SUPREME COURT OF CANADA

CITATION: Nolan *v.* Kerry (Canada) Inc., 2009 SCC 39

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BETWEEN:

Elaine Nolan, George Phillips, Elisabeth Ruccia, Paul Carter, R.A. Varney and Bill Fitz, being members of the DCA Employees Pension Committee representing certain of the members and former members of the Pension Plan for the Employees of Kerry (Canada) Inc.
Appellants
and
Kerry (Canada) Inc. and Superintendent of Financial Services
Respondents
- and -
Association of Canadian Pension Management and Canadian Labour Congress
Interveners

CORAM: Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: (paras. 1 to 133)	Rothstein J. (Binnie, Deschamps, Abella and Charron JJ. concurring)
REASONS DISSENTING IN PART: (paras. 134 to 204)	LeBel J. (Fish J. concurring)

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NOLAN *V.* KERRY (CANADA) INC.

Elaine Nolan, George Phillips, Elisabeth Ruccia, Paul Carter, R.A. Varney and Bill Fitz, being members of the DCA Employees Pension Committee representing certain of the members and former members of the Pension Plan for the Employees of Kerry (Canada) Inc. *Appellants*

v.

Kerry (Canada) Inc. and Superintendent of Financial Services *Respondents*

and

Association of Canadian Pension Management and Canadian Labour Congress *Interveners*

Indexed as: Nolan *v.* Kerry (Canada) Inc.

Neutral citation: 2009 SCC 39.

File No.: 32205.

2008: November 18; 2009: August 7.

Present: Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Pensions — Pension plans — Expenses — Whether employer responsible for paying pension plan expenses — Whether such expenses properly payable from pension trust fund.

Pensions — Pension plans — Contribution holidays — Defined benefit pension plan amended in 2000 to introduce a defined contribution component — Plan trust fund constituted in two separate funding vehicles with two separate trustees — Whether employer can use actuarially determined surplus pension funds from original defined benefit component of pension plan to satisfy its contribution obligations in respect of both defined benefit and defined contribution components of pension plan.

Civil procedure — Costs — Financial Services Tribunal — Pension plans — Issues before Tribunal relating to employer's obligations under pension plan — Pension trust fund not a party to proceedings — Whether Financial Services Tribunal can award costs out of pension trust fund — Whether on judicial review court should exercise its discretion to award costs out of pension trust fund — Financial Services Commission of Ontario Act, 1997, S.O. 1997, c. 28, s. 24.

Administrative law — Appeals — Standard of review — Financial Services Tribunal — Standard of review applicable to Tribunal's decisions relating to its authority to award costs and to employer's obligations under pension plan.

The respondent Company has administered a pension plan ("Plan") for its employees since 1954. The Plan text required contributions from both the employees and the Company and a separate trust agreement provided that these contributions were to be paid into a trust ("Trust") created under the trust agreement and held in a trust fund ("Fund"). By 2001, the Fund had been in an actuarially determined surplus position for a number of years. Until 1984, the Company paid the Plan expenses directly. In 1985, following amendments to the Plan documents, third-party Plan expenses for actuarial, investment management and audit services were paid from the Fund. As of 1985, the Company also started taking contribution holidays from its funding obligations.

Prior to 2000, the Plan existed solely as a defined benefit ("DB") pension plan. In 2000, the Plan text was amended again in order to introduce a defined contribution ("DC") component. The DB pension component continued for existing employees, but was closed to new employees; thereafter, all newly hired employees would join the DC component. Employees who were DB members had the option of converting to the DC component. As a result of these amendments, employees were divided into Part 1 Members, who participated in the Plan's DB provisions and Part 2 Members who, after January 1, 2000, participated in the DC part of the Plan. The Fund was constituted in two separate funding vehicles with two separate trustees. The Company announced its intention to take contributions holidays from its obligations to DC members by using the surplus accumulated in the Fund from the DB component, which still covered DB members, to satisfy the premiums owing to the DC component.

After the Company introduced the amendments in 2000, certain former employees of the Company and members of the Plan (the "Committee") asked the Ontario Superintendent of Financial Services to investigate the Company's payment of Plan expenses from the Fund and its contribution holidays. The Superintendent issued two Notices of Proposal. Under the first, the Superintendent proposed to order that the Company reimburse the Fund for expenses that had not been incurred for the exclusive benefit of Plan members. Under the second, the Superintendent proposed to refuse, among other things, to order the Company to reimburse the Fund for the contribution holidays it had taken. Both the Company and the Committee requested a hearing before the Financial Services Tribunal to challenge the Notices of Proposal. The Tribunal held that: (1) all of the Plan expenses at issue could be paid from the Fund, except for $6,455 in consulting fees related to the introduction of the DC part of the Plan; and (2) the Company was entitled to take contribution holidays while the Fund was in a surplus position. The Tribunal did recognize that the Plan documents as amended in 2000 did not permit DC contribution holidays. However, it held the Company could retroactively amend the Plan provisions to designate the DC members as beneficiaries of the Fund, thereby allowing the Company to fund its DC contributions from the DB surplus. The Tribunal also refused to award costs payable out of the Fund.

On appeal, the Divisional Court held that the expenses at issue could not be paid out of the Fund as they were not for the exclusive benefit of the employees and such payment would constitute a partial revocation of the Trust. The court, although it upheld the Tribunal's decision that DB contribution holidays were permitted, ruled that the surplus in the Fund accumulated under the DB arrangement could not be used to fund the Company's contribution obligations to the DC arrangement. It also held that, while the Tribunal was correct that it did not have jurisdiction to award costs out of the Fund, the court could do so. On the relevant issues, the Court of Appeal, allowed the Company's appeal, dismissed the Committee's cross-appeal and upheld the Tribunal's rulings.

Held (LeBel and Fish JJ. dissenting in part): The appeal should be dismissed.

Per Binnie, Deschamps, Abella, Charron and **Rothstein**, JJ.: Having regard to the purpose of the Tribunal, the nature of the questions and the expertise of the Tribunal, the appropriate standard of review is reasonableness for the issues of Plan expenses and DB and DC contribution holidays. While these issues are largely questions of law, in that they involve the interpretation of pension plans and related texts, the Tribunal does have expertise in the interpretation of such texts, as it is both close to the industry and more familiar with the administrative scheme of pension law. The standard of reasonableness also applies to the issue of the Tribunal's authority to order costs from the Fund. This issue involves the Tribunal's interpreting its constating statute to determine the parameters of the costs order it may make. The question of costs is incidental to the Tribunal's broad power to review the Superintendent's decisions in the context of the regulation of pensions. A court should adopt a deferential standard of review to the Tribunal's decision in this respect. [29-31][35]

With the exception of the consulting fees relating to a study of the possibility of introducing a DC component to the Plan, the Company did not have the obligation to pay the Plan expenses at issue since the Plan documents did not require, expressly or implicitly, that it pay such expenses. The provisions of the trust agreement, as amended in 1958, provided that the Company undertake to pay trustee fees and trustee expenses. As between the Company and trustee, these provisions only cover expenses incurred in the performance of the trustee's duties and in the execution of this Trust. They do not refer to expenses otherwise incurred in the administration of the Plan. Expenses associated with the employment of actuaries, accountants, counsel and other services required for the administration of the Plan are expenses of the Plan, but they are not fees and expenses incurred in the execution of the Trust. Furthermore, the trust agreement's 1958 amendments, which provided that taxes, interest and penalties were to be paid from the Fund, could not impose any additional obligations on the Company because these amendments also included a provision expressly stating that the amendments do not increase the Company's original obligations with respect to the expenses for which it was responsible. Nor could the language in the trust agreement forbidding the use of trust funds for any purpose other than the exclusive benefit of the employees impose an obligation on the Company to pay the Plan expenses. The exclusive benefit language is also subject to the limitation that it will not enlarge the Company's obligations. The payment of Plan expenses is necessary to ensure the Plan's continued integrity and existence, and the existence of the Plan is a benefit to the employees. It is therefore to the exclusive benefit of the employees that expenses for the continued existence of the Plan are paid out of the Fund. Lastly, allowing for the Plan expenses to be paid out of the Trust does not constitute a partial revocation of the Trust. In the absence of an obligation requiring the Company to pay the Plan expenses, funds in the Trust can be used to pay reasonable and *bona fide* expenses and to the extent that the funds are paying legitimate expenses necessary to the Plan's integrity and existence, the Company is not purporting to control the use of funds in the Trust. [17][38-39][44][50-52][55][57-59]

The Company was entitled to take contribution holidays with respect to the DB benefit arrangement. When plan documents provide that funding requirements will be determined by actuarial practice, the employer may take a contribution holiday unless other wording or legislation prohibits it. The right to take a contribution holiday can be excluded either explicitly or implicitly in circumstances where a plan mandates a formula for calculating employer contributions which removes actuarial discretion. Here, the Company's contributions are determined by actuarial calculations. Clause 14(b) of the Plan, as amended in 1965, provides for contributions that will cover the members' future retirement benefits and requires the exercise of actuarial discretion as it does not fix annual contributions. The clause therefore does not prevent the Company from taking a contribution holiday where the actuary certifies that no contributions are necessary to provide the required retirement income to members. [17][68-70][76]

The Tribunal's decision to allow contribution holidays in respect of the DC component of the Plan, once appropriate retroactive amendments are made, was not unreasonable. There is no legislative restriction prohibiting the retroactive amendment designating DC members as beneficiaries of the Trust, the creation of a single plan and trust, and the DC contribution holidays. The Plan documents do not preclude combining the two components in one plan and nothing in these documents or trust law prevents the use of the actuarial surplus for the DC contribution holidays. Having regard to the Plan documents, it was reasonable for the Tribunal to find that there was one plan and that, with a retroactive amendment, there could be one trust and that contribution holidays with respect to either or both of the DB and DC components of the Plan did not violate the exclusive benefit provision or constitute a partial revocation of the Trust. Similarly, it was not unreasonable that DC members could be designated beneficiaries of the Trust. The fact that DB and DC funds will be held by different custodians does not prevent them from belonging to the same trust. The Plan, after the retroactive amendments, would consist of DB and DC components. Members of both parts of the Plan therefore would be beneficiaries of the Trust and use of funds in the Trust to benefit either part would be allowed because the Trust explicitly provides that the funds can be used for the benefit of the beneficiaries.

[84-85][91][93][103][110][114]

Retroactively permitting the funding of the DC component from the DB surplus does not affect the exclusive benefit provisions of the Plan. Because the amendment will be retroactive, there would be no re-opening of a closed plan in law and no attempt to merge two independent trusts. The Plan and Trust in this case have not been terminated. Only a part of the Plan has been closed to new employees. There is, therefore, no actual surplus that has vested with the employees. The DB surplus remains actuarial and the DB members retain their right to the defined benefits provided for under the Plan. Their interest in the surplus is only to the extent that it cannot be withdrawn or misused. Retroactively amending the Plan takes no vested property right away from the DB members. They have no right to require surplus funding of the Plan in order to increase their security. [104][106-107][113]

In light of s. 24 of the *Financial Services Commission of Ontario Act, 1997*, the Tribunal did not err in holding that it could not award costs from the Fund. Since the Fund was not a party to the proceedings, the Tribunal could not order costs from the Fund. [17][116-117]

The Court of Appeal correctly declined to award costs to the Committee from the Fund. The key question is whether the litigation is adversarial or whether it is aimed at the due administration of the pension trust fund. Adversarial claims will not qualify for a costs award from the trust fund. Here, the litigation was adversarial in nature because it was ultimately about the propriety of the Company's actions and because the Committee sought to have funds paid into the Fund to the benefit of the DB members only. The Company was successful in this case and there is no reason to penalize it by diminishing the Fund surplus, thereby reducing its opportunity for contribution holidays. [17][124][128-129]

Per **LeBel** and Fish JJ. (dissenting in part): The Company's use of DB surplus to fund its obligations toward the DC plan is not supported by the legislative regime and constitutes a breach of the Plan provisions, the trust agreement, and the relevant principles of trust law. When the DC plan was created in 2000, the Company's employees ceased to be members of a single plan, and the employees in the DC plan were not beneficiaries of the DB trust. While the Tribunal acknowledged that the Company's amendments to the Plan in 2000 seeking to permit contribution holidays in the DC plan violated the terms of the 1954 trust agreement and constituted an encroachment on irrevocable trust funds, it failed to take these very principles into consideration when ordering its remedy of retroactively designating DC members as beneficiaries of the Fund. The retroactive amendment would breach the same terms of the trust agreement and the Plan's text that prohibited the DC contribution holidays in the first place. As a result, the Tribunal's decision that approved such an amendment was unreasonable. [135][141]

The Court of Appeal therefore erred in upholding the Tribunal's contribution holiday decision and in reinstating the retroactive designation remedy. First, the court failed to consider the lack of support for this type of contribution holiday in the governing legislation and regulations which do not authorize the use of surplus in a DB fund to offset an employer's contribution obligations toward a DC plan except in the event of a full conversion from a DB to a DC plan. Full conversion has not occurred in this case. Second, the court adopted an unduly formalistic view of the pension plan and failed to appreciate the separate and distinct nature of the DB and DC plans in this case and instead focused on the formal existence of a single plan. To determine whether there is in fact a single plan in existence, it is necessary to examine the plan's particular arrangement, which will differ from case to case. The plan documentation must clearly evince an intention to maintain a single plan and, most importantly, the plan structure must actually reflect and follow from this intention. Here, the Plan documentation reveals a degree of segregation between the DB and DC plans that confirms that the amendments in 2000 effectively created a second pension plan whose members are not beneficiaries of the original fund. The DB and DC plans exist as separate entities and should not be treated as two components of a single plan. Third, the court ought to have considered the trust ramifications of the Company's DC contribution holidays as the law of trusts forbids an employer's attempts to control or withdraw irrevocable assets within the fund in order to take contribution holidays with respect to its obligations toward a different group of plan members.

[142-144][158][162][168][201]

While the Company has the right to amend the Plan unilaterally, plan amendments are still subject to the terms of the 1954 trust agreement that prohibit the use of funds for other than the exclusive benefit of the trust beneficiaries, who in this case are DB members. The use of fund surplus to provide contribution holidays with respect to the DC plan violates the exclusive benefit provisions in the Plan and trust agreement as it benefits all but the DB members. As well, the designation of DC members as beneficiaries of the Fund would not be for the exclusive or even primary benefit of the DB members. Only the Company and DC members, who have no more entitlement to the Fund, stand to benefit from this designation. The unlawfulness of the DC contribution holidays would not be remedied even if the DC members could be declared beneficiaries of the Fund. The withdrawal of funds to enable the Company's DC contribution holidays would continue to violate the exclusive benefit provisions. There is no evidence that the structure of the Fund would change as a result of this designation. The Company would continue to take DC contribution holidays by withdrawing assets from the Fund and placing them in the DC members' accounts. This movement of funds is not for the exclusive benefit of any of the beneficiaries, whether DB or DC members. [174][176-177][179][183]

The Company's attempt to use the DB surplus to fund its contribution obligations toward the DC plan also violates one of the hallmarks of trust law: the prohibition against the revocation of trust assets. An employer may not remove pension contributions held in trust unless a power of revocation was expressly included in the trust at the time of its inception. A general power of amendment does not amount to a power of revocation. Once assets have been placed in the trust fund, the settlor cannot interfere with them and cannot withdraw them for his or her own use without the express power to do so in the trust agreement. This principle extends not only to the *corpus* of the trust fund but also to any surplus in the fund, unless there is specific wording in the plan documentation that would oust the surplus from the trust's ambit. In this case, the trust agreement contains no power of revocation, and the Company's contribution holidays in the DC plan from the DB surplus amounted to a partial revocation of the Trust. The shifting of assets from the DB fund to the DC members' accounts is a clear example of the Company's exercising control over trust assets. The same conclusion would be reached even if the DC members could legitimately be designated as beneficiaries of the Fund. [191-194][196-197][200]

Cases Cited

By Rothstein J.

Distinguished: *Markle v. Toronto (City)* (2003), 63 O.R. (3d) 321; *Kemble v. Hicks*, [1999] EWHC 301 (BAILII), [1999] O.P.L.R. 1; *Buschau v. Rogers Communications Inc.*, 2006 SCC 28, [2006] 1 S.C.R. 973; **considered**: *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611; *Hockin v. Bank of British Columbia* (1995), 123 D.L.R. (4th) 538; *C.U.P.E.-C.L.C., Local 1000 v. Ontario Hydro* (1989), 68 O.R. (2d) 620; *Trent University Faculty Assn. v. Trent University* (1997), 35 O.R. (3d) 375; *Châteauneuf v. TSCO of Canada Ltd.* (1995), 124 D.L.R. (4th) 308; *Aegon Canada Inc. v. ING Canada Inc.* (2003), 179 O.A.C. 196; *Barclays Bank Plc v. Holmes*, [2000] EWHC 457 (BAILII), [2001] O.P.L.R. 37; **referred to**: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152; *GenCorp Canada Inc. v. Ontario (Superintendent, Pensions)* (1998), 158 D.L.R. (4th) 497; *Lockheed Corp. v. Spink*, 517 U.S. 882 (1998); *Sutherland v. Hudson's Bay Co.* (2007), 60 C.C.E.L. (3d) 64; *National Grid Co. plc v. Mayes*, [2001] UKHL 20, [2001] 2 All E.R. 417; *Buckton v. Buckton*, [1907] 2 Ch. 406; *Sutherland v. Hudson's Bay Co.* (2006), 53 C.C.P.B. 154; *Patrick v. Telus Communications Inc.*, 2008 BCCA 246, 294 D.L.R. (4th) 506; *Smith v. Michelin North America (Canada Inc.)*, 2008 NSCA 107, 271 N.S.R. (2d) 274; *Huang v. Telus Corp. Pension Plan (Trustees of)*, 2005 ABQB 40, 41 Alta. L.R. (4th) 107; *Patrick v. Telus Communications Inc.*, 2005 BCCA 592, 49 B.C.L.R. (4th) 74; *Burke v. Hudson's Bay Co.*, 2008 ONCA 690, 299 D.L.R. (4th) 276; *Ontario Teachers' Pension Plan Board v. Ontario (Superintendent of Financial Services)* (2003), 36 C.C.P.B. 154; *MacKinnon v. Ontario Municipal Employees Retirement Board*, 2007 ONCA 874, 288 D.L.R. (4th) 688; *C.A.S.A.W., Local 1 v. Alcan Smelters and Chemicals Ltd.*, 2001 BCCA 303, 198 D.L.R. (4th) 504; *Bentall Corp. v. Canada Trust*

Co. (1996), 26 B.C.L.R. (3d) 181; *White v. Halifax (Regional Municipality) Pension Committee*, 2007 NSCA 22, 252 N.S.R. (2d) 39; *Lennon v. Ontario (Superintendent of Financial Services)* (2007), 87 O.R. (3d) 736; *Turner v. Andrews*, 2001 BCCA 76, 85 B.C.L.R. (3d) 52.

By LeBel J. (dissenting in part)

Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190; *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611; *Sutherland v. Hudson's Bay Co.* (2007), 60 C.C.E.L. (3d) 64; *Barclays Bank Plc v. Holmes*, [2000] EWHC 457 (BAILII), [2001] O.P.L.R. 37; *Kemble v. Hicks*, [1999] EWHC 301 (BAILII), [1999] O.P.L.R. 1; *Lennon v. Ontario (Superintendent of Financial Services)* (2007), 87 O.R. (3d) 736; *Baxter v. Ontario (Superintendent of Financial Services)* (2004), 43 C.C.P.B. 1; *Aegon Canada Inc. v. ING Canada Inc.* (2003), 179 O.A.C. 196, aff'g (2003), 34 C.C.P.B. 1; *Sulpetro Ltd. Retirement Plan Fund (Trustee of) v. Sulpetro Ltd. (Receiver-Manager)* (1990), 66 D.L.R. (4th) 271; *Buschau v. Rogers Communications Inc.*, 2006 SCC 28, [2006] 1 S.C.R. 973, rev'g 2001 BCCA 16, 195 D.L.R. (4th) 257; *Imperial Group Pension Trust Ltd. v. Imperial Tobacco Ltd.*, [1991] 2 All E.R. 597; *Bathgate v. National Hockey League Pension Society* (1992), 98 D.L.R. (4th) 326, aff'd (1994), 110 D.L.R. (4th) 609; *Police Retirees of Ontario Inc. v. Ontario Municipal Employees' Retirement Board* (1999), 22 C.C.P.B. 49.

Statutes and Regulations Cited

Financial Services Commission of Ontario Act, 1997, S.O. 1997, c. 28, s. 24.

Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 13(2), 19, 34, 81(1), (2), 87(1), (2), 89(9).

R.R.O. 1990, Reg. 909, ss. 3, 7(3), 9, 13, 14.

Trustee Act, R.S.O. 1990, c. T.23, ss. 6(b), 27(3).

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APPEAL from a judgment of the Ontario Court of Appeal (Laskin, Gillese and Rouleau JJ.A.), 2007 ONCA 416, 86 O.R. (3d) 1, 282 D.L.R. (4th) 227, 225 O.A.C. 163, 60 C.C.P.B. 67, [2007] O.J. No. 2176 (QL), 2007 CarswellOnt 3493, setting aside the decision of O'Driscoll, Jarvis and Molloy JJ. (2006), 209 O.A.C. 21, 52 C.C.P.B. 1, [2006] O.J. No. 960 (QL), 2006 CarswellOnt 1503, and restoring the decisions of the Financial Services Tribunal dated March 4, 2004 and September 1, 2004. Appeal dismissed, LeBel and Fish JJ. dissenting in part.

Ari N. Kaplan, *Kirk M. Baert* and *David Rosenfeld*, for the appellants.

Ronald J. Walker, *Christine P. Tabbert* and *Peggy A. McCallum*, for the respondent Kerry (Canada) Inc.

Deborah McPhail, for the respondent the Superintendent of Financial Services.

Jeff W. Galway and *Kathryn M. Bush*, for the intervener the Association of Canadian Pension Management.

Steven Barrett, for the intervener the Canadian Labour Congress.

The judgment of Binnie, Deschamps, Abella, Charron and Rothstein JJ. was delivered by

ROTHSTEIN J. —

I. Introduction

[1] This appeal raises issues related to the obligations of an employer under a pension plan for its employees. In particular, the appeal concerns (1) whether the employer was responsible for paying plan expenses or whether such expenses were properly payable from the pension trust fund; (2) whether the employer could use actuarially determined surplus pension funds to satisfy its contribution obligations in respect of both defined benefit ("DB") and defined contribution ("DC") components of the pension plan. In addition, the appeal raises two issues with respect to costs: first, whether the Financial Services Tribunal (the "Tribunal") had the authority to award costs to the appellants out of the pension trust fund; second, when on judicial review of a pension decision, a court should exercise its discretion to award costs out of the pension trust fund.

[2] The Ontario Court of Appeal found in favour of the respondents on all issues before this Court (2007 ONCA 416, 86 O.R. (3d) 1, and 2007 ONCA 605, 282 D.L.R. (4th) 625). I am in agreement and I would dismiss this appeal.

II. Facts

[3] The respondent employer (the "Company") is presently named Kerry (Canada) Inc.; its predecessors include DCA Canada Inc. It has administered a pension plan (the "Plan") for its employees since 1954. The terms of the Plan were set out in a pension plan text dated December 31, 1954. The Plan text required contributions from both the employees and the Company. A predecessor of the Company and the National Trust Company Limited entered into a separate trust agreement, also dated December 31, 1954. Contributions were paid into a trust (the "Trust") created under the trust agreement and held in a trust fund (the "Trust Fund" or the "Fund").

[4] The Plan has about 80 members. By 2001, the Fund had been in an actuarially determined surplus position for a number of years.

[5] The Plan text and the Trust Agreement have been amended a number of times. Until 1984, the Company paid the Plan expenses directly. In 1985, following amendments to the Plan documents, third-party Plan expenses for actuarial, investment management and audit services were paid from the Fund. Between 1985 and 2002, approximately $850,000 was paid from the Fund to cover these expenses.

[6] As of 1985, the Company also started taking contribution holidays from its funding obligations, that by 2001 were worth approximately $1.5 million.

[7] Prior to 2000, the Plan existed solely as a DB pension plan. In 2000, the Plan text was amended again in order to introduce a DC component. The DB pension component continued for existing employees, but was closed to new employees; thereafter, all newly hired employees would join the DC component. Employees who were DB members had the option of converting to the DC component. As a result of these amendments, employees were divided into Part 1 Members, who participated in the Plan's DB provisions and Part 2 members who, after January 1, 2000, participated in the DC part of the Plan. The Trust Fund was constituted in two separate funding vehicles with two separate trustees. The Company announced its intention to take contribution holidays from its obligations to DC members by using the surplus accumulated in the Fund from the DB component, which still covered DB members, to satisfy the premiums owing to the DC component.

[8] The appellants are members of the DCA Employees Pension Committee and former employees of the Company who participated in the Plan (the "Committee"). The Committee was created by employees of the Company and is distinct from the Retirement Committee created under the Plan documents. After the Company introduced the 2000 amendments, the Committee asked the Superintendent of Financial Services (the "Superintendent"), the other respondent in this case, to make a number of orders under the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "PBA"), relating to the payment of Plan expenses from the Fund and the Company's contribution holidays.

[9] The Superintendent issued two Notices of Proposal. Under the first Notice of Proposal, the Superintendent proposed to order that the Company reimburse the Fund for expenses that had not been incurred for the exclusive benefit of Plan members. Under the second, the Superintendent proposed to refuse, among other things, to order the Company to reimburse the Fund for the contribution holidays it had taken. The Company requested a hearing before the Tribunal to challenge the Notice of Proposal regarding expenses. The Committee challenged the second Notice of Proposal concerning contribution holidays before the Tribunal. The Superintendent was a party to both hearings.

[10] On the issues relevant in this appeal, the Tribunal generally ruled in favour of the Company. At the first hearing, it held that all of the Plan expenses at issue could be paid from the Fund except for $6,455 in consulting fees related to the introduction of the DC part of the Plan ([2004] O.F.S.C.D. No. 192 (QL)).

[11] In the second hearing, the Tribunal held that the Company was entitled to take contribution holidays while the Fund was in a surplus position ([2004] O.F.S.C.D. No. 193 (QL)). The Tribunal did recognize that the Plan documents as amended in 2000 did not permit DC contribution holidays. However, it held that the Company could retroactively amend the Plan provisions to designate the DC members as beneficiaries of the Trust Fund, thereby allowing the Company to fund its DC contributions from the DB surplus.

[12] The Tribunal also refused to award costs ([2004] O.F.S.C.D. No. 190 (QL) and [2004]

O.F.S.C.D. No. 191 (QL)). With respect to costs in the second hearing, a majority of the Tribunal held it did not have the authority to order costs from the Fund and that regardless it did not think a costs award against either party was justified.

[13] The Committee appealed these decisions to the Divisional Court.

III. Lower Court Rulings

[14] The Divisional Court ruled that the payment of Plan expenses out of the Trust Fund constituted a partial revocation of the Trust, noting that this Court's decision in *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, forbids revoking a trust unless a specific power to do so was reserved at the time the trust was constituted. The Divisional Court upheld the Tribunal's ruling that DB contribution holidays were permitted as nothing in the Plan texts precluded them.

[15] However, it ruled that the surplus in the Fund accumulated under the DB arrangement could not be used to fund the employer's contribution obligations to the DC arrangement. It ruled that the 2000 Plan text created two separate funds — one for the DB arrangement and one for the DC arrangement. It concluded that there were "in law" two plans and two pension funds, which could not be joined.

[16] The Divisional Court held that the Tribunal was correct that it did not have jurisdiction to award costs out of the Fund ((2006), 209 O.A.C. 21). However, it held that the court could award costs from the Fund. It ordered the Company to pay the Committee's costs on a partial indemnity

basis ((2006), 213 O.A.C. 271). It also ordered that the difference between these costs and the Committee's solicitor-client costs be paid to them out of the Fund.

[17] Gillese J.A., writing for a unanimous Ontario Court of Appeal, allowed the Company's appeal, dismissed the Committee's cross-appeal and upheld the Tribunal's rulings on the issues before this Court.

IV. Issues

1. Did the Tribunal err in concluding that the Company did not have the obligation to pay the expenses at issue?
2. Did the Tribunal err in concluding that the Company was entitled to take contribution holidays with respect to the DB arrangement?
3. Did the Tribunal err in concluding that the Company was entitled to take contribution holidays with respect to the DC arrangement?

4a. Did the Tribunal err in holding that it could not award costs from a pension trust fund?

4b. Did the Court of Appeal err in declining to award costs to the Committee from the Trust Fund?

[18] An issue surrounding the notice given by the Company in relation to its 2000 amendments was raised before the Tribunal and the courts below. It was not argued before this Court.

V. Preliminary Matters

A) *Pension Terminology*

[19] There are two main categories of pension plans. Defined Benefit plans ("DB" plans) guarantee the employees specific benefits on retirement. The employer is usually responsible to make contributions which ensure the plan's trust fund can cover the expected future benefits that it will pay out to retiring employees. Actuaries are generally retained to estimate the contributions needed. Should the actuary determine that the funds in the trust are greater than the amount needed to cover future benefits, the plan is said to be in surplus. If the legislation and plan documentation permits, the employer may take a contribution holiday, whereby the surplus funds are used to cover the employer's contribution obligations. Should the actuary determine that the trust has less money than is needed to cover future benefits, the plan is in deficit and the employer is required to make the necessary contributions to ensure the benefit obligations can be met.

[20] In Defined Contribution plans ("DC" plans), the employer guarantees the amount of contribution it will make for each employee. The benefits on retirement are determined by these contributions and any earnings from their investment. Since no benefits are guaranteed, DC plans do not have surpluses or deficits.

[21] A further distinction exists between terminating, winding up, and closing a pension plan. Termination and wind-up are part of the process of discontinuing a pension plan, whereby contributions cease being made, benefits cease being paid out and assets are distributed. Generally

earned employee benefits are paid into a new retirement vehicle for the employees: see Ari N. Kaplan, *Pension Law* (2006), at pp. 502 ff. and Susan G. Seller, *Ontario Pension Law Handbook* (2nd ed. 2006), at pp. 61 ff. Closing a plan's membership, by contrast, does not imply discontinuing it or liquidating its assets. A closed plan will continue to pay benefits to its members and may continue to require contributions. However, it will no longer accept new members.

B) *Standard of Review*

[22] On the issues before this Court, the Divisional Court reviewed the Tribunal's decision on a correctness standard. The Court of Appeal reviewed the issues of Plan expenses, DB contribution holidays and DC contribution holidays on a reasonableness standard, though it would have upheld the Tribunal's rulings on a correctness review as well. It reviewed the issue of the Tribunal's authority to award costs from the Fund on a correctness standard.

[23] Since the Court of Appeal released its decision in this case, this Court has revisited the analytical framework for determining standard of review in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. That decision established a two-step process for determining the applicable standard of review (para. 62).

[24] Under the first step of the process, the court must "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question" (para. 62). In *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152, this Court applied a

standard of correctness to the Tribunal's ruling involving the interpretation of the PBA. This case does not involve the interpretation of the PBA. It is, therefore, necessary to consider the second step of the *Dunsmuir* process.

[25] The second step involves applying the "standard of review analysis", which Bastarache and LeBel JJ. explained this way in *Dunsmuir*, at para. 64:

> The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[26] In this case, there is no privative clause.

[27] Under the PBA, the purpose of the Tribunal is to review decisions of the Superintendent of Financial Institutions in the context of the regulation of the pension sector. Where it is of the opinion that the PBA is not being followed, the Superintendent "may require an administrator or any other person to take or to refrain from taking any action in respect of a pension plan or a pension fund" (s. 87(1) and (2)). The PBA provides a right of appeal to the Tribunal for many of these orders at the proposal stage. At s. 89(9), it grants the Tribunal the power to

> direct the Superintendent to carry out or to refrain from carrying out the proposal and to take such action as the Tribunal considers the Superintendent ought to take in accordance with this Act and the regulations, and for such purposes, the Tribunal may substitute its opinion for that of the Superintendent.

The Tribunal, therefore, serves an adjudicative function within Ontario's pension regulation scheme.

[28] The purpose of the PBA was explained at para. 13 of *Monsanto*, citing *GenCorp Canada Inc. v. Ontario (Superintendent, Pensions)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.), at para. 16:

> [T]he *Pension Benefits Act* is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans, and "evinces a special solicitude for employees affected by plant closures".

In *Monsanto*, Deschamps J. noted that this objective of protecting employees is balanced against the fact that pension legislation is a complex administrative scheme in which the regulator has a certain advantage because it is closer to the industry (para. 14). The Tribunal plays a role in the administration of this complex scheme when reviewing decisions of the Superintendent taken under the PBA.

[29] The questions at issue in this appeal are largely questions of law, in that they involve the interpretation of pension plans and related texts, as noted above. However, the Tribunal does have expertise in the interpretation of such texts, being both close to the industry and more familiar with the administrative scheme of pension law.

[30] Having regard to the purpose of the Tribunal, the nature of the questions and the expertise of the Tribunal, the appropriate standard of review is reasonableness for the issues of Plan expenses, DB contribution holidays and DC contribution holidays.

[31] The issue of the Tribunal's authority to order costs from the Fund requires the interpretation of the Tribunal's enabling statute, the *Financial Services Commission of Ontario Act, 1997,* S.O. 1997, c. 28. As noted in *Dunsmuir,* at para. 54, "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity."

[32] On the other hand, para. 59 of *Dunsmuir* states that "administrative bodies must also be correct in their determinations of true questions of jurisdiction or vires". However, para. 59 goes on to note that it is important "to take a robust view of jurisdiction" and that true questions of jurisdiction "will be narrow".

[33] Administrative tribunals are creatures of statute and questions that arise over a tribunal's authority that engage the interpretation of a tribunal's constating statute might in one sense be characterized as jurisdictional. However, the admonition of para. 59 of *Dunsmuir* is that courts should be cautious in doing so for fear of returning "to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years".

[34] The inference to be drawn from paras. 54 and 59 of *Dunsmuir* is that courts should usually defer when the tribunal is interpreting its own statute and will only exceptionally apply a correctness of standard when interpretation of that statute raises a broad question of the tribunal's authority.

[35] Here there is no question that the Tribunal has the statutory authority to enquire into the matter of costs; the issue involves the Tribunal interpreting its constating statute to determine the parameters of the costs order it may make. The question of costs is one that is incidental to the broad power of the Tribunal to review decisions of the Superintendent in the context of the regulation of pensions. It is one over which the Court should adopt a deferential standard of review to the Tribunal's decision.

[36] I have arrived at the same conclusion as the Court of Appeal with respect to the standard of review that is applicable to the issues before this Court except on the issue of the Tribunal's jurisdiction to award costs from the Fund. As mentioned above, Gillese J.A. also found that the Tribunal's decisions on these issues withstood a correctness review. She came to this conclusion through an analysis that was more detailed than is necessary for a review on a standard of reasonableness. However, her analysis is cogent and proves that the Tribunal's decisions would clearly satisfy a review on a reasonableness standard. These reasons adopt large portions of her analysis.

VI. Issue 1 — Plan Expenses

A) *Background*

[37] Since 1985, Plan expenses had been paid from the Fund, rather than by the Company. These include expenses relating to accounting, actuarial, investment and trustee services. In 1994, the Company accepted that it was responsible for certain trustee fees and administrative expenses.

As a result, it reimbursed approximately $235,000 to the Fund. The remaining expenses, totalling approximately $850,000 through 2002 remain in dispute.

[38] The Tribunal ruled that expenses were payable from the Trust Fund, with the exception of $6,455 in consulting fees relating to a study of the possibility of introducing a DC component to the Plan ([2004] O.F.S.C.D. No. 192 (QL), at para. 38). The Divisional Court held that the Tribunal's decision was incorrect. The expenses could not be paid out of the Trust Fund as they were not for the exclusive benefit of the employees. Moreover, the Divisional Court ruled that the paying of expenses out of the Fund constituted a partial revocation of the Trust.

[39] Gillese J.A. approached the question of the responsibility for payment of Plan expenses by looking first to the PBA, as amended, and then to the common law to determine whether any statutory provisions or common law rules place such an obligation on the employer. She found nothing in the PBA or the common law that would impose such a requirement on the employer. She then focussed on the Plan documents and found nothing in them that would require the employer to pay Plan expenses.

[40] I am in substantial agreement with her analysis and conclusion. The Committee cites no statutory or common law authority that would oblige an employer to pay the expenses of a pension plan. Rather, the obligations of the employer will be determined by the text and context of the Plan documents.

B) *Textual Analysis*

[41] The Committee's position is that because the original Plan documents did not expressly permit Plan expenses to be paid from the Trust Fund, expenses must be paid by the employer. It argues that paying Plan expenses from the Fund would not be for the exclusive benefit of the employees and would partially revoke the Trust.

[42] The Company replies that the Plan documents do not create an express obligation for the employer to pay Plan expenses. This is because the documents do not address the Plan expenses at issue in this appeal.

[43] The Committee rightly insists that it is necessary to consider the context in which the Plan documents deal with the obligation to pay expenses to determine whether by necessary implication the Company undertook to pay Plan expenses.

[44] Sections 5 and 19 of the 1958 Trust Agreement provide that the employer undertook to pay Trustee fees and Trustee expenses.

> 5. <u>The expenses incurred by the Trustee</u> in the performance of its duties, including fees for expert assistants employed by the Trustee with the consent of the Company and fees of legal counsel, and <u>such compensation to the Trustee</u> as may be agreed upon in writing from time to time between the Company and the Trustee, and all other proper charges and disbursements <u>of the Trustee</u> shall be paid by the Company, and until paid shall constitute a charge upon the Fund.
>
> . . .
>
> 19. <u>The Trustee shall be entitled to compensation</u> in accordance with the Schedule of Fees on pension and profit-sharing trusts of National Trust Company, Limited now in effect, which compensation may be adjusted from time to time based upon experience hereunder, as and when agreeable to the Company and the Trustee. Compensation payable to any successor trustee shall be agreed to by the Company and such successor

> trustee at the time of its designation. Such compensation shall constitute a charge upon the Fund unless it shall be paid by the Company. The Company expressly agrees to pay all expenses incurred by it or by any Trustee in the execution of this Trust and to pay all compensation which may become due to any Trustee under the provisions of this Agreement. [Emphasis added.]

As between the Company and Trustee, these provisions only cover expenses incurred "in the performance of [the Trustee's] duties" and "in the execution of this Trust". They do not refer to expenses otherwise incurred in the administration of the Plan. As Gillese J.A. correctly pointed out, silence does not create an obligation on the employer to pay Plan expenses.

[45] The Committee argues that "in the execution of this Trust" means operating a pension plan. They point to this Court's decision in *Buschau v. Rogers Communications Inc.*, 2006 SCC 28, [2006] 1 S.C.R. 973, in which Deschamps J. wrote, at para. 2: "[A] pension trust is not a stand-alone instrument. The Trust is explicitly made part of the Plan."

[46] The Trust is indeed part of the Plan, but it is not all of the Plan; rather, it plays a role in the working of the Plan. The two are distinguished in the Plan documents.

[47] The 1954 Plan text defined the Trust Fund as the "Retirement Trust Fund established, under the terms of the Retirement Plan and the undermentioned Trust Agreement, for the accumulation of contributions as herein described and for the payment of certain benefits to Members" (s. 1). It defined the "Trustee" as the company appointed to administer the Fund (s. 1). The Trustee is responsible for the administration of the Fund from which benefits are paid in accordance with the terms of the Plan. The preamble to the 1954 Trust Agreement also makes clear

that the Trust exists as a part of the Plan for the purpose of holding funds irrevocably contributed for the payment of benefits. The Trust is therefore an element of the Plan that holds the contributions and from which the benefits are paid out. The Plan itself is a broader document which sets out such things as eligibility criteria, contribution requirements, the form of benefits and what happens upon termination.

[48] Sections 5 and 19 of the 1958 Trust Agreement make clear that they apply to expenses incurred in the execution of the Trust. They do not, therefore, refer to the administration of the Plan outside the execution of the Trust.

[49] As Gillese J.A. explained, at para. 59, a properly administered pension plan requires other services than those of the trustee, such as actuarial, accounting and investment services. In this case, the responsibility for such services rested not with the trustee, but with the "Retirement Committee", as part of its responsibility for the administration of the Plan. Section 4 of the original Plan text provides:

> <u>ADMINISTRATION OF THE PLAN</u>
>
> The Plan shall be administered by a Retirement Committee consisting of at least three members appointed by the Company.
>
> . . .
>
> The Committee shall have the right and power, among other rights and powers,
>
> . . .
>
> (c) to employ or appoint Actuaries, Accountants, Counsel (who may be Counsel for the Company) and such other services as it may require from time to time in the administration of the Plan.

[50] Obviously, there are expenses associated with the employment of actuaries, accountants, counsel and other services required for the administration of the Plan. These are expenses of the Plan, but they are not fees and expenses incurred in the execution of the Trust. I think it is a fair inference that where the employer undertook to pay amounts associated with the Plan, its obligations were expressly stated. The expenses it undertook to pay were those incurred in the execution of the Trust and not others.

[51] The Committee says that because the 1958 amendments to the Trust Agreement provided that taxes, interest and penalties were to be paid from the Fund, by implication all other expenses are the responsibility of the employer. However, s. 11 of the 1958 amendments also provided that:

> 11. This Agreement may be amended in whole or in part or be terminated any time and from time to time by an instrument in writing executed by the Company and the then Trustee; provided however that unless approved by the Minister of National Revenue no such amendment shall authorize or permit any part of the Fund to be used for, or diverted to, purposes other than for the exclusive benefit of such employees, or their beneficiaries or personal representatives as from time to time may be included under the Plan, and for the payment of taxes assessments or other charges as provided in Section 5 and Section 19 herein, provided, it being understood that <u>this proviso is not to be construed to enlarge the obligations of the Company beyond those assumed by it under the Plan.</u> [Emphasis added.]

The last part of this section specifies that the amendments do not increase the employer's original obligations with respect to the expenses for which it was responsible. The original documentation was silent as to the obligation to pay Plan expenses other than those associated with the Trust. The 1958 amendments could not impose any additional obligations on the Company because s. 11

expressly provided that the Trust Agreement was not to be construed as enlarging the Company's obligations.

C) *"Exclusive Benefit"*

[52] Nor could the language in s. 11 forbidding trust funds from being used for any purpose other than the exclusive benefit of the employees impose an obligation on the Company to pay the Plan expenses. The "exclusive benefit" language in s. 11 is subject to the limitation that it will not enlarge the Company's obligations. While it is true that the employer did pay the expenses at issue for a number of years, it was never under any obligation to do so. In light of there being no obligation on the Company and of the expenses at issue being essential to the administration of the Plan, subsequent amendments allowing the expenses to be paid out of the Trust Fund do not infringe the exclusive benefit language.

[53] Nor can the term "exclusive benefit" be construed to mean that no one but the employees can benefit from a use of the trust funds. Many persons will benefit indirectly from a use of pension funds. Notably, the employee's family would benefit from the employee's long-term financial security.

[54] An employer might also benefit in a number of ways. The U.S. Supreme Court, in dealing with an employer's introduction of an early retirement plan, recognized that an employer can legitimately receive a number of incidental benefits from a pension plan even though the plan is subject to legislation containing exclusive benefit language. These incidental benefits include

"attracting and retaining employees, paying deferred compensation, settling or avoiding strikes, providing increased compensation without increasing wages, increasing employee turnover, and reducing the likelihood of lawsuits by encouraging employees who would otherwise have been laid off to depart voluntarily": *Lockheed Corp. v. Spink*, 517 U.S. 882 (1998), at pp. 893-94. Such indirect or incidental benefits from the use of pension funds do not mean that the funds are being used for a purpose other than the exclusive benefit of the trust beneficiaries.

[55] Here the existence of the Plan is a benefit to the employees. The payment of Plan expenses is necessary to ensure the Plan's continued integrity and existence. It is therefore to the exclusive benefit of the employees, within the meaning of s. 11, that expenses for the continued existence of the Plan are paid out of the Fund.

[56] The Committee has sought to rely on *Hockin v. Bank of British Columbia* (1995), 123 D.L.R. (4th) 538. The British Columbia Court of Appeal was called upon to rule on the propriety of the employer charging expenses to the pension trust fund. The Court of Appeal wrote, at para. 59:

> The bank not only charged the costs of its internal staff but also the costs of the actuaries involved in the plan conversion and the cost of producing the video and other publicity material designed to persuade the employees to participate in the new plan. These costs were, in our view, incurred by the bank rather more for its own benefit than for the benefit of the employees and were collateral to the purposes of the pension fund.

This conclusion is not unlike the Tribunal's conclusion in this case; the Tribunal held that consulting fees related to studying the possibility of adding a DC part to the Company's Pension Plan were not for the employees' exclusive benefit and could not be charged to the Plan. Rather than considering all the expenses at issue together and coming to a global judgement on whom they benefited more, the Tribunal in this case considered the various expenses separately and decided whether each one was for the benefit of the employees. Such an approach is eminently reasonable.

D) *Partial Revocation and Markle*

[57] I reject the Committee's contention that allowing for the Plan expenses to be paid out of the Trust constitutes a partial revocation of the Trust.

[58] This Court ruled in *Schmidt* that an employer cannot remove pension funds it has placed in a trust unless it expressly reserved the power of revocation at the time the trust was created. Cory J. wrote, at p. 643: "Generally, however, the transfer of the trust property to the trustee is absolute. Any power of control of that property will be lost unless the transfer is expressly made subject to it."

[59] Paying plan expenses out of the trust fund is not a matter of the settlor (the Company in this case) exercising a power of control on a part of the property it has transferred to the trust. So long as nothing in the plan texts requires the paying of expenses by the employer, funds in the pension trust can be used to pay reasonable and *bona fide* expenses. In the absence of an obligation on the employer to pay the plan expenses, to the extent that the funds are paying legitimate expenses necessary to the integrity and existence of the plan, the employer is not purporting to control the use of funds in the trust.

[60] In this case, Plan expenses were incurred for services of third parties and not those of the employer. However, in my view whether the services are provided by third parties or the employer itself is immaterial as long as the expenses charged are reasonable and the services necessary. The Committee cited *Markle v. Toronto (City)* (2003), 63 O.R. (3d) 321, in which the Ontario Court of Appeal disallowed the City of Toronto's attempt to charge its employee pension fund for expenses it incurred itself in providing services necessary to the administration of the pension plan. The by-law which set out the terms of the plan had previously made the City responsible for those expenses. The City attempted to amend these terms such that it would be entitled to recover the costs of administrative services it provided to the plan. The Ontario Court of Appeal ruled that the City of Toronto's actions constituted a partial revocation of the trust.

[61] *Markle*, however, is distinguishable from the present case. In *Markle*, the City had a previous obligation to pay plan expenses, which it attempted to amend both retroactively and prospectively. The retroactive amendment allowing the City to recover for expenses it had been required to pay before the amending legislation was passed was inconsistent with the terms of the trust, which required the City to pay plan expenses over the period that the amendment covered. The amendment sought to charge the trust for services already performed and for which the City was to bear the expense; it was not an amendment to reflect the true intention of the earlier plan text.

[62] The prospective amendment would have required the trustees to pay from the trust fund expenses for services the City had previously agreed to cover. This was considered to fetter the discretion of the trustees, and in so doing, return control over funds in the plan trust fund to the City,

thereby resulting in an impermissible partial revocation of the trust. The wording of previous amendments relating to expenses made them payable from the trust fund “subject to the approval of the Board of Trustees”. By conferring control on the Board of Trustees, the City was not purporting to control use of trust funds or to fetter the trustee’s discretion. Unlike the impugned amendments, these earlier amendments did not constitute a revocation of the trust.

[63] The situation in the present case is different because the Trust Agreement had never imposed an obligation on the Company to pay Plan expenses. The Company did not purport to control the use of funds it had placed in trust by forcibly shifting its own obligation onto the Trust Fund.

[64] Each case will turn on its own facts and the terms of the plan and trust at issue. Unlike *Markle* where the employer attempted to cancel its own obligation to pay plan expenses by obliging the trustees to pay them from the fund, here there was no obligation to pay Plan expenses, nor any action that was inconsistent with the Company’s power of amendment.

[65] Where trust funds may be used for the payment of plan expenses for services required by the plan, the distinction between whether the services are provided by the settlor or a third party is artificial. The only consideration is whether funds can be used to pay expenses and the legitimacy and reasonableness of the costs incurred. To the extent that the expenses at issue are *bona fide* expenses necessary to the administration of the pension plan, it should not matter whether the expenses are owed to a third party or to the employer itself. There is no reason in principle why the employer should be obliged to contract out such services.

[66] For these reasons, I would not disturb the findings of the Tribunal with respect to Plan expenses.

VII. Issue 2 — DB Contribution Holidays

[67] Since 1985, the employer has taken contribution holidays from its funding obligations to the employees covered by the DB part of the Plan. The Committee argues that the Plan forbids DB contribution holidays in this case because it provides a specific formula for calculating the Company's contributions. That is, the Company's contributions to the DB arrangement are not properly determined by the exercise of actuarial discretion.

[68] In *Schmidt*, this Court held that "unless the terms of the plan specifically preclude it, an employer is entitled to take a contribution holiday" (p. 638). Cory J. explained the criteria for determining whether a plan permitted contribution holidays, at p. 653, where he wrote:

> I can see no objection in principle to employers' taking contribution holidays when they are permitted to do so by the terms of the pension plan. When permission is not explicitly given in the plan, it may be implied from the wording of the employer's contribution obligation. Any provision which places the responsibility for the calculation of the amount needed to fund promised benefits in the hands of an actuary should be taken to incorporate accepted actuarial practice as to how that calculation will be made. That practice currently includes the application of calculated surplus funds to the determination of overall current service cost.

Cory J. went on to further clarify this point, at p. 656, writing:

> An employer's right to take a contribution holiday must also be determined on a case-by-case basis. The right to take a contribution holiday can be excluded either explicitly or implicitly in circumstances where a plan mandates a formula for calculating employer contributions which removes actuarial discretion. Contribution holidays may also be permitted by the terms of the plan. When the plan is silent on the issue, the right to take a contribution holiday is not objectionable so long as actuaries continue to accept the application of existing surplus to current service costs as standard practice.... Because no money is withdrawn from the fund by the employer, the taking of a contribution holiday represents neither an encroachment upon the trust nor a reduction of accrued benefits. [Emphasis added.]

[69] When plan documents provide that funding requirements will be determined by actuarial practice, the employer may take a contribution holiday unless other wording or legislation prohibits it.

[70] The Tribunal held that under the 1965 Plan amendments, DB contribution holidays are permitted. Section 14(b) of the Plan text was amended to read:

> The Company shall contribute from time to time but not less frequently than annually such amounts as are not less than those certified by the Actuary as necessary to provide the retirement income accruing to Members during the current year pursuant to the Plan and to make provision for the proper amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued as required by the Pension Benefits Act, after taking into account the assets of the Trust Fund, the contributions of Members during the year and such other factors as may be deemed relevant. [Emphasis added.]

Contribution holidays are permitted under this clause, because the Company's contributions are determined by actuarial calculations. Nothing in the clause prevents the Company from taking a contribution holiday where the actuary certifies that no contributions are necessary to provide the required retirement income to members.

[71] However, the Committee argues that the original 1954 Plan text prohibits contribution holidays and that subsequent amendments — including the 1965 amendments cited above — are invalid. The Tribunal disagreed. It noted that s. 22 of the 1954 Plan text granted the Company a broad power of amendment of the Plan, subject to the limitation that amendments to the Plan could not affect accrued rights of Plan members. Contribution holidays did not affect the benefits of Plan members under the Plan at the time of the 1965 amendment. As Cory J. wrote in *Schmidt*, at p. 654:

> The entitlement of the trust beneficiaries is not affected by a contribution holiday. That entitlement is to receive the defined benefits provided in the pension plan from the trust and, depending upon the terms of the trust to receive a share of any surplus remaining upon termination of the plan.

The Tribunal held that the 1965 amendment was valid. Since the Company did not begin taking contribution holidays until 1985, the Tribunal held that it therefore did not need to examine whether contribution holidays were permitted in the 1954 Plan text.

[72] Gillese J.A. did examine the 1954 Plan text provisions and concluded that they also allowed contribution holidays. I agree.

[73] The text of the 1954 Plan addresses employer contributions at s. 14(b):

> (b) Contributions by the Company
>
> In addition to contributing the full cost of providing the Past Service retirement incomes referred to in Section 13 (a) of this Plan, the Company shall also contribute, in respect of Future Service benefits, such amounts as will provide, when added to the Member's own required contributions, the Future Service retirement incomes referred to in Section 13 (b) of the Plan.

[74] In its factum, the Committee stressed the fact that s. 14(b) did not refer to an actuary (para. 92), though at the hearing the Committee's counsel conceded that the legitimacy of contribution holidays under the Plan did not turn on the use of the word "actuary". The Committee argues that s. 14(b) is analogous to clauses in previous cases which required specific annual contributions: *C.U.P.E.-C.L.C., Local 1000 v. Ontario Hydro* (1989), 68 O.R. (2d) 620 (C.A.); *Trent University Faculty Assn. v. Trent University* (1997), 35 O.R. (3d) 375 (C.A.); *Hockin* and *Châteauneuf v. TSCO of Canada Ltd.* (1995), 124 D.L.R. (4th) 308 (Que. C.A.). In those cases, they argue, requirements for annual contributions prevented the employer from taking contribution holidays.

[75] However, nothing in s. 14(b) provides a formula that would eliminate actuarial discretion. The clause requires the Company to contribute "such amounts as will provide" for the employees' retirement incomes. Actuarial discretion is clearly called for, as the clause does not specify how these amounts will be determined — nor does it preclude the amounts from being zero.

[76] As noted by Gillese J.A., the cases cited by the Committee concerned clauses that provided for contributions that would cover the difference between employee contributions and the benefits accrued or paid out in a given year (para. 122). This can be calculated without the exercise of an actuary's discretion. Section 14(b) provides for contributions that will cover the members' future retirement benefits. It requires the exercise of actuarial discretion, as it does not fix annual contributions and therefore does not preclude contribution holidays.

[77] Again, I would find that the Tribunal's decision was reasonable.

VIII. Issue 3 — DC Contribution Holidays

A) *Background*

[78] In 2000, the Company amended the Plan text in order to introduce a DC component. The amendment closed the DB component to new employees; new employees would thereafter become DC members on being hired. Existing employees who were DB members had the option of converting to the DC component. As a result of these amendments, employees were divided into Part 1 Members, who are governed by the Plan's DB provisions and Part 2 Members who, after January 1, 2000, are governed by the DC part of the Plan. The Plan was constituted in two separate funding vehicles with two separate custodians — by January 2000, CIBC Mellon Trust held the original DB Fund; Standard Life Assurance Company held the DC funds. However, both parts of the Plan would be registered as a single plan (the Company's counsel acknowledged at the hearing that the Plan had yet to be registered).

[79] The Company expressed its intention to take contribution holidays from its obligations to DC members, by using the surplus from the original DB component to satisfy the premiums owing to the DC component.

[80] The Tribunal ruled that the 2000 amendments which purported to allow DC contribution holidays were contrary to s. 1 of the 1954 Trust Agreement, which provides:

> No part of the corpus or income of the Fund shall ever revert to the Company or be used for or diverted to purposes other than for the exclusive benefit of such persons or their beneficiaries or personal representatives as from time to time may be designated in the Plan except as therein provided.

The Tribunal reasoned:

> Any holiday taken by the Company in respect of Part 2 contributions in this fashion can only be realized by actually moving money out of the Fund and transferring it to the insurer that is the funding agency for Part 2, for credit to the individual accounts of the Part 2 members. This action is inconsistent with section 1 of the 1954 Trust Agreement, recited above under the heading "FACTS" (section 1 of the 1958 Trust Agreement is in similar terms).
>
> There are two ways in which this inconsistency could be resolved. The 2000 Plan could be amended to eliminate the authority of the Company to apply the surplus in the Fund to satisfy its contribution obligation in respect of Part 2 members or the Part 2 members could be made beneficiaries of the trust in respect of the Fund (in which case it would seem to follow that the insurance policy that is the funding vehicle for Part 2 should be held by the trustee). [paras. 32-33]

[81] The Committee contests the permissibility of the retroactive amendment envisaged by the Tribunal. They question whether the Company could, as the Tribunal concluded, introduce a new DC pension component that was part of the same pension plan as the existing DB component and whose members were also beneficiaries of the same Trust Fund as the DB members.

[82] It is on this point that LeBel J. and I join issue. While he acknowledges that s. 13(2) of the PBA permits retroactive amendments, he finds that the DB and DC arrangements constitute distinct plans and that the DB and DC members cannot be beneficiaries of the same trust.

[83] LeBel J. says that the contribution holidays for DC members violate the exclusive

benefit provisions of the Trust. He also says that the contribution holidays constitute a partial revocation of the Trust. His position is premised on there being two separate trusts and two separate plans, one for the DB members and one for the DC members.

[84] However, with one trust in which all DB and DC members are beneficiaries, the use of trust funds for either the DB or DC members would not infringe the exclusive benefit provision. Surplus funds applied to DC accounts would simply move funds within the Trust. And if there is one trust, there is no partial revocation when the actuarial surplus is used for contribution holidays with respect to the DC part of the Plan. In my view, having regard to the Plan documentation, it was reasonable for the Tribunal to find that there was one plan and that, with a retroactive amendment, there could be one trust and that contribution holidays with respect to either or both of the DB and DC components of the Plan did not violate the exclusive benefit provision or constitute a partial revocation of the Trust.

[85] LeBel J. says that it is wrong to presume "a single plan with two (or more) components, simply to be displaced by prohibitive language in the documentation or the legislation" (para. 162). However, pension plans are private arrangements subject to government regulation. Absent regulation prohibiting the combining of DB and DC components in a single plan or prohibiting the taking of contribution holidays in respect of either component of the plan, whether such actions are permitted will be determined with reference to the plan documentation and contract and trust law. In this case, there is no government regulation that prevents the retroactive amendment, a single plan and trust and the DC contribution holidays.

[86] LeBel J. expresses concern that the use of a DB surplus for DC purposes disrupts the careful balance between providing incentives for employers to provide pension schemes and the need to protect pensioners' rights (para. 149). In my respectful view, it is not the role of the courts to find the appropriate balance between the interests of employers and employees. That is a task for the legislature. Indeed, as Deschamps J. noted, at para. 14 of *Monsanto*: "[P]ension standards legislation is a complex administrative scheme, which seeks to strike a delicate balance between the interests of employers and employees, while advancing the public interest in a thriving private pension system". The role of the courts is to ascertain and uphold the rights of the parties in accordance with the applicable statutory and common law and the terms of the relevant documentation. In my view, the applicable law and Plan documentation does permit and provide for DC contribution holidays.

B) *Can the DC and DB Arrangements Be Included in a Single Plan and Single Trust?*

[87] The Committee relies on the Divisional Court's finding that the creation of a DC arrangement alongside the existing DB arrangement created "in law, two (2) pension plans, two (2) pension funds and two (2) classes of members" (para. 72). Generally, it does not necessarily follow that the creation of two differently funded pension arrangements results in two distinct pension plans and two distinct trusts. In this case, I do not think it was unreasonable for the Tribunal to conclude that the DB and DC arrangements could be components of a single Plan and that the 2000 Plan could be retroactively amended to create a single trust.

[88] The 2000 amendments to the Plan text can reasonably be interpreted as intending a

single plan. Section 1.07 of the foreword says:

> The Plan is hereby amended and restated . . . to:
>
> . . .
>
> (c) change the Plan from one having defined benefit provisions only to a pension plan with a defined benefit component and a defined contribution component, effective January 1, 2000.

Section II defines "Plan" as "the Pension Plan for Employees of Kerry (Canada) Inc., as Revised and Restated at January 1, 2000, the terms of which are as set forth in this document, and as it may be amended from time to time". Members of the Plan are defined as employees who meet the applicable eligibility requirements and continue to be entitled to benefits under either section of the Plan. Section 18.08 specifically provides that actuarial surplus can be used for "either Part 1 or Part 2 [members]". These provisions demonstrate that the 2000 amendments to the Plan text evince the intention that there be a single plan.

[89] The support for a single plan found in the Plan text distinguishes this case from *Kemble v. Hicks*, [1999] EWHC 301 (Ch) (BAILII), [1999] O.P.L.R. 1. In *Kemble*, the plan sponsor ran a DB plan and decided to create a new DC arrangement by a temporary deed (plan text) that it intended to incorporate into the main plan deed. However, it never did amend the main deed governing the original plan to reflect the new DC arrangement. The two pension arrangements existed under separate deeds and the one governing the DB plan made no mention of incorporating the one governing the DC arrangement.

[90] Here there is an amendment to the overall plan indicating that the intention is to create a single plan and expressly allowing for contribution holidays in respect of each component of the Plan. Nothing in the relevant statutory or common law prohibits the creation of combined DB and DC plans. Therefore it was not unreasonable for the Tribunal to conclude that this would be a single plan.

[91] Similarly, it was not unreasonable that DC members could be designated beneficiaries of the Trust. Trusts may have different classes of beneficiaries or numerous accounts; the fact that DB and DC funds will be held by different custodians does not prevent them from belonging to the same trust. Section 6(b) of the *Trustee Act*, R.S.O. 1990, c. T.23, for instance, allows different trustees to be appointed over different parts of the trust property. Section 27(3) of the same Act allows trustees to invest in mutual funds, which will themselves often be administered by their own trustees. There is no reason why a single plan could not have DB and DC components whose members were beneficiaries of the same trust, provided the plan documents and legislation do not prohibit this.

[92] The Committee argues that *Schmidt* forecloses this possibility. They cite the statement of McLachlin J. (as she then was), dissenting in part on a different point, that "[a] defined contribution plan can never have a surplus" (p. 697). They also cite the following passage, at p. 653, of Cory J.'s majority judgment as supporting their position:

> An employer's right to take a contribution holiday can also be excluded by the terms of the pension plan or the trust created under it. <u>An explicit prohibition against applying an existing fund surplus to the calculation of the current service cost, or other provisions which in effect convert the nature of the plan from a defined benefit to a</u>

> defined contribution plan, will preclude the contribution holiday. For example, the presence of a specific formula for calculating the contribution obligation, such as those considered in the *Ontario Hydro* and *Trent University* cases, prevents employers from taking a contribution holiday. However, whenever the contribution requirement simply refers to actuarial calculations, the presumption will normally be that it also authorizes the use of standard actuarial practices. [Emphasis added.]

In this passage, Cory J. was concerned with explaining the criteria by which the previous case law determined a right to contribution holidays in existing plan provisions. Where the employer's existing contribution requirements are fixed by a specific formula, such that contributions are not determined by an exercise of actuarial discretion, there can be no contribution holidays. Speaking generally, a single stand-alone DC plan will not allow contribution holidays, because its contributions are fixed and not determined by actuarial discretion.

[93] However, the Plan at issue in this case is different. A new component is being added to the existing Plan. After the retroactive amendments, the Plan would consist of DB and DC components. So long as it is a single plan and all employees are beneficiaries of the same trust, the Plan will not have been converted to a stand-alone DC plan. The point made in *Schmidt* does not apply to this situation.

[94] The Committee points to the fact that *Schmidt* concerned the amalgamation of two plans into a single plan. Despite the amalgamation, this Court considered the contribution holidays issue separately for each of the formerly existing plans. The Ontario Court of Appeal's decision in *Aegon Canada Inc. v. ING Canada Inc.* (2003), 179 O.A.C. 196, similarly concerned the merger of pension plans, in which each merging plan's surplus was considered separately. The Committee says that, "except where the trust permits the activity, an employer may not amend the trust to 'co-mingle' or

‘cross-subsidize’ its obligations to employees in one part of a pension plan by using assets of the fund held exclusively for members in the other part of the same plan” (A.F., at para. 103).

[95] However, both *Schmidt* and *Aegon* involved mergers of pre-existing plans. The plans and trusts had different beneficiaries to which different employers had undertaken different obligations. In this case, the obligations have always been to the same set of employees — the Company’s employees — and, after the retroactive amendment, always from the same trust. Neither *Schmidt* nor *Aegon* blocks the retroactive amendment at issue here.

[96] This is because there is nothing inherently wrong with a pension plan being structured in the way the Company proposes — provided the plan documents or legislation do not forbid it. This was Gillese J.A.’s conclusion (para. 111). Siegel J. came to this same conclusion in a decision released shortly after Gillese J.A.’s judgment (though he seemingly reached this conclusion independently — see para. 236): *Sutherland v. Hudson’s Bay Co.* (2007), 60 C.C.E.L. (3d) 64 (Ont. S.C.J.). Siegel J. concluded, at para. 219, that

> (1) there is no support in the case law for the plaintiffs’ proposition that the assets of an “exclusive benefit trust” may not be used for the benefit of members of a defined contribution section added to a pension plan previously structured solely as a defined benefit plan, and (2) more generally, there is judicial support for, and no legal principle prohibiting, amendments to a pension plan that establish a defined contribution section that exists together with a defined benefit section, with the same trust fund supporting the payment of benefits under each section of the plan.

[97] The case law supporting the permissibility of a single plan involving DC and DB components includes the English Chancery decision in *Barclays Bank Plc v. Holmes*, [2000] EWHC

457 (Ch) (BAILII), [2001] O.P.L.R. 37. In *Barclays*, Neuberger J. ruled that there is no reason in law that an employer could not set up a single plan under which some beneficiaries receive DB benefits and some receive DC benefits. At para. 54, he wrote the following, referring to amendments in a 41st deed which granted the employer the right to use a surplus in a DB component to take contribution holidays in respect of a DC component that was part of the same plan:

> There is no intrinsic reason, as a matter of general law, why an employer or any other person could not set up a Pension Scheme expressly on that basis, in the way that, for instance, the Bank has undoubtedly purported to do, in the present case, in the 41st Deed. Such a view is supported by consideration of the multifarious types of private trusts which are created from time to time, which often involve many differing classes of beneficiary but a single fund.

It is true that in *Barclays*, the same trust Company controlled all accounts. However, as stated above, I do not think there is any difficulty with a single trust having numerous accounts at different institutions.

[98] *Barclays* is not, of course, determinative of this appeal. The legislative context and plan texts are different. However, it does support the proposition that there is nothing repugnant in principle to the existence of a single plan whose members receive different benefits, funded in different ways, depending on which of the various parts of the plan they participate in.

C) *Do the Plan Documents or Legislation Prohibit the Plan from Having DB and DC Components or Prohibit Contribution Holidays for either of These Components?*

[99] Combining DB and DC components or contribution holidays for one or both

components can be prohibited by the plan documents or by legislation. Therefore, for the Committee's argument to succeed, it must establish that there is a legislative or contractual impediment to the Company taking contribution holidays in the DC part of the Plan. It has not succeeded in this task.

[100] First, the legislation does not prevent the retroactive amendment making the DC members beneficiaries of the existing Trust and entitling the employer to apply the actuarial surplus to its DC contribution obligations. To the contrary, as noted by the Court of Appeal, at para. 103, s. 9 of the *Pension Benefits Act* General Regulations, R.R.O. 1990, Reg. 909 (the "*Regulations*"), provides that on conversion of a DB plan to a DC plan, a surplus can be used to offset contributions to the DC plan. While this case is not a conversion and s. 9 does not apply, it does suggest that a surplus accumulated under a DB component of a plan can be applied to a DC component of a plan.

[101] Section 7(3) of the *Regulations* allows the following:

> In any year for which no special payments are required to be made for a pension plan under section 5, an actuarial gain may be applied to reduce contributions for normal costs required to be made by the employer, by a person or entity required to make contributions on behalf of the employer, by the members of the pension plan or by any of them.

So long as the DC component is part of the same Plan as the DB component, s. 7(3) supports the principle that any surplus in the Plan can be applied to DC contribution obligations. The retroactive amendments aim to ensure that the DB and DC components are part of the same Plan.

[102] The Committee pointed to no parts of the legislation that would prevent making the two components parts of a single Plan.

[103] LeBel J. rightly points out that nothing in the legislation permits contribution holidays where a DC component is added to a DB plan. He highlights the difference between the full conversion from a DB to a DC plan contemplated by s. 9 of the *Regulations* and the situation in which a DC component is added to an existing DB plan. However, I do not think it follows from this difference that the legislation prohibits contribution holidays in the circumstances of this case. Here the legislation is silent on the specific point at issue. Absent legislative restriction, the permissibility of contribution holidays must be determined with reference to contractual and trust law. In my view, nothing in the Plan documents prevents combining the two components in one plan or prohibits contribution holidays in respect of either component.

[104] The Committee argues that retroactively permitting the funding of the DC component from the DB surplus is not for the exclusive benefit of any of the members. The Committee analogizes the situation in this case to the one this Court dealt with in *Buschau*. In *Buschau*, an ongoing plan with a substantial surplus was closed to new members. The employer had previously withdrawn surplus funds in breach of the trust. It subsequently acknowledged that it had no right to recover the surplus funds and repaid them, but still sought to benefit from the surplus by other means. It attempted to re-open the membership of the closed plan to access its surplus by taking contribution holidays in respect of its obligations to the new plan members. The Committee seeks to rely on Deschamps J.'s statement at para. 41 of *Buschau* that re-opening the plan in that case would be problematic.

[105] I do not find the Committee's use of *Buschau* convincing, because the circumstances here are quite different. *Buschau* involved a DB plan in surplus that had been closed for a number of years and was still paying benefits to its existing members. The employer attempted to re-open the plan to new members in order to gain access to its surplus by way of contribution holidays to these new members — thereby using the surplus in the plan to cover its contribution obligations to the new members. The employer had previously attempted to use the surplus to cover its contribution obligations by merging the closed plan with other plans in order to use the closed plan's surplus to take contribution holidays with respect to the other plans. A previous judgment prevented a merger from achieving such a result — despite the merger, the fund remained separate. The Court of Appeal in *Buschau* had stated that by re-opening the plan the employer would rightly be viewed as trying to do what it could not do by merger, i.e. benefit from the surplus by taking contribution holidays. The Court of Appeal stated that, as with the merger, because of the employer's previous breach of trust, an attempt to re-open the plan would result in the employer being forced to account for its trust obligations to the original plan members as if the plan had not been re-opened. Deschamps J.'s remark about re-opening the plan being problematic was made in this context.

[106] What the Tribunal contemplated here was a retroactive amendment expressly permitted by the PBA. The legal effect of the retroactive amendment would not amount to re-opening a closed plan, but to establishing that DC members were beneficiaries of the Trust from the moment the DC component was created and the DB component closed to new members. Because the amendment is retroactive, there would be no re-opening of a closed plan in law and no attempt to merge two independent trusts. This case is not analogous to *Buschau*; what was problematic in *Buschau* does

not arise here.

[107] Another factor distinguishing this case from *Buschau* is the significant difference between a terminated plan and an ongoing plan. In *Schmidt*, Cory J. distinguished between an ongoing plan's *actuarial* surplus and a terminated plan's *actual* surplus. At pp. 654-55, he wrote:

> While a plan which takes the form of a trust is in operation, the surplus is an actuarial surplus. Neither the employer nor the employees have a specific interest in this amount, since it only exists on paper, although the employee beneficiaries have an equitable interest in the total assets of the fund while it is in existence. When the plan is terminated, the actuarial surplus becomes an actual surplus and vests in the employee beneficiaries. The distinction between actual and actuarial surplus means that there is no inconsistency between the entitlement of the employer to contribution holidays and the disentitlement of the employer to recovery of the surplus on termination. The former relies on actuarial surplus, the latter on actual surplus.

In this case, as stated, the Plan and Trust have not been terminated. Only a part of the Plan has been closed to new employees. There is, therefore, no actual surplus that has vested with the employees. The DB surplus remains actuarial and the DB members retain their right to the defined benefits provided for under the Plan. Their interest in the surplus is only to the extent that it cannot be withdrawn or misused. Retroactively amending the Plan takes no vested property right away from the DB members.

[108] Moreover, Deschamps J. wrote at para. 34 of *Buschau*:

> A plan is also seen as being, if not a permanent instrument, at least a long-term one. However, the participation of any individual member is ephemeral: members come and go, while plans are expected to survive the flow of employees and corporate reorganizations. In an ongoing plan, a single group of employees should not be able to

> deprive future employees of the benefit of a pension plan.

Here, the Plan was intended to be ongoing and cover all employees of the Company. As Gillese J.A. noted, at para. 110, it was intended that all employees would be members of the Plan and the Trust.

[109] This intention is demonstrated in the Plan documents. Section 1 of the 1954 Trust Agreement provided that the Trust Fund would not be diverted or used for "purposes other than for the exclusive benefit of such persons or their beneficiaries or personal representatives as from time to time may be designated in the Plan except as therein provided". The 1958 Trust Agreement, in force at the time of the 2000 amendments, similarly provided that beneficiaries would be "such persons as from time to time may be designated in the Plan" (s. 1). Section 22 of the Plan text designates existing and retired employees as the persons to benefit from the Plan. The Plan was always meant to apply to all employees. It continues to do so with this retroactive amendment. It is therefore not inconsistent with the Plan to designate the DC members as beneficiaries of the original Trust.

[110] After the retroactive amendments, members of both parts of the Plan will be beneficiaries of the Trust; use of funds in the Trust to benefit either part is allowed because the Trust explicitly provides that the funds can be used for the benefit of the beneficiaries.

[111] LeBel J. finds that the Trust only ever contemplated DB plan members being its beneficiaries. He notes that certain provisions in the 1954 Trust Agreement contemplate the possibility of the amount of the Fund either being inadequate to meet its liabilities (ss. 2 and 6) or

exceeding its liabilities (s. 11), scenarios that could not arise in a DC plan.

[112] In my opinion, the Trust contemplated a broader category of beneficiaries. As stated above, the language governing the designation of the beneficiaries of the Trust is general and it has always applied to the employees of the Company. I do not think it was unreasonable for the Tribunal to conclude that the Plan allowed for the designation of DC members, who are Company employees, as beneficiaries of the Trust.

[113] LeBel J. says that an amendment that purports to make DC employees beneficiaries of the same single trust as DB employees and to allow the employer to take contribution holidays in respect of the DC employees affects the benefits of the DB employees in the sense that assets in the pension fund are being reduced. DB members may well prefer higher actuarial surpluses in the pension fund. Indeed, the Committee argued against the use of the actuarial surplus for the payment of Plan expenses and the taking of DB contribution holidays, as well as for the taking of DC contribution holidays. However, absent legislation stating otherwise, DB members have no right to require surplus funding of the Plan in order to increase their security. In *National Grid Co. plc v. Mayes*, [2001] UKHL 20, [2001] 2 All E.R. 417, Lord Hoffmann stated: "Caution is a matter for the actuary in certifying the surplus and certifying the arrangements as reasonable" (para. 17). It is the plan documents and trust law that govern. Nothing in the Plan documents or trust law gives the DB members a vested interest in the actuarial surplus of the Trust Fund or prevents the use of the actuarial surplus for Plan expenses or DB or DC contribution holidays.

[114] In my respectful opinion, the Tribunal's decision to allow contribution holidays in

respect of the DC component of the pension Plan, once appropriate retroactive amendments are made, was not unreasonable.

IX. Issue 4 — Costs

[115] There are two issues with respect to costs. First, did the Tribunal have the authority to order that costs be paid out of the Trust Fund? Second, the Court of Appeal reversed the decision of the Divisional Court and was therefore entitled to make its own costs ruling: 2007 ONCA 605, 282 D.L.R. (4th) 625. It declined to award costs to the Committee from the Fund. The issue is whether this Court should interfere with that exercise of discretion by the Court of Appeal.

A) *Tribunal's Authority to Award Costs*

[116] On the first issue, s. 24 of the *Financial Services Commission of Ontario Act, 1997* provides: "The Tribunal may order that a party to a proceeding before it pay the costs of another party or the Tribunal's costs of the proceeding." The Tribunal held that since the Fund was not a party to the proceedings before it, it did not have the authority to order costs payable from the Fund.

[117] The language of s. 24 is unambiguous on this point. The Tribunal cannot order costs from the Trust Fund if the Fund is not a party. Here, the Fund was not a party. In these circumstances, the Court should defer to the Tribunal.

B) *Awarding Costs from the Fund*

[118] On the second issue, I would not interfere with Gillese J.A.'s decision not to order costs payable to the Committee form the Fund.

[119] Gillese J.A. identified two authorities setting out the proper approach to follow in deciding when to award an unsuccessful litigant its costs from a trust fund. The English case *Buckton v. Buckton*, [1907] 2 Ch. 406, notes three categories of cases in the wills and estate context. The first category is comprised of cases in which the trustees apply to a court to construe the terms of the trust deed so that they may determine the proper administration of the trust. The second category is comprised of similar cases seeking to determine the proper administration of the trust, but brought by the beneficiaries of the trust rather than the trustees. In both these cases, costs may rightfully be paid from the trust fund. However, costs will not be paid from the fund in cases that fall under the third category, that is, where a beneficiary makes a claim which is adverse to other beneficiaries of the trust.

[120] In *Sutherland v. Hudson's Bay Co.* (2006), 53 C.C.P.B. 154 (Ont. S.C.J.) ("*Sutherland (2006)*"), Cullity J. set out the situations where he finds that costs may be payable from a trust fund. His approach appears similar to the first two categories of *Buckton*. At para. 11, he writes:

> Orders for the payment of costs out of trust funds are most commonly made in either of two cases. One is where the rights of the unsuccessful parties to funds held in trust are not clearly and unambiguously dealt with in the terms of the trust instrument. In such cases, the order is sometimes justified by describing the problem as one created by the testator or settlor who transferred the funds to the trust. The other case is where the claim of the unsuccessful party may reasonably be considered to have been advanced for the benefit of all of the persons beneficially interested in the trust fund.

[121] I think these cases helpfully define the circumstances in which costs should be awarded from a pension trust fund. The rules in both *Buckton* and *Sutherland (2006)* would allow a court to award its costs out of the fund where there is a legitimate uncertainty as to how to properly administer the trust and where the dispute is not adversarial.

[122] In *Patrick v. Telus Communications Inc.*, 2008 BCCA 246, 294 D.L.R. (4th) 506, the British Columbia Court of Appeal has recently criticized the application of *Buckton* to a number of cases, including one it had previously decided. It expressed the view that in British Columbia *Buckton* should only apply to proceedings dealt with in chambers (originating applications under the British Columbia *Rules of Court*) and not to more complex trial litigation. It nevertheless acknowledged that in pension litigation, costs may be awarded on the basis set out in *Sutherland (2006)*. I think this ruling points to some difficulties in applying *Buckton* in the context of pension litigation.

[123] Pension litigation is frequently more complex than estate litigation. In the context of pension litigation, the court must not just be sensitive to the litigation being adversarial between beneficiaries of the trust, as *Buckton* might be taken to suggest, but also between the beneficiaries and the settlor (in this case the Company), the trustees or the administrators (in this case the Retirement Committee). Unlike the wills and estate context, the employer that settles a pension trust is likely under an ongoing obligation to contribute to the trust fund. As a result, awarding costs out of a pension trust fund may have an impact on the employer. This is especially true in cases such as this involving issues of expenses payable by a trust fund and of contribution holidays. In these cases, a costs award from the fund will reduce the actuarial surplus in the fund and hasten the date

when the employer must satisfy expense requirements or must begin making contributions again.

[124] In *Smith v. Michelin North America (Canada Inc.)*, 2008 NSCA 107, 271 N.S.R. (2d) 274, the Nova Scotia Court of Appeal addressed the question of costs with the benefit of the Ontario Court of Appeal's decision in this case. It agreed with Gillese J.A.'s finding that the key question is whether the litigation is adversarial rather than aimed at the due administration of the pension trust fund. Claims that are adversarial amongst beneficiaries will not qualify for a costs award from the fund. However, not even every claim in which the beneficiaries have a common interest in the litigation will entitle them to their costs from the fund. A claim might still be adversarial, even if it is not adversarial amongst beneficiaries. Costs will only be awarded from the fund where the proceedings are necessary for the due administration of the trust.

[125] Where litigation involves issues, such as in the present case, of a dispute between a settlor of a trust fund and some or all of its beneficiaries, the ordering of costs payable from the fund to the unsuccessful party may ultimately have to be paid by the successful party. In these types of cases, a court will be more likely to approach costs as in an ordinary lawsuit, i.e., payable by the unsuccessful party to the successful party.

[126] In the end, of course, costs awards are quintessentially discretionary. Courts have considered a number of factors in finding that litigation was concerned with due administration of the trust. Courts have noted that the litigation was primarily about the construction of the plan documents (*Huang v. Telus Corp. Pension Plan (Trustees of)*, 2005 ABQB 40, 41 Alta. L.R. (4th) 107, *Patrick v. Telus Communications Inc.*, 2005 BCCA 592, 49 B.C.L.R. (4th) 74, and *Burke v.*

Hudson's Bay Co., 2008 ONCA 690, 299 D.L.R. (4th) 276), clarified a problematic area of the law (*Ontario Teachers' Pension Plan Board v. Ontario (Superintendent of Financial Services)* (2003), 36 C.C.P.B. 154 (Ont. Div. Ct.), and *Burke*), was the only means of clarifying the parties' rights (*Burke*), alleged maladministration (*MacKinnon v. Ontario Municipal Employees Retirement Board*, 2007 ONCA 874, 288 D.L.R. (4th) 688), and had no effect on other beneficiaries of the trust fund (*C.A.S.A.W., Local 1 v. Alcan Smelters and Chemicals Ltd.*, 2001 BCCA 303, 198 D.L.R. (4th) 504, and *Bentall Corp. v. Canada Trust Co.* (1996), 26 B.C.L.R. (3d) 181 (S.C.)).

[127] Courts have refused to award costs when they considered litigation ultimately adversarial. In reaching this conclusion, they have noted the following factors: the litigation included allegations by the unsuccessful party of breach of fiduciary duty (*White v. Halifax (Regional Municipality) Pension Committee*, 2007 NSCA 22, 252 N.S.R. (2d) 39); the litigation only benefited a class of members and it would impose costs on other members should the plaintiff be successful (*Smith*, *Lennon v. Ontario (Superintendent of Financial Services)* (2007), 87 O.R. (3d) 736 (S.C.J.), and *Turner v. Andrews*, 2001 BCCA 76, 85 B.C.L.R. (3d) 32); the litigation had little merit (*Smith*, *White* and *Lennon*).

[128] In this case, the Company was successful, i.e., it does not have to pay into the Fund to cover expenses at issue and may take contribution holidays. There is no reason to penalize it by reducing the Fund surplus and thereby reducing its opportunity for contribution holidays.

[129] Moreover, Gillese J.A. held that the litigation was adversarial in nature because it was ultimately about the propriety of the Company's actions and because the Committee sought to have

funds paid into the Fund to the benefit of the DB members only. The litigation seems particularly unusual in light of several Committee members having played a part in the taking of the decisions the Committee is now challenging.

[130] I agree with Gillese J.A. that this case is adversarial in nature.

[131] Gillese J.A. also concluded that the Committee was not bringing this litigation on behalf of all beneficiaries. She rested this conclusion on the fact that the benefits the Committee claimed were only for the DB members of the Plan. She also took into account a conclusion reached by a concurring Tribunal member (see *Nolan v. Superintendent of Financial Services*, [2004] O.F.S.C.D. No. 191 (QL), at para. 27, Mr. McNairn), that the Committee had not demonstrated its precise level of support among Plan members.

[132] For these reasons, there would be no justification to interfere with the costs ruling of Gillese J.A that costs should be payable by the Committee in favour of the Company.

X. Disposition

[133] The appeal should be dismissed with costs in favour of the Company against the appellants.

The reasons of LeBel and Fish JJ. were delivered by

LEBEL J. —

I. Introduction

[134] The issues raised in this appeal affect the millions of Canadians who are members of occupational pension plans. Several of these issues are the subjects of frequent litigation in the pension field, such as an employer's use of pension funds to pay plan expenses, the taking of "contribution holidays" in a defined benefit pension plan ("DB plan"), and the proper test for determining whether the costs of litigation can be awarded from a pension fund. I agree with my colleague's conclusions on these issues and will not address them in the reasons below.

[135] However, one question raised in this appeal is novel, and more contentious: it asks whether an employer can use the surplus of a DB pension plan to fund its contribution obligations toward a defined contribution pension plan ("DC plan"). It is on this issue that my colleague and I part ways. I believe that the employer's use of DB surplus to fund its obligations toward the DC plan is not supported by the legislative regime and constitutes a breach of the plan provisions, the trust agreement, and the relevant principles of trust law. When the DC plan was created in 2000, the company's employees ceased to be members of a single plan. The employees in the DC plan ("DC members") are not beneficiaries of the DB trust and any amendment that would purport to designate them as such would contravene these same provisions and principles. As a result, the decision of the Financial Services Tribunal (the "Tribunal") that approved such an amendment was unreasonable and must be quashed.

II. Overview

[136] I will not attempt to duplicate my colleague's thorough review of the facts. However, a brief sketch of the parameters of this appeal and of some particular facts is necessary. The pension plan in this case provided benefits on a DB basis until January 1, 2000, when the respondent company closed the DB plan to new members and opened a DC plan. Existing employees could choose whether to join the DC plan or to remain in the DB plan, whereas new employees were only entitled to join the DC plan. The appellants, a group of former employees of Kerry (Canada) Inc. and its predecessor companies ("Kerry"), essentially contend that their employer misused the funds in their pension trust. The appellants claim that the company did not ever have the right to pay certain expenses related to the management of the plan from the pension fund, and that it was not entitled to use the fund's surplus to offset its required contributions (i.e. to take a "contribution holiday") with respect to both the DB and the DC plans. This case arose as a result of the appellants' decision to challenge these alleged irregularities before the Superintendent of Financial Services (the "Superintendent"). The Superintendent, who is the other respondent in this appeal, ordered Kerry to reimburse the pension fund for some of the third-party expenses, but refused to order reimbursement for the contribution holidays Kerry had taken with respect to the DB and DC plans.

[137] The Tribunal heard the appeal against the Superintendent's Notices of Proposal. The Tribunal released several sets of reasons, only one of which is relevant to this discussion: [2004] O.F.S.C.D. No. 193 (QL). In those reasons, the Tribunal held that Kerry was entitled to take contribution holidays from the DB plan. Moreover, it held that Kerry could continue to fund its

contributions toward the DC plan from the DB surplus, but on the condition that it retroactively amend the 2000 pension plan (the "Plan") to designate the DC members as beneficiaries of the pension trust fund (the "retroactive designation" remedy).

[138] The Ontario Superior Court of Justice, Divisional Court (the "Divisional Court") reviewed the Tribunal's contribution holiday decision on the standard of correctness because, in its opinion, the issue required the interpretation of pension plan documents and trust agreements, and therefore engaged a question of law. The Divisional Court concluded that the Tribunal did not correctly address the contribution holiday issue and reversed the Tribunal on this point: (2006), 209 O.A.C. 21. It viewed the DB and DC plans as two separate and distinct pension plans, and held that the contribution holidays taken with respect to the DC plan constituted unlawful cross-subsidization between pension funds that could not be remedied by a retroactive designation of DC members as fund beneficiaries.

[139] The Ontario Court of Appeal applied the standard of reasonableness to the Tribunal's contribution holiday decision, as the issue engaged the Tribunal's relative expertise in interpreting pension plan documents and was not a pure question of law. Gillese J.A., for the court, held that the Tribunal's decision was reasonable and reinstated its proposed remedy, adding that she would have reached the same conclusion even on the correctness standard: 2007 ONCA 416, 86 O.R. (3d) 1. Although her reasoning was not the same as that of the Tribunal, Gillese J.A. agreed that a retroactive amendment designating the DC members as trust beneficiaries would permit the employer to use the surplus in the fund to pay its contributions toward the DC plan. The appellants sought and obtained leave to appeal to this Court: [2008] 1 S.C.R. xi.

[140] I agree that the appropriate standard of review for the contribution holiday issue is reasonableness. As my colleague has aptly explained, at paras. 26-30 of his reasons, the four factors underlying the standard of review analysis clearly point to the conclusion that the Tribunal's decision concerning the DC contribution holidays must only be interfered with if it is unreasonable. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, this Court explained that reasonableness is a deferential standard that requires the reviewing court to determine whether the administrative decision falls within a range of defensible outcomes. A decision is unreasonable if, for instance, it fails to adhere to the principles of "justification, transparency and intelligibility" (*Dunsmuir*, at para. 47) or if the outcome cannot be supported on a reasoned analysis of the facts and the law underpinning the issue in question. Respect for the rule of law requires that a court not uphold an administrative decision that is irrational, arbitrary, or untenable. A decision is irrational when it is devoid of a basis in law in respect of its core legal issues.

[141] In this case, the Tribunal's decision with respect to the DC contribution holidays fell outside the range of reasonable outcomes available to it. The Tribunal did acknowledge that the employer's amendments to the Plan seeking to permit contribution holidays in the DC plan violated the terms of the original Trust Agreement entered into in 1954 (the "Trust Agreement") and constituted an encroachment on irrevocable trust funds. However, it failed to take these very principles into consideration when ordering its remedy of retroactively designating DC members as beneficiaries of the fund. The retroactive amendment would breach the same terms of the Trust Agreement and the Plan's text that prohibited the DC contribution holidays in the first place. The Tribunal's failure to take this into account when crafting the remedy cannot be justified and the

remedy is therefore unreasonable.

[142] The Court of Appeal therefore erred in concluding that the Tribunal's contribution holiday decision was reasonable and in reinstating the retroactive designation remedy. Indeed, I believe that the court's conclusion that Kerry would be entitled to take contribution holidays in the DC plan following the retroactive amendment was predicated on a number of errors. First, the court failed to consider the lack of support for this type of contribution holiday in the governing legislation and regulations. The *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "*PBA*"), and the *Pension Benefits Act* General Regulations, R.R.O. 1990, Reg. 909 (the "*Regulations*"), do not authorize the use of surplus in a DB fund to offset an employer's contribution obligations toward a DC plan except in the event of a full conversion from a DB to a DC plan. All parties to this appeal agree that full conversion has not occurred. As such, the legislation is of no assistance to the respondents.

[143] Second, the court adopted an unduly formalistic view of the pension plan. Gillese J.A. held that Kerry's creation of a DC plan did not result in a new plan, since "[c]ontrol, management and administration of the Plan remained with the Retirement Committee and the company" (para. 111). It is true that the Plan falls to be registered as a single plan and that the same committee administers both parts of the Plan. However, this appeal demands a much closer examination of the arrangement that has been in place since the creation of the DC plan in 2000. The DB and DC contributions are completely segregated and belong to entirely different funding regimes. Members who switched to the DC plan removed all their accrued benefits from the DB fund and placed them in separate annuity accounts that have no real, factual connection to the fund. Gillese J.A. failed to

appreciate the separate and distinct nature of the DB and DC plans in this case and instead focused on the formal existence of a single plan. In so doing, she failed to acknowledge that Kerry's use of the DB surplus to eliminate its contribution obligations to the DC plan resulted in a violation of the provisions in the Plan and Trust Agreement that prohibit the use of trust funds for other than the exclusive benefit of fund beneficiaries. Moreover, she overlooked the serious problems with the Tribunal's remedy of ordering the retroactive designation of DC members as beneficiaries of the fund.

[144] Third, the court ought to have considered the trust ramifications of the employer's DC contribution holidays. In *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, this Court held that pension funds impressed with a trust are governed primarily by the equitable principles of trust law. Cory J. wrote that a pension trust "is governed by equity, and, to the extent that applicable equitable principles conflict with plan provisions, equity must prevail" (p. 655). Thus, even if there were no legislative or contractual impediment to the DC contribution holidays, it would still be necessary to determine whether the holidays are barred by trust principles. In this case, the DC contribution holidays could only be realized by the withdrawal of funds from the pension trust, which holds the contributions and accrued benefits of the employees of the DB plan ("DB members"), and the subsequent deposit of those same funds into the DC members' annuity accounts. This is a clear example of the employer's controlling and encroaching on funds that are irrevocably held in trust for the benefit of DB members. This action violates the general trust principle against revocation as well as the provisions in the Plan's documentation that expressly prohibit the employer's revocation of trust funds.

[145] In sum, Kerry's contribution holidays in the DC plan cannot be supported under any reasonable interpretation of the Plan's documentation or of relevant trust law principles. I will address each of these points in turn in the following reasons.

III. Analysis

A. *Background: Contribution Holidays*

[146] As explained by Rothstein J., an employer can lawfully use the surplus of a pension fund to take contribution holidays with respect to a DB pension plan, provided that it is permitted by the legislation and plan documentation: *Schmidt*. A plan might expressly authorize or prohibit contribution holidays. When a plan is silent on the matter, implicit authorization for contribution holidays might be found in the plan's formula for calculating employer contributions. If the formula requires the discretion of an actuary to determine the amount of each contribution, then the actuary's discretion enables him or her to follow the accepted actuarial practice of using fund surplus to offset employer contributions. A fixed formula for employer contributions, however, would implicitly prohibit the taking of contribution holidays since it obliges the employer to contribute to the fund regardless of whether the contributions are actually required to provide the members with their guaranteed benefits (*Schmidt*, at p. 653).

[147] While it is settled law that an employer may take contribution holidays in these circumstances, that does not mean that the issue has not attracted some controversy or that contribution holidays might not be, at times, imprudent. Many employees believe that surplus

should be maintained to serve as a "cushion" against future market failings or employer insolvency (A. N. Kaplan, *Pension Law* (2006), at p. 404). Indeed, there is a very real risk that contribution holidays could affect the stability of pension plans. According to the report of the Ontario Expert Commission on Pensions, some employers have taken contribution holidays when the results of their last triennial valuation permitted them, despite the fact that the plans were under-funded at the time the holidays were taken. Research conducted on federally regulated pension plans and cited in the Commission report revealed that "45% of under-funded plans would not have been under-funded had they [the employers] not taken contribution holidays" (Government of Ontario, *A Fine Balance: Safe Pensions, Affordable Plans, Fair Rules* (2008), at p. 78).

[148] On the other hand, many employers maintain that the ability to take contribution holidays provides them with the incentive to fund DB pension plans generously, since any contributions over the amount required to meet the plan's liabilities can serve to reduce their future contributions. Moreover, the possibility of taking contribution holidays might entice employers to provide pension benefits on a DB basis in the first place, in spite of the often greater demands on employers in such plans. Employees typically prefer DB plans because they provide guaranteed benefits with less attendant risk. Given the current trend among Canadian employers to create DC rather than DB plans, some employees might welcome measures (such as contribution holidays) that encourage employers to adopt DB plans.

[149] This debate demonstrates the tension between providing incentive for employers to establish pension schemes that do not carry with them prohibitive financial burdens, and the need to protect pensioners' rights and ensure the vitality of those plans, especially at times of economic

instability. While it might be said that allowing employers to take contribution holidays with respect to DB plans strikes the appropriate balance between these competing demands, I believe that the use of surplus from a DB plan to fund an employer's obligations with respect to a separate DC plan disrupts this careful balance, to the detriment of plan members.

[150] The question of contribution holidays in the context of DC plans has rarely been examined by Canadian courts. The reason for this stems from the nature of a DC plan: the contribution amount is guaranteed. The employer (and possibly the employee, depending on the type of plan) makes regular contributions of a fixed amount to the member's account. The final benefit that the member receives consists of the total sum that has been contributed, plus any return on the investment. Thus, unlike the members of a DB plan, the members of a DC plan recoup *all* the money that has accumulated in their personal account, whatever the amount. For this reason, DC plans themselves do not accumulate a surplus. Since employers cannot lawfully take a contribution holiday unless the plan is in a state of actuarial surplus, there is no opportunity for contribution holidays in a pure DC plan. In this case, the employer's addition of a DC plan to an ongoing DB plan means that a surplus arises, unusually, in the context of a DC plan.

[151] As I will explain in these reasons, no support for this type of contribution holiday can be found in the legislative framework or in the provisions of the Plan and Trust Agreement. Rather, the Plan documentation and the principles of trust law effectively forbid the taking of a contribution holiday in the DC plan that is funded from the surplus in the DB plan. The Tribunal's remedy of retroactively designating the DC members as fund beneficiaries cannot cure this defect in the Plan amendments that seek to permit contribution holidays with respect to the DC plan.

B. *The Legislative Framework*

[152] Pension law is governed first and foremost by provincial legislation. In Ontario, all pension plans must be administered in accordance with the *PBA* and the *Regulations* (see *PBA*, s. 19). The legislation clearly permits an employer to take contribution holidays when a pension fund is in a state of actuarial surplus. Section 7(3) of the *Regulations* reads:

> In any year for which no special payments are required to be made for a pension plan under section 5, an actuarial gain may be applied to reduce contributions for normal costs required to be made by the employer, by a person or entity required to make contributions on behalf of the employer, by the members of the pension plan or by any of them.

As I noted above, a DC plan on its own can never be in a state of surplus. Presumptively, then, s. 7(3) of the *Regulations* is limited in scope to DB plans that are capable of accumulating a surplus (or an "actuarial gain").

[153] There is, however, one instance in which a DC plan might be said to enjoy some benefit of a surplus, and that is following a full conversion from a DB plan. This is made clear by s. 9 of the *Regulations*:

> If an amendment to a pension plan with defined benefits converts the defined benefits to defined contribution benefits, the employer may offset the employer's contributions for normal costs against the amount of surplus, if any, in the pension fund after the conversion.

My colleague and I agree that the DB plan in this case was not fully converted to a DC plan, since the DB plan continued to operate after it was closed to new members in 2000. As such, s. 9 of the *Regulations* does not apply to the case at bar. There is therefore no legislative provision that permits the allocation of surplus from a DB plan to a DC plan when a full conversion has not occurred. The circumstances in which a surplus might lawfully be used to fund contribution holidays under s. 7(3), then, is limited to either a DB plan standing alone or a DC plan that has been fully converted from a DB plan.

[154] My colleague, however, contends that the legislation, while it does not expressly permit the use of surplus in a DB plan to fund contribution holidays in a DC plan, suggests that there is nothing inherently wrong with using the surplus in this way, provided the DC members are designated as beneficiaries of the pension fund.

[155] However, the circumstances of a full conversion from a DB to a DC plan differ significantly from those of the current appeal, which involves (for lack of a better phrase) only a partial conversion to a DC plan. Upon total conversion to a DC plan, the pension benefits would still be held by the same members whose contributions made up the original DB fund, albeit in a different form. It would be a vertical transformation: full conversion would turn a single DB plan into a single DC plan. The beneficiaries would not change and the plan would simply continue in a different form. This picture is consistent with s. 81(1) of the *PBA*:

> **81** (1) Where a pension plan is established by an employer to be a successor to an existing pension plan and the employer ceases to make contributions to the original pension plan, the original pension plan shall be deemed not to be wound up and the new pension plan shall be deemed to be a continuation of the original pension plan.

Benefits from the original plan are also deemed to belong to the new plan after total conversion (*PBA*, s. 81(2)). When a DB plan completely changes to a DC plan, the issue of cross-subsidization simply does not arise as there are not two separate plans or separate funding arrangements between which funds are transferred.

[156] For these reasons, the legislation and its regulations do not permit Kerry to use the surplus from the DB fund to finance its contributions toward the DC plan. If Kerry had simply converted the Plan into a DC plan for all members, then s. 9 of the *Regulations* might permit this use of surplus. Fortunately for existing employees, however, they were given the option to remain in the ongoing DB plan. The resulting arrangement thus does not fall into any of the categories addressed by the legislation.

C. *Two Separate Plans*

[157] This appeal also requires the resolution of a preliminary question: did Kerry's creation of a DC plan in 2000 maintain a single pension plan for all employees, or did it effectively result in two separate plans, one DB and one DC? The Divisional Court held that Kerry had created two separate plans:

> The 2000 Plan text, no matter what language is employed, clearly creates two (2) funds. The Appellants, who elected to stay in Plan 1, as they were entitled to do, are or have contributed to the DBP and have a beneficial interest in all of the funds in the Plan. The DCP, Part 2, fund is completely separate and funded separately. The Part 2 DCP employees have no connection to the Part 1 DBP plan and cannot legitimately be given a beneficial interest in the fund on the DBP side. Here, there are in law, two (2) pension plans, two (2) pension funds and two (2) classes of members. [para. 72]

The Court of Appeal, however, held that there was in essence a single pension plan with two components and two classes of members. Since the plan was originally designed to benefit all full-time employees, the creation of a DC scheme for some of those employees could not have resulted in an entirely new plan.

[158] Though I disagree with much of the Divisional Court's reasoning, I agree with its conclusion that Kerry effectively created a second pension plan whose members are not beneficiaries of the original fund. It is true that there is only one plan in a formal sense. The Plan falls to be registered as a single plan that provides benefits to all of the company's eligible employees, and it is managed by a single administrator. However, its characterization as a single plan cannot be sustained in light of the high degree of segregation in the Plan documentation between the DB and DC components. I believe that, for all intents and purposes, the DB and DC plans exist as separate entities and should not be treated in this appeal as two components of a single plan.

[159] To start, DB and DC pension plans are not cut from the same cloth. DB and DC plans provide different types of benefits to their members, and carry a different set of risks and rewards. In a DB plan, the members' final pension benefits are guaranteed and the employer bears primary responsibility for making up any shortfall if the plan is under-funded. While members of a DB plan still bear some risk, such as in the event of employer insolvency, that risk is spread across the membership. Individuals in a DC plan, however, are more vulnerable to market forces. They stand to benefit greatly if the return on their investments is high, but if the return is low, then their overall pension benefits are also low and the employer bears no liability for the plan's poor performance. DB plans are also much more heavily regulated than DC plans. For instance, the reporting

requirements under Ontario's *PBA Regulations* are more stringent for DB plans than for DC plans (see e.g. ss. 3, 13 and 14). In light of these fundamental differences between the two types of plans, it should not be presumed that when an employer creates a DC plan for some employees and retains a DB plan for others, he or she has created a single plan.

[160] In this case, the structure of the Plan reflects these differences by treating the two groups of employees differently. The Plan is divided into Part 1, some provisions of which apply exclusively to DB members, and Part 2, which applies exclusively to DC members. Different provisions govern each group of members on matters such as member contributions and their entitlement to benefits, both while the plan is ongoing and upon plan termination. For instance, s. 16.03 reads:

> On termination or discontinuance, each Part 1 Member shall have recourse only to the assets in the Pension Fund attributable to Part 1 Members for the provision of the benefits outlined in the Plan for Part 1 Members and each Part 2 Member shall have recourse only to the amounts in his Member's Account.

The Part 2 provisions do not establish any link between Part 2 DC members and the pension fund, aside from the amendment that purports to allow the company to take contribution holidays from the surplus of the fund.

[161] The Plan delineates the funding arrangements for the DB and DC plans and the means by which employees converted to the DC plan in 2000. The assets of DB members continue to be held in the original trust fund, which is administered by CIBC Mellon Trust Company according to the terms of the Trust Agreement entered into between those parties in 2000. For those employees

who decided to convert to the DC plan, however, the company ascertained the value of their benefits that had accrued in the fund on a DB basis up to that time and transferred trust assets equal to that amount to the employees' new DC accounts. Thus, the DC members no longer have any contributions in the fund. Their assets are held in individual accounts and are invested by the Standard Life Assurance Company pursuant to the terms of its contract with Kerry. According to this contract, Standard Life has undertaken to manage the DC members' contributions and to invest them in pooled funds, the value of which fluctuates with the investments' market value, and in guaranteed funds. Upon retirement, the benefits would be paid out as an annuity from those funds in accordance with the terms of the Plan and the statutory framework. Unlike the DB fund benefits, the value of the DC benefits upon retirement is not guaranteed as it is contingent on the success (or otherwise) of the investments. I believe that from the moment the DC members' accrued benefits were moved out of the fund into these separate investment accounts, the DC members ceased to belong to the DB plan and were no longer beneficiaries of the fund.

[162] My colleague asserts that there is no reason in law why a pension plan might not have a single fund for both DB and DC members, provided that the plan documentation and legislation do not prohibit it. To some extent, I agree. There is certainly nothing repugnant in having several components of a single pension plan with a shared fund, as is clear from the growing number of "hybrid plans". But to the extent that my colleague's reasons suggest a *presumption* that the employer's provision of DB and DC plans for a single group of employees results in a single plan, I cannot agree. The starting point should not be the presumption of a single plan with two (or more) components, simply to be displaced by prohibitive language in the documentation or the legislation. Rather, it is necessary to examine the plan's particular arrangement, which will differ from case to

case, to determine whether there is in fact a single plan in existence. The plan documentation must clearly evince an intention to maintain a single plan and, most importantly, the plan structure must actually reflect and follow from this intention. In the few cases in which courts have allowed contribution holidays in a DC plan by resort to surplus in a DB fund, the courts have emphasized the need to examine the plan documentation for evidence of a single plan with a single fund for all members.

[163] In one of these cases, *Sutherland v. Hudson's Bay Co.* (2007), 60 C.C.E.L. (3d) 64, the Ontario Superior Court of Justice examined a DB pension trust to which two DC components were added at different times. Siegel J. concluded that the employees were all members of the same plan and beneficiaries of the same trust fund. In arriving at this conclusion, he acknowledged that "the issue as to whether a single trust fund was accomplished in any given situation is fact specific, depending entirely on the text of the relevant documentation" (para. 218). The documentation in *Sutherland* showed that when the DC members were added to the plan, their assets were transferred to the DB trust fund and the pooled assets were ultimately administered by a single trustee, Royal Trust Corporation of Canada ("Royal Trust"). Although the DC members had accounts to which their pension contributions were credited, Siegel J. noted that there was "no evidence that such accounts were segregated in some manner" (para. 71). Indeed, all of the assets were invested on a collective basis.

[164] The structure of the plan changed somewhat in 2001 when Royal Trust appointed an agent, The Standard Life Assurance Company of Canada ("Standard Life"), to invest the contributions that attached to the DC section of the plan. The Standard Life policy explicitly

recognized Royal Trust as the trustee of those assets, and invested the funds only under the direction of Royal Trust, rather than the plan members. Siegel J. held that this new arrangement did not alter the legal relationship between the plan members and the trustee. Apart from Standard Life's physical possession of those funds, there was no legal separation between the assets held by Standard Life and those contained in the Fund (para. 298).

[165] Siegel J. contrasted the arrangement in *Sutherland* with that in the case at bar. After pointing to some degree of similarity between the DC investment arrangements in the two cases, he held that the plan documentation in the case at bar contemplated a greater separation between the DB and DC schemes:

> The pension plan document in *Kerry* evidences an intention to separate the assets in the trust fund that are referable to the defined benefit section of the plan from those that are referable to the defined contribution section of the plan. [para. 269]

Siegel J. was right to make this distinction. In the current appeal, there is no evidence that the contributions of the DB and DC plan members were ever pooled in a single fund; nor is there any suggestion that the insurance company that invests the DC members' assets has an agency relationship (or any relationship at all) with CIBC Mellon Trust, the fund's trustee. To the contrary, Standard Life invests the DC members' assets according to the terms of its contract with Kerry, which refers neither to CIBC Mellon Trust nor to the assets held for DB members in the original trust (A.R., at p. 731). The plan documentation thus contemplates a far greater level of differentiation between DB and DC members than the arrangements in *Sutherland*.

[166] My colleague also cites *Barclays Bank Plc v. Holmes*, [2000] EWHC 457 (Ch) (BAILII), [2001] O.P.L.R. 37, for the proposition that a pension plan might be structured as a single plan with both DB and DC members as beneficiaries of the fund. The conclusion in *Barclays* again turned largely on the court's interpretation of the relevant plan documentation. Neuberger J. held that the documentation and the plan structure clearly showed the employer's intention to create a single plan impressed with a trust. For instance, the definition of "Member" in the plan text specifically entitled DC members to benefits under the fund and, as noted by Rothstein J., the same trustee administered all the accounts. Furthermore, the court was influenced by the particular legislative context, which contemplated that a pension plan might have a single fund that supports both DB and DC schemes.

[167] The outcome in *Barclays* can be contrasted with that of another English case, *Kemble v. Hicks*, [1999] EWHC 301 (Ch) (BAILII), [1999] O.P.L.R. 1, which involved a DB pension plan to which a DC component was added. As in the current case, the DC members' contributions were held in individual investment accounts under a contract with an insurance company that was not the trustee of the DB fund. The court held that the employer was not entitled to use the DB surplus to fund its contributions toward DC members. Rimer J. acknowledged that the DB and DC plans were "part of the same overall scheme", but held that

> the establishment of the money-purchase [DC] scheme involved the setting up of what was, within that overall scheme, a scheme quite separate from the final-salary scheme and to which different considerations applied. Those who joined the money-purchase scheme severed their connection with the final-salary scheme, transferred to a new scheme and enjoyed the benefit of a payment to it of a sum representing the actuarial value of their benefits in the final- salary scheme accrued until 31 March 1989. Those who elected not to transfer retained their interest in the assets which remained subject to the final-salary [DB] scheme. [p. 7]

[168] I believe that the arrangement in *Kemble* more closely mirrors the arrangement in the case at bar and, as such, similar considerations apply. These cases demonstrate that while it may not be impermissible for an employer to create two divisions of a single plan, it is also not impermissible for an employer to create what are in fact two separate plans for a single group of employees. Indeed, this possibility is contemplated by s. 34 of the *PBA*, which enables an employer to set up separate pension plans for full-time and part-time employees. One must examine the plan documentation and the actual arrangements to determine which structure is adopted in a particular case. As I outlined above, the Plan documentation in this case reveals a degree of segregation between the DB and DC plans that confirms that the 2000 amendments effectively created a second pension plan.

D. *The "Exclusive Benefit" Provisions*

[169] Why does it matter in this case whether the employees belong to a single plan or to two separate plans? The answer to this question lies in the provisions of the Plan and Trust Agreement that forbid the use of trust assets for other than the exclusive benefit of plan members.

[170] The relevant provisions can be found in the original plan documentation. Section 22 of the 1954 Plan Text provides that

> <u>all contributions</u> made by the Company are irrevocable, and, together with all contributions made by Members, <u>may only be used exclusively for the benefit of Members</u>, retired Members, their beneficiaries or estates, and their contingent annuitants. [Emphasis added.]

Section 1 of the 1954 Trust Agreement contains a similar restriction on the use of trust assets:

> No part of the corpus or income of the Fund shall ever revert to the Company or be used for or diverted to purposes other than for the exclusive benefit of such persons or their beneficiaries or personal representatives as from time to time may be designated in the Plan except as therein provided. [Emphasis added.]

For ease of reference, I will refer to both of these provisions as the "exclusive benefit" provisions, though it is the Trust Agreement that is of paramount importance here. As noted above, the Tribunal acknowledged that the amendments purporting to authorize contribution holidays in the DC plan from the DB surplus would violate these provisions, as they would

> allow the Company to use or divert some part of the Fund, i.e. the surplus, "to purposes other than for the exclusive benefit of" the beneficiaries of the trust in respect of the Fund who, by virtue of the 2000 Plan, are now the Part 1 members. Any holiday taken by the Company in respect of Part 2 contributions in this fashion can only be realized by actually moving money out of the Fund and transferring it to the insurer that is the funding agency for Part 2, for credit to the individual accounts of the Part 2 members. This action is inconsistent with section 1 of the 1954 Trust Agreement .... [para. 32]

[171] It is important at the outset to be clear about who is protected by these provisions and whom the Trust Agreement is meant to serve. I agree with the Tribunal's conclusion that "such persons ... as from time to time may be designated in the Plan" referred to in the Trust Agreement are the DB members only, for two reasons. First, as I have explained above, the assets in the fund consist solely of the contributions made by or on behalf of the DB members alone. Any assets previously held in the name of current DC members were removed at the time of the conversion. Second, the terms of the Trust Agreement clearly contemplate that member beneficiaries would belong to a DB plan. For instance, the Agreement contains provisions concerning the possibility

of fund liabilities, which do not arise in a DC plan (ss. 2, 6 and 11). Indeed, the very nature of a trust fund is inconsistent with the structure of the DC accounts in this case. I will address this issue once again in my discussion of the Tribunal's retroactive designation remedy. For the time being, however, I simply conclude that the exclusive benefit provisions serve to protect DB members from any use of trust assets that is not for their exclusive benefit, such as cross-subsidization between separate plans.

[172] The issue of cross-subsidization has received significant judicial attention in cases concerning the merger of two or more pension plans. The question of how the merger affects the members' entitlement to assets under their original plan is typically resolved with reference to the terms of the plan documentation and trust agreements in each case. Thus, in some cases, the co-mingling of funds in a merged plan has been found to be lawful: e.g. *Lennon v. Ontario (Superintendent of Financial Services)* (2007), 87 O.R. (3d) 736 (Div. Ct.); *Baxter v. Ontario (Superintendent of Financial Services)* (2004), 43 C.C.P.B. 1 (Ont. Div. Ct.). In others, the particular facts of the case militated against the co-mingling of funds after a merger: *Aegon Canada Inc. v. ING Canada Inc*. (2003), 179 O.A.C. 196 (C.A.); *Sulpetro Ltd. Retirement Plan Fund (Trustee of) v. Sulpetro Ltd. (Receiver-Manager)* (1990), 66 D.L.R. (4th) 271 (Alta. C.A.).

[173] While the merger cases engage a host of issues that are not relevant to this appeal, the cases are instructive in terms of the broader principle against cross-subsidization between plans that are effectively distinct from one another. In *Aegon*, for instance, the trust assets of two funds were segregated after a merger in accordance with the terms of the trust agreement and the employer's undertaking to the then Pension Commission of Ontario. The employer, however, diverted the assets

from one fund to the other in order to take contribution holidays with respect to the second fund. The Court of Appeal held that this action violated the trust agreement because it used trust assets for other than the exclusive benefit of the plan members who were beneficiaries of the fund.

[174] This general principle was affirmed in *Sutherland*, when Siegel J. noted:

> Where it is found that two separate funds exist, there is no principle that can support "cross-subsidization" in the form of payment of the pension benefits of one group of beneficiaries by using assets in a trust fund intended to fund the pension benefits of a separate group of beneficiaries. [para. 260]

Indeed, the results in *Sutherland* and *Barclays* were predicated on the courts' conclusion that the employees were members of a single plan and beneficiaries of the same fund. As such, there was no use of trust assets for other than the exclusive benefit of the members. In *Kemble*, however, the existence of two separate plans meant that the employer's use of surplus from a DB fund to reduce its contributions toward a DC plan was an unjust subsidization of the DC members at the DB members' expense. The same result enures in this case: the use of fund surplus to provide contribution holidays with respect to the DC plan violates the exclusive benefit provisions in the Plan documentation as it benefits all but the DB members.

[175] This brings us to the Tribunal's remedy, also approved by my colleague in his reasons, of retroactively amending the Plan to designate the DC members as beneficiaries of the DB trust fund in order to legitimize the DC contribution holidays. I believe that this remedy is unreasonable and cannot be adopted as it would breach the terms of the Trust Agreement, and would not solve the problem of the DC contribution holidays constituting a violation of the exclusive benefit provisions.

[176] The company has the right to amend the Plan unilaterally and can, by virtue of s. 13(2) of the *PBA*, make retroactive amendments. However, plan amendments are still subject to the terms of the original Trust Agreement that prohibit the use of funds for other than the exclusive benefit of the trust beneficiaries, who in this case are DB members. Therefore, an amendment to the Plan that seeks to change the beneficiaries of the fund must not contravene the same exclusive benefit provisions that precipitated the need for the remedy in the first place.

[177] The designation, which aims to provide formal legitimation for DC contribution holidays, would not be for the exclusive or even primary benefit of the DB members. It would not benefit them at all. The company certainly stands to benefit from this designation, by being relieved of its contribution obligations to DC members for as long as the DB fund experiences a surplus. It might even be argued that DC members could benefit from the arrangement, by sharing the same entitlement to surplus upon termination that the DB members might be found to have. Indeed, Gillese J.A. concluded that the designation would have the effect of granting the DC members a right to enjoy the surplus with the DB members upon termination of the plan (paras. 107-8). However, the respondents have not pointed to any benefit that might accrue to the DB members from this designation, and none can be established. Rather, the DB members stand only to lose from the retroactive designation of DC members as beneficiaries of the trust.

[178] It is true, as Gillese J.A. at the Court of Appeal and Rothstein J. in his reasons have pointed out, that the plan contemplated an expanding class of members and that new employees would continually have been added to the DB scheme as trust beneficiaries prior to 2000.

Deschamps J. acknowledged the fluidity of pension plans in *Buschau v. Rogers Communications Inc*., 2006 SCC 28, [2006] 1 S.C.R. 973, when she wrote:

> A plan is also seen as being, if not a permanent instrument, at least a long-term one. However, the participation of any individual member is ephemeral: members come and go, while plans are expected to survive the flow of employees and corporate reorganizations. [para. 34]

Along these lines, the respondent Kerry argues that the designation of DC members as beneficiaries of the trust is simply an extension of the employer's general power to continually add new members to an existing plan, such as by merger:

> The introduction of new members into a pension plan does not breach any underlying trust and is not objectionable as a matter of contract law so long as members continue to receive their benefits. If a plan merger is permissible, it is difficult to see how it cannot be permissible to amend plan language so as to treat all members of a single plan having two parts as members of the Plan for the purposes of being able to receive benefits from the Fund. [R.F., at para. 83]

One might argue, then, that the regular addition of new employees, or the introduction of an entirely new class of employees (e.g. part-time employees), into an existing plan is so commonplace that there is no need to even inquire into whether the addition of new members would violate the exclusive benefit provisions of the plan documentation.

[179] However, the proposed arrangement in this case raises significant concerns that are not engaged by the addition of new employees to an ongoing plan. Prior to 2000, new employees who joined the Plan made regular contributions to the fund or had contributions made in their name, thus

increasing the *corpus* (or body) of the fund. Those financial contributions to the fund can be seen as providing some sort of benefit, however indirectly, to the existing plan members. More assets mean a stronger and more resilient pension fund, and higher returns on the investments. The same benefit does not arise from the retroactive designation of DC members as beneficiaries of the fund. After 2000, new employees (and existing employees who switched into the DC plan) no longer contribute anything to the fund. Their contributions are directed into their separate annuity accounts, and any prior contributions made by employees who switched to the DC plan were removed at the time of the conversion. The DC members have no more entitlement to the trust fund. It would make a mockery of the significant protections afforded to trust funds if such entitlement could be granted by the mere stroke of a pen.

[180] Why is it that the DC members cannot claim any entitlement to the fund? As noted above, when employees opted to convert their DB benefits to the DC plan in 2000, assets equal to the amount of benefits that had accrued to date were taken from the fund and placed in individual accounts. The Plan stipulates that, after this conversion, the new DC members would "henceforth be governed by the defined contribution provisions of the Plan and will not be permitted to resume participation in the Plan under the defined benefit provisions" (2000 Plan Text Foreword, s. 1.07). By the terms of this arrangement, then, the DC members can be seen to have relinquished their interest in the remaining assets of the DB Fund. All of their previous contributions and all employer contributions made in their name were removed from the fund and placed in individual accounts, and they cannot revert to the DB plan. They are not beneficiaries of the fund because they do not and cannot derive any benefit from the assets held in that fund. An amendment that would serve to designate them as such is simply an artificial and incomplete response to the problem.

[181] This is quite unlike the situation contemplated by the Ontario Superior Court of Justice in *Sutherland*, when Siegel J. held that there is no reason in law why a pension plan might not be structured with two sections, one DB and one DC, "with the same trust fund supporting the payment of benefits under each section of the plan" (para. 219). In the current appeal, only DB members would have their benefits paid from the trust fund. The DC members' benefits are held separately in annuity accounts that have no connection to the original trust fund that was set up to provide pension benefits on a DB basis to Kerry's employees in 1954.

[182] Indeed, because the company started taking contribution holidays from the DB plan in 1985, everything that has been contributed to the fund since that time has been amassed penny by penny by the DB members alone. The Tribunal's remedy would permit the company to remove assets from the fund and to place those assets in the accounts held by DC members, simply to relieve itself of the obligation to contribute toward the DC plan. As a result, the DB members would see the same amount of money going into the fund as before 2000, but a greater amount coming out of it. The intuitive unfairness of this arrangement should be apparent to even the greatest cynic. More importantly, the arrangement is not only unfair on a principled basis but is also unlawful, as it would result in the use of trust funds for other than the exclusive benefit of the current DB members.

[183] The unlawfulness of the DC contribution holidays would not be remedied *even if* the DC members could be declared beneficiaries of the fund. The withdrawal of funds to enable the employer's DC contribution holidays would continue to violate the exclusive benefit provisions

regardless of whether the DC members were technically beneficiaries of the fund. There is no evidence before this Court that the structure of the fund would change as a result of this designation. The employer would continue to take DC contribution holidays by withdrawing assets from the fund and placing them in the DC members' accounts. As I noted above, this movement of funds is not for the exclusive benefit of any of the beneficiaries, whether DB or DC members. To the contrary, it harms the DB members, who see the *corpus* of their fund decreasing at a steady rate. And while the initial designation of the DC members as beneficiaries might provide them with some future benefit with respect to potential entitlement to surplus, the use of the fund surplus to finance the contribution holidays would simply deplete the overall surplus to which they might one day claim entitlement.

[184] It is hard to see how the DC contribution holidays benefit anyone but Kerry, who is relieved of its contribution obligations to the DC plan. Of what use are the exclusive benefit provisions if they could permit the withdrawal of trust funds for the primary or even exclusive benefit of the company? Indeed, it is not necessary to find that the members have a vested interest in the surplus to appreciate that the present arrangement violates the exclusive benefit provisions and would continue to do so even if the Tribunal's remedy were adopted. Every DC contribution holiday leaves the *corpus* of the trust smaller, whereas a contribution holiday in respect of a regular DB plan simply leaves the trust alone.

[185] For these reasons, I believe that the Tribunal's order to amend the Plan to make the DC members beneficiaries of the trust in respect of the Fund is unreasonable and that the amendment purporting to allow DC contribution holidays from the DB surplus remains invalid for contravening

the exclusive benefit provisions in the Plan documentation.

E. *The Law of Trusts*

[186] The original pension plan in this case was impressed with a trust in 1954. As such, it is subject not only to the requirements imposed by statute and the law of contract, but also to the strictures of trust law. The law of trusts is notoriously difficult to define because, like a child with sticky fingers, it leaves its imprint on a number of different areas ranging from wills and estates to divorce proceedings and pension schemes. What must be remembered, however, is that the law of trusts is primarily oriented toward the protection of beneficiaries, who are entitled to have the trust property administered in their best interest.

[187] This Court held in *Schmidt* that a pension trust is akin to a classic trust, as it is created in order to provide a benefit to employees (p. 640). In a classic trust, the trustee and the beneficiaries share ownership of the trust assets: the beneficiaries have an equitable interest in the trust assets while the trustee holds legal title to them. The trustee has a fiduciary duty to hold the assets exclusively in the interest of the beneficiaries (D.W.M. Waters, M.R. Gillen and L.D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 38). Indeed, the beneficiaries of a trust are given legal protection of the highest order.

[188] Despite their status as classic trusts, however, pension trusts engage somewhat different considerations due to the existing legal relationship between the settlor (usually the employer) and the trust beneficiaries (the employees). Browne-Wilkinson V.-C.'s comments in *Imperial Group*

Pension Trust Ltd. v. Imperial Tobacco Ltd., [1991] 2 All E.R. 597 (Ch. D.), are apt:

> Pension scheme trusts are of quite a different nature to traditional trusts. The traditional trust is one under which the settlor, by way of bounty, transfers property to trustees to be administered for the beneficiaries as objects of his bounty. Normally, there is no legal relationship between the parties apart from the trust. The beneficiaries have given no consideration for what they receive. The settlor, as donor, can impose such limits on his bounty as he chooses, including imposing a requirement that the consent of himself or some other person shall be required to the exercise of the powers.
>
> As the Court of Appeal has pointed out . . . a pension scheme is quite different. Pension benefits are part of the consideration which an employee receives in return for the rendering of his services. In many cases, . . . membership of the pension scheme is a requirement of employment. In contributory schemes, . . . the employee is himself bound to pay his or her contributions. Beneficiaries of the scheme, the members, far from being volunteers have given valuable consideration. The company employer is not conferring a bounty. In my judgment, the scheme is established against the background of such employment and falls to be interpreted against that background [pp. 605-6]

[189] U.K. courts are not alone in noting the distinction between traditional and pension trusts. In *Bathgate v. National Hockey League Pension Society* (1992), 98 D.L.R. (4th) 326 (Ont. Ct. (Gen. Div.)), at pp. 385-88, aff'd (1994), 110 D.L.R. (4th) 609 (Ont. C.A.), Adams J. wrote:

> Trust law responds to the long gestation of pension arrangements and accommodates the welfare of former employees who often lack any other effective means to protect their interests. ... Trust law, in this modern context, must accommodate and be responsive to key differences between the traditional settling of a trust and the ongoing administration of a pension plan in a changing economic environment. But employers, trade unions and trustees must also appreciate the central importance of pension arrangements to all employees and be vigilant of the dependent interests engrained in these plans.

The beneficiaries of a pension trust depend on the fund's assets to sustain them during retirement. In the unionized workplace, employees will have often traded other benefits for a strong pension regime for themselves and their families. Pension schemes are frequently used by employers to attract the most qualified employees and to encourage long-term commitment to the job. In this context, it is important to call upon the flexibility of trust law in assessing the legitimacy of the employer's actions carried out with respect to the trust. It is not enough simply to look to the propriety of the trustee's administration of the trust to determine whether the rights of the beneficiaries have been unjustly interfered with. The employer's actions are also implicated.

[190] Newbury J.A. recognized the special role of the employer in the pension trust context in *Buschau v. Rogers Communications Inc.*, 2001 BCCA 16, 195 D.L.R. (4th) 257, at para. 1 (rev'd in 2006 SCC 28, [2006] 1 S.C.R. 973, but not on this point):

> In Canada at least, pension trusts and plans also usually contemplate that the settlor, or employer, will play a role akin to that of the trustee in a traditional trust, even though a trust company is appointed as formal trustee. Indeed, employers often retain the authority to direct the trustee as to many matters relating to the administration of the trust, and even to amend or modify the class of beneficiaries under the trust, change the benefits to which they will be entitled, and on occasion, revoke or terminate the trust unilaterally.

Lane J. came to a similar conclusion in *Aegon Canada Inc. v. ING Canada Inc*. (2003), 34 C.C.P.B. 1 (Ont. S.C.J.) at para. 38, aff'd 179 O.A.C. 196 (C.A.):

> These cases illustrate the importance of the trust aspect of the pension scheme before me. It is not simply a payment scheme or other appurtenance to the pension, but an important legal relationship created by the employer with its employees, not subject to unilateral alteration.

[191] In this case, the law of trusts provides the appellants with an added layer of protection.

The employer's attempt to use the DB surplus to fund its contribution obligations toward the DC plan not only breaches the "exclusive benefit" provisions, but also violates one of the hallmarks of trust law: the prohibition against the revocation of trust assets.

[192] In *Schmidt*, this Court ruled that an employer may not remove pension contributions held in trust unless a power of revocation was expressly included in the trust at the time of its inception. A general power of amendment does not amount to a power of revocation (pp. 643-46).

[193] The classic explanation of revocation comes from *Waters' Law of Trusts in Canada*:

> A settlor cannot revoke his trust unless he has expressly reserved the power to do so. This is a cardinal rule, and it involves two important concepts. The first is that the trust is a mode of disposition, and once the instrument of creation of the trust has taken effect ... the settlor has alienated the property as much as if he had given it to the beneficiaries by an out-and-out gift. [p. 353]

Generally speaking, revocation consists in the settlor's exercising some control over the trust assets. Once assets have been placed in the trust fund, the settlor cannot interfere with them and cannot withdraw them for his or her own use without the express power to do so in the trust agreement. In *Schmidt*, Cory J. wrote:

> Generally, however, the transfer of the trust property to the trustee is absolute. Any power of control of that property will be lost unless the transfer is expressly made subject to it. [p. 643]

[194] This principle extends not only to the *corpus* of the trust fund but also to any surplus in

the fund, unless there is specific wording in the plan documentation that would oust the surplus from the trust's ambit (*Schmidt*, at pp. 641-42). Thus, once placed in the fund, *all* assets must be administered in accordance with the principles of trust law and should therefore be safe from the interference and control of the settlor.

[195] Within a classic DB plan, a contribution holiday would not result in an encroachment on the trust because no money need actually be withdrawn from the fund to enable the holiday (*Schmidt*, at p. 654). Trust principles do not attach to pension contributions until they are actually paid into the fund. In other words, the *failure* to put money in a fund does not generally amount to a breach of trust principles unless that contribution is required by the terms of the trust.

[196] Against this background, it is necessary to determine whether Kerry's contribution holidays in the DC plan from the DB surplus amounted to a partial revocation of the trust. I believe that it did.

[197] No power of revocation is contained in the Trust Agreement in this case. And yet, the contribution holidays in the DC plan were accomplished by means of a withdrawal of assets from the DB fund and a deposit of those assets into the DC members' accounts. The actual transfer of funds is necessary because Kerry is required by the terms of the Plan to make a regular contribution to the DC plan. Thus, the "holidays" still involve the deposit of funds into the account, but the source of the employer's contribution has changed: rather than coming from the employer's own pocket, the value of each contribution is withdrawn from the DB fund and placed in the members' annuity accounts. This shifting of funds is a clear example of the employer's exercising control over

trust assets. It is not comparable to the employer's legitimate use of assets from the fund to cover reasonable and *bona fide* plan expenses. The transfer of trust assets to enable a contribution holiday can hardly be described as necessary to ensure the integrity and proper maintenance of the plan.

[198] Nor is it comparable to the circumstances in *Sutherland*, where the court held that there was no impediment to the employer's contribution holidays in the DC part of the plan from the DB surplus because the employees were all members of the same plan and beneficiaries of the same trust (paras. 284-89). Recall that until 2001, the DB and DC assets were held in a single fund. The contribution holidays did not require the removal of assets from the fund and, therefore, did not constitute an encroachment on the trust. Even after the arrangement changed in 2001, such that the DC funds were invested separately by the trustee's agent, the court's finding that the contributions were effectively held in a single fund led to the conclusion that contribution holidays did not entail an encroachment on the trust (paras. 290-303). No withdrawal of assets from the trust fund was required to effect a contribution holiday, and hence no encroachment occurred. The employer simply refrained from making contributions to the fund. In this case, however, the DC contribution holidays required the removal of assets from the trust fund and the deposit of those assets in the DC members' annuity accounts. This is not a case of the employer's simply failing to contribute to the fund. Thus, the reasoning in *Sutherland* does not assist the respondents.

[199] Similarly, in *Police Retirees of Ontario Inc. v. Ontario Municipal Employees' Retirement Board* (1999), 22 C.C.P.B. 49, the Ontario Superior Court of Justice dismissed the retirees' argument that the employer's contribution holidays resulted in an encroachment on the trust. The employer had taken contribution holidays after additional funds that arose through a

Supplementary Benefits Agreement were added to the pension fund. The court held that the establishment of the Supplementary Benefits Agreement did not create a separate pension plan and that, as a result, the supplementary funds were part of the regular fund (paras. 61-70). Therefore, no money was actually paid out of the fund in order for the employer to take contribution holidays (para. 76). Again, this conclusion was premised on the finding that there was a single plan in existence, which meant that the Police Board could take contribution holidays by merely ceasing its contributions to the fund. The failure to pay into the fund did not amount to an encroachment on the trust assets. In the current appeal, every DC contribution holiday leaves the DB trust fund smaller than before, without any justification in law. This clearly constitutes an encroachment on and a revocation of the trust.

[200] It should be noted that I would reach the same conclusion *even if* the DC members could legitimately be designated as beneficiaries of the trust fund. The rationale in *Schmidt* for upholding an employer's right to take contribution holidays is limited to those situations in which no assets are withdrawn from the trust fund. In an ordinary DB plan, the employer is simply required to ensure that the assets in the fund are sufficient to meet its expected liabilities. If the plan documentation and legislation permit them, then contribution holidays can be taken for as long as the plan is in a state of actuarial surplus. Nothing in *Schmidt* suggests that an employer should be permitted to remove trust assets in the manner contemplated by Kerry, even if the ultimate recipients of those assets are among the trust beneficiaries. This would not only constitute an unlawful interference with the trust assets (revocation) but also would pit one group of beneficiaries against the other, with the ultimate reward falling to the employer.

[201] The principles of trust law are as relevant in the context of an ongoing pension trust as they are in the context of a terminated or wound-up plan impressed with a trust. In this case, the trust beneficiaries are protected by the specific language in the Plan documentation that prohibits the use of trust funds for other than their own benefit. Moreover, the law of trusts forbids the employer's attempts to control or withdraw irrevocable assets within the fund in order to take contribution holidays with respect to its obligations toward a different group of plan members.

F. *Conclusion*

[202] For the reasons above, I must disagree with my colleague's conclusion that the respondent Kerry was entitled to withdraw assets from the DB surplus and deposit them in the DC members' accounts. I believe that the amendments to the Plan purporting to authorize these payments are not permitted by the legislation and are in breach of the "exclusive benefit" provisions of the Plan documentation and the relevant principles of trust law. The Tribunal's conclusion that these defects could be cured by a retroactive designation of DC members as fund beneficiaries was unreasonable, and the Court of Appeal erred in upholding the Tribunal's conclusion on this point.

[203] I would thus allow the appeal in part, quash the Tribunal's decision on contribution holidays, and direct the Superintendent to refuse registration of the amendments that purport to permit the employer's use of fund surplus under Part 1 of the Plan to offset or eliminate its contribution obligations under Part 2 of the Plan.

[204] On the matter of costs, I do not need to take issue with my colleague's determination

that costs could not be awarded from the fund in this case. Since I would allow the appeal in part, the appellants would be entitled to full costs throughout from the respondent Kerry.

Appeal dismissed, LEBEL *and* FISH JJ. *dissenting in part.*

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