicitaient diverses formes de réparation, dont un jugement déclarant illégale la fusion du régime de Premier avec d'autres régimes qui était à l'origine du régime de RCI, ainsi que la restitution de la somme retirée de la fiducie. Le procès a eu lieu en 1998, et la fusion a été jugée légale. Le juge de première instance a conclu que les participants avaient droit aux avantages qui leur avaient été promis dans le cadre du régime initial et

B.C.L.R. (3d) 125. On January 11, 2001, the Court of Appeal upheld the finding that the merger was valid but held that the merger of the pension plans did not affect the existence of the Premier Trust as a separate trust. The court ordered that "the members of the Premier Plan shall be at liberty to undertake proceedings in the Supreme Court of British Columbia to terminate the Premier Trust, based either on the rule in *Saunders v. Vautier* or on the *Trust and Settlement Variation Act*, R.S.B.C. 1996, c. 463 to the extent either may be applicable". The Court of Appeal held that RCI had no "interest" in the Trust and that its consent was therefore not necessary under the rule in *Saunders v. Vautier* (see *Buschau No. 1*). RCI paid back the surplus that it had removed before judgment was delivered. While the decision of the Court of Appeal on this issue is not under appeal, I would note at the outset that the court's finding in *Buschau No. 1* that the Plan (and fund) and Trust can be severed and dealt with independently is no doubt responsible in large part for the difficulties posed in this appeal.

notamment à tout surplus qui existerait au moment de la cessation du régime fusionné : (1998), 54 B.C.L.R. (3d) 125. Le 11 janvier 2001, la Cour d'appel a confirmé la conclusion selon laquelle la fusion était valide, mais elle a jugé que la fusion des régimes de retraite n'avait aucun effet sur la fiducie de Premier qui continuait d'exister comme une entité distincte. La cour a ordonné que [TRADUCTION] « les participants au régime de Premier soient libres d'engager devant la Cour suprême de la Colombie-Britannique des procédures destinées à mettre fin à la fiducie de Premier en se fondant soit sur la règle de *Saunders c. Vautier* soit sur la *Trust and Settlement Variation Act*, R.S.B.C. 1996, ch. 463, dans la mesure où l'une ou l'autre pourra s'appliquer ». La Cour d'appel a décidé que RCI n'avait aucun « intérêt » dans la fiducie et qu'il n'était donc pas nécessaire d'obtenir son consentement selon la règle de *Saunders c. Vautier* (voir *Buschau n^o 1*). Avant le prononcé du jugement, RCI a remboursé la partie du surplus qu'elle avait retirée. Bien que la décision de la Cour d'appel sur cette question ne soit pas portée en appel, je tiens à souligner au départ qu'il ne fait aucun doute que la conclusion tirée par cette cour dans l'arrêt *Buschau n^o 1*, selon laquelle le régime (et la caisse) et la fiducie peuvent être dissociés et traités séparément, est en grande partie à l'origine des difficultés qui se posent dans le présent pourvoi.

69 On May 24, 2001, the respondents petitioned the Supreme Court of British Columbia for an order terminating the Premier Trust. This was the commencement of the present proceeding. The respondents sought, *inter alia*, an order "that the Premier Pension Plan be terminated or, alternatively, that the surplus portion of the Premier Pension Plan be terminated".

Le 24 mai 2001, les intimés ont demandé à la Cour suprême de la Colombie-Britannique de rendre une ordonnance mettant fin à la fiducie de Premier. Cette requête a marqué le début de la présente instance. Les intimés sollicitaient notamment une ordonnance enjoignant [TRADUCTION] « de mettre fin au régime de retraite de Premier ou, subsidiairement, au surplus du régime de retraite de Premier ».

70 Loo J. heard the petition in two stages. Following the first hearing in November 2001, she held that the applicability of the rule in *Saunders v. Vautier* was decided by the previous decision of the Court of Appeal, and that the rule was applicable. She ordered RCI to provide to the respondents information pertaining to the Plan "so they can obtain the necessary consents to terminate the Plan" ((2002),

La juge Loo a entendu la requête en deux étapes. En novembre 2001, au terme de la première audition, elle a conclu que la question de l'applicabilité de la règle de *Saunders c. Vautier* avait été tranchée dans la décision antérieure de la Cour d'appel, et que la règle s'appliquait. Elle a ordonné à RCI de fournir aux intimés les renseignements sur le régime [TRADUCTION] « qui leur permettront

100 B.C.L.R. (3d) 327, 2002 BCSC 624, at paras. 12 and 33).

On January 7, 2003, the respondents came to court with consents executed by the 144 members of the Plan. The respondents lacked, however, the consent of approximately 25 of the beneficiaries designated by the members pursuant to the plan provisions. The respondents could not rely on the rule in *Saunders v. Vautier* to terminate the Premier Trust because it requires the consent of all possible beneficiaries. They therefore sought to have the court consent to the termination, on behalf of the designated beneficiaries, pursuant to s. 1 of the *Trust and Settlement Variation Act*, R.S.B.C. 1996, c. 463.

In reasons issued on May 1, 2003 ((2003), 13 B.C.L.R. (4th) 385, 2003 BCSC 683), Loo J. held that the respondents were entitled to terminate the Premier Trust and gave the court's consent on behalf of the designated beneficiaries to such termination.

Newbury J.A. issued reasons for judgment on behalf of the Court of Appeal on February 20, 2004. She held, at paras. 11 and 22 of *Buschau No. 2*, that:

(a) Loo J. erred in holding that the applicability of the rule in *Saunders v. Vautier* was decided by the previous judgment of the Court of Appeal. The conclusion that *Saunders v. Vautier* applied was, however, correct;

(b) The respondents were not entitled to terminate the Premier Trust under the rule in *Saunders v. Vautier* because they lacked the consent of all designated beneficiaries;

(c) Loo J. erred in holding that the court had jurisdiction, under the *Trust and Settlement Variation Act*, to consent to a termination of the Premier Trust on behalf of capacitated designated beneficiaries;

d'obtenir les consentements requis pour mettre fin au régime » ((2002), 100 B.C.L.R. (3d) 327, 2002 BCSC 624, par. 12 et 33).

71 Le 7 janvier 2003, les intimés se sont présentés à la cour munis des consentements signés par les 144 participants au régime. Toutefois, ils n'avaient pas obtenu le consentement d'environ 25 des bénéficiaires que les participants avaient désignés conformément aux dispositions du régime. Les intimés ne pouvaient pas invoquer la règle de *Saunders c. Vautier* pour mettre fin à la fiducie de Premier parce qu'elle exige le consentement de tous les bénéficiaires éventuels. Ils ont donc demandé à la cour de consentir à la cessation au nom des bénéficiaires désignés, conformément à l'art. 1 de la *Trust and Settlement Variation Act*, R.S.B.C. 1996, ch. 463.

72 Dans des motifs déposés le 1er mai 2003 ((2003), 13 B.C.L.R. (4th) 385, 2003 BCSC 683), la juge Loo a décidé que les intimés avaient le droit de mettre fin à la fiducie de Premier, et a donné, au nom des bénéficiaires désignés, le consentement de la cour à cette cessation.

73 Le 20 février 2004, la juge Newbury a déposé des motifs de jugement au nom de la Cour d'appel. Elle a conclu ceci, aux par. 11 et 22 de l'arrêt *Buschau nº 2* :

a) la juge Loo a commis une erreur en décidant que la question de l'applicabilité de la règle de *Saunders c. Vautier* avait été tranchée dans le jugement antérieur de la Cour d'appel. Elle a cependant eu raison de conclure que cette règle s'appliquait;

b) les intimés n'avaient pas le droit de mettre fin à la fiducie de Premier en application de la règle de *Saunders c. Vautier* parce qu'ils n'avaient pas obtenu le consentement de tous les bénéficiaires désignés;

c) la juge Loo a commis une erreur en décidant que, aux termes de la *Trust and Settlement Variation Act*, la cour avait compétence pour consentir à la cessation de la fiducie de Premier au nom de bénéficiaires désignés ayant la capacité juridique;

(d) It was not possible that RCI could reopen the Premier Plan to new members "since such a step could not, in the particular circumstances of this case, be taken in good faith by this employer *vis-à-vis* the existing beneficiaries".

74 The court held that "normally" the appeal would be allowed but, in this case, the court would withhold entering judgment for three months to give the respondents an opportunity, as suggested by the court, to revoke the designations of existing beneficiaries (who were not before the court), gather further consents and make further submissions (paras. 11 and 103).

75 Subsequently, the Court of Appeal received motions for judgment from RCI and the respondents. In an order issued by the Court of Appeal on May 18, 2004 in *Buschau No. 3*, the court held that the appeal should be allowed but made, *inter alia*, the following orders:

THIS COURT ORDERS that the appeal is allowed, that the order of Loo, J. be set aside, and that the petition brought pursuant to the *Trust and Settlement Variation Act* be dismissed;

THIS COURT FURTHER ORDERS that the appellant, Rogers Communications Inc. ("RCI"), does not have an "interest" in the Trust that would make its consent to the termination under *Saunders v. Vautier* necessary;

THIS COURT ORDERS that, provided the consents of all Members and those persons who are now designated beneficiaries have been obtained for the termination of the Trust, the petitioners shall be at liberty to proceed to invoke the rule in *Saunders v. Vautier*;

. . .

THIS COURT FURTHER ORDERS that RCI cannot amend the Premier Pension Plan to permit the addition of new members.

76 As of March 31, 2002, the portion of assets in the master trust allocated to the Premier Trust was approximately $11 million greater than the actuarial liabilities for the Premier Plan members (RCI's factum, at para. 24).

d) RCI ne pouvait pas rouvrir le régime de Premier à de nouveaux participants [TRADUCTION] « étant donné que, dans les circonstances particulières de la présente affaire, ce n'était pas une mesure que cet employeur pouvait prendre de bonne foi eu égard aux bénéficiaires existants ».

La cour a conclu que « normalement » l'appel serait accueilli, mais qu'en l'espèce elle attendrait pendant trois mois avant de rendre jugement afin que les intimés puissent, comme elle le proposait, révoquer les désignations de bénéficiaires existants (qui n'étaient pas devant elle), obtenir d'autres consentements et présenter d'autres arguments (par. 11 et 103).

La Cour d'appel a, par la suite, reçu des requêtes en jugement déposées par RCI et les intimés. Dans une ordonnance rendue le 18 mai 2004 dans l'arrêt *Buschau n^o^ 3*, elle a conclu que l'appel devait être accueilli, mais elle a notamment ajouté ceci par voie d'ordonnance :

[TRADUCTION]

LA COUR ORDONNE que l'appel soit accueilli, que l'ordonnance de la juge Loo soit annulée et que la requête fondée sur la *Trust and Settlement Variation Act* soit rejetée;

LA COUR DÉCLARE EN OUTRE que l'appelante, Rogers Communications Inc. (« RCI »), n'a dans la fiducie aucun « intérêt » qui, selon *Saunders c. Vautier*, rendrait nécessaire son consentement à la cessation;

LA COUR DÉCLARE que, pourvu que tous les participants et toutes les personnes actuellement désignées comme bénéficiaires aient donné leur consentement à la cessation de la fiducie, les requérants seront libres d'invoquer la règle de *Saunders c. Vautier*;

. . .

LA COUR DÉCLARE EN OUTRE que RCI ne peut modifier le régime de retraite de Premier pour permettre l'adhésion de nouveaux participants.

Dès le 31 mars 2002, la part de l'actif de la fiducie principale attribuée à la fiducie de Premier représentait environ 11 millions de dollars de plus que la provision actuarielle au titre des participants au régime de Premier (mémoire de RCI, par. 24).

The Court of Appeal further decided that the Trustee would have to satisfy itself that the conditions under the rule in *Saunders v. Vautier* had been met and that all statutory requirements had been complied with before distribution. If necessary, the Trustee could seek direction under s. 86 of the *Trustee Act*, R.S.B.C. 1996, c. 464. The court also rejected the submission that proceedings under the *Trust and Settlement Variation Act* would be required, given that the Trust could be terminated under the rule in *Saunders v. Vautier* itself (*Buschau No. 3*).

77 La Cour d'appel a en outre décidé que la fiduciaire devrait s'assurer que les conditions de la règle de *Saunders c. Vautier* avaient été remplies et que toutes les exigences légales avaient été respectées avant de procéder à la répartition. La fiduciaire pouvait, au besoin, présenter une demande de directives fondée sur l'art. 86 de la *Trustee Act*, R.S.B.C. 1996, ch. 464. Étant donné qu'il pouvait être mis fin à la fiducie en vertu de la règle de *Saunders c. Vautier* même, la cour a également rejeté l'argument selon lequel une instance fondée sur la *Trust and Settlement Variation Act* serait nécessaire (*Buschau n^o^ 3*).

At the hearing of this appeal on November 15, 2005, this Court requested that the parties provide further written submissions regarding the interface between the rule in *Saunders v. Vautier* and the *PBSA*. This decision followed a discussion between various members of the Court and counsel concerning possible conflicts between the rule in *Saunders v. Vautier* and the *PBSA*. I might also add that the same concerns had been raised by National Trust in its factum.

78 Lors de l'audition du présent pourvoi le 15 novembre 2005, notre Cour a demandé aux parties de présenter d'autres observations écrites concernant l'interaction de la règle de *Saunders c. Vautier* avec la *LNPP*. Cette décision a été prise à la suite d'une discussion entre différents membres de la Cour et avocats au sujet des conflits possibles entre cette règle et la *LNPP*. J'ajouterais également que Trust National avait exprimé les mêmes préoccupations dans son mémoire.

3. Analysis

The *PBSA* is a comprehensive statutory scheme structured to further the public policy objective of enhanced financial security for workers upon their withdrawal from the active workforce. The *PBSA*, together with the *Pension Benefits Standards Regulations, 1985*, SOR/87-19, facilitates pension contributions from workers and employers, and protects and preserves pension funds and maximizes pension benefits, all in the interest of providing income security for workers in retirement.

3. Analyse

79 La *LNPP* est un régime législatif complet conçu pour favoriser la réalisation de l'objectif de politique générale d'amélioration de la sécurité financière des travailleurs au moment où ils quittent les rangs de la population active. Conjuguée au *Règlement de 1985 sur les normes de prestation de pension*, DORS/87-19, elle facilite les cotisations de retraite des travailleurs et des employeurs, protège et préserve les caisses de retraite et maximise les prestations de retraite, tout cela dans le but d'assurer une sécurité du revenu aux travailleurs retraités.

Within this comprehensive scheme, s. 29 and the regulations enacted in relation thereto contain detailed provisions for the termination of pension plans and the distribution of plan assets.

80 Dans le cadre de ce régime complet, l'art. 29 et le règlement qui s'y rapporte contiennent des dispositions détaillées qui régissent la cessation des régimes de retraite et la répartition de leur actif.

Given the voluntary nature of the private pension plan system, employers are generally entitled to terminate a pension plan, as expressed in most plan documents, including the Plan at issue here. This

81 Étant donné que le système de régimes de retraite privés est de nature facultative, les employeurs ont généralement le droit de mettre fin à un régime de retraite, y compris celui en cause dans la présente

right is recognized in s. 29(5) of the *PBSA*, which refers to the intention of a plan administrator (who in most cases will be the employer) to terminate a pension plan. But the Superintendent is also given power to terminate pension plans in other certain specified situations. He has the power to revoke a pension plan's registration for failure to comply with directions (s. 11.1). Directions of compliance can be issued where the Superintendent is of the opinion that an administrator or employer is acting in a manner "contrary to safe and sound financial or business practices" (s. 11(1)), or that a pension plan, or the administration of a pension plan, is not compliant with the *PBSA* or regulations (s. 11(2)). If registration is revoked, a plan is deemed to have been terminated (s. 29(1)).

82 In addition to deemed termination in consequence of the revocation of a plan's registration, s. 29(2) stipulates three other situations in which the Superintendent has power to directly order the termination of a plan. The Superintendent may exercise this power when there has been: (a) cessation or suspension of employer contributions; (b) discontinuance of the employer's business operations; or (c) the employer's failure to fund the plan in accordance with prescribed standards of solvency. In each case, the power is directed to circumstances in which the security of the promised pension benefits is threatened.

83 This is consistent with the statute governing the Office of the Superintendent which states that the objects of the Office, in respect of pension plans, are: (a) to supervise pension plans in order to determine if they meet minimum funding requirements or are complying with the other requirements of the legislation; (b) if not, to advise the administrator and take, or advise the administrator to take, necessary corrective measures; and (c) to promote the adoption by administrators of policies and procedures designed to control and manage risk (see the *Office of the Superintendent of Financial Institutions Act*, R.S.C. 1985, c. 18 (3rd Supp.), Part I). It is apparent from the statutory objects of the Office that the supervisory

affaire; c'est ce que prévoient la plupart des documents relatifs à ces régimes. Ce droit est reconnu par le par. 29(5) *LNPP*, qui renvoie à l'intention de l'administrateur d'un régime de pension (qui, dans la plupart des cas, est l'employeur) de mettre fin à un régime de retraite. Toutefois, le surintendant est également habilité à mettre fin à des régimes de pension dans certaines autres situations précises. Il a le pouvoir de révoquer l'agrément d'un régime de pension pour défaut de se conformer à des directives (art. 11.1). Le surintendant peut donner des directives s'il est d'avis qu'un administrateur ou un employeur agit d'une manière « contrair[e] aux bonnes pratiques du commerce » (par. 11(1)), ou s'il estime qu'un régime de pension ou la gestion de celui-ci n'est pas conforme à la *LNPP* ou aux règlements (par. 11(2)). Si l'agrément est révoqué, le régime est réputé avoir pris fin (par. 29(1)).

Outre la présomption de cessation qui résulte de la révocation de l'agrément d'un régime, le par. 29(2) mentionne trois autres cas où le surintendant a le pouvoir d'ordonner directement la cessation d'un régime. Le surintendant peut exercer ce pouvoir lorsqu'il y a eu a) suspension ou arrêt de paiement des cotisations patronales, b) abandon des secteurs d'activité de l'employeur ou c) omission de l'employeur de cotiser au régime conformément aux normes de solvabilité réglementaires. Dans chaque cas, le pouvoir vise des cas où la sécurité des prestations de retraite promises est menacée.

Cela est compatible avec le texte législatif régissant le Bureau du surintendant, qui précise que le Bureau poursuit, à l'égard des régimes de pension, les objectifs suivants : a) superviser les régimes de pension pour s'assurer du respect des exigences minimales de capitalisation et des autres exigences de la mesure législative; b) en cas de non-respect de ces exigences, aviser l'administrateur et prendre les mesures nécessaires pour corriger la situation, ou forcer l'administrateur à les prendre; c) inciter les administrateurs à se doter de politiques et de procédures pour contrôler et gérer le risque (voir la *Loi sur le Bureau du surintendant des institutions financières*, L.R.C. 1985, ch. 18 (3^{e} suppl.), partie I). Il ressort des objectifs légaux du Bureau que la

focus of the Superintendent is primarily on matters affecting the solvency or financial condition of pension plans. It is worth noting here that National Trust invokes the *PBSA* in its appeal, arguing at para. 70 of its factum that "[t]he judgment of the British Columbia Court of Appeal turns this statutory scheme on its head and places the Trustee in the role that by statute has been assigned to the administrator and to the Superintendent."

supervision assurée par le surintendant porte principalement sur les questions touchant la solvabilité ou la situation financière des régimes de pension. Il convient de noter ici que Trust National invoque la *LNPP* dans son pourvoi, en faisant valoir au par. 70 de son mémoire, que [TRADUCTION] « [l]e jugement de la Cour d'appel de la Colombie-Britannique va à l'encontre du régime législatif et confie au fiduciaire le rôle que la loi assigne à l'administrateur et au surintendant. »

There is no provision in the *PBSA* for plan beneficiaries to terminate a pension plan. Furthermore, there is no provision in the *PBSA* for any party (employer, administrator, trustee, Superintendent, plan members or other beneficiaries) to terminate the Trust under which the pension fund contributions are held as security for the payment of plan benefits, prior to, and independent of, the termination of the Plan. Beneficiaries may request that the Superintendent exercise his discretionary power under s. 29(2), but the Superintendent's power to terminate a plan is available only where the stipulated pre-conditions are met. The Superintendent does not have a general discretion to terminate pension plans.

84 Aucune disposition de la *LNPP* ne permet aux bénéficiaires d'un régime de retraite de mettre fin à ce régime. De plus, aucune disposition de la *LNPP* ne permet à quiconque (employeur, administrateur, fiduciaire, surintendant, participants au régime ou autres bénéficiaires) de mettre fin à la fiducie en vertu de laquelle les cotisations à la caisse de retraite sont détenues à titre de garantie du versement des prestations du régime, avant la cessation du régime et indépendamment de celle-ci. Les bénéficiaires peuvent demander au surintendant d'exercer le pouvoir discrétionnaire que lui confère le par. 29(2), mais le pouvoir du surintendant de mettre fin à un régime ne peut être exercé que si les conditions préalables énoncées sont remplies. Le surintendant n'a aucun pouvoir discrétionnaire général de mettre fin à des régimes de retraite.

"[T]ermination" in relation to a pension plan is defined in the *PBSA* as the cessation of the crediting of benefits to plan members generally (s. 2(1)). Termination of a pension plan is distinguished from "winding-up" which refers to the distribution of the assets of a terminated pension plan. The *PBSA* provides that the pension fund assets are only to be distributed after the Superintendent approves a report filed by the plan administrator on the termination of a plan. The report must set out the nature of the benefits to be provided under the plan and describe the methods of allocating and distributing those benefits (s. 29(9) and (10)).

85 La *LNPP* définit le terme « cessation » comme étant la cessation d'un régime de pension dans le cas où il n'est plus porté de droits à prestation en faveur des participants (par. 2(1)). Une distinction est établie entre la cessation d'un régime de pension et sa « liquidation », qui désigne la répartition de l'actif d'un régime de pension à la suite de sa cessation. La *LNPP* prévoit que l'actif de la caisse de retraite ne peut être réparti qu'une fois que le surintendant a approuvé le rapport déposé par l'administrateur lors de la cessation du régime. Ce rapport doit exposer la nature des prestations à verser au titre du régime et décrire les méthodes d'affectation et de répartition de celles-ci (par. 29(9) et (10)).

A major issue in this appeal is whether termination of the Plan must logically precede the termination of the Trust. According to RCI, the judgment

86 Une question importante dans le présent pourvoi est de savoir si la cessation du régime doit logiquement précéder la cessation de la fiducie. Selon RCI,

of the British Columbia Court of Appeal reverses the legislative scheme by permitting the beneficiaries of the Premier Plan to terminate the Trust and distribute the Trust assets, which were being held as security for the pension benefits accruing under the Plan, outside the legislative scheme and prior to the termination of the pension plan itself. It argues at para. 18 of its supplemental factum that

> [i]n enacting the *PBSA, 1985*, Parliament intended to devise a comprehensive scheme for dealing with issues of pension plan regulation, including the circumstances of their termination and the winding up and distribution of assets held in pension funds. If it had contemplated granting additional rights to plan members to act on their own initiative to terminate pension trusts and distribute plan assets, it would have done so.

87 It would appear that none of the statutory grounds for termination of a pension plan are present in this case. The Premier Plan is fully funded and there is no threat to the solvency of the Plan or the security of the pension benefits. There is no issue that the RCI Plan is being administered in a manner contrary to safe and sound financial or business practices, nor of non-compliance with the requirements of the legislation.

88 RCI has suspended contributions to the Plan. However, these contribution holidays are authorized by the terms of the Plan and have been approved by the courts. The reference to "suspension or cessation of employer contributions" in s. 29(2)(*a*) of the *PBSA* must be construed as referring to situations where an employer does not make required contributions. It does not extend to contribution holidays where the employer is relieved from making contributions by reason of a surplus in the Plan.

3.1 *The Applicability of the Rule in Saunders v. Vautier*

89 RCI recognizes that there may be circumstances in which it is appropriate to apply common law trust principles to resolve issues regarding pension

le jugement de la Cour d'appel de la Colombie-Britannique va à l'encontre du régime législatif en autorisant les bénéficiaires du régime de Premier à mettre fin à la fiducie et à en répartir l'actif, qui était détenu à titre de garantie du versement des prestations de retraite accumulées en vertu du régime, en dehors du régime législatif et avant la cessation du régime de retraite lui-même. Elle fait valoir ceci au par. 18 de son mémoire supplémentaire :

> [TRADUCTION] Lorsqu'il a édicté la *LNPP de 1985*, le législateur a voulu établir un régime complet à l'égard des questions de réglementation des régimes de retraite, y compris les circonstances de leur cessation ainsi que la liquidation et la répartition de l'actif détenu dans les caisses de retraite. S'il avait songé à accorder aux participants à ces régimes des droits additionnels de procéder, de leur propre initiative, à la cessation des fiducies de retraite et à la répartition de l'actif des régimes, il l'aurait fait.

Aucune des raisons, prévues par la Loi, de mettre fin à un régime de retraite ne semblerait exister en l'espèce. Le régime de Premier est entièrement capitalisé, et la solvabilité du régime et la sécurité des prestations de retraite ne sont pas compromises. Personne ne conteste que le régime de RCI est géré d'une manière contraire aux bonnes pratiques du commerce ou non conforme aux exigences de la mesure législative.

RCI a suspendu ses cotisations au régime. Toutefois, ces périodes d'exonération de cotisations sont autorisées par les modalités du régime et ont été approuvées par les tribunaux. La mention de « la suspension ou l'arrêt de paiement des cotisations patronales », à l'al. 29(2)*a*) *LNPP*, doit être interprétée comme visant les cas où l'employeur n'effectue pas les cotisations requises. Elle ne vise pas les périodes d'exonération de cotisations pendant lesquelles l'employeur est dispensé d'effectuer des cotisations en raison de l'existence d'un surplus dans le régime.

3.1 *L'applicabilité de la règle de Saunders c. Vautier*

RCI reconnaît qu'il peut y avoir des cas où il convient d'appliquer les principes de common law en matière de fiducie pour résoudre les questions

right to ask for distribution of the Trust surplus, providing they satisfied the conditions set out in *Saunders v. Vautier*. The decision regarding bad faith cannot stand where it is without a foundation. I am of the view that RCI's powers of amendment were not forfeited or estopped because of the closure of the Plan. Any termination of the Plan and amendments to it must be examined on the basis of its terms and conditions, in consideration of the applicable provisions of the *PBSA*. What would constitute an abuse of the employer's power or would otherwise offend community standards of reasonableness in the contemplated use of the Premier Plan assets for the benefit of present and future employees of RCI must be determined on that basis alone. In essence then, what is permitted and what is abusive will have to be determined in future proceedings according to the standard set in s. 8(10)(*b*) of the *PBSA* which states that "[w]here the employer is the administrator pursuant to paragraph 7(1)(*c*), if there is a material conflict of interest between the employer's role as administrator and the employer's role in any other capacity, the employer . . . (*b*) shall act in the best interests of the members of the pension plan."

4. Disposition

104 The appeal is allowed and the order of the Court of Appeal is set aside with costs in all courts to RCI and in this Court to National Trust.

Appeal allowed.

Solicitors for the appellant/respondent Rogers Communications Inc.: Nathanson, Schachter & Thompson, Vancouver.

Solicitors for the appellant/respondent National Trust Co.: Blake, Cassels & Graydon, Vancouver.

Solicitors for the respondents Sandra Buschau et al.: Laxton & Company, Vancouver.

sur l'idée qu'on avait promis aux participants au régime, en plus de leurs prestations de retraite, le droit de demander la répartition du surplus de la fiducie s'ils satisfaisaient aux conditions de la règle de *Saunders c. Vautier*. La décision concernant la mauvaise foi ne peut être maintenue si elle est dénuée de fondement. Selon moi, RCI n'a pas été déchue de ses pouvoirs de modification ni empêchée de les exercer en raison de la fermeture du régime. La cessation et la modification du régime doivent être examinées en fonction de ses modalités et des dispositions applicables de la *LNPP*. Ce sont là les seuls critères qui doivent servir à déterminer ce qui, dans l'emploi que l'on entend faire de l'actif du régime de Premier au profit des employés actuels et futurs de RCI, constituerait un abus du pouvoir de l'employeur ou contreviendrait par ailleurs aux normes sociales de raisonnabilité. Essentiellement, la question de savoir ce qui est permis et ce qui est abusif devra donc être tranchée, dans toute instance future, en fonction de la norme énoncée à l'al. 8(10)*b*) *LNPP*, qui précise que « [l]'employeur qui est l'administrateur, conformément à l'alinéa 7(1)*c*), doit, s'il y a un conflit d'intérêts sérieux entre les fonctions qu'il exerce à ce double titre [. . .] *b*) agir de façon à servir les intérêts des participants. »

4. Dispositif

Le pourvoi est accueilli et l'ordonnance de la Cour d'appel est annulée, avec dépens devant toutes les cours pour RCI et devant notre Cour pour Trust National.

Pourvoi accueilli.

Procureurs de l'appelante/intimée Rogers Communications Inc. : Nathanson, Schachter & Thompson, Vancouver.

Procureurs de l'appelante/intimée la Compagnie Trust National : Blake, Cassels & Graydon, Vancouver.

Procureurs des intimés Sandra Buschau et autres : Laxton & Company, Vancouver.

exercise of a discretionary power in a contractual context begins with careful consideration of the parties' reasonable contractual expectations" (factum, at para. 75). It is a prohibition against acting in a manner "calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee" unless the employer has "reasonable and proper cause" (para. 80, quoting *Imperial Group Pension Trust Ltd. v. Imperial Tobacco Ltd.*, [1991] 2 All E.R. 597 (Ch. D.), at p. 606). The respondents reject the contractual perspective and say that nothing done by the employer should affect or dilute their entitlements under the Plan; equitable principles should apply. I do not consider it necessary to arbitrate this debate. Section 8(10) of the *PBSA* provides sufficient guidance. The special context of pension plans requires employers who administer pension plans on behalf of their employees to always act in accordance with the spirit, purpose and terms of the pension plan; employers must always act in such a way as to ensure the protection of employees' pension benefits, not in a way that would reduce, threaten or eliminate them (see *Imperial Group*).

prestations déterminées. Selon RCI, [TRADUCTION] « l'analyse de la bonne foi concernant l'exercice d'un pouvoir discrétionnaire dans un contexte contractuel commence par un examen minutieux des attentes contractuelles raisonnables des parties » (mémoire, par. 75). L'obligation de bonne foi interdit d'agir d'une manière [TRADUCTION] « calculée ou susceptible de détruire ou de compromettre gravement le rapport de confiance entre l'employeur et l'employé », à moins que l'employeur n'ait un « motif raisonnable et valable » de le faire (par. 80, citant la décision *Imperial Group Pension Trust Ltd. c. Imperial Tobacco Ltd.*, [1991] 2 All E.R. 597 (Ch. D.), p. 606). Les intimés rejettent le point de vue contractuel et affirment qu'aucun acte de l'employeur ne devrait compromettre ou affaiblir les droits que leur confère le régime; les principes d'equity devraient s'appliquer. Je ne crois pas nécessaire d'arbitrer ce débat. Le paragraphe 8(10) *LNPP* donne des indications suffisantes. En raison du contexte particulier des régimes de retraite, l'employeur qui gère un tel régime pour le compte de ses employés doit toujours en respecter l'esprit, l'objet et les modalités; l'employeur doit toujours se comporter de manière à préserver les prestations de retraite des employés et non de manière à les réduire, à les compromettre ou à les éliminer (voir la décision *Imperial Group*).

It seems clear to me that the conclusion of the Court of Appeal on the issue of good faith is premised on its earlier decision that the amendment would deprive the beneficiaries of the Premier Trust of their right to terminate it under the rule in *Saunders v. Vautier*. I have found that the respondents cannot terminate the Trust pursuant to *Saunders v. Vautier*. But of course the parties could not ignore the Court of Appeal's decision in *Buschau No. 1*. As a result of that decision, a separate accounting was required for the Premier Trust. RCI then considered the possibility of making the Plan eligible to new membership so that similarly situated employees who were members of non-contributory defined benefit plans could be integrated into the Premier Plan. This is what the Court of Appeal rejected. Its reasoning is however driven by the idea that the Plan members were promised more than their pensions under the Plan, i.e., the

103 Il me semble clair que la conclusion de la Cour d'appel sur la question de la bonne foi était fondée sur sa décision antérieure selon laquelle la modification priverait les bénéficiaires de la fiducie de Premier de leur droit d'y mettre fin en application de la règle de *Saunders c. Vautier*. Je suis arrivé à la conclusion que les intimés ne peuvent se fonder sur cette règle pour mettre fin à la fiducie. Toutefois, il est évident que les parties ne pouvaient pas faire abstraction de l'arrêt *Buschau n^o^ 1* de la Cour d'appel. À la suite de cette décision, une comptabilité distincte était requise pour la fiducie de Premier. RCI a alors envisagé la possibilité de rendre le régime accessible à de nouveaux participants de manière à pouvoir intégrer dans le régime de Premier les employés qui se trouvaient dans la même situation mais qui participaient à des régimes non contributifs à prestations déterminées. C'est ce que la Cour d'appel a rejeté. Son raisonnement repose toutefois

100 For these reasons, I would conclude that the rule in *Saunders v. Vautier* does not apply in the circumstances of this case and that any application regarding the termination of the Plan and Trust must be dealt with in accordance with the terms of the Plan and the provisions of the *PBSA*. The respondents' suggestion that the absence of a procedure in the *PBSA* permitting a unilateral termination of the Plan by the members justifies the action under the rule of *Saunders v. Vautier* cannot be accepted. The rule simply does not apply. Members' rights are determined by the Plan itself and the *PBSA*; as indicated above, neither the terms of the Plan itself nor the provisions of the *PBSA* grant the members a right to terminate the Plan. The unilateral right of members to terminate the Plan simply does not exist in this case.

3.2 *The Issue of Good Faith*

101 The Court of Appeal decided, at para. 61 of its reasons in *Buschau No. 2*, that the obligation of good faith of the employer precluded RCI from adopting any amendments to the Plan and Trust opening it to new members following its closure in 1984; it related this to what it termed the "stratagem" adopted by RCI years earlier to benefit from the actuarial surplus by merging different pension plans. The Court of Appeal then continued with a discussion of the employer's "interest" in the Plan and Trust.

102 It is quite obvious that the whole discussion concerning good faith had to do with fair conduct as administrator of the Plan. RCI insists that there is nothing uncommon about closed pension plans or the decision to rationalize funding and the provision of benefits after mergers. In its view, the proposed creation of an integrated pension scheme was a rational business decision that should not raise any issue regarding good faith when done within the parameters of the Plan's terms. RCI says there is no stratagem, only the exercise of a power to amend in the context — and this is fundamental — of a defined benefit plan. RCI says that "the analysis of good faith in respect of the

Pour ces motifs, je suis d'avis de conclure que la règle de *Saunders c. Vautier* ne s'applique pas en l'espèce et que toute demande relative à la cessation du régime et de la fiducie doit être examinée conformément aux modalités du régime et aux dispositions de la *LNPP*. L'idée des intimés, selon laquelle l'action fondée sur la règle de *Saunders c. Vautier* est justifiée par l'absence dans la *LNPP* d'une procédure qui permettrait aux participants de mettre fin unilatéralement au régime, ne peut pas être retenue. Cette règle ne s'applique tout simplement pas. Les droits des participants sont déterminés par le régime lui-même et la *LNPP*; comme nous l'avons vu, ni les modalités du régime lui-même ni les dispositions de la *LNPP* n'accordent aux participants le droit de mettre fin au régime. En l'espèce, les participants n'ont tout simplement pas le droit de mettre fin unilatéralement au régime.

3.2 *La question de la bonne foi*

La Cour d'appel a statué, au par. 61 de l'arrêt *Buschau n^o^ 2*, que l'obligation de bonne foi de l'employeur empêchait RCI de modifier le régime et la fiducie pour permettre l'adhésion de nouveaux participants, qui avait été interdite en 1984; elle a rattaché cela à ce qu'elle a qualifié de [TRADUCTION] « stratagème » que RCI avait employé quelques années auparavant pour bénéficier du surplus actuariel et qui avait consisté à fusionner différents régimes de retraite. La Cour d'appel s'est ensuite livrée à une analyse de l'« intérêt » de l'employeur dans le régime et la fiducie.

Il est tout à fait évident que toute l'analyse de la bonne foi avait trait au comportement équitable en tant qu'administrateur du régime. RCI maintient que les régimes de retraite fermés ou la décision de rationaliser la capitalisation et le versement de prestations à la suite de fusions n'ont rien d'inhabituel. À son avis, le projet de création d'un régime de retraite intégré constituait une décision d'affaires rationnelle qui ne devrait soulever aucune question de bonne foi si elle respecte les paramètres fixés par les modalités du régime. RCI plaide l'absence de stratagème et ajoute qu'il n'est question que de l'exercice d'un pouvoir de modification dans le contexte — ce qui est fondamental — d'un régime à

Act assist. The current spouses and common law partners who have a present contingent interest are *sui juris*. As such, they could give their consent to termination of the Plan, and the court does not have the power to consent on their behalf unless they are legally incapacitated.

As for the interests of future possible spouses and common law partners, whose consent would also be required for termination pursuant to *Saunders v. Vautier*, those interests are more problematic in that their direct consent cannot be obtained, and asking a court to consent on their behalf would raise serious questions. RCI notes at para. 37 of its supplementary factum that, "the court may only consent on behalf of a beneficiary if the proposed trust variation is in the interests of that party. It is difficult to conceive of a circumstance in which termination of a pension trust would be in the interests of future spouses or common law partners." Consenting to the termination of the Plan on behalf of future unascertainable spouses and common law partners would presumably not be in their best interests. If plan members who are not currently married or in a common law relationship were allowed to terminate the Plan and obtain the surplus, but were then to enter into a marriage or common law relationship in the future, their future spouses or common law partners would not enjoy their statutory right to the joint and survivor benefit to which they would have been entitled had the Plan been ongoing and not terminated. Thus, even if this was sufficient, valid consents to termination of the Plan in order to satisfy the pre-conditions of the *Saunders v. Vautier* rule have not been and cannot be obtained from all possible beneficiaries here; more importantly, while the current spouses and common law partners of plan members are able to consent to termination, future spouses and common law partners who are currently unascertainable cannot give such consent, and a court would likely be reluctant to give its consent on their behalf.

par la loi ne peuvent être écartés ni par le consentement des participants au régime et autres bénéficiaires actuels, ni par les tribunaux. L'alinéa 1b) de la *Trust and Settlement Variation Act* n'est pas plus utile. Les époux et conjoints de fait actuels qui ont présentement un intérêt éventuel sont juridiquement autonomes. Par conséquent, ils pourraient donner leur consentement à la cessation du régime et la cour n'a pas le pouvoir de consentir en leur nom, sauf s'ils sont frappés d'incapacité juridique.

99 Le cas des intérêts des futurs époux et conjoints de fait, dont le consentement à la cessation serait également nécessaire selon la règle de *Saunders c. Vautier*, est plus problématique parce qu'il est impossible d'obtenir directement leur consentement et que demander à la Cour de consentir en leur nom soulèverait de graves questions. RCI fait remarquer, au par. 37 de son mémoire supplémentaire, que [TRADUCTION] « la cour ne peut consentir au nom d'un bénéficiaire que si la modification que l'on propose d'apporter à la fiducie est dans l'intérêt de cette partie. Il est difficile d'imaginer une situation où la cessation d'une fiducie de retraite serait dans l'intérêt des futurs époux ou conjoints de fait. » Consentir à la cessation du régime au nom de futurs époux et conjoints de fait non identifiables ne serait probablement pas dans leur intérêt. Si on permettait aux participants au régime qui ne sont pas actuellement mariés ou en union de fait de mettre fin au régime et de toucher le surplus, mais que ceux-ci venaient ensuite à se marier ou à vivre en union de fait, leurs futurs époux ou conjoints de fait ne jouiraient pas du droit conféré pas la loi à la prestation réversible qu'ils posséderaient si le régime avait continué d'exister. Ainsi, même si cela était suffisant, le consentement valide à la cessation du régime que tous les bénéficiaires éventuels doivent donner pour que les conditions préalables de la règle de *Saunders c. Vautier* soient remplies n'a pas été et ne peut pas être obtenu en l'espèce; qui plus est, s'il est vrai que les époux et les conjoints de fait actuels des participants au régime sont en mesure de consentir à la cessation, les futurs époux et conjoints de fait actuellement non identifiables ne peuvent le faire, et un tribunal hésiterait probablement à consentir en leur nom.

the operation of the rule in *Saunders v. Vautier*, as applied by the Court of Appeal in this case, which is based on an entirely different policy objective.

97 The introduction of the *Saunders v. Vautier* principle without qualification or restriction into the private pension system would constitute a very significant derogation from an employer's right to voluntarily choose to offer or continue a pension plan. An employer motivated by labour market factors to create and maintain a pension plan for its employees for the business benefits it may derive may not be so motivated when a plan instituted for such reasons can be terminated by the unilateral action of members and other beneficiaries, without consideration of the employer's business interests. In these circumstances, the "fair and delicate balance between employer and employee interests" (*Monsanto Canada*, at para. 24) will be disrupted in a manner which is contrary to the legislative objective of encouraging the establishment and maintenance of private pension plans.

98 The rule in *Saunders v. Vautier* requires the consent of all parties who have an interest, or who own rights of enjoyment, in the trust property. The Court of Appeal held that the rule could be applied with the consent of all members (by which they surely meant to include former members) of the Premier Plan and those persons who are now designated beneficiaries (*Buschau No. 2*). But s. 22 of the *PBSA* requires that, absent a written waiver in prescribed form, any pension benefit paid after January 1, 1987 to a member or former member who has a spouse or common law partner on the date that the first payment is made shall be a joint and survivor pension benefit, entitling the surviving spouse to a benefit of at least 60 percent of the joint benefit. This requirement is reflected in the terms of the Premier Plan (art. IX(3)). The inclusion of survivor benefits was a policy choice of the Legislature that must be honoured. These statutory rights cannot be overridden by the consent of present plan members and other beneficiaries or by the courts. Nor can s. l(b) of the *Trust and Settlement Variation*

sécurité du revenu de retraite. Cela n'est pas compatible avec la façon dont la Cour d'appel applique la règle de *Saunders c. Vautier* en l'espèce, laquelle repose sur un objectif de politique générale complètement différent.

L'introduction, sans aucune réserve ni restriction, de la règle de *Saunders c. Vautier* dans le système des régimes de retraite privés constituerait une atteinte très importante au droit de l'employeur de choisir de son propre gré d'offrir ou de maintenir un régime de retraite. L'employeur qui, pour des raisons liées au marché du travail, songe à établir et à maintenir un régime de retraite pour ses employés à cause des avantages commerciaux qu'il comporte sera peut-être moins porté à le faire si les participants et autres bénéficiaires d'un régime établi pour ces raisons peuvent y mettre fin unilatéralement sans tenir compte de ses propres intérêts commerciaux. Dans ces circonstances, le « juste et délicat équilibre entre les intérêts de l'employeur et ceux de l'employé » (*Monsanto Canada*, par. 24) sera rompu d'une manière contraire à l'objectif législatif consistant à encourager l'établissement et le maintien de régimes de retraite privés.

La règle de *Saunders c. Vautier* exige le consentement de toutes les parties qui ont un intérêt dans les biens en fiducie ou qui possèdent des droits de jouissance sur ceux-ci. La Cour d'appel a conclu que la règle pouvait s'appliquer avec le consentement de tous les participants (qui, selon elle, étaient sûrement censés inclure les participants anciens) au régime de Premier et des personnes qui sont maintenant des bénéficiaires désignés (*Buschau n^o^ 2*). Cependant, l'art. 22 *LNPP* prévoit qu'en l'absence de renonciation écrite, en la forme réglementaire, toute prestation de pension versée après le 1^er^ janvier 1987 à un participant actuel ou ancien qui a, à la date du premier versement, un époux ou un conjoint de fait doit être une prestation réversible, ce qui permet à l'époux ou au conjoint survivant de recevoir une prestation équivalant à au moins 60 pour 100 de la prestation réversible. Cette exigence se reflète dans les modalités du régime de Premier (art. IX(3)). L'ajout de prestations de survivant constituait un choix de politique générale du législateur qu'il faut respecter. Ces droits conférés

rule only where there is no conflict with the legislative scheme as in *Schmidt*. In my view, the unique role of the employer in respect of the pension plan and pension Trust cannot be ignored; and the terms of the contract at the root of the Trust cannot be circumvented; as well, the legislative framework cannot be made irrelevant by applying the rule in *Saunders v. Vautier*.

In the context of the appeal brought by National Trust, particular regard must be given to s. 8(3) of the *PBSA*, which states:

8. . . .

(3) The administrator shall administer the pension plan and pension fund as a trustee for the employer, the members of the pension plan, former members, and any other persons entitled to pension benefits or refunds under the plan.

It is clear that a court has no authority to assign to National Trust the responsibilities of the administrator and of the Superintendent contrary to the legislative scheme which has determined a process to terminate a pension plan. But here I believe the Court of Appeal was defining a role for National Trust in light of the distinction it had made between the termination of the Plan and the termination of the Trust, only the former being subject to the terms of the Plan and provisions of the *PBSA*.

The underlying social policy objective of the legislation is to promote the establishment and maintenance of private pension plans in order to provide income security for employees and their families in retirement. As this Court recognized in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, 2004 SCC 54, at para. 38, modern pension statutes are public policy legislation that recognize the "vital importance of long-term income security". The "locking-in" provisions, portability provisions, as well as the termination and winding-up provisions are all part of the objective of ensuring retirement income security. This is not consistent with

au régime. Cela est très différent de la décision d'appliquer la règle uniquement en l'absence de conflit avec le régime législatif, comme ce fut le cas dans l'affaire *Schmidt*. À mon avis, on ne peut faire abstraction du rôle unique que l'employeur joue à l'égard du régime et de la fiducie de retraite, et on ne peut se soustraire aux clauses du contrat à l'origine de la fiducie. On ne peut pas non plus faire perdre toute pertinence au cadre législatif en appliquant la règle de *Saunders c. Vautier*.

95 Dans le cadre de l'appel interjeté par Trust National, il faut prêter une attention particulière au par. 8(3) *LNPP*, dont voici le texte :

8. . . .

(3) L'administrateur d'un régime de pension gère le régime et le fonds de pension en qualité de fiduciaire de l'employeur, des participants actuels ou anciens et de toutes autres personnes qui ont droit à des prestations de pension ou à des remboursements au titre du régime.

Il est clair qu'un tribunal n'a pas le pouvoir d'assigner à Trust National les responsabilités de l'administrateur et du surintendant contrairement au régime législatif qui a établi un processus de cessation de régime de retraite. Mais en l'espèce, je crois que la Cour d'appel s'est trouvée à définir un rôle pour Trust National à la lumière de la distinction qu'elle avait établie entre la cessation du régime et celle de la fiducie, selon laquelle seule la cessation du régime était assujettie aux modalités du régime et aux dispositions de la *LNPP*.

96 L'objectif de politique sociale qui sous-tend la mesure législative est de favoriser l'établissement et le maintien de régimes de retraite privés afin d'assurer une sécurité du revenu aux employés retraités et à leurs familles. Comme notre Cour l'a reconnu dans l'arrêt *Monsanto Canada Inc. c. Ontario (Surintendant des services financiers)*, [2004] 3 R.C.S. 152, 2004 CSC 54, par. 38, les lois modernes en matière de retraite sont des lois d'intérêt public qui reconnaissent « l'importance cruciale de la sécurité du revenu à long terme ». Les dispositions en matière de « blocage » et de transférabilité de même que celles relatives à la cessation et à la liquidation ont toutes pour objectif d'assurer la

collectively agree to vary its terms. The rule would permit members of a pension plan to unilaterally vary its terms without the employer's consent.

93 It is also very important to consider the legislative context in which modern pension plans operate. It would appear that, in her 2003 decision, Loo J. disregarded the provisions of the *PBSA* regarding termination, but applied the *Trust and Settlement Variation Act* where it was necessary to circumvent the difficulty in obtaining all consents necessary under the rule in *Saunders v. Vautier.* In *Buschau No. 3*, the Court of Appeal noted that the rule in *Saunders v. Vautier* could result in the termination of the Plan if all of the preconditions of the rule were met, without regard for the legislative scheme and in particular s. 29(9) which provides that on termination of a plan, the administrator must file a report with the Superintendent

> setting out the nature of the pension benefits and other benefits to be provided under the plan and a description of the methods of allocating and distributing those benefits and deciding the priorities in respect of the payment of full or partial benefits to the members.

94 This means that the rule in *Saunders v. Vautier* would permit the termination of the pension plan and Trust without the involvement of the employer as plan administrator and without the approval of the Superintendent. The only logical explanation for this conclusion is that the Court of Appeal had accepted that the Trust was independent of the Plan and could be dealt with solely by reference to the Trust itself, notwithstanding, in particular, that the *PBSA* (and the terms of the Plan, at art. IX(3)) provided special protections for spouses and common law partners. The terms of the Plan could be totally disregarded. At para. 54 of its reasons in *Buschau No. 2*, the Court of Appeal seems to accept that the Trust and the Plan constitute an "integrated whole", but nevertheless concludes that this whole is subject to trust law principles and to the resulting "disappearance" of the employer's rights and powers on the sole initiative of the plan members. This is very different from the decision to apply the

des fiduciaires, convenir collectivement d'en modifier les modalités. La règle permettrait aux participants à un régime de retraite d'en modifier unilatéralement les modalités sans le consentement de l'employeur.

Il est également très important de tenir compte du contexte législatif des régimes de retraite modernes. Il semblerait que, dans la décision qu'elle a rendue en 2003, la juge Loo n'a pas tenu compte des dispositions de la *LNPP* relatives à la cessation, mais a appliqué la *Trust and Settlement Variation Act* alors qu'il fallait contourner la difficulté d'obtenir tous les consentements requis selon la règle de *Saunders c. Vautier.* Dans l'arrêt *Buschau n^o^ 3*, la Cour d'appel a souligné que l'application de cette règle pouvait entraîner la cessation du régime si toutes ses conditions préalables étaient remplies, indépendamment du régime législatif et, en particulier, du par. 29(9) qui prévoit que, lors de la cessation d'un régime, l'administrateur doit déposer auprès du surintendant un rapport

> exposant la nature des prestations de pension ou autres à servir au titre du régime, les méthodes d'affectation et de répartition de celles-ci et établissant les priorités de paiement des prestations intégrales ou partielles aux participants.

Cela signifie que la règle de *Saunders c. Vautier* permettrait de mettre fin au régime et à la fiducie de retraite sans la participation de l'employeur en tant qu'administrateur du régime et sans l'approbation du surintendant. La seule explication logique de cette conclusion est que la Cour d'appel avait reconnu que la fiducie était indépendante du régime et pouvait être examinée uniquement en fonction de ses propres modalités, en dépit du fait notamment que la *LNPP* (et les modalités du régime énoncées à l'art. IX(3)) accordait des protections spéciales aux époux et aux conjoints de fait. Il n'était pas possible de faire totalement abstraction des modalités du régime. Au paragraphe 54 de l'arrêt *Buschau n^o^ 2*, la Cour d'appel semble reconnaître que la fiducie et le régime forment un [TRADUCTION] « tout », mais elle conclut néanmoins que ce tout est assujetti aux principes du droit des fiducies et à la [TRADUCTION] « disparition » des droits et pouvoirs de l'employeur qui résulterait de la seule initiative des participants

the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the Plan (including [the Trust] Agreement) provided that no such amendment which affects the rights, duties, compensation, or responsibilities of the Trustee shall be made without its consent and provided further that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the [Trust] to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the Plan . . . .

[TRADUCTION] le droit de modifier, à tout moment, en totalité ou en partie, les dispositions du régime (dont la [. . .] convention [de fiducie]) pourvu qu'aucune modification touchant les droits, les obligations, la rémunération ou les responsabilités du fiduciaire ne soit effectuée sans son consentement et pourvu également que, sauf avec l'approbation du ministre du Revenu national, aucune modification n'autorise ou ne permette qu'une partie de la [fiducie] soit utilisée ou affectée à d'autres fins que le bénéfice exclusif des personnes et de leur succession, qui peuvent à l'occasion être désignées dans le régime ou conformément à celui-ci. . .

General Rule Five permitted, but did not oblige, the employer to allocate additional pensions or pension entitlements to plan members, retired or otherwise, if the Plan had an actuarial surplus. General Rule Six permitted members to designate a beneficiary, and to alter or revoke that designation within the bounds of the law. General Rule Seven gave the employer the right to amend, modify or change the Plan, provided that the changes did not affect certain of the members' rights or benefits. It also gave the employer the right to terminate the Plan if necessary. It went on to say:

La Cinquième règle générale permettait à l'employeur, sans l'y obliger, d'accorder d'autres prestations de retraite ou droits à des prestations de retraite aux participants au régime, retraités ou non, si le régime affichait un surplus actuariel. La Sixième règle générale permettait aux participants de désigner un bénéficiaire et de modifier ou de révoquer légalement cette désignation. La Septième règle générale conférait à l'employeur le droit d'amender, de modifier ou de changer le régime, pourvu que les changements ne portent pas atteinte à certains droits ou avantages des participants. Elle accordait également à l'employeur le droit de mettre fin au régime, si nécessaire. Elle précisait en outre ceci :

In the event of the termination of the Plan, the benefits being paid to Retired Members will be continued as provided for under the terms and provisions of the Plan. The balance of the assets remaining in the Trust Fund, after all liabilities to Retired Members have been satisfied, will be distributed by the Committee among the remaining Members on the basis required under the provisions of Section 12 of the Pension Benefits Standards Act.

[TRADUCTION] En cas de cessation du régime, les prestations versées aux participants retraités seront maintenues conformément aux modalités et aux dispositions du régime. Après que toutes les dettes envers les participants retraités auront été acquittées, le comité répartira entre les autres participants l'actif restant de la caisse en fiducie, conformément aux dispositions de l'article 12 de la Loi sur les normes de prestation de pension.

The Plan clearly states then that it is the employer who may amend and terminate the Plan and that it is the employer's expectation that the Plan and Trust will continue indefinitely. In such circumstances, there could be no reasonable expectation on the part of RCI or the members that the Trust could be terminated by the members, over RCI's objections, in order that the members might obtain the surplus. The application of the rule in *Saunders v. Vautier* would contradict the reasonable contractual expectations of the parties because beneficiaries who can collapse a trust under *Saunders v. Vautier* can, with the consent of the trustees,

92

Le régime prévoit donc clairement que c'est l'employeur qui peut modifier le régime et y mettre fin, et que l'employeur s'attend à ce que le régime et la fiducie subsistent indéfiniment. Dans ces circonstances, ni RCI ni les participants au régime ne pouvaient raisonnablement s'attendre à ce qu'en dépit des objections de RCI les participants puissent mettre fin à la fiducie afin de pouvoir toucher le surplus. L'application de la règle de *Saunders c. Vautier* irait à l'encontre des attentes contractuelles raisonnables des parties du fait que les bénéficiaires qui peuvent mettre fin à une fiducie en application de cette règle peuvent, avec le consentement

clearly contemplated a continuing plan supported by a permanent Fund; segregation of the Fund by "closing" the Premier Plan was not possible. It is therefore an error to infer that the rule in *Saunders v. Vautier* can in effect create a manner of realizing on the actuarial surplus (the Fund) in violation of the terms of the Plan; in the case of this pension Plan, absolute entitlement to the surplus would only occur once the surplus became real, that is, once the Plan and Trust had been terminated. This is because the members only have a contingent interest in the Trust surplus, which does not vest until the Plan is terminated. This is reinforced by the statement in *Schmidt*, at p. 655: "When the plan is terminated, the actuarial surplus becomes an actual surplus and vests in the employee beneficiaries" (emphasis added) (see also p. 654). As a result, the rule in *Saunders v. Vautier* cannot be invoked here, since the rule requires that the beneficiaries seeking early termination possess the sum total of vested, not contingent, interests in the trust corpus: see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 1178. The question then is whether termination of this Plan can occur outside the boundaries of the *PBSA*. The Court of Appeal reasoned that *Schmidt* had implicitly accepted that the rule in *Saunders v. Vautier* could apply independently of the *PBSA* and of any contract. The real question is whether trust law can in effect prevail over the contract and governing legislation in the present case (*Buschau No. 2*).

91 It is important to take note of the terms of the Plan and Trust documents. As I have previously stated, these are not distinct. The terms of the Plan are very specific and somewhat atypical of plans adopted in later years. In particular, art. V(1) of the Trust Agreement reserves to the employer

régime lorsqu'un surplus a été réalisé, sans égard aux modalités du régime, n'est pas compatible avec son objet ou avec le régime législatif applicable. Le contrat prévoyait clairement l'existence continue d'un régime doté d'une caisse permanente; il n'était pas possible de gérer séparément la caisse en « fermant » le régime de Premier. Il est donc erroné d'inférer que la règle de *Saunders c. Vautier* peut avoir pour effet de créer une façon de réaliser le surplus actuariel (la caisse) contrairement aux modalités du régime. Dans le cas du présent régime de retraite, il ne pouvait y avoir de droit absolu au surplus qu'une fois le surplus devenu réel, c'est-à-dire une fois qu'il aurait été mis fin au régime et à la fiducie. Cela s'explique par le fait que les participants ont seulement un intérêt éventuel dans le surplus de la fiducie, qui n'est dévolu qu'à la cessation du régime. Cela est renforcé par l'énoncé figurant à la p. 655 de l'arrêt *Schmidt*, selon lequel « [à] la cessation du régime, le surplus actuariel devient un surplus réel et est dévolu aux employés bénéficiaires » (je souligne) (voir aussi p. 654). Par conséquent, la règle de *Saunders c. Vautier* ne peut pas être invoquée en l'espèce étant donné qu'elle exige que les bénéficiaires qui sollicitent la cessation anticipée possèdent tous les intérêts dévolus et non éventuels dans le capital de la fiducie : voir D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3e éd. 2005), p. 1178. Il s'agit donc de savoir si la cessation du présent régime peut se produire en dehors du cadre établi par la *LNPP*. La Cour d'appel a estimé que l'arrêt *Schmidt* avait reconnu implicitement que la règle de *Saunders c. Vautier* pouvait s'appliquer indépendamment de la *LNPP* et de tout contrat. La véritable question est de savoir si, en l'espèce, le droit des fiducies peut effectivement l'emporter sur le contrat et la loi applicable (*Buschau nº 2*).

Il importe de tenir compte des modalités établies dans les documents relatifs au régime et à la fiducie. Comme je l'ai déjà dit, elles ne sont pas distinctes. Les modalités du régime sont très particulières et quelque peu différentes de celles des régimes adoptés au cours d'années subséquentes. En particulier, l'art. V(1) de la convention de fiducie réserve à l'employeur

plans which have not been directly addressed in the legislation. I agree. This was the approach taken in *Schmidt* with respect to the question of ownership of surplus on termination of a pension plan. In that case, it was acknowledged that there was a gap in the legislation and the provisions of the statute did not provide guidance on this issue. However, RCI argues that, in the present case, s. 29 contains detailed provisions regarding the circumstances and manner in which pension plans may be terminated. RCI concludes that the legislation has "occupied the field" on this issue and there is no room for the operation of a common law rule.

Pension trusts are not the same as traditional trusts, as stated by the Court of Appeal at paras. 1-2 in *Buschau No. 1*. In employment pension trusts, there is a legal relationship between the parties apart from the trust and continuing obligations on the part of the administrator. In the present case, in view of its very terms (see General Rule Seven (2)), there is no entitlement to an actuarial surplus while the Plan is ongoing. As stated by the Court of Appeal, the Trust Agreement and the Plan form an "integrated whole" (*Buschau No. 2*, at para. 13). Moreover, this is a defined benefit plan, i.e., a plan that is entirely funded by the employer, where members have an equitable interest in the trust assets, a right *in personam* against the trustee to require proper administration of the trust assets, and a contingent interest to the trust assets existing on plan termination if they are alive and members at the date of termination. The employer assumes the risk in such a plan; when interest rates and investment returns are high, a surplus will be realized, and when the economy changes, unfunded liabilities will often result. The goal is to require contributions by the employer that are sufficient to provide the defined benefits over long periods of time in spite of market fluctuations. To permit termination of the Plan when a surplus has been realized independently of the terms of the Plan is not consistent with its object or the applicable statutory regime. The contract

relatives aux régimes de retraite qui n'ont pas été directement abordées dans la mesure législative. Je partage cet avis. Tel est le point de vue qui a été adopté dans l'affaire *Schmidt* au sujet de la propriété d'un surplus à la cessation d'un régime de retraite. Dans cette affaire, on a reconnu qu'il existait une question non résolue par la loi et que les dispositions de la loi en cause ne fournissaient aucun indice de l'intention législative à cet égard. RCI fait cependant valoir qu'en l'espèce l'art. 29 contient des dispositions détaillées qui régissent les circonstances dans lesquelles il peut être mis fin à des régimes de retraite, et la manière dont cela peut être fait. Elle conclut que cette question est [TRADUCTION] « entièrement régie » par la mesure législative et il n'y a pas lieu d'appliquer une règle de common law.

90 Contrairement à ce qu'affirme la Cour d'appel aux par. 1 et 2 de l'arrêt *Buschau n^o 1*, les fiducies de retraite ne sont pas des fiducies classiques. Dans les fiducies de régime de retraite d'employés, il existe un rapport juridique entre les parties indépendamment de la fiducie et des obligations permanentes de l'administrateur. En l'espèce, compte tenu des modalités mêmes du régime (voir la Septième règle générale, section 2), il n'y a aucun droit à un surplus actuariel pendant que le régime est en vigueur. Comme l'a affirmé la Cour d'appel, la convention de fiducie et le régime forment un [TRADUCTION] « tout » (*Buschau n^o 2*, par. 13). Il s'agit en outre d'un régime à prestations déterminées, c'est-à-dire d'un régime entièrement capitalisé par l'employeur, où les participants ont un intérêt en equity dans l'actif de la fiducie, un droit personnel d'exiger du fiduciaire qu'il gère correctement l'actif de la fiducie et un intérêt éventuel dans l'actif de la fiducie qui subsiste à la cessation du régime s'ils sont vivants et participants à la date de la cessation. L'employeur assume le risque lié à un tel régime; lorsque les taux d'intérêt et le rendement des investissements sont élevés, un surplus est réalisé, et lorsque l'économie fluctue, il en résulte souvent un passif non capitalisé. L'objectif est d'exiger de l'employeur des cotisations suffisantes pour assurer le versement des prestations déterminées durant de longues périodes en dépit des fluctuations du marché. Permettre la cessation du

Tab 3

Lomas v. Rio Algom Limited et al.

[Indexed as: Lomas v. Rio Algom Ltd.]

99 O.R. (3d) 161

Court of Appeal for Ontario,
Gillese, Blair and MacFarland JJ.A.
March 10, 2010

Pensions -- Winding up -- Court not having jurisdiction to make order compelling employer to commence proceedings to wind up pension plan pursuant to s. 68(1) of Pension Benefits Act -- Pension Benefits Act, R.S.O. 1990, c. P.8, s. 68(1).

The applicant, a former employee of the respondent and contributing member of the respondent's employee pension plan, brought an application for an order winding up the pension plan or directing the respondent to make an application under s. 68 of the Pension Benefits Act for the partial winding up of the pension plan. The respondent brought a motion to strike the paragraphs of the notice of application in which those remedies were requested as disclosing no reasonable cause of action. Before the motion was heard, the Supreme Court of Canada released its decision in Buschau v. Rogers Communications Inc. Based on Buschau, the motion judge found that the court did not have jurisdiction to order the wind up of the pension plan directly. The claim for a court-ordered wind up was struck. However, he found that Buschau did not preclude the court from ordering an employer to commence wind up proceedings pursuant to s. 68(1) of the PBA. The balance of the motion was dismissed. The majority of the Divisional Court affirmed the motion judge's ruling. The respondent appealed.

Held, the appeal should be allowed.

The Divisional Court erred in finding that Buschau did not address the issue of the court's jurisdiction to compel an employer which has been found to be in breach of its obligations to commence wind up proceedings under the PBA. In Buschau, the Supreme Court makes it clear that the court does not have the authority to compel an employer to wind up a pension plan at the request of members of the pension plan because to do so would be contrary to (1) the societal purposes for which pension plans exist; (2) the scheme of the legislation that governs pension plans; and (3) the language usually found in pension plan documentation giving the employer the right to terminate the trust and pension plan. Ordering an employer to commence wind up proceedings under s. 68 of the PBA is tantamount to ordering the wind up of the pension plan. Because the court cannot do indirectly that which it cannot do directly, it is plain and obvious that the court does not have the authority to order an employer to commence wind up proceedings under s. 68 of the PBA at the request of plan members. Moreover, such an order would run contrary to the legislative provisions governing the wind up of private pension plans in Ontario. If the Superior Court of Justice were to order the respondent to commence wind up proceedings, it would violate the PBA and the Financial Services Commission of Ontario Act, 1997, S.O. 1997, c. 28 and amount to an unauthorized usurpation of the authority delegated to the superintendent of financial services and the Financial Services Tribunal.

Cases referred to

Bushau v. Rogers Cablesystems Inc., [2001] B.C.J. No. 50, 2001 BCCA 16, 195 D.L.R. (4th) 257, [2001] 2 W.W.R. 56, 148 B.C.A.C. 263, 83 B.C.L.R. (3d) 261, 10 B.L.R. (3d) 13, 26 C.C.P.B. 47, 36 E.T.R. (2d) 10, 102 A.C.W.S. (3d) 223 [Leave to appeal to S.C.C. refused [2001] 2 S.C.R. vii, [2001] S.C.C.A. No. 107]; Buschau v. Rogers Communications Inc., [2006] 1 S.C.R. 973, [2006] S.C.J. No. 28, 2006 SCC 28, 269 D.L.R. (4th) 1, 349 N.R. 324, [2006] 8 W.W.R. 583, J.E. 2006-1309, 226 B.C.A.C. 25, 54 B.C.L.R. (4th) 1, 52 C.C.P.B.

161, 26 E.T.R. (3d) 1, 148 A.C.W.S. (3d) 483, EYB 2006-106843, apld [page162]

Gaydon (Re), [2001] NSWSC 473 (Aus.); Mahar v. Rogers Cablesystems Ltd. (1995), 25 O.R. (3d) 690, [1995] O.J. No. 3035, 34 Admin. L.R. (2d) 51, 58 A.C.W.S. (3d) 398 (Gen. Div.); Saunders v. Vautier (1841), Cr. & Ph. 240, 41 E.R. 482 (Ch. D.); Westfield Queensland No. 1 Pty Ltd. v. Lend Lease Real Estate Investments Ltd., [2008] NSWSC 516 (Aus.), consd

Other cases referred to

Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534, [1991] S.C.J. No. 91, 85 D.L.R. (4th) 129, 131 N.R. 321, [1992] 1 W.W.R. 245, J.E. 92-271, 6 B.C.A.C. 1, 61 B.C.L.R. (2d) 1, 9 C.C.L.T. (2d) 1, 39 C.P.R. (3d) 449, 43 E.T.R. 201, 30 A.C.W.S. (3d) 199; Citadel General Assurance Co. v. Lloyds Bank Canada, [1997] 3 S.C.R. 805, [1997] S.C.J. No. 92, 152 D.L.R. (4th) 411, 219 N.R. 323, J.E. 97-2034, 66 Alta. L.R. (3d) 241, 206 A.R. 321, 35 B.L.R. (2d) 153, 47 C.C.L.I. (2d) 153, 19 E.T.R. (2d) 93, 74 A.C.W.S. (3d) 898; Gencorp Canada Inc. v. Ontario (Superintendent of Pensions) (1998), 39 O.R. (3d) 38, [1998] O.J. No. 961, 158 D.L.R. (4th) 497, 114 O.A.C. 170, 37 C.C.E.L. (2d) 69, 78 A.C.W.S. (3d) 170 (C.A.) [Leave to appeal to S.C.C. refused [1998] 2 S.C.R. vii, [1998] S.C.C.A. No. 206]; Hermann Loog v. Bean (1884), 26 Ch. D. 306 (C.A.); Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93, 74 D.L.R. (4th) 321, 117 N.R. 321, [1990] 6 W.W.R. 385, J.E. 90-1436, 49 B.C.L.R. (2d) 273, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 23 A.C.W.S. (3d) 101; Lomas v. Rio Algom Ltd., [2006] O.J. No. 5122, 57 C.C.P.B. 315, 154 A.C.W.S. (3d) 213 (S.C.J.) [Leave to appeal granted [2007] O.J. No. 5287 (Div. Ct.)]; Nolan v. Kerry (Canada) Inc., [2009] 2 S.C.R. 678, [2009] S.C.J. No. 39, 2009 SCC 39, 309 D.L.R. (4th) 513, EYB 2009-162383, J.E. 2009-1510, 391 N.R. 234, 49 E.T.R. (3d) 159, 76 C.C.P.B. 1, 76 C.C.E.L. (3d) 55, 92 Admin. L.R. (4th) 203, 253 O.A.C. 256; PDC 3 Limited Partnership v. Bregman + Hamann Architects (2001), 52 O.R. (3d) 533, [2001] O.J. No. 422, 140 O.A.C. 302, 12 B.L.R. (3d) 215, 8 C.L.R. (3d) 167, 103 A.C.W.S. (3d) 231 (C.A.)

Statutes referred to

Financial Services Commission of Ontario Act, 1997, S.O. 1997, c. 28, ss. 2, 3, 5 [as am.], (2) [as am.], 20

Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 3, 18, 68, (1), (2), 69(1) [as am.], 70, (1), (2), 71, 72 [as am.], 73, 74, 75 [as am.], 75.1, 76, 89(1), (2) [as am.], (3), (3.1), (3.2), (4) [as am.], (5), (6) [as am.], (7), (8) [as am.], (9) [as am.], (10) [rep. R.S.O. 1997, c. 28, s. 208(8)], (11) [as am.], 90 [rep. R.S.O. 1997, c. 28, s. 209], 91(1)
Pension Benefits Standards Act, 1985, R.S.C. 1985, c. 32 (2nd Supp.) [as am.]
Variation of Trusts Act, R.S.O. 1990, c. V.1 [as am.]
Rules and regulations referred to
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 21.01(1)(b), 25.11
Uniform Civil Procedure Rules 2005 (N.S.W.)
Authorities referred to
Sharpe, Robert J., Injunctions and Specific Performance, looseleaf (Aurora: Canada Law Book, 2009)

APPEAL from the decision of the Divisional Court (Lane and Kiteley JJ. for the majority, Murray J. dissenting) (2008), 89 O.R. (3d) 130, [2008] O.J. No. 282 (Div. Ct.) dismissing an appeal from the order of the motion judge dismissing a motion to strike [page163] a claim for an order compelling the employer to commence proceedings to wind up the pension plan.

Neil Finkelstein and Anne Glover, for appellant.

C. Clifford Lax, Q.C., and Andrew J. Winton, for respondent.

The judgment of the court was delivered by

[1] GILLESE J.A.: -- Can the court compel an employer to commence proceedings to wind up a pension plan? This appeal answers that question.
Background

[2] In 1966, Rio Algom Limited ("Rio Algom") established a pension plan for its salaried employees (the "Pension Plan"). Funds contributed to the Pension Plan were to be held in trust.

Accordingly, Rio Algom entered into a trust agreement with Montreal Trust Company as trustee (the "1966 Trust Agreement"). The pension plan text (the "1966 Plan Agreement") was attached to the 1966 Trust Agreement.

[3] Both the 1966 Trust Agreement and the 1966 Plan Agreement provide that no part of the trust fund is to be used for, or diverted to, purposes other than for the exclusive benefit of the employee members of the Plan.

[4] Effective August 1, 1997, the Pension Plan was changed from a defined benefit ("DB") plan to a plan with both a DB and a defined contribution ("DC") portion. Members as of that date were given a one-time opportunity to switch from the DB to the DC portion of the plan. Members admitted after that date were eligible only for the DC portion of the Pension Plan.

[5] Alexander E. Lomas (the "applicant") has retired from employment with Rio Algom. While employed, he was a salaried employee and contributing member of the Pension Plan. He brought an application in which he seeks $2 million in damages, as well as other relief, including that which forms the subject of this appeal. He seeks to represent the members of the DB portion of the Pension Plan and others who may benefit from this proceeding as a result of their prior membership in the DB portion of the Pension Plan.

[6] The applicant alleges that Rio Algom has unilaterally and surreptitiously amended the Pension Plan to the detriment of plan members. He also claims that at various times before 1999, contrary to the original terms of the Pension Plan and in breach of trust, contract and fiduciary duty, Rio Algom and its officers and directors wrongfully diverted millions of dollars from the [page164] Pension Plan. Specifically, he alleges that Rio Algom: failed to contribute funds due and payable under the Pension Plan; failed to administer or cause the trustee to administer the Pension Plan for the benefit of the beneficiaries; managed and administered the funds contrary to the 1966 Trust Agreement and the 1966 Plan Agreement; and failed to make annual payments to fund the current service costs of the Pension Plan.

[7] Rio Algom brought a motion to strike paras. 1(h), 1(i)(i) and (ii), and 2(y) of the Amended Notice of Application (the "Amended Application") as disclosing no reasonable cause of action. For ease of reference, those paragraphs of the Amended Application are set out below. Paragraph 1(i)(ii) is struck to reflect that part of the motion judge's order from which no appeal has been taken. For convenience, I will refer to the balance of the paragraphs in question as the "impugned paragraphs".

1. The Applicant makes an application for:

. . . . .

(h) an Order determining:

(i) the present value of the assets of the Trust Fund;

(ii) the amount actuarially required to provide the pension and other benefits required to be paid to the persons named in paragraph 1(a) hereof in accordance with the terms of the Pension Plan,

and directing that the Respondents make an application under section 68 of the Pension Benefits Act for the partial winding-up of the Pension Plan and the distribution of the assets to the persons entitled thereto in conformity with the other determinations and declarations sought herein;

(i) in the alternative to the relief sought in paragraph 1(h), above:

(i) an Order for the purchase by the Trustee of annuities, policies of insurance or other instruments actuarially sufficient to ensure the payment of all pension and other entitlements due under the Pension Plan;

(ii) an Order for the winding up of the Pension Plan and distribution of its remaining or residual assets to those entitled thereto in accordance with the Pension Plan;

2. The grounds for the application are:

. . . . .

(y) The value of assets of the defined benefits portion of the Pension Plan is substantially in excess of the amount actuarially required to provide pension benefits to those entitled thereunder. The class of persons who are beneficiaries of the defined benefits portion of the Pension Plan is closed and the members of the class are determinable. No good purpose will be served by delaying the distribution of [page165] the surplus assets of the Pension Plan to those entitled to share in the distribution of the residual assets of the Trust Fund, after making provision for the payment of the pension and other benefits due to the persons entitled thereto. The surplus of the Trust Fund should be the subject of a partial wind-up under the Pension Benefits Act, so that the value may be distributed to the persons entitled thereto.

[8] After the motion was scheduled but before it was heard, the Supreme Court of Canada released its decision in Buschau v. Rogers Communications Inc., [2006] 1 S.C.R. 973, [2006] S.C.J. No. 28. Based on Buschau, the applicant conceded that he could no longer seek the relief set out in subpara. 1(i)(ii) of the Amended Notice, which asked the court to directly order the wind up of the Pension Plan. However, he maintained that Buschau did not preclude the court from ordering the employer to commence wind up proceedings pursuant to s. 68(1) of the Pension Benefits Act, R.S.O. 1990, c. P.8 (the "PBA").

[9] The motion judge accepted the applicant's submission. By order dated December 22, 2006 [[2006] O.J. No. 5122, 57 C.C.P.B. 315 (S.C.J.)] (the "Initial Order"), he struck the claim for a court-ordered wind up of the Pension Plan (para. 1(i)(ii)) but dismissed the balance of the motion, thus leaving the impugned paragraphs operative.

[10] In summary, the motion judge reasoned as follows. The application calls on the court to determine and declare the rights of Pension Plan members. If the court finds that wrongs have been committed, it has the power to fashion an appropriate remedy. Whether it has the jurisdiction to order Rio Algom to

apply for a wind up is a novel question. However, the applicant is not asking the court to assume the supervisory role of the Superintendent of Financial Services (the "Superintendent") or the Financial Services Tribunal (the "Tribunal"). Rather, the request is for an order compelling Rio Algom to do something that the PBA permits it to do -- apply for a wind up under s. 68. If that occurred, "the Superintendent would then oversee the subsequent and remaining steps in the winding-up process". Assuming that a finding is made that the rights of the Pension Plan members have been breached, the court is the best forum to determine the remedy.

[11] Rio Algom sought leave to appeal to the Divisional Court.

[12] By order dated May 8, 2007, Carnwath J. granted leave on the basis that the decision of the motion judge appeared to be in conflict with Buschau [[2007] O.J. No. 5287 (Div. Ct.)]. He stated that in Buschau, the Supreme Court of Canada found that the courts have no jurisdiction to order the wind up of a pension plan. The effect of the Initial Order, however, was to permit the impugned paragraphs to remain in the pleading and [page166] those paragraphs ask the court to order Rio Algom to wind up the Pension Plan by way of application to the Superintendent. Thus, he said, the effect of the Initial Order was to permit the court to do indirectly what it could not do directly. Resolving this matter is of public importance because the Initial Order implies that there could be concurrent schemes for a pension plan wind up -- the statutory scheme and a court-ordered scheme.

[13] The Divisional Court heard Rio Algom's appeal on October 18, 2007. A majority of the Divisional Court (Lane and Kiteley JJ.) were of the view that the motion had been properly decided and the impugned paragraphs should be permitted to remain in the Amended Application. Justice Murray dissented. By order dated January 24, 2008 (the "Order"), Rio Algom's appeal to the Divisional Court was dismissed.

[14] Rio Algom appeals to this court.

[15] I would allow the appeal, largely for the reasons given by Murray J. in dissent.

The Divisional Court Decision

The majority decision

[16] The majority decision in the Divisional Court (the "majority decision" or the "majority") affirmed the Initial Order. Like the motion judge, the majority did not view Buschau as having addressed whether the court can compel an employer who has been found to be in breach of its obligations to commence wind up proceedings under the PBA. In the majority's view, Buschau focused on the rule in Saunders v. Vautier (1841), Cr. & Ph. 240, 41 E.R. 482 (Ch. D.) and not on the general question of the role of equity and trust law in relation to the pension benefits legislative scheme.

[17] The majority viewed the relief sought in the impugned paragraphs as compelling a wrongdoer to remedy its wrongdoing by taking a step expressly contemplated by the PBA, namely, an employer exercising its right to apply for a partial wind up. Remedies for breach of trust are fact dependent. Thus, the majority reasoned, a determination of the appropriate remedy requires a fuller record than that which is available on a motion such as this. If restitution -- an equitable remedy -- can be achieved only by a mandatory order requiring the wrongdoer to act as permitted by statute, there is no policy reason to prevent that. The victims of the wrongdoing may also have access to a remedy by means of a request to the Superintendent but that does not affect their rights in trust law. [page167]

[18] The majority concluded by stating that the motion judge correctly held that it was not plain and obvious that the applicant could not succeed on the pleading as written.

The dissent

[19] Justice Murray would have struck the impugned paragraphs on the basis that they were prohibited by Buschau. In his view, Buschau stands for the proposition that pension plan members

have no right to compel the wind up of a defined benefit pension plan and they cannot circumvent the wind up provisions of the pension legislation by seeking a court order compelling the employer to wind up the pension plan. Therefore, he stated, it is not open to the court to order an employer to wind up a pension plan at the request of plan members.

[20] Murray J. also concluded that the impugned paragraphs could not remain because they contemplate relief that is inconsistent with the scheme of the PBA. There is no provision in the PBA that permits plan members to make an application for plan termination or wind up. As the Supreme Court noted in Buschau, if pension plan members have concerns about possible violations of the trust and plan, they are to alert the Superintendent. And, as was also pointed out in Buschau, because employees in an organization come and go, they have only a "passive and limited right with regard to employer decisions concerning the future of their plan and trust fund". Granting an order on behalf of plan members to compel the employer to apply for a plan wind up is inconsistent with those "passive and limited rights".

[21] Further, Murray J. reasoned, under the PBA only the employer and the Superintendent have the right to terminate a pension plan. The allegations raised in the Amended Application are all matters that the Superintendent is entitled to take into account in determining whether to take steps to wind up the pension plan. The court has no jurisdiction to perform the duties imposed on the Superintendent by the legislature. It ought not to act in a manner that negates the expertise of a statutorily appointed regulator. For the court to order -- at the request of plan members -- Rio Algom to terminate the DB Pension Plan would be an unauthorized usurpation of the authority delegated by the PBA to the Superintendent.

[22] Finally, Murray J. found that such an order would also interfere with the appeal process under the legislation. Under the PBA, a proposal to wind up made by the Superintendent can [page168] be appealed to the Tribunal [See Note 1 below] and then to the Divisional Court. [See Note 2 below] If the court requires an employer to apply for a wind up, the statutory

appeal process is not available and the employer will have been deprived of its appeal rights.

[23] For all of these reasons, Murray J. concluded that it was plain and obvious that the court did not have the authority to order the relief requested in the impugned paragraphs.

The Issue

[24] This appeal raises a single issue: does the court have the jurisdiction to make an order compelling an employer to commence proceedings to wind up a pension plan pursuant to s. 68(1) of the PBA?

The Legal Principles Governing a Motion to Strike

[25] The motion to strike a pleading was brought under rules 21.01(1)(b) and 25.11 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. There is no dispute about the applicable legal principles. A claim should be struck if it is plain and obvious that it cannot succeed. [See Note 3 below] Neither the length and complexity of the issues nor the novelty of the cause of action should prevent the plaintiff from proceeding to trial. [See Note 4 below] Important issues of law are normally decided on a full factual record, which allows the trial judge to make findings that form the basis for the legal analysis and conclusions. [See Note 5 below]

An Overview of Why this Appeal Must be Allowed

[26] The majority decision of the Divisional Court is explicitly founded on the premise that Buschau does not address the issue in this appeal, namely, whether the court can compel an employer who has been found to be in breach of its obligations to commence wind up proceedings under the PBA. The majority [page169] views Buschau as having focused on the rule in Saunders v. Vautier and not on the more general question of the role equity and trust law in respect of the pension benefits legislation.

[27] With respect, I disagree.

[28] The rule in Saunders v. Vautier enables trust beneficiaries, in certain circumstances, to end the trust and

force the distribution of the trust property. It is correct that in Buschau the Supreme Court of Canada held that members of a pension plan cannot use the rule to terminate a pension trust. However, I agree with Murray J. that Buschau is not confined to that narrow proposition.

[29] In Buschau, the Supreme Court makes it clear that the court does not have the authority to compel an employer to wind up a pension plan at the request of members of the pension plan because to do so would be contrary to:

(i) the societal purposes for which pension plans exist;

(ii) the scheme of the legislation that governs pension plans; and

(iii) the language usually found in pension plan documentation giving the employer the right to terminate the trust and pension plan.

[30] Ordering an employer to commence wind up proceedings under s. 68 of the PBA is tantamount to ordering the wind up of the pension plan. Because the court cannot do indirectly that which it cannot do directly, [See Note 6 below] Buschau makes it "plain and obvious" that the court does not have the authority to order an employer to commence wind up proceedings under s. 68 of the PBA at the request of plan members.

[31] I also agree with Murray J. that such an order runs contrary to the legislative provisions governing the wind up of private pension plans in Ontario. If the Superior Court of Justice were to order Rio Algom to commence wind up proceedings, it would violate the scheme of the PBA and the Financial Services Commission of Ontario Act, 1997, S.O. 1997, c. 28 (the "FSCOA"), and amount to an unauthorized usurpation of the authority delegated to the Superintendent and Tribunal.

[32] The following examination of Buschau and the relevant legislation will explain the foregoing conclusions and why this appeal must be allowed. [page170]

Buschau Examined

The facts

[33] In 1974, Premier Communications Ltd. established a defined benefit pension plan for the benefit of its employees (the "Plan"). The Plan provided that in the event of termination, surplus was to be distributed among the remaining members. The Plan funds were held in a trust (the "Trust").

[34] The Plan was governed by the Pension Benefits Standards Act, 1985, R.S.C. 1985, c. 32 (2nd Supp.) (the "PBSA"). There are no material differences between its relevant provisions and the corresponding ones in the PBA in respect of the matters in issue in this appeal.

[35] Rogers Communication Inc. ("RCI") [See Note 7 below] acquired Premier Communications Ltd. in 1980. In 1981, RCI amended the Plan to provide that on its termination, surplus would revert to it. In 1984, RCI closed the Plan to new employees. In 1992, RCI retroactively merged other of its pension plans with the Plan. By 2002, the Plan had an actuarial surplus of $11 million.

[36] Much litigation ensued over the Plan. The court determined, among other things, that although the merger of the pension plans was valid, it did not affect the existence of the Trust as a separate trust. It also held that the members of the Plan retained the right to any surplus funds that remained on Plan termination. [See Note 8 below]

[37] The Plan members wanted the surplus so they applied to the court for an order terminating the Plan. They relied on the rule in Saunders v. Vautier, which provides that if all of those persons who are beneficially entitled to the trust property are of full legal capacity and agree, they may modify or extinguish the trust without reference to the wishes of the settler or trustee. [See Note 9 below] The Plan members argued that the rule in Saunders v. Vautier allowed them to terminate the Trust even though the Plan documentation provided that only the employer had that right. They argued, alternatively, that RCI should be required to wind up the Plan under the PBSA. They maintained that because the Superintendent's power to terminate the Plan was discretionary, they had no clear recourse under the PBSA. [page171]

[38] The British Columbia first instance and appeal courts held that the rule in Saunders v. Vautier applied and could be used to enable the Plan members to collapse the Trust. The Supreme Court of Canada reversed that decision.

The majority decision in Buschau

[39] Justice Deschamps wrote for the majority. She gave a number of reasons for holding that the rule in Saunders v. Vautier does not apply to pension trusts, which I would group and summarize as follows.

[40] First, the rule in Saunders v. Vautier is incompatible with the context and purpose of pension plans. Pension plans serve broad societal goals. Together with government programs and individual savings, they provide an aging population with invaluable financial support. Recognizing the economic and social importance of pension plans, Parliament and a majority of the provincial and territorial legislatures have adopted legislation regulating them. Permitting the rule in Saunders v. Vautier to operate would defy the application of the PBSA, which deals extensively with the wind up of pension plans and the distribution of assets. It is clear that Parliament intended the PBSA provisions to displace the rule in Saunders v. Vautier. The PBSA provides a means to reach the distribution stage -- it prevails over the rule. [See Note 10 below]

[41] Gift or legacy trusts are gratuitous -- accelerating the date of the beneficiaries' entitlement has no broad social consequences. However, the capital of the pension trust fund cannot be distributed without defeating the social purpose of preserving the financial security of employees in their retirement by allowing them to receive periodic payments until they die. Furthermore, before a pension plan is wound up, surplus is only an actuarial concept. While the plan is in operation, individuals entitled to the surplus assets do not have a specific interest in them. [See Note 11 below]

[42] A pension plan, if not a permanent instrument, is at least a long-term one. The participation of any individual

member is ephemeral -- members come and go while pension plans are expected to survive the flow of employees and corporate reorganizations. In an ongoing pension plan, a single group of employees should not be able to deprive future employees of the [page172] benefit of a pension plan. Thus, members often have only a passive and limited right with regard to employer decisions concerning the future of their plan and trust fund. They are not left without recourse should the employer infringe the PBSA because they can alert the Superintendent to their concerns. [See Note 12 below]

[43] Second, unlike other trusts, pension trusts are not stand-alone instruments. They serve only as the vehicle for holding and managing the funds of the pension plan. In the present case, the Trust agreement is made part of the Plan and is dependent on the Plan for which it was created. The two instruments are therefore indissociable. Pension trusts cannot be terminated without taking into account the provisions in the pension plan documentation and the legislation that governs the pension plan. While there are no indirect effects which arise on the application of the rule in Saunders v. Vautier to other types of trusts, that is not the case with pension trusts. Application of the rule would end a pension trust but it would not deal with termination of the pension plan. However, termination of the pension plan in accordance with the PBSA is a condition precedent to distribution of the assets held in the pension trust. [See Note 13 below]

[44] Further, while classic trust law allows no room for the settlor's intention, treating employers as having no interest in the pension trust conflicts with the usual expectations of the parties to the pension plan. Neither the Plan nor the Trust agreement gives the members a right to terminate the Plan. [See Note 14 below]

[45] Third, the rights of pension plan members are subject to the provisions of the PBSA. While the PBSA is not a complete code, when recourse to it is available, plan members should use it. [See Note 15 below]

[46] The PBSA deals explicitly with pension plan wind up. It

gives the Superintendent a key role in the termination and distribution stages of a pension plan wind up. For the members to get the surplus, the Plan must first be terminated. Since the Plan does not provide for them to terminate it, the members can ask the Superintendent to consider ordering a partial Plan wind up. The Superintendent is in the best position to determine whether there is any legitimate purpose to be served by [page173] permitting a pension plan to continue or whether it should be wound up. [See Note 16 below]

The minority decision in Buschau

[47] Justice Bastarache wrote the minority decision in Buschau. He concluded that the Plan members could not use the rule in Saunders v. Vautier to collapse the Plan or Trust for reasons similar to those given by the majority. Those reasons can be summarized as follows.

[48] The PBSA is a comprehensive statutory scheme structured to further the public policy objective of enhanced financial security for workers on their withdrawal from the active workforce. Within this comprehensive scheme, there are detailed provisions for the termination of pension plans and the distribution of plan assets. [See Note 17 below]

[49] Given the voluntary nature of the private pension plan system, employers are generally entitled to terminate a pension plan, a matter expressed in most plan documents, including the Plan. This right is recognized in the PBSA. The Superintendent is also given the power to terminate pension plans in certain specified situations. There is no provision in the PBSA for plan beneficiaries to terminate a pension plan. [See Note 18 below]

[50] It is an error to infer that the rule in Saunders v. Vautier can create a manner of realizing on the actuarial surplus in the fund in violation of the terms of the Plan. In this Plan, absolute entitlement to the surplus would only occur once the surplus became real, that is, once the Plan and Trust had been terminated. This is because the members only have a contingent interest in the Trust surplus which does not vest until the Plan is terminated. [See Note 19 below]

[51] The Plan states that it is the employer who may amend and terminate the Plan and it is the employer's expectation that the Plan and Trust will continue indefinitely. In the circumstances, there could be no reasonable expectation on the part of the employer or Plan members that the Trust could be terminated by the members over the objections of the employer. The application of the rule in Saunders v. Vautier would contradict [page174] the reasonable contractual expectations of the parties as it would permit the members to unilaterally vary the terms of the Trust without the employer's consent. [See Note 20 below]

[52] The unique role of the employer in respect of the pension plan and trust cannot be ignored. The terms of the contract at the root of the trust cannot be circumvented. The legislative framework cannot be made irrelevant by applying the rule in Saunders v. Vautier. [See Note 21 below]

[53] The underlying social policy objective of private pension plan legislation is to promote the establishment and maintenance of private pension plans to provide income security for employees and their families in retirement. This is not consistent with the operation of the rule in Saunders v. Vautier. [See Note 22 below]

[54] Termination of the Plan and Trust must be dealt with in accordance with the terms of the Plan and the provisions of the PBSA. The rule in Saunders v. Vautier does not apply. Neither the terms of the Plan nor the provisions of the PBSA grant the members a right to terminate the Plan. [See Note 23 below]
Buschau Applied

[55] I have set out the reasons in Buschau at some length to demonstrate that it stands for the general proposition that, absent language in the pension plan documentation to the contrary, pension plan members have no right to compel the wind up of a defined benefit pension plan. The reasoning of the Supreme Court in Buschau, as summarized above, shows that the court was not focused on the narrow matter of the rule in Saunders v. Vautier. Rather, the Supreme Court provides much-needed guidance on the rights of plan members generally in

relation to the termination of a pension fund and the wind up of a pension plan.

[56] The reasoning in Buschau makes it clear that the court does not have the authority to compel an employer to wind up a pension plan at the request of members of the pension plan because to do so would be contrary to

(i) the societal purposes for which pension plans exist;
[page175]

(ii) the scheme of the legislation that governs pension plans; and

(iii) the language usually found in pension plan documentation giving the employer the right to terminate the trust and pension plan.

[57] The majority decision in the Divisional Court would permit the court to order Rio Algom to wind up the Plan pursuant to s. 68(1) of the PBA. However, ordering an employer to commence wind up proceedings under s. 68(1) of the PBA is tantamount to ordering the wind up of the pension plan. Because the court cannot do indirectly that which it cannot do directly, [See Note 24 below] Buschau makes it "plain and obvious" that the court does not have the authority to order an employer to commence wind up proceedings under s. 68 of the PBA at the request of plan members.

[58] The applicant submits that Buschau stands for the proposition that the rule in Saunders v. Vautier is not available to plan members because the rule operates outside the PBA. On the applicant's view, because the impugned paragraphs ask the court to order Rio Algom to wind up the Pension Plan by means of s. 68(1) of the PBA, the reasoning in Buschau does not apply. I do not accept this submission.

[59] I accept that Buschau dictates that where a statutory scheme exists for the termination and wind up of pension plans, it must be followed. That statutory process, discussed in detail below, is not to be circumvented by the courts. However, that does not mean that the court has the right to require an employer to wind up the pension plan by means of compliance with the legislative scheme. The core reasoning in Buschau is

that the members of a pension plan do not have the right to compel an employer to wind up the pension plan. The decision in Buschau is not confined to the method by which wind up is to take place.

The Scheme of the PBA Precludes the Court from Ordering an Employer to Commence Wind Up Proceedings

[60] Before examining the statutory scheme governing the wind up of pension plans in Ontario, it is useful to recall certain foundational principles underlying the pension legislation. [page176]

[61] Canada has chosen a "voluntary" system of private pension plan coverage. This means that unlike some other countries in the world, Canadian employers are not obliged to provide pension plans for their employees. Thus, employers have the right to decide both whether to establish pension plans for their employees and, subject to anything to the contrary in the pension plan documentation, to end any pension plan they might establish. However, while employers have the right to establish and to wind up pension plans, both actions are heavily regulated through legislation. There are many reasons for regulating pension plans but one of the most fundamental is the need for oversight by an independent regulator to ensure that pension plan promises are met and pension funds are not misused. It is with these principles in mind that I turn to a consideration of the statutory framework governing the wind up of pension plans. In this regard, I endorse Murray J.'s excellent analysis of the statutory wind up provisions.

[62] Pension plans provided for people employed in Ontario are subject to the provisions of the PBA. [See Note 25 below] Together, the PBA and the FSCOA govern the wind up of pension plans. The relevant provisions in both pieces of legislation can be found as Schedules "A" and "B" to these reasons.

[63] FSCOA creates the administrative structure for certain regulated sectors in Ontario, including pension plans. The three principal institutions established by FSCOA are the Financial Services Commission (the "Commission"), the Superintendent and the Tribunal. The role of the Superintendent

is, among other things, to administer the PBA and supervise generally private pension plans. [See Note 26 below]

[64] The PBA provides only two methods by which a pension plan can be wound up.

[65] First, the employer's right to wind up pension plans, in whole or in part, is affirmed in s. 68(1) of the PBA. However, this does not mean that the employer's right to wind up is unfettered. Wind up of a pension plan can be done only through compliance with the PBA. Section 68(2) makes it mandatory that the plan administrator give written notice of the proposal to wind up the pension plan to the Superintendent and pension plan members, among others. Section 70(1) stipulates that the administrator of a pension plan that is to be wound up must file a wind up [page177] report and s. 70(2) provides that no payments can be made out of the pension fund after notice of proposal to wind up, until the Superintendent has approved the wind up report.

[66] As the pension fund of a pension plan that is wound up continues until all the pension fund assets have been disbursed, [See Note 27 below] and as the preceding paragraph makes clear, distribution on wind up is dependent on Superintendent approval, the only way the employer can wind up is through compliance with the PBA. The Superintendent's role in a "s. 68 wind up" is to provide the necessary regulatory oversight to ensure that the wind up complies with the requirements of the PBA and regulations and the plan documentation. [See Note 28 below] The Superintendent cannot force the continuation of the pension plan.

[67] Second, s. 69(1) gives the Superintendent the discretion to order the wind up of a pension plan, in whole or in part, in certain specified situations such as the employer's failure to make required contributions to the pension fund, the employer's bankruptcy, or the cessation of employment of a significant number of members of the pension plan as a result of the discontinuance of all or part of the employer's business. More is said below about the elaborate process that must be followed in a Superintendent-initiated wind up.

[68] At this juncture, it is significant to note that the PBA does not give plan members the right to compel the wind up of a pension plan. As the Supreme Court observed in Buschau, this does not leave plan members without recourse. If plan members believe that the employer has acted improperly in the administration of the plan, they may turn to the Superintendent. [See Note 29 below] All of the alleged wrongdoing set out in the Amended Notice of Application are matters that the Superintendent can take into account in determining what steps, if any, should be taken in respect of the Pension Plan. As Buschau directs, when recourse to the Superintendent is available to plan members, they should use it. [See Note 30 below]

[69] Based on Buschau, the applicant has conceded that the court cannot make an order directly compelling Rio Algom to wind up the Pension Plan. With respect, there is no difference between ordering Rio Algom to wind up the Pension Plan and [page178] the relief contemplated in the impugned paragraphs, namely, ordering Rio Algom to commence wind up proceedings pursuant to s. 68(1) of the PBA. As will be evident from the foregoing explanation of the wind up provisions that apply to employers, there is only one way an employer can wind up a pension plan in Ontario and that is pursuant to s. 68(1) of the PBA.

[70] Because the court cannot order Rio Algom to wind up the Pension Plan at the request of plan members, it cannot order Rio Algom to commence wind up proceedings pursuant to s. 68(1) at the request of plan members -- the two are synonymous. To suggest that there is a difference between the two orders reflects a fundamental misunderstanding of the employer initiated wind up of a pension plan.

[71] I return to a consideration of the statutory scheme governing the Superintendent's powers in relation to the wind up of pension plans. It offers a separate basis for concluding that the court does not have the authority to compel an employer to commence wind up proceedings under the PBA.

[72] When it is the Superintendent (rather than the employer) who initiates the wind up of a pension plan, a very different process must be followed. The PBA and the FSCOA create a carefully calibrated, multi-layered process for deciding whether a wind up will be ordered when the wind up has not been initiated by the employer. Section 89(5) of the PBA requires the Superintendent to serve notice of the proposal to make an order to wind up (the "Notice of Proposal"), together with written reasons for why he or she proposes to make the wind up order, on the plan administrator and the employer. The Superintendent is also empowered to require the plan administrator to transmit a copy of the Notice of Proposal and reasons to other persons (s. 89(5)).

[73] The Notice of Proposal must state that the person on whom it is served is entitled to a hearing before the Tribunal (s. 89(6)). If a hearing is not required, the Superintendent may carry out the proposal (s. 89(7)). That is, the Superintendent may wind up the pension plan.

[74] However, the employer or any other person receiving the Notice of Proposal can challenge the proposed wind up order. This is done by requiring a hearing before the Tribunal (s. 89(6) and (8)).

[75] The Superintendent, the person requiring the hearing and any other persons specified by the Tribunal are the parties [page179] to the proceeding (s. 89(11)). [See Note 31 below] The Tribunal has exclusive jurisdiction to decide all questions of fact and law that arise in the proceeding (s. 20 of the FSCOA). At or after the hearing, the Tribunal has the power to direct the Superintendent to carry out or to refrain from carrying out the proposal to wind up, and to take such actions as the Tribunal considers the Superintendent ought to have taken in the circumstances (s. 89(9)).

[76] Whatever decision the Tribunal makes can be appealed to the Divisional Court (s. 91(1)).

[77] If the court could simply require the employer to commence wind up proceedings under s. 68(1) of the PBA as the

Order would permit, the statutory process governing Superintendent-initiated wind ups would be eliminated. This appears to me to be an impermissible interference with the legislative scheme in two ways.

[78] First, the court would have to decide the matters of fact and law necessary in determining whether a wind up should be ordered. Those matters involve difficult questions of entitlement and calculations of liability for plan members' pensions, the adequacy of the plan assets to satisfy liabilities, prioritization of claims, methods of distribution, questions related to grow-in benefits and a host of other complex, technical issues. [See Note 32 below] But, the legislature has given the Superintendent the power in the first instance to determine whether to initiate wind up proceedings and it has given the Tribunal exclusive jurisdiction to decide that matter at or after the hearing. [See Note 33 below] If the court were to order Rio Algom to commence wind up proceedings, it would violate the legislative scheme and amount to an unauthorized usurpation of the authority delegated to the Superintendent and Tribunal.

[79] Second, the procedural safeguards and appeal rights of all affected parties that are established by the statutory process would be eliminated. There would be no preliminary determination by the Superintendent that a wind up was necessary and appropriate. There would be no hearing by the Tribunal and there would be no appeal to the Divisional Court. Instead, the [page180] Ontario Superior Court of Justice would make the first instance decision.

[80] In Mahar v. Rogers Cablesystems Ltd. (1995), 25 O.R. (3d) 690, [1995] O.J. No. 3035 (Gen. Div.), at p. 698 O.R., Sharpe J. rejected the suggestion that there was overlapping jurisdiction between an expert regulatory body and the courts, saying:

> [W]here Parliament has created a statutory regime which includes both rights and a procedure for their resolution, there is at the very least a strong reluctance to permit jurisdiction to be divided between the specialized agency or

tribunal and the courts or to permit overlapping or concurrent jurisdiction.

[81] Those comments apply with force in the pension field, where the courts have repeatedly recognized the need for specialized expertise. [See Note 34 below] As Robins J.A. said in Gencorp Canada Inc. v. Ontario (Superintendent of Pensions) (1998), 39 O.R. (3d) 38, [1998] O.J. No. 961 (C.A.), at p. 43 O.R., leave to appeal to S.C.C. refused [1998] 2 S.C.R. vii, [1998] S.C.C.A. No. 206, when speaking about the PBA:

> The administration and regulation of this manifestly complex and specialized field of activity requires specific knowledge and expertise.

[82] Furthermore, the court would be disadvantaged should the statutory process be circumvented because it would be deprived of a cogent factual record on which to evaluate the strengths and weaknesses of the arguments for and against termination of the pension plan and distribution of the assets. If the statutory process is followed, when the Divisional Court hears an appeal from a decision of the Tribunal, it has the benefit of a full record. The Superintendent and the Tribunal will have fulfilled the different roles assigned to them by the legislation in determining whether to order a wind up, using their specialized expertise. If, however, the court could compel the employer to commence wind up proceedings without the benefit of the statutory process, the roles of the Superintendent and the Tribunal are eliminated and the court is denied the benefit of their specialised expertise. As Murray J. said, at para. 52 of his dissenting reasons:

> It is the departure from the statutory scheme, in the manner advanced by the [applicant], that would deprive a reviewing court of a cogent record on which to evaluate the strengths and weaknesses of the arguments for and against plan termination or that relate to the distribution of plan assets. [page181]

[83] The task of deciding when to order an "involuntary" wind up [See Note 35 below] has been specifically assigned by the

legislature to the Superintendent and the Tribunal. Deference is due the decisions of both. [See Note 36 below] If the Order is permitted to stand, the courts would become an alternate forum for the determination of that matter. This would disrupt the legislative scheme, short-circuit the statutory process and deprive the courts and the litigants of the knowledge and expertise brought to the difficult issues that arise when contemplating the involuntary wind up of a pension plan. As Murray J. said, at para. 51:

> To deprive a reviewing court of the specialized expertise of the regulators on wind up and the subsequent distribution of assets reflects neither the intention of the legislature nor the interests of the employer, plan members or others with an interest in the pension plan.

Conclusion

[84] The impugned paragraphs contemplate the court making an order requiring Rio Algom to commence wind up proceedings pursuant to s. 68 of the PBA. A majority of the Divisional Court would permit the impugned paragraphs to remain because, in their view, it is not plain and obvious that such an order is unavailable as a mandatory injunction to protect the applicant plan member's rights or as one of the court's array of restitutionary remedies.

[85] A restorative mandatory injunction requires the defendant to repair a situation in a manner consistent with the plaintiff's rights. It is available only to protect an existing right. [See Note 37 below] Both the reasoning in Buschau and the legislative scheme governing the wind up of pension plans lead to the conclusion that the applicant, as a member of the Pension Plan, does not have the right to compel its wind up. As he has no such right, a mandatory injunction to that effect is not available.

[86] Nor does the court have the authority to order the employer to commence wind up proceedings as part of its powers to effect restitution. Together, the PBA and the FSCOA create a comprehensive statutory regime regarding the wind up of pension plans. Under that scheme, the court has no original

jurisdiction to [page182] order the wind up of a pension plan. There is no difference between an order requiring an employer to wind up a pension plan and an order requiring an employer to commence wind up proceedings under the PBA. As there is no power in the court to order the former, there is no power in the court to order the latter.

[87] Therefore, it is "plain and obvious" that the court does not have the authority to order Rio Algom to commence wind up proceedings under the PBA.

[88] The foregoing is sufficient to dispose of this appeal. Nonetheless, a brief comment is warranted in respect of the suggestion in the reasons of the majority in the Divisional Court, that the court has the power to terminate a pension trust pursuant to trust law principles. I question that suggestion for two reasons.

[89] The first relates to the fact that a pension trust is "indissociable" [See Note 38 below] from the pension plan. As the court cannot order the wind up of the pension plan, and the plan and trust are indissociable, I query whether the court can order the termination of a pension trust. This query is compounded by the fact that it is not clear that a pension trust can be terminated without first winding up the pension plan. [See Note 39 below]

[90] Second, apart from the rule in Saunders v. Vautier, I am unaware of any trust law principle that allows the court to terminate a trust before the purposes of the trust have been fulfilled. [See Note 40 below] Indeed, the inherent power of the court to vary a trust is so limited that legislation was required to provide the court with adequate power in that regard. [See Note 41 below]

[91] The reasoning of the New South Wales Supreme Court in Gaydon (Re) [See Note 42 below] is illustrative of this point. In Gaydon, the plaintiff became the trustee of the Crane Trust as a result of a court order removing Ms. Crane as trustee. Following Ms. Crane's mingling of trust accounts and mismanagement of the trust assets, the plaintiff had been unable

to reconstruct the accounts of the Crane Trust. The trust beneficiaries had attained the age [page183] of majority and were of sound mind. The plaintiff sought an order removing himself as trustee and dissolving the trust. The court rejected the notion that it could order the trust to be dissolved.

[92] At paras. 29-31 of Gaydon, Barett J. held that the prayer for relief

> . . . is framed upon some implicit assumption that the Court may, by order, dissolve a trust in the same way as it may, for example, dissolve a partnership . . . . Any such assumption is, of course, unwarranted. It is the duty of the Court to uphold and protect trusts, not to destroy them, although where the terms of the trust envisage, in certain circumstances, realisation of property, winding up of the trust's affairs and final payments to beneficiaries, the Court will, naturally enough, give effect to those "winding-up" provisions. . . .
>
> Thinking of the kind which sees an application of this kind made is fostered by the growing assimilation of certain kinds of trusts to companies. I refer, of course, to trusts governed by the provisions of the Corporations Law dealing with managed investment schemes. Part 5C.9 of the Corporations Law allows managed investment schemes to be wound up in various circumstances and creates certain powers which may be exercised by the Court in relation to such a winding up. But those provisions are irrelevant here. I mention them only to emphasise that, in the absence of applicable statutory powers, it is no business of the Court to act so as to put an end to a trust. . . .
>
> Termination of the Crane Trust, if it is to occur, is something which lies within the power of the beneficiaries, Mrs. Rodgers and Mrs. Flynn. Being sui juris and absolutely entitled, they can invoke the rule in Saunders v. Vautier [1841] Cr & Ph 240 to put an end to the trust so that it can be regarded as fully administered and the plaintiff can be regarded as discharged.

(Emphasis added; citation omitted)

[93] This passage was relied upon in Westfield Queensland No. 1 Pty Ltd. v. Lend Lease Real Estate Investments Ltd. [See Note 43 below] In Westfield, the plaintiffs owned a shopping centre through a network of trust arrangements. They came to a stalemate regarding the management of the shopping centre and sought, among other things, the termination of several of the trusts pursuant to the Uniform Civil Procedure Rules 2005 (N.S.W.) and the inherent jurisdiction of the court.

[94] The court held that there was no general power to terminate the trust. The court's jurisdiction under the Rules was "not a jurisdiction to make any such order in relation to a trust as the court thinks fit; a fortiori it is not a jurisdiction to terminate a trust when the court sees fit". [See Note 44 below] Powers conferred on trustees for [page184] expediency in the management and administration of property do not authorize the court to determine the trust. [See Note 45 below] Relying on Gaydon, the court stated as a general proposition that it is the court's role to uphold and enforce trusts, not to terminate them. It concluded by stating that there is nothing in the inherent powers of the court that would assist the plaintiffs in their contention that they were entitled to the winding up of the trust. [See Note 46 below]

[95] Restitutionary remedies are designed to effect restitution to the estate, that is, to compensate the estate for loss suffered. [See Note 47 below] The imposition of a constructive trust over assets, the requirement to account, tracing and an order for compensation are examples of restitutionary remedies. [See Note 48 below] Beneficiaries of an express trust may also seek the removal of trustees.

[96] If, as the respondent submits, Rio Algom is incapable of fulfilling its fiduciary duties as a result of a repeated pattern of abusing its powers as administrator of the Pension Plan, the court could avail itself of the remedies mentioned in the preceding paragraph. For the reasons given, I question whether ordinary trust principles would permit the court to order the termination of the pension trust.

Disposition

[97] I would allow the appeal, grant the motion and strike out subparas. 1(h), 1(i)(i) and 2(y) of the Amended Notice of Application, with costs to the appellant fixed at $35,000, all inclusive. I would make no order as to the costs of the proceedings below, as counsel have advised they will be able to resolve those matters between themselves.

Appeal allowed. [page185]

SCHEDULE A

Financial Services Commission of Ontario Act, 1997, S.O. 1997, c. 28, ss. 2, 3, 5 and 20

Commission established

2(1) There is hereby established a commission to be known in English as the Financial Services Commission of Ontario and in French as Commission des services financiers de l'Ontario.

Members

(2) The Commission shall consist of the chair and the two vice-chairs of the Commission, the Superintendent and the Director.

Quorum

(3) A majority of the members of the Commission constitutes a quorum.

Purposes

3. The purposes of the Commission are,

(a) to provide regulatory services that protect the public interest and enhance public confidence in the regulated sectors;

(b) to make recommendations to the Minister on matters affecting the regulated sectors; and

(c) to provide the resources necessary for the proper functioning of the Tribunal.

. . . . .

Superintendent

5(1) There shall be a Superintendent of Financial Services appointed under Part III of the Public Service of Ontario Act, 2006 who shall be the chief executive officer of the Commission.

Powers and duties

(2) The Superintendent shall,

(a) be responsible for the financial and administrative affairs of the Commission;

(b) exercise the powers and duties conferred on or assigned to the Superintendent;

(c) administer and enforce this Act and every other Act that confers powers on or assigns duties to the Superintendent; and

(d) supervise generally the regulated sectors.

Delegation of powers and duties

(3) The Superintendent may, subject to the conditions that the Superintendent considers appropriate, delegate in writing to any person employed in the Commission the exercise of any power or the performance of any duty that this Act or any other Act confers on or assigns to the Superintendent [page186] and all acts done and decisions made under the delegation are as valid and effective as if done or made by the Superintendent.

Same, hearings

(4) The Superintendent may appoint in writing any employee of the Commission, or any other person, to hold a hearing on behalf of the Superintendent and to exercise the powers and perform the duties of the Superintendent relating to the hearing.

Oaths

(5) The Superintendent may administer an oath required under this Act and any other Act that confers powers on or assigns duties to the Superintendent.

. . . . .

Exclusive jurisdiction

20. The Tribunal has exclusive jurisdiction to,

(a) exercise the powers conferred on it under this Act and every other Act that confers powers on or assigns duties to it; and

(b) determine all questions of fact or law that arise in any proceeding before it under any Act mentioned in clause (a).

SCHEDULE B

Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 18, 68-77, 89-91

Employees in Ontario

3. This Act applies to every pension plan that is provided for persons employed in Ontario.

. . . . .

Refusal or revocation of registration

18(1) The Superintendent may,

(a) refuse to register a pension plan that does not comply with this Act and the regulations;

(b) revoke the registration of a pension plan that does not comply with this Act and the regulations;

(c) revoke the registration of a pension plan that is not being administered in accordance with this Act and the regulations;

(d) refuse to register an amendment to a pension plan if the amendment is void or if the pension plan with the amendment would cease to comply with this Act and the regulations;

(e) revoke the registration of an amendment that does not comply with this Act and the regulations.

Application of subs. (1)

(2) The authority of the Superintendent under subsection (1) is subject to the right to a hearing under section 89.

Effect of refusal or revocation

(3) A refusal of registration of a pension plan or a revocation of registration of a pension plan operates to terminate the pension plan as of the date specified by the Superintendent.

Idem

(4) A refusal of registration of an amendment to a pension plan or the revocation of an amendment to a pension plan operates to terminate the amendment as of the date specified by the Superintendent.

Wind up

(5) Where registration of a pension plan is refused or revoked, the administrator shall wind up the pension plan in accordance with this Act and the regulations.

. . . . .

Winding up

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

Same, jointly sponsored pension plans

(1.1) The following rules apply, and subsection (1) does not apply, with respect to jointly sponsored pension plans:

1. If a jointly sponsored pension plan is also a multi-employer pension plan, the administrator may wind up the plan in whole or in part unless the documents that create and support the plan authorize another

person or entity to do so. In that case, the authorized person or entity may wind up the plan in whole or in part.

2. If a jointly sponsored pension plan is not a multi-employer pension plan, the administrator or another person or entity may wind up the plan in whole or in part if the documents that create and support the plan authorize the administrator, person or entity to do so.

Notice

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

(a) the Superintendent;
(b) each member of the pension plan;
(c) each former member of the pension plan;
(d) each trade union that represents members of the pension plan;
(e) the advisory committee of the pension plan; and
(f) any other person entitled to a payment from the pension fund. [page188]

Notice of partial wind up

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

Information

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

Effective date

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

in any other case, on the date notice is given to members.

Order by Superintendent

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

Winding up order by Superintendent

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

(a) there is a cessation or suspension of employer contributions to the pension fund;

(b) the employer fails to make contributions to the pension fund as required by this Act or the regulations;

(c) the employer is bankrupt within the meaning of the Bankruptcy and Insolvency Act (Canada);

(d) a significant number of members of the pension plan cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer or as a result of the reorganization of the business of the employer;

(e) all or a significant portion of the business carried on by the employer at a specific location is discontinued;

(f) all or part of the employer's business or all or part of the assets of the employer's business are sold, assigned or otherwise disposed of and the person who acquires the business or assets does not provide a pension plan for the members of the employer's pension plan who become employees of the person;

(g) the liability of the Guarantee Fund is likely to be substantially increased unless the pension plan is wound up in whole or in part;

(h) in the case of a multi-employer pension plan,

(i) there is a significant reduction in the number of members, or

(ii) there is a cessation of contributions under the

pension plan or a significant reduction in such contributions; or

(i) any other prescribed event or prescribed circumstance occurs. [page189]

Date and notice

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

Wind up report

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

(a) the assets and liabilities of the pension plan;

(b) the benefits to be provided under the pension plan to members, former members and other persons;

(c) the methods of allocating and distributing the assets of the pension plan and determining the priorities for payment of benefits; and

(d) such other information as is prescribed.

Payments out of pension fund after notice of proposal to wind up

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

Application of subs. (2)

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

Approval

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

Refusal to approve

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

Rights and benefits on partial wind up

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

Appointment of administrator to wind up

71(1) If a pension plan that is to be wound up in whole or in part does not have an administrator or the administrator fails to act, the Superintendent may act as or may appoint an administrator. [page190]

Costs of administration on winding up

(2) The reasonable administration costs of the Superintendent or of the administrator appointed by the Superintendent may be paid out of the pension fund.

Termination

(3) The Superintendent may terminate the appointment of an administrator appointed by him or her if the Superintendent considers it reasonable to do so.

Notice of entitlement upon wind up and election

72(1) Within the prescribed period of time, the administrator of a pension plan that is to be wound up, in whole or in part, shall give to each person entitled to a pension, deferred pension or other benefit or to a refund in respect of the pension plan a statement setting out the person's entitlement under the plan, the options available to the person and such other information as may be prescribed.

Election

(2) If a person to whom notice is given under subsection (1) is required to make an election, the person shall make the election within the prescribed period of time or shall be deemed to have elected to receive immediate payment of a pension benefit, if eligible therefor, or, if not eligible to receive immediate payment of a pension benefit, to receive a pension commencing at the earliest date mentioned in clause 74(1)(b).

Payment

(3) Within the prescribed period of time, the administrator shall make payment in accordance with the election or deemed election.

Determination of entitlements

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

(a) the employment of each member of the pension plan affected by the winding up shall be deemed to have been terminated on the effective date of the wind up;

(b) each member's pension benefits as of the effective date of the wind up shall be determined as if the member had satisfied all eligibility conditions for a deferred pension; and

(c) provision shall be made for the rights under

section 74.

Transfer rights on wind up

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

Combination of age and years of employment

74(1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan [page191] equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,

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

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

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

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

Part year

(2) In determining the combination of age plus employment or membership, one-twelfth credit shall be given for each

month of age and for each month of continuous employment or membership at the effective date of the wind up.

Member for ten years

(3) Bridging benefits offered under the pension plan to which a member would be entitled if the pension plan were not wound up and if the membership of the member were continued shall be included in calculating the pension benefit under subsection (1) of a person who has at least ten years of continuous employment with the employer or has been a member of the pension plan for at least ten years.

Prorated bridging benefit

(4) For the purposes of subsection (3), if the bridging benefit offered under the pension plan is not related to periods of employment or membership in the pension plan, the bridging benefit shall be prorated by the ratio that the member's actual period of employment bears to the period of employment that the member would have to the earliest date on which the member would be entitled to payment of pension benefits and a full bridging benefit under the pension plan if the pension plan were not wound up.

Notice of termination of employment

(5) Membership in a pension plan that is wound up in whole or in part includes the period of notice of termination of employment required under Part XV of the Employment Standards Act, 2000.

Application of subs. (5)

(6) Subsection (5) does not apply for the purpose of calculating the amount of a pension benefit of a member who is required to make contributions to the pension fund unless the member makes the contributions in respect of the period of notice of termination of employment. [page192]

Consent of employer

(7) For the purposes of this section, where the consent of an employer is an eligibility requirement for entitlement to receive an ancillary benefit, the employer shall be deemed to have given the consent.

Consent of administrator, jointly sponsored pension plans

(7.1) For the purposes of this section, where the consent of the administrator of a jointly sponsored pension plan is an eligibility requirement for entitlement to receive an ancillary benefit, the administrator shall be deemed to have given the consent.

Application of section

(8) This section and sections 73 (determination of entitlements), 84, 85 and 86 (guaranteed benefits) apply in respect of the wind up, in whole or in part, of a pension plan where the effective date of the wind up is on or after the 1st day of April, 1987.

Refund

(9) A person affected by a wind up who elects to receive a benefit under subsection (1) is not entitled to payment of any refund of contributions or interest under subsection 63(3) or (4) (refunds).

Liability of employer on wind up

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.

Payment

(2) The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times.

Exception, jointly sponsored pension plans

(3) This section does not apply with respect to jointly sponsored pension plans. [page193]

Liability on wind-up, jointly sponsored pension plans
Employers, etc.

75.1(1) Where a jointly sponsored pension plan is wound up in whole or in part, the employer or the person or entity required to make contributions under the plan on behalf of 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 plan, are payable by the employer or by the person or entity on behalf of the employer, that are due or have accrued and that have not been paid into the pension fund; and

(b) any additional amounts that, under the documents that create and support the plan, are payable in the circumstances by the employer or the person or entity on behalf of the employer.

Members

(2) Where a jointly sponsored pension plan is wound up in whole or in part, the members shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the plan, are payable by the members, that are due or have accrued and that have not been paid into the pension fund; and

(b) any additional amounts that, under the documents that create and support the plan, are payable in the circumstances by the members.

Payments

(3) The payments required by subsections (1) and (2) shall be made in the prescribed manner and at the prescribed times.

Pension fund continues subject to Act and regulations

76. The pension fund of a pension plan that is wound up continues to be subject to this Act and the regulations until all the assets of the pension fund have been disbursed.

Insufficient pension fund

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

. . . . .

Notices and hearings

Notice of proposal to refuse or revoke

89(1) Where the Superintendent proposes to refuse to register a pension plan or an amendment to a pension plan or

to revoke a registration, the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the applicant or administrator of the plan.

Notice of proposal to make or refuse to make order

(2) Where the Superintendent proposes to make or to refuse to make an order in relation to, [page194]

(a) subsection 42(9) (repayment of money transferred out of pension fund);

(b) subsection 43(5) (repayment of money paid to purchase pension, deferred pension or ancillary benefit);

(c) subsection 80(6) (return of assets transferred to pension fund of successor employer);

(d) subsection 81(6) (return of assets transferred to new pension fund);

(d.1) section 83 (the Guarantee Fund applies to a pension plan);

(e) section 87 (administration of pension plan in contravention of Act or regulation); or

(f) section 88 (preparation of a report),

the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the administrator and on any other person to whom the Superintendent proposes to direct the order.

Notice of proposal re membership

(3) Where the Superintendent proposes to make or to refuse to make an order requiring an administrator to accept an employee as a member of a class of employees for whom a pension plan is established or maintained, the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the administrator, and the Superintendent shall serve or require the administrator to serve a copy of the notice and the written reasons on the employee.

Notice re payment of surplus

(3.1) Where an application is filed in accordance with subsection 78(2) for the payment of surplus to the employer and the Superintendent proposes to consent or refuse to consent under subsection 78(1), the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the applicant and on any person who made written representations to the Superintendent in accordance with subsection 78(3).

Notice re return of excess amount

(3.2) Where an application is filed in accordance with subsection 78(4) and the Superintendent proposes to consent or refuse to consent under subsection 78(4), the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the applicant and the Superintendent may require the applicant to transmit a copy of the notice and the written reasons on such other persons or classes of persons or both as the Superintendent specifies in the notice to the applicant.

Notice of proposal to attach terms and conditions to approval or consent

(4) Where the Superintendent proposes to refuse to give an approval or consent or proposes to attach terms and conditions to an approval or consent under this Act or the regulations, other than a consent referred to in subsection (3.1) or (3.2), the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the applicant for the approval or consent. [page195]

Notice of proposed wind up order

(5) Where the Superintendent proposes to make an order requiring the wind up of a pension plan or declaring a pension plan wound up, the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the administrator and the employer, and the Superintendent may require the administrator to transmit a copy of the

notice and the written reasons on such other persons or classes of persons or both as the Superintendent specifies in the notice to the administrator.

Notice requiring hearing

(6) A notice under subsection (1), (2), (3), (3.1), (3.2), (4) or (5) shall state that the person on whom the notice is served is entitled to a hearing by the Tribunal if the person delivers to the Tribunal, within thirty days after service of the notice under that subsection, notice in writing requiring a hearing, and the person may so require such a hearing.

Power of Superintendent

(7) Where the person on whom the notice is served does not require a hearing in accordance with subsection (6), the Superintendent may carry out the proposal stated in the notice.

Hearing

(8) Where the person requires a hearing by the Tribunal in accordance with subsection (6), the Tribunal shall appoint a time for and hold the hearing.

Power of Tribunal

(9) At or after the hearing, the Tribunal by order may direct the Superintendent to carry out or to refrain from carrying out the proposal and 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.

(10) Repealed.

Parties

(11) The Superintendent, the person who requires a hearing and such other persons as the Tribunal specifies are parties to the proceeding before the Tribunal under this section.

(12), (13) Repealed.

Release of documentary evidence

(14) Documents and things put in evidence at a hearing shall, upon the request of the person who produced them, be released to the person within a reasonable time after the matter in issue has been finally determined.

. . . . .

90. Repealed.

Appeal to court

91(1) A party to a proceeding before the Tribunal under section 89 may appeal to the Divisional Court from the decision or order of the Tribunal. [page196]

Certified copy of record

(2) Upon the request of a party desiring to appeal to the Divisional Court and upon payment of the fee established by the Minister, the Tribunal shall furnish the party with a certified copy of the record of the proceeding, including the documents received in evidence and the decision or order appealed from.

Notes

Note 1: Although the word "appealed" is used, where the Superintendent proposes to make a wind up order, the employer is entitled to a hearing before the Financial Services Tribunal: see s. 89(5)-(11) of the PBA. Such a hearing appears to be de novo: see footnote 31, below.

Note 2: And, with leave, to this court.

Note 3: Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93, at p. 975 S.C.R.

Note 4: Ibid., at pp. 975 and 977 S.C.R.

Note 5: PDC 3 Limited Partnership v. Bregman + Hamann Architects (2001), 52 O.R. (3d) 533, [2001] O.J. No. 422 (C.A.), at para. 11.

Note 6: As Carnwath J. observed in granting leave to appeal the Initial Order to the Divisional Court.

Note 7: Formerly Rogers Cablesystems Inc.

Note 8: Buschau v. Rogers Cablesystems Inc., [2001] B.C.J. No. 50, 83 B.C.L.R. (3d) 261 (C.A.), at paras. 63-68, leave to appeal to S.C.C. refused [2001] 2 S.C.R. vii, [2001] S.C.C.A. No. 107.

Note 9: Buschau, at para. 21.

Note 10: At paras. 12, 13, 19 and 28.

Note 11: At paras. 17 and 31.

Note 12: At para. 34.

Note 13: At paras. 2 and 29.

Note 14: At paras. 30 and 34.

Note 15: At para. 35.

Note 16: At paras. 35, 39, 45 and 52.

Note 17: At paras. 79 and 80.

Note 18: At paras. 81 and 84.

Note 19: At para. 90.

Note 20: At para. 92.

Note 21: At para. 94.

Note 22: At para. 96.

Note 23: At para. 100.

Note 24: As Carnwath J. observed in granting leave to appeal the Initial Order to the Divisional Court [[2007] O.J. No. 5287 (Div. Ct.)].

Note 25: PBA, s. 3.

Note 26: FSCOA, s. 5(2).

Note 27: PBA, s. 76.

Note 28: See ss. 68 and 70.

Note 29: Buschau, at paras. 34-35.

Note 30: At para. 35.

Note 31: While it need not be decided on this appeal, it appears to me that the hearing before the Tribunal is de novo, rather than an appeal. The Superintendent has not made an order that is being appealed. Rather, he has issued a Notice of Proposal which has triggered the right to a hearing by those affected if the proposal is implemented.

Note 32: See, for example, PBA, ss. 70 and 72-75.

Note 33: FSCOA, s. 20.

Note 34: Nolan v. Kerry (Canada) Inc., [2009] 2 S.C.R. 678, [2009] S.C.J. No. 39, at para. 29.

Note 35: That is, a wind up that has not been voluntarily

initiated by the employer.

Note 36: Nolan v. Kerry Canada (Inc.), at paras. 22-30.

Note 37: Hermann Loog v. Bean (1884), 26 Ch. D. 306 (C.A.), at pp. 316-17; The Honourable Mr. Justice Robert J. Sharpe, Injunctions and Specific Performance, looseleaf (Aurora: Canada Law Book, 2009) at para. 1.10.

Note 38: Buschau, at para. 29.

Note 39: This was a major issue in Buschau: see para. 86 of the minority decision. However, it remains unanswered.

Note 40: For example, even where it is impossible to complete performance of a charitable trust, the trust is not ended. Instead, through a cy pres scheme, the purposes of the charitable trust are fulfilled as nearly as possible.

Note 41: Variation of Trusts Act, R.S.O. 1990, c. V.1.

Note 42: [2001] NSWSC 473 (Aus.).

Note 43: [2008] NSWSC 516 (Aus.).

Note 44: Ibid., at para. 44.

Note 45: Ibid., at paras. 49-68.

Note 46: Ibid., at para. 68.

Note 47: Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534, [1991] S.C.J. No. 91, at p. 547 S.C.R., McLachlin J.; Citadel General Assurance Co. v. Lloyds Bank Canada, [1997] 3 S.C.R. 805, [1997] S.C.J. No. 92, at para. 30.

Note 48: Canson, at p. 588 S.C.R., La Forest J.

Tab 4

Lacroix et al. v. Canada Mortgage and Housing Corporation et al.

McCann et al. v. Canada Mortgage and Housing Corporation et al.

[Indexed as: Lacroix v. Canada Mortgage and Housing Corp.]

110 O.R. (3d) 81

2012 ONCA 243

Court of Appeal for Ontario,
Doherty, Laskin and Simmons JJ.A.
April 18, 2012

Pensions -- Costs -- Former employees bringing proposed class actions seeking court-ordered partial termination of pension plan or damages premised on partial termination -- Motion judge declining to certify proposed common issues -- Motion judge properly rejecting plaintiffs' request that their costs be paid out of pension fund -- Litigation not aimed at ensuring proper administration of pension funds and not benefitting all plan members -- Litigation highly adversarial.

Pensions -- Termination -- Court not having jurisdiction under s. 8(11) of Pension Benefits Standard Act to order employer to partially terminate pension plan and not having jurisdiction to award damages premised on partial termination -- Employer's decision to use actuarial surplus for its own benefit and to fund benefit enhancements for plan members not resulting in partial termination and not converting actuarial surplus into "crystallized" surplus -- Pension Benefits Standards Act, 1985, R.S.C. 1985, c. 32 (2nd Supp.), s. 8(11).

CMHC, a federal Crown corporation whose pension plan was regulated under the Pension Benefits Standards Act ("PBSA"), laid off a large number of employees. Many of those employees elected to take the commuted value of their pension benefits out of the plan and leave the plan. A few years later, the pension plan moved into a surplus position, and CMHC decided to use a portion of the actuarial surplus for its own benefit and to fund benefit enhancements for plan members. No CMHC employees who had left the pension plan before the effective date of each of the two benefit enhancement packages received the enhanced benefits. The plaintiffs were former CMHC employees. They brought proposed class proceedings asking the court to order partial termination of the pension plan or damages premised on a partial termination. Two of the plaintiffs also claimed that CMHC misrepresented to them that it would give only one package of benefit enhancements. On a certification motion, the motion judge declined to certify those proposed common issues. He held that the issues relating to the partial termination claim did not give rise to a viable cause of action and that the other requirements for certification had not been met. He refused to certify the misrepresentation claim because it did not raise a common issue. Finally, he rejected the plaintiffs' request that their costs be paid out of the pension fund. The Divisional Court upheld the motion judge's decision, and also concluded that a court had no jurisdiction to order CMHC to effect a partial termination of its pension plan and no jurisdiction to award damages based on a partial termination. The plaintiffs appealed.

Held, the appeal should be dismissed. [page82]

A court does not have jurisdiction under s. 8(11) of the PBSA to order an employer to partially terminate a pension plan. While s. 8(11) gives a court the power to "make any order on such terms as the court considers appropriate", s. 29 contains specific provisions governing plan termination. Under s. 29, only two persons may initiate the termination of a pension plan: the superintendent has discretion to terminate a pension plan if the enumerated criteria are met; and an administrator

may initiate the termination of a pension plan, subject to the supervision of the superintendent, who must be given advance notice of any proposed termination. The scheme of the PBSA shows that, impliedly, Parliament has excepted terminations from the remedies available to the court under s. 8(11). Giving the court jurisdiction to order an employer to partially terminate its pension plan on the application of a group of former employees would disregard the regulatory expertise of the superintendent and threaten the balance between employers and employees. Ultimately, it could put the long-term survival of pension plans at risk. A court also lacks jurisdiction under s. 8(11) of the PBSA to award damages equivalent to a pro rata share of the distribution of the surplus on a partial termination. The court cannot do indirectly what it cannot do directly. Finally, CMHC's decision to use a portion of the actuarial surplus for its own benefit and the benefit of the remaining plan members did not effect a "backdoor" partial termination of the pension plan and did not convert the actuarial surplus into a "crystallized" surplus. The plaintiffs' claim for partial termination or damages based on a partial termination did not disclose a cause of action.

The Divisional Court did not err in upholding the motion judge's decision that the misrepresentation claim did not raise a common issue.

The motion judge did not err in refusing to award the plaintiffs their costs out of the pension fund. Costs of litigation should be paid from a pension fund only where (a) the litigation is concerned with the due administration of the trust and there exists some legitimate uncertainty about how to administer the trust; and (b) the dispute is not adversarial. This litigation was not aimed at ensuring the proper administration of pension funds in an ongoing plan, would not benefit all plan members and was highly adversarial.

Cases referred to

Lomas v. Rio Algom Ltd. (2010), 99 O.R. (3d) 161, [2010] O.J. No. 932, 2010 ONCA 175, 259 O.A.C. 333, 316 D.L.R. (4th) 385, 186 A.C.W.S. (3d) 665, 81 C.C.P.B. 1, revg (2008), 89 O.R. (3d) 130, [2008] O.J. No. 282, 65 C.C.P.B. 108, 233 O.A.C. 58, 290 D.L.R. (4th) 363, 163 A.C.W.S. (3d) 547 (Div. Ct.);

Nolan v. Kerry (Canada) Inc., [2009] 2 S.C.R. 678, [2009] S.C.J. No. 39, 2009 SCC 39, 309 D.L.R. (4th) 513, EYB 2009-162383, J.E. 2009-1510, 391 N.R. 234, 49 E.T.R. (3d) 159, 76 C.C.P.B. 1, 76 C.C.E.L. (3d) 55, 92 Admin. L.R. (4th) 203, 253 O.A.C. 256, 179 A.C.W.S. (3d) 1202, apld

Burke v. Hudson's Bay Co., [2010] 2 S.C.R. 273, [2010] S.C.J. No. 34, 2010 SCC 34, 268 O.A.C. 1, 406 N.R. 109, 324 D.L.R. (4th) 498, 60 E.T.R. (3d) 1, 84 C.C.P.B. 1, 193 A.C.W.S. (3d) 1332, EYB 2010-180092, 2010EXP-3280, 2010EXPT-2234, J.E. 2010-1818, D.T.E. 2010T-674; Buschau v. Rogers Communications Inc., [2006] 1 S.C.R. 973, [2006] S.C.J. No. 28, 2006 SCC 28, 269 D.L.R. (4th) 1, 349 N.R. 324, [2006] 8 W.W.R. 583, J.E. 2006-1309, 226 B.C.A.C. 25, 54 B.C.L.R. (4th) 1, 52 C.C.P.B. 161, 26 E.T.R. (3d) 1, 148 A.C.W.S. (3d) 483, EYB 2006-106843; Hembruff v. Ontario Municipal Employees Retirement Board (2005), 78 O.R. (3d) 561, [2005] O.J. No. 4667, 260 D.L.R. (4th) 161, 203 O.A.C. 234, 48 C.C.P.B. 214, 143 A.C.W.S. (3d) 931 (C.A.); Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services), [2004] 3 S.C.R. 152, [2004] S.C.J. No. 51, 2004 SCC 54, 242 D.L.R. (4th) 193, 324 N.R. 259, J.E. 2004-1546, 189 O.A.C. 201, 17 Admin. L.R. (4th) 1, 45 B.L.R. (3d) 161, 41 C.C.P.B. 106, 132 A.C.W.S. (3d) 579, consd [page83]

Other cases referred to

Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 2002 SCC 42, 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, J.E. 2002-775, 166 B.C.A.C. 1, 100 B.C.L.R. (3d) 1, 18 C.P.R. (4th) 289, 93 C.R.R. (2d) 189, REJB 2002-30904, 113 A.C.W.S. (3d) 52; CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman, [2001] O.J. No. 4620, 18 B.L.R. (3d) 260, 8 C.C.L.T. (3d) 240, 15 C.P.R. (4th) 289, 109 A.C.W.S. (3d) 860 (S.C.J.); Cloud v. Canada (Attorney General) (2004), 73 O.R. (3d) 401, [2004] O.J. No. 4924, 247 D.L.R. (4th) 667, 192 O.A.C. 239, 27 C.C.L.T. (3d) 50, [2005] 1 C.N.L.R. 8, 2 C.P.C. (6th) 199, 135 A.C.W.S. (3d) 567 (C.A.); Lacroix v. Canada Mortgage and Housing Corp., [2009] O.J. No. 316, 68 C.P.C. (6th) 111, 46 E.T.R. (3d) 191, 73 C.C.P.B. 224, 174 A.C.W.S. (3d) 31 (S.C.J.); Lacroix v. Canada Mortgage and Housing Corp. (May 22, 2009), Ottawa, Court File No. 99-CV-10694 (S.C.J.); McCann v. Canada Mortgage and Housing Corp. (May

22, 2009), Ottawa, Court File No. 07-CV-38762 (S.C.J.); McCann v. Canada Mortgage and Housing Corp., [2009] O.J. No. 319, 75 C.P.C. (6th) 156, 73 C.C.P.B. 273 (S.C.J.); Ontario (Attorney General) v. Bear Island Foundation, [1991] 2 S.C.R. 570, [1991] S.C.J. No. 61, 83 D.L.R. (4th) 381, 127 N.R. 147, J.E. 91-1268, 46 O.A.C. 396, [1991] 3 C.N.L.R. 79, 20 R.P.R. (2d) 50, 28 A.C.W.S. (3d) 628; Ontario Public Service Employees Union v. Ontario, [2005] O.J. No. 1841, [2005] O.T.C. 357, 46 C.C.P.B. 200, 13 C.P.C. (6th) 178, 139 A.C.W.S. (3d) 17 (S.C.J.); Plaza Fiberglass Manufacturing Ltd. v. Cardinal Insurance Co. (1994), 18 O.R. (3d) 663, [1994] O.J. No. 1023, 115 D.L.R. (4th) 37, 72 O.A.C. 66, 22 C.C.L.I. (2d) 161, 56 C.P.R. (3d) 46, 4 E.T.R. (2d) 69, [1994] I.L.R. 1-3067 at 2871, 47 A.C.W.S. (3d) 1064 (C.A.); Rizzo & Rizzo Shoes Ltd. (Re) (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 154 D.L.R. (4th) 193, 221 N.R. 241, J.E. 98-201, 106 O.A.C. 1, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 CLLC 210-006, 76 A.C.W.S. (3d) 894; Saunders v. Vautier (1841), 41 E.R. 482, [1835-1842] All E.R. Rep. 58 (L.C.C.); Schmidt v. Air Products Canada Ltd., [1994] 2 S.C.R. 611, [1994] S.C.J. No. 48, 115 D.L.R. (4th) 631, 168 N.R. 81, [1994] 8 W.W.R. 305, J.E. 94-983, 20 Alta. L.R. (3d) 225, 155 A.R. 812, 4 C.C.E.L. (2d) 1, 3 C.C.P.B. 1, 3 E.T.R. (2d) 1, 48 A.C.W.S. (3d) 439

Statutes referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5(1), (a), (b), (c), (d), (e)

Jobs and Economic Growth Act, S.C. 2010, c. 12

Pension Benefits Act, R.S.O. 1990, c. P.8 [as am.], s. 68, (1)

Pension Benefits Standards Act, 1985, R.S.C. 1985, c. 32 (2nd Supp.) [as am.], ss. 8 [as am.], (10) [as am.], (b), (11) [as am.], 29 [as am.], (2), (5), (12) [rep. S.C. 2010, c. 12, s. 1816(7)]

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 21.01(3)(a), (d)

APPEAL from the judgment of the Divisional Court (J. Wilson, Karakatsanis and Bryant JJ.), [2010] O.J. No. 2599, 2010 ONSC

65, 90 C.P.C. (6th) 169 (Div. Ct.) upholding the decision of the motion judge dismissing a motion to certify proposed common issues.

William J. Sammon and James B. Barnes, for appellants Nicole Lacroix and Rosie Ladouceur. [page84]

Paull N. Leamen and Tara M. Sweeney, for appellants Frank McCann and David Guffie.

J. Brett Ledger, Andrea Laing and Lauren Tomasich, for respondents.

The judgment of the court was delivered by

[1] LASKIN J.A.: -- The central question on these appeals is whether a court has jurisdiction to order the Canada Mortgage and Housing Corporation to partially terminate its pension plan or to award damages based on a partial termination.

A. Overview

[2] Between 1995 and 2000, CMHC laid off half of its workforce. Many, though not all, laid-off employees elected to take the commuted value of their pension benefits out of the CMHC pension plan and leave the plan.

[3] A few years after CMHC began to reduce its workforce, it decided to use part of the surplus in its pension plan to enhance the benefits of plan members. CMHC gave two benefit enhancement packages, the first at the beginning of 1999 and the second at the beginning of 2001. However, those employees who had left the plan were not eligible for these enhanced benefits. Their exclusion spawned the two class proceedings now before this court.

[4] Nicole Lacroix and Rosie Ladouceur represent a group of former CMHC employees who did not receive either package of benefit enhancements. Initially, they claimed that CMHC committed a breach of trust and breach of fiduciary duty by

depriving them of these benefit enhancements. Common issues relating to their benefit enhancement claim have already been certified.

[5] Frank McCann and David Guffie represent a group of former employees who received the first benefit enhancement package, but not the second package. Their action has not yet been certified as a class action.

[6] On the motions that give rise to these appeals, each set of plaintiffs now seek to certify common issues relating to their claim that CMHC contravened the conflict of interest provisions of the federal Pension Benefits Standards Act, 1985, R.S.C. 1985, c. 32 (2nd Supp.) (the "PBSA") by failing to partially terminate its pension plan. As a remedy for this contravention, the plaintiffs ask the court to order partial termination or damages premised on a partial termination. In addition, McCann/Guffie seek to certify a common issue relating to their claim that CMHC [page85]misrepresented to them that it would give only one package of benefit enhancements.

[7] The motion judge, Charbonneau J., declined to certify any of these proposed common issues. He held that the issues relating to the partial termination claim did not give rise to a viable cause of action. He also held that the other requirements for certification under s. 5(1) of Ontario's Class Proceedings Act, 1992, S.O. 1992, c. 6 had not been met. He refused to certify the misrepresentation claim because it did not raise a common issue. [See Note 1 below] Finally, he rejected the plaintiffs' request that their costs be paid out of the pension fund. [See Note 2 below]

[8] The Divisional Court dismissed the plaintiffs' appeals. In addition to upholding the findings of the motion judge, the Divisional Court concluded that a court has no jurisdiction to order CMHC to effect a partial termination of its pension plan and has no jurisdiction to award damages based on a partial termination.

[9] The plaintiffs obtained leave to appeal to this court. On their appeal, they raise four issues, of which the first is by

far the most important and took up most of the oral argument:

(a) Does the claim relating to partial termination disclose a cause of action under s. 5(1)(a) of the Class Proceedings Act?

(b) Did the motion judge err in concluding that the issues proposed for certification do not meet the requirements of s. 5(1)(b), (c) and (d) of the Class Proceedings Act?

(c) Did the Divisional Court err in upholding the motion judge's finding that the misrepresentation claim advanced by McCann/Guffie does not raise a common issue?

(d) Did the motion judge err in failing to award the appellants their costs from the CMHC pension fund?

B. Factual History

[10] The factual history giving rise to these class proceedings is thoroughly set out in the reasons of the motion judge and the [page86]Divisional Court. Here, I will briefly summarize those facts necessary to understand the issues on appeal.

(a) The CMHC pension plan

[11] CMHC is a federal Crown corporation. It is the settlor and sponsor of the CMHC pension plan, and the administrator of the plan. The individual defendants are the trustees of the plan.

[12] CMHC's pension plan was established by a trust agreement, which was made in 1960 and later amended in 1992. The plan is a defined benefit plan. And it is an ongoing plan, which is federally regulated under the PBSA.

(b) CMHC downsized its workforce starting May 1995

[13] Two programs, by which CMHC cut its workforce in half, are relevant to these proceedings. The first -- called the Workforce Adjustment Program -- occurred from May 1995 to 1996. The second -- called the Transition -- began in January 1997 and continued for several years.

[14] Employees dismissed under either program who were not eligible for or did not choose early retirement were given three options:

-- take the commuted value of their CMHC pension benefits;

-- transfer their pension contributions and service into the pension plan of a new employer; or

-- remain in the CMHC pension plan as inactive members and receive a deferred pension payable at age 60.

[15] The plaintiffs representing the two classes in these proceedings elected the first option -- to take the commuted value of their pension benefits -- although at different times.

(c) CMHC's surplus decisions and its two benefit enhancement packages

[16] By the 1990s, CMHC's pension plan moved into a surplus position. The surplus came about because of increases in the actuarial value of the assets of the pension fund. Initially, the actuarial surplus was quite small, less than $10 million. However, it grew to $64.8 million by 1995, to $101.3 million by 1996, to $123.7 million by 1998 and to nearly $200 million by 1999.

[17] CMHC's board of directors decided to apply a portion of the actuarial surplus to enhance the pension benefits for plan members. It did so by two benefit enhancement packages. [page87]

[18] The first package of benefits was given to all those who were members of the pension plan on January 1, 1999. The Board allocated $128.7 million of the actuarial surplus for benefit enhancements. This sum included $100 million to be notionally "shared" between CMHC and the plan members based on their respective contributions to the pension fund over the history of the plan.

[19] The second package of enhanced benefits was given to all those who were members of the pension plan on January 1, 2001. This time, the CMHC Board allocated $124.5 million of the actuarial surplus for increased benefits. This amount again was shared with the plan members based on historic contribution

rates to the fund.

[20] Two critical facts about these surplus decisions underlie this litigation. First, no CMHC employee who had left the pension plan before the effective date of each benefit enhancement package received the enhanced pension benefits.

[21] Second, while the plan members benefited from the allocation of the actuarial surplus to these two packages, so too did CHMC. Although CHMC did not actually withdraw any money from the pension plan, it used its allocated share of the actuarial surplus to offset the costs of some of the benefit enhancements, to forgive a $59.4 million corporate debt that it owed to the pension fund, and to implement contribution holidays for the company and the remaining plan members. CMHC then allocated what was left of its share of the actuarial surplus for its future benefit.

[22] At the heart of the class plaintiffs' complaint is their allegation that in making these surplus decisions, CMHC acted in its own interest and in the interest of the remaining plan members, but at the expense of the interest of the departing plan members. To remedy what they say is CMHC's unfair treatment of them, the plaintiffs seek access to the surplus in the plan and a pro rata share in the distribution of that surplus.

(d) The class plaintiffs

[23] Nicole Lacroix and Rosie Ladouceur are the representative plaintiffs in the first class proceeding. Both were long-time employees of CMHC, who lost their jobs when CMHC downsized. Both elected to take the commuted value of their pension benefits and leave the plan before January 1, 1999. They, therefore, did not receive either of the two benefit enhancement packages given by CMHC to its remaining employees.

[24] Frank McCann and David Guffie are the representative parties in the second class proceeding. They too were long-serving [page88]employees of CMHC, who lost their jobs during the corporation's downsizing. Both McCann and Guffie received the first benefit enhancement package but then elected

to take the commuted value of their pension and leave the plan before January 1, 2001. They, therefore, did not receive the second benefit enhancement package.

(e) OSFI did not declare a partial termination of the CMHC pension plan

[25] OFSI, the Office of the Superintendent of Financial Institutions, oversees federally regulated pension plans. As my colleague Gillese J.A. discussed in Lomas v. Rio Algom Ltd. (2010), 99 O.R. (3d) 161, [2010] O.J. No. 932, 2010 ONCA 175, the superintendent's role in determining whether a pension plan should be wound-up -- in whole or in part -- is a key aspect of a "carefully calibrated" legislative scheme. [See Note 3 below]

[26] The evidence in the record in these proceedings shows that OSFI has never declared what the appellants seek -- a partial termination of a pension plan. However, the evidence stopped short of showing any policy whereby OSFI defers decisions on partial termination to plan administrators.

[27] Moreover, as the Divisional Court noted, at para. 50 of its reasons, OFSI considered and decided against ordering a partial termination of the CMHC pension plan. Instead, the superintendent approved CMHC's surplus sharing decisions and its two benefit enhancement packages. The appellants did not seek judicial review of OFSI's determination not to declare a partial termination.

C. Relevant Legislation

[28] Two pieces of legislation are relevant to this litigation: the federal PBSA and the provincial Class Proceedings Act.

(a) The Pension Benefits Standard Act, 1985

[29] In these appeals, the important provisions of the PBSA are those dealing with conflicts of interest and plan terminations.

[30] Section 8(10) addresses conflicts of interest. Where an entity is both an employer and an administrator of a pension

[page89]plan and the two roles come into conflict, s. 8(10)(b) requires the administrator to act in the best interests of the plan members:

> 8(10) If there is a material conflict of interest between the role of an employer who is an administrator, or the role of the administrator of a simplified pension plan, and their role in any other capacity, the administrator
>
> (a) shall, within thirty days after becoming aware that a material conflict of interest exists, declare that conflict of interest to the pension council or to the members of the pension plan; and
>
> (b) shall act in the best interests of the members of the pension plan.

[31] Where an administrator breaches s. 8(10), s. 8(11) gives the Superior Court broad jurisdiction to fashion an appropriate remedy:

> 8(11) If an administrator contravenes subsection (10), a court of competent jurisdiction may, on application by the Superintendent or any other interested person, make any order on such terms as the court considers appropriate.

[32] The appellants contend that as CMHC acknowledged a breach of s. 8(10) for the purpose of the motions before Charbonneau J., as a remedy for that breach the Superior Court of Justice either should order CMHC to partially terminate its pension plan or should itself order a partial termination.

[33] Under s. 29 of the PBSA, both the superintendent and an administrator can partially terminate a pension plan but plan members have no right to seek a partial termination. [See Note 4 below]

[34] Section 29(2) of the PBSA gives the superintendent authority to declare a whole or partial termination of a pension plan, provided specified criteria are met:

> 29(2) The Superintendent may declare the whole or part of a pension plan terminated where

(a) there is any suspension or cessation of employer contributions in respect of all or part of the plan members;
(b) the employer has discontinued or is in the process of discontinuing all of its business operations or a part thereof in which a substantial portion of its employees who are members of the pension plan are employed; or
(c) the Superintendent is of the opinion that the pension plan has failed to meet the prescribed tests and standards for solvency in respect of funding referred to in subsection 9(1). [page90]

[35] The appellants accept that none of the criteria in s. 29(2) has been established, and therefore that the superintendent cannot declare a partial termination of the CMHC pension plan under s. 29(2).

[36] However, s. 29(5) [See Note 5 below] of the PBSA also gives the administrator of a pension plan authority to terminate the whole or part of a pension plan:

29(5) An administrator who intends to terminate the whole or part of a pension plan or wind up a pension plan shall notify the Superintendent in writing of that intention at least sixty days before the date of the intended termination or winding-up.

[37] Finally, s. 29(12) specifies the rights of plan members on a partial termination:

29(12) Where a plan is terminated in part, the rights of members affected shall not be less than what they would have been if the whole of the plan had been terminated on the same date as the partial termination.

[38] The appellants say that there is an "interplay" between s. 8(11) and s. 29(5). They argue that s. 8(11) gives the court the power to review an administrator's failure to terminate a plan under s. 29(5). The appellants submit that CMHC has contravened s. 8(10) of the PBSA, and therefore, under s.

8(11), the court should order it to partially terminate its pension plan in accordance with s. 29(5).

(b) The Class Proceedings Act

[39] Section 5(1) of the Class Proceedings Act sets out the requirements for certification:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who, [page91]
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[40] With the exception of the misrepresentation claim asserted by McCann and Guffie, my reasons focus on the requirement in s. 5(1)(a): do the appellants' pleadings disclose a cause of action? The misrepresentation claim turns on whether it meets the requirement in s. 5(1)(c): does it raise a common issue?

D. The Appellants' Conflict of Interest Allegation

[41] In their pleadings, the appellants allege that they beneficially own the surplus in the pension plan. They then say

that CMHC was in a conflict of interest under s. 8(10) of the PBSA between its role as employer and its role as plan administrator. Because CMHC was in a conflict of interest, it was required to act in the best interests of the plan members. According to the appellants, CMHC could only do so by partially terminating its pension plan. Instead, CMHC kept the entire surplus in the plan and used part of it for its own benefit and the benefit of the remaining plan members, at the expense of the departing plan members. CMHC thus contravened s. 8(10).

[42] For the purpose of the appellants' certification motions and its own jurisdiction motion, [See Note 6 below] CMHC has acknowledged that the appellants can establish the necessary facts to prove a contravention of s. 8(10) of the PBSA. CMHC's acknowledgment has largely narrowed the parties' debate in these appeals to a single but fundamental question: assuming CMHC contravened s. 8(10) of the PBSA, does the court have jurisdiction under s. 8(11) to order it to partially terminate its pension plan or to award damages premised on a partial termination? Although, in his ruling on the earlier jurisdiction motion brought by CMHC, the motion judge accepted that the court might have jurisdiction, the Divisional Court concluded that the court did not have this jurisdiction.

[43] If the court does not have jurisdiction, the partial termination claim does not disclose a cause of action, and the proposed common issues relating to that claim should not be certified. [page92]

E. Judicial History of these Proceedings

[44] The judicial history of these proceedings has been lengthy and complicated. That history is best understood in the context of the two theories of liability put forward by the appellants: one, the appellants were wrongly excluded from the benefit enhancement packages; and two, CMHC breached its statutory and fiduciary duty by failing to partially terminate its pension plan. The following is a summary of the previous decisions of the motion judge in these proceedings, his decisions that are under appeal and the decision of the Divisional Court.

(a) The previous proceedings before the motion judge

-- In 2000, in the Lacroix/Ladouceur action, the motion judge certified, on consent, common issues that challenged the propriety of CMHC's decision to refuse to give the two benefit enhancement packages to those employees who elected to take the commuted value of their pension benefits and leave the plan. Appendix A lists these common issues that have been certified on consent.

-- In 2003, Lacroix/Ladouceur successfully moved to expand their existing claim by adding former members of the plan who had taken the first benefit enhancement package, but left the plan before receiving the second benefit enhancement package (the McCann/Guffie class plaintiffs).

-- Also, in 2003, Lacroix/Ladouceur moved to certify additional common issues relating to CMHC's failure to partially terminate the pension plan. That motion was dismissed by the motion judge. Appeals to the Divisional Court and this court were dismissed. The Supreme Court of Canada refused leave to appeal.

-- In 2007, the motion judge ordered that the claims of McCann/ Guffie be severed from those of Lacroix/Ladouceur and that they be asserted in a separate proceeding.

-- Also, in 2007, the motion judge permitted Lacroix/Ladouceur to amend their statement of claim and again seek certification of issues relating to CMHC's failure to partially terminate the pension plan.

-- In 2008, CMHC moved under rule 21.01(3)(a) or (d) [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194] to stay the Lacroix/Ladouceur action on the ground that the court has no jurisdiction either to order a partial termination for [page93]breach of s. 8(10) of the PBSA or to award damages for CMHC's failure to partially terminate the plan. The motion judge dismissed CMHC's motion. In doing so, he relied on the decision of the Divisional Court in Lomas v. Rio Algom Ltd. (2008), 89 O.R. (3d) 130, [2008] O.J. No. 282 (Div. Ct.). He said, at paras. 27 and 29:

> I agree with the plaintiffs that section 8 may be interpreted as granting to the Superior Court jurisdiction to deal with clear cases of breach of conflicts in proper circumstances. The defendants [have] the onus on this motion to convince the court that it is clear that the Superior Court has been completely deprived of its inherent jurisdiction to deal with breaches of legal duties in similar factual circumstances. I am not convinced that this is the case. This is particularly so on the very restricted evidentiary record before me.
>
> . . . . .
>
> The issue in Lomas (supra) is more similar to the issue in this case. Moreover, the remedy sought by the plaintiffs in this case is not a declaration of partial termination as in the Lomas case but an award of damages which has no direct incidence on the pension plan itself and which is the remedy usually contemplated for breaches of legal obligations.

(b) The decisions of the motion judge under appeal

[45] The decisions of the motion judge now under appeal arise from motions brought by each of the class plaintiffs. Lacroix/Ladouceur again brought a motion to certify additional common issues relating to CMHC's failure to partially terminate its pension plan. Appendix B lists these proposed additional common issues. McCann/Guffie brought a companion motion to certify common issues relating to partial termination in their action. Appendix C lists these proposed common issues.

[46] In the Lacroix/Ladouceur action, the motion judge declined to certify the proposed additional common issues relating to partial termination, though he did certify as a common issue a claim for punitive damages in relation to the benefit enhancement claim. In the McCann/Guffie action, the motion judge declined to certify any of the proposed common issues.

[47] In respect of both motions, the motion judge found

significant deficiencies under all five branches of the test for certification in s. 5(1) of the Class Proceedings Act. He concluded:

-- The claim based on CMHC's duty to partially terminate the plan or for damages for its failure to do so did not constitute a viable cause of action. The motion judge so held, even though he had ruled in CMHC's 2008 jurisdiction motion that the court may have jurisdiction over a partial termination; [page94]

-- the class definition irrationally excluded members and former members of the CMHC pension plan, and lacked a rational connection to the proposed common issues;

-- the proposed issues relating to partial termination are not common and, if certified, would create conflicts among class members;

-- the appellants failed to show that a class proceeding was preferable; and

-- the appellants' proposed litigation plan was inadequate.

[48] The motion judge also addressed the misrepresentation claim in respect of the second benefit enhancement package that was unique to the McCann/Guffie action. He did not certify that claim as, in his view, it did not raise a common issue. There was no common representation and no class-wide reliance. Thus, the claim "can only be resolved by individual trials".

[49] After receiving written submissions on costs, the motion judge ordered the appellants to pay the respondents the costs of the motions. He also declined to award the appellants their own costs from the CMHC pension fund.

(c) The decision of the Divisional Court

[50] The Divisional Court upheld the conclusions of the motion judge and dismissed the appellants' appeals. Moreover, the Divisional Court gave an additional reason for dismissing these appeals: the court has no jurisdiction over the proposed

issues relating to partial termination. This added reason was based on this court's decision in Rio Algom, which reversed the Divisional Court's decision in that case, and which was released after the motion judge's decision.

(d) Current status of the claims

[51] Pending our decision, Lacroix/Ladouceur have a certified action for common issues relating to their benefit enhancement claim.

[52] McCann/Guffie do not have a certified action because, as they admitted before the Divisional Court, their proposed common issues entirely depend on their assertion that CMHC breached its duty under s. 8(10) by failing to partially terminate its pension plan. The respondents have agreed to consent to an order certifying common issues relating to a benefit enhancement claim similar to that advanced by Lacroix/ Ladouceur, but so far McCann/Guffie have not pleaded that claim. [page95]

F. Concurrent Jurisprudential Developments

[53] These proceedings have been ongoing for over a decade and still have not progressed past the certification stage. At various times, the Lacroix/Ladouceur plaintiffs have amended their pleadings to reformulate an identifiable class, to advance new claims and, most important, to put forward a new theory of liability -- the partial termination theory -- for which they seek to certify several additional common issues.

[54] In large part, it seems to me, the appellants have attempted to recast their lawsuits and their submissions to meet the obstacles to their claims presented by developments in the jurisprudence, and especially the obstacle presented by two cases from this court, Hembruff v. Ontario Municipal Employees Retirement Board (2005), 78 O.R. (3d) 561, [2005] O.J. No. 4667 (C.A.) and Rio Algom.

[55] When these proceedings began, the case law was well settled that individual plan members have no claim to payment or distribution of the surplus from an ongoing pension plan. The right to the surplus crystallizes on the termination of a

plan because only then does the surplus become ascertainable: see Schmidt v. Air Products Canada Ltd., [1994] 2 S.C.R. 611, [1994] S.C.J. No. 48. However, the appellants did seem to have a claim for damages for breach of trust and breach of fiduciary duty arising out of CMHC's failure to give departing plan members either or both of the benefit enhancement packages. Common issues relating to that claim were certified in the Lacroix/Ladouceur action in 2000.

[56] Then, in 2005, this court released its decision in Hembruff. In that decision, Gillese J.A. concluded that plan members who take the commuted value of their pension benefits and leave the plan give up any entitlement to future benefit enhancements. She wrote, at para. 123:

> Mr. Lyon admitted that he read and understood that statement, and understood that he would no longer be a member of OMERS if he withdrew his CVP. In my view, it is self-evident that if an individual ceases membership in the OMERS pension plan, he or she gives up eligibility for any benefit enhancements that might be implemented thereafter. Having chosen to withdraw their funds from the plan and invest those funds elsewhere, such individuals cannot later be heard to complain that they are not receiving additional benefits from the plan they chose to leave. As Cumming J. stated in McMaster University v. Robb (2001), 37 C.C.P.B. 252 (Ont. S.C.J.) at para. 11:
>
> > Anyone choosing to remove the commuted value of his/her benefits would be well aware that s/he is giving up any continuing claim to any benefits under the Plan. A choice is made on a basis of what is assumed will be financially best for the individual for the future and expert advice can be obtained to assist in making that choice. Individuals are responsible for the choices they make. [page96]

[57] Hembruff thus put in jeopardy the Lacroix/Ladouceur benefit enhancement claim, and likely prompted the appellants to focus their claim on issues relating to CMHC's failure to partially terminate its pension plan. Soon after it was

advanced, that claim found some support in the majority reasons of the Divisional Court in Rio Algom, which I referred to earlier, and which at least held that it was not plain and obvious that the court lacked jurisdiction to order a partial termination.

[58] Moreover, in Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services), [2004] 3 S.C.R. 152, [2004] S.C.J. No. 51, 2004 SCC 54, the Supreme Court of Canada had already held that members of a pension plan affected by a partial termination may, depending on the terms of the plan, be entitled to their pro rata share of the surplus from the date of partial termination on the same basis as if the plan were fully terminated on that date. Thus, the Divisional Court's decision in Rio Algom and the Supreme Court of Canada's decision in Monsanto together seemed to provide the appellants and the class members they represent with a route to access the surplus in the CMHC pension plan.

[59] Then, in 2010 this court released its decision in Rio Algom. In that case, in the context of a pension plan regulated under Ontario's Pension Benefits Act, R.S.O. 1990, c. P.8, Gillese J.A. wrote that the court had no authority to order an employer to commence proceedings to wind up a pension plan. As I said in reviewing the judicial history of these proceedings, the Divisional Court relied on this court's ruling in Rio Algom to conclude that the common issues relating to partial termination, which the appellants propose for certification, do not disclose a cause of action.

[60] I turn now to the issues on the appeals.

G. Analysis

(a) Does the claim relating to partial termination disclose a cause of action under s. 5(1)(a) of the Class Proceedings Act?

[61] To be certified as a class proceeding, the pleading must disclose a cause of action. In the Lacroix/Ladouceur proceeding, common issues relating to the claim for benefit enhancements have already been certified. McCann/Guffie have not proposed common issues relating to a separate or stand-

alone benefit enhancement claim. On these appeals, the issues proposed for [page97]certification -- though worded somewhat differently by each set of appellants -- relate to the claim for partial termination. [See Note 7 below]

[62] Thus, the fundamental question on these appeals is whether the court has jurisdiction to order a partial termination or to order CMHC to effect a partial termination of its pension plan. As I understand their argument, the appellants put their position on both bases. However, they stress the argument that the court has jurisdiction under s. 8(11) of the PBSA to order CMHC to partially terminate its pension plain in accordance with s. 29(5) of the PBSA. I use the two formulations of the question interchangeably. For the purpose of determining the court's jurisdiction, they amount to the same question: see Rio Algom (C.A.), at para. 30.

[63] If the court does not have this jurisdiction, then the claim of each set of appellants relating to partial termination does not disclose a cause of action, and the common issues relating to that claim cannot be certified. The "plain and obvious" test applies to the question of the court's jurisdiction. Unless it is plain and obvious that the court has no jurisdiction to order a partial termination, the plaintiffs will have met this branch of the test for certification. See Cloud v. Canada (Attorney General) (2004), 73 O.R. (3d) 401, [2004] O.J. No. 4924 (C.A.).

[64] The submissions of the parties on the question of the court's jurisdiction raise the following issues:

(i) As a matter of statutory interpretation, does the court have jurisdiction under s. 8(11) of the PBSA to order CMHC to partially terminate its pension plan?

(ii) Does this court's decision in Rio Algom apply to the appellants' partial termination claims?

(iii) Should Rio Algom be reconsidered in the light of the Supreme Court of Canada's decisions in Burke v. Hudson's Bay Co., [2010] 2 S.C.R. 273, [2010] S.C.J. No. 34, 2010 SCC 34 and Monsanto, and the minority opinion of Bastarache J. in Buschau v. Rogers Communications Inc., [2006] 1 S.C.R. 973, [2006] S.C.J. No. 28, 2006 SCC 28?

(iv) Does the court have jurisdiction under s. 8(11) of the PBSA to award damages equivalent to a pro rata share of the distribution of the surplus on a partial termination? [page98]

(v) Did the CMHC effect a "backdoor" partial termination of its pension plan, or "crystallize" the surplus, by using a portion of the surplus for its benefit and the benefit of the remaining plan members?

(vi) Should the court's choice of remedy for the breach of s. 8(10) of the PBSA be certified as a common issue?

(i) As a matter of statutory interpretation, does the court have jurisdiction under s. 8(11) of the PBSA to order CMHC to partially terminate its pension plan?

[65] For convenience, I reproduce the key provisions of the PBSA -- s. 8(10) and (11), and s. 29(2) and (5):

8(10) If there is a material conflict of interest between the role of an employer who is an administrator, or the role of the administrator of a simplified pension plan, and their role in any other capacity, the administrator

(a) shall, within thirty days after becoming aware that a material conflict of interest exits, declare that conflict of interest to the pension council or to the members of the pension plan; and

(b) shall act in the best interest of the members of the pension plan.

(11) If an administrator contravenes subsection (10), a court of competent jurisdiction may, on application by the Superintendent or any other interested person, make any order on such terms as the court considers appropriate.

. . . . .

29(2) The Superintendent may declare the whole or part of a pension plan terminated where

(a) there is any suspension or cessation of employer contributions in respect of all or part of the plan members;

(b) the employer has discontinued or is in the process

of discontinuing all of its business operations or a part thereof in which a substantial portion of its employees who are members of the pension plan are employed; or

(c) the Superintendent is of the opinion that the pension plan has failed to meet the prescribed tests and standards for solvency in respect of funding referred to in subsection 9(1).

. . . . .

(5) An administrator who intends to terminate the whole or part of a pension plan or wind up a pension plan shall notify the Superintendent in writing of that intention at least sixty days before the date of the intended termination or winding-up.

[66] The essence of the debate between the parties on the question whether the court has jurisdiction to order partial termination may be put as follows: [page99]

-- On the one side, the appellants say that s. 8(11) gives the court broad jurisdiction to remedy a contravention of s. 8(10) -- a jurisdiction that includes the power to order a partial termination in an appropriate case. If Parliament had intended to preclude the court from ordering partial termination, it could have said so expressly.

-- On the other side, the respondents say that s. 29 contains specific provisions governing plan termination -- provisions that recognize the expertise of the superintendent and vest the office of the superintendent with exclusive jurisdiction to supervise the whole or partial termination of a pension plan. This specific regime for plan termination in s. 29 shows that Parliament could not have intended the court to use its general remedial authority in s. 8(11) to order an employer to terminate its pension plan.

[67] Each side of the debate has merit if ss. 8 and 29 are each looked at in isolation. However, at bottom, the debate raises an issue of statutory interpretation. And statutory

interpretation requires the court to look at provisions of a statute, not in isolation, but in their entire context. In doing so, the court tries to determine the most appropriate interpretation, one that best reflects the intent of the legislation scheme.

[68] The starting point is Elmer Driedger's modern principle of statutory interpretation, a principle the Supreme Court of Canada has repeatedly applied to interpret legislation:

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

See, for example, Rizzo & Rizzo Shoes Ltd. (Re) (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2; and Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 2002 SCC 42.

[69] When ss. 8 and 29 are looked at in the light of the scheme and object of the PBSA, it is evident that Parliament did not intend to give courts the authority to order employers to terminate their pension plans.

Scheme of the PBSA

[70] In s. 29, Parliament has provided that only two persons may initiate the termination of a pension plan. First, under s. 29(2), the superintendent has discretion to terminate a pension plan if the enumerated criteria are met. Second, under [page100] s. 29(5), an administrator may initiate the termination of a pension plan. That the statute recognizes an employer's right to terminate a plan is to be expected because in Canada pension plan coverage is voluntary in the sense that employers may choose whether to establish one for their employees. However, an administrator's right to terminate a plan under s. 29(5) is subject to the supervision of the superintendent, who must be given advance notice of any termination proposed by an administrator.

[71] Two points that flow from s. 29 are important for deciding whether courts can order a plan termination. First, s. 29 shows that Parliament has given supervisory authority over all plan terminations to the superintendent. Undoubtedly, it has done so because it recognizes that the termination of a plan, either in whole or in part, is a complex and highly technical matter, and thus a matter that demands specialized expertise. The office of the superintendent has this expertise; courts do not. [See Note 8 below]

[72] Second, Parliament has not given plan members the right to seek the termination of a pension plan. Their right, if aggrieved, is to ask for the superintendent's assistance.

[73] Having regard to the detailed regime for plan termination in s. 29 -- a regime that recognizes the expertise of the superintendent and does not recognize a right of employees to ask for a termination -- it makes little sense to say that Parliament intended courts to have jurisdiction to order the termination of a plan at the instance of disaffected employees.

[74] The scheme of the PBSA thus shows that, impliedly, though not expressly, Parliament has excepted terminations from the remedies available to the court under s. 8(11) of the PBSA. The wording of s. 8(11) supports this conclusion. One of the parties that may apply for relief under s. 8(11) for a contravention of s. 8(10) is the superintendent. I cannot accept that Parliament could have intended to permit the superintendent to circumvent the carefully tailored mandate for plan termination in s. 29 by resorting to s. 8(11) to terminate a plan.

Object of the PBSA

[75] The object of the PBSA, like its scheme, supports the respondents' position. The case law is replete with discussion [page101] about the object of pensions and pension legislation: see, for example, Monsanto, Buschau and Rio Algom.

[76] A main object of pensions is to provide long-term

financial security to workers after their withdrawal from active employment. Pension legislation, such as the PBSA, establishes expert regulatory supervision over and minimum standards for pension plans. The overall aim of the legislation is to protect and safeguard the pension rights and benefits of current and former plan members. In the words of Deschamps J. in Monsanto, at para. 38 (speaking of the Ontario legislation):

> The Act thus seeks, in some measure, to ensure a balance between employee and employer interests that will be beneficial for both groups and for the greater public interest in established pension standards.

[77] Giving the court jurisdiction to order an employer to partially terminate its pension plan on the application of a group of former employees undermines these important objects of the statute. Doing so would disregard the regulatory expertise of the superintendent. It would threaten the balance between employers and employees. And ultimately, it could put the long-term survival of pension plans at risk. As Bastarache J. noted in Buschau, at para. 97, if a plan can be terminated by the action of members or other beneficiaries, then "the 'fair and delicate balance between employer and employee interests' (Monsanto Canada, at para. 24) will be disrupted in a manner which is contrary to the legislative objective of encouraging the establishment and maintenance of private pension plans".

[78] For these reasons, I conclude that as a matter of statutory interpretation, courts have no jurisdiction under s. 8(11) of the PBSA to order CMHC to effect a partial termination of its pension plan.

(ii) Does this court's decision in Rio Algom apply to the appellants' partial termination claims?

[79] The respondents submit that the court's decision in Rio Algom provides an additional and compelling ground to dismiss these appeals. They say that the Divisional Court correctly applied Rio Algom to reject the appellants' claims relating to partial termination. The appellants submit that Rio Algom does not govern the question whether the court has jurisdiction over partial termination under s. 8(11) of the PBSA.

[80] Rio Algom was decided under the provincial Pension Benefits Act. A group of aggrieved employees sought the wind-up of Rio Algom's pension plan. By the time the case reached this court, the employees had conceded that the court could not [page102] directly order the wind-up or termination of a pension plan. [See Note 9 below] However, they contended that the court could order the employer to commence wind-up proceeding under s. 68(1) of the provincial statute, a provision similar to s. 29(5) of the PBSA.

[81] Gillese J.A., writing for the court, rejected the employees' contention. In doing so, she relied on the Supreme Court of Canada's decision in Bushau. In Buschau, the Supreme Court held that the common law rule in Saunders v. Vautier [(1841), 41 E.R. 482, [1835-1842] All E.R. Rep. 58 (L.C.C.)] -- which allows trust beneficiaries to terminate a trust in certain circumstances -- does not apply to pension trusts.

[82] However, Gillese J.A. concluded that Buschau stood not merely for this narrow proposition, but for the broader proposition that a court cannot compel an employer to commence proceedings to wind up a pension plan. She concluded that ordering an employer to commence wind-up proceedings "is tantamount to" ordering the wind-up of a pension plan. As the court cannot make the latter order, it cannot make the former order. In her words, at para. 78: "If the court were to order Rio Algom to commence wind up proceedings, it would violate the legislative scheme and amount to an unauthorized usurpation of the authority delegated to the Superintendent and Tribunal."

[83] In these appeals, the appellants are, in substance, asking the court to do what the employees in Rio Algom asked the court to do: order the employer to begin proceedings to terminate -- here partially terminate -- the pension plan. [See Note 10 below] This court rejected the relief sought by the employees in Rio Algom; the respondents submit that we should similarly reject the relief the appellants seek on these appeals. The appellants, however, attempt to avoid the impact of Rio Algom on the ground that it was decided under the provincial Pension Benefits Act while the present appeals are

to be resolved under the federal PBSA. The appellants point out that s. 8(10), and especially s. 8(11), have no counterpart in the provincial Act.

[84] I accept that to be so. The provincial statute contains no provision giving the court the broad remedial power found in s. 8(11) of the PBSA. However, the absence of such a power in the provincial statute is of no consequence in these appeals. The [page103] analysis in Rio Algom still applies to the partial termination claim put forward by the appellants, for three reasons.

[85] First, Gillese J.A. noted, at para. 34 of her reasons in Rio Algom, on matters pertaining to plan termination, the two statutes do not markedly differ.

[86] Second, Buschau, which Gillese J.A. relied on in concluding that a court cannot compel an employer to wind up or terminate a pension plan, was decided under the PBSA. Indeed, in Buschau, the Supreme Court of Canada said that s. 29(2) of the PBSA dictates the circumstances when partial termination should be declared. Plan members dissatisfied with the actions of their employer may ask the superintendent to intervene. In short, their recourse is to the superintendent, not the court.

[87] Gillese J.A. applied similar reasoning in holding that a court cannot order an employer to commence wind-up proceedings under s. 68 of the Ontario Pension Benefits Act at the request of a plan member. Moreover, at para. 59 of her reasons [in Rio Algom], she expressly referred to Buschau. She said:

> The core reasoning in Buschau is that the members of a pension plan do not have the right to compel an employer to wind up the pension plan. The decision in Buschau is not confined to the methods by which wind up is to take place. (Emphasis added)

Thus, it matters not that the appellants seek a partial termination under s. 8(11) of the PBSA, a provision without an equivalent in the Ontario statute. As Gillese J.A. said, employees have no right to compel an employer to terminate (or partially terminate) a pension plan, no matter what route they

use to try to obtain that result.

[88] Third, the policy reasons that underlie the conclusion of Gillese J.A. in Rio Algom are the same as those that underlie the Supreme Court of Canada's decision in Buschau. On this point, I agree with the following passage, from para. 61 of the reasons of the Divisional Court:

> Both Rio Algom and Buschau v. Rogers Communications Inc., [2006] 1 S.C.R. 973 rely upon similar policy considerations. Pension plans serve broad and long-term societal functions in providing economic support during retirement. Before a pension plan is wound up, surplus is only an actuarial concept and individuals entitled to the surplus assets do not have a specific interest in them. Members should not be able to deprive future employees of the benefit of a pension plan and often have only a passive and limited right with regard to employer decisions concerning the future of their plan and trust fund. They are not without recourse because they can alert the Superintendent of their concerns, who can act in an appropriate case: see Buschau at paras. 17, 31, 34. [page104]

[89] I conclude that although Rio Algom was decided under a different statutory regime, its reasoning and rationale apply to the appellants' claims for partial termination under the PBSA. Rio Algom is therefore a compelling authority in support of the respondents' position on these appeals unless it is open to reconsideration.

(iii) Should Rio Algom be reconsidered in the light of the Supreme Court of Canada's decisions in Burke and Monsanto and the minority opinion of Bastarache J. in Buschau?

[90] The appellants contend, in the alternative, that if Rio Algom applies to terminations under the PBSA, it should nonetheless be reconsidered because it is at odds with the Supreme Court of Canada's unanimous decisions in Burke and Monsanto and with Bastarache J.'s minority reasons in Buschau. I would reject this contention.

Burke

[91] The appellants fasten on the statement of Rothstein J., at para. 45, that "[p]ension legislation is not a complete code"; rather, its purpose is to establish minimum standards and regulatory supervision to protect those entitled to pension benefits. The appellants then argue that a higher standard than that found in the PBSA will be needed to protect their equity in the surplus.

[92] Burke does not assist the appellants. In that case, the Supreme Court had to decide whether an employer or plan administrator was required to transfer pension surplus to a successor plan on the sale of a division of the company's business. As Rothstein J. noted, this was a novel issue that could not be resolved by the pension legislation alone.

[93] However, Rothstein J. was careful to distinguish the case before him and, for example, the situation in Buschau. At para. 46 of his reasons, he said: "By contrast, in Buschau, the application of the trust rule in Saunders v. Vautier would have allowed the employees to circumvent the statutory procedure and defeat the objective of the legislative scheme".

[94] The reasons in Burke are thus entirely consistent with Gillese J.A.'s statement in Rio Algom, at para. 59: "I accept that Buschau dictates that where a statutory scheme exists for the termination and wind up of pension plans, it must be followed. The statutory process . . . is not to be circumvented by the courts." Here, the appellants seek to use the court to circumvent [page105] the scheme for plan termination in s. 29 of the PBSA. In Burke, unlike these two appeals, the statutory scheme did not yield a complete answer.

Monsanto

[95] The appellants argue that a court-ordered partial termination is consistent with the policy considerations underlying the Supreme Court of Canada's decision in Monsanto. The appellants say that we should prefer these policy considerations to those relied on in Rio Algom. I do not agree

because Monsanto was an entirely different case from the one we must resolve.

[96] Monsanto did arise in the context of a large downsizing and a surplus, as do the appeals before us. But, Monsanto does not deal with the question before us: whether there should be a partial termination. In Monsanto, a partial termination had already taken place. The Supreme Court had to decide a different question: how the individual rights of the plan members on a partial termination affected the timing of the distribution of surplus.

[97] Deschamps J. held that the best interests of plan members required that they receive their pro rata share of the surplus on partial termination, rather than waiting for a full wind-up of the plan. She cited the following policy considerations in support of her conclusion: [See Note 11 below]

-- No unfairness to plan members would result as the fund would still be in surplus after distribution;

-- not recognizing the beneficial interest of the downsized employees at the time of partial termination would put them in a worse position than the ongoing employees, as they have lost their jobs and their level of pensionable earnings has been reduced;

-- the downsized workers should be subject to the risks of the plan while they are part of it but not after termination;

-- if the downsized employees are required to wait for a full wind-up at an indeterminate date in the future, some may no longer be reachable; and

-- because the actuarial surplus becomes an actual surplus and vests in the plan members upon plan termination, [page106] distribution on partial wind-up is consistent with the trust principles outlined in Schmidt v. Air Products.

[98] These policy considerations assume that a partial

termination has taken place and explain why surplus should be distributed at that time. These policy considerations do not apply when a partial termination has yet to take place. Instead, the policy considerations at play in Rio Algom (and Buschau) -- which stress the importance of pensions in providing long-term income security -- govern the two appeals before us.

Buschau

[99] The appellants rely heavily on the minority reasons of Bastarache J. in Buschau. As I said, in that case, the court unanimously held that the members of a pension plan regulated under the PBSA could not invoke the common law rule in Saunders v. Vautier [See Note 12 below] to terminate the plan.

[100] Deschamps J., writing for the majority, held that Parliament intended the provisions of the PBSA dealing with plan termination to displace the common law rule.

[101] Bastarache J., writing for the minority, largely agreed with the reasons of Deschamps J. He held that allowing plan members to unilaterally terminate a pension plan would be inconsistent with the objective of the PBSA. He concluded, at para. 100: "The unilateral right of members to terminate the Plan simply does not exist in this case." To this extent, his reasons are consistent with those of Gillese J.A. in Rio Algom.

[102] However, at the end of his reasons, in a section headed "The Issue of Good Faith", Bastarache J. discusses plan members' right to ask for a distribution of the surplus and an employer's obligation to act in accordance with s. 8(10). In the following passage, at para. 103, he seems to suggest that a court might review a decision about plan termination to ensure that it complied with s. 8(10)(b) of the PBSA:

> Any termination of the Plan and amendments to it must be examined on the basis of its terms and conditions, in consideration of the applicable provisions of the P.B.S.A. What would constitute an abuse of the employer's power or would otherwise offend community standards of reasonableness

in the contemplated use of the Premier Plan assets for the benefit of present and future employees of RCI must be determined on that basis alone. In essence then, what is permitted and what is abusive will have to be determined in future proceedings according to the standard set in s. 8(10)(b) of the P.B.S.A. which states that "[w]here the employer is the administrator [page107] pursuant to paragraph 7(1)(c), if there is a material conflict of interest between the employer's role as administrator and the employer's role in any other capacity, the employer . . . (b) shall act in the best interests of the members of the pension plan."

[103] It seems to me, however, that this passage is of little help to the appellants. It is obiter. And, Bastarache J.'s reasons as a whole support the paramountcy of the PBSA regime for plan terminations. Moreover, even in this passage, Bastarache J. does not go so far as to say that a court can order an employer to effect a partial termination. Thus, I am not persuaded that his minority reasons cast doubt on this court's decision in Rio Algom.

(iv) Does the court have jurisdiction under s. 8(11) of the PBSA to award damages equivalent to a pro rata share of the distribution of the surplus on a partial termination?

[104] The appellants put forward an alternative position: they are not asking the court to order a partial termination; instead, they are simply asking the court to award damages, a power the court undoubtedly has. They contend that their claim is fundamentally a damages claim. However, the damages the appellants seek are a pro rata share of the surplus that would be distributed to them on a partial termination.

[105] The Divisional Court rejected the appellants' position. It concluded, at para. 72, "that a court does not have jurisdiction to grant damages based upon the hypothetical distribution of surplus on wind up following a partial termination of the pension plan". The Divisional Court explained, at para. 73 of its reasons, that a damage award would amount to an indirect partial termination:

> On partial termination and wind up, distribution comes from the surplus assets of the plan. An order for damages comes out of the employer's funds. However the surplus (to which the employer has contributed) would remain in the fund. Presumably, such an order would result in either a windfall to other plan members, or would result in a surplus that is not attributable to any plan members. If the damage award comes from the fund, or if the employer seeks recovery from the fund, in fact the court has indirectly ordered a partial termination. The essence of the claim is for a share of the surplus, even though characterized as damages. An order of damages that uses a hypothetical partial termination as a measure for damages is effectively an indirect partial termination order.

[106] I agree. Again, as Gillese J.A. said in Rio Algom, at para. 30, the court cannot do indirectly what it cannot do directly. As the court has no jurisdiction to order a partial [page108] termination of CMHC's pension plan, it has no jurisdiction to award damages premised on a partial termination.

(v) Did CMHC effect a "backdoor" partial termination of its pension plan, or "crystallize" the surplus, by using a portion of the surplus for its own benefit and the benefit of the remaining plan members?

[107] Lacroix/Ladouceur also argue that by sharing $253.2 million of a $432 million surplus between itself and the remaining employees to the exclusion of the laid-off employees, CMHC effected a "backdoor" partial termination. McCann/Guffie essentially make the same argument, claiming that CMHC's action "crystallized" the surplus. In effect, they say, when CMHC used the surplus it converted a fluctuating actuarial calculation into a discrete sum of money. Implicitly, the appellants ask the court to declare that this is what has occurred. Neither argument was made before the motion judge or the Divisional Court.

[108] I do not agree with either argument. As CMHC points out, the arguments are backwards. A surplus may be said to "crystallize" on a partial termination because only on

termination (or wind up) can plan members be entitled to share in the surplus. [See Note 13 below] But, the converse is not true. An employer's decision to use actuarial surplus to fund benefit enhancements for plan members does not result in a partial termination or convert an actuarial surplus into a "crystallized" surplus.

[109] Put differently, an employer's use of surplus in an ongoing plan does not by itself impose an obligation to declare a partial termination or change the rights of plan members. To say that it did would have the perverse effect of discouraging employers from implementing benefit enhancements. Rothstein J. made this point in Burke, at para. 83:

> The fact that an employer may voluntarily choose to increase pension benefits out of surplus funds or otherwise, does not change the nature of the employees' interest in the pension fund or extend fiduciary obligation to voluntary actions of the employer. The employees' equitable interest is limited to their defined benefits.

[110] For these reasons, the arguments on backdoor partial termination or crystallization of the surplus cannot succeed. [page109]

(vi) Should the court's choice of remedy for the breach of s. 8(10) of the PBSA be certified as a common issue?

[111] Having determined that the court cannot order a partial termination, I now turn to the appellants' final alternative argument. They submit that the court should simply certify as a common issue the choice of remedy for a breach of s. 8(10), and leave it to the trial judge to fashion the appropriate order. I do not agree with this submission.

[112] If the appellants prove a breach of s. 8(10), then the court will have to decide the appropriate remedy. However, on my assessment of the law, that remedy cannot include an order for partial termination or an award of damages premised on partial termination. As discussed above, that assessment is consistent with the opinion of Gillese J.A. in Rio Algom, at

paras. 85-87. Thus, I see no merit in leaving to the trial judge as a common issue the choice of an appropriate remedy. The question of remedial jurisdiction should be resolved now, at the certification stage.

[113] I have concluded that it is plain and obvious the court has no jurisdiction under s. 8(11) of the PBSA to grant the appellants the remedies they seek. Accordingly, their claim for partial termination or damages based on a partial termination does not disclose a cause of action. On that ground alone, I would not certify their proposed common issues relating to partial termination. Nevertheless, I will briefly address the remaining branches of the test for certification under s. 5(1) of the Class Proceedings Act.

(b) Did the motion judge err in concluding that the issues proposed for certification do not meet the requirements of s. 5(1)(b), (c) and (d) of the Class Proceedings Act?

[114] In addition to holding that the appellants' claims did not constitute a viable cause of action, the motion judge found that the appellants had failed to satisfy the other requirements for certification. Specifically, in respect of s. 5(1)(b) of the Class Proceedings Act, he found that the proposed class plaintiffs did not have a rational relationship with the proposed common issues and irrationally excluded individuals with the same claim.

[115] In respect of s. 5(1)(c) of the Class Proceedings Act, the motion judge found that the proposed issues relating to the partial termination claim were not common issues and, if certified, would create conflicts among class members.

[116] In respect of s. 5(1)(d) of the Class Proceedings Act, the motion judge found that a class proceeding was not the preferable [page110] procedure to resolve issues relating to the partial termination claim because that claim raised "many technical issues inextricably linked to the PBSA regime". In short, "[t]he Superintendent acting under the purview of the statutory framework is the preferable procedure to decide those issues": Lacroix v. Canada Mortgage and Housing Corp., supra,

at para. 146.

[117] Finally, the motion judge also concluded [Lacroix v. Canada Mortgage, [2009] O.J. No. 316 (S.C.J.), at para. 148], in respect of s. 5(1)(e) of the Class Proceedings Act, that the appellants' "litigation plan is vague and incomplete and the proceedings will soon become unmanageable".

[118] Although the Divisional Court did not expressly address the motion judge's findings on s. 5(1)(b), (c), (d) and (e) of the Class Proceedings Act, it did uphold his findings.

[119] In this court, the appellants submit that the motion judge erred in his findings on s. 5(1)(b), (c) and (d) of the Class Proceedings Act, and that their litigation plan can be restructured to make it workable. In response, CMHC submits the motion judge reasonably found that the appellants had not set out a properly identifiable class, had not proposed issues relating to partial termination that were common and had not met their onus of showing that a class proceeding would be a preferable procedure. The motion judge's findings, CMHC argues, are entitled to substantial deference, especially as they were upheld in the Divisional Court. As the Supreme Court of Canada said in Ontario (Attorney General) v. Bear Island Foundation, [1991] 2 S.C.R. 570, [1991] S.C.J. No. 61, at p. 574 S.C.R., the principle of appellate deference is "all the stronger in the face of concurrent findings of both courts below".

[120] I find considerable merit in the position of CMHC. However, as I would dismiss these appeals on the ground that the partial termination claims does not disclose a cause of action, a restructuring of the litigation plan does not assist the appellants and it is unnecessary to resolve definitely whether the motion judge's findings on s. 5(1)(a), (b), (c) and (d) of the Class Proceedings Act should be upheld.

(c) Did the Divisional Court err in upholding the motion judge's finding that the misrepresentation claim advanced by McCann/Guffie does not raise a common issue?

[121] The McCann/Guffie claim alleges CMHC misrepresented to

the class that there would be only one package of benefit enhancements -- in other words, it would be a "one time only" benefit. The motion judge refused to certify issues relating to their claim because he found no evidence of a common [page111] misrepresentation and no evidence from which reliance -- an essential element of the cause of action -- could be inferred on a class-wide basis. The Divisional Court deferred to his findings. McCann/Guffie submit that the Divisional Court erred in doing so. I do not accept their submission.

[122] The motion judge's findings on the misrepresentation claim were findings of fact, and they were firmly grounded in the record. The alleged common misrepresentation on which McCann/Guffie relies occurred when the first package of benefit enhancements was distributed. At the time, CMHC's Board explained that it did not intend to make regular use of surplus for the benefit of members, and that this package was an unusual circumstance. McCann/Guffie maintain that the Board's explanation amounts to a "one time only" representation. However, for example, in his cross-examination, Mr. Guffie acknowledged that he did not believe that CMHC literally meant "one time only". Indeed, he understood that should the fund again be in a surplus position, CMHC could similarly enhance the benefits of plan members. Mr. Guffie's evidence alone undermines the McCann/Guffie assertion that the alleged misrepresentation was a common misrepresentation.

[123] Similarly, the evidence in the record undermines the notion that class-wide reliance can be inferred or assumed. Mr. Guffie himself elected to take the commuted value of his benefits before the alleged misrepresentation occurred. And, he conceded that he would have made the same decision regardless of the misrepresentation. Other class members, too, may have elected to take the commuted value of their pension before the alleged misrepresentation, and still other class members may have made their election without regard to what the CMHC Board represented.

[124] Reliance need not always be treated as an individual issue in class proceedings. In some cases, class-wide reliance may be inferred from the facts. See Ontario Public Service

Employees Union v. Ontario, [2005] O.J. No. 1841, 13 C.P.C. (6th) 178 (S.C.J.), at para. 68, per Cullity J.; and CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman, [2001] O.J. No. 4620, 18 B.L.R. (3d) 260 (S.C.J.), per Cumming J. This, however, is not one of those cases. On the record before him, the motion judge reasonably found that reliance was very much an individual issue.

[125] The motion judge also reasonably held [Lacroix v. Canada Mortgage, [2009] O.J. No. 316 (S.C.J.), at para. 94] that even if CMHC had a "duty to notify the plan members that they had a right to share in an eventual distribution of surplus and that [page112] they would forgo that right if they left the plan", and that, therefore, its breach of this duty amounted to a misrepresentation by omission, still class-wide reliance could not be inferred. CMHC would be entitled to defend the claim on the basis that individual members' decisions to leave the plan were unconnected to the misrepresentation: see Plaza Fiberglass Manufacturing Ltd. v. Cardinal Insurance Co. (1994), 18 O.R. (3d) 663, [1994] O.J. No. 1023 (C.A.).

[126] For all these reasons, the Divisional Court did not err in upholding the motion judge's finding that the McCann/ Guffie's "one time only" misrepresentation claim did not raise a common issue. I would not give effect to this ground of appeal.

(d) Did the motion judge err in failing to award the appellants their costs from the CMHC pension fund?

[127] The motion judge rejected the appellants' request that their full indemnity costs be paid out of the CMHC pension fund.

[128] In this court, the appellants submit, as they did in the Divisional Court, that the motion judge erred in denying their request. They put their case for costs from the fund on two bases: they contend that the question who owns the surplus lies at the heart of their actions and that the answer to this question will benefit all plan members; and they contend that this litigation "concerns the due administration of the trust

by CMHC".

[129] The Divisional Court noted that, in accordance with the decisions of this court, public policy permits costs to be payable out of a pension fund in two categories of cases: first, where proceedings are brought to ensure the due administration of the pension trust fund; or where proceedings are brought for the benefit of all beneficiaries. However, the Divisional Court did not agree that these proceedings fell under either category. It deferred to the motion judge's exercise of discretion on costs, at para. 125:

> In our view, the certification judge correctly articulated the law, exercised his discretion and made no error in principle. Nor did he misapprehend the facts. His decision makes sense based on the history of this case and the nature of the claim. We see no basis to interfere with the exercise of his discretion.

[130] I, too, see no basis to interfere with the motion judge's refusal to award the appellants their costs from the fund. In addition to attracting significant deference, the motion judge's determination is consistent with the Supreme Court of Canada's decision in Nolan v. Kerry (Canada) Inc., [2009] 2 S.C.R. 678, [2009] S.C.J. No. 39, 2009 SCC 39. There, Rothstein J. for the majority, upheld this court's refusal to order that the costs [page113] of former employees of a pension plan be paid out of the pension fund. He noted, at paras. 121-27, that costs of litigation should be paid from a pension fund only where (a) the litigation is concerned with the due administration of the trust, and there exists some legitimate uncertainty about how to administer the trust; and (b) where the dispute is not adversarial.

[131] This litigation does not meet either of these two criteria. This litigation is not aimed at ensuring the proper administration of pension funds in an ongoing plan. It will not benefit all plan members. Rather, it is an attempt by a group of former plan members to gain access to the surplus, and extract a portion of that surplus for their own benefit. Viewed in this light, the appellants' objective in this litigation

cannot possibly benefit existing plan members or concern the due administration of the fund.

[132] Moreover, this litigation is highly adversarial. In both proceedings, the appellants have called into question the appropriateness of CMHC's actions. They have asserted breaches of trust, and of fiduciary and statutory duties, and have even sought punitive damages. This is not in any sense a non-adversarial dispute.

[133] I would not give effect to this ground of appeal.

H. Conclusion

[134] The Divisional Court was correct in concluding that a court has no jurisdiction to order CMHC to partially terminate its pension plan or to award damages premised on a partial termination of the plan.

[135] The Divisional Court did not err in upholding the motion judge's decision that the misrepresentation claim advanced by McCann/Guffie does not raise a common issue.

[136] The motion judge did not err in refusing to award the appellants their costs out of the pension fund.

[137] Therefore, I would dismiss both appeals. In accordance with the agreement of the parties, I would order that the appellants pay to the respondent CMHC its costs of the appeal in the amount of $20,000, inclusive of disbursements and applicable taxes. The appellants shall determine their respective contributions to this amount.

Appeal dismissed.

[page114]

APPENDIX A

Common Issues Certified on Consent as listed by the Divisional Court, at para. 32:

1. Do members of the proposed class have an equitable and/or

beneficial interest in the pension fund surplus which entitled them to an equitable share of what the defendants have characterized as "benefits enhancements" funded out of surplus?

2. If the answer to 1 is yes, did the election by the members to take the commuted value of their pension terminate any beneficial right or interest they might have had in the surplus by virtue of the trust and/or fiduciary relationship?

3. If the answer to 2 is no, did the failure of the defendants to include members of the class to the extent of their equitable share in what the defendants have characterized as "benefits enhancements" funded from surplus amount to breach of trust or fiduciary duty?

4. If the answer to 3 is yes, are the class members entitled to any remedy and, if so, on what basis?

5. If the answer to 2 is yes, should those class members

(a) whose commuted value transfer election was reduced by the amount of the maximum income tax limit, but

(b) who were permitted by CMHC to leave any commuted value balance over such limit in the plan to be received as a transfer restriction annuity rather than a residual cash payment (TRD sub-class), nevertheless be entitled to have any beneficial right or interest in the surplus determined as if their commuted value transfer had not occurred or only to the extent of the value of the transfer restriction annuity as was done by CMHC.

APPENDIX B

The Lacroix/Ladouceur plaintiffs proposed the following additional common issues before Charbonneau J.:

(i) Does the surplus in the CMHC pension fund belong to the plan members?

(ii) If the answer to (i) is yes, did CMHC breach its trust, fiduciary and/or statutory duties to the class members by failing to declare a partial termination of the pension fund trust pursuant to s. 29(5) of the PBSA for the benefit

of the class members and, if so, what is their remedy?

(iii) (If the election by the class members to take the commuted value of their pension terminated any beneficial right or interest in the surplus) are the defendants estopped by their conduct from alleging same, assuming reliance? [page115]

(iv) Were the defendants guilty of conduct that justifies an award of punitive and/or exemplary damages?

APPENDIX C

The McCann/Guffie plaintiffs proposed the following common issues before Charbonneau J.:

(i) Did CMHC hold the pension fund surplus in trust for the class members?

(ii) Did CMHC breach its trust, fiduciary and/or statutory duty by failing to pay the class members their full pro rata share of surplus when it distributed surplus on the first day of January 1999?

(iii) Did CMHC breach its trust, fiduciary and/or statutory duty by failing to pay the class members their full pro rata share of surplus when it distributed surplus on the first day of January 2001?

(iv) Did CMHC and the trustees breach their trust, fiduciary and/or statutory duty to the class members by allowing CMHC to allocate for itself approximately 60 per cent of the surplus that was distributed on the 1 January 1999 and the 1 January 2001?

(v) Did CMHC breach its trust, fiduciary and/or statutory obligations to the class members by failing to declare partial termination of the pension plan fund trust pursuant to s. 29(5) of the PBSA?

(vi) Did the defendant trustees breach their trust, fiduciary and/or statutory obligations by failing to ensure that CMHC declared a partial termination of the pension fund trust pursuant to s. 29(5) of the PBSA for the benefit of the class members?

(vii) Did CMHC make a common representation and/or warranty to the class members that the surplus distribution that occurred on the 1 January 1999 was to be one time only?

(viii) If the answer to (vii) is yes, will reliance on such representation and/or warranty by the class members be assumed?

(ix) If the answers to any one of common issues (i), (ii), (iii), (iv) and (v) are yes, to what remedy are the plaintiffs entitled?

(x) Are the class members entitled to exemplary and/or punitive damages and, if so, in what amount?

Notes

Note 1: Lacroix v. Canada Mortgage and Housing Corp., [2009] O.J. No. 316, 68 C.P.C. (6th) 111 (S.C.J.) and McCann v. Canada Mortgage and Housing Corp., [2009] O.J. No. 319, 75 C.P.C. (6th) 156 (S.C.J.).

Note 2: McCann v. Canada Mortgage and Housing Corp. (May 22, 2009), Ottawa, 07-CV-37862 (S.C.J.) and Lacroix v. Canada Mortgage and Housing Corp. (May 22, 2009), Ottawa, 99-CV-10694 (S.C.J.).

Note 3: Rio Algom deals with the provincial legislation; these two appeals deal with the federal statute. However, as I will discuss, the superintendent's supervisory role is a critical aspect of both statutory regimes.

Note 4: Section 29 was amended in 2010 by the Jobs and Economic Growth Act, S.C. 2010, c. 12. In these reasons, I refer to the provision previously in effect, as it governs this litigation.

Note 5: Under the 2010 amendment, the right of an administrator to partially terminate a pension plan has been removed. Now, only the superintendent can partially terminate a plan.

Note 6: See para. 44 below.

Note 7: Apart from the McCann/Guffie misrepresentation claim, which I deal with separately below.

Note 8: Under the recent amendments to s. 29 see footnote

5, at para. 36 only the superintendent can initiate a partial termination. This amendment further shows Parliament's intent to rely on the expertise of the superintendent for decisions on plan terminations.

Note 9: They made that concession because of the Supreme Court's decision in Buschau.

Note 10: I use wind-up of a pension plan and termination of a pension plan interchangeably.

Note 11: See paras. 39-40 and 44-46.

Note 12: Supra.

Note 13: Depending on the terms of the plan documents.
