52 In *United Scientific, supra*, Lord Diplock reiterated the historic approach of equity to the issue of the timeliness of performance as follows, at p. 927:

> . . . the rules of equity, to the extent that the Court of Chancery had developed them up to 1873 as a system distinct from rules of common law, did not regard stipulations in contracts as to the time by which various steps should be taken by the parties as being of the essence of the contract unless the express words of the contract, the nature of its subject matter or the surrounding circumstances made it inequitable not to treat the failure of one party to comply exactly with the stipulation as relieving the other party from the duty to perform his obligations under the contract. [Emphasis added.]

53 Thus, at the time of the Judicature Acts, equity presumed that time was not of the essence unless the parties had expressly made it of the essence or the nature of the property or circumstances allowed for such a presumption. Since the Judicature Acts, the rule of equity has prevailed in Canada and there is therefore no general presumption that time is of the essence. See for example in Alberta, *Judicature Act*, R.S.A. 1980, c. J-1, s. 22; in British Columbia, *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 31; in Manitoba, *Mercantile Law Amendment Act*, C.C.S.M, c. M120, s. 5; in New Brunswick, *Judicature Act*, R.S.N.B. 1973, c. J-2, s. 32; in Newfoundland *Judicature Act*, R.S.N. 1990, c. J-4, s. 91; in Nova Scotia, *Judicature Act*, R.S.N.S. 1989, c. 240, s. 43(8); in Ontario, *Mercantile Law Amendment Act*, R.S.O. 1990, c. M.10, s. 15; in Prince Edward Island, *Supreme Court Act*, R.S.P.E.I. 1988, c. S-10, s. 29(2); in Saskatchewan, *Queen's Bench Act*, R.S.S. 1978, c. Q-1, s. 45(6). Similarly, in *United Scientific*, Lord Simon noted, at p. 940, that "in modern English law time is prima facie not of the essence of a contract". See *Law of Property Act, 1925* (U.K.), 15 & 16 Geo. 5, c. 20, s. 41.

54 This Court must therefore begin from the presumption that time is not of the essence in the contract in the present case. However, keeping in mind that parties to commercial contracts are free to make time of the essence in relation to the performance of any contractual obligations (*United Scientific*, at p. 923; *Scandinavian Trading Tanker Co AB v. Flota Petrolera Ecuatoriana — The Scaptrade*, [1983] 2 All E.R. 763, at p. 768), I must assess whether these parties have expressly made time the essence of this contract through the incorporation of a "time of the essence" clause. If they have not, this Court may still conclude that time is of the essence if the nature of the property involved or the circumstance of this case call for such an interpretation.

Is Clause 30 a "Time of the Essence" Clause?

55 This Court must look to the actual language used by these parties in clause 30, the option clause, to determine whether it was their intention to expressly make time of the essence. The respondent submits that since this is a commercial contract entered into by equal parties, the wording of clause 30 must be strictly construed. The respondent further submits that the words "promptly and in accordance with the schedule" make time of the essence in relation to the lease payments. Accordingly, the argument goes, the appellant's single late payment, even though it was caused by a bank error and quickly remedied with interest, allows the respondent to put an end to the option.

56 Before discussing the strict interpretation urged by the respondent, I would point out that commercial parties should be familiar enough with the applicable law to know that they must use very precise words if their intention is to make time the essence of a contract. This is self-evident given that the reason for the inclusion of a clause of this

nature in the first place is to provide certainty about the consequences of breach which the substantial non-performance doctrine cannot provide. Furthermore, because of the real possibility of an unjust enrichment, courts must be certain that it was the parties' intention to allow any breach of the timing of performance, no matter how minor or non-prejudicial, to justify rescission of the entire contract.

57 In my opinion, the words used in clause 30 are simply not precise enough to satisfy this Court that these parties intended to make timely lease payments the essence of this contract. The word "promptly" adds nothing to the words "in accordance with the schedule". Read together, these words call for regular payment. Nothing exceptional about the obligations of the parties can be inferred. This conclusion is bolstered by the respondent's admission in oral argument that contracts used in this industry often include the actual words "time is of the essence" when the parties intend to, in fact, make time of the essence.

58 Binnie J., in his separate reasons, attaches great importance to the use of the words "full performance" in clause 30. An examination of the use of this expression in case law reveals that these words, which do not appear to be terms of art, refer to the obligation to do all things required under the contract, not to the manner of performance of the obligation; see *LeMesurier v. Andrus* (1984), 31 R.P.R. 143, at p. 168, reversed on other grounds (1986), 54 O.R. (2d) 1. This view is also advocated in the United States; see for example *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889 (N.Y. 1921), at p. 890 (Cardozo J.). *Halsbury's Laws of England*, which Binnie J. quotes, refers to "exact" performance when addressing the issue under review here, but states that even exact performance is mitigated by *Englan* the doctrine of substantial non-performance in

appropriate cases; see *Halsbury's Laws of d* (4th ed. 1998), vol. 9(1), at para. 921. I would therefore conclude that the use of the words "full performance" by these parties was not sufficient to change their obligations, particularly since timely performance, which is at issue here, is generally considered to be a separate issue.

59 Even if it could be said that the words of clause 30 are adequate to make time of the essence in relation to the lease payments, the actual wording of clause 30 could only support a finding that time is of the essence in relation to clause 10, since it reads: "payments being made promptly and in accordance with the schedule of clause 10 throughout this Agreement". The respondent urges this Court to find that the reference to clause 10 in the option clause is a typographical error and was meant to read "clause 11". It appears that the Federal Court of Appeal proceeded on this assumption since its reference to the option clause includes the notation "[*sic*]" after the words "clause 10". As noted, no such finding was made by the trial judge. Both clauses 10 and 11 contain schedules. Furthermore, a reference to clause 10 in the option clause is more consistent with what the parties would reasonably have intended had they addressed their minds to this issue upon entering the charter party. Indeed, it makes more commercial sense that the respondent would be more insistent on receiving a total of $85,000 per year than each monthly payment on the exact day it falls due. In addition, it is unlikely that the parties could have intended that a single late payment among 35 payments made over a five year term, caused by no fault of the appellant and quickly remedied with interest, would void the option, given its importance to the contract as a whole.

60 Since the option clause expressly refers to clause 10 and not clause 11, it is logical to conclude that the parties could only have intended that time be of the essence

in relation to clause 10, should the words used in fact be sufficient to imply a time of the essence clause. The trial judge properly found no breach of clause 10 because the appellant's single late payment did not breach the clause 10 requirement to pay $85,000 for the year in which the late payment occurred. As the trial judge found, the late payment was, at most, a breach of clause 11, which sets out the exact day upon which each monthly payment was due.

61 Having found that the actual wording of clause 30 reveals no intention on behalf of these parties to expressly make timely lease payments of the essence in relation to the exercise of the option by the appellant, this Court must next assess whether the nature of the property involved or the circumstances in the present case call for such an interpretation.

Can "Time is of the Essence" be Implied from the Property Involved or the Circumstances in the Present Case?

62 Time will be presumed to be of the essence if the subject matter of a contract is the acquisition of a perishable commodity or something which is likely to rapidly change in value. See for example *Lang v. Provincial Natural Gas and Fuel Co. of Ontario* (1908), 17 O.L.R. 262 (Ch. D.); *Sprague v. Booth* (1908), 21 O.L.R. 637 (Ont. C.A.), aff'd [1909] A.C. 576 (P.C.); *Hare and Nicoll*, [1966] 2 Q.B. 130 (C.A.); *United Scientific*, *supra*, at p. 950. In such cases, if the seller fails to deliver within the specified time, the buyer may be seriously prejudiced. No such potential prejudice arises in the present case. The property at issue is a vessel. It is not perishable. Furthermore, it cannot be said that its value will fluctuate greatly, as for example, the value of corporate shares.

In any event, the appellant's lack of timeliness is in no way related to the delivery of the vessel. Rather, the appellant made a single late lease payment and failed to deliver the log books in the manner requested. As a result, I cannot conclude that the nature of the property in the present case would make it inequitable to presume time was not of the essence in relation to the exercise of the option.

63 Finally, I must assess whether the circumstances surrounding this contract would make it inequitable for this Court to presume that time was not of the essence in relation to the exercise of the option.

64 The respondent places a great deal of emphasis on the commercial nature of this contract. However, there is no general rule making time the essence of all commercial contracts (*United Scientific*, *supra*, at pp. 924 and 950). Indeed, in *United Scientific*, Lord Diplock refused to hold that a timetable specified in a rent review clause was of the essence where no specific "time of the essence" clause was incorporated into the contract. As in other cases, the Court was concerned with whether the deficiency in performance was of vital importance given the contractual context (Treitel, *supra*, at p. 715).

65 Although he was dealing with a charter party which did not contain an option, the words of Lord Diplock in *Scandinavian Trading Tanker Co AB*, *supra*, at p. 768, are applicable here:

> Prima facie parties to a commercial contract bargaining on equal terms can make 'time to be of the essence' of the performance of any primary obligation under the contract that they please . . . . When time is made of the essence

> of a primary obligation, failure to perform it punctually is a breach of a condition of the contract which entitles the party not in breach to elect to treat the breach as putting an end to all primary obligations under the contract that have not already been performed.

66 The fact that commercial parties are free to make time of the essence rather than to make time not of the essence confirms that there is no general rule that time is of the essence in all commercial contracts. Indeed, under such a rule, the essential question surrounding the availability of rescission would revolve around whether or not a given contract could be classified as "commercial" or not. The actual intentions of the parties and requirements of the contractual context would be rendered irrelevant. The problems of drawing a distinction on this artificial ground are apparent; see Treitel, at p. 742.

67 The respondent also urged this Court to presume that time is of the essence in the present case because it involves the exercise of an option to purchase. According to this argument, time is always of the essence in relation to the exercise of options. See for example *Krause v. Bain Bros. Alta. Ltd.* (1972), 29 D.L.R. (3d) 500 (Alta. S.C.T.D.); *United Scientific*, *supra*; P. M. Perell, "Putting Together the Puzzle of Time of the Essence" (1990), 69 *Can Bar Rev.* 417, at p. 425; Di Castri, *supra*, at p. 6-12.

68 I must disagree with the statement that time is always of the essence in option contracts. Option case law reveals that courts have not applied any such strict approach to the timing of performance. One example of the flexibility courts have applied to performance in option contexts is the doctrine of spent breach. This doctrine mitigates against the severity of the application of the strict performance rule to options by preventing deficiently performed conditions precedent which have been remedied by the

time the option is to be exercised from rendering the option void. For example, in *Bass Holdings Ltd. v. Morton Music Ltd.*, [1987] 2 W.L.R. 397 (Ch. D.), a lease contract included an option to renew provided the tenant was not in breach of any of the tenant's covenants contained in the lease. The tenant was at one time in breach of this condition because his rent was overdue. However, he had remedied that breach by the time he sought to exercise the option. In its interpretation of the contract, the court found that such "spent" breaches do not prevent the exercise of the option. The language here may be somewhat confusing. In reality, this doctrine simply provides that the option clause is interpreted to mean that conditions precedent are met providing that the positive covenants of the underlying contract have been performed at the time of the exercise of the option. There is, therefore, no breach, even though some payments were made late. Late payment can be remedied because this possibility is implied in the interpretation of the option clause.

69 The doctrine of spent breach has also been recognized by Canadian appeal courts. In *Birchmont Furniture Ltd. v. Loewen* (1978), 84 D.L.R. (3d) 599 (Man C.A.), a lease contained an option to purchase "provided there be no default by the Tenant in any of the terms and conditions expressed or implied in the within Lease" (p. 599). The tenant had defaulted under the lease, but there were no outstanding defaults when the time came to exercise the option. The Manitoba Court of Appeal, *per* Hall J.A., confirmed the trial judge's interpretation of the option clause and allowed the tenant to exercise the option because the deficient performance of the lease had been remedied prior to the exercise of the option. See also *Petrillo v. Nelson* (1980), 114 D.L.R. (3d) 273 (Ont. C.A.).

70 My review of the doctrine of spent breach reveals that courts have not assumed that time is always of the essence in option cases. The respondent's argument that time is necessarily of the essence in the present case simply because it involves an option must therefore fail.

71 No other circumstances in the present case support a presumption that these parties would have intended to make the timing of each of the 35 lease payments of the essence had they addressed their minds to this issue upon entering the charter party. It is, to my mind, incredible that the parties could have intended that a single late payment among 35 payments made over a five-year term, caused by no fault of the appellant and quickly remedied with interest, would deprive the appellant of the option, given its importance to the contract as a whole. This conclusion is reinforced when one considers that the respondent did not insist on strict compliance with the method of payment set out in clause 11, a matter which will be discussed more fully below.

72 Since the presumption that time is not of the essence has not been displaced, the bilateral nature of the contract in the present case requires that this Court apply the substantial non-performance doctrine.

Application of the Substantial Non-Performance Doctrine

1. Breach of Clause 25

73 In the present case, the trial judge found that clause 25 of the charter party, namely the duty to provide log books, had been minimally breached. I agree, noting

however that this is not meant to be taken as an application of the *de minimis non curat lex* principle. Nevertheless, since there was some disagreement in the courts below about the application of this principle, I will take this opportunity to address it briefly.

74 The trial judge below was of the opinion that a court can apply *de minimis* after finding a minor divergence in performance from the express terms of a contract to prevent that divergence from being considered a breach. He made no distinction between the application of the principle to unilateral as opposed to bilateral contracts. In contrast, the Federal Court of Appeal was of the opinion that *de minimis* is only a rule of contractual interpretation used to determine whether or not a breach has been committed. According to Décary J.A., the principle can only be applied to prevent the finding of a breach on the basis that the parties had implicitly agreed that substantial performance would be tantamount to strict performance. He found that the principle could not be used to qualify a breach as minimal. Therefore, Décary J.A. held that the trial judge, having found that a breach had been committed, could no longer look to the *de minimis* principle to conclude that the breach was so trivial that it did not constitute a breach. However, like the trial judge, Décary J.A. did not comment on whether the application of the *de minimis* principle would differ depending on whether a case involved a unilateral or a bilateral contract.

75 While there is little jurisprudence which expressly addresses how the *de minimis* principle is to be applied, the case law which does exist suggests that the approach of the trial judge is correct, providing it is specified that a finding of *de minimis* means that no fundamental breach permitting rescission has been committed, not that there has been no breach giving rise to an action in damages. For example, in *Runnymede*

Iron & Steel Ltd. v. Rossen Engineering and Construction Co., [1962] S.C.R. 26, this Court dealt with the deficient performance of a contract of sale. In the contract, the respondent agreed to sell and deliver steel rails to the appellant. Approximately 20 to 25 percent of the delivered rails were defective. The appellant sought to rescind the entire contract. The important element of the case for present purposes is the order in which this Court dealt with the breach. The Court first found that the respondent had breached the contract by providing defective goods. Only then did the Court state that *de minimis* could not be applied since at least 20 percent of the goods were defective. This case thus supports the approach of the trial judge, namely that a court should first find a divergence from the performance dictated in the contract and then assess whether that divergence is *de minimis*.

76 In *Gillespie v. Wells* (1912), 2 D.L.R. 519 (Man. K.B.), the plaintiff and defendant entered a contract for the sale of land. The defendant agreed to sell its property in exchange for a promise from the plaintiff to make specified payments over a specified term. The defendant refused to transfer the property claiming that the plaintiff had not fully performed a condition precedent, namely tendering the full amount owing under the payment schedule. The plaintiff brought this action for specific performance. The Court found that the plaintiff had indeed diverged from the contractually required performance because her final payment was deficient by $2.20. Nevertheless, the Court granted specific performance by applying *de minimis* to the plaintiff's slight deficiency in performance. In this way, the Court first found a divergence in performance and only then applied *de minimis*. At no point in the judgment did the Court suggest that *de minimis* actually prevented the finding of a breach in the first place. The rule was simply used to qualify the breach as minimal.

77 While I agree with the trial judge on the method in which the *de minimis* principle should be applied, I disagree that it should be applied in the present case. I leave the scope of the *de minimis* principle, and more particularly whether it applies to unilateral contracts, to be determined in the appropriate case.

78 Instead of referring to the *de minimis* principle in his interpretation of clause 25, the trial judge should have interpreted this clause in light of s. 261(1) of the *Canada Shipping Act*, R.S.C., 1985, c. S-9, which states:

> **261.** (1) An official log shall be kept in every foreign-going ship and every home-trade ship of or over fifty tons register tonnage registered in Canada in the appropriate form for that ship approved by the Minister.

79 According to the terms of the charter party, the *Challenge One* is a home-trade ship which falls within the scope of s. 261(1). It is described as a vessel of about 56.5 tons which is to be operated between Harbour Deep and Jackson's Arm White Bay, Newfoundland. Accordingly, s. 261 dictates that the logs of the *Challenge One* must remain on board the vessel. Furthermore, clause 25 makes no reference to the removal of the logs from the vessel or the making of copies of the logs. It refers to the actual logs only. The clause 25 requirement that the appellant supply the logs to the respondent upon request should therefore have been interpreted as requiring the logs to be made available to the respondent on board the vessel. I note, however, that it is likely that Nadon J. assumed clause 25 only required the appellant to supply the respondent with copies of the logs because he was aware of the statutory requirement that the actual log books remain on board the vessel.

80 In the circumstances of the case, I would not disturb the finding of the trial judge that there was substantial compliance with clause 25. As mentioned, the Court of Appeal did not deal with clause 25.

2. Breach of Clause 11

81 Clause 11 of the charter party specifically states that the appellant is to make monthly payments "in cash in Canadian currency by way of Bank Transfer and/or certified cheque". Yet, the accepted practice between these parties was for the appellant to submit seven post-dated, uncertified cheques to the respondent at the beginning of each operating season. The adoption of this alternative method of payment indicates that the respondent was not insistent on strict compliance with the method of payment set out in clause 11. It follows that the respondent cannot now insist on a strict application of clause 11. In *A/S Tankexpress v. Compagnie Financière Belge Des Pétroles S/A* (1948), 82 Lloyd's L.R. 43 (H.L.), a charter party gave the owner a right to withdraw the ship if the charterer did not pay "[i]n cash, monthly, in advance, in London". However, the parties had mutually adopted and accepted a practice whereby the charterer would pay by sending a cheque to the owner in the mail. Thus, like the respondent in the present case, the owner did not insist on strict compliance with the method of payment set out in the agreement. In *Tankexpress*, the charterer made all payments in accordance with the adopted practice, but on one occasion the cheque arrived late because it was delayed in transit due to war. The House of Lords unanimously concluded that the owner did not have the right to withdraw the ship because the charterer had made payment in accordance with the adopted practice. Lord Uthwatt stated, at p. 57:

> I fail to see that it is implicit in this particular arrangement that the charterers are to take the risk that the agreed machinery, to which they must adhere, fails in a particular instance to perform the functions that both have assigned to it.
>
> . . . the charterers having complied with the working arrangement as to payment involved in the accepted method had not breached the contract.

82 Lord Du Parcq (with Lord Morton concurring) stated, at pp. 58-59:

> I conclude, therefore, that if the charterers, when the time came to make the payment due in September, 1939, in fact acted in accordance with the "accepted method," the owners were not entitled, on the ground that, through no fault of the charterers, receipt of the payment was delayed, to exercise a remedy which was open to them only "in default of" the payment stipulated by the contract.
>
> . . .
>
> Whatever form of transmission is adopted, there is a possibility of delay, though it may be a slight possibility. If one party elects to rely on the postal service, or on any messenger of his own choice, he has to bear the responsibility for his agent's delay; but when, as in this case, both parties are agreed that a cheque is to be sent, and it is in fact sent by suitable, and normally expeditious, means, the creditor must run the risk of delay equally with the debtor. It seems to me to be hopeless to contend that the owners' acceptance of the method of payment was subject to a condition, unexpressed but implied, that if the cheque did not arrive in London on Sept. 27, the charterers, though they were not to blame for the delay, should be treated as having made default, and so would incur the risk of losing a contract of great value. If such a condition had been expressly stated, the charterers might well have thought that they were being asked, not to conform to a sensible business arrangement, but to walk into a trap.

83 In *Zim Israel Navigation Co. v. Effy Shipping Corporation — The Effy*, [1972] 1 Lloyd's Rep. 18 (Q.B. Com. Ct.), the Court applied the reasoning in *Tankexpress*. In *The Effy*, a charter party gave the owner a right to withdraw the ship if the charterer did not make monthly cash payments in advance. The parties had mutually adopted and accepted the practice that the charterer would pay by notifying its Israeli bank

to transfer funds to the owner's London bank via an American bank. Thus, as in *Tankexpress, supra,* the owner had not insisted on strict compliance with the method of payment set out in the contract. On one occasion, the charterer notified its bank to transfer the funds for a timely credit to be made to the owner's account. However, due to a bank error, the transfer was late. The Court found the case to be indistinguishable from *Tankexpress*.

84 Likewise, I am of the opinion that the facts surrounding the application of clause 11 in the case at bar are indistinguishable from *Tankexpress*. I again refer to the decision of Lord Du Parcq in that case, at p. 59:

> There is always a risk that a cheque may be lost in transit, especially when it has to cross the sea, and since all men, and even banks, are capable of error, it may, through some blunder, not be met, although there are funds to meet it. In either of these events the charterers would no doubt remain liable to pay the hire due, but in neither case would the delay in payment justify cancellation of the contract. . . . The risk of delay in the post was hardly more serious than the risk of delay in clearing the cheque. That these risks should be accepted by the owners is not surprising. [Emphasis added.]

85 The fact that the respondent accepted the practice of making payment by post-dated, uncertified cheques is inconsistent with its present insistence on strict compliance with the clause 11 requirement that the appellant pay only with cash or certified cheques on a given day. Lease payments were made under a modified arrangement, rather than under the strict terms set out in clause 11. The modified method of payment accepted by the parties involved a risk of delay in clearing the cheques. Such a delay in fact occurred because of an error by a bank employee. The respondent must bear the consequences of this risk equally with the appellant because it materialized as a result of their mutually

accepted alteration of the strict terms of the agreement. The respondent cannot now insist that the option clause, which makes the availability of the option dependent on the performance of the written terms of the charter party, be strictly applied to the appellant's late payment under the modified arrangement.

86 In *Tankexpress*, great emphasis was put on two facts: there were sufficient funds available in the account to cover the cheque on the due date; and the charterer had no reason to expect that those funds would be delayed in reaching the owner. Similarly, in the present case, the appellant had sufficient funds in its account to cover its cheque and had no reason to suspect a bank error might delay payment of those funds to the respondent. The appellant always had the intention to pay on time and took all the steps that it could reasonably have been expected to take given the modified payment arrangement into which the parties had entered. What is more, upon being notified by the respondent that its cheque had been refused, the appellant promptly paid the amount due plus interest in accordance with the respondent's instructions. The appellant also made all of the remaining payments under the charter party on time. Under these circumstances, I would conclude that the appellant substantially performed its modified clause 11 obligations.

Conclusion

87 I have come to the conclusion that the appellant has substantially performed its obligations under the charter party. The trial judge was not asked to consider the possible application of relief against forfeiture, forbearance or promissory estoppel. I will therefore not discuss these remedies. As just mentioned, the respondent has no right to

cancel the appellant's option to purchase the vessel in the present case. This result is consistent with the true intentions of these parties as revealed by all of the circumstances and with the applicable policy reasons. The respondent has received a significant benefit from the appellant's defective performance which it cannot restore. Furthermore, there is no proportionality between the impact of the appellant's defective performance on the respondent and the benefit the appellant will lose if the respondent is permitted to void the option. The deficient performance did not give rise to uncertainty because there was no reason for the respondent to believe that the single late payment, which was caused by a bank error rather than any fault of the appellant, would put future lease payments in doubt. The concern of the Court in this instance must be with fairness. On the facts of this case, the respondent was simply not deprived of what it bargained for.

Disposition

88 The appeal was allowed, with costs throughout, in a decision rendered from the bench on October 9, 1998.

SUPREME COURT OF CANADA

SAIL LABRADOR LIMITED

v.

THE OWNERS, NAVIMAR CORPORATION LTÉE and ALL OTHERS INTERESTED IN THE SHIP *CHALLENGE ONE*, HER EQUIPMENT, BUNKERS AND FREIGHTS, and THE SHIP *CHALLENGE ONE*, HER EQUIPMENT, BUNKERS AND FREIGHTS

CORAM: The Chief Justice and Gonthier, Cory, Iacobucci, Major, Bastarache and Binnie JJ.

BINNIE J. --

89 I agree with my colleagues that this appeal must be allowed. I would not, however, with respect, invoke the doctrine of substantial performance. As Justice Bastarache makes clear in his reasons (at paras. 25 and 50), the question whether a contractual term is satisfied by substantial performance, or whether strict (or "complete" or "exact") performance is required, is a matter of interpretation. Everything turns on the intention of the parties as expressed (in this case) in the charter party. A concise statement of the rule is found in *Halsbury's Laws of England* (4th ed. 1998), vol. 9(1), at para. 924: "It has been said to be a question of construction in each case whether the parties intended that this doctrine [of substantial performance] should apply or that there should be complete and exact performance". Here, the contracting parties stipulated "full performance" as a condition precedent to the exercise of the option:

Option to Purchase

30. Subject to full performance of all its obligations in this Charter Party including but not limited to payments being made promptly and in accordance with the schedule of Clause 10 throughout this Agreement, the Charterer shall have an option to purchase the vessel .... [Emphasis added.]

90 The stipulation that the appellant's option to purchase the *Challenge One* was "[s]ubject to full performance of all its obligations in this Charter Party" (emphasis added) should be respected by the courts. The words "all obligations" refer to all of the things required under the contract, and the words "full performance" must therefore refer to the sufficiency of performance of each of them. If the contracting parties had deliberately set out to exclude the doctrine of substantial performance from their contractual arrangement, I do not know what words they could have found to make their intention any clearer. Substantial performance is less than full performance, according to the ordinary meaning of the words.

91 There is good reason why the parties specified full performance. So long as the option was outstanding, the vessel owners were disabled from selling their ship to anyone but the charterer, yet the charterer was under no reciprocal obligation to buy unless and until the option was exercised. As Lord Diplock put it in *United Scientific Holdings Ltd. v. Burnley Borough Council*, [1978] A.C. 904 (H.L.), at p. 929, "the grantor [of the option] needs to know with certainty the moment when [the disability from selling the ship] has come to an end". This, I believe, is the commercial rationale for the strict interpretation of options endorsed by Duff C.J. in *Pierce v. Empey*, [1939] S.C.R. 247, at p. 252. My colleague suggests that *Pierce* can be explained on the basis that the option in that case could be characterized as a unilateral contract. However,

an option is a unilateral obligation, irrespective of whether it is contained in a unilateral or a bilateral contract: *United Dominions Trust (Commercial), Ltd. v. Eagle Aircraft Services, Ltd.*, [1968] 1 All E.R. 104 (C.A.), *per* Diplock L.J., at p. 110:

> While, for simplicity in analysing the relevant differences in legal character, I have spoken of synallagmatic [i.e., bilateral or multilateral] and unilateral or "if" contracts, it would be more accurate to speak of synallagmatic and unilateral obligations, for obligations of these two different kinds are often contained in a single agreement, as where a lease contains an option for renewal. [Emphasis added.]

It is the unilateral nature of the obligation rather than the nature of the contract that is the key to the strict interpretation of options. It is not without significance that in this case the parties stipulated for "full performance" *in relation to the exercise of the option* (i.e., by including the stipulation in the option clause itself) rather than in relation to their contract generally. The parties thereby made it clear that whatever consequences may flow from deficient performance of the clauses in question in terms of the ongoing charter of the vessel, such clauses would have to be fully performed if the vessel owners were to continue to be disabled from selling the vessel to third parties by the option.

92 There are good policy reasons to support the approach taken by Duff C.J. in *Pierce* and to respect the decision of the parties in this case to call for "full" performance in relation to the exercise of the option. Owners have a business need to know exactly where they stand in that regard, as pointed out by Lord Diplock. Determining "full" performance is not without difficulty, but attempting to predict what a court would consider to be "substantial" performance of a condition precedent

on the facts of a particular case adds unnecessarily to commercial uncertainty. I agree with my colleagues that in some contracts the parties may be interpreted to have agreed to the preconditions to the option being governed by the more flexible standard of "substantial" performance. They did not do so here.

93 Despite the different view I take of the proper interpretation of the contract, I agree that the appeal must be allowed. When the terms of the charter party, properly construed, are applied to the facts found by the trial judge, I believe that the requirements of Duff C.J. in *Pierce* are met, namely that the conditions precedent to the exercise of the option were satisfied or that the "holder of the option is on some equitable ground relieved from the strict fulfilment of them" (p. 252).

94 While, as stated, I accept the trial judge's findings of fact, his interpretation of the legal obligations created by the charter party raises questions of law or mixed questions of fact and law properly reviewable in this Court (see: *Dominion Grange Mutual Fire Insurance Association v. Bradt* (1895), 25 S.C.R. 154, at p. 161; *Regina Industries Ltd. v. City of Regina*, [1947] S.C.R. 345, at p. 354). I agree with my colleague, for the reasons he gives in para. 59, that the courts below were not entitled to rewrite the option to refer to clause 11 instead of clause 10. Clause 10 was performed in full. In any event, the owners were estopped from relying on non-compliance with clause 11 because they accepted an alternate payment arrangement which clearly carried with it the risk of the very type of bank error that in fact materialized. The possibility of such an estoppel was expressly contemplated in *Pierce*, *supra*. Finally, as to clause 25, the courts below were wrong to read an obligation to furnish copies of log books into a clause which provided for no such

thing. The log books were kept aboard the vessel in accordance with s. 261 of the *Canada Shipping Act*, R.S.C., 1985, c. S-9, and would have been "supplied" to the owners at that place if and when the owners had turned up.

95 On a proper interpretation of the charter party the conditions precedent to the exercise of the option were therefore satisfied in "full" (or, in the instance of the banking arrangements, the owners were estopped from saying otherwise), and I thus agree with the conclusion of my colleagues that the charterers were entitled to exercise the option. Therefore, the appeal must be allowed.

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In the Court of Appeal of Alberta

Citation: Rapatax (1987) Inc. v. Cantax Corporation Ltd., 1997 ABCA 86

Date: 19970327
Docket: 96-16417
Registry: Calgary

Between:

Rapatax (1987) Inc.

Plaintiff
(Respondent)

- and -

Cantax Corporation Ltd.

Defendant
(Appellant)

The Court:

The Honourable Mr. Justice Harradence
The Honourable Madam Justice Russell
The Honourable Madam Justice Picard

Reasons for Judgment of The Honourable Madam Justice Picard
Concurred in by The Honourable Mr. Justice Harradence and
Concurred in by The Honourable Madam Justice Russell

APPEAL FROM THE JUDGMENT OF THE HONOURABLE MR. JUSTICE HUTCHINSON DATED THE 19™ DAY OF SEPTEMBER, 1995

COUNSEL:

J.B. Laycraft, Esq., for the Plaintiff(Respondent)

D.A. McGillivray, Esq., for the Defendant(Appellant)

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE PICARD

[1] The primary issue in this appeal is whether or not a contract of indeterminate duration is unilaterally terminable upon reasonable notice.

FACTS

[2] The essential facts are relatively simple. The appellant/defendant, Cantax Corporation Inc. ("Cantax"), was a developer of computer software used in the processing of income tax returns. The respondent/plaintiff, Rapatax (1987) Inc. ("Rapatax"), was in the "service bureau" business and primarily processed income tax returns on a mainframe computer. The parties entered into a joint venture for the development of a new line of income-tax-related software. That agreement was never reduced to writing. Moreover, while the lawyer for one of Rapatax's principals recommended a ten-year term, the parties never agreed on the duration of the agreement, nor on means by which the agreement could be unilaterally terminated. Approximately three months later, after Rapatax had incurred a variety of costs related to the joint venture, but before any product was brought to market, Cantax breached the agreement by purporting to unilaterally terminate it without notice.

[3] Rapatax brought an action against Cantax for breach of contract and sought damages for expenses incurred and for loss of anticipated profits. At trial, each party adduced expert evidence as to the profits that Rapatax would have earned if Cantax had not breached the agreement. The trial judge understandably was "astounded" at the difference between the respective estimates: whereas Rapatax's expert predicted profits of approximately $1,000,000 over a five-year period, Cantax's expert predicted losses of between $471,435 and $1,318,954 over the same time.

TRIAL FINDINGS

[4] The trial judge found that the parties had a valid contract which was breached by Cantax. Moreover, he found that the calculations performed by Cantax's expert witness were based on unrealistic assumptions. Consequently he assessed damages for loss of anticipated profits on the basis of Rapatax's more optimistic predictions. But he limited them to a five-year period because Rapatax's expert did not think it was possible in the circumstances to provide accurate predictions beyond that time. However, in one important regard, he preferred Cantax's position. While Rapatax had argued for a discount figure of 6.5% to 7.5%, the trial judge accepted Cantax's contention that damages for loss of anticipated earnings should be subject to a global 25% contingency allowance to reflect: (i) the present value of the loss of profits that would have occurred in the future, (ii) the negative economic contingencies that may have adversely affected the profitability of the joint venture and, (iii) the positive possibilities that the parties would have "renewed" their agreement after five years or that Cantax would have bought out Rapatax's interest The trial judge also awarded $60,000 to compensate Rapatax for expenses which it had

incurred in performing its obligations under the agreement. In total, Rapatax received damages of $1,065,000, plus interest.

THE APPEAL

[5] Cantax accepts the trial judge's finding that the parties had a valid contract which was breached by it before a product was brought to market. However, it has appealed the decision essentially on two grounds. The first is the duration of the parties' contract in light of the fact that the agreement did not state a termination date. Cantax's position in this Court was that the trial judge erred by: (i) failing to determine that a contract for an indeterminate period is terminable upon reasonable notice and, (ii) failing to determine what constituted reasonable notice on the facts. Rapatax, in response, argued that the trial judge properly held that the joint venture was not terminable upon reasonable notice.

[6] The second ground of appeal is the quantification of damages. Cantax argued that it was unreasonable for the trial judge to reject its expert evidence in favour of Rapatax's. Rapatax said that the trial judge committed no reversible error.

ANALYSIS

Unilateral Termination of Contract of Indeterminate Duration

[7] While the trial judge recognized the need to determine whether or not the parties' contract was unilaterally terminable upon reasonable notice, it is unclear whether he found the joint venture to be potentially terminable, though not actually so on the facts before him, or enforceable in perpetuity and therefore not capable of being terminated at all.

[8] The trial judge quoted passages from two Supreme Court of Canada decisions: *Gill Brothers v. Mission Saw Mills Limited* [1945] S.C.R. 766 (*"Gill Brothers"*) and *Town of Fort Francis v. Boise Cascade Canada Ltd.* (1983), 143 D.L.R. (3d) 196 (*"Fort Francis"*). From the former, he relied upon the following statement of Kerwin J., *supra,* at 767:

> [The contract] contained no stipulation as to its duration but the trial judge found, and the Court of Appeal agreed with him, that it was subject to termination upon reasonable notice, that the six days' notice given by the appellant on June 24, 1943 was unreasonable, that the contract was wrongfully terminated on June 30, 1943 and that six months notice would have been reasonable. ... [W]e are unable to agree with Mr. Bull's alternative contention that if the court agreed with the courts below that such a contract had been made it could be terminated at any time. Speaking generally, a contract indefinite in time is prima facie perpetual. The respondents do not quarrel with the finding that the contract in question was determinable on six months notice and no other period has been suggested.

That passage is inconclusive. While suggesting in *dicta* that contracts of indefinite duration *prima facie* are perpetual, the Supreme Court of Canada proceeded upon the basis that no appeal had been taken from the trial judge's decision that the contract was terminable upon reasonable notice.

[9] The trial judge also relied upon a statement by Estey J. in ***Fort Francis, supra,*** at 208:

> The one issue which now appears to be accepted as settled by the parties to this appeal concerns the right of either party to the agreement of 1905 to terminate it unilaterally by notice. Both courts below found that no such right existed in law, and that issue was not argued at any length in this court, both the parties conceding that it is difficult to contemplate the termination of an agreement where the terminating party cannot restore the other to the position enjoyed prior to the execution of the agreement.

Again, the Supreme Court of Canada was not asked to address the issue of whether or not a contract of indefinite duration was unilaterally terminable; in that case, the parties agreed on appeal that their agreement was not so terminable. In the circumstances, that was understandable. The contract in ***Fort Francis*** was highly unusual. It occurred in the context of a complex, long-term, legislative scheme under which the plaintiff corporation was permitted to develop a hydro-electric power station and was required to supply the defendant town with energy at a particular price. The joint venture in the present case is, of course, of a far different nature.

[10] While the trial judge did not expressly state whether or not he believed the parties' joint venture to be enforceable in perpetuity, an answer in the affirmative seems implicit in his decision. Support for that view can be drawn from the fact that he did not deal with the issue of reasonable notice in his judgment. Furthermore, after observing that Cantax had failed to respond to the suggestion by Rapatax's counsel that the agreement be limited to a ten-year term, he concluded that "[i]t appear[ed] that the term of the joint venture was of no real concern to any of the parties and in any event did not go to the heart of their joint venture arrangement".

[11] The trial judge's approach to the quantification of relief even more strongly implies that he considered the joint venture to be enforceable in perpetuity. First, although he limited his award of damages for loss of anticipated profits to a period of five years, he appears to have done so simply because Rapatax's expert believed that it would be impractical to make projections over a longer time. Consequently, it may be that if the plaintiff's expert had been willing to offer a prediction in perpetuity, the trial judge would have acted upon it. That possibility finds support in the fact that the trial judge derived the

principles applicable to the quantification of damages from the decision of this Court in *Nathu v. Imbrook Properties Ltd.* (1992), 2 Alta. L.R. 48. In that case, McClung J.A. stated at 53:

> Because the loss of projected business profits generally invites consideration of contingencies, these calculations are, to some degree, an exercise in conjecture. However, that has not resulted in the courts declining the task. Unsettled circumstances, including the probable and future volition of third parties can be estimated if not measured. The onus to, prove loss of profits is on the plaintiff.
>
> [Emphasis supplied]

[12] Another reason for believing that the trial judge held the joint venture not to be unilaterally terminable upon notice stems from the fact that he calculated damages for lost profit on the basis of a discount factor which took into account a "loss of residual value opportunity at the end of the five-year cash-flow period in order to compensate for a renewal of the business arrangements between the parties which has been lost." Contemplation of "renewal" after the five-year period relied upon by Rapatax's expert means that the contract was not unilaterally terminable. If the contract had been terminable, and if the reasonable notice period had been five years or less, it seems clear from the facts that Cantax would have acted unilaterally to terminate and to foreclose any possibility of "renewal". (On the facts of the case, "continuance" seems a better term. "Renewal" suggests an agreement which naturally has come to an end and which intentionally has been extended. However, there is no basis for holding that the joint venture would have expired naturally after five years. The question, rather, is simply whether or not the parties would continue on with their arrangement.)

[13] While the trial judge's decision is not entirely clear, it would appear that it held that: (i) the parties' contract was in perpetuity, (ii) the agreement was not unilaterally terminable upon reasonable notice, (iii) Rapatax was entitled to damages for lost profit to the extent that it proved such damages and, (iv) Rapatax established only that it lost (a) five years' profit and, (b) the potential for either the continued existence of the joint venture or a buy-out by Cantax.

THE LAW

[14] As noted above, the Supreme Court of Canada held in *dicta* in *Gill Brothers, supra,* and *Fort Frances, supra,* that a contract of indefinite duration *prima facie* is enforceable in perpetuity, but also that in some circumstances, unilateral termination may occur upon reasonable notice.

[15] The traditional common law position can be found in *Llanelly Railway and Dock Co. v. London and North Western Railway Co.* (1873), 8 Ch. App. 942 at 949-950 per James L.J.

> I start with this proposition, that prima facie every contract is permanent and irrevocable, and that it lies upon a person who says that it is revocable or determinable to show either some expression in the contract itself, or something in the nature of the contract, from which it is reasonably to be implied that it was not intended to be permanent and perpetual, but was to be in some way or other subject to determination. No doubt there are a great many contracts of that kind: a contract of partnership, a contract of master and servant, a contract of principal and agent, a contract of employer and employed in various modes - all these are instances of contracts in which, from the nature of the case, we are obliged to consider that they were intended to be determinable. All the contracts, however, in which this has been held are, as far as I know, contracts which involve more or less of trust and confidence, more or less of delegation of authority, more or less of the necessity of being mutually satisfied with each other's conduct, more or less of personal relations between the parties.
>
> [Emphasis supplied]

Several points can be drawn from that passage. First, contracts of indeterminate duration are presumed to be perpetual. Second, that presumption is rebuttable, and in fact, depending upon the circumstances, may be displaced easily. Indeed, in recent times, it has been suggested that parties to a business relationship seldom would wish to be bound in perpetuity and that a contrary presumption would be more consonant with commercial reality: *Winter Garden Theatre (London) Ltd v. Millennium Productions Ltd.* [1948] A.C. 173 at 196497 per Lord Porter, 198 per Lord Uthwatt (H.L.); A.R. Carnegie, "Terminability of Contracts of Unspecified Duration", (1965) 85 L.Q.R. 392; S.M. Waddams, The Law of Contracts (3rd edition) (1993) pp. 335-336.

[16] Some recent Canadian cases illustrate the application of the *dicta* of the Supreme Court. In *Cate's Trucking Ltd. v. Saskatchewan Oil and Gas Corp.* (1989), 72 Sask. L.R. 233 (Q.B.) (*"Cate's Trucking"*), the parties had an oral contract under which the plaintiff hauled oil for the defendant. The agreement contained no express provisions pertaining to termination. During the life of the arrangement, the plaintiff, on the basis that the contract was of indefinite duration, acquired vehicles capable of meeting the defendant's needs. After several years, the defendant terminated without notice and the plaintiff sued for breach of contract. The trial judge noted the paucity of case law on the issue of termination of contracts of indefinite duration, "Commercial contracts of this type are almost invariably reduced to writing. They contain provisions providing when and how they may be terminated": *supra,* at 64. He then interpreted the trial decision in *Gill*

Brothers, supra, and concluded that, in the circumstances, the defendant was required to provide reasonable notice of six months prior to termination.

[17] In *Don McNeil and Garden City Enterprises Co. Ltd v. Seymour* [1986] B.C.J. No. 2216 (S.C.), the parties entered into an oral agreement under which each agreed to sell herring bait during alternating years. After several years, the defendant decided to sell bait every year and gave notice of termination to the plaintiff. Oppal L.J.S.C. found that the contract was of indefinite duration and, after considering the intention of the parties at the time of entering into the contract, held that the agreement was terminable on reasonable notice of one year. In applying the applicable principles to the facts, he noted that the parties entered into the agreement in response to prevailing economic conditions and suggested that they obviously would not have wanted to be perpetually bound to the same arrangement if such conditions changed.

[18] Finally, in *Philip F. Levine Ltd v. 3SM Tours Ltd* [1983] 4 W.W.R. 149 (Alta. Q.B.), the plaintiff granted a license to the defendant to operate under the name of "Budget Rent-a-Car". That agreement was for a fixed term of three years. At the end of the three years, the parties agreed to extend the arrangement for a further period, during which time they would attempt to reach a lasting agreement. The additional period lapsed without a new bargain being struck and the plaintiff purported to exercise a right under the original agreement allowing it to terminate for cause. The defendant refused to accept the plaintiff's position and continued on under the Budget banner. In the litigation that followed, Power J. considered whether or not the plaintiff was required under the original agreement to give reasonable notice of termination, notwithstanding the absence of any provision to that effect. He considered a number of English authorities which held that the implication of such a term depends upon the common, though unstated, objective intention of the parties at the time they entered into the contract. The authorities canvassed also favoured interpreting contracts in a manner which gave efficacy to agreements. Applying those principles to the facts, Power J. held that the licensing agreement required the plaintiff to give reasonable notice of its intention to terminate. In doing so he highlighted the importance of considering "the true construction of the agreement" ***supra,*** at p. 157.

His decision represents the modern commercial view, previously discussed, that parties to a business relationship would usually not intend to be bound in perpetuity.

[19] It may matter little in practical terms which presumption is applied. In either event, the presumption merely places the onus of proof and is determinative only in the rare (perhaps fanciful) instance in which the scales of proof are equally balanced at the

end of a trial. Consequently, there seems no need to depart from the dicta of the Supreme Court of Canada in *Gill Brothers, supra,* that contracts of indefinite duration are rebuttably presumed to be perpetual. However, it is necessary for a court to look at the relationship between the parties and the nature and terms of the contract to determine whether there is a basis upon which to conclude that the contract is terminable upon reasonable notice.

C. Application of the Law

[20] Having determined that: (i) the trial judge held the joint venture to be enforceable in perpetuity and, (ii) while *prima facie* perpetual, contracts of indeterminate duration may be unilaterally terminated upon reasonable notice, it remains to be decided whether or not the trial judge's characterization of the agreement between Rapatax and Cantax was correct.

[21] Although the case law does not provide clear and exhaustive criteria by which to determine which contracts are unilaterally terminable upon reasonable notice, the joint venture in the present case must certainly have been so. It is inconceivable that either party would have wished to forever be bound to the contract. Their agreement represented a simple commercial enterprise. Certainly, there is nothing in the present case in the nature of the complex, legislative scheme that characterized the contract in *Fort Francis, supra.* Nor, unlike the situation in *Fort Francis,* was either party irreversibly committed to the project such that restoration to their pre-contractual position was impossible; indeed, the venture in the present case had been in existence a matter of mere months and had yet to produce any tangible results before Cantax committed its breach. The fact that the joint venture pertained to tax-related computer software, an inherently volatile product that would have required annual updating, is a very important factor. The cooperation required for such a project would be very difficult if the parties' relationship became poisoned.

[22] We find that the trial judge committed a reviewable error. He failed to recognize the possibility that while *prima facie* perpetual, a joint venture such as the one here might be subject to unilateral termination depending upon the facts. In doing so, he committed an error of law. Even if he recognized the possibility of such terminability, he rejected it in the circumstances. That decision was unreasonable as a matter of fact.

[23] The issue of reasonable notice was not addressed at trial and it is impossible to do so on the record before this Court. Any assessment of damages is based on the determination of notice and can only be dealt with after that issue is resolved. These two issues can only be dealt with in a new trial.

[24] The appeal is allowed and a new trial is ordered.

JUDGMENT DATED at, Alberta,
this 27 th day of March
A.D. 1997

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1983 CarswellAlta 5
Alberta Court of Queen's Bench

Wincal Properties Ltd. v. Cal-Alta Holdings Ltd.

1983 CarswellAlta 5, [1983] 3 W.W.R. 57, [1983] A.W.L.D. 102, [1983] A.W.L.D. 88, 18 A.C.W.S. (2d) 253, 24 Alta. L.R. (2d) 50, 27 R.P.R. 39, 43 A.R. 223

WINCAL PROPERTIES LTD. v. CAL-ALTA HOLDINGS LTD. and FIDELIS MANAGEMENT LTD.

MacDonald J.

Judgment: January 11, 1983
Docket: Calgary No. 8001-21542

Counsel: *W. Lirenman*, for plaintiff.
J. G. Shea, for defendant Fidelis Mgmt. Ltd.
M. A. Cowper-Smith, for defendant Cal-Alta Holdings Ltd.

Subject: Property; International; Corporate and Commercial

Headnote

Conflict of Laws --- Property — Law governing property — Immovables

Mortgages --- Change of ownership — Mortgaged land — Sale or transfer of interest in land — Obligations of purchaser or transferee to mortgagor — Express covenants

Mortgages — Change of ownership of mortgaged lands — Sale by mortgagor — Rights as between mortgagee and purchaser — Subsequent purchases bound by covenant to pay.

Conflict of laws — Property — Immovables — Action on personal covenants of Alberta companies with respect to mortgages on property in Manitoba — Alberta court applying Manitoba law.

The plaintiff Alberta company sold properties in Winnipeg to the defendant F. F. assumed first mortgages and granted the plaintiff second mortgages which contained a standard covenant to pay. F. then sold its interest to the defendant C., taking third mortgages back. By agreement among the three parties, the plaintiff and F. postponed their mortgages to the granting of new first mortgages. Later, C. re-transferred an undivided one-half interest to F. and then C. and F. sold to H., who defaulted on the mortgages. The first mortgagee brought foreclosure proceedings which resulted in both second and third mortgages being foreclosed. The plaintiff sued both defendants on the personal covenants in the second mortgages.

Held:

Judgment for plaintiff.

The Alberta court had jurisdiction because all parties were incorporated there, but Manitoba law governed. Under the provisions of the relevant legislation, the defendants were bound by the covenant to pay in the mortgages. The defence of promissory estoppel founded on the fact that one of the plaintiff's officers had conveyed to the defendants

his belief that the plaintiff's remedies were limited to foreclosure did not succeed. The defendants did not alter their position to their prejudice based on any representation of the plaintiff.

Table of Authorities

Cases considered:

Brown v. Weil, 53 O.L.R. 183, [1923] 4 D.L.R. 1164 (C.A.) — *referred to*

Central London Property Trust v. High Trees House, [1947] K.B. 130, [1956] 1 All E.R. 256 — *referred to*

Century 21 Real Estate Ltd. v. Reykdal Invt. Ltd. (1979), 9 Alta. L.R. (2d) 209, 8 R.P.R. 61 (T.D.) — *applied*

Crabb v. Arun Dist. Council, [1976] Ch. 179, [1975] 3 All E.R. 865 (C.A.) — *referred to*

Deschamps v. Miller, [1908] 1 Ch. D. 856 — *referred to*

Gordon Grant & Co. v. Boos, [1926] A.C. 781 (P.C.) — *referred to*

Henderson v. Bank of Hamilton (1894), S.C.R. 716 — *referred to*

Hughes v. Metro. Ry. Co. (1877), 2 App. Cas. 439 (H.L.) — *referred to*

Humble Invt. Ltd. v. Therevan Dev. Corp. Ltd. (1982), 21 Alta. L.R. (2d) 40 (Q.B.) — *referred to*

Last Mountain Dev. Ltd. v. Oscar Fech Const. Ltd. (1978), 7 Alta. L.R. (2d) 87 (T.D.) — *referred to*

Pac. Nat. Exhibition v. Hastings Minor Hockey Assn., [1981] 6 W.W.R. 755, 32 B.C.L.R. 1, 129 D.L.R. (3d) 721 (S.C.) — *considered*

Pollock v. Shapera, [1938] 1 W.W.R. 310, [1938] 1 D.L.R. 759 (Man. K.B.) — *referred to*

Prince Albert Pulp Co. Ltd. v. Foundation Co., [1977] 1 S.C.R. 200, [1976] 4 W.W.R. 586, 1 C.P.C. 74, 68 D.L.R. (3d) 283, 8 N.R. 181 — *referred to*

Sokolov v. Kachmark, [1929] 2 D.L.R. 305 (Man. C.A.) — *referred to*

Ulrich v. Morris (1966), 58 W.W.R. 445 (Man. C.A.) — *applied*

Statutes considered:

Real Property Act of Manitoba, C.C.S.M. c. R30, s. 75.

Authorities considered:

Castel, Canadian Conflict of Laws, 1st ed. (1975), p. 345.

16 Hals. (4th) 1069, para. 1593.

Spenser Bower & Turner on Estoppel 3rd ed. (1977), pp. 9, 10, 58, 121, 122, 125, 126, 136.

Action on personal covenants contained in second mortgages.

MacDonald J.:

1 On 2nd February 1976 the plaintiff company, which had been incorporated in the province of Alberta, became licensed to carry on business in the province of Manitoba. In that year it purchased properties in the city of Winnipeg. On 14th April 1977 the plaintiff sold these properties, ten in number, to the defendant Fidelis Management Ltd. The properties were subject to first mortgages for about $1.13 million. In financing the purchase Fidelis assumed the first mortgages and granted the plaintiff second mortgages for a total of $620,000 secured against the several properties. Each second mortgage contained a standard covenant by the mortgagor, Fidelis, to pay to the mortgagee, the plaintiff, the principal sum in stated monthly payments with the balance payable on 15th April 1978 together with interest prior to 15th April 1978 at the rate of 10 per cent per annum and after that date at the rate of 10 $^{1}/_{2}$ per cent per annum.

2 On 11th April 1978 Fidelis transferred its interest in the properties to the defendant Cal-Alta Holdings Ltd., taking third mortgages to cover part of the purchase price. In May 1978, Cal-Alta was desirous of refinancing the purchase and after negotiations between Cal-Alta, the plaintiff and Fidelis an agreement, Ex. 2, was executed by the three parties. The refinancing agreement was that the plaintiff and Fidelis would postpone their second and third mortgages respectively in order that new first mortgages might be granted increasing the size of the first-mortgage loans. Out of the additional loan secured, the original first mortgages were to be discharged, certain costs and repairs were to be paid and payment of agreed amounts was to be made on the second and third mortgages. In cl. 5 of the agreement it was stated in part:

> Cal-Alta shall provide Wincal and Fidelis, through his solicitors or solicitors representing the new first mortgage lenders, assurances in writing that upon registration of postponements of Wincal's second mortgages and Fidelis' third mortgages to the new first mortgages, that Wincal's second mortgages will continue as valid and subsisting second mortgage charges secured against the said lands and premises subject only to the new first mortgages and similarly, that Fidelis' third mortgages will continue as valid and subsisting third mortgage charges secured against the said lands and premises subject only to the new first mortgages, and Wincal's second mortgages ...

and in cl. 7:

> The parties hereto expressly acknowledge and confirm, each to the other, that this agreement is not intended to be an amendment or variation, nor shall it be deemed an amendment or variation of the terms and conditions contained in the second mortgages held by Wincal or the terms and conditions contained in the third mortgages held by Fidelis.

3 On 9th April 1979 Cal-Alta transferred an undivided half-interest of its rights, title and interest back to Fidelis. Further negotiations between the plaintiff and the defendants took place in an effort to have the plaintiff extend the due date of the second mortgages. The plaintiff indicated it would do so subject to terms, one of which was that the plaintiff would be given personal guarantees by the principals of the defendant companies. Personal guarantees were refused and no changes were made in the terms of the second mortgages held by the plaintiff. In the spring of 1980 Cal-Alta and Fidelis sold the mortgaged properties to H & D Holdings Ltd. subject to the mortgages. Some payments were made by the new purchaser on the second mortgages but finally the holder of the first mortgages brought action for foreclosure resulting in both second and third mortgages being foreclosed.

4 The plaintiff now sues the defendants, both Alberta companies, on the personal covenants contained in the second mortgages.

5 The first question raised by the defendants is the jurisdiction of this court, the situs of the lands mortgaged being in the province of Manitoba.

6 Castel, in Canadian Conflict of Laws, 1st ed. (1975), at p. 345, states:

> The recognition by Canadian courts of the exclusive jurisdiction of the Courts of the situs has not prevented them from exercising equitable jurisdiction in personam. They will grant decrees imposing personal obligations on a defendant with respect to contractual or equitable obligations arising out of a transaction involving a foreign immovable.

7 In *Century 21 Real Estate Ltd. v. Reykdal Invt. Ltd.* (1979), 9 Alta. L.R. (2d) 209 at 214, 8 R.P.R. 61 (T.D.), Laycraft J. (as he then was) referred to *Gordon Grant & Co. v. Boos*, [1926] A.C. 781 (P.C.), and at p. 215 said:

> This case clearly establishes the right of a mortgagee to sue on the personal covenant in an action subsequent to the action in which he obtained an order for sale.

8 In the case at bar the plaintiff is simply suing on the personal covenant for the debt due. No impediment in law is shown to prevent it from so doing.

9 The next question is what law the Alberta court should recognize as governing the contractual rights.

10 Falconbridge on Mortgages, 4th ed. (1977), p. 850, states:

> From a practical, if not theoretical point of view, it would appear desirable that, apart from questions of procedure, a court, if it does not decline jurisdiction altogether, ought to apply the lex rei sitae, so far as the circumstances permit, to the enforcement of any contract relating to land.

11 In the case at bar the contracts under which suit is brought were mortgage contracts registered under the Real Property Act of Manitoba, C.C.S.M., c. R30. The property with which the parties were dealing was situate in Manitoba, rental payments from the property were recovered in Manitoba. Although the action in personam is brought in Alberta because the parties have their being in Alberta, in my respectful opinion it would be more proper and reasonable to apply Manitoba law to the mortgage contracts than to apply Alberta law, which latter would govern mortgages registered under the Land Titles Act, R.S.A. 1980, c. L-5.

12 Section 75 of the Real Property Act of Manitoba provides in s. 75:

> 75 In every instrument for which a certificate of title has been issued subject to a mortgage or encumbrance, there shall be implied, unless otherwise expressed, the following covenant by the transferee both with the transferor and the mortgagee, that is to say: That the transferee will pay the principal money, interest, annuity or rent charge secured by the mortgage or encumbrance, at the rate and at the time specified in the instrument creating it, and will indemnify and keep harmless the transferor from and against the principal sum or other moneys secured thereby, and from and against liability in respect of any of the covenants therein contained or, under this Act, implied on the part of the transferor.

13 In *Ulrich v. Morris* (1966), 58 W.W.R. 445, the Manitoba Court of Appeal held that in an action on the covenant, the first mortgage having foreclosed, the action was maintainable notwithstanding that the second mortgagee, through no fault of his own, cannot reconvey the estate on payment of the mortgage debt.

14 I therefore hold that the action of the plaintiff in personam for the debt owing under the personal covenant in the mortgage is maintainable in Alberta and that the defendants as transferees of the land became bound pursuant to the Real Property Act of Manitoba by the implied covenant to pay the principal moneys and interest owing under the mortgages held by the plaintiff as second mortgagee.

15 Thirdly, in further defence, the defendants plead that the plaintiff is estopped from relying on the personal covenants in the mortgage. This defence, in part at least, is related to the defence that the implied covenants under the Real Property Act were rebutted by the evidence.

16 It may assist in understanding the application of estoppel to refer to the judgment of Denning L.J. in *Crabb v. Arun Dist. Council*, [1976] Ch. 179, [1975] 3 All E.R. 865 at 871 (C.A.) referred to by Anderson J.A. in *Pac. Nat. Exhibition v. Hastings Minor Hockey Assn.*, [1981] 6 W.W.R. 755 at 761, 32 B.C.L.R. 1, 129 D.L.R. (3d) 721 (S.C.):

> The basis of this **proprietary estoppel** — as indeed of promissory estoppel — is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law. The early cases did not speak of it as "estoppel". They spoke of it as "raising an equity". If I may expand that, Lord Cairns said in *Hughes v. Metro. Ry. Co.* (1877), 2 App. Cas. 439 at 448 (H.L.), "... it is the first principle upon which all Courts of Equity proceed ..." that it will prevent a person from insisting on his strict legal rights — whether arising under a contract, or on his title deeds, or by statute — when it would be inequitable for him to do so having regard to the dealings which will preclude him from insisting on his strict legal rights? If he makes a binding contract that he will not insist on the strict legal position, a court of equity will hold him to his contract. *Short of a binding contract, if he makes a promise that he will not insist on his strict legal rights — even though that promise may be unenforceable in point of law for want of consideration or want of writing — and if he makes the promise knowing or intending that the other will act on it, and he does act on it, then again a court of equity will not allow him to go back on that promise: see Central London Property Trust v. High Trees House*, [1947] K.B. 130, [1956] 1 All E.R. 256; *Charles Rickards Ltd. v. Oppenheim*, [1950] 1 K.B. 616 at 622, [1950] 1 All E.R. 420 at 423. *Short of an actual promise, if he, by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights — knowing or intending that the other will act on that belief — and he does so act, that again will raise an equity in favour of the other, and it is for a court of equity to say in what way the equity may be satisfied. The cases show that this equity does not depend on agreement but on words or conduct.* In *Ramsden v. Dyson* (1866), L.R. 1 H.L. 129 at 170, Lord Kingsdown spoke of a verbal agreement "or what amounts to the same thing, an expectation, created or encouraged". In *Birmingham Land Co. v. London & North Western Ry.* (1888), 40 Ch. D. 268 at 277, Cotton L.J. said that "... what passed did not make a new agreement but what took place ... raised an equity against him". And it was the Privy Council who said that "the Court must look at the circumstances in each case to decide in what way the equity can be satisfied", giving instances: see *Plimmer v. Wellington* (1884), 9 App. Cas. 699 at 713, 714. (The italics are Anderson J.A.'s.)

17 16 Hals. (4th) commencing at para. 1593, p. 1069, sets forth matters necessary to found estoppel. These I capsulize in part as follows:

> [1.] In order to found an estoppel a representation must be of an existing fact, not a mere intention; nor a mere belief. [para. 1593]
>
> [2.] To found an estoppel a representation must be clear and unambiguous; not necessarily susceptible of only one interpretation, but such as will reasonably be understood by the person to whom it is made in the sense contended for, and for this purpose the whole of the representation must be looked at. This is merely an application of the old maxim applicable to all estoppels, that they "must be certain to every intent". [para. 1595]
>
> [3.] ... the doctrine of estoppel by representation ought not in most cases to be applied unless the representation is such as to amount to the contract or licence of the party making it. [para. 1599]
>
> [4.] It is necessary to estoppel by representation that in acting upon the representation the party to whom it was made should have altered his position to his prejudice. [para. 1601]

18 The circumstances upon which the defendants rely to establish estoppel are related to the sale of the mortgaged property in the spring of 1980 to the company known as H & D Enterprises Ltd. It is recalled that in May 1978, after negotiations concerning refinancing the mortgage debt and the obtaining of further mortgage financing, the parties

entered into Ex. 2 whereby the plaintiff agreed to postpone its second mortgages in favor of new first mortages subject to a pay down of part of the moneys owing under the second mortgages. In April 1979 Cal-Alta Holdings transferred one half of its interest in the lands to Fidelis. I accept the evidence on behalf of the plaintiff that there were no discussions between the defendants and the plaintiff concerning this transfer.

19 In late 1979 or early 1980 discussions did take place on behalf of the plaintiff and the defendants in part because the total balance of moneys owing under the second mortgages was coming due on 15th April 1980. These discussions had to do with payment of the mortgage debt to the plaintiff. The plaintiff was approached to grant an extension of time. On 14th January 1980 the plaintiff indicated by letter (Ex. 3) that the desired extension would be granted subject to: (1) current accounts and taxes being brought up to date; (2) a payment of $50,000 on the second mortgages; and (3) receipt of personal guarantees. The $50,000 payment was not made and the principals of the defendants refused to give the plaintiff personal guarantees. As a result no extension agreement resulted.

20 I accept the evidence on behalf of the plaintiff that after 14th January 1980 and prior to the end of February 1980 no further discussions were held. As the due date of the second mortgages was arriving the defendants showed anxiety and made endeavours to sell the mortgaged properties. After the sale to H & D Enterprises the plaintiff received payments on the mortgages from the new purchaser.

21 No written consent to the sale to H & D Enterprises was given by the plaintiff. The defendants advised the plaintiff of their intention to sell but there was no written agreement with the plaintiff to limit the obligation of the defendants on the sale and no written contract to release the defendants from their obligations under the second mortgages. The discovery of Mr. Virdis on behalf of Cal-Alta admits that prior to sale to H & D Enterprises there was no discussion or agreement with the plaintiff that on sale to H & D, Cal-Alta would be relieved of its obligations under the mortgages. In evidence in chief Virdis stated that prior to selling the property the liability of Cal-Alta was never discussed.

22 It is clear that the only rights the plaintiff had were held under its second mortgages. Herbert Styles, a realtor, negotiated on behalf of the defendants in the refinancing of the first mortgage. His evidence was that Bernard, on behalf of the plaintff, was concerned about the second mortgage security — which explains the request of the plaintiff for personal guarantees. Styles testified that it was his impression from Bernard that the plaintiff was solely dependant on the land, but admitted that the plaintiff was relying on the mortgages, which were his only security.

23 In light of all the evidence heard I am unable to find that the plaintiff represented as an existing fact anything that would found estoppel nor that any representation was made that would amount to a contract or licence in favour of the defendants nor that as a result of any representation the defendants altered their position to their prejudice. It may have been, at one time, that Bernard on behalf of the plaintiff believes his rights were limited to the right of foreclosure against the land, but if such belief was conveyed to the defendants (which I am not satisfied was the case) the existence of such a belief alone is not sufficient to found estoppel. It may be that the defendants failed to appreciate that transferring the land did not eliminate their liability for the debt secured by the mortgages but I do not find that the defendants altered their position to their prejudice based on any representation of the plaintiff, though they may have acted based on their own belief that by transfer of land they could limit the defendants' liability.

24 Counsel referred to the following authorities which were considered:

Re personal covenant:

25 *Brown v. Weil*, 53 O.L.R. 183, [1923] 4 D.L.R. 1164 (C.A.); *Ulrich v. Morris*, supra; Castel, Canadian Conflict of Laws, 1st ed. (1975); *Henderson v. Bank of Hamilton* (1894), S.C.R. 716 at 718; *Sokolov v. Kachmark*, [1929] 2 D.L.R. 305 (Man. C.A.); *Pollock v. Shapera*, [1938] 1 W.W.R. 310, [1938] 1 D.L.R. 759 (Man. K.B.); 16 Hals. (4th); *Deschamps v. Miller*, [1908] 1 Ch. D. 856; *Century 21 Real Estate Ltd. v. Reykdal Invt. Ltd.*, supra.

Re estoppel:

26 *Hughes v. Metropolitan Ry. Co.* (1877), 2 App. Cas. 439 (H.L.); *Pac. Nat. Exhibition v. Hastings Minor Hockey Assn.*, supra; *Central London Property Trust v. High Trees House*, supra; Spencer Bower & Turner on Estoppel 3rd ed. (1977), at pp. 9, 10, 58, 121, 122, 125, 126 and 136; *Last Mountain Dev. Ltd. v. Oscar Fech Const. Ltd.* (1978), 7 Alta. L.R. (2d) 87 (T.D.); *Humble Invt. Ltd. v. Therevan Dev. Corp. Ltd.* (1982), 21 Alta. L.R. (2d) 40 (Q.B.).

Re interest:

27 *Prince Albert Pulp Co. Ltd. v. Foundation Co.*, [1977] 1 S.C.R. 200, [1976] 4 W.W.R. 586, 1 C.P.C. 74, 68 D.L.R. (3d) 283, 8 N.R. 181.

28 In the result, judgment is given against the defendants for $370,360.33 with interest thereon at 10 $^{1}/_{2}$ per cent per annum from 15th November 1980. The plaintiff sought a higher award of interest pursuant to s. 15 of the Judicature Act, R.S.A. 1980, c. J-1, based on payment having been unjustly withheld. The mortgages provided that the rate of 10 $^{1}/_{2}$ per cent applied and I do not find that simple failure to pay the plaintiff constitutes improperly withholding within the meaning of the Judicature Act.

29 Costs of the action are awarded in favour of the plaintiff against the defendants in triple col. 5, Sched. C, no limiting rule to apply

Judgment for plaintiff.

End of Document

9

2013 BCCA 309
British Columbia Court of Appeal

Scholz v. Scholz

2013 CarswellBC 1956, 2013 BCCA 309, [2013] 9 W.W.R. 827, [2013] B.C.W.L.D. 6276, [2013] B.C.W.L.D. 6277, [2013] B.C.W.L.D. 6278, [2013] B.C.W.L.D. 6279, [2013] B.C.W.L.D. 6323, [2013] B.C.W.L.D. 6346, 230 A.C.W.S. (3d) 303, 340 B.C.A.C. 151, 46 B.C.L.R. (5th) 98, 579 W.A.C. 151, 88 E.T.R. (3d) 163

Ruth Hertha Wanda Scholz, Appellant (Plaintiff) and Michael Curt Scholz and Carolyn Kathleen Scholz, Respondents (Defendants)

Levine, Kirkpatrick, Neilson JJ.A.

Heard: April 8, 2013
Judgment: June 28, 2013
Docket: Vancouver CA040190

Proceedings: affirming *Scholz v. Scholz* (2012), 2012 CarswellBC 2378, 2012 BCSC 1172 (B.C. S.C.)

Counsel: L.I. Barron, for Appellant
P.J. Reardon, for Respondents

Subject: Estates and Trusts; Restitution; Contracts; Property

Headnote

Estates and trusts — Trusts — Resulting trust — Creation — Advance of purchase funds

In 2001 plaintiff built coach house on property of her son and daughter-in-law (defendants), at their invitation — Plaintiff lived there until defendants sold property in 2011 — When defendants refused to share sale proceeds with plaintiff in recognition of her contribution of coach house, plaintiff brought action claiming beneficial interest in property — In allowing action in part, trial judge rejected claim of resulting trust — Plaintiff contended that trial judge erred in failing to find that her contribution of funds to build coach house was analogous to providing funds to purchase property — Plaintiff appealed — Appeal dismissed — Trial judge made no error in rejecting claim of resulting trust — Evidence supported trial judge's findings that plaintiff had not transferred property to defendants, had not contributed to purchase price of property, and had not intended to acquire ownership interest in property.

Estates and trusts — Trusts — Constructive trust — Elements of constructive trust

In 2001 plaintiff built coach house on property of her son and daughter-in-law (defendants), at their invitation — Plaintiff lived there until defendants sold property in 2011 — When defendants refused to share sale proceeds with plaintiff in recognition of her contribution of coach house, plaintiff brought action claiming beneficial interest in property — In allowing action in part, trial judge rejected claim of constructive trust — Plaintiff appealed — Appeal dismissed — Trial judge properly rejected claim of constructive trust because there was no evidence that defendants were unjustly enriched by presence of coach house on property — There was no appraisal or other evidence that property value was enhanced by coach house — It was non-forming structure, and purchasers did not view it due to

its unkempt state — There was no evidence that defendants derived any benefit from coach house — It was plaintiff who benefited from rent-free accommodation it provided, while defendants paid her attendant expenses.

Restitution and unjust enrichment --- General principles — Requirements for unjust enrichment — Conferral of benefit

In 2001 plaintiff built coach house on property of her son and daughter-in-law (defendants), at their invitation — Plaintiff lived there until defendants sold property in 2011 — When defendants refused to share sale proceeds with plaintiff in recognition of her contribution of coach house, plaintiff brought action claiming beneficial interest in property — In allowing action in part, trial judge rejected claim of constructive trust — Plaintiff appealed — Appeal dismissed — Trial judge properly rejected claim of constructive trust because there was no evidence that defendants were unjustly enriched by presence of coach house on property — There was no appraisal or other evidence that property value was enhanced by coach house — It was non-forming structure, and purchasers did not view it due to its unkempt state — There was no evidence that defendants derived any benefit from coach house — It was plaintiff who benefited from rent-free accommodation it provided, while defendants paid her attendant expenses.

Estoppel --- Estoppel in pais — Promissory estoppel — Promise or intention to affect legal relationship

Proprietary estoppel — In 2001 plaintiff built coach house on property of her son and daughter-in-law (defendants), at their invitation — Plaintiff lived there until defendants sold property in 2011 — When defendants refused to share sale proceeds with plaintiff in recognition of her contribution of coach house, plaintiff brought action claiming beneficial interest in property — In allowing action in part, trial judge rejected claim for proprietary estoppel — Plaintiff appealed — Appeal dismissed — Finding of fact that circumstances regarding invitation to build coach house did not reasonably give rise to expectation that plaintiff would share in profits from future sale of property was supported by evidentiary record — That plaintiff lived in coach house for nine years without paying rent or utilities and received other assistance from defendants militated against finding of detrimental reliance or finding that it would be unconscionable to deny claim — Plaintiff's assertion that had she known she would not recoup costs of coach house she would have purchased alternative accommodation was not supported on record.

Estates and trusts — Trusts — Express trust — Miscellaneous

In 2001 plaintiff built coach house on property of her son and daughter-in-law (defendants), at their invitation — Plaintiff lived there until defendants sold property in 2011 — When defendants refused to share sale proceeds with plaintiff in recognition of her contribution of coach house, plaintiff brought action claiming beneficial interest in property — In allowing action in part, trial judge awarded damages of $36,576, representing depreciated value of coach house over years of plaintiff's residency — Plaintiff appealed — Appeal dismissed — Resolution imposed, imputation of legal relationship on family arrangement, was appropriate given limited evidence as to intent at material time — Award represented exercise of judicial discretion, governed by concern to be fair to both parties; award's review was to be approached with high degree of deference — Plaintiff's view that her interest would have appreciated because of real estate market failed to recognize that rising property values were largely due to land value, and she had no ownership interest in property itself — Plaintiff benefited from opportunity to reside near her family, where they watched over her and subsidized her living expenses — Depreciation rate of 10 per cent was not overly generous to defendants — Annual costs attributed to plaintiff's residence in coach house by trial judge were significantly more favourable than expenses she would have encountered in alternative accommodation.

Real property --- Interests in real property — Fixtures — Miscellaneous

Depreciation — In 2001 plaintiff built coach house on property of her son and daughter-in-law (defendants), at their invitation — Plaintiff lived there until defendants sold property in 2011 — When defendants refused to share sale proceeds with plaintiff in recognition of her contribution of coach house, plaintiff brought action claiming beneficial interest in property — In allowing action in part, trial judge awarded damages of $36,576, representing depreciated value of coach house over years of plaintiff's residency — Plaintiff appealed — Appeal dismissed — Resolution imposed, imputation of legal relationship on family arrangement, was appropriate given limited evidence as to intent at material time — Award represented exercise of judicial discretion, governed by concern to be fair to both parties;

award's review was to be approached with high degree of deference — Plaintiff's view that her interest would have appreciated because of real estate market failed to recognize that rising property values were largely due to land value, and she had no ownership interest in property itself — Plaintiff benefited from opportunity to reside near her family, where they watched over her and subsidized her living expenses — Depreciation rate of 10 per cent was not overly generous to defendants — Annual costs attributed to plaintiff's residence in coach house by trial judge were significantly more favourable than expenses she would have encountered in alternative accommodation.

Table of Authorities

Cases considered by *Neilson J.A.*:

Hardwick v. Johnson (1977), [1977] EWCA Civ 4, [1978] 2 All E.R. 935, [1978] 1 W.L.R. 683 (Eng. C.A.) — followed

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — referred to

Hussey v. Palmer (1972), [1972] 1 W.L.R. 1286, [1972] 3 All E.R. 744 (Eng. C.A.) — considered

Kerr v. Baranow (2011), 14 B.C.L.R. (5th) 203, [2011] 3 W.W.R. 575, 64 E.T.R. (3d) 1, 93 R.F.L. (6th) 1, 300 B.C.A.C. 1, 509 W.A.C. 1, 274 O.A.C. 1, [2011] 1 S.C.R. 269, 2011 SCC 10, 2011 CarswellBC 240, 2011 CarswellBC 241, 328 D.L.R. (4th) 577, 411 N.R. 200, *(sub nom. Vanasse v. Seguin)* 108 O.R. (3d) 399 (S.C.C.) — referred to

Sharpe, Re (1980), [1980] 1 All E.R. 198, [1980] 1 W.L.R. 219 (Eng. Ch. Div.) — considered

Soulos v. Korkontzilas (1997), [1997] 2 S.C.R. 217, 212 N.R. 1, 1997 CarswellOnt 1490, 1997 CarswellOnt 1489, 9 R.P.R. (3d) 1, 46 C.B.R. (3d) 1, 17 E.T.R. (2d) 89, 32 O.R. (3d) 716 (headnote only), 146 D.L.R. (4th) 214, 100 O.A.C. 241 (S.C.C.) — considered

Trethewey-Edge Dyking (District) v. Coniagas Ranches Ltd. (2003), 7 R.P.R. (4th) 163, 12 B.C.L.R. (4th) 46, 2003 BCCA 197, 2003 CarswellBC 657, 224 D.L.R. (4th) 611, 180 B.C.A.C. 258, 297 W.A.C. 258 (B.C. C.A.) — considered

Wilson v. Fotsch (2010), 81 R.F.L. (6th) 241, 2010 BCCA 226, 8 B.C.L.R. (5th) 1, 57 E.T.R. (3d) 159, 286 B.C.A.C. 276, 484 W.A.C. 276, 2010 CarswellBC 1158, [2010] 11 W.W.R. 29, 319 D.L.R. (4th) 26 (B.C. C.A.) — considered

APPEAL by plaintiff from judgment reported at *Scholz v. Scholz* (2012), 2012 CarswellBC 2378, 2012 BCSC 1172 (B.C. S.C.), allowing in part action for beneficial interest in property.

***Neilson J.A.*:**

1 This appeal arises from an unfortunate property dispute between the 87-yearold appellant and her son and daughter-in-law. In 2001, at the respondents' invitation, the appellant built a coach house on their property in West Vancouver. She lived there until the respondents sold the property in 2011. When the respondents refused to share the sale proceeds with the appellant in recognition of her contribution of the coach house the appellant, supported by her daughter, commenced an action against them claiming a beneficial interest in the property. On August 3, 2012, following a summary trial, a

Supreme Court judge rejected her claims in resulting trust, constructive trust, and proprietary estoppel, but awarded her damages of $36,576, representing the depreciated value of the coach house over the years of her residency: 2012 BCSC 1172 (B.C. S.C.). The appellant appeals from that order.

Background

2 In 1998, the respondents bought the West Vancouver property for $515,000. In 2001, they built a new home on the property. At the time, the appellant was recovering from hip surgery and unable to live alone, so she was residing with the respondents in rental accommodation. The respondents offered her an opportunity to build and live in a coach house on the property. She accepted this offer, paid for the construction of the coach house, and moved into it in 2002.

3 Between 2002 and 2011, the parties lived in their respective homes on the property. The appellant paid no rent, and the respondents paid for property taxes, utilities, and insurance associated with the property. Nannies employed by the respondents delivered meals to the appellant and cleaned the coach house.

4 In 2007, the respondents decided to buy another property and build a new home there. Initially, their plans included a self-contained suite for the appellant, but difficulties developed between the parties and they withdrew this offer. In 2011, the respondents listed the property with the coach house, and subsequently accepted an offer to purchase it for $3,053,000, with completion on July 4, 2011.

5 With her son's assistance, the appellant located a suitable apartment to rent, and then went on a short holiday with her daughter. To her displeasure, the respondents moved her things out of the coach house to the apartment while she was gone.

6 The appellant asked for a share of the sale proceeds of the property proportionate to the funds she had spent in constructing the coach house, and the increase in market value related to that amount. The respondents refused, and on April 7, 2011 the appellant brought an action against them and filed a certificate of pending litigation. She alleged that she and the respondents had orally agreed that if she built the coach house she would acquire an ownership interest in the structure and the land under it. She claimed a beneficial interest in the sale proceeds by way of a resulting trust or a constructive trust.

7 The respondents brought a successful application to set aside the certificate of pending litigation so the sale of the property could be completed, and a portion of the funds from the sale were paid into trust pending resolution of the appellant's claim.

The Reasons for Judgment of the Trial Judge

8 Since the appellant sought a proportionate share of the sale proceeds, the trial judge first addressed the amount that she had paid to construct the coach house, and the funds expended by the respondents to purchase the property and erect their home on it. Both amounts were contentious. The judge accepted the appellant's evidence that she had paid $94,408 for the coach house. He accepted the respondents' figure of $2.1 million as their contribution to the property.

9 The trial judge found the facts did not support the appellant's claim in resulting trust. He rejected her argument that she had acquired a beneficial interest in the property by funding a structure that was affixed to it. He held she had not made any contribution to the purchase price of the property. He found no convincing evidence of an agreement between the parties that the appellant was to acquire an ownership interest in the land, nor of her intention to do so. Instead, the judge concluded the evidence established that the appellant intended that the respondents would hold the value of the coach house in trust for her as it depreciated through her years of use.

10 The trial judge next addressed the appellant's claim in constructive trust and unjust enrichment, and found there was no support for this since there was no evidence the respondents had been enriched by the presence of the coach

house. He noted they had borne all costs associated with the building while the appellant lived there, and there was no evidence it had enhanced the value of the property.

11 The trial judge similarly found nothing to justify the appellant's claim in equitable licence or proprietary estoppel because the circumstances in which the respondents invited her to build the coach house would not reasonably have created an expectation that she would share in any profit from the future sale of the property.

12 The trial judge nevertheless found the appellant had recourse against the respondents based on the decision of Lord Denning in *Hardwick v. Johnson* (1977), [1978] 2 All E.R. 935, [1978] 1 W.L.R. 683 (Eng. C.A.). He found the circumstances established a family relationship with intended consequences, to which the court could impute terms consistent with the parties' reasonable expectations. He set out his findings on this point as follows:

> [32] In the present case, I do not think it likely that the plaintiff would have built the Coach House on the understanding that she could never hope to recoup at least some portion of the construction costs, no matter how long she was able to live in it. I do not think it likely that Mr. Scholz would have assumed his mother to be proceeding on that basis. Rather, I find that had the parties turned their minds to the subject in 2001, they would reasonably have recognized the possibility of the defendants obtaining some benefit upon the Coach House being vacated by the plaintiff. It is difficult to believe that Mr. Scholz, had he turned his mind to the subject, would not have been willing to recognize the possibility of some value being conferred on him through construction of the Coach House, in the event of his mother needing to move elsewhere, or perhaps in the event of her early demise.
>
> [33] I think it likely that if the parties turned their minds to the subject in 2001, they would have agreed to a mechanism which would provide the plaintiff with a fair measure of compensation upon termination of her occupation of the Coach House, and would avoid the possibility of the defendants obtaining a windfall gain. The most reasonable mechanism, and one which I find appropriate to impute to the parties, is that the value of the Coach House would be viewed by them as depreciating at a fixed rate on a declining balance, from year to year. The concept of depreciation is one which Mr. Scholz would have been familiar with given his business background. It is not a difficult concept to grasp, and I have no reason to believe that it would not have been understandable to, and attractive to, the plaintiff.
>
> [34] The question then is, what would an appropriate rate of depreciation be? If this were a commercial agreement, the parties might very well have agreed on the 5% rate for non-farm buildings under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). At that rate, over nine years the plaintiff's total investment of $94,408 would have declined in value to $59,500. However, given the circumstances - that this was not a commercial relationship; that the defendants had no great personal desire for a Coach House on their property; that the Coach House was non-conforming with the District's bylaws; that the plaintiff was to be occupying the land rent-free; and that the defendants were going to be incurring expense in caring for the plaintiff -it is likely that a higher rate would have been viewed as appropriate.

13 The trial judge accordingly chose a depreciation rate of 10% over the appellant's nine years of occupation. Applying that rate to the $94,408 contributed by the appellant produced an award of $36,756.

Grounds of Appeal

14 The appellant maintains the trial judge erred:

1) in dismissing her claim in resulting trust;

2) in dismissing her claim in constructive trust;

3) in dismissing her claim for proprietary estoppel; and

4) in choosing a depreciation rate of 10% to reduce her damages.

Discussion

15 I will deal first with features of the appellant's argument that inform several of her grounds of appeal.

16 The appellant initially included in her claim a right to the real property on which the coach house stood. She has, however, abandoned any proprietary remedy and now limits her claim to a proportionate share of the sale proceeds. She says she reasonably believed the coach house was hers, and had a reasonable expectation that, if the respondents sold the property, she would receive that part of the proceeds representing her initial investment and her share of the increased market value. She says the trial judge therefore erred in finding she had no beneficial interest in the value of the property.

17 At several points in her submissions the appellant relies on Lord Denning's judgment in *Hussey v. Palmer*, [1972] 3 All E.R. 744, [1972] 1 W.L.R. 1286 (Eng. C.A.), so I will set that out here. The case involved a similar factual scenario in which an elderly widow was invited to live with her daughter and son-in-law, and used her funds to build an addition to their home for that purpose. After 15 months, differences arose between them and the mother moved out, but sued her daughter and son-in-law to recover the funds she had spent on the addition. The litigation followed a convoluted path but, ultimately, the majority gave judgment for the widow. In reaching that result, Lord Denning stated at 747:

> ... Although the plaintiff alleged that there was a resulting trust, I should have thought that the trust in this case, if there was one, was more in the nature of a constructive trust; but this is more a matter of words than anything else. The two run together. By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded upon large principles of equity, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it. The trust may arise at the outset when the property is acquired, or later on, as the circumstances may require. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution. It is comparable to the legal remedy of money had and received which, as Lord Mansfield said, is very beneficial and therefore, much encouraged [*Moses v. MacFarlan* (1760) 2 Burr. 1005, 1012]. Thus we have repeatedly held that, when one person contributes towards the purchase price of a house, the owner holds it on a constructive trust for him, proportionate to his contribution, even though there is no agreement between them, and no declaration of trust to be found, and no evidence of any intention to create a trust.

18 The appellant urges this Court to reach the same result, and reimburse her for her initial investment and its appreciation since 2001.

19 Finally in terms of general matters, the appellant's first three grounds of appeal are essentially an attack on the findings of fact made by the trial judge. Such findings attract a deferential standard of review, and this Court will not interfere with them in the absence of a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.).

1) Did the trial judge err in dismissing the appellant's claim in resulting trust?

20 A resulting trust arises when a person transfers property or contributes to its purchase price, and the property is then placed in the name of another. Its central characteristic is that the property results back to the transferor or contributor when that person asserts his or her rights. A transfer of ownership is essential to the creation of a resulting trust. The governing factor is the intention of the transferor at the time of the transfer, in particular, whether that person intended to acquire an ownership interest in the property or to make a gift: Donovan W.M. Waters, ed, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012) at 21, 394-400; *Kerr v. Baranow*, 2011 SCC 10 (S.C.C.) at paras. 15-18.

21 Relying on *Hussey*, the appellant argues the trial judge erred in failing to find that her contribution of funds to build the coach house was analogous to providing funds to purchase the property. She contends she is therefore the beneficiary of a resulting trust to the extent of that contribution, valued in today's real estate market.

22 I am satisfied the trial judge made no error in rejecting this claim. There was clear evidentiary support for his findings that the appellant had not transferred property to the respondents, had not contributed to the purchase price of the property, and had not intended to acquire an ownership interest in the property. I cannot accept that Lord Denning's passing comments about a resulting trust in *Hussey* can overcome the absence of these hallmarks of a resulting trust in the appellant's case.

23 I would not accede to this ground of appeal.

2) Did the trial judge err in rejecting the appellant's claim of constructive trust?

24 Relying again on *Hussey*, the appellant claims the trial judge erred in failing to find she was the beneficiary of a constructive trust arising from the coach house. She maintains her circumstances are analogous to those in the authorities that have developed the concept of constructive trust in the field of matrimonial assets. Citing *Wilson v. Fotsch*, 2010 BCCA 226 (B.C. C.A.), she seeks an award of damages on a "value survived" basis, measured by her proportionate share of the net profit achieved on the sale of the property. On the figures found by the trial judge she calculates this as 4.5% of the $2.1 million that represents the respondents' contribution to the property, resulting in an award of $133,179. The appellant, however, urges this Court to accept figures more favourable to her, but rejected by the trial judge, which would produce an award of $184,450. She contends that, given the disparity in the parties' financial circumstances, this result would accord with the considerations of good conscience that underlie constructive trusts.

25 A constructive trust is a remedy that may be imposed by law to enforce an obligation arising from unjust enrichment or from "profitable wrongdoing": *Waters' Law of Trusts in Canada* at 489-499. In *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, 146 D.L.R. (4th) 214 (S.C.C.), the Supreme Court observed that both scenarios are rooted in the concept of "good conscience":

> [36] The situations which the judge may consider in deciding whether good conscience requires imposition of a constructive trust may be seen as falling into two general categories. The first category concerns property obtained by a wrongful act of the defendant, notably breach of fiduciary obligation or breach of duty of loyalty. The traditional English institutional trusts largely fall under but may not exhaust (at least in Canada) this category. The second category concerns situations where the defendant has not acted wrongfully in obtaining the property, but where he would be unjustly enriched to the plaintiff's detriment by being permitted to keep the property for himself. The two categories are not mutually exclusive. Often wrongful acquisition of property will be associated with unjust enrichment, and vice versa. However, either situation alone may be sufficient to justify imposition of a constructive trust.

26 The appellant has not claimed or proven that the respondents obtained property from her by a wrongful act. Instead, her claim for a constructive trust arises from her view that the respondents were unjustly enriched by the construction of the coach house. To succeed in that claim the appellant must establish three elements: a benefit to or enrichment of the respondents; a corresponding deprivation suffered by her; and the absence of a juristic reason for the respondents' enrichment. The first element of enrichment requires proof that the appellant gave the respondents something of tangible value that they have retained: *Kerr* at paras. 32, 38.

27 I am satisfied that the trial judge properly rejected this claim because there was no evidence the respondents had been unjustly enriched by the presence of the coach house on their property. There was no appraisal or other evidence that the property value was enhanced by the coach house. It was a non-conforming structure, and the purchasers of the property did not view it due to its unkempt state. Nor was there evidence that the respondents had derived any benefit from the coach house. Instead, as the trial judge pointed out, once it was built, it was the appellant who benefitted from the rent-free accommodation it provided, while the respondents paid her attendant expenses.

28 I am not persuaded that *Hussey* assists the appellant. Canadian courts have not adopted the broad view of constructive trust endorsed by Lord Denning in that decision, and have instead developed the analytical framework I

have just outlined. Moreover, a review of the judgments in *Hussey* reveals two important differences between that case and the case at bar, which are relevant to a claim for a constructive trust arising from unjust enrichment. First, the judgments in *Hussey* are based on an implicit assumption that the widow's contribution added value to her daughter's home, a premise absent in the appellant's case. Second, Mrs. Hussey resided in the home for just fifteen months after building the addition, whereas the appellant had nine years' use of the coach house.

29 I find no merit in this ground of appeal.

3) Did the trial judge err in dismissing the appellant's claim for proprietary estoppel?

30 The appellant says the trial judge erred in failing to find the arrangement between her and the respondents gave her an equitable licence leading to a right of **proprietary** estoppel. She relies on the judgment of Browne-Wilkinson J. in *Sharpe, Re*, [1980] 1 All E.R. 198 (Eng. Ch. Div.), at 201, [1980] 1 W.L.R. 219 (Eng. Ch. Div.):

> ... In a strict case of **proprietary** estoppel the plaintiff has expended his own money on the defendant's property in an expectation encouraged by, or known to, the defendant that the plaintiff either owns the property or is to have some interest conferred on him. Recent authorities have extended this doctrine and, in my judgment, it is now established that, if the parties have proceeded on a common assumption that the plaintiff is to enjoy a right to reside in a particular property and in reliance on that assumption the plaintiff has expended money or otherwise acted to his detriment, the defendant will not be allowed to go back on that common assumption and the court will imply an irrevocable licence or trust which will give effect to that common assumption.

31 This Court considered **proprietary** estoppel in *Trethewey-Edge Dyking (District) v. Coniagas Ranches Ltd.*, 2003 BCCA 197 (B.C. C.A.). For present purposes, I adopt Madam Justice Newbury's discussion, at paras. 64-73, of the broader approach to **proprietary** estoppel developed in the English authorities, and paraphrase the three questions that emerge as follows. First, did the respondents as the owners of the legal right to the property do something to encourage the appellant to believe they did not intend to rely on their right? Second, has the appellant acted to her detriment because of that? Third, would it be unconscionable for the respondents to go back on the assumption they have allowed the appellant to make?

32 The appellant argues the trial judge erred by failing to recognize that, by inviting her to build the coach house, the respondents permitted her to believe she owned the coach house or, at the least, that she could occupy it indefinitely. She says this led her to act to her detriment because she could have used the funds spent on the coach house to buy more secure accommodation, such as a condominium. Instead, her limited funds now consign her to rental housing, and she says the trial judge should have found it would be unconscionable for the respondents to now deny her recompense reflecting her interest in the property.

33 The trial judge found the circumstances in which the appellant was invited to build the coach house did not reasonably give rise to an expectation that she would share in the respondents' profits from a future sale of the property. That is a finding of fact, supported by the evidentiary record. Moreover, I agree with the respondents that the undisputed evidence that the appellant lived in the coach house for nine years without paying for rent or utilities, and received other assistance from the respondents, militates against a finding of detrimental reliance, or a finding that it would be unconscionable to deny her claim. Finally, as discussed in the next section, the appellant's assertion that, had she known she would not recoup the cost of the coach house she would have purchased alternative accommodation is not supported on the record.

34 I would not accede to this ground of appeal.

4) Did the trial judge err in choosing a depreciation rate of 10% to reduce the appellant's damages?

35 Having dismissed the appellant's equitable claims, the trial judge turned to these comments of Lord Denning in *Hardwick* at 938 as a basis for providing some relief to the plaintiff:

In the well-known case of *Balfour v. Balfour*, [[1919] 2 K.B. 571 at 579], Atkin LJ said that family arrangements made between husband and wife "are not contracts because the parties did not intend that they should be attended by legal consequences". Similarly, family arrangements between parent and child are often not contracts which bind them, see *Jones v. Padavatton* [[1969] 2 All E.R. 616]. Nevertheless these family arrangements do have legal consequences; and, time and time again, the courts are called on to determine what is the true legal relationship resulting from them. This is especially the case where one of the family occupies a house or uses furniture which is afterwards claimed by another member of the family, or when one pays money to another and afterwards says it was a loan and the other says it was a gift, and so forth. In most of these cases the question cannot be solved by looking to the intention of the parties, because the situation which arises is one which they never envisaged and for which they made no provision. So many things are undecided, undiscussed, and unprovided for that the task of the courts is to fill in the blanks. The court has to look at all the circumstances and spell out the legal relationship. The court will pronounce in favour of a tenancy or a licence, a loan or a gift, or a trust, according to which of these legal relationships is most fitting in the situation which has arisen; and will find the terms of that relationship according to what reason and justice require. In the words of Lord Diplock in *Pettitt v. Pettitt* [[1969] 2 All E.R. 385 at 413-4]:

> '...the court imputes to the parties a common intention which in fact they never formed and it does so by forming its own opinion as to what would have been the common intention of reasonable men as to the effect [of the unforeseen event if it] had been present to their minds...'

36 As previously set out, the trial judge imputed to this "family arrangement" a recognition by the parties that the coach house would be of some value to the respondents if the appellant vacated it, and an intention to fairly compensate her in that case in a manner that would not give the respondents a windfall. To accomplish that end, the judge imposed a framework in which the value of the coach house, measured by its construction costs, would depreciate at a fixed rate on a declining basis during each year of the appellant's residency. Because this was a personal rather than commercial relationship, and the appellant had lived there on very favourable terms, he found a depreciation rate of 10% was appropriate and calculated the award of $36,576 accordingly.

37 The appellant says the trial judge's imputation that she would agree to depreciation of her investment in the coach house is both unrealistic and unreasonable. She had no business background to support his assumption that she would understand such an arrangement, and she would not have agreed to a scheme in which she lost her savings for her old age. Moreover, it was unreasonable to impute an expectation that her interest would depreciate when the Lower Mainland real estate market was rising dramatically. Finally, she complains that the trial judge's arbitrary approach does not reflect the costs the respondents actually incurred, which cannot be ascertained in any event because they failed to respond to her requests to produce records of their expenses. The appellant contends the arbitrary figure of 10% depreciation cannot be supported in these circumstances.

38 The parties agree that when the appellant built the coach house they did not discuss what would happen to the funds she had invested if she had to vacate at the respondents' request. In my view, the resolution imposed by the trial judge [_] an imputation of a legal relationship on a family arrangement [_] was appropriate in these circumstances, given the limited evidence as to their intent at the material time. The resulting award represented an exercise of judicial discretion, governed by a concern to be fair to both parties. This Court therefore approaches its review with a high degree of deference.

39 While the appellant maintains she would have purchased other accommodation in 2001 had she known she could not recoup her investment in the coach house, there is no evidence of what this might have been, or of its likely cost. Her view that her interest would have appreciated rather than depreciated because of the escalating real estate market fails to recognize that rising property values are largely due to land value, and she had no ownership interest in the property itself. It is also significant that her choices of accommodation were limited because she was unable to live independently. There is no question she benefitted from the opportunity to reside near her family, where they watched over her and subsidized her living expenses.

40 While the appellant suggests the 10% depreciation rate is overly generous to the respondents, the limited evidence available suggests the reverse. After leaving the coach house, she moved to an apartment where she pays monthly rent of $1,305, or $15,660 annually, plus utilities. By contrast, the deduction due to the depreciation rate was considerably lower, being $9,441 in her first year of residency, declining to $4,064 in her last year, and averaging $535 a month over the entire time. Thus, the annual costs attributed to the appellant's residency in the coach house by the trial judge were significantly more favourable than the expenses she would have encountered in alternative accommodation.

41 The appellant has failed to persuade me that the depreciation rate chosen by the trial judge was an inappropriate mechanism by which to value her claim, or that it was unfair to either party.

42 I would not give effect to this ground of appeal.

Conclusion

43 I would dismiss the appeal.

***Levine J.A.*:**

I AGREE.

***Kirkpatrick J.A.*:**

I AGREE.

Appeal dismissed.

10

2012 SCC 71
Supreme Court of Canada

PIPSC v. Canada (Attorney General)

2012 CarswellOnt 15718, 2012 CarswellOnt 15719, 2012 SCC 71, 2012 C.E.B. & P.G.R. 8017 (headnote only), [2012] 3 S.C.R. 660, [2012] A.C.S. No. 71, [2012] S.C.J. No. 71, 119 O.R. (3d) 80 (note), 1 C.C.P.B. (2nd) 1, 221 A.C.W.S. (3d) 470, 274 C.R.R. (2d) 30, 300 O.A.C. 202, 352 D.L.R. (4th) 491, 438 N.R. 1, J.E. 2012-2355, D.T.E. 2012T-892, EYB 2012-215501

Professional Institute of the Public Service of Canada, Canadian Merchant Service Guild, Federal Government Dockyard Trades and Labour Council (East), International Brotherhood of Electrical Workers, Federal Government Dockyard Chargehands Association, Research Council Employees' Association, Association of Public Service Financial Administrators, Professional Association of Foreign Service Officers, Federal Government Dockyard Trades and Labour Council (West), Canadian Association of Professional Radio Operators, Canadian Air Traffic Control Association, Canadian Military Colleges Faculty Association and Federal Superannuates National Association (Appellants) and Attorney General of Canada (Respondent)

Public Service Alliance of Canada (Appellant) and Attorney General of Canada (Respondent)

Armed Forces Pensioners'/Annuitants' Association of Canada, Association des Membres de la Police Montée du Québec, British Columbia Mounted Police Professional Association, Mounted Police Association of Ontario and Canadian Association of Professional Employees (Appellants) and Attorney General of Canada (Respondent) and Attorney General of British Columbia (Intervener)

McLachlin C.J.C., LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis JJ.

Heard: February 9, 2012
Judgment: December 19, 2012
Docket: 33968

Proceedings: affirming *PIPSC v. Canada (Attorney General)* (2010), (sub nom. *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*) 275 O.A.C. 40, 2010 ONCA 657, 2010 CarswellOnt 7532, 84 C.C.P.B. 161, (sub nom. *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*) 2010 C.E.B. & P.G.R. 8409, 102 O.R. (3d) 241 (Ont. C.A.); affirming *PIPSC v. Canada (Attorney General)* (2007), 66 C.C.P.B. 54, 2007 CarswellOnt 7541 (Ont. S.C.J.)

Counsel: Paul J.J. Cavalluzzo, Hugh O'Reilly, Amanda Darrach, for Appellants, Professional Institute of the Public Service of Canada et al.
James Cameron, Andrew Raven, Andrew Astritis, for Appellants, Public Service Alliance of Canada, Armed Forces Pensioners'/Annuitants' Association of Canada et al.
Peter Southey, Dale Yurka, Christine Mohr, for Respondent
J. Gareth Morley (written), for Intervener

Subject: Corporate and Commercial; Employment; Estates and Trusts; Civil Practice and Procedure; Constitutional

Headnote

Pensions --- Surplus funds — Use of surplus — Miscellaneous

Public Service Superannuation Plan, Canadian Forces Superannuation Plan, and RCMP Superannuation Plan were defined benefit plans — Contributions were made by employees to Superannuation Account (SA) for each plan, by reservation from salary — Government, as employer, was required to make matching contributions to each SA — Interest was credited by government to each SA annually — If actuarial valuation disclosed that estimated liabilities of plan to its members were greater than amount in SA, government was required to make additional contributions by way of credits to SA — Benefits were paid to retired employees in accordance with defined formula — By March 31, 2000, total surplus in three plans amounted to approximately $30 billion — Plaintiffs' action claiming interest in outstanding balance in SAs was dismissed — Plaintiffs' appeal was dismissed — Appellate court found trial judge did not err in concluding that there were no assets in SAs — Appellate court found trial judge erred in concluding that Public Service Superannuation Act constituted complete code — Appellate court found it was questionable as to whether plan members had any equitable rights in actuarial surplus — Appellate court found there was nothing in Act to suggest that plan members were entitled to anything more than their promised pension benefits — Appellate court found trial judge did not err in concluding that government, as Administrator of Plans, was fiduciary — Appellate court found government had ability to exercise discretion unilaterally in way that affected plan members' practical interests — Appellate court found it was not appropriate that constructive trust be awarded, as government was not under equitable obligation at time it amortized surplus — Plaintiffs appealed — Appeal dismissed — Courts below were correct to conclude that superannuation accounts were not separate funds containing assets but accounting ledgers for tracking payments and estimating future liabilities — Accounts did not hold assets in form of accounts receivable from government, and at no time was government engaged in borrowing from accounts — Plaintiffs had no equitable claim to surplus funds, and entitlements were limited to statutory benefits in Superannuation Act — Fiduciary relationship did not exist between government and plan members.

Pensions — Public service superannuation — Employers' duties and liabilities — Miscellaneous

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Estates and trusts — Trusts — Constructive trust — Elements of constructive trust

Public Service Superannuation Plan, Canadian Forces Superannuation Plan, and RCMP Superannuation Plan were defined benefit plans — Contributions were made by employees to Superannuation Account (SA) for each plan, by reservation from salary — Government, as employer, was required to make matching contributions to each SA — Interest was credited by government to each SA annually — If actuarial valuation disclosed that estimated liabilities of plan to its members were greater than amount in SA, government was required to make additional contributions by way of credits to SA — Benefits were paid to retired employees in accordance with defined formula — By March 31, 2000, total surplus in three plans amounted to approximately $30 billion — Plaintiffs' action claiming interest in outstanding balance in SAs was dismissed — Plaintiffs' appeal was dismissed — No assets in SAs — Appellate court found trial judge erred in concluding that Public Service Superannuation Act constituted complete code — Appellate court found it was questionable as to whether plan members had any equitable rights in actuarial surplus — Appellate court found there was nothing in Act to suggest that plan members were entitled to anything more than their promised pension benefits — Appellate court found trial judge did not err in concluding that government, as Administrator of Plans, was fiduciary — Appellate court found government had ability to exercise discretion unilaterally in way that affected plan members' practical interests — Appellate court found it was not appropriate that constructive trust be awarded, as government was not under equitable obligation at time it amortized surplus — Plaintiffs appealed — Appeal dismissed — Courts below were correct to conclude that superannuation accounts were not separate funds containing assets but accounting ledgers for tracking payments and estimating future liabilities — No constructive trust existed over surplus funds — No unjust enrichment occurred.

Régimes de retraite — Excédent d'actifs — Utilisation de l'excédent — Divers

Régime de pension de la fonction publique, le régime de retraite des Forces canadiennes et le régime de retraite de la GRC étaient des régimes à prestations déterminées — Contributions des employés étaient versées dans le compte de retraite (CR) de leur régime respectif au moyen de retenues salariales — Gouvernement, à titre d'employeur, était tenu de verser dans chaque CR une contribution correspondant au même montant — Intérêts étaient crédités sur une base annuelle par le gouvernement à chaque CR — Si l'évaluation actuarielle révélait que le passif estimatif envers les membres des régimes excédait le montant du CR, le gouvernement devait faire des contributions additionnelles au moyen de crédits dans les CR — Prestations étaient payées aux employés retraités selon une formule définie — En date du 31 mars 2000, le montant total des excédents des trois régimes s'élevait à environ 30 milliards de dollars — Action intentée par les demandeurs visant à obtenir un intérêt dans le solde excédentaire des CR a

été rejetée — Appel interjeté par les demandeurs a été rejeté — Cour d'appel a conclu que le juge de première instance n'a pas commis d'erreur en concluant qu'il n'y avait aucun élément d'actif dans les CR — Cour d'appel a conclu que le juge de première instance a commis une erreur en concluant que la Loi sur la pension de la fonction publique constituait un code exhaustif — Cour d'appel a conclu qu'il serait surprenant que les membres du régime aient des intérêts en equity dans les excédents actuariels — Cour d'appel a conclu qu'il n'y avait aucune indication dans la Loi laissant entendre que les membres du régime avaient droit à autre chose que les prestations de retraite promises — Cour d'appel a conclu que le juge de première instance n'a pas commis d'erreur en concluant que le gouvernement, à titre d'administrateur des régimes, était un fiduciaire — Cour d'appel a conclu que le gouvernement pouvait exercer sa discrétion unilatéralement de façon à influer sur les intérêts pratiques des membres du régime — Cour d'appel a conclu qu'il n'était pas indiqué que l'on reconnaisse l'existence d'une fiducie présumée, puisque le gouvernement n'avait aucune obligation en equity au moment d'amortir l'excédent — Demandeurs ont formé un pourvoi — Pourvoi rejeté — C'était à bon droit que les juridictions inférieures ont conclu que les comptes de pension de retraite n'étaient pas des caisses distinctes contenant des éléments d'actif, mais plutôt des livres comptables servant au suivi des paiements et à l'estimation du passif futur — Comptes ne contenaient pas d'éléments d'actif sous forme de créance sur le gouvernement, et le gouvernement n'avait jamais emprunté aux comptes de pension de retraite — Demandeurs n'avaient pas de droit en equity sur les fonds excédentaires, et leur droit se limitait aux prestations déterminées prévues par les lois sur les pensions — Il n'y avait pas de relation fiduciaire entre le gouvernement et les membres des régimes.

Régimes de retraite --- Pension de retraite de la fonction publique — Obligations et responsabilités des employeurs — Divers

Régime de pension de la fonction publique, le régime de retraite des Forces canadiennes et le régime de retraite de la GRC étaient des régimes à prestations déterminées — Contributions des employés étaient versées dans le compte de retraite (CR) de leur régime respectif au moyen de retenues salariales — Gouvernement, à titre d'employeur, était tenu de verser dans chaque CR une contribution correspondant au même montant — Intérêts étaient crédités sur une base annuelle par le gouvernement à chaque CR — Si l'évaluation actuarielle révélait que le passif estimatif envers les membres des régimes excédait le montant du CR, le gouvernement devait faire des contributions additionnelles au moyen de crédits dans les CR — Prestations étaient payées aux employés retraités selon une formule définie — En date du 31 mars 2000, le montant total des excédents des trois régimes s'élevait à environ 30 milliards de dollars — Action intentée par les demandeurs visant à obtenir un intérêt dans le solde excédentaire des CR a été rejetée — Appel interjeté par les demandeurs a été rejeté — Cour d'appel a conclu que le juge de première instance n'a pas commis d'erreur en concluant qu'il n'y avait aucun élément d'actif dans les CR — Cour d'appel a conclu que le juge de première instance a commis une erreur en concluant que la Loi sur la pension de la fonction publique constituait un code exhaustif — Cour d'appel a conclu qu'il serait surprenant que les membres du régime aient des intérêts en equity dans les excédents actuariels — Cour d'appel a conclu qu'il n'y avait aucune indication dans la Loi laissant entendre que les membres du régime avaient droit à autre chose que les prestations de retraite promises — Cour d'appel a conclu que le juge de première instance n'a pas commis d'erreur en concluant que le gouvernement, à titre d'administrateur des régimes, était un fiduciaire — Cour d'appel a conclu que le gouvernement pouvait exercer sa discrétion unilatéralement de façon à influer sur les intérêts pratiques des membres du régime — Cour d'appel a conclu qu'il n'était pas indiqué que l'on reconnaisse l'existence d'une fiducie présumée, puisque le gouvernement n'avait aucune obligation en equity au moment d'amortir l'excédent — Demandeurs ont formé un pourvoi — Pourvoi rejeté — C'était à bon droit que les juridictions inférieures ont conclu que les comptes de pension de retraite n'étaient pas des caisses distinctes contenant des éléments d'actif, mais plutôt des livres comptables servant au suivi des paiements et à l'estimation du passif futur — Comptes ne contenaient pas d'éléments d'actif sous forme de créance sur le gouvernement, et le gouvernement n'avait jamais emprunté aux comptes de pension de retraite — Demandeurs n'avaient pas de droit en equity sur les fonds excédentaires, et leur droit se limitait aux prestations déterminées prévues par les lois sur les pensions — Il n'y avait pas de relation fiduciaire entre le gouvernement et les membres des régimes.

Régimes de retraite --- Excédent d'actifs — Divers

Régime de pension de la fonction publique, le régime de retraite des Forces canadiennes et le régime de retraite de la GRC étaient des régimes à prestations déterminées — Contributions des employés étaient versées dans le compte de retraite (CR) de leur régime respectif au moyen de retenues salariales — Gouvernement, à titre d'employeur, était tenu de verser dans chaque CR une contribution correspondant au même montant — Intérêts étaient crédités sur une base annuelle par le gouvernement à chaque CR — Si l'évaluation actuarielle révélait que le passif estimatif envers les membres des régimes excédait le montant du CR, le gouvernement devait faire des contributions additionnelles au moyen de crédits dans les CR — Prestations étaient payées aux employés retraités selon une formule définie — En date du 31 mars 2000, le montant total des excédents des trois régimes s'élevait à environ 30 milliards de dollars — Action intentée par les demandeurs visant à obtenir un intérêt dans le solde excédentaire des CR a été rejetée — Appel interjeté par les demandeurs a été rejeté — Il n'y avait aucun élément d'actif dans les CR — Cour d'appel a conclu que le juge de première instance a commis une erreur en concluant que la Loi sur la pension de la fonction publique constituait un code exhaustif — Cour d'appel a conclu qu'il serait surprenant que les membres du régime aient des intérêts en equity dans les excédents actuariels — Cour d'appel a conclu qu'il n'y avait aucune indication dans la Loi laissant entendre que les membres du régime avaient droit à autre chose que les prestations de retraite promises — Cour d'appel a conclu que le juge de première instance n'a pas commis d'erreur en concluant que le gouvernement, à titre d'administrateur des régimes, était un fiduciaire — Cour d'appel a conclu que le gouvernement pouvait exercer sa discrétion unilatéralement de façon à influer sur les intérêts pratiques des membres du régime — Cour d'appel a conclu qu'il n'était pas indiqué que l'on reconnaisse l'existence d'une fiducie présumée, puisque le gouvernement n'avait aucune obligation en equity au moment d'amortir l'excédent — Demandeurs ont formé un pourvoi — Pourvoi rejeté — C'était à bon droit que les juridictions inférieures ont conclu que les comptes de pension de retraite n'étaient pas des caisses distinctes contenant des éléments d'actif, mais plutôt des livres comptables servant au suivi des paiements et à l'estimation du passif futur — Comptes ne contenaient pas d'éléments d'actif sous forme de créance sur le gouvernement, et le gouvernement n'avait jamais emprunté aux comptes de pension de retraite — Demandeurs n'avaient pas de droit en equity sur les fonds excédentaires, et leur droit se limitait aux prestations déterminées prévues par les lois sur les pensions — Il n'y avait pas de relation fiduciaire entre le gouvernement et les membres des régimes.

Successions et fiducies --- Fiducies — Fiducie présumée — Indices d'une fiducie présumée

Régime de pension de la fonction publique, le régime de retraite des Forces canadiennes et le régime de retraite de la GRC étaient des régimes à prestations déterminées — Contributions des employés étaient versées dans le compte de retraite (CR) de leur régime respectif au moyen de retenues salariales — Gouvernement, à titre d'employeur, était tenu de verser dans chaque CR une contribution correspondant au même montant — Intérêts étaient crédités sur une base annuelle par le gouvernement à chaque CR — Si l'évaluation actuarielle révélait que le passif estimatif envers les membres des régimes excédait le montant du CR, le gouvernement devait faire des contributions additionnelles au moyen de crédits dans les CR — Prestations étaient payées aux employés retraités selon une formule définie — En date du 31 mars 2000, le montant total des excédents des trois régimes s'élevait à environ 30 milliards de dollars — Action intentée par les demandeurs visant à obtenir un intérêt dans le solde excédentaire des CR a été rejetée — Appel interjeté par les demandeurs a été rejeté — Il n'y avait aucun élément d'actif dans les CR — Cour d'appel a conclu que le juge de première instance a commis une erreur en concluant que la Loi sur la pension de la fonction publique constituait un code exhaustif — Cour d'appel a conclu qu'il serait surprenant que les membres du régime aient des intérêts en equity dans les excédents actuariels — Cour d'appel a conclu qu'il n'y avait aucune indication dans la Loi laissant entendre que les membres du régime avaient droit à autre chose que les prestations de retraite promises — Cour d'appel a conclu que le juge de première instance n'a pas commis d'erreur en concluant que le gouvernement, à titre d'administrateur des régimes, était un fiduciaire — Cour d'appel a conclu que le gouvernement pouvait exercer sa discrétion unilatéralement de façon à influer sur les intérêts pratiques des membres du régime — Cour d'appel a conclu qu'il n'était pas indiqué que l'on reconnaisse l'existence d'une fiducie présumée, puisque le gouvernement n'avait aucune obligation en equity au moment d'amortir l'excédent — Demandeurs ont formé un pourvoi — Pourvoi rejeté — C'était à bon droit que les juridictions inférieures ont conclu que les comptes de pension

de retraite n'étaient pas des caisses distinctes contenant des éléments d'actif, mais plutôt des livres comptables servant au suivi des paiements et à l'estimation du passif futur — Fonds excédentaires ne faisaient l'objet d'aucune fiducie présumée — Il n'y a pas eu d'enrichissement injustifié.

The Public Service Superannuation Plan, Canadian Forces Superannuation Plan, and RCMP Superannuation Plan were defined benefit plans. Contributions were made by employees to a Superannuation Account (SA) for each plan, by reservation from salary. The government, as employer, was required to make matching contributions to each SA. Interest was credited by the government to each SA annually. If actuarial valuation showed that estimated liabilities of plan to its members were greater than the amount in the SA, the government was required to make additional contributions by way of credits to the SA. Benefits were paid to retired employees in accordance with a defined formula. By March 31, 2000, the total surplus in the three plans amounted to approximately $30 billion.

The plaintiffs' action claiming an interest in the outstanding balance in the SAs was dismissed. The plaintiffs' appeal was dismissed. The appellate court found the trial judge did not err in concluding that there were no assets in the SAs. The trial judge erred in concluding that the Public Service Superannuation Act constituted a complete code. The appellate court found it was questionable whether plan members had any equitable rights in the actuarial surplus. There was nothing in the Act to suggest that plan members were entitled to anything more than their promised pension benefits. The appellate court found the trial judge did not err in concluding that the government, as administrator of the plans, was a fiduciary. The appellate court found the government had an ability to exercise its discretion unilaterally in a way that affected the plan members' practical interests. The appellate court found it was not appropriate that a constructive trust be awarded, as the government was not under an equitable obligation at the time it amortized the surplus.

The plaintiffs appealed.

Held: The appeal was dismissed.

Per Rothstein J. (McLachlin C.J.C., LeBel, Deschamps, Fish, Abella, Cromwell, Moldaver, Karakatsanis JJ. concurring): The Courts below were correct to conclude that superannuation accounts were not separate funds containing assets but accounting ledgers for tracking payments and estimating future liabilities. These accounts did not hold assets in the form of accounts receivable from the government, and at no time was the government engaged in borrowing from the accounts. The Superannuation Acts required the government to record accounting credits and debits to track the operation of the plans, and to pay the statutorily defined benefits to members out of the consolidated revenue fund. But they did not require the government to transfer assets into the accounts, nor did they require the government to borrow from the accounts or to place paperless government receivables. Furthermore, members of the plans did not have a proprietary interest in their contributions or in government credits.

The plaintiffs had no equitable claim to the surplus funds, and their entitlements were limited to statutory benefits in the Superannuation Acts.

No fiduciary relationship existed between the government and plan members with respect to the surplus. The pensions were public and therefore analogies regarding the duties of the administrator of a private plan were inexact. When the current test for ascertaining whether an ad hoc fiduciary relationship existed was applied, it was clear that the government was not required to forsake the interest of those other than the plan members, and the plan members were not vulnerable to the discretion of the government.

No constructive trust existed over the surplus funds. No unjust enrichment had occurred, and there was no enrichment and corresponding deprivation. As the plan members had no equitable interest in the surplus, applying

debit to surplus was not expropriation. The amounts debited were done so by statutory authority and parliament did not intend for compensation to flow to plan members.

Le régime de pension de la fonction publique, le régime de retraite des Forces canadiennes et le régime de retraite de la GRC étaient des régimes à prestations déterminées. Les contributions des employés étaient versées dans le compte de retraite (CR) de leur régime respectif au moyen de retenues salariales. Le gouvernement, à titre d'employeur, était tenu de verser dans chaque CR une contribution correspondant au même montant. Des intérêts étaient crédités sur une base annuelle par le gouvernement à chaque CR. Si l'évaluation actuarielle révélait que le passif estimatif envers les membres des régimes excédait le montant du CR, le gouvernement devait faire des contributions additionnelles au moyen de crédits dans les CR. Des prestations étaient payées aux employés retraités selon une formule définie. En date du 31 mars 2000, le montant total des excédents des trois régimes s'élevait à environ 30 milliards de dollars.

L'action intentée par les demandeurs visant à obtenir un intérêt dans le solde excédentaire des CR a été rejetée. L'appel interjeté par les demandeurs a été rejeté. La Cour d'appel a conclu que le juge de première instance n'a pas commis d'erreur en concluant qu'il n'y avait aucun élément d'actif dans les CR. Le juge de première instance a commis une erreur en concluant que la Loi sur la pension de la fonction publique constituait un code exhaustif. La Cour d'appel a conclu qu'il serait surprenant que les membres du régime aient des intérêts en equity dans les excédents actuariels. Il n'y avait aucune indication dans la Loi laissant entendre que les membres du régime avaient droit à autre chose que les prestations de retraite promises. La Cour d'appel a conclu que le juge de première instance n'a pas commis d'erreur en concluant que le gouvernement, à titre d'administrateur des régimes, était un fiduciaire. La Cour d'appel a conclu que le gouvernement pouvait exercer sa discrétion unilatéralement de façon à influer sur les intérêts pratiques des membres du régime. La Cour d'appel a conclu qu'il n'était pas indiqué que l'on reconnaisse l'existence d'une fiducie présumée, puisque le gouvernement n'avait aucune obligation en equity au moment d'amortir l'excédent.

Les demandeurs ont formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Rothstein, J. (McLachlin, J.C.C., LeBel, Deschamps, Fish, Abella, Cromwell, Moldaver, Karakatsanis, JJ., souscrivant à son opinion) : C'était à bon droit que les juridictions inférieures ont conclu que les comptes de pension de retraite n'étaient pas des caisses distinctes contenant des éléments d'actif, mais plutôt des livres comptables servant au suivi des paiements et à l'estimation du passif futur. Ces comptes ne contenaient pas d'éléments d'actif sous forme de créance sur le gouvernement, et le gouvernement n'avait jamais emprunté aux comptes de pension de retraite. Les lois sur les pensions obligeaient le gouvernement à enregistrer les crédits et les débits comptables pour suivre le fonctionnement des régimes, et à payer sur le Trésor les prestations déterminées prévues par la loi. Par contre, elles n'exigeaient pas que le gouvernement transfère des éléments d'actif aux comptes, ni qu'il emprunte sur les comptes ou qu'il y inscrive des créances sur le gouvernement non étayées par des pièces justificatives. De plus, les membres des régimes ne pouvaient revendiquer un intérêt propriétal dans les contributions qu'ils ont versées ou les crédits gouvernementaux.

Les demandeurs n'avaient pas de droit en equity sur les fonds excédentaires, et leur droit se limitait aux prestations déterminées prévues par les lois sur les pensions.

Il n'existait pas de relation fiduciaire entre le gouvernement et les membres des régimes à l'égard des surplus. Les régimes de retraite relevaient du secteur public, il n'y avait donc pas lieu d'établir des comparaisons avec les devoirs d'un administrateur d'un régime de retraite privé. En appliquant le critère actuel permettant de déterminer si une relation fiduciaire ad hoc existait, il ressortait clairement que le gouvernement n'était pas obligé de renoncer

aux intérêts de toute autre partie en faveur des membres des régimes, et ces derniers n'étaient pas en situation de vulnérabilité par rapport à l'exercice du pouvoir discrétionnaire du gouvernement.

Les fonds excédentaires ne faisaient pas l'objet d'une fiducie présumée. Il n'y avait pas eu d'enrichissement injustifié ni d'enrichissement et appauvrissement corrélatif. Comme les membres des régimes n'avaient pas d'intérêts en equity dans les surplus, le fait de débiter les surplus ne constituait pas une expropriation. Les montants avaient été débités en application de la loi, et le législateur ne prévoyait pas que ces débits donnent lieu au versement d'une indemnité aux membres des régimes.

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Generally — referred to

s. 21 — considered

s. 21(1) — considered

s. 21(2) — considered

Civil Service Superannuation Act, R.S.C. 1927, c. 24
s. 12(2) [en. 1944-45, c. 34, s. 6] — referred to

Defence Services Pension Continuation Act, R.S.C. 1952, c. 63
Generally — referred to

Financial Administration Act, S.C. 1951, c. 12 (2nd Sess.)
s. 2(e) "Consolidated Revenue Fund" — referred to

Financial Administration Act, R.S.C. 1985, c. F-11
s. 2 "Consolidated Revenue Fund" — referred to

s. 2 "money" — referred to

s. 2 "negotiable instrument" — referred to

s. 2 "public money" — referred to

s. 17 — referred to

s. 63(2) — considered

s. 64 — considered

s. 64(2)(d) — considered

Fisheries Act, R.S.C. 1985, c. F-14
Generally — referred to

Militia Pension Act, Act to amend the, S.C. 1946, c. 59
Generally — referred to

Pensions and to enact the Special Retirement Arrangements Act and the Pension Benefits Division Act, Act to amend certain Acts in relation to, S.C. 1992, c. 46
Generally — referred to

Pension Benefits Standards Act, 1985, R.S.C. 1985, c. 32 (2nd Supp.)
s. 4 — referred to

Public Pensions Reporting Act, R.S.C. 1985, c. 13 (2nd Supp.)
Generally — referred to

s. 5 — referred to

s. 7 — considered

s. 8 — considered

s. 8(1) — referred to

s. 9(1) — referred to

Public Sector Pension Investment Board Act, S.C. 1999, c. 34
Generally — referred to

s. 4(1)(a) — referred to

Public Service Labour Relations Act, S.C. 2003, c. 22, s. 2
s. 2(1) "employee" — referred to

s. 2(1) "employee" (d) — considered

s. 2(1) "public service" — referred to

s. 113(b) — considered

Public Service Modernization Act, S.C. 2003, c. 22

Generally — referred to

Public Service Superannuation Act, S.C. 1952-53, c. 47
Generally — referred to

s. 33 — considered

Public Service Superannuation Act, R.S.C. 1985, c. P-36
Generally — referred to

s. 3(1) "Superannuation Act" — referred to

s. 4(2) — referred to

s. 43 — referred to

s. 44(6)-44(8) — referred to

s. 44(9) — referred to

s. 44(10) — referred to

s. 44(13) — referred to

s. 45 — considered

Royal Canadian Mounted Police Act, R.S.C. 1952, c. 241
Generally — referred to

Royal Canadian Mounted Police Superannuation Act, S.C. 1959, c. 34
Generally — referred to

Royal Canadian Mounted Police Superannuation Act, R.S.C. 1985, c. R-11
Generally — referred to

s. 29(9)-29(13) — referred to

Authorities considered:

Canada, House of Commons, *House of Commons Debates*, vol. VI, 3rd Sess., 34 Parl., February 24, 1992, p. 7486

Canada, Receiver General for Canada, *Public Accounts of Canada 1996,* vol. I, *Summary Report and Financial Statements* (Ottawa: Treasury Board, 1996)

Canada, Receiver General for Canada, *Public Accounts of Canada 1997,* vol. I, *Summary Report and Financial Statements* (Ottawa: Treasury Board, 1997)

Sullivan, Ruth, *Sullivan on the Construction of Statutes*, 5th ed. (Toronto, Ont.: LexisNexis Canada Inc., 2008)

Words and phrases considered:

actuarial deficit

To the extent that the estimated cost of the pension liabilities is greater than the certified value of the "assets" reflected in the Superannuation Accounts, there is an "actuarial deficit". On the other hand, where the certified value of the "assets" reflected in the Superannuation Accounts exceeds estimated pension liabilities, there is an "actuarial surplus".

assets

In my view, the word "assets" in the *Superannuation Acts* [Royal Canadian Mounted Police Superannuation Act, R.S.C. 1985, c. R-11; Canadian Forces Superannuation Act, R.S.C. 1985, c. C-17; Public Service Superannuation Act, S.C. 1952-53, c. 47] and the *PPRA* [Public Pensions Reporting Act, R.S.C. 1985, c. 13 (2nd Supp.)], when it is used in connection with the Superannuation Accounts, refers to the credit balances reflected in the Accounts. As discussed above, the actual moneys related to pension contributions remained in the CRF [Consolidated Revenue Fund] until paid out to members, and the Accounts did not contain government debt. The Superannuation Accounts themselves reflect accounting credits and debits.

Termes et locutions cités :

déficit actuariel

Lorsque le coût estimatif des engagements au titre des pensions est supérieur à la valeur certifiée de l'actif figurant aux comptes de pension de retraite, il y a « déficit actuariel ». À l'inverse, lorsque la valeur certifiée de l'actif inscrit aux comptes de pension de retraite excède le montant estimatif des engagements au titre des pensions, il y a « surplus actuariel ».

assets

Dans les lois sur les pensions [Loi sur la pension de retraite de la Gendarmerie royale du Canada, L.R.C. 1985, ch. R-11; Loi sur la pension de retraite des Forces canadiennes, L.R.C. 1985, ch. C-17; Loi sur la pension du service public, S.C. 1952-53, ch. 47] et la LRRPP [Loi sur les rapports relatifs aux pensions publiques, L.R.C. 1985, ch. 13 (2e suppl.)], le mot « actif », lorsqu'il est employé en liaison avec les comptes de pension de retraite, se rapporte selon moi aux soldes créditeurs des comptes. Comme je l'ai expliqué plus tôt, l'argent des contributions au titre des pensions était conservé dans le Trésor jusqu'au versement des prestations aux membres, et les comptes ne contenaient pas de créance sur le gouvernement. Les comptes de pension de retraite eux-mêmes sont l'expression comptable des crédits et des débits.

APPEAL by plaintiffs from judgment reported at *PIPSC v. Canada (Attorney General)* (2010), (sub nom. *Professional Institute of the Public Service of Canada v. Canada (Attorney General))* 275 O.A.C. 40, 2010 ONCA 657, 2010 CarswellOnt 7532, 84 C.C.P.B. 161, (sub nom. *Professional Institute of the Public Service of Canada v. Canada (Attorney General))* 2010 C.E.B. & P.G.R. 8409, 102 O.R. (3d) 241 (Ont. C.A.), dismissing appeal by plaintiffs from judgment dismissing plaintiffs' claim to surplus funds in pension accounts.

POURVOI formé par les demandeurs à l'encontre d'une décision publiée à *PIPSC v. Canada (Attorney General)* (2010), (sub nom. *Professional Institute of the Public Service of Canada v. Canada (Attorney General))* 275 O.A.C. 40, 2010 ONCA 657, 2010 CarswellOnt 7532, 84 C.C.P.B. 161, (sub nom. *Professional Institute of the Public Service of Canada v. Canada (Attorney General))* 2010 C.E.B. & P.G.R. 8409, 102 O.R. (3d) 241 (Ont. C.A.), ayant rejeté un appel interjeté par les demandeurs à l'encontre d'un jugement ayant rejeté leur requête se rapportant aux fonds excédentaires se trouvant dans les comptes de pension.

***Rothstein J.*:**

I. Introduction

1 This appeal concerns three statutory, public sector pension plans, the members of which are federal public service employees, members of the Canadian Forces, and members of the RCMP. Each plan is administered by the Government of Canada, and each is a contributory, defined benefit plan.

2 The statutes governing the plans establish for each one a "Superannuation Account", which records payments into and out of the plan. In the 1990s, the credits to the Superannuation Accounts began to reflect actuarial surpluses (meaning that the credits exceeded the estimated cost of providing pension benefits). By March 1999, the total surpluses of the three plans had reached approximately $30.9 billion.

3 Beginning with the 1990-91 Public Accounts (Canada's annual financial reports), the government began to "amortize" the actuarial surpluses in the Superannuation Accounts. On April 1, 2000, the *Public Sector Pension Investment Board Act*, S.C. 1999, c. 34 ("Bill C-78") came into force. Bill C-78 changed the way in which contributions to the plans were collected, managed and distributed. It also required the Minister to debit from the Superannuation Account certain amounts in excess of specified actuarial surplus ceilings. Unlike the effect of the prior amortization practice, on the basis of Bill C-78, the government debited over $28 billion directly from the Superannuation Accounts, thereby reducing the actuarial surplus in those accounts.

4 The appellants (being various unions and employee/pensioner associations) filed suit, seeking relief that would require the government to return $28 billion to the plans. The trial judge dismissed the claims, and the Ontario Court of Appeal upheld the decision ((2007), 66 C.C.P.B. 54 (Ont. S.C.J.), aff'd 2010 ONCA 657, 102 O.R. (3d) 241 (Ont. C.A.)).

5 In order to succeed, the plan members must establish that they have an equitable entitlement to the actuarial surpluses. Otherwise, their entitlement will be limited to the defined pension benefits set out in the governing statutes. In this connection, the nature of the Superannuation Accounts is an issue of central importance. The appellants have argued that the Superannuation Accounts were funds that contained assets in which an equitable interest could be claimed. They say their equitable interest is protected by a fiduciary duty on the part of the government, and, in the alternative, by a constructive trust based on unjust enrichment. The government counters that the Superannuation Accounts were merely accounting records and contain no assets to which an equitable interest could attach. A further issue raised on appeal is whether, if the plan members did have an interest in the actuarial surplus, that interest was extinguished by Bill C-78.

6 I have determined that the courts below were correct to conclude that the Superannuation Accounts were not separate funds containing assets, but were rather accounting ledgers used to track pension-related payments, and to estimate Canada's future pension liabilities in the Public Accounts. Therefore, the plan members' entitlements are limited to the statutorily defined benefits set out in the *Superannuation Acts*.

7 I have also concluded that the government was not subject to a fiduciary obligation in favour of the plan members with respect to the actuarial surplus. Nothing in the *Superannuation Acts*, or any other legislation, supports the contention that the government has undertaken to forsake the interests of all others (including taxpayers) in favour of the plan members with respect to the actuarial surplus. Further, there was no unjust enrichment and therefore no basis for a constructive trust. As the Superannuation Accounts did not contain assets in which the appellants had an interest, they did not suffer any detriment as a result of the government's accounting treatment of the Superannuation Accounts. For the same reason, Bill C-78 did not expropriate any property of the plan members. Accordingly, I would dismiss the appeal.

II. Facts

A. The Pension Plans

8 The summary of facts that follows parallels the findings of the Court of Appeal closely. There are three pension plans involved in this appeal (the "Plans"). They were established by statute for each of three groups: substantially all those who are employed in the federal public service; the members of the RCMP; and the regular force of the Canadian Forces (the "Plan members"). The relevant statutes are the *Public Service Superannuation Act*, R.S.C. 1985, c. P-36 ("*PSSA*"); the *Canadian Forces Superannuation Act*, R.S.C. 1985, c. C-17 ("*CFSA*"); and the *Royal Canadian Mounted Police Superannuation Act*, R.S.C. 1985, c. R-11 ("*RCMPSA*") (collectively, the "*Superannuation Acts*").

9 Each of the *Superannuation Acts* has legislative antecedents dating back to the late 19th or early 20th centuries. As currently enacted, they date from the coming into force of the present *Superannuation Acts* — January 1, 1954, for the *PSSA*, S.C. 1952-53, c. 47 ("*PSSA* 1954"); March 1, 1960, for the *CFSA*, S.C. 1959, c. 21; and April 1, 1960, for the *RCMPSA*, S.C. 1959, c. 34.

10 The Plans are the same in all aspects relevant to these proceedings. For ease of reference, I will generally refer only to the *PSSA*, but the analysis and conclusions apply equally to the *CFSA* and the *RCMPSA*.

11 The *Superannuation Acts* set out the terms of the Plans. They establish contributory, defined benefit pension plans. Membership in the Plans is compulsory for all eligible public service employees, members of the regular force of the Canadian Forces, and members of the RCMP.

12 There are two relevant time periods in this appeal. The first period is up to and including March 31, 2000. It precedes the coming into force of Bill C-78, legislation that amended the *Superannuation Acts* and, thus, the Plans. The second period begins on April 1, 2000, when Bill C-78 came into effect.

13 Employees are required to make a contribution to the relevant Plan, by way of reservation of salary. While the contribution rates for these Plans varied, employees generally contribute in the range of 5 to 7.5 percent of their salaries.

14 The defined benefit to which an employee is entitled, upon retirement, is determined in accordance with a formula. The basic pension is two percent per year of pensionable service (to a maximum of 35 years) multiplied by the average of the best five consecutive years of salary.

15 The terms of the Plans are not subject to collective bargaining. The *PSSA* Plan is excluded by virtue of s. 113(*b*) of the *Public Service Labour Relations Act*, enacted by the *Public Service Modernization Act*, S.C. 2003, c. 22, s. 2 ("*PSLRA*") (formerly s. 57(2)(*b*) of the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 ("*PSSRA*") [rep. S.C. 2003, c. 22, s. 285]). The *RCMPSA* Plan is not subject to collective bargaining because RCMP members are expressly excepted from para. (*d*) of the definition of "employee" in s. 2(l) of the *PSLRA* (formerly para. (*e*) of the definition of "employee" in s. 2(1) of the *PSSRA*) and thus have no collective bargaining rights. The *CFSA* Plan is not subject to collective bargaining because members of the Canadian Forces are neither Crown employees nor part of the public service as defined in the *PSLRA* and therefore do not have collective bargaining rights. Nor are the Plans subject to the *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.) (see s. 4).

16 Employee contributions to the Plans were required to be deposited into the Consolidated Revenue Fund ("CRF"). "Consolidated Revenue Fund" is defined to mean "the aggregate of all public moneys that are on deposit at the credit of the Receiver General", in the *Financial Administration Act*, R.S.C. 1985, c. F-11 ("*FAA*"), s. 2. Prior to April 1, 2000, contributions to the Plans were reflected as credits to the "Superannuation Accounts" (or "Accounts"), which were statutorily established for each of the Plans. Amounts payable pursuant to the *Superannuation Acts* (pension benefits) were paid from the CRF and debited to the appropriate Superannuation Account.

17 In addition to credits reflecting Plan members' contributions, the legislatively prescribed credits to the Superannuation Accounts prior to April 1, 2000, consisted of the following: (1) credits in respect of contributions by Public Service corporations; (2) government contribution credits; (3) additional actuarial liability credits (to cover

actuarial liabilities); (4) transfers from other pension plans and Supplementary Retirement Benefits Accounts; and (5) interest credits on the balance in the Superannuation Accounts at the rate prescribed by regulation.

18 The required government contribution credits varied over time. For example, the government was required to credit the Superannuation Account created for the *PSSA* Plan with amounts matching employee contributions in respect of current service: a year in arrears, from 1954 to 1991, and on a monthly basis, from 1991 to 2000. Additionally, further credits were required in relation to past or "buyback" service, and to provide for the cost of benefits accrued in the month in relation to current service.

19 The reporting of the government's pension liabilities is subject to the *FAA*, the applicable *Superannuation Act*, and the *Public Pensions Reporting Act*, R.S.C. 1985, c. 13 (2nd Supp.) ("*PPRA*"). Pursuant to s. 64 of the *FAA*, for each fiscal year the Receiver General must prepare, and the President of the Treasury Board must lay before the House of Commons, an annual report known as the "Public Accounts". The Public Accounts reflect the value of the assets and liabilities of Her Majesty in Right of Canada. They are the Government of Canada's main financial reporting document.

20 The two principal statements in the Public Accounts are the Statement of Financial Position, which sets out the assets and liabilities of the government, and the Statement of Operations and Accumulated Deficit, which sets out the government's revenues and expenditures.

21 The transactions and balances in the Superannuation Accounts are reported annually in the Public Accounts. The government's annual credits made pursuant to the *Superannuation Acts* are shown as a government expense in the Statement of Operations and Accumulated Deficit. The amounts set out in the Superannuation Accounts are shown as an ongoing liability of the government in its Statement of Financial Position. The Superannuation Accounts have been classified as "Specified Purpose Accounts" under the liabilities section of the Statement of Financial Position since the 1980-81 fiscal year.

22 As required by the *Superannuation Acts* and the *PPRA*, actuarial reports were received from time to time with respect to each of the Plans. The *PPRA* requires the Chief Actuary of the Office of the Superintendent of Financial Institutions to periodically estimate the cost of the government's future pension obligations, and to cause a "certification of the assets" of the Plans (ss. 5, 8(1) and 9(1)). To the extent that the estimated cost of the pension liabilities is greater than the certified value of the "assets" reflected in the Superannuation Accounts, there is an "actuarial deficit". On the other hand, where the certified value of the "assets" reflected in the Superannuation Accounts exceeds estimated pension liabilities, there is an "actuarial surplus".

23 In the 1990s, the actuarial valuations showed that the estimated cost of the present and future obligations for each of the three Plans was less than the total of the amounts showing in the Superannuation Accounts. The surplus arose as a result of a combination of factors, including low inflation rates, high interest rates, government-imposed restraints on salaries, the capping of indexing benefits in the 1980s, and changing assumptions in calculating the actuarial liability of the Plans. The surplus in the three Superannuation Accounts reached $16.6 billion by December 1992, climbing to $23.4 billion in March 1996 and $30.9 billion in March 1999.

B. Amortization of the Surplus

24 In the 1990-91 fiscal year, the government began to "amortize" the actuarial surplus in the Superannuation Accounts. The word "amortize" is used to describe the actions undertaken by the government, over a number of years, to gradually reduce the impact of the actuarial surplus on the Public Accounts. The amortization consisted of the following actions: the government continued to credit its contributions to the Superannuation Accounts in accordance with the *Superannuation Acts*. However, the Public Accounts recorded lower net annual pension expenses. To accomplish this objective, the government booked into the Public Accounts negative expenses to reflect the amount of the surplus amortized during the year, thereby reducing the government's total pension expenses. For the books to balance, the negative adjustments to pension expenses were equally reflected in reductions in the government's total stated pension

liabilities on its Statement of Financial Position. To make this happen, the amounts amortized each year were debited to contra-liability accounts (i.e., liability accounts having a debit balance) created in the Public Accounts. These accounts went by different names over the years — such as the "Allowance for Pension Adjustments" — but their function was the same: they allowed the government to reduce its stated net pension liabilities in the Public Accounts by the amount of the amortization without debiting the Superannuation Accounts themselves. The Superannuation Accounts maintained their credit balances, unaffected by the amortization, but the debit balances in the separate allowance accounts partially offset them in the Public Accounts. The government's stated net pension liabilities were in this way gradually brought toward the actuarial valuation of Plan liabilities (i.e., the surplus was gradually reduced), but the balances in the Superannuation Accounts were not affected.

25 The effect of this "amortization" was therefore twofold: it reduced the government's annual budget deficit (or increased the annual budget surplus) by reducing annual pension expenditures, and it brought the government's net debt down by reducing the net pension liabilities to an amount closer to the actuarial estimates of the government's future pension obligations.

26 During the 1990s, the government amortized a total of $18.6 billion, with further amounts being amortized after the year 2000.

C. Bill C-78

27 In 1999, the government introduced Bill C-78, which came into force on April 1, 2000. It made significant changes to the *Superannuation Acts*. It established a Pension Fund in each of the *Superannuation Acts* that replaced the Superannuation Accounts for post-March 31, 2000 service ("Pension Funds"). Since April 1, 2000, employee and government contributions in respect of current service have been made to the Pension Funds.

28 Under Bill C-78, the amounts in the Pension Funds were to be invested externally. Bill C-78 established an investment board to manage the assets in the Pension Funds. One of the objects of the investment board is to manage the amounts that are transferred to it, pursuant to the amended Superannuation Act, "in the best interests of the contributors and beneficiaries under those Acts" (s. 4(1)(*a*)).

29 Bill C-78 added s. 44(9) to (13) to the *PSSA*. In general terms, these subsections both grant discretion to and create an obligation on the Minister to debit the Superannuation Accounts to reduce the actuarial surplus. While the Minister has the discretion to debit the Superannuation Accounts with any amount of the surplus between 100 percent and 110 percent of the amount estimated to be required to meet the cost of benefits payable, as determined from the actuarial reports, the Minister is required to debit the Accounts for any actuarial surplus that exceeds 110 percent of the amount required to pay future benefits.

30 Bill C-78 provided that after January 1, 2004, employee contribution rates would no longer be set by legislation but would be set at the discretion of the Treasury Board, subject to certain restrictions. Employees faced a legislated increase of 15 to 33 percent in contribution rates in the years from 2000 to 2003. In 2005, the Treasury Board announced further increases.

31 Bill C-78 also changed the basis for the government's annual contributions. Instead of being required to make contributions matching those made by employees, the government's contributions are now determined by the President of the Treasury Board, based on the actuarial valuations for each Plan.

32 All benefits for pensionable service prior to April 1, 2000, when paid, are charged to the appropriate Superannuation Account. However, benefits paid for service thereafter are paid from the appropriate Pension Fund.

33 Between 2001 and 2004, the government relied on Bill C-78 to debit over $28 billion from the Superannuation Accounts. Since the effect of the prior amortization was to reduce the annual deficit or increase the annual surplus, and

to reduce the government's net debt, the debiting of any amounts already amortized had no effect on Canada's financial position.

D. The Appellants' Action

34 The appellants brought an action for the return of the actuarial surplus reflected in the Superannuation Accounts, arguing that the government had breached its trust and fiduciary duties by amortizing and debiting the surplus. The appellants also maintained that Bill C-78 did not extinguish Plan members' interest in the surplus as it did not evidence an unambiguous intent to expropriate without compensation. The trial judge dismissed the appellants' action. The Ontario Court of Appeal dismissed their appeal.

35 In their appeal in this Court, the appellants seek a declaration that the Plan members have an equitable interest in the outstanding balance in the Superannuation Accounts as of March 31, 2000. They say that the equitable interest includes the right to have the entire amount in the Superannuation Accounts used solely for the purpose of providing pension benefits to Plan members. In the alternative, the appellants seek a declaration that the equitable interest of the Plan members constitutes a right to have a share of the actuarial surplus in the Superannuation Accounts used for the purpose of providing benefits to the Plan members. Under this alternative, the appellants have prorated their share in accordance with the ratio of employee and employer contributions as of March 31, 2000. The Plan members' contributions were the equivalent of 42.2 percent of the actuarial surplus on that date. They also seek a declaration that ss. 44(9) and 44(10) of Bill C-78 do not authorize the reduction from the Superannuation Accounts of any amount in which Plan members have an equitable interest without compensation. And they seek an order that the Superannuation Accounts be credited with all amounts that were removed following Bill C-78 in which the Plan members have an equitable interest, together with interest.

E. Relevant Statutory Provisions

36 The relevant statutory provisions are set forth in the Appendix at the conclusion of these reasons.

III. Judgments Below

A. Ontario Superior Court of Justice (Panet J.)

37 The appellants brought a claim for breach of trust, and a claim for breach of fiduciary duty with respect to the outstanding balance in the Superannuation Accounts, as of March 31, 2000.

38 In considering the statutes and other documents, Panet J. found that the trust requirement that there be certainty of intention was not present. Panet J. also concluded that there was no certainty of subject matter. He found that there was no separate or segregated fund. Panet J. rejected the appellants' claim for breach of fiduciary duty, as there was no scope for the exercise of any discretion or power, a necessary element of a fiduciary relationship. Panet J. held that the government had no discretion because the *PSSA* was a complete statutory code.

39 The appellants also objected to the amortization of the surplus. Panet J. rejected this claim on the basis that the Public Service Superannuation Plan was not a funded plan, and that the amortized amounts in the Superannuation Account were not assets that had been removed.

40 In Panet J.'s view, the Superannuation Accounts did not contain assets. Rather, the Accounts were maintained by the government, pursuant to the *FAA*, to record and disclose an estimate of its pension liability (the cost of the pension obligation).

41 Panet J. considered whether the government had borrowed from the Superannuation Accounts the difference between the contributions to the Plans plus interest, and the pension payments from the Plans. He found there was no amount owing by the government to the Superannuation Accounts.

42 In his view, the government's pension liability comes from the *Superannuation Acts*, not the Accounts. The Superannuation Accounts are effectively an estimate of the cost of the government's pension liability. Panet J. considered the actuarial reports periodically submitted to Parliament, which make reference to assets and liabilities in the Plans. However, he found that the use of the word "assets" in these reports does not correspond to the ordinary meaning of that word. "Asset" was used to mean the recorded contributions of employees and the government, less benefits paid — i.e., the balances in the Superannuation Accounts.

43 Even though he concluded that the Superannuation Accounts did not contain assets, Panet J. went on to consider whether Bill C-78 expropriated any interest that the Plan members had in the surplus. He concluded that, in clear and unambiguous terms, Bill C-78 required the Minister to debit from the Superannuation Accounts any amount that exceeds 110 percent of the amount estimated to be required to meet pension obligations, and that it gave him the discretion to debit additional amounts of the surplus.

44 Finally, Panet J. rejected the appellants' argument that Bill C-78 breached the *Charter* rights of Plan members.

45 Panet J. concluded that the declarations sought by the appellants should not be granted.

B. Court of Appeal for Ontario (Gillese J.A., Concurred in by Laskin and Juriansz JJ.A.)

46 Gillese J.A. found that the trial judge had correctly concluded that the Superannuation Accounts did not contain assets, notwithstanding the appearance of the word "assets" in the *PSSA*. In her view, Superannuation Accounts were "legislated ledgers", designed to record the amounts credited to the Plans, and to estimate the government's liability to provide benefits to Plan members. The "real money" deducted from employees' pay cheques was deposited (retained) in the CRF, becoming a part of the aggregate of all public moneys, with a corresponding credit in the appropriate Superannuation Account (paras. 49 to 52).

47 Although government documents referred to the Plans as being "fully funded", Gillese J.A. held that, understood in context, that phrase simply meant that the value of credited contributions in the Superannuation Accounts was sufficient to discharge the government's liability for promised pension benefits (para. 55).

48 However, Gillese J.A. held that the trial judge erred by determining that the *PSSA* was a complete code. While the *PSSA* listed many of the parties' rights and obligations, prior to April 1, 2000, the *PSSA* did not address the actuarial surpluses in the Superannuation Account. Accordingly, the Act did not constitute a complete code prior to Bill C-78 coming into force.

49 It did not follow from this conclusion that Plan members had equitable rights to the actuarial surplus. They did not have an interest in the surplus flowing from the *PSSA*, the employment relationship, trust principles, or from the government's fiduciary obligations as plan administrator.

50 Gillese J.A. found that the government was not a fiduciary in its capacity as administrator of the Plans prior to April 1, 2000. However, she held that the trial judge had erred by determining that the government did not have any discretion that could give rise to a fiduciary duty. In her view, the government had discretion in managing the amounts credited to the Superannuation Accounts. The government made the decision to deal with the actuarial surplus by amortizing it, and this amounted to the exercise of discretion.

51 Gillese J.A. held that there was no property belonging to the Plan members that was affected by the government's exercise of discretion, but that the way the government exercised its discretion had an effect on the practical interests of the Plan members. It appeared to her that the exercise of discretion led to the employees having to contribute more towards the cost of their pensions. However, the core question was whether "given all the surrounding circumstances, one party could reasonably have expected that another would act in the former's best interests" (para. 94). In this case, she concluded it would *not* be reasonable for Plan members to expect the government to act in their best interests

when exercising its discretion. A fiduciary duty is unlikely to apply to the Crown, as it would create a conflict between the Crown's responsibility to act in the public interest, on one hand, and its obligation to act in the best interests of beneficiaries, on the other.

52 Gillese J.A. also held that a constructive trust should not be imposed. She found that it need not be imposed to satisfy the requirements of good conscience, in view of the lack of an equitable obligation on the part of the government. Second, the government was not enriched by the amortization and removal (pursuant to Bill C-78) of the actuarial surplus. In her view, whatever benefit there was to the amortization, it enured to all Canadian taxpayers. In any event, Bill C-78 was a juristic reason justifying any removal.

53 Accordingly, Gillese J.A. dismissed the appeal. Laskin and Juriansz JJ.A. concurred.

IV. Issues

54 The issues in this appeal are:

a. Did the Superannuation Accounts contain assets?

b. Did the government owe a fiduciary duty to the Plan members?

c. Should a constructive trust be imposed over the balances in the Superannuation Accounts as of March 31, 2000?

d. Did Bill C-78 authorize the government to debit the actuarial surpluses in the Superannuation Accounts?

V. Analysis

55 This Court has considered the law related to pension plan surpluses on several occasions, but it has always done so in the context of private sector pension plans. In this appeal, the Court must consider pension plan surpluses in the context of statutory, public sector pension plans.

56 *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611 (S.C.C.), is the leading statement of the law on pension plan surpluses. That case establishes the principle that, in the absence of overriding legislation, the first step to assessing competing claims to the surplus is to determine, in accordance with ordinary principles of trust law, whether the pension fund is impressed with a trust. If it is, all applicable trust principles apply. If, on the other hand, the pension fund is not subject to a trust, entitlement to the surplus will be assessed in accordance with the principles of contract interpretation.

57 In *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273 (S.C.C.), this Court affirmed *Schmidt*, along with *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)*, 2009 SCC 39, [2009] 2 S.C.R. 678 (S.C.C.), and *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152 (S.C.C.), to the effect that entitlement to a pension plan surplus is "determined according to the words of the relevant documents and applicable contract and trust principles and statutory provisions" (para. 26).

58 At trial, the appellants advanced the argument that the *Superannuation Acts* created express trusts for the benefit of Plan members. However, the trial judge rejected the express trust argument, and it has not resurfaced on appeal.

59 In this appeal, the appellants have based their arguments not on express trust, but on constructive trust. Their contention is that the Superannuation Accounts contain assets, and that the government is under an equitable (fiduciary) obligation in respect of its management of them. The appellants argue that the government breached its fiduciary duty by amortizing the surplus, and that this gives rise to a constructive trust over the assets in the Superannuation Accounts, in favour of the Plan members. The appellants have also argued that a constructive trust should be imposed on the basis of unjust enrichment. As mentioned above, central to both of these arguments is the issue of whether the Superannuation Accounts in fact contained assets. If they did not, then there could be no equitable interest subject to a

fiduciary duty, nor any unjust enrichment justifying a constructive trust. Accordingly, the first issue to address is whether the Superannuation Accounts contained assets.

A. Did the Superannuation Accounts Contain Assets?

60 Both courts below found that the Superannuation Accounts did not contain assets. At first instance, Panet J. rejected appellants' expert evidence that the primary asset of each Account is a receivable from the government. He found that, in fact, the government had not borrowed from the Superannuation Accounts and that there were no amounts owing by the government to the Accounts. Rather, the Superannuation Accounts were no more than accounts maintained by the government to record and disclose its estimated pension liability. At the Court of Appeal, Gillese J.A. found no error with this conclusion. In her view, "[i]n essence, the Superannuation Accounts are legislated ledgers" (para. 50).

61 While there is no question that the Superannuation Accounts are not pools of marketable securities, the appellants maintain that the courts below erred in not finding that the Accounts contain assets, namely, receivables owing from the government to the Accounts. They submit that real money was contributed to the Accounts in each year, but, because the amounts were not invested externally, the government effectively borrowed this money from the Accounts for its own use — leaving promises to pay in the Accounts. These promises to pay, they say, are assets, much like Government of Canada bonds.

62 As I will presently explain, I agree with the respondent and the courts below that the Superannuation Accounts do not contain assets. The Superannuation Accounts are no more than accounting records designed to track the operation of the Plans and to estimate the government's future pension liabilities.

(1) The Superannuation Acts

63 The Superannuation Accounts are all established by statute and therefore, an analysis of their nature must begin with the legislation. The current Superannuation Account for the Public Service Superannuation Plan is a continuation of the account established by the 1952 revision of the *Civil Service Superannuation Act*, R.S.C. 1952, c. 50 (*PSSA*, definition of "*Superannuation Act*" in s. 3(1) and s. 4(2)). The 1952 Revised Statutes of Canada re-enacted, in turn, a provision that was originally found in *An Act to amend the Civil Service Superannuation Act*, S.C. 1944-45, c. 34, s. 6, enacted by Parliament in 1944.

64 The *Civil Service Superannuation Act*, s. 21, provided that all funds collected and distributed pursuant to that Act flowed into, and out of, the CRF:

> **21.** (1) The moneys received under the provisions of this Act shall form part of the Consolidated Revenue Fund, and the moneys payable under the said provisions shall be payable out of the said Consolidated Revenue Fund.

The CRF was defined to mean, at the relevant time, in *The Financial Administration Act*, S.C. 1951 (2nd Sess.), c. 12, s. 2(*e*), assented to December 21, 1951, "the aggregate of all public moneys that are on deposit at the credit of the Receiver General". Section 21 of the *Civil Service Superannuation Act* further provided for a special account in the CRF, to be known as the Superannuation Account, for purposes of funds received and payable in respect of the Act:

> (2) There shall be kept in a Special Account in the Consolidated Revenue Fund, to be known as the Superannuation Account, of all moneys so received or so payable, and there shall be added to the said Account annually an amount representing interest, at such rate and calculated in such manner as the Governor in Council may by regulation prescribe, on the amount to the credit of such account.

65 The description of the Superannuation Account as a "Special Account in the Consolidated Revenue Fund ... of all moneys so *received* or so *payable*" describes accounting entries — a record of transactions relating to government pension plans reflected in credits and debits. It is apparent from the statutory language that Parliament contemplated that the Account would reflect Plan-related transactions into and out of the CRF. Considered together with the direction to

receive all Plan-related moneys into the CRF, and to pay them out of the CRF, the language is consistent with accounting entries rather than with a direction to keep a separate, identifiable accumulation of assets.

66 As the current Superannuation Account is a continuation of the account established by the 1952 Revised Statutes of Canada (originally established legislatively in 1944), the current Superannuation Account continues to represent accounting entries reflecting, through credits and debits, superannuation Plan-related transactions into and out of the CRF.

67 In this regard, I pause to remind that the Superannuation Account continues to exist notwithstanding the establishment in 2000 of the Pension Funds pursuant to Bill C-78. Benefits for pensionable service prior to April 1, 2000, are, generally, charged to the Superannuation Account and paid out of the CRF (*PSSA*, s. 43).

68 The current *FAA* supports the view that all pension-related transactions are into and out of the CRF, and no money is deposited in or withdrawn from the Superannuation Accounts themselves. The *FAA* provides that "all public money shall be deposited to the credit of the Receiver General", and it defines "public money" as including "all money that is paid to or received or collected by a public officer under or pursuant to any Act ... and is to be disbursed for a purpose specified in or pursuant to that Act" (ss. 17 and 2). Thus, while the *PSSA* no longer refers specifically to the Superannuation Account as being an account in the CRF, the scheme of the *FAA* provides that the moneys collected under the *PSSA* form part of the CRF. Thus, the continuation of the 1944 Superannuation Account, an account in the CRF, is consistent with the financial administration legislation currently in force.

69 When Parliament first established the Superannuation Account, the intention was to create an accounting ledger to track the operation of the superannuation Plan. Not only does the Account record transactions into and out of the CRF, as I have explained, but the credit balance reflects an estimate of Canada's future pension liability under the *PSSA*. This is demonstrated by the fact that, when the Account is in deficit (i.e., is an understatement of the actuarial estimate of pension liabilities), the *PSSA* requires the government to record actuarial liability credits to bring the credit balance in the Account — through annual instalments, to spread out the impact on the Public Accounts — toward the actuarial estimate of the future pension obligation (*PSSA*, s. 44(6) to (8)). In this way, the Superannuation Account is useful from a financial reporting perspective. And it explains why it is disclosed in the Public Accounts as a government liability.

70 While the above discussion focuses on the Superannuation Account applicable to the Public Service Superannuation Plan, the conclusions apply equally to the other two pension plans at issue on this appeal. The Canadian Forces Superannuation Account is a continuation of the Permanent Services Pension Account established in the accounts of Canada pursuant to the *Defence Services Pension Act*, R.S.C. 1952, c. 63, as it read before March 1, 1960. The Permanent Services Pension Account was earlier enacted pursuant to *An Act to amend the Militia Pension Act*, S.C. 1946, c. 59, s. 6, and was described as "a Special Account in the Consolidated Revenue Fund". Likewise, the RCMP Superannuation Account is a continuation of the Royal Canadian Mounted Police Pension Account established in the accounts of Canada pursuant to the *Royal Canadian Mounted Police Act*, R.S.C. 1952, c. 241, as it read before April 1, 1960. The Royal Canadian Mounted Police Pension Account was earlier enacted pursuant to *An Act to amend the Royal Canadian Mounted Police Act*, S.C. 1947-48, c. 28, s. 10, and was also said to be "a Special Account in the Consolidated Revenue Fund".

71 The legislation supports the finding that the Superannuation Accounts are accounting entries, rather than funded pools of assets.

(2) The "Borrowing Theory"

72 The appellants' argument that the Superannuation Account contained assets did not rely on the contention that there was identifiable property in the Accounts that could be liquidated or sold. (This much was admitted by the appellants' expert, John Christie, at trial, upon cross-examination: A.R., vol. III, at 142.) His theory (the "Borrowing Theory") was instead, that "[t]he assets of the plan are a promise to pay from the government of Canada, a debt of the government

of Canada" (A.R., vol. III, at pp. 142-43). In his opinion, the assets consisted of the "promise to pay to the account the amount that was owed to it by the government of Canada" (p. 147).

73 Scott Milne (the appellants' accountant) presented a similar opinion. He stated at trial that the government has

> effectively paid the money into the account, and then they have borrowed the money back from the account. So the end result is ... that the pension account has a receivable from the government and the government has a payable to the pension account. [A.R., vol. IV, at p. 48]

74 The trial judge rejected the expert evidence supporting the Borrowing Theory, and the Court of Appeal agreed. I see no reason to interfere with this finding.

75 The appellants argue, incorrectly in my view, that "if the Government did not borrow the amounts in the Superannuation Accounts, the only conclusion available is that it violated the *PSSA* by failing to contribute to the Accounts in the first place" (A.F., at para. 57). They assert that the experts testified at trial that the only way for the government to have met its statutory obligations without actually transferring money into the Accounts was through the Borrowing Theory. The problem, however, is that this argument is premised on a legally incorrect interpretation of the governing legislation. As already discussed, the Superannuation Accounts were — and are — legislated ledgers to track Plan-related CRF transactions and to estimate the government's pension liabilities to Plan members. In short, they are accounting records — that is to say, *information* — not repositories of assets capable of holding property.

76 For the appellants' Borrowing Theory to hold together, it must be possible to say that the government was required to contribute property to the Superannuation Accounts, and that it was, in fact, borrowing this property back and depositing it into the CRF for public purposes. However, if the Superannuation Accounts are informational accounting records, as I have already concluded they are, this is manifestly impossible. There can be no transfer of actual property to — or borrowing from — an informational record. The property is, and always was, elsewhere: viz., prior to April 1, 2000, the legislation contemplated that all property associated with the operation of the Plans was to be held in, and ultimately be paid out of, the CRF. Throughout the operation of the Superannuation Accounts, there was no intermediate step in which any property should have gone into the Accounts, only to be immediately borrowed back by the government. Not only were such "offsetting cheques" (A.R., vol. IV, at p. 51) not contemplated by the legislation, but the trial judge also found as a fact that this is not how the government was operating the Accounts. Legislatively, the Accounts were informational records incapable of holding assets; in practice, they were treated as such. There was no borrowing from them; there was no debt owing to them; there was no property in them.

77 As I have said, the *Superannuation Acts* required the government to record accounting credits and debits to track the operation of the Plans, and to pay the statutorily defined benefits to members out of the CRF. But they did *not* require the government to transfer assets into the Accounts, nor did they require the government to "borrow" from the Accounts or to place paperless government receivables in them to reflect this "borrowing". The suggestion that any of this was statutorily required is not reflected in the relevant legislation. The Superannuation Accounts were intended to be, and were, part of the government's accounting system. Contrary to the appellants' contention, the Accounts were not capable of holding assets.

78 The appellants also put before the Court various government documents and reports that refer to "borrowing" from the Superannuation Accounts. In the Auditor General's 1991 report to the House of Commons, for example, it is stated that a

> substantial portion of the government's budgetary deficit is financed through internal non-cash borrowing from specified purpose accounts (SPAs).... These borrowings do not involve cash but rather result from a deferral of payments of contributions and interest owed by the government to the third parties on whose behalf the SPAs are administered. [A.R., vol. IV, at p. 233]

79 Similarly, it is written in the 1994 report of the Economic Analysis and Forecasting Division, entitled "Public Service Pension Review: The Macroeconomic Impacts of Investing in A Diversified Portfolio of Market Assets":

> At present, the pension funds are, in effect, segmented off from the capital market. They constitute a pool of funds to which only the government has access. The Government 'borrows' from the fund and credits the fund with interest as if the borrowing was done exclusively through 20-year Government of Canada bonds. [A.R., vol. V, at p. 167]

80 It is important, however, to understand these references to "borrowing" in context. As the Treasury Board Secretariat explained in its response to the Auditor General's 1991 report:

> The government does not borrow funds directly from the public service pension accounts to finance other spending activities. The government has borrowed from the pension accounts only in the sense that by not raising money to invest required employee and government contributions in marketable securities it has not had to borrow money in the capital markets. [A.R., vol. IV, at p. 237]

81 There is a difference between saying that the effect of the superannuation scheme operates *as if* the government were borrowing from the capital markets, without actually doing so — as the Treasury Board Secretariat explains — and saying the government is *actually* borrowing *from* the Superannuation Accounts, in the sense that a debt is owing *to* the Accounts (such that the Accounts hold government receivables). The legislation does not support the appellants' contention that there was borrowing from the Accounts. The superannuation scheme reflects "internal borrowing" only in the sense that it avoids, by design, the need for the external borrowing that would otherwise be required to finance the government's pension obligations.

82 It remains only to dispose of the appellants' reliance on *Ermineskin Indian Band & Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222 (S.C.C.). In that case, this Court was concerned with the Crown's obligations in respect of oil and gas royalties collected on behalf of Aboriginal bands. The Crown deposited the royalties into the CRF and credited interest based on the market yield of long-term government bonds. Superficially relevant to this appeal is the discussion in that case of the Crown's "borrowing" of royalty moneys. The bands argued that the Crown was in breach of its fiduciary duty because (1) a trustee is not permitted to borrow from a trust fund, and (2) by holding the royalties in the CRF for use by the Crown, the Crown was engaged in "forced borrowing" of the assets in the trust (para. 126). This Court agreed that the "Crown is borrowing the bands' money held in the CRF" (para. 127). However, it concluded that this practice was not a breach of the Crown's fiduciary duty because the "borrowing" was required by legislation (para. 127).

83 It might be said that similar type of "borrowing" is reflected in the present appeal. While the government owed future obligations to the Plan members (their statutorily defined benefits), it had the use of current funds in the CRF, including the amounts of employee contributions withheld from their pay cheques. Likewise, by not having to withdraw funds from the CRF to satisfy its own contribution obligations, the government continued to have the use of funds that it would have otherwise had to set aside to invest in marketable securities. As already discussed, however, it does not follow from this "internal borrowing" that the Superannuation Accounts contain government receivables: the Superannuation Accounts are no more than legislated accounting records. *Ermineskin* does not suggest otherwise.

84 Further, in *Ermineskin*, the Crown received royalty moneys "in trust" for the bands, and the Court concluded that the relationship between the Crown and the bands was "trust-like in nature" (para. 74). Upon collecting the royalty moneys, "in trust", the Crown was statutorily required to retain them in the CRF (para. 127). In other words, the legislation required the Crown to take property that was subject to a "trust-like" fiduciary duty, collected on behalf of beneficiaries, and to deposit it into the CRF for public use. It is accurate to describe this statutory scheme as involving the public "borrowing" of property from the "trust". This is in contrast to the present case: the government did not undertake, expressly or impliedly, to act in the best interests of Plan members with respect to the actuarial surplus (discussed below). The Superannuation Accounts are just accounting records and they are not funds, nor are they "trust-like", such that it is possible to borrow from them.

85 Accordingly, the courts below were right to reject the Borrowing Theory. Panet J. correctly found that, "[i]n fact, there is no such borrowing and there is no amount owing by the government to the Superannuation Account of each plan" (para. 222).

(3) The Word "Assets"

86 The appellants point out that the *Superannuation Acts* and the *PPRA* use the word "assets" in connection with the Superannuation Accounts.

87 The 1954 version of the *PSSA* required the reporting of "an estimate of the extent to which the assets of the said [Superannuation] Account are sufficient to meet the cost of the benefits payable under this Act" (s. 33). The *PPRA* provides that the "Minister shall cause a certification of the assets of a pension plan established under the *Canadian Forces Superannuation Act*, ... the *Public Service Superannuation Act*, [and] the *Royal Canadian Mounted Police Superannuation Act* ... to be made and a report thereof to be filed" (s. 8). The *PPRA* also refers to the "going concern assets" of the Plans (s. 7).

88 These provisions pre-date Bill C-78, which amended the *Superannuation Acts* to make specific reference to the *PPRA*. From September 14, 1999, onward, the *PSSA*, for example, provided:

> **45.** In accordance with the *Public Pensions Reporting Act*, a cost certificate, an actuarial valuation report and an assets report on the state of each of the Superannuation Account, the Public Service Superannuation Investment Fund and the Public Service Pension Fund shall be prepared, filed with the Minister designated under that Act and laid before Parliament.

89 The appellants say that these legislative references mean that the Superannuation Accounts contain assets, in the sense that there is something of value in the Accounts to which the Plan members could have an equitable interest.

90 In my view, the word "assets" in the *Superannuation Acts* and the *PPRA*, when it is used in connection with the Superannuation Accounts, refers to the credit balances reflected in the Accounts. As discussed above, the actual moneys related to pension contributions remained in the CRF until paid out to members, and the Accounts did not contain government debt. The Superannuation Accounts themselves reflect accounting credits and debits. Prior to Bill C-78, there was no mechanism in the *Superannuation Acts*, or elsewhere, to direct payments into a separate pension fund.

91 Accordingly, the word "assets" in the legislation cannot indicate that the Superannuation Accounts contain any property to which the Plan members could have an interest. I would not, however, agree with the Court of Appeal's suggestion that the Parliamentary use of the word "assets" reflects "sloppy use of language" (para. 49). Rather, the word "asset" is being used in the *Superannuation Acts* and the *PPRA* in a different sense: as Panet J. said in respect of the actuarial reports periodically submitted to Parliament, the term "assets" refers to the credit balances in the Superannuation Accounts (para. 228). The same, in my view, applies to the legislation. It is simply a matter of definition.

(4) Extrinsic Aids

92 The appellants rely on several representations by government to the effect that the Superannuation Accounts contain assets. The authority to rely on such representations is found in *Schmidt*, where Cory J. stated:

> Documents not normally considered to have legal effect may nonetheless form part of the legal matrix within which the rights of employers and employees participating in a pension plan must be determined. Whether they do so will depend upon the wording of the documents, the circumstances in which they were produced, and the effect which they had on the parties, particularly the employees. [p. 669]

93 In *Burke*, however, this Court determined that, where the relevant articles in the plan documents were unambiguous, it was not necessary to consider surrounding documents (in that case, employer pension booklets) as interpretative aids.

94 *Schmidt* and *Burke* were decided in the private law context. As this case involves statutory plans, the considerations are different. Specifically, it is necessary to consider the law on extrinsic evidence in statutory interpretation.

95 As this Court reiterated in *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.), "[i]t is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (para. 29 (emphasis deleted), quoting *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743 (S.C.C.), at para. 14).

96 I have found that the *Superannuation Acts* require the Superannuation Accounts to operate like accounting records, tracking pension-related payments that are made into and out of the CRF. The Accounts are not required by the *Superannuation Acts* to be segregated, funded accounts, that receive or make any actual payments themselves; thus, the legislation does not require them to contain assets. The language in the legislation is quite consistent: "assets" simply has a statutorily specific meaning, namely, the credit balances in the Accounts. However, even were it appropriate to look at extrinsic materials, they do not assist the appellants for the reasons that follow.

97 The appellants present documents that were produced years after the Superannuation Accounts were established. They have not pointed to documents coinciding with (or preceding) the creation of the Superannuation Accounts, which, as noted above, are *continued* by the current *Superannuation Acts*.

98 The appellants' documents therefore reflect subsequent governments' interpretations of previous Parliamentary work (*United States v. Dynar*, [1997] 2 S.C.R. 462 (S.C.C.), at para. 45). However, as Cory and Iacobucci JJ. wrote in the context of subsequent legislative history, "in matters of legal interpretation, it is the judgment of the courts and not the lawmakers that matters. It is for judges to determine what the intention of the enacting Parliament was" (*Dynar*, at para. 45). Accordingly, it is necessary to be cautious when relying on the many subsequent government documents to which the appellants have referred the Court.

99 Further, Parliament, which created the Superannuation Accounts, is to be distinguished from the executive branch of government, which administers them. Although it is not impossible that governmental documents could assist in the interpretation of legislation, the words of subsequent government Ministers and bureaucrats offer minimal guidance in identifying Parliament's intention concerning the Superannuation Accounts.

100 The appellants present one Parliamentary debate that took place prior to the enactment of Bill C-78. In February 1992, the President of the Treasury Board said, when introducing Bill C-55, that the "bill also proposes that all [superannuation] plans should henceforth be operated on a fully funded basis" (*House of Commons Debates*, vol. VI, 3rd Sess., 34th Parl., February 24, 1992, p. 7486). He went on to say that the *Superannuation Acts* would be amended to "consolidat[e] the assets and obligations in respect of each [sector]" (p. 7486).

101 However, Bill C-55, which was enacted as S.C. 1992, c. 46, did nothing to change the nature of any of the Superannuation Accounts. The Accounts did not hold actual assets before 1992, and the amendments did not change this fact.

102 The notion that Bill C-55 made the Superannuation Accounts "fully funded" is also found in the 1993 document "Treasury Board Secretariat and Department of Finance Study of the Implications of the Current and Alternative Methods of Financing Federal Public Service Pensions". With respect to the words "fully funded", the document states: "Among other provisions of Bill C-55, the Superannuation Acts were amended to require, effective April 1991, that the plans be fully funded; that is, that contributions be made each month by the Government which, together with employee contributions and interest credits, are sufficient to provide for the cost of the benefits that have accrued in respect of that month" (A.R., vol. V, at p. 221). In other words, "fully funded" in this context refers to government contribution credits that must be made to record the cost of benefits accruing each month. It does not refer to an identifiable fund of assets set aside to cover the government's pension liabilities.

103 The appellants also present a Treasury Board document entitled "Basic Facts about Pensions in the Public Service of Canada", dated October 18, 1976. The Treasury Board expressly denied that the Plans (other than indexation benefits) were "pay-as-you go". Rather, the Treasury Board said that the "basic pensions are fully funded in a government account" (A.R., vol. V, at p. 11). The "Basic Facts" document explained the meaning of "fully funded" as follows: "This means that pensions are provided for in such a way that, if the Plan were suddenly terminated, the Account would, without further contributions but with future interest earnings, have sufficient credits to meet the pension payments ..." (A.R., vol. V, at pp. 10-11).

104 The description of the Accounts as "fully funded" is also found in an undated pension booklet which was at one time given to federal employees (A.R., vol. V, at p. 83). And, as in the *Superannuation Acts*, the language of "assets" can be found in various internal and external governmental documents (see e.g. "Public Service Pensions", January 1970 (A.R., vol. V, at p. 5).

105 While the government documents presented by the appellants use language stating that the Accounts contain assets, other government documents, presented by the government, support the argument that they do not. The Auditor General has several times expressed — in his official observations on the Public Accounts — that the Superannuation Accounts are "unfunded pensions, in the sense that assets have not been set aside to pay for ultimate pension benefits" ("Supplementary Information: Observations by the Auditor General on the Financial Statements of the Government of Canada and the Statement of Transactions of the Debt Servicing and Reduction Account", in *Public Accounts of Canada 1997* (1997), vol. I, 1.25, at p. 1.28; see also "Supplementary Information: Observations by the Auditor General on the Financial Statements of the Government of Canada, the Statement Required Under the *Spending Control Act* and the Statement of Transactions of the Debt Servicing and Reduction Account", in *Public Accounts of Canada 1996* (1996), vol. I, 1.24, at p. 1.27).

106 Similarly, the Towers Perrin consulting report, "Return Expectations for the Public Service Superannuation Fund", prepared for the Department of Finance and Treasury Board in 1993, states that, "[i]n the case of the PSSF [the "Public Service Superannuation Fund"], *the plan is not 'funded'* in the sense of an externally invested trust fund, but it is accounted for and actuarially treated as if it were" (A.R., vol. V, at p. 145 (emphasis added)). In this document, the Plans are referred to as "notionally- funded".

107 In my view, even if reference to extrinsic aids was appropriate, the extrinsic evidence available is inconclusive. Nor does it afford insight into the intention of Parliament when creating the Superannuation Accounts. Thus, I cannot give much weight to the documents presented by the appellants in their submissions. It would appear that, from time to time, government officials have inaccurately described the Superannuation Accounts in publications and internal communications.

(5) Conclusion on Whether the Superannuation Accounts Contain Assets

108 For the reasons given, I agree with the courts below that the Superannuation Accounts do not hold assets — not even the government receivables that the appellants suggest they contain. The *Superannuation Acts* created the Accounts to track Plan-related CRF transactions and to estimate the government's pension liabilities to Plan members. In this way, they are accounting records, not funded and segregated pools of assets. When the word "assets" is used in the legislation in reference to the Superannuation Accounts, it merely signifies their credit balances, not anything of value to which the appellants could have an interest.

109 The courts below were correct to reject the theory that the government borrowed from the Accounts, placing in them promises to pay by the government (the purported assets in the Accounts). This theory is inconsistent with the legislation in that it assumes that the government was required to contribute property into the Accounts in the first place. As the Accounts are no more than accounting records, this would have been impossible. Prior to April 1, 2000, all of

the real money associated with Canada's pension scheme remained unsegregated in the CRF, until benefits were actually paid — out of the CRF — to Plan members.

110 I have concluded that the Superannuation Accounts do not contain assets. Therefore, there was no property in respect of which Plan members can have a legal or equitable interest. However, even if the Accounts did contain assets, the appellants have not established that Plan members have a proprietary interest in either their contributions made or in the government credits under the *Superannuation Acts*.

111 On a plain reading of the *Superannuation Acts*, there is no suggestion that the Plan members have a proprietary interest in their contributions. Contributing employees can claim no continuing property interest in these amounts. In exchange for their contributions, and with each year of pensionable service, employees gain a legal entitlement to a future benefit. That is the nature of this defined benefit plan.

112 The appellants asserted that employees have an interest in both the employee and employer contributions, plus interest, on the basis that they form part of employees' total compensation. Even if it were to be assumed that employees have an interest in the contributions at the point in time at which their salaries are to be paid to them, no interest in these amounts could survive the requirement in the *Superannuation Acts* that they be paid into the CRF and credited to the Accounts. Rather, this is the "cost" paid by employees for the future legal entitlement to their statutorily defined benefits. The *Superannuation Acts* also do not establish that employees have an equitable interest in the amounts credited to the Accounts. They provide only a legal entitlement to statutorily defined pension benefits.

B. Did the Government Owe a Fiduciary Duty to the Plan Members?

(1) Was There a Fiduciary Relationship Between the Government and the Plan Members?

113 Fiduciary relationships may be either *per se* or *ad hoc*. The former refers to those relationships that the law presumes to be — and characterizes as — fiduciary (*Perez v. Galambos*, 2009 SCC 48, [2009] 3 S.C.R. 247 (S.C.C.), at paras. 36-37). The recognized categories give rise to fiduciary duties "because of their inherent purpose or their presumed factual or legal incidents" (para. 36). The existence of an *ad hoc* fiduciary relationship, on the other hand, is determined on a case-by-case basis. Whereas the *per se* categories describe relationships in which the fiduciary character is "innate", *ad hoc* fiduciary relationships arise from the specific circumstances of a particular relationship (*Galambos*, at para. 48).

114 The appellants argue that the Court of Appeal erred in failing to find that the government was a *per se* fiduciary in its role as plan administrator. Alternatively, they say that the Court of Appeal erred in failing to find an *ad hoc* fiduciary relationship in the circumstances: "the Government had undertaken to act in the Plan Members' best interests with respect to their pension contributions; the Plan Members were in a vulnerable relationship in which the Government had significant discretion; and the Government could exercise this discretion to affect the Plan Members' interests" (A.F., at para. 67). According to the appellants, that interest includes both receiving pension benefits and ensuring that their contributions were maintained to be used for pension purposes.

115 Chief Justice McLachlin recently listed the *per se* fiduciary relationships in *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, [2011] 2 S.C.R. 261 (S.C.C.), identifying the following: trustee-*cestui que trust*, executor-beneficiary, solicitor-client, agent-principal, director-corporation, guardian-ward, and parent-child.

116 In this case, the government does not fall into any of these categories. The closest category (trustee-*cestui que trust*) does not apply because the government is not a true trustee in equity in respect of any trust property held for the benefit of the Plan members. The appellants contend, however, that the government is in a recognized fiduciary role in its capacity as a pension plan administrator.

117 The administrator/pension Plan member relationship was dealt with in *Burke*. This Court found that the indicia of an *ad hoc* fiduciary relationship were met.

118 However, the authority of *Burke* on this point is limited to the private pension plan context. Participants in public pension plans are not subject to the same vulnerabilities or risks as participants in private pension plans. The government stands behind the pension plans that it provides for its employees, and is not subject to the same sort of credit risks as are private entities. Furthermore, this Court recognized in *Elder Advocates* that while the Crown is subject to the normal requirements for establishing an *ad hoc* fiduciary relationship, "the special characteristics of governmental responsibilities and functions mean that governments will owe fiduciary duties only in limited and special circumstances" (para. 37). McLachlin C.J. in that case quoted Dickson J., as he then was, writing for the majority in *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.), at p. 385:

> It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function.
>
> [Emphasis added by McLachlin C.J.; para. 37.]

119 Binnie J. made the same point writing for the Court in *Roberts v. R.*, 2002 SCC 79, [2002] 4 S.C.R. 245 (S.C.C.), at para. 96: "The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting ...." The same principle also dictates that the Crown will not be presumed to be a fiduciary based solely on its role bearing a similarity to a traditional category of fiduciary.

120 It is not necessary to decide the precise ambit of any potential fiduciary duty that might arise between the government, as pension plan administrator, and the beneficiaries of the Plan, or whether the relationship inherently carries with it some set of fiduciary obligations. This is because it is clear that the government had no fiduciary duty to the Plan members with respect to the actuarial surplus. This is demonstrated under the template provided for identifying *ad hoc* fiduciary duties in *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.), and *Elder Advocates*.

121 Beginning with Wilson J.'s dissenting opinion in *Frame*, and subsequently adopted by the majority of this Court (see e.g. *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.)), the following characteristics were said to identify those relationships where fiduciary obligations had been imposed.

> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. [p. 136]

122 Most recently, in *Elder Advocates*, McLachlin C.J. stated that the aforementioned characteristics were useful but did not provide a complete code. This Court adopted the *Hodgkinson* factors, but added the requirement of an undertaking by the alleged fiduciary to act in the best interest of the alleged beneficiary or beneficiaries.

123 Each lower court in this case applied the earlier version of the test, as *Elder Advocates* had not yet been decided.

(2) Undertaking to Act in the Best Interest of the Alleged Beneficiary

124 It is now definitely a requirement of an *ad hoc* fiduciary relationship that the alleged fiduciary undertake, either expressly or impliedly, to act in accordance with a duty of loyalty. It is critical that the purported beneficiary be able to identify a forsaking of the interests of all others on the part of the fiduciary, in favour of the beneficiary, in relation to the specific interest at issue.

