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

BRIEF OF AUTHORITIES OF THE APPLICANTS, VICTORIAN ORDER OF NURSES FOR CANADA- ONTARIO BRANCH AND VICTORIAN ORDER OF NURSES FOR CANADA NOVA SCOTIA BRANCH

(Re motion returnable January 19, 2016)

January 18, 2016

Norton Rose Fulbright Canada LLP
Royal Bank Plaza, South Tower, Suite 3800
200 Bay Street, P.O. Box 84
Toronto, Ontario M5J 2Z4 CANADA

Matthew Halpin LSUC#26208F
Tel: 613.780.8654
Fax: 613.230.5459
Email: matthew.halpin@nortonrosefulbright.com

Evan Cobb LSUC #55787N
Tel: 416.216.1929
Fax: 416.216.3930
Email: evan.cobb@nortonrosefulbright.com

Lawyers for the Applicants, Victorian Order of Nurses For Canada – Ontario Branch and Victorian Order of Nurses For Canada Nova Scotia Branch

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

INDEX

1 *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.).

2 *McGee v. London Life Insurance Co.*, [2011] O.J. No. 4206 (Ont. S.C.J.)

3 *Ontario (Ministry of Training, Colleges and Universities) v. Two Feathers Forest Products LP* (2013), 6 C.B.R. (6th) 129 (Ont. C.A.)

4 *Kerr v. Baranow*, [2011] 1 S.C.R. 269

5 *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217

6 *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379

7 *Allarco Entertainment Inc. (Re)* (2009), 58 CBR (5th) 140 (Alta. Q.B.)

8 *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J.).

9 *Jaguar Mining Inc. (Re)* (2013), 12 C.B.R. (6th) 290 (Ont. S.C.J.).

10 *4519922 Canada Inc. (Re)* (2015), 22 C.B.R. (6th) 44 (Ont. S.C.J.).

Tab 1

Case Name:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF a Plan of Compromise and Arrangement involving Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 4446372 Canada Inc. and 6932819 Canada Inc., Trustees of the Conduits Listed In Schedule "A" Hereto

Between

The Investors represented on the Pan-Canadian Investors Committee for Third-Party Structured Asset-Backed Commercial Paper listed in Schedule "B" hereto, Applicants (Respondents in Appeal), and Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 6932819 Canada Inc. and 4446372 Canada Inc., Trustees of the Conduits listed in Schedule "A" hereto, Respondents (Respondents in Appeal), and Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal Inc., Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Domtar Inc., Domtar Pulp and Paper Products Inc., GIRO Inc., Vêtements de sports R.G.R. Inc., 131519 Canada Inc., Air Jazz LP, Petrifond Foundation Company Limited, Petrifond Foundation Midwest Limited, Services hypothécaires la patrimoniale Inc., TECSYS Inc., Société générale de financement du Québec, VibroSystM Inc., Interquisa Canada L.P., Redcorp Ventures Ltd., Jura Energy Corporation, Ivanhoe Mines Ltd., WebTech Wireless Inc., Wynn Capital Corporation Inc., Hy Bloom Inc., Cardacian Mortgage Services, Inc., West Energy Ltd., Sabre Enerty Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd. and Standard Energy Inc., Respondents (Appellants)

[2008] O.J. No. 3164

2008 ONCA 587

45 C.B.R. (5th) 163

296 D.L.R. (4th) 135

2008 CarswellOnt 4811

168 A.C.W.S. (3d) 698

240 O.A.C. 245

47 B.L.R. (4th) 123

92 O.R. (3d) 513

Docket: C48969 (M36489)

Ontario Court of Appeal
Toronto, Ontario

J.I. Laskin, E.A. Cronk and R.A. Blair JJ.A.

Heard: June 25-26, 2008.
Judgment: August 18, 2008.

(121 paras.)

Bankruptcy and insolvency law -- Proceedings in bankruptcy and insolvency -- Practice and procedure -- General principles -- Legislation -- Interpretation -- Courts -- Jurisdiction -- Federal -- Companies' Creditors Arrangement Act -- Application by certain creditors opposed to a Plan of Compromise and Arrangement for leave to appeal sanctioning of that Plan -- Pan-Canadian Investors Committee was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that formed the subject matter of the proceedings -- Plan dealt with liquidity crisis threatening Canadian market in Asset Backed Commercial Paper -- Plan was sanctioned by court -- Leave to appeal allowed and appeal dismissed -- CCAA permitted the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court -- Companies' Creditors Arrangement Act, ss. 4, 6.

Application by certain creditors opposed to a Plan of Compromise and Arrangement for leave to appeal the sanctioning of that Plan. In August 2007, a liquidity crisis threatened the Canadian market in Asset Backed Commercial Paper (ABCP). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on US sub-prime mortgages. By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007, pending an attempt to resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that formed the subject matter of the proceedings. The Plan was sanctioned on June 5, 2008. The applicants raised an important point regarding the permissible scope of restructuring under the Companies' Creditors Arrangement Act: could the court sanction a Plan that called for creditors to provide releases to third parties who were themselves insolvent and not creditors

of the debtor company? They also argued that if the answer to that question was yes, the application judge erred in holding that the Plan, with its particular releases (which barred some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

HELD: Application for leave to appeal allowed and appeal dismissed. The appeal raised issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There were serious and arguable grounds of appeal and the appeal would not unduly delay the progress of the proceedings. In the circumstances, the criteria for granting leave to appeal were met. Respecting the appeal, the CCAA permitted the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where the releases were reasonably connected to the proposed restructuring. The wording of the CCAA, construed in light of the purpose, objects and scheme of the Act, supported the court's jurisdiction and authority to sanction the Plan proposed in this case, including the contested third-party releases contained in it. The Plan was fair and reasonable in all the circumstances.

Statutes, Regulations and Rules Cited:

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

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 4, s. 6

Constitution Act, 1867, R.S.C. 1985, App. II, No. 5, s. 91(21), s. 92(13)

Appeal From:

On appeal from the sanction order of Justice Colin L. Campbell of the Superior Court of Justice, dated June 5, 2008, with reasons reported at [2008] O.J. No. 2265.

Counsel:

See Schedule "A" for the list of counsel.

The judgment of the Court was delivered by

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

A. INTRODUCTION

1 In August 2007 a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

2 By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007 pending an attempt to resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

3 Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

Leave to Appeal

4 Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument we encouraged counsel to combine their submissions on both matters.

5 The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and -- given the expedited time-table -- the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as *Re Cineplex Odeon Corp.* (2001), 24 C.B.R. (4th) 21 (Ont. C.A.), and *Re Country Style Food Services* (2002), 158 O.A.C. 30, are met. I would grant leave to appeal.

Appeal

6 For the reasons that follow, however, I would dismiss the appeal.

B. FACTS

The Parties

7 The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third party financial institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer, and several holding companies and energy companies.

8 Each of the appellants has large sums invested in ABCP -- in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants -- slightly over $1 billion -- represent only a small fraction of the more than $32 billion of ABCP involved in the restructuring.

9 The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies, and some smaller holders of ABCP product. They participated in the market in a number of different ways.

The ABCP Market

10 Asset Backed Commercial Paper is a sophisticated and hitherto well-accepted financial instrument. It is primarily a form of short-term investment -- usually 30 to 90 days -- typically with a low interest yield only slightly better than that available through other short-term paper from a government or bank. It is said to be "asset backed" because the cash that is used to purchase an ABCP Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of

the notes.

11 ABCP was often presented by those selling it as a safe investment, somewhat like a guaranteed investment certificate.

12 The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over $116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this proceeding relates to approximately $32 billion of non-bank sponsored ABCP the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

13 As I understand it, prior to August 2007 when it was frozen, the ABCP market worked as follows.

14 Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers" (banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

15 The cash from the purchase of the ABCP Notes was used to purchase assets which were held by trustees of the Conduits ("Issuer Trustees") and which stood as security for repayment of the notes. Financial institutions that sold or provided the Conduits with the assets that secured the ABCP are known as "Asset Providers". To help ensure that investors would be able to redeem their notes, "Liquidity Providers" agreed to provide funds that could be drawn upon to meet the demands of maturing ABCP Notes in certain circumstances. Most Asset Providers were also Liquidity Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

16 When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The Liquidity Crisis

17 The types of assets and asset interests acquired to "back" the ABCP Notes are varied and complex. They were generally long-term assets such as residential mortgages, credit card receivables, auto loans, cash collateralized debt obligations and derivative investments such as credit default swaps. Their particular characteristics do not matter for the purpose of this appeal, but they shared a common feature that proved to be the Achilles heel of the ABCP market: because of their long-term nature there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP Notes.

18 When uncertainty began to spread through the ABCP marketplace in the summer of 2007, investors stopped buying the ABCP product and existing Noteholders ceased to roll over their maturing notes. There was no cash to redeem those notes. Although calls were made on the Liquidity Providers for payment, most of the Liquidity Providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence the "liquidity crisis" in the ABCP market.

19 The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes -- partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of

certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their maturing ABCP Notes.

The Montreal Protocol

20 The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze -- the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement -- known as the Montréal Protocol -- the parties committed to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

21 The work of implementing the restructuring fell to the Pan-Canadian Investors Committee, an applicant in the proceeding and respondent in the appeal. The Committee is composed of 17 financial and investment institutions, including chartered banks, credit unions, a pension board, a Crown corporation, and a university board of governors. All 17 members are themselves Noteholders; three of them also participated in the ABCP market in other capacities as well. Between them, they hold about two thirds of the $32 billion of ABCP sought to be restructured in these proceedings.

22 Mr. Crawford was named the Committee's chair. He thus had a unique vantage point on the work of the Committee and the restructuring process as a whole. His lengthy affidavit strongly informed the application judge's understanding of the factual context, and our own. He was not cross-examined and his evidence is unchallenged.

23 Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible, and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian ABCP market.

The Plan

a) Plan Overview

24 Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's words, "all of the ABCP suffers from common problems that are best addressed by a common solution." The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper -- which has been frozen and therefore effectively worthless for many months -- into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

25 The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

26 Under the Plan, the vast majority of the assets underlying ABCP would be pooled into two master asset vehicles (MAV1 and MAV2). The pooling is designed to increase the collateral available and thus make the notes more secure.

27 The Plan does not apply to investors holding less than $1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the $1-million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be designed to secure votes in favour of the Plan by various Noteholders, and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABCP collapse.

b) The Releases

28 This appeal focuses on one specific aspect of the Plan: the comprehensive series of releases of third parties provided for in Article 10.

29 The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers, and other market participants -- in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" -- from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest, and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

30 The application judge found that, in general, the claims for damages include the face value of the Notes, plus interest and additional penalties and damages.

31 The releases, in effect, are part of a *quid pro quo*. Generally speaking, they are designed to compensate various participants in the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets, and provide below-cost financing for margin funding facilities that are designed to make the notes more secure;
b) Sponsors -- who in addition have cooperated with the Investors' Committee throughout the process, including by sharing certain proprietary information -- give up their existing contracts;
c) The Canadian banks provide below-cost financing for the margin funding facility and,
d) Other parties make other contributions under the Plan.

32 According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation."

The CCAA Proceedings to Date

33 On March 17, 2008 the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25th. The vote was overwhelmingly in support of the Plan -- 96% of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the Monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Re-calculated on this basis the results remained firmly in favour of the proposed Plan -- 99% of those connected with the development of the Plan voted positively, as did 80% of those Noteholders who had not been involved in its formulation.

34 The vote thus provided the Plan with the "double majority" approval -- a majority of creditors representing two-thirds in value of the claims -- required under s. 6 of the CCAA.

35 Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 and 13. On May 16, the application judge issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

36 The result of this renegotiation was a "fraud carve-out" -- an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

37 A second sanction hearing -- this time involving the amended Plan (with the fraud carve-out) -- was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

38 The appellants attack both of these determinations.

C. LAW AND ANALYSIS

39 There are two principal questions for determination on this appeal:

1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its directors?
2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it?

(1) Legal Authority for the Releases

40 The standard of review on this first issue -- whether, as a matter of law, a CCAA plan may contain third-party releases -- is correctness.

41 The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company.[1] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

a) on a proper interpretation, the CCAA does not permit such releases;
b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;
c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the *Constitution Act*, 1867;
d) the releases are invalid under Quebec rules of public order; and because
e) the prevailing jurisprudence supports these conclusions.

42 I would not give effect to any of these submissions.

Interpretation, "Gap Filling" and Inherent Jurisdiction

43 On a proper interpretation, in my view, the CCAA permits the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of (a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on all creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entrée to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

44 The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: *Canadian Red Cross Society (Re)* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.). As Farley J. noted in *Re Dylex Ltd.* (1995), 31 C.B.R. (3d) 106 at 111 (Ont. Gen. Div.), "[t]he history of CCAA law has been an evolution of judicial interpretation."

45 Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent

jurisdiction?

46 These issues have recently been canvassed by the Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters,"[2] and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools -- statutory interpretation, gap-filling, discretion and inherent jurisdiction -- it is not necessary in my view to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

47 The Supreme Court of Canada has affirmed generally -- and in the insolvency context particularly -- that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "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": *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21, quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983); *Bell Expressvu Ltd. Partnership v. R.*, [2002] 2 S.C.R. 559 at para. 26.

48 More broadly, I believe that the proper approach to the judicial interpretation and application of statutes -- particularly those like the CCAA that are skeletal in nature -- is succinctly and accurately summarized by Jackson and Sarra in their recent article, *supra*, at p. 56:

> The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in *Québec* as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

49 I adopt these principles.

50 The remedial purpose of the CCAA -- as its title affirms -- is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1990), 4 C.B.R. (3d) 311 at 318 (B.C.C.A.), Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

> Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

51 The CCAA was enacted in 1933 and was necessary -- as the then Secretary of State noted in introducing the Bill on First Reading -- "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, *House of Commons Debates (Hansard)* (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, *Elan Corp. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (C.A.), *per* Doherty J.A. in dissent; *Re Skydome Corp.* (1998), 16 C.B.R. (4th) 125 (Ont. Gen. Div.); *Re Anvil Range Mining Corp.* (1998), 3 C.B.R. (4th) 93 (Ont. Gen. Div.).

52 In this respect, I agree with the following statement of Doherty J.A. in *Elan, supra,* at pp. 306-307:

> ... [T]he Act was designed to serve a "broad constituency of investors, creditors and employees".[3] Because of that "broad constituency" the court must, when considering applications brought under the Act, *have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.* [Emphasis added.]

Application of the Principles of Interpretation

53 An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the application judge pointed out, the restructuring underpins the financial viability of the Canadian ABCP market itself.

54 The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

55 This perspective is flawed in at least two respects, however, in my opinion. First, it reflects a view of the purpose and objects of the CCAA that is too narrow. Secondly, it overlooks the reality of the ABCP marketplace and the context of the restructuring in question here. It may be true that, in their capacity as ABCP *Dealers*, the releasee financial institutions are "third-parties" to the restructuring in the sense that they are not creditors of the debtor corporations. However, in their capacities as *Asset Providers* and *Liquidity Providers*, they are not only creditors but they are prior secured creditors to the Noteholders. Furthermore -- as the application judge found -- in these latter capacities they are making significant contributions to the restructuring by "foregoing immediate rights to assets and ... providing real and tangible input for the preservation and enhancement of the Notes" (para. 76). In this context, therefore, the application judge's remark at para. 50 that the restructuring "involves the commitment and participation of all parties" in the ABCP market makes sense, as do his earlier comments at paras. 48-49:

> Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.
>
> In these circumstances, *it is unduly technical to classify the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors*, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring. [Emphasis added.]

56 The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper ..." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor and creditors. His focus was on *the effect* of the restructuring, a perfectly permissible perspective, given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal."

57 I agree. I see no error on the part of the application judge in approaching the fairness assessment or the interpretation issue with these considerations in mind. They provide the context in which the purpose, objects and scheme of the CCAA are to be considered.

The Statutory Wording

58 Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in:

> a) the skeletal nature of the CCAA;
> b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in
> c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

59 Sections 4 and 6 of the CCAA state:

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or

liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding

(*a*) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(*b*) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Compromise or Arrangement

60 While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada*, loose-leaf, 3rd ed., vol. 4 (Toronto: Thomson Carswell) at 10A-12.2, N para. 10. It has been said to be "a very wide and indefinite [word]": *Re Refund of Dues under Timber Regulations*, [1935] A.C. 184 at 197 (P.C.), affirming S.C.C. [1933] S.C.R. 616. See also, *Re Guardian Assur. Co.*, [1917] 1 Ch. 431 at 448, 450; *Re T&N Ltd. and Others (No. 3)*, [2007] 1 All E.R. 851 (Ch.).

61 The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement." I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

62 A proposal under the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3 (the "BIA") is a contract: *Employers' Liability Assurance Corp. Ltd. v. Ideal Petroleum* (1959) Ltd. [1978] 1 S.C.R. 230 at 239; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 at para. 11 (C.A.). In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes, and therefore is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See *Re Air Canada* (2004), 2 C.B.R. (5th) 4 at para. 6 (Ont. S.C.J.); *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 at 518 (Gen. Div.).

63 There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor

and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan -- including the provision for releases -- becomes binding on all creditors (including the dissenting minority).

64 *Re T&N Ltd. and Others, supra,* is instructive in this regard. It is a rare example of a court focussing on and examining the meaning and breadth of the term "arrangement". T&N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. *Companies Act 1985*, a provision virtually identical to the scheme of the CCAA -- including the concepts of compromise or arrangement.[4]

65 T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the "EL claimants") would assert their claims. In return, T&N's former employees and dependants (the "EL claimants") agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

66 Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The Court rejected this argument. Richards J. adopted previous jurisprudence -- cited earlier in these reasons -- to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example.[5] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

> In my judgment it is not a necessary element of an arrangement for the purposes of s. 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s. 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many years to give the term its widest meaning. *Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party.* [Emphasis added.]

67 I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in *T&N* were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for

what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial third parties are making to the ABCP restructuring. The situations are quite comparable.

The Binding Mechanism

68 Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind all creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes[6] and obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The Required Nexus

69 In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

70 The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan. This nexus exists here, in my view.

71 In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

a) The parties to be released are necessary and essential to the restructuring of the debtor;
b) *The claims to be released are rationally related to the purpose of the Plan and necessary for it*;
c) The Plan cannot succeed without the releases;
d) *The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan*; and
e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

72 Here, then -- as was the case in *T&N* -- there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP

Notes and are required for the Plan to succeed. At paras. 76-77 he said:

> [76] I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.
>
> [77] This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

73 I am satisfied that the wording of the CCAA -- construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation -- supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The Jurisprudence

74 Third party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's Bench in *Re Canadian Airlines Corp.* (2000), 265 A.R. 201, leave to appeal refused by *Resurgence Asset Management LLC v. Canadian Airlines Corp.* (2000), 266 A.R. 131 (C.A.), and [2001] S.C.C.A. No. 60, (2001) 293 A.R. 351 (S.C.C.). In *Re Muscle Tech Research and Development Inc.* (2006), 25 C.B.R (5th) 231 (Ont. S.C.J.) Justice Ground remarked (para. 8):

> [It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

75 We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of *Re Canadian Airlines*, however, the releases in those restructurings -- including *Muscle Tech* -- were not opposed. The appellants argue that those cases are wrongly decided, because the court simply does not have the authority to approve such releases.

76 In *Re Canadian Airlines* the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the well-spring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

77 Justice Paperny began her analysis of the release issue with the observation at para. 87 that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company." It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in *Michaud v. Steinberg*,[7] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument -- dealt with later in these reasons -- that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the

amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92).

78 Respectfully, I would not adopt the interpretive principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

79 The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are *Michaud v. Steinberg, supra*; *NBD Bank, Canada v. Dofasco Inc.*, (1999), 46 O.R. (3d) 514 (C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada* (2001), 19 B.L.R. (3d) 286 (B.C.S.C.); and *Re Stelco Inc.* (2005), 78 O.R. (3d) 241 (C.A.) ("*Stelco I*"). I do not think these cases assist the appellants, however. With the exception of *Steinberg*, they do not involve third party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that *Steinberg* does not express a correct view of the law, and I decline to follow it.

80 In *Pacific Coastal Airlines*, Tysoe J. made the following comment at para. 24:

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

81 This statement must be understood in its context, however. Pacific Coastal Airlines had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action dismissed on grounds of *res judicata* or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

82 The facts in *Pacific Coastal* are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian -- at a contractual level -- may have had some involvement with the particular dispute. Here, however, the disputes that are the subject-matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

83 Nor is the decision of this Court in the *NBD Bank* case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly-owned subsidiary of Dofasco. The Bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors." Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the Bank. On appeal, he argued that since the Bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process -- in short, he was personally protected

by the CCAA release.

84 Rosenberg J.A., writing for this Court, rejected this argument. The appellants here rely particularly upon his following observations at paras. 53-54:

> 53 In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 at 297, the *CCAA* is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.
>
> 54 In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the *CCAA* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. [Footnote omitted.]

85 Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third party releases was not under consideration at all. What the Court was determining in *NBD Bank* was whether the release extended by its terms to protect a third party. In fact, on its face, it does not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little factual similarity in *NBD* to the facts now before the Court" (para. 71). Contrary to the facts of this case, in *NBD Bank* the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement involving significant contributions by the beneficiaries of the release -- as is the situation here. Thus, *NBD Bank* is of little assistance in determining whether the court has authority to sanction a plan that calls for third party releases.

86 The appellants also rely upon the decision of this Court in *Stelco I*. There, the Court was dealing with the scope of the CCAA in connection with a dispute over what were called the "Turnover

Payments". Under an inter-creditor agreement one group of creditors had subordinated their rights to another group and agreed to hold in trust and "turn over" any proceeds received from Stelco until the senior group was paid in full. On a disputed classification motion, the Subordinated Debt Holders argued that they should be in a separate class from the Senior Debt Holders. Farley J. refused to make such an order in the court below, stating:

> [Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves *and not directly involving the company*. [Citations omitted; emphasis added.]
>
> See *Re Stelco Inc.* (2005), 15 C.B.R. (5th) 297 (Ont. S.C.J.) at para. 7.

87 This Court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the Court were quite different from those raised on this appeal.

88 Indeed, the Stelco plan, as sanctioned, included third party releases (albeit uncontested ones). This Court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and therefore that they were entitled to a separate civil action to determine their rights under the agreement: *Re Stelco Inc.*, (2006), 21 C.B.R. (5th) 157 (Ont. C.A.) ("*Stelco II*"). The Court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The Court said (para. 11):

> In [*Stelco I*] -- the classification case -- the court observed that it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company ... *[H]owever, the present case is not simply an inter-creditor dispute that does not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process*. [Emphasis added.]

89 The approach I would take to the disposition of this appeal is consistent with that view. As I have noted, the third party releases here are very closely connected to the ABCP restructuring process.

90 Some of the appellants -- particularly those represented by Mr. Woods -- rely heavily upon the decision of the Quebec Court of Appeal in *Michaud v. Steinberg, supra*. They say that it is determinative of the release issue. In *Steinberg*, the Court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 -- English translation):

> [42] Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.

...

> [54] The Act offers the respondent a way to arrive at a compromise with is creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.
>
> ...
>
> [58] The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

91 Justices Vallerand and Delisle, in separate judgments, agreed. Justice Vallerand summarized his view of the consequences of extending the scope of the CCAA to third party releases in this fashion (para. 7):

> In short, the Act will have become the Companies' *and Their Officers and Employees* Creditors Arrangement Act -- an awful mess -- and likely not attain its purpose, which is to enable the company to survive in the face of *its* creditors and through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of operation, contrary to its purposes and, for this reason, is to be banned.

92 Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature -- they released directors from all claims, including those that were altogether unrelated to their corporate duties with the debtor company -- rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para. 90 he said:

> The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this [A]ct that these terms *encompass all that should enable the person who has recourse to it to fully dispose of his debts*, both those that exist on the date when he has recourse to the statute and *those contingent on the insolvency in which he finds himself* ... [Emphasis added.]

93 The decision of the Court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself," however. On occasion such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in *Steinberg*, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analysing the Act -- an approach inconsistent with the jurisprudence referred to above.

94 Finally, the majority in *Steinberg* seems to have proceeded on the basis that the CCAA cannot

interfere with civil or property rights under Quebec law. Mr. Woods advanced this argument before this Court in his factum, but did not press it in oral argument. Indeed, he conceded that if the Act encompasses the authority to sanction a plan containing third-party releases -- as I have concluded it does -- the provisions of the CCAA, as valid federal insolvency legislation, are paramount over provincial legislation. I shall return to the constitutional issues raised by the appellants later in these reasons.

95 Accordingly, to the extent *Steinberg* stands for the proposition that the court does not have authority under the CCAA to sanction a plan that incorporates third-party releases, I do not believe it to be a correct statement of the law and I respectfully decline to follow it. The modern approach to interpretation of the Act in accordance with its nature and purpose militates against a narrow interpretation and towards one that facilitates and encourages compromises and arrangements. Had the majority in *Steinberg* considered the broad nature of the terms "compromise" and "arrangement" and the jurisprudence I have referred to above, they might well have come to a different conclusion.

The 1997 Amendments

96 *Steinberg* led to amendments to the CCAA, however. In 1997, s. 5.1 was added, dealing specifically with releases pertaining to directors of the debtor company. It states:

> 5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> Exception
>
> (2) A provision for the compromise of claims against directors may not include claims that
>
> (*a*) relate to contractual rights of one or more creditors; or
>
> (*b*) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> Powers of court
>
> (3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.
>
> Resignation or removal of directors
>
> (4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.
>
> 1997, c. 12, s. 122.

97 Perhaps the appellants' strongest argument is that these amendments confirm a prior lack of

authority in the court to sanction a plan including third party releases. If the power existed, why would Parliament feel it necessary to add an amendment specifically permitting such releases (subject to the exceptions indicated) in favour of directors? *Expressio unius est exclusio alterius*, is the Latin maxim sometimes relied on to articulate the principle of interpretation implied in that question: to express or include one thing implies the exclusion of the other.

98 The maxim is not helpful in these circumstances, however. The reality is that there *may* be another explanation why Parliament acted as it did. As one commentator has noted:[8]

> Far from being a rule, [the maxim *expressio unius*] is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes its does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.

99 As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in *Steinberg*. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring, rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden and Morawetz, vol. 1, *supra*, at 2-144, Es.11A; *Le Royal Penfield Inc. (Syndic de)*, [2003] R.J.Q. 2157 at paras. 44-46 (C.S.).

100 Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

<u>The Deprivation of Proprietary Rights</u>

101 Mr. Shapray very effectively led the appellants' argument that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect: *Halsbury's Laws of England*, 4th ed. reissue, vol. 44 (1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2nd ed., *supra*, at 183; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Markham: Butterworths, 2002) at 399. I accept the importance of this principle. For the reasons I have explained, however, I am satisfied that Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself. I would therefore not give effect to the appellants' submissions in this regard.

The Division of Powers and Paramountcy

102 Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the *Constitution Act, 1867*, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the *Civil Code of Quebec*.

103 I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: *Reference re: Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659. As the Supreme Court confirmed in that case (p. 661), citing Viscount Cave L.C. in *Royal Bank of Canada v. Larue* [1928] A.C. 187, "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament." Chief Justice Duff elaborated:

> Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

104 That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action -- normally a matter of provincial concern -- or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.

Conclusion With Respect to Legal Authority

105 For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

(2) The Plan is "Fair and Reasonable"

106 The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

107 Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In the absence of a demonstrable error an appellate court will not interfere: see *Re Ravelston Corp. Ltd.* (2007), 31 C.B.R. (5th) 233 (Ont. C.A.).

108 I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties -- including leading Canadian financial institutions -- that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and

supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

109 The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

110 The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers, (ii) limits the type of damages that may be claimed (no punitive damages, for example), (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order, and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

111 The law does not condone fraud. It is the most serious kind of civil claim. There is therefore some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: *Fotinis Restaurant Corp. v. White Spot Ltd.* (1998), 38 B.L.R. (2d) 251 at paras. 9 and 18 (B.C.S.C.). There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings -- the claims here all being untested allegations of fraud -- and to include releases of such claims as part of that settlement.

112 The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, that the need "to avoid the potential cascade of litigation that ... would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

113 At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here -- with two additional findings -- because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

a) The parties to be released are necessary and essential to the restructuring of the debtor;
b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
c) The Plan cannot succeed without the releases;
d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
g) The releases are fair and reasonable and not overly broad or offensive to public

policy.

114 These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

115 The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they -- as individual creditors -- make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

116 All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

117 In insolvency restructuring proceedings almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices," inasmuch as everyone is adversely affected in some fashion.

118 Here, the debtor corporations being restructured represent the issuers of the more than $32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. He was required to consider and balance the interests of <u>all</u> Noteholders, not just the interests of the appellants, whose notes represent only about 3% of that total. That is what he did.

119 The application judge noted at para. 126 that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized at para. 134 that:

> No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity among all stakeholders.

120 In my view we ought not to interfere with his decision that the Plan is fair and reasonable in all the circumstances.

D. DISPOSITION

121 For the foregoing reasons, I would grant leave to appeal from the decision of Justice Campbell, but dismiss the appeal.

R.A. BLAIR J.A.
J.I. LASKIN J.A.:-- I agree.
E.A. CRONK J.A.:-- I agree.

* * * * *

SCHEDULE "A" - CONDUITS

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

* * * * *

SCHEDULE "B" - APPLICANTS

ATB Financial

Caisse de Dépôt et Placement du Québec

Canaccord Capital Corporation

Canada Post Corporation

Credit Union Central of Alberta Limited

Credit Union Central of British Columbia

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank Financial Inc./National Bank of Canada

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

* * * * *

SCHEDULE "A" - COUNSEL

1) Benjamin Zarnett and Frederick L. Myers for the Pan-Canadian Investors Committee.
2) Aubrey E. Kauffman and Stuart Brotman for 4446372 Canada Inc. and 6932819 Canada Inc.
3) Peter F.C. Howard and Samaneh Hosseini for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG.
4) Kenneth T. Rosenberg, Lily Harmer and Max Starnino for Jura Energy Corporation and Redcorp Ventures Ltd.
5) Craig J. Hill and Sam P. Rappos for the Monitors (ABCP Appeals).

6) Jeffrey C. Carhart and Joseph Marin for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor.
7) Mario J. Forte for Caisse de Dépôt et Placement du Québec.
8) John B. Laskin for National Bank Financial Inc. and National Bank of Canada.
9) Thomas McRae and Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al).
10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.
11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank.
12) Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees.
13) Usman Sheikh for Coventree Capital Inc.
14) Allan Sternberg and Sam R. Sasso for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.
15) Neil C. Saxe for Dominion Bond Rating Service.
16) James A. Woods, Sebastien Richemont and Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP.
17) Scott A. Turner for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.
18) R. Graham Phoenix for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

1 Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

2 Justice Georgina R. Jackson and Dr. Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., *Annual Review of Insolvency Law, 2007* (Vancouver: Thomson Carswell, 2007).

3 Citing Gibbs J.A. in *Chef Ready Foods, supra,* at pp. 319-320.

4 The Legislative Debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the *Companies Act 1985* (U.K.): see *House of Commons Debates (Hansard), supra.*

5 See *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 192; *Ontario Business Corporations Act,* R.S.O. 1990, c. B.16, s. 182.

6 A majority in number representing two-thirds in value of the creditors (s. 6).

7 *Steinberg* was originally reported in French: [1993] R.J.Q. 1684 (C.A.). All paragraph references to *Steinberg* in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055.

8 Reed Dickerson, *The Interpretation and Application of Statutes* (1975) at pp. 234-235, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at 621.

Tab 2

Case Name:

McGee v. London Life Insurance Co.

RE: Barbara McGee and Pauline McCallum,
Applicants, and
London Life Insurance Company Limited, Respondent

[2011] O.J. No. 4206

2011 ONSC 2897

92 C.C.P.B. 31

3 C.C.L.I. (5th) 275

2011 CarswellOnt 9676

208 A.C.W.S. (3d) 856

Court File No. 07-CV-327818CP

Ontario Superior Court of Justice

H.J. Wilton-Siegel J.

Heard: December 6-8, 2010.
Judgment: June 17, 2011.

(204 paras.)

Pensions and benefits law -- Private pension plans -- Administration of pensions -- Surplus funds -- Allocation -- Entitlement of employees -- Entitlement of employers -- Winding-up of plan -- Determination of entitlement to funds -- Partial winding up -- Application by pension plan members for declaration that pension plan assets attributable to partial windup were impressed with a trust dismissed -- Employer established plan in 1922, which was later amended to provide employer with right to any surplus, and partially wound-up in 1996 pursuant to corporate reorganization -- Plan assets not impressed with trust as employer had no intention to establish trust and was not required to secure plan obligations by means of trust -- Employer reserved right to amend plan to incorporate right to retain surplus and consequently such amendments were validly enacted.

Application by pension plan members for a declaration that the plan assets attributable to the partial windup were impressed with a trust. In 1922, the respondent established the pension fund as a defined contribution plan which provided for optional member contributions that were matched by company grants of 50 per cent of such contributions. In 1940, a new pension plan was established and the company ceased receiving contributions to pursuant to the 1922 pension plan. The 1940 pension plan fixed mandatory employee contributions at five per cent of income and the company's contribution at

one per cent of the employee's income. Thereafter, the plan was amended on several occasions. In 1973, another new pension plan was established, which continued the 1940 pension plan and continued mandatory contributions. In addition, under the 1973 plan, the company reserved the right to a return of any surplus attributable to its contributions. The plan was subsequently revised to provide that the company was entitled to the return of any surplus. In 1993, the company entered into a trust agreement with three individual trustees and the pension fund assets were transferred into their control. Under the trust agreements the company retained the right to terminate the agreement, trust fund and/or the plan in whole or in part, and to amend the agreements. From 1922 until 1993, the assets, liabilities, revenues and expenses of the plan were recorded in the company financial statements. However, in or around 1986, the company identified a specific pool of assets which it assigned to the pension plan. In 1996, the company underwent a reorganization which resulted in staff reductions and triggered a partial wind-up of the plan. In connection with the partial windup, the plan actuary filed a partial windup report which did not deal with the distribution attributable to the partial windup. He later filed an amended report in which he and the company took the position that the plan members were not entitled to the partial windup surplus, which was valued at approximately $16 million. Thereafter, the applicants commenced a class proceeding for, among other things, a declaration that the plan assets attributable to the partial windup were impressed with a trust.

HELD: Application dismissed. The plan assets, in particular the surplus assets, were not impressed with a trust in favour of the plan members, former plan members and beneficiaries. The employer had no intention to establish a trust of assets to fund its obligations under the pension plan prior to the amendments in 1973, which provided the employer with a right to any surplus in the pension plan assets, as the by-laws which established or amended the pension plans did not establish a trust of plan assets, there was no segregation of funds, it never represented to plan members that any assets had been vested in a trust, and it retained the right to terminate the plan. Furthermore, prior to 1993, there was no evidence that the Department of National Revenue required that the plan assets be placed in trust or that the employer represented to the Department of National Revenue that a trust had been created. In 1973, the employer had the power to amend the terms of the plan to incorporate a right in its favour to any surplus plan assets and consequently the provisions in the later revised plans regarding the employer's right to retain the plan surplus were validly enacted. Finally, while the employer owed and continued to owe fiduciary and other obligations to plan members, such obligations did not obligate it to impose the plan assets with a trust and there was no evidence that the employer was in breach of any of those obligations.

Statutes, Regulations and Rules Cited:

Bankruptcy Act, R.S.C. 1970, c. 14,

Canada Joint Stock Companies Clauses Act, 1869, S.C. c. 12, s. 13

Canadian and British Insurance Companies Act, R.S.C. 1985, c. I-15, s. 88

Class Proceedings Act, 1992, c. 6, s. 5(1)

Income Tax Act, S.C. 1970-71-72, c. 63, s. 20(1)(s)

Insurance Act, 1910, S.C. 1910, c. 32, s. 57(2)

Interpretation Act, R.S.C. 1906, c. 1, s. 31(g)

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

Pension Benefits Act Regulation 103/66, s. 18(1)

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 57.01(6)

Counsel:

Howard Goldblatt and Dona L. Campbell, for the Applicants.

Jeff Galway and Kathryn Bush, for the Respondent.

ENDORSEMENT

1 **H.J. WILTON-SIEGEL J.**:-- The applicants Barbara McGee and Pauline McCallum (the "Applicants") submit that the assets of the London Life Insurance Company Staff Pension Plan (the "Plan") are impressed with a trust and, as a result, pursuant to the provisions of the Pension Benefits Act, R.S.O. 1990, c. P-8 (the "PBA"), the assets attributable to the partial windup of the Plan in respect of a 1996 reorganization, including any surplus funds, must be distributed to the Plan members affected by the partial windup. In this Endorsement, the term "Plan" refers to the London Life Staff Pension Plan as it existed from time to time, commencing with the 1922 Pension Plan (as defined below).

Background

2 The London Life Insurance Company ("London Life" or the "Company") was incorporated by an act of the Legislative Assembly of the Province of Ontario in 1874. In 1884, it was continued under the laws of Canada by an act of Parliament, which was subsequently amended in 1885 and again in 1891. In 1986, London Life received Letters Patent continuing the corporation under the Canadian and British Insurance Companies Act, R.S.C. 1985, c. I-15, as amended, having authorization to conduct the business of life insurance and accident and sickness insurance.

The Staff Pension Plan

3 London Life first established a staff pension plan in 1916 pursuant to By-Law 28 of the Company ("By-Law 28"), which provided for the purchase of pensions for agents and employees of the Company. The pension plan was established pursuant to authority granted by section 57(2) of The Insurance Act, 1910, S.C. 1910, c. 32, which provided that the directors could pass a by-law for the creation of a staff pension plan, provided that such by-law was approved by the shareholders. It does not appear that any monies were ever contributed by London Life or any potential members of the staff pension fund under By-Law 28.

4 In 1922, London Life repealed By-Law 28 and replaced it with a new By-Law 28 ("New by-Law 28"), which also established a pension plan for agents and employees of the Company on terms substantially similar to the earlier by-law. This pension plan was also established pursuant to the authority granted under section 57(2) of The Insurance Act, 1910.

5 The pension fund established under New By-Law 28 (the "1922 Pension Plan") was a defined contribution plan which provided for optional member contributions that were matched by Company grants of 50% of such contributions. Upon retirement, a member's contributions, related Company grants, and interest credited thereon by the Company were used to purchase an annuity or coupon income bond from the Company. New By-Law 28 set out the terms of the Plan established thereunder in

considerable detail. Paragraph 14 provided that "all matters arising in connection with the carrying out of [New By-Law 28] shall be regulated and prescribed by rules and regulations to be from time to time adopted or amended by the Directors of the Company".

6 Paragraphs 5 and 6 of New By-Law 28, dealing, respectively, with the contributors' accounts and the crediting of interest, are relevant for the present proceedings:

> 5. An account shall be kept with each Contributor and he shall be credited therein with all contributions made by him to the fund, which amounts together with the interest to be added as hereinafter provided shall be kept separate and distinct from the amounts granted by the Company. There shall also be kept a separate account of the grants of the Company in the name of each Contributor to which shall be credited from time to time an amount out of the funds of the Company equal to one-half of the contributions actually paid from time to time by such Contributor as authorized by this By Law and the interest on such grants as hereinafter provided shall also be credited to such amounts.
> 6. Interest at the rate hereinafter provided shall be allowed by the Company on the 31st of December each year upon the amounts at the credit of the Contributor, both in respect to contributions and grants and the interest as allowed in respect of contributions shall be credited to such contributions and held as such and the interest allowed in respect of the amount to the credit of said account in respect of grants made by the Company shall be credited to grants and held as such. No special investments of the Company shall be allotted to the fund but the interest allowed thereon and credited to the accounts as above mentioned shall be ascertained as follows: The average net rate of interest earned on the assets of the Company shall be computed by the method prescribed by the Insurance Company of the Dominion of Canada for insertion in the annual return and statement made to the Department and from such rate shall be deducted 10% which it is estimated will be a fair proportion thereof to allow for the cost of investing and taking care of investments and there shall also be deducted therefrom such further proportion of such rate as the total losses, if any, occurred by the Company upon all their invested assets bear to the total earnings from invested assets of the said Company. In ascertaining such losses, if any, the books of the Company shall be taken as conclusive and such losses shall be taken to have occurred in the years in which the same are written off and for the purposes hereof of any amount written off any security or property shall be considered to have been a loss. The rate, after such deduction for expenses and losses is made shall be the rate of interest to be allowed. Interest on any sums paid in during any month shall only be calculated thereon from the last day of the month during which they are so paid.

7 Starting in 1922, agents and employees made contributions to the Plan. From 1922 until the end of 1993, all contributions and Company grants to the Plan over this period were included in the assets and liabilities of London Life in its financial statements. Certain accounting aspects of the administration of the Plan are addressed further below.

8 Section 12 of New By-Law 28 also provided that any forfeited amounts would be transferred to a contingent fund to be used to pay medical benefits for the contributors or their families and that any excess was to be applied for the remaining contributors. The forfeited amounts contemplated by this provision were the Company grants, and interest thereon, in respect of contributors whose employment with London Life was terminated or who withdrew their own contributions prior to purchasing a retirement annuity.

9 In January 1939, the Company approved by-law 49 for the provision of pensions to agents and employees of London Life ("By-Law 49"). By-Law 49 became effective on January 1, 1940. On that date, London Life ceased receiving contributions pursuant to the 1922 Pension Plan established under New By-Law 28, and a new pension plan was established pursuant to rules and regulations enacted under paragraph 3 of By-Law 49 (the "1940 Pension Plan").

10 The following paragraphs in By-Law 49 are relevant for this proceeding:

> 3. THE amount of such payments by the Agents and Employees and the Company and the time and manner of making the same, the purposes for which all moneys in the said fund are to be held, the application thereof to the purchase of annuities, including the specification of the time when such moneys are to be so applied, or the repayment or distribution of the whole or any part of such moneys in cash either to an Agent or Employee or the Company in such cases as may be provided for, the allowance and crediting of interest and the rate thereof, the right of the Company to refuse to receive further payments and the effect of such refusal, and the manner of giving notice of such refusal, and all other details which may be considered necessary in reference to such funds shall be from time to time set forth, provided and governed by such rules, regulations, form and orders as shall be adopted or prescribed from time to time by resolution of the Board of Directors, and the rights and interests of Agents and Employees in such fund shall be subject to such rules, regulations and orders.
> 4. SUCH rules, regulations, forms and orders may, from time to time, be rescinded, repealed, altered, amended or added to by the Directors of the Company, and shall become effective at such time or times as may be prescribed by the Directors but no such rescission, repeal, alteration, amendment or addition shall to his prejudice affect [sic] any rights theretofore acquired by any Agent or Employee in respect of any moneys previously paid by or credited to such Agent or Employee, but all moneys paid thereafter by any Agent or Employee and the rights of any Agent or Employee in respect of all moneys so thereafter paid, shall be subject to such new rules and regulations from time to time made, until further alteration thereof.
> 5. THE moneys received and held by the Company under the provisions of this By-law shall be held in one fund, with the moneys received and held under the former Staff Pension Fund By-law, and all such moneys shall be known as the Staff Pension Fund, but separate accounts shall be kept for the moneys received under said former Staff Pension Fund By-law and under this By-law, so that the amounts received under each By-law shall not be confused and all persons who have become entitled to any right, title or interest in the Pension Fund held under the said former Staff Pension Fund By-law shall retain such right, title and interest and the same shall in no wise be affected or derogated hereby.
> 6. ON the 31st of December in each year the Company shall ascertain on the basis prescribed by the Directors of the Company the amount of the reserve which should be maintained to provide the benefits to be granted under this By-law in respect of the service to such date of all Agents and Employees of the Company. The amount of such reserve shall be maintained in the Fund and shall include the total credit balance in respect of all payments by Agents and Employees and all payments under this By-law shall be made out of the said Fund. The Company shall, from time to time, transfer between the general funds of the Company and the Staff Pension Fund such amounts as may be required to provide for the payments to be made out of the Fund and to maintain the proper amount of reserve therein. [emphasis added]

11 The 1940 Pension Plan contained separate rules and regulations for Company agents and for Company employees. In each case, however, the 1940 Pension Plan contemplated a defined benefit plan to which contributions by the qualifying employees and agents were mandatory. An amendment to the rules and regulations in 1949 permitted additional voluntary contributions by Plan contributors.

12 Under the 1940 Pension Plan, as so amended, the mandatory pension contributions were fixed at 5% of income. An employee accumulated pension credits comprising (1) in respect of the employee's mandatory contribution, a variable percentage of the employee's income in each contribution year dependent on the employee's age; and (2) in respect of the Company's contribution, a fixed percentage (1%) of the employee's income in each contribution year.

13 The 1940 Pension Plan was amended on several occasions from 1957 to 1974 both by amendments to By-Law 49 and by amendments to the rules and regulations passed thereunder. In 1957, By-Law 49 was re-designated as By-Law 122, Staff Pension Fund By-Law ("By-Law 122").

14 In 1974, By-Law 122 was repealed and By-Law 126 (Staff Pension Fund) ("By-Law 126") was enacted, which contemplated a new pension plan for the agents and employees of the Company effective January 1, 1973 (the "1973 Pension Plan").

15 The full text of By-Law 126 is as follows:

> 1. There shall be established, effective as of January 1, 1973, a pension plan for the benefit of the field and office staff of the Company in accordance with, and subject to the terms and conditions of, the Staff Pension Plan dated January 1, 1973 submitted to the meeting and initialed by the Chairman for identification (hereinafter referred to as the "Plan") and the Directors are hereby authorized and directed to do such acts and things as they deem necessary or desirable to give effect hereto.
> 2. The Plan and any of its terms, conditions and other provisions and any rules, regulations, forms, orders or other actions or things made or done or required to be done in relation thereto may be rescinded, repealed, altered, amended or added to, and be effective at such times, as the Directors may, in their discretion, determine from time to time; but provided always that no such revision, repeal, alteration, amendment or addition shall to his or her prejudice affect the rights theretofore acquired pursuant to the Plan by any field or office staff member.
> 3. By-law No. 122 is hereby repealed in its entirety, as are all other previous acts, or proceedings inconsistent herewith, except that
>
>   (a) the Staff Pension Fund shall be continued and administered pursuant to the Plan; and
>
>   (b) to the extent that the said By-law No. 122 and the previous acts or proceedings are required to remain in full force and effect so as not to affect, to his or her prejudice, any rights acquired by any field or office staff member prior to January 1, 1973 in respect to any moneys previously paid by or credited to such field or office staff member.

16 By-Law 126 therefore continued the 1940 Pension Plan as it existed in 1973 and provided that, thereafter, the Plan was to be administered in accordance with the terms of the 1973 Pension Plan, which also contemplated a defined benefit plan.

17 The 1973 Pension Plan continued mandatory contributions at 5% of income but provided for a pension equal to a percentage, not exceeding 70%, of the member's final average earnings calculated by reference to the member's years of service. In respect of voluntary contributions, which continued to be permitted for a relatively short period under the 1973 Pension Plan, the Plan continued a pension credit approach to the calculation of pension entitlement. The right to make voluntary contributions was subsequently terminated by the Company.

18 Section 16 of the 1973 Pension Plan purported to reserve a right of the Company to a return of any surplus in the Plan on any Plan termination attributable to the Company's contributions to the Plan:

> 16. Future of the Plan
>
> While the Company expects to maintain the Plan, the Company reserves the right to change or terminate the Plan, in whole or in part, with respect to all Members or a class or group of Members. However, no such change will adversely affect the pensions accrued up to the date of change or termination with respect to service and earnings to that point in time. In the event of termination of the Plan, no contributions made by the Company to the Plan can be returned to the Company unless all accrued liabilities to Members, former Members and their beneficiaries for service and earnings to date have been satisfied ... [emphasis added]

19 The 1973 Pension Plan was revised effective January 1, 1987 by revised rules and regulations. The revised Plan contained a provision similar to section 16 of the 1973 Pension Plan. The revised Plan also provided that the Plan became non-contributory for members under the age of 55.

20 Paragraph 13.0 of the revised Plan addressed the issue of surplus more generally for the first time in the following terms:

> C. SURPLUS
>
> The Company reserves the right, with prior written consent of the Pension Commission of Ontario and Revenue Canada, Taxation, where applicable, to take a refund of any surplus or experience gain that is in excess of any withholding amounts specified by the current practices of applicable authorities. A refund of any surplus or experience gain under this Section shall only be made to the Company provided that all unfunded liabilities and experience deficiencies under the Plan have been eliminated.
>
> The Company reserves the right to use a portion of the Surplus to provide for all or a part of the Company's Regular Pension Contributions, as provided in subsection 4 E.

21 The Plan was further revised by an amendment and restatement effective January 1, 1991, which was approved by the board of directors of the Company (the "1991 Restatement"). Paragraph 13.C of the 1991 Restatement was substantially similar to the provisions of paragraph 13.C in the 1987 revision. Paragraph 14 of the 1991 Restatement also contained a provision similar to section 16 of the 1973 Pension Plan reserving in favour of the Company a right to amend or terminate the Plan. However, the provision went on to provide specifically that, in the event of termination of the Plan, "any surplus may be returned to the company after provision has been made for all accrued liabilities to members, former members and their beneficiaries for service and earnings to the date of termination".

22 Effective December 31, 1993, London Life entered into a trust agreement with three individual trustees (the "1993 Trust Agreement"). At that time, pension fund assets were transferred into the control of the trustees, and the assets of the Company were reduced in like amount. The trustees invested the pension fund assets in a segregated account maintained by the Company.

23 The trustees of the pension fund assets were changed by agreements in 1994 (the "1994 Trust Agreement"), in 2002 (the "2002 Trust Agreement"), and in 2010 (the "2010 Trust Agreement") (the 1993 Trust Agreement, the 1994 Trust Agreement, the 2002 Trust Agreement and the 2010 Trust Agreement are herein referred to collectively as the "Trust Agreements").

24 Each of the 1993 Trust Agreement, the 1994 Trust Agreement and the 2002 Trust Agreement provided that London Life retained the right to terminate the relevant agreement and trust fund and/or the Plan in whole or in part. Each Agreement further provided that "[u]pon instructions from the Company to the Trustees, the Trustees shall distribute the assets of the Trust Fund ... in accordance with the instructions of the Company ... " The 2010 Trust Agreement contains a similar provision.

25 In addition, each of the 1993 Trust Agreement and the 1994 Trust Agreement contained a provision by which the Company reserved the right at any time to amend or modify, in whole or in part, any or all of the provisions of these Trust Agreements, with retroactive or prospective effect, upon 30 days prior written notice to the trustees under such Agreements. The 2002 Trust Agreement and the 2010 Trust Agreement also contained provisions giving the Company the right to amend such Trust Agreements.

Treatment of Assets and Liabilities of the Plan

26 The extent to which London Life segregated assets to fund Plan liabilities prior to 1993 is significant for the determinations herein. The following summarizes the evidence before the Court on this issue.

27 First, as an accounting matter, from 1922 to December 31, 1993, the assets and liabilities, as well as the revenues and expenses, of the Plan were recorded in the Company financial statements rather than in a separate entity.

28 The 1922 financial statements include the employee and company contributions and grants in the profit and loss statement, and the liabilities of the Plan on the balance sheet. There was, however, no separate asset account for the assets of the Plan. This presentation of the Plan assets and liabilities, and revenues and expenses, continued until the 1993 fiscal year with the addition from time to time of contingency, reserve and other liability and expense accounts related to the Plan.

29 Commencing in the 1974 fiscal year, the financial statements also included a note indicating whether or not an unfunded liability existed based on a valuation of Plan liabilities. This note was expanded, starting with the 1982 fiscal year, to include a statement regarding the Plan's "share of London Life's assets". Commencing in 1987, consistent with a change in London Life's investment policy regarding the Plan described below, the note refers to the value of the "plan assets" as of the year-end. Notwithstanding this additional disclosure, however, the balance sheet did not reflect any "plan assets" as a category of assets separate from London Life's other assets.

30 Therefore, at all times prior to December 31, 1993, for financial accounting purposes, the assets attributable to the Plan were included in the general assets of the Company rather than as a separate category of assets of the Company.

31 Second, there is no evidence that, prior to 1986, the Company assigned any particular subset of its general assets to the Plan in the sense that the market value or investment return on such assets was taken into consideration in determining the extent of any unfunded liability or investment experience in respect of the Plan.

32 The evidence indicates, however, that, at some point in or around 1986, London Life did begin identifying a specific pool of assets that it assigned to the Plan for such purposes. The Applicants say that this action - which they call "earmarking" of assets - is significant even if it occurred some time after the enactment of By-Law 49 and the rules and regulations establishing the 1940 Pension Plan. This issue is addressed below.

Regulation of Pension Plans Under the ITA

33 In 1942, the predecessor to the Income Tax Act (Canada) (the "ITA"), as it existed at that time, was amended to require pension plans to be "approved" by the Department of National Revenue (the "DNR", subsequently Revenue Canada and currently the Canada Revenue Agency) if they wished to qualify for certain tax benefits under the ITA. These benefits included: (1) deductibility by employees of their contributions; (2) deductibility by employers of special payments made in respect of employees' past service; (3) deductibility by employers of contributions made in respect of employees' current service; and (4) after 1945, exemption of income earned by an approved pension fund.

34 The Statement of Principles and Rules, issued by the DNR in 1947 (the "1947 Rules"), stipulated in paragraph 15 that where pensions were provided other than by the purchase of individual contracts or a group annuity contract issued by an insurance company, the funds of a pension plan must be placed in the hands of trustees under a trust deed outlining their obligations in respect of the funds. Accordingly, the 1947 Rules contemplated that funds of an approved pension plan would be held under an individual or group insurance contract or under a funded trust.

35 In 1950, the DNR issued revised rules entitled a Statement of Principles and Rules Respecting Pension Plans for the Purposes of the Income Tax Act (the "1950 Rules"). There is no equivalent in the 1950 Rules to paragraph 15 in the 1947 Rules. Instead, the 1950 Rules address three particular vehicles for securing the payment of pension fund obligations - insurance contracts, an incorporated pension society and a funded trust - without specifically requiring that any pension plan must be established pursuant to one of these three vehicles.

36 The 1947 Rules, the 1950 Rules and subsequent information circulars that replaced these Rules were not, however, legally binding until the legislation enacted in 1991 referred to below.

37 In 1956, the ITA was amended to require that a pension plan be "registered" under the ITA before contributions to the plan would be deductible for income tax purposes. This change was accompanied by the institution of other registration requirements that are not material to the present proceeding.

38 In addition, throughout the relevant period, employers have been required to file T4 forms and T4 Supplementary forms documenting all salary or other remuneration paid by the employer above a prescribed amount. The T4 Supplementary form requires identification of the amount of various employee deductions, including the amount of employee contributions to "an approved superannuation or pension fund." Such reporting enabled employees of an employer to deduct the amount of such contributions from their income for income tax purposes.

39 In 1991, the ITA was amended to provide the Minister under the Act with the authority to refuse registration of a pension plan unless "the arrangements under which the property is held in connection

with the plan is acceptable to the Minister." Also in 1991, the successor to the Canadian and British Insurance Companies Act enacted in that year eliminated the specific authorization of an insurance company to create a staff pension plan by way of by-law. London Life says that it was in response to these amendments, and certain other developments, that it took steps to place the Plan assets in trust at the end of 1993.

Approval of the Staff Pension Plan

40 The Plan was approved by the DNR on January 1, 1951, was automatically registered under the ITA in 1956, and has continued to be registered with the ITA since that date. The Plan was also registered under the Pension Benefits Act, R.S.O. 1990, c. P.8, as amended, on June 14, 1967 and has continued to be so registered since that date.

41 The consequences for London Life of approval and registration of the Plan under the ITA were, however, minimal until 1969, when the income of insurance companies first became taxable under the ITA. Prior to that time, the only consequence of approval or registration of the Plan under the ITA was to permit the Company's employees to deduct the amount of their contributions to the Plan for income tax purposes.

42 Since 1969, London Life has deducted its contributions to the Plan for the purposes of the ITA. In addition, on approximately 11 occasions between 1971 and 1983 it applied for, and received, Revenue Canada approval for special payments to the Plan. In respect of most, if not all, of these payments, the Revenue Canada approval was given on the basis that the payments "irrevocably vest in or for the fund or plan." The evidence does not include any advice from the Company as to how it addressed this feature of the Revenue Canada approvals.

Procedural Background

43 This proceeding arises as a result of a 1996 reorganization of London Life, which resulted in staff reductions across Canada (the "Reorganization"). The Reorganization triggered a wind-up of the Plan in respect of 491 Plan members and former Plan members who ceased to be employed by the Company between January 1, 1996 and December 31, 1996 as a result of the Reorganization (the "Partial Windup").

44 In connection with the Partial Windup, the Plan actuary filed a partial windup report in November 2001, which was revised and updated in August 2002 and October 2002 (collectively, the "Partial Windup Report"). The Partial Windup Report did not deal with the distribution of the surplus allocable to the Partial Windup (the "Partial Windup Surplus"). By letter dated May 6, 2004, the Superintendent of Financial Institutions of the Province of Ontario indicated that the Partial Windup Report was acceptable except insofar as it failed to address the issue of surplus.

45 Subsequent to the release of the Supreme Court decision in Monsanto Canada Inc. v. Superintendent of Financial Services, [2004] 3 S.C.R. 152, the Plan actuary filed an updated Partial Windup Report dealing with the issue of surplus in September 2005. In the updated Partial Windup Report, the Plan actuary and the Company took the position that the Plan members had no entitlement to the Partial Windup Surplus. It is understood that the Company's most recent estimate of the Partial Windup Surplus as at May 1, 2005 (using data as of December 31, 1995) is approximately $16 million. The exact amount does not appear to be in dispute but was not specifically addressed in this proceeding.

This Proceeding

46 By statement of claim dated February 16, 2007, the Applicants commenced this action under the

Class Proceedings Act, 1992, S.O. 1992, c. 6 (the "CLA"), seeking, among other things, a declaration that the Plan assets attributable to the Partial Windup are impressed with a trust.

47 By order dated May 6, 2008, Lax J. certified the action as a class proceeding and appointed the Applicants as representative plaintiffs on behalf of the following class:

> All Office members (i.e. administrative employees) of the London Life Insurance Company Staff Pension Plan, Registration No. 0343368 with a vested entitlement under the Plan, who were employed by the London Life Insurance Company ("London Life") and whose employment was terminated by London Life in 1996 or who voluntarily resigned or retired as a result of the 1996 reorganization of London Life or the discontinuance in 1996 of a significant portion of the business of London Life, including such members' beneficiaries or estates.

48 Lax J. also ordered that the common issues to be tried are to be the following:

1. Are the Plan assets, in particular the surplus assets, impressed with a trust in favour of the Plan members, former Plan members, and other beneficiaries?
2. What is the quantum of the Partial Windup Surplus?
3. What is the entitlement of the members of the class to the Partial Windup Surplus or damages?
4. What is the appropriate method for calculating surplus entitlements or damages of the members of the class?
5. Did London Life commit breaches of trust, breaches of fiduciary duty, or breaches of its employer obligation of good faith, or breaches of its statutory obligations in respect of members of the class?

49 By order dated September 25, 2008, Lax J. converted the action into an application and ordered that the application be heard and decided on the issue of entitlement to the Partial Windup Surplus prior to any hearing on the issue of damages and/or distribution of the Partial Windup Surplus.

Motion to Amend the Order of Lax J.

50 At the commencement of the hearing of this Application, the Applicants moved to amend the order of Lax J. dated May 6, 2008 to add the following issues to be tried:

1. Should the Court impose a constructive trust in favour of class members over the entire Partial Windup Surplus?
2. If the answer to (1) is no, should the Court impose a constructive trust in favour of class members in respect of that part of the Partial Windup Surplus attributable to special payments made by London Life?
3. Should the Court impose a resulting trust in favour of class members over the portion of the Partial Windup Surplus attributable to contributions made by members?

51 The Applicants did not move to amend the pleadings in this proceeding. Instead, the Applicants limited their motion to a request to add these three issues as additional common issues. The Applicants contend that, on a liberal and general reading, the pleadings already assert these claims. They argue that, accordingly, London Life cannot reasonably assert that it would have acted differently if the claims had been asserted earlier and, therefore, cannot assert any viable claim of prejudice.

52 The Applicants' therefore argue in the alternative that (1) the claims for imposition of a constructive trust or the declaration of a resulting trust are encompassed by the common issues certified by Lax J. and (2) if not, such claims should be permitted to proceed on the grounds that they are based on the same factual matrix as the common issues that have been certified and that London Life has suffered no prejudice in the timing of the assertion of these claims.

53 London Life argues that the constructive trust and resulting trust claims were not set out in the pleadings and were not addressed in the affidavit evidence. It argues that the Applicants must bring a motion to amend the pleadings and that, in the present circumstances, such motion would be denied because the factual matrix underlying these claims is not the same as for the certified common issues. London Life also argues that it is prejudiced in having these issues raised in this manner insofar as it has not been able to produce its full evidence on these issues.

54 I propose to deal separately with the constructive trust and resulting trust claims.

Constructive Trust Claims

55 The Applicants assert two separate constructive trust claims based on (1) an alleged failure to properly register the Plan with the DNR and (2) an alleged failure to appropriately credit the full amount of investment earnings to the Plan assets and to credit the appropriate rate of interest to Plan member contributions.

56 The claim for imposition of a constructive trust based on an alleged failure to properly register the Plan with the DNR is, in essence, an alternative theory of liability based on a subset of the factual matrix upon which the Applicants base their claim of an express or implied trust. The circumstances are therefore, in substance, similar to those addressed by Lax J. in Yvonne Andersen et al. v. St. Jude Medical, Inc. et al., 2010 ONSC 77 at para. 12, notwithstanding the Applicants' failure to move to amend the pleadings.

57 I see no reason not to grant the requested relief of an amendment to the common issues to add this particular claim.

58 This proposed addition to the common issues does not fundamentally change the nature of this proceeding. It is also arguable that, read liberally, such claim is embraced by the first of the common issues certified by Lax J. and the pleading in paragraph 1(b) of the Statement of Claim that the assets of the Plan are impressed by a trust and held for the exclusive benefit of the plaintiff class. Paragraph 1(b) speaks only to the assets being impressed by a trust without specifying whether the Applicants assert an express trust, a constructive trust or a resulting trust. Further, London Life has not demonstrated any specific manner in which it is prejudiced by consideration of this issue in this proceeding. In particular, it has not identified any category of evidence that it would have produced in response to this claim that it has been prevented from producing by the late assertion of this claim. Nor has it suggested that this proposed issue does not satisfy the requirements under section 5(1) of the CLA for common issues.

59 On the other hand, I do not think it is appropriate to grant the Applicants' motion in respect of the claim for a constructive trust based on the investment income and interest crediting issues. I reach this conclusion for several reasons.

60 First, this second claim for constructive trust is a claim that London Life breached an obligation to contribute certain monies to the trust or to the Plan member accounts. The Applicants allege that, as a result of this breach, the Partial Windup Surplus and the amounts owing in respect of the member accounts are actually larger than the amounts currently calculated by the Company. In respect of this

claim, the Applicants do not assert an entitlement to Plan assets in trust that comprise the Partial Windup Surplus but, instead, assert a claim in respect of assets that are not currently Plan assets. Accordingly, they seek an order requiring London Life to transfer additional assets into the Plan. In essence, this is a claim for unjust enrichment based on allegations of self-dealing. As such, the claim is not set out in the pleadings, and it goes beyond the common issues currently certified by Lax J.

61 Second, London Life has demonstrated that it would be prejudiced if the motion were granted in respect of this claim. Given the nature of this claim, London Life would be expected to produce additional evidence including an analysis of the investment and interest credit experience in response to that proposed by the Applicants in the "Comparison Table" that they prepared for this proceeding.

62 Third, this claim is not based on the factual matrix before the Court, or on a subset thereof, respecting the issue of an express or implied trust. As indicated above, it is also far from clear that all the relevant evidence is before the Court. In respect of this issue, it is not a complete answer to say that all the existing documentation is before the Court.

63 Lastly, while I can appreciate that this is an additional issue that requires a forum, the mere fact that the Court is hearing this Application is insufficient justification to amend the common issues to include this claim in this Application, given the considerations set out above. In any event, I am not satisfied that this hearing is the only forum in which this issue can be raised in relation to the Partial Windup Surplus.

64 For these reasons, the requested relief in respect of the claim for a constructive trust, based on the Company's approach to crediting investment income and interest to the Plan and to members' contributions, respectively, is denied.

Resulting Trust Claim

65 The claim for a declaration of the existence of a resulting trust is asserted in respect of the portion of the Partial Windup Surplus attributable to the members' contributions. This claim is also an alternative theory of liability based on a subset of the factual matrix in respect of the Applicants' claim regarding the existence of an express or implied trust.

66 The requested relief adding the claim for a resulting trust to the common issues is granted for the same reasons that similar relief was granted in respect of the first of the Applicants' two claims for imposition of a constructive trust.

Positions of the Parties

The Applicants

67 The Applicants' principal argument is that the assets of the Plan, including any surplus, are impressed with an express or implied trust in favour of the plaintiff members of the class under one or more of By-Law 28, New By-Law 28 or By-Law 49. The Applicants also argue that London Life failed to reserve for itself the right to amend the Plan to access any surplus on Plan termination by failing to reserve a right to revoke or terminate the 1940 Pension Plan in By- Law 49. They say that, as a result, commencing with the 1973 Pension Plan, the provisions of the Plan that provide that London Life shall have the right to receive some or all of the Plan surplus on Plan termination are invalid.

68 The Applicants submit that the intention to establish a trust may be implied by all of the circumstances pertaining to the pension plan arrangements under these by-laws, including not only the terms of these by-laws but also London Life's decision not to enter into an insurance contract with

respect to the Plan, London Life's conduct vis-à-vis the Canadian tax authorities, and certain features of the operation of the Plan.

69 As a result of the disposition of the Applicants' motion addressed above, the Applicants also make two additional, alternative submissions that apply if the Court does not find that an express or implied trust exists. They argue that the Court ought to impose a constructive trust in favour of the Plan members over the Plan assets. They also submit that a resulting trust applies to any Partial Windup Surplus attributable to the contributions that the Plan members made to the Plan assets.

London Life

70 London Life says that there was never any intention to create a trust prior to the 1993 Trust Agreement and that there is no documentation that evidences the creation of a trust. It also says that, as a matter of contract law, at all relevant times, London Life had a broad power to amend the terms of the Plan and, accordingly, it had the power to amend the terms of the Plan in 1973 to include a right to the return of any surplus in the Plan.

71 London Life also argues that the Applicants have failed to satisfy the requirements for the imposition of a constructive trust and that a resulting trust in favour of the Plan members does not arise in the present circumstances.

Issues for the Court

72 There is no issue that London Life reserved a right of revocation in respect of the trust established under the Trust Agreements as well as a right to the return of any surplus in the contractual documentation pertaining to the Plan commencing with the 1973 Pension Plan. Accordingly, London Life would be entitled to the Partial Windup Surplus unless the Applicants can establish that the Plan assets were vested in trust prior to 1973 or that the terms of the Plan were not validly amended in or after 1973 to include a right of the Company to a return of any surplus.

73 The principal issue for the Court is therefore whether London Life held the requisite intention prior to 1973 to establish a trust of assets to fund its obligations under the Plan. If such intention is not established, the Court must also consider whether London Life had the authority in 1973 and thereafter to amend the Plan to provide for an entitlement to any surplus that might arise in the Plan assets. I will address each of these questions in turn.

74 I will then address the Applicants' further issues of whether the Court should impose a constructive trust and whether a resulting trust operates in the present circumstances. Lastly, I will address whether London Life committed any breach of its obligations in respect of members of the plaintiff class based on the determinations made in reaching the conclusions regarding the preceding issues.

Are the Plan Assets Impressed by a Trust Established Prior to 1973?

75 The Applicants' principal position is that the Plan assets were impressed by a trust to fund London Life's obligations under the Plan, possibly in 1916 or 1922 but certainly no later than 1940. The Court must therefore determine whether the provisions of By-Law 28, New By- Law 28 or By-Law 49 established a trust of the Plan assets.

76 I will address the following four issues pertaining to the Applicants' argument that the Plan assets are impressed with an express or implied trust: (1) whether By-Law 28 or New By- Law 28 established a trust; (2) whether By-Law 49 established a trust; (3) whether the circumstances pertaining to DNR approval and subsequent registration of the Plan evidenced the establishment of a trust; and (4) whether

London Life had the power to amend the Plan in 1973 to incorporate the Company's entitlement to any surplus in the Plan?

Applicable Law

77 The principles to be applied in any consideration of the existence of a trust in respect of a pension plan have been summarized as follows by Cory J. in Schmidt v. Air Products Canada Ltd., [1994] 2 S.C.R. 611:

> 44 An employer who creates an employee pension plan agrees to provide pension benefits to retiring employees. At first, employers undertaking this obligation paid retired employees directly from company income. Gradually, the practice of creating separate pension funds emerged following the passage of regulations designed to protect employees from the bankruptcy or termination of the company, coupled with the realization of employers that the cost of providing pensions is reduced if money is put aside on behalf of present employees for their future benefit.
>
> 45 Pension funds thus began to be structured in several different ways. Investment contracts and trust funds eventually proved to be the most popular forms of pension plan funding for employers since they provided the requisite degree of "irrevocability" of contribution to entitle an employer to obtain tax relief on its pension contributions ...
>
> 46 Entitlement to the surplus will often turn upon a determination as to whether the pension fund is impressed with a trust. Accordingly, the first question to be decided in a pension surplus case is whether or not a trust exists.
>
> 1. Trust or Contract?
>
> 47 Employer-funded defined benefit plans usually consist of an agreement whereby an employer promises to pay each employee upon retirement a pension which is defined by a formula contained in the plan. A pension fund is created pursuant to the plan, either by way of contract or by way of trust. Whether or not any given fund is subject to a trust is determined by the principles of trust law. If there has been some express or implied declaration of trust, and an alienation of trust property to a trustee for the benefit of the employees, then the pension fund will be a trust fund.
>
> 48 If no trust is created, then the administration and distribution of the pension fund and any surplus will be governed solely by the terms of the plan. However, 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. The contract or pension plan may influence the payment of trust funds but its terms cannot compel a result which is at odds with the existence of the trust.
>
> ...
>
> 52 To repeat, the first step is to determine whether or not the pension fund is in fact a pension trust. This will most often be revealed by the wording of the pension plan itself, but may also be implied from the plan and from the way in which the pension fund is set up. A pension trust is a "classic" or "true" trust and not a mere trust for a

purpose. If there is no trust created under the pension plan, the wording of the pension plan alone will govern the allocation of any surplus remaining on termination. However, if the fund is subject to a trust, different considerations may govern.

...

C. Summary

90 In the absence of provincial legislation providing otherwise, the courts must determine competing claims to pension surplus by a careful analysis of the pension plan and the funding structures created under it. The first step is to determine whether the pension fund is impressed with a trust. This is a determination which must be made according to ordinary principles of trust law. A trust will exist whenever there has been an express or implied declaration of trust and an alienation of trust property to a trustee to be held for specified beneficiaries.

91 If the pension fund, or any part of it, is not subject to a trust, then any issues relating to outstanding pension benefits or to surplus entitlement must be resolved by applying the principles which pertain to the interpretation of contracts to the pension plan.

92 If, however, the fund is impressed with a trust, different considerations apply. The trust is not a trust for a purpose, but a classic trust. It is governed by equity, and, to the extent that applicable equitable principles conflict with plan provisions, equity must prevail. The trust will in most cases extend to an ongoing or actual surplus as well as to that part of the pension fund needed to provide employee benefits. However, an employer may explicitly limit the operation of the trust so that it does not apply to surplus.

93 The employer, as a settlor of the trust, may reserve a power to revoke the trust. In order to be effective, that power must be clearly reserved at the time the trust is created. A power to revoke the trust or any part of it cannot be implied from a general unlimited power of amendment.

78 Demonstration of the existence of a trust requires demonstration of the existence of three certainties: (1) certainty of intention on the part of the settler to create a trust; (2) certainty of subject matter; and (3) certainty of objects (see: Canada (Attorney General) v. Confederation Life Insurance Co., [1995] O.J. No. 1959 at para. 121 (Gen. Div.)).

79 In the present proceeding, there is no issue regarding either the subject-matter of the trust, being the Plan assets, or the objects of the trust, being the Plan beneficiaries. The principal issue for the Court is whether London Life demonstrated an intention to establish a trust of assets to fund its obligations under the Plan prior to the amendments to the terms of the Plan in or after 1973, which provided London Life with a right to any surplus in the Plan assets.

80 In this proceeding, the onus falls on the Applicants to establish the requisite certainty of intention on the part of London Life. Certainty of intention is a matter of construction. It is not necessary to identify a formal document to infer an intention to create a trust. The intention to create a trust may be inferred by having regard to "the constating documents of the Plan and the surrounding circumstances or factual matrix" of the arrangements (see: Bathgate v. National Hockey League Pension Society (1992), 11 O.R. (3d) 449 at pp. 507-508 (Gen. Div.), per Adams J.

Analysis and Conclusions

81 For the reasons set out below, I am of the opinion that none of By-Law 28, New By-Law 28 or By-Law 49 established a trust of Plan assets.

Did By-Law 28 or New By-Law 28 Establish a Trust?

82 The Applicants rely on the following two features of By-Law 28 and New By-Law 28 in support of their assertion that these by-laws established a trust, although they acknowledge that the language of the by-laws presents some difficulty.

83 First, each by-law provided that any forfeited funds of withdrawing or terminated members were to be used for the benefit of the remaining contributors. In the case of By-Law 28, paragraph 12 provided that any such funds (being the Company grants credited to them and accrued interest thereon) were to be credited to the remaining contributors in proportion to the respective amounts standing to their credit by way of Company grants, including all accrued interest thereon. In the case of New By-Law 28, paragraph 12 provided that any such funds were to be credited first to a fund out of which the directors were authorized to make payments to present or former contributors or their families in respect of sickness or other special hardship. Paragraph 12 of New By-Law 28 further specified that any amount in such fund that, in the opinion of the directors, exceeded the reasonable requirements for such fund was to be "placed to the account" of the remaining contributors on the same basis as contemplated in By-Law 28.

84 Second, as a related matter, the Applicants argue that neither By-Law 28 nor New By-Law 28 contained any language that expressly permitted revocation of either the Plan itself or the specific provisions dealing with the forfeiture of funds of withdrawing or terminating members.

85 Are these provisions sufficient to establish a certainty of intention on the part of London Life to create a trust in respect of the Plan assets?

86 The Applicants argue that the combined effect of these two provisions in each of By-Law 28 and New By-Law 28 is sufficient to evidence such an intention. They argue that, even if London Life had a right to revoke the Plan, it had no right to withdraw any Plan assets and, accordingly, the Court should conclude that such Plan assets were vested in trust.

87 I do not agree with this conclusion for the following seven principal reasons.

88 First, as a corporate matter, London Life had the authority to establish a pension plan by way of a by-law as a contractual promise to pay without creating a trust of assets to fund performance of such obligation. London Life's authority to create the Plan was derived from section 13 of the Canada Joint Stock Companies Clauses Act, 1869, S.C. 1869, c. 12, and section 57(2) of The Insurance Act, 1910, S.C. 1910, c. 32, which was subsequently replaced by section 88 (later section 89) of the Canadian and British Insurance Companies Act, 1932, S.C. 1932, c. 46. Each of these statutes contemplated that an insurance company could create a pension plan by by-law. None of these provisions required that pension plan assets be the subject of an insurance contract or a trust. By implication, these statutes permitted an insurance company to create a pension plan by extending an unfunded contractual promise to pay a pension out of the general assets of the company.

89 In correspondence involving Revenue Canada, the Department of Insurance, the Canadian Life Insurance Association and the Company between 1972 and 1980, there is evidence that a number of Canadian life insurance companies created similar pension plans. The evidence, which is comprised of

correspondence from Revenue Canada and the Department of Insurance, certain internal memoranda of the Company and certain proposed amendments to the Bankruptcy Act, R.S.C. 1970, c. 14, collectively reflects this understanding.

90 Second, at the time By-Law 28 and New By-Law 28 were enacted, there were no rules or policies of the DNR that governed pension plans. There is, instead, an absence of any evidence as to any standards that were usual or customary in respect of pension plans at such time. There is, therefore, no inference that can be drawn from the absence of an insurance contract, as the Applicants suggest, to the effect that London Life must have intended to vest Plan assets in a trust.

91 Third, and most important, there is no evidence of any segregation of the funds that comprised the Company grants and interest credited to the Plan members. As Waters remarks in Waters' Law of Trusts in Canada, 3rd ed. (Thomson Canada Limited, Canada, 2005) at p. 3, "the one element that predominates in the common law idea of a trust is segregated property". In this case, the evidence indicates that the funds used to discharge London Life's obligations under the Plan were held as general assets of the Company until December 31, 1993, when the Plan assets were expressly vested in trust pursuant to the 1993 Trust Agreement.

92 During the period in which New By-Law 28 governed the Plan (no assets ever having been contributed pursuant to By-Law 28), separate accounting records were maintained for each contributor for administrative purposes. These records tracked the amount of each contributor's contributions, the aggregate of Company grants to the credit of the contributor and the interest credited in respect of these amounts. The aggregate of such amounts were recorded on the Company balance sheet as the pension plan liability of the Company. However, at no time during the existence of the 1922 Pension Plan did London Life record assets referable to the Plan as a separate category of assets on its balance sheet, nor did it maintain an identifiable fund of assets that represented the corpus of the alleged trust.

93 If Plan assets had been segregated, the fact that any forfeited funds were retained for Plan purposes would have been significant. However, the application of the forfeited funds proceeds by way of an accounting entry only to affect a pro rata increase in each Plan member's interest. In these circumstances, I do not think any inference can be drawn from the operation of the forfeiture provisions in New By-Law 28.

94 In their reply submissions, the Applicants argue that the absence of a segregated fund should be considered to be evidence of a breach of trust rather than of the absence of an intention to create a trust. This argument, while ingenuous, is ultimately circular as an argument in favour of the existence of an express or implied trust. It ignores the fact that the burden of proof that lies with the Applicants. In the absence of some evidence that the Company acknowledged at least the possibility of a breach of trust in the administration of the Plan in the relevant years, the absence of a segregated fund remains a considerable obstacle to establishing an intention to create a trust. The Applicants' argument based on the absence of a segregated fund is, however, relevant in the context of the Applicants' claim for imposition of a constructive trust, where it is addressed further.

95 Fourth, as a related matter, the provisions respecting income on a contributor's interest in the Plan (comprising the contributor's contributions and allocated Company grants) also negate the existence of a trust. Both By-Law 28 and New By-Law 28 provided for the crediting of interest under a similar provision.

96 The relevant provision in New By-Law 28, contained in paragraph 6, reads as follows:

> No special investments of the Company shall be allotted to the fund but the interest allowed thereon and credited to the accounts as above mentioned shall be ascertained

> as follows: The average net rate of interest earned on the assets of the Company shall be computed by the method prescribed by the Insurance Company of the Dominion of Canada for insertion in the annual return and statement made to the Department and from such rate shall be deducted 10% which it is estimated will be a fair proportion thereof to allow for the cost of investing and taking care of investments and there shall also be deducted therefrom such further proportion of such rate as the total losses, if any, occurred by the Company upon all their invested assets bear to the total earnings from invested assets of the said Company.

97 The approach to interest on a contributor's interest in the Plan contemplated by this provision is unrelated to the performance of any specific assets of the Company that can be identified as "Plan" assets. Instead, the interest allocated to the contributor's interest in the Plan was determined by reference to the net return on all of the assets of London Life adjusted to take into account a proportionate share of losses. Such an approach to the investment return on a contributor's interest in the Plan is inconsistent with the segregation of assets to fund payment of Company grants or interest on a contributor's interest in the Plan.

98 Fifth, there is no evidence that London Life ever represented to the Plan members that any assets had been vested in a trust to satisfy Plan liabilities. In particular, it is not clear that any representations as to the deductibility of contributions to the Plan for income tax purposes were made during the operation of New By-Law 28.

99 Sixth, I do not agree that London Life did not retain the right to terminate the Plan for two reasons.

100 As a by-law, the London Life shareholders had the corporate authority to terminate the Plan by a further by-law. This is addressed further below. New By-Law 28 expressly provided in an introductory provision that By-Law 28 was repealed and replaced by New By-Law 28. From this, it is also clear that, by establishing the 1922 Pension Plan pursuant to a by-law, London Life reserved, in respect of By-Law 28, and intended to reserve, in respect of New By- Law 28, a power of revocation of the Plan.

101 In addition, paragraph 13 of By-Law 28 provided that the Company could, at any time, and on notice, refuse to accept new contributions or further contributions from existing contributors. In such event, the Company could require the contributors to withdraw all funds "at their credit", including not only their contributions but also the Company grants placed to their credit. If the Company failed to give such notice, By-Law 28 provided that the funds were to be "held and administered in all respects as though the Contributors had voluntarily ceased to make further contributions." These provisions are the substantive equivalent of termination or revocation of the Plan. New By-Law 28 contained provisions respecting termination of the Plan that were substantially similar to these provisions in By-Law 28.

102 Seventh, the language of New By-Law 28 is not supportive of the intention to create a trust. There is no language referring to a trust, a trust agreement, trustees or trustee obligations imposed on London Life. There is also no reference to the reservation of a fund for the exclusive benefit of the contributors and no express prohibition against the use or diversion of assets for purposes other than to provide pension or other benefits to London Life agents or employees.

103 Further, as a related matter, section 2 of each of By-Law 28 and New By-Law 28 provided as follows:

> No person shall become interested in said Fund or be entitled to any of the benefits thereof except he has contributed thereto and then only to the extent and for the benefits hereinafter set forth.

Such language is inconsistent with an intention to vest assets in trust on an irrevocable basis.

104 While the absence of any language referring to a trust is not necessarily determinative, given the six other considerations addressed above, such absence is strong support in the present circumstances for the conclusion that London Life did not intend to establish a trust in connection with the enactment of By-Law 28 or New By-Law 28. In this respect, I note that the circumstances are even more compelling than those in which Cory J. found that the Stearns plan in Schmidt, supra, was not subject to a trust.

Did By-Law 49 Establish a Trust?

105 The Applicants argue that, even if By-Law 28 and New By-Law 28 failed to establish a trust, By-Law 49 created a trust of the Plan assets. Three provisions of By-Law 49 require particular consideration in regard to this argument.

106 First, paragraph 5 deals with the relationship between the 1922 Pension Plan and the 1940 Pension Plan. The provisions of paragraph 5, which are set out above, do not provide any clear guidance as to this relationship. They suggest, however, that the 1922 Pension Plan continued to be administered after January 1, 1940 in accordance with the provisions of New By-Law 28 as it existed on that date in respect of contributions and Company grants allocated prior to January 1, 1940, and that the provisions of the 1940 Pension Plan governed all contributions to the Plan subsequent to that date. As a related matter, while By-Law 49 speaks to "one fund", there is no evidence that the By-Law contemplated a segregated fund of assets rather than a continuation of the practice of holding all assets in respect of the Plan as general assets of the Company.

107 The Applicants rely more heavily on paragraph 6 and, in particular, on the provision that required the Company, from time to time, to "transfer between the general funds of the Company and the Staff Pension Fund such amounts as may be required to provide for the payments to be made out of the Fund and to maintain the proper amount of the reserve therein."

108 Lastly, the Applicants rely upon the fact that there is no express right of revocation in respect of the 1940 Pension Plan. While paragraph 4 provides that the "rules, regulations, forms and orders" in respect of the 1940 Pension Plan may be "rescinded, repealed, altered, amended or added to," nothing in the 1940 Pension Plan expressly addresses the revocation or termination of the Plan itself.

109 Does By-Law 49 indicate an intention to establish a trust in respect of the Plan assets, in respect of the 1940 Pension Plan or both the 1940 Pension Plan and the 1928 Pension Plan? I conclude that it does not for the following six reasons.

110 First, as was the case for By-Law 28 and New By-Law 28, there is no language indicating an intention to create a trust or to impose trustee obligations on London Life. Apart from section 2 of By-Law 28 and New By-Law 28, for which there is no counterpart in By-Law 49, By-Law 49 is silent on the same matters that are often relied upon to create a trust as were the earlier bylaws.

111 Second, for the reasons set out above, London Life had the corporate authority to establish a pension plan as a contractual promise to pay by means of a by-law without establishing a trust to fund Plan obligations.

112 Third, as was also the case for By-Law 28 and New By-Law 28, there is no evidence of any DNR rules or policies at the time that By-Law 49 was enacted that addressed security for pension plan assets. There is, therefore, no inference that can be drawn from any applicable DNR rules or policies regarding an intention to establish a trust for such purposes.

113 Fourth, similarly, there is also no evidence that London Life represented to Plan members that any assets had been placed in trust in respect of liabilities pertaining to the 1940 Pension Plan at any time during its existence. The representation to the Plan members that contributions to the Plan were deductible for income tax purposes cannot be construed as a representation that a trust existed. Such an inference requires a determination that DNR approval and registration of the Plan necessarily implies the existence of a trust, which is rejected for the reasons set out below.

114 Fifth, as set out above, even after the establishment of the 1940 Pension Plan, there is no evidence that London Life segregated a specific fund of assets that would comprise the corpus of a trust that funded Plan liabilities.

115 As a related matter, insofar as By-Law 49 envisaged a single fund including the 1922 Pension Plan, which I have already concluded was not funded by assets vested in a trust, the establishment of a trust to fund the 1940 Pension Plan would have involved inconsistent treatment of the two pension plans. While nothing prevented inconsistent treatment in this regard, if it had been intended to create a trust to fund the 1940 Pension Plan, By-Law 49 would have had to address this fact and the means by which the two pension plans were to be operated as a "single fund". The absence of such provisions in By-Law 49 and the rules and regulations passed under it establishing the 1940 Pension Plan, as well as the treatment of the Plan liabilities in the financial statements of the Company, supports the conclusion that the approach to Plan assets was not changed by the establishment of the 1940 Pension Plan and that, therefore, neither pension plan was funded by assets vested in a trust.

116 Sixth, the "earmarking" of assets that did occur in the present case is insufficient to establish a segregation of assets that is indicative of an intention to establish a trust of Plan assets. As mentioned, the evidence suggests that, beginning in or about 1986, London Life assigned a pool of assets included in its general assets to the Plan and based its annual valuation of Plan assets, and the determination of any unfunded liability of the Plan, on the market value of and investment return on, such assets. The Applicants say that, even if it cannot be established that London Life physically segregated this pool of assets to fund its Plan obligations, such "earmarking" of funds is sufficient to evidence an intention to establish a trust of such assets. They rely on the decision of Morawetz J. in Nortel Networks Corporation (Re), 2010 ONSC 3061 at paras. 42-46 and the decision in Eu v. Rosedale Realty Corp. (Trustee of), [1997] O.J. No. 2275 (Gen. Div.) at para. 27 as support for the proposition that earmarking of funds may be indicative of an intention to hold such funds in trust.

117 I do not accept this argument for five reasons.

118 First, the limited evidence in respect of the circumstances in which such "earmarking" of assets was implemented suggests that the Company took this action for reasons unrelated to an intention to create a trust. Specifically, the Company appears to have changed its investment policy in respect of funding its Plan liabilities from a policy based on the general investment return on the Company's assets to an investment policy involving an asset mix that it considered more appropriate to funding pension liabilities. In doing so, however, it did not alter the legal reality that the assets selected for the pension plan portfolio remained general assets of the Company, and it did not evidence an intention to create a trust of these assets.

119 Second, it is clear from the correspondence and internal Company memoranda between 1972 and 1987, as well as a letter in 1989 from the Company to the Pension Commission of Ontario, that the Company employees involved with the Plan proceeded on the basis that London Life had not previously established a trust prior to that time and that there was no intention to do so during that period. While the understanding of those employees regarding the legal significance of By-Law 28, New By-Law 28 and By-Law 49 is of no probative value, their actions in the period after 1972 are supportive of an absence of

intention to establish a trust between 1972 and 1993, notwithstanding the implementation of a policy of "earmarking" assets for Plan purposes.

120 Third, in the absence of evidence for segregation of assets, I do not think that the reference in paragraph 6 of By-Law 49 to a reserve is evidence, on its own, of an intention to create a trust. Maintenance of a reserve can speak to maintenance of a specific fund of assets vested in trust or to a liability on the balance sheet. Similarly, the reference to transfers "between the general funds of the Company and the Staff Pension Fund" can speak to a physical transfer of segregated assets or an accounting transfer reflected on the Company's balance sheet. On balance, I think it is more probable that the reserve contemplated in paragraph 6 is an accounting reserve only. In any event, the Applicants have not established, on a balance of probabilities, that paragraph 6 refers to a specific fund of assets or otherwise reflects an intention to create a trust.

121 As a related matter, the Applicants also argue that, while paragraph 6 speaks to transfers "between" the general funds of the Company and the "Staff Pension Fund", the only transfers actually contemplated were transfers from the Company to the 1940 Pension Plan. This has not, however, been established. Moreover, I do not think this is helpful in determining the issue - it begs the question of whether the "transfer" contemplated was an accounting entry or a physical transfer of assets. If anything, given the determination in the previous paragraph, I think the word "between" is more supportive of the concept of an accounting entry than of a physical transfer of funds.

122 Fourth, there is a significant difficulty with the temporal aspect of this "earmarking" of assets, which, on the evidence before the Court, occurred many years after the establishment of the 1940 Pension Plan. As in Schmidt, supra there were no significant changes in circumstances between 1940 and 1987 or 1991 that warrant a finding that a trust which did not exist at the inception of the 1940 Pension Plan suddenly came into existence in or about 1987 or 1991 with the implementation of a practice of "earmarking" Plan assets.

123 Lastly, as a legal matter, this "earmarking" of assets is substantially different from the segregation of assets in the decisions relied upon by the Applicants. In Nortel, supra, payments were made to a third party insurance company. In Rosedale Realty, supra, funds were transferred out of a statutory account into an account which was separate from the general account of the debtor. Neither circumstance has been demonstrated in the present case.

Do the Circumstances Pertaining to DNR Approval and Subsequent Registration of the Plan Evidence the Establishment of a Trust?

124 Accordingly, if By-Law 49 envisaged a trust of Plan assets, the evidence for such trust must be found in circumstances beyond the text of By-Law 49 and the circumstances considered above. The Applicants say that the circumstances pertaining to the DNR approval and subsequent registration of the Plan supply this evidence. The Applicants make two related arguments to the effect that the Court should infer either (1) the existence of a trust in or about 1951 or; (2) a binding representation of London Life to the DNR concerning the existence of a trust in or about 1951. Both these arguments, which are discussed below, rely upon the framework for approval and registration of pension plans under the predecessor to the ITA commencing in 1947.

Positions of the Parties

125 As mentioned above, the 1947 Rules contemplated that the funds of an approved pension plan would be held under an insurance contract or in a trust. The first argument of the Applicants is that, in the absence of evidence that the Plan obligations were secured by an insurance contract, the Court should infer that the Plan funds were held by a trust from the fact that the Plan was approved and

registered by the DNR. The Applicants' second argument is that the Court should infer that London Life represented to the DNR that the Plan funds were held in trust in order to obtain such approval and registration of the Plan.

126 London Life's position is that neither the 1947 Rules, the 1950 Rules nor any subsequent rules or information circulars were binding prior to 1991, that there is no evidence that the DNR required the Plan assets to be placed in a trust, and that there is no evidence of any representation to the DNR that a trust had been created. Instead, London Life says the DNR approved the Plan in 1951 and allowed the Plan to be registered between 1956 and 1993 without using any of the three enumerated vehicles in the 1950 Rules for securing the Plan obligations.

Analysis and Conclusions

127 I will address each of the Applicants' arguments in turn.

London Life's Decision not to Enter into an Insurance Contract with Respect to the Plan

128 The Applicants submit that the Court should infer that London Life chose to secure the Plan assets by impressing them with a trust from the absence of an insurance contract to secure the Plan assets. The Applicants' submission is based on an assumption that, since the issuance of the 1947 Rules, pension plan assets had to be secured by either an individual or group annuity insurance contract, held by an incorporated pension society (for which there is no evidence in this case), or held in a trust.

129 The Applicants bear the onus of establishing that the inference is reasonable in the circumstances. The Applicants have not satisfied this onus. For the following reasons, I conclude instead that such an inference, on a balance of probabilities standard, is excluded by the evidence that the DNR may have allowed London Life to register the Plan without requiring funding by means of an insurance contract or a pension trust.

130 First, in 1951, when the Plan was approved by the DNR, the 1950 Rules were apparently operative. As mentioned above, the 1950 Rules did not expressly provide that DNR approval required that a pension plan be structured in one of the three forms described above. In addition, the 1950 Rules were not legally binding. In these circumstances, the evidence suggests that there was a very real possibility that other forms of pension plans could have received DNR approval.

131 This possibility is evidenced, as mentioned above, by correspondence in the 1970's involving Revenue Canada and the Department of Insurance, as well as two proposed amendments to the Bankruptcy Act in effect at such time. This documentation indicates that Revenue Canada and the Department of Insurance understood that a number of Canadian life insurance companies had established pension plans by means of a by-law that did not provide either for an insurance contract or for pension plan assets to be held in a trust. Notwithstanding Revenue Canada's position in an information circular published in May 1972, the evidence suggests that Revenue Canada acquiesced for a lengthy period of time to a situation in which these insurance companies maintained non-trusteed plans while an alternative means of protecting Plan members from insolvency was pursued by way of a proposed amendment to the Bankruptcy Act.

132 In addition, the evidence suggests two possible rationales for such acquiescence.

133 As insurance companies were not taxed under the ITA in 1951, the principal consequence of London Life's receipt of DNR approval and subsequent registration of the Plan in 1951 and 1956, respectively, was not to permit London Life to receive a tax benefit, as the Applicants suggest, but rather

to permit its employees to receive the same tax treatment on their contributions as employees of taxable entities. Registration of the Plan only had beneficial tax consequences to London Life after 1969, when a new tax regime for life insurance companies was initiated.

134 I note as well that the DNR requirements respecting qualifying insurance contracts were not put in evidence in this proceeding nor was there any evidence as to how pension plans were structured using insurance contracts in 1951 and thereafter. However, the wording of the 1950 Rules, as well as of subsequent information circulars, suggests that pension plans could be structured in reliance on unsecured insurance contracts as opposed to segregated funds or deposit administration contracts. In this regard, it would appear that the requirement that an individual insurance contract be held on the terms of an express trust was not introduced into the DNR information circulars until 1975. As a related matter, section 18(1) of Regulation 103/66 enacted under the Pension Benefits Act provided that pension funds not administered by a government shall be administered in one of five vehicles, of which "a life insurance company", without further detail, was one.

135 Therefore, to the extent the DNR rules did permit registration of pension plans using unsecured insurance contracts with life insurance companies, it might also suggest a further basis for DNR acquiescence to life insurance company pension plans that were not structured as one of the vehicles contemplated by the 1950 Rules. There is no substantive difference for such purposes between an obligation of London Life and an insurance contract with another life insurance company. Each would involve an unsecured contract and would rely on federal governmental supervision and regulation, rather than a segregation of assets, to protect the pension plan members. I do not, however, reach any conclusion on the basis of such conjecture given the limited evidence on this issue. The significance of this consideration is limited to evidencing a further factor that, together with the other factors addressed above, excludes a finding on a balance of probabilities that the absence of an insurance contract must imply the existence of a pension plan trust.

136 To be clear, it cannot be established with certainty that London Life was one of the insurance companies in respect of which the DNR acquiesced in the enforcement of its policies. In addition, it is not possible to establish, on a balance of probabilities, that either or both of the foregoing rationales explained any such acquiescence. However, the evidence is sufficient to establish a real possibility that the Company was included in the group of life insurance companies in respect of which the DNR accepted unsecured pension plans created by a by-law. This possibility presents a significant obstacle to the Applicants given the onus of proof.

137 Further, the Applicants say that, in the two cases of which they are aware in which there was no insurance contract, the pension plan assets were found to have been held in a trust: see Markle v. Toronto (City), [2003] O.J. No. 265 (CA.); and Anova Inc. Employees Retirement Pension Plan (Administrator of) v. Manufacturers Life Insurance Co., [1994] O.J. No. 2938 (Gen. Div.).

138 However, in these cases, the courts expressly found that the requirements for a finding of a trust had been demonstrated, including a clear intention to create a trust. The finding of a trust in these cases did not turn solely, or even materially, on the absence of an insurance contract, and, as such, they do not support the Applicants' position.

139 The Applicants also say that, in all instances in which the courts have rejected the argument that pension plan assets were impressed with a trust, the relevant pension plan was secured by an insurance contract. Going further, they say that they are not aware of any instance in which a court has inferred an intention on the part of an employer to leave pension plan assets unsecured by failing to put in place either an insurance contract or a trust.

140 While this may be true, it is not persuasive in the face of evidence that the DNR may have

permitted certain life insurance companies in Canada to maintain contractual pension plans until 1993. In any event, the absence of any judicial decisions in this area cannot be determinative. The absence of any case law dealing with the present circumstances is not a basis for inferring an historical intention on the part of the Company.

141 Based on the foregoing, I conclude that the Applicants have not established, on a balance of probabilities - much less as an undisputed fact - that London Life was required to secure the Plan obligations by means of an insurance contract or a trust of Plan assets in order to obtain DNR approval of the Plan in 1951 or registration of the Plan in 1956 and thereafter.

London Life's Conduct in Registering the Plan with the DNR

142 The Applicants also urge the Court to draw an inference that London Life represented to the DNR that a trust existed whether or not a trust had actually been created. This submission is relevant both in respect of the Applicants' position, addressed in this section, that an express or implied trust existed - on the basis that the representation reflected the existence of such a trust - and in respect of the Applicants' alternative position, addressed later, that the Court should impose a constructive trust - on the basis that London Life misrepresented the circumstances to the DNR and should not be permitted to resile from that representation.

143 The Applicants make two alternative submissions in respect of the inference of a representation to the DNR.

The Absence of Form T150

144 First, the Applicants rely specifically on the absence of a copy of the Form T150 executed by London Life that was required to be filed in connection with an application for approval of a pension plan under the 1947 Rules and also, apparently, under the 1950 Rules. The form requires, among other things, that a copy of "the trust deed, by-law or other document under which the plan is constituted" be attached. In the body of the form, the applicant is also required to indicate whether the pensions were provided by "group annuity, individual annuity or funded trust". The Applicants argue that, given this language, London Life must have represented in a Form T150 filed in or about 1951 that the Plan was constituted by a funded trust.

145 I do not accept this argument for the following reasons.

146 Firstly, if London Life had indicated that the Plan was provided by a funded trust, as the Applicants suggest must have occurred, it would have had to provide a copy of the relevant trust deed. There is no evidence of any such document having been prepared and no evidence of any request by the DNR for such a document for its files in connection with the approval or registration process. There is also no evidence of any such document in the files of the Canada Revenue Agency, which were reviewed by a representative of London Life.

147 Secondly, correspondence from the Department of Insurance dated November 25, 1974, which refers to an earlier letter of the Company, suggests that the Department of Insurance understood at that time that the Plan had been established without the creation of a trust of Plan assets to secure the Plan obligations.

148 Lastly, while it is possible to draw an adverse inference from the failure to produce a document where one would reasonably expect a properly run company to have the document in its possession, I do not think this is appropriate in the present circumstances. London Life has provided voluminous documentation in this proceeding and has contacted the Canada Revenue Agency to obtain any

documents in its files on the relevant issues. The application for approval of the Plan was made to the DNR almost 50 years ago and has been superseded by many filings since then. Most significantly, there is no evidence of intentional destruction of documentation in respect of the matters at issue in this proceeding. These facts are sufficient to displace any presumption that London Life destroyed such documentation with a view to affecting this litigation.

Inference from DNR Approval and Registration of the Plan

149 The second argument of the Applicants is more general. They submit that the Court should assume that the Plan was registered "properly". They also submit that it is highly unlikely that the DNR would have approved the Plan and granted the tax benefits that resulted therefrom unless the assets were held under one of the three funding vehicles addressed in the 1950 Rules. The Applicants ask the Court to infer from these two propositions that in or about 1951 London Life must have advised the DNR, in some manner, that a trust relationship existed.

150 I decline to draw this inference for the reason that the Applicants have failed to establish the second of the two propositions upon which it is based. As set out above in addressing the Applicants' submission based on the absence of an insurance contract, the evidence does not establish that approval of the Plan in 1951 required that the Plan had to be established using one of the three vehicles addressed in the 1950 Rules. In the absence of such evidence, the Court cannot draw the inference proposed by the Applicants.

Could the Plan be Amended in 1973 to Incorporate the Company's Right to Surplus?

151 Based on the foregoing, I conclude that London Life had not established a pension fund trust as of January 1, 1973, the effective date of the 1973 Pension Plan. Given this determination, it is not necessary to address the Applicants' argument that London Life failed to reserve a right of revocation of the trust and therefore could not amend the Plan to provide a right in its favour to any Plan surplus. The question remains, however, whether the Company had the authority, as a contractual matter, to amend the terms of the Plan to include such a right in the 1973 Pension Plan.

The Issue

152 As set out above, section 16 of the 1973 Pension Plan contained a provision permitting the Company to terminate the Plan and to receive back any excess Company contributions. Subsequently, in 1987, the 1973 Pension Plan was revised to include paragraph 13.C, which expressly reserved any surplus in favour of the Company, and, in 1991, the 1991 Restatement specifically provided in paragraph 14 for the return of any surplus to the Company in the event of termination of the Plan.

153 As I understand the Applicants' position, they accept that, if validly enacted, the effect of section 16 of the 1973 Pension Plan and/or paragraph 13.C of the revised Plan effective January 1, 1987 and/or paragraph 14 of the 1991 Restatement was to entitle London Life to any Partial Windup Surplus. The Applicants argue, however, that the Company lacked the power to enact such provisions. They argue that the power to amend the 1940 Pension Plan must be found within the terms of that Plan. They argue further that the terms of paragraph 3 of the 1940 Pension Plan permitted rules and regulations in respect of the operation and administration of the Plan but did not extend to revocation or termination of the 1940 Pension Plan.

Applicable Legal Principles

154 Given the determination that no trust existed as of 1973, the issue for the Court is not whether London Life reserved a right to revoke a trust but rather whether it reserved a right to amend the Plan as

a contractual document. For this purpose, the Plan documentation must be interpreted in accordance with the general principles that govern the interpretation of contracts. The general rule is that pension plan documentation may be amended to provide for a return of surplus to the employer if the employer has reserved a power of amendment. In particular, a general or unlimited power of amendment is sufficient, absent special circumstances, to indicate an intention that the employer shall be entitled to amend the documentation to provide for a right to surplus in its favour. It is not necessary to establish a right to terminate the Plan to establish such an intention. On the other hand, a right to terminate the Plan, if established, would also imply a general or unlimited right to amend the Plan that would be sufficient, absent special circumstances, to validate such an amendment dealing with any pension plan surplus.

155 These principles are illustrated in the decision of Schmidt, supra, in respect of the Stearns pension plan. At paragraph 145 of that decision, Cory J. held that an amendment to the amalgamated pension plan that provided an express right to surplus in favour of the employer was within the limits of the employer's power of amendment. From its inception, the Stearns plan had included a right in favour of the Company to amend or terminate the plan provided that any such action did not have the effect of reducing the "then existing interest in the Fund" of any member or beneficiary. Cory J. held that the amendment did not have any such effect under the prior Stearns plan because the employees had no interest in the surplus remaining on termination until such time as the company exercised its discretion to give them such an interest. Put another way, Cory J. held that the removal of a mere potential interest in the funds was within the company's amending power.

Analysis and Conclusions

156 While the present circumstances differ in certain respects from those in Schmidt, I conclude that the same principles apply. On the basis of those principles, I conclude, for the reasons set out below, that London Life had the power in 1973 to amend the terms of the Plan to incorporate a right in its favour to any surplus in Plan assets. Accordingly, I also conclude that the amendments in 1973 to include section 16 in the 1973 Pension Plan, in 1987 to include paragraph 13.C in the revised Plan effective January 1, 1987, and in 1991 to include paragraph 14 in the 1991 Restatement were validly enacted.

157 As a preliminary matter, I observe that section 16 of the 1973 Pension Plan speaks to the return of Company contributions rather than to the withdrawal or return of surplus as in paragraph 13.C of the revised Plan effective January 1, 1987 and paragraph 14 of the 1991 Restatement, respectively. It would appear that this language reflects the fact that, as of 1973, all Plan assets were held as general funds of the Company without any "earmarking" of any assets. In such circumstances, the only excess monies to be addressed in respect of a termination of the Plan would be excess Company contributions reflected in the Company's accounts.

158 Given this context, I think section 16 should be interpreted to extend to any excess amounts reflected in the Company's accounts including, after 1986, any surplus arising based on the market value of the assets "earmarked" for the Plan. Insofar as the Applicants argue that section 16 is limited to a right of return of the portion of any surplus attributable to the Company's contributions only, I would reject the argument on this basis. In any event, however, paragraph 13.C and paragraph 14 clearly establish a right in favour of the Company to any surplus. I see no circumstances between 1973 and 1987, or between 1973 and 1991, that would have the result of limiting in any way whatever the power of amendment that London Life had in 1973. Accordingly, for present purposes, the Company's right to any surplus in Plan assets is established if the Company had the power to amend the terms of the Plan to include such a right in 1973 irrespective of whether such power was actually exercised in 1973, in 1987 or in 1991.

159 In my opinion, London Life had the power to amend the terms of the Plan in 1973 to provide that any surplus in the Plan would revert to the Company subject to the requirement that the existing rights of

the Plan members not be prejudicially affected. There are two grounds for concluding that London Life had the requisite power of amendment of the Plan.

160 First, London Life had a broad power of amendment under the terms of New By-Law 28 and By-Law 49 to amend the terms of the Plan. Paragraph 13 of New By-Law 28 gave the Company the authority to refuse new contributions to the Plan, which effectively constitutes a right of termination. Paragraph 3 of By-Law 49 provided for rules and regulations that would address, among other things, the purposes for which all monies in the Plan were to be held and the repayment or distribution of the whole or any part of such monies to an agent, employee or the Company as may be provided. This language is broad enough to include payment of any surplus to the Company.

161 Second, the Applicants' argument ignores the fact that the Plan has been created by a bylaw of the Company. As a by-law, the shareholders of the Company had the authority to amend or terminate the Plan at any time by a further by-law that complied with the provisions of the Canadian and British Insurance Companies Act, as it existed prior to 1991. This power was expressly set out in section 13 of the Canada Joint Stock Companies Act, 1869, which applied to the Company by incorporation into its governing statute. It was also provided for, in the absence of a contrary intention, in section 31(g) of the Interpretation Act, R.S.C. 1906, c. 1, and subsequent versions of that statute. This power was evidenced when, as mentioned above, the pension plan established by By-Law 28 was terminated and replaced by the 1922 Pension Plan by means of the repeal of By-Law 28 and the substitution of New By-Law 28. The fact that subsequent by-laws amended and continued the Plan did not exclude the right or authority of the shareholders of the Company in 1973 to terminate the Plan by repealing By-Law 122 without replacing it with By-Law 126.

162 As mentioned, however, London Life's power of amendment was subject to a limitation. While By-Law 49 did not contain any express amending provisions similar to the provision in Schmidt, supra, paragraph 4 of By-Law 49 did provide that no amendment to the rules and regulations passed under the by-law "shall prejudice affect [sic] any rights theretofore acquired by any Agent or Employee in respect of any moneys previously paid or credited to such Agent or Employee ..." I think it is clear from the context that "prejudice affect" is intended to mean "prejudicially affect" rather than "prejudice or affect", as the latter would render the word "prejudice" redundant.

163 I conclude, however, that this limitation provision was not contravened in the present circumstances on the basis of the principle articulated by Cory J. Given the determinations above regarding the absence of a trust and the existence of a power of amendment, the amendments to the terms of the Plan gave the Company an express entitlement to any surplus in Plan assets. Therefore, in 1973, the Plan members had no interest in any Plan surplus, apart from a potential interest to the extent the Company exercised its discretion to give them such an interest on termination. On this basis, the amendments to the Plan in 1973, 1987 and 1991 did not prejudicially affect any rights acquired by that date by the Plan members in respect of any Plan surplus.

164 Accordingly, I conclude that London Life had the power to amend the Plan in or after 1973 to incorporate a right in its favour to any surplus remaining in the Plan on termination after making provision for all accrued liabilities of Plan members for service and earnings to the date of termination.

Constructive Trust

Issues for the Court

165 The Applicants submit that, if the Court finds that the required intention to create a trust was lacking and, accordingly, the Plan assets are not impressed with an express or implied trust, the Court ought to impose a constructive trust either (1) over all Plan assets by virtue of London Life's actions in

obtaining DNR approval and registration of the Plan; or (2) at the least, over the special payments made by London Life in respect of the Plan by virtue of their irrevocable nature, as described above. I will consider each claim separately after reviewing the applicable law.

Applicable Law

166 Courts have imposed a constructive trust in two broad categories of cases: (1) to remedy unjust enrichment; and (2) to condemn a wrongful act and maintain the integrity of institutions dependant on trust-like relationships: see Soulos v. Korkontzilas, [1997] 2 S.C.R. 217 at para. 43.

167 In Soulos at para. 45, the Court set out the following four conditions that must generally be satisfied before a constructive trust is imposed:

> ... Extrapolating from the cases where courts of equity have imposed constructive trusts for wrongful conduct, and from a discussion of the criteria considered in an essay by Roy Goode, "Property and Unjust Enrichment", in Andrew Burrows, ed., Essays on the Law of Restitution (1991), I would identify four conditions which generally should be satisfied:
>
> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
> (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
> (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
> (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

Claim Based on Requirements for DNR Approval and Registration

Positions of the Parties

168 The Applicants assert three separate bases for this claim.

169 The principal argument of the Applicants is that London Life's fiduciary and good faith obligations as the sponsor and administrator of the Plan required it to ensure that the Plan assets were adequately protected and used to benefit its employees. The Applicants argue that, if the Plan was not impressed with a trust, London Life breached these obligations in failing to properly register the Plan with the DNR. The Applicants also argue that, in the absence of a trust or an insurance contract, the DNR approval and registration of the Plan was "improper". Finally, the Applicants argue that London Life must have represented to the DNR that a trust existed, in connection with the approval and registration of the Plan, and cannot now deny the representation.

170 In respect of each of these three arguments, the Applicants submit that London Life acted in an improper manner and that the Court should impose a constructive trust by way of condemnation of such behaviour. In the case of the third ground, they supplement this submission by reliance on the following passage in Schmidt, supra, at para. 67:

> The tax motivations of the respective parties to pension plans are not particularly relevant to a judicial interpretation of the trust. However a court should not be eager to sanction a result which would allow an employer to represent to the Minister of National Revenue that it has irrevocably committed funds to an employee pension plan, only to later purport to revoke the pension trust in order to recoup surplus funds.

The Applicants argue that the size of the Partial Windup Surplus has been increased as a result of the tax benefits that the Company enjoyed on the basis that it was properly registered.

171 The Company does not dispute that it owed, and indeed continues to owe, fiduciary and other obligations to the Plan members as the Plan sponsor and administrator. It submits, however, that such obligations did not obligate it to impress the Plan assets with a trust, much less require an inference that the Plan assets were impressed with a trust. As will be explained in the following paragraphs, I concur with this conclusion.

Analysis and Conclusions

172 Clearly, as the Plan sponsor and administrator, London Life owed both a duty of care as well as fiduciary obligations to the Plan members. However, the mere existence of such obligations is not, by itself, sufficient to support the imposition of a constructive trust. In the present circumstances, there are several significant difficulties with the Applicants' arguments, which I propose to consider collectively.

173 The fundamental difficulty with the Applicants' position is that they have failed to establish that London Life was required to create a trust of Plan assets in order to obtain DNR approval and subsequent registration of the Plan. Therefore, the Applicants cannot establish any of the following conduct on the part of London Life, which the Applicants allege in their factum warrants the imposition of a constructive trust.

174 The Applicants have failed to demonstrate that approval of a pension plan established by a by-law of an insurance company without the establishment of a trust fund was "improper". Accordingly, the Applicants have failed to establish that London Life failed to properly register the Plan with the DNR and nonetheless took advantage of such failure. As a related matter, the Applicants cannot rely on the absence of a waiver from the requirements of the 1950 Rules for the same reason. If the 1950 Rules did not require that the Plan be structured in 1951 with a funded trust, there was no need for London Life to seek an exemption or waiver, formal or otherwise.

175 The Applicants have also failed to establish that the Company potentially exposed the Plan to the risk of deregistration thereby jeopardizing the deductibility of employee contributions and potentially eroding the investment base of the Plan and imperilling the validity of the Plan. In addition to the obvious difficulty that the Plan was never de-registered and there is no evidence of any threatened action to such effect, given the absence of evidence that the Plan was improperly registered, the Court cannot conclude that the Company exposed the Plan and its members to these alleged risks.

176 The Applicants have similarly failed to establish any representation made to the DNR regarding the existence of a trust which London Life is now denying in asserting its claim to the Partial Windup Surplus. In addition, as a related matter, the Applicants also failed to establish any misrepresentation to the Plan members regarding the proper registration of the Plan from which London Life should not, in good conscience, be permitted to resile.

177 Ultimately, the Applicants' argument must be that London Life was required to establish a trust of Plan assets prior to 1973 in order to satisfy its fiduciary and other obligations to the Plan members,

regardless of whether it was required to do so in order to obtain DNR approval and registration of the Plan. In effect, the Applicants seek to impose such an obligation retrospectively, with an effective date prior to 1973, by way of a constructive trust.

178 I do not accept this argument for three reasons.

179 First, and principally, the creation of a pension plan by way of an unfunded contractual promise entails the assumption of fiduciary and other obligations by the Plan administrator. However, absent special circumstances which have not been demonstrated in this case, I do not think that these obligations give rise to an obligation at law to create a pension trust fund to fund the pension plan liabilities.

180 I am not aware of any support for such a proposition in any case law. Protection of pension plan beneficiaries is to be found instead in the extensive statutory requirements applicable to pension funds, as well as in the governmental regulation of pension plans and life insurance companies. The conclusion of Cory J. in Schmidt, supra at paragraphs 141 to 148 in respect of the fiduciary duty alleged in that case may, in fact, support the Company's position that it was under no duty to establish a trust. In addition, I note that, while the Stearns pension plan in Schmidt was found by Cory J. to be a contractual agreement only, there is no suggestion in the reasons of Cory J. that the establishment of that pension plan was in any manner a breach of the employer's obligations.

181 Second, I do not think that the Applicants can establish on this basis either the requirements for unjust enrichment or the element of wrongdoing necessary to fit within the categories of cases in which a constructive trust has been imposed by the courts. The issue of London Life's alleged failure to satisfy its fiduciary obligations by vesting Plan assets in a trust was not raised by any party prior to this proceeding. Insofar as the concerns of Revenue Canada expressed in the correspondence in the 1970's might be interpreted to bear on this issue, the evidence also indicates that London Life was addressing the issue albeit in a manner that did not involve a trust. Moreover, there is no evidence that the Pension Commission of Ontario, as the party responsible for governmental regulation of the Plan, took the position that London Life was in breach of its obligations as the Plan sponsor and administrator.

182 Third, constructive trust is an equitable remedy that is granted in the discretion of a court. The present circumstances do not warrant the exercise of such discretion because of the retrospective nature of any such order. The purpose of the order sought by the Applicants is not to protect assets in the hands of a third party to which the Applicants have been found to be entitled. It is, instead, to reverse the legal effect of actions validly adopted by London Life over a period of at least sixty years. Moreover, the most that can be said regarding the Company's fiduciary obligations during this time would be that there was a considerable evolution in the law and practice over the period. The Applicants seek, in effect, to impose current standards and practice on the Company retroactive to a time when such standards and practice were far from clear in order to claim an entitlement to assets to which they are not legally entitled today. That is not the purpose of a constructive trust.

183 Further, even if it were found that London Life had obtained tax benefits to which it was not entitled and which increased the size of the Partial Windup Surplus, imposition of a constructive trust in favour of the Plan members would be inappropriate. In such circumstances, the proper party to seek relief is the Canada Revenue Agency on behalf of the taxpayers of this country. It would be inappropriate for the Court to grant a remedy that merely shifted the entitlement to a surplus that was improperly obtained in the first place.

Claim Based on the Special Payments

184 The Applicants also seek imposition of a constructive trust in respect of the portion of the Partial

Windup Surplus attributable to the special payments made between 1971 and 1983. The Applicants rely on the language in the Revenue Canada approvals of such payments that required that the special payments irrevocably vest in or for the Plan. I note that, although this claim is asserted as a claim for imposition of a constructive trust, it is based on an assertion that, by making these payments, London Life either vested the payments in trust or represented to Revenue Canada that it was doing so, and, in either case, cannot now resile from such actions.

185 The Applicants bear the onus of establishing, on a balance of probabilities, that the receipt of Revenue Canada approval of the special payments on the basis of this language evidenced an intention on the part of London Life to vest the special payments in trust or a representation to the DNR that it would do so. They have failed to satisfy this onus for the following four reasons.

186 First, there is no evidence that any trust document was created in connection with the special payments. There is also no evidence that London Life represented that a trust of the Plan assets, or a trust of the assets required to fund the special payments, had been created, nor is there any evidence that Revenue Canada understood that a trust already existed.

187 Second, there is no evidence that Revenue Canada required a trust to be created to receive such payments to the extent that the obligations of a pension plan were not already funded by a pension plan trust. The language of the Revenue Canada approvals tracked the language of section 20(1)(s) of the Income Tax Act, S.C. 1970-71-72, c. 63, as amended, as it existed at such time. There was no guidance in the statute or otherwise as to the meaning of this language, and no attendant requirements, that support the Applicants' position.

188 Moreover, the wording of section 20(1)(s), and the manner in which pension plans were structured, may suggest that it was not specifically directed toward ensuring that special payments had to be made to a trust. There is a difference between vesting assets in a plan and in a fund. This suggests that the requirement in section 20(1)(s) was not intended to impose a structural requirement but was directed instead toward ensuring that the assets representing the special payments were dedicated to funding pension plan obligations, however the pension plan was structured, and could not be used for other purposes so long as such liabilities existed. This is consistent with the fact that the special payments addressed the circumstances of a deficiency in the pension plan assets relative to pension plan liabilities. Moreover, because a pension plan could have been structured by way of an insurance contract rather than a pension trust, the specific requirement to vest such payments in a pension fund trust cannot be inferred from the language of the Revenue Canada approvals.

189 Third, as mentioned, the special payments were necessary to address a Plan deficiency. This required a commitment not to withdraw the special payments so long as the deficiency continued. It did not, however, require the parties to commit to a course of action after the deficiency had been eliminated. It was not necessary to go beyond that situation to address the possibility of a Plan surplus. For this reason, in the absence of language in the Revenue Canada approval letters indicating an intention to override any existing documentation to the contrary, there is at least a reasonable doubt that the making of the special payments can be taken as evidence of an intention by London Life to divest itself of any right to the funds in circumstances not in contemplation at the time of payment, namely a surplus in Plan assets.

190 Lastly, given the finding that no trust existed in 1973, it follows that any trust established to receive the assets comprising the special payment would be limited to such assets. Considering the level of complexity involved in the maintenance of a trust fund for such limited purposes within the overall Plan, it would have been expected that either Revenue Canada or the Company would have required rules governing the trust relationship pertaining to the assets that funded the special payments. Their absence is further support for the absence of a trust in respect of such payments.

191 The Applicants also make an alternative submission based on the evidence pertaining to the special payments. In their factum, the Applicants argued that, because there was no reason for London Life to treat the special payments differently from other payments to the Plan, the language of the Revenue Canada approvals must reflect the existence of a trust for Plan assets generally. This is not an argument for a constructive trust but a further argument for inferring the existence of an express or implied trust. I agree that the evidence suggests that London Life treated the special payments in the same manner as all other contributions to the Plan. But it does not support the conclusion that such treatment involved a pension plan trust for the reasons set out above. Accordingly, I decline to draw this alternative inference proposed by the Applicants.

Conclusion regarding the Claim for Imposition of a Constructive Trust

192 Based on the foregoing, I conclude that the present circumstances do not satisfy the requirements of the third requirement of Soulos, supra, for the imposition of a constructive trust. In the absence of a demonstrated breach of London Life's obligations, there is no legitimate reason for imposing a constructive trust on Plan assets. For the same reason, it also follows that the Applicants have failed to satisfy the second requirement of Soulos. In the present circumstances, there can be no logical connection between Plan assets constituting the Partial Windup Surplus and any activities of the Company in breach of its allegations.

Resulting Trust

Issue for the Court

193 The Applicants also argue that a resulting trust arises over the portion of the Partial Windup Surplus attributable to member contributions.

Applicable Law

194 A resulting trust arises in respect of an existing trust whose objects have been satisfied without exhaustion of the corpus of the trust. In such circumstances, a court must identify the beneficiaries on whose behalf the trustees hold the remaining assets of the trust.

195 The application of the principle of a resulting trust in the context of pensions was addressed by Cory J. in Schmidt, supra, as follows:

> 69 A resulting trust may arise if the objects of the trust have been fully satisfied and money still remains in the trust fund. In such situations, the remaining trust funds will ordinarily revert by operation of law to the settlor of the fund. However, a resulting trust will not arise if, at the time of settlement, the settlor demonstrates an intention to part with his or her money outright. This is to say the settlor indicates that he or she will not retain any interest in any remaining funds.
>
> ...
>
> 74 The relevant documents in this case are such that it is not necessary to examine all of the difficult issues which can arise in relation to resulting trusts. Nonetheless, when a resulting trust arises in respect of a contributory plan, I would be inclined to prefer the view of Nitikman J in Martin & Robertson Administration Ltd. v. Pension Commission of Manitoba (1980), [1980] M.J. No. 334, 2 A.C.W.S. (2d) 249, to that of Scott J. in Davis v. Richards & Wallington Industries Ltd., [1991] 2 All E.R. 563

(Ch.Div.). Nitikman J held that where employers and employees are (by virtue of their contributions) settlors of the trust, surplus funds remaining on termination can revert on a resulting trust to both employers and employees in proportion to their respective contributions. Scott J., on the other hand, held that employees cannot benefit from a resulting trust since, by the mere act of contributing to the fund, they manifest an intention to part irrevocably with their money.

75 I do not think that any general rule can be laid down as to the intentions of employees contributing to a pension trust. Where the circumstances of a particular case do not indicate any particular intention to part outright with money contributed to a pension fund, equity and fairness would seem to require that all parties who contributed to the fund should be entitled to recoup a proportionate share of any surplus subject to a resulting trust. However, this issue should be left to be resolved when it arises.

76 In most pension trust cases the resulting trust will never arise. This may be because the objects of the trust can never be said to be fully satisfied so long as funds which could benefit the employees remain in the pension trust, or because the settlor has manifested a clear intention to part outright with its contributions. The operation of the resulting trust may also be precluded by the presence of specific provisions dealing with the disposition of surplus on plan termination.

94 Funds remaining in a pension trust following termination and payment of all defined benefits may be subject to a resulting trust. Before a resulting trust can arise, it must be clear that all of the objectives of the trust have been fully satisfied. Even when this is the case, the employer cannot claim the benefit of a resulting trust when the terms of the plan demonstrate an intention to part outright with all money contributed to the pension fund. In contributory plans, it is not only the employer's but also the employees' intentions which must be considered. Both are settlors of the trust. Both are entitled to benefit from a reversion of trust property. [emphasis added]

Position of the Applicants

196 The Applicants say that there is a presumption that the Plan members did not intend to gift their contributions to the Company and that there is no evidence to rebut this presumption. They argue that, instead, there is evidence that the Plan members intended to remain entitled to access their contributions and any excess funds arising from their contributions.

Analysis and Conclusions

197 An issue of a resulting trust raises two questions: (1) have the objects of a trust of Plan assets been satisfied without exhaustion of the corpus of the trust, and (2) if so, on behalf of which parties do the trustees hold the remaining assets of the trust?

198 The present circumstances are determined by the findings above that collectively establish a right in favour of London Life to any plan surplus on termination of the Plan. Even if it were held that the objects of the trust of Plan assets established under the Trust Agreements have been satisfied in respect of the employees who ceased to be employed as a result of the Reorganization without exhaustion of the Partial Windup Surplus, the trustees under the 2010 Trust Agreement hold the assets representing the Partial Windup Surplus in favour of London Life. In such circumstances, as is contemplated in paragraph 76 of Schmidt, supra, the operation of a resulting trust is precluded. There can be no issue of a